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No. 3--10--0456

Order filed June 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

JOHN SIMCICH and PHYLLIS)	Appeal from the Circuit Court
SIMCICH,)	of the 13th Judicial Circuit,
)	La Salle County, Illinois
Plaintiffs-Appellees,)	
)	
v.)	No. 06--L--34
)	
GEORGE DEPHILLIPS, M.D.,)	
MICHAEL MALEK, M.D.,)	
)	
Defendants,)	
)	
and)	
)	
PROVENA HOSPITALS, d/b/a)	
ST. JOSEPH MEDICAL CENTER, a)	
hospital corporation,)	
)	Honorable Joseph P. Hettel,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

Held: The trial court did not err by denying defendant's motion for a judgment notwithstanding the verdict and motion for a new trial.

Plaintiffs, John Simcich and Phyllis Simcich, brought this medical malpractice action against defendants, George DePhillips, M.D., Michael Malek, M.D., Provena Hospitals (Provena), Gregory Lewis, M.D., and Brian Scholbrock, M.D. Their complaint alleged, *inter alia*, that defendants' malpractice resulted in an untimely diagnosis and treatment of John's cauda equina syndrom following back surgery. Plaintiffs allege Provena was vicariously liable for the negligence of its employee nurses and physical therapists. A jury found in favor of the physicians, but rendered a judgment against Provena Hospital in the amount of \$2,027,000. Provena appeals, claiming plaintiffs failed to prove all necessary elements of their cause of action and, as such, the trial court erred in denying its motion for judgment notwithstanding the verdict. In the alternative, Provena asserts it is, at a minimum, entitled to a new trial for plaintiffs failure to timely disclose certain expert opinions.

FACTS

On December 21, 2004, John underwent back surgery, performed by Dr. DePhillips at Provena. Thereafter, it is undisputed that John developed a severe form of nerve compression in the lower portion of the spinal canal known as cauda equina syndrome (CES). Plaintiffs alleged that the CES resulted in lasting and permanent injury to John and that the attending physicians should have discovered and treated John's complications earlier which would have avoided the

lasting and permanent injury. Plaintiffs also alleged that Provena's nurses and physical therapists should have taken additional steps in their care of John, most notably oral notification of his symptoms and progress to the physicians as well as proper charting of all John's symptoms. Failure to take those steps, plaintiffs conclude, added to the delay in diagnosing John's CES, thereby causing his injuries.

Following lengthy discovery, the case proceed to a 22-day jury trial in September and October of 2009. The jury deliberated for five days and, as noted above, rendered judgment in favor of the defendant doctors and against Provena. Provena filed a posttrial motion asking for judgment notwithstanding the verdict, or alternatively for a new trial. The trial court denied Provena's motion. Plaintiffs filed posttrial motions seeking a new trial against the physicians; the trial court denied plaintiffs' motions. The only issues raised in this appeal concern the judgment entered against Provena.

The record in this matter is voluminous making it somewhat impractical to include a complete recitation of all operable facts in any one section of this order. As such, relevant facts not contained in this initial section of the order will be added as needed.

Plaintiffs' second amended complaint, including the amendments thereto, alleges, *inter alia*, that Dr. DePhillips and Dr. Malek failed to timely recognize and protect against postoperative complications; failed to prevent and guard against the evolving development of CES; disregarded symptoms of pain, swelling, weakness and the inability to ambulate; failed to order an MRI in a timely manner that would have revealed a postoperative hematoma; and, failed

to promptly and reasonably recognize and provide a diagnosis and treatment for CES. The second amended complaint further claims that Provena's "agents, employees and medical staff" deviated from the applicable standard of care: as agent nurse employees deviated from the standard of care by failing to make thorough and complete neurological assessments of John; by failing to recognize signs of spinal cord compression exhibited by John; by failing to report each complication exhibited by John; by failing to personally notify the various physicians involved of continuous abnormalities demonstrated by John during physical therapy and daily nursing assessments; and, by failing to notify either in writing or orally continuing abnormalities including pain, weakness and bladder dysfunction.

During trial, testimony established that over the years, John had developed numerous health problems, at least one of which required him to take the blood thinner Coumadin.

In 1998, John began suffering from back pain. Dr. Phillips, a neurosurgeon, saw John in December of 2004 and determined a pinched nerve to be the cause of John's pain. On December 21, 2004, Dr. DePhillips performed a laminectomy to address the pinched nerve. In preparation for surgery, John stopped taking Coumadin. After surgery, Dr. DePhillips entered an order for physical therapy. Pursuant to that order, on December 23, 2004, Provena's physical therapists performed their initial examination of John.

