

No. 1-09-0079

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD SCHOFIELD,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 06 L 10056
)	
THOMAS HLOUSEK, D.D.S.,)	Honorable
)	James D. Egan,
Defendant-Appellee.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concurred in the judgment.

ORDER

Held: The circuit court's grant of defendant's motion for summary judgment and denial of plaintiff's motion for reconsideration was affirmed where: (1) defendant met his burden of production and plaintiff failed to present a factual basis arguably entitling him to a favorable judgment; and (2) plaintiff had the opportunity to respond to defendant's motion and depose Rule 213 witnesses in opposition to defendant's motion but failed to do so.

Plaintiff, Richard Schofield, appeals the orders of the circuit court granting summary judgment in favor of defendant, Thomas Hlousek, D.D.S., on plaintiff's dental malpractice action and denying his motion to reconsider. Plaintiff contends the circuit court erred in granting defendant's motion for summary judgment and denying plaintiff's motion for reconsideration where:

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(1) questions of material fact exist and defendant's right to summary judgment was not clear and free from doubt; and (2) plaintiff was not given the opportunity to disclose his Supreme Court Rule 213(f)(3) (Ill. Sup. Ct. R. 213(f)(3) (eff. July 1, 2002)) expert witnesses opining on the standard of care (standard of care witnesses). We affirm.

Plaintiff filed a complaint against defendant seeking to recover damages for personal injuries arising out of defendant's alleged malpractice in administering oral anesthesia during a cavity filling on July 13, 2004. Plaintiff alleged that as part of the cavity filling, defendant administered a shot of oral anesthesia to the rear of plaintiff's mouth, which had the analgesic effect of numbing all sections of his mouth. Plaintiff alleged that from July 13, 2004, through September 22, 2004, he continued to experience numbness in his mouth. Defendant assured him on numerous occasions that the lack of sensation was normal and that he would have return of sensation shortly. Plaintiff alleged defendant:

- "a. negligently and carelessly administered an oral anesthetic in an improper location so that Plaintiff's lingual nerve was injured;
- b. negligently and carelessly selected an improper anesthetic in that nerve damage was caused;
- c. was negligent in the administration of the oral anesthesia in that nerve damage was caused;
- d. [n]egligently and carelessly failed to recognize that he was administering a local anesthetic in an improper anatomic location;
- e. [f]ailed to diagnose and treat post-operative nerve damage in the Plaintiff's mouth;
- f. [w]as otherwise careless and negligent in the performance of a routine cavity filling."

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Plaintiff alleged that as a proximate result of defendant's alleged negligence, he suffered permanent nerve damage in his mouth, lack of sensation and inability to taste, and that additional procedures may be necessary to alleviate these symptoms.

In his answer and affirmative defenses, defendant admitted that on July 13, 2004, he filled plaintiff's cavity and administered oral anesthesia, but he denied each allegation of negligence against him.

In his deposition, defendant testified he had given plaintiff injections of an anesthetic, Lidocaine, in connection with dental work on August 22, 2000, November 28, 2000, and December 11, 2001. On December 11, 2001, defendant replaced a filling in plaintiff's lower left molar. On that date, plaintiff required two injections of Lidocaine on the lower left side of his mouth; this injection procedure is known as an "inferior alveolar nerve block." Thereafter, on July 13, 2004, when plaintiff needed another tooth filling, defendant decided to use a different anesthetic, Articaine, believing it would more quickly and efficiently numb the affected area. Defendant testified Articaine had a reputation of numbing patients "a little bit quicker and a little bit more assured." Defendant also had read literature about Articaine indicating there was a "good safety factor" involved in its use. Defendant had used Articaine on other patients for approximately one year prior to plaintiff's injection and none of those patients complained of any resulting long-term numbness. Defendant testified he did not warn plaintiff about any possible side effects associated with Articaine, nor did he have plaintiff sign a consent form, because the incidence of side effects was so low. Defendant also did not inform plaintiff that Articaine was a different anesthetic than the Lidocaine he previously had received for his tooth fillings.

Defendant testified he injected the Articaine into plaintiff's mouth with a 27-gauge short needle after first numbing the skin with an application of a topical anesthetic. The injection of Articaine was via an inferior alveolar nerve block in the same location as the earlier injections of Lidocaine on December 11, 2001. Defendant testified that in administering the Articaine, he did not strike any blood vessel and plaintiff did not display any unusual signs or symptoms at the time of the injection. Two or three days after the injection, plaintiff called to complain he still was feeling numb. Defendant explained to plaintiff that perhaps he accidentally grazed or hit one of plaintiff's nerves while injecting the Articaine, or perhaps he deposited the Articaine near a nerve and caused a bruise, all of which could have caused a longer-lasting anesthetic effect. Defendant told plaintiff the numbness might not wear off for weeks or even months.

