2011 IL App (1st) 101238-U

FOURTH DIVISION
AUGUST 25, 2011

No. 1-10-1238

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

APRIL ANDERSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	06 L 12696
	)	
SCOTT DONNELLY, D.O. and	)	The Honorable
MIDWEST PHYSICIAN GROUP, LTD.,	)	Marcia Maras,
	)	Judge Presiding.
Defendants-Appellees.	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

HELD: In a medical malpractice action against defendants for negligent treatment during and after plaintiff's mastectomy, plaintiff's section 2-622 report was insufficient to establish that summary judgment was improperly granted in favor of defendants because parties cannot rely on their pleadings alone to oppose summary judgment, and the report did not qualify as an affidavit because the medical records referenced in the report were not attached to it. However, the deposition of the subsequent treating physician, though self-contradictory at points, established that there were genuine issues of material fact regarding whether the defendant doctor breached the standard of care in performing an incomplete mastectomy and removing the drains too early.

¶ 1 Plaintiff, April Anderson, appeals a grant of summary judgment in favor of defendants,

Scott Donnelly and Midwest Physician Group, Ltd. Dr. Donnelly performed a modified radical mastectomy of plaintiff's left breast, after which plaintiff developed a seroma and an infection and underwent a revision surgery. Plaintiff alleged in her complaint for medical malpractice that Dr. Donnelly negligently performed an incomplete mastectomy and removed her drains too early, which caused the seroma and infection and necessitated the revision surgery. Plaintiff's subsequent treating physician, Dr. Nora Jaskowiak, signed a section 2-622 report which was attached to plaintiff's complaint, stating that Dr. Donnelly's treatment breached the standard of care by performing an incomplete mastectomy and removing plaintiff's drains too early. At Dr. Jaskowiak's deposition, while maintaining that it was still her opinion to a reasonable degree of medical certainty that Dr. Donnelly performed an incomplete mastectomy, and that she believed Dr. Donnelly removed plaintiff's drains too early, the doctor simultaneously maintained that she had no opinion whether Dr. Donnelly breached the standard of care in his treatment of plaintiff. The trial court granted summary judgment to defendants. We hold that genuine issues of material fact remain based on Dr. Jaskowiak's deposition testimony, and therefore reverse and remand.

¶ 2 BACKGROUND

¶ 3 Plaintiff first saw Dr. Donnelly on October 26, 2004, for evaluation of a mass in her left breast. A portion of the mass was removed for a biopsy, and the specimen removed was positive for adenocarcinoma. Dr. Donnelly informed plaintiff of the results on her visit to his clinic on November 23, 2004. Dr. Donnelly informed plaintiff of her options: (1) a modified radical mastectomy, with or without reconstruction; and (2) a partial mastectomy, or lumpectomy, with

radiation. Plaintiff chose a modified radical mastectomy without reconstructive surgery. Dr. Donnelly saw plaintiff again on November 30, 2004, at which time plaintiff was complaining of breast pain, and plaintiff's choice of treatment remained a modified radical mastectomy.

¶ 4 On December 6, 2004, plaintiff had a modified radical mastectomy of her left breast performed by defendant Donnelly at St. James Hospital in Olympia Fields, Illinois. Jackson-Pratt drains were placed during the procedure. Plaintiff was discharged from the hospital on December 7, 2004, and Dr. Donnelly removed her Jackson-Pratt drains on December 10, 2004. Dr. Donnelly saw plaintiff on December 14, 2004 because she had a seroma, or fluid buildup. On December 21, 2004, Dr. Donnelly reported that plaintiff had to return to the emergency room the previous weekend because her wound had become distended. Dr. Donnelly continued to monitor the seroma and drained it as necessary on December 21, 2004 and December 28, 2004. However, on December 28, 2004 plaintiff informed Dr. Donnelly that she had been to the emergency room to again have the seroma drained. Plaintiff was also treated at the emergency room on January 6, 2005, when she presented with swelling of her left breast, tightness of the skin, pain, and seroma and possible infection. Plaintiff had a large amount of fluid drained from the recurring seroma and was discharged on January 7, 2005. Plaintiff saw her family practitioner on January 24, 2005 with left breast pain and tightness, redness, and seroma of her left breast. Dr. Donnelly last saw plaintiff for treatment of the seroma on January 25, 2005, at which time Donnelly noted the seroma was resolved.