The anticoagulant Heparin was administered on December 23, 2004, two days after surgery. The Heparin was at therapeutic levels by the afternoon of December 23, 2004, and followed-up by Coumadin hours later upon Dr. DePhillips' orders. After the administration of

the Heparin, John's pain increased from what was in the 0 to 2 range, to an 8 on a scale of 0 to 10. John's pain levels were recorded at five on December 24, 2004, following numerous doses of Vicodin and other pain medications.

John testified that pain began to increase on the night of December 23. He noted "they couldn't relieve the pain with Vicodin" so "they gave me Demerol." That night, or early in the morning of December 24, John woke in such pain that he "couldn't even stand it anymore" so he "grabbed the IV and [he] walked it into the bathroom" where he wrapped the cord around his neck as he "wanted to end it all there at that time." Nurses became aware of the incident and helped him back to bed. John noted that on December 24, a nurse came to assist him in getting to the bathroom but before he could make it, his bowel movement "just went out of me." When asked whether either of those incidents were charted, John stated, "That I couldn't tell you."

Dr. DePhillips testified that John's pain was expected to increase as he began to ambulate after surgery. Dr. DePhillips categorized John's pain as neurological given the report that it was "aching pain" rather than a "shooting" or "stabbing" pain. Dr. DePhillips found no motor strength or other abnormalities when he examined John the morning of December 24. That examination indicated that John did not suffer from any kind of neurological compromise at that point in time. The exam further revealed no abnormalities with respect to the wound at the incision site. Dr. DePhillips knew that John suffered urinary discomfort on the morning of December 24 and that his catheter had been removed on December 23. Dr. DePhillips believed the urinary pain was likely due to swelling, or an enlarged prostate, rather than a neurologic

abnormality as 25 to 50% of 75-year-old-men will experience urinary retention after surgery.

After his morning examination of John on December 24, Dr. DePhillips transferred John's care to Dr. Malek. Dr. DePhillips spoke to Dr. Malek providing him with all the information available concerning John's condition including John's chart.

John's son, Ken Simcich, testified that he visited his father mid-morning on December 24. John was very tired and complained of such bad pain in his hips and legs that he could not sleep. Ken noted John could not move his legs on December 24 so the staff had to help him move them to get him out of bed.

John's daughter, Lynn Zellmer, testified that she visited her father on December 23, 24 and 25. On December 25, her father began crying and stating that he did not understand why he was in so much pain. She noted the nursing staff had to put the catheter back in. Lynn recalled a nurse asking John to quantify his pain to which John replied, "a 9 or 10." Lynn continued that, "I just remember that because the nurse said are you sure, John, that you don't mean like a 5 or 6?" Lynn also heard her father complain of the pain radiating through his hips, back and legs.

On December 25, John experienced drop foot: the inability to move the ankle or foot upward. Five physicians, including Dr. Malek, saw John that day. John told Dr. Malek about the drop foot. Dr. Malek determined it was an isolated event. Dr. Malek checked John's chart before seeing him on December 25. The chart included nursing and physical therapy records. Dr. Malek knew of John's heart history and the administration of the anticoagulation medication as well as the potential for bleeding in the wound area subsequent to the administration of that

medication. John's pain reports did not concern Dr. Malek as they were not bilateral and Vicodin provided relief

After the December 25 examination, Dr. Malek indicated John was neurologically ready for discharge. John's symptoms did not make Dr. Malek suspicious of CES. Dr. Malek testified that none of John's symptoms up to and including December 25 warranted a rectal exam. Dr. Malek examined John on December 26 and went through the same process of looking at his chart and talking to him as was done on December 25. Dr. Malek's assessment was that John was stable, awake, oriented and still ready for discharge as he was not exhibiting bilateral, neurological, or persistent pain but only normal surgical pain that responded to medication. Again, Dr. Malek had ruled out postoperative CES.

Lynn Zellmer called Dr. DePhillips on December 26 concerned with Dr. Malek's intention to discharge John the next day. Lynn asked why her father was scheduled for discharge when he was still in a severe amount of pain and catheterized. She testified that Dr. DePhillips stated he believed her father was already discharged, told her to make sure the hospital staff was aware of the family's concerns, and that he would call Dr. Malek.

Dr. DePhillips recalled talking to the John's family but could not recall exactly what he did in response to that discussion. His normal course of practice would have been to contact Dr. Malek and ask Dr. Malek to see John on December 27, the date of potential discharge.

Phyllis Simcich, John's wife, testified that on either December 26 or 27, she recommended John try to walk as he was in tremendous pain and she thought it might help. A

nurse and one of her sons had to help John out of bed as he had no control of his feet. When trying to move them, he tripped but was caught by her son before hitting the floor. Dr. Malek did see John on December 27. Physical therapy notes indicating right hip pain did not concern Dr. Malek on that day nor did the therapist's notation that John required a rolling walker on December 26, as Dr. Malek believed each was a product of postoperative swelling.