Defendant testified plaintiff came in for an office visit on August 31, 2004. Plaintiff complained of continued numbness and of having a hard time tasting certain types of food. Defendant testified he could not say, to a reasonable degree of dental certainty, that the cause of plaintiff's numbness was due to the Articaine as opposed to an exact hit of a nerve or a bruise of a nerve. Defendant testified that the lingual nerve runs very close to the area where he injected the Articaine, but that he did not believe he contacted the lingual nerve during the injection because plaintiff did not jump or complain of an electric shock sensation. Defendant later read dental journal articles published after plaintiff's injection suggesting that Articaine posed a higher incidence of paresthesia or prolonged anesthetic effect than Lidocaine. Defendant testified he has since discontinued using Articaine because he does not want to be involved in another situation where a patient has an unusually long-lasting anesthetic effect.

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Since plaintiff's numbness had not gone away as of his August 31, 2004, office visit, defendant referred plaintiff to the oral surgeons at Kasper, Heaton, Wright, Pagni & Associates. Doctor Kasper called defendant after examining plaintiff and stated he was referring plaintiff to Doctor Steinberg, who was an expert on nerve injuries.

Doctor Mark Steinberg testified in his deposition that he first examined plaintiff on September 22, 2004, following plaintiff's referral by Doctor Kasper. Doctor Steinberg determined plaintiff had sustained a "needle stick injury to [his] right lingual nerve." Doctor Steinberg testified in pertinent part that a patient can suffer nerve damage from an inferior alveolar nerve block even when the dentist has acted appropriately and within the standard of care. Doctor Steinberg explained that an inferior alveolar nerve block is a "blind procedure *** done with a known set of landmarks in the mouth." Once the dentist inserts the needle, he cannot see the needle's tip. Since every person's anatomy is different, the dentist may inadvertently hit a nerve even though he inserted the needle appropriately according to the landmarks of the mouth. The risk of lingual nerve injuries following an inferior alveolar nerve block varies from .6% to 2.0% and there is no way to predict when such an injury will occur.

Doctor Steinberg testified he had only heard plaintiff's account of the type of dental procedure he underwent on July 13, 2004, and in the absence of any evidence corroborating plaintiff's account, Doctor Steinberg refused to offer an opinion as to whether defendant deviated from the standard of care. However, we note the parties do not dispute plaintiff's account of the type of procedure he underwent on July 13, 2004, specifically, a tooth filling in which defendant used an inferior alveolar nerve block to inject plaintiff with Articaine in the lower left side of his mouth. Doctor Steinberg

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reiterated in his deposition testimony that the mere fact nerve damage occurs following a dental injection does not indicate a deviation from the standard of care. Doctor Steinberg also testified that defendant complied with the standard of care subsequent to the dental injection by referring plaintiff to an oral surgeon within three months of the alleged injury.

Defendant moved for summary judgment on the grounds there was no evidence he deviated from the standard of care. Plaintiff did not file a response to the summary judgment motion and did not disclose an expert on his behalf. The circuit court granted defendant's motion for summary judgment as "defendant has set forth facts that are undisputed at this point and *** there has been no other experts brought forth."

Plaintiff filed a motion to reconsider, which the circuit court denied. Plaintiff filed this timely appeal.

Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits, when viewed in the light most favorable to the nonmovant, reveal that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *State Farm Fire and Casualty Co. v. Martinez*, 384 Ill. App. 3d 494, 497-98 (2008). Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is clear and free from doubt. *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 433-34 (2005). Review is *de novo*. *Martinez*, 384 Ill. App. 3d at 498.

Defendant bears the initial burden of production on his motion for summary judgment. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). Defendant may meet his burden of production in two ways: (1) by affirmatively showing some element of plaintiff's case must be resolved in

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defendant's favor; or (2) by establishing an absence of evidence supporting plaintiff's case. *Fung*, 374 Ill. App. 3d at 624. When defendant satisfies his initial burden of production, the burden shifts to plaintiff to present a factual basis (*e.g.*, through affidavits or deposition testimony) arguably entitling him to a favorable judgment. *Fung*, 374 Ill. App. 3d at 624.

