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., AND PATRICIA COURTNEY, CRNA,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois,
First District No. 1-17-2338

There Heard on Appeal from the
Circuit Court of Cook County, County Department, Law Division,
No. 2014 L 11533,
Hon. William E. Gomolinski, Judge Presiding

JOINT REPLY BRIEF OF DEFENDANTS-APPELLANTS MERCY HOSPITAL AND MEDICAL CENTER, CORDIA CLARK-WHITE, M.D., ALFREDA HAMPTON, M.D., NATASHA HARVEY, M.D. AND PATRICIA COURTNEY, CRNA

DONOHUE BROWN
MATHEWSON & SMYTH LLC
Richard H. Donohue
Karen Kies DeGrand
Meagan P. VanderWeele
140 South Dearborn Street, Suite 800
Chicago, Illinois 60603
(312) 422-0910
donohue@dbmslaw.com
degrand@dbmslaw.com
vanderweele@dbmslaw.com

Attorneys for Defendants-Appellants, Mercy Hospital and Medical Center, Cordia Clark-White, M.D., Alfreda Hampton, M.D., and Natasha Harvey, M.D.

PRETZEL & STOUFFER, CHARTERED
Robert Marc Chemers
John V. Smith
Matthew Reddy
Pretzel & Stouffer, Chartered
One South Wacker Drive, Suite 2500
Chicago, IL 60606
(312) 346-1973
rchemers@pretzel-stouffer.com
jsmith@pretzel-stouffer.com;
mreddy@pretzel-stouffer.com;

Attorneys for Defendant-Appellant, Patricia Courtney, CRNA

ORAL ARGUMENT REQUESTED

E-FILED
7/20/2020 1:56 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ARGUMENT IN REPLY

This appeal boils down to two simple issues. The Court's resolution of them will have a lasting impact on personal injury litigation and beyond that broad category of cases.

First, may a personal injury plaintiff bury the results of medical testing performed by a disclosed Supreme Court Rule 213(f)(3) physician through a strategic re-designation of the physician as a Supreme Court Rule 201(b)(3) consultant? Under Illinois law and basic concepts of fairness, the answer must be "no." But plaintiff fails to meaningfully address this question. Instead, despite her expert neurologist's objective evaluation and testing of plaintiff's nerve and muscle function, and despite her prior admissions concerning the content of the neurologist's report, in her brief plaintiff coyly suggests that she did not withhold unequivocal factual information, such as by saying she has "never conceded this point"—that the neurologist's records contain "objective factual evidence." (Response at 10.) Plaintiff, however, does not and cannot deny that the expert witness report she has fought so hard to withhold contains objective data resulting from an electromyography ("EMG"), a diagnostic procedure for detecting the condition of a patient's nerves and muscles. Plaintiff admitted in her brief in the appellate court that the report contains objective results of a June 1, 2017 EMG study. (Plaintiff's appellate brief at 5.) The only reasonable conclusion from the record is that Dr. David Preston, plaintiff's Rule 213(f)(3) neurologist, included in his report data reflecting test results not to her liking.

Second, may a litigant use her procedural failures as the basis for defending an appellate decision resting on speculation concerning the relevant facts—here, regarding

the assertion of a discovery privilege? The answer to this question is "no." But plaintiff urges the Court to simply accept a vague description of the content of Dr. Preston's report. Plaintiff seeks to be excused from establishing that she is entitled to withhold undisputedly relevant documents from production and to provide an adequate record on appeal. At least four times in her brief (response at 5, 9, 18, 27), plaintiff claims that defendants should have sought an *in camera* inspection of the expert's report, a role reversal that makes no sense given plaintiff's position as the party asserting the privilege, defendants' lack of access to the expert's records and the trial court's orders overruling the privilege claim.

Supreme Court Rule 213 provides the backdrop for these two important issues. The orderly process of discovery, never more so than in medical malpractice litigation, requires compliance with the disclosure rules pertaining to expert witnesses. Plaintiff seeks this Court's approval of a litigation strategy antithetical to the letter and spirit of Rule 213, in which plaintiff disclosed an expert and then, after the expert generated evidence harmful to her damage claim, argued that the disclosure was "inadvertent," another contention unsupported by the record, and then sought to re-designate the expert as a Rule 201(b)(3) consultant, a scheme unsupported by any legal authority.