On the morning of December 28, nurse Gholson approached Dr. Malek and requested that he examine John. Upon examination that morning, Dr. Malek found for the first time that John could not move either foot. Also for the first time, John's incision was swollen. The incision had been flat on all prior examinations. Dr. Malek opined that the bilateral neurogenic and persistent weakness coupled with the swelling at the incision site were the first indication of the potential for a clinically significant hematoma. Dr. Malek testified that the weakness in both legs and swollen incision "immediately triggers cauda equina and work-up for cauda equina."

Upon observing these symptoms, Dr. Malek aspirated the incision and found new red blood that had not clotted. Had the blood been there for a long time, it would have been blue or black. He then ordered an MRI and x-ray. John then returned to surgery on December 28.

Plaintiff's expert, Dr. DeLong testified that no surgery should have been performed in the first place; that Dr. DePhillips failed to obtain informed consent; and, that Dr. DePhillips failed to inform John of surgical alternatives. He noted physicians must be vigilant for CES on patients such as John using blood thinners and that signals of CES were present on December 23. He believed Dr. DePhillips should have recognized signs of CES on December 24 and performed a

rectal exam that day. Failure to perform the rectal exam was a deviation of the standard of care.

Dr. DeLong testified that the proximate causes of John's CES were: Dr. DePhillip's failure to go to the hospital on December 27 after receiving the call from John's daughter; Dr. DeLong's failure to perform a rectal exam or order an MRI; and the fact that Dr. Malek waited too long to perform additional surgery.

Plaintiffs also called a physical therapist as an expert in their case-in-chief, Mr. Buchanan. Buchanan testified that changes to the extremities can represent either pressure or other neurological compression which physical therapists should "alert the medical team, the nurse and the physician about"; and, any deterioration such as going from walking independently to now needing a walker should be communicated to a physician because it is a deterioration of the patient.

Plaintiffs called nursing expert Kaylene Osinski during their case-in-chief. Nurse Osinski noted she is the assistant dean at the Baker University School of Nursing in Topeka, Kansas and still actively practices nursing. Nurse Osinski, testified that communication between the physicians and the nursing staff was inadequate. Specifically, she noted that "you clearly see a progression right after the Heparin, the pain goes up, it stays up, the pain broadens or progresses from the back to the buttocks to the legs and then you eventually see lack of dorsiflexion and foot drop, which is really the most severe. So there is a continual progression with this patient which is not reported to the physician." Nurse Osinski conceded that none of the doctors had any complaints with the level of communication between the nursing staff and the physicians that

actually treated John. Nevertheless, nurse Osinski testified the nurses deviated from the proper standard of care by failing to "choose" as a "priority problem" the "neuro aspect *** as a part of the care plan" after John's surgery.

Nurse Osinski noted that the nursing charts indicated that on December 24, the nurses were "not doing neuro assessments every four hours as ordered" and also were "not always charting the location of the pain. And the standard of care is that you always chart the location." Nurse Osinski very specifically testified that failure to make a neurological assessment as ordered deviated from the applicable standard of care. In her opinion, the charts indicated that the nurses failed to perform "a neuro vascular assessment every four hours" on December 25 as ordered as well which also deviated from the standard of care. Nurse Osinski testified that, at best, the nurses performed the assessment once every eight hours and, at times, once in a twelve-hour shift.

Following nurse Osinski's and physical therapist Buchanan's testimony, Dr. DeLong was called back to the stand and asked, after "considering the nursing records and the disclosures both in her deposition and the written disclosure of Nurse Osinski, do you have an opinion within a reasonable degree of medical certainty as to whether or not the conduct of the nurses was the proximate cause in the conditions of ill-being that developed in John Simcich namely the cauda equina syndrome and all of its sequelae including the treatment and including the conditions of ill-being referenced to the bowel, bladder, sexual dysfunction, depression and the functional issues in reference to the lower extremities?" He stated he did and that, within a reasonable

degree of medical certainty, "it was related to the cauda equina syndrome and proximately caused the cauda equina syndrome and the sequelae." Dr. DeLong acknowledged that Dr. Malek, Dr. DePhillips and Dr. Wright (defense expert) had no complaints about the nurses' or physical therapists' communication with the physicians that treated John.

The matter proceeded to closing arguments during which plaintiffs discussed many theories of liability. Plaintiffs highlighted the information Provena's nurses failed to record in John's chart and pass on to the physicians.

Ultimately, the jury returned a verdict in plaintiffs' favor and against Provena. Provena filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court denied Provena's motion. This appeal followed.

ANALYSIS

Provena raises essentially two claims of error on appeal, each, however, involves a number of sub-issues. Initially, Provena alleges the trial court erred when denying its motion for a judgment notwithstanding the verdict. Provena's second claim of error is that the trial court erred in denying its motion for a new trial.