¶5 On February 1, 2005, plaintiff came under the care of Dr. Nora Jaskowiak. An ultrasound of plaintiff's breast was performed on February 9, 2005, which showed either subcutaneous fat or

residual breast parenchyma. Dr. Jaskowiak was concerned that there may have been residual breast tissue and therefore recommended revision surgery of plaintiff's left breast, which she performed at the University of Chicago Medical Center on April 18, 2005. During this surgery, Dr. Jaskowiak removed a large piece of residual breast tissue. The pathology report indicated that there were rare remnants of mammary ducts and aconite, or lobules, in the tissue. There was no remaining cancer present in the tissue that Dr. Jaskowiak removed.

¶6 Plaintiff filed the instant cause of action against Dr. Donnelly and Midwest Physician Group alleging that Dr. Donnelly was negligent in treating plaintiff. Pursuant to section 2-622 of the Illinois Code of Civil Procedure (735 ILCS 5/2-622) (West 2004)), plaintiff attached a letter signed by Dr. Jaskowiak to her complaint, stating that Dr. Donnelly's performance of the modified radical mastectomy "fell below the standard of care for the following reasons:

1. Post operative drains were removed on post operative day 3, which was too early. This resulted in the development of a large seroma and infection.
2. The surgery was incomplete in that a significant amount of residual breast tissue was left behind.
3. Tissue that was not removed and not biopsied included a 7 mm ill-defined modular density and a 6 x 1 cm area of linear pleomorphic calcifications. These areas should have been removed and biopsied."

¶7 However, at her deposition Dr. Jaskowiak gave conflicting and, at times, self-contradictory testimony. Dr. Jaskowiak could not recall any facts concerning the composition of the section 2-622 letter. Jaskowiak could not even recall if someone else prepared the letter and

asked her to sign it. Jaskowiak explained that she had been in Chile where she gave five lectures and she was seven months pregnant at the time.

¶8 In addressing her first opinion in the section 2-622 letter that the drains were removed too early, when counsel for plaintiff asked whether that was still her opinion, Dr. Jaskowiak answered, "I think that removing the drains early contributed." Yet, Dr. Jaskowiak testified that because she did not review Dr. Donnelly's records, it was “fair” to say that she did not have an opinion one way or another whether Dr. Donnelly's removal of the drains was timely. It is unclear from the deposition transcript whether Dr. Jaskowiak meant she did not review Dr. Donnelly's records at all, or whether she meant she did not review the records prior to her deposition. However, at the beginning of her testimony she stated that in preparation for the deposition she reviewed only her chart concerning her care of plaintiff. Later, when asked about the statement in the section 2-622 report that Dr. Jaskowiak reviewed Dr. Donnelly's records, Dr. Jaskowiak testified that she indeed reviewed Dr. Donnelly's operative note.

¶9 Dr. Jaskowiak testified that it was within the standard of care for drains to be used for a modified-radical mastectomy, and that there are fairly standard indications used to determine the removal of the drains, including whether there is still fluid coming out of the drain. Jaskowiak testified that different physicians operating within the standard of care can have different judgments about when to take a drain out. Upon further examination by Dr. Donnelly’s counsel, Dr. Jaskowiak again testified that it was “[t]rue” that she did not have an opinion one way or another whether the removal of the drains was appropriate because she did not have enough information. However, Dr. Jaskowiak again maintained her statement in the section 2-622

regarding the early removal of plaintiff's Jackson-Pratt drains and testified, "I am concerned that the timing of the removal of the drains contributed to her seroma and potentially the infection."

¶10 In addressing Jaskowiak's second opinion in the section 2-622 letter, Jaskowiak was not equivocal. When Jaskowiak was asked whether the standard of care required the removal of the entire breast, Jaskowiak agreed that the "goal" of a modified-radical mastectomy is to remove the entire breast and axillary content. Dr. Jaskowiak agreed with the statement in the section 2-622 report that an incomplete removal of the left breast was performed by Dr. Donnelly, and that this remained her opinion.

¶11 Dr. Jaskowiak testified that she did not agree at all with the last paragraph of the section 2-622 report, and was "astounded" to find the statements in the report.