I. Under *De Novo* or Deferential Review, This Court Should Affirm the Trial Court's Ruling.

Plaintiff errs in urging that a *de novo* standard of review governs all aspects of this appeal. (Response at 1-2.) A *de novo* standard of review may govern application of a trial court's privilege rulings (see *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 13); however, where, as here, the reviewing court considers a question concerning the

trial court's application of well-established law to the facts of record, an abuse of discretion standard applies. See *Doe v. Township High School District 211*, 2015 IL App (1st) 140857, ¶¶ 75, 81. The abuse of discretion standard of review is more appropriate for this appeal, given a trial court's great latitude in defining the scope of discovery. See *TTX Co. v. Whitley*, 295 Ill. App. 3d 548, 553 (1st Dist. 1998). A discovery order will not be disturbed absent an abuse of discretion. *Doe*, 2015 IL App (1st) 140857, ¶ 74. Either standard of review should lead this Court to reverse the appellate court's decision and reinstate the trial court's order overruling plaintiff's claim of privilege under Supreme Court Rule 201(b)(3) and request to re-designate a previously disclosed Rule 213 controlled expert witness.

II. Plaintiff's Disclosure of Dr. Preston as a Rule 213(F)(3) Expert Witness Entitles Defendants to Dr. Preston's Report.

As plaintiff admits in her brief (response at 3, 4, 16, 19, 23), she disclosed Dr. Preston as a Supreme Court Rule 213(f)(3) controlled expert witness who will testify at trial regarding his examination of Alexis Dameron, the results and findings of an EMG study that he performed, and his opinions concerning Ms. Dameron's condition and claimed injury. (C 460.) In response to defendants' written interrogatories asking plaintiff to identify her controlled expert witnesses and to disclose their opinions, conclusions and all reports (C 262), plaintiff stated: "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." (C 460.) Plaintiff concedes that "the purpose of Dr. Preston's EMG study and examination of Plaintiff was for testimony at trial." (Response at 22.)

Likewise, the appellate court recognized that "plaintiff disclosed David Preston, M.D., as a testifying expert witness" pursuant to Rule 213(f)(3). *Dameron v. Mercy Hospital and Medical Center*, 2019 IL App (1st) 172338 ("Opinion"), ¶ 5.

Plaintiff's disclosure of Dr. Preston is a binding judicial admission[1] that he is a controlled expert witness under Rule 213(f)(3). See *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶ 36. Moreover, after the trial court rejected plaintiff's later claim that Dr. Preston was a consultant under Rule 201(b)(3), plaintiff again asserted that Dr. Preston is "a retained 213(f)(3) witness" in her motion for reconsideration (C 492), another binding judicial admission. *Abruzzo*, 2013 IL App (1st) 122360, ¶ 41 (noting that a party's assertion in motions and supporting memoranda are binding judicial admissions).

Despite plaintiff's repeated admissions that she disclosed Dr. Preston as a controlled expert witness under Rule 213(f)(3), plaintiff now claims that Dr. Preston is a consultant under Rule 201(b)(3) and that plaintiff is not required to produce Dr. Preston's test results and opinions regarding his examination of the plaintiff and evaluation of her alleged injury. Plaintiff cannot logically contend that "Dr. Preston is a Rule 201(b)(3) non-testifying consultant that was specially retained by Plaintiff's counsel for the purpose of rendering opinions to aid in trial preparation" (Response at 25) while repeatedly admitting that she disclosed Dr. Preston as a controlled expert and intended to call him to

[1] Plaintiff errs in claiming that defendants waived the arguments that plaintiff's initial disclosure of Dr. Preston was a judicial admission and that the disclosure was not inadvertent. (Response at 28-29.) The arguments bear directly on the issues raised in defendants' appellate brief and petition for leave to appeal. This Court requires parties only to preserve issues or claims, not arguments, for appeal. See *1010 Lakeshore Association v. Deutche Bank National Trust Co.*, 2015 IL 118372, ¶ 18.

testify at trial. It was not until after Dr. Preston examined Ms. Dameron, performed an EMG, received the test results and formulated his opinions regarding Ms. Dameron's claimed injury that plaintiff reversed course and claimed Dr. Preston was a consultant under Rule 201(b)(3). Plaintiff's maneuvering is the type of tactical gamesmanship this Court has consistently condemned. See *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109-10 (2004); see also *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 325 (1993) ("We strenuously disapprove of strategies which are purposefully designed to circumvent our discovery rules.").