I. Judgment Notwithstanding the Verdict

We review the denial of a motion for judgment notwithstanding the verdict *de novo*. *Demos v. Ferris-Shell Oil Co.*, 317 Ill. App. 3d 41, 47 (2000). A judgment notwithstanding the verdict (*n.o.v.*) should be entered when all the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence

could ever stand. *Maple v. Gustafson*, 151 Ill. 2d 445 (1992); *Pedrick v. Peoria & E.R. Co.*, 37 Ill. 2d 494 (1967).

A. Causal Link Between Provena's Nurses and Physical Therapists Actions and Plaintiffs' Injuries

Provena asserts that it was entitled to a judgment *n.o.v.* as plaintiffs failed to present any evidence of a causal link between the actions of Provena's nurses and physical therapists and plaintiffs' injuries. It asserts many theories as to how and why plaintiffs failed to satisfy their burden to prove the causal link. These theories include Provena's claims that: (1) plaintiffs failed to establish the applicable standard of care as nurse Osinski's testimony regarding "national standards" lacked proper foundation; or (2) in the alternative, if we find plaintiffs did establish the proper standard of care, the evidence adduced at trial was insufficient to prove that failure to orally communicate information contained within John's chart deviated from that standard of care; and (3) even if plaintiffs established the proper nursing standard of care and that Provena's nurses deviated from it, plaintiffs still failed to prove a causal link between the alleged deviation and John's injuries as no evidence suggested Dr. Malek would have done anything differently had the nurses acted in the manner nurse Osinski suggested they should have acted. Provena maintains that a finding in their favor on any one of those issues mandates we vacate the judgment entered against them and reverse this matter with direction to the trial court to enter a judgment *n.o.v.* in Provena's favor.

Before addressing those claims individually, we note that in any medical malpractice

cause, a plaintiff must prove the proper standard of care by which to measure the defendant's conduct, that defendant negligently breached the standard of care and that defendant's breach was a proximate cause of the plaintiff's injuries. *Purtill v. Hess*, 111 Ill. 2d 229, 241-42 (1986).

Proof to sustain each of these three elements must come via expert medical testimony, or else the cause of action fails. *Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7, 15 (1999).

Proximate cause must be established by expert testimony to a reasonable degree of medical certainty, and the causal connection must not be contingent, speculative or merely possible. *Ayala v. Murad*, 367 Ill. App. 3d 591 (2006).

i. The Applicable Nursing Standard of Care

Initially we note that Provena does not take issue with nurse Osinski's credentials, qualifications as an expert or ability to render an expert opinion. Provena simply alleges that nurse Osinski failed to properly identify upon what written authority she based her testimony concerning "national standards" and, therefore, plaintiffs failed to adduce evidence sufficient to establish the applicable standard of care. We find Provena has waived this claim.

During her testimony regarding Provena's nurses' failure to chart the location of John's pain, nurse Osinski initially discussed national standards of care.

"Q. That's the section right here that you just talked about?"

A. Correct. And as I said, there were a couple places they didn't even document the location. And it is the national standard of care to document the location of the pain."

During cross-examination, Provena revisited the issue of the nursing standard of care in the following exchange:

"Q. Now when you are acting in this role of an expert, would you agree with me that you want to gather the facts as to what happened, correct?

A. Absolutely.

Q. And when you are doing that, you are applying your judgment to the conduct of other nurses at some prior point in time, right?

A. I am applying the standard of care, yes.

Q. And you are applying what in your judgment the standard of care is, correct?

A. What the published standards of care are.

Q. Do you personally set the standard of care?

A. No, there are national guidelines that have the standards of care.

Q. And are you of the belief that reasonable nurses may differ with respect to whether or not the standard of care is complied with under a given set of facts?

A. I think there is different judgment that nurses make."

Not only did Provena fail to further examine the issue of "national standards" beyond the testimony quoted above, it neither moved to strike nor objected to the testimony. Provena now uses nurse Osinski's reference to a national standard to claim that "without stating what those national standards were and without having those supposed national standards admitted into evidence, Nurse Osinski's testimony lacked foundation ***. Thus, the jury lacked a sound evidentiary basis to conclude that the Provena nurses deviated from the standard of care by not orally communicating with the physicians."

