NOTICE
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2025 IL App (4th) 240093-U

NO. 4-24-0093

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 7, 2025
Carla Bender
4th District Appellate
Court, IL

WILLIAM GORSKI and DEBRA GORSKI,	)	Appeal from the
Plaintiffs-Appellants,	)	Circuit Court of
v.	)	Lee County
KATHERINE SHAW BETHEA HOSPITAL, an	)	No. 17L4
Illinois Corporation, By and Through Its Agents,	)	
Apparent Agents, and Employees, Including but Not	)	
Limited to EMILY SORENSON RICHARDSON,	)	
D.O., and EMILY SORENSON RICHARDSON,	)	Honorable
D.O., Individually,	)	Jacquelyn Dawn Ackert,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Doherty and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the jury's verdict in favor of defendants and the trial court's denial of plaintiffs' posttrial motion because the trial court properly rejected plaintiffs' (1) claims that defendants had violated the *Petrillo* doctrine (see *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 588 (1986)), (2) objection to the admission of a physician's letter into evidence and plaintiffs' subsequent request to cross-examine experts with the physician's deposition, (3) objection that a defense expert offered undisclosed opinions at trial, and (4) proposed jury instructions. The appellate court also rejected plaintiffs' forfeited improper closing argument claim and request for plain-error review.

¶ 2 In January 2017, plaintiffs, Bill Gorski and Debra Gorski, filed a complaint against defendants, Emily Sorenson Richardson, D.O. (Dr. Richardson), and Katherine Shaw Bethea Hospital (KSB), alleging claims of negligence based on Dr. Richardson's care of Bill. The complaint alleged generally that Dr. Richardson and other employees of KSB failed to timely

conduct testing for Bill's sudden vision loss, resulting in delayed treatment of Bill's vision loss and Bill's becoming functionally blind.

¶ 3 In February 2023, the trial court conducted a jury trial on plaintiffs' claims. At the conclusion of the week-long trial, the jury entered a general verdict in favor of defendants.

¶ 4 Plaintiffs later filed a 53-page posttrial motion, asserting the trial court made several evidentiary errors and failed to properly instruct the jury. In December 2023, the court denied plaintiffs' posttrial motion in a lengthy written order.

¶ 5 Plaintiffs appeal, arguing that the trial court erred by (1) permitting Bill's treating physician, Dr. Josephy Welty, to testify at trial despite his having had an *ex parte* communication with defense counsel in violation of the *Petrillo* doctrine (see *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 588 (1986)), (2) admitting into evidence letters written by Dr. Marilyn Kay (who was a later treating physician of Bill's) containing her opinion that Bill's condition may have been caused by something other than giant cell arteritis (GCA) and thereafter prohibiting plaintiffs from cross-examining Dr. Welty with Dr. Kay's deposition testimony, (3) allowing defendants' expert, Dr. Paul Ajamian, to offer undisclosed causation testimony on direct examination and thereafter prohibiting plaintiffs from cross-examining Dr. Ajamian with a transcript of Dr. Kay's deposition, (4) denying plaintiffs' proposed issues instruction, and (5) overruling plaintiffs' objection to defendants' closing argument that allegedly misstated the law on plaintiffs' burden of proof.

¶ 6 We disagree and affirm.

¶ 7 I. BACKGROUND

¶ 8 A. The Plaintiffs' Complaint and Pretrial Proceedings

¶ 9 In January 2017, plaintiffs filed a complaint against defendants, asserting several

medical malpractice claims against Dr. Richardson, individually, and sought to hold KSB vicariously liable for the conduct of its employees, "including but not limited to" Dr. Richardson. Specifically, the complaint alleged that on September 17, 2015, Bill experienced sudden vision loss in his right eye and went to KSB for treatment, where Dr. Richardson, an optometrist employed by KSB, examined him. Dr. Richardson believed the vision loss was caused by underlying health conditions and ordered further testing to be performed on September 21, 2015, by Bill's primary care physician. The complaint alleged that Dr. Richardson and other employees of KSB, including nurses and physicians, failed to recognize the emergency nature of Bill's condition and timely conduct further testing. As a result, Bill experienced almost complete vision loss when he woke up on September 22, 2015, and was permanently blind.

¶ 10 Plaintiffs filed several amended complaints, revising their claims and adding and dropping various defendants and claims as discovery progressed over the course of several years.

¶ 11 In January 2023, the parties filed numerous motions *in limine* and fully briefed several specific issues addressing expert testimony and proximate cause. In particular, plaintiffs sought to limit defendants' ability to present evidence on (1) other potential causes of Bill's vision loss and (2) Bill's preexisting medical conditions. Defendants objected, explaining that such causation evidence was permitted because they intended to present a sole proximate cause defense. Defendants said that evidence of Bill's preexisting conditions was crucial to whether Dr. Richardson complied with the standard of care when making her diagnosis. The trial court reserved ruling on those issues, explaining it would need to see how the evidence came out at trial to determine what was appropriate.

¶ 12 B. The Jury Trial

¶ 13 In late January and early February 2023, the trial court conducted a week-long jury

trial at which the following evidence was presented.

¶ 14 1. *Bill Gorski*

¶ 15 Bill Gorski testified that he was 64 years old and had been a lifelong resident of Dixon, Illinois. He was married and had two adult children. His wife, Debra, had worked as a respiratory therapist for KSB, and his son was an emergency room nurse who also worked at KSB. Bill was 57 years old when the events underlying the lawsuit took place. He had preexisting health conditions of high blood pressure, high cholesterol, and diabetes. Bill testified that his conditions were well-managed through medications prescribed by his primary care physician, Dr. Welty, whom he and his and entire family had seen for many years.

¶ 16 On September 16, 2015, while Bill was on his way home from work, he noticed an opaque gray area in the field of vision of his right eye that he could not see through. The next morning, Thursday, September 17, 2015, Bill drove to the KSB Eye and Vision Center, where he saw Dr. Richardson. After the exam, Dr. Richardson ordered further tests. On Saturday, September 19, 2015, Dr. Richardson called Bill and told him to contact his primary care physician, Dr. Welty, on Monday morning because she wanted Bill to get an ultrasound and some blood tests, which would be requested through Dr. Welty's office on Monday. Dr. Richardson said she would also call Dr. Welty's office on Monday. Bill testified that Dr. Richardson did not tell him why she was ordering the tests, and he did not know he was to get the tests done on Monday.

¶ 17 On Monday, September 21, 2015, Bill called Dr. Welty's office twice in the morning. Because he could not get through, he left a voicemail. He then called Dr. Richardson, and she told him she would call Dr. Welty. She also informed Bill that she had previously faxed the orders to Dr. Welty.

¶ 18 Not long after, Teresa Shroyer, Dr. Welty's nurse of many years, called Bill, saying

she set up an ultrasound and tests for Wednesday. Bill had known Shroyer for a long time, and she had always been very helpful when scheduling appointments and tests for him in the past.

¶ 19 When Bill woke up the next day, on Tuesday, September 22, 2015, he saw large dark lines in his left field of vision, and his vision in both eyes was getting darker. Bill was scared, so he and Debra contacted Dr. Richardson, who told them to come in and she would see him immediately.

¶ 20 Bill and Debra went to see Dr. Richardson, and they told her Bill had not completed the tests. Debra asked if the tests could be moved up, and Dr. Richardson said they could not. Bill testified that Dr. Richardson told him that he would be driving in two months and sent them home.

¶ 21 Bill and Debra decided to go to the lab to get the blood tests done if they could, which they were able to do. In the late afternoon, Dr. Richardson called Bill and said she had reviewed the blood test results, which indicated to her that he had "temporal arteritis"—GCA—and Bill needed to go to the emergency room. Dr. Richardson told Bill and Debra to go to a hospital in Sterling, Illinois, because they had the appropriate specialist available to treat him.

¶ 22 At the hospital, Bill's vision was close to gone when he began receiving intravenous steroids to halt his vision loss. He stayed in the hospital and on intravenous steroids for several days. His vision stabilized, but when he left the hospital, only his extreme peripheral vision was left.

¶ 23 After Bill was discharged from the hospital, he was prescribed prednisone and referred to a specialist, Dr. Kay at the University of Wisconsin-Madison, for a second opinion. Dr. Kay sent a letter to Bill and his doctors in which she wrote that she believed GCA was less likely a cause of his condition, which might have been caused by emboli. She recommended tapering Bill off the steroids, but Bill testified that his doctors did not follow her suggestion.

¶ 24 2. *Dr. Emily Richardson*

¶ 25 Dr. Richardson testified that she was an optometrist and evaluated Bill on Thursday, September 17, 2015. She diagnosed Bill with ischemic optic neuropathy (ION), which is damage to the optic nerve due to reduced blood flow from inflammation and leads to vision loss. However, ION comes in two forms: (1) arteritic ischemic optic neuropathy, commonly known as GCA and (2) nonarteritic ischemic optic neuropathy (NAION). GCA is an autoimmune condition that inflames blood vessels, cutting off blood to the optic nerve, commonly occurring in the elderly, meaning those in their 70s and 80s, and impacting more women than men. NAION is caused by underlying conditions and risk factors that cause inflammation, including hypertension and diabetes.

¶ 26 Dr. Richardson testified that her primary working diagnosis was NAION based on the sudden loss of vision in the lower portion of Bill's eye, his relatively younger age of 57, and his risk factors of diabetes and hypertension. Dr. Richardson also noted that Bill did not have any of the other classic symptoms associated with GCA, like jaw pain, temporal headache, or scalp tenderness. Dr. Richardson explained that treatment of ION depends on the type; however, Dr. Richardson's medical records included only ION and did not specify which type. The type was important because although both involve sudden vision loss, NAION is typically not progressive and is stable once vision loss occurs. Treatment involves addressing the underlying risk factors. GCA involves inflammation of the arteries and is effectively treated through the immediate administration of steroids to reduce the inflammation and arrest further vision loss that would otherwise occur if untreated.

¶ 27 Dr. Richardson testified that she considered GCA and agreed that time for diagnosing it was important. Although she did not specifically chart GCA, Dr. Richardson ordered

the three specific blood tests that are used to diagnose the condition. She decided to refer Bill to Dr. Welty, who could order the blood tests, because (1) if the condition was NAION, Dr. Welty would be in charge of treating the underlying conditions and (2) as an optometrist, although Dr. Richardson could order the tests, she could not prescribe the steroids that would be needed for treatment, and Dr. Welty could. Dr. Richardson testified that she told Bill her plan was to order a further eye scan and, pending the results, refer him to Dr. Welty for blood tests and further care.

¶ 28 Dr. Richardson testified that the scans were conducted on Friday, her scheduled day off, so she reviewed them on Saturday morning. Based on the results, she called Bill and told him that the plan was to send him to Dr. Welty on Monday morning for the blood tests that would determine the cause of his vision loss. She told Bill to call Dr. Welty on Monday.

¶ 29 Later on Saturday, after Dr. Richardson's call with Bill ended, she sent a fax, marked urgent, to Dr. Welty's office. The fax asked Dr. Welty to order the three blood tests and have them completed "ASAP." The fax further instructed that Bill should be seen on Monday.

¶ 30 On Monday morning, after Dr. Richardson was informed by Bill that he had not heard from Dr. Welty, she called Dr. Welty's office and talked to Shroyer, his nurse, to see if they had received the fax. They had, and Shroyer said she would call Bill.

¶ 31 On Tuesday morning, Bill and Debra called to inform Dr. Richardson of the further vision loss. They immediately went to Dr. Richardson's office for an examination, and she documented ION. Bill said the tests were scheduled for Wednesday.

¶ 32 Dr. Richardson called Dr. Welty's office to find out why the tests had not been ordered because she was shocked they had not been performed. Her understanding was that the blood tests were not scheduled but could be done on a walk-in basis once they were ordered. Dr. Richardson stated that Bill got the tests on Tuesday, and when she saw the results, they were

extremely elevated. She contacted Dr. Welty and coordinated with him about where to send Bill for emergency treatment and to whom to refer him for that care. She spoke with an ophthalmologist at the hospital in Sterling and sent Bill there for treatment.

¶ 33 3. *Plaintiffs' Medical Experts*

¶ 34 Dr. Joseph Sowka testified that he was an optometrist in Florida and primarily focused his practice on elderly care. Dr. Sowka opined that Dr. Richardson failed to meet the standard of care by not promptly diagnosing GCA, failing to immediately refer Bill for emergency treatment, and failing to get the blood tests performed in a timely manner. Dr. Sowka believed Bill had classic symptoms of GCA and that Dr. Richardson should have recognized the symptoms and acted quickly because GCA is one of the few true emergency diseases that optometrists address.

¶ 35 On cross-examination, Dr. Sowka agreed that the medical records showed that throughout his course of treatment in September 2015 (including after he sought emergency treatment), when Bill was asked by various nurses and physicians about the symptoms specific to GCA, he denied having them. Specifically, he denied jaw pain, scalp tenderness, and a fever.

¶ 36 Dr. Sowka acknowledged that in his decades of practice, he had only seen a few cases of GCA in someone Bill's age. Dr. Sowka further agreed that although Dr. Richardson did not chart GCA, she had considered that Bill might have it because she ordered the necessary tests to rule that disease out as a cause. Dr. Sowka agreed that having a primary care physician order the tests was within the standard of care because optometrists cannot order the necessary steroids to treat GCA. Finally, Dr. Sowka agreed that had the tests been performed on Monday, as Dr. Richardson wanted, she would have complied with the applicable standard of care. Dr. Sowka's only issue was with the timing of completing the tests.

¶ 37 Dr. Randy Kardon testified as plaintiffs' causation expert and stated he was a neuro-

ophthalmologist. Dr. Kardon explained GCA, how the disease operates, and the proper treatment. Dr. Kardon testified that had Bill been treated with intravenous steroids at any time up until he went to bed on Monday night, he would not have lost any further vision. Dr. Kardon denied that an embolism was a potential cause of Bill's vision loss.

¶ 38 4. *Dr. Joseph Welty*

¶ 39 Defendants called Dr. Welty in their case-in-chief. Dr. Welty testified that he had been Bill's primary care physician for years. Further, he had been employed by KSB since 2004 and was still employed by the hospital, although he had retired from active practice in 2021 and began teaching medical students during their residencies. He had not seen or treated Bill since leaving active practice.

