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2014 IL App (4th) 131043-U

NO. 4-13-1043

FILED
November 25, 2014
Carla Bender
4th District Appellate Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MARC WILSON and SANDY WILSON,	)	Appeal from
Plaintiffs-Appellants,	)	Circuit Court of
v.	)	Champaign County
ROBERT S. SCHAEFER and CHRISTIE	)	No. 08L133
CLINIC, P.C.,	)	
Defendants-Appellees.	)	Honorable
	)	Jeffrey B. Ford,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting summary judgment to defendants; there was a genuine issue of material fact as to whether the physician's alleged failure to inform his patient of a potential surgery complication proximately caused his patient's injury.

¶ 2 In August 2004, plaintiff, Marc Wilson, underwent hip-replacement surgery. Following his surgery, Marc suffered permanent sciatic nerve palsy and right foot drop. He and his wife, Sandy Wilson, filed suit against his surgeon, Robert S. Schaefer, M.D., and Dr. Schaefer's employer, Christie Clinic, P.C., alleging Dr. Schaefer failed to inform him a risk of his surgery was sciatic nerve palsy. Defendants moved for summary judgment on plaintiffs' claim, alleging plaintiffs failed to establish Dr. Schaefer's alleged failure to inform was the proximate cause of Marc's injuries.

¶ 3 In October 2013, the trial court granted summary judgment in defendants' favor. Plaintiffs appeal, arguing they presented evidence sufficient to create an issue of genuine material fact on the issue of proximate cause. We agree and reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 Marc, born in 1951, suffered from degenerative arthritis in his right hip. To treat the pain in his hip, Marc attempted therapy and endured shots. In July 2004, Marc met with Dr. Schaefer to discuss the possibility of hip arthroplasty, also known as hip replacement. Marc agreed to the surgery, which Dr. Schaefer performed on August 28, 2004. During the surgery, Marc's sciatic nerve was damaged, resulting in a constant burning and tingling sensation in Marc's right foot and in foot drop. Marc and his wife, Sandy Wilson, filed suit against Dr. Schaefer and his employer, seeking damages under the doctrine of informed consent. Plaintiffs allege Dr. Schaefer failed to inform Marc of the risk of damage to his sciatic nerve and foot drop and, had Marc been informed of the risk, he would not have elected to do the surgery.

¶ 6 A. Deposition of Marc Wilson

¶ 7 Before surgery, Marc worked at Kraft Foods. His job, driving a fork truck, required heavy lifting. Marc loaded and dumped 50-pound bags on carts, moved 55-gallon barrels off and on pallets, and dumped 40-pound blocks. Before 2004, Marc had undergone three other surgeries, all unrelated to his hip pain.

¶ 8 Marc described his hip pain. It was "hard to go up stairs" and difficult to lift, walk, and exit or enter the fork truck. Marc suffered pain when he walked during the three months before surgery, categorizing the pain as a 5 on a scale of 1 to 10, with 10 being the strongest. It was also sometimes painful for him to sit. Marc "did everything"; it just took him

longer. Marc continued to go to a gym and work out, on average, three times a week. He "shot baskets," coached a girls softball team, rode his bike, and went to Illinois football and basketball games.

¶ 9 Marc sought treatment for his hip pain. Marc saw Dr. DePersio in May 2003. Dr. DePersio told Marc he did not need surgery because he was too young. Marc was also treated by Dr. Paluska. Dr. Paluska informed Marc his hip was like "grinding and walking on concrete." Dr. Paluska recommended Marc participate in physical therapy to treat his hip pain. Marc followed this recommendation, but experienced no relief. Marc then received two injections, probably steroids, to address his pain. The first injection provided "a little bit" of short-term relief; the second injection provided none. Dr. Paluska next suggested hip surgery as an alternative, depending upon how long he wanted to live with pain. Several people from therapy recommended Marc see Dr. Price about hip surgery. Marc's "hip was hurting so bad" and Dr. Price was full, so he saw Dr. Schaefer instead.