As this court noted in *Hardy v. Cordero*, 399 Ill. App. 3d 1126 (2010), " 'A motion to strike is required to preserve errors in the admission of evidence. *** [A] party opposing evidence waives any objection unless a motion to strike is made as soon [as] the objectionable nature of evidence becomes apparent.' " *Hardy*, 399 Ill. App. 3d at 1135 (quoting *Netto v. Goldenberg*, 266 Ill. App. 3d 174, 178 (1994)). Provena neither objected to nor moved to strike any of nurse Osinski's testimony concerning either the applicable standard of care or the foundation for that testimony. Provena has waived this issue.

ii. Nursing Deviation from the Standard of Care and
Failure to Orally Communicate Information

Provena's arguments, taken as a whole, suggest that theory that Provena's nurses violated the applicable standard of care by failing to orally communicate information contained within the chart to the physicians. Provena suggests this was the only area in which plaintiffs identified a deviation of the standard of care by Provena's nurses. Nurse Osinski, however, testified to a

number of areas in which she believed Provena's nurses violated the applicable standard of care. Specifically, she stated that neurological assessments were to be performed by the nurses every 4 hours but were only performed every 8 or 12 hours. Failing to perform these tests as ordered, she opined, deviated from the applicable standards of care. She also noted that failure to document or chart exactly where John experienced pain deviated from the applicable standard of care. While Provena suggests that the only alleged violation of the nursing standard of care identified by the plaintiffs at trial related to orally communicating with the physicians, our review of the record indicates nurse Osinski identified other deviations as well.

Even were we to agree with Provena that plaintiffs' theory of liability predicated upon failure of the nurses to orally communicate with the physicians was infirm in some manner, it would have been improper for the trial court to vacate the jury's verdict and enter a judgment *n.o.v.* as that was not the only deviation of care plaintiffs alleged Provena's nurses committed. In the medical malpractice case of *Bergman v. Kelsey*, 375 Ill. App. 3d 612 (2007), the court noted that, "Under section 2-1201(d) of the Code of Civil Procedure *** (735 ILCS 5/2-1201(d) (West 2000)), a general verdict can be sustained on any of several bases of liability and will not be reversed due to the impairment of one of the theories. [Citation.] Therefore, even if plaintiff's alternative theories should not have been presented to the jury, plaintiff still could have recovered under the separate theory of defendants' breach of the standard of care relating to discussing the two different strategies of treating GBS infections with plaintiff." *Bergman*, 375 Ill. App. at 623.

In *Bergman*, the plaintiff presented numerous theories under which it claimed defendants

violated the applicable standards of care. *Bergman*, 375 Ill. App. 3d at 621. Similarly to the case at bar, the *Bergman* defendants claimed on appeal "that the circuit court erred in denying their request for a judgment *n.o.v.* where there was no basis for any of plaintiff's theories of liability." *Bergman*, 375 Ill. App. 3d at 621. However, in *Bergman*, unlike the case at bar, the *Bergman* defendants seemingly attacked every violation of the standard of care plaintiff alleged. Provena focuses almost singularly on the lack of oral communication between the nurses and physicians. As noted from the passage quoted above from *Bergman*, if sufficient evidence is adduced at trial to support even one of the theories of recovery under which a plaintiff proceeds and the jury returns a general verdict, it would be improper for the trial court to vacate that verdict and enter a judgment *n.o.v.*

In the case at bar, the jury returned a general verdict against "Provena Hospitals, d/b/a St. Joseph Medical Center" on "Verdict Form A." Special interrogatories were given to the jury asking, "Do you find that the nurses' negligence proximately caused John Simcich's injuries?" and "Do you find that the physical therapists' negligence proximately caused John Simcich's injuries?" The jury answered, "Yes" to each special interrogatory.

Neither party asked the jury to identify exactly which actions of the nurses or physical therapists violated the applicable standard of care upon which the jury imposed liability. As such, and as suggested by the *Bergman* court, even were we to find that plaintiffs failed to properly prove one of defendants' alleged deviations from the proper standard of care, the same would not be sufficient to vacate a general jury verdict and enter a judgment *n.o.v.* where

plaintiffs alleged numerous deviations from the standard of care. Plaintiffs offered sufficient evidence to prove Provena's nurses violated applicable standards of care by failing to chart the location of John's pain, failing to perform ordered neurological tests, and that these deviations proximately caused John's injuries. Therefore, we find Provena's arguments regarding any improprieties with plaintiffs' theories concerning the nurses' failure to orally communicate information to the physicians, even when taken as true, does not entitle Provena to a judgment *n.o.v.* Plaintiffs identified numerous deviations of the nursing standard of care above and beyond the failure to communicate.

iii. Dr. Malek's Testimony and Actions Negating a
Causal Link Between Nurses and John's Injuries

Provena asserts that plaintiffs offered no "evidence that if the nurses had spoken to any neurosurgeons (Dr. DePhillips and Dr. Malek) between December 23 and 27 about Mr. Simich's symptoms that the physicians would definitely have performed additional surgery prior to December 28 that would have avoided Mr. Simicich's cauda equina syndrome and resulting injuries." Discussing and citing to *Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7 (1999), and *Snelson v. Kamm*, 204 Ill. 2d 1 (2003), Provena claims Dr. DePhillips' and Dr. Malek's conduct necessitates a finding that neither the nurses' nor the physical therapists' actions were a proximate cause of John's injuries. Specifically, Provena notes that Dr. Malek testified he would not have suspected QES until a hematoma with pressure was noticed at the incision site coupled with the presence of bilateral neurogenic weakness and pain in John's legs. Dr. Malek continued

that these symptoms were not present until December 28 and, as such, he would not have suspected QES or treated John any differently regardless of what the nurses or physical therapists may, or may not have told him. Given Dr. Malek's pronouncement, Provena submits the trial court erred in denying its motion for a judgment *n.o.v.*