Where, as here, a party discloses a controlled expert witness who has prepared a report, that party must produce the expert's findings and opinions. 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.") In accordance with plaintiff's Rule 213(f)(3) disclosure, Dr. Preston examined Ms. Dameron, performed a comparison EMG and nerve conduction study to evaluate her claimed injuries, and prepared a report. (Response at 2.) The plain language of Rule 213(f)(3) entitles defendants to all of Dr. Preston's written reports, including the report related to the June 1, 2017 EMG study that plaintiff has refused to produce.

Plaintiff justifies shielding the test results by repeating a non-sequitur–that defendants may, but did not, request a Supreme Court Rule 215 examination. (Response at 4, 9, 13, 24, 25, 26.) Of course, a later performance of the test by another examiner is no substitute for obtaining the data generated by Dr. Preston's study on June 1, 2017.

Rule 215, to the extent applicable, supports defendants' position. 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 tests the examiner has made may be received in evidence except at the instance of the party examined or who produced the person examined.") Plaintiff acknowledges in her brief that a Rule 215 report "must be disclosed to all parties." (Response at 25.) So too must the results of Dr. Preston's testing.

III. The Appellate Court Erroneously Relied on Dr. Preston's Role as a Controlled Expert Witness to Conclude That the Defendants Are Not Entitled to the EMG Study Results.

Plaintiff relies on the false assumption that Dr. Preston did not provide medical treatment to plaintiff, a position contrary to the record, plaintiff's admissions and the appellate decision. Both plaintiff and the appellate court acknowledge that Dr. Preston examined the plaintiff, performed diagnostic testing of plaintiff's claimed nerve injury that yielded objective results, and prepared a report containing the neurological findings and Dr. Preston's conclusion. Opinion, ¶ 5. Plaintiff admits that her counsel "retained Dr. Preston to examine Plaintiff in order to provide his opinions regarding the extent of her Plaintiff's injuries" (response at 21) "for testimony at trial" (response at 22) and that "on June 1, 2017, Dr. Preston performed a comparison electromyogram ('EMG') and/or

nerve conduction study on the Plaintiff Alexis Dameron" (response at 2). Yet, the appellate court erroneously–and without any record support–concluded Dr. Preston was not one of plaintiff's treating physicians. Opinion, ¶¶ 30-32.

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, a fact the appellate court overlooked. Under Illinois discovery rules requiring full disclosure of relevant evidence, defendants are entitled to learn the results of Dr. Preston's examination and data generated by the EMG study.[2] See Ill. S. Ct. R. 201(b)(1); see also *Monier v. Chamberlain*, 35 Ill. 2d 351, 359-60 (1966) ("Other material *** containing relevant and evidentiary details must, under our discovery rules, remain subject to the truth-seeking process thereof."); *Shields v. Burlington North & Santa Fe Railway Co.*, 353 Ill. App. 3d 506, 509 (1st Dist. 2004) (same) (quoting *Stimpert v. Abdnour*, 24 Ill. 2d 26, 31 (1962)).

The appellate court reached its conclusion that Dr. Preston was not a treating physician without accounting for the fact that he provided medical care to the plaintiff in