¶ 10 Marc recalled meeting with Dr. Schaefer one time, on July 22, 2004, before his surgery. Marc knew Dr. Schaefer was an orthopedic surgeon. The purpose of the meeting was to learn about hip replacement. Dr. Schaefer examined Marc, but Marc could not recall what Dr. Schaefer did during the examination. The two discussed types of hips. Marc could not recall what type Dr. Schaefer recommended. Marc did not remember whether Dr. Schaefer discussed with him his previous attempts at treatment. Marc did not recall any discussion regarding the risks and benefits of surgery. As of that date, Marc was taking medication to treat his right hip pain. He suffered right hip pain for approximately 1 1/2 years.

¶ 11 Marc did not recall telling Dr. Schaefer he was at the end of his rope. Dr.

Schaefer "[b]asically *** just told me that I needed to have surgery." He explained Marc would be able to walk again with no pain and his hip would be fine. Dr. Schaefer also explained anesthesia would be used during the surgery. Dr. Schaefer explained infection was a risk of surgery. Marc did not remember any discussion about a potential injury to arteries or nerves. Marc recalled Dr. Schaefer stating his option was to either live with the pain or have the surgery. Marc would not have had the surgery had he been informed of the risk of permanent sciatic nerve injury. Marc suffered no hip pain after the surgery.

¶ 12 Marc recalled meeting with someone for a preoperative visit. He did not recall any discussion about risks and benefits. Marc would not have undergone the surgery had he known there were risks of severe blood loss, fractures, injuries to tendons, ligaments, or nerves, or a heart attack. Marc was told he would be fine after the hip replacement.

¶ 13 After surgery, Marc continued to have numbness in his right leg and he experienced foot drop. Marc sought treatment at Mayo Clinic and Northwestern Memorial Hospital. Doctors there informed him his sciatic nerve was hit during surgery. Marc recalled telling the Mayo Clinic neurologist both of his legs were numb after surgery, but the right leg numbness did not improve. According to the neurologist at Mayo Clinic, Marc would suffer tingling and burning in his right foot and foot drop 24 hours a day for the rest of his life. Marc had some improvement with foot drop over a two-year period. Since his surgery, he cannot sleep without prescription drugs. He cannot wear any shoe not tied to his foot. Marc has a difficult time walking and going up and down stairs. Marc can no longer coach softball. The Mayo Clinic doctor told him nerve injury was a recognized but rare complication of hip surgery. Marc believed the complication rate was approximately 2%.

¶ 14 Marc recalled being informed about risks of anesthesia: "they just said something that whenever I was getting anesthesia, that something might happen." Marc knew that a risk of being paralyzed was a consequence of the procedure:

> "Q. You mentioned that you were told there was a risk of something hitting your spine. I want to direct your attention to that. Was it your understanding that if that complication did occur, if your spine were injured during the procedure, that as a consequence you might be paralyzed?
>
> A. Yes.
>
> Q. Okay. So you did know prior to the procedure that being paralyzed was a potential complication of the procedure?
>
> A. Yes."

¶ 15 B. Deposition of Randall N. Smith, M.D.

¶ 16 Dr. Randall N. Smith, a board-certificated orthopedic surgeon, was a medical-opinion expert testifying on behalf of plaintiffs. He agreed Marc, as of July 22, 2004, was a good candidate for a total hip replacement. Dr. Smith opined Marc "had enough arthritis and enough pain that a successful total hip would make him a better person." While noting the "level of pain" is "very subjective," Dr. Smith speculated, based on the records, Marc's pain from degenerative arthritis was at a 6 or 7 out of 10. Dr. Smith did not see any actual films of Marc's right hip before the surgery. Dr. Smith agreed Marc's hip pain would not improve but would degenerate and worsen with age. Marc's arthritis would have been more disabling. Dr. Smith would have recommended total right hip replacement.

¶ 17 Dr. Smith opined the standard of care required Dr. Schaefer, in seeking informed consent from a patient for a total right hip replacement, to advise the patient of the potential for significant nerve damage. An explanation of the meaning of "significant nerve damage" was also necessary. By significant, Dr. Smith opined the physician must explain the potential for "foot drop," difficulty in walking, and weakness in the leg.