To establish dental malpractice, plaintiff must prove the proper standard of care by which to measure defendant's conduct, defendant's negligent breach of that standard, and a resulting injury to plaintiff proximately caused by defendant's lack of skill or care. *Rosenberg v. Miller*, 247 Ill. App. 3d 1023, 1028 (1993).

Expert testimony is required to establish a breach of the standard of care, except where defendant's negligence is grossly apparent or within the everyday knowledge of a lay person. *Rosenberg*, 247 Ill. App. 3d at 1029.

In the present case, defendant met his burden of production by supporting his summary judgment motion with deposition testimony affirmatively showing he complied with the standard of care. Specifically, defendant's deposition testimony indicates there was no contraindication for injecting Articaine into plaintiff's mouth through an inferior alveolar nerve block at the time of his tooth filling on July 13, 2004, and that plaintiff exhibited no unusual symptoms at the time of the injection and he appeared normal upon leaving the dental office that day. Defendant also testified that given the perceived low incidence of side effects associated with Articaine as of July 13, 2004, the standard of care did not require him to discuss them with plaintiff or have plaintiff sign a consent form. Doctor Steinberg's deposition testimony indicates there was a possibility defendant struck plaintiff's lingual nerve during the inferior alveolar nerve block or injected the Articaine near the

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lingual nerve, causing a bruise; however, Doctor Steinberg testified that the striking or bruising of the lingual nerve during an inferior alveolar nerve block, is not, in and of itself, indicative of a breach of the standard of care because an inferior alveolar nerve block is a blind procedure and a dentist may hit a nerve even when he inserted the needle appropriately according to the landmarks of the patient's mouth. Doctor Steinberg also testified defendant complied with the standard of care post-occurrence by referring plaintiff to an oral surgeon within three months of the alleged injury.

All this evidence enabled defendant to meet his burden of production by showing he complied with the standard of care at the time he injected Articaine into plaintiff's mouth as part of a tooth filling on July 13, 2004, and when he referred plaintiff to an oral surgeon post-injection. As defendant met his burden of production, plaintiff could not rely on his pleadings to create a question of material fact, but was required to present a factual basis arguably entitling him to a favorable judgment. *Fung*, 374 Ill. App. 3d at 624. Plaintiff presented no such factual basis and did not even file a response to defendant's motion for summary judgment. Accordingly, the circuit court did not err in granting summary judgment in favor of defendant.

Plaintiff contends the circuit court erred in granting defendant summary judgment without first giving plaintiff the opportunity to disclose and present Rule 213(f)(3) standard of care witnesses. Plaintiff contends that at the time of the court's grant of summary judgment, no order had been entered setting a schedule requiring him to disclose his retained Rule 213(f)(3) standard of care witnesses and, thus, there had been no requirement that he present any opinion testimony as to defendant's violation of the standard of care.

Plaintiff waived review by failing to argue at the hearing on the motion for summary

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judgment that he needed additional discovery or that summary judgment was premature because the court had not set a schedule for disclosure of Rule 213(f)(3) witnesses. Instead, plaintiff raised this argument for the first time in his motion for reconsideration. See *Caywood v. Gossett*, 382 Ill. App. 3d 124, 134 (2008) (arguments raised for the first time in a motion for reconsideration are waived on appeal.)

Even addressing the issue on the merits, we find plaintiff's argument unavailing. The Illinois Code of Civil Procedure allows defendant to file his motion for summary judgment "at any time" (735 ILCS 5/2-1005(b) (West 2008)), even before an order setting a Rule 213(f)(3) disclosure schedule. Defendant filed his motion for summary judgment on January 24, 2008, and he supported his summary judgment motion with deposition testimony enabling him to meet his burden of production by showing he complied with the standard of care. See our discussion above. Once defendant met his burden of production, plaintiff could not simply rest on his pleadings and wait for the circuit court to enter a Rule 213(f)(3) disclosure schedule. Rather, plaintiff was required to set forth a factual basis arguably entitling him to judgment in his favor. *Fung*, 374 Ill. App. 3d at 624.

The circuit court gave plaintiff ample opportunity to respond to defendant's motion for summary judgment and set forth his factual basis in support of his complaint. Specifically, on February 11, 2008, the circuit court entered a briefing schedule allowing plaintiff 60 days to respond, by April 11, 2008. Plaintiff filed a motion on April 22, 2008, for an additional 30 days to disclose his opinion witness and an additional 30 days thereafter to file his response to the summary judgment motion. On April 29, 2008, the circuit court granted plaintiff 30 days, until May 29, 2008, to respond to defendant's motion. Instead of filing a response, plaintiff filed an emergency motion on

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June 30, 2008, for an additional 28 days to respond to defendant's motion. On July 1, 2008, the circuit court granted a "final" extension, allowing plaintiff until July 29, 2008, to respond. On September 2, 2008, the circuit court granted another emergency motion filed by plaintiff and gave him until September 16, 2008, to respond to defendant's summary judgment motion.

Plaintiff never filed a response to defendant's summary judgment motion and never set forth a factual basis in support of his complaint. Nor did plaintiff file a Supreme Court Rule 191(b) (Ill. Sup. Ct. R. 191(b) (eff. July 1, 1971)) affidavit in response to defendant's motion. Rule 191(b) allows a party to file an affidavit in opposition to a motion for summary judgment stating that material facts that ought to appear in the affidavit are known only to persons whose affidavits the affiant is unable to procure. *Saladino v. Team Chevrolet, Inc.*, 242 Ill. App. 3d 735, 742 (1993). The affidavit must name the persons and show why their affidavits cannot be procured and what the affiant believes they would testify to if sworn. *Saladino*, 242 Ill. App. 3d at 742. Plaintiff did not file a Rule 191(b) affidavit or comply with the circuit court's briefing schedule and therefore he cannot now complain of an inability to conduct expert discovery and properly develop his case. See *Saladino*, 242 Ill. App. 3d at 742-43; *Gill v. Chicago Park District*, 85 Ill. App. 3d 903, 906-07 (1980).

Next, plaintiff contends the circuit court erred in denying his motion to reconsider the grant of summary judgment in favor of defendant. In his motion to reconsider, plaintiff contended the grant of summary judgment was improper because: (1) defendant admitted to plaintiff he may have struck or bruised plaintiff's lingual nerve; (2) defendant did not advise plaintiff he was using an anesthetic different than what he had used previously, nor did he advise plaintiff of any possible

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long-term adverse side effects; (3) defendant did not have plaintiff sign a consent form; (4) defendant later read articles in dental journals published after plaintiff's injury indicating a higher incidence of paresthesia or lingering anesthetic effect of an Articaine based anesthetic as opposed to a Lidocaine based anesthetic; and (5) Doctor Steinberg testified he had no opinion as to whether defendant deviated from the standard of care when injecting plaintiff with Articaine. All these facts were contained in the deposition testimony of defendant and Doctor Steinberg that was before the circuit court at the time it entered summary judgment for defendant. Plaintiff contends that in entering summary judgment for defendant, the circuit court erred in its application of the existing law. We review *de novo* the denial of a motion asking the court to reconsider its application of existing law. *Kyles*, 359 Ill. App. 3d at 433.

None of the facts raised in plaintiff's motion to reconsider establish that the circuit court erred in its previous application of existing law when granting defendant's summary judgment motion. As discussed above, defendant supported his motion for summary judgment with his own deposition testimony indicating there was no contraindication for administering Articaine via an inferior alveolar nerve block to plaintiff on July 13, 2004. Defendant also testified that as of July 13, 2004, the perceived risk of side effects associated with the giving of a local anesthetic such as Articaine was considered so low that dentists generally did not discuss them with the patient or require that a consent form be signed. Defendant testified he later read articles in dental journals published subsequent to plaintiff's injury indicating that Articaine was associated with lingering anesthetic effect; however, post-occurrence literature may not be used as an aid to interpret the standard of care at the time of the occurrence. See *Nelson v. Upadhyaya*, 361 Ill. App. 3d 415, 422-23 (2005).

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Defendant also supported his summary judgment motion with Doctor Steinberg's deposition testimony that a patient can suffer nerve damage following an inferior alveolar nerve block even when the dentist has acted within the standard of care, and that defendant complied with the standard of care post-occurrence by referring plaintiff to an oral surgeon within three months of his alleged injury. All this evidence cited by defendant in support of his summary judgment motion enabled him to meet his burden of production by showing he complied with the standard of care at all relevant times. As defendant met his burden of production, plaintiff was required to present a factual basis arguably entitling him to a favorable judgment. *Fung*, 374 Ill. App. 3d at 624. Plaintiff did not do so. Accordingly, the circuit court did not err by denying plaintiff's motion to reconsider the grant of summary judgment based on plaintiff's failure to present a factual basis.

Plaintiff also argued in his motion to reconsider that the circuit court erred in granting defendant summary judgment without first giving plaintiff the opportunity to disclose and present Rule 213(f)(3) standard of care witnesses. Plaintiff's argument is without merit for the reasons discussed earlier in this order.

For the foregoing reasons, we affirm the circuit court.

Affirmed.