¶12 Dr. Donnelly testified at his deposition that it was his practice to remove the Jacskon-Pratt drains within three to five days of surgery because the chance of infection increases with the length of time the drains are left in the breast. Dr. Donnelly further explained that a surgeon has to make a judgment call about whether to leave the drains in to alleviate any pressure or pain from a seroma, versus removing the drains because of the increasing risk of possible infection. Dr. Donnelly testified that the presence of a seroma on December 14, 2004 was a normal drainage process that occurs after surgery. The fluid comprising the seroma did not appear to be under tension, and plaintiff had no discoloration of the skin or discomfort. Therefore, Dr. Donnelly determined that no intervention was necessary because the body reabsorbs the fluid if it is not under tension.

¶13 Defendants filed their motion for summary judgment on December 10, 2009, arguing that

plaintiff provided no expert testimony that Dr. Donnelly deviated from the standard of care. In opposing defendants' motion, plaintiff relied on her complaint and the attached section 2-622 report signed by Dr. Jaskowiak and Dr. Jaskowiak's deposition testimony. On April 6, 2010, the circuit court heard argument and granted summary judgment to defendants. Plaintiff timely appealed.

¶14 ANALYSIS

¶15 Plaintiff argues that summary judgment was improperly granted where she opposed defendants' motion with Dr. Jaskowiak's deposition. Defendants argue that Dr. Jaskowiak's section 2-622 report is inadequate to oppose summary judgment, and that Dr. Jaskowiak's deposition fails to create a genuine issue of material fact because Jaskowiak in fact testified that she had no opinion on whether Dr. Donnelly breached the standard of care.

¶16 Summary judgment is appropriate where the pleadings, depositions, affidavits, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002) (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993)); *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007) (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43, 809 N.E.2d 1248, 1256 (2004), and *Gilbert*, 156 Ill. 2d at 517). "Genuine" is construed to mean that there is evidence to support the position of the nonmoving party. *Ralston v. Casanova*, 129 Ill. App. 3d 1050,

(1984). "In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case and must construe them strictly against the movant and liberally in favor of the opponent." *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986) (citing *Kolakowski v. Voris*, 83 Ill. 2d 388, 398 (1980)).

¶17 Although summary judgment is encouraged as an aid to expedite the disposition of a lawsuit, it is nevertheless "a drastic means of disposing of litigation and therefore should be allowed only when the right of the moving party is clear and free from doubt." *Purtill*, 111 Ill. 2d at 240. "A motion for a summary judgment should be denied if the facts in the record present more than one conclusion or inference, including one unfavorable to the movant." *Zahl v. Krupa*, 399 Ill. App. 3d 993, 1011 (2010), *appeal dismissed* 237 Ill. 2d 593 (quoting *Hahn v. Union Pacific R.R. Co.*, 352 Ill. App. 3d 922, 928 (2004)). If the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424 (1998).

¶18 This court reviews a grant of summary judgment *de novo*. *Roth v. Opiela*, 211 Ill. 2d 536, 542 (2004); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "If the court of review determines that a genuine issue of material fact exists, then the entry of summary judgment must be overturned." *Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville*, 261 Ill. App. 3d 750, 755 (1994), *appeal denied*, 157 Ill. 2d 503 (1994).

¶19 Section 2-622 Report

¶20 We first address defendants' contention that the section 2-622 report is inadequate to oppose summary judgment. Although a plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002) (citing *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996)). "If the party moving for a summary judgment provides evidentiary facts that, if uncontradicted, entitle him to a judgment, the opposing party cannot rely on his pleadings alone to raise issues of material fact." *Crichton v. Golden Rule Ins. Co.*, 358 Ill. App. 3d 1137, 1145 (2005) (citing *Kellerman v. Mar-Rue Realty & Builders, Inc.*, 132 Ill. App. 3d 300, 305 (1985)). However, a court does not take as true unrebutted affidavits, or portions thereof, that do not comply with Supreme Court rule describing procedure for motions for summary judgment and involuntary dismissal. *Forrester v. Seven Seventeen HB St. Louis Redevelopment Corp.*, 784 N.E.2d 834 (2002).