¶ 18 Marc's sciatic nerve was injured during surgery and no longer working. Dr. Smith testified regarding the potential causes for Marc's sciatic nerve injury:

> "Q. Have you developed any opinions with regard to this case as to the potential causes for the sciatic nerve injury?
>
> A. Yes.
>
> Q. And what are the potential causes, in your opinion?
>
> A. The most likely is retraction on the sciatic nerve. Another possibility is cement got near the sciatic nerve. I think those are 1A and 1B as far as the potential causes. I think anything else would be unlikely.
>
> Q. Well, what are the other potential causes, although they might be unlikely, in your opinion?
>
> A. Positioning at the time of the surgery where there would be pressure on the nerve. Bleeding postoperatively. Postoperative hematoma. *** I think that would be it.
>
> Q. Could anesthesia in this case have been involved in any potential cause for the sciatic nerve injury?

A. Only if they helped position the patient preoperatively. There was an epidural done, but I can't see how an epidural would cause what happened here. I just don't see it. I can't say a hundred percent there's no way. I just find it way, way down the list."

¶ 19 When asked, if something was hit during the process of the epidural, a patient might be paralyzed after the procedure, Dr. Smith testified, "if the epidural caused hematoma, bleeding, direct injury to the nerve, that was possible, yes." Dr. Smith testified one could experience foot drop when spinal anesthesia causes nerve injury. One could also experience weakness or loss of either power or sensation or paralysis. When asked if he could rule out anesthesia as the cause of Marc's injuries, Dr. Smith stated the following: "It's highly unlikely but I cannot rule it out. That's why I wanted evaluations postoperatively to evaluate."

¶ 20 Dr. Smith opined the foot drop and nerve damage was not addressed or evaluated appropriately post-op: "[T]here were no studies done. They were just kind of left to hope and pray that we get better. Nothing was done to evaluate was there a hematoma? Was there something impinging on the nerve? Was there some other reason? No testing and no follow-up was tried." Dr. Smith did not know the rate at which the foot-drop complication occurs. He estimated "probably about three or four percent." Marc's sciatic nerve is damaged and is not working.

¶ 21 During the last five years of his practice, Dr. Smith performed about three hip replacements per month. Dr. Smith had not had a patient experience the type of sciatic nerve palsy experienced by Marc. He believed less than five patients, in perhaps his 23 years of

performing surgeries, experienced some type of weakness. He further explained the following about the decision to have hip-replacement surgery: "We do these hip replacements with the same complications or risks, and most people say yes. Some delay it once they hear about the complications as long as they can until it becomes unbearable. And that's a subjective decision the patient has to make, how much pain, how much disability versus the risks and potential benefits of the surgery."

¶ 22 C. David Freeman's Deposition

¶ 23 David Freeman, a physician's assistant, met with Marc before surgery on August 11, 2004, for a preoperative visit. Freeman had no independent memory of conversations with Marc. He recalled generally Marc was eager for the surgery to relieve his symptoms. Freeman's routine or practice was to explain the surgical procedure and postoperative recovery to the patient and to go through the surgical consent form word for word with the patient.

¶ 24 D. Deposition of Robert Schaefer, M.D.

¶ 25 Dr. Schaefer, after listening to Marc's deposition, concluded Marc did not have normal muscle function but also did not have complete foot drop. Dr. Schaefer opined Marc's condition was permanent and Marc suffered sympathetic mediated pain, as well as sciatic nerve palsy. Dr. Schaefer did not know what caused Marc's injury. He could only speculate. Dr. Schaefer testified "there's no one specific cause that [he could] say with certainty resulted in the sciatic nerve palsy."

