No. 125219

IN THE
SUPREME COURT OF ILLINOIS

ALEXIS DAMERON, Plaintiff-Appellee, v. MERCY HOSPITAL AND MEDICAL CENTER, *et al.*, Defendants-Appellants.	))))))))))	On Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 1-17-2338 There on Appeal from the Circuit Court of Cook County, Illinois, Law Division, No. 2014 L 11533, Hon. William E. Gomolinski, Judge presiding

PLAINTIFF-APPELLEE ALEXIS DAMERON'S BRIEF AND ARGUMENT

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STANDARD OF REVIEW

Defendants incorrectly argue that one of the applicable standards of review is abuse of discretion. (Defs' Joint Brief at 13). However, the applicable standard of review is *de novo* because (1) this matter involves the applicability of a discovery privilege; and (2) presents a matter of first impression. *See Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 13; *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 27; *Norskog v. Pfiel*, 197 Ill. 2d 60, 71 (2001); *Cook County State's Attorney v. Illinois State Labor Relations Bd.*, 292 Ill. App. 3d 1, 6 (1st Dist. 1997); *Niven v. Siqueira*, 109 Ill. 2d 357, 368 (1985). The trial court's discovery rulings were properly tested by Plaintiff's counsel through contempt proceedings. *See People v. Coyne*, 2014 IL App (1st) 123105, ¶ 8. "When a contempt order based on a discovery violation is appealed, the underlying discovery order is also subject to review." *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 6 (citing *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001)). The contempt and discovery orders are reviewed *de novo* because they present a matter of law, namely whether the consultant work product privileged afforded in Rule 201(b)(3) protects Dr. Preston's records. *See In re Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 10 (finding the *de novo* standard of review applies when the facts of a contempt order are not in dispute and the court is presented with a question of law). This Court has exercised *de novo* review in cases like the instant case, where the party held in contempt claimed the materials sought were privileged work product. *See, e.g., Shields v. Burlington N. & Santa Fe Ry. Co.*, 353 Ill. App. 3d 506, 508 (1st Dist. 2004). At issue is the interpretation of Illinois discovery rules, specifically Illinois Supreme Court Rules 201 and 213, which this Court reviews *de novo*. *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 35 ("Our review of the

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construction of a court rule is *de novo*."). Additionally, this case presents a matter of first impression in Illinois, which also supports the exercise of *de novo* review. *See Cook County State's Attorney*, 292 Ill. App. 3d at 6 (finding that the reviewing court will exercise *de novo* review in a matter of first impression). Therefore, this Court should only apply a *de novo* standard of review.

STATEMENT OF FACTS

This medical malpractice case arises from an injury to Plaintiff Alexis Dameron's lateral femoral cutaneous and femoral nerves, which she sustained during an over six-hour robotic-assisted hysterectomy performed at Mercy Hospital and Medical Center on August 29, 2013, due to improper positioning. Plaintiff alleges that the damage to her femoral nerves and her resulting femoral neuropathy were caused by the Defendants' negligent medical treatment because they failed to re-position her at any time during the six-hour surgery, and a compression injury to the nerve occurred as a result. (C 22-51).

In order to prepare the case for trial, Plaintiff's counsel retained David C. Preston, M.D. as a consulting expert. Dr. Preston was neither a treating physician nor did he provide any medical treatment to the Plaintiff for her injuries. (C 483-84). Any indication to the contrary is the result of error or inadvertence. (C 492).

At the request of Plaintiff's counsel, on June 1, 2017, Dr. Preston performed a comparison electromyogram ("EMG") and/or nerve conduction study on the Plaintiff Alexis Dameron. Dr. Preston was paid by Plaintiff's counsel to examine the Plaintiff and to provide his opinions regarding her condition in preparation for trial. (C 493). Dr. Preston prepared a report from the EMG study he conducted on the Plaintiff, which discusses his findings and opinions. The EMG study and assessment that Dr. Preston performed was in

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his capacity as a consulting expert for the specific purpose of assisting Plaintiff's counsel in preparing the case for trial.

Prior to the EMG study, on April 28, 2017, the court ordered the Plaintiff to file her Rule 213(f)(3) disclosures by May 30, 2017. (C 446). Plaintiff timely filed her Rule 213(f)(3) disclosures on May 30, 2017, and initially disclosed Dr. Preston as a testifying expert. (C 460-61). Plaintiff disclosed that Dr. Preston would be testifying regarding the results of the comparison EMG study he would be performing on the Plaintiff on June 1, 2017, and specifically reserved the right to supplement and amend these opinions. (C 460-61).

On July 27, 2017, Plaintiff's counsel sent an email to defense counsel informing them that she is withdrawing Dr. Preston as a testifying expert witness. (C 464). In the email, Plaintiff's counsel asserted that Dr. Preston is a non-testifying consulting expert witness under Illinois Supreme Court Rule 201(b)(3), and as such, Plaintiff will not be producing any documents from Dr. Preston's review of the case or his examination of the Plaintiff. (C 464).

On July 31, 2017, Plaintiff served her Amended Rule 213(f)(3) Disclosures upon defense counsel, which formally withdrew Dr. Preston as a testifying expert witness. (C 468-476). Significantly, the trial date in the underlying case was set for July 18, 2018, almost a year away. (C 429).

On August 3, 2017, Plaintiff filed her Motion to Designate David C. Preston, M.D., a Non-Testifying Expert Consultant under Illinois Supreme Court Rule 201(b)(3) and Preclude Discovery of Facts and Opinions Known by Dr. Present Absent a Showing of Exceptional Circumstances by Defendants. (C 452-489).

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On August 4, 2017, Plaintiff presented her motion to designate Dr. Preston a non-testifying expert consultant and to preclude discovery. The court heard the parties' arguments and denied the Plaintiff's motion. (C 490). The court further ordered the Plaintiff to produce Dr. Preston's records regarding the June 1, 2017 comparison EMG study he performed on the Plaintiff. (C 490). Plaintiff's counsel respectfully refused to produce these documents in open court and argued that these documents were privileged consultant work product under Rule 201(b)(3). (C 490). The court found Plaintiff in friendly contempt and fined her $100 due to the refusal to comply with the court's discovery order. (C 490). The court also continued the matter for subsequent case management conference on September 6, 2017, for status on scheduling Plaintiff's expert witnesses' depositions and status on filing a notice of appeal regarding the August 4, 2017 order. (C 491).

On September 5, 2017, Plaintiff filed her Motion to Reconsider the Order of August 4, 2017. (C 492-494). Plaintiff argued that Dr. Preston was a retained expert witness, not a treating physician, who was paid for his time and for the EMG study by Plaintiff's counsel as part of Plaintiff's counsel's trial preparation. (C 492-94). Plaintiff also argued that if Defendants want to evaluate the present condition of the Plaintiff, then they are able to do so through a Rule 215 independent medical examination which they had not yet requested. (C 493). Defendants' misconstrue Plaintiff's motion to reconsider and argue that the Plaintiff admitted in her motion that Dr. Preston is a retained Rule 213(f)(3) expert. (Defs' Petition at 10-11). However, a plain reading of Plaintiff's motion to reconsider and motion to designate Dr. Preston as a non-testifying consultant pursuant to Rule 201(b)(3) shows that Plaintiff argued that Dr. Preston *was* a retained Rule 213(f)(3) expert, not a treating physician, who had been properly withdrawn as a trial witness and converted to a non-

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testifying consulting expert, and therefore, his work product is privileged absent exceptional circumstances under Rule 201(b)(3). (C 483-89, C 492-93).

Notably, Defendants never requested that the trial court conduct an *in camera* inspection of Dr. Preston's records nor did the trial court ever order the Plaintiff to submit Dr. Preston's records for *in camera* inspection. (See C 490-91, C 495).

On September 6, 2017, the court denied Plaintiff's Motion to Reconsider the Order of August 4, 2017. (C 495). The court reduced the Plaintiff's friendly contempt fine to $1.00 and ordered the case to be placed on the appellate calendar. (C 495).

On September 19, 2017, Plaintiff timely filed her notice of appeal from the August 4, 2017 and September 6, 2017 orders. (C 497). The matter was fully briefed by the parties.

On March 25, 2019, the First District Illinois Appellate Court properly reversed the trial court's order denying the Plaintiff's motion to designate Dr. Preston as a Rule 201(b)(3) consultant and ordering her to produce Dr. Preston's EMG study and vacated the friendly contempt finding against the Plaintiff and the $1.00 fine imposed. *Dameron v. Mercy Hospital & Medical Center*, 2019 IL App (1st) 172338, ¶ 56.

On July 26, 2019, the appellate court properly denied Defendants' Petition for Rehearing. (Defs' Appendix at A 19-20). On November 26, 2019, this Honorable Court granted Defendants' Petition for Leave to Appeal. (Defs' Appendix at A 21). On February 4, 2020, Defendants filed their Joint Brief and Appendix. On March 5, 2020, this Court granted Plaintiff's unopposed motion for extension of time to file an Appellee Brief until May 11, 2020. Due to COVID-19, on March 24, 2020, this Court entered an order which extended the filing of Plaintiff's Appellee's Brief by 35 days or by June 15, 2020. (See

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Order M.R. 30370). On June 16, 2020, this Court granted Plaintiff's Second Agreed and Unopposed Motion for Extension of Time to File her Appellee Brief on June 22, 2020.

ARGUMENT

At the outset, Defendants' Joint Brief should be stricken because they improperly attached two documents to the appendix of their joint petition which were never part of the record on appeal. (See Defs' Appendix at A 22-26). One document appears to be an undated online article from the Mayo Clinic regarding electromyography ("EMG") [*Id.* at A 22-25], while the other document purports to be a template for an EMG report by the American Association of Neuromuscular & Electrodiagnostic Medicine, which is also undated. (*Id.* at A 26). Neither document is verified or authenticated. Defendants laid no foundation for either document. Defendants failed to produce these documents in discovery. Significantly, Defendants never requested that these documents supplement the record on appeal, and neither document was considered by the trial court or appellate court.

It is well settled that parties cannot use briefs or appendices to supplement the record on appeal, and that reviewing courts will not consider improperly appended documents which were not included in the record on appeal. *Hall v. Melton (in Re Melton)*, 321 Ill. App. 3d 823, 826 (1st Dist. 2001). "[I]f the materials are not taken from the record, they may not generally be placed before the appellate court in an appendix and will be disregarded." *Oruta v. B.E.W.*, 2016 IL App (1st) 152735, ¶ 32. These improper documents were also attached to the petition for leave to appeal.

Moreover, Illinois Supreme Court Rule 315(c)(6) clearly states that the appendix to a petition for leave to appeal to the Supreme Court "shall include the opinion or order of the Appellate Court and any ***documents from the record*** which are deemed necessary to the consideration of the petition." Ill. Sup. Ct. Rule 315(c)(6) (emphasis added). Likewise,

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Rule 342 states: "The appellant's brief shall include, as an appendix, a table of contents to the appendix, the judgment appealed from, any opinion, memorandum, or findings of fact filed or entered by the trial judge or by any administrative agency or its officers, any pleadings or other ***materials from the record*** that are the basis of the appeal or pertinent to it, the notice of appeal, and a complete table of contents, with page references, of the record on appeal." Ill. Sup. Ct. Rule 342 (emphasis added). It is clear that the appendix to Defendants' Joint Brief is limited to materials and documents contained within the record on appeal. However, in violation of Rules 315 and 342, Defendants improperly appended unverified, unauthenticated and undated documents to their Joint Brief which were never included in the record on appeal. (See Defs' Appendix at A 22-26). This Court should strike Defendants' Joint Brief based on these rule violations. "Supreme court rules are not advisory suggestions, but rules to be followed." *Oruta v. B.E.W.*, 2016 IL App (1st) 152735, ¶ 33. This Court's consideration of the Defendants' Joint Brief must be restricted to matters of record. *See Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009). "A party may generally not rely on matters outside the record to support its position on appeal. When a party's brief fails to comply with that rule, a court of review may strike the brief, or simply disregard the inappropriate material." *Id.* (internal citation omitted).

If this Court will not strike the Defendants' Joint Brief on this basis, then Plaintiff respectfully requests that this Court disregard these documents and not consider any of Defendants' arguments relating to the inappropriately appended material.

The appellate court's decision should be affirmed for the following reasons: (1) the appellate court properly held that Dr. Preston was a non-testifying consultant whose product is privileged absent exceptional circumstances pursuant to Illinois Supreme Court

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Rule 201(b)(3); (2) the appellate court found that the consultant work product privilege applied to Dr. Preston and his records; (3) the appellate court properly relied on federal law as persuasive authority in ruling on Plaintiff's appeal, which involved a matter of first impression in Illinois; (4) the appellate court properly found that Dr. Preston was not a treating physician; and (5) the appellate court properly found that Defendants are not entitled to Dr. Preston's privileged records absent a showing of exceptional circumstances under Rule 201(b)(3).

The appellate court properly reversed the trial court's order denying Plaintiff's motion to re-designate Dr. Preston as an Illinois Supreme Court Rule 201(b)(3) consultant and ordering disclosure of Dr. Preston's EMG report and vacated the contempt finding against the Plaintiff and the $1.00 fine imposed, holding that "Dr. Preston's EMG study was protected by the consultant's work product privilege and subject to disclosure only upon a showing of exceptional circumstances." *Dameron v. Mercy Hospital & Medical Center*, 2019 IL App (1st) 172338, ¶¶ 50, 55-56. Contrary to Defendants' assertions, Plaintiff did not circumvent any discovery rules in re-designating Dr. Preston as a non-testifying consultant before disclosure of his opinions and EMG report. The appellate court properly found that such a re-designation, done in a timely fashion, was proper and brought Illinois in line with pertinent federal law on the matter. *Id.*

Defendants inaptly claim that Dr. Preston was a treating physician in an attempt to argue that they are entitled to his EMG report on that basis. (Defs' Joint Brief at 13). The appellate court properly found that Dr. Preston was not a treating physician, and that Defendants are not entitled to his EMG report on that basis. *Dameron*, 2019 IL App (1st) 172338, ¶¶ 31-32.

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Defendants continue to argue that they are prejudiced because they cannot obtain the information contained in Dr. Preston's report through any other means. However, Defendants completely ignore the fact that they never requested an Illinois Supreme Court Rule 215 examination of Plaintiff, which would allow them to obtain the same results or at the very least similar facts and opinions, as well as the fact that they can retain their own experts to refute Plaintiff's injuries. There are no exceptional circumstances that exist, nor do Defendants argue as much, that would allow Defendants to obtain Dr. Preston's privileged report. This is especially true in light of the fact that Defendants had the opportunity to request a Rule 215 examination of Plaintiff and failed to do so.

Lastly, Defendants inaptly argue that Plaintiff failed to ask for an *in camera* inspection and failed to include Dr. Preston's report in the record on appeal and therefore failed to show that the report is privileged. (Defs' Joint Brief at 14). This argument flies in the face of logic. First, the trial court never ordered Plaintiff's counsel to produce Dr. Preston's records for *in camera* inspection nor did defense counsel ever request that the trial court conduct an *in camera* inspection of Dr. Preston's records. (See C 490-91, C 495). Second, if Plaintiff were to disclose the report and include it in the record on appeal, there would be no need for the underlying appeal because Defendants would have the report. Moreover, disclosure of the report ends the opportunity for the expert to claim privilege over his report. *SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009). Plaintiff's counsel properly used the discovery rules to challenge the trial court's ruling to disclose Dr. Preston's report. Furthermore, the appellate court agreed that Dr. Preston was a Rule 201(b)(3) consultant whose work product is privileged absent a showing of exceptional circumstances by Defendants. *Dameron*, 2019 IL App (1st) 172338, ¶¶ 55-56.

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Therefore, Plaintiff respectfully requests that this Court affirm the decision of the appellate court.

I. This Court Should Affirm the Appellate Court's Decision because the Appellate Court Properly Held that Dr. Preston was a Non-Testifying Consultant Whose Work Product is Privileged Absent Exceptional Circumstances Pursuant to Rule 201(b)(3).

A. Dr. Preston's Report is Protected Consultant Work Product.

Defendants argue that Illinois Supreme Court Rule 201 requires "full disclosure," and thus Dr. Preston's records must be disclosed despite the fact that the consultant work product privilege applies. (Defs' Joint Brief at 15). This argument is inapposite as Rule 201 clearly provides for the consultant work product privilege. The appellate court found that this privilege applies to Dr. Preston's EMG report. *Dameron*, 2019 IL App (1st) 172338, ¶ 50. Rule 201 allows for relevant discovery to be withheld due to applicable privileges. See Ill. Sup. Ct. R 201(b)(2), (b)(3), and (n). Under Defendants' theory, all relevant discovery must be disclosed despite an applicable privilege, which clearly contravenes the purpose of Rule 201. It is axiomatic that not all relevant material is discoverable in Illinois. That is why privileges like the consultant work product privilege exist. "[T]he effect of any evidentiary privilege is to bar the discovery of potentially relevant facts . . ." *Marsh v. Lake Forest Hospital*, 166 Ill. App. 3d 70, 76 (2d Dist. 1988).

Defendants erroneously claim that Plaintiff admitted that Dr. Preston's records contain objective factual evidence regarding the EMG he performed. (Defs' Joint Brief at 14, 18). However, Plaintiff never conceded this point and instead argued that Dr. Preston's report contained his findings and opinions based on his evaluation of the Plaintiff. (See Plaintiff's Appellate Brief at 5). Defendants also improperly accuse Plaintiff of attempting to "conceal objective, factual evidence that was unfavorable to her case." (Defs' Joint Brief

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at 18). This could not be further from the truth. Plaintiff properly and timely asserted the consultant work product privilege pursuant to Rule 201(b)(3) and properly challenged the trial court's discovery order requiring her to produce Dr. Preston's records by requesting to be held in friendly contempt in order to properly appeal the issue. "The correctness of a discovery order may be tested through contempt proceedings." *People v. Coyne*, 2014 IL App (1st) 123105, ¶ 8. Defendants are not entitled to Dr. Preston's report or his records as they are not discoverable absent a showing of exceptional circumstances, which Defendants failed to show.

Defendants heavily rely on the inapposite cases, *Shields v. Burlington Northern & Santa Fe Ry.*, 353 Ill. App. 3d 506 (1st Dist. 2004) and *Neuswanger v. Ikegai America Corp.*, 221 Ill. App. 3d 280 (3d Dist. 1991), to argue that relevant and material evidence that does not expose the attorney's mental processes or litigation strategy is discoverable. (See Defs' Joint Brief at 17-18). At all times, Plaintiff has argued that the EMG report contains Dr. Preston's mental processes and opinions and that the EMG was performed for the purposes of aiding in litigation and not for the purpose of medical diagnosis and treatment. Dr. Preston's relationship with Plaintiff and Plaintiff's counsel was always as a consulting expert, not as a treating physician.

Moreover, the appellate court correctly found that *Shields* and *Neuswanger* were distinguishable and instead found *Costa v. Dresser Industries*, 268 Ill. App. 3d 1 (3d Dist. 1994) to be applicable. *Dameron*, 2019 IL App (1st) 172338, ¶ ¶ 43-50. The appellate court correctly held:

> We find the tissue testing results in *Costa* more comparable to the EMG comparison study than the surveillance videotapes in *Shields* and *Neuswanger*. The decision in *Costa* supports our conclusion that Dr. Preston's EMG study was protected by the consultant's work

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> product privilege and subject to disclosure only upon a showing of exceptional circumstances.

Id. at ¶ 50.

In *Costa*, the appellate court found that the trial court did not err when it denied plaintiff's requests to obtain the identity of defendants' consulting expert, the results of any testing done by that expert, and any opinions formed by that expert after finding that the plaintiff failed to make a showing of exceptional circumstances under Illinois Supreme Court Rule 201(b)(3)'s predecessor, Rule 220(c)(5). 268 Ill. App. 3d 1, 7-8 (3d Dist. 1994). In the underlying case, the plaintiff alleged that the death of her husband was due to mesothelioma that he contracted as a result of exposure to asbestos-containing products manufactured, sold or used by the defendants. *Id.* at 4. The trial court ordered the plaintiff to turn over materials and slides to the defendants so they may do joint testing on the tissue sample of the decedent's lungs. *Id.* at 7. The court held that the plaintiff made no showing that it was impracticable for her to obtain opinions on what disease process caused her husband's death because she was able to do any testing she wanted on the available tissue sample and was able to retain an expert witness to testify that the cause of death was mesothelioma to refute defendants' experts' testimony that the cause of death was bronchogenic carcinoma. *Id.* at 8. Furthermore, the court found no evidence of plaintiff's contention that defendants were "tissue shopping" and found that plaintiff's assertion that defendants' consulting expert's findings were consistent with her own expert's finding was "completely unsupported." *Id.*

This case is much more similar to *Costa* than the surveillance video cases, *Shields* and *Neuswanger*, cited by Defendants. Here, there is no justifiable reason for disclosure of Dr. Preston's report, which contains his opinions, without a showing of exceptional

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circumstances, which do not exist. Defendants are able to retain their own experts to refute Plaintiff's injuries and can also request a Rule 215 medical examination of the Plaintiff if they so choose. Yet, Defendants have failed to avail themselves of the option for a Rule 215 examination. Defendants have not only failed to make the required showing of exceptional circumstances, but also a review of the record reveals that no such exceptional circumstances exist. As such, Defendants are not entitled to Dr. Preston's records, which are privileged consultant work product under Rule 201(b)(3).

B. The Appellate Court Properly Relied on Relevant Federal Law in Deciding this Issue of First Impression in Illinois.

The crux of the appellate court's holding was that "where a previously disclosed testifying expert witness has been timely withdrawn prior to disclosing his or her report in discovery, the expert may be re-designated a Rule 201(b)(3) consultant and entitled to the consultant's privilege against disclosure, absent exceptional circumstances." *Dameron*, 2019 IL App (1st) 172338, ¶ 55. In reaching this conclusion, the appellate court relied on federal law interpreting Federal Rule of Civil Procedure 26(b)(4)(D) (formerly Rule 26(b)(4)(B)), which corresponds to Illinois Supreme Court Rule 201(b)(3) in regard to the consultant work product privilege. *See Dameron*, 2019 IL App (1st) 172338, ¶¶ 20-27. The *Dameron* opinion conforms Illinois law with federal law regarding the corresponding consultant work product privilege found in Federal Rule of Civil Procedure 26(b)(4)(D).

Defendants inaptly argue that the appellate court improperly relied on federal law and the unpublished federal case, *Davis v. Carmel Clay Schools*, No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251 (S.D. Ind. May 17, 2013), in its decision. (Defs' Joint Brief at 22). However, this is not a viable reason for this Court to reverse the appellate court's decision. As this discovery issue was a matter of first impression in Illinois, the

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appellate court was well within its discretion to rely on established federal law interpreting federal discovery rules which correspond Illinois discovery rules involving the consultant work product privilege. *Dameron*, 2019 IL App (1st) 172338, ¶¶ 20-22. As the appellate court aptly noted, "where there are similarities between provisions of our Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq.* (West 2016)) and the Federal Rules of Civil Procedure, our courts have looked to federal precedent interpreting the federal rule for guidance in interpreting the Illinois Code." *Dameron*, 2019 IL App (1st) 172338, ¶ 21 (citing *Owens v. VHS Acquisition Subsidiary No. 3, Inc.*, 2017 IL App (1st) 161709, ¶ 27 and *Fauley v. Metropolitan Life Insurance Co.*, 2016 IL App (2d) 150236, ¶ 41).

Reviewing courts are allowed to review cases from foreign jurisdictions as persuasive authority to the extent that these cases address the issue at bar and there is no Illinois authority that speaks to this issue. *Perik v. JPMorgan Chase Bank, N.A.*, 2015 IL App (1st) 132245, ¶ 25. It is well established that reported federal circuit and district decisions are persuasive authority in Illinois state courts. *Kerbes v. Raceway Associates, LLC*, 2011 IL App (1st) 110318, ¶ 34. The appellate court has held that while decisions of the United States District Court and the Court of Appeals are not binding upon state courts, they are persuasive authority and can provide guidance. *People v. Criss*, 307 Ill. App. 3d 888, 900 (1st Dist. 1999); *see also Sears v. National Union*, 331 Ill. App. 3d 347, 352 (1st Dist. 2002). Moreover, this Court may afford a Seventh Circuit decision more persuasive value than decisions of other federal courts as long as it is reasonable and logical. *State Bank of Cherry v. CGB Enterprises*, 2013 IL 113836, ¶¶ 53-54. The appellate court is also allowed to rely on unreported federal cases as persuasive authority where, like here, there is no Illinois case on point. *See, e.g., Fauley v. Metropolitan Life Insurance Co.*, 2016 IL

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App (2d) 150236, ¶¶ 41-42 (following the holding of an unreported federal court of appeals case cited by defendant after finding that there was no Illinois case on point).

Notably, the appellate court did not rely solely on an unpublished federal decision in its opinion but rather adopted the reasoning of established federal precedent that was outlined in *Davis v. Carmel Clay Schools*, No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251 (S.D. Ind. May 17, 2013), an unpublished federal case. *See Dameron*, 2019 IL App (1st) 172338, ¶¶ 23-25 and cases cited therein. A plain reading of the appellate opinion reveals that the appellate court adopted the view presented in *SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009) and its progeny that states that once the expert's report is disclosed to the opposing party, the expert ceases to enjoy protection from discovery by the opposing party, but, prior to producing the expert report, a party can change a testifying expert to a non-testifying expert without losing the protections from discovery, absent exceptional circumstances. *See Dameron*, 2019 IL App (1st) 172338, ¶¶ 23-25 and cases cited therein.

Contrary to Defendants' assertion, the issue presented in *Davis* was precisely the same issue presented in this matter, namely "whether a witness who was identified as a testifying expert, but never produced a report or provided testimony, can be re-designated as a non-testifying or consulting expert to be shielded from discovery." *Davis v. Carmel Clay Schools*, No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251, at *5-6 (S.D. Ind. May 17, 2013). Based on the sound legal reasoning of the federal courts on this discovery issue, the appellate court properly found that "where a previously disclosed testifying expert witness has been timely withdrawn prior to disclosing his or her report in discovery, the expert may be re-designated a Rule 201(b)(3) consultant and entitled to the

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consultant's privilege against disclosure, absent exceptional circumstances." *Dameron*, 2019 IL App (1st) 172338, ¶ 55. In so ruling, the appellate court brought Illinois in line with the well-reasoned federal law regarding the corresponding consultant work product privilege.

Defendants attempt to draw a factual distinction between Dr. Preston's records and the expert's records in *Davis* to argue that the appellate court inappropriately expanded the work product doctrine in Illinois because Dr. Preston's report is a "medical test result." (See Defs' Joint Brief at 22-23). Defendants' attempt to factually distinguish *Davis* is inapposite. Defendants incorrectly argue that the appellate court's opinion allows litigants to hide factual evidence relied upon by experts that would be discoverable. *Id.* at 23. Defendants misapprehend the issue at hand. As argued *infra* in Section II, Dr. Preston was not a treating physician and did not provide medical treatment to the Plaintiff. At the request of Plaintiff's counsel, Dr. Preston's only involvement in the case was to evaluate Plaintiff's condition and offer opinions to aid Plaintiff's counsel's trial preparation. Thus, Dr. Preston's EMG report, which contains his findings and opinions, is not a "medical record," which would ordinarily be discoverable. When Plaintiff's counsel timely withdrew Dr. Preston as a testifying Rule 213(f)(3) witness and re-designated him as a Rule 201(b)(3) non-testifying consultant prior to disclosure of his report, opinions, and testimony, it was incumbent upon Defendants to make a showing of exceptional circumstances in order to obtain Dr. Preston's records. Importantly, Defendants failed to meet their burden and are not entitled to Dr. Preston's records as a result.

Contrary to Defendants' assertion, the issue in *Davis* was not the discoverability of the expert's opinions but whether his report was discoverable after being withdrawn as an

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expert. (Defs' Joint Brief at 23). Under Federal Rule of Civil Procedure 26(a)(2), a party must disclose the identity of any expert who will testify at trial and, if required, must disclose that expert's report, which contains, among other things, a statement of all the expert's opinions and the bases and reasons for them as well as the facts or data considered by the expert witness in forming them. *Davis v. Carmel Clay Schools*, No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251, at *7 (S.D. Ind. May 17, 2013). The *Davis* court found that the defendant was able to re-designate his expert as a consultant whose work product is privileged absent exceptional circumstances because the expert's report was not disclosed and no expert testimony was provided. *Id.* at *24. It is irrelevant, as Defendants argue, that the *Davis* court did not explicitly discuss whether the withdrawn expert's report contained factual data because the defendant in *Davis* was allowed to change his mind and withdraw a testifying expert prior to disclosure of the expert's report. *Id.* at *24. Moreover, expert reports must contain the factual data relied upon by the expert in reaching his opinions under Federal Rule of Civil Procedure 26(a)(2)(B). USCS Fed Rules Civ Proc R 26(a)(2)(B). Regardless, the withdrawn expert's report in Davis is shielded from discovery absent a showing of exceptional circumstances. *Davis*, No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251, at *24. Similarly, here, the appellate court in *Dameron* adopted the reasoning and federal precedent cited in *Davis* to find that Plaintiff can re-designate Dr. Preston as a non-testifying consultant whose work product is privileged absent exceptional circumstances. *Dameron*, 2019 IL App (1st) 172338, ¶¶ 23-25, 55-56.

Additionally, as discussed *supra* in section I., sub-section A., *Costa* is more applicable than *Shields* and *Neuswanger*. Contrary to Defendants' assertion, Plaintiff never conceded that Dr. Preston's records and EMG report contain concrete facts. (Defs' Joint

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Brief at 24). Even assuming *arguendo* that Dr. Preston's EMG report contained some factual data, under *Costa*, this is not enough to allow the report, which contains Dr. Preston's opinions and subjective findings, to be disclosed absent a showing of exceptional circumstances, which simply do not exist here. Importantly, the court in *Costa* still found that the tissue testing results was privileged pursuant to Rule 201(b)(3). *Costa*, 268 Ill. App. 3d at 7-8. As the appellate court in *Dameron* stated with regard to the holding in *Costa*:

> In upholding the denial of the production request, the reviewing court noted that there was no dispute that the defendants' alleged expert was a consulting expert and as such his identity, opinions, and work product were discoverable only upon a showing of exceptional circumstances that make it impracticable to ***obtain facts and opinions*** on the same subject matter by other means. *Costa*, 268 Ill. App. 3d at 7-8.

Dameron, 2019 IL App (1st) 172338, ¶ 49 (emphasis added). It is clear that both the tissue testing results and opinions of the consulting expert in *Costa* were not discoverable absent a showing of exceptional circumstances. *Costa*, 268 Ill. App. 3d at 7-8. This same reasoning was properly applied to the instant case. Therefore, the decision of the appellate court should be affirmed.

Defendants incorrectly argue that the instant case cannot be distinguished from *Neuswanger*. (Defs' Joint Brief at 25). However, the appellate court properly rejected the Defendants' comparison to *Neuswanger* as well as the other the surveillance video cases cited by Defendants and found *Costa* to be more similar and applicable to the instant case. *Dameron,* 2019 IL App (1st) 172338, ¶¶ 48-50. See *supra* Section I., sub-section A. for a full discussion of *Costa*.

Finally, Defendants lament the fact that an *in camera* inspection was not performed by the trial court with respect to Dr. Preston's records. (Defs' Joint Brief at 25). However, Defendants cannot complain that an *in camera* inspection was not completed when (1)

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Defendants never requested that Dr. Preston's records be reviewed *in camera* and (2) the trial court never ordered the Plaintiff to produce the records for *in camera* inspection.

Therefore, the appellate court decision should be affirmed.

C. Plaintiff Properly Re-designated Dr. Preston as a Non-testifying Consultant Prior to Trial.

Defendants falsely attempt to paint Plaintiff's proper actions as some nefarious plan to shield discoverable evidence from them. (Defs' Joint Brief at 26). However, Plaintiff properly and timely utilized the discovery rules to withdraw Dr. Preston as a Rule 213(f)(3) testifying expert and re-designate him as a non-testifying, consulting expert without disclosing his opinions, his report, or his testimony. Plaintiff did not waive the protections of Rule 201(b)(3). Plaintiff is entitled to change her mind regarding testifying experts and can re-designate Dr. Preston a non-testifying consulting expert without waiving the work product protections provided in the corresponding Illinois Supreme Court Rule 201(b)(3). *See Ross v. Burlington Northern R. Co.*, 136 F.R.D. 638, 639 (N.D. Ill. 1991). Furthermore, in Illinois, it is well established that a party has a right to abandon an expert witness as long as the opposing party is made fully aware of the abandonment through clear notice. *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994). Almost a year before trial and prior to Defendants' expert disclosures, Plaintiff promptly notified defense counsel that she is withdrawing Dr. Preston as a testifying expert and that his records are privileged pursuant to Rule 201(b)(3). (C 446, C 464). Plaintiff then filed amended disclosures which formally withdrew Dr. Preston as a testifying expert. (C 468-476). Plaintiff's timely withdrawal of Dr. Preston as a Rule 213(f)(3) expert and re-designation as a non-testifying consultant takes further discovery of Dr. Preston out of the purview of disclosure requirements of Rule 213(f)(3) and places it squarely within the consultant work product privilege of Rule 201(b)(3).

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Defendants misapply the discovery rules and fail to recognize the limitation placed on Dr. Preston's records and report by the consultant work product privilege. Ill. Sup. Ct. 201(b)(3).

In *Shields v. Burlington Northern & Santa Fe Ry.*, 353 Ill. App. 3d 506, 512-13 (1st Dist. 2004), the court held that the defendants' consultant's video surveillance tapes of the plaintiff were not work product and must be produced because they did not reveal mental processes, opinions, or other conceptual data. Unlike in *Shields*, here, Dr. Preston's report contains his opinions, mental processes, and conceptual data based on his examination of Plaintiff. Dr. Preston's findings, impressions of the EMG and nerve conduction study results, and opinions contained in his report are "opinion" and "core" work product. Thus, the report constitutes consultant work product and must be shielded from discovery under Rule 201(b)(3) absent exceptional circumstances.

Defendants have not shown that they will suffer any prejudice by Plaintiff's timely decision to withdraw Dr. Preston as a testifying expert and to claim privilege over his work product pursuant to Rule 201(b)(3). There is no unfair surprise or tactical gamesmanship. On the other hand, it would be absurd and unjust for Defendants to benefit from the diligent trial preparation of Plaintiff's counsel and obtain work product from a withdrawn Plaintiff's expert to the detriment of the Plaintiff. *See Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984) (FRCP 26(b)(4)(B) "is designed to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation."). Justice demands that Dr. Preston's records remain privileged.

Therefore, this Court should affirm the decision of the appellate court.

II. The Appellate Court Properly Held that Dr. Preston is not a Treating Physician.

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Plaintiff has consistently asserted that Dr. Preston was not a treating physician and that he was retained by Plaintiff's counsel as a consultant to aid in trial preparation. (C 483-85). Dr. Preston never served as Plaintiff's treating physician. Rather, Plaintiff's counsel retained Dr. Preston to examine Plaintiff in order to provide his opinions regarding the extent of Plaintiff's injuries. Plaintiff did not choose Dr. Preston and was not referred to Dr. Preston by any physician for treatment. Significantly, Plaintiff's counsel paid Dr. Preston for the EMG and nerve conduction study. (C 493). Plaintiff received no medical treatment from Dr. Preston nor did she follow-up with him after the EMG study. The only interaction Plaintiff had with Dr. Preston was during the EMG and nerve conduction study on June 1, 2017. Dr. Preston neither provided nor recommended any course of medical treatment for the Plaintiff. Thus, no patient-physician relationship ever existed between Plaintiff and Dr. Preston. At all times, Dr. Preston was a consulting expert on the case.

Furthermore, the EMG and nerve conduction study performed by Dr. Preston was not performed for the purposes of medical treatment but rather as a diagnostic tool for Plaintiff's counsel to obtain an expert consultation and opinion regarding Plaintiff's nerve condition in preparation for trial. Contrary to Defendants' assertion, Dr. Preston's records simply do not constitute medical records of a treating physician which would be discoverable. (See Defs' Joint Brief at 29). Dr. Preston did not provide any medical therapy or treatment for the Plaintiff and was specially retained by Plaintiff's counsel to provide his opinions and subjective interpretation of Plaintiff's condition in preparation for trial. This makes Dr. Preston a Rule 201(b)(3) consultant whose records are privileged absent exceptional circumstances, which do not exist in this case. Ill. Sup. Ct. R. 201(b)(3).

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Likewise, the appellate court correctly found that Dr. Preston was not a treating physician, noting "Dr. Preston's relationship to the case was that of an expert who had been consulted for testimony, not for treatment." *Dameron*, 2019 IL App (1st) 172338, ¶ 31. The appellate court properly relied on *Cochran v. Great Atlantic & Pacific Tea Co.*, 203 Ill. App. 3d 935, 940 (5th Dist. 1990) in determining that "[s]imply put, a treating physician is one consulted for treatment, and an expert is one consulted for testimony." *Dameron*, 2019 IL App (1st) 172338, ¶ 30. The record is clear that the purpose of Dr. Preston's EMG study and examination of Plaintiff was for testimony at trial, not for medical diagnosis and treatment. Defendants concede that the court in *Cochran* concluded that the radiologist was a treating physician rather than an expert because the plaintiff was referred to the radiologist for treatment by another physician. (Defs' Joint Brief at 30). This is a crucial difference. Here, Dr. Preston was an expert sought out and retained by Plaintiff's counsel, not a treating physician who Plaintiff was referred to for medical treatment.

Defendants claim that the appellate court erred in relying on *Cochran* because *Cochran* dealt with former Rule 220. (Defs' Joint Brief at 31). Defendants fail to set forth the so-called "significant difference" between former Rule 220 and current Rule 213(f) that would render the distinction between a treating physician and an expert a moot point in today's context. (Defs' Joint Brief at 31). Defendants argue that the appellate court misconstrued the distinction between a treating physician and an expert witness as set forth in *Cochran* simply because *Cochran* discussed former Rule 220, which is now Rule 213. However, this is a distinction without a difference because that has no impact on the definition of a treating physician and a retained expert. In Illinois, it is well established that "a treating physician is one consulted for treatment whereas an expert is one consulted to render an

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opinion at trial." *People v. Blair*, 2011 IL App (2d) 070862, ¶ 50. Defendants' attempt to distinguish *Cochran* is therefore unavailing. The record is clear that Dr. Preston was not a treating physician, but rather a consulting expert, and therefore, his records are privileged pursuant to Rule 201(b)(3). The determination of whether a physician is a treating physician or expert depends on his relationship to the case, not the substance of his testimony. *Dameron*, 2019 IL App (1st) 172338, ¶ 30. Moreover, the appellate court did not, as Defendants contend, acknowledge that Dr. Preston provided "medical care" to the Plaintiff. (Defs' Joint Brief at 31). Rather, the appellate court found that:

> There is nothing in the record indicating that the plaintiff had been referred to Dr. Preston for treatment or that Dr. Preston had, prior to that date, seen or treated the plaintiff in connection with her alleged injuries. Dr. Preston's relationship to the case was that of an expert who had been consulted for testimony, not for treatment.

Dameron, 2019 IL App (1st) 172338, ¶ 31.

It is axiomatic that the purpose of Dr. Preston's examination and the EMG study he performed on the Plaintiff was for trial preparation and not for medical treatment and diagnosis. Plaintiff had originally disclosed Dr. Preston as a Rule 213(f)(3) retained expert witness and then timely withdrew him as a testifying expert and re-designated him as a non-testifying consultant. (C 464). Significantly, Dr. Preston was never one of Plaintiff's treating physicians and never provided any medical treatment for her injuries. Dr. Preston was paid by Plaintiff's counsel for his evaluation and EMG study. (C 493). Plaintiff's counsel specifically retained Dr. Preston for the purpose of obtaining opinions regarding the Plaintiff's current condition and evaluating the nature and extent of her injuries in preparation for the trial. (C 483).

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The mere fact that Dr. Preston examined the Plaintiff, at the request of Plaintiff's counsel, for purposes of rendering opinions for the litigation and to aid Plaintiff's counsel in preparing for trial is insufficient to render him a treating physician. It is well established that "physicians conducting medical examinations at the request of third parties assume a fundamentally different role from treating physicians" and that no physician-patient relationship exists under these circumstances. *Sandler v. Sweet*, 2017 IL App (1st) 163313, ¶ 15. Here, Dr. Preston was retained by Plaintiff's counsel to evaluate the Plaintiff and offer opinions in preparation for trial. Despite Defendants' contention, Dr. Preston never provided medical care or treatment to the Plaintiff, and his role was limited to evaluating the nature and extent of Plaintiff's nerve injuries to aid Plaintiff's counsel's trial preparation. *See Sandler*, 2017 IL App (1st) 163313, ¶ 15 (finding no physician-patient relationship existed between defendant's retained expert and the plaintiff where the expert performed a neuropsychological examination of the plaintiff for the purpose of disclosure in litigation). The appellate court properly held that Dr. Preston was not one of Plaintiff's treating physicians and Defendants are not entitled to Dr. Preston's EMG report on that basis. *Dameron*, 2019 IL App (1st) 172338, ¶ 32. Additionally, of note, the appellate court correctly held, under Illinois Supreme Court Rule 213(f) and (g), "the plaintiff would be required to turn over Dr. Preston's reports of the EMG study only if he were going to testify at trial, and if he testified, his testimony would be limited to his disclosures. As the plaintiff has withdrawn him as a witness, his report and opinions are not subject to discovery." *Dameron*, 2019 IL App (1st) 172338, ¶ 40.

Finally, Defendants ironically argue that Dr. Preston is akin to an independent medical examiner pursuant to Rule 215 in order to claim that Dr. Preston's EMG report is

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discoverable. (Defs' Joint Brief at 32). First, Defendants never requested a Rule 215 examination of Plaintiff, and Dr. Preston was never appointed by the trial court as a Rule 215 medical examiner but rather was specially retained by Plaintiff's counsel. Second, Dr. Preston is a Rule 201(b)(3) non-testifying consultant that was specially retained by Plaintiff's counsel for the purpose of rendering opinions to aid in trial preparation. Dr. Preston is by no means an independent medical examiner as contemplated by Rule 215. A Rule 215 independent medical examiner is basically a court-appointed expert who is available to both parties to call as a witness to testify at trial and his report must be disclosed to all parties. Ill. Sup. Ct., R 215(a), (d)(3), and (d)(4). To the contrary, a Rule 201(b)(3) consultant is specially employed or retained by a party in anticipation of litigation or preparation for trial who will not be called to testify and whose identity, opinions, and work product are not discoverable absent exceptional circumstances. Ill. Sup. Ct., R 201(b)(3). A Rule 201(b)(3) consulting expert, like Dr. Preston, is not available as a witness for the opposing party to call as a trial witness and his opinions and work product are not discoverable absent a showing of exceptional circumstances by the opposing party. *Id.*

Therefore, Dr. Preston's EMG report and records are not discoverable absent exceptional circumstances pursuant to Rule 201(b)(3).

III. The Appellate Court did not Shift the Burden for Establishing Privilege but Rather Properly Found that Defendants were Required to Show Exceptional Circumstances in Order to Obtain Dr. Preston's Privileged Records.

Defendants inaptly argue that the appellate court shifted the burden for establishing privilege to Defendants. (Defs' Brief at 33). Defendants again misapprehend the discovery issue at hand. The issue was whether a Rule 213(f)(3) witness can be withdrawn and re-designated as a Rule 201(b)(3) non-testifying consultant whose work product is privileged

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absent exceptional circumstances. The issue is not, as Defendants contend, whether the Plaintiff failed to establish Dr. Preston's records were consultant work product. Likewise, contrary to Defendants' assertion, the appellate court did not shift the burden to Defendants to establish a lack of privilege. Rather, the appellate court correctly applied the law with regard to Rule 201(b)(3) and found that Defendants were required to show exceptional circumstances in order to obtain Dr. Preston's EMG report, which they failed to do. *Dameron*, 2019 IL App (1st) 172338, ¶ 50.

Under Rule 201(b)(3), the party seeking the privileged work product of a non-testifying consultant has the burden to show exceptional circumstances "under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means." Ill. Sup. Ct., R 201 (b)(3). Defendants failed to establish exceptional circumstances and therefore are barred from obtaining Dr. Preston's records. Moreover, no exceptional circumstances exist that would allow disclosure of Dr. Preston's EMG report or records as argued above. For example, if Defendants had requested a Rule 215 examination, then they could have requested that an independent medical examiner perform an EMG and/or evaluation of the Plaintiff and discovered the same facts or opinions relating to Plaintiff's condition. However, Defendants failed to avail themselves of this option. Also, Defendants still had and currently have ample time to retain and disclose experts of their own to dispute Plaintiff's injuries. Therefore, there are no exceptional circumstances that warrant disclosure of Dr. Preston's records.

Defendants incorrectly argue that they have been "punished" for Plaintiff's alleged failure to provide Dr. Preston's records to the trial court for *in camera* inspection. (Defs' Joint Brief at 34). This argument is completely overblown. As argued above, Defendants,

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as the parties seeking Dr. Preston's records, had the onus to request an *in camera* inspection and to prove that exceptional circumstances exist that warrant disclosure of Dr. Preston's privileged records. Defendants failed to do both. Defendants cannot contend that they were prejudiced by the lack of an *in camera* inspection, when they did not request one themselves. Moreover, Plaintiff was under no duty to request an *in camera* inspection of the privileged records nor was Plaintiff required to provide any of the lower courts with Dr. Preston's records. If Plaintiff disclosed Dr. Preston's records and included them in the record on appeal, then that would completely obviate the need for the underlying appeal and allow Defendants to obtain the privileged records of a non-testifying, consulting expert hired by Plaintiff to the detriment of Plaintiff. It is obvious that a party challenging a discovery order on the basis of privilege is not required to include the privileged documents in the record on appeal. Otherwise, the privileged documents would be made public and available to the opposing side, which would defeat any privilege that may have applied. Moreover, the lower courts did not order Plaintiff to provide Dr. Preston's records for their inspection.

Additionally, Plaintiff sufficiently established that Dr. Preston's records contained his opinions and mental processes regarding Plaintiff's condition. The appellate court properly found that:

> In the absence of the EMG study from the record on appeal, we cannot conclude that the material sought from Dr. Preston was of a purely concrete nature, as was the case in *Shields* and *Neuswanger*, and that the production of the EMG study would not expose Dr. Preston's thought processes. We find the tissue testing results in *Costa* more comparable to the EMG comparison study than the surveillance videotapes in *Shields* and *Neuswanger*. The decision in *Costa* supports our conclusion that Dr. Preston's EMG study was protected by the consultant's work product privilege and subject to disclosure only upon a showing of exceptional circumstances.

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Dameron, 2019 IL App (1st) 172338, ¶ 50. Like the tissue testing results in *Costa*, Dr. Preston's EMG report is privileged absent exceptional circumstances and is not of a purely concrete nature that would allow Defendants to obtain his records without showing exceptional circumstances under Rule 201(b)(3). *See generally* ***Costa v. Dresser Industries***, 268 Ill. App. 3d 1 (3d Dist. 1994). The appellate court did not, as Defendants and *amici* suggest, improperly expand the work product doctrine but merely created a limited exception for the consultant work product doctrine contained in Rule 201(b)(3) that allows parties to re-designate testifying experts to consulting experts whose work product is privileged absent exceptional circumstances if the expert's report and opinions have not already been disclosed, which comports with corresponding federal law. *Dameron*, 2019 IL App (1st) 172338, ¶¶ 55-56. This is by no means a radical decision. The *Dameron* opinion is supported by both Illinois and federal case law and must be affirmed.

Therefore, Defendants are not entitled to Dr. Preston's records, and the appellate court's decision should be affirmed.

IV. The *Amicus* Brief Does Not Provide Any Additional Support to Defendants' Arguments and Should be Disregarded.

The arguments in the *amicus* brief are nearly identical to Defendants' arguments. As such, all arguments set forth herein are adopted in response to the *amicus* brief. *Amici* also argue that Plaintiff's initial disclosure of Dr. Preston as a Rule 213(f)(3) constituted a judicial admission and was not inadvertent. (Amicus Brief at 8-9). Defendants do not make either argument on appeal and thus have waived review of this issue. Defendants failed to raise these issues in their petition for leave to appeal and in their joint brief, and therefore, any challenge to those issues is waived. *See Dameron*, 2019 IL App (1st) 172338, ¶ ¶ 33-42. "A party's failure to raise an issue in the petition for leave to appeal may be

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deemed waiver of that argument." *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 152 (2004). Therefore, any review of these issues would be improper.

CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellee, Alexis Dameron, respectfully requests that this Honorable Court strike the Joint Brief of Defendants-Appellants and/or disregard the improperly appended documents [A 22-26] thereto, and affirm the judgment of the First District Appellate Court of Illinois.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Emily A. Herbick, hereby certify that on June 22, 2020, I caused a digital version of the foregoing brief to be served upon the following by electronic filing and service via Odyssey E-File IL and email transmission:

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CERTIFICATE OF COMPLIANCE

I, Emily A. Herbick, certify that this brief conforms to the requirements of Rules 315(f) and 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, 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 29 pages.

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No. 125219

IN THE
SUPREME COURT OF ILLINOIS

ALEXIS DAMERON, Plaintiff-Appellee, v. MERCY HOSPITAL AND MEDICAL CENTER, *et al.*, Defendants-Appellants.	)	On Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 1-17-2338 There on Appeal from the Circuit Court of Cook County, Illinois, Law Division, No. 2014 L 11533, Hon. William E. Gomolinski, Judge presiding

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TO: All Attorneys of Record
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PLEASE TAKE NOTICE that on June 22, 2020, the undersigned, on behalf of Plaintiff-Appellee, Alexis Dameron, filed electronically with the Clerk of the Supreme Court of Illinois via Odyssey E-File IL, Plaintiff-Appellee's Brief and Argument, in the above-captioned matter.

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CERTIFICATE OF SERVICE

I, Emily A. Herbick, an attorney, on oath, state that I caused a true and correct copy of Plaintiff-Appellee's Brief and Argument to be served upon:

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