Docket 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, Defendant-Appellants.	On Appeal From The Illinois Appellate Court First Judicial District Docket No. 1-17-2338 There Heard on Appeal From The Circuit Court of Cook County, Illinois County Department, Law Division No. 14 L 11533 The Honorable William E. Gomolinski, Judge Presiding

AMICUS CURIAE BRIEF OF THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL IN SUPPORT OF DEFENDANTS-APPELLANTS

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TABLE OF POINTS AND AUTHORITIES

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Illinois Association of Defense Trial Counsel ("IDC") is a voluntary organization of independent lawyers whose experience includes substantial tort practice generally for the defense. The IDC is a not-for-profit organization with approximately seven hundred members drawn from every county in Illinois. Members of the IDC, in defending medical malpractice and other tort litigation, regularly propound and serve Rule 213 interrogatories to learn the identify of testifying medical experts and medical test results as part of discovery, and they have an interest in how this court addresses the important issues surrounding a party's redesignation of a physician from a testifying controlled expert witness under Supreme Court Rule 213(f)(3) (Ill. S. Ct. R.213(f)(3) (eff.

Jan. 1, 2018)) to a nontestifying consultant, as well as the related claim that the results of a medical test performed by the physician constitute "work product" protected from discovery under Supreme Court Rule 201(b)(3) (Ill. S. Ct. R.201(b)(3) (eff. May 29, 2014)).

Mindful that it is a privilege and not a right to appear as an *amicus curiae* before the court, the IDC is grateful to do so in this case. Based on the experience of its members, the IDC respectfully submits that its views may be of some assistance in the further development of the law on discovery and expert disclosure.

PREFATORY REMARKS

This appeal arises from an opinion of the appellate court (*Dameron v. Mercy Hospital & Medical Center*, 2019 IL App (1st) 172338, which held that the plaintiff, Alexis Dameron, could redesignate a neurologist whom she previously disclosed as a controlled expert witness under Illinois Supreme Court Rule 213(f)(3) as a consultant, and claim that the neurologist's opinions and findings relating to a comparison electromyogram ("EMG") and/or nerve conduction EMG study that he performed after he was disclosed constituted his work product which was protected from discovery.[1]

As set forth in the appellate opinion, the plaintiff alleged that she underwent a hysterectomy at Mercy Hospital and sustained injuries due to medical negligence. (¶ 4). She filed a medical malpractice complaint against the defendants, Mercy Hospital and

[1] Attorney Mghnon Martin, who assisted in the preparation of the *amicus curiae* brief, previously served as a law clerk to Justice Shelvin Louise Marie Hall, who authored the *Dameron* opinion. She was not involved in the writing, research or proofreading of the *Dameron* opinion. As she did not participate personally or substantially in the preparation of the opinion, she is allowed to participate in the drafting of the *amicus curiae* brief in accordance with Illinois Rules of Professional Conduct. See Ill. R. Prof'l Conduct (2010) R.1.12 (eff. Jan. 1, 2010).

Medical Center, Cordia Clark-White, M.D., Alfreda Hampton, M.D., Natasha Harvey, M.D. and Patricia Courtney (defendants). After the defendants appeared and answered, the parties conducted discovery. *Id.*

Dameron's Rule 213(f)(3) answers to interrogatories, served on the third court-order deadline on May 30, 2017, disclosed David Preston, M.D., a neurologist, as a controlled expert witness who would testify as to the results of an EMG that he was about to perform on her. (¶ 5). Dr. Preston conducted the EMG on June 1, 2017 and prepared a report in which he discussed his findings and opinions. *Id.*

After Dr. Preston prepared his report, the plaintiff filed a motion to redesignate Dr. Preston as a nontestifying expert consultant under Illinois Supreme Court Rule 201(b)(3). (¶ 6). Dameron served amended answers without identifying Dr. Preston and argued in her motion that because Dr. Preston would not be testifying, his opinions were privileged from discovery. (¶ 7). In response, the defendants refused to schedule depositions until Dameron disclosed Dr. Preston's EMG study results and provided Dr. Preston for deposition. (¶ 8).

Following argument from both parties, the trial court denied the plaintiff's motion to redesignate Dr. Preston as a consulting expert and ordered Dameron to produce the EMG study results. (¶ 9). When Dameron refused, the trial court found her in contempt and imposed a fine. The trial court denied Dameron's motion for reconsideration. *Id.*

The Illinois Appellate Court, First Judicial District, Fifth Division, reversed, vacated the contempt finding, and remanded for further proceedings. (¶ 56). The court held that a party may redesignate a previously disclosed controlled expert as a Rule 201(b)(3) consultant before the expert's report is produced in discovery, and assert the

consultant's privilege against disclosure of the report. (¶ 55). The court held that because Dameron had disclosed only Dr. Preston's identity but not his report or findings, she could redesignate him as a consultant and assert that his findings were privileged and not discoverable. (¶ 50).