¶ 40 Dr. Welty testified that he did not remember seeing Dr. Richardson's fax or ordering the tests. Dr. Welty explained that his office had a standard operating procedure for faxes he received. His nurses would collect them and organize them by urgency or importance and would show them to Dr. Welty around noon, after the morning patients, and then the remainder at the end of the day, after the last patient had been seen. Based on his review of the medical records, Dr. Welty believed that this standard procedure was followed in Bill's case. The blood tests had been ordered at 12:18 p.m. on Monday, September 21, 2015.

¶ 41 Dr. Welty was shown Dr. Richardson's fax, and he explained that his understanding of the fax was that Dr. Richardson wanted the tests ordered and completed on Monday. Dr. Welty testified that Shroyer had worked with him for 30 years and was knowledgeable and dependable. He would have conveyed to his nurse that the labs needed to be completed on Monday. He would have expected his nurse to call the patient and inform them that the tests were to be completed on Monday.

¶ 42 Dr. Welty acknowledged that the records showed the tests were not activated at the lab until Tuesday. He did not know why they were not completed on Monday, as he had directed. Had Dr. Welty seen the elevated results on Monday, he would have contacted Dr. Richardson and asked that Bill be sent for treatment immediately. Dr. Welty understood that Dr. Richardson had ordered the tests to look for GCA, which he knew was an emergency condition if present.

¶ 43 Dr. Welty testified that his first independent recollection of Bill's vision treatment was on Tuesday, September 22, 2015, when he became aware of the test results. Dr. Welty spoke with Dr. Richardson and told her to contact a specific ophthalmologist at the hospital in Sterling.

¶ 44 Dr. Welty continued to treat Bill after his vision loss. He received a letter from Dr. Kay in November 2015 suggesting that the cause of the vision loss was a shower of emboli and not GCA. Based on this letter, Dr. Welty changed his diagnosis of GCA by adding the embolic event.

¶ 45 Dr. Welty testified on cross-examination that if he had gotten involved, he would have referred Bill for treatment for a suspected GCA. Dr. Welty said he would not expect a doctor to refer an urgent matter to him without a phone call. He had never had someone send him an urgent request via fax on a Saturday.

¶ 46 5. *Dr. Paul Ajamian*

¶ 47 Dr. Paul Ajamian testified as defendants' optometry expert. Dr. Ajamian testified that Dr. Richardson complied with the standard of care and her conduct did not cause Bill's injury. Dr. Ajamian explained that high blood pressure, diabetes, heart disease, and high cholesterol are risk factors for NAION, and Bill had these factors. Dr. Ajamian believed that Dr. Richardson's actions showed she properly considered GCA based on her (1) questions for specific symptoms and (2) ordering the appropriate blood tests. Dr. Ajamian opined Dr. Richardson appropriately

prioritized what was most likely to occur in a relatively younger person, like Bill, but still considered GCA as a possible cause. Dr. Ajamian stated Bill's condition was not an emergency and that a week to get test results would be reasonable. Dr. Ajamian's opinion was that Bill did not have signs of GCA.

¶ 48 6. *The Jury's Verdict*

¶ 49 The jury returned a general verdict in favor of defendants.

¶ 50 C. Plaintiffs' Posttrial Motion

¶ 51 In May 2023, plaintiffs filed their 53-page posttrial motion, which raised several issues. Relevant to this appeal, plaintiffs argued that the trial court erred by (1) denying various motions *in limine*, (2) allowing Dr. Welty to testify despite an alleged *Petrillo* violation, (3) not permitting plaintiffs to cross-examine certain witnesses with Dr. Kay's deposition, and (4) improperly instructing the jury.

¶ 52 In December 2023, the trial court entered a comprehensive and lengthy written order denying all of plaintiffs' claims as asserted in their motion. The court reviewed the pretrial motions, testimony, objections, and arguments made at trial and concluded with respect to each and every issue raised by plaintiffs that the court's initial rulings were proper and did not prejudice plaintiffs' case. The court declined to order a new trial.

¶ 53 This appeal followed.

¶ 54 II. ANALYSIS

¶ 55 Plaintiffs appeal, arguing that the trial court erred by (1) permitting Bill's treating physician, Dr. Welty, to testify at trial despite his having had an *ex parte* communication with defense counsel in violation of the *Petrillo* doctrine, (2) admitting into evidence letters written by Dr. Kay (who was a later treating physician of Bill) containing her opinion that Bill's condition

may have been caused by something other than GCA and thereafter prohibiting plaintiffs from cross-examining Dr. Welty with Dr. Kay's deposition testimony, (3) allowing defendants' expert, Dr. Ajamian, to offer undisclosed causation testimony on direct examination and thereafter prohibiting plaintiffs from cross-examining Dr. Ajamian with a transcript of Dr. Kay's deposition, (4) denying plaintiffs' proposed issues instruction, and (5) overruling plaintiffs' objection to defendants' closing argument that allegedly misstated the law on plaintiffs' burden of proof.

¶ 56 We disagree and affirm.

¶ 57 A. The Alleged *Petrillo* Violation

¶ 58 Plaintiffs first argue that the trial court erred by denying their motion to bar defendants from calling as a witness at trial Bill's treating physician, Dr. Welty. Plaintiffs claim that the court's permitting Dr. Welty to testify after defendants engaged in *ex parte* communications with him violated the *Petrillo* doctrine, resulting in the need for a new trial. We disagree.

¶ 59 1. *The Applicable Law*

¶ 60 "The *Petrillo* doctrine forbids *ex parte* communications between defense counsel and a plaintiff's treating physician because these conferences jeopardize the sanctity of the physician-patient relationship and are prohibited as against public policy." *Hall v. Flowers*, 343 Ill. App. 3d 462, 466 (2003) (citing *Petrillo*, 148 Ill. App. 3d at 588). "The *Petrillo* court explained that ***, 'the confidential relationship existing between a patient and physician demands that information confidential in nature remain, absent patient consent, undisclosed to third parties.' " *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 57 (2001) (quoting *Petrillo*, 148 Ill. App. 3d at 591). "[I]n obtaining information or evidence, defense counsel is restricted to the 'regular channels of discovery including, but not limited to, written interrogatories and depositions.' "

Caldwell v. Advocate Condell Medical Center, 2017 IL App (2d) 160456, ¶ 76 (quoting *Petrillo*, 148 Ill. App. 3d at 587). The court in *Petrillo* defined *ex parte* contacts as including "any discussion that defense counsel has with a plaintiff's treating physician which is not pursuant to the authorized methods of discovery." *Petrillo*, 148 Ill. App. 3d at 584 n.1.

¶ 61 2. *This Case*

¶ 62 Plaintiffs acknowledge that the trial court entered a protective order in November 2017 that permitted KSB to have *ex parte* discussions with hospital employees who treated Bill. However, plaintiffs claim the order was never intended to apply to Dr. Welty, who was a respondent in discovery at the time. In addition, plaintiffs argue that the order did not apply to Dr. Welty when the *ex parte* communication occurred because a changed circumstance had removed the underling basis for the order —namely, Dr. Welty had been dismissed with prejudice from the case.

¶ 63 Defendants respond that the plain language of the November 2017 order permitted them to have *ex parte* communications with any KSB employee, including nurses and physicians, who was involved in Bill's treatment in September 2015, and, at all times, Dr. Welty was an employee of KSB. Defendants also emphasize that plaintiffs (1) never sought to modify or vacate the November order and (2) do not provide any legal authority that such a protective order is automatically revised based on a plaintiff's changing theories of liability.

¶ 64 We note that the issue was raised in the trial court at trial when plaintiffs moved orally to bar Dr. Welty from testifying because of an alleged *Petrillo* violation. Defense counsel produced a copy of the trial court's November 2017 order, which counsel said explicitly granted him permission to meet with Dr. Welty. Defense counsel noted that order remained in effect. Plaintiffs' attorney responded, "The relevant inquiry is today. Not 2017. It's today, what his status

is today. He's not a defendant whose conduct is in this case by the pleadings."

¶ 65 The trial court read the November 2017 order aloud and noted that it stated that the attorneys for defendants were allowed to have *ex parte* communications with KSB employees, including nurses and physicians, who were involved in Bill's care in September 2015 without violating *Petrillo*. Plaintiffs insisted that the order was "irrelevant to what's happening today" because it was entered when Dr. Welty's conduct was involved in the case, but he was "no longer [involved] and hasn't been for years." Defense counsel responded, "The order remains in place. It's never been modified. Plaintiff never sought to have that order limited or modified or removed or in any way limited to the order. It clearly allows me to communicate with Dr. Welty." Plaintiffs argued, "At the time this order was entered, communications with Dr. Welty [were] not even contemplated because he was still a party and represented by [his own attorney]. This doesn't cover Dr. Welty, and it certainly doesn't cover Dr. Welty since his dismissal."

¶ 66 When the trial court denied plaintiffs' motion to bar Dr. Welty, plaintiffs requested the court permit them to *voir dire* Dr. Welty to learn what communications occurred between him and defense counsel. Ultimately, the court permitted plaintiffs to do so.

¶ 67 Dr. Welty then testified that he had been employed by KSB since 2004 and remained an employee. Plaintiffs asked Dr. Welty if he had met with the lawyers representing defendants, and Dr. Welty responded he had "met with them one to two weeks ago and again yesterday." Plaintiffs then asked, "And did they talk about how they're going to have you testify about [Dr.] Kay's letter in this case?" Dr. Welty said, "Yes." Plaintiffs attempted to ask if opposing counsel informed Dr. Welty about Dr. Kay's deposition, at which point defendants objected.

¶ 68 The trial court took a recess to address the objection outside the presence of the jury and Dr. Welty. During that sidebar, plaintiffs explained that they "would like to ferret out what

[Dr. Welty] talked about in preparation for this testimony about [Dr.] Kay." Plaintiffs continued, "My intent is to question his veracity and bias when he met with these people who are not his lawyers and what they told him and what he planned on testifying to today." The court replied, "Absolutely not."

¶ 69 Plaintiffs again raised the *Petrillo* issue in their motion for a new trial, which the trial court denied. In the court's written order denying plaintiffs' motion, the court explained its ruling as follows:

> "Plaintiffs argue that Dr. Welty should not have been allowed to testify at trial due to a *Petrillo* violation. The Court's finding that there had not been a *Petrillo* violation was based upon the Court order entered on November 17, 2017, that specifically allowed *ex parte* communications with KSB employees. The order provided that '[t]he attorneys for [KSB] are hereby allowed to conduct *ex parte* discussions with [KSB] employees, including nurses and physicians, who were involved in the care of William Gorski from September 7, 2015, through September 22, 2015, including but not limited to, Teresa Shroyer, LPN, outside the presence of Plaintiffs or their counsel, without violation of the physician/patient privilege or *Petrillo*.' Dr. Welty is an employee of [KSB]. Plaintiffs were aware of this order and never asked to vacate it or limit its application. The order speaks for itself and this Court refuses to guess what the intent of the order was at the time it was entered.
>
> The Court stands by its ruling."

¶ 70 We agree with the trial court and reject plaintiffs' contention that any *Petrillo* violation occurred.

¶ 71 The trial court's order is broad and clearly permits *ex parte* discussions with

treating physician employees. No dispute exists that Dr. Welty was a KSB employee, as well as Bill's primary care physician. Dr. Welty testified at trial in February 2023 that he was still a KSB employee. Dr. Welty was a named defendant or respondent in discovery during this litigation, and the allegations in plaintiffs' various complaints expressly stated he was a KSB employee.

¶ 72 The November 2017 order had no expiration date or limiting conditions. Of major importance for our conclusion that the trial court's ruling was correct that no *Petillo* violation occurred is that *plaintiffs never moved to vacate, amend, or modify the order at any time*. Accordingly, when defendants spoke with Dr. Welty for an hour prior to calling him to testify at trial the next day, the November 2017 order expressly permitted the *ex parte* communication about which plaintiffs complain.

¶ 73 Plaintiffs' suggestion that the order never intended to cover Dr. Welty is contrary to the plain language of the order itself. Plaintiffs attempt to support their argument by pointing to the language in the order specifically naming only Shroyer, as being covered while not mentioning any other person by name. But the order explicitly names Shroyer as being included "*but not limited*" to the only covered employee and also explicitly states that "physicians" who were involved in Bill's treatment in September 2015 are also covered. The trial court's interpretation of its own order was clearly correct, and defendants cannot be faulted for relying upon that order.

¶ 74 Plaintiffs' final argument regarding *Petrillo* is that the November 2017 order automatically ceased to apply to Dr. Welty once the basis for that order no longer existed due to a change in circumstances. Specifically, plaintiffs note that defendants sought the protective order on the grounds that they could be held vicariously liable for Dr. Welty's negligence as an employee of the hospital. In November 2021, plaintiffs voluntarily dismissed Dr. Welty with prejudice, and the trial court entered an agreed order to that effect. Plaintiffs explain that the statute of limitations

had expired and the agreed order conclusively barred them from seeking to hold KSB liable for Dr. Welty's conduct. Plaintiffs claim that these events constituted a change in circumstances that automatically nullified the November 2017 protective order's coverage of Dr. Welty as an exception to the *Petrillo* doctrine because the vicarious liability exception no longer applied.

¶ 75 Under these circumstances, plaintiffs fault defendants for not recognizing the change in circumstances that removed the basis for the protective order. Plaintiffs argue:

> "Given the significant change in circumstances in the status of the case ***, and the fact that the premise for the order allowing *ex parte* contacts was no longer valid, defendants had to appreciate that plaintiffs would challenge any *ex parte* contact. Yet, *rather than raise the issue proactively by motion asking for permission before talking with Welty* more than five years after the order, to assure *Petrillo* was followed, they gambled by going directly to Welty." (Emphasis added.)

¶ 76 These contentions are completely without merit.

¶ 77 B. The Trial Court's Admission of Dr. Kay's 2015 Letters

¶ 78 Plaintiffs argue that the trial court erred by (1) admitting into evidence letters written by Dr. Kay in 2015 that contained her opinion that Bill's vision loss was caused by emboli because she later "recanted that opinion" during her deposition and (2) prohibiting them from cross-examining Dr. Welty with Dr. Kay's deposition testimony.

¶ 79 Defendants respond that the trial court properly admitted Dr. Kay's letters because they were admitted into evidence by stipulation of the parties. Defendants also contend that the court properly barred plaintiffs from cross-examining Dr. Welty with Dr. Kay's deposition transcript because Dr. Welty had no knowledge of Dr. Kay's deposition.

¶ 80 We agree with defendants.

¶ 81 1. *Additional Factual Background*

¶ 82 Given the lengthy record in this case, we set forth additional factual background necessary for the analysis of plaintiffs' claims.