In *Seef*, the parents of a stillborn son brought an action to recover damages alleging negligent failure to monitor the condition of the fetus and timely perform a caesarean section. *Seef*, 311 Ill. App. 3d at 10. The *Seef* plaintiffs alleged, *inter alia*, that employees from the hospital failed to accurately interpret and monitor fetal monitoring strips and relay pertinent information to the physician. *Seef*, 311 Ill. App. 3d at 10.

The hospital filed a motion *in limine* to bar all testimony from plaintiffs' nursing expert suggesting the hospital deviated from the applicable standard of care by failing to notify the physician earlier of changes on the fetal monitoring strips. *Seef*, 311 Ill. App. 3d at 11. The trial court granted the motion and "barred such testimony because [the physician] had testified that, even if the nurses had notified him earlier, he would not have acted sooner." *Seef*, 311 Ill. App. 3d at 12. As the "only expert witness regarding deviations by the nurses" had been barred, the trial court granted the hospital's motion to dismiss the claim against the hospital. *Seef*, 311 Ill. App. 3d at 12.

In a divided decision, the majority of the *Seef* court affirmed the trial court's decision to bar the plaintiffs' nurse's expert testimony. *Seef*, 311 Ill. App. 3d at 16. The majority stated:

"Dr. Sutkus testified that he would have done nothing

differently even had he seen the monitor strips earlier, thereby negating any argument for notifying him earlier. *If* the nurses had notified Dr. Sutkus earlier, his interpretation of those earlier monitor strips would not have indicated a problem requiring immediate intervention prior to 3:05 a.m. Dr. Sutkus testified that the first sign of a problem was on the monitor strip starting at 3:05 a.m. and that the earlier monitor strips showed adequate fetal recovery." (Emphasis in the original.)

Seef, 311 Ill. App. 3d at 16.

However, the dissent in *Seef* noted:

"Dr. Sutkus speculated about what he would have done had the nurse acted in accordance with the standard of care, whereas Dr. Lilling [the plaintiff's expert] offered not speculation, but an expert medical opinion as to how an obstetrician meeting the standards of care should have proceeded if properly notified. The weight to be given to Dr. Sutkus' and Dr. Lilling's conflicting testimony was a matter for the jury to determine. [Citation.]" *Seef*, 311 Ill. App. 3d at 27 (O'Mara Frossard, P.J. dissenting).

The dissent in *Seef* went on to cite well-settled law that a trier of fact is not required to accept a defendant's hypothetical testimony as uncontroverted fact, particularly when the opposing party

offers contradictory testimony (see *Wodziak v. Kash*, 278 Ill. App. 3d 901 (1996)) and that proximate cause issues are fact specific and uniquely for the jury's determination. See *Holton v. Memorial Hospital*, 176 Ill. 2d 95 (1997). Given the fact that the plaintiffs introduced expert testimony indicating the nurses deviated from the standard of care and additional expert testimony from a physician claiming those deviations were a proximate cause of the baby's stillborn death, the dissent opined it was error not to allow the case against the hospital to proceed to the jury. *Seef*, 311 Ill. App. 3d at 26-27 (O'Mara Frossard, P.J. dissenting).

We find the dissent from *Seef* more availing than the majority's reasoning as did our supreme court in *Snelson*. We also note Dr. Malek's testimony is quite different than Dr. Sutkus' testimony in *Seef*. The majority of the *Seef* court took issue with the dissent's characterization of Dr. Sutkus' testimony as a "self-serving hypothetical" and believed it rather to be "an inculpatory, unequivocal statement regarding his mental state at the time of the incident [through which] he took full blame for the baby's death by admitting that *** he misapprehended the seriousness of the situation." *Seef*, 311 Ill. App. 3d at 16.

Dr. Malek's testimony was neither inculpatory nor acknowledged that any actions should have been taken sooner than they were. Dr. Malek testified that the first time he could have reasonably suspected QES was the morning of December 28 when the bilateral drop foot presented coupled with a significant hematoma at the incision site. He noted that John's pain and neurological symptoms prior to the development of his bilateral food drop did not lead him to suspect QES as one would not suspect QES until they observed "pain that is bilateral. *** And it

has to be persistent. It is the kind of pain that cannot be relieved in spite of medication."

However, Dr. Malek admitted that the hematoma developed on December 21, the day of surgery. He opined that it simply was not clinically significant until December 28. Undoubtedly, as the dissent suggested in *Seef* and our supreme court acknowledged in *Snelson*, it was the duty and task of the trier of fact to weigh the credibility of Dr. Malek's testimony.

In *Snelson*, the plaintiff alleged that a surgeon's and hospital's malpractice resulted in the loss of 95% of his small intestine. *Snelson*, 204 Ill. 2d at 10. The jury returned a verdict against the defendant physician and hospital. *Snelson*, 204 Ill. 2d at 22. The trial court granted the hospital's motion for a judgment *n.o.v.* *Snelson*, 204 Ill. 2d at 23. Our supreme court affirmed the trial court's order granting the hospital a judgment *n.o.v.* *Snelson*, 204 Ill. 2d at 43-44.

In doing so, the *Snelson* court noted:

"Snelson in essence argues that St. Mary's nurses deviated from the standard of care by failing to (1) advise Kamm [the physician] at 6 p.m. that they had inserted a catheter at 3 p.m. and (2) advise Kamm that Snelson continued to experience some pain through the evening after Kamm left at 6 p.m. The problem with Snelson's argument is that there was no expert testimony presented at trial that either of these matters constituted a deviation from the nursing standard of care.

Similar to *Gill*, there was no indication in the present case that Kamm would have taken a different course of action had he been informed that Snelson had some pain after Kamm left at 6 p.m. Moreover, Snelson did not even allege that St. Mary's nurses deviated from the standard of care in failing to apprise Kamm of any further pain.

Snelson's suggestion that it is impossible for a plaintiff to prove causation where the doctor testifies that 'he would not have acted differently regardless of what information could have been given him [by the nurses]' is a red herring for two reasons. First, Snelson mistakenly assumes that a doctor will not be willing to tell the truth about whether the conduct of hospital nurses affected his decisionmaking ability. Second, a plaintiff would always be free to present expert testimony as to what a reasonably qualified physician would do with the undisclosed information and whether the failure to disclose the information was a proximate cause of the plaintiff's injury in order to discredit a doctor's assertion that the nurse's omission did not affect his decisionmaking. See *Seef v. Ingalls Memorial Hospital* 311 Ill. App. 3d 7, 26-27 (1999) (O'Mara Frossard, P.J. dissenting). In such a case, a factual dispute

as to proximate cause would be created sufficient for the jury to resolve. We do not, of course, have such a factual dispute."

Snelson, 204 Ill. 2d at 42-46.

We are presented with the exact factual dispute discussed by our supreme court in the latter part of the above quoted passage from *Snelson*; that is, a treating physician who testifies that the alleged breach of the standard of care by nurses had no effect on his decision making and a plaintiff who presented expert testimony as to what a reasonably qualified physician would do with the undisclosed information and an allegation that failure to disclose the information was a proximate cause of plaintiff's injuries. Unlike the evidence presented in *Snelson*, nurse Osinski testified that failure to orally disclose certain information deviated from the applicable standard of care. Dr. DeLong testified that the nurses' deviation from the applicable standard of care proximately caused plaintiff's injuries. Dr. Malek disagreed and testified that he would have done nothing differently prior to December 28 as that is when the plaintiff first presented with bilateral foot drop and the incision site became swollen. Given Dr. DeLong's and nurse Osinski's testimony, the jury in this matter was free to believe or reject Dr. Malek's assertion that no action became warranted until December 28. As such, the trial court did not err in allowing the jury verdict to stand and denying Provena's motion for a judgment *n.o.v.*

Finally , as an aside, Provena claims plaintiffs failed to prove it proximately caused John's injuries as, "According to plaintiffs' theory of the case, Dr. DePhillips' and Dr. Malek's conduct was a superseding or intervening cause of plaintiffs' injuries." That was simply not plaintiffs'

sole theory of the case. Plaintiffs alleged deviations of the standard of care by Provena's nurses, physical therapists, and Drs. DePhillips and Malek, claiming each deviation proximately caused John's injuries.

iv. Physical Therapists

Similar to its claims of error associated with the testimony regarding its nurses, and verdict based upon that testimony, Provena claims that the plaintiffs adduced no evidence that Provena's physical therapists proximately caused John's injuries. We need not address Provena's claims regarding any potential improprieties regarding testimony or theories of recovery associated with the physical therapists. Again, the verdict against Provena was general in nature. As noted above, plaintiffs adduced sufficient evidence at trial to support the jury's verdict, that being Provena's nurses deviated from the applicable standard of care and those deviations proximately caused John's injuries. Even were we to agree with Provena that no evidence existed causally connecting the actions of its physical therapists to John's injuries, it would still be improper to grant its motion for a judgment *n.o.v.* given the general nature of the verdict. Plaintiffs only had to prove one of its theories.