¶21 Defendants argue that the section 2-622 report by Jaskowiak attached to plaintiff's complaint cannot be relied upon by plaintiff to oppose defendants' summary judgment motion. We agree. First, although the section 2-622 report was necessarily and properly part of plaintiff's complaint, a party opposing summary judgment may not rely on her pleadings alone to raise issues of material fact. *Forsberg v. Edward Hospital & Health Services*, 389 Ill. App. 3d 434, 442 (2009) (citing *Safeway Insurance Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1999)). Section 2-622(a)(1) requires the plaintiff or his attorney to file an affidavit of merit with the complaint stating that the affiant has consulted and reviewed the facts of the case with a health care

professional who, in a written medical report -- after a review of the medical records and other relevant material has determined that there is a "reasonable and meritorious" cause for filing the action. 735 ILCS 5/2-622(a)(1) (West). The Illinois legislature enacted section 2-622 in 1985 in an effort to curtail frivolous medical malpractice lawsuits and to eliminate such actions at the pleading stage before the expenses of litigation mounted. *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 401 (2010) (citing *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 65 (1992); B. Elward, The 1985 Illinois Medical Malpractice Reform Act: An Overview and Analysis, 14 S. Ill. U. L. J. 27, 28 (1989)). The requirements of section 2-622 do not rise to the level of substantive elements of a claim for medical malpractice; the report constitutes only a threshold opinion, based on a health professional's overview of the case. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 117 (2004).

¶22 Second, the section 2-622 report does not qualify for consideration in opposition to summary judgment as an affidavit. Affidavits in support of motions under section 2-1005 are controlled by Supreme Court Rule 191 (Ill. S. Ct. R. 191 (eff. July 1, 2002)). *Elliott v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724, 732 (1992). See also 735 ILCS 5/2-1005(e) (West 2010) ("The form and contents of and procedure relating to affidavits under this Section shall be as provided by rule."). An affidavit submitted in the summary judgment context serves as a substitute for testimony at trial. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002) (citing *Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587 (1971)). Therefore, it is necessary that there be strict compliance with Rule 191(a) "to insure that trial judges are presented with valid evidentiary facts upon which to base a decision." *Robidoux*, 201

Ill. 2d at 336 (quoting *Solon v. Godbole*, 163 Ill. App. 3d 845, 851 (1987)).

¶23 An expert's affidavit in support of or in opposition to a motion for summary judgment must adhere to the requirements set forth in the plain language of Rule 191(a). *Robidoux*, 201 Ill. 2d at 339. Supreme Court Rule 191 provides the following:

> "affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used." Ill. S. Ct. R. 191 (eff. July 1, 2002).

¶24 Donnelly cites to *Forsberg* in support, where the court held that a section 2-622 report could not be considered as an affidavit because it did not meet all the requirements of Supreme Court Rule 191 (Ill. Sup. Ct. R. 191 (eff. July 1, 2002)). The report referred to the medical records that the expert doctor reviewed, but it did not attach any of those records or any other papers upon which he relied. *Forsberg*, 389 Ill. App. 3d at 440. The court held that this deficiency rendered the report inadmissible in opposition to defendant's motion for summary judgment. *Forsberg*, 389 Ill. App. 3d at 440. See also *Robidoux*, 201 Ill. 2d at 339 (failure to attach papers to affidavit violated Rule 191(a)).

¶25 Here, the section 2-622 report by Dr. Jaskowiak indicated that she reviewed the medical records of plaintiff, including the records of Dr. Donnelly and records from the University of Chicago Hospitals. However, none of these records were attached to the report. Thus, as in *Forsberg*, the section 2-622 report is inadmissible. "Evidence that would be inadmissible at trial may not be considered in support of or in opposition to a motion for summary judgment." *Travel 100 Group, Inc. v. Mediterranean Shipping Co. (USA)*, 383 Ill. App. 3d 149, 152 (2008). Therefore, defendants are correct that the section 2-622 report, by itself, cannot be relied upon by plaintiff to create a genuine issue of material fact. On our *de novo* review, we therefore do not consider the report.

¶26 However, on appeal plaintiff does not rely upon Jaskowiak's section 2-622 report in arguing that granting summary judgment was improper. Plaintiff argues that Jaskowiak's deposition testimony presents a genuine issue of material fact which renders the grant of summary judgment inappropriate. We thus address whether Jaskowiak's deposition testimony presents any genuine issue of material fact.