¶ 83 a. Plaintiffs' Motion *In Limine* No. 47

¶ 84 In January 2023, plaintiffs filed a motion *in limine* No. 47 seeking to bar evidence that Bill's vision loss was caused by anything other than GCA. Specifically, plaintiffs pointed to the medical records and deposition testimony of Dr. Kay, who evaluated Bill in November 2015, shortly after his vision loss and diagnosis of GCA, as a treating physician for the purpose of rendering a second opinion. Plaintiffs asserted that, when Dr. Kay evaluated Bill in 2015, she opined (in her written records) that emboli were the cause of Bill's vision loss; later, in her 2019 deposition, she "recanted" that opinion when she gave the following testimony:

> "Q. Did you form an opinion to a reasonable degree of medical certainty in November of 2015 as to what was the cause of his vision loss?
>
> A. I didn't feel I could give a certain cause given that I was seeing him with new findings.
>
> * * *
>
> Q. You're not articulating an opinion today, Doctor, that Bill Gorski did not have [GCA] back in September of 2015, correct?
>
> A. No, I'm not."

¶ 85 According to plaintiffs, any opinions in Kay's notes or deposition as to causation did not meet the standards for admissibility because Illinois law requires that expert testimony regarding causation in a medical negligence case be given to a reasonable degree of medical certainty.

¶ 86 That same month, the trial court conducted a hearing on plaintiffs' motion *in limine*. Plaintiffs argued that their retained expert, Dr. Randy Kardon, was the only expert who had offered a "competent admissible expert opinion" regarding causation, which was that GCA caused Bill's vision loss. Therefore, they asserted, no other evidence of causation should be admitted at trial, including Dr. Kay's statements in her written records or deposition, because her "testimony is clear that she did not form an opinion to a reasonable degree of medical certainty as to the cause of his vision loss and therefore that is not an opinion."

¶ 87 Defendants responded that Dr. Kay's "letters"—which were actually in the form of (1) a November 4, 2015, consultation note and (2) a November 13, 2015, letter to Bill's primary physician and neuro-ophthalmologist—reflected that she believed (1) Bill's vision loss was caused by emboli and the steroid treatment for GCA should be stopped and (2) GCA was a less likely cause of his vision loss. According to defendants, Dr. Kay's written documentation of her thoughts and opinions after evaluating Bill was competent evidence for the jury to weigh. Defendants also argued that Dr. Kay's deposition testimony did not amount to a recantation.

¶ 88 The trial court agreed with defendants and denied plaintiffs' motion *in limine*.

¶ 89 b. The Parties' Stipulations

¶ 90 Approximately two weeks later, the jury trial commenced. On January 31, 2023, following opening statements, but before the presentation of evidence, the following discussion occurred regarding joint exhibits:

> "MR. MEYER [(DEFENDANTS' ATTORNEY)]: Judge, we have reached an agreement on exhibits that have been marked as joint exhibits and stipulated to their foundation and to their admission into evidence.
>
> Obviously, the question of whether any of that material goes back to the

jury is something we'll address with the Court later. And then I'll let Counsel identify the ones we've—

MS. DEGNAN [(PLAINTIFFS' ATTORNEY)]: Yes, Your Honor, so we've agreed on Joint Exhibits—Do you want just the number, or do you want me to identify what the exhibit is?

THE COURT: Are they already on a list?

MS. DEGNAN: They are on a list but not listed as Joint and the numbers have probably changed.

THE COURT: If you could identify for me the number and then just a brief description of what it is.

MS. MITCHELL [(DEFENDANTS' ATTORNEY)]: Judge, I have a revised exhibit list for the defense which has the joint exhibits listed on there.

MS. DEGNAN: I have one as well.

THE COURT: And the corresponding numbers?

MS. MITCHELL: Yes. We agreed to match numbers so that there would be no confusion.

THE COURT: That would be great, then. So, if you could just give me the numbers.

MS. DEGNAN: Okay, so it's Joint Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

THE COURT: So 6 through 18 are all—6 through 18 are all joint exhibits. Their foundation is stipulated to and they're agreed to be admitted into evidence?

MS. DEGNAN: That's correct.

MR. MEYER: Correct, Your Honor.

THE COURT: 6 through 18 will be admitted into evidence.

(Joint Exhibit Nos. 6 through 18 received into evidence.)

THE COURT: Are we now ready for the jury?

MS. DEGNAN: We are, Your Honor."

¶ 91 Joint exhibit Nos. 7 and 11 are collections of Bill's medical records. Pages 126 and 127 of joint exhibit No. 7 are Dr. Kay's consultation note documenting her examination of Bill on November 4, 2015. (That same consultation note appears as pages 6 and 7 of joint exhibit No. 11.) The consultation note states that Bill was seen by Dr. Kay at the request of Dr. Welty and Dr. John Hahn for a second opinion. Relevant to this appeal, Dr. Kay noted the following:

> "[Bill] has retinal emboli and different ones than what Dr. Hahn noted a month ago. This has to be coming from somewhere. He needs a transesophageal echo [(TEE)] to look for heart valve abnormalities, and more importantly aorta plaques given that both eyes have had this occur. It sounds as though there was a shower of emboli that affected both eyes over a period of a few days and the elevated sed rate could theoretically be due to SBE.
>
> I have to think that it is less likely that he has [GCA], although we will review hopefully the temporal artery specimens. However, I would recommend tapering his prednisone, and strongly encourage an evaluation of his heart valves and the aorta for a source of emboli."

¶ 92 Page 115 of joint exhibit No. 7 is a letter from Dr. Kay addressed to Dr. Welty and copied to Dr. Hahn and Bill. (The same letter appears as page 42 of joint exhibit No. 11.) Dr. Kay's letter is written on "UW Health" [(University of Wisconsin Hospitals and Clinics)] letterhead and

is dated November 13, 2015. The letter reads as follows:

> "Dear Dr. Welty:
>
> The TEE showed no obvious plaques in the aorta although I note there were some noted on the CT angio[gram] of the chest. Dr. Hahn and I both saw Hollenhorst plaques in the fundi, and I saw them in both eyes which strongly suggests an embolic shower from a common source of bloodflow to the eyes. We reviewed the [temporal artery] biopsy here and no signs of arteritis were found.
>
> I would suggest tapering him off the steroids, monitoring the esr and c reactive protein. I think his vision loss is from embolism to the retinal and posterior ciliary arteries of both eyes.
>
> Anti platelet therapy would seem appropriate, but to prevent further embolic related neurologic events. Unfortunately I doubt his vision will recover much, if at all.
>
> ***
>
> Sincerely,
>
> Marilyn C. Kay, MD"

¶ 93 c. Jury Trial

¶ 94 During trial, defense counsel cross-examined Bill about his appointment with Dr. Kay on November 4, 2015. Bill testified Dr. Hahn had referred him to Dr. Kay for the purpose of obtaining a second opinion. Counsel asked Bill about the letter Dr. Kay wrote following the visit, addressed to Dr. Hahn and copied to Bill and Dr. Welty, reflecting Dr. Kay's opinion. Plaintiffs' counsel objected to questions about the letter on the grounds of "relevance and the motions that we discussed before." The trial court overruled the objection and allowed defense counsel to

question Bill about the content of Dr. Kay's letter, particularly that she wanted further testing because his vision loss might be the result of emboli. (Plaintiffs' counsel thereafter asserted a standing objection for the record.)

¶ 95 Later, defense counsel questioned Dr. Welty on direct examination about the substance of Dr. Kay's consultation note and letter. Counsel displayed pages 126 and 127 of joint exhibit No. 7 on the screen (Dr. Kay's November 4, 2015, consult note, which was copied to Dr. Hahn and Dr. Welty) and walked through the substance of the note with Dr. Welty, including that Dr. Kay noted under her "Impression" section that Bill "ha[d] retinal emboli." Counsel then asked, "And then what did [Dr. Kay] tell you in terms of what the process was?" Dr. Welty answered, "She indicated it sounds as if there were a shower of emboli that affected both eyes over a period of a few days." Counsel then asked, "And as to whether this was [GCA] or something else, what did you learn? From Dr. Kay, that is." Dr. Welty answered:

> "She indicated that she thought that it was less likely that he had [GCA], although will review [*sic*] the temporal artery specimens. She recommended tapering his Prednisone and strongly encouraged an evaluation of his heart valves and aorta for source of emboli and indicated he may need to be anticoagulated."

Plaintiffs' counsel did not object to any questioning regarding the substance of Dr. Kay's first letter, or consultation note, copied to Dr. Welty.

¶ 96 Defense counsel then asked Dr. Welty if he received a second letter from Dr. Kay, and after receiving an affirmative answer, counsel displayed page 115 of joint exhibit No. 15 (Dr. Kay's November 13, 2015, letter addressed to Dr. Welty). Counsel asked, "What did she tell you?" and Dr. Welty began testifying about the contents of the letter. Plaintiffs' counsel did not object.

¶ 97 Defense counsel then asked Dr. Welty, "What did she tell you about what she

thought was causing *** Mr. Gorski's vision loss?" Plaintiffs' counsel then objected to the questioning relating to Dr. Kay's letters, stating, "I'm going to have a running objection to this line of inquiry about Dr. Marilyn Kay who has not testified." The trial court responded, "Objection overruled," and Dr. Welty answered that Dr. Kay "indicated that with her findings, it strongly suggested an embolic shower from a common source of blood flow to the eyes." Dr. Welty also testified that Dr. Kay, in her letter, "suggested tapering [Bill] off the steroids *** and indicated that she thought his vision loss was from embolism to the retinal and posterior ciliary arteries of both eyes."

¶ 98 Shortly thereafter, defense counsel directed Dr. Welty to page 43 of joint exhibit No. 7, which reflected an office visit between Dr. Welty and Bill in December 2015. Counsel noted that Dr. Welty's record from that visit stated that Bill was being treated for a presumptive case of GCA, but there also existed some evidence for an embolic phenomenon as a potential source for his blindness. Defense counsel asked whether the reference to the embolic phenomenon as a potential source came from Dr. Kay's report and opinion. Plaintiffs' attorney objected to the form of the question. The trial court overruled the objection, and Dr. Welty answered, "Yes." Defense counsel then asked Dr. Welty if he changed his assessment based on Dr. Kay's letter. Plaintiffs' counsel stated, "I'll object [pursuant] to [Illinois Supreme Court Rule 213 (eff. Jan. 1, 2018)], [Y]our Honor." The court overruled the objection, and Dr. Welty answered that he did change his assessment by "add[ing] 'and/or embolic event' " to his presumptive diagnosis.

¶ 99 During the cross-examination of Dr. Welty by plaintiffs' counsel, counsel asked Dr. Welty whether he had the opportunity to meet with defense counsel. After Dr. Welty answered that he had met with them twice shortly in advance of trial, the following exchange occurred:

"MR. MCNABOLA [(PLAINTIFFS' ATTORNEY)]: And did they talk

about how they're going to have you testify about [Dr.] Kay's letter in this case?

A. Yes.

Q. And did they tell you that [Dr.] Kay had a deposition and she said she did not—

MR. MEYER [(DEFENDANTS' ATTORNEY)]: Objection.

Q. —think that the embolus was the cause?

THE COURT: Objection is sustained.

MR. McNABOLA: I need a sidebar on that, please."

¶ 100 During the ensuing sidebar, plaintiffs' attorney argued as follows:

"[Defense] counsel has now tried to bootstrap [Dr.] Kay's speculation with no basis based upon a reasonable degree of medical certainty that the emboli was the cause, let alone a cause, of Bill's blindness. He attempted to bootstrap it through a family practice physician who likewise has no opinion as to causation based upon a reasonable degree of medical certainty that the emboli was a cause or the only cause of Bill's blindness.

I would like to get into questioning about that subject matter because Counsel just went over that during opening—during his direct examination about what [Dr.] Kay had written in November [2015], well after Bill had already had double blindness and—about this presence of the emboli.

It should be stricken. It's mere speculation. There's no basis for it. And during cross-examination I would like to ferret out what he talked about in preparation for this testimony about [Dr.] Kay."

¶ 101 The trial court responded as follows:

> "Well, Attorney McNabola, [Dr. Welty] just testified to a joint exhibit. So you agreed to this exhibit, and the information contained within the exhibit is what he testified to. If you want to ask him more questions about the exhibits and his knowledge, I believe that's completely appropriate, but you can't question him about a deposition given by another physician that he wasn't present at. He wouldn't have any knowledge. You could ask him if he has any knowledge of Dr. Kay, any further knowledge of her opinions, but everything he just testified to was contained in the joint exhibit which both parties offered to me at the beginning of this trial."

¶ 102 Plaintiffs' attorney replied, "My intent is to question [Dr. Welty's] veracity and bias when he met with these people who are not his lawyers and what they told him and what he planned on testifying to today." The court responded, "Absolutely not."

¶ 103 Defense counsel then interjected that Dr. Welty was a party to the case at the time of Dr. Kay's deposition, and accordingly, "it is possible Dr. Welty has some privileged information [(from discussions with his own attorneys)] that Dr. Kay was deposed," although defense counsel "certainly [did not] share anything about Dr. Kay's deposition or any of those issues at all." Defense counsel also noted that Dr. Kay's letter "is actually in the evidence twice, it's the—there's a joint exhibit that's in evidence which is the [University of Wisconsin Hospitals and Clinics] records from [Dr.] Kay, and that letter is also contained in Dr. Welty's own chart as well."

¶ 104 The trial court responded, "Right. There will be no testimony from Dr. Welty about the deposition of Dr. Kay."

¶ 105 Plaintiffs' attorney then reiterated that plaintiff was "objecting to the entire line of questioning with regard to Dr. Kay's opinion" due to Dr. Kay's deposition testimony, then argued

that plaintiffs should be able to "understand whether [defense counsel] shared with Dr. Welty the fact that Dr. Kay denied having an opinion to a reasonable degree of certainty" at her deposition because "it shows the bias, and it shows that they didn't give him all the information." Counsel continued, "Perhaps if Dr. Welty knew [(the substance of Dr. Kay's deposition testimony)], he wouldn't have agreed to give this testimony. I don't know."

¶ 106 Defendants' counsel responded as follows:

> "The reality, Judge, is [Dr.] Kay at the time [Bill] was being treated for his vision loss wrote a letter and said take him off the steroids, not once, but twice; and if he had [GCA], then taking him off the steroids was not the course of treatment to do that. If there's any evidence more compelling about what her opinion was, and it's clearly stated in the letter, 'This is, in my opinion, an emboli as the cause of his central vision loss.' These are not opinions of retained witnesses; this is a treater who's actively treating the patient at the time who writes with clarity as to what her findings were and what her conclusions were and recommends—unlike any of the experts retained by Plaintiff, recommends active treatment that would impact whether his—his visual status, whether he has emboli or [GCA].
>
> And it's as competent of evidence as would exist in regards to that issue. *** If she's subsequently in a deposition and testified—what I think she said is she didn't have an opinion one way or the other, quite frankly, rather than what Counsel is suggesting. They could have brought her in. They had the opportunity to bring her in.
>
> Her letter has been in the records. It's in evidence, and it went in evidence in their case[.]"

¶ 107 The trial court ruled as follows:

> "Thank you. The testimony offered by Dr. Welty this morning is to his treatment of Bill and what he just reviewed as far as records. And he's not given an opinion as to any reasonable degree of medical certainty on anything. He's simply noting—and everything he just went through was in his—the joint exhibit that was offered at the beginning of the evidence. I'm not going to allow you to go down the path of getting into a deposition that was given by Dr. Kay which he has no knowledge of, wasn't present at, and would have no basis to testify to. I'm not allowing it."

¶ 108 Plaintiffs' counsel then asked the trial court whether he could ask Dr. Welty if he was aware of Dr. Kay's deposition. The court responded, "You can ask that. I'm not going to allow you to—him to testify to her deposition."

¶ 109 Defense counsel then asked if the trial court would speak to Dr. Welty, stating, "[I]f he has information [(about Dr. Kay's deposition)] it certainly didn't come from me. We didn't discuss any of this. If he has it *** it would have come from his attorney."

¶ 110 The trial court directed Dr. Welty to return to the stand and, outside the presence of the jury, asked Dr. Welty whether he had any knowledge of the deposition of Dr. Kay. Dr. Welty answered, "I do not." The court stated, "I believe that answers the question."

¶ 111 The jury returned to the courtroom and the trial resumed. Plaintiffs' counsel resumed cross-examination, asking Dr. Welty the following questions:

> "Q. I think when we broke we were talking about your testimony on direct examination concerning a couple of reports that were sent by Dr. Marilyn Kay, correct?

A. Yes.

Q. In your preparation for your testimony today with the lawyers, did they tell you what [Dr.] Kay's opinion is concerning embolus and whether or not it was the only cause of Bill's blindness in both eyes?

A. The only opinion I have of what Dr. Kay said was in the letters that I received from her.

Q. Nothing more than that? They didn't tell you anything more?

A. No.

Q. And you assumed they were going to tell you the full story when you met with them, which you needed to know?

A. Yes.

Q. Okay. Do you know of anyone concerning [Bill]—any physician who diagnosed emboli as the cause of his condition?

A. Dr. Kay's letters indicated to me that that's what she felt was the cause of his condition.

Q. Back in November of '15?

A. Yes.

Q. Are you aware that Dr. Kay received much information after that?

A. The only information I'm aware of that Dr. Kay received is in the two letters that we've reviewed.

Q. You don't know that there was a positive biopsy that was done by a specialist that deals with ophthalmological pathology slides on a daily basis from University of Iowa that scientifically saw [GCA] in Bill?

A. I am not.

Q. Okay. Do you know [Dr.] Kay?

A. I do not.

Q. Do you know where she is?

A. I do not."

¶ 112 During closing argument, defense counsel addressed causation, arguing that the jury should find for defendants if they found that emboli were more likely than not the cause of Bill's vision loss. As evidence for emboli causing Bill's condition, counsel pointed to Dr. Kay's letters, arguing as follows:

> "So what did she say? You heard it, and the letter was admitted—her records were admitted into evidence. *** [S]he said that in her view, the vision loss was not [GCA]—not likely [GCA] but was the embolization of materials from the chest arteries to the retinal arteries, that goes to the retina, and to the posterior ciliary artery. *** And that the embolization happened first to the right eye and then to the left eye six days later."

¶ 113 Plaintiffs' counsel objected "for the record on this line of [argument]," and the trial court overruled the objection.

¶ 114 Defense counsel continued his argument, reminding the jury that Dr. Kay wrote her letters as part of Bill's active treatment, during which she recommended additional testing to explore alternative causes for Bill's condition. Counsel asserted that her advice to stop the steroids, which were the treatment for GCA, was "pretty good evidence that she believe[ed] that the emboli were the cause of his [vision loss]." Counsel continued, "[T]hat letter couldn't be any more reliable because it's written for the purpose of providing his care."

¶ 115 At the conclusion of evidence and closing arguments, the jury returned a verdict for defendants.

¶ 116 d. Posttrial Motions

¶ 117 In May 2023, plaintiffs filed their posttrial motion, arguing, among other things, that the trial court erred by denying their motion *in limine* No. 47 and allowing defendants to present their emboli causation theory through Dr. Kay's letters. Plaintiffs argued that, because defendants were aware that Dr. Kay testified in 2019 that she did not have an opinion to a reasonable degree of scientific certainty as to the cause of Bill's vision loss, defendants elected not to have Dr. Kay testify at trial; instead, defendants introduced their theory of embolic causation through her 2015 letter. Specifically, plaintiffs asserted the following:

> "Despite this unequivocal sworn [deposition] testimony from Dr. Kay denying that she had any opinion regarding the cause of Bill's vision loss, the trial court permitted Defense to discuss [Dr. Kay's] contradictory statements in the November 13, 2015 letter in opening statement, with every witness, and in closing argument to suggest to the jury that Bill's vision loss was not a result of GCS, but rather, caused by an embolic shower. Defense counsel reading from a letter contradicted by the writer's sworn deposition testimony is *not* competent evidence of causation."(Emphasis in original.)

¶ 118 We note that plaintiffs did not raise in their posttrial motion any objection to the trial court's order limiting plaintiffs' counsel from cross-examining Dr. Welty with Dr. Kay's deposition testimony.

¶ 119 In September 2023, defendants filed their response to plaintiffs' posttrial motion, arguing that the trial court properly denied plaintiffs' motion *in limine* No. 47 and "appropriately

exercised its discretion to allow some evidence of causation of [Bill's] vision loss." Defendants argued that plaintiffs waived any objection to Dr. Kay's opinion expressed in her letters because they stipulated to the admission of the letters into evidence as part of joint exhibit Nos. 7 and 11 at the start of trial. Defendants asserted that they properly presented the content of Dr. Kay's letters through Bill and Dr. Welty, who both received the letters.

¶ 120 Defendants also pointed out that Dr. Kay's 2015 letters reflected her diagnosis and treatment recommendations as a treating physician; the fact that she declined at her 2019 deposition to offer an opinion to a reasonable degree of scientific certainty as to causation did not constitute a contradictory opinion. Defendants further argued that plaintiffs could have called Dr. Kay to testify at trial if they wished to present further evidence regarding her opinions.

¶ 121 In December 2023, the trial court issued a written order denying plaintiffs' posttrial motion. The court agreed with defendants that plaintiffs waived any objection to the presentation of the content of Dr. Kay's letters. The court wrote the following:

> "Once Plaintiffs stipulated to the admission of Join Exhibits 7 and 11 and said exhibits were admitted into evidence during trial, it was proper for Defendants to present them through witnesses and argue reasonable inferences based upon the exhibits. Plaintiffs could have objected to the admission of Dr. Kay's letters and maintained their standing to argue the Court erred in denying Plaintiff's Motion in Limine #47, but they chose to stipulate to their admissibility, thereby waiving this argument.
>
> As an aside, at the time of argument on Plaintiff's Motion *In Limine* #47, the Court was aware of Dr. Kay's letters and the fact that the letters established another potential cause for Bill's blindness. The parties acknowledged Dr. Kay is

an expert. The Court denied the Motion *in Limine* because there existed competent medical evidence that Bill's blindness may have been caused by something other than [GCA] as established by the opinions Dr. Kay expressed in her letters. Notably, either party could have called Dr. Kay as a witness at trial."

¶ 122 2. *The Applicable Law and Standard of Review*

¶ 123 "The admission of evidence is within the sound discretion of the trial court and a reviewing court will not reverse the trial court unless that discretion was clearly abused." *Gill v. Foster*, 157 Ill. 2d 304, 312-13 (1993). An abuse of discretion occurs when the court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would adopt the court's view. *TruServ Corp. v. Ernst & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007).

¶ 124 Generally, "[a]n error in the admission or exclusion of evidence will not constitute reversible error unless one party has been prejudiced or the proceedings have been materially affected." *Pister v. Matrix Service Industry Contractors, Inc.*, 2013 IL App (4th) 120781, ¶ 56 (citing *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 758 (2010)). "Jury verdicts should not be set aside and cause the expense of a new trial unless there has been a miscarriage of justice, caused by an error that prejudiced and affected the substantial rights of an innocent party." *Gersch v. Kelso-Burnett Co.*, 272 Ill. App. 3d 907, 908 (1995).

¶ 125 3. *This Case*

¶ 126 a. The Trial Court Did Not Err by Admitting Dr. Kay's Letters Into Evidence

¶ 127 The record clearly establishes that plaintiffs stipulated to the admission of joint exhibit Nos. 7 and 11, both of which contained Dr. Kay's letters. Plaintiffs acknowledge the general rule in Illinois that a party who stipulates to evidence may not "later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). They argue,

however, that the general rule does not apply in this case because "[t]he stipulation was not intended to bring all the medical records before the jury."

¶ 128 Specifically, plaintiffs assert that "it should be clear plaintiffs did not intend to agree to the medical chart's uses for all purposes" because (1) plaintiffs objected to Dr. Kay's letters in their motion *in limine* and (2) plaintiffs did not have reason to anticipate that defendants would raise Dr. Kay's embolic shower statements as a cause of Bill's vision loss. Plaintiffs also contend that "because Dr. Kay's letters with her opinions were followed by her deposition testimony recanting or limiting much of what was in the letters, the court should similarly have recognized that the parties had not intended the records to come in for all purposes."

¶ 129 Plaintiffs' arguments are unpersuasive. Plaintiffs agreed to the admission of the letters as part of joint exhibit Nos. 7 and 11. Upon stipulating to the admission of the joint exhibits, plaintiffs neither (1) revived their earlier objection (in their motion *in limine*) to the admission of Dr. Kay's letters nor (2) articulated any limitation on the exhibits' use. In fact, plaintiffs said nothing at all about Dr. Kay's letters. The burden was on plaintiffs—and not the trial court—to clearly identify and state on the record any limitation concomitant with their stipulation to the documents' admission into evidence. We flatly reject plaintiffs' assertion on appeal that the trial court "should have recognized" plaintiffs' unspoken intent.

¶ 130 In support of their argument, plaintiffs cite *Maring v. Meeker*, 263 Ill. 136, 143 (1914), and argue, "In [that] tax case, certain deeds were understood to be in evidence, but the court concluded it was not conceded they were competent evidence to prove a disputed fact." However, *Maring* is factually distinguishable. In that case, "[m]ost of the facts concerning the matters of record were introduced in the form of a stipulation of facts signed by both parties." *Id.* at 138. The stipulation read:

> "It is further agreed that the complainants do not admit nor agree that the deed from the sheriff to Caitlin Preston aforesaid, nor the sheriff's tax deed to William H. Coons aforesaid, are competent evidence; but it is only agreed relative thereto that the records show the above state of facts." *Id.* at 139.

¶ 131 The *Maring* case is distinguishable because it involves a factual stipulation and not a joint stipulation to the admission of documentary evidence. Nonetheless, if anything, the *Maring* case supports our conclusion here; the *Maring* parties included in their factual stipulation that they were *not conceding* the deeds were competent evidence (in that case, of chain of record title), but they were agreeing only to the fact of the deeds' existence. *Id.* Unlike *Maring*, plaintiffs here stipulated to the documents' admission into evidence and placed no limitation on their use. If they intended otherwise, they could easily have done what the *Maring* parties did and made explicit any limitations they wished to place on their joint stipulation.

¶ 132 Moreover, plaintiffs' assertion that plaintiffs did not have reason to anticipate that defendants would raise Dr. Kay's embolic shower statements as the cause of Bill's vision loss is belied by the record. Plaintiffs were clearly on notice that defendants intended to present the substance of Dr. Kay's letters to the jury when defendants objected to plaintiffs' motion *in limine* at the January 11, 2023, motion hearing and argued the following:

> "[Dr. Kay's] note from the first visit, says 'I think this is caused by embolics—an embolic phenomenon. ***[S]he, in her letter says, stop the steroids. I don't think he has—its less likely that he has GCA; that's competent evidence. It's in her written documentation and as a result that's all appropriate for the jury to hear. It goes to the weight. They can argue all day long about what that—that her opinion and her thoughts are not entitled to any weight and that's—but it doesn't mean that

Dr. Kay's writings or testimony *** [about] other causes should be barred or excluded[.]"

¶ 133 One week later, at a January 24, 2023, pretrial hearing, defendants again argued that Dr. Kay's letters were competent evidence that Bill's vision loss was caused by emboli. Defense counsel argued, "[W]hat [Dr. Kay] did write unequivocally in November of 2015 *** is that I don't believe this is [GCA]. I believe it is embolic and stop the steroids. That's competent evidence. It should go before the jury."

¶ 134 Defendants could not have stated more clearly that they intended to present Dr. Kay's letters to the jury as evidence of embolic causation. Accordingly, we reject plaintiffs' assertion that one week later, when stipulating to the documents' admission, they had no reason to anticipate that defendants would do what they said they were going to do.

¶ 135 We note that plaintiffs also argue, "Even if the stipulation is read broadly to mean everything in the chart [(joint exhibit Nos. 7 and 11)] was meant to be used before the jury, nothing prevented plaintiffs from withdrawing or limiting the stipulation once they realized what defendants intended to do with the records." However, the problem with this argument, as defendants point out, is that nowhere in the record did plaintiffs attempt to withdraw or limit the stipulation.

¶ 136 Ultimately, we conclude that the trial court did not err by admitting Dr. Kay's letters into evidence because (1) the parties jointly stipulated to the competency of the evidence, without limitation as to its use and (2) plaintiffs were on notice that defendants intended to present the letters as evidence of embolic causation and took no action to limit its use for that purpose.

¶ 137 b. The Trial Court Did Not Err by Barring Cross-Examination of Dr. Welty With Dr. Kay's Deposition Testimony

¶ 138 Plaintiffs also argue that the trial court erred by not allowing plaintiffs to cross-examine Dr. Welty about the substance of Dr. Kay's deposition testimony. As an initial matter, we note that plaintiffs did not raise this issue in their posttrial motion. Accordingly, plaintiffs have forfeited the issue for appellate review. See Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994) ("A party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion."). Moreover, plaintiffs made no offer of proof about what Dr. Welty's testimony would have been had he been questioned about Dr. Kay's deposition testimony. See *Snowstar Corp. v. A&A Air Conditioning & Refrigeration Service, Inc.*, 2024 IL App (4th) 230757, ¶ 71 ("[T]o preserve a claim of error in a civil jury case *** Rule 103(b) requires (1) a contemporaneous offer of proof be made at trial, even where the court has ruled before trial on the record excluding the evidence, and (2) the claim of error be raised in a posttrial motion.").

¶ 139 Aside from these procedural deficiencies, we also would find no error in the trial court's ruling. "[F]acts, data, or opinions that have not been reviewed by the expert, are not properly admitted into evidence, nor reasonably relied upon by another expert in testimony at trial, may not be employed to impeach the expert's opinion." *Rios v. City of Chicago*, 331 Ill. App. 3d 763, 773-74 (2002) (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 705.2, at 699 (7th ed. 1999)).

¶ 140 As defendants point out, Dr. Welty did not testify as a retained expert witness, but as a treating physician. Dr. Welty's testimony relating to Dr. Kay's letters was solely related to his treatment of Bill in 2015 based upon information from Dr. Kay in her 2015 letter. Her later deposition testimony was irrelevant to Dr. Welty's testimony, which was simply that, in December 2015, he (1) was treating Bill for "presumptive GCA" but (2) added "or possible embolic cause" after receiving Dr. Kay's letter. Dr. Welty testified that he did not review or rely upon Dr. Kay's

2019 deposition testimony. In fact, he had no knowledge of her deposition. Moreover, neither party called Dr. Kay as a witness at trial. Accordingly, the trial court properly prevented plaintiffs from utilizing cross-examination as a "Trojan Horse" to admit inadmissible hearsay evidence of Dr. Kay's deposition testimony. See *id.* at 773 (Cross-examination of an expert with records he did not rely on may not be used as a "Trojan Horse *** to slip hearsay evidence into the trial.").

¶ 141 We also note that plaintiffs argued at trial that the purpose of their requested cross-examination was to "ferret out" what defense counsel talked to Dr. Welty about when preparing for direct examination. Following argument, the trial court permitted plaintiffs to ask Dr. Welty several questions, testing his testimony about what he had learned from Dr. Kay's letter, including (1) "whether defense counsel told him what Dr. Kay's opinion [was] concerning embolus and whether or not it was the only cause," (2) whether he was aware of any other physician stating that emboli were the cause of Bill's vision loss, (3) whether he was aware that Dr. Kay received "much" information after her 2015 letter, and (4) whether he was aware that a specialist in ophthalmological pathology "saw [GCA] in Bill." Accordingly, we conclude that the trial court properly exercised its discretion with regard to the scope of the cross-examination of Dr. Welty under the circumstances of this case.

¶ 142 c. The "Two-Issue Rule"

¶ 143 In their briefs, the parties discuss at length whether, in the event the trial court erred, the "two-issue rule" saved the jury's verdict. The "two-issue rule" provides as follows:

> "If several grounds of recovery are pleaded in support of the same claim, whether in the same or different counts, an entire verdict rendered for that claim shall not be set aside or reversed for the reason that any ground is defective, if one or more of the grounds is sufficient to sustain the verdict." 735 ILCS 5/2-1201(d) (West

2022).

Because we have concluded that the trial court did not err—that is to say, we have found no defect—we need not discuss the applicability of the "two-issue rule."

¶ 144 C. The Trial Court's Admission of Dr. Ajamian's Expert Opinion

¶ 145 Plaintiffs argue that the trial court erred when it (1) allowed defendants' standard of care expert, Dr. Ajamian, to opine that diabetes, not GCA, caused Bill's vision loss and (2) barred plaintiffs from cross-examining Dr. Ajamian with Dr. Kay's deposition testimony stating that she could not rule out GCA as a cause.

¶ 146 Defendants respond that the trial court did not abuse its discretion by (1) allowing Dr. Ajamian's testimony and (2) limiting cross-examination of Dr. Ajamian because his review of Dr. Kay's deposition testimony was not relevant to any of the opinions he offered at trial.

¶ 147 We agree with defendants.

¶ 148 1. *Additional Factual Background*

¶ 149 Again, due to the lengthy record in this case, we present the following additional factual background necessary for the analysis of plaintiffs' claims.

¶ 150 a. Dr. Ajamian's Rule 213(f) Disclosures

¶ 151 Prior to trial, defendants disclosed Dr. Ajamian, an optometrist, as a retained expert witness pursuant to Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2018). Defendants disclosed that Dr. Ajamian would testify consistently with his discovery deposition, as well as the documents he reviewed (which, it was later established, included Dr. Richardson's medical notes and deposition testimony). Defendants specifically disclosed the following:

> "Dr. Ajamian is expected to offer opinions regarding *** the care and treatment of William Gorski including his vision, the conditions of NAION and

> AION, to visual loss and visual changes, to the appropriate patient evaluation, monitoring, care and treatment by optometrists, to Dr. Richardson's compliance with the standard of care as well as the opinion that nothing that Dr. Richardson did or failed to do violated the standard of care and therefore was not a proximate cause of [Bill's injuries.] Additionally, it is anticipated that Dr. Ajamian will rebut each and every opinion critical of Dr. Richardson including those offered by Dr. Sowka [(plaintiffs' retained expert)]. He will testify to those factual issues and any opinions expressed at his deposition and to any logical corollaries of those opinions."

¶ 152 Defendants' disclosures also specifically mentioned (1) Bill's history of diabetes, (2) Dr. Richardson's observation of "infranasal dot hemorrhages, along with strands and dots" when she examined and photographed Bill's eyes, and (3) Dr. Richardson's "impression list" that noted "the non-insulin-dependent diabetes and [ION] of the right eye greater than the left."

¶ 153 b. Plaintiffs' Motion *In Limine* Nos. 41 and 48

¶ 154 In January 2023, plaintiffs filed their motion *in limine* Nos. 41 and 48. Motion No. 41 sought to "[bar] Defendants from calling any witness not identified in Rule 213 disclosures, and barring Defendants from eliciting or presenting opinion testimony from any witness beyond that which has been previously disclosed pursuant to Supreme Court Rule 213."

¶ 155 Motion No. 48 sought to bar Dr. Ajamian, from "offering any opinion regarding whether 'initial treatment at an earlier point in time would have altered Mr. Gorski's course.' " Plaintiffs argued that Dr. Ajamian's Rule 213 disclosures established that he lacked expertise in the treatment of GCA and was therefore unqualified to offer the aforementioned opinion.

¶ 156 That same month, the trial court held a hearing on plaintiffs' motions *in limine*. The

trial court granted motion No. 41, with the understanding that Rule 213 does not limit the cross-examination of expert witnesses. After taking motion No. 48 under advisement, the court ultimately entered a written order barring Dr. Ajamian from "offering any opinion regarding the impact initiation of steroid treatment at an earlier point in time would have had on [Bill's] vision loss and *** making any argument, suggestion, or insinuation suggesting earlier steroid treatment would not have altered the course of Mr. Gorski's vision loss."

¶ 157 c. Dr. Ajamian's Trial Testimony

¶ 158 i. *Direct Examination*

¶ 159 Dr. Ajamian testified that, as an optometrist and expert in ocular disease, he has seen patients with ION, NAION, and GCA. He testified that he reviewed the KSB Eye and Vision Center records as part of his role as an expert witness. Counsel then identified 19 individuals who had been deposed in the case, which included Dr. Welty and Dr. Kay, and asked Dr. Ajamian if he had reviewed all 19 depositions; Dr. Ajamian answered that he had.

¶ 160 During his testimony, while testifying using a series of demonstrative slides to explain the structures of the eye, including the cornea, optic nerve, and arteries feeding those nerves, defense counsel asked Dr. Ajamian what symptoms beyond sudden vision loss are present when a patient has NAION. Dr. Ajamian answered that no additional symptoms would appear; instead, the optometrist would have to "be a detective and just look at [the patient's] medical history and see that they're hypertensive, diabetic, any of *** the risk factors related to vascular systemic disease that would be underlying it but no other—." Counsel then showed Dr. Ajamian slide No. 6, which Dr. Ajamian stated showed "some of the risk factors of NAION." He listed those risk factors as "high blood pressure, diabetes, heart disease, cholesterol, sleep apnea," and sometimes "migraines."

¶ 161 The following colloquy then occurred between defense counsel and Dr. Ajamian:

"Q. And what is it that's common to these conditions as it relates to NAION[?]

A. All of—all of these can be underlying causes of NAION, but the only symptom again is sudden vision loss and a swollen nerve.

Q. And as you were telling us, that's because these conditions all reduce the blood flow in that earlier slide we saw with the—there was lack of blood flow—

A. Correct.

Q. —or these conditions are associated with that?

A. I'm sorry. Because these are all vascular conditions that—that impede blood flow then that translates to the eye as well. We know that diabetes impedes blood flow and that's why people lose toes and feet and limbs because there's no profusion similar to the optic nerve.

Q. And which of these conditions, if any, were present in Bill Gorski?

A. From my reading of the history and the record, the high blood pressure, the diabetes and the high cholesterol.

* * *

Q. Let's look at Slide 7, and what is depicted on Slide 7?

A. So I wanted to show an example of this ischemia from diabetes that causes so many things in the eye. It causes little dot-and-blot hemorrhages in the retina, but it can cause a [NAION] or ischemia to the optic nerve, and that's what this case is, of a swollen nerve from diabetes, from NAION.

MR. McGARRAH [(PLAINTIFFS' COUNSEL)]: Your Honor, at this time

I'll object based on, this was not disclosed under Rule 213 disclosure and our Motion. So I need to object for the record. This opinion has not been disclosed."

The trial court recessed so the attorneys could address the objection outside the presence of the jury.

¶ 162 After the jurors and witness left the courtroom, plaintiffs' counsel argued that Dr. Ajamian's testimony "regarding NAION and diabetes has not been disclosed." Counsel specifically asserted that "there's been no opinion articulated by any medical expert in this case, including Dr. Ajamian, that Bill's vision loss was caused by diabetes or that diabetes *** contributed to [the] cause."

¶ 163 Defense counsel responded out that Dr. Ajamian had testified in his deposition that hypertension, cholesterol, and diabetes were "risk factors for the swollen nerve finding that we'll get to when we see Bill Gorski's specific pictures." Defense counsel further argued as follows:

> "The disclosures—213 identifies that [Dr. Ajamian is] going to *** explain the anatomy and the physiology and the medical conditions. This is simply a demonstrative for the jury to understand what NAION looks like in—and some photos of what is—on the left, he'll testify this is a swollen nerve associated with NAION, and on the right I expect that he'll testify that that's what the patient's optic nerve looks like three months later when it at—at that point becomes pale or pallor. ***
>
> This is simply foundation that will give the jury some understanding of the issues so that when we talk about Bill Gorski's particular images and studies, the jury has some understanding of what the condition is and how it demonstrates."

¶ 164 The trial court overruled plaintiffs' objection, finding as follows:

"This is not the testimony that this is what Bill Gorski suffered from. In fact, this doctor is hired as an expert to testify to standard of care and would have to lay the groundwork for what a reasonable optometrist would be looking for.

So this is—the testimony isn't that this is Bill Gorski's picture or what he suffered from."

¶ 165 Dr. Ajamian and the jury returned to the courtroom. Defense counsel questioned Dr. Ajamian about slide Nos. 7 and 8, which were demonstrative photographs showing optic nerve swelling, the development of optic nerve pallor, and examples of normal and abnormal optic nerves. He explained that the abnormal photograph in slide No. 8 showed swelling in a patient with NAION "from underlying hypertension." He explained that the image showed how restricted blood flow to the nerve "cause[d] swelling, dying off of those nerve fibers and then the ultimate result being pallor of that optic nerve, which is accompanied with vision loss."

¶ 166 Dr. Ajamian then testified about working diagnoses and differential diagnoses, including the purpose of each and how an optometrist formulates each, as well as how an optometrist learns about rare diseases. Defense counsel then asked Dr. Ajamian for his expert opinions regarding Dr. Richardson's care of Bill. The following exchange occurred:

"Q. *** [D]o you have an opinion to a reasonable degree of optometric certainty whether Dr. Richardson *** possessed and used the knowledge, skill and care ordinarily used by a careful optometrist in her evaluation, care and treatment of Bill Gorski in September of 2015; first, do you have an opinion?

A. Yes.

Q. And what is your opinion?

A. Yes, that she met the standard of care all throughout, all the time.

Q. And that is, that she acted as a reasonably careful optometr[ist] while caring for Bill Gorski?

A. Yes.

Q. And that was—was Dr. Richardson's conduct a cause or contributed to cause Bill Gorski's vision loss?

A. No.

Q. What did?

A. His disease. He had a very bad disease, underlying disease.

MR. McGARRAH: Objection. 213. This has not been disclosed as well.

THE COURT: Objection overruled."

¶ 167 Defense counsel continued his direct examination, asking Dr. Ajamian to explain his opinion that Dr. Richardson met the standard of care. Dr. Ajamian testified regarding the steps Dr. Richardson took when she evaluated Bill on September 15, 2023. As part of that testimony, Dr. Ajamian testified that Bill's "presentation" that day was "very complicated," including fluid in his retina, "dot-and-blot hemorrhages throughout both eyes that would indicate diabetes; he had a swollen optic nerve, and *** sudden vision loss." Defense counsel showed Dr. Ajamian slide No. 9, which contained photographs taken of Bill's eyes on September 15 and which were in evidence as part of joint exhibit Nos. 14 and 15. Dr. Ajamian then testified about the clinical significance of the photos (pointing out the swelling of the nerve and "dot-and-blot" hemorrhages, "which could be very consistent with diabetes") and stated that Dr. Richardson made the same findings, which he stated were "very" appropriate and matched what Dr. Ajamian saw in the photographs perfectly.

¶ 168 The remainder of Dr. Ajamian's testimony on direct examination regarded his

review of Dr. Richardson's evaluation and care of Bill. Specifically, he opined that, based upon his review of Dr. Richardson's records, although her working diagnosis was NAION, she also considered GCA as a potential cause for Bill's vision loss and ordered the proper tests. He also stated that nothing indicated that the tests needed to be completed emergently and that the time frame of her care plan was within the standard of care. He added that the standard of care does not require an optometrist to be correct in making diagnoses but, instead, reasonably careful. Dr. Ajamian further explained, "In this case it was just very impressive that in a 57-year-old with no other [GCA] symptoms that she still held it out as a possibility and got the blood work done or tried to get it done by that Monday."

¶ 169 Outside the presence of the jury, plaintiffs' counsel renewed her objection that defendants had elicited a causation opinion that had not been disclosed. Counsel argued, "They now have something to argue about in terms of their sole proximate cause that they didn't have ahead of time. This is gamesmanship. *** We're not prepared for it. It is unduly and unfairly prejudicial."

¶ 170 Defense counsel responded that the Rule 213 disclosures identified Dr. Ajamian's opinion that Dr. Richardson had met the standard of care in all respects and that nothing she did or failed to do caused or contributed to Bill's injuries. Counsel further asserted, "[I]f it's not a result of her conduct, [what it is a result of] is a logical corollary. I mean, he's testified extensively to the disease process, and I think that that's an opinion that's appropriate and proper in this case."

¶ 171 The trial court denied plaintiffs' request to strike Dr. Ajamian's testimony.

¶ 172 ii. *Cross-Examination*

¶ 173 During plaintiffs' cross-examination of Dr. Ajamian, counsel asked whether Dr. Ajamian had reviewed Dr. Kay's deposition transcript. Defendants objected, "Beyond the scope,"

and the trial court sustained defendants' objection. Plaintiffs' counsel asked to make an offer of proof and asserted two bases for "why [he] should be able to get into this": (1) "Doctor from University of Wisconsin [(Dr. Kay's employer)] was mentioned by some of the materials Dr. Ajamian reviewed in connection with his retention as an expert witness" and (2) "I am entitled to explore the basis for any expert's opinion, and he's clearly said he reviewed and relied upon all of the depositions, including the deposition of Dr. Kay."

¶ 174 Defense counsel responded that "[t]here was no questioning at all with respect to anything related to Dr. Kay." He continued as follows:

> "The only mention of Dr. Kay was that she's on the list of materials that he was provided in review. The simple fact that she's *** on the list does not open this issue up for cross-examination when it was not a topic or subject on which he offered any testimony in direct.
>
> There's also the other issue, which is the scope of his questioning related to September of 2015, we didn't talk about Mr. Gorski's condition in November of 2015, when Dr. Kay was involved. It truly is well beyond the scope of the examination and intentionally so."

¶ 175 The trial court asked plaintiffs' counsel for more information on "what the purpose is when none of his testimony relates to anything that occurred after September 22nd."

¶ 176 Plaintiffs' counsel asserted that Dr. Ajamian had given an opinion as to causation, and "there's testimony by Dr. Kay that says, based upon what she is aware of with respect to Mr. Gorski it does not rule out [GCA] or temporal arteritis."

¶ 177 The trial court asked defense counsel if he had anything further, and counsel responded as follows:

> "I believe all that Dr. Ajamian suggested [was] that [Bill's] condition was due to the disease process in follow-up to the question of whether Dr. Richardson departed [from] the standard of care and whether her comment departed [from] the standard of care. There was no discussion about anything related to what caused it other than the general reference to the disease process. Dr. Ajamian testified about standard of care issues.
>
> Dr. Kay does not offer any standard of care testimony."

¶ 178 The trial court agreed with defendants, noting that Dr. Ajamian had given standard of care testimony and had not testified to an embolic cause; accordingly, the court did not see how Dr. Kay's testimony "ha[d] anything to do with it." The court sustained defendants' objection.

¶ 179 iii. *Posttrial Motion and Ruling*

¶ 180 Plaintiffs alleged in their posttrial motion that the trial court erred by (1) allowing two new undisclosed opinions from Dr. Ajamian regarding the cause of Bill's vision loss and (2) preventing plaintiffs from cross-examining Dr. Ajamian with Dr. Kay's deposition testimony.

¶ 181 In December 2023, the trial court entered a written order denying plaintiffs' posttrial motion.

¶ 182 Regarding Dr. Ajamian's testimony, the trial court ruled as follows:

> "The first 'new' causation opinion plaintiffs allege was erroneously allowed involved testimony Dr. Ajamian was offering when he was reviewing PowerPoint slides being shown to the jury. In discussing slide 7, an example of ischemia from diabetes, Dr. Ajamian was explaining that ischemia from diabetes 'causes little dot-and-blot hemorrhages in the retina, but it can cause a [NAION] or ischemia to the optic nerve, *and that's what this [case] is*, of a swollen nerve from diabetes,

NAION.' Plaintiffs' claim Dr. Ajamian was testifying that slide 7 was a representation of Bill Gorski's condition. In fact, slide 7 was a demonstrative slide pertaining to foundational portions of Dr. Ajamian's testimony; slides 9 and 10 were Bill's actual fundus photos from September 17, 2015, and September 22, 2015, respectively. When Dr. Ajamian testified 'and that's what this is,' he was referring to Slide 7 which was a representation of ischemia from diabetes. He did not offer an opinion that Bill's condition was ischemia from diabetes. He did not offer a causation opinion. He was a standard of care expert testifying to his belief that Dr. Richardson had met the standard of care in her treatment of Bill. Dr. Ajamian's Rule 213 disclosures specifically mentioned the dot-and-blot hemorrhages in the retina, Bill's history of diabetes, and his opinion that it was reasonable for Dr. Richardson to conclude that Bill's presentation was due to NAION. Dr. Ajamian's testimony on this issue was not in violation of Illinois Supreme Court Rule 213(f)(3) or the Court's rulings on the Motions *in Limine*.

The Plaintiffs allege a second undisclosed causation opinion was elicited from Dr. Ajamian when he answered a question regarding whether Dr. Richardson's conduct was a cause or contributed to Bill's vision loss. He replied 'no,' and when asked what caused it, he replied '[h]is disease. He had a very bad disease, underlying disease.' Plaintiffs allege his answer that Bill's disease caused his vision loss was an undisclosed causation opinion. The court disagrees. The court agrees with the Defendants' argument that Dr. Ajamian's statement was simply a logical corollary to his earlier testimony that nothing Dr. Richardson did or did not do caused Bill's vision loss. No one asked Dr. Ajamian what he meant by his

statement. He did not say it was Bill's diabetes, emboli, or NAION. It was the court's interpretation that he meant it was GCA that caused his vision loss which is exactly what Plaintiffs were claiming. Although the Court stands by its ruling, the Court finds that even if this answer should have been stricken, it did not prejudice the Plaintiffs." (Emphasis added.)

¶ 183 Regarding the trial court's limiting cross-examination, the court ruled as follows:

"Plaintiffs allege the court erred in precluding Plaintiffs' counsel from cross-examining Dr. Ajamian with deposition testimony of Dr. Marilyn Kay, a treating physician of Bill's after he lost his eyesight. The court precluded this line of questioning on the basis that Dr. Ajamian was a standard of care expert. He was not a causation witness. His testimony on direct examination was limited to the care Dr. Richardson provided to Bill between September 17, 2015, and September 22, 2015. As stated earlier in this opinion, Dr. Ajamian did not give a causation opinion. Dr. Kay was a treating neuro-ophthalmologist who provided care to Bill in November of 2015. Dr. Kay's opinions as a subsequent treating physician had no relevance as to the issue of whether Dr. Richards[on] met the standard of care in her treatment of Bill. Cross-examination of Dr. Ajamian regarding his review of Dr. Kay's deposition testimony was irrelevant and could have confused the jury. The Court stands by its ruling."

¶ 184 2. *Applicable Law*

¶ 185 The admissibility of evidence and scope of cross-examination are matters for the sound discretion of the trial court, and its decision will not be reversed on appeal absent an abuse of discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 92, 102 (1995). "An abuse

of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable or when no reasonable person would take the same view." *Jones v. Rallos*, 384 Ill. App. 3d 73, 89 (2008).

¶ 186 3. *This Case*

¶ 187 a. Dr. Ajamian's Testimony Did Not Violate Rule 213 or the Trial Court's Rulings *In Limine*

¶ 188 Plaintiffs challenge on appeal the trial court's admission of two statements by Dr. Ajamian during his direct examination that they argue constituted new, undisclosed causation opinions. We address each of the statements plaintiffs challenge in turn, as the trial court did, presenting them in context of the question answered and the response given.

¶ 189 i. *The First Statement*

¶ 190 First, plaintiffs challenge Dr. Ajamian's answer in the following exchange:

> "Q. Let's look at Slide 7, and what is depicted on Slide 7?
>
> A. So I wanted to show an example of this ischemia from diabetes that causes so many things in the eye. It causes little dot-and-blot hemorrhages in the retina, but it can cause a [NAION] or ischemia to the optic nerve, and *that's what this case is, of a swollen nerve from diabetes*, from NAION." (Emphasis added.)

¶ 191 Plaintiffs' objection is based on the premise that Dr. Ajamian testified that *Bill*'s "case" was the result of diabetes—that, is that diabetes caused Bill's vision loss. Indeed, at trial, counsel argued that "[t]he clear *inference* here is that [Bill] has NAION from diabetes." (Emphasis added.) Removing Dr. Ajamian's words from their context might support such an inference; however, plaintiffs' objection is wholly rebutted when Dr. Ajamian's words are viewed in their proper context.

¶ 192 As the trial court correctly noted, Dr. Ajamian's statement was made in the context

of explaining a series of demonstrative exhibits that provided foundational testimony regarding the structures of the eyes and disease conditions that Dr. Ajamian would be testifying about when offering his expert opinions. Although slide No. 7 is not in evidence, we know from Dr. Ajamian's testimony that slide No. 7 showed photographs of someone's eyes other than Bill's. In that context, we agree with the trial court when, in the course of describing what was depicted in slide No. 7, Dr. Ajamian's reference to "this case" meant the "case" depicted in slide No. 7—not Bill Gorski. Plaintiffs' assertion that the "case" Dr. Ajamian was talking about was Bill and not the unidentified subject in the photographs in slide No. 7 is simply unsupported by the context in which Dr. Ajamian's remarks occurred. Accordingly, we disagree that Dr. Ajamian's remarks constituted a new, undisclosed causation opinion.

¶ 193 We further note that prior to plaintiffs' objection, Dr. Ajamian had testified at length and without objection about diabetes being a risk factor for NAION because it is a vascular condition that impedes blood flow to the eyes. During that same explanation, Dr. Ajamian also testified without objection that Bill suffered from diabetes. That is to say, plaintiffs failed to object when Dr. Ajamian's testimony created the same inference they later complained of—namely, that Bill's diabetes caused his vision loss. Accordingly, even if we accepted plaintiffs' improper inference argument—which, as we have explained, we do not—it is one they forfeited at trial by not objecting earlier.

¶ 194 ii. *The Second Statement*

¶ 195 The second statement that plaintiffs assert constituted a new, undisclosed causation opinion appeared in the following context during the same direct examination:

> "Q. *** [D]o you have an opinion to a reasonable degree of optometric certainty whether Dr. Richardson *** possessed and used the knowledge, skill and

care ordinarily used by a careful optometrist in her evaluation, care and treatment of Bill Gorski in September 2015; first, do you have an opinion?

A. Yes.

Q. And what is your opinion?

A. Yes, that she met the standard of care all throughout, all the time.

Q. And that is, that she acted as a reasonably careful optometr[ist] while caring for Bill Gorski?

A. Yes.

Q. And that was—was Dr. Richardson's conduct a cause or contributed to cause Bill Gorski's vision loss?

A. No.

Q. What did?

A. *His disease. He had a very bad disease, underlying disease.*" (Emphasis added.)

¶ 196 Again, plaintiffs offer a strained interpretation of Dr. Ajamian's testimony; they assert that by "disease," he meant "diabetes." But, he did not say "diabetes." By "disease," Dr. Ajamian could just have easily meant the disease of GCA. Importantly, Dr. Ajamian testified at length about Dr. Richardson's evaluation notes showing how and why she considered GCA—a disease—as a cause of Bill's vision loss. Dr. Ajamian's testimony about diabetes concerned how and why it was a risk factor for NAION, also a disease. (We note that "disease" is defined as "a condition of the living animal or plant body or one or more of its parts that impairs normal functioning and is typically manifested by distinguishing signs and symptoms." Merriam Webster Online Dictionary, https://www.merriamwebster.com/dictionary/disease (last visited

January 28, 2025).) That is to say, we simply don't know which disease Dr. Ajamian meant because he did not specify *which* disease he was referring to, nor was he asked to elaborate. Because of the vague nature of his answer, we cannot say that the trial court, which was present for the entire testimony, abused its discretion by concluding that Dr. Ajamian had not offered a new, undisclosed causation opinion when he opined that Bill's vision loss was caused by his "disease."

¶ 197 We additionally conclude that Dr. Ajamian's testimony fell well within the Rule 213 disclosures and motions *in limine* ruling. Motion *in limine* No. 48 is simply inapplicable to this analysis because it related specifically to testimony about the timing of the administration of steroids. Motion *in limine* No. 41 barred testimony not disclosed pursuant to Rule 213. Defendants disclosed that Dr. Ajamian, a standard of care expert, would offer the opinion that no act or omission or Dr. Richardson caused Bill's vision loss, as well as any logical corollaries flowing therefrom. And, that is precisely what Dr. Ajamian did. He testified that no act or omission of Dr. Richardson caused Bill's vision loss. To explain or emphasize that opinion, he contrasted human acts or omissions with the natural disease process—a logical corollary. By not specifying which disease (as we explained above), he remained well within the bounds of his Rule 213 disclosures.

¶ 198 Accordingly, we conclude that the trial court did not err by allowing Dr. Ajamian's testimony.

¶ 199 b. The Trial Court Did Not Err by Barring Cross-Examination of Dr. Ajamian With Dr. Kay's Deposition Transcript

¶ 200 Plaintiffs argue, "The error in allowing the undisclosed opinion about diabetes as a cause was exacerbated when the [trial] court erroneously barred plaintiffs from cross-examining

Dr. Ajamian with Dr. Kay's deposition." We disagree.

¶ 201 First, we have rejected the premise of plaintiffs' claim of error by concluding that Dr. Ajamian did *not* offer a new causation opinion. At trial, plaintiffs' counsel asserted that Dr. Ajamian had offered a new opinion that diabetes had caused Bill's vision loss. Based on that claim, plaintiffs contend they were entitled to "explore the basis" of that new opinion with Dr. Kay's deposition testimony—which Dr. Ajamian stated he had reviewed—that she had not ruled out GCA as a cause of Bill's vision loss.

¶ 202 Generally, litigants are afforded wide latitude during cross-examination regarding materials they have reviewed and relied upon when forming their opinions. *Moss v. Miller*, 254 Ill. App. 3d 174, 183 (1993). However, here, for the reasons we previously stated, Dr. Ajamian did *not* offer a new causation opinion. Accordingly, there existed no new causation opinion that plaintiffs were entitled to explore, and the trial court properly limited the scope of cross-examination to Dr. Ajamian's testimony on direct examination.

¶ 203 Second, and more fundamentally, plaintiffs have forfeited this claim of error by failing to properly preserve it for appellate review. Namely, plaintiffs failed to make an offer of proof at the time the trial court sustained defendants' objection to the cross examination. See *Snowstar*, 2024 IL App (4th) 230757, ¶ 71 ("[T]o preserve a claim of error in a civil jury case *** Rule 103(b) requires (1) a contemporaneous offer of proof be made at trial, even where the court has ruled before trial on the record excluding the evidence, and (2) the claim of error be raised in a posttrial motion.").

¶ 204 Although plaintiffs argued in their posttrial motion that the trial court erred by preventing them from cross-examining Dr. Ajamian "regarding his review of Dr. Kay's testimony," the specific grounds they asserted in support of their claim of error were different from

the specific grounds they state on appeal. Namely, in the posttrial motion, plaintiffs asserted that they wished to examine Dr. Ajamian about (1) his knowledge of Dr. Kay's deposition and (2) Dr. Kay's testimony that "she had no opinion regarding the cause of [Bill's] vision loss." But, on appeal, plaintiffs argue that they wanted to examine Dr. Ajamian about "the part of [Dr.] Kay's deposition where she said she could not rule out GCA as a cause and that the findings were consistent with GCA." We highlight this discrepancy not only as it pertains to the proper preservation of an issue in a posttrial motion—the purpose of which is to give the trial court an opportunity to correct any errors below (see *Brown v. Decatur Memorial Hospital*, 83 Ill. 2d 344, 349-50 (1980) ("[R]equiring the litigants to state the specific grounds in support of their contentions *** prevents them from *** raising on appeal arguments which the trial judge was never given the opportunity to consider."))—but also to illustrate the problem presented by the lack of an offer of proof.

¶ 205 Because plaintiffs failed to make an offer of proof, even if we accept plaintiffs' claim that Dr. Ajamian had offered a new causation opinion—which, we emphasize, we do not—we are wholly unable to ascertain (1) what cross-examination testimony Dr. Ajamian would have offered and (2) whether its absence seriously prejudiced plaintiffs. See *id.* ("An offer of proof is the key to preserving a possible error when the trial court excludes evidence" because it "disclose[s] the nature of the offered evidence so that a reviewing court can determine whether the exclusion was erroneous and harmful.").

¶ 206 In their reply brief, plaintiffs defend the lack of an offer of proof by arguing "everyone, including the court, had [Dr. Kay's] deposition and knew what [Dr.] Kay said. And in any event [Dr. Ajamian] would be impeached no matter what he answered, so no offer of proof was required." Plaintiffs misapprehend the point of an offer or proof, which, as we explained

above, is to ascertain what *Dr. Ajamian's* testimony about the substance of Dr. Kay's deposition testimony would have been so a reviewing court could determine whether plaintiffs were seriously prejudiced by the absence of that testimony. Furthermore, plaintiffs' position that it did not matter what Dr. Ajamian's testimony would have been reveals that their request to cross-examine Dr. Ajamian with Dr. Kay's deposition was indeed an improper attempt to utilize cross-examination as a "Trojan Horse" to admit inadmissible hearsay. See *Rios*, 331 Ill. App. 3d at 773.

¶ 207 D. The Trial Court Did Not Err by Giving Illinois Pattern Jury Instructions, Civil, No. 12.05

¶ 208 Plaintiffs argue that if this court determines the trial court erred by allowing the admission of improper causation evidence—namely, (1) Dr. Kay's letter asserting embolic cause and (2) Dr. Ajamian's testimony of diabetic cause—then the court also erred by giving Illinois Pattern Instructions, Civil No., 12.05 (instruction withdrawn Aug. 2021) (hereinafter IPI Civil No. 12.05).

¶ 209 The court instructed the jury as follows:

> "If you decide that Dr. Richardson was professionally negligent and that her professional negligence was a proximate cause of injury to William Gorski, it is not a defense that something else may have been a cause of the injury.
>
> However, if you decide that the sole proximate cause of injury to William Gorski was something other than the conduct of Dr. Richardson, then your verdict should be for the defendants."

See *id.*

¶ 210 "It is within the discretion of the trial court to determine which issues are raised by the evidence presented and which jury instructions are thus warranted." *Mikolajczyk v. Ford Motor*

Co., 231 Ill. 2d 516, 549 (2008). "All that is required to justify the giving of an instruction is that there be some evidence in the record to justify the theory of the instruction. The evidence may be insubstantial." *Id.* (quoting *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007)).

¶ 211 Here, the trial court explained in its written order denying plaintiffs' posttrial motion that evidence supported its giving IPI Civil No. 12.05. Specifically, the court noted that Dr. Kay's records were admitted into evidence by joint stipulation of the parties and were "competent evidence that another condition, embolisms to the retinal and ciliary arteries, and not [GCA] were the cause of Bill's vision loss." We agree with the trial court that Dr. Kay's letters were properly before the jury as competent evidence that something other than GCA may have caused Bill's vision loss. Accordingly, we conclude that the trial court did not err by giving IPI Civil No. 12.05.

¶ 212 We briefly address Dr. Ajamian's testimony only to note that the trial court did not identify his testimony as a basis for giving IPI Civil No. 12.05, likely because the court—like this court—concluded that Dr. Ajamian had not testified that diabetes caused Bill's vision loss.

¶ 213 E. The Trial Court's Denial of Plaintiffs' Proposed Illinois Pattern Jury Instructions, Civil, No. 20.01

¶ 214 Plaintiffs also argue on appeal that the trial court erred by rejecting their proposed Illinois Pattern Jury Instructions, Civil, No. 20.01 (2011) (hereinafter IPI Civil No. 20.01), which alleged Dr. Richardson's "failure to properly diagnose the cause of Bill Gorski's vision loss" was a proximate cause of his injuries. Instead, the court instructed the jury that plaintiffs alleged Dr. Richardson's "failure to properly consider GCA as a differential diagnosis of Bill Gorski's condition" was a proximate cause of his injuries. Plaintiffs assert that the court's alternative language for IPI Civil No. 20.01 did not encompass their theory of liability, which was supported

by their expert optometrist witness, Dr. Sowka.

¶ 215 Defendants respond that the trial court properly instructed the jury. We agree with defendants.

¶ 216 1. *Additional Factual Background*

¶ 217 During the February 7, 2023, jury instruction conference, plaintiffs submitted their proposed instruction No. 8, which was IPI Civil No. 20.01. The proposed instruction stated, in relevant part, as follows:

> "[Plaintiffs] claim that they were injured and sustained damage, and that the Defendants were negligent in one or more of the following ways:
>
> a. Failed to properly diagnose the cause of Bill Gorski's vision loss; or
>
> b. Failed to timely obtain lab studies to permit timely treatment; or
>
> c. Failed to send Bill Gorski to an emergency room in a timely manner; or
>
> d. Failed to inform Bill Gorski of the potential underlying inflammatory condition that could progress to additional vision loss.
>
> The Plaintiffs further claim that one or more of the foregoing was a proximate cause of their injuries."

¶ 218 Defendants objected to the first allegation, that Dr. Richardson failed to properly diagnose the cause of Bill's vision loss, arguing as follows:

> "The issue of diagnosis and differential diagnosis, I think there's been sufficient testimony that the appropriate orders, if one was to consider [GCA] are, in fact, the specific labs that Dr. Richardson requested were ordered. And so there's

really no proximate cause testimony to link the lack of a proper diagnosis as Plaintiff characterizes it with the loss of vision.

The issue is, did the labs get done in a timely manner. The diagnosis, working diagnosis, possibilities, her consideration of being thorough, all of that is not relevant to *** the causal issue because what comes from the diagnosis is the need to get specific labs, which is what's reflected in a duplicative process in [allegations (b) and (c)].

***

So I think there should be a singular criticism of failing to obtain the labs in a timely manner prior to his vision loss, and we would tender an instruction that reflects that language."

¶ 219 Plaintiffs responded that the evidence had "plainly *** and clearly established [each of the] multiple violations" in their proposed instruction. Counsel asserted that plaintiffs' expert witness, Dr. Sowka, had opined that each of the allegations in the proposed instruction was a proximate cause of Bill's vision loss. Regarding the failure to diagnose allegation, counsel asserted the following:

"Dr. Sowka's testimony is clear that Dr. Richardson failed to properly reach a proper diagnosis in this case in that she concluded that it was NAION and she didn't take the steps necessary to reach that diagnosis. And then failing to take those steps by ordering the tests she did not reach the proper diagnosis of GCA."

¶ 220 Defense counsel replied as follows:

"Even if she got the wrong diagnosis but ordered the right labs, which is what Dr. Sowka acknowledged, that she appropriately ordered the—or requested

> the right labs, whether she made the right diagnosis or gave it the appropriate weight or called it a differential or not, she considered the condition and she ordered the right labs. Therefore, the failure to properly diagnose the cause has no causal connection by Dr. Sowka's own testimony because what she did was the right thing, what was indicated by the standard of care, which is get those labs. And that's exactly what she did.
>
> That's uncontroverted here that she identified the right labs and that she asked for them to be done on Monday. We can debate to the jury as to whether that meets the standard of care and whether that's timely, but there's no basis for the Court to instruct the jury that there was a failure to properly diagnose the cause for this simple reason: If the jury finds a breach in her not reaching the proper diagnosis, the question is how did that cause or contribute to cause an injury? And in this case, the plaintiffs' evidence doesn't make that connection.
>
> Sowka acknowledges the right tests for the diagnosis he believes was indicated were ordered. At that point any type of proximate cause ceases to exist. The question then becomes: Was it done timely? And that's why that's the only issue that should be relevant."

¶ 221 Essentially, plaintiffs asserted that the evidence showed Dr. Richardson's failure to properly diagnose the cause of Bill's vision loss "contributed to the delay in getting *** the appropriate treatment on board"; defendants argued that the failure to diagnose could not be a proximate cause of the vision loss because, despite what she wrote down as her diagnosis, she ordered the correct lab tests.

¶ 222 The trial court struck allegation (c) but took the remainder of the proposed

instruction under advisement so it could review its notes relating to Dr. Sowka's testimony.

¶ 223 The following morning, the trial court and the parties resumed their discussion of plaintiffs' proposed IPI Civil No. 20.01. Plaintiffs submitted a revised version, striking allegation (c) as the court had previously ruled, but maintaining the "failure to diagnose" allegation of proximate cause. Plaintiffs pointed out that during evening communications between the parties and court—which do not appear in the record—plaintiffs "cite[d] to the Court the testimony from Dr. Sowka on that issue that we believe supports the claim that Dr. Richardson failed to properly consider [GCA] as a differential diagnosis of Bill Gorski's condition."

¶ 224 Defendants shed some light on the trial court's communication to the parties, stating

> "I think that Your Honor's email last night with the indication that the allegation should read 'failed to properly consider [GCA] as a differential diagnosis of Bill Gorski's condition' is entirely consistent with Dr. Sowka's testimony on pages 41 and 42 where he was talking about the alleged deviation in that regard."

Defendants took the position that the court's suggested language was more appropriate than plaintiffs' suggested language.

¶ 225 The trial court stated that it had suggested the "failed to consider" language after reviewing the entire transcript and focusing on the "questions regarding specifically the standard of care questions and answers with respect to Dr. Sowka." The court rejected plaintiffs' revised proposed instruction, which still included the "failed to diagnose" language, and instead instructed the jury, in relevant part, as follows:

> "[Plaintiffs] claim *** Dr. Emily Richardson, was professionally negligent in one or more of the following ways:
>
> a. Failed to properly consider [GCA] as a differential diagnosis of

Bill Gorski's condition; or

b. Failed to timely obtain lab studies to permit timely treatment; or

c. Failed to inform Bill Gorski of the potential underlying inflammatory condition that could progress to additional vision loss.

The Plaintiffs further claim that one or more of the foregoing was a proximate cause of their injuries."

¶ 226 As we have noted, the jury returned a verdict in favor of defendants.

¶ 227 Plaintiffs argued in their posttrial motion that the trial court erred by rejecting their proposed IPI Civil No. 20.01. Specifically, plaintiffs argued their "central theory of liability" was that Dr. Richardson failed to properly diagnose GCA as the cause of Bill's vision loss. They asserted that Dr. Sowka's testimony supported the allegation in their proposed IPI Civil No. 20.01 that Dr. Richardson's "failure to properly diagnose the cause of Bill's vision loss" was a proximate cause of injuries; accordingly, the trial court's alternative language, which was given to the jury, that plaintiffs alleged Dr. Richardson's "failure to properly consider [GCA] as a differential diagnosis of Bill Gorski's condition" was a proximate cause of his injuries, did not encompass plaintiffs' theory of liability, prejudicing plaintiffs.

¶ 228 Defendants argued in their written response that the trial court correctly instructed the jury based upon the court's review of Dr. Sowka's testimony and Dr. Richardson's specific acts and omissions Dr. Sowka alleged breached the standard of care.

¶ 229 The trial court entered a written order denying plaintiffs' posttrial motion, finding as follows:

"Plaintiffs allege the court erred in refusing their Jury Instruction Number 8 [(IPI Civil No. 20.01)] which they allege reflected their primary theory of

liability, Dr. Richardson's failure to properly diagnose the cause of Bill Gorski's vision loss. As Defendants point out in their reply, the Court reviewed the testimony of Plaintiffs['] expert to identify the specific acts and omissions alleged to breach the standard of care. Based upon the testimony of Plaintiffs['] expert, the Court instructed the jury that 'Dr. Richardson failed to properly consider [GCA] as a differential diagnosis of Bill Gorski's condition.' Plaintiffs' allegation that the instruction given by the court omits the central theory of their case is not supported by the record. The Court stands by its ruling."