Thereafter, the defendants timely filed a petition for rehearing, which was denied, and a petition for leave to appeal, which this court granted on November 26, 2019. The IDC now seeks leave to file this *amicus curiae* brief within the time for the defendants to file their brief pursuant to Rule 345(b). Ill. S. Ct. R.345(b) (eff. Sept. 20, 2010).

ARGUMENT

I. THE APPELLATE COURT'S OPINION UNDULY EXPANDS THE WORK PRODUCT DOCTRINE IN SUPREME COURT RULE 201(b)(3) AND PREVENTS THE DISCOVERY OF OBJECTIVE MEDICAL TEST RESULTS

This appeal turns on the question of whether, and under what circumstances, a plaintiff may withdraw a physician previously disclosed as a controlled expert witness under Rule 213(f)(3), redesignate the physician as a consultant under Rule 201(b)(3), and then assert that the objective findings relating to a medical test that the physician performed on the plaintiff after disclosure are privileged from discovery. As the appellate court recognized, the appeal presents matters of first impression under Supreme Court Rules 213(f)(3) and 201(b)(3).

Rules 201(b)(1), (b)(2) and (b)(3) provide in relevant part:

> (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).
>
> (2) Privilege and Work Product. * * * Material 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. * * *
>
> (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.

Ill. S. Ct. Rs.201(b)(1), (b)(2), (b)(3) (eff. May 29, 2014). By comparison, as the appellate court noted (¶ 22), Federal Rule 26(b)(4) does not use the term "consultant" but distinguishes between "an expert whose opinion may be presented at trial" and "an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial" (citing FED. RS. CIV. PROC. 26(b)(4)(A), (b)(4)(D) (West 2015)).

The appellate court held that not only could the plaintiff change the designation of the neurologist from a testifying controlled expert under Rule 213(f)(3) to a nontestifying consultant under Rule 201(b)(3) after the neurologist performed the EMG, but also that the EMG results and his report were consultant "work product" likewise protected from discovery. (¶ 50). The IDC respectfully submits that just as surveillance videotape has been held not to constitute consultant "work product" protected from discovery, so, too, medical test results should not be considered "work product" under Rule 201(b)(3).

In *Shields v. Burlington Northern & Santa Fe Ry. Co.*, 353 Ill. App. 3d 506 (1st Dist. 2004), the plaintiff filed a motion to compel the discovery of a surveillance video of the plaintiff. *Id.* at 507-08. The trial court ordered the production of the video. *Id.* On appeal, the appellate court noted that the work product privilege applies to "conceptual data" but does not extend to "relevant and material evidentiary details" which "must, under our discovery rules, remain subject to the truth-seeking processes thereof." *Id.* at 509 (quoting *Monier v. Chamberlain*, 35 Ill. 2d 351, 360 (1966)). The *Shields* court further noted that 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." 353 Ill. App. 3d at 509 (quoting *Neuswanger v. Ikegai America Corp.*, 221 Ill. App. 3d 280, 285-86 (3d Dist. 1991)). The *Shields* court concluded that the videotape, while possibly disclosing some of the expert's thought processes through angle and focus, was not the type of opinion or theory that constitutes protected work product when the videotape contains "substantive evidence concerning the extent of a plaintiff's injuries." *Id.* at 513. The same is even more true of medical test results that concern the nature and extent of a party's injuries. Unlike a videotape prepared for litigation, an EMG is a diagnostic test used by physicians in the medical care and treatment.

The appellate court distinguished *Shields* on the basis that this case does not involve a videotape. (¶ 48). While that may be true, the court made the unwarranted assumption that the EMG results were not of a purely concrete nature. (¶ 50). The court improperly shifted the burden to the defendants to show that the EMG results were *not*

work product, even though the burden of asserting the work product privilege rested at all times with the plaintiff and the plaintiff did not make the EMG results and the medical report part of the record for appellate review.

In holding that the EMG results were work product, the appellate court overstated the holding of *Costa v. Dresser Industries, Inc.*, 268 Ill. App. 3d 1 (3d Dist. 1994). (¶ 49). There, the plaintiff conceded that the defendants' expert was a nontestifying consultant and that the results of any testing of the decedent's tissue sample were discoverable only if exceptional circumstances existed. *Id.* at 7-8. Here, to the contrary, the defendants are not arguing that there are exceptional circumstances for the production of a consulting neurologist's work product. Rather, they are arguing that the EMG results are objective data and not work product at all. *Costa* does not address whether the EMG results are discoverable as objective medical data concerning the nature and extent of a plaintiff's injuries.

Finally, the appellate court wrongly relied on federal case law regarding the disclosure of a nontestifying expert under Federal Rule 26(b)(4)(D) of the Rules of Civil Procedure. (¶¶ 22-27). As the appellate court recognized in *Shields*, the federal definition of "work product" broadly protects all material prepared for trial, even if the materials do not disclose any mental processes or other such conceptual data. 353 Ill. App. 3d at 511. This court expressly rejected the broad federal definition of "work product" and narrowed the scope of the work product doctrine used in Illinois more than fifty years ago in *Monier*. 35 Ill. 2d at 361.