¶27 Jaskowiak Deposition

¶28 In our *de novo* review and consideration of whether Dr. Jaskowiak's deposition testimony presents a genuine issue of material fact, we are mindful that summary judgment may be granted when the movant can establish the nonmovant lacks sufficient evidence to prove an essential element of the cause of action. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Rice v. AAA Aerostar, Inc.*, 294 Ill. App. 3d 801, 805 (1998). "In a negligence medical malpractice case, the burden is on the plaintiff to prove the following elements of a cause of action: the proper

standard of care against which the defendant physician's conduct is measured; an unskilled or negligent failure to comply with the applicable standard; and a resulting injury proximately caused by the physician's want of skill or care." *Sullivan*, 209 Ill. 2d at 112 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241-42 (1986)). Expert testimony regarding these elements is required. "Unless the physician's negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert medical testimony is required to establish the standard of care and the defendant physician's deviation from that standard." *Sullivan*, 209 Ill. 2d at 112 (quoting *Purtill*, 111 Ill. 2d at 241-42).

¶29 Defendants assert that plaintiff has failed to establish any expert testimony that Dr. Donnelly breached the standard of care. Although the parties do not discuss the other elements, pursuant to our *de novo* review we have reviewed the pleadings and depositions on file and have determined that there is sufficient evidence regarding the proper standard of care and plaintiff's resulting injuries. Dr. Jaskowiak testified that the standard of care for a modified radical mastectomy is removal of the entire breast and surrounding tissue, and that, while timing of the removal of drains is variable, Dr. Donnelly's removal of plaintiff's drains was too early. Plaintiff's resulting seroma and revision surgery are undisputed.

¶30 In maintaining that plaintiff failed to establish any expert evidence regarding the element of breach of the standard of care, defendants cite to portions of Jaskowiak's testimony where she testified that she has no opinion whether Dr. Donnelly breached the standard of care. Plaintiff, on the other hand, cites to other portions of Dr. Jaskowiak's deposition testimony where Jaskowiak opined that Donnelly's treatment of plaintiff fell below the standard of care.

Defendants accuse plaintiff of "conflat[ing] bits and pieces of Dr. Jaskowiak's testimony" in order "to attempt to create a picture that does not exist." However, it is precisely those "bits and pieces" which present a genuine issue of material fact. Although Jaskowiak's deposition testimony was at times contradictory, claiming at times she had "no opinion" on whether Donnelly breached the standard of care, at other points Dr. Jaskowiak conceded that it was her opinion that Dr. Donnelly's treatment of plaintiff fell below the standard of care.

¶31 At Dr. Jaskowiak's deposition, plaintiff's counsel questioned Jaskowiak about each of the opinions in the section 2-622 letter. We find that there remain genuine issues of material fact relating to the first two opinions, that Dr. Donnelly breached the standard of care in removing plaintiff's drains too early, and that Dr. Donnelly breached the standard of care in performing an incomplete mastectomy.

¶32 Jaskowiak was somewhat contradictory and unclear about her first opinion that Dr. Donnelly breached the standard of care in removing plaintiff's drains too early. In addressing her first opinion in the section 2-622 letter that the drains were removed too early, when counsel for plaintiff asked whether that was still her opinion, Dr. Jaskowiak answered, "I think that removing the drains early contributed." Counsel for plaintiff asked again whether the opinion in the section 2-622 letter was still her opinion. After repeated objection by Dr. Donnelly's counsel that the question was already asked and answered, the record was read back, and Jaskowiak testified in response, "I do [sic] – I am concerned that the timing of the removal of the drains contributed to her seroma and potentially the infection."

¶33 Dr. Jaskowiak testified that it was within the standard of care for drains to be used for a

modified-radical mastectomy, and that there are fairly standard indications used to determine the removal of the drains, including whether there is still fluid coming out of the drain. Jaskowiak testified that different physicians operating within the standard of care can have different judgments about when to take a drain out. Dr. Jaskowiak testified that because she did not review Dr. Donnelly's records, it was "fair" to say that she did not have an opinion one way or another whether Dr. Donnelly's removal of the drains was timely. Upon further examination by Dr. Donnelly's counsel, Dr. Jaskowiak again testified that it was "[t]rue" that she did not have an opinion one way or another whether the removal of the drains was appropriate because she did not have enough information.

¶34 However, Dr. Jaskowiak also maintained her statement in the section 2-622 regarding the early removal of plaintiff's Jackson-Pratt drains and testified, "I am concerned that the timing of the removal of the drains contributed to her seroma and potentially the infection." Dr. Jaskowiak testified that, in her experience, someone of plaintiff's size and weight would typically have about 60 or 70 ccs of fluid drainage on post-operative day three. Dr. Jaskowiak does not even see her patients until post-operative day 10 or 11, by which time she suspects the drain is ready to be pulled. According to Dr. Jaskowiak, plaintiff reported that she was producing a reasonable amount of fluid, which led Dr. Jaskowiak to believe the drains were removed too soon. Given Dr. Jaskowiak's wavering testimony in this regard, we find a genuine issue of material fact whether Dr. Donnelly breached the standard of care in removing plaintiff's drains too early.

¶35 In addressing Jaskowiak's second opinion in the section 2-622 letter, when Jaskowiak was asked whether the standard of care required the removal of the entire breast, Jaskowiak agreed

that the "goal" of a modified-radical mastectomy is to remove the entire breast and axillary content. When asked whether, to a reasonable degree of medical certainty, it was still her opinion that Dr. Donelly breached the standard of care, Dr. Jaskowiak initially answered:

> "It's a very difficult question for me to answer. I think I can say that I was concerned in [plaintiff's] case that there was remaining breast tissue and that lead me to the recommendation to perform further surgery on her."

¶36 After further questioning, Dr. Jaskowiak conceded that she agreed that Dr. Donnelly's surgery did not achieve the standard of care of removing the entire breast. Plaintiff had a significant amount of soft tissue remaining on her left chest wall and, in making the best cancer decision, plaintiff had two options: radiate the remaining tissue; or perform surgery. Dr. Jaskowiak agreed with the statement in the section 2-622 report that an incomplete removal of the left breast was performed by Dr. Donnelly, and that this remained her opinion. Dr. Jaskowiak's testimony regarding Donnelly's incomplete removal of plaintiff's left breast was unequivocal, and thus clearly presents a genuine issue of material fact as to whether Dr. Donnelly breached the standard of care by performing an incomplete mastectomy.

¶37 Thus, despite Dr. Jaskowiak's equivocations that she had no opinion as to whether Dr. Donnelly breached the standard of care in plaintiff's case, she did maintain her second opinion in the report, and gave conflicting testimony regarding her first opinion in the report. These remaining disputed genuine issues of material fact preclude summary judgment. Cf *Henry v.*

Panasonic Factory Automation Co., 396 Ill. App. 3d 321, 328 (2009) (held summary judgment was properly granted where the testimony of the injured worker's expert in design-defect products liability action against machine manufacturer was that he had no opinion regarding any of the three specific allegations of design defect contained in the worker's complaint). Considering contradictory portions of Dr. Jaskowiak's deposition testimony in isolation, without considering the entirety of her testimony, is an improper basis for a summary judgment. See *Colvin v. Hobart Brothers*, 156 Ill. 2d 166, 174 (1993) (holding the lower court erred by failing to consider all the evidence presented in granting summary judgment).

¶38 Further, we find that plaintiff's authority in support is on point and persuasive. Plaintiff relies on *Schulenburg v. Rexnord, Inc.*, 254 Ill. App. 3d 445 (1993), where an injured plaintiff appealed the circuit court's grant of summary judgment in favor of the defendant machine manufacturer. The plaintiff was injured while operating a cement finishing machine manufactured by the defendant. *Schulenburg*, 254 Ill. App. 3d at 445. The accident occurred when plaintiff was sitting or kneeling and was reaching back over the front wall of the central unit into the open area circumscribed by the central unit's sides to lubricate the shaft by spreading grease on the outside of the smaller of the two cylinders that make up the shaft. *Schulenburg*, 254 Ill. App. 3d at 446. To simplify the lubrication process, plaintiff's employer added a zerk grease fitting, which is a small piece of metal that has a hole through the middle of it into which grease is inserted. *Schulenburg*, 254 Ill. App. 3d at 446-47. The zerk fitting protruded from the outer surface of the larger cylinder and the open area that plaintiff was reaching into contained an unguarded rotating shaft. *Schulenburg*, 254 Ill. App. 3d at 447. While plaintiff was clearing

stones away, his coat sleeve began to wrap around the rotating shaft, pulling plaintiff toward the shaft and tearing off his arm from above the elbow. *Schulenburg*, 254 Ill. App. 3d at 446.