¶ 230 2. *Applicable Law*

¶ 231 "In Illinois, the parties are entitled to have the jury instructed on the issues presented, the principles of law to be applied, and the necessary facts to be proved to support its verdict." *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 507 (2002). "The function of jury instructions is to convey to the jury the correct principles of law applicable to the submitted evidence and, as a result, jury instructions must state the law fairly and distinctly and must not mislead the jury or prejudice a party." (Emphasis omitted.) *Id.*

¶ 232 "[I]t must be remembered that juries are composed of laypersons who are not trained to separate issues and to disregard irrelevant matters." *Id.* Accordingly, "issues instructions," such as IPI Civil No. 20.01 (titled "Issues Raised by the Pleadings"), serve to "tell[ ] the jury the points in controversy between the parties and simplif[y] their task of applying the law to the facts." IPI Civil No. 20.00, Introduction. The trial court should instruct the jury regarding the issues in the case "in a clear and concise manner" by providing "a summary of the pleadings, succinctly stated without repetition and without undue emphasis." (Emphasis omitted.) *Signa v. Alluri*, 351 Ill. App. 11, 19-20 (1953).

¶ 233 A trial court's decision to grant or deny a jury instruction is reviewed for an abuse of discretion. *Bailey v. Mercy Hospital & Medical Center*, 2021 IL 126748, ¶ 42. " 'The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law.' " *Id.* (quoting *Dillon*, 199 Ill. 2d at 505. "Ultimately, a reviewing court should grant a new trial only when the trial court's refusal to give a tendered jury instruction results in serious prejudice to the party's right to a fair trial." *Id.*

¶ 234 3. *This Case*

¶ 235 Plaintiffs first contend they were prejudiced because the given "failure to consider GCA" charge was easier for defendants to rebut than the proffered "failure to properly diagnose" charge. Plaintiffs have not provided authority supporting their position that a trial court abuses its discretion—that is, seriously prejudices a plaintiff such that it deprives him or her of a fair trial—when the court fashions an issues instruction that makes it more difficult for the plaintiff to prove a charge. We reject the notion that a plaintiff is entitled to any jury instruction that makes the case easier for him or her to win; rather, a "litigant ha[s] the right to have the jury instructed on each theory *supported by the evidence*." (Emphasis added). *Mikolajczyk*, 231 Ill. 2d at 549. That is to say, the trial court's focus when fashioning the issues instruction is whether a charge is supported by the evidence. The supreme court in *Mikolajczyk* elaborated as follows:

> "The decision to give or deny a tendered instruction is within the discretion of the trial court. [Citation.] So long as the tendered instructions clearly and fairly instruct the jury, a party is entitled to instructions on any theory of the case that is *supported by the evidence*. [Citation.] *** '[I]t is within the discretion of the trial court to determine which issues are raised by the evidence presented and which jury

instructions are thus warranted.' " *Id.*

Accordingly, as the supreme court instructs, a trial court should look to the evidence when determining how the jury should be instructed.

¶ 236 In this case, the trial court, after hearing the arguments of the parties regarding plaintiffs' proffered instruction, took the matter under advisement. Because plaintiffs had argued that their proffered charge was supported by Dr. Sowka's testimony (plaintiffs' standard of care expert optometrist), the trial court examined the transcript of his testimony. We, too, have examined Dr. Sowka's testimony and conclude that the court properly instructed the jury.

¶ 237 Dr. Sowka testified on direct examination that a differential diagnosis was "a list of potential conditions, given a patient's presenting symptoms and signs." He stated that Dr. Richardson's differential diagnosis was "incomplete" because there were several types of ION, including both NAION and GCA. (That is to say, she did not specify the type of ION on her differential diagnosis.) Plaintiffs' counsel asked Dr. Sowka whether he had "an opinion as to whether the failure of Dr. Richardson to have [GCA] on the differential diagnosis was a deviation from the standard of care?" Dr. Sowka answered, "I have. Yes, I do." Counsel asked, "And what is your opinion in that regard, sir?" Dr. Sowka answered, "It was a deviation." Later, counsel asked Dr. Sowka whether "each one of the deviations [he had] testified to this morning was a proximate cause of Bill's vision loss?" Dr. Sowka again answered affirmatively.

¶ 238 During cross-examination, Dr. Sowka ultimately testified that based upon the questions Dr. Richardson had asked Bill and the lab tests she had ordered, she *had* considered both NAION and GCA when assessing Bill's condition. His criticism of Dr. Richardson was that she did not write down either NAION or GCA on her documentation, only ION. Counsel asked, "[W]hether [GCA] was on her differential diagnosis or not, she did the right thing by identifying

those tests needing to be done, correct?" Dr. Sowka answered, "Correct." Dr. Sowka's testimony on cross-examination revealed his belief that, had Dr. Richardson diagnosed GCA on Thursday, labs and steroids would have been administered that day, avoiding Bill's vision loss. However, he agreed that the standard of care would have been met if the laboratory tests had been performed as late as Monday, September 21.

¶ 239 Having examined the entirety of Dr. Sowka's testimony, we conclude that the trial court did not abuse its discretion by instructing the jury that the issue was whether Dr. Richardson "failed to properly consider [GCA] as a differential diagnosis of Bill Gorski's condition." Dr. Sowka never testified that Dr. Richardson breached the standard of care by "failing to properly diagnose the cause of Bill Gorski's loss of vision." Instead, he agreed with plaintiffs' counsel's assertion that she breached the standard of care by "fail[ing] *** to have [GCA] on the differential diagnosis." Plaintiffs point to no other testimony that supports their position.

¶ 240 When viewed in the context of the remainder of Dr. Sowka's testimony—namely, that (1) Dr. Richardson had indeed considered GCA, along with NAION, given she ordered the appropriate lab tests, (2) his criticism was with her documentation, not the substance of her assessment and plan, and (3) his agreement that Dr. Richarson would have met the standard of care by either sending Bill to Dr. Welty or obtaining the laboratory tests on Monday, we conclude the trial court's instruction was supported by the evidence.

¶ 241 Plaintiffs argue that the trial court's instruction prevented them from arguing that Dr. Richardson's failure to diagnose GCA on Thursday caused Bill's vision loss because it delayed the administration of the lab tests and steroids. We disagree that the court's instruction prevented plaintiffs from making this argument because we discern no substantive difference between Dr. Richardson's "fail[ure] to properly diagnose" GCA and her "fail[ure] to properly consider" GCA.

Whether she failed to "diagnose" GCA or "consider" GCA, either option would lead to the same result: the necessary testing was delayed.

¶ 242 Plaintiffs' argument reveals that the real issue is whether the laboratory tests were obtained in a timely manner, *not* what Dr. Richarson wrote or did not write on her differential diagnosis. Plaintiffs were free to argue that Dr. Richardson did not "properly consider" GCA on Thursday because, had she done so, she would have ordered the tests emergently instead of waiting, and Bill would not have lost his vision.

¶ 243 The problem for plaintiffs is this: Whether Dr. Richardson ordered the tests on Thursday or Monday, even their own expert agreed Dr. Richardson's actions would have been within the standard of care. Accordingly, because whether Dr. Richardson "failed to properly diagnose" GCA or "failed to properly consider" GCA leads to the same conclusion: plaintiffs cannot show they were prejudiced by the trial court's instruction.

¶ 244 F. Closing Argument

¶ 245 Last, plaintiffs argue that the trial court erred by overruling their objection to defense counsel's misstatement of the law in closing argument that the jury could not find for plaintiffs unless the jury unanimously agreed on at least one of the three charges in the issues instruction. Specifically, defendants' counsel told the jury the following:

> "As to those breaches of the standard of care, there are three on the instructions. All 12 of you must agree that one of those actions breached the standard of care. If you are disagreeing and four of you think that it's A, and four of you think that it's B, and four of you think that it's C, you are not unanimous. You have not all agreed as to a specific breach of the standard of care."

¶ 246 Plaintiffs objected, and the trial court overruled the objection. Plaintiffs assert that

(1) defendants' argument improperly instructed the jury as to the law and (2) the court's overruling the objection essentially told the jury that defendants' argument was a correct statement of the law.

¶ 247 The fundamental problem with plaintiffs' argument is that they forfeited this claim by failing to raise it in their posttrial motion. Nonetheless, plaintiffs urge this court to either (1) excuse or overlook the forfeiture and address the merits or (2) apply the doctrine of plain error. Plaintiffs acknowledge that plain error is rarely applied in civil cases but argue that the evidence in this case was closely balanced and defendants' misstatement of the law on a critical question misled the jury such that a new trial is warranted. We emphatically disagree.

¶ 248 In *Crim v. Dietrich*, 2020 IL 124318, ¶ 25, the Illinois Supreme Court wrote the following:

> "Section 2-1202 [of the Code of Civil Procedure] governs '[p]ost-trial motions in jury cases' and sets out strict rules for filing such motions in jury trials, stating that '[r]elief desired after trial in jury cases, *** *must* be brought in a single post-trial motion.' (Emphasis added.) 735 ILCS 5/2-1202(b) (West 2016). Section 2-1202 further requires that post-trial motions in jury cases be filed within 30 days after the entry of judgment, and the motion 'must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief.' 735 ILCS 5/2-1202(c), (b) (West 2016). Section 2-1202(e) specifies what happens if a party in a jury case fails to file a post-trial motion:
>
> > '(e) Any party who fails to seek a new trial in his or her post-trial motion, either conditionally or unconditionally, as herein provided, waives the right

to apply for a new trial, except in cases in which the jury has failed to reach a verdict.' 735 ILCS 5/2-1202(e) (West 2016)."

¶ 249 The supreme court then noted that there are two exceptions to the rule that a litigant must file a posttrial motion to preserve his or her appeal following a jury trial. First, when the jury has failed to reach a verdict; second, when the trial court has entered a directed verdict. *Id.* ¶ 26. Neither of these exceptions apply to the facts of this case.

¶ 250 In *Crim*, the supreme court also explained the sound policy reasons behind the requirement that the litigant file a posttrial motion following a jury case:

> "First, and foremost, this court has long favored the correction of errors at the circuit court level. [Citation.] The statutory requirement meets our general rule by allowing circuit court judges—those most familiar with the evidence and the witnesses—an opportunity to review their ruling and decide if a new trial or a judgment notwithstanding the verdict is appropriate. [Citation.] Filing a post-trial motion following a jury's verdict also allows a reviewing court to ascertain from the record whether the circuit court was afforded an adequate opportunity to reassess any allegedly erroneous rulings that affected the case, including the jury's verdict. [Citation.] Further, requiring the litigants to specify the grounds in support of their contentions in a section 2-1202 motion prevents the litigant from stating mere general objections." *Id.* ¶ 34.

¶ 251 In *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 31, a First District opinion cited approvingly by the supreme court in *Crim* (see *Crim*, 2020 IL 124318, ¶ 26), the First District noted that "[t]he same result [for a party's failure to file a posttrial motion after a civil jury trial] is also dictated by Supreme Court Rule 366." The First District explained its analysis as follows:

"Subsection (b) of Rule 366 is entitled: 'Scope of Review.' Ill. S. Ct. R. 366(b) (eff. Feb. 1, 1994). This subsection is divided into three parts: (1) 'General'; (2) 'Scope and Procedure on Review in Jury Cases'; and (3) 'Scope and Procedure on Review in Nonjury Cases.' Ill. S. Ct. R. 366(b) (eff. Feb. 1, 1994). Like the Code, the very structure of the rule indicates that jury and nonjury cases are to be treated differently.

Subsection (b) states in relevant part:

> '(2) Scope and Procedure on Review in Jury Cases.
>
> * * *
>
> (iii) Post–Trial Motion. A party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion.
>
> ***
>
> (3) Scope and Procedure on Review in Nonjury Cases.
>
> ***
>
> (ii) Post Judgment Motions. Neither the filing of nor the failure to file a post judgment motion limits the scope of review.' Ill. S. Ct. R. 366(b)(2)(iii), (3)(ii) (eff. Feb. 1, 1994).

As the above quote demonstrates, jury and nonjury cases are treated quite differently by the rules. While the failure to file a posttrial motion in a nonjury case does not limit the scope of the appellate court's review, the failure to file a posttrial motion in a jury case[ ] results in waiver, which we now call a forfeiture. In contrast to a nonjury case, a party in a jury case may not argue to the appellate court 'any

> point, ground, or relief not specified' in his or her posttrial motion. Ill. S. Ct. R. 366(b)(2)(iii), (3)(ii) (eff. Feb. 1, 1994)." *Id.* ¶¶ 31-32.

¶ 252 Citing *Crim*, this court recently had occasion to discuss the same issue regarding the need for the filing of a posttrial motion in a civil jury case. In *Eiselt v. Cahill*, 2023 IL App (4th) 220800-U, ¶ 52, this court wrote the following:

> "Section 2-1202 of the Code (735 ILCS 5/2-1202 (West 2022)) sets forth strict rules for the filing of posttrial motions in a jury case. *Crim v. Dietrich*, 2020 IL 124318, ¶ 25, 164 N.E.3d 1205. It provides any '[r]elief desired after trial in jury cases *** must be sought in a single post[ ]trial motion.' 735 ILCS 5/2-1202(b) (West 2022). Further, '[t]he post[ ]trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief.' *Id.* Neglecting to file a posttrial motion after a jury trial 'fail[s] to preserve any challenge to the jury's verdict for appellate review.' *Crim*, 2020 IL 124318, ¶ 35. Additionally, '[a] party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion.' Ill. S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994)."

¶ 253 Plaintiffs try to avoid the application of this rule by arguing that the plain-error rule should apply. We reject plaintiffs' argument and agree with what the First District wrote in *Arient*, 2015 IL App (1st) 133969, ¶ 37, on this matter:

> "The plain error doctrine may be applied in civil cases only where the act complained of was a prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process

itself. [Citations.] This court has observed that the application of the plain error doctrine to civil cases should be exceedingly rare."

¶ 254 We agree with the First District's analysis and conclude that nothing about this case comes remotely close to meeting the standard necessary for the application of the plain-error doctrine in a civil case. In support of this conclusion, we note that (1) defendants' alleged misstatement of the law was a mere three sentences in a lengthy closing argument; (2) at the time defendants made the alleged misstatement, plaintiffs simply said, "Objection," and the trial court said, "Overruled," with no further discussion; and (3) plaintiffs made no mention of defendants' alleged misstatement in their detailed, 53-page posttrial motion.

¶ 255 In conclusion, we thank the trial court for its comprehensive written order denying plaintiffs' posttrial motion. We found that order very helpful in our efforts to understand this procedurally and factually complicated case.

¶ 256 III. CONCLUSION

¶ 257 For the reasons stated, we affirm the trial court's judgment.

¶ 258 Affirmed.