Regardless of whether the neurologist is deemed a controlled expert or a consultant, the appellate court erred by conflating the federal definition of "work

product" with the narrower scope of the work product recognized and protected under Supreme Court Rule 201(b)(3). On this record, the plaintiff did not show that the EMG results performed on June 1, 2017 was conceptual rather than substantive evidence of a concrete and objective nature regarding the nature and the extent of the plaintiff's injuries. The IDC respectfully asks that this court reverse the appellate court and affirm the trial court's order compelling the plaintiff's production of the EMG results.

II. THE APPELLATE COURT ERRED IN ALLOWING THE PLAINTIFF TO REDESIGNATE THE NEUROLOGIST AS A CONSULTANT WHEN HE HAD BEEN DISCLOSED AS A CONTROLLED EXPERT WITNESS UNDER RULE 213(f)(3)

Relying on *Davis v. Carmel Clay Schools* (1:11-cv-00771-SEB-MJD, 2013 WL 2159476 (S.D. Ind. May 17, 2013), the appellate court held that the plaintiff could still redesignate her neurologist as a consultant because her counsel had not produced the test results or the expert's report at the time she disclosed him as a controlled expert. (¶¶ 22-27).

In finding that the plaintiff had not made a judicial admission in her Rule 213(f)(3) answers, the appellate court held that the plaintiff could withdraw the neurologist because the plaintiff maintained that the disclosure was "inadvertent" in her motion to redesignate. (¶ 35). "Inadvertent" is defined as heedless, lack of attention, want of care, or careless. *Black's Law Dictionary*, 903 (Rev. Ed. 1968). Nothing in the plaintiff's Rule 213(f)(3) answers suggest that the disclosure of Dr. Preston as a controlled expert was heedless or indicative of a lack of attention, a want of care or carelessness, especially when the plaintiff went to the effort of disclosing that Dr. Preston was about to perform an EMG on the plaintiff two days later on June 1, 2017. The appellate court had no factual or legal basis on which to conclude that the plaintiff's Rule

213(f)(3) disclosure of Dr. Preston was inadvertent.

The appellate court also noted that Rule 213 places a duty on a party answering the interrogatory to supplement or amend any prior answer whenever "new information" becomes available. (¶ 35). The appellate court did not identify what the "new information" was but presumably the EMG results constituted the "new information" that did not support her claim. If the EMG results did, the plaintiff would not have redesignated Dr. Preston as a consultant and his report and findings as work product. The IDC respectfully submits that medical test results that do not support the party's case should not be considered "new information" that would allow the party to redesignate a previously disclosed controlled expert as a consultant.

The appellate court further noted that the plaintiff was able to abandon the neurologist as a witness (citing *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994)). (¶ 35). That misses the point: abandoning Dr. Preston would not have prevented the defendants from retaining Dr. Preston as their own controlled expert. The appellate court did not fully appreciate the difference between abandoning Dr. Preston as a testifying witness and redesignating him as a nontestifying consultant. The two are not one and the same.

Finally, the appellate court held that even if the plaintiff's Rule 213(f)(3) answer was a judicial admission , it was an admission only insofar as Dr. Preston was "originally hired" as a controlled expert rather than as a consultant (¶ 35). On the contrary, the plaintiff's Rule 213(f)(3) answer was a clear and unequivocal judicial admission on its face. To allow the plaintiff to redesignate Dr. Preston after he performed the EMG on the plaintiff is nothing less than strategic gamesmanship prohibited by our discovery rules. *Wilson v. Moon*, 2019 IL App (1st) 173065, ¶ 33. If the appellate opinion is allowed to

stand, the ruling will become a mainstay of strategic gamesmanship in litigation.

CONCLUSION

For all of the foregoing reasons, the Illinois Association of Defense Trial Counsel respectfully requests that this court reverse the opinion and judgment of the Illinois Appellate Court, First Judicial District, Fifth Division, and affirm the judgment of the Circuit Court of Cook County, Illinois.

Respectfully submitted,

/s/ Michael Resis

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus curiae* brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this *amicus curiae* brief, excluding the pages containing the Rule 341(d) cover, the statement of points and authorities, and the Rule 341(c) certificate of compliance, is 10 pages.

/s/ Michael Resis
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NOTICE OF FILING

TO: See attached service list below

PLEASE TAKE NOTICE that on the 4th day of February 2020, we caused to be filed electronically with the Clerk of the Illinois Supreme Court, the attached *amicus curiae* brief in support of defendants-appellants, a copy of which, together with this notice of filing with affidavit of service, is herewith served upon all attorneys of record.

Respectfully submitted

By: /s/ Michael Resis
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AFFIDAVIT OF SERVICE

The undersigned, Jacqueline Y. Smith, a non-attorney, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct, and that I caused the foregoing notice of filing and amicus brief of Illinois Association of Defense Trial Counsel to be served upon the parties listed below on this 4th day of February, 2020, by electronic mail and electronically through the court's Odyssey electronic filing manager.

/s/ Jacqueline Y. Smith
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