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No. 125219

In the

Supreme Court of Illinois

ALEXIS DAMERON,

Plaintiff-Appellee,

v.

MERCY HOSPITAL and MEDICAL CENTER, CORDIA CLARK-WHITE, M.D., ALFREDA HAMPTON, M.D., NATASHA HARVEY, M.D., PATRICIA COURTNEY, CRNA,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-17-2338.
There Heard On Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 2014 L 11533.
The Honorable **William E. Gomolinski**, Judge Presiding.

JOINT BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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B. The Appellate Court Relied on an Unpublished District Court Decision and Other Inapposite Authority.

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NATURE OF THE CASE

This is a medical malpractice action in which plaintiff alleges the defendant health care providers were negligent in performing a hysterectomy that plaintiff claims injured a nerve in her right leg. Defendants appeal the reversal of a contempt order and fine imposed on the plaintiff for her refusal to produce the testing data and opinions of one of plaintiff's disclosed Supreme Court Rule 213(f)(3) expert witnesses.

The appellate ruling endorses the withholding of documents simply because they contain information that undercuts a damage claim. Plaintiff disclosed a neurologist as a Rule 213(f)(3) controlled expert witness who would testify at trial regarding the results of a yet-to-be-performed electromyogram (EMG) and/or nerve conduction study. After the neurologist examined plaintiff, performed the EMG and nerve conduction study, and prepared a report regarding his findings and opinions, plaintiff attempted to withdraw the neurologist as a controlled expert witness and refused to produce the results of the study and the expert's opinions and records. The trial court rejected plaintiff's request to designate the expert as a non-testifying consultant and ordered plaintiff to produce the information and records regarding the EMG and nerve conduction study. Plaintiff refused to comply with the court's order and, pursuant to plaintiff's request, the circuit court entered an appealable contempt order

and monetary fine. The appellate court reversed the circuit court's order in an opinion issued on March 15, 2019.

Questions Presented For Review

1. Whether the trial court correctly rejected plaintiff's assertion of privilege over her medical records and test results pursuant to the Illinois consultant privilege, Supreme Court Rule 201(b)(3).

2. Whether the appellate court erred in finding that Dr. Preston was not a "treating physician" whose report is subject to discovery.

3. Whether the appellate court erred in shifting the burden of proof to the party seeking disclosure to disprove privilege and in shifting the burden of providing an adequate record on appeal to the appellees.

Jurisdiction

This Court has jurisdiction under Supreme Court Rules 304(b)(5) and 315, which govern appeals from orders of contempt and leave to appeal to this Court.

On August 4, 2017, the circuit court denied the plaintiff's motion to designate Dr. David C. Preston as a consultant under Illinois Supreme Court Rule 201(b)(3) and ordered plaintiff to produce Dr. Preston's records regarding a comparison EMG study he performed on the plaintiff regarding her alleged injuries (C 490). After plaintiff refused in open court to produce the records, the circuit court found plaintiff in contempt and imposed a

$100 fine (C 490). On September 6, 2017, the court denied plaintiff's motion to reconsider the Order of August 4, 2017 (C 495).

The appellate court reversed the circuit court's order and vacated the circuit court's finding of contempt on March 15, 2019 (A001-018). Defendants filed a joint petition for rehearing on April 5, 2019, which the appellate court denied on July 26, 2019 (A019-20). Defendants timely filed a joint petition for leave to appeal to this Court on August 29, 2019. This Court allowed the petition on November 26, 2019 (A021).

Illinois Supreme Court Rules Involved

Illinois Supreme Court Rule 201(b)(1):

> **"(1)** ***Full Disclosure Required.*** Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts. The word "documents," as used in Part E of Article II, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, communications and electronically stored information as defined in Rule 201 (b)(4)."

Illinois Supreme Court Rule 201(b)(3):

> **"(3)** ***Consultant.*** A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only upon a showing of 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."

Illinois Supreme Court Rule 213(f)(2)(3):

> **"(f)** ***Identity and Testimony of Witnesses.*** Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:
>
> ***
>
> **(2)** ***Independent Expert Witnesses.*** An "independent expert witness" is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert witness, the party must

identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(3) ***Controlled Expert Witnesses.*** A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case."

Statement of Facts

Plaintiff, Alexis Dameron, alleges that defendants, Mercy Hospital and Medical Center, Dr. Alfreda Hampton, Dr. Natasha Harvey and Patricia Courtney, CRNA, negligently performed a hysterectomy (C 22-51). According to plaintiff, defendants failed to reposition her during the surgery, which allegedly caused a compression injury to a nerve in plaintiff's right leg (*Id*).

Defendants Propound Supreme Court Rule 213 Interrogatories.

Mercy Hospital propounded written interrogatories which requested, among other things, that plaintiff describe her alleged injuries and identify her treating physicians (C 256-64). Defendants also requested plaintiff to identify all controlled expert witnesses pursuant to Supreme Court Rule 213(f) (C 262). For each expert, Mercy Hospital requested plaintiff to disclose the expert's conclusions and opinions and to produce all reports (C 262).

In response to Mercy Hospital's request for a description of her injuries, plaintiff cited the complaint and medical records (C 269). Plaintiff claimed that she sustained a nerve injury to her leg (C 28). Plaintiff also cited her medical records in response to Mercy Hospital's request for identification of all treating physicians (C 270). In answering

interrogatories, plaintiff stated that she had not retained experts at that time and reserved the right to amend her answers at a later date (C 273).

Plaintiff Discloses Dr. Preston as a Controlled Expert Witness.

After the trial court twice ordered plaintiff to disclose her controlled expert witnesses (C 437, 446), on May 30, 2017, the third court-ordered disclosure deadline, plaintiff served answers to defendants' Supreme Court Rule 213(f)(3) interrogatories (C 453-62). Among other witnesses, plaintiff identified Dr. David Preston, a neurologist, as a controlled expert witness who would testify at trial as follows:

> "Dr. Preston will be called as one of the Plaintiff's controlled expert opinion witnesses to testify regarding the results of the comparison electromyogram and/or nerve conduction studies he will be performing on Alexis Dameron on June 1, 2017.
>
> * * *
>
> Dr. Preston will testify regarding the methods of performing and results of the electromyogram and/or nerve conduction study he will be performing on Alexis Dameron on June 1, 2017." (C 460).

Plaintiff also disclosed that Dr. Preston reviewed her prior EMG and nerve conduction studies performed at Mercy Hospital and Medical Center on November 12, 2013, following the surgery at issue (*Id*). With the disclosure of Dr. Preston's anticipated trial testimony, plaintiff produced Dr. Preston's *curriculum vitae* (*Id*).

Plaintiff Withdraws Dr. Preston as an Expert and Refuses to Produce His Treating Data and Opinions.

After plaintiff disclosed Dr. Preston as a controlled expert witness who would testify at trial, the parties' attorneys began scheduling the depositions of plaintiff's experts pursuant to the trial court's case management orders (C 449, 450). On July 27, 2017, nearly two months after plaintiff identified Dr. Preston as a controlled expert witness, her counsel sent an email advising defendants for the first time that plaintiff was withdrawing Dr. Preston as an expert witness and claimed Dr. Preston was a "non-testifying consulting expert witness under Supreme Court Rule 201(b)(3)." (C 464). Plaintiff's counsel further informed defendants, also for the first time, that plaintiff would "not be producing any documents from Dr. Preston's review of this case or Dr. Preston's examination of Alexis Dameron" (*Id*).

At a case management conference before the circuit court later that same morning, defendants objected to plaintiff's refusal to produce Dr. Preston's records. The circuit court granted plaintiff leave to submit case authority regarding her position that she could withhold Dr. Preston's records pursuant to the consultant privilege (C 478). The circuit court scheduled a subsequent case management conference and hearing to address plaintiff's privilege claim (*Id*).

Plaintiff Contends Her Disclosure of Dr. Preston Was Inadvertent and Claims He Is a Non-Testifying Consultant.

The week after the July 27, 2017 case management conference, plaintiff served amended answers to Rule 213(f)(3) interrogatories, in which she omitted Dr. Preston as a controlled expert witness (C 468-76). Plaintiff also filed a motion entitled "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. Preston Absent a Showing of Exceptional Circumstances of Defendants" (C 483-89). Plaintiff claimed she had "inadvertently disclosed Dr. Preston in Plaintiff's 213(f)(3) answers to interrogatories as a testifying expert witness" (C 484). Relying extensively on unreported federal district court decisions and citing the Illinois consultant privilege provided in Rule 201(b)(3), plaintiff sought entry of a court order precluding discovery of Dr. Preston's medical records, which include the hard data generated by his diagnostic studies (C 483-89).

Plaintiff Refuses to Produce Dr. Preston's Records and Is Held in Contempt of Court.

On August 4, 2017, plaintiff presented her motion to re-designate Dr. Preston. The circuit court heard oral argument regarding the privilege issue. No court reporter was present for the hearing. After reviewing plaintiff's motion and the case law she cited, the circuit court denied the

motion and ordered plaintiff to produce Dr. Preston's records (C 490). Plaintiff's counsel advised the court and counsel present that she refused to produce the records. Consequently, the circuit court entered an order holding plaintiff in civil contempt for refusing to produce Dr. Preston's records and imposed a fine against the plaintiff in the amount of $100 (*Id*).

Claiming Dr. Preston is a Controlled Expert, Plaintiff Moves for Reconsideration.

After the circuit court rejected plaintiff's claim of privilege, plaintiff again changed her position concerning Dr. Preston's status. Despite her earlier withdrawal of Dr. Preston as a controlled expert witness and assertion that Dr. Preston was a non-testifying consultant who was inadvertently disclosed, plaintiff filed a motion identifying Dr. Preston as a Rule 213(f)(3) witness: "Plaintiff's Motion to Reconsider Order of August 4, 2017 (Ruling For Plaintiff to Produce Supreme Court Rule 213(f)(3) Witness, Dr. David Preston's Records)" (C 492-93). Plaintiff stated in the motion to reconsider that "Dr. Preston is not a treating physician, but a retained 213(f)(3) witness" (C 492). Plaintiff sought reconsideration of the circuit court's order requiring production of Dr. Preston's records on the basis that "[t]he Court failed to consider, in its previous ruling, what [sic] this was plaintiff's retained expert physician and not a treating physician." (C 493). Nowhere in the plaintiff's motion for reconsideration did she maintain that Dr. Preston's medical records were privileged. Instead,

plaintiff repeatedly contended that Dr. Preston was her "retained expert physician" pursuant to Rule 213(f)(3) (*Id*).

Trial Court Denies Plaintiff's Motion for Reconsideration.

Plaintiff presented her motion for reconsideration of the trial court's earlier ruling regarding production of Dr. Preston's records. After hearing argument, the circuit court denied plaintiff's motion (C 495). At plaintiff's request, the circuit court reduced plaintiff's monetary fine for refusing to produce Dr. Preston's records to $1.00 (*Id*).

The Appellate Court Reverses the Order of the Trial Court.

On appeal, the First District of the Appellate Court reversed the circuit court's order directing plaintiff's production of Dr. Preston's EMG study and the order denying plaintiff's motion to re-designate Dr. Preston as a consultant. *Dameron v. Mercy Hospital and Medical Center*, 2019 IL App (1st) 172338, ¶¶ 56-57. The appellate court found that that the EMG study was protected by the consultant's work-product privilege and subject to disclosure only upon showing of exceptional circumstances. *Id*. at ¶ 50. The appellate court acknowledged that the EMG study was not a part of the record on appeal and thus the panel could not ascertain the extent to which the study contained unprivileged concrete facts and/or Dr. Preston's privileged thought processes; nonetheless, the court concluded

that the consultant's work product privilege protected Dr. Preston's EMG study in its entirety. *Id.*

Standard of Review

A *de novo* standard of review governs application of a trial court's privilege ruling. See *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 14. In addition, the deferential abuse of discretion standard of review potentially is applicable, given the trial court's great latitude in defining the scope of discovery. See *D.C. v. S.A.*, 178 Ill. 2d 551, 559-60 (1997). The imposition of sanctions against a party for noncompliance with discovery rules also is a matter within the broad discretion of the trial court. *Reyes v. Menard, Inc.*, 2012 IL App (1st) 112555, ¶ 22. Under either standard of review, this Court should reverse the appellate court's decision and reinstate the trial court's order overruling plaintiff's claims of privilege under Supreme Court Rule 201(b)(3) and request to re-designate a previously disclosed Rule 213 controlled expert witness.

Argument

In reaching its flawed conclusion that the consultant's work-product privilege protected the EMG study, the appellate court upended Illinois' long-standing discovery rules requiring "full disclosure" of factual evidence regarding a plaintiff's claimed injury. Ill. S. Ct. R. 201(b)(1). Dr. Preston examined plaintiff, evaluated her claimed injuries, and performed

diagnostic studies. The objective test results and Dr. Preston's findings and opinions are the exact type of evidence discoverable in medical malpractice cases. The appellate court's opinion facilitates a litigation strategy this Court deplores – purposeful circumvention of the discovery rules to hide facts relevant to a cause of action. See *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 1009-10 (2004).

In finding that Dr. Preston's report was not discoverable, the appellate court also erroneously concluded that Dr. Preston was not a treating physician. There is no dispute that a defendant is entitled to discover the report of a treating physician in a medical malpractice action. See *Palm v. Holocker*, 2018 IL 123152, ¶ 28. In concluding that Dr. Preston was not plaintiff's treating physician, the appellate court misapplied the distinction between treating physicians and expert witnesses set forth in *Cochran v. Great Atlantic & Pacific Tea Company*, 203 Ill. App. 3d 935, 940 (5th Dist. 1990), a factually distinguishable case decided under the now-repealed Supreme Court Rule 220. In doing so, the appellate court ignored the medical care that Dr. Preston provided to plaintiff in the form of an examination and diagnostic study, which produced factual data directly related to plaintiff's alleged injuries - data that defendants cannot obtain other than from plaintiff, the only party with access to Dr. Preston's test results.

Lastly, the appellate court's finding that Dr. Preston's report was not discoverable – even though plaintiff failed to include it in the record – erroneously shifted the burden of proof of claiming a privilege to the party requesting an otherwise discoverable document. See *Cox v. Yellow Cab Co.*, 61 Ill. 2d 416, 419-20 (1975); see also *Klaine v. Southern Illinois Hospital Services*, 2016 IL 118217, ¶ 15 (the "mere assumption that the matter is confidential and privileged will not suffice"). Here, plaintiff made no effort to establish that Dr. Preston's records contained privileged information. She produced no affidavits and failed to submit Dr. Preston's records to the circuit court for an *in camera* inspection. No transcript exists of the hearing on plaintiff's motion to designate Dr. Preston as a consultant. In fact, plaintiff admitted on appeal that Dr. Preston's records contain objective factual evidence regarding the EMG study he performed (Plaintiff's Appellate Brief at 5). Plaintiff's failure to meet her burden of establishing that Dr. Preston's records contain privileged information requires reversal of the appellate court's decision.

I. The Appellate Court Erred in Holding That Dr. Preston's EMG Report, Including Objective Test Results, Is Protected From Discovery Under the Work Product Doctrine.

In reversing the trial court's order directing plaintiff to produce Dr. Preston's EMG study and testing results, the appellate court ignored well-

established Illinois law governing discovery and established a dangerous precedent which permits litigants to hide unfavorable factual evidence.

This Court has long recognized that the objectives of pretrial discovery are to ascertain the truth and promote an expeditious resolution of controversies on the merits. See *D.C.*, 178 Ill. 2d at 561. The General Assembly and this Court have adopted discovery procedures "to effectuate the prompt and just disposition of litigation, by educating the parties in advance of trial as to the real value of their claims and defenses." *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231, 236 (1957).

Illinois Supreme Court Rule 201 defines the scope of discovery in civil cases and requires "full disclosure." Ill. S. Ct. R. 201(b)(1). Broad in scope, Rule 201 authorizes discovery of "all information that would be admissible at trial as well as information which is reasonably likely to lead to admissible evidence." *Klaine v. Southern Illinois Hospital Services*, 2014 IL App (5th) 130356, ¶ 14, *aff'd*, 2016 IL 118217. Because Rule 201 permits a wide range of discovery, a circuit court is accorded great latitude in determining its scope. *D.C.*, 178 Ill. 2d at 56.

Under the "full disclosure" requirement of Rule 201(b), a party must produce all evidence "regarding any matter relevant to the subject matter involved in the pending action." Ill. S. Ct. R. 201(b)(1). Evidence is relevant where it has "any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401.

In furtherance of Rule 201's requirement of "full disclosure," the rules of discovery authorize litigants to issue written interrogatories and request production of documents to obtain all evidence and records relevant to a lawsuit. See Ill. S. Ct. R. 201(b)(1), 213(a) and 214. Pursuant to Rule 213(j), this Court has approved the issuance of interrogatories to a medical malpractice plaintiff that request a description of the alleged injury and identification of all medical records and treating physicians. See Ill. S. Ct. R. 213(j) and Appendix, "Medical Malpractice Interrogatories to Plaintiff." Written discovery serves the purpose of pretrial discovery, which Illinois courts have described as "assuring the truth and to eliminate as far as possible surprise, so that judgments will rest upon the merits and not upon skillful maneuvering of the counsel." *Wegmann v. Department of Registration & Education,* 61 Ill. App. 3d 352, 356 (1st Dist. 1978).

There is no dispute that Dr. Preston's EMG report and study are relevant evidence and subject to discovery under Rule 201(b)(1). In seeking to conceal Dr. Preston's report, plaintiff attempted to re-designate him as a consultant and argued that his report became privileged under Rule 201(b)(3).

Rule 201(b)(3) provides a narrow exception to Rule 201's "full disclosure requirement" for a consultant's work product. Ill. S. Ct. R. 201(b)(3). This exception protects only "opinion" or "core" work product, which consists of materials generated in preparation for litigation that reveal the mental impressions, opinions or trial strategy of an attorney. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d. 178, 196 (1991). As this Court has observed, the work product privilege protects:

> "only those memoranda, reports or documents which reflect the employment of the attorney's legal expertise, those 'which reveal the shaping process by which the attorney has arranged the available evidence for use in trial as dictated by his training and experience,' ***. Thus, memoranda made by counsel of his impression of a prospective witness *** [are] exempt from discovery ***. Other material, not disclosing such conceptual data but containing relevant and material evidentiary details must, under our discovery rules, remain subject to the truth-seeking processes thereof." *Monier v. Chamberlain*, 35 Ill. 2d 351, 359-60 (1966).

Reviewing courts in Illinois have repeatedly emphasized that the work product doctrine does not shield material and relevant evidentiary facts. See *Stimpert v. Abdnour*, 24 Ill. 2d 26, 31 (1962) ("[The work product] rule does not protect material and relevant evidentiary facts from the truth-seeking processes of discovery"); *Shields v. Burlington Northern & Santa Fe Railway Co.*, 353 Ill. App. 3d 506, 509 (1st Dist. 2004). Thus, evidence that is relevant and material, and does not expose the attorney's

mental processes or litigation strategy, is discoverable. See *id.*; see also *Newswanger v. Ikegai America Corp.*, 221 Ill. App. 3d 280, 285 (3d Dist. 1991) (upholding trial court's order compelling production of consultant's videotape where it did not expose the mental processes or strategy of the attorney who hired him).

Significantly, nothing in the record - no affidavit, no privilege log, no *in camera* inspection - suggests that Dr. Preston's report contains "opinion" or "core" work product. Plaintiff sought to re-designate Dr. Preston as a consultant in a bold attempt to conceal objective, factual evidence that was unfavorable to her case. Even if Dr. Preston, originally disclosed as a controlled expert witness, could have been re-designated as a consultant, the work product privilege does not convert the objective factual data in his records and EMG report into protected "core" work product. *Newswanger*, 221 Ill. App. 3d at 285.

A. Dr. Preston's Report Is Not Protected Work Product.

Not only did plaintiff fail to produce evidence to support her claim of privilege over Dr. Preston's records and findings, she also admitted in her opening brief in the appellate court that Dr. Preston's report contains objective results of the June 1, 2017 EMG study and his examination of the plaintiff (Plaintiff's Brief, at 5). An EMG is a diagnostic procedure that utilizes electrodes to measure nerve cells' electrical signals.

Electromyography (EMG), Mayo Clinic, https://mayocl.in/2wpvPJt (last visited January 31, 2020) (A022-25). The patient's nerve-to-muscle signal transmissions are translated into graphs, sounds or numerical values. *Id.*; see also *Practice Toolkit Report Sample, American Association of Neuromuscular & Electrodiagnostic Medicine*, https://bit.ly/2PNfu9G (last visited January 31, 2020) (A026).

Dr. Preston's report consists of factual test data regarding the condition of plaintiff's nerves and muscles. The information bears directly on her claim that defendants injured the nerves in her right leg. Regardless of whether Dr. Preston is considered a treating physician or a retained expert, under Illinois discovery rules, defendants are entitled to learn the objective results of Dr. Preston's examination and data generated during the EMG study. See *Monier*, 35 Ill. 2d at 359-60 ("Other material *** containing relevant and evidentiary details must, under our discovery rules, remain subject to the truth-seeking process thereof."); see also *Shields*, 353 Ill. App. 3d at 509 ("The work product rule does not protect material and relevant evidentiary facts from the truth-seeking processes of discovery") (quoting *Stimpert*, 24 Ill. 2d at 31).

In *Newswanger*, the appellate court rejected the application of the work product doctrine to a videotape made at the defendant's direction showing an expert's tests made on the machine that allegedly injured the

plaintiff. 221 Ill. App. 3d at 285-86. The court affirmed an order requiring production of the videotape, with appropriate deletions from the audio for the expert's thought processes and theories. The appellate court explained:

> "Where the material gathered or produced by an attorney or expert is of a more concrete nature *** and does not expose the attorney's or expert's mental processes, it serves the judicial process and is not unfair to require the parties to mutually share such material and analyze it prior to trial.
>
> *** [The defendant] argues that a videotape discloses an expert's thought processes and case evaluation by the movement, angle, distance and duration of focusing on various aspects of the expert's field investigation. However, such subtleties do not convince us that the videotape is thus transmuted into 'core work product' or 'conceptual data' in need of protection.
>
> Moreover, to the extent that an expert's mental processes would be exposed in the manner suggested, we believe that the same could be said with respect to a tape-recorded interview. *** Justice is best served by full and fair disclosure and *** any interest that the party recording a conversation, surreptitiously or otherwise, may have in denying production of a defendant's taped conversation must fall to the overriding judicial interest in finding the truth. ***
>
> In our opinion, the truth-seeking interest in a civil case is sufficiently compelling to require disclosure of [the] consulting expert's videotaped field investigation without a showing of exceptional circumstances." *Neuswanger*, 221 Ill. App. 3d at 285-86.

Citing *Newswanger*, the appellate court in *Shields* held that surveillance videotapes of the allegedly injured plaintiff's activities were not subject to the work product privilege, regardless of whether the party

that hired the videographer chose to use the video in its case. 353 Ill. App. 3d at 512-13. The appellate court drew no distinction between surveillance videotapes and any other substantive evidence of the plaintiff's physical limitations, and recorded or transcribed statements from witnesses, or data collected from attempts to recreate an accident. *Id.* at 512.

While the videotapes in *Shields* had been prepared for trial, the appellate court, relying on *Monier*, rejected the notion that the work product doctrine protects any and all materials prepared in anticipation of litigation, including materials that do not reveal any mental processes. *Id.* As the appellate court explained:

> "Concealing substantive evidence from the opposing party always gives a tactical advantage, and it often permits greater impeachment of the opposite party's witnesses. Full discovery, demanded by supreme court rules, allows each party's witnesses to tailor their testimony to the opposite party's evidence. We see no reason to deviate from the policy of full disclosure here, as we see no need for special treatment of the substantive evidence in a surveillance videotape. Because surveillance videotapes constitute substantive evidence and not work product within the meaning of discovery rules, we find that the trial court correctly ordered [the defendant] to produce any surveillance videotapes of plaintiff." *Shields*, 353 Ill. App. 3d at 512.

Dr. Preston's report is indistinguishable from the videotapes in *Newswanger* and *Shields*. Plaintiff does not and cannot dispute that the EMG test Dr. Preston performed was a diagnostic procedure to evaluate plaintiff's injuries. Dr. Preston's report contains substantive factual data

that is not "core work product" or "conceptual data." *Newswanger*, 221 Ill. App. 3d at 286. To the extent that the report may contain any protected information, it can be redacted from the report after an *in camera* review.

B. The Appellate Court Relied on an Unpublished District Court Decision and Other Inapposite Authority.

In applying the work product doctrine to Dr. Preston's report, the appellate court relied on an unpublished federal district court decision employing a work product doctrine analysis. See *Dameron*, 2019 IL App (1st) 172338, ¶¶ 23-25 (citing *Davis v. Carmel Clay Schools, No. 1:11 -cv-00771-SEB-MJD*, 2013 U.S. Dist. LEXIS 70251 (S.D. Ind., May 17, 2013)). *Davis* is readily distinguishable and provides no basis for permitting plaintiff to withhold a medical test result that directly bears on her damages claim. In *Davis*, the parents of a minor who was allegedly harassed at his high school sued the school district for failing to respond to the claims of harassment and abuse. *Davis*, 2013 U.S. Dist. LEXIS 70251, *2. The plaintiffs sought the opinions of the defendant school district's withdrawn expert concerning the expert's review of a videotape of an alleged bullying incident. *Id.* at **2-4. The district court determined that, because the school district withdrew its expert before producing the expert's report, plaintiffs were not entitled to discover the expert's opinions and findings. *Id.* at *24. Significantly, the ruling in *Davis* did not permit defendants to conceal the objective evidence their expert relied upon in

arriving at his opinions. Rather, the issue in *Davis* was the discoverability of a withdrawn expert's opinions, not whether factual data the expert relied on was discoverable. Neither party in *Davis* argued that the opinions of the withdrawn expert contained factual data.

In contrast, Dr. Preston's report unquestionably contains factual data, well outside the scope of the work product doctrine. By allowing the plaintiff to conceal objective evidence regarding her claimed injury, the appellate court expanded the district court's narrow ruling in *Davis* well beyond its scope and rewrote the work product doctrine in Illinois. The appellate court's opinion allows litigants to conceal factual evidence relied upon by experts that, until this opinion, plainly would be discoverable. See *Monier*, 209 Ill. 2d at 109-10.

In addition, the appellate court erroneously relied on *Costa v. Dresser Industries, Inc.*, 268 Ill. App. 3d 1 (3d Dist. 1994), in attempting to distinguish this case from *Neuswanger*, 221 Ill. App. 3d 280. *Dameron*, 2019 IL App (1st) 172338, ¶¶ 49-50. In basing its conclusion on the finding that the tissue testing in *Costa* is "more comparable" to the EMG study in this case, the appellate court overlooked the fact that the decision in *Costa* did not address whether the results of the tissue testing contained thought processes and opinions or only concrete facts.

The similarities between this case and *Costa* are superficial at best. Moreover, the issue the appellate court addressed in *Costa* was fundamentally different than the issue in this case. The plaintiff in *Costa* specifically sought to discover the protected opinion of the defendant's consulting expert on the sole basis that exceptional circumstances warranted discovery of that evidence. *Costa*, 268 Ill. App. 3d at 7. In *Costa*, unlike here, the party asserting a privilege did not admit that the material sought contained concrete facts, and the plaintiff took the position that the jury had the right to know the extent of the "disagreement between experts consulted by the defendants." *Id.*

Unlike *Costa*, here, plaintiff admits that Dr. Preston's records and EMG report contain concrete facts. Defendants seek the results of Dr. Preston's EMG study because the test results undisputedly contain purely concrete data regarding plaintiff's claimed injury, which is discoverable even in the absence of exceptional circumstances.

Moreover, in distinguishing this case from the decisions in *Shields* and *Neuswanger*, the appellate court stated that a "surveillance video by its nature records factual information in the form of images, which is distinct from the expert's mental processes." *Dameron*, 2019 IL App (1st) 172338, ¶ 48. The videotape in *Neuswanger*, however, was not merely surveillance video; rather, it was prepared by an expert in preparation for

litigation. 221 Ill. App. 3d at 282. The appellate court in *Newswanger* recognized that the videotape allegedly disclosed an expert's thought processes and case evaluation; nonetheless, the court concluded that inclusion of the expert's reasoning did not convert the entire videotape into protected "core work product." *Id.* at 286. Significantly, the court acknowledged the party's "legitimate concerns" in protecting its expert's work product but found that those concerns were sufficiently addressed by the trial court's order permitting the deletion of the expert's audible thought processes as protected work product. *Id.*

This case cannot be distinguished from *Neuswanger* on the basis that the videotape there was necessarily devoid of the expert's mental processes. As in *Neuswanger*, nothing in this case would have prevented the circuit court from ordering the redaction of any protected "core work product" from the EMG study if plaintiff had produced the study for *in camera* review.

C. Re-Designating Dr. Preston as a Consultant Does Not Transform His Report Into Protected Work Product.

Before attempting to re-designate Dr. Preston as a consultant, plaintiff disclosed Dr. Preston as controlled expert witness who would testify at trial pursuant to Rule 213(f)(3) (C 460). In her response to defendants' Rule 213(f) interrogatories, plaintiff specifically disclosed that "Dr. Preston will be called as one of the plaintiff's controlled expert opinion

witnesses to testify regarding the results of the comparison electromyogram and/or nerve conduction studies he will be performing on Alexis Dameron in June 1, 2017." (*Id.*) As stated in plaintiff's Rule 213(f)(3) disclosure, Dr. Preston examined plaintiff, performed a diagnostic EMG and nerve conduction study to evaluate her claimed injuries, and prepared a report containing his findings. *Dameron*, 2019 IL App (1st) 172338, ¶ 5.

In a telling about-face, plaintiff retracted her disclosure to conceal Dr. Preston's objective findings and test results from the defendants (C 464). Only after Dr. Preston prepared his report did plaintiff seek to abandon Dr. Preston as an expert witness and to re-designate him as a consultant under Rule 201(b)(3).

Where a party discloses a controlled expert witness who has prepared a report, that party must produce the expert's opinions and report. Ill. S. Ct. R. 213(f)(3); see also Committee Comments, Ill. S. Ct. R. 213(g) ("[A] party must *** provide all reports of opinion witnesses"). The plaintiff has never disputed that Dr. Preston's report contains his findings following his examination of the plaintiff (Plaintiff's Brief at 5).

Even if Dr. Preston could be categorized as a consultant after being disclosed as a testifying expert witness, the revised designation would not shield his reports and test results consisting of objective data that is not "core work product." *Newswanger*, 221 Ill. App. 3d at 286. In *Shields*, even

after the appellate court acknowledged that the videographer who took a surveillance video of the plaintiff was a consultant, it held that the videos themselves constituted substantive evidence and not work product, and the trial court correctly ordered them to be produced. 353 Ill. App. 3d at 512-13. The court in *Shields* found that the videographer's identity was not discoverable because he was a consultant; by contrast, here plaintiff willingly disclosed Dr. Preston's identity as an expert witness before attempting to change his designation. Likewise, the appellate court in *Newswanger* found that, although the videotapes in question were taken by a consulting expert and the footage itself may disclose some of the expert's thought processes by showing the focus of his investigation, the tapes were not "transmuted" into "core work product" or "conceptual data" subject to the work product privilege. 221 Ill. App. 3d at 285.

The appellate court erroneously relied on *Davis*, an inapposite, unpublished federal decision, to conclude that Dr. Preston's report is protected is not applicable. Unlike *Davis*, which was limited to the discoverability of a withdrawn expert's opinion, defendants in this case seek factual data undisputedly contained in Dr. Preston's report.

By allowing plaintiff to withhold Dr. Preston's report, the appellate court permitted the type of tactical gamesmanship this Court has consistently condemned. See *Sullivan*, 209 Ill. 2d at 109-10; see also

Boatmen's National Bank v. Martin, 155 Ill. 2d 305, 325 (1993) ("We strenuously disapprove of strategies which are purposefully designed to circumvent our discovery rules."). After receiving Dr. Preston's findings and test results, plaintiff attempted to withdraw Dr. Preston as a controlled expert and re-designate him as a consultant under Rule 201(b)(3) to prevent defendants from discovering the results of Dr. Preston's examination and testing. The timing of plaintiff's withdrawal of Dr. Preston as a controlled expert is not coincidental. If the test results and Dr. Preston's opinions had supported plaintiff's injury claim, plaintiff would have readily produced Dr. Preston's records and report and disclosed his opinions.

II. The Appellate Court's Erroneous Conclusion That Dr. Preston Is Not a Treating Physician Conflicts With the Undisputed Facts.

The appellate court misclassified Dr. Preston as a treating physician who provided medical care to plaintiff related to her alleged injuries. Claiming defendants' performance of a hysterectomy injured a nerve in her right leg, plaintiff filed a medical malpractice suit seeking compensation for her alleged injuries (C 22-51). By filing suit and placing her physical condition at issue, plaintiff consented to defendants discovering medical information related to her alleged injury. See *Palm*, 2018 IL 123152, ¶ 28 (quoting *Petrillo v. Syntex Laboratories, Inc.,* 148 Ill. App. 3d 581, 591 (1st Dist. 1986) ("[W]e note that when a patient files suit, he implicitly consents

to his physician releasing any of the medical information related to the mental or physical condition which the patient has placed at issue in the lawsuit.")).

As the appellate court acknowledged, Dr. Preston examined the plaintiff, performed diagnostic testing of plaintiff's claimed nerve injury that yielded objective results, and prepared a report discussing his findings and conclusions. *Dameron*, 2019 IL App (1st) 172338, ¶ 6. Yet the appellate court erroneously concluded that Dr. Preston was not one of plaintiff's treating physicians. *Id.*, ¶ 31. The appellate court's unfounded conclusion that Dr. Preston is not a treating physician conflicts with discovery rules that require disclosure of a physician's examination of a plaintiff's alleged injury.

In reaching its flawed conclusion, the appellate court misconstrued an important distinction between treating physician and expert witness set forth in *Cochran*, 203 Ill. App. 3d at 940. *Dameron*, 2019 IL App (1st) 172338, ¶ 30. Compounding its faulty reasoning, the appellate court also failed to address the fact that Dr. Preston provided medical care to the plaintiff in the form of an examination and diagnostic study, which produced the type of objective factual data that routinely is discoverable.

In *Cochran*, the Fifth District of the Appellate Court was asked to determine whether a radiologist's opinions were "expert opinions" within

the scope of former Supreme Court Rule 220, and should have been barred because the radiologist was never disclosed as a controlled expert who would testify at trial. *Id.* at 939. Subsequently, this Court replaced Rule 220 with Rule 213. Thus, the *Cochran* analysis of Rule 220 does not apply to the present case. In *Cochran*, after suffering a fall, a physician referred plaintiff to a radiologist for diagnostic testing. *Id.* at 939. At trial, the radiologist testified regarding the results of his diagnostic testing and offered opinions regarding his interpretation of a CT scan. *Id.* The radiologist also offered opinions regarding another radiologist's interpretation of an x-ray. *Id.*

On appeal, the court in *Cochran* determined that the radiologist was a treating physician, not a retained expert. *Id.* at 940-41. Thus, the appellate court found that the radiologist's opinions regarding another radiologist's interpretation of diagnostic testing did not fall within the ambit of Rule 220. The appellate court in *Cochran* observed that "whether a physician is a treating physician or an expert depends on the physician's relationship to the case, not the substance of his testimony." *Id.* at 940. The *Cochran* court concluded the radiologist was a treating physician because the plaintiff had been referred by another physician to the radiologist for treatment. *Id.* at 941.

Given the significant difference between the disclosure requirements of Rule 213(f) and former Rule 220, the *Cochran* court's distinction between treating physician and expert witness does not apply here. The issue in this case is not whether Dr. Preston may offer opinions regarding diagnostic testing performed by another physician. Rather, this Court should address whether hard data concerning Dr. Preston's diagnostic testing is discoverable. The appellate court thus erred in relying on *Cochran*.

Regardless of whether Dr. Preston is considered a treating physician or an expert witness, he performed a diagnostic EMG that generated factual data concerning plaintiff's claimed injury. Under the rules of discovery that require full disclosure of relevant evidence, the defendants are entitled to learn the results of Dr. Preston's examination and data generated during the EMG study. See Ill. S. Ct. R. 201(b)(1); see also *Monier*, 35 Ill. 2d at 359-60 ("material *** containing relevant and evidentiary details must, under our discovery rules, remain subject to the truth-seeking process thereof.").

The appellate court reached its conclusion that Dr. Preston was not a treating physician despite acknowledging that he provided medical care to the plaintiff in the form of an examination and an EMG study. The appellate court erroneously concluded that Dr. Preston was not one of the

plaintiff's treating physicians because the record did not indicate that Dr. Preston saw or treated plaintiff for her injuries prior to the EMG study he performed. *Dameron*, 2019 IL App (1st) 172338, ¶ 31. While the plaintiff initially disclosed Dr. Preston as a controlled expert opinion witness, he undisputedly examined plaintiff and conducted an EMG study to evaluate the nature and extent of her claimed injuries (C 460).

Like the objective test results generated in the context of a Rule 215 independent medical examination, which the examined party receives regardless of whether the party seeking a Rule 215 examination decides to call the examiner at trial, the EMG results must be produced. See Ill. S. Ct. R. 215(c) ("[i]f the [examiner's] report is not delivered to the attorney for the party examined within the time herein specified or within any extensions or modifications thereof granted by the court, neither the examiner's report, the examiner's testimony, the examiner's findings, X-ray films, nor the results of any test the examiner has made may be received in evidence *except at the instance of the party examined or who produced the person examined*.") (Emphasis added.) Significantly, Rule 215(c) closes with the admonition that "[n]o examiner under this rule shall be considered a consultant."

III. Contrary to the Appellate Court's Opinion, the Party Seeking Disclosure Holds the Burden of Proof for Establishing Privilege and the Burden of Providing an Adequate Record on Appeal.

The appellate court's opinion conflicts with decisions of this Court and shifts the burden of proof for claiming privilege over documents to the requesting party. This Court has long held that a party who claims privilege has the burden of coming forward with facts to establish the privilege. See *Cox*, 61 Ill. 2d at 419-20; see also *Klaine*, 2016 IL 118217, ¶ 15 ("A mere assumption that the matter is confidential and privileged will not suffice."). The appellate court not only based its decision on the unsupported assumption that Dr. Preston's records contain privileged material, but erred further by imposing on defendants the burden of proof for establishing privilege.

As the party asserting a privilege, plaintiff bore the burden of proving facts to establish that Dr. Preston's records and testing results were privileged. See *Mylnarski v. Rush-Presbyterian-St. Luke's Medical Center*, 213 Ill. App. 3d 427, 431 (1st Dist. 1991). However, here, plaintiff never attempted to establish that Dr. Preston's records contained privileged information. Plaintiff produced no affidavits or other evidence to support her claim of privilege over Dr. Preston's report and opinions. Plaintiff never filed or served a privilege log or sought an *in camera* inspection. Moreover, the record contains no transcript of the hearing on plaintiff's motion to

designate Dr. Preston as a consultant or the hearing on plaintiff's motion for reconsideration of the trial court's order compelling production of Dr. Preston's report.

Despite plaintiff's failure to establish privilege, the appellate court erroneously assumed Dr. Preston's records and testing results were privileged material. The appellate court acknowledged that it could not conclude whether the material in Dr. Preston's records was of a "purely concrete nature" in the absence of Dr. Preston's EMG study; yet the court inexplicably presumed the study contained Dr. Preston's thought processes and, therefore, was protected in its entirety from disclosure. *Dameron*, 2019 IL App (1st) 172338, ¶ 50. This Court should reverse the appellate court's reasoning and conclusion, which directly conflict with this Court's long-standing precedent. The burden of establishing a privilege rests with the party seeking to protect a document from discovery. See *Cox*, 61 Ill. 2d at 419-20; see also *Klaine*, 2016 IL 118217, ¶ 15; *Mylnarski*, 213 Ill. App. 3d at 431.

In opposing the discovery requests and in moving for reconsideration, plaintiff had ample opportunity to provide Dr. Preston's materials for *in camera* inspection by the circuit court. Plaintiff failed to do so. The appellate court inexplicably punished defendants for plaintiff's failure to provide Dr. Preston's records for *in camera* inspection by the

circuit court and erroneously shifted to the defendants the plaintiff's burden to establish that Dr. Preston's records and testing results were privileged material. The appellate court erroneously assumed that Dr. Preston's records contained his thought process and were protected from disclosure in their entirety, despite no evidence in the record to support this assumption.

This Court should reverse for the additional reason that the appellate court erroneously relieved plaintiff of her obligation to provide a sufficient record to the reviewing court. This Court's precedent prohibited the appellate court from speculating regarding the content of Dr. Preston's materials. See *Webster v. Hartman*, 195 Ill. 2d 426, 436 (2001). In the absence of a sufficient record, the appellate court should have presumed that the trial court's order conformed with the law and had a sufficient factual basis. See *Corral v. Mervis Industries*, 217 Ill. 2d 144, 156-57 (2005). The deficiency in the record alone should have led the appellate court to affirm, not to reverse the trial court's order. See *Wackrow v. Niemi*, 231 Ill. 2d 418, 428, n.4 (2008) (observing that without a sufficient record, "a reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis").

At minimum, the case should be remanded to the circuit court for an *in camera* review of Dr. Preston's records to allow the circuit court to

determine if the study contains any protected mental processes and, if so, to allow redaction of only that protected information before requiring production of the rest of the records. A review would have sufficiently addressed plaintiff's concerns while protecting the truth-seeking interest in a civil case by compelling production of objective factual evidence that is relevant to plaintiff's claimed damages. Without the benefit of a review of the EMG study, however, the only assumptions that can be drawn are against the plaintiff, whose burden it was to establish that the information sought was privileged. See *Klaine*, 2016 IL 118217, ¶ 15.

Dated: February 4, 2020

Respectfully submitted,

By: /s/Robert Marc Chemers

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Supreme Court Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 37 pages.

/s/ *Robert Marc Chemers*
Robert Marc Chemers

APPENDIX

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2019 IL App (1st) 172338

Fifth Division

March 15, 2019

No. 1-17-2338

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ALEXIS DAMERON, Plaintiff-Appellant, v. MERCY HOSPITAL AND MEDICAL CENTER, an Illinois Not-For-Profit Corporation, Individually and By and Through Its Agents, Servants and/or Employees; CORDIA CLARK-WHITE, M.D., Individually and as Agent, Servant and Employee of Mercy Hospital and Medical Center; ALFREDA HAMPTON, M.D., Individually and as Agent, Servant and/or Employee of Mercy Hospital; NATASHA HARVEY, M.D., Individually and as Agent, Servant and Employee of Mercy Hospital; ERICA TAYLOR, M.D., Individually and as Agent, Servant and/or Employee of Mercy Hospital; PATRICIA COURTNEY, Individually and as Agent, Servant and/or Employee of Mercy Hospital; MARY CAHILL, Individually and as Agent, Servant and/or Employee of Mercy Hospital; GENEVIEVE LANNING, Individually and as Agent, Servant and/or Employee of Mercy Hospital; and JAYLEN SHEARER, Individually and as Agent, Servant and/or Employee of Mercy Hospital, Defendants (Mercy Hospital and Medical Center; Cordia Clark-White, M.D.; Alfreda Hampton, M.D.; Natasha Harvey, M.D.; and Patricia Courtney,	) Appeal from the) Circuit Court of) Cook County.)) No. 2014 L 11533)) Honorable) William E. Gomolinski,) Judge Presiding.

Defendants-Appellees).)
)

JUSTICE HALL delivered the judgment of the court, with opinion.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment and the opinion.

OPINION

¶ 1 This is an interlocutory appeal pursuant to Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016). The plaintiff, Alexis Dameron, was held in contempt[1] for refusing to comply with a discovery order of the circuit court of Cook County. The order at issue required the plaintiff to disclose to the defendants the report of a nontestifying medical expert.

¶ 2 On appeal, plaintiff contends that the trial court erred when it denied her motion to redesignate her expert witness a consultant and ordered her to produce the expert witness' report.

¶ 3 BACKGROUND

¶ 4 On November 6, 2014, the plaintiff filed a medical malpractice complaint against the defendants, Mercy Hospital and Medical Center, Cordia Clark-White, M.D., Alfreda Hampton, M.D., Natasha Harvey, M.D. and Patricia Courtney.[2] The plaintiff alleged that in August 2013, she underwent a surgical procedure at Mercy Hospital during which she sustained injuries due to the negligence of the defendants. The defendants filed their appearances and answers to the complaint. Thereafter the parties conducted discovery.

¶ 5 On May 30, 2017, the plaintiff filed her answers to interrogatories. Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007). In her answers, the plaintiff disclosed David Preston, M.D., as a testifying

[1]The trial court did not specify the exact form of contempt. However, the trial court and the parties treated it as a "friendly contempt," designed to test the correctness of the underlying production order. See *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 6.

[2]The remaining defendants were dismissed from the suit and are not parties to this appeal.

expert witness. She further disclosed that Dr. Preston would be testifying as to the results of a test he would perform on the plaintiff on June 1, 2017. On that date, Dr. Preston examined the plaintiff and conducted a comparison electromyogram (EMG) and/or nerve conduction study (EMG study) on the plaintiff. Thereafter, Dr. Preston prepared a report in which he discussed his findings and opinions. Dr. Preston's report is not in the record on appeal.

¶ 6 On August 3, 2017, the plaintiff filed a motion to designate Dr. Preston a nontestifying expert consultant pursuant to Illinois Supreme Court Rule 201(b)(3) (eff. May 29, 2014) and to preclude discovery of facts and opinions known by Dr. Preston, absent a showing of exceptional circumstances by the defendants. In support of her motion, the plaintiff alleged the following facts.

¶ 7 Dr. Preston had been retained to assist the plaintiff's attorney by evaluating the nature and extent of the plaintiff's injuries and to perform the EMG study on her. Dr. Preston was not one of the plaintiff's treating physicians, he had not been referred to her by any of her treating physicians, and the doctor did not provide the plaintiff with any medical treatment for her complained-of injuries. The May 30, 2017, disclosure of Dr. Preston as a testifying expert witness was "inadvertent" and that on July 27, 2017, the plaintiff's attorney notified the defendant's attorneys that she was withdrawing Dr. Preston as a testifying expert witness. The plaintiff's attorney informed defendants' attorneys that because Dr. Preston would not be testifying, his opinions were privileged from discovery pursuant to Rule 201(b)(3). On July 31, 2017, the plaintiff's attorney served her amended answers to discovery which contained no mention of Dr. Preston as a testifying expert witness.

¶ 8 The plaintiff further alleged that on July 27, 2017, the trial court had ordered the plaintiff's attorney to provide deposition dates for her expert witnesses. However, the defendants refused to schedule those depositions until Dr. Preston's records of the EMG study were disclosed to them. Since the defendants' attorneys failed to show that the facts and opinions known to Dr. Preston could not be obtained by other means, pursuant to Rule 201(b)(3), the plaintiff alleged that she was not required to disclose them to the defendants. The defendants did not respond in writing to the plaintiff's motion.

¶ 9 On August 4, 2017, following argument by the parties, the trial court denied the plaintiff's motion to designate Dr. Preston as a consulting expert and ordered the plaintiff to produce Dr. Preston's records regarding the EMG study on the plaintiff. The plaintiff refused to produce Dr. Preston's records. The trial court found the plaintiff in contempt and imposed a $100 fine. The plaintiff filed a motion to reconsider the court's August 4, 2017, order. On September 6, 2017, the trial court denied the plaintiff's motion for reconsideration but reduced the fine for contempt to $1.

¶ 10 On September 19, 2017, the plaintiff filed her notice of interlocutory appeal from the trial court's orders of August 4, 2017, and September 6, 2017.

¶ 11 ANALYSIS

¶ 12 We are asked to determine whether a party who has disclosed a witness as a testifying expert may thereafter redesignate that witness as a consultant whose opinions and work product are privileged from discovery unless there is a showing of exceptional circumstances by the opposing party.

¶ 13 I. Standard of Review

¶ 14 The applicability of a discovery privilege is a matter of law which we review *de novo*. *Harris*, 2015 IL 117200, ¶ 13.

¶ 15 II. Rules and Principles Governing Pretrial Discovery

¶ 16 The objectives of pretrial discovery are to allow better preparation for trial, the elimination of surprise and to promote the expeditious and final determination of controversies in accordance with the substantive rights of the parties. *D.C. v. S.A.*, 178 Ill. 2d 551, 561 (1997). In contrast, privileges are not designed to promote the truth-seeking process; rather, they serve some outside interest by protecting certain matters from discovery. *D.C.*, 178 Ill. 2d at 561-62. As such, privileges are an exception to the rule that the public has a right to every person's evidence. *D.C.*, 178 Ill. 2d at 562. "Privileges are not to be lightly created or expansively construed, for they are in derogation of the search for the truth." *D.C.*, 178 Ill. 2d at 562.

¶ 17 Illinois Supreme Court Rule 201(b)(1) (eff. May 29, 2014) provides in pertinent part that "[e]xcept as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action." Illinois Supreme Court Rule 201(b)(2) (eff. May 29, 2014) provides in pertinent part that "[m]aterial prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Illinois Supreme Court Rule 201(b)(3) (eff. May 29, 2014) provides:

> "A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional

circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject matter by other means."

¶ 18 III. Discussion

¶ 19 We begin by observing that in Illinois, a party may withdraw an expert witness so long as the opposing party is given clear and sufficient notice allowing it to take the necessary action in light of the abandonment of the witness. *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994). However, the plaintiff does not merely seek to withdraw Dr. Preston as a testifying expert witness but to redesignate him as a nontestifying consultant whose reports and opinions are protected from discovery by the defendants pursuant to the privilege set forth in Rule 201(b)(3).

¶ 20 The issue in this case is not addressed in our discovery rules. Neither party has directed us to Illinois cases addressing this precise issue. In the absence of Illinois authority, the plaintiff relies on federal case law interpreting the federal rules corresponding to our rules governing discovery.

¶ 21 The defendants point out that several of these decisions are unpublished orders and that such orders have no precedential value in Illinois courts. *Board of Education of Springfield School District No. 186 v. Attorney General*, 2017 IL 120343, ¶ 54. However, our supreme court went on to say, "the district court's reasoning is of interest." *Board of Education of Springfield School District No. 186*, 2017 IL 120343, ¶ 55. Moreover, 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. *Owens v. VHS Acquisition Subsidiary Number 3, Inc.*, 2017 IL App (1st) 161709, ¶ 27; see *Fauley v. Metropolitan Life Insurance Co.*,

2016 IL App (2d) 150236, ¶ 41 (where no Illinois case was on point, the reviewing court considered an unreported federal court of appeals case to be persuasive authority).

¶ 22 Since Illinois discovery rules and prior decisions have not addressed this precise issue, we find sufficient similarities between our discovery rules and federal discovery rules so as to render federal case law on this issue instructive and the federal courts' reasoning persuasive, though not precedential. While the term "consultant," is not used, the Federal Rules of Civil Procedure similarly distinguish between an expert whose opinions may be presented at trial and an expert employed only for trial preparation and not expected to testify. *San Román v. Children's Heart Center, Ltd*, 2010 IL App (1st) 091217, ¶ 23; Fed. R. Civ. P. 26(b)(4)(A), (B).[3]

¶ 23 Prior to 2009, the majority of federal courts decisions took the view that a party could change its mind and change the designation of an expert witness, in which case that expert could not be subject to discovery absent a showing of exceptional circumstances. *Davis v. Carmel Clay Schools*, No. 1:11-cv-00771-SEB-MJD, 2013 WL 2159476, at *3 (S.D. Ind. May 17, 2013); see *Ross v. Burlington Northern R.R. Co.*, 136 F.R.D. 638, 639 (N.D. Ill. 1991); *Sunrise Opportunities, Inc. v. Regier*, No. 05 C 2825, 2006 WL 581150, at *1 (N.D. Ill. March 7, 2006). But see *House v. Combined Insurance Co. of America*, 168 F.R.D. 236, 245 (N.D. Iowa 1996) (the opposing party could depose and use an expert at trial, who had been previously disclosed but subsequently withdrawn as a witness).[4]

¶ 24 In 2009, the Seventh Circuit Court of Appeals recognized that "[a] witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report

[3]The nontestifying expert provision is now contained in Rule 26(b)(4)(D) (Fed. R. Civ. P. 26(b)(4)(D)).

[4]*House* reflected the minority view prior to 2009.

has been disclosed, and a deposition conducted, to the status of a trial-preparation expert whose identity and views may be concealed." *Securities & Exchange Comm'n v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009) (citing Fed. R. Civ. P. 26(b)(4)(B)); see *Hartford Fire Insurance Co. v. Transgroup Express, Inc.*, 264 F.R.D. 382 (N.D. Ill. 2009). However, neither the pre-2009 nor the post-2009 cases distinguished situations where the expert's name was disclosed but no report disclosed from those where the expert report had been disclosed. *Davis*, 2013 WL 2159476, at *5.

¶ 25 In *Davis*, the issue was "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*, 2013 WL 2159476, at *2. The issue before it required the district court to determine what constituted the "designation" of an expert witness. The court observed that in the Seventh Circuit, *Koenig* and its progeny dictated that once the expert's report was disclosed to the opposing party, the expert ceased to enjoy protection from discovery by the opposing party. But "it is clear that prior to producing the expert report, courts [have found] that a party can change a testifying expert to a non-testimonial expert without losing the protections" from discovery, absent exceptional circumstances. *Davis*, 2013 WL 2159476, at *7. Following an analysis of the relevant case law, the court concluded that

> "both the disclosure of the name of the expert as well as the expert's required report is necessary to fully disclose a testifying expert under Fed R. Civ. P. 26 and comply with that Rule. The Court also agrees that parties are entitled to change their minds and decide not to use an expert to testify at trial. *** Defendant did not disclose any testimony or

> expert opinions in the form of a report from [the expert witness]. Moreover, Plaintiff has shown no reliance upon Defendant's expert disclosure *** that would result in any prejudice to Plaintiff. As a result, the only means by which Plaintiff is entitled to conduct discovery of [the redesignated expert witness] is the 'exceptional circumstances' exception of Rule 26(b)(4)(D)." (Emphasis omitted.) *Davis*, 2013 WL 2159476, at *7.

¶ 26 Rule 213(f)(3) provides that for a "controlled expert witness, the party must identify: *** (iv) any reports prepared by the witness." Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2018). In the present case, the plaintiff had disclosed the identity of her expert, Dr. Preston but had not yet disclosed or identified his report because at the time she filed her answers to interrogatories, Dr. Preston had not yet conducted an examination or any testing of the plaintiff.

¶ 27 The defendants raise several arguments in support of their contention that once the plaintiff disclosed Dr. Preston as a testifying expert, they were entitled to the results of the EMG study. We address each argument in turn.

¶ 28 A. Treating Physician

¶ 29 The defendants maintain that Dr. Preston was one of the plaintiff's treating physicians since he examined her and conducted the EMG study to assess the health of her muscles and nerve cells. They point out that by filing suit a plaintiff implicitly consents to his physician releasing any medical information related to his physical or mental condition that the patient had placed at issue in the lawsuit. *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 591 (1986). The defendants reason that since Dr. Preston was a treating physician, the plaintiff has waived any right to withhold the results of Dr. Preston's June 1, 2017, EMG study from the defendants.

¶ 30 "[W]hether a physician is a treating physician or an expert depends on the physician's relationship to the case, not the substance of his testimony." *Cochran v. Great Atlantic & Pacific Tea Co.* 203 Ill. App. 3d 935, 940 (1990). Simply put, a treating physician is one consulted for treatment, and an expert is one consulted for testimony. *Cochran*, 203 Ill. App. 3d at 941. In *Cochran*, after suffering a fall, the plaintiff saw Dr. Thomas Griffith, who in the course of treating the plaintiff referred her to Dr. G. Richard Locke, a radiologist for diagnostic X-rays and a CT scan. The reviewing court determined that Dr. Locke was a treating physician, *i.e.* "[h]e was a physician to whom plaintiff had been referred for treatment." *Cochran*, 203 Ill. App. 3d at 941.

¶ 31 The opposite is true in the present case. In her answers to discovery, the plaintiff disclosed Dr. Preston as a "controlled expert opinion witnesses" who would be testifying regarding the results of the EMG study he was performing on the plaintiff on June 1, 2017. 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.

¶ 32 We conclude that Dr. Preston was not one of the plaintiff's treating physicians. Therefore, the defendants are not entitled to the results of the EMG study on that basis.

¶ 33 B. Judicial Admission

¶ 34 The defendants argue that the plaintiff's disclosure of Dr. Preston as her expert witness is binding as a judicial admission. "Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *In re Estate of*

Rennick, 181 Ill. 2d 395, 406 (1998). Judicial admissions are not evidence but have the effect of withdrawing a fact from contention. *Brummet v. Farel*, 217 Ill. App. 3d 264, 267 (1991). In general, answers to interrogatories may be treated as judicial admissions. *Brummet*, 217 Ill. App. 3d at 267. A judicial admission may not be controverted or explained. *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶ 36. However, the general rule is inapplicable when the party's testimony is inadvertent, or uncertain, or amounts to an estimate or opinion rather than a statement of concrete fact. *Brummet*, 217 Ill. App. 3d at 267.

¶ 35 The plaintiff's disclosure of Dr. Preston as an expert witness in her answer to interrogatories did not constitute a judicial admission. First, in her motion to redesignate Dr. Preston as a consultant, the plaintiff maintained that the disclosure was inadvertent. Second, Rule 213 places a duty on the party answering the interrogatories to supplement or amend any prior answer whenever new or additional information becomes available. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2018). Third, even after disclosing him as a testifying expert witness, the plaintiff was still entitled to withdraw him as a witness. *Taylor*, 162 Ill. 2d at 97.

¶ 36 In *Abruzzo*, the reviewing court held that a statement in the defendant's reply brief in response to its motion to dismiss was a judicial admission. The court determined that stating the emergency personnel left without rendering medical treatment went beyond accepting the allegations in the complaint as true for purposes of the motion to dismiss and was an equivocal assertion of fact constituting a judicial admission. *Abruzzo*, 2013 IL App (1st) 122360, ¶ 49. Therefore, even if the plaintiff's disclosure was a binding admission of fact, it only prevented her from denying that Dr. Preston was originally hired as an expert witness rather than as a consultant.

¶ 37 Accordingly, the plaintiff's disclosure of Dr. Preston was not a judicial admission.

¶ 38 C. Waiver

¶ 39 The defendants argue that because Dr. Preston was initially disclosed as a testifying expert witness, the plaintiff waived any privilege to the EMG study. See Ill. S. Ct. R. 213, Committee Comments (rev. June 1, 1995) (stating in pertinent part that "a party must *** provide all reports of opinion witnesses").

¶ 40 We note that Rule 213(f) requires a party to furnish "the identities and addresses of witnesses who will testify at trial," as well as the subject matter and the opinions of the witnesses. Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2018). Illinois Supreme Court Rule 213(g) (eff. Jan. 1, 2018), provides as follows:

> "The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial."

Construing sections (f) and (g) of Rule 213 together, 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. Therefore, the committee comments to Rule 213(g) rule do not support the defendants' argument that they are entitled to Dr. Preston's records of the EMG study.

¶ 41 The defendants' reliance on *Dalen v. Ozite Corp.* 230 Ill. App. 3d 18 (1992), is misplaced. In that case, the reviewing court addressed whether Ozite Corporation (Ozite) waived any privilege regarding the confidentiality of a memorandum prepared for Ozite by its attorney

when it allowed Dalen's attorney to review its files. The court rejected Ozite's claim that it did not have time to purge the files and that the disclosure of the memorandum was inadvertent. The court determined Ozite and its counsel's conduct was completely inconsistent with their claim of confidentiality. Under the balancing test set forth in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 132 F.R.D. 204 (N.D. Ind. 1990), the court determined that by allowing Dalen free access to its files after Dalen made numerous requests for them, Ozite waived the protection of the work product doctrine. *Dalen*, 230 Ill. App. 3d at 29. In contrast, in the present case, Dr. Preston's report had not been disclosed to the defendants since it was not even in existence at the time the plaintiff disclosed him as her controlled expert witness.

¶ 42 Therefore the plaintiff did not waive the consultant's privilege by disclosing Dr. Preston as her testifying expert witness.

¶ 43 D. *Shields v. Burlington Northern & Santa Fe Ry. Co.*

¶ 44 The defendants argue that, even if Dr. Preston was considered a "consultant," they are still entitled to his EMG study since they allege it contains material and relevant facts. In support, they rely on *Shields v. Burlington Northern & Santa Fe Ry. Co.*, 353 Ill. App. 3d 506 (2004), in which the reviewing court considered the applicability and scope of the work-product privilege of Rule 201(b)(2) and the consultant work product privilege of Rule 201(b)(3) to a surveillance video.

¶ 45 In *Shields*, the plaintiff sought production of a surveillance video taken of the plaintiff since he had incurred his injuries and that was in the possession of the defendant. The defendant refused to produce the video, arguing that the video was work product and not discoverable until

the defendant determined to use it at trial. The trial court found the defendant's attorney in contempt. *Shields*, 353 Ill. App. 3d at 507-08.

¶ 46 On review of the contempt finding, the appellate court observed that Illinois law supported the production of surveillance tapes because the work product privilege " 'does not protect material and relevant evidentiary facts from the truth-seeking processes of discovery.' " *Shields*, 353 Ill. App. 3d at 509 (quoting *Stimpert v. Abdnour*, 24 Ill. 2d 26, 31 (1962)). The court noted that the reviewing court in *Neuswanger v. Ikegai America Corp.*, 221 Ill. App. 3d 280 (1991), held that a videotape made by the defendant's consulting expert showing his tests on the operation of the machine that injured the plaintiff was discoverable, "with appropriate deletions from the soundtrack for anything the expert said that revealed his thought processes and theories." *Shields*, 353 Ill. App. 3d at 509. The court in *Neuswanger* explained:

> " '[W]here the material gathered or produced by an attorney or expert is of a more concrete nature *** and does not expose the attorney's or expert's mental processes, it serves the judicial process and [it] is not unfair to require the parties to mutually share such material and analyze it prior to trial.
>
> * * *
>
> In our opinion, the truth-seeking interest in a civil case is sufficiently compelling to require disclosure of [the] consulting expert's videotaped field investigation without a showing of exceptional circumstances.' " *Shields*, 353 Ill. App. 3d at 509-10 (quoting *Neuswanger*, 221 Ill. App. 3d at 285-86).

When any protected conceptual data was deleted, the videotape would not constitute " 'work product' within the meaning of discovery rules." *Shields*, 353 Ill. App. 3d at 510.

¶ 47 The court in *Shields* distinguished *Wiker v. Pieprzyca-Berkes*, 314 Ill. App. 3d 421 (2000), where the defendant refused to produce any surveillance video of the plaintiff who sought damages for injuries suffered in an auto collision. On appeal from a verdict in favor of the defendant, the appellate court found that the failure to produce the video did not require reversal of the verdict since " 'the person hired to make the surveillance video qualifies as a consultant under [Rule 201(b)(3)], so long as he or she and the video are not presented at trial.' " *Shields*, 353 Ill. App. 3d at 510 (quoting *Wiker*, 314 Ill. App. 3d at 430). The court in *Shields* distinguished *Wiker* on the grounds that the case did not hold that the surveillance videotape constituted protected work product and did not discuss how the videotape would reveal any protected mental processes, opinions or strategy. Therefore, *Wiker* did not compel reversal of the order for the production of the surveillance tapes in the case before it. *Shields*, 353 Ill. App. 3d at 511.

¶ 48 The cases relating to production of surveillance tapes are factually in apposite. The dispute in the present case does not involve a surveillance video of the plaintiff. Moreover, a surveillance video by its nature records factual information in the form of images, which is distinct from an expert's mental processes.

¶ 49 We find the decision in *Costa v. Dresser Industries, Inc.*, 268 Ill. App. 3d 1 (1994), to be more relevant. In *Costa*, the parties agreed to joint testing of tissue samples from the decedent's lungs. Following the testing, the plaintiff was ordered to turn over slides and other material to the defendants that were then inspected and/or tested by the defendants' expert. The trial court denied the plaintiff's request for the identity of the defendants' consulting expert and the results of any testing. *Costa*, 268 Ill. App. 3d at 7. 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. The court found that the plaintiff failed to establish exceptional circumstances since there was sufficient tissue to do the amount of testing she wanted, the tissue the defendants received was not shown to be unique, and the plaintiff's own expert was able to refute the cause of death testimony by the defendants' testifying experts. *Costa*, 268 Ill. App. 3d at 8.

¶ 50 In the present case, the trial court ordered the plaintiff's attorney to produce "Dr. Preston's records regarding his June 1, 2017 comparison EMG study" on the plaintiff. 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.

¶ 51 E. Fundamental Fairness Exception

¶ 52 Finally, the defendants maintain that the plaintiff is using the consultant's privilege to subvert the legal process. They liken the situation in the present case to the one presented in *Deprizio v. MacNeal Memorial Hospital Ass'n*, 2014 IL App (1st) 123206. In that case, the reviewing court rejected the defendants' claim that the "fundamental fairness exception"

required disclosure of the plaintiff's mental health records. *Deprizio*, 2014 IL App (1st) 123206, ¶ 30. The court noted that "the exception was narrow and only applied to circumstances where 'plaintiffs are invoking the mental-health therapist-patient privilege to exploit or subvert the legal process.' " *Deprizio*, 2014 IL App (1st) 123206, ¶ 31 (quoting *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 61 (2002)). Since the present case does not involve mental health records, the exception does not apply. Moreover, other than the fact of withdrawal of Dr. Preston and re-designating him as a Rule 201(b)(3) consultant, the defendants fail to identify any evidence in the record to support their claim of subversion of the legal process by the plaintiff.

¶ 53 After careful consideration, we reject the defendants' arguments that they are entitled to the results of Dr. Preston's June 1, 2017, EMG study on the plaintiff.

¶ 54 CONCLUSION

¶ 55 Persuaded by the analysis of the federal courts in the decisions discussed above, we hold 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 redesignated a Rule 201(b)(3) consultant and entitled to the consultant's privilege against disclosure, absent exceptional circumstances. In the present case, Dr. Preston's report of the EMG study he performed on the plaintiff had not been disclosed to the defendants prior to the motion to redesignate him as a consultant. Therefore, the trial court erred when it denied the plaintiff's motion to redesignate Dr. Preston as Rule 201(b)(3) consultant.

¶ 56 We reverse the trial court's order denying the plaintiff's motion to redesignate Dr. Preston as a Rule 201(b)(3) consultant and ordering her to produce Dr. Preston's EMG study.

We vacate the contempt finding against the plaintiff and the $1 fine imposed. This case is remanded to the circuit court for further proceedings consistent with this opinion.

¶ 57 Reversed in part and vacated in part; cause remanded.

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

ALEXIS DAMERON, Plaintiff-Appellant, v. MERCY HOSPITAL AND MEDICAL CENTER, an Illinois Not-For-Profit Corporation, Individually and By and Through Its Agents, Servants and/or Employees; CORDIA CLARK-WHITE, M.D., Individually and as Agent, Servant and Employee of Mercy Hospital and Medical Center; ALFREDA HAMPTON, M.D., Individually and as Agent, Servant and/or Employee of Mercy Hospital; NATASHA HARVEY, M.D., Individually and as Agent, Servant and Employee of Mercy Hospital; ERICA TAYLOR, M.D., Individually and as Agent, Servant and/or Employee of Mercy Hospital; PATRICIA COURTNEY, Individually and as Agent, Servant and/or Employee of Mercy Hospital; MARY CAHILL, Individually and as Agent, Servant and/or Employee of Mercy Hospital; GENEVIEVE LANNING, Individually and as Agent, Servant and/or Employee of Mercy Hospital; and JAYLEN SHEARER, Individually and as Agent, Servant and/or Employee of Mercy Hospital, Defendants, (Mercy Hospital and Medical Center; Cordia Clark-White, M.D.; Alfreda Hampton, M.D.; Natasha Harvey, M.D.; and Patricia Courtney, Defendants-Appellees).	)	No. 17-2338

ORDER

THIS CAUSE having come on to be heard on the Defendants' Petition for Rehearing, and this Court being fully advised in the premises:

1-17-2338

IT IS HEREBY ORDERED, that the Defendants' Petition for Rehearing is denied.

ENTER:

Shelvin L. M. Hall

Justice Shelvin Louise Marie Hall

Mary K Rochford

Presiding Justice Mary K. Rochford

Justice Thomas Hoffman

ORDER ENTERED

JUL 26 2019

APPELLATE COURT FIRST DISTRICT

SUPREME COURT OF ILLINOIS

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November 26, 2019

In re: Alexis Dameron, Appellee, v. Mercy Hospital and Medical Center, etc., et al., Appellants. Appeal, Appellate Court, First District. 125219

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Neville, J., took no part.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

MAYO CLINIC

Electromyography (EMG)

Overview

Electromyography (EMG) is a diagnostic procedure to assess the health of muscles and the nerve cells that control them (motor neurons). EMG results can reveal nerve dysfunction, muscle dysfunction or problems with nerve-to-muscle signal transmission.

Motor neurons transmit electrical signals that cause muscles to contract. An EMG uses tiny devices called electrodes to translate these signals into graphs, sounds or numerical values that are then interpreted by a specialist.

During a needle EMG, a needle electrode inserted directly into a muscle records the electrical activity in that muscle.

A nerve conduction study, another part of an EMG, uses electrode stickers applied to the skin (surface electrodes) to measure the speed and strength of signals traveling between two or more points.

Why it's done

Your doctor may order an EMG if you have signs or symptoms that may indicate a nerve or muscle disorder. Such symptoms may include:

- Tingling
- Numbness
- Muscle weakness
- Muscle pain or cramping
- Certain types of limb pain

EMG results are often necessary to help diagnose or rule out a number of conditions such as:

- Muscle disorders, such as muscular dystrophy or polymyositis
- Diseases affecting the connection between the nerve and the muscle, such as myasthenia gravis
- Disorders of nerves outside the spinal cord (peripheral nerves), such as carpal tunnel syndrome or peripheral neuropathies

- Disorders that affect the motor neurons in the brain or spinal cord, such as amyotrophic lateral sclerosis or polio
- Disorders that affect the nerve root, such as a herniated disk in the spine

Risks

EMG is a low-risk procedure, and complications are rare. There's a small risk of bleeding, infection and nerve injury where a needle electrode is inserted.

When muscles along the chest wall are examined with a needle electrode, there's a very small risk that it could cause air to leak into the area between the lungs and chest wall, causing a lung to collapse (pneumothorax).

How you prepare

Food and medications

When you schedule your EMG, ask if you need to stop taking any prescription or over-the-counter medications before the exam. If you are taking a medication called Mestinon (pyridostigmine), you should specifically ask if this medication should be discontinued for the examination.

Bathing

Take a shower or bath shortly before your exam in order to remove oils from your skin. Don't apply lotions or creams before the exam.

Other precautions

The nervous system specialist (neurologist) conducting the EMG will need to know if you have certain medical conditions. Tell the neurologist and other EMG lab personnel if you:

- Have a pacemaker or any other electrical medical device
- Take blood-thinning medications
- Have hemophilia, a blood-clotting disorder that causes prolonged bleeding

What you can expect

Before the procedure

You'll likely be asked to change into a hospital gown for the procedure and lie down on an examination table. To prepare for the study, the neurologist or a technician places surface electrodes at various locations on your skin depending on where you're experiencing symptoms. Or the neurologist may insert needle electrodes at different sites depending on your symptoms.

During the procedure

When the study is underway, the surface electrodes will at times transmit a tiny electrical current that you may feel as a twinge or spasm. The needle electrode may cause discomfort or pain that usually ends shortly after the needle is removed.

During the needle EMG, the neurologist will assess whether there is any spontaneous electrical activity when the muscle is at rest — activity that isn't present in healthy muscle tissue — and the degree of activity when you slightly contract the muscle.

He or she will give you instructions on resting and contracting a muscle at appropriate times. Depending on what muscles and nerves the neurologist is examining, he or she may ask you to change positions during the exam.

If you're concerned about discomfort or pain at any time during the exam, you may want to talk to the neurologist about taking a short break.

After the procedure

You may experience some temporary, minor bruising where the needle electrode was inserted into your muscle. This bruising should fade within several days. If it persists, contact your primary care doctor.

Results

The neurologist will interpret the results of your exam and prepare a report. Your primary care doctor, or the doctor who ordered the EMG, will discuss the report with you at a follow-up appointment.

By Mayo Clinic Staff

Report Sample

Helping physicians improve the quality of their reports is a key goal for AANEM in 2011. The report template below is based on the AANEM's educational paper Reporting the Results of Needle EMG and Nerve Conduction Studies. A report template helps the EDX physician adhere to and document required procedures —by checking them off a list. This process will help the EDX physician complete a thorough analysis of the patient's history, physical, and EDX data that will improve diagnostic accuracy and result in quality patient care. The template also will help laboratories applying for the laboratory accreditation program meet the criteria used to evaluate EDX reports. The template was developed listing the key elements for a EDX standard report excluding F-wave, H-reflex, and repetitive stimulation studies. Physicians are strongly urged to utilize this template to improve their reports.

Name: Patient Name:
Address: Patient Address:

Patient ID: 01234
Gender: female
Date of Birth: 01/01/65
Height/Weight: 5'7" 300lbs
Examination Date: 01/10/11

← Patient Demographics

Referring Physician: Dr X

History and Physical Examination

A 46-year-old female was referred for an EDX examination because of increasing problems with numbness in tingling in her left hand over the last 3 years. The patient notes numbness during the day when gripping the steering wheel of her car. She has been waking during the night with pain or paresthesias in the left hand relieved by shaking the hand.

← Reason for Referral

Her past history is significant for a successful right carpal tunnel release 3 years ago for similar symptoms. She had a right sided mastectomy for breast cancer 10 years ago. A brief general examination was remarkable for lymphedema of the right upper extremity and a well healed scar over the right carpal tunnel. A brief neurological examination demonstration normal deep tendon reflexes, normal strength and sensation in both upper extremities.

← Description of History and Physical Exam

The EDX studies were performed to evaluate for a left carpal tunnel syndrome.

NCS Examination

For sensory nerve conduction studies, the amplitude is measured peak-to-peak, the latency reported is the distal peak latency, and the conduction velocity, if measured, is determined from onset latencies and is over the forearm.

For motor nerve conduction studies, the amplitude is measured baseline-to-peak, the latency reported is the distal onset latency, the conduction velocity is calculated over the forearm, and the F wave latency is the minimum latency.

Unless otherwise noted, the hand temperature was monitored continuously and remained between 32°C and 36°C during the performance of the NCSs.

← Limb Temperature

SENSORY AND MOTOR NERVE CONDUCTION STUDIES (shaded results are abnormal)*

Type of Study	Side/ Nerve	Stimulation Site	Recording Site	Distance	AMP	Reference Normal Values	Latency	Reference Normal Values	Conduction Velocity	Reference Normal Values
Sensory	Left Median	Index	Wrist	13 cm	14	(>10 μV)	3.5	(<3.6 ms)		
Sensory	Left Median	Palm	Wrist	8 cm	55	(>20 μV)	2.5	(<2.3 ms)		
Motor	Left Median	Wrist	APB	7 cm	13.5	(>4.0 mV)	4.1	(<4. 5ms)		
Motor	Left Median	Elbow/Wrist	APB	24	12.9	(>4.0 mV)	8.3		59	(>49 m/s)

Tabular NCS Data:
- Side & Nerve
- Stimulation & Recording Site
- SNAP/CMAP Amplitude
- Peak Latency
- Conduction Velocity
- Reference Values

EMG Examination

The study was performed with a concentric needle electrode. Fibrillation and fasciculation activity is graded from none (0) to continuous (4+). The configuration and recruitment pattern of motor unit action potentials under voluntary control, if not normal, are described below.

Needle EMG Results*

			Spontaneous Activity			Voluntary Activity			
Side	Muscle	Insertional Activity	Positive Sharp Waves	Fibrillation	Fasciculation	Amplitude	Duration	Polyphasics	Recruitment
Left	Pronator Teres	Normal	0	0	0	Normal	Normal	None	Normal
Left	Flexor Pollicis Longus	Normal	0	0	0	Normal	Normal	None	Normal
Left	Abductor Pollicis Brevis	Normal	0	0	0	Normal	Normal	None	Normal

Tabular EMG Data:
- Side
- Muscle Tested
- Activity Data
  - Voluntary
  - Insertional
  - Spontaneous

Findings*

(*The results of the NCSs on the left ring finger study for CTS and left ulnar are not included due to space considerations. In addition, the EMG results for the other upper extremity muscles, biceps, triceps, flexor carpi ulnaris, abductor digiti quinti, and first dorsal interosseous, are not included.)

- The left median sensory conduction study was ABNORMAL: the peak latency was prolonged with orthodromic stimulationof the ring finger and the palm.
- The left median motor conduction study was normal.
- The left ulnar sensory conduction study was normal.
- The left ulnar motor conduction study was normal.
- Needle examination with a concentric needle electrode of selected muscles of the left upper extremity was normal.

← Description of Findings

Diagnostic Interpretation

The study was ABNORMAL.

The findings were compatible with a diagnosis of median nerve pathology at the left wrist affecting primarily the median sensory fibers in the carpal tunnel segment.

There was no electrodiagnostic evidence of more proximal median nerve pathology or ulnar nerve pathology.

← Probable Diagnosis & Location of Pathology

Notes

Right upper limb comparison studies were not performed due to lymphedema following right complete mastectomy and a history of a previous right carpal tunnel release.

In comparison with prior EDX studies of the left upper limb, which were reported to the patient as normal, today's study demonstrates median sensory neuropathy at the wrist consistent with a clinical diagnosis of a mild left CTS.

← Study Limitations & Previous Study Information

TABLE OF CONTENTS OF RECORD ON APPEAL

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

ALEXIS DAMERON, *Plaintiff-Appellee,* v. MERCY HOSPITAL AND MEDICAL CENTER, et al., *Defendants-Appellants.*	)	No. 125219

The undersigned, being first duly sworn, deposes and states that on February 4, 2020, there was electronically filed and served upon the Clerk of the above court the Joint Brief of Defendants-Appellants. Service of the Joint Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

James A. Karamanis, Esq.
Barney & Karamanis, LLP
Two Prudential Plaza
180 N. Stetson, Suite 3050
Chicago, Illinois 60601
Email: james@bkchicagolaw.com

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Joint Brief bearing the court's file-stamp will be sent to the above court.

/s/ Robert Marc Chemers
Robert Marc Chemers

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 instrument are true and correct.

/s/ Robert Marc Chemers
Robert Marc Chemers