II. New Trial

Provena claims that if no judgment *n.o.v.* is entered in its favor, we must grant it a new trial as: (1) Dr. DeLong's testimony concerning proximate cause as it related to the nurses' and physical therapists' failure to orally communicate information to the physicians should have been barred as it was not timely disclosed; (2) Dr. DeLong's testimony causally connecting the

physical therapists alleged deviations of the standard of care was based upon an inaccurate hypothetical; and (3) the jury's verdict is simply against the manifest weight of the evidence.

A. DeLong's Proximate Cause Testimony and Timely Disclosure

Provena acknowledges that Dr. DeLong supplemented his interrogatory answers regarding the nurses' and physical therapists' conduct approximately 75 days before trial. Provena claims, however, the opinions should have been barred for "nondisclosure." It is clear the opinions were disclosed.

Provena made a motion to bar DeLong's supplemental disclosure noting that when it deposed DeLong, he made no criticisms of Provena's nursing or physical therapy staff. The motion claimed that DeLong's new opinions are just that, new opinions and not mere supplements to prior opinions. Provena argued DeLong disclosed no opinion regarding the quality of nursing care, the quality of physical therapy care, or that the plaintiffs' injuries were causally connected with the actions or inactions of the nursing/physical therapy staff prior to supplementing his interrogatory answers. Therefore, Provena requested the trial court bar the new opinions of DeLong. Plaintiffs respond by noting that DeLong's supplemental opinions were filed more than 60 days prior to the trial. The supplement was filed July 1 and trial was set to, and did, begin on September 14.

After the trial court denied Provena's motion to bar DeLong's testimony regarding causation, Provena immediately filed a motion for leave to disclose a neurosurgery expert and for a continuation of the trial. Provena requested "the opportunity to disclose a neurosurgery

expert to refute the opinions of plaintiff's neurosurgery expert in light of the court's recent ruling on plaintiff's disclosures." The motion noted Provena would retain and produce the expert within 60 days. On July 28, 2009, the trial court granted Provena's motion noting Provena was "allowed to disclose additional expert and amend 213's as needed by September 10, 2009 *** trial date of 9-14-09 to stand."

Given this course of events, we cannot agree with Provena that the trial court erred in denying its motion to bar Dr. DeLong's testimony for failing "to comply with Supreme Court Rule 213's mandatory disclosure requirements." Ill. S. Ct. R. 213 (eff. Jan. 1, 2007) While Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2007) does prohibit opinions not disclosed in an interrogatory or discovery deposition, Illinois Supreme Court Rule 213(i) (eff. Jan. 1, 2007) allows for and, in fact, imposes a duty to supplement or amend any prior answer or response.

Certainly, the decision to allow or bar DeLong's testimony contained within the supplemental 213 disclosures rested with the sound discretion of the trial court. See *Sullivan v. Edward Hospital*, 209 Ill. 2d 100 (2004). Given the timing of the disclosures and Provena's opportunity to respond, we cannot say the trial court abused its discretion in allowing DeLong's testimony concerning the causal relationship between the nurses' and physical therapists' deviations from the standard of care and plaintiff's injuries. As such, we find the trial court did not err in denying Provena's motion for a new trial based on alleged improper disclosure of Dr. DeLong's opinions.

B. Manifest Weight of the Evidence

Finally, Provena closes its argument by renewing its claim that there is simply no evidence indicating that Dr. Malek's course of treatment would have changed even if the nurses or physical therapists orally communicated their observations to him. Therefore, Provena contends that any verdict against the hospital but in favor of the treating physician is unreasonable, arbitrary and not based on the evidence. Provena further contends that given Dr. Malek's admission that it was his duty and his alone to diagnose the CES, the opposite conclusion to a judgment against Provena but in favor of Dr. Malek is readily apparent.

As noted above, plaintiffs alleged numerous deviations from the applicable standards of care beyond the lack of oral communication with the physicians. Moreover, as noted in section I(A)(iii) of this order, pursuant to our supreme court's directive in *Snelson*, the plaintiffs herein were free to present expert testimony as to what a reasonably qualified physician would do with the undisclosed information and whether the failure to disclose the information to a physician was a proximate cause of John's injuries. *Snelson*, 204 Ill. 2d at 46. The plaintiffs did so in this case. Dr. Malek's testimony indicating that the information would not have changed his course of action created "a factual dispute as to proximate cause *** for the jury to resolve." *Snelson*, 204 Ill. 2d at 46. The jury was free to accept or reject that testimony as they saw fit. We simply cannot say that a contrary verdict is clearly evident in this matter given nurse Osinski's testimony that the nurses deviated from the applicable standard of care and Dr. DeLong's testimony causally connecting those deviations to John's injuries. To do so would require us to reweigh the evidence.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of La Salle County is affirmed.

Affirmed.