¶ 26 Dr. Schaefer testified to the following regarding the cause of Marc's injury:

> "[Marc] had a hip arthroplasty performed and so there was surgery done around the hip. The hip was dislocated, it was moved

in order to obtain access to the canal, so in the course of moving the hip around, it is possible that a stretch injury occurred to the nerve at that time. That would be one possibility. During the exposure to the hip joint, retractors were placed around the hip in order to open up the space to see down into the hip joint, and a retractor could have inadvertently injured the nerve. At the time he received a regional anesthesia prior—prior to his surgery in preparing him. I guess it's a theoretical possibility that there was bleeding around the site of the anesthesia in the—and the nerve roots were affected, scarred by that. it's a theoretical possibility.

So to me, if I—if I had to include a differential, it would be stretching of the nerve during manipulation of the leg. That may have been more likely if the nerve was—had an anatomical variation, such as tethering or scarring around the nerve, because with this particular approach, it's statistically very, very uncommon to have an injury to the sciatic nerve. But a stretching injury from movement of the leg, retractor injury, or an anesthesia complication to me would be the three things that I would put in the differential of why this might have happened."

¶ 27 Dr. Schaefer was asked if anesthesia was the least likely possibility. Dr. Schaefer responded as follows: "I don't know if I can rate them one through three. I think they're all

theoretical possibilities, but I don't have any factual data to tell me one is that much greater than the other."

¶ 28 Dr. Schaefer could not provide an exact figure for the percentage of patients who undergo a total hip replacement who experience permanent sciatic nerve injury. The 2% figure referenced in Marc's deposition seemed high to him. The percentages would vary based upon the approach taken during surgery. Dr. Schaefer used the anterolateral approach, which, he believed, would place the number at less than 1%.

¶ 29 Dr. Schaefer described the decision to have hip replacement as elective. The decision was based on the degree of pain the patient experienced and how the pain affected quality of life. There was a risk/benefit ratio for patients: "If someone comes and they've got very minimal, mild pain symptoms, the risk/benefit ratio is not very good for them to undergo a major operative procedure, but if they're having pain that significantly impacts the quality of their life, they're more likely or more willing to consider undergoing an operative procedure that has antecedent risks ***."

¶ 30 Dr. Schaefer recalled meeting Marc in July 2004. He recalled Marc "as being in quite a bit of pain." Marc was "fairly, fairly desperate that something needed to be done." Dr. Schaefer remembered Marc was "really struggling." Dr. Schaefer did not recall discussing specific alternatives to hip arthroplasty. In general, Dr. Schaefer would discuss alternatives that had already been attempted. He knew Marc had tried a variety of nonoperative treatments, such as medication, injections, and therapy, yet Marc continued to struggle. Dr. Schaefer and Marc's discussion centered on the decision to treat his condition surgically or live with it. Dr. Schaefer was certain he did not tell Marc his only alternative was hip replacement. Dr. Schaefer

acknowledged Marc could delay the surgery, but he did not believe it realistic to say hip replacement was not in Marc's future: "I can't say that I haven't seen anyone's hip arthritis burn out, but being a 230-pound man on his feet all day long with the pain that he was having, I've seen lots of people in Marc's situation and to say he would have never had a hip replacement is probably not—to me—not a realistic statement."

¶ 31 Based on Marc's status in July 2004, Dr. Schaefer believed conservative treatment was failing and would continue to fail. The only other option was a significant modification to Marc's lifestyle. Dr. Schaefer believed that is how he would have presented the options to Marc. It was Dr. Schaefer's routine in 2004 to inform patients of the risk of foot drop. Dr. Schaefer estimated he performed 800-900 hip arthroplasties in his 18-year career; 400 by the time of Marc's surgery. Dr. Schaefer, during his career, knew of only two of his patients who suffered foot drop.

¶ 32 Dr. Schaefer acknowledged it was theoretically possible for someone, upon hearing the risks and benefits, to decide against surgery. There were instances where he presented surgery as a viable option and patients declined. Dr. Schaefer could not provide a percentage. Dr. Schaefer reported some of his patients were treated by him for months or years before deciding to undergo hip replacement; some never had hip replacement. When asked if he found "unreasonable" the decision to forego surgery "for whatever reason after" having been presented with surgery as a "viable option," Dr. Schaefer opined he did not find it unreasonable.

