No. 128841

In the Illinois Supreme Court

CHARLES MUHAMMAD and ANGIE MUHAMMAD, as parents of C.M, a minor, and C.M., individually,	)	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-21-0478
Appellees	)	
v.	)	On Appeal from the Circuit Court of Cook County, Illinois – Law Division
ABBOTT LABORATORIES INC. and ABBVIE INC.,	)	Case No. 2019-L-6254 Hon. Brendan A. O'Brien
Appellants	)	

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Oral Argument Requested

POINTS AND AUTHORITIES

NATURE OF THE ACTION

For forty years in Illinois, a plaintiff could only establish that a prescription medication's warning was inadequate, and thus caused her harm, by showing that a different warning would have prompted her prescribing physician to act differently. That inquiry is subjective (what would *this doctor*, treating *this patient*, have done with a different warning?) because the doctor is a "learned intermediary" evaluating a specific medicine for a particular patient, taking into account her unique medical history. Manufacturers warn doctors (not patients) of drug risks, and doctors warn patients.

The decision below, which reversed summary judgment for two prescription medicine manufacturers, makes a mess of the learned intermediary rule by relying not on what *this doctor* would do with *this patient*, but on evidence about what a "reasonable" doctor should do. Worse still, it cited only *medical malpractice* cases in which the standard is an objective one—a distinction the First District said made "no difference."

That decision is wrong, and deviates from the law this Court has announced. These treating doctors testified unequivocally that they would not have changed their course of treatment even if they had received the warnings Plaintiffs want. Under the proper subjective standard, no "objective" hired expert testimony can rebut that to preclude summary judgment. Summary judgment was the right result because the treating physicians' testimony broke the chain of causation between the manufacturer and the patient.

ISSUE PRESENTED FOR REVIEW

Whether Defendants are entitled to summary judgment because Plaintiffs cannot demonstrate Defendants' alleged failure to warn proximately caused their injuries when Mrs. Muhammad's prescribing physicians testified that they would not have changed their course of treatment if Defendants had provided a different warning.

STATEMENT OF JURISDICTION

The First District Appellate Court issued its decision on June 23, 2022. Defendants filed a petition for rehearing, which was denied on July 20, 2022. On August 24, 2022, Defendants timely filed a petition for leave to appeal pursuant to Illinois Supreme Court Rule 315(a), which this Court granted on November 30, 2022. This Court accordingly has jurisdiction over this appeal, and the appeal is timely.

STATEMENT OF FACTS

A. Mrs. Muhammad's Medical History And Treatment.

At the time relevant to this case, Plaintiff Angie Muhammad suffered from schizoaffective and bipolar disorders with a history of acute psychotic episodes and multiple hospitalizations. A.2-3. Her symptoms included auditory hallucinations and suicidal and homicidal thoughts and ideations (thoughts of killing herself, her husband, and her two children). A.2. Her psychotic episodes were mixed—she suffered simultaneously from manic and depressive symptoms, and cycled rapidly between them, so that her episodes

of mania and depression were frequent. A.3. Mrs. Muhammad's condition was severe, complicated, and difficult to treat. A.2-3.

In December 2003, when Mrs. Muhammad began treatment at Northwestern Memorial Hospital's psychiatry department, her symptoms were not controlled by her existing antipsychotic medication, and she was at risk of harming herself and others. A.2-3. Dr. Christian Stepansky, a resident physician in psychiatry, treated Mrs. Muhammad. A.2. He was overseen, during the relevant time, by Dr. Thomas Allen, Mrs. Muhammad's attending physician, also a psychiatrist. A.4. Dr. Stepansky evaluated various medications Mrs. Muhammad could use and prescribed Depakote, which was more effective at controlling her symptoms. A.3.

Dr. Stepansky knew that Depakote could cause birth defects, including spina bifida, if taken in pregnancy. A.3. On more than one occasion, he discussed the risks with Mrs. Muhammad who, at the time, was using a birth control patch (which Dr. Stepansky monitored) to avoid pregnancy. A.4, 29-30. Mrs. Muhammad told her doctors that she did not want to become pregnant. A.4.

Nevertheless, Mrs. Muhammad became pregnant with her son, C.M, in September 2005.[1] A.5. C.M. was born with spina bifida allegedly caused by his *in utero* exposure to Depakote. *Id.*

[1] C.M. and his father, Charles, are also Plaintiffs.

B. Plaintiffs' Prior Lawsuit For Medical Negligence And Current Lawsuit For Pharmaceutical Failure-to-Warn.

The Muhammads first sued Dr. Allen and Northwestern for medical negligence in 2012,[2] alleging that Mrs. Muhammad's treating doctors had the information necessary to safely prescribe Depakote, and it was the doctors' failure to utilize that information that caused the Plaintiffs' harm. A.5, 1. In *Northwestern*, Plaintiffs claimed that Mrs. Muhammad's physicians *were* aware of the risks of birth defects posed by prescribing Depakote to someone who might become pregnant, and that they deviated from the standard of reasonable care by keeping her on the medicine after there was evidence she might become pregnant. Plaintiffs alleged in their complaint that it was "well known within medical and mental health care communities" that Depakote "could cause serious, debilitating birth defects to a developing fetus," including spina bifida, and that it should not be prescribed to "women who are or might become pregnant while using Depakote." A.38, ¶ 4. They also alleged that Mrs. Muhammad's physicians continued prescribing Depakote, "despite knowledge of well documented and widely accepted dangers associated with Depakote," after Mrs. Muhammad reported she might be pregnant in May 2005 (even though she was not pregnant at that time). *Id.*, ¶ 5.

[2] *See Muhammad, et al. v. Nw. Mem'l Hosp. & Med. Ctr., et al.*, Cook County, (No. 12-L-12174) ("*Northwestern*").

In 2018, Plaintiffs also filed a case against Defendants Abbott Laboratories, Inc. and AbbVie Inc. (collectively, "Abbott"),[3] manufacturers of Depakote, asserting failure-to-warn claims. Before the *Northwestern* case was tried, Plaintiffs voluntarily dismissed that case against Abbott, presumably recognizing that their theory of liability in *Northwestern* was contrary to a failure-to-warn cause of action against the Depakote manufacturers.

At the *Northwestern* trial, Plaintiffs put on significant evidence advancing their theory that the risks of Depakote were known by Mrs. Muhammad's treating physicians, repeating several times to the jury that, at the time C.M. was conceived, Mrs. Muhammad's physicians knew that Depakote carried risks of birth defects, including spina bifida, and therefore should have discontinued that course of treatment. *See* A.59, at 43:18-44:9 (stating to jury that medical literature demonstrated the "risk of a baby having abnormalities related to Depakote is as high as 17 percent," and Dr. Stepansky should have taken that risk into account "before prescribing Depakote"); A.60, at 48:5-11 ("[E]ven if you would agree that Depakote could be started, that the balance shifted on May 31st: [when] . . . Mrs. Muhammad came in to see Dr. Stepanksky and she said doctor, my menstrual period is two weeks late, I think I'm pregnant."); A.106, at 83:18-84:5, A.77 (Plaintiffs' expert testifying "[t]he

[3] Effective January 2013, Abbott Laboratories separated its research-based pharmaceutical business into an independent, publicly traded company, AbbVie Inc. Abbott manufactured and sold the Depakote involved in this case. AbbVie Inc., the research-based pharmaceutical company, now has responsibility for Depakote in the United States.

risk" that Mrs. Muhammad would have a child with a birth defect "is just too great," so the doctors should have discontinued Depakote after May 31st, 2005); A.61, at 63:5-14 (stating that "after May 31st of 2005 . . . had the doctors acted appropriately, had they weighed and balanced the risks versus the benefits . . . they should not have gone forward with Depakote after that date").

The jury in *Northwestern* accepted Plaintiffs' theory and awarded Plaintiffs an $18.5 million verdict.[4] Then, in June 2019, after obtaining that multi-million dollar verdict based on the doctors' medical negligence, Plaintiffs revived this action against Abbott. Plaintiffs alleged that Abbott failed sufficiently to warn those same doctors of the risk of birth defects from Depakote, despite what they had claimed in the *Northwestern* action. A.2, 7.

In 2005, when Mrs. Muhammad's doctors prescribed Depakote, its label contained a Black Box Warning, the most serious warning allowed by the FDA, stating that the drug could cause birth defects, including specifically a 1-2% risk of spina bifida if taken during the first trimester of pregnancy and an unquantified risk of other birth defects. A.3, 8. According to Plaintiffs, by 2004 Abbott possessed the results of new research suggesting that the overall risk of birth defects was in the range of 8% or, perhaps, as high as 10.7-17%. A.8. The risk of spina bifida remained at 1-2%.

Plaintiffs do not dispute that Depakote's label accurately stated the 1-2% risk of spina bifida—the risk at issue in this action. Nor do they dispute

[4] The award was lowered to $12 million, pursuant to a high-low agreement.

that the label warned of the risk of other birth defects that are compatible and incompatible with life. Rather, they claim the warning should have also provided a range to quantify the potential total risks of all birth defects reflected in this research. In other words, the inadequacy of that warning, Plaintiffs allege, is that the label did not provide a percentage range for all birth defects.

Both Dr. Allen and Dr. Stepansky testified about their knowledge of Depakote's risks and their decision to prescribe it. A.8-9. Dr. Allen testified that, given the severity of Mrs. Muhammad's illness, the risk she posed to herself and others, the efficacy of Depakote, and the fact that she was on birth control, he still would have prescribed Depakote even if the reported risk of birth defects had been higher. A.9, 35. His testimony was unwavering: "[R]egardless [] what the percentage of risk was," because Mrs. Muhammad was on birth control, even if it were "100%," he still would have prescribed Depakote. A.9; *see also* A.35. Dr. Stepansky likewise testified that the 1-2% spina bifida risk was "all [he] needed to know" to understand that the medicine should not be prescribed to a woman likely to become pregnant, but because Mrs. Muhammad was "'using reliable birth control,'" he believed the medicine was the best option for her condition. A.9, 28.

Abbott moved for summary judgment on the grounds that: (1) Plaintiffs' prior statements in their malpractice lawsuit claiming that the same physicians had the information necessary to prescribe the medicine safely

contradicted their theory of liability in this case such that they should be judicially estopped from pursuing this action; and (2) Plaintiffs could not establish causation because the uncontroverted testimony of Mrs. Muhammad's prescribing physicians established that they still would have concluded that Depakote was the best option for Mrs. Muhammad even if the Depakote label had included different warnings. A.9-10.

Attached to their response to Abbott's motion for summary judgment, Plaintiffs submitted a 5-page affidavit from Dr. Suhayl Nasr—a psychiatrist who never treated or examined Mrs. Muhammad. Dr. Nasr opined that a "reasonably careful" psychiatrist adhering to the standard of care would not have prescribed Depakote if its label included a warning of a 10%-17% overall risk of birth defects. A.8, 98. He thus concluded that the "testimony of Dr. Stepansky and Dr. Allen is contrary to the standard of care and does not represent what a reasonably careful psychiatrist would have done in under [*sic*] the circumstances in 2005." A.99.

The trial court granted summary judgment on judicial estoppel, without reaching the issue of causation, and Plaintiffs appealed. A.101-04; *see also* A.10. On appeal the First District considered both potential bases for summary judgment.

The First District reversed. A.1-24. The court first held that judicial estoppel did not apply because Plaintiffs' theory that Abbott allegedly failed to adequately warn doctors of Depakote's risks was not incompatible with their

theory of medical negligence against the doctors in the *Northwestern* case. A.13. On causation, the court held that a treating physician's factual testimony that he would not have changed his prescribing decisions with additional information could be overcome by expert opinion testimony that "such conduct would not conform to the standard of care." A.22. In support, the First District exclusively cited medical malpractice cases. That those decisions did not arise in the context of product liability claims for failure to warn, the court said, "makes no difference." *Id.*

STANDARD OF REVIEW

Where "an appeal arises from the reversal of a circuit court's order granting summary judgment," this Court's "standard of review is *de novo*." *N. Ill. Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005).

ARGUMENT

I. Summary Judgment Is Appropriate Because Plaintiffs Cannot Demonstrate Abbott's Alleged Failure To Warn Proximately Caused Their Injuries.

A plaintiff cannot survive summary judgment if she fails to establish the necessary elements of her claim including, in a pharmaceutical failure-to-warn case like this one, that a prescription medicine's allegedly inadequate warning caused her harm. That causation question asks whether the physician treating the plaintiff-patient would have made a different prescribing decision if he had been given a different warning. The inquiry is subjective, and asks what the treating physician would do in light of the specific patient's unique medical

history and the doctor's expertise. In legal parlance, the physician acts as the "learned intermediary" between the manufacturer and the patient, translating the risks and benefits of a prescription medicine based on the doctor's medical knowledge and the patient's needs.

In this case, the undisputed evidence shows that, even if Mrs. Muhammad's physicians had received the warning Plaintiffs claim would have been adequate, her doctors still would have concluded that Depakote was the best medicine for her. Abbott's alleged failure to deliver the additional warning, then, cannot be the proximate cause of Plaintiffs' injuries, because C.M. still would have been exposed to the medicine even had the additional warning been provided. This breaks the chain of causation, and Abbott is entitled to summary judgment.

The First District's decision to the contrary is wrong. The court misapplied the learned intermediary doctrine, which is a fundamental principle of pharmaceutical failure-to-warn cases. Proximate causation turns on whether the individual plaintiff's treating physician would have changed his course of treatment, based on his "individualized medical judgment," *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507, 518 (1987), had he received a different warning. The decision below erroneously conflates the evaluation of the treating physician's actual *subjective* decision-making process in a failure-to-warn case with the *objective* "reasonable physician" causation test in

a medical malpractice case. The First District's legal conclusion and its rationale in getting there were both wrong, and this Court should reverse.

A. The First District Misapplied the Learned Intermediary Doctrine.

This Court adopted the learned intermediary doctrine in a case alleging a drug manufacturer failed to warn adequately of a prescription drug's known risks nearly forty years ago in *Kirk*. Under this doctrine, which has been adopted in nearly every state,[5] "manufacturers of prescription drugs have a duty to warn prescribing physicians of the drugs' known dangerous propensities," but they have "no duty to directly warn the user of a drug of possible adverse effects." 117 Ill. 2d at 517, 519. Rather, prescribing physicians, "using their medical judgment, have a duty to convey the warnings to their patients." *Id.* at 517; *see also Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 191 n.3 (2002) ("'[M]anufacturers' warnings about prescription drugs are to be given to the physicians, who then [have] the duty to warn the patients.'"); Illinois Pattern Jury Instructions-Civil ("IPI") 400.07B. The rationale for the rule is that the prescribing physician is the "learned intermediary" between the manufacturer and the patient, and is best positioned to "weigh[] the benefits of any medication against its potential dangers" and make an "individualized medical judgment bottomed on a

[5] *See In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, 806 (E.D. Tex. 2002) (surveying 48 states that had adopted doctrine as of 2002); *In re Accutane Litig.*, 194 A.3d 503, 524 (N.J. 2018) (recognizing learned intermediary doctrine); *Baker v. Univ. of Vermont*, 2005 WL 6280644 (Vt. Super. Ct. May 4, 2005) (same).

knowledge of both patient and palliative." *Kirk*, 117 Ill. 2d at 518 (quoting *Stone v. Smith, Kline & French Labs.*, 731 F.2d 1575, 1579-80 (11th Cir. 1984)).

The contours of the learned intermediary doctrine are well established: In adopting the rule, the *Kirk* court recognized that it was joining "numerous jurisdictions" that had already done so. 117 Ill. 2d at 517. And Illinois courts since *Kirk* have consistently reaffirmed that prescription drug manufacturers do not owe a duty to warn patients directly of the potential adverse consequences of their medicines. *See, e.g.*, *Happel*, 199 Ill. 2d at 190-91 ("[M]anufacturers of prescription drugs have a duty to warn prescribing physicians of the drugs' known dangerous propensities, and the physicians, in turn, using their medical judgment, have a duty to convey the warnings to their patients."); *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 430 (2002) ("The duty to warn the health-care professional, rather than the ultimate consumer or patient, is an expression of the 'learned intermediary' doctrine."); *Martin ex rel. Martin v. Ortho Pharm. Corp.*, 169 Ill. 2d 234, 238-39 (1996) (applying the same rule); *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 30 (1992) ("the 'learned intermediary doctrine' . . . basically states that drug manufacturers must warn physicians of a drug's dangerous side effects and that the prescribing physicians have a duty to convey the warnings to their patients"); *Meinhart v. Hy-Vee, Inc.*, 2022 IL App (2d) 220042-U, ¶ 53 (similar).

Given that a prescription drug manufacturer owes no duty to warn a patient directly of potential side effects, a plaintiff can only hold such a

manufacturer liable for an allegedly inadequate warning by showing that the manufacturer's warning to physicians "[was] inadequate and the risk [was] not widely-known within the medical community." *Sellers v. Boehringer Ingelheim Pharms., Inc.*, 881 F. Supp. 2d 992, 1006 (S.D. Ill. 2012); *see also Hansen*, 198 Ill. 2d at 432 ("Doctors who have not been *sufficiently* warned of the harmful effects of a drug cannot be considered 'learned intermediaries[.]'"). And, as with all failure-to-warn claims, the plaintiff must also show that the inadequate warning proximately caused her injuries. *N. Tr. Co. v. Upjohn Co.*, 213 Ill. App. 3d 390, 401 (1st Dist. 1991).

1. Causation Is A Physician-Specific, Subjective Inquiry.

To establish that a pharmaceutical manufacturer's inadequate warning proximately caused her injuries, a plaintiff must show that, if her prescribing physician had been provided an adequate warning, *that particular physician* would not have prescribed the drug to *that individual patient* (the plaintiff) under the circumstances of her case. The very essence of the learned intermediary doctrine is that "the" prescriber, with his own unique knowledge and experience with the patient, is in the best position to appreciate a medicine's risks, take into account the patient's needs, and convey to the patient any warning. *See Kirk*, 117 Ill. 2d at 518. The inquiry is patient- and circumstance- dependent, and reflects that medical treatment decisions differ based on a host of factors—like medical history, disease progression and severity, risk factors, personal characteristics, and other issues—and therefore require both medical expertise and familiarity with the patient's unique

circumstances. Treatment decisions are personal, and doctors, not pharmaceutical manufacturers, know patients best.

Under Illinois law, a plaintiff must show "that the presence of adequate warnings would have prevented the plaintiff's injuries." *Broussard v. Houdaille Indus., Inc.*, 183 Ill. App. 3d 739, 744 (1st Dist. 1989). This means "the plaintiff must be able to prove that if there had been a proper warning, the learned intermediary . . . would have declined to prescribe or recommend the product." *Vaughn v. Ethicon, Inc.*, 2020 WL 5816740, at *4 (S.D. Ill. Sept. 30, 2020) (citing *N. Tr. Co.*, 213 Ill. App. 3d at 401); *see also* 33 AM. L. PROD. LIAB. 3d § 37 (2022) ("The question in the learned intermediary context is not what an objective physician would decide but, rather, what the plaintiff's doctor would determine based on knowledge of the particular drug and the plaintiff's risk factors."). Consistent with *Kirk*, a plaintiff must prove that her doctor's "individualized medical judgment" would have been different with a different warning. 117 Ill. 2d at 518.

This inquiry focuses on what, as a matter of fact, the actual treating physician knew and did and whether, as a matter of fact, *that physician* would have made a different treatment decision if provided a different warning. It is the prescribing physician's subjective decision-making that matters. If the prescribing physician "even when provided with the most current research and warnings, would still have prescribed the product," that "severs any potential chain of causation through which the plaintiff could seek relief against the

manufacturer." 33 AM. L. PROD. LIAB. 3d § 37 (2022). In other words, these Plaintiffs must show that *Mrs. Muhammad's treating physicians* would have made a different decision *for Mrs. Muhammad* if they had known that the total percentage risk of birth defects from Depakote was as high as 17%.

The subjective causation standard stems directly from the rationale underlying the learned intermediary doctrine as announced by this Court: Because "[p]rescription drugs are likely to be complex medicines, esoteric in formula and varied in effect" the treating physician "[a]s a medical expert . . . can take into account the propensities of the drug as well as the susceptibilities of his patient" in "weighing the benefits of any medication against its potential dangers." *Kirk*, 117 Ill. 2d at 518 (internal quotation marks omitted). Illinois courts consistently have reaffirmed that a plaintiff's actual prescribing physician (not any physician, and certainly not the manufacturer) considers the risks of a particular drug and makes treatment decisions for that particular patient. *See, e.g.*, *Happel*, 199 Ill. 2d at 193 ("[T]he rationale underlying the learned intermediary doctrine is that because the prescribing physician has knowledge of the drugs he is prescribing and, more importantly, knowledge of his patient's medical history, it is the physician who is in the best position to prescribe drugs and monitor their use."); *Kennedy v. Medtronic, Inc.*, 366 Ill. App. 3d 298, 305 (1st Dist. 2006) ("[A] doctor is considered in the best position to prescribe drugs and monitor their use

because he is knowledgeable of the propensities of the drugs he is prescribing and the susceptibilities of his patient.").[6]

Illinois courts are not alone in recognizing that causation in the learned intermediary doctrine context is a physician- and patient-dependent inquiry. "[N]ationally, it is well-settled that in prescription drug failure-to-warn cases" a manufacturer's inadequate warning causes harm *only* if a different warning would have altered the physician's decision and, thus, prevented the injury. *In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II)*, 2017 WL 3531684, at *6 (D.N.J. Aug. 17, 2017). Courts have held that to be the law in Alabama,[7] Arizona,[8] Arkansas,[9] California,[10] Colorado,[11] Connecticut[12] Delaware,[13]

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[6] *Accord Aquino v. C.R. Bard, Inc.*, 413 F. Supp. 3d 770, 790 (N.D. Ill. 2019) (plaintiff must establish "that if there had been a proper warning, her surgeon would have declined to use the product"); *Stephens v. CVS Pharmacy*, 2009 WL 1916402, at *3 (N.D. Ill. June 11, 2009) ("undisputed" that the prescriber "affirmatively stated that she was aware [of the risk as] a possible side effect of [the drug] when she prescribed it for plaintiff"); *Giles v. Wyeth Inc.*, 500 F. Supp. 2d 1063, 1066 n.3 (S.D. Ill. 2007) ("In failure to warn cases, courts regularly grant summary judgment when 'the physician's testimony shows unequivocally that s/he knew at the relevant time *all* the information which would have been included in a proper warning.'").

[7] *Bodie v. Purdue Pharma Co.*, 236 F. App'x 511, 521-22 (11th Cir. 2007).

[8] *D'Agnese v. Novartis Pharms. Corp.*, 952 F. Supp. 2d 880, 892-93 (D. Ariz. 2013).

[9] *Sharp v. Ethicon, Inc.*, 2020 WL 1434566, at *3 (W.D. Ark. 2020).

[10] *Motus v. Pfizer Inc.*, 358 F.3d 659, 661 (9th Cir. 2004).

[11] *Lynch v. Olympus Am., Inc.*, 2018 WL 5619327, at *12 (D. Colo. 2018).

[12] *Roberto v. Boehringer Ingelheim Pharms., Inc.*, 2019 WL 1938604, at *1 (Conn. Super. Ct. 2019).

[13] *Boros v. Pfizer, Inc.*, 2019 WL 1558576, at *3 (Del. Super. Ct. 2019).

Florida,[14] Georgia,[15] Indiana,[16] Iowa,[17] Kansas,[18] Louisiana,[19] Maryland,[20] Michigan,[21] Minnesota,[22] Mississippi,[23] Missouri,[24] New Jersey,[25] New York,[26] North Carolina,[27] Ohio,[28] Oklahoma,[29] Oregon,[30] Pennsylvania,[31] South Carolina,[32] Utah,[33] Washington,[34] West Virginia,[35] Wisconsin,[36] and Wyoming.[37]

Thus, courts across the country, not just in Illinois, agree that causation

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[14] *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304, 1321 (11th Cir. 2017).
[15] *Ellis v. C.R. Bard, Inc.*, 311 F.3d 1272, 1283 n.8 (11th Cir. 2002).
[16] *Kaiser v. Johnson & Johnson*, 947 F.3d 996, 1015-16 (7th Cir. 2020).
[17] *Kelly v. Ethicon, Inc.*, 2020 WL 4572348, at *4 (N.D. Iowa 2020).
[18] *Miller v. Pfizer Inc.*, 196 F. Supp. 2d 1095, 1126-30 (D. Kan. 2002).
[19] *Felice v. Valleylab, Inc.*, 520 So. 2d 920, 927 (La. Ct. App. 1987).
[20] *Grinage v. Mylan Pharms., Inc.*, 840 F. Supp. 2d 862, 868-69 (D. Md. 2011).
[21] *Mowery v. Crittenton Hosp.*, 400 N.W.2d 633, 637-38 (Mich. Ct. App. 1986).
[22] *In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 7368132, at *3 (M.D. Ga. 2016) (applying Minnesota law).
[23] *Janssen Pharm., Inc. v. Armond*, 866 So. 2d 1092, 1101 (Miss. 2004).
[24] *Johnson v. Medtronic, Inc.*, 365 S.W.3d 226, 232 (Mo. Ct. App. 2012).
[25] *Baker v. App Pharms. LLP*, 2012 WL 3598841, at *8 (D.N.J. 2012).
[26] *Donovan v. Centerpulse Spine Tech Inc.*, 416 F. App'x 104, 107 (2d Cir. 2011).
[27] *Block v. Woo Young Med. Co.*, 937 F. Supp. 2d 1028, 1035 (D. Minn. 2013).
[28] *Heide v. Ethicon, Inc.*, 2020 WL 1322835, at *5 (N.D. Ohio 2020).
[29] *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017-18 (10th Cir. 2001).
[30] *Parkinson v. Novartis Pharms. Corp.*, 5 F. Supp. 3d 1265, 1272-74 (D. Or. 2014).
[31] *Bock v. Novartis Pharms. Corp.*, 661 F. App'x 227, 232 (3d Cir. 2016).
[32] *Bean v. Upsher-Smith Pharms., Inc.*, 2017 WL 4348330, at *8 (D.S.C. 2017), *aff'd*, 765 F. App'x 934 (4th Cir. 2019).
[33] *MacMurray v. Boehringer Ingelheim Pharms., Inc.*, 2017 WL 11496825, at *9 (D. Utah 2017).
[34] *Sherman v. Pfizer, Inc.*, 440 P.3d 1016, 1023 (Wash. Ct. App. 2019).
[35] *Campbell v. Bos. Sci. Corp.*, 2016 WL 5796906, at *8 (S.D. W. Va. 2016), *aff'd*, 882 F.3d 70 (4th Cir. 2018).
[36] *In re Zimmer, NexGen Knee Implant Prods. Liab. Litig.*, 884 F.3d 746, 752 (7th Cir. 2018).
[37] *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 856 (10th Cir. 2003).

is a fact-specific inquiry about the subjective decision of the treating physician. *See, e.g.*, *Ackermann v. Wyeth Pharms.*, 526 F.3d 203, 208 (5th Cir. 2008) (under Texas law, plaintiff must show "that the alleged inadequacy [of a warning] caused *her doctor* to prescribe the drug *for her*") (emphases added) (internal quotation marks omitted); *Swintelski v. Am. Med. Sys., Inc.*, 521 F. Supp. 3d 1215, 1221 (S.D. Fla. 2021) ("[W]hat matters is whether the implanting physician would have altered his decision to implant the product had he been equipped with more detailed warnings."); *Vaughn*, 2020 WL 5816740, at *4 ("Like Illinois law, Missouri law requires a plaintiff to prove that a warning would have caused the learned intermediary to alter his recommendation for the allegedly defective product." (citing *Madsen v. Am. Home Prods. Corp.*, 477 F. Supp. 2d 1025, 1035 (E.D. Mo. 2007)); *see also Mixson v. C.R. Bard Inc.*, 2022 WL 4364153, at *4 (N.D. Fla. Sept. 16, 2022) (granting summary judgment where treating physician testified he would not have read the stronger warning had it been given).

2. The First District Did Not Properly Credit The Prescribing Physicians' Testimony.

The First District's decision departs from *Kirk* and its progeny, as well as from the settled majority rule. It also puts Illinois failure-to-warn law out of step with the decisions of courts in at least 31 other states, which have endorsed this fact-specific approach, by ignoring the learned intermediary's role in the causation analysis. The facts here are unequivocal and specific to this patient: Mrs. Muhammad's prescribing physicians testified that they

would *not* have changed course *even if* Depakote's label included the additional risk information Plaintiffs claim was required. Since her prescribers understood that Mrs. Muhammad was using birth control and given the severity of her disease—and just as they prescribed Depakote despite a Black Box Warning including a warning of a 1-2% risk of spina bifida—they would have done the same even if the overall risk of birth defects was as high as 17%, or even greater.

Dr. Stepansky testified that, because Mrs. Muhammad was using birth control and in light of the severity of her disease, the birth defect risk posed by Depakote was not important in his prescribing decision. A.28; *see also* A.9. Dr. Allen similarly testified that "regardless [] what the percentage of the risk was," even if the risk of birth defects were "100%", because Mrs. Muhammad was on birth control, he "would have still prescribed [Depakote]." A.9; *see also* A.35. Because Mrs. Muhammad was on birth control and her psychotic illness was severe, the additional information regarding the risk of other birth defects would not have altered his course of treatment. *Id.*

The First District acknowledged this—"both [doctors] testified that they would not have acted differently,"—but denied the critical import of that testimony. A.22. Under the learned intermediary doctrine adopted by this Court, the First District's inquiry should have ended with the unequivocal evidence that the prescribing physicians would not have acted differently with a different warning. The prescribing physicians, who are best positioned to

"weigh[] the benefits of any medication against its potential dangers" and make an "individualized medical judgment" for their specific patient, would have prescribed Depakote even with a different warning label. *Kirk*, 117 Ill. 2d at 518. This evidence breaks the chain of causation; Abbott's alleged failure to warn did not proximately cause Plaintiffs' injuries because Mrs. Muhammad's prescribing physicians would not have changed their course of treatment even if the label had warned of additional risks.

3. Opinion Testimony About Hypothetical "Reasonable Physicians" Cannot Overcome A Prescribing Physician's Unequivocal Testimony Regarding His Individualized Medical Judgment.

Attempting to salvage their claim in light of the unequivocal testimony of both of Mrs. Muhammad's treating physicians, Plaintiffs submitted, and the First District relied upon, an affidavit from a physician who never treated or examined Mrs. Muhammad, Dr. Nasr. But this opinion from an expert hired for litigation is completely irrelevant to the operative legal question what *Mrs. Muhammad's treating physicians* would have done with different warnings, and it cannot create a genuine issue of material fact on proximate causation.

In their attempt to defeat summary judgment, Plaintiffs pointed to their expert's affidavit, created in response to Abbott's motion and attached to their opposition, in which Dr. Nasr opined that Mrs. Muhammad's treating physicians *should have* altered their course of treatment had they received a warning that Depakote carried additional risks of birth defects. Dr. Nasr claimed that, if Abbott had warned of a "10 to 17% or greater risk of birth

defects in a fetus exposed *in utero* to Depakote . . . a reasonably careful psychiatrist . . . would not have prescribed Depakote to Angie Muhammad on May 24, 2005 or on any date thereafter." A.98. He also opined that if the treating physicians had known of the additional risks of birth defects and still prescribed Depakote to Mrs. Muhammed, they would have departed from the standard of reasonable care.[38] A.99.

On appeal, the First District relied on Dr. Nasr's affidavit to conclude that there was "conflicting evidence" on the question "whether greater warnings would have led the physicians to make different prescribing decisions such that C.M. would not have been exposed to Depakote," and so the decision granting summary judgment was reversed. A.22-23. This applies the wrong legal standard to reach the wrong result. As Illinois courts repeatedly have recognized, *see supra* at 13-16, the learned intermediary analysis requires case-specific factual evidence, not any "objective" opinion divorced from the conduct and testimony of the plaintiff's physicians. Expert opinion regarding what a putative "reasonable physician would do" does not "create[] a triable issue as to proximate cause" because "[t]he question in the learned

[38] This conclusion itself is dubious, as Depakote's label today contains additional risk information but it is still not wholly contraindicated for women of child-bearing age. Dr. Nasr's opinion effectively seeks to contraindicate Depakote for uses permitted by the FDA, which would create substantial preemption issues as a matter of law. *See, e.g.*, *Rheinfrank v. Abbott Labs., Inc.*, 680 F. App'x 369, 384-88 (6th Cir. 2017) (holding similar Depakote claim preempted). And as a matter of policy, such an outcome would leave many women with serious illness unable to access the medicine best suited to them.

intermediary context is not what an objective physician would decide, but rather what *plaintiff's doctor* would determine based on *his knowledge of the drug in question and the plaintiff's risk factors*." *Stafford v. Wyeth*, 411 F. Supp. 2d 1318, 1322 (W.D. Okla. 2006) (emphases added); *see also Cooper v. Bristol-Myers Squibb Co.*, 2013 WL 85291, at *6-7 (D.N.J. Jan. 7, 2013) (courts "look carefully at the testimony of the prescribing physician," and testimony of a non-prescribing physician is irrelevant); *Isaac v. C. R. Bard, Inc.*, 2021 WL 1177882, at *5 (W.D. Tex. Mar. 29), *report and recommendation adopted by* 2021 WL 2773018 (W.D. Tex. Apr. 20, 2021) (granting summary judgment because "the learned-intermediary analysis focuses on the actions of the treating physician, not the opinion of an expert witness").

The legal causation question turns on the decision-making of *these doctors* in *this case*—a subject on which Dr. Nasr could not comment—not a "reasonable doctor" in a hypothetical case. The decision below ignores the legally operative and determinative facts in favor of counter-factual and irrelevant expert testimony. "Under Plaintiff's construction, the court is required to take the rather curious action of ignoring what the treating physician says he would have done given a certain factual setting for no other reason than the fact that he is not an 'objective' physician[.]" *Woulfe v. Eli Lilly & Co.*, 965 F. Supp. 1478, 1484 (E.D. Okla. 1997). The decision below would allow a jury to find for the Plaintiffs even when that result was directly contrary to the undisputed evidence from Mrs. Muhammad's prescribing

physicians. This Court should reject that approach to preserve the learned intermediary doctrine and the important, patient-centered medical treatment goals it furthers.

The rationale of *Kirk* and its progeny is consistent with a rule that testimony from a hired expert who has never treated a patient cannot create a triable issue of fact when the unwavering testimony of the treating physician emphatically establishes that a different warning would not have changed the physician's course of conduct. *Kirk* recognizes that the treating physician is responsible for making an "individualized medical judgment" in weighing the benefits and risks of a particular drug. 117 Ill. 2d at 518; *accord Happel*, 199 Ill. 2d at 193. It is incompatible with that analysis to allow expert testimony from a non-treating physician regarding a hypothetical reasonable physician to create a material fact question on what the treating physician would have done. The treating physician's individualized medical judgment is not trumped by an after-the-fact opinion from a non-treating physician about a hypothetical reasonable doctor.

Plaintiffs' misuse of expert testimony is also inconsistent with Illinois failure-to-warn law outside the pharmaceutical drug context. In non-pharmaceutical product liability cases, a plaintiff who fails to read a warning cannot recover from the maker of a product for failure to warn. *See Maychszak v. Brown*, 2019 IL App (2d) 190042-U, ¶ 76 ("[T]he plaintiff has to show the warnings were actually read."); *cf. Sheahan v. Ne. Ill. Reg'l Commuter R.R.*

Corp., 212 Ill. App. 3d 732, 737 (1st Dist. 1991) (in negligence action "motorist who completely disregarded working warning signals" that train was approaching could not recover from railroad company for failure to provide additional warnings).

The First District itself spelled this out in *Kane v. R.D. Werner Co.*, 275 Ill. App. 3d 1035 (1st Dist. 1995). There, the plaintiff was injured when he fell off an extension ladder and sued the manufacturer for inadequate warnings. The First District affirmed summary judgment because the "plaintiff admittedly never read the warnings that were given," and thus the alleged inadequate warning "could not have proximately caused his injuries." *Id.* at 1036-37. The rationale of the decision below would have allowed the plaintiff in *Kane* to survive summary judgment simply by paying an expert to opine that a "reasonable man" would have read the warning and thus avoided injury—notwithstanding uncontroverted factual testimony to the contrary. That is not, and has never been, the law in Illinois. In the context of a tort action challenging the adequacy of a warning, the factual evidence about whether the warning provided was actually read and followed by the legally operative actor is critical.

4. The Decision Below Conflates The Separate Torts Of Medical Negligence And Failure-To-Warn, Which Have Distinct Causation Tests.

Because nothing in Illinois product liability failure-to-warn precedent supports the First District's decision, the court had to look elsewhere for support and reached into medical malpractice law to sustain its holding.

Notwithstanding that medical malpractice and product liability cases involve two completely different legal standards, the First District insisted its reliance on medical malpractice case law in product liability litigation "makes no difference." A.22. But it does matter, and the fact that the court could cite no failure-to-warn precedent to support its holding is telling.

Different legal standards apply to the separate torts of medical negligence and pharmaceutical failure-to-warn, and applying the wrong standard amounts to reversible legal error. Medical malpractice claims—like the *Northwestern* case these Plaintiffs previously brought against Mrs. Muhammad's healthcare providers—ask whether a hypothetical reasonable physician, applying professional standards of care, would have acted in the same way that the plaintiff's physician did. *See*, *e.g.*, *Purtill v. Hess*, 111 Ill. 2d 229, 242 (1986) (the physician-defendant's conduct is judged against the "degree of knowledge, skill, and care which a reasonably well-qualified physician in the same or similar community would bring to a similar case under similar circumstances."); IPI 105.01. That inquiry is precisely the one that Plaintiffs here sold the First District in this failure-to-warn case: An objective reasonable physician standard.

Adjudicating a reasonable physician standard in medical negligence claims thus *requires* expert testimony. *See Snelson v. Kamm*, 204 Ill. 2d 1, 42 (2003). That is because "a lay juror is not skilled in the profession and thus is not equipped to determine what constitutes reasonable care in professional

conduct without the help of expert testimony." *Id.* Precisely because medical judgments are sophisticated and complex, an objective evaluation of whether actions in accordance with those judgments breached the duty of care requires expert testimony to evaluate. But as explained above, the causation question in a pharmaceutical failure-to-warn case is a completely different inquiry, asking the subjective question what this doctor treating this patient would choose to do. Thus, what *a reasonable physician* would have done is irrelevant, because it says nothing about what *the prescribing physician* would have done. If the prescribing physician would not have altered his decision, any alleged inadequacy simply cannot be the cause of the injury. Expert testimony cannot answer, or even inform, this question. Experts are not mind-readers, nor can they opine about the credibility of other witnesses—here, Mrs. Muhammad's prescribing physicians. *See, e.g.*, *People v. Becker*, 239 Ill. 2d 215, 236 (2010) ("Under Illinois law, it is generally improper to ask one witness to comment directly on the credibility of another witness.").

The need for expert testimony in medical malpractice cases also makes sense in light of the defendant-physician's self-interest in those cases. A doctor accused of medical malpractice, whose conduct is being evaluated, is the defendant to suit in those cases, and thus an objective evaluation of his decision-making matters, because it acts as a check on otherwise wholly self-serving testimony. *See*, *e.g.*, *Seef v. Ingalls Mem'l Hosp.*, 311 Ill. App. 3d 7, 27 (1st Dist. 1999) (Frossard, P.J., dissenting) ("A trial court is not required to

accept a defendant's hypothetical testimony as uncontroverted fact" due to the potential for the defendant to offer "self-serving testimony, due to bias"); *Wodziak v. Kash*, 278 Ill. App. 3d 901, 912 (1st Dist. 1996) (finding "scant evidentiary value" in medical malpractice defendant's testimony). No such concern with physician testimony exists when the defendant is the pharmaceutical manufacturer.[39]

A medical malpractice suit against the treating physicians, not a pharmaceutical failure-to-warn suit, is the proper avenue for Plaintiffs to recover for what they actually claim caused their harm—a course of treatment that departed from the reasonable standard of care. Plaintiffs already had their bite at the apple to recover for that harm in their medical malpractice suit against the treating physicians and hospital. *See infra* at 37-39.

Worse still, the two medical malpractice cases upon which the First District principally relied do not actually support the conclusion the court reached, *even if* those cases were relevant in the first place (and they are not). They do not stand for the proposition that a treating physician's testimony

[39] A straightforward reading of the Illinois Rules of Evidence on expert testimony supports the conclusion that expert testimony is not appropriate to establish causation in a pharmaceutical failure-to-warn case. Illinois Rule of Evidence 702 allows expert testimony only where the witness's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The use of expert testimony here does not meet that standard, as it is unnecessary to decide the issue, and serves only to distract the jury from the undisputed testimony of Mrs. Muhammad's treating physicians. *See Watkins v. Schmitt*, 172 Ill. 2d 193, 207 (1996) (upholding exclusion of expert testimony when there was sufficient testimony from fact witnesses to allow jury to decide the issue).

should not "be given dispositive weight" when the opposing party presents expert testimony, as the court claimed. A.22.

In *Buck v. Charletta*, 2013 IL App (1st) 122144, the court's holding did not turn on whether *expert testimony* created a dispute of fact about whether the treating physician would have acted differently.[40] Rather, the *factual evidence* in that case was disputed and improperly weighed by the trial court. Specifically, there was a fact question in *Buck* whether the plaintiff's physician read a radiologist's MRI report that indicated the plaintiff may have lung cancer and, by failing to read and communicate those findings to the plaintiff (who happened to be an oncology nurse), delayed her treatment for over a year. *Id.*, ¶¶ 3, 60. The defendants argued that the radiologist did not cause the delayed diagnosis, because the treating doctor testified that he would not have acted differently if the radiologist had taken steps to ensure that the report was received (because, the treating physician claimed, he *had* informed the plaintiff of the MRI report and no additional communication from the radiologist would have caused him to act differently). *Id.*, ¶ 61. But whether the report was disclosed was contested: The plaintiff "presented ample

[40] It is worth underscoring that the *Buck* court applied the correct standard to that medical malpractice case: "Proximate cause in a medical malpractice case must be established by expert testimony to a reasonable degree of medical certainty, and the causal connection must not be contingent, speculative, or merely possible. It is the plaintiff's burden to present expert testimony that shows both that: (1) the defendant deviated from the standard of care and (2) that *that deviation* was the proximate cause of the plaintiff's injury." 2013 IL App (1st) 12144, ¶ 59 (internal quotation marks and citations omitted).

evidence that would allow a jury to find that [the treating physician] failed to inform [the plaintiff] of the radiological findings." *Id.*, ¶ 72. Thus, what the treating physician *actually* did—whether he supplied the results or not—was a fact question for the jury. *Id.*, ¶ 73.

In *Buck*, the court found that it should not give "dispositive effect" to the treating physician's testimony that he would not have done anything differently had the radiologist orally advised him of the test results because there was conflicting evidence established by *fact witnesses* as to whether the radiologist negligently caused the plaintiff's injuries by not conveying the findings at all. *Id.*, ¶ 71. Here, by contrast, Dr. Nasr's affidavit did not actually provide any *factual* testimony that would arguably sever the chain of causation.

Shicheng Guo v. Kamal, 2020 IL App (1st) 190090, on which the decision below also relied, is likewise inapplicable. There, the defendant-doctor inaccurately read a plaintiff's brain scan and failed to diagnose an underlying condition that ultimately caused a separate brain hemorrhage resulting in the plaintiff's death. *Id.*, ¶¶ 4-7. The plaintiff declined treatment at the first hospital, and then sought treatment at a different hospital, which also failed to treat the underlying condition. *Id.* Physicians at the second hospital testified that they would not have done anything differently had the condition been diagnosed in the first place. *Id.*, ¶ 21. The court held this testimony did not sever the chain of causation because plaintiff's expert opined that the

initial "failure to diagnose [plaintiff's] brain hemorrhage increased the risk of harm to [plaintiff] by depriving her of an opportunity for immediate treatment[.]" *Id.* The jury could thus consider whether the plaintiff would have received the necessary treatment *before* the third parties that the defendants claimed had broken the chain of causation were ever involved. *Shicheng Guo* thus stands in sharp contrast to this case, where Mrs. Muhammad's treating physicians were the *sole* step in the chain between the alleged failure-to-warn and Plaintiffs' claimed injuries.

Thus, even the medical malpractice cases on which the First District (erroneously) relied do not support the court's conclusion that expert testimony can create a genuine issue of material fact here. Unlike those medical malpractice cases, Mrs. Muhammad's treating physicians unequivocally testified that they would not have changed their course of treatment, and no contested material facts or additional actors affected that analysis. In short, defendants in *Buck* and *Shicheng Guo claimed* they would not have acted differently, but other factual evidence rendered that testimony irrelevant or contested. That is far afield of the facts here, which are uncontroverted and centrally relevant.

In allowing this case to proceed, and in relying on putative "expert" testimony about what a hypothetical physician would have done, the First District misapplied the subjective standard this Court (in line with a multitude of courts across the country) has imposed in favor of an objective standard

imported from a very different kind of case. A.22-23. The decision below warps the learned intermediary inquiry into a reasonable doctor test, thereby negating the unique physician-patient relationship that is the principal foundation of the learned intermediary doctrine. It alters the operative legal question, which until this case asked *what this doctor would have done*, by instead asking *what a reasonable doctor should do*. And it allows the opinion of a doctor not involved in treating the patient to overcome evidence of what doctors who actually treated the patient would have done. The result erases the line between medical malpractice and failure-to-warn.

The law is clear that a failure-to-warn claim cannot proceed against a manufacturer unless *this doctor* would have acted differently. By asking what *a reasonable doctor* would have done, the First District transforms the learned intermediary doctrine's subjective inquiry into an exercise in hypothetical reasonableness. That misapplication of well-settled causation requirements necessitates reversal.

B. Summary Judgment Is Appropriate Where Uncontested Evidence Establishes The Prescribing Physician Would Not Have Altered His Decision With A Different Warning.

Abbott is entitled to summary judgment because Plaintiffs cannot establish that Abbott's alleged failure to provide a different warning proximately caused their injuries. When the learned intermediary doctrine is properly applied, undisputed testimony from treating doctors that a different warning would not have altered their treatment breaks the chain of causation as a matter of law. *Motus v. Pfizer Inc.,* 196 F. Supp. 2d 984, 997-98 (C.D. Cal.

2001) (collecting cases), *aff'd*, 358 F.3d 659 (9th Cir. 2004); *In re Zyprexa Prods. Liab. Litig.*, 727 F. Supp. 2d 101, 114 (E.D.N.Y. 2010) (collecting cases); *Cooper*, 2013 WL 85291, at *6 ("[W]here a physician testifies that nothing . . . could cause him to change his decision to prescribe, causation is not shown."); *Vaughn*, 2020 WL 5816740, at *4. Appellate courts throughout the country affirm summary judgment in this context. *See, e.g.*, *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 816 (11th Cir. 2010); *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1021, 1024 (10th Cir. 2001); *Odom v. G.D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992).

Plaintiffs' invocation of an expert opinion from a doctor who has never treated Mrs. Muhammad about what a reasonable physician would have done, or not done, cannot create a genuine issue of material fact. If merely proffering such an expert opinion could create a disputed issue, summary judgment in failure-to-warn cases would be impossible to obtain. Plaintiffs have presented no factual evidence supporting causation, and they may not survive summary judgment simply by asserting that the jury might disbelieve the uncontroverted treating physician testimony. *See Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1371 (S.D. Fla. 2007) (summary judgment appropriate where plaintiffs presented no more than "mere conjecture and speculation" as to why jury might disbelieve treating physician's testimony); *see also* 10A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. § 2726 (4th ed. Apr. 2022) ("[S]pecific facts must be produced in order to put credibility in

issue so as to preclude summary judgment. Unsupported allegations . . . will not suffice."); *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 130 (3d Cir. 1998) (it is "axiomatic" that a nonmoving party "cannot defeat summary judgment simply by asserting that a jury might disbelieve an opponent's affidavit"). Summary judgment is accordingly appropriate.

C. No Other Grounds Support Affirmance.

In their briefing below, Plaintiffs sought to sidestep the unequivocal evidence that Mrs. Muhammad's physicians would not have changed their course of treatment with additional warnings, by relying on a "heeding presumption" (*viz.*, a presumption that an additional warning would have been read and "heeded" by the prescribing physicians) to argue that an inadequate warning is presumed to be the proximate cause of a plaintiff's injury. *See* A.91. While the First District's decision did not address the heeding presumption, Plaintiffs may seek to resurrect it here. This Court should not, for the first time, adopt a heeding presumption in this case, particularly given the court below did not address it. Doing so would enmesh Illinois in a thicket of contradictory and confusing case law.

First, a heeding presumption cannot sustain the decision below because this Court has *never* adopted such a presumption. Even the First District did not go so far as to adopt such a presumption in this case, presumably recognizing that approach has not been approved by this Court. This is not the case to question that precedent.

Second, the application of the presumption in other states is a morass, with courts split on the doctrine's scope and applicability. *See* Michael David Lichtenstein & Priya R. Masilamani, *Recent Developments in Toxic Torts and Environmental Law*, 41 Tort Trial & Ins. Prac. L.J. 755, 759 (2006) (explaining that multiple courts have taken directly conflicting positions regarding the heeding presumption's applicability to cases involving pharmaceutical products). The presumption originated in *non-pharmaceutical* failure to warn cases, and allows that a warning, if given, would have been heeded by the plaintiff to prevent his injuries. But it is not clear how that presumption would translate in the pharmaceutical context alleging an inadequate warning because of the learned intermediary doctrine. Must a court presume the physician would not have prescribed the drug at all (notwithstanding that, as here, it is permissible to use such drugs for women of child-bearing age, even though they pose serious risks)? Or does the court presume the physician simply would have incorporated the increased risk into the individualized risk-benefit analysis provided for a particular patient? If so, does that mean something more than a different verbal warning to the patient, and how does that impact causation? *Compare, e.g.*, *Eck*, 256 F.3d at 1021 (determining that "'heed' in this context means only that the learned intermediary would have incorporated the 'additional' risk into [her] decisional calculus" not that "she would have *given* the warning") *with In re NuvaRing Prods. Liab. Litig.*, 2013 WL 3716389, at *10 (E.D. Mo. July 12, 2013) (heeding presumption allows

court to presume "a warning would have altered the behavior of their prescribing physicians," *i.e.* that they would not prescribe the drug).

These questions become especially fraught in cases like this one, where a serious and complicated illness can be treated by a medicine that comes with strong warnings. The risks of that medicine may sometimes, but not always, outweigh its benefits. Those individual patient care decisions, about whether the risk is worth the benefit, turn on the medical expertise of treating physicians and their knowledge of the circumstances and history of their patient—not FDA-regulated warnings provided by the manufacturer. A heeding presumption is particularly ill-suited to pharmaceutical failure-to-warn cases.

Third, even if this Court were inclined to change the law and permit a heeding presumption, this is not the case in which to do it because any discussion of the heeding presumption would be purely hypothetical in this context. The heeding presumption (like all presumptions) is not absolute and can be rebutted—and, in this case, the presumption would be rebutted if it were applied. Here, any presumption that these physicians would have changed their conduct if given a different warning is rebutted conclusively by the physicians' undisputed testimony that such a warning would not have changed their course of treatment decisions. *See Eck*, 256 F.3d at 1021 (heeding presumption rebutted by prescriber testimony "that even if she knew [plaintiff] was taking a drug with a more frequent [risk], she would have still

prescribed"); *Stafford*, 411 F. Supp. 2d at 1320-21 (heeding presumption rebutted "by establishing that although the prescribing physician would have 'read and heeded' the warning or additional information, this would not have changed the prescribing physician's course of treatment"). A treating physician can receive and read a warning and still choose, in his medical judgment and based on the severity and circumstances of his patient's illness, not to change his prescribing decision.

Thus, even if the Court wanted to consider adopting a heeding presumption in the learned intermediary context, this uncontroverted prescriber testimony rebuts it. Where, as a here, a physician testifies that patient circumstances would have caused the physician to make the same treatment decision even if they received a greater warning about a drug, any heeding presumption is overcome. The use of such a presumption cannot as a matter of law—and does not in this case—create a contested fact question that can defeat summary judgment in light of the undisputed and unequivocal testimony of the treating physician about his treatment choices.

D. The Verdict In *Northwestern* Underscores That Reversal In This Case Is The Equitable Result.

Summary judgment is the right outcome as a legal matter in this case, *and* it is the equitable result. That is because Plaintiffs have already recovered for their injuries underlying this suit. Before bringing this failure-to-warn action, Plaintiffs filed a separate lawsuit against Mrs. Muhammad's prescribing physicians and hospital alleging, *inter alia*, medical malpractice.

Their theory in the *Northwestern* trial was that, *given Depakote's well-known risks of causing birth defects*, the prescribing physicians should have discontinued treating Mrs. Muhammad with Depakote after they had evidence she might not be properly using birth control. *See* A.60, 61. Although Plaintiffs also initially sued Abbott while the *Northwestern* case was pending, Plaintiffs strategically dismissed that suit—and even moved to have all mention of the previous failure-to-warn claim excluded from the *Northwestern* trial. A.67-68. This strategy worked, and resulted in an $18.5 million jury verdict.

Having won on that theory of medical malpractice—that the risks of Depakote were so well-known that no reasonable physician would have continued to prescribe the drug to Mrs. Muhammad—Plaintiffs now seek to recover again against the pharmaceutical manufacturer, but this time on a theory that the same physicians who acted unreasonably because the risks of Depakote were so well-known *were not sufficiently warned of Depakote's risks*. But the question posed in *Northwestern*—which the jury answered—is the correct one: Whether, in a medical malpractice case, the treating physicians acted as an objectively prudent doctor would have in light of prevailing medical standards of care.

In other words, the results in *Northwestern* speak for themselves, and make clear that this Court's decision to uphold the differences between medical negligence and failure-to-warn claims *will not* leave injured plaintiffs without recourse. It will, instead, simply require that plaintiffs who advance both

causes of action to do so in a way that meets the separate causation tests these two claims require. In short, they will have to show by objective expert testimony that a reasonable physician would have acted differently to meet their causation burden for medical negligence in a claim against a treating physician *and* that the subjective treatment decisions of the treating physician would have been different if given different drug warnings to meet their causation burden in a failure-to-warn claim against a pharmaceutical manufacturer. An expert must opine on the former, but cannot opine on the latter. Thus, properly applying the subjective standard called for by the learned intermediary doctrine in failure-to-warn cases leads to equitable results, in this case and future cases, by ensuring that blame properly lands where it should, based on the facts and circumstances of particular causes of action.

A holding to the contrary would be inequitable, as it would, on one hand, allow a plaintiff to argue (as these Plaintiffs did) that a drug's risks are so well-known that the physician had all the information necessary to prescribe the medicine safely and prevent the injury while, on the other, arguing that the same physician needed additional information in order to prescribe the medicine safely and avoid injury. A pharmaceutical defendant cannot be expected to abide by the medical malpractice standard that applies to doctors who may misuse or mis-prescribe drugs. Instead, such defendants should be held to the standard the learned intermediary doctrine articulates. This puts

the burden of evaluating the specific circumstances of a particular patient on the shoulders of her doctor and ensures that the most sensitive and important treatment decisions occur at the patient level. When a manufacturer informs a doctor of a drug's risks, the doctor must translate and apply those risks to a patient.

CONCLUSION

For these reasons, the Court should reverse the decision of the First District Appellate Court.

Dated: March 8, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Lauren J. Caisman, an attorney for Appellants Abbott Laboratories Inc. and Abbvie Inc., hereby certify that this Brief conforms to the form and length requirements of Rule 341. The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) Certificate of Compliance, the Certificate of Service, and those matters to be appended to the brief under Rule 342(a), is 8,750 words.

/s/ *Lauren J. Caisman*
Lauren J. Caisman

NOTICE OF FILING/CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of March, 2023, I electronically submitted a true and correct copy of the foregoing *Appellants' Brief* and the following *Appendix to Appellants' Brief* to the Clerk of Court using the Court's approved electronic filing service provider.

The undersigned hereby further certifies that one copy of the *Appellants' Brief* and one copy of the *Appendix to Appellants' Brief* were served via electronic mail and U.S. Mail on the 8th day of March, 2023, to the following counsel/parties of record to this appeal:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Notice of Filing/Certificate of Service are true and correct.

/s/ *Lauren J. Caisman*
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No. 128841

In the Illinois Supreme Court

CHARLES MUHAMMAD and ANGIE MUHAMMAD, as parents of C.M, a minor, and C.M., individually,	)	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-21-0478
Plaintiffs-Appellees	)	
v.	)	On Appeal from the Circuit Court of Cook County, Illinois – Law Division Case No. 2019-L-6254 Hon. Brendan A. O'Brien
ABBOTT LABORATORIES INC. and ABBVIE INC.,	)	
Defendants-Appellants	)	

APPENDIX TO APPELLANTS' BRIEF

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2022 IL App (1st) 210478

No. 1-21-0478

Filed June 23, 2022

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CHARLES MUHAMMAD AND ANGIE MUHAMMAD, as Parents of C.M., a Minor; and C.M., Individually,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 19 L 6254
ABBOTT LABORATORIES, INC.; and ABBVIE INC.,	)	Honorable Brendan A. O'Brien,
Defendants-Appellees.	)	Judge, Presiding

JUSTICE MARTIN delivered the judgment of the court, with opinion
Presiding Justice Reyes and Justice Rochford concurred in the judgment and opinion

OPINION

¶ 1 In 2006, C.M. was born with the neural tube defect spina bifida. As he grew, he exhibited severe cognitive impairment and physical abnormalities. C.M.'s birth defects have been attributed to *in utero* exposure to Depakote, an anticonvulsant drug that his mother, Angie Muhammad, was prescribed to treat her mental illness. The Muhammads sued Angie's mental health physicians and their employer, Northwestern Memorial Hospital (Northwestern), alleging medical negligence for prescribing Depakote when Angie could become pregnant (the Northwestern case). Following a

jury trial, the Muhammads obtained a judgment of $18.5 million. Subsequently, the Muhammads brought an action against Depakote's manufacturer, Abbott Laboratories, Inc., and its related entities (collectively, Abbott), alleging that Abbott failed to sufficiently warn physicians regarding Depakote's risks of causing birth defects. Abbott moved for summary judgment arguing that the Muhammads should be judicially estopped from asserting this claim since, as Abbott contended, they took an inconsistent position in the prior Northwestern case. In addition, Abbott insisted the Muhammads cannot prove that Abbott caused C.M.'s injuries since, *inter alia*, the physicians testified in depositions that greater warnings would not have affected their decisions to prescribe Depakote. The circuit court granted Abbott's summary judgment motion, finding that the Muhammads were taking a position against Abbott contrary to their previous position in the Northwestern case. Based on that finding, the court concluded that judicial estoppel precluded the Muhammads' claim and that Abbott was entitled to judgment as a matter of law. The Muhammads appeal.

¶ 2 I. BACKGROUND

¶ 3 Angie Muhammad had a history of acute psychotic episodes and was hospitalized on several occasions as a result. In December 2003, Angie began receiving treatment at Northwestern's psychiatry department, known as the Rehabilitation Clinic of the Stone Institute of Psychiatry (Rehab Clinic). Angie was hospitalized four times between January and May 2005 with acute psychotic symptoms, including auditory hallucinations and suicidal and homicidal ideation (thoughts of killing herself, husband, and two young children).

¶ 4 Dr. Christian Stepansky, a second-year psychiatry resident at the Rehab Clinic, was part of Angie's treatment team and began seeing her every Tuesday to assess her symptoms and medication regimen. Angie's psychiatric condition was considered severe, complicated, and

difficult to treat. She was diagnosed with schizoaffective and bipolar disorders. She experienced "mixed episodes" of simultaneous manic and depressive symptoms and "rapid cycling"—frequent episodes of mania or depression. These symptoms were not controlled by Angie's antipsychotic medication, and she was at risk of harming herself or others unless her mood could be stabilized. Dr. Stepansky referred Angie to Dr. Pedro Dago for evaluation, in part to assess whether a language barrier was inhibiting Angie's care. Angie's first language was Spanish, and Dr. Dago was a Spanish speaking psychiatrist. After his evaluation on May 19, 2005, Dr. Dago recommended that Angie be prescribed either lithium or Depakote[1] to stabilize her mood.

¶ 5 Dr. Stepansky, under the supervision of attending psychiatrist Dr. Marcia Brontman, decided to recommend that Angie take Depakote. He reasoned that lithium was not a good option since lithium's therapeutic dosage is near the toxic dosage, which could result in death, and Angie had a history of suicidal ideation and a prior overdose attempt. He also ruled out another drug, Tegretol, since that drug was known to counteract birth control medication, which Angie was using, and she did not want to become pregnant. In addition, Depakote was more effective than the other drugs at controlling rapid cycling and mixed episodes.

¶ 6 Dr. Stepansky knew, however, that Depakote posed a risk of birth defects if taken during pregnancy, including that a child could be born with spina bifida. The 2005 edition of the Physician's Desk Reference (PDR) included a "black box" warning stating that Depakote can produce birth defects such as spina bifida if taken during pregnancy. In addition, the PDR entry for Depakote reported that Centers for Disease Control (CDC) data showed a 1% to 2% risk of a child being born with spina bifida if taken during the first trimester of pregnancy, up to 20 times the rate in the general population. The same information appeared on the insert Abbott included in

[1]Depakote is also known as valproate or valproic acid.

Depakote's packaging. Dr. Stepansky was aware of the PDR and insert warnings, but he did not recall reviewing either while he was treating Angie.

¶ 7 On May 24, 2005, Dr. Stepansky discussed his recommendation with Angie that she take Depakote. He informed her about the risk of birth defects if she were to become pregnant while taking it and advised that she not conceive because of that risk. At the time, Angie was using birth control medication that was administered by a patch affixed to her arm. Angie had some history of noncompliance with taking medication as directed, but unlike oral medication that must be taken daily, the patch was effective for several days before needing replacement. In addition, Dr. Stepansky and the nurse who participated in Angie's weekly appointments could monitor Angie's patch compliance. Since Angie stated she did not want to become pregnant and he believed her birth control could be managed, Dr. Stepansky reasoned that the benefit of Depakote to stabilize her mood outweighed the risk.

¶ 8 At her next appointment, on May 31, Angie informed Dr. Stepansky that her menstrual period was late. He ordered an immediate test that revealed she was not pregnant. Over the next few months, Dr. Stepansky increased the Depakote dosage to reach a tolerable therapeutic level. In July, Dr. Thomas Allen replaced Dr. Brontman as the attending psychiatrist supervising Dr. Stepansky. In an appointment on October 11, 2005, Angie again stated that she had missed her menstrual period. On this occasion, Angie refused to undergo an immediate pregnancy test but agreed to take one at home and report the result. Several days later, after an appointment with her psychologist, Angie requested that Dr. Stepansky order a pregnancy test at Northwestern. The laboratory confirmed that Angie was pregnant on October 20. That same day, Dr. Stepansky contacted Angie and instructed her to stop taking Depakote. Angie experienced another psychotic

episode in December. Dr. Stepansky then prescribed lithium to stabilize her mood. Angie continued to take lithium for the remainder of her pregnancy.

¶ 9 Angie likely became pregnant in early September 2005. Her son, C.M., was born in May 2006 with spina bifida. C.M. has severe cognitive impairment, his jaw and teeth are maldeveloped, and he suffers from other malformations. A neurologist, Dr. George Siegel, has opined that these medical issues were caused by his *in utero* exposure to Depakote during the early period of embryogenesis. These conditions are permanent.

¶ 10 The Muhammads first brought an action for medical negligence against Northwestern in 2012. Dr. Allen was named as a defendant, but Dr. Stepansky was not. The complaint alleged that:

> "Depakote was well known within the medical and mental health communities as a drug that could cause serious, debilitating birth defects to a developing fetus, including the birth defect known as *Spina Bifida*, and was therefore well known within the same health care communities to be contraindicated for women who are or might become pregnant while using Depakote."

It further alleged that after Angie reported in May 2005 that she might be pregnant:

> "Rather than discontinuing the Depakote, and despite knowledge of the well documented and widely accepted dangers associated with the use of Depakote *** the dosage of Depakote was between May and September 2005 increased rather than halted ***."

¶ 11 The Muhammads filed a separate action against Abbott in August 2017, alleging that Abbott failed to provide adequate warnings of Depakote's risk of birth defects. They voluntarily dismissed the Abbott case in June 2018 and the Northwestern case proceeded to a jury trial beginning in August 2018. Before trial, the Muhammads filed a motion *in limine* to bar the Northwestern defendants from eliciting any evidence that the Muhammads had filed a separate

action against Abbott. At the hearing on the motion *in limine*, the Muhammads' counsel explained that the Abbott complaint had been filed to preserve the Muhammads' ability to pursue a remedy against Abbott within the applicable statute of limitations. He added, "if *** we win this trial, then there would be no need to take further action." He went on to argue that any mention of the Muhammads' action against Abbott would be prejudicial and was otherwise irrelevant. He pointed out that the Northwestern physicians all acknowledged that they were aware that Depakote posed a risk of birth defects and none of them claimed that they would not have prescribed Depakote if they had more information. Defense counsel indicated that the issue could be relevant for purposes of cross-examining Dr. Siegel, one of the Muhammads' experts. The trial judge tentatively granted the motion *in limine* barring mention of the action filed against Abbott, but she informed the parties that they would revisit the issue before the cross-examination of Dr. Siegel to narrowly tailor the permissible questioning.[2]

¶ 12 In opening statements, the Muhammads' lawyer told the jury that their psychiatry expert, Dr. Cheryl Wills, would testify that Depakote was a "reasonable choice" for Angie when it was originally prescribed on May 24, provided that the physicians ensured that she was using reliable birth control. However, Dr. Wills would also testify that the balance of benefits versus risks of taking Depakote shifted on May 31 when Angie reported she might be pregnant. As counsel explained, Dr. Wills believed that based on the May 31 "pregnancy scare," the physicians should have realized that they needed to take Angie off Depakote. Coupled with other indicators that Angie could not be relied on to use the birth control patch correctly, the physicians could not

[2]The record before us does not include any further discussion of the issue from the Northwestern trial or show what ultimately occurred.

sufficiently ensure she would not get pregnant. On the stand, Dr. Wills testified that the physicians should have stopped prescribing Depakote on May 31.[3]

¶ 13 According to an instruction given to the jury, the Muhammads alleged that Northwestern and Dr. Allen negligently caused C.M.'s injuries by the following:

> "(a) Failed to adequately monitor a second year resident's care and treatment of [a] complicated mentally ill patient; or
>
> (b) Failed to put into place an adequate plan to prevent Angie Muhammad from getting pregnant while taking Depakote (valproic acid); or
>
> (c) Failed to re-evaluate Angie Muhammad and her birth control plan when she reported that her menstrual period was late on May 31, 2005; or
>
> (d) Failed to stop prescribing Depakote (valproic acid) on May 31, 2005 when Angie Muhammad reported that her menstrual period was late; or
>
> (e) Failed to secure a pregnancy test on October 11, 2005 when Angie Muhammad reported that her menstrual period was late; or
>
> (f) [F]ailed [to] direct Angie Muhmmad to stop taking Depakote (valproic acid) on October 2005 when she reported that her menstrual period was late."

The jury returned an $18.5 million verdict in favor of the Muhammads.[4]

¶ 14 The Abbott case was refiled in June 2019. The Abbott complaint asserts various causes of action, including strict product liability and negligence. All the claims share the common factual allegation that Abbott failed to adequately warn about Depakote's risks of birth defects.

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[3]Abbott attached only this single question and answer from a transcript of Dr. Wills's trial testimony to its motion for summary judgment. The record here discloses nothing more about her testimony.

[4]Pursuant to a "high-low" agreement, Northwestern paid $12 million.

¶ 15 According to an affidavit from psychiatrist Dr. Suhayl Joseph Nasr, documents produced in discovery in this case reveal that Abbott was made aware in 2004 of two new data sets suggesting a 10.7% to 17% risk of birth defects associated with Depakote use in women with epilepsy. Neither Dr. Nasr's affidavit nor the related supporting documents differentiate between spina bifida and other birth defects regarding this 10% to 17% risk. Nonetheless, researchers reported to Abbott that this rate of risk was "significantly higher than the package insert." Also in 2004, a separate study indicated that 8.1% of babies born to women taking Depakote had major malformations. The researchers of that study provided Abbott with a draft abstract stating their conclusion that "[Depakote] is a potent teratogen[5] in humans and its use should be reduced to the minimum or substituted with another safer [anticonvulsant drug]." Dr. Nasr asserts that if Abbott's labeling and warnings had disclosed a 10% to 17% risk of birth defects, a reasonably careful psychiatrist adhering to the standard of care would not have prescribed Depakote for Angie on May 24, 2005, or any later date. In Dr. Nasr's opinion, the 10% to 17% risk of birth defects—compared to the 1% to 2% risk of spina bifida or unquantified risks of other defects disclosed in the insert and PDR—significantly changes the risk-benefit analysis when considering Depakote for a patient like Angie, such that the risks outweighed the benefit. Additionally, Dr. Nasr believes lithium, which only carries a small risk of correctable heart defects, was a superior alternative for Angie. Ultimately, Dr. Nasr opines that if Abbott had disclosed Depakote's greater 10% to 17% risk of birth defects, C.M. would not have been born with spina bifida and other congenital defects.

¶ 16 In a deposition taken in 2020, two years after the trial in the Northwestern case, Dr. Stepansky testified that, in 2005, he knew that Depakote posed an increased risk of spina bifida if taken when pregnant. Further, he knew that spina bifida was a serious condition that could lead to

[5]An agent or factor which causes malformation of an embryo.

cognitive impairment and other developmental abnormalities. The reported 1% to 2% risk of spina bifida was "all [he] needed to know," according to Dr. Stepansky, whether to recommend that Angie take Depakote. He further explained that the insert and PDR warning was "enough for [him] to decide not to prescribe [Depakote] to a woman of child-bearing years unless she was using reliable birth control."

¶ 17 Similarly, Dr. Allen testified in a 2020 deposition that "birth control was a very critical factor *** in approving the prescription of Depakote in 2005." Had Angie not been using reliable birth control, he would not have approved the prescription as he did when supervising Dr. Stepansky. Like Dr. Stepansky, Dr. Allen attested that the 1% to 2% risk of spina bifida was enough information to not prescribe Depakote to any woman of child-bearing age who was not using birth control. But, so long as Angie was, the benefits outweighed the risks, in his opinion. If the reported risk of birth defects had been higher, according to Dr. Allen, it would not have changed his analysis. Rather, "it all depends on whether she's on birth control or not." Since he believed Angie needed Depakote to treat her bipolar disorder and she was taking precautions to not get pregnant, he would have still prescribed it "regardless of what the percentage of risk was," even "100%."

¶ 18 In his affidavit, Dr. Nasr states that Dr. Stepansky's and Dr. Allen's statements that they would have prescribed Depakote for Angie regardless of the level of risk is contrary to the standard of care. Rather, in his opinion, the 10% to 17% risk of birth defects revealed in the 2004 studies rendered Depakote unsafe for her and, had Abbott disclosed such risk, a reasonably careful psychiatrist would not have prescribed it for her.

¶ 19 As we noted, Abbott moved for summary judgment on two separate bases. First, Abbott argued that the Muhammads' claim premised on the failure to warn about Depakote's risk of birth

defects is inconsistent with the position they took against the physicians in the Northwestern case. Second, Abbott argued that the Muhammads cannot prove Abbott's failure to warn was the proximate cause of C.M.'s injury since, *inter alia*, Drs. Stepansky and Allen testified that greater warnings would not have made a difference in their decision to prescribe Depakote for Angie. The circuit court agreed with Abbott's first argument. In a written order, the court summarized the two cases as follows:

> "In the previous *Northwestern* case, Plaintiffs contended that the treating doctor should have stopped prescribing Depakote on May 31, 2005, when he learned it was possible Mrs. Muhammad was pregnant because the doctors knew of the birth risks associated with Depakote. In this *Abbott* case, Plaintiffs argue that Mrs. Muhammad should never have been given Depakote at all because the doctors did not know of the risks."

The court found these theories inconsistent by reasoning that:

> "The jury in the *Northwestern* case presumably accepted that the doctors knew or should have known of Depakote's birth risks and returned a verdict in Plaintiffs' favor based on the doctors negligently prescribing it when they suspected she was pregnant. Plaintiffs now allege that Defendants failed to warn the doctors regarding the birth risks associated with the use of the drug. If Plaintiffs succeed here in *Abbott* and prove that Defendants failed to warn the doctors, then this would be contrary to the previous position and verdict that found the doctors failed to conform their treatment to the applicable standard of care based on their knowledge of Depakote's birth risks."

Based on its finding, the circuit court concluded that Abbott proved by clear and convincing evidence that judicial estoppel applied and granted Abbott's summary judgment motion. The court did not address Abbott's alternative argument. The Muhammads filed a timely notice of appeal.

¶ 20 II. ANALYSIS

¶ 21 A. Standard for Summary Judgment

¶ 22 Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 25. We review a circuit court's entry of summary judgment *de novo*. *Jarosz v. Buona Cos.*, 2022 IL App (1st) 210181, ¶ 29. *De novo* review means we consider the motion anew and perform the same analysis that a trial court would. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). We may affirm summary judgment where the pleadings, depositions, affidavits, and admissions on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Jarosz*, 2022 IL App (1st) 210181, ¶ 22. However, we construe the record strictly against the movant and liberally in favor of the nonmoving party, drawing all reasonable inferences in favor of the nonmovant. *Shuttlesworth v. City of Chicago*, 377 Ill. App. 3d 360, 366 (2007). Since summary judgment is a drastic measure, it should only be granted if the movant's right to judgment is clear and free from doubt. *Seymour v. Collins*, 2015 IL 118432, ¶ 42.

¶ 23 B. Principles of Judicial Estoppel

¶ 24 Judicial estoppel is an equitable doctrine that may be invoked when a litigant took a position in one judicial proceeding, benefited from that position, and then seeks to assert a contrary position in a later proceeding. *Id.* ¶ 36. The doctrine aims to "protect the integrity of the judicial process by prohibiting a party from 'deliberately changing positions' according to the exigencies of the moment." *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)). It "is intended to promote truth-seeking, while dissuading gamesmanship." *Davis v. Pace Suburban Bus Division of the Regional Transportation Authority*, 2021 IL App (1st) 200519, ¶ 27. "The core

concern is *** that a party takes factually inconsistent positions, in separate proceedings, intending that the trier of fact accept the truth of the facts alleged." *Seymour,* 2015 IL 118432, ¶ 38. The party seeking to invoke judicial estoppel must prove it by clear and convincing evidence. *Id.* ¶ 39.

¶ 25 Five prerequisites are "generally required" before a court can invoke judicial estoppel: "The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *Id.* ¶ 37.

¶ 26 Yet, even if the prerequisites are met, judicial estoppel should be considered and applied with caution to avoid impinging on the truth-seeking function of the court. *Id.* ¶ 39. It is an extraordinary measure and must be carefully confined to its anti-hoodwinking purpose. *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App. 3d 836, 850 (1994). Judicial estoppel is intended to address bad faith—playing " 'fast and loose' " with the court. *People v. Runge*, 234 Ill. 2d 68, 133 (2009) (quoting *People v. Caballero*, 206 Ill. 2d 65, 80 (2002)). A change in theory does not necessarily indicate that a party is acting in bad faith. Indeed, a change of position in response to new, previously unavailable evidence is "consistent with the court's truthfinding role" and does not trigger judicial estoppel. (Internal quotation marks omitted.) *Id.*

¶ 27 For these reasons, a court's inquiry is not complete once it finds the prerequisite factors of judicial estoppel are met. Rather, the court must next determine, in its discretion, whether judicial estoppel should be invoked " 'as fairness and justice require.' " *Davis*, 2021 IL App (1st) 200519, ¶ 73 (quoting *Yorulmazoglu v. Lake Forest Hospital*, 359 Ill. App. 3d 554, 563 (2005)). If the court finds that that party did not intend to be deceptive, or if the court believes that applying the doctrine would lead to unwarranted or unjust results, the court need not invoke it. *Id.* ¶ 29.

¶ 28 C. Are the Muhammads' Positions Inconsistent?

¶ 29 Abbott argues that the Muhammads' claims in this case are factually inconsistent with the position they took in the Northwestern case. Abbott posits that the plaintiffs "revised the relevant factual underpinnings and their causation theories in successive suits to obtain an unfair advantage." In its summary judgment motion, Abbott asserted that the "basic premise" of the Muhammads' position in the Northwestern case was that the physicians "had all the information they needed to prescribe the medicine safely, but failed to utilize that knowledge in accord with the standard of care." Abbott noted that the Muhammads' complaint against Northwestern alleged that it was "well known within the medical and mental healthcare communities" that Depakote could cause birth defects. And they alleged the physicians failed to discontinue it "despite knowledge of the well documented and widely accepted dangers associated with the use of Depakote." But, Abbott insisted, the Muhammads were now blaming Abbott for inadequate warnings about the "same risks" that they previously alleged to be widely known. In its brief before this court, Abbott avers that in the Northwestern case, the plaintiffs "argued that the substandard treating decisions of Mrs. Muhammad's physicians were the *sole* cause of her alleged injuries." (Emphasis in original.) Abbott further contends that "[t]o support their position, Plaintiffs argued *** that no additional information from Abbott would have made a difference because the defendant physicians still would have made the same prescribing decision."

¶ 30 Based on the record before us, we disagree with Abbott's characterization of the Muhammads' positions. Rather, we find that the Muhammads' positions in the separate cases are compatible. *Cf. id.* ¶ 42 (finding judicial estoppel applied when "plaintiff was taking fundamentally incompatible positions in each case"). That is, the acceptance of the facts alleged in the Northwestern case as true does not necessarily preclude the truth of the Muhammads' factual

allegations against Abbott. See *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2016 IL App (1st) 142754, ¶ 68 ("For judicial estoppel to apply, the two positions must be totally inconsistent—the truth of one must necessarily preclude the truth of the other.").

¶ 31 Courts recognize that there can be more than one proximate cause of a plaintiff's injury. *Shicheng Guo v. Kamal*, 2020 IL App (1st) 190090, ¶ 23. Any actor whose negligence proximately causes an injury in whole or in part is liable to the plaintiff. *Davis*, 2021 IL App (1st) 200519, ¶ 50.

¶ 32 Abbott's alleged failure to provide sufficient warnings about Depakote's risk of birth defects and the physicians' failure to cease prescribing Depakote to Angie once it became apparent her birth control measures were unreliable could both be found to be proximate causes of C.M.'s injuries. According to Dr. Nasr, if Abbott had disclosed the 10% to 17% risk of birth defects, which was greater than the warning information stated in the insert, physicians adhering to the standard of care would not have prescribed Depakote for Angie at any time. Dr. Nasr's opinion implies a corollary that the inadequate warning led the physicians to believe that Angie could safely take Depakote subject to reliable birth control measures. Notably, that is the standard of care that Dr. Wills appears to have testified was applicable in the Northwestern trial. The standard of care is based on information known at the time of a physician's action. *Granberry v. Carbondale Clinic, S.C.*, 285 Ill. App. 3d 54, 65 (1996) ("no physician should have his *conduct* measured by knowledge and standards not in existence at the time the conduct at issue occurred" (emphasis in original)); see also *Smith v. Silver Cross Hospital*, 339 Ill. App. 3d 67, 76-77 (2003) (finding that policies and procedures adopted after the time of treatment at issue were irrelevant to establish the applicable standard of care). The Muhammads alleged, and the Northwestern case jury necessarily accepted, that the physicians did not meet the standard of care by continuing to prescribe Depakote to Angie when they should have realized her birth control was unreliable. Their negligence was

not predicated so much on the extent of their knowledge that Depakote could cause birth defects, but on their misjudgment about Angie's ability to use effective birth control measures. The jury instruction outlining the Muhammads' negligence allegations, focused on the continuation of Depakote rather than its initial prescription, underscores this point. That the physicians had, in Abbott's words, "all they needed to know to *discontinue* Depakote" does not preclude that they lacked sufficient information to not start Angie on Depakote to begin with. (Emphasis added.)

¶ 33 Despite the physicians' negligence, Abbott's allegedly deficient warning could still be found to be a proximate cause of C.M.'s injury. A plaintiff asserting a claim based on a drug maker's failure to warn must establish that the failure to warn caused the injury. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 266 (1990). A defendant's conduct is a cause of the plaintiff's injury "only if that conduct is a material element and a substantial factor in bringing about the injury." *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). This standard is met when, "absent that conduct, the injury would not have occurred." *Id.* If a finder of fact were to accept Dr. Nasr's opinion that physicians would never have prescribed Depakote to Angie if there had been sufficient warnings, then, but for the deficient warning, the physicians' later negligence would not have occurred and C.M. would not have been injured by exposure to Depakote. "[P]roximate cause 'need not be the only, last or nearest cause; it is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes injury.' " *Garest v. Booth*, 2014 IL App (1st) 121845, ¶ 41 (quoting *Leone v. City of Chicago*, 235 Ill. App. 3d 595, 603 (1992)). "[A] tortfeasor cannot avoid responsibility merely because another person is guilty of negligence contributing to the same injury, and even though the injury would not have occurred but for the negligence of the other person." *Unger v. Eichleay Corp.*, 244 Ill. App. 3d 445, 452 (1993). This court has recognized that a prescribing physician's malpractice does not necessarily relieve a drug manufacturer from

liability for failure to provide adequate warnings of a drug's risks. *Mahr v. G.D. Searle & Co.*, 72 Ill. App. 3d 540, 566 (1979). Accordingly, the Muhammads' theories of liability against Abbott and Northwestern are compatible. The facts asserted to establish either the physicians' or the drug maker's liability do not necessarily preclude the others' liability.

¶ 34 The alleged facts discussed in *Davis* provide an analogy. There, a bus passenger sustained injuries when the bus driver braked suddenly to avoid colliding with a Lexus sedan that had pulled into the bus's path from a parking lot. *Davis*, 2021 IL App (1st) 200519, ¶ 6. The plaintiff filed an action seeking a declaratory judgment against his auto insurer on the theory that the unidentified Lexus was a " 'hit-and-run' " vehicle, thus triggering coverage under the uninsured motorist provision of plaintiff's policy (the coverage case). *Id.* ¶ 10. The circuit court ultimately agreed with the plaintiff and found he was entitled to coverage under that provision. *Id.* ¶ 14. Within the coverage case, the court found that the Lexus driver's negligence in pulling into the bus's path was a proximate cause of the plaintiff's injuries " 'because [the Lexus] caused the bus driver to take actions that then caused the plaintiff to fall.' " *Id.* ¶ 13. Separately, the plaintiff sued the bus company alleging that the bus driver was negligent for speeding and slamming on the brakes instead of gradually slowing to avoid the Lexus. *Id.* ¶¶ 17, 19. This court observed that since there can be more than one proximate cause of a plaintiff's injury, "[t]here would be nothing inconsistent *** with plaintiff claiming that the negligence of the Lexus driver was a proximate cause of his injuries *** and that the negligence of the [bus driver] was a proximate cause of his injuries." *Id.* ¶ 50. Here, by analogy, Abbott is like the Lexus driver and the physicians are like the bus driver. In both cases, it is consistent to claim that the later actor's conduct caused the injury, and such conduct would not have occurred but for the initial actor's conduct, which is also a cause of the injury.

¶ 35 Although the plaintiff in *Davis* was judicially estopped, judicial estoppel did not apply on account of the theories he asserted for each defendant's liability. The court found judicial estoppel appropriate since, after winning the coverage case, his expert witness testified in a deposition that the bus driver's negligence was the *sole* proximate cause of his injuries rather than *a* proximate cause along with the Lexus driver's negligence. *Id.* ¶ 51. Through the expert's opinion, his position "morphed" between the coverage case and the tort case against the bus company. *Id.* ¶ 53. Nothing similar has occurred here. Contrary to Abbott's assertion, we do not find that the Muhammads, through their experts or otherwise, have claimed that either the physicians or Abbott is solely to blame for C.M.'s injuries. As we have explained, Dr. Wills's opinion that the physicians caused C.M.'s injury by keeping Angie on Depakote when the unreliability of her birth control was apparent does not preclude Dr. Nasr's opinion that Abbott's failure to warn caused C.M.'s injuries since a greater warning would have led the physicians to not prescribe her Depakote at all.

¶ 36 At first glance, Dr. Wills's testimony that Depakote was initially a "reasonable choice" for Angie appears to contradict Dr. Nasr's opinion that Angie should have never been prescribed Depakote at all. However, we are not persuaded that this apparent inconsistency compels us to invoke judicial estoppel. First, we do not know whether Dr. Wills testified that it was reasonable to start Angie on Depakote. Abbott's only supporting evidence is counsel's opening statement indicating how she would testify, not her actual testimony. It is not unheard of for testimony to fail to match what was promised in an opening statement. Apart from that, Dr. Nasr indicated that his opinion was based on information obtained in discovery in the Abbott case. The record does not establish that Dr. Wills was privy to the same information. We cannot presume that Dr. Wills considered the same information or that her "reasonable choice" testimony, if she so testified, necessarily implied that she believed the additional information Dr. Nasr discusses has no effect

on prescribing decisions. Thus, Abbott has not shown by clear and convincing evidence that the experts based their opinions on the "same risks." More significant, the initial prescription of Depakote does not appear to have been the focus of Dr. Wills's testimony. She opined that the physicians failed to meet the standard of care by continuing Angie on Depakote when her birth control was unreliable. The record before us shows that Dr. Wills's testimony merely concerned the physicians' conduct based on what was known about Depakote at that time. Dr. Nasr's opinion regards other, undisclosed information about Depakote. The experts simply address different matters.

¶ 37 In addition, even if we were to consider Dr. Wills's and Dr. Nasr's opinions to be contradictory, we cannot foreclose the possibility that the difference reflects the discovery of new evidence justifying a change in theory. A change of position in response to new, previously unavailable evidence is "consistent with the court's truthfinding role" and does not trigger judicial estoppel. (Internal quotation marks omitted.) *Runge*, 234 Ill. 2d at 133. As mentioned, additional undisclosed evidence about Depakote's risk of birth defects came to light during discovery in this case, and the record does not demonstrate the experts were considering the same information.

¶ 38 Further, we reject Abbott's contention that the Muhammads' position in the Northwestern case included that "no additional information from Abbott would have made a difference because the defendant physicians still would have made the same prescribing decision." For that proposition, Abbott relies on statements the Muhammads' counsel made to support their motion *in limine* to bar mention of their separate suit against Abbott. Such statements, of course, were made to the judge, not the jury. While any part of the trial record may provide some indicia of a party's position, judicial estoppel is ultimately concerned with factual allegations that a party intends for the finder of fact to accept as true. *Seymour*, 2015 IL 118432, ¶ 38. By themselves,

arguments advanced to the judge in a motion *in limine* before a jury trial are not factual allegations intended for the finder of fact—the jury—to accept as true. Abbott has not directed us to any part of the record in the Northwestern case apart from the motion *in limine* hearing to demonstrate that the Muhammads presented arguments or evidence to the jury that the physicians "still would have made the same prescribing decision." In addition, the Muhammads' counsel did not actually state nor imply such a thing. Rather, he argued that evidence about the separate suit was prejudicial and irrelevant since none of the *physicians* were claiming that they would have acted differently had Abbott provided more information. In other words, he was pointing out that the physicians were not asserting, as a defense to their alleged negligence, that Abbott failed to adequately warn them. Thus, the statements do not signify anything about what the *Muhammads* were claiming. "The physicians are *not* saying so" does not equate to "we *are* saying so."

¶ 39 Similarly, the Muhammads' counsel's statement "if *** we win this trial, then there would be no need to take further action" does not compel us to invoke judicial estoppel. This statement, too, was made to the judge in argument on the motion *in limine* and not to the jury to accept as true. Also, it is a legal opinion and not a statement of fact. Judicial estoppel applies to statements of fact, not to legal opinions or conclusions. *Pepper Construction Co.*, 2016 IL App (1st) 142754, ¶ 66. Like the other statements made by counsel, it may provide some indicia of the Muhammads' position, but Abbott has not provided clear and convincing evidence that the Muhammads alleged facts in the trial of the Northwestern case that were inconsistent with their position in this case such that the judgment in their favor bars "further action" against Abbott.

¶ 40 In sum, the Muhammads did not simply flip-flop from "the doctors were sufficiently warned" to "the doctors were not sufficiently warned." The Northwestern case claimed the physicians' negligence regarding Angie's birth control while on Depakote was a cause of C.M.'s

injuries, while this case claims that Abbott's insufficient warning of Depakote's risks of birth defects was another cause of C.M.'s injuries. The Muhammads have not alleged expressly or implicitly in either action that any defendant was solely responsible for C.M.'s injuries, and their experts' opinions can be reconciled as consistent with one another. We find that Abbott has failed to show by clear and convincing evidence that the Muhammads are taking a position in this case inconsistent with their position in the Northwestern case. Accordingly, we decline to invoke judicial estoppel to bar this action.

¶ 41 D. Proximate Cause

¶ 42 Separate from its argument based on judicial estoppel, Abbott contends that the Muhammads cannot prove Abbott's alleged failure to warn is a proximate cause of C.M.'s injury and, therefore, Abbott is entitled to judgment as a matter of law.

¶ 43 In part, Abbott relies on the "learned intermediary" doctrine, which holds that "[t]he doctor, functioning as a learned intermediary between the prescription drug manufacturer and the patient, decides which available drug best fits the patient's needs and chooses which facts from the various warnings should be conveyed to the patient." *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 519 (1987). Since physicians function as learned intermediaries, "there is no duty on the part of manufacturers of prescription drugs to directly warn patients." *Id.* Rather, "manufacturers of prescription drugs have a duty to warn prescribing physicians of the drugs' known dangerous propensities." *Id.* at 517. Adequate warnings of a drug's risks and side effects shield the manufacturer from liability if a patient suffers from those effects while taking the drug. *Sellers v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 881 F. Supp. 2d 992, 1005 (S.D. Ill. 2012) (citing *Kirk*, 117 Ill. 2d 507). At the same time, "there is no duty to warn of a risk that is already known by those to be warned." *Proctor v. Davis*, 291 Ill. App. 3d 265, 277 (1997). So, "a drug

manufacturer need not provide a warning of risks known to the medical community." *Id.* But, " '[d]octors who have not been *sufficiently* warned of the harmful effects of a drug cannot be considered "learned intermediaries." ' " (Emphasis in original.) *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 432 (2002) (quoting *Proctor*, 291 Ill. App. 3d at 283).

¶ 44 Thus, to establish a drug manufacturer's liability, a plaintiff must show the drug manufacturer's warning was inadequate and the risk was not widely known in the medical community. *Sellers*, 881 F. Supp. 2d at 1006 (citing *Hansen*, 198 Ill. 2d at 432, *Proctor*, 291 Ill. App. 3d at 280, and *Tongate v. Wyeth Laboratories*, 220 Ill. App. 3d 952, 963 (1991)). The adequacy of warnings is generally a question of fact. *Proctor*, 291 Ill. App. 3d at 283. Expert testimony is required to establish that a warning is inadequate unless a lay person could readily understand the insufficiency of the warning. *Northern Trust Co. v. Upjohn Co.*, 213 Ill. App. 3d 390, 399 (1991).

¶ 45 Abbott argues that the Muhammads cannot show that its warning was inadequate or that Depakote's risks of birth defects were not widely known in the medical community, contending that they have not produced evidence to support either proposition. Moreover, Abbott contends that the record establishes the opposite since the physicians testified that they were aware that Depakote could cause birth defects and such risks were stated in the package insert and PDR. We disagree. Though the record demonstrates that in 2005 the insert and PDR reported a 1% to 2% risk of spina bifida and noted unquantified risks of other birth defects, Dr. Nasr's affidavit and referenced documentation reveal that Abbott had been made aware of risks "significantly higher than the package insert" in 2004. Dr. Stepansky and Dr. Allen testified that they were aware of the insert and PDR warning information. Neither physician stated that he was aware of the higher risks that Dr. Nasr's affidavit references. Furthermore, Dr. Nasr attests that this information makes a

difference: it changes the benefit versus risk analysis for doctors considering Depakote for a woman of childbearing age. For Angie, he opines that physicians adhering to the standard of care would not have prescribed Depakote at all if the higher risks had been disclosed in the warnings. The affidavit and accompanying documents also indicate that Abbott made researchers change their abstract title and conclusion to sound less alarming. Thus, Dr. Nasr's affidavit necessarily implies that the warning was inadequate due to a consequential difference in the risks Abbott was aware of and the risks Abbott disclosed. His affidavit further implies that the greater risks were not widely known within the medical community. Accordingly, we find that a genuine question of fact exists on these issues.

¶ 46 Next, Abbott argues that the Muhammads cannot prove its alleged failure to warn was a proximate cause of C.M.'s injuries since Drs. Stepansky and Allen both testified that they would not have acted differently if they had been informed that Depakote posed a greater risk of birth defects. Illinois courts have reasoned that a physician's testimony that " 'I would not have done anything differently' [if I had been provided additional information]" should not be given dispositive weight when, as in this case, the opposing party presents conflicting expert testimony that such conduct would not conform to the standard of care. See *Buck v. Charletta*, 2013 IL App (1st) 122144, ¶¶ 69, 71; *Shicheng Guo*, 2020 IL App (1st) 190090, ¶¶ 33-34. The resolution of the conflict in testimony "involves factual findings and credibility determinations that should be left to the jury." *Shicheng Guo*, 2020 IL App (1st) 190090, ¶ 34.

¶ 47 Abbott argues that *Buck* and *Shicheng Guo* are inapposite since those were medical malpractice cases, and this case concerns a drug manufacturer's alleged failure to warn. While that distinction is accurate, it makes no difference. Just as in *Buck* and *Shicheng Guo*, the physicians' testimony and an expert's opinion differ on a material issue. Whether the physicians would have

prescribed Depakote if Abbott had disclosed risks "significantly higher than the package insert" bears directly on whether Abbott's alleged failure to warn was a proximate cause of C.M.'s injuries. To prevail, the Muhammads must establish that greater warnings would have prevented C.M.'s injuries; that is, whether greater warnings would have led the physicians to make different prescribing decisions such that C.M. would not have been exposed to Depakote. See *Northern Trust Co.*, 213 Ill. App. 3d at 401; *Broussard v. Houdaille Industries, Inc.*, 183 Ill. App. 3d 739, 744 (1989). Dr. Nasr's affidavit and the depositions of Drs. Stepansky and Allen present conflicting evidence on this question. A trial is the proper mechanism for resolution.

¶ 48 III. CONCLUSION

¶ 49 For these reasons, we find that judicial estoppel does not apply, genuine issues of material fact exist as to proximate cause, and Abbott is not entitled to judgment as a matter of law. Accordingly, we reverse the judgment of the circuit court granting Abbott summary judgment and remand for further proceedings.

¶ 50 Reversed and remanded.

No. 1-21-0478

2022 IL App (1st) 210478

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 19-L-6254; the Hon. Brendan A. O'Brien, Judge, presiding.
Attorneys for Appellant:	Milo W. Lundblad, of Brustin & Lundblad, Ltd., of Chicago, for appellants.
Attorneys for Appellee:	Lauren J. Caisman, of Bryan Cave Leighton Paisner LLP, of Chicago, and Dan H. Ball and Stefani L. Wittenauer, of Bryan Cave Leighton Paisner LLP, of St. Louis, Missouri, for appellees.

EXHIBIT 1

Charles Muhammad, et al.
vs.
Abbott Laboratories, Inc., et al.

No. 2019 L 6254

Christian Stepansky, M.D.

11/12/2020

TRANSCRIPT AND WORD INDEX

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHARLES MUHAMMAD and ANGIE MUHAMMAD, as parents of C.M., a Minor, and C.M., Individually,

Plaintiffs,

vs. No. 2019 L 6254

ABBOTT LABORATORIES INC. and ABBVIE INC.,

Defendants.

The discovery deposition of CHRISTIAN STEPANSKY, M.D., called by Defendants for examination, taken pursuant to Notice, the provisions of the Illinois Code of Civil Procedure, and the Rules of the Supreme Court of the State of Illinois, taken before Mary Ann Casale, Certified Shorthand Reporter, Illinois License No. 084-002668, at 70 West Madison Street, Suite 4000, Chicago, Illinois, on November 12, 2020, at 1:15 p.m.

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I N D E X

E X H I B I T S

MR. BALL: We'll swear the witness and begin.

(Witness sworn.)

CHRISTIAN STEPANSKY, M.D.,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BALL:

Q. Would you tell us your name, please.

A. Christian Stepansky.

Q. And, Dr. Stepansky, you understand that we're here today to ask you some questions about your treatment and decisions with respect to Angie Muhammad?

A. Yes.

Q. And you have previously given testimony in the case involving Northwestern?

A. Yes.

Q. And you understand that that case is over with and there's now a case involving Abbott, the manufacturer of Depakote; and we, me and my colleague here, are attorneys for Abbott? You understand that?

A. Yes.

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A. Yes.
Q. And did that go into your risk benefit decision about what medication to prescribe?
A. Yes.
Q. And the fact that Depakote had greater risks than -- for birth defects than lithium and Tegretol, that also went into your decision process, right?
A. Yes.
Q. So if Angie Muhammad had said she intended to get pregnant or that she wasn't sure she could take appropriate steps to avoid pregnancy, you would not have prescribed Depakote?
A. Correct.
Q. So the only reason you prescribed Depakote was Angie Muhammad's assurance that she told you she didn't want to become pregnant and that she would take reliable steps not to become pregnant?
A. And had already been doing so, yes.
Q. And had already been doing so.
So if you had any concerns that Angie Muhammad would not take steps to avoid pregnancy, you would not have prescribed Depakote, true?

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A. Correct.
Q. And that's because of the risk of birth defects that you knew about back in 2005?
A. Correct.
Q. Okay. And if the risks of birth defects had been even higher than what we've seen in the Dago paper, for example, let's say the manufacturer had said the risk of birth defects was 10 percent or 20 percent or 30 percent.
Your decision making process still would have been the same, true?
MR. LUNDBLAD: Objection; foundation, speculation.
BY MR. BALL:
Q. The way I'm understanding, Dr. Stepansky, this was kind of a black-and-white decision process for you.
If Angie Muhammad was taking steps -- did not want to become pregnant and was taking steps not to become pregnant, that you were able to verify, then you were -- then you would prescribe Depakote, true?
A. Correct.
Q. If on the other hand she was either

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expressing uncertainty about whether she wanted to become pregnant or there was some uncertainty about whether she could take appropriate steps or whether you were witnessing that she wasn't taking appropriate steps, then you would not have prescribed Depakote?
A. Correct.
Q. So the whole decision-making process on whether to prescribe Depakote or not relied totally upon her use of contraceptives?
A. Correct.
Q. Okay. So whether the risk of Depakote was higher or different than what you knew from your own bank of knowledge back in 2005, that was not important to you in your decision-making process so long as she was using birth control?
A. Correct.
MR. LUNDBLAD: I object; lack of foundation, speculation.
BY MR. BALL:
Q. So if the manufacturer of Depakote had told you, for example, that there was an overall birth defect risk of 10 percent or more and that there was -- on top of that there was a risk of

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neurodevelopmental delay of 20 percent or more, if you had been told that back in 2005 by the manufacturer, you still would not have changed your prescribing recommendation because to you the key issue was whether she was using birth control or not, true?
MR. LUNDBLAD: Same objection; speculation, lack of foundation.
THE WITNESS: Correct.
BY MR. BALL:
Q. And you can't point to anything -- well, strike that.
Sitting here today, you are comfortable that you made the correct prescribing decision as of -- the circumstances as you understood them back in 2005, true?
A. Yes.
Q. And there's nothing that you can point to that -- that the manufacturer Abbott could have told you that would have changed that decision so far as you know, true?
MR. LUNDBLAD: Same objection; foundation, speculation.
THE WITNESS: Could you re-ask the

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question?
BY MR. BALL:
Q. Yeah.
You can't point to any information that Abbott could have given you or should have given you back in 2005 that would have changed your decision? You can't point to anything specific?
A. No.
Q. True?
MR. LUNDBLAD: Same objection; foundation, speculation.
BY MR. BALL:
Q. What I said is true?
A. True.
Q. Now, I want to talk about your interactions -- I want to talk about your interactions with Angie Muhammad's son, okay?
A. Yes.
Q. So we already talked about what you knew from your training and from your conversations and communications with Dr. Dago and Dr. Brontman about the decision-making process about what medication was best.
We've talk about the risk/benefit

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analysis, et cetera, right?
A. Right.
Q. So I assume you would have done that whole mental process of risk/benefit analysis kind of before walking into the room and talking to Angie Muhammad?
A. Right.
Q. And did you offer alternatives to Angie Muhammad?
MR. LUNDBLAD: Objection; foundation.
MR. BALL: All right. All right. Calm down. Let me reask the question.
BY MR. BALL:
Q. When it came time -- Let me back up.
Did there come a time when you prescribed Depakote for Angie Muhammad?
A. Yes.
Q. And that was with Dr. Brontman's approval?
A. Yes.
Q. And later it was with -- and you actually continued the prescription of Depakote on into the fall of 2005?
A. Yes.

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Q. And that was, first of all, approved by Dr. Brontman and later approved by Dr. Allen?
A. Yes.
MR. LUNDBLAD: Objection; foundation.
MR. BALL: I don't understand that objection.
I will just tell you that I do not believe a foundation objection without some type of explanation preserves anything, so -- because I don't have an opportunity to remedy the situation.
So what is the nature of that objection?
MR. LUNDBLAD: Well, your objection is -- or your comment is usually the opposite. Usually people say no speaking objections.
But my objection is you've not asked Dr. -- this Dr. Stepansky whether or not he recalls or had any conversations with Dr. Allen, so you're assuming in your question --
MR. BALL: Okay.
MR. LUNDBLAD: -- that discussions

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occurred.
MR. BALL: That's fair. I'll clear that up.
BY MR. BALL:
Q. Dr. Allen became the attending that you reported to as of July 1 of '05, right?
A. Yes.
Q. Did Dr. -- did you have discussions with Dr. Allen after July 1 of '05 about Angie Muhammad?
A. Yes.
Q. Did you discuss with him whether Depakote was the correct medication for her during that time?
A. Yes.
Q. And did he approve of the continued use of Depakote?
A. Yes.
Q. Okay. Now, getting back to where I was, you did recommend and prescribe Depakote for Angie Muhammad during that 2005 time period that we've talked about?
A. Yes.
Q. Did you have discussions with her about Depakote?

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A. Yes.
Q. Okay. Would you please tell me about those discussions, and I'd like to start with the time when you first began prescribing Depakote for her in the May time period of 2005, okay?
MR. LUNDBLAD: I have another objection. Again, it's foundation.
You've not established that this witness has any recollection of his conversations and what he said to Mrs. Muhammad.
MR. BALL: Okay. So I think that the response I would have to that is if he doesn't remember, he can say that. But I don't have to ask that in every question to establish foundation. That's my position, but I'll go ahead and ask.
BY MR. BALL:
Q. Do you remember -- first of all, do you remember Angie Muhammad?
A. Yes.
Q. Okay. This was a significant patient for you, true?
A. Yes, yes.

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Q. And do you remember talking to her about Depakote when you began prescribing it in May of 2005?
A. Yes.
Q. Okay. Would you please tell me what you talked to her about?
A. I laid out the risk/benefits like we described earlier, the risks if she were to get pregnant, the benefits to her helping her particular mental disorder.
Q. Would you tell me what you told her about -- first of all, about the benefits of Depakote, how you thought it would help her?
A. Are you looking for exact wordage?
Q. No.
I'm asking you for your best recollection of what you conveyed to her about the benefits back in May of 2004.
A. That this medication would likely help prevent the mood swings, would help her stay out of the hospital, and help her not end up having dangerous consequences as a result of suicidal or homicidal ideation.
Q. And, in fact -- just moving ahead, in

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fact, during the entire time that she was on Depakote from that May of '05 until the fall of '05, did, in fact, she stay out of the hospital?
A. Yes.
Q. Did, in fact, her mood swings improve?
A. Yes.
Q. It did, in fact -- were there any other episodes of homicidal or suicidal ideation during that time?
A. No.
Q. And there had been multiple occasions of those in the earlier months of 2005?
A. Correct.
Q. So you explained to her that, about what the benefit would be?
A. Correct.
Q. Now, would you explain to me again -- I'm not expecting you to know word for word.
But, to the best you can, would you explain to me what message you conveyed to Angie Muhammad in May of 2005 about the risks?
A. That this medication would be dangerous in pregnancy for a baby, that it has significant risks of birth defects.

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Q. Did you say anything about what kind of birth defects?
A. I don't have an independent recollection of how specific. With someone like Ms. Muhammad, I would want to keep it as simple and stark as I could.
Q. Okay. Yeah, I was going to get -- Is it your -- Was it your medical judgment about what to say -- well, with any patient, is it your medical judgment what to say to them about the risk of a medication?
A. Yes.
Q. Okay. And you have to put it in lay terms so that they can understand, right?
A. Correct.
Q. And you also have -- you don't want to scare somebody from taking a medication that would be beneficial to them?
A. Correct.
Q. Okay. So you have to use your medical judgment about exactly how to express the risks to them?
A. Correct.
Q. And I think you just said that you told

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, MARY ANN CASALE, a Notary Public within and for the County of Cook and State of Illinois and a Certified Shorthand Reporter of said State, do hereby certify that heretofore, to-wit:

On November 12, 2020, personally appeared before me CHRISTIAN STEPANSKY, M.D., a witness in a case now pending and undetermined in the In the Circuit Court of Cook County, Illinois, wherein Charles Muhammad, et al., are the Plaintiffs and Abbott Laboratories, Inc., et al., are the Defendants.

I further certify that the witness was first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the testimony then given by the said witness was reported stenographically by me in the presence of said witness, was thereafter converted to the written English word via computer-aided transcription, and the foregoing is a true and complete transcript of the testimony so given by said witness as aforesaid; that the signature of the witness to the foregoing

Page 118

deposition was waived.

I further certify that the taking of this deposition was pursuant to Notice and that there were present at the taking of said deposition the appearances as hereinbefore noted. I further certify that I am not a relative or employee or attorney or counsel, nor a relative or employee of such attorney or counsel for any of the parties hereto, nor interested directly or indirectly in the outcome of this action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal this 3rd day of December, 2020.

MARY ANN CASALE, CSR, RDR, CLVS, CMRS
Illinois C.S.R. License No. 084-002668

EXHIBIT 2

Charles Muhammad, et al.
vs.
Abbott Laboratories, Inc., et al.

No. 2019 L 6254

Thomas W. Allen, M.D.

10/14/2020

TRANSCRIPT AND WORD INDEX

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHARLES MUHAMMAD and ANGIE MUHAMMAD, as parents C.M., a Minor, and C.M., Individually,

Plaintiffs,

vs. No. 2019 L 6254

ABBOTT LABORATORIES INC. and ABBVIE INC.,

Defendants.

The discovery deposition of THOMAS W. ALLEN, M.D., called by Defendants for examination, taken pursuant to Notice, the provisions of the Illinois Code of Civil Procedure, and the Rules of the Supreme Court of the State of Illinois, taken before Mary Ann Casale, Certified Shorthand Reporter, Illinois License No. 084-002668, at 70 West Madison Street, Suite 4000, Chicago, Illinois, on October 14, 2020, at 1:15 p.m.

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I N D E X

E X H I B I T S

(Witness sworn.)

THOMAS W. ALLEN, M.D.,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BALL:

Q. Would you tell us your name, please.

A. My name is Tom Allen.

Q. And you're a medical doctor?

A. Yes.

Q. And, Dr. Allen, we've been introduced before the deposition. I'm a lawyer for Abbott, who is a defendant in this case, okay?

A. Okay.

Q. And I'm going -- you have previously given testimony concerning issues related to the treatment of Angie Muhammad, correct?

A. Correct.

Q. And you've had an opportunity to review that testimony before your deposition here today?

A. Yes, I did.

Q. And you also reviewed, I assume, some medical records about your involvement or the hospitals involved in her treatment?

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that have to be put into the equation when you're determining risks and benefits?
MS. SOCOL: Objection; vague.
MR. BALL: Same --
MR. LUNDBLAD: Mrs. Socol, I'm not sure what part you play in this at this point, so I'm not sure it's appropriate for you to object.
MR. BALL: Well, I was -- I was cut off by Ms. Socol, so I will object to the vagueness of the question, the form of the question, and the lack of specificity.
MR. LUNDBLAD: All right.
MR. BALL: And it's also repetitive based on what he's already said earlier in the deposition.
BY MR. LUNDBLAD:
Q. Would you agree that in providing a patient with information on making a decision on what medication to take that the patient has to be told about all potential risks or significant risks?
MR. BALL: Object to the form about all and significant, what that means.

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Object to the form of that.

BY MR. LUNDBLAD:
Q. Well, let me make it more specific.
In prescribing Depakote to a patient of child-bearing age, would it be necessary to tell the patient that -- in addition to spina bifida, that there is a risk of limb deformities, facial deformities, and cognitive delay that could occur if the patient becomes pregnant?
MR. BALL: Object to the form.
THE WITNESS: (No response.)
MR. BALL: I objected to form.
You can go ahead and answer to the best of your ability, if you're able to.
THE WITNESS: I'm sorry. Can you repeat that. I just stopped when I heard an objection.
MR. LUNDBLAD: Ms. Reporter, can you read it back for me, please.
(Record read as requested.)
MR. LUNDBLAD: Not that question. The question specific to Depakote. I will see if I can repeat it.

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BY MR. LUNDBLAD:
Q. My question is this: Doctor, you've told us that in 2005, you knew that there was an association between limb defects, facial defects, and babies born to mothers taking Depakote.
When outlining the risks and benefits to the patient, is that information something that needs to be told to the patient?
MR. BALL: Same objection.
THE WITNESS: I would have said there's an elevated risk of congenital abnormalities.
BY MR. LUNDBLAD:
Q. Okay. Now, if, for example, a drug was known to have 100 percent frequency in causing a birth defect, if the -- if the woman were taking it and got pregnant, would you prescribe that drug?
MR. BALL: Object to the form; foundation.
MS. SOCOL: Would you read that question back, please.
(Record read as requested.)
THE WITNESS: Are you talking specifically in terms of Angie?

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BY MR. LUNDBLAD:
Q. All right. We can make it that.
If you knew that there was 100 percent risk that a drug you were going to prescribe to treat Angie would cause a birth defect, a serious birth defect, if she became pregnant would that then lead you to conclude that the -- whatever benefit you might have gotten would be outweighed by the risk?
A. If she definitely needed the medication -- and I believe Angie did -- regardless of what the percentage of the risk was, the fact that she was taking precautions not to get pregnant, I would have still prescribed it.
Q. Okay. Now, you mentioned that -- well, strike that.
Counsel for defendant had proposed using an excerpt from the PDR as an exhibit. I, also, was intending to do the same, but defendant's copy is a little more legible.
MR. LUNDBLAD: Can you provide that to the witness, Mr. Ball?
MR. BALL: Yeah. For the record, it's a hell of a lot more legible, so --

her and you would not have given that to her as an option?

A. Exactly.

Q. So she wouldn't have had a decision to make in July, August, September of 2005 because you would not have recommended lithium or Tegretol because you knew she was on birth control and you knew Depakote was a better medication for her.

True?

A. That's correct.

MR. BALL: That's all the questions, I have, again.

MR. LUNDBLAD: All right. We're finished as far as I'm concerned. I guess we're concerned.

THE STENOGRAPHER: Signature?

MR. BALL: You can waive. It's up to you.

THE WITNESS: I don't need to read it.

MR. BALL: He's going to waive signature, Milo.

MR. LUNDBLAD: Okay. That's fine.

FURTHER DEPONENT SAITH NAUGHT.

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, MARY ANN CASALE, a Notary Public within and for the County of Cook and State of Illinois and a Certified Shorthand Reporter of said State, do hereby certify that heretofore, to-wit:

On October 14, 2020, personally appeared before me THOMAS W. ALLEN, M.D., a witness in a case now pending and undetermined in the In the Circuit Court of Cook County, Illinois, wherein Charles Muhammad, et al., are the Plaintiffs and Abbott Laboratories, Inc., et al., are the Defendants.

I further certify that the witness was first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the testimony then given by the said witness was reported stenographically by me in the presence of said witness, was thereafter converted to the written English word via computer-aided transcription, and the foregoing is a true and complete transcript of the testimony so given by said witness as aforesaid; that the

signature of the witness to the foregoing deposition was waived.

I further certify that the taking of this deposition was pursuant to Notice and that there were present at the taking of said deposition the appearances as hereinbefore noted. I further certify that I am not a relative or employee or attorney or counsel, nor a relative or employee of such attorney or counsel for any of the parties hereto, nor interested directly or indirectly in the outcome of this action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal this 29th day of October, 2020.

MARY ANN CASALE, CSR, RDR, CLVS, CMRS
Illinois C.S.R. License No. 084-002668

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHARLES MUHAMMAD and ANGIE MUHAMMAD, As Parents of C[redacted] M[redacted], a minor, and [redacted] Individually,	)	
Plaintiffs,	)	
	)	No. 12 L 12174
vs.	)	
NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER, DANIEL YOHANNA, M.D., and THOMAS W. ALLEN, M.D.,	)	
Defendants.	)	

FIRST AMENDED COMPLAINT AT LAW

Plaintiffs, [redacted] Individually and CHARLES and ANGIE MUHAMMAD, as Parents and Next Friends of their son, C[redacted] M[redacted], a minor, by their attorneys, BRUSTIN& LUNDBLAD, LTD., complain of the Defendants, NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER (NMHMC), DANIEL YOHANNA, M.D., and THOMAS W. ALLEN, M.D., as follows:

COUNT I

[redacted] A MINOR – PROFESSIONAL NEGLIGENCE AGAINST NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER UNDER *RESPONDEAT SUPERIOR* – ACTUAL OR APPARENT AGENCY

1. At all times relevant hereto, Defendant, NMHMC, held itself out as and was a business engaged in providing medical services to the public within the City of Chicago, County of Cook, State of Illinois, by employing various nurses, mental health care professionals, residents, interns, externs, medical students and technicians.

2. Between May 2005 and September 2005, and at all times relevant hereto, ANGIE MUHAMMAD, the biological mother of Plaintiff, [redacted], a minor, was under the care of mental health care professionals CHRISTIAN STEPANKSY, M.D.

(STEPANSKY), DANIEL YOHANNA, M.D (YOHANNA) and THOMAS ALLEN, M.D. (ALLEN), at NMHMC for treatment of long-standing mental illness.

3. At all times relevant hereto, Defendant, NMHMC, accepted ANGIE MUHAMMAD as a mental health patient for care and treatment which was provided by, among others, NMHMC employee, agent and/or servant STEPANKSY, who was a resident at the time, and who in May 2005 prescribed a drug known as Depakote for ANGIE MUHAMMAD as part of her treatment of ANGIE MUHAMMAD'S unstable mental condition.

4. At all times relevant hereto, Depakote was well known within medical and mental health care communities as a drug that could cause serious, debilitating birth defects to a developing fetus, including a birth defect known as *Spina Bifida*, and was therefore well known within the same health care communities to be contraindicated for women who are or might become pregnant while using Depakote.

5. In late May 2005, and at various times in the months prior thereto, ANGIE MUHAMMAD reported to her various health care providers at NMHMC, including STEPANKSY, YOHANNA and/or ALLEN, that she might be pregnant. Rather than discontinuing the Depakote, and despite knowledge of well documented and widely accepted dangers associated with the use of Depakote by mental health patients such as ANGIE MUHAMMAD, the dosage of Depakote was between May and September 2005 increased rather than halted by STEPANKSY, YOHANNA and/or ALLEN.

6. At all relevant times herein, the Defendant, NMHMC, through its agents, employees, agents and/or servants, including STEPANKSY, YOHANNA and/or ALLEN, had a duty to exercise due care and caution in the examination, diagnosis, care and treatment of ANGIE MUHAMMAD such that her as yet unborn child, [redacted] a minor, would not suffer in-utero injury due to her Depakote usage, as prescribed by STEPANKSY, YOHANNA and/or ALLEN, during her pregnancy with him.

7. Notwithstanding its duty to exercise due care in connection with the diagnosis, care and treatment of ANGIE MUHAMMAD, NMHMC, through its agents, employees and/or servants,

including but not limited to STEPANKSY, YOHANNA and/or ALLEN, was negligent in one or more the following respects:

(a) Improperly prescribed Depakote to ANGIE MUHAMMAD in May 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote DR. STEPANKSY prescribed for her;

(b) Improperly increased ANGIE MUHAMMAD'S Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote STEPANSKY prescribed for her.

8. As a direct and proximate result of one or more of the foregoing negligent acts and/or omissions of the Defendant, NMHMC, by and through its agents, employees and/or servants, including, but not limited to STEPANKSY, YOHANNA and/or ALLEN, ANGIE MUHAMMAD gave birth to a son, [redacted] on May 18, 2006 with hydrocephalus, *Spina Bifida* and other serious and permanently debilitating abnormalities. Further, as a result of the foregoing negligent acts, the minor Plaintiff, [redacted], will require future care and treatment, has suffered severe personal injury, permanent disability, pain and suffering, emotional distress and has incurred substantial medical bills that he is reasonably expected to incur well into the future.

WHEREFORE, Plaintiffs, CHARLES and ANGIE MUHAMMAD, as Parents and Next

Friends of their son, [redacted] a minor, demand judgment against the Defendant, NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER, in an amount in excess of $50,000.00, together with any other relief deemed just and proper, including but not limited to the costs of this suit.

COUNT II

[redacted] A MINOR -- PROFESSIONAL NEGLIGENCE AGAINST CHRISTIAN STEPANSKY, M.D., DANIEL YOHANNA, M.D. and THOMAS ALLEN, M.D

1. At all times relevant hereto, Defendants, STEPANSKY, YOHANNA and ALLEN (PHYSICIAN DEFENDANTS), were duly licensed medical doctors and mental health care professionals practicing within the City of Chicago, County of Cook, State of Illinois, at, among other locations, NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER (NMHMC).

2. Between May 2005 and September 2005, and at all times relevant hereto, ANGIE MUHAMMAD, the biological mother of Plaintiff, [redacted] a minor, was under the care of mental health care professional PHYSICIAN DEFENDANTS at NMHMC for treatment of long-standing mental illness.

3. At all times relevant hereto, Defendants, PHYSICIAN DEFENDANTS, accepted ANGIE MUHAMMAD as a mental health patient for care and treatment.

4. In May 2005 PHYSICIAN DFENDANTS prescribed a drug known as Depakote for ANGIE MUHAMMAD as part of her treatment of ANGIE MUHAMMAD'S unstable mental condition.

5. At all times relevant hereto, Depakote was well known within medical and mental health care communities as a drug that could cause serious, debilitating birth defects to a developing fetus, including a birth defect known as *Spina Bifida*, and was therefore well known within the same health care communities to be contraindicated for women who are or might become pregnant while using Depakote.

6. In late May 2005, and at various times in the months prior thereto, ANGIE MUHAMMAD reported to her various health care providers at NMHMC, including PHYSICIAN DEFENDANTS, that she might be pregnant. Rather than discontinuing the Depakote, and despite knowledge of well documented and widely accepted dangers associated with the use of Depakote by mental health patients such as ANGIE MUHAMMAD, the dosage of Depakote was between May and September 2005 increased rather than halted.

7. At all relevant times herein, the PHYSICIAN DEFENDANTS aforesaid had a duty to exercise due care and caution in the examination, diagnosis, care and treatment of ANGIE MUHAMMAD such that her as yet unborn child, [redacted], a minor, would not suffer in-utero injury due to her Depakote usage, as prescribed by the PHYSICIAN DEFENDANTS, during her pregnancy with him.

8. Notwithstanding their individual and collective duty to exercise due care in connection with the diagnosis, care and treatment of ANGIE MUHAMMAD, the PHYSICIAN DEFENDANTS were negligent in one or more the following respects:

DR. CHRISTIAN STPEPANSKY:

(a) Improperly prescribed Depakote to ANGIE MUHAMMAD in May 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote STEPANSKY prescribed for her;

(b) Improperly increased ANGIE MUHAMMAD'S Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote STEPANSKY prescribed for her.

DANIEL YOHANNA, M.D.:

(a) Improperly prescribed and/or allowed Depakote to be prescribed to ANGIE MUHAMMAD in May 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote YOHANNA prescribed or allowed to be prescribed for her;

(b) Improperly allowed to be increased and/or himself increased ANGIE MUHAMMAD'S Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote YOHANNA prescribed or allowed to be prescribed for her;

(c) Failed to appropriately monitor and/or mange the care of ANGIE MUHAMMAD during the period aforesaid, instead, based upon the records available to me at this time, allowing a resident, CHRISTIAN STEPANSKY, M.D., to manage ANGIE MUHAMMAD'S medical/mental health care between the periods of at least May 2005 through September 2005.

THOMAS ALLEN, M.D.:

(a) Improperly prescribed and/or allowed Depakote to be prescribed to ANGIE MUHAMMAD in May 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote ALLEN prescribed or allowed to be prescribed for her;

(b) Improperly allowed to be increased and/or himself increased ANGIE MUHAMMAD'S Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and

September 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote ALLEN prescribed or allowed to be prescribed for her;

(c) Failed to appropriately monitor and/or mange the care of ANGIE MUHAMMAD during the period aforesaid, instead, based upon the records available to me at this time, allowing a resident, CHRISTIAN STEPANSKY, M.D., to manage ANGIE MUHAMMAD'S medical/mental health care between the periods of at least May 2005 through September 2005.

9. As a direct and proximate result of one or more of the foregoing negligent acts and/or omissions of the PHYSICIAN DEFENDANTS, ANGIE MUHAMMAD gave birth to a son, [redacted] on May 18, 2006 with hydrocephalus, *Spina Bifida* and other serious and permanently debilitating abnormalities. Further, as a result of the foregoing negligent acts, the minor Plaintiff, [redacted] will require future care and treatment, has suffered severe personal injury, permanent disability, pain and suffering, emotional distress and has incurred substantial medical bills that he is reasonably expected to incur well into the future.

WHEREFORE, Plaintiffs, CHARLES and ANGIE MUHAMMAD, as Parents and Next Friends of their son, [redacted] a minor, demands judgment against the Defendants, CHRISTIAN STEPANKSY, M.D., DANIEL YOHANNA, M.D and THOMAS ALLEN, M.D., in an amount in excess of $50,000.00, together with any other relief deemed just and proper, including but not limited to the costs of this suit.

COUNT III

[redacted] INDIVIDUALLY UNDER THE FAMILY EXPENSE ACT AGAINST NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER UNDER *RESPONDEAT SUPERIOR* – ACTUAL OR APPARENT AGENCY

1. At all times relevant hereto, Defendant, NMHMC, held itself out as and was a business engaged in providing medical services to the public within the City of Chicago, County of Cook, State of Illinois, by employing various nurses, mental health care professionals, residents, interns, externs, medical students and technicians.

2. Between May 2005 and September 2005, and at all times relevant hereto, ANGIE MUHAMMAD, the biological mother of Plaintiff, [redacted] a minor, was under the care of mental health care professionals CHRISTIAN STEPANKSY, M.D. (STEPANSKY), DANIEL YOHANNA, M.D (YOHANNA) and THOMAS ALLEN, M.D. (ALLEN), at NMHMC for treatment of long-standing mental illness.

3. At all times relevant hereto, Defendant, NMHMC, accepted ANGIE MUHAMMAD as a mental health patient for care and treatment which was provided by, among others, NMHMC employee, agent and/or servant STEPANKSY, who was a resident at the time, and who in May 2005 prescribed a drug known as Depakote for ANGIE MUHAMMAD as part of her treatment of ANGIE MUHAMMAD'S unstable mental condition.

4. At all times relevant hereto, Depakote was well known within medical and mental health care communities as a drug that could cause serious, debilitating birth defects to a developing fetus, including a birth defect known as *Spina Bifida*, and was therefore well known within the same health care communities to be contraindicated for women who are or might become pregnant while using Depakote.

5. In late May 2005, and at various times in the months prior thereto, ANGIE MUHAMMAD reported to her various health care providers at NMHMC, including STEPANKSY, YOHANNA and/or ALLEN, that she might be pregnant. Rather than discontinuing the Depakote, and despite knowledge of well documented and widely accepted dangers associated with the use of Depakote by mental health patients such as ANGIE MUHAMMAD, the dosage of Depakote was between May and September 2005 increased rather than halted by STEPANKSY, YOHANNA and/or ALLEN.

6. At all relevant times herein, the Defendant, NMHMC, through its agents, employees, agents and/or servants, including STEPANKSY, YOHANNA and/or ALLEN, had a duty to exercise due care and caution in the examination, diagnosis, care and treatment of ANGIE MUHAMMAD such that her as yet unborn child, [redacted], a minor, would not suffer in-utero injury due to her Depakote usage, as prescribed by STEPANKSY, YOHANNA and/or ALLEN, during her pregnancy with him.

7. Notwithstanding its duty to exercise due care in connection with the diagnosis, care and treatment of ANGIE MUHAMMAD, NMHMC, through its agents, employees and/or servants, including but not limited to STEPANKSY, YOHANNA and/or ALLEN, was negligent in one or more the following respects:

(a) Improperly prescribed Depakote to ANGIE MUHAMMAD in May 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote STEPANSKY prescribed for her;

(b) Improperly increased ANGIE MUHAMMAD'S Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote STEPANSKY prescribed for her.

8. As a direct and proximate result of one or more of the foregoing negligent acts and/or omissions of the Defendant, NMHMC, by and through its agents, employees and/or servants, including, but not limited to STEPANKSY, YOHANNA and/or ALLEN, ANGIE MUHAMMAD gave birth to a son, [redacted] on May 18, 2006 with

hydrocephalus, *Spina Bifida* and other serious and permanently debilitating abnormalities. Further, as a result of the foregoing negligent acts, the minor Plaintiff, [redacted] will require future care and treatment, has suffered severe personal injury, permanent disability, pain and suffering, emotional distress and has incurred substantial medical bills that he is reasonably expected to incur well into the future.

9. At all times relevant hereto, there was in full force and effect an Illinois statute commonly known as the Family Expense Act, under which this count is brought.

WHEREFORE, Plaintiff, [redacted], individually, demands judgment against the Defendant, NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER, in an amount in excess of $50,000.00, together with any other relief deemed just and proper, including but not limited to the costs of this suit.

COUNT IV

[redacted] INDIVIDUALLY UNDER THE FAMILY EXPENSE ACT AGAINST CHRISTIAN STEPANSKY, M.D., DANIEL YOHANNA, M.D. and THOMAS ALLEN, M.D

1. At all times relevant hereto, Defendants, STEPANSKY, YOHANNA and ALLEN (PHYSICIAN DEFENDANTS), were duly licensed medical doctors and mental health care professionals practicing within the City of Chicago, County of Cook, State of Illinois, at, among other locations, NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER (NMHMC).

2. Between May 2005 and September 2005, and at all times relevant hereto, ANGIE MUHAMMAD, the biological mother of Plaintiff, [redacted] a minor, was under the care of mental health care professional PHYSICIAN DEFENDANTS at NMHMC for treatment of long-standing mental illness.

3. At all times relevant hereto, Defendants, PHYSICIAN DEFENDANTS, accepted ANGIE MUHAMMAD as a mental health patient for care and treatment.

4. In May 2005 PHYSICIAN DFENDANTS prescribed a drug known as Depakote for ANGIE MUHAMMAD as part of her treatment of ANGIE MUHAMMAD'S unstable mental condition.

5. At all times relevant hereto, Depakote was well known within medical and mental health care communities as a drug that could cause serious, debilitating birth defects to a developing fetus, including a birth defect known as *Spina Bifida*, and was therefore well known within the same health care communities to be contraindicated for women who are or might become pregnant while using Depakote.

6. In late May 2005, and at various times in the months prior thereto, ANGIE MUHAMMAD reported to her various health care providers at NMHMC, including PHYSICIAN DEFENDANTS, that she might be pregnant. Rather than discontinuing the Depakote, and despite knowledge of well documented and widely accepted dangers associated with the use of Depakote by mental health patients such as ANGIE MUHAMMAD, the dosage of Depakote was between May and September 2005 increased rather than halted.

7. At all relevant times herein, the PHYSICIAN DEFENDANTS aforesaid had a duty to exercise due care and caution in the examination, diagnosis, care and treatment of ANGIE MUHAMMAD such that her as yet unborn child, [redacted], a minor, would not suffer in-utero injury due to her Depakote usage, as prescribed by the PHYSICIAN DEFENDANTS, during her pregnancy with him.

8. Notwithstanding their individual and collective duty to exercise due care in connection with the diagnosis, care and treatment of ANGIE MUHAMMAD, the PHYSICIAN DEFENDANTS were negligent in one or more the following respects:

DR. CHRISTIAN STPEPANSKY:

(a) Improperly prescribed Depakote to ANGIE MUHAMMAD in May 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high

risk of becoming pregnant at any time during the use of the Depakote SETPANKSY prescribed for her;

(b) Improperly increased ANGIE MUHAMMAD'S Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote STEPANSKY prescribed for her.

DANIEL YOHANNA, M.D.:

(a) Improperly prescribed and/or allowed Depakote to be prescribed to ANGIE MUHAMMAD in May 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote YOHANNA prescribed or allowed to be prescribed for her;

(b) Improperly allowed to be increased and/or himself increased ANGIE MUHAMMAD'S Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote YOHANNA prescribed or allowed to be prescribed for her;

(c) Failed to appropriately monitor and/or mange the care of ANGIE MUHAMMAD during the period aforesaid, instead, based upon the records available to me at this time, allowing a resident, CHRISTIAN STEPANSKY, M.D., to manage ANGIE MUHAMMAD'S medical/mental health care between the periods of at least May 2005 through September 2005.

THOMAS ALLEN, M.D.:

(a) Improperly prescribed and/or allowed Depakote to be prescribed to ANGIE

MUHAMMAD in May 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote ALLEN prescribed or allowed to be prescribed for her;

(b) Improperly allowed to be increased and/or himself increased ANGIE MUHAMMAD'S Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when he knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote ALLEN prescribed or allowed to be prescribed for her;

(c) Failed to appropriately monitor and/or mange the care of ANGIE MUHAMMAD during the period aforesaid, instead, based upon the records available to me at this time, allowing a resident, CHRISTIAN STEPANSKY, M.D., to manage ANGIE MUHAMMAD'S medical/mental health care between the periods of at least May 2005 through September 2005.

9. As a direct and proximate result of one or more of the foregoing negligent acts and/or omissions of the PHYSICIAN DEFENDANTS, ANGIE MUHAMMAD gave birth to a son, [redacted], on May 18, 2006 with hydrocephalus, *Spina Bifida* and other serious and permanently debilitating abnormalities. Further, as a result of the foregoing negligent acts, the minor Plaintiff, [redacted], will require future care and treatment, has suffered severe personal injury, permanent disability, pain and suffering, emotional distress and has incurred substantial medical bills that he is reasonably expected to incur well into the future.

10. At all times relevant hereto, there was in full force and effect an Illinois statute commonly known as the Family Expense Act, under which this count is brought.

WHEREFORE, Plaintiff, [redacted], individually, demands judgment

against the Defendants, CHRISTIAN STEPANKSY, M.D., DANIEL YOHANNA, M.D and THOMAS ALLEN, M.D., in an amount in excess of $50,000.00, together with any other relief deemed just and proper, including but not limited to the costs of this suit.

COUNT V

[redacted] A MINOR – INSTITUTIONAL/CORPORATE AGAINST NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER

1. At all times relevant hereto, Defendant, NMHMC, held itself out as and was a business engaged in providing medical services to the public within the City of Chicago, County of Cook, State of Illinois, by employing various nurses, mental health care professionals, residents, interns, externs, medical students and technicians.

2. Between May 2005 and September 2005, and at all times relevant hereto, ANGIE MUHAMMAD, the biological mother of Plaintiff, [redacted] a minor, was under the care of mental health care professionals CHRISTIAN STEPANKSY, M.D. (STEPANSKY), DANIEL YOHANNA, M.D (YOHANNA) and THOMAS ALLEN, M.D. (ALLEN), at NMHMC for treatment of long-standing mental illness.

3. At all times relevant hereto, Defendant, NMHMC, accepted ANGIE MUHAMMAD as a mental health patient for care and treatment which was provided by, among others, NMHMC employee, agent and/or servant STEPANKSY, who was a resident at the time, and who prescribed a drug known as Depakote for ANGIE MUHAMMAD as part of her treatment of ANGIE MUHAMMAD'S unstable mental condition.

4. At all times relevant hereto, Depakote was well known within medical and mental health care communities as a drug that could cause serious, debilitating birth defects to a developing fetus, including a birth defect known as *Spina Bifida*, and was therefore well known within the same health care communities to be contraindicated for women who are or might become pregnant while using Depakote.

5. In late May 2005, and at various times in the months prior thereto, ANGIE MUHAMMAD reported to her various health care providers at NMHMC, including

STEPANKSY, YOHANNA and/or ALLEN, that she might be pregnant. Rather than discontinuing the Depakote, and despite knowledge of well documented and widely accepted dangers associated with the use of Depakote by mental health patients such as ANGIE MUHAMMAD, the dosage of Depakote was between May and September 2005 increased rather than halted by STEPANKSY, YOHANNA and/or ALLEN.

6. At all relevant times herein, the Defendant, NMHMC, had a duty to exercise due care and caution in the examination, diagnosis, care and treatment of ANGIE MUHAMMAD such that her as yet unborn child, [redacted] a minor, would not suffer in-utero injury due to her Depakote usage, as prescribed by STEPANKSY, YOHANNA and/or ALLEN, during her pregnancy with him.

7. Notwithstanding its duty to exercise due care in connection with the diagnosis, care and treatment of ANGIE MUHAMMAD, NMHMC was negligent in one or more the following respects:

NORTHWESTERN MEMORIAL HOSPITAL AND MEDICAL CENTER:

(a) By way of lack of appropriate supervision/institutional control, improperly prescribed and/or allowed Depakote to be prescribed to ANGIE MUHAMMAD by resident CHRISTIAN STEPANSKY, M.D. in May 2005 when NWMHMC knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote NWMHMC allowed to be prescribed or allowed to be prescribed for her;

(b) By way of lack of appropriate supervision/institutional control, improperly prescribed and/or allowed Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when NWMHMC knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given

her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote NWMHMC prescribed or allowed to be prescribed for her;

(c) Failed to appropriately monitor and/or mange the care of ANGIE MUHAMMAD during the period aforesaid, instead, based upon the records available to me at this time, allowing a resident, CHRISTIAN STEPANSKY, M.D., to manage ANGIE MUHAMMAD'S medical/mental health care between the periods of at least May 2005 through September 2005.

8. As a direct and proximate result of one or more of the foregoing negligent acts and/or omissions of the Defendant, NMHMC, ANGIE MUHAMMAD gave birth to a son, [redacted] on May 18, 2006 with hydrocephalus, *Spina Bifida* and other serious and permanently debilitating abnormalities. Further, as a result of the foregoing negligent acts, the minor Plaintiff, [redacted], will require future care and treatment, has suffered severe personal injury, permanent disability, pain and suffering, emotional distress and has incurred substantial medical bills that he is reasonably expected to incur well into the future.

WHEREFORE, Plaintiffs, CHARLES and ANGIE MUHAMMAD, as Parents and Next Friends of their son, [redacted] a minor, demand judgment against the Defendant, NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER, in an amount in excess of $50,000.00, together with any other relief deemed just and proper, including but not limited to the costs of this suit.

COUNT VI

[redacted] - INSTITUTIONAL/CORPORATE NEGLIGENCE -- INDIVIDUALLY UNDER THE FAMILY EXPENSE ACT AGAINST - AGAINST NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER

1. At all times relevant hereto, Defendant, NMHMC, held itself out as and was a business engaged in providing medical services to the public within the City of Chicago, County of

Cook, State of Illinois, by employing various nurses, mental health care professionals, residents, interns, externs, medical students and technicians.

2. Between May 2005 and September 2005, and at all times relevant hereto, ANGIE MUHAMMAD, the biological mother of Plaintiff, [redacted] a minor, was under the care of mental health care professionals CHRISTIAN STEPANKSY, M.D. (STEPANSKY), DANIEL YOHANNA, M.D (YOHANNA) and THOMAS ALLEN, M.D. (ALLEN), at NMHMC for treatment of long-standing mental illness.

3. At all times relevant hereto, Defendant, NMHMC, accepted ANGIE MUHAMMAD as a mental health patient for care and treatment which was provided by, among others, NMHMC employee, agent and/or servant STEPANKSY, who was a resident at the time who in May 2005 prescribed a drug known as Depakote for ANGIE MUHAMMAD as part of her treatment of ANGIE MUHAMMAD'S unstable mental condition.

4. At all times relevant hereto, Depakote was well known within medical and mental health care communities as a drug that could cause serious, debilitating birth defects to a developing fetus, including a birth defect known as *Spina Bifida*, and was therefore well known within the same health care communities to be contraindicated for women who are or might become pregnant while using Depakote.

5. In late May 2005, and at various times in the months prior thereto, ANGIE MUHAMMAD reported to her various health care providers at NMHMC, including STEPANKSY, YOHANNA and/or ALLEN, that she might be pregnant. Rather than discontinuing the Depakote, and despite knowledge of well documented and widely accepted dangers associated with the use of Depakote by mental health patients such as ANGIE MUHAMMAD, the dosage of Depakote was between May and September 2005 increased rather than halted by STEPANKSY, YOHANNA and/or ALLEN.

6. At all relevant times herein, the Defendant, NMHMC had a duty to exercise due care and caution in the examination, diagnosis, care and treatment of ANGIE MUHAMMAD such that her as yet unborn child [redacted] a minor, would not suffer in-utero injury

due to her Depakote usage, as prescribed by STEPANKSY, YOHANNA and/or ALLEN, during her pregnancy with him.

7. Notwithstanding its duty to exercise due care in connection with the diagnosis, care and treatment of ANGIE MUHAMMAD, NMHMC, was negligent in one or more the following respects:

NORTHWESTERN MEMORIAL HOSPITAL AND MEDICAL CENTER:

(a) By way of lack of appropriate supervision/institutional control, improperly prescribed and/or allowed Depakote to be prescribed to ANGIE MUHAMMAD by resident CHRISTIAN STEPANSKY, M.D. in May 2005 when NWMHMC knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote NWMHMC allowed to be prescribed or allowed to be prescribed for her;

(b) By way of lack of appropriate supervision/institutional control, improperly prescribed and/or allowed Depakote dosage, rather than completely halting its usage by ANGIE MUHAMMAD, in the months between May 2005 and September 2005 when NWMHMC knew or reasonably should have known that (1) Depakote is contraindicated for patients such as ANGIE MUHAMMAD who are or might become pregnant during the use of Depakote; and that (2) ANGIE MUHAMMAD, particularly given her past history, including a "pregnancy scare" in or about March 2005, and given her severe and lengthy mental illness/known prior non-compliance with birth control usage, was at a high risk of becoming pregnant at any time during the use of the Depakote NWMHMC prescribed or allowed to be prescribed for her;

(c) Failed to appropriately monitor and/or mange the care of ANGIE MUHAMMAD during the period aforesaid, instead, based upon the records available to me at this time, allowing a resident, CHRISTIAN STEPANSKY, M.D., to manage ANGIE MUHAMMAD'S medical/mental health care between the periods of at least May 2005 through September 2005.

8. As a direct and proximate result of one or more of the foregoing negligent acts and/or omissions of the Defendant, NMHMC, ANGIE MUHAMMAD gave birth to a son,

[redacted] on May 18, 2006 with hydrocephalus, *Spina Bifida* and other serious and permanently debilitating abnormalities. Further, as a result of the foregoing negligent acts, the minor Plaintiff, [redacted] will require future care and treatment, has suffered severe personal injury, permanent disability, pain and suffering, emotional distress and has incurred substantial medical bills that he is reasonably expected to incur well into the future.

WHEREFORE, Plaintiff, [redacted] individually, demands judgment against the Defendant, NORTHWESTERN MEMORIAL HOSPITAL and MEDICAL CENTER, in an amount in excess of $50,000.00, together with any other relief deemed just and proper, including but not limited to the costs of this suit.

Respectfully submitted,

Harsha S. Narayan

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100 W. Monroe Street, 4th Floor
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(312) 263-1250
Attorney No.: 21626

AFFIDAVIT PURSUANT TO ILLINOIS SUPREME COURT RULE 222(b)

I, Harsha S. Narayan, one of the attorneys representing the Plaintiff hereby certify that, based on my experience in handling personal injury claims, the total of money damages sought in this case exceeds $50,000.00.

Respectfully submitted,

Harsha S. Narayan

BRUSTIN & LUNDBLAD, LTD.
100 W. Monroe Street, 4th Floor
Chicago, Illinois 60603
(312) 263-1250
Attorney No.: 21626

EXHIBIT 7

STATE OF I INOIS)
) SS:
COUNTY OF C O O K)
IN THE CIRCUIT COURT OF COOK COUNTY, I INOIS
COUNTY DEPARTMENT - AW DIVISION

CHAR ES MUHAMMAD and ANGIE MUHAMMAD, as Pa ents of [redacted], a m no , and [redacted], Ind v dua y,

P a nt ffs,

-vs- No. 2 2 74

NORTHWESTERN MEMORIA HOSPITA and MEDICA CENTER, and THOMAS W. A EN, M.D.,

Defendants.

REPORT OF PROCEEDINGS at the t a of the above-ent t ed cause befo e the Hono ab e MARGUERITE CO INS, Judge of sa d Cou t, taken befo e Pame a . Cosent no, Ce t f ed Sho thand Repo te fo the County of Cook and State of I no s, at Da ey Cente , 6 0, Ch cago, I no s, at 2:00 p.m., on the 27th of August, 20 8.

Repo ted by: Pame a . Cosent no, CSR
cense No.: 084-00360

A P P E A R A N C E S:
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On beha f of the Defendants.

* * *

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(Whereupon, the following proceedings were had outside the presence and hearing of the Jury:)

MR. LUNDBLAD: On behalf of Plaintiff, we ask that you also give the burden of proof instruction so that the jury -- so there's no doubt the jury understands this is not a criminal case and beyond a reasonable doubt and that the standard for this whole trial is more probably true than not.

THE COURT: And I do give that.

MR. LUNDBLAD: Okay.

THE COURT: I should have done that, should have shown you what I'm going to read. It's basically 101, 1.01. And I've just streamlined it. In my estimation, it was a little -- it was just hard to read and everything, so I've streamlined it.

I have also included the portion about they're going to be able to not only take notes but also ask questions. I'm going to give them a very short outline of how we're going to do the questioning.

MR. BAKER: Also burden of proof.

THE COURT: Well, yeah, burden of proof I

treating Mrs. Muhammad day-to-day. All he had was a snapshot picture.

So on May 24th of 2005 -- I'm going to put a little timeline up to try to help you a little bit with dates.

So you'll hear that Dr. Stepansky sent Mrs. Muhammad to Dr. Dago. He saw her on May 19th. He made a report. It's not clear whether he actually talked to Dr. Stepansky, but Dr. Stepansky had his report. And so on May 24th, that is when Dr. Stepansky decided that he was going to prescribe Depakote as a mood stabilizer.

Now, as indicated, one of our experts, Dr. Siegel, who is a neurologist, who has used medications to treat epileptic patients, he will tell you in his opinion lithium should have been selected on that date, rather than Depakote. And the reason is, is that you have to look at risks and probabilities.

Now lithium, like Depakote, has the propensity or can cause or it's believed that it can cause damage to fetuses. However, the risk is much lower and much less than Depakote. The most significant risk to a fetus with lithium concerns a

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heart defect. It's called Ebstein's anomaly. And it was known in 2005 that the risk of this anomaly, if you didn't take lithium, was like one in 20,000 or something, a very, very small number of babies have this anomaly.

However, even with lithium, the risk is, I believe, one in a thousand or 1 in 2000. So it's a risk but not a large risk. And that all has to be considered in weighing the risk versus benefit.

On the other hand, Depakote, the laundry list of risks that I gave you, are much more significant. Now, if in the population of women having babies, all babies born in the United States, I believe you'll hear the statistic that the risk of having a neural tube defect, spina bifida, is 0.5 percent to 0.1 percent, which would be one in a thousand to 1 in 2000. So that's the natural risk of any woman having a baby, who has not taken a drug like Depakote.

On the other hand, if someone is taking Depakote and gets pregnant while taking Depakote, there's literature and reports that go over a wide range. Some reports say 1 to 2 percent. Other reports say 3.8 percent. Other literature suggests that the risk of a spinal defect, a neural tube defect

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in a baby exposed to Depakote is as high as 5 percent to 9 percent.

That means five out of a hundred babies, nine out of a hundred babies, would have a neural tube defect if their mother took Depakote, compared to one in a thousand or 1 in 2000.

So you can see that the risk caused by Depakote is very significant. It's a big risk over what it would be without.

You'll also hear from Dr. Siegel, who has done extensive studies and written articles on Depakote itself, but also on the development of the brain, he will tell you that there are studies that show that the risk of having these problems from Depakote with fetus increases with the amount that's being given. There's a correlation between dosage and a higher risk of having neural tube defects.

And in particular, which I believe he will tell you, that if the woman is taking more than a thousand milligrams of Depakote a day, that the risk jumps significantly and that there are some studies that show that the risk of a baby having abnormalities related to Depakote is as high as 17 percent if the dose rate is more than a thousand per day.

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You'll also hear that at the time Quatro was conceived, which I believe the testimony will be it happened around September 8th or September 9th of 2005, Mrs. Muhammad, based on the prescription given by Dr. Stepansky, was taking 2,500 milligrams of Depakote per day.

So this all goes into the risk-benefit analysis that Dr. Stepansky acknowledges that he had to do before prescribing Depakote.

At the top I'm showing the risk, sort of a caricature of the risk-benefit analysis. You will hear from Dr. Dago, for example, he will acknowledge that it was known in 2005 that Depakote was more dangerous than lithium. However, he said that Depakote would be a reasonable choice when it was first prescribed on May 24th. And I believe the defendants' experts will say the same.

And our psychiatry expert, Dr. Cheryl Wills, will also say that it was a reasonable choice on May 24th to give -- to start Mrs. Muhammad on Depakote, but she will tell you that there was a huge qualifier, a huge "but" to her saying that it would be reasonable to start on Depakote.

Now, Dr. Wills will tell you, that if you

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prescribe Depakote, with all its risks of causing harm to a fetus in the event that woman gets pregnant, then you, as a psychiatrist must make sure that that woman does not get pregnant, that she is on birth control and using birth control appropriately to prevent pregnancy. Dr. Wills will tell you that, in her opinion, that's what the standard of care requires. That is what a doctor should do under those circumstances.

So Dr. Wills will tell you that in the case of Mrs. Muhammad, that he did not fulfill the "but," that is, they did not take steps to make sure that Mrs. Muhammad was on birth control and using it properly. Now, you'll hear that Mrs. Muhammad's choice that she had for birth control was the birth control patch. I don't know how many of you are familiar with it, but the patch is similar to the pill in that it chemically prevents pregnancy. However, with the patch, instead of taking a pill every day, the woman once a week has to put a new patch on her arm or on her skin somewhere so that the chemical in the patch, the birth control chemicals, can be absorbed.

And you will hear that the patch has to be

changed the same day every week, that if you delay two days, your protection is no longer there. So you have to -- if somebody is using a patch, you have to make sure that they are following those directions explicitly. They can't deviate. They have to change and put the new patch on the same day of every week.

Now, you will hear that Mrs. Muhammad, perhaps because of her mental illness, was not very understanding about birth control and about the patch, and this lack of understanding was something that either was known to Dr. Stepansky on May 24th when he prescribed Depakote, or it should have been known because there were notes from the record from Dr. Peden, the psychologist who saw Mrs. Muhammad very regularly, and Dr. Stepansky said it was his practice to read those notes, that as of March 4th of 2005, when Mrs. Muhammad was in some of her in and out of the hospital, she thought that when she was at one of the hospitals, they gave her a shot for birth control.

Well, it turns out that was wrong, she was not given a shot for that. Then she told Dr. Peden, the psychologist, you know, I'm running out of patches, I only have one left, and this was on March 4th, 2005.

And at that time, Mrs. Muhammad did not have a gynecologist, did not have a doctor to prescribe more patches for her. And she didn't understand who she had to contact. She thought her gynecologist was the doctor who delivered her last child in 2004, Dr. Plunkett.

But Dr. Plunkett says no, no, no, I am only a high-risk doctor, I deliver high-risk babies. I have nothing to do with treating women as a gynecologist, so I'm not her doctor.

So it's not until May when the topic comes up again on May 9th with Dr. Peden about patches and Angie says, you know, I don't have a gynecologist, I need patches, and so they had to call -- Dr. Peden had to call and get an emergency prescription from a clinic called the PAC to get two months' worth of patches for Mrs. Muhammad. Then they set up an appointment for her to go in and get a year of prescription.

Again, even as late as May 9th, Mrs. Muhammad demonstrated to Dr. Peden that she had little understanding about the patch, that she needed a gynecologist, and she needed to get a doctor to give her a prescription.

All of this needed to be taken into account in considering the risk-benefit of prescribing Depakote to a woman who was of childbearing age, who lacked total understanding on how to avoid pregnancy.

Now, we believe the evidence will show that on May 31st, that even if you would agree that Depakote could be started, that the balance shifted on May 31st: What happened on that date is that Mrs. Muhammad came in to see Dr. Stepansky and she said doctor, my menstrual period is two weeks late, I think I'm pregnant. So they send her down to a laboratory to get a test. But the test didn't come back for a week. But in the opinion of Dr. Wills, our expert, that should have been something that should have, as my partner said, they were asleep at the wheel, should have awakened Dr. Stepansky and his supervisors that this lady was a problem, that she was at high risk of getting pregnant, and that she was taking a drug, Depakote, with a high risk of causing injury to her fetus if she became pregnant.

So it's the opinion of our expert, Dr. Wills, that on May 31st, the balance shifted against having Depakote as part of the medication for Mrs. Muhammad.

And obviously if Mrs. Muhammad was not taking

to have a catheter put in and a catheter overnight to preserve his kidneys.

And I believe the evidence will be that Charles will not be capable of doing that himself. That a five-year-old cannot say, oh, it's three hours, I have to catheterize myself. Physically he can do that, but he will not, I don't think, according to the evidence, be able to do that on his own on a timetable.

The other thing is that Charles will not be able to, I don't believe, recognize the symptoms of bigger problems. If his shunt is malfunctioning or if he has a tethered cord, some -- especially with a shunt, that can be an emergent situation. So somebody has to recognize the symptoms, headaches or other symptoms.

I believe the evidence will show that Charles will never be able to do that. As a result, Charles, I believe the evidence will show, will require around-the-clock assistance for the rest of his life. And you will hear from a healthcare planner, life care planner, her name is Pam Chwala and she will offer that opinion that she believes Charles should have that care or need that care.

She will offer two options of doing that. Either you hire somebody by the hour and have 3 shifts 7 days a week, 24 hours a day, or her alternative would be to have a live-in person who's there 24 hours a day, who gets paid a salary, so it's a lot less money than having paid by the hour. But nonetheless, it's going to be an expensive proposition which he will require as long as he lives.

Now, there will also be an issue as to what will be the extent of Charles' life. Defendants have hired an expert who will come in and he will say 40, 40, that's all. When Charles reaches 40, that's it, he's going to be gone.

On the other hand, you will hear from one of Charles's treater, Dr. Dias, and he will say that if Charles is maintained so that his kidneys don't get injured by not having his bladder evacuated properly, and if his shunt is properly monitored, that he has potential to live a normal lifespan and that means that Charles will require attention throughout that life.

Keep in mind, too, that although the parents have been carrying that burden for the last 12 years, Charles's father is now 74 and how much longer will he

be able to do it? And also Mrs. Muhammad with her continuing issues with her mental health, how much longer can she be depended on to provide the care that Charles will need?

So anyway, that's the reason why we believe that at the end of the case that the evidence will show that Depakote, after May 31st of 2005, should not have been part of the treatment for Mrs. Muhammad, and that had the proper -- had the doctors acted appropriately, had they weighed and balanced the risks versus the benefits and including the risk, the high risk that Mrs. Muhammad was going to get pregnant, that they should not have gone forward with Depakote after that date.

In addition to that, on October 11th, when Mrs. Muhammad again came to them and said, I think I'm pregnant, that should have immediately stopped the Depakote and it would have prevented many of the injuries that Charles has.

So we believe that at the end you should make a finding in favor of Charles IV and against Defendants, and you will hear the evidence and you will be allowed to consider what would be fair, appropriate, and just damages to make sure that

Charles has what he needs for the rest of his life.

Thank you for your attention. I hope I haven't overstayed my time. Thank you.

THE COURT: Just a little. So my question to you is, do you want a brief bathroom break now or go right into the second opening statement by the defense? Tell me now. Bathroom break, yes? Okay. We are going to try to make it short because they get the same amount of time for their opening that the Plaintiffs have.

THE DEPUTY: All rise, please.

(Whereupon, a break was taken, after which the following proceedings were had:)

THE COURT: Bowman called me. Is she sitting out there now?

MR. BAKER: She asked that Mr. Masciopinto, he represents Dr. Bowman, and he also represents most of the children's treating physicians and nurses. We're just going to roll with Dr. Bowman after this supplement.

THE COURT: Well, yes. So what I plan is this. If it's going to be an hour, what I will do is I will give them another bathroom break. I did bring

cookies for them to at least have something to eat, then we can roll that down -- so what we are going to do, because we want to get this going, and then we will give them lunch. But how long is Bowman?

MR. BAKER: I would suspect less than an hour.

THE COURT: Less than an hour. For just your side?

MR. BAKER: I haven't timed it but I would hopefully be less, an hour at the max.

THE COURT: For just you?

MR. BAKER: Yeah.

THE COURT: Then that's --

MS. REITER: 15 minutes.

THE COURT: Fifteen minutes. Okay, so then we will do that. I will just tell them that the witness will last about an hour and 15 minutes, then after that we will have lunch.

MR. BAKER: Since Mr. Masciopinto is here, just briefly, he also represents Nurse Moylan, who we have under subpoena, who is being somewhat recalcitrant to coming in.

THE COURT: Yeah. What are we going to do about that?

MR. MASCIOPINTO: She's not really being recalcitrant. She's just scheduled to work on each of these days in the clinic and she's kind of invaluable there.

THE COURT: There's no such thing as an indispensable person, we all know that. Right? She has to come in.

MR. MASCIOPINTO: All right. I'll do my best to work with counsel to arrange that.

THE COURT: That's legitimate. I'm not trying to be a jerk about it. Let's do it. But she has got to come in. And you know, being a lawyer, you know what the options are. They're not good.

MR. MASCIOPINTO: I understand that. That's why we offered the evidence deposition. But I understand your Honor's position, so.

MR. BAKER: And I've asked Mr. Masciopinto to just let me know.

THE COURT: We're cooperative.

Ready? Bring them out.

(Whereupon, the following proceedings were had in open Court in the presence of the Jury:)

THE DEPUTY: We are back in session.

THE COURT: Thank you. Now, we will hear the opening statements from the defense. Please proceed.

O P E N I N G S T A T E M E N T

MS. SOCOL: Thank you.

Ladies and gentlemen, your Honor, counsel, Dr. Allen, and colleagues, my name is Donna Socol. It is my privilege to represent Dr. Tom Allen and Northwestern Memorial Hospital. I'd like you to think about suicide. I'd like you to think about homicide. I'd like you to think about someone who is so psychotic and out of touch with reality that she takes a knife and threatens to kill her husband, Charles and her two sons, [redacted], and then herself. Someone who is been in and out of mental institutions, on a variety of medications, antipsychotics, antidepressants. Someone who wants nothing more in life than to be functional, to stay out of mental hospitals, and to be a loving mother and a loving wife. And that's Angie Muhammad.

So she came to us. She came to Northwestern Stone Institute of Psychiatry, an outpatient clinic. And under the capable hands of Dr. Tom Allen, the psychiatrist, Dr. Marcia Brontman, a psychiatrist,

Dr. Janet Peden, who has a Ph.D. in psychology as a psychotherapist, and a psychiatric nurse, Judy Wilson. They were able to keep her out of a mental institution. They were able to improve her quality of life. With the assistance of a drug called Depakote.

Now, I'm going to address four issues in this case, which I think will be the theme throughout this trial, and the first one is why was Depakote the drug of choice for Mrs. Muhammad? Why was it the best drug for Mrs. Muhammad and her schizoaffective disorder? The second, our interdisciplinary team. How does the Stone Institute of Psychiatry and the team work together to accomplish a goal, to keep Angie Muhammad out of the mental institution?

The third, why Angie Muhammad was capable and competent when she wasn't in a mental institution, of making choices regarding birth control.

And fourth, by the time Angie Muhammad told us that she had missed her menstrual period on October 11th of 2005, [redacted] neural tube was formed and he was going to have spina bifida and all the consequences that were related to spina bifida and the outcome that he has today.

So let's go to the first issue. Why was

Depakote the drug of choice for Angie Muhammad, the best drug?

Angie Muhammad had schizoaffective disorder and there is no one who's going to quarrel with that. She had a complex, complicated, significant mental disorder. I will tell you about that in a minute. The statistics for Angie Muhammad was that without treatment, she had a 10 to 15 percent chance of killing herself, meaning one out of ten patients with schizoaffective disorder will kill themselves without treatment, they'll commit suicide, they'll possibly commit homicide.

What's the risk of having a baby with spina bifida, on birth control, with Depakote? It's unlikely. It's a one in 10,000 risk. So you balance the risks. One out of ten risk of killing yourself, versus a one in 10,000 risk of having a baby with spina bifida, on Depakote, using birth control.

Let's talk about birth control for a minute. Birth control is not 100 percent effective. The only thing hundred percent effective is hysterectomy, abstinence. Tubal ligation has a 1-in-200 risk of failure. IUD, a 1-in-100 risk of failure. The patch, a 1-in-100 risk of failure. Birth control pills the

same. So there was a risk of birth control failure.

Now, what is schizoaffective disorder? As I said, there's no disagreement that she was schizoaffective. So it's mania. What's mania? Out of control, euphoria, happiness, running around wild. You'll hear testimony that she cleaned her house day and night, happy, looking inappropriately. Followed by depression, ultimate sadness, uncontrollable sadness, and psychosis. And the psychosis, the out of touch with reality where she heard voices telling her to do things, where she talked to people in her room that weren't there, delusional. That popped up every now and then. Not related to the mania or the depression. All three elements of schizoaffective disorder. Difficult to manage? Yes. Complex? Yes. Depakote worked for her. It's a mood stabilizer.

Now, let's look at Angie Muhammad's history. I am not going to go back to 2002 because she was in a mental institution then, too.

December 10, 2003, to January 23, 2004, she's hospitalized at Northwestern Memorial Hospital for attempting suicide by ingesting protein pills while she is pregnant with her second son. She is trying to kill them both. She is on Risperdal, an

antipsychotic, she is on Prozac, an antidepressant. It didn't work.

January 4th, 2005, to January 13, 2005, she's hospitalized at Northwestern and Lake Shore Mental Hospital for auditory hallucinations and suicidal and homicidal ideations. She's an Haldol, an antipsychotic. She's on Cogentin, a drug that has to be given to stop the side effects, the jitteriness, Parkinson-like sides effect of Haldol. And she's on Seroquel, another type of mood stabilizer.

February 9, 2005, to February 26, 2005, she is hospitalized with visual hallucinations at MacNeal Hospital. She is taking Cogentin, Haldol and Seroquel again. Suicidal ideations.

April 17th, 2005, to May 4, 2005 she is hospitalized at Northwestern, followed by River Edge Mental Hospital, Glen Oaks Mental Hospital, with psychotic thoughts of killing her husband, Charles, and her two sons, Charles, with a knife.

She is on Haldol, an antipsychotic, Zoloft, an antidepressant, and Cogentin again.

So given this history and Angie Muhammad's high risk, high risk of suicide, one in ten patients will kill themselves, she's put on Depakote on May 24,

2005, a mood stabilizer that worked for her.

Now, who's going to tell you that Depakote was the medication of choice for Angie Muhammad, in addition to her antipsychotic and antidepressant, who is going to tell you that? Dr. Allen will tell you that and he'll tell you why it worked.

Dr. Marcia Brontman will tell you that, she is the psychiatrist who cared for Angie Muhammad. She will tell you why Depakote was the drug of choice. Dr. Stepansky, our second-year resident will tell you that was the drug of choice for Angie. And you know who else will tell you that, Depakote was an appropriate drug for Angie Muhammad? Their own psychiatric witness who they hired to give opinions in this case, Dr. Wills. They mentioned her.

Dr. Wills will tell you Depakote was appropriate and Dr. Brontman and Dr. Wills will tell you something else. They will tell you that Depakote was the better choice than lithium. Why? Well, it's a better choice with -- for schizoaffective disorder. And you heard them talk about the lithium causing harm to a fetus possibly.

Well, what about mom? Do you just forget about mom, do you forget about the risk of lithium to

A. Yes.
MR. BAKER: Thank you, Doctor.
THE COURT: Any recross?
MS. REITER: Just one.
RECROSS-EXAMINATION
BY MS. REITER:
Q. Doctor, do I have this correct, that spina bifida causes the Arnold-Chiari II, which then causes hydrocephalus?
A. That's the thought is that the open spina bifida leads to the formation of the Chiari II. We don't really know why they develop the hydrocephalus. We think it's related to a number of findings related to the Chiari II.
So, yes, in my mind, the Chiari II then leads to the hydrocephalus, but there are many theories.
Q. The hydrocephalus, though, is the collection of fluid in the brain seen on one of the pictures, correct?
A. Correct.
MS. REITER: That's all I have. Thank you.
MR. BAKER: Thank you, Doctor. I have nothing else.
THE COURT: Any of the jurors have a question

that you wish to have the doctor answer?
Okay. Thank you very much.
Thank you, Doctor. You may step down.
(Witness excused.)
THE COURT: And you may go to lunch. It was a rough morning. Be ready at 20 minutes after 20.
(Whereupon, at 1:38 p.m., a luncheon recess was taken to 2:20 p.m.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, PAMELA L. COSENTINO, being first duly sworn on oath says that she is a court reporter doing business in the City of Chicago; that she reported in shorthand the proceedings given at the taking of said trial and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid and contains all the proceedings given at said trial.
IN TESTIMONY WHEREOF: I have hereunto set my verified digital signature this 28th day of August, 2018.

Pamela L. Cosentino

PAMELA L. COSENTINO, CSR

EXHIBIT 8

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

CHARLES MUHAMMAD and ANGIE MUHAMMAD, as Parents of [redacted], a minor, and [redacted], Individually,

Plaintiff,

-vs- No. 12 L 012174

NORTHWESTERN MEMORIAL HOSPITAL AND MEDICAL CENTER and THOMAS W. ALLEN, M.D.,

Defendants.

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable Marguerite A. Quinn, Judge of said Court, taken before Judith T. Lepore, Certified Shorthand Reporter for the County of Cook and State of Illinois, at 11:03 a.m., on the 20th day of August, 2018.

Judith T. Lepore, CSR
License No.: 084-004040

MR. LUNDBLAD: 18, defendants are objecting. The reason we're making this motion is that during the pendency of this case, there was an award against Abbott in St. Louis against -- for Depakote, claiming -- and the award was for inadequate warnings that the product was defective and unreasonably dangerous. So when we saw that, to protect ourselves and our client's position, we did file a lawsuit against Abbott so that we could protect our client's rights under the statute of limitation.

We have voluntarily dismissed that case probably about two months ago so that we could complete this trial. And if, you know, we win this trial, then there would be no need to take further action. But we believe it would be prejudicial for the defendants to bring in the fact that we did file this other lawsuit. We did so strictly to preserve our client's rights. Abbott is not a defendant in this case. To this point, none of the defendants, Dr. Allen, Dr. Stepansky, or Dr. Brontman, the people involved have testified that, oh, if we just had more information, we wouldn't have prescribed Depakote.

So there's no basis then to scramble the issue, because the award in that other case was -- or

was based on the fact that the warnings were not adequate. All the defendants here have testified, we were aware of the propensity for Depakote to cause neural tube defects. We were aware that Depakote can cause all these other issues. We knew from the literature what the rate of risk was. We took that all into consideration and made our decision. And nobody said that if only we knew more, we would have acted differently.

MS. REITER: Well, as to Abbott, I've asked Dr. Siegel about Abbott, whether he reported his findings to Abbott. There is a statement, a judicial statement and complaint filed in the Circuit Court of Cook County. Although the case is voluntarily dismissed, it might be a document reflecting another position by the plaintiffs that might be used in cross-examination of someone. So I mean --

THE COURT: Is there?

MS. REITER: -- to not voice my objection to this motion, I object to it.

MS. SOCOL: So do I. Also, Abbott Lab is the manufacturer of Depakote. So I think not allowing us to talk about Abbott --

THE COURT: But do your people say, we have

no idea that this was a problem?

MS. SOCOL: No, they don't do that. But we just want to cross-examine Dr. Siegel.

THE COURT: On what? Tell me what you're going to cross-examine Dr. Siegel on.

MS. REITER: Well, Dr. Siegel is the one who says that there is -- see, I think with the product liability case, the gist of it is in -- what do you call those things, you know, you try some cases?

MR. SNYDER: MDL.

MS. REITER: No, the test cases.

MR. SNYDER: Bell weather.

MS. REITER: Bell weather, yeah. From what I gather, the issue is that the risk of Depakote being associated with spina bifida was understated in terms of 2005, 2004, and 2006, 4 to 6. And it was stated 1 to 2 percent. It should have been higher because there was literature out there that would have supported a different warning to doctors. That's the product liability action.

And Dr. Siegel, who does not really want to commit to the 1 to 2 percent was a reasonable number for our doctors to have relied on, he talks about other literature said this, that, or the other thing

and sometimes it's reported higher. If he doesn't commit to the 1 to 2 percent that was known in 2005, I may have to cross him on what warnings were given to doctors.

THE COURT: So this is what I'm going to do. I'm going to grant this, but before Siegel hits the stand, let's revisit this, okay, so we can very narrowly tailor what your cross-examination will be. By that time, I probably will have read Siegel's testimony.

MS. SOCOL: Good luck with that.

MS. REITER: It's 300 pages.

THE COURT: Every time I look at you and talk about that, I'm not getting a good vibe.

MS. REITER: The worst part of it is the first half of the second session where I went through about 50 of his articles, are those reasonably reliable --

THE COURT: Yeah, I made the comment, oh, doesn't he have like 91 articles?

MS. SOCOL: 91.

MS. REITER: That was Sunday afternoon. I'm not sure why I did that, but it's there. It's not my usual style.

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, JUDITH T. LEPORE, being first duly sworn on oath says that she is a court reporter doing business in the City of Chicago; that she reported in shorthand the proceedings given at the taking of said trial and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid and contains all the proceedings given at said trial.

IN TESTIMONY WHEREOF: I have hereunto set my verified digital signature this 21st of August 2018.

Judith Lepore

JUDITH T. LEPORE, CSR

License No.: 084-004040

EXHIBIT 9

STATE OF ILLINOIS)
)
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

CHARLES MUHAMMAD and ANGIE)
MUHAMMAD, as Parents of [redacted])
[redacted] a minor, and [redacted])
[redacted], Individually,)
Plaintiffs,)
vs.) 12 L 12174
NORTHWESTERN MEMORIAL HOSPITAL)
AND MEDICAL CENTER and THOMAS W.)
ALLEN, MD,)
Defendants.)

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable Marguerite Quinn, Judge of said Court, on August 31, 2018, at the hour of 9:30 a.m.

Reported by: Barbara Manning, CSR
License No.: 084-003277

APPEARANCES:

THE LAW OFFICES OF BRUSTIN & LUNDBLAD, LTD.
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Representing the Defendants.

I N D E X

universally about the dangers of Depakote or the pros and cons universally, then you can throw it up there. Okay? I am sure you are going to go over it a couple times, right?

MR. LUNDBLAD: Probably.

THE COURT: Probably. All right.

(Whereupon, the following proceedings were held in the presence of the jury.)

THE COURT: Welcome back, everyone. We have just one witness today, and we will just proceed. We will go until we go. Okay. And then we will leave. All right? I don't want to labor you too much on Labor Day weekend.

(Witness sworn)

CHERYL D. WILLS, MD

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LUNDBLAD:

Q. Good morning. Would you please introduce yourself to the jury?

Dr. Stepansky, Dr. Allen and Northwestern Memorial Hospital from May 24 through October 11th, do you have an opinion as to whether or not those deviations caused injury to Charles, IV Muhammad?

A. Yes, I do.

Q. And what's your opinion?

A. Those actions resulted in [redacted] being born with the birth defects that will affect him for the rest of his life.

Q. Now, if Depakote had been -- as I understand it, you testified that Depakote should have been stopped on May 31, 2005 when Mrs. Muhammad first reported the missed periods and potential pregnancy?

MS. SOCOL: Objection, 213.

THE COURT: Can you read that again?

(Record read)

THE COURT: Overruled.

THE WITNESS: Yes, it should have been stopped.

BY MR. LUNDBLAD:

Q. And the failure to stop the Depakote on that date, did that in your opinion cause harm,

STATE OF ILLINOIS)
) SS:
COUNTY OF WILL)

BARBARA MANNING, as an Officer of the Court, says that she is a shorthand reporter doing business in the State of Illinois; that she reported in shorthand the proceedings of said trial, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said trial.

IN TESTIMONY WHEREOF: I have hereunto set my verified digital signature this 3rd day of September, 2018.

Barbara Manning

BARBARA MANNING

CERTIFIED SHORTHAND REPORTER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHARLES MUHAMMAD and ANGIE MUHAMMAD, As Parents of CHARLES MUHAMMAD, a minor, and CHARLES MUHAMMAD, Individually,	)	
Plaintiffs,	)	Case No. 2019 L 6254
vs.	)	Calendar X
	)	Judge Brendan O'Brien
ABBOTT LABORATORIES, INC., and ABBVIE INC.	)	
Defendants.	)	

I. FACTS

Angie Muhammad began treating in the Rehabilitation Clinic of the Stone Institute of Psychiatry in December 2003. Exhibit 1(i). Stone Institute is part of Northwestern Memorial Hospital. Angie was being treated for a psychotic disorder. *Id*. Treatment was provided by a treatment team which included an attending psychiatrist and a psychiatric resident. Exhibit 1(a) at 15-16. The resident evaluated Angie weekly and was in charge of prescribing and monitoring drug therapy. *Id*. at 17-18.

Dr. Christian Stepansky became resident physician on Angie's team beginning in January 2005. Dr. Stepansky was in the middle of his second year of residency training in psychiatry. The attending psychiatrist on Angie's team supervising Dr. Stepansky from January through July 1, 2005 was Dr. Marcia Brontman. *Id*. at 7, 10.

From January through early May 2005, Angie was hospitalized on multiple occasions for treatment of acute psychotic symptoms. In May, Dr. Stepansky, on the recommendation of Dr. Brontman, referred Angie to Dr. Pedro Dago for evaluation. Angie's native language is Spanish. One reason for the referral to Dr. Dago, who speaks Spanish, was to determine whether language issues were impeding her treatment. Exhibit 1(i).

Dr. Dago evaluated Angie on May 19, 2005. He made a diagnosis that Angie was likely bipolar v. schizoaffective. Exhibit 1(j). In his report to Dr. Stepansky, Dr. Dago recommended that Dr. Stepansky consider prescribing Lithium or Depakote (also known as valproic acid or valproate) to Angie. *Id.* Lithium and Depakote are mood stabilizers used to treat bipolar and schizoaffective disorders. Exhibit 1(a) at 12-13. On May 24, 2005, Dr. Stepansky saw Angie and prescribed Depakote. *Id*. at 53-54. Dr. Stepansky does not remember conferring with his supervisor, Dr. Brontman, before starting Angie on Depakote. *Id*. at 55. There are no notes in Angie's medical records documenting a discussion between Dr. Brontman and Dr. Stepansky regarding his decision to start Angie on Depakote. *Id*. at 53-55. Dr. Stepansky does not remember whether in May 2005 he considered giving Lithium over Depakote. *Id*. at 58. Nor do Dr. Stepansky's notes reflect whether he considered prescribing Lithium instead of Depakote. *Id.* at 53-56. Dr. Stepansky does not remember his reasons and rationales for prescribing Depakote. *Id.* at 54-55, 58.Dr. Stepansky's notes do not document his thinking when he prescribed Depakote. *Id.*

In May 2005, Dr. Stepansky knew that Angie was married, of child bearing age and that if she became pregnant while taking Depakote, the drug could harm her fetus. Exhibit 1(a) at 18, 59. He knew there was a risk Depakote could cause a neural tube defect also known as spina bifida. *Id*. The information Abbott published in the 2005 Physician Desk Reference on Depakote stated that the estimated risk that a fetus exposed to Depakote would develop spina bifida was approximately 1 to 2%. Exhibit 1(p). In May 2005, Dr. Stepansky was aware generally that Depakote had the potential to cause neuro cognitive deficits in fetuses exposed to the drug. Exhibit 1(a) at 18. Dr. Stepanksy does not remember what he knew in 2005 regarding the percentage risk of neurocognitive deficits in fetuses exposed to Depakote. Exhibit 1(b) at 87-88.

The information Abbott had published in the 2005 Physician Desk Reference did not quantify the risk of neurocognitive deficits in fetuses exposed to Depakote. Exhibit 1(p).

In April 2004, researchers with the Antiepileptic Drug (AED) Pregnancy Registry sent Abbott a draft of an abstract reporting data gathered on Depakote. The abstract had a preliminary title of "Valroate Monotherapy is a Potent Teratogen in Humans." It reported that 8.1% of the women who became pregnant while taking Depakote gave birth to babies with major congenital anomalies. The proposed abstract concluded that "VPA (valproic acid) is a potent teratogen in humans and its use should be reduced to the minimum or substituted by another safer AED." Exhibit 1(l).

In May 2004, Abbott was aware of two new data sets which suggested a 10.7 to 17% risk of teratogenicity associated with babies exposed to Depakote *in utero*. Abbott acknowledged that these new studies reported risks of birth defects that were significantly higher than what was stated in Abbott's package insert for Depakote. Exhibit 1(o).

Dr. Stepansky, knowing that Depakote posed some risk of causing birth defects, advised Angie on May 24, 2005 not to get pregnant while taking the medication. Dr. Stepansky knew Angie was using a birth control patch to prevent pregnancy. Exhibit 1(a) at 51, 57.

On May 31, 2005, Angie returned to see Dr. Stepansky. This was seven days after starting Depakote. Angie reported that her menstrual period was two weeks late. Dr. Stepansky ordered a STAT pregnancy test that was negative. Dr. Stepansky's notes do not reflect that he discussed Angie's potential pregnancy with his supervisor, Dr. Brontman. Dr. Stepansky did not discontinue his prescription for Depakote but documented that he repeated his warning to Angie that the drug could cause birth defects if she became pregnant. Exhibit 1(a) at 66-73.

Dr. Stepansky continued to regularly evaluate Angie through the summer of 2005. Exhibit 1(g). On July 1, 2005, Dr. Thomas Allen replaced Dr. Brontman as Dr. Stepansky's supervisor. Exhibit 1(a) at 10. Dr. Stepansky continued prescribing Depakote. On September 8th or 9th, 2005, Angie became pregnant while taking Depakote. Exhibit 5 at 13-16. On October 11, 2005, Angie saw Dr. Stepansky and reported that her menstrual period was late. Exhibit 1(a) at 84-92. Dr. Stepansky asked her to go to the hospital's laboratory for a pregnancy test which Angie refused. *Id*. Angie told Dr. Stepansky that she would take a home pregnancy test and report the result. Dr. Stepansky did not direct Angie to stop taking Depakote until it was determined whether or not she was pregnant. *Id*. Angie continued taking Depakote for another nine days. On October 20th, Dr. Pedan, Angie's psychologist learned that her pregnancy test was positive. Dr. Pedan paged Dr. Stepansky to advise him of the test result. After learning of this finding, Dr. Stepansky told Angie to stop taking Depakote. *Id.*

Angie's son Charles IV (known as Quatro) was born on May 18, 2006. The baby was transferred immediately to Lurie Children's Hospital for surgery to repair his neural tube defect. Besides spina bifida, Quatro has been diagnosed with significant cognitive deficits and physical abnormalities that are consistent with what is known as valproic acid syndrome. Exhibit 1(k).

The Muhammads sued Dr. Stepansky's employer, Northwestern Memorial Hospital and Dr. Allen who was supervising Dr. Stepansky when Angie became pregnant. (The *Northwestern* litigation.) The case went to trial in August 2018 and a jury reached a verdict in favor of the Muhammads and against defendants on September 21, 2018. The jury awarded plaintiffs damages in the amount of $18,500, 000.00. While the jury was deliberating, the parties entered into a "high-low" settlement agreement. The verdict exceeded the agreed upon high of $12 million and defendant Northwestern paid that amount to plaintiffs.

The case went to the jury on the following allegations of negligence:

a. Failed to adequately monitor a second year resident's care and treatment of complicated mentally ill patient; or
b. Failed to put into place an adequate plan to prevent Angie Muhammad from getting pregnant while taking Depakote (valproic acid); or
c. Failed to re-evaluate Angie Muhammad and her birth control plan when she reported that her menstrual period was late on May 31, 2005; or
d. Failed to stop prescribing Depakote (valproic acid) on May 31, 2005 when Angie Muhammad reported that her menstrual period was late or;
e. Failed to secure a pregnancy test on October 11, 2005 when Angie Muhammad reported that her menstrual period was late or;
f. Failed to direct Angie Muhammad to stop taking Depakote (valproic acid) on October 11, 2005 when she reported that her menstrual period was late.

Exhibit 4 (Jury Instruction).

Plaintiffs contended that defendants' alleged acts of negligence wrongly exposed Quatro to the adverse effects of Depakote from the time of conception on or about September 8th until it was stopped on October 20th. Plaintiff's causation expert, Dr. George Siegel, opined that the Depakote Angie ingested in that time period caused Quatro's spinal bifida, cognitive deficits and other physical abnormalities. Exhibit 1(k). The jury returned a general verdict on these charges and defendants did not submit any special interrogatories.

The Muhammads filed their first lawsuit against defendants Abbott Laboratories Inc. and ABBIE Inc. on August 24, 2917. Plaintiffs voluntarily dismissed this case on June 7, 2018. Exhibit 3. The case was re-filed on June 6, 2019. Exhibit 2. The Muhammads seek to recover damages under theories of strict product liability, negligence and breach of warranty. Plaintiffs contend that defendants' Depakote was defective in its warnings and labeling because Abbott knew the risk of Depakote causing major congenital malformations was high as 17%. Plaintiffs contend further that even though Abbott had knowledge of these risks, it failed to adequately warn or instruct physicians and consumers of the nature and extent of those risks. (The *Abbott* litigation.) *Id.*

II. THE DOCTRINE OF JUDICIAL ESTOPPEL SHOULD NOT BE APPLIED TO BAR PLAINTIFFS' CAUSES OF ACTION AGAINST ABBOTT AND ABBVIE

Judicial estoppel is an equitable doctrine invoked by the court at its discretion. *New Hampshire v. Maine,* 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001); *People v. Runge*, 234 Ill. 2d 68, 132, 917 N.E.2d 940, 334 Ill. Dec. 865 (2009). The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from "deliberately changing positions" according to the exigencies of the moment. (Internal quotation marks omitted*.) New Hampshire*, 532 U.S. at 749-50. Judicial estoppel applies in a judicial proceeding when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding. *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi,* 342 Ill. App. 3d 453, 460, (1st Dist. 2003). Judicial estoppels, however, is a flexible doctrine that should not be used when to do so would result in an injustice. *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App. 3d 836, 850-51 (1994). The doctrine is "an extraordinary one which should be applied with caution" because it impinges on the trial court's role as fact finder by "preclud[ing] a contradictory position without examining the truth of either statement." (Internal quotation marks omitted.) *Id.* at 856-57. Consistent with extraordinary nature of the doctrine, the party seeking to use judicial estoppel must prove by clear and convincing evidence the prerequisites for its application. *Seymour v. Collins*, 2015 IL 118432 ¶39. There are five prerequites. The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it. *Runge,* 234 Ill. 2d at 132.

The first two prerequisites for applying judicial estoppel do not exist. The Muhammad's factual assertions in *Northwestern* are consistent with their factual assertions here. In both cases, the Muhammads contend that Angie should not have been taking Depakote in September 2005 when she got pregnant. The reasons why Angie should not have been taking Depakote then differ in each case but the differences are not factually inconsistent. In *Northwestern*, plaintiffs contended that Dr. Stepansky should have stopped prescribing Depakote on May 31, 2005, when he learned it was possible Angie was pregnant. In *Abbott*, plaintiffs contend that Angie should never have been given Depakote at all. Exhibit 1, Dr. Nasr affidavit. This difference arises from Abbott's alleged suppression of information which if known would have contraindicated Depakote from the outset. *Id.*

In the information disseminated by Abbott in 2005, it warned that "[v]alproate can produce teratogenic effects such as neural tube defects (e.g. spina bifida). Exhibit 1(p) at 435. Abbott specifically warned that the risk of spina bifida was "approximately 1 to 2%." *Id*. at 438. Accordingly, Abbott warned that due to the risk of neural tube defects, " use of Depakote tablets in women of childbearing potential requires that the benefits of its use be weighed against the risk of injury to the fetus." *Id.* at 435. Abbott's literature further stated that "[a]ccording to published and unpublished reports" valproate, if taken during pregnancy, may result in increased birth defects in addition to spina bifida. *Id*. at 438. Abbott, however, claimed that there was "insufficient data to determine the incidence" of these other anomalies. *Id.*

In the *Northwestern* litigation, plaintiffs contended that Abbott's warnings were sufficient to put Dr. Stepansky on notice that if he prescribed Depakote to Angie there was some risk that if she became pregnant her fetus could be harmed by the drug. Therefore, plaintiffs contended that he had a duty to take reasonable precautions prevent her from becoming pregnant. Plaintiffs'

expert opined that Dr. Stepansky failed to fulfill this duty and Angie got pregnant. Def. Exhibit 7, Plaintiff's Opening Statement. As a second prong of attack, plaintiffs' contended that when Angie reported that her menstrual period was late on May 31, 2005, Dr. Stepansky should have reconsidered his decision to prescribe Depakote. *Id*. In the opinion of plaintiffs' expert, this event should have been a warning flag to Dr. Stepansky that Angie, who had a history of medication non-compliance, could not be trusted to correctly use a birth control patch which has to be changed weekly. *Id.* At that juncture, the benefits of Depakote no longer justified the risk of Angie getting pregnant and delivering a child with birth defects. *Id.* The final prong of attack was that Dr. Stepansky, knowing Depakote's potential to cause birth defects should have immediately directed Angie to stop taking the drug when she reported missing her menstrual period on October 11, 2005. Plaintiffs contended that the additional exposure of the fetus to Depakote for nine more days caused more damage and cognitive deficits. *Id*. This last issue is not germane in the *Abbott* litigation because the Muhammads contend Angie should never have been started on Depakote. Exhibit 1. The jury agreed with one or more of plaintiffs' theories.

Plaintiffs' contentions in the *Abbott* litigation are not inconsistent with their theories in *Northwestern*. It is black letter law that in a medical malpractice case, a physician's conduct must be measured by the knowledge and standards that existed at the time the conduct at issue occurred. *Granberry v. Carbondale Clinic. S.C*., 285 Ill. App. 3d 54, 65 (5th Dist. 1996). Plaintiffs did not contend it was negligent for Dr. Stepansky to prescribe Depakote to Angie on May 24, 2005. Plaintiffs' expert opined that a case could be made based on existing knowledge and standards, that it was reasonable for Dr. Stepansky to prescribe Depakote *provided* proper precautions were taken to prevent pregnancy. Def. Exhibit 7. Therefore, the expert did not opine that Dr. Stepansky's initial prescription for Depakote was negligent. *Id.*

In this litigation, Plaintiffs contend that Abbott knew more about the risks of Depakote in 2005 than what it was disclosing in its labeling. Plaintiffs further contend that if Abbott had included in its 2005 labeling the data it possessed indicating the risk of major birth defects was potentially 17%, Depakote never should have been prescribed for Angie because the risk of fetal injury at that level would have outweighed the drug's potential benefit. Exhibit 1. This position is not inconsistent with plaintiffs' stance in the *Northwestern* litigation.

Even if this court finds that Abbott has proven by clear and convincing evidence that Plaintiffs have taken inconsistent factual positions, the court must still exercise its discretion in determining whether to apply judicial estoppel. *Seymour v. Collins*, 2015 IL 118432 ¶47. The doctrine should not be applied if the result would be inequitable. *Id.* at ¶50. Plaintiffs submit that in this instance, factual inconsistencies, if any, do not warrant the draconian remedy of judicial estoppels. *Id.*

Moreover, judicial estoppel is limited to factual inconsistencies. It does not apply if a party takes positions that are legally inconsistent. *People v. Jones,* 223 Ill. 2d 569, 598 (2006). Plaintiffs' factual positions in both cases is consistent. Angie should not have been taking Depakote when she became pregnant. The legal theories pursued against Northwestern were different than those alleged against Abbott but that does not warrant summary judgment based on judicial estoppel. *State Farm Casualty Co. v. Watts Regulator Co*., 2016 IL App (2nd) 160275 ¶ 22. Abbott focuses on arguments made by Muhammads' counsel in support of a motion *in limine*. Counsel argued that the knowledge Dr. Stepansky and Dr. Allen had, albeit incomplete, should have been enough to decide Angie was no longer a candidate for Depakote after the pregnancy scare on May 31, 2005. As to the comment that neither doctor said they would have acted differently if they knew more, it merely was a report to the court that neither had been

asked that question in their discovery depositions. Exhibit 1, Attachments (a) and (c). The doctors were questioned on that topic for the first time in the *Abbot*t litigation. *Id.,* at (b) and (d).

From the same argument, Abbott highlights a comment by plaintiffs' counsel that if plaintiffs prevailed in the malpractice claim, there would be no need to proceed further. This comment was counsel's opinion or legal conclusion. The doctrine of judicial estoppel "does not apply where the prior statement is merely an expression of opinion or legal conclusion." *Ceres Terminals v. Chi. City Bank & Tr. Co.*, 259 Ill. App. 3d 836, 852 (1st Dist.1994).

The medical malpractice cases cited by defendants are inapplicable. First, *Watson v. Northwestern Memorial Hospital*, No. 1-16-0091, 2016 WL 5888993 is an unpublished order and cannot be cited pursuant to Supreme Court Rule 23. *Smeilis v. Lipkis,* 2012 IL App (1st) 103385 is factually distinguishable. There, the plaintiff originally presented an expert who opined that her injury was proximately caused by the failure of doctors to diagnose and treat a neurological condition with surgery by a date certain while she was a patient in a hospital. After settling with these defendants on the eve of trial, the plaintiff changed her theory to contend that her condition was normal when she left the hospital but was injured later through the neglect of a physician treating her at a nursing home that she was discharged to from the hospital.

Illinois law recognizes that there may be more than one proximate cause of an injury. A plaintiff party who wins a jury verdict against one set of defendants is not barred by the doctrine of judicial estoppels from proceeding against another set of defendants who were granted summary judgment improperly. *McIntyre v. Balagani*, 2019 IL App (3d) 140543. In *McIntyre*, the court found that plaintiff's positions against each set of defendants were not inconsistent because both could be a proximate cause of the alleged injury. Id. at ¶64. Here, the injuries

Quatro suffered could be caused by a combination of Abbott's inadequate labeling and the malpractice of the defendants sued in the *Northwestern* case.

III. THERE ARE ISSUES OF FACT THAT PRECLUDE SUMMARY JUDGMENT ON THE ISSUE OF PROXIMATE CAUSE

Defendants, for purposes of their summary judgment motion, do not dispute the issue of whether their warnings were inadequate as alleged by the Muhammads. The same Depakote labeling was at issue in *Raquel v Abbott Laboratories Inc*., 2017 U.S. Dist. LEXIS 112329 (S.D. Ill.) and a jury returned a verdict in favor of plaintiff. Abbott and the Muhammads have agreed to use depositions of Abbott employees form *Raquel* in this case along with the documents used as exhibits.

It is defendants' position that even if their labeling and warnings were inadequate, the Muhammads cannot prove a causal connection between these defects and Quatro's injury. They contend that the chain of causation is broken by the testimony of Dr. Stepansky and Dr. Allen that they would have prescribed Depakote to Angie even if Abbott's warnings disclosed a higher risk of birth defects than what was stated in defendants' 2005 drug labeling. This argument fails for multiple reasons.

First, defendants' reliance on the learned intermediary doctrine is misplaced. Under this doctrine, a pharmaceutical company's duty to warn is to the physician, not the patient consuming the medication. *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507 (1987). The physician, in turn owes a duty to convey the warnings to their patient using their medical judgment. *Id.* at 517. Defendants contend that the testimony of the learned intermediaries in this case that they would have prescribed Depakote regardless of what additional information they might have had on increased risk, breaks any causal connection and insulates them from liability. The flaw in this argument is that when a drug company's warnings are inadequate, doctors

"cannot be considered 'learned intermediaries' and it is a question fact whether warnings are adequate." *Hansen v. Baxter Healthcare Corp*., 198 Ill. 2d 420, 432 (2002)(citing *Proctor v. Davis*, 291 Ill. App. 3d 265 (1st Dist. 1997)). If the learned intermediary doctrine does not apply, the logical conclusion is that the prescribing doctors' conduct is not relevant and does not insulate the drug company from liability. *Giles v. Wyeth Laboratories, Inc.*, 500 F. Supp. 2d 1063, 1068 (S.D. Ill. 2007)(applying Illinois law). Therefore, plaintiff does not have to prove that the prescribing physicians would have acted differently if proper warnings had been given. *Mahr v. G.D. Searle & Co*., 72 Ill. App. 3d 540, 566-67 (1st Dist. 1979). The rationale is two-fold. First, it is only speculation to assume that a properly worded warning would have had no effect on the prescribing doctor. *Id.* at 1067. Second, a drug manufacturer cannot claim that its "failure to warn had no effect on the outcome when, if the defendant had made the proper warning, we would know for sure whether the outcome would have been affected." *Giles*, 500 F. Supp. At 1068 (quoting *Ortho Pharm. Corp. v. Chapman*, 180 Ind. App. 33 (Ind. Ct. App. 1979).

The above rationales apply here. Both Dr. Stepansky and Dr. Allen admit that they cannot remember what they knew about the risks of Depakote in 2005 when they prescribed it to Angie. To testify 15 years later that they would not have changed their course of action even if they learned that the risk of birth defects was greater than previously known is nothing more than rank speculation.

In a case involving the adequacy of Abbott's 1999 labeling for Depakote, Abbott moved for summary judgment on the issue of proximate cause. *D.W.K. v. Abbott Laboratories, Inc. (In re Depakote*), 2015 U.S. Dist. LEXIS 108399 at 24; 2015 WL 4776093. There, the court found there were issues of fact as to whether Abbott's warnings "sufficiently apprised the prescribing physicians…of Depakote's dangerous propensities such that these physicians could be

considered learned intermediaries." Therefore, the court, as one basis for its ruling held that a jury had to decide those issues. *Id*.

Some Illinois courts also have suggested that if a drug warning is inadequate, then it is presumed the defective warning was a proximate cause of plaintiff's injury. *Mahr v. G.D. Searle & Co*., 72 Ill. App. 3d 540, 566-67 (1st Dist. 1979). The rationale is that medical practitioners presumably will act competently by heeding and following proper warnings, i.e., the "heeding presumption." *Id. See also, D.W.K. v. Abbott Laboratories, Inc. (In re Depakote*), 2015 U.S. Dist. LEXIS 108399 at 24; 2015 WL 4776093.

Defendants argue that the testimony of Dr. Stepansky and Dr. Allen that they "would not have done anything differently" is conclusive on the issue of proximate cause. That is not true under Illinois law. If a doctor testifies that his course of action would not have changed even if he had been given additional information, a plaintiff can challenge that assertion and create a question of fact by offering expert opinion as to what a reasonably well qualified physician would have done with the undisclosed information. *Snelson v. Kamm*, 204 Ill. 2d 1, 46 (2003). In establishing this principle, the Illinois Supreme Court adopted Justice Frossard's dissent in *Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7, 26-27 (1st Dist. 1999). *Id.*

In *Seef*, nurses failed to properly interpret a fetal monitor strip and timely inform the obstetrician that the baby was in trouble. The treating obstetrician testified that even if he had been told about the abnormal strip earlier, he would not have taken any different action. *Id*. at 26. The plaintiff countered with the testimony of an expert obstetrician who contradicted the treater and opined that a reasonably qualified obstetrician would have delivered the baby sooner if informed of the abnormal strip. In Justice Frossard's opinion, the hypothetical testimony of the treating doctor that he would have done nothing was speculation. In contrast, Justice Frossard

found that the expert's testimony was more credible medical opinion regarding what a doctor should have done to meet the standard of care. He further observed that "[a] trial court is not required to accept a defendant's hypothetical testimony as uncontroverted fact, particularly when the opposing party offers contradictory testimony." *Id*. at 27 (citing *Wodziak v. Kash*, 278 Ill. App. 3d 901 (1st Dist. 1996).

Subsequent to *Snelson*, courts consistently have held that when a defendant moves for summary judgment on the issue of proximate cause based on the assertion of a treating doctor that he would not have done anything different, a plaintiff can defeat the motion with expert testimony. *Buck v. Charletta,* 2013 IL App (1st) 122144 ¶¶69-72; *Shicheng Guko v. Kamel,* 2020 IL App (1st) 190090 ¶¶33-34.

Here, the Muhammads' tender the affidavit of Dr. Suhayl Nasr, an expert in psychiatry. Exhibit 1. He testifies that if a reasonably qualified psychiatrist knew the information Abbott allegedly failed to disclose that the risk of major birth defects caused by Depakote was 10 to 17%, that psychiatrist would not have prescribed Depakote to Angie under any circumstance. To do so would violate the standard of care. *Id*. Dr. Nasr's expert testimony discredits the hypothetical testimony of Dr. Stepansky and Dr. Allen. A jury must decide which to believe. *Buck v. Charletta,* 2013 IL App (1st) 122144 ¶¶69-72.

Abbott claims that there is no evidence that Dr. Stepansky and Dr. Allen consulted with its labeling before prescribing Depakote to Angie thus entititling it to summary judgment under the holding in *Vaughn v. Ethicon,* Inc., 2020 WL 5816740. (S.D. Ill. 2020). That assertion is not accurate. Dr. Allen testified that he believes he had consulted with the Physicians Desk Reference (PDR) speicifically for Depakote and assumes he probably did so before July, August, September, October of 2005. Exhibit 1, (d) at 27. Similarly, Dr. Stepansky testified that he is

familiar with the PDR and uses and relies upon the PDR. Exhibit 1, (b) at 67. He also knew Depakote had a "Black Box" warning its labeling before he prescribed Depakote to Angie. *Id*. at 68. Finally, the PDR and package insert for Depakote were sources of information Dr. Stepansky used when determining whether the benefits of Depakote outweighed its risks when he prescribed it for Angie. *Id*. at 82-83. This court in ruling on a motion for the summary judgment, must view all evidence in a light most favorable to the non-moving party. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). When the testimony of the doctors is construed most favorably for the Muhammads, it is sufficient to create a question of fact as to whether Abbott's labeling played some role in the decision of Dr. Stepansky to start Angie on Depakote and Dr. Allen's alleged decision to continue her on the drug after he began supervising Dr. Stepansky.

IV. CONCLUSION

For the reasons stated above, the motion of defendants Abbott Laboratories, Inc. and ABBVIE, Inc. for summary judgment must be denied.

Respectfully submitted,

BRUSTIN & LUNDBLAD, LTD.

By: /s/ *Milo W. Lundblad*
Milo W. Lundblad
One of Their Attorneys

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EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHARLES MUHAMMAD and ANGIE MUHAMMAD, As Parents of CHARLES MUHAMMAD, a minor, and CHARLES MUHAMMAD, Individually,	)	
Plaintiffs,	)	Case No. 2019 L 6254
vs.	)	Calendar X
	)	Judge Brendan O'Brien
ABBOTT LABORATORIES, INC., and ABBVIE INC.	)	
Defendants.	)	

AFFIDAVIT SUHAYL JOSEPH NASR, M.D.

NOW COMES YOUR affiant, Suhayl Joseph Nasr, M.D., duly sworn upon oath, states that I am over the age of 18, have personal knowledge of and am competent to testify to the following:

1. I am a medical doctor licensed to practice medicine by the States of Indiana and Illinois. I am Board Certified by the American Board of Psychiatry and Neurology in general psychiatry and geriatric psychiatry. I earned my undergraduate degree in Biology/Chemistry and medical degree from American University of Beirut, Beirut, Lebanon. Thereafter, I did an internship in Medicine/Neurology at American University Medical Center, Beirut, Lebanon. I came the United States in 1974 and completed a residency and fellowship in psychiatry at Strong Memorial Hospital which is affiliated with The University of Rochester School of Medicine and Dentistry, Rochester, New York.
2. I have been in the private practice of psychiatry since 1986. As part of my practice, I am Medical Director of Behavioral Health Service Line for Beacon Health System and Consultant, Notre Dame University Counseling Center.
3. I am currently a Volunteer Clinical Professor with the Indiana University School of Medicine-South Bend and Adjunct Assistant Professor of Psychology at Notre Dame University. Earlier in my career, I held teaching appointments at the University of Chicago, The Pritzker School of Medicine and the University of Illinois at Chicago. While at the Illinois State Psychiatry Institute and University of Illinois at Chicago, I treated mentally ill patients as outpatients in clinics similar to the Stone Institute of Psychiatry where Angie Muhammad was treated starting in 2003. Attached hereto as Exhibit Q is my curriculum vitae which sets out in greater detail my education, training and experience in the field of psychiatry.
4. In the course of my professional career, I have treated many patients with bipolar and schizoaffective disorders similar to the mental illnesses diagnosed in Angie Muhammad. Through my education, training and experience, I am familiar with

medications used to treat patients with mental disorders similar those suffered by Mrs. Muhammad, including medications to modulate mood swings including Lithium and Depakote (also known as valproic acid).

5. Based on my education, training and experience, I am familiar with the standard of care required of psychiatrists and residents in psychiatry treating patients suffering mental disorders similar to those with which Angie Muhammad was diagnosed in 2005 under the same or similar circumstances.
6. At the request of counsel for the Muhammads, I have reviewed the medical records, documents, and other materials:
    a. Stepansky deposition transcript and exhibits-Northwestern
    b. Stepansky deposition transcript and exhibits-Abbott
    c. Allen deposition transcript and exhibits-Northwestern
    d. Allen deposition transcript and exhibit-Abbott
    e. Northwestern Hospital Records
    f. Dr. Channon Assessment
    g. MacNeal Hospital Records
    h. Riveredge Hospital Records
    i. Dr. Stepansky Letter to Dr. Dago
    j. Dr. Dago Reports (Typed and hand written.)
    k. Dr. Siegel evaluation
    l. Abbott Document 0000110
    m. Abbott Document 0000114
    n. Abbott Document 0000116
    o. Abbott Document 0000584
    p. 2005 PDR excerpt Re: Depakote

7. Following my review of the above materials, I find the following facts to be relevant:
    a. Angie Muhammad was born on March 22, 1978. At the relevant times she was married. She gave birth to her first son in 2001; her second son in 2004 and her third son, who is the plaintiff, on May 18, 2006.
    b. Angie had a history of a hospital admission for treatment of mental illness in Mexico in approximately 1997, her first admission. After moving to the Chicago area she had multiple additional admissions at Northwestern Memorial Hospital to treat acute psychotic events on April 28 through May 23, 2002; February 21 through March 6, 2003; and, December 10, 2003 through January 23, 2004. Following this admission, Angie began receiving treatment as an outpatient at the Rehabilitation Clinic of the Stone Institute of Psychiatry which is part of Northwestern Memorial Hospital.
    c. In January 2005, Dr. Christian Stepansky, a psychiatry resident became part of the team treating Angie at the Clinic. The team included an attending psychiatrist, Dr. Marcia Brontman; and Dr. Janet Peden, a psychologist. Dr. Stepansky saw patients, including Angie, on Tuesdays. Dr. Stepansky was responsible for managing Angie's medications. When Dr. Stepansky saw patients on Tuesdays, he would assess their symptoms, assess their medication regimen, adjust their medication regimen if necessary, and give them an appointment to return. Dr. Brontman, did not see patients with Dr. Stepansky.

d. From January 2005 through May 4, 2005, Angie had multiple hospital admissions to treat acute psychotic symptoms.
e. On or about May 16, 2005, Dr. Stepansky asked Dr. Pedro Dago, a Spanish speaking colleague, to evaluate Angie to determine in part whether her ability to speak English was an impediment to her treatment at the clinic.
f. Dr. Dago evaluated Angie on May 19, 2005 and prepared a report for Dr. Stepansky. He made a diagnosis of "most likely bipolar v. schizoaffective" and commented that "she can get very psychotic and very dangerous." Dr. Dago made treatment recommendations which included "[c]onsider Lithium, Depakote."
g. On May 24, 2005, Dr. Stepansky saw Angie and during this evaluation he prescribed Depakote. Dr. Stepansky's note does not state his reasons for prescribing Depakote. He believes it would have been to prevent further cycling of Angie's bipolar disorder. Although Dr. Dago's recommendation was for Lithium or Depakote, Dr. Stepansky cannot recall whether he considered prescribing Lithium. Dr. Stepansky knew both Lithium and Depakote could harm a fetus if Angie became pregnant. Dr. Stepansky does not recall why he chose Depakote over Lithium. His note does not refer to Lithium. Dr. Stepansky's note says: "Risks/benefits of med discussed. Written info given. Specifically informed patient of teratogenic potential. Liver, pancreatic, hemo effects." The doctor does not remember what he specifically told Angie about the risks and benefits of Depakote.
h. On May 31, 2005, Angie returned to the clinic. She told Dr. Stepansky that her menstrual period was late. A STAT pregnancy test was negative. Dr. Stepansky continued prescribing Depakote and increased the daily dose.
i. Dr. Stepansky continued prescribing Depakote and increasing Angie's daily dose through the summer of 2005. Dr. Allen replaced Dr. Brontman as Dr. Stepansky's supervisor on July 1, 2005. There are no notes in the medical chart documenting any contact between Dr. Allen and Angie before October 2005. In retrospect, we know Angie became pregnant on approximately September 8 or 9, 2005.
j. On October 11, 2005, Angie informed Dr. Stepansky that her menstrual period was late. She refused going the hospital's laboratory for a pregnancy test. Dr. Stepansky did not direct Angie to stop taking Depakote.
k. On October 20, 2005, Dr. Stepansky learned that a laboratory test confirmed Angie was pregnant and told Angie to stop taking Depakote.
l. At the end of November 2005, Angie was hospitalized to treat acute psychotic symptoms. After this episode, Angie was started on Lithium.
m. On May 18, 2006, Angie gave birth to her son, the plaintiff in this case, who was born with a neural tube defect. Dr. Siegel, a neurologist, is of the opinion that in addition to his neural tube defect, the child has severe cognitive impairment, jaw and teeth maldevelopment, and other malformations that were caused by his exposure to Depakote during the early period of embryogenesis. The conditions are permanent.
n. Abbott's product labeling for Depakote published in the 2005 Physician's Desk Reference provides a "Black Box" warning that "VALPROATE (THE

GENERIC NAME FOR DEPAKOTE) CAN PRODUCE TERATOGENIC EFFECTS (E.G. SPINA BIFIDA). ACCORDINGLY, THE USE OF DEPAKOTE TABLETS IN WOMEN OF CHILD BEARING POTENTIAL REQUIRES THAT THE BENEFITS OF ITS USE BE WEIGHED AGAINST THE RISK OF INJURY TO THE FETUS."

o. The 2005 labeling states that the estimated risk of a fetus exposed to valproic acid developing spina bifida is approximately 1 to 2%. The labeling further states that offspring of women receiving valproic acid during pregnancy have an increased incidence of birth defects. Abbott's drug information disclosure did not quantify the amount of increased risk.

p. In contrast to Abbott's 2005 labeling, an internal document produced by Abbott in discovery in this matter shows that in 2004, Abbott possessed a proposed unpblished abstract authored by researchers from the Antiepileptic Drug Pregnancy Registry which discussed its data from the study of teratogenic effects of valproic acid and other anti-seizure medications taken by pregnant women. The abstract was entitled: "Valproate Monotherapy is a Potent Teratogen in Humans." The data showed that 8.1% of babies born to women taking Depakote had major malformations. The researchers concluded that "Valproate is a potent teretogen in humans and its use should be reduced to the minimum or substituted by another safer AED." Abbott objected to the title of the abstract and conclusion. After the authors reviewed Abbott's comments, the objected to title and conclusion were revised.

q. Also, in May 2004, Abbott was aware of "two new data sets" that suggested a 10.7-17% risk of teratogenicity associated with Depakote use in women with epilepsy and the rate of risk was "significantly higher than the package insert."

8. Following my evaluation of the information reviewed, I formed the following conclusions and opinions which I hold to a reasonable degree of medical certainty based on my education, training and experience in the field of psychiatry:

   a. If prior to May 24, 2005, Abbott's product labeling and warnings disclosed that there was a 10 to 17% or greater risk of birth defects in a fetus exposed *in utero* to Depakote (valproic acid), a reasonably careful psychiatrist possessing the knowledge, skill and care ordinarily used by a reasonably careful psychiatrist would not have prescribed Depakote to Angie Muhammad on May 24, 2005 or on any date thereafter. Or in other words, if a psychiatrist prescribed Depakote to Angie on or after May 24, 2005, that psychiatrist would have deviated from the standard of care.

   b. Bases for my opinion:

      i. Angie Muhammad was a fertile woman of child bearing age who was married and sexually active. Therefore, she was at risk for an unplanned pregnancy while taking Depakote.

      ii. Other than sterilization, other methods of birth control are not 100% effective. Angie's mental illness and history of medication non-compliance increased her risk of getting pregnant inadvertently.

      iii. Angie's risk of getting pregnant combined with the 10 to 17% risk of a birth defect in her child if she got pregnant while taking Depakote

outweighed the potential benefit Depakote might have had in treating her bipolar v. schizophrenic disorders.

iv. The 10 to 17% or greater risk of birth defects that Abbott failed to disclose in its 2005 product labeling significantly changed the risk/benefit analysis used in weighing whether it is appropriate to prescribe Depakote. This higher risk of birth defects, tips the balance against Depakote.

v. Another important factor that must be considered in the risk/benefit analysis for prescribing Depakote is whether there was any other effective and safer medication available. In this instance there was a better medication available in 2005. Dr. Dago recommended "Lithium, Depakote." Lithium has been used for decades to successfully treat bipolar/schizophrenic disorders. Lithium presents a small risk of causing heart defects that can be corrected through surgery. Lithium can be used during pregnancy. Attachment b, Stepansky transcript, Exhibit 1. Lithium was prescribed to Angie during her pregnancy in January 2006. When compared to the greater risk of birth defects for Depakote (10 to 17% or greater) of which Abbott was aware of but failed to disclose, Lithium clearly should have been the medication of choice for Angie had the increased risk been part of the equation.

c. Dr. Stepansky and Dr. Allen in depositions given in 2020 claim that even if they had been told by Abbott that the overall birth defect risk was 10% plus an added risk of neurodevelopmental delay of 20%, they would still have prescribed Depakote to Angie in 2005. Dr. Allen went further to claim he would have prescribed Depakote to Angie even if there was a 100% risk of birth defects if she got pregnant while taking the drug. This testimony of Dr. Stepansky and Dr. Allen is contrary to the standard of care and does not represent what a reasonably careful psychiatrist would have done in under the circumstances in 2005 for the reasons stated in paragraph (b) above.

d. If Abbott had disclosed the higher 10 to 17% risk of birth defects, plaintiff Charles Muhammad IV would not have been injured by his exposure to Depakote. That is, it is more likely than not, had Depakote not been prescribed, Charles IV would not have been born with spina bifida, congenital defects and other anomalies that he has.

e. Bases for opinion:

i. If Abbott disclosed and warned of the true risk of birth defects caused by *in utero* exposure to Depakote, the drug would not have been prescribed to Angie by psychiatrists adhering to the standard of care.

ii. Therefore, if Depakote had not been prescribed, Charles IV would not have been exposed and injured by the drug when Angie got pregnant in September 2005.

9. I base my opinions on the information provided and I reserve the right to revise and

supplement them as additional information becomes available.

Suhayl Nasr, M.D.

Date: 3/1/2021

VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters, the undersigned certifies that he/she verily believes the same to be true.

Signed on March 1, 2021.

Suhayl Nasr, M.D.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHARLES MUHAMMAD and ANGIE MUHAMMAD, as parents of C.M., a minor, and C.M., individually,	)	
Plaintiffs,	)	Case No. 2019 L 006254
v.	)	Calendar X
ABBOTT LABORATORIES INC. and ABBVIE INC.,	)	Judge Brendan O'Brien
Defendants.	)	

ORDER

This cause coming to be ruled on Defendants ABBOTT LABORATORIES INC. and ABBVIE INC.'s (collectively, "Abbott") Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005. Based on the parties' motions and submitted material, it is hereby ordered that Defendants' Motion for Summary Judgment is *granted*, as more fully set forth below.

BACKGROUND

This cause arises out of a spina bifida and related birth defects Plaintiff C.M. was born with in May 2006. Plaintiff C.M. and his parents Charles and Angie Muhammad ("Mr. and Mrs. Muhammad") assert that alleged damages were the result of Abbott's bipolar prescription medication Depakote that Mrs. Muhammad took while pregnant.

Defendants filed a Motion for Summary Judgment asserting that the doctrine of judicial estoppel bars an additional recovery based on a theory inconsistent to that under which Plaintiffs obtained a previous recovery in a prior malpractice case ("*Northwestern*"). Defendants also assert that Plaintiffs cannot establish that the allegedly inadequate warning was the proximate cause of their injuries.

LAW AND ANALYSIS

I. STANDARD OF REVIEW

A trial court is permitted to grant summary judgment only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). "The trial court must consider documents and exhibits filed in support or opposition to a motion for summary judgment in the light most favorable to the nonmoving party." *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶ 55. "Summary judgment is a drastic measure and should be granted only if the movant's right to judgment is clear and free from doubt." *Id.* "While the nonmoving party in a summary judgment motion is not required to prove his or her case, the nonmovant must present a factual basis arguably entitling that party to a judgment." *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004).

II. JUDICIAL ESTOPPEL

"Judicial estoppel is an equitable doctrine invoked by the court at its discretion." *Seymour v. Collins*, 2015 IL 118432, ¶ 36. "Judicial estoppel applies in a judicial proceeding when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding." *Id.* Five prerequisites are 'generally required' before a court may invoke the doctrine of judicial estoppel. *Id.* at ¶ 37. "The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *Id.* Judicial estoppel "must be proved by clear and convincing evidence." *Id.* at ¶ 39.

Plaintiffs argue that the first two elements do not exist here. In the previous *Northwestern* case,

Plaintiffs contended that the treating doctor should have stopped prescribing Depakote on May 31, 2005, when he learned it was possible Mrs. Muhammad was pregnant because the doctors knew of the birth risks associated with Depakote. In this *Abbott* case, Plaintiffs argue that Mrs. Muhammad should never have been given Depakote at all because the doctors did not know of the birth risks. Plaintiffs further argue that these two positions are not factually inconsistent.

Defendants contend that Plaintiffs previously claimed at trial in *Northwestern* that Mrs. Muhammad's treating physicians had adequate information about Depakote's risks in order to prescribe it safely but failed to act in accordance with that knowledge. Defendants also contend that Plaintiffs originally sued Abbott, but dismissed their claims because they were inconsistent with their malpractice claim that the physicians were well-aware of the risks and had the information needed to safely prescribe Depakote. Defendants further contend that Plaintiffs now claim in *Abbott* that Mrs. Muhammad's doctors lacked adequate information to make an informed treating decision because of Abbott's alleged failure to warn.

The jury in the *Northwestern* case presumably accepted that the doctors knew or should have known of Depakote's birth risks and returned a verdict in Plaintiffs' favor based on the doctors negligently prescribing it when they suspected she was pregnant. Plaintiffs now allege that Defendants failed to warn the doctors regarding the birth risks associated with the use of the drug. If Plaintiffs succeed here in *Abbott* and prove that Defendants failed to warn the doctors, then this would be contrary to the previous position and verdict that found that the doctors failed to conform their treatment to the applicable standard of care based on their knowledge of Depakote's birth risks.

Plaintiffs cite to *McIntyre v. Balagani*, 2019 IL App (3d) 140543 and argue that a plaintiff who wins a jury verdict against one set of defendants is not barred by the doctrine of judicial estoppel from proceeding against another set of defendants who were granted summary judgment improperly. In

McIntyre, the plaintiff did not rely on contradictory facts to pursue a negligence claim against the on-call hematologist as well as the treating physicians as they both could have been liable for her husband's death.

Accordingly, here in *Abbott* Plaintiffs took a different position than in *Northwestern*, that was factually inconsistent in these two separate judicial proceedings, intending for the trier of fact to accept the truth of the facts alleged (Plaintiffs argued in *Northwestern* that the doctors had enough knowledge of Depakote's birth risks) and have succeeded in the first proceeding (*Northwestern*) and received some benefit from it (jury awarded Plaintiffs damages in the amount of $18,500,000.00). As such, Defendants have proven by clear and convincing evidence that judicial estoppel is applicable here.

III. PROXIMATE CAUSE

Based on the above, this court need not analyze the proximate cause arguments.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is *granted*.

Judge Brendan A. O'Brien

MAR 31 2021

Circuit Court - 2175

/s/ Brendan O'Brien
Hon. Brendan O'Brien
Circuit Court Judge

STATE OF ILLINOIS)
)
COUNTY OF COOK)
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION
CHARLES MUHAMMAD and ANGIE MUHAMMAD, as Parents of CHARLES MUHAMMAD, a minor, and CHARLES MUHAMMAD, Individually,
Plaintiffs,
vs.) 12 L 12174
NORTHWESTERN MEMORIAL HOSPITAL AND MEDICAL CENTER and THOMAS W. ALLEN, MD,
Defendants.

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable Marguerite Quinn, Judge of said Court, on August 31, 2018, at the hour of 9:30 a.m.

Reported by: Barbara Manning, CSR
License No.: 084-003277

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I N D E X

(whereupon, the following proceedings were held out of the presence of the jury.)

MS. SOCOL: Your Honor, as Your Honor might remember, at the beginning when we had motions in limine, Mr. Lundblad brought a motion in limine to bar one of my experts because I had two psychiatric experts, Dr. Gitlin and Dr. Suri from UCLA. They both live in LA.

And Your Honor indicated you thought they were cumulative so we withdrew one.

THE COURT: Right.

MS. SOCOL: So it just came to my attention that they are trying to get Dr. Gitlin to come to Chicago to put in their case or do an evidence dep, and there is no time to do an evidence dep. For us to fly to California and --

THE COURT: For Dr. Gitlin?

MS. SOCOL: Yes.

THE COURT: That's the one you said you weren't going to have.

MS. SOCOL: I withdrew because you thought

So I'd say left and then take it off and put it on that one the next time. So there are ways to educate and reinforce the medication adherence, and we do that all of the time.

Q. Now, according to the records was Mrs. Muhammad in the clinic every week?

A. Yes, she was meeting with Dr. Peden.

Q. And was there also a nurse involved in her treatment?

A. Yes. A nurse is part of the treatment team.

Q. And the nurse and Dr. Peden, they have been part of this monitoring team to make sure the patch was changed weekly as prescribed?

A. Yes. She had a good relationship with Dr. Peden. They could have collaborated on this until she felt more comfortable with the nurse.

Q. Now, with regard to the decision to start the Depakote, that decision, is that a decision that should have been reviewed and approved by Dr. Brontman to meet the standard of care?

A. Yes.

Q. Is there any documentation to indicate that Dr. Brontman was aware that Depakote had been started on May 24th?

A. There was no documentation. Remember, this is a second-year resident. This is where you are really learning how to use these medications so it requires a heightened level of supervision.

Q. All right. Going forward I think the next time that Dr. Stepansky saw Mrs. Muhammad was a week later on May 31, 2003?

A. Yes.

Q. Or 2005. I am sorry.

A. Yes.

Q. Was there any significant event that occurred on that day?

A. Yes. I believe Mrs. Muhammad said that she -- her period was a couple of -- menstrual period was a couple of weeks late.

Q. And what should have been the significance to Dr. Stepansky with that news? What significance should that have been to him?

A. Well, that tells you that you really

need to find out what she is doing with contraception and that maybe Depakote is not the medication for her because with all of the history of noncompliance, unreliability and then this happens, you really need to be on your P's and Q's because this could lead to irreversible damage in a child.

Q. Now, after Mrs. Muhammad told Dr. Stepansky that she could be pregnant, is there any documentation of any review of the plan to keep Mrs. Muhammad from getting pregnant?

A. No, I didn't see any communication with the attending psychiatrist, Dr. Brontman. I didn't see any discussions with the treatment team, and I didn't see any efforts to reach out to others to help her be compliant.

Q. Now, in the absence of having this program in place to make sure that Mrs. Muhammad didn't get pregnant, as of May 31, 2005, do you have an opinion as to whether Mrs. Muhammad should have been continued on Depakote?

A. Absolutely not. The risk is just too great, meaning no one wants to have a child with

a birth defect.

But for someone with this level of illness to happen, it just adds insult to injury, and you are putting her at risk. And we are taught first do no harm.

MS. SOCOL: Objection, Your Honor, 213.

THE COURT: All right. I am going to let the answer stand. Let's keep to disclosed opinions.

BY MR. LUNDBLAD:

Q. All right. The news or information that Mrs. Muhammad came in and had a period that was late, is that information that should have been communicated to her supervisor -- his supervisor, Dr. Brontman, to meet the standard of care?

A. Absolutely.

Q. And is there any documentation indicating that there was any discussion between Dr. Brontman and Dr. Stepansky regarding the fact that Mrs. Muhammad reported that her period was two weeks late?

A. Not that I saw.

Q. Now, when in reaction to -- strike

THE COURT: Hey, don't interrupt. Go ahead.
MR. SNYDER: It's just unheard of, and there is no set of circumstances in any case that I have ever seen.
It would absolutely defeat the fourth element of any 501 instruction, and I think it's telling that this was an action of plaintiff's own doing.
They brought a motion, they argued the testimony as cumulative, and now they want to unargue that the testimony is cumulative.
And we are already moving at a pace as slow as molasses. This has been the plaintiff's case so far, and I don't know how else we are going to speed it up.
And adding one more psychiatrist who is going to go for hours -- and it's not just taking the dep. Ms. Socol does have to fly out there and be there to prepare him.
THE COURT: Okay. This is what I am thinking. Let's call a mistrial. If it's so important, let's call a mistrial.
You know, that's always an option because the more I am hearing about this, we

have -- I mean, I think we have misjudged the calendar. I think we entirely misjudged the calendar.
Because we have got how many days left? We don't have -- one, two, three, four, five, six of the family members have not been scheduled on that calendar.
MS. SOCOL: Dr. Allen hasn't been scheduled.
THE COURT: And Dr. Allen hasn't been scheduled. Moylan hasn't been scheduled on that calendar -- oh, she has. I am sorry.
Dresner isn't on that. We have got -- already we have got a conflict on the 11th that the plaintiffs have to call their expert in out of line, and that gives them -- let me get a September.
MR. LUNDBLAD: Your Honor, with regard to Dr. Gitlin, we will not pursue taking his deposition.
THE COURT: Okay. Because we are running out of time.
MR. BRUSTIN: We will forego it. We will just finish.

THE COURT: Okay. And no 501. No 501 instruction.
MS. SOCOL: Thank you, Your Honor.
THE COURT: Okay. That's it. All right. Let's go. Anything else? Again, thank you all for adjusting to my schedule.
I want credit where credit's due. Thank you once again for adjusting to the Court's schedule.
I left early yesterday at 1:00, and we were able to fit it in. So I do appreciate both sides accommodating the Court.
MR. BRUSTIN: Your powerful opinion has persuaded my no-brainer. We want to finish the case.
THE COURT: Yes. I think that's -- I think I agree with that, that you agree with me. So that's good. Great. All right.
MS. SOCOL: Thank you, Your Honor.
THE COURT: You're welcome.
(Which were all the proceedings had in the above cause this date and time, 2:10 p.m.)

STATE OF ILLINOIS)
) SS:
COUNTY OF WILL)

BARBARA MANNING, as an Officer of the Court, says that she is a shorthand reporter doing business in the State of Illinois; that she reported in shorthand the proceedings of said trial, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said trial.

IN TESTIMONY WHEREOF: I have hereunto set my verified digital signature this 3rd day of September, 2018.

Barbara Manning

BARBARA MANNING
CERTIFIED SHORTHAND REPORTER