¶39 At his deposition, the plaintiff gave contradictory accounts of how his coat became caught in the rotating shaft. At one point plaintiff unequivocally stated that he did not specifically know what caught his arm. At other points he answered affirmatively when asked if it was the zerk which protruded from the rotating shaft which caught his arm. *Schulenburg*, 254 Ill. App. 3d at 449-50. We held that,"[t]aken as a whole, plaintiff's deposition testimony is inconclusive; it does not remove from dispute the question of whether his coat was caught on the zerk." *Schulenburg*, 254 Ill. App. 3d at 451. Therefore, summary judgment was inappropriate. We went on to note that, "[c]ertainly plaintiff's statements may be used to impeach his testimony at trial and will no doubt weaken his credibility. However, the credibility of a witness is a question for the trier of fact to resolve, not a matter to be decided on a motion for summary judgment." *Schulenburg*, 254 Ill. App. 3d at 451. The order granting summary judgment was reversed and the cause remanded.

¶40 In contrast, defendants argue that the facts of the instant case are similar to *Pedersen v. Joliet Park District*, 136 Ill. App. 3d 172 (1985). In *Pedersen*, the plaintiff slipped and fell to the floor while playing basketball in defendant's gymnasium. *Pedersen*, 136 Ill. App. 3d at 173. Plaintiff's complaint alleged that the defendants were negligent in inadequately and improperly maintaining and cleaning the gymnasium floor, in creating a dangerous condition by failing to clean the floor properly, and in failing to warn of the dangerous condition. *Pedersen*, 136 Ill. App. 3d at 173-74. At his deposition, the plaintiff had testified the accident happened so fast that

he could not recall what made him fall and that at the time of his injury the floor did not appear to be dusty or slippery and the floor seemed like it was clean and in good shape. *Pedersen*, 136 Ill. App. 3d at 174. The defendant moved for summary judgment based upon plaintiff's deposition. However, plaintiff filed an affidavit in opposition in which he asserted that he had returned to the scene of his injury in the company of his expert witness and at that time began to remember that the tile surface of the gym floor was dusty and slippery. *Pedersen*, 136 Ill. App. 3d at 174. The trial court granted summary judgment for the defendant. The appellate court affirmed, stating, "we find unpersuasive the plaintiff's attempt to create an issue of fact by stating in his deposition that [the floor] was not dusty, and then by contradicting himself in a later affidavit. *Pedersen*, 136 Ill. App. 3d at 176.

¶41 However, the glaring distinction between both the instant case and *Schulenberg*, contrasted with *Pederson*, is that both in the present case and in *Schulenberg* the contradictory statements appeared within the same deposition testimony, while in *Pederson* the plaintiff contradicted his deposition testimony in a later affidavit. Here, Dr. Jaskowiak's contradictory statements all appear within her deposition. Thus, *Pederson* is not on point.

¶42 Our own research reveals precedent in which a medical expert's contradictory testimony similarly precluded summary judgment. In *Burns v. Grezeka*, 155 Ill. App. 3d 294 (1987), the plaintiff was a passenger in a vehicle that was stopped at a red light when it was struck in the rear by a car driven by the defendant, who subsequently died. In the plaintiff's action for negligence against defendant's estate, the defendant's estate moved for summary judgment on the basis that the defendant suffered an Act of God, an abdominal aneurysm, which caused the accident. The

doctor who examined the defendant shortly after the accident testified at his deposition that the defendant told him he was driving his car when he suddenly became weak and passed out. *Burns*, 155 Ill. App. 3d at 296-97. The doctor determined the defendant's decedent was suffering from an abdominal aneurysm which had been present for the past two or three years and had ruptured spontaneously. *Burns*, 155 Ill. App. 3d at 296. Based upon the decedent's description of the accident and the fact that he could not find any other cause for the decedent's dizziness, the doctor testified it was his belief it was most probable that the aneurysm had preceded and caused the accident. *Burns*, 155 Ill. App. 3d at 297. However, in response to the defendant's motion for summary judgment, the plaintiff filed additional excerpts from the doctor's deposition indicating that the decedent had fainted while he was stopped at the red light and that, based upon a reasonable degree of medical certainty, it was possible that the accident had preceded and caused the rupture. *Burns*, 155 Ill. App. 3d at 297. The trial court granted the defendant's motion for summary judgment, but the Second District Appellate Court reversed. The court held that the doctor's testimony was contradictory and presented a genuine issue of material fact regarding when the aneurysm rupture occurred. *Burns*, 155 Ill. App. 3d at 299.

¶43 Similarly here, Dr. Jaskowiak's inconsistent testimony presents a genuine issue of material fact regarding whether Dr. Donnelly met or breached the standard of care. In reviewing the disposition of a summary judgment motion, the proper standard is to construe the pleadings, depositions, admission, exhibits and affidavits strictly against the movant and in favor of the nonmovant. See *Purtill*, 111 Ill. 2d at 240. Additionally, we are mindful that summary judgment is "a drastic means of disposing of litigation and therefore should be allowed only when the right

of the moving party is clear and free from doubt." *Purtill*, 111 Ill. 2d at 240. Here, defendants' right to summary judgment is not clear and free from doubt. Construing Dr. Jaskowiak's deposition strictly against defendants and in favor of the plaintiffs, as we must, Dr. Jaskowiak's testimony presents genuine issues of material fact as to whether Dr. Donnelly breached the standard of care in both performing an incomplete mastectomy and removing plaintiff's drains too early post-operatively.

¶44 We note that while Dr. Jaskowiak's inconsistencies prevent summary judgment disposition of the instant case, they present credibility issues for trial. "The general rule is that an expert's testimony is to be judged by the rules of weight and credibility applied to all other witnesses." *Iaccino*, 406 Ill. App. 3d at 402 (quoting *Hegener v. Board of Education*, 208 Ill. App. 3d 701, 734 (1991)). Given the specific issue presented here, inconsistency between a physician's section 2-622 report and later testimony by the physician, we find our analysis in *Iaccino* instructive. In *Iaccino*, this court held that an expert doctor's section 2-622 report could be used against the expert as a prior inconsistent statement for impeachment purposes. *Iaccino*, 406 Ill. App. 3d at 404. If an expert doctor's trial testimony is inconsistent with the opinions contained in his written medical report, then it is legitimate to raise that inconsistency before the jury. [Citation.]." *Iaccino*, 406 Ill. App. 3d at 404. This court also noted that "[t]he legislative policy underlying section 2-622 of the Code favors the disclosure and evaluation of any material changes in the trial testimony and opinions of an expert who provides a written medical report pursuant to section 2-622 of the Code." *Iaccino*, 406 Ill. App. 3d at 404. In *Iaccino* we also highlighted our concern regarding section 2-622 reports and later inconsistent testimony:

> "If the expert, in sworn testimony in the ensuing litigation, testifies to something inconsistent with the opinions set forth in his written medical report, then there may be legitimate concern as to whether there was valid cause to initiate the litigation in the first instance. [Citation.] In addition, if a physician writing such a report knows that he or she may be subject to cross-examination concerning the opinions contained in the report, then the physician will be more careful to make only those accusations of medical malpractice that have a reasonably valid scientific basis." *Iaccino*, 406 Ill. App. 3d at 404.

¶45 The credibility issues regarding Dr. Jaskowiak's report and deposition testimony are issues for the trier of fact, and are inappropriate to determine on a motion for summary judgment.

¶46 CONCLUSION

¶47 We determine that Dr. Jaskowiak's deposition testimony raises genuine issues of material fact regarding whether Dr. Donnelly breached the standard of care in performing an incomplete mastectomy and removing plaintiff's drains too early post-operatively. Although at times Dr. Jaskowiak testified that she had no opinion whether Dr. Donnelly's treatment of plaintiff fell below the standard of care, at other points in the deposition she maintained her opinions that Dr. Donnelly performed an incomplete mastectomy and removed plaintiff's drains too early. We further determine that the inconsistency between Dr. Jaskowiak's section 2-622 report and her deposition testimony raise credibility issues for the trier of fact. However, viewing the material on file in the light most favorable to plaintiff as we are required to do, Dr. Jaskowiak's testimony raises genuine issues of material fact regarding the necessary elements of a medical malpractice action, including whether Dr. Donnelly breached the standard of care.

¶48 Reversed and remanded.