¶ 33 E. Summary Judgment

¶ 34 In August 2013, defendants filed motions for summary judgment. Defendants argued plaintiffs could not establish the proximate-cause element of an informed consent cause

of action.

¶ 35 In October 2013, the trial court agreed with defendants and granted their motions for summary judgment. The court found no genuine issue of material fact on the issue of proximate cause. The court found the question to be whether Dr. Schaefer's failure to inform Marc of possible paralysis proximately caused Marc's injury. The court first determined Marc admitted having been informed a risk of anesthesia was paralysis. The court found if Marc accepted the risk of paralysis from anesthesia he accepted the fact paralysis may occur during surgery and proximate cause did not exist.

¶ 36 The trial court concluded the applicable test for proximate cause—what a reasonable person in Marc's condition would have decided had that person known of the risk—was objective and the subjective testimony by Marc was not an issue of material fact. The court examined the deposition testimony. The court found the objective evidence, which included evidence of Marc's pain and treatment history as well as the physicians' unanimous opinion surgery was the next step, found the following:

> "Without a genuine issue of material fact then is it appropriate under these facts to determine would a reasonable person in Plaintiff's position after he had the shots, after he had the therapy, in constant pain and with all the doctors telling him that the next step is surgery would that person have chosen the surgery if he had known of all the significant perils? From the evidence provided here, that answer is yes."

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 The purpose of summary judgment is to decide whether a genuine issue of material facts exists, not to try questions of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8 (2008). Summary judgment is proper where the depositions, pleadings, affidavits, and admissions on file, when viewed in the light most favorable to the nonmovant, establish no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pontiac National Bank v. Vales*, 2013 IL App (4th) 111088, ¶ 29, 993 N.E.2d 463 (citing 735 ILCS 5/2-1005(c) (West 2008)). Our review of a summary judgment is *de novo*. *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 40 A party, when moving for summary judgment, satisfies the initial burden of production by showing either some element of the case must be resolved in the movant's favor or there is an absence of evidence supporting the nonmovant's case. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 355, 726 N.E.2d 1171, 1174-75 (2000). The burden of production then shifts to the nonmovant to " 'come forward with evidentiary material that establishes a genuine issue of fact'." *Goodrich Corp. v. Clark*, 361 Ill. App. 3d 1033, 1044, 837 N.E.2d 953, 962 (2005) (quoting *Weil, Freiburg & Thomas, P.C. v. Sara Lee Corp.*, 218 Ill. App. 3d 383, 394, 577 N.E.2d 1344, 1352 (1991)). Absent a genuine issue of fact, the case is not triable. See generally *Pielet v. Pielet*, 2012 IL 112064, ¶ 53, 978 N.E.2d 1000. We are mindful summary judgment is a drastic means of disposing of a case and thus will only allow summary judgment when the right of the moving party is clear and free from doubt. *Vales*, 2013 IL App (4th) 111088, ¶ 29, 993 N.E.2d 463.

¶ 41 To recover at trial on their claim of lack of informed consent, plaintiffs must

establish the following: (1) Dr. Schaefer had a duty to disclose the risk of foot drop or sciatic nerve injury; (2) he failed to adequately disclose the risk; (3) the failure to disclose directly and proximately caused Marc to consent to the treatment he would otherwise not have consented to; and (4) Marc was injured during the proposed treatment. *Coryell v. Smith*, 274 Ill. App. 3d 543, 546, 653 N.E.2d 1317, 1319 (1995).