[2] Plaintiff inappropriately requests the Court to strike defendants' joint brief on the basis of the content of defendants' Appendix. Defendants included two documents in the Appendix that they cited in their joint response filed in the appellate court, without objection by plaintiff. The documents plaintiff now contends are improper include an article from the Mayo Clinic regarding electromyography (EMG) diagnostic procedures (A 22-25) and a report template for an EMG published by the American Association of Neuromuscular & Electrodiagnostic Medicine (A 26). Defendants properly cited the documents and included them in an Appendix as scholarly authority to provide background information regarding the diagnostic procedure Dr. David Preston performed on plaintiff and the report that plaintiff refuses to produce. See *In re Marriage of Schmitt,* 391 Ill. App. 3d 1010, 1017 (2d Dist. 2009). Should the Court determine the documents included in the Appendix are not properly before the Court, the appropriate remedy would be for the Court to simply disregard the material, not, as plaintiff claims, to strike the brief. See *Allstate Insurance Co. v. Kovar*, 363 Ill. App. 3d 493, 499 (2d Dist. 2006).

the form of an examination and an EMG study. The 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. Opinion, ¶ 31. The appellate court's finding cannot be squared with the undisputed fact that Dr. Preston examined plaintiff and performed EMG testing to evaluate the nature and extent of her claimed injuries.

In reaching its flawed conclusion, the appellate court misconstrued as dispositive the distinction between a treating physician and an expert witness set forth in *Cochran v. Great Atlantic & Pacific Tea Co.*, 203 Ill. App. 3d 935, 940 (5th Dist. 1990). In *Cochran*, the Fifth District determined whether a radiologist's findings were expert opinions subject to disclosure under former Supreme Court Rule 220. *Id.* at 939. After plaintiff suffered 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 Fifth District in *Cochran* determined that the radiologist was a treating physician, not a controlled expert. *Cochran*, 203 Ill. App 3d at 940-41. 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. *Id*. 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 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.

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

Plaintiff cites additional inapposite case law addressing a topic not before the Court: whether a physician-patient relationship exists for purposes of determining whether the physician owes a duty of care. (Response at 24.) *Sandler v. Sweet*, 2017 IL App (1st) 163313, and the other cases cited by plaintiff on the duty issue, did not address whether the defendant physician's records were discoverable. Rather, in *Sandler*, the appellate court considered whether the defendant physician, an expert retained by the plaintiff's adversary in pending litigation, owed a duty of care that supported plaintiff's medical malpractice action against the expert. *Sandler*, 2017 IL App (1st) 163313, ¶ 12. The appellate court determined that the plaintiff was not the physician's patient but, rather, the physician was a retained expert whose role was limited to evaluating the nature and extent of the plaintiff's alleged injury. *Id.,* ¶ 15. Notably, the defendant physician was required to produce his report and opinions in the pending litigation, in which he served as a retained expert. *Id.,* ¶ 4.

Plaintiff also cites *People v. Blair* (response at 22-23), an inapposite criminal case in which the issue was whether the State could call the victim's treating radiologist to

testify at trial without first disclosing a statement of the radiologist's qualifications as required under Supreme Court Rule 412–a rule governing the disclosure of experts in criminal proceedings not applicable to the present case. 2011 IL App (2d) 070862, ¶¶ 46-52. The issue in *Blair* was not, as plaintiff suggests, whether the State was required to disclose the radiologist's records and opinions prior to trial. Indeed, in finding the radiologist was a treating physician rather than an expert under Rule 412, the appellate panel observed that the State produced the radiologist's medical reports to opposing counsel. *Id.*, ¶ 52. Moreover, the defendant had the opportunity to depose the radiologist to discover his opinions before trial. *Id.* By contrast, here plaintiff refuses to produce Dr. Preston's report, including his findings and opinions, despite having expressly disclosed him as a retained expert witness who will testify at trial. Plaintiff's reliance on *People v. Blair*, therefore, is unavailing.

IV. No Authority Supports Plaintiff's Re-Designation of a Previously Disclosed Controlled Expert as a Consultant for the Purpose of Hiding the Expert's Report.

Until the appellate court released its decision, Illinois law did not allow a plaintiff to disclose an expert physician, undergo examination and medical testing by that physician regarding her alleged injuries, and then prevent defendants from discovering the test results and the expert's findings and opinions. The Opinion clashes with this Court's policy governing discovery.

This Court has long observed that one of the overriding considerations under Illinois discovery rules is ascertainment of the truth. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 196 (1991). To that end, Supreme Court Rule 201, which defines the scope of discovery in civil cases, 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 trial court is accorded great latitude in determining its scope. *D.C. v. S.A.*, 178 Ill. 2d 551, 559 (1997).

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.

This Court has articulated a narrow exception to Rule 201's "full disclosure requirement." Only "opinion" or "core" work product, which consists of materials generated in preparation for litigation and revealing the mental impressions, opinions or trial strategy of an attorney, is protected from disclosure. *Waste Management*, 144 Ill. 2d at 196. Reviewing courts in Illinois repeatedly have emphasized that the work product doctrine does not protect relevant factual evidence. See *Stimpert*, 24 Ill. 2d at 31; see also *Shields*, 353 Ill. App. 3d at 509 ("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.") Relevant evidence that does not expose the attorney's mental processes or litigation strategy is discoverable. *Id.*; see also *Neuswanger v. Ikegai America Corporation*, 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).

Here, as plaintiff ultimately admits, Dr. Preston's report contains objective results of the June 1, 2017 EMG study that he performed, as well as his findings and opinions related to the study and his examination. (Response at 2.) At no time has plaintiff argued that Dr. Preston's report contains her attorneys' mental processes, impressions or litigation strategy. Thus, there is no basis for asserting the work product privilege or citing Rule 201(b)(2).

Plaintiff exaggerates defendants' position–defendants do not seek disclosure of all relevant discovery regardless of any applicable privilege. (Response at 10.) Plaintiff, not defendants, urges the Court to reverse well-established Illinois precedent by taking an expansive approach to the application of privilege. As authority for the proposition that evidentiary privileges bar the discovery of relevant facts, plaintiff selectively quotes the appellate court's decision in *Marsh v. Lake Forest Hospital*, 166 Ill. App. 3d 70 (2d Dist. 1988). (Response at 10.) Plaintiff fails to provide the appellate court's full quote, in which the appellate panel recognized that evidentiary privileges must be narrowly limited and applied:

> "[T]he effect of any evidentiary privilege is to bar the discovery of potentially relevant facts, which is inconsistent with the truth-seeking function. Thus, any privilege should be narrowly limited to the extent necessary to achieve its desired purpose." *Marsh*, 166 Ill. App. 3d at 76.

In *Marsh*, the appellate court held that the Medical Records Act privilege, which protects documents related to a hospital's peer-review process, did not apply to polygraph test results because extending the privilege would not advance the policies sought to be

served by the Act. *Id*. The appellate court appropriately employed a strict approach to the application of privilege.

Here, the appellate court erroneously accepted plaintiff's position, despite the absence of evidence in the record that arguably warranted application of the work product doctrine to Dr. Preston's records. Instead, the appellate court relied on an unpublished federal district court decision to substantially expand the protections afforded by the doctrine and to prevent relevant facts from being discovered. See Opinion, ¶¶ 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*, however, provides no basis for the appellate court's unprecedented expansion of the work product doctrine or for permitting plaintiff to withhold a medical test result. In *Davis*, the parents of a minor who allegedly was 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. 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.

The appellate court misconstrued *Davis*. The district court did not expand the work product doctrine or permit defendants to conceal the objective evidence its 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 in reaching his opinions was discoverable. Here, the appellate court expanded the district

court's narrow ruling in *Davis* far beyond its scope and, based on that unpublished district court decision, rewrote the work product doctrine in Illinois.

Plaintiff urges this Court to treat federal authority as persuasive based on decisions that have no application here, such as *State Bank of Cherry v. CGB Enterprises*, 2013 IL 113836, ¶¶ 53-54. (Response at 14.) In *Cherry*, this Court considered federal case law in an entirely different context – interpretation of a federal statute. *Id*.

The other cases on which plaintiff relies for the proposition that federal district decisions should be treated as persuasive authority also are inapposite. See *Perik v. JPMorgan Chase Bank, N.A.*, 2015 IL App (1st) 132245, ¶ 25 (citing a California state court decision "remarkably similar to the case at bar" in a matter of first impression in Illinois regarding whether a trial court has jurisdiction to consider a motion to vacate an arbitration award where arbitrated claim was based on pre-receivership conduct of a failed bank and plaintiff failed to exhaust administrative remedies set forth in the Financial Institutions Reform, Recovery and Enforcement Act of 1989); *Kerbes v. Raceway Associates, LLC*, 2011 IL App (1st) 110318, ¶ 34 (declining to rely on unreported federal decisions regarding interpretation of Fair Labor Standards Act of 1938 in class action lawsuit alleging violations of the Illinois Minimum Wage Law and Wage Payment Collection Act); *Sears v. National Union*, 331 Ill. App. 3d 347, 352 (1st Dist. 2002) (holding that, in limited circumstances, Illinois state courts have discretion to rely on persuasive federal diversity decisions in predicting how a sister state's supreme court would rule); *People v. Criss*, 307 Ill. App. 3d 888, 900 (1st Dist. 1999) (citing reported district court decisions and of the Court of Appeals on whether trial court properly

admitted into evidence transcripts of recorded conversations between criminal defendant and undercover police officer and allowed jury to read transcript during deliberations).

Plaintiff also directs this Court to inapposite Illinois case law. She cites no Illinois decisions permitting a litigant to "re-designate" a disclosed expert witness to hold the status of a non-testifying consultant. The Illinois case law plaintiff cites regarding the abandonment of expert witnesses does not sanction, or even contemplate, the "re-designation" of a controlled expert for the purpose of halting discovery or withholding production of a controlled expert's opinions and reports. Plaintiff cites *Taylor v. Kohli* (response at 19), wherein this Court addressed whether an expert is an agent of the party who hired him, in the context of considering whether the expert's statements serve as admissions against that party's interest. 162 Ill. 2d 91, 93 (1994). The plaintiff in *Taylor* sought to withdraw an expert whom the defendant already had deposed. *Id.* at 94. After the expert's deposition, the plaintiff informed the defendant that the witness would not be called to testify at trial. *Id.* At trial, the defendants sought to read the unfavorable testimony of plaintiff's expert into evidence on the basis that it constituted an admission against plaintiff's interest. *Id.* This Court held that an expert witness is not *per se* an agent of the party calling the expert. *Id*. at 96.

In *Taylor*, the defendant had the opportunity to depose plaintiff's expert and learn the expert's opinions before plaintiff abandoned him. By contrast, here plaintiff disclosed Dr. Preston as a testifying expert but then refused to produce his opinions and the results of his examination and testing of Ms. Dameron. Thus, unlike *Taylor*, where plaintiff comported with the mandatory disclosure requirements governing expert discovery, here plaintiff refused to fulfill her Rule 213(f)(3) obligations prior to her attempted withdrawal

of Dr. Preston as a controlled expert witness. Moreover, plaintiff has not abandoned Dr. Preston. Rather, plaintiff continues to retain Dr. Preston but seeks to convert him from a controlled expert to a non-testifying consultant to circumvent the mandatory disclosure requirements of Rule 213(f)(3).

V. The Appellate Court's Opinion Shifts Both the Burden of Proof for Establishing Privilege to the Party Seeking Disclosure and the Burden of Providing an Adequate Record on Appeal to the Appellee.

Despite having every opportunity to do so in the nearly three years since the trial court compelled plaintiff to produce Dr. Preston's report, plaintiff has failed to establish the report contains opinion or core work product that is protected from disclosure under Rule 201(b)(3)'s narrow exception to the full disclosure requirement. 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. Yet, plaintiff claims Dr. Preston's report contains Preston's "mental processes and opinions." (Response at 11.) Tellingly, at no time, even in seeking reconsideration of the order compelling production, has plaintiff sought to substantiate her position by providing the documents at issue for an *in camera* review. Plaintiff argues that she could provide Dr. Preston's report for the appellate court's review only by disclosing it (response at 9)–a flawed procedural assertion. A party challenging a discovery ruling that requires the production of allegedly privileged documents may provide the document for appellate review without disclosure to the public or to her litigation opponent. See, *e.g*, *Daley v. Teruel*, 2018 IL App (1st) 170891, ¶ 11, n.1 (noting that the documents at issue, which the appellate court deemed privileged under the federal Patient Safety Act, were provided to the appellate court under seal).

Rather than addressing the appellate court's error in shifting the burden of proof for establishing a privilege, plaintiff points a finger at defendants and misapplies the narrow "exceptional circumstances" limitation on Rule 201(b)(3). (Response at 25-26.) Citing no legal authority, plaintiff contends that defendants "had the onus to request an *in camera* inspection and to prove that exceptional circumstances exist that warrant disclosure of Dr. Preston's privileged records." (Response at 27.) But plaintiff, not defendants, had the burden of proof on the privilege issue. Here, without question, plaintiff failed to meet her burden of establishing that a privilege applied to shield the report from disclosure. See *Cox v. Yellow Cab Co.*, 61 Ill 2d 416, 419-20 (1975) ("One who claims to be exempt by reason of privilege from the general rule which compels all persons to disclose the truth has the burden of showing the facts which give rise to the privilege.") At no time need defendants have requested an *in camera* inspection, where the trial court ruled in their favor and compelled production of the report.

The appellate court misapplied the principles applicable to establishing privilege and the responsibility for compiling an adequate appellate record. The panel assumed that Dr. Preston's records contained his thought processes and was protected from disclosure in its entirety, despite the court's acknowledgement that no evidence in the record supported its assumption. The appellate court stated: "[I]n 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****." Opinion, ¶ 50. Although defendants-appellees never had access to the documents and could not supply them to the circuit court or to the appellate court, the appellate court construed the shortcomings in the record on appeal against defendants, in whose favor the trial court ruled. The case law

required the opposite presumption and ruling–in defendants' favor. 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").

The appellate court's analysis, and plaintiff's unsupported position that Dr. Preston's report is privileged, directly conflict with Illinois law placing the burden of establishing a privilege on the party seeking to protect a document from disclosure. See *Cox*, 61 Ill. 2d at 419-20; see also *Klaine,* 2016 IL 118217, ¶ 15; *Mylnarski v. Rush-Presbyterian-St. Luke Medical Center*, 213 Ill. App. 3d 427, 431 (1st Dist. 1991). Plaintiff's failure to meet her burden of establishing that Dr. Preston's records contained privileged information should have led the appellate court to affirm the circuit court's order requiring production of the records.

The flaw in the appellate court's reasoning is further illustrated by its treatment of the decision in *Costa v. Dresser Industries*, *Inc.*, 268 Ill. App. 3d 1 (3d Dist. 1994), as controlling authority and the court's attempt to distinguish this case from *Neuswanger v. Ikegai America Corp*., 221 Ill. App. 3d 280 (3d Dist. 1991). In basing its conclusion on the finding that the tissue testing in *Costa* is "more comparable" to Ms. Dameron's EMG study, the appellate court overlooked that the decision in *Costa* never addressed whether the results of the tissue testing in that case contained thought processes and opinions or only concrete facts. Despite any superficial similarities between this case and *Costa*, the appellate court in *Costa* addressed a fundamentally different issue. There the plaintiff specifically sought to discover the 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*, the record contained no admission that the material sought included concrete facts; rather, the plaintiff took the position that the jury had to know the extent of the "disagreement between experts consulted by the defendants." *Id.*

Here, the defendants seek the results of an EMG study, beyond dispute purely objective data. The EMG results are discoverable even in the absence of exceptional circumstances. Unlike *Costa*, here plaintiff has admitted the study contains objective data.

Moreover, in distinguishing this case from *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." Opinion, ¶ 48. The videotape in *Neuswanger*, however, was not a mere surveillance video; rather, it was prepared by an expert in preparation for litigation. 221 Ill. App. 3d at 282. The videotape allegedly disclosed the expert's thought processes and case evaluation, but the appellate court concluded that inclusion of the expert's reasoning did not transmute the entire videotape into protected "core work product." *Id.* at 286. Significantly, the *Neuswanger* 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 plausibly be distinguished from *Neuswanger* on the basis that the videotape there necessarily was devoid of the expert's mental processes. Similar to *Neuswanger*, nothing in this case would have prevented the trial court from ordering the

redaction of any protected "core work product" from the EMG study if plaintiff had ever produced the study for *in camera* review, which the burden of proof for establishing a privilege required plaintiff to do.

CONCLUSION

In light of plaintiff's burden, her admission that Dr. Preston's report contained factual evidence, and the historically narrow application of the work-product privilege, the only assumptions that may properly be drawn under these circumstances are: (1) Dr. Preston's EMG study contains concrete facts that are unprotected by the work product privilege; (2) the results of Dr. Preston's study are unfavorable to the plaintiff's case; and/or (3) the trial court correctly ordered the plaintiff to produce Dr. Preston's study.

Alternatively, if the Court declines to draw any assumptions in the absence of reviewing the EMG study, the case should be remanded for an *in camera* review of Dr. Preston's records so that the trial court can determine if the study contains any protected mental processes and, if so, to allow redaction of only protected information before requiring production of the remaining records. A review would sufficiently address plaintiff's concerns while protecting the truth-seeking interest in civil cases by compelling production of factual evidence that is relevant to plaintiff's claimed damages.

WHEREFORE, defendants-appellants respectfully request this Court to reverse the appellate court's decision and affirm the circuit court's order finding plaintiff in contempt for failing to produce to Dr. David Preston's records and requiring production of those records. In the alternative, defendants-appellants respectfully request this Court to grant any supervisory relief that this Court deems just.

Dated: July 20, 2020

Respectfully submitted,

By: /s/ Karen Kies DeGrand

DONOHUE BROWN MATHEWSON & SMYTH LLC
Richard H. Donohue
Karen Kies DeGrand
Meagan P. VanderWeele
140 South Dearborn Street, Suite 800
Chicago, Illinois 60603
312-422-0910
donohue@dbmslaw.com
degrand@dbmslaw.com
vanderweele@dbmslaw.com

Attorneys for defendants-appellants, Mercy Hospital and Medical Center, Cordia Clark-White, M.D., Alfreda Hampton, M.D., and Natasha Harvey, M.D.

By: /s/ Robert Marc Chemers

PRETZEL & STOUFFER, CHARTERED
Robert Marc Chemers
John V. Smith
Matthew Reddy
Pretzel & Stouffer, Chartered
One South Wacker Drive, Suite 2500
Chicago, IL 60606
312-346-1973
rchemers@pretzel-stouffer.com
jsmith@pretzel-stouffer.com;
mreddy@pretzel-stouffer.com;

Attorneys for Defendant-Appellant, Patricia Courtney, CRNA

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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5978 words.

/s/ Karen Kies DeGrand
Karen Kies DeGrand

Karen Kies DeGrand
DONOHUE BROWN
MATHEWSON & SMYTH LLC
140 South Dearborn Street, Suite 800
Chicago, IL 60603
(312) 422-0910
degrand@dbmslaw.com

NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on July 20, 2020, I electronically filed the Joint Reply Brief of Defendants-Appellants Mercy Hospital and Medical Center, Cordia Clark-White, M.D., Alfreda Hampton, M.D., Natasha Harvey, M.D., and Patricia Courtney, CRNA, with the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that on July 20, 2020, I electronically served the above-mentioned document through the court electronic filing manager and by email to the attorneys of record listed below. Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct

/s/Patrice A. Serritos
Patrice A. Serritos

DONOHUE BROWN
MATHEWSON & SMYTH LLC
140 South Dearborn Street, Suite 800
Chicago, IL 60603
(312) 422-0910
appellate@dbmslaw.com

ATTORNEYS OF RECORD

James A. Karamanis
Emily A. Herbick
Barney & Karamanis, LLP
180 North Stetson, Suite 3050
Two Prudential Plaza
Chicago, IL 60601
312-553-5300
james@bkchicagolaw.com;
emily@bkchicagolaw.com
bonnie@bkchicagolaw.com

Robert Marc Chemers
John V. Smith
Matthew Reddy
Pretzel & Stouffer, Chartered
One South Wacker Drive, Suite 2500
Chicago, IL 60606
312-346-1973
rchemers@pretzel-stouffer.com
jsmith@pretzel-stouffer.com;
mreddy@pretzel-stouffer.com;

Michael L. Resis
Mghnon Martin
SmithAmundsen LLC
150 North Michigan Avenue, Suite 3300
Chicago, IL 60601
312-894-3249
mresis@salawus.com
mmartin@salawus.com