¶ 42 Regarding the proximate-cause element, case law establishes a plaintiff cannot recover absent proof by a preponderance of the evidence he would not have consented to the proposed procedure absent full and adequate disclosure of the risks. See *id*. Courts in Illinois follow the majority of jurisdictions in applying an objective standard to decide whether a plaintiff has made such a showing. *Id.* Under this objective standard, if disclosure of the risk would not have altered the decision of a reasonable person in the plaintiff's position, no causal connection between the nondisclosure and the injury exists. *Id.* (quoting *Guebard v. Jabaay*, 117 Ill. App. 3d 1, 10, 452 N.E.2d 751, 757-58 (1983)); see also *St. Gemme v. Tomlin*, 118 Ill. App. 3d 766, 769, 455 N.E.2d 294, 296 (1983) (quoting *Cobbs v. Grant*, 502 P.2d 1, 11-12 (Cal. 1972)). If, however, disclosure would have caused a reasonable person in plaintiff's petition to refuse the proposed surgery, proximate cause is established. *Coryell*, 274 Ill. App. 3d at 546, 653 N.E.2d at 1319 (quoting *Guebard*, 117 Ill. App. 3d at 10, 452 N.E.2d at 758). For a jury verdict to stand, the jury would have to reasonably conclude, without conjecture or speculation, plaintiffs proved by a preponderance of the evidence, had Dr. Schaefer adequately disclosed the risk of foot drop or sciatic nerve injury, a reasonable person in Marc's position would have refused the hip-replacement surgery.

¶ 43 Defendants argue plaintiffs cannot recover because they lack evidence

establishing a triable issue on proximate cause. This argument shifts the burden of production to plaintiffs. At a minimum, plaintiffs must produce "some factual basis" that, when viewed in the light most favorable to them, establishes a *triable* issue exists. See *Hutchcraft*, 312 Ill. App. 3d at 355, 726 N.E.2d at 1175. An issue is triable when reasonable persons may draw different inferences from undisputed facts. *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 44 Plaintiffs contend they have submitted sufficient objective evidence. Plaintiffs point to Marc's testimony he would have declined the surgery had he been informed of the risk of sciatic nerve injury. Plaintiffs also point to testimony by Dr. Schaefer that some patients decide never to have hip replacement and Dr. Schaefer's testimony that he did not find it unreasonable when his patients chose not to have surgery. Plaintiffs emphasize the physicians' testimony that Marc had other options, including living with his pain. Plaintiffs rely on the First District's decision in *Coryell*. In *Coryell*, the court found the plaintiff, who presented no expert testimony on proximate cause and who testified she would not have elected to undertake the procedure, survived summary judgment. *Coryell*, 274 Ill. App. 3d at 550, 653 N.E.2d at 1321.

¶ 45 Defendants argue the Fourth District decision of *St. Gemme*, which arguably requires expert testimony on proximate cause, applies and contend plaintiffs have produced no expert testimony on the issue. Defendants argue plaintiffs, at best, have evidence showing Marc would not have elected to undergo the surgery. Defendants emphasize both physicians in the case opined Marc was in significant pain, other treatment alternatives had been tried, surgery was his next step, and the risk of sciatic nerve injury and foot drop was low.

¶ 46 We begin our analysis with the earlier decision of *St. Gemme*. In *St. Gemme*, this court considered the appeal of a patient who sought damages from a dentist whom she alleged

failed to disclose the risk of paresthesia, which is a change or loss of sensation in a lip, following a tooth extraction. *St. Gemme*, 118 Ill. App. 3d at 767-68, 455 N.E.2d at 295. The plaintiff asserted she would not have consented to the extraction has she known of the paresthesia risk, while the expert evidence established extraction was the only remedy and left untreated would have threatened plaintiff's life. *Id.* at 769, 455 N.E.2d at 296. This court stated it agreed with the Supreme Court of California's decision in *Cobbs v. Grant*, 502 P.2d 1, 11-12 (Cal. 1972), which stated an objective test on the issue of proximate cause:

> " 'The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test [is] preferable: *i.e.*, what would a prudent person in the patient's position have decided if adequately informed of all significant perils'." *St. Gemme*, 118 Ill. App. 3d at 769, 455 N.E.2d at 296.

¶ 47 For guidance on the question of proximate cause, the *St. Gemme* court looked to malpractices cases and observed, in those cases, expert evidence on the question was required: "[i]n all but the most gross malpractice cases there must be expert evidence not only as to the negligence of the defendant but also as to a proximate causal connection between the negligence

and the injury suffered by the plaintiff." *Id.* The court then turned to its case and observed the only evidence in the case was plaintiff's testimony she would not have consented to the surgery, and the expert evidence was to the contrary. *Id.* The court found the evidence did not establish the plaintiff would not have undergone the surgery had the risk been adequately disclosed. *Id.*

¶ 48 In *Coryell*, 274 Ill. App. 3d at 545, 653 N.E.2d at 1318, the First District considered whether the trial court erroneously granted summary judgment on the ground the plaintiff failed to present expert evidence showing the alleged inadequacy of disclosure proximately caused her injuries. The plaintiff developed lower back pain and was diagnosed with weak stomach muscles. *Id.* at 544, 653 N.E.2d at 1318. Her physician recommended surgery that would undermine the skin and fat on the plaintiff's abdominal wall and repair her stomach muscles. *Id.* After the surgery, the patient suffered necrosis and an open wound in her stomach; she filed suit complaining her doctor failed to adequately disclose the risks of the injury she experienced. *Id.* at 544-45, 653 N.E.2d at 1318.

¶ 49 The *Coryell* court observed Illinois courts follow the majority of jurisdictions in using an objective standard to ascertain whether a plaintiff has shown proximate cause. *Id.* at 546, 653 N.E.2d at 1319. The court rejected the proposition the objective standard may be satisfied only through expert medical evidence that indicates a physician's failure to disclose proximately caused the injury. *Id.* at 555, 653 N.E.2d at 1321. The *Coryell* court agreed expert evidence is necessary to support an allegation of malpractice when the assessment of the alleged negligence necessitates knowledge or training outside the understanding of lay persons. *Id.* at 548-49, 653 N.E.2d at 1320. The court, however, found the proof differs in a case based upon a doctor's failure to disclose. The court found the jury to be in a better position to ascertain

whether the undisclosed information would have changed the plaintiff's decision to undergo the proposed treatment, using their knowledge, experience, and common sense to ascertain what a prudent person would have done. *Id.* at 550, 63 N.E.2d at 1321. Emphasizing plaintiff's testimony she would have opted for nonsurgical treatment had the risks been explained to her, the court concluded the plaintiff presented evidence sufficient to provide the jury with a factual issue: "whether a reasonably prudent person in her position, properly informed, would not have elected to undergo surgery." *Id.*, 653 N.E.2d at 1322.

¶ 50 While *St. Gemme* and *Coryell* may differ on the necessity of expert testimony on proximate cause, both agree to the objective nature of the test for proximate cause. Both ask what a reasonable or prudent person in the plaintiff's position would have done had the risks been adequately disclosed. See *id.* at 546, 653 N.E.2d at 1319 (quoting *Guebard*, 117 Ill. App. 3d at 10, 452 N.E.2d at 757); *St. Gemme*, 118 Ill. App. 3d at 769, 455 N.E.2d at 296 (quoting *Cobbs*, 502 P.2d at 11-12).

¶ 51 We need not decide whether to follow *St. Gemme* or *Coryell* on the issue of whether expert testimony on proximate cause is required in all informed-consent cases; the record contains sufficient evidence, both from the experts and from Marc, to create a triable issue under the reasonable-person standard. We disagree *Coryell* establishes a patient's subjective testimony is *alone* sufficient to create a triable issue under the reasonable-person standard.

¶ 52 In this case, the evidence establishes a triable fact exists: whether a reasonably prudent person in Marc's position would have undergone the surgery had he known of the risks of foot drop. This is not a case, like *St. Gemme*, where reasonable alternatives did not exist. Marc's testimony establishes, although he was in pain, he was still active. Marc testified he "did

everything"; it simply took him longer. Marc went to a gym and worked out consistently. He rode his bike, shot baskets, coached a softball team, and went to collegiate athletic events. The experts, while testifying hip replacement was in Marc's future, acknowledged Marc could choose other alternatives, such as continuing with therapy, delaying surgery, and simply living with the pain. Dr. Schaefer testified he had patients elect not to proceed with surgery upon hearing the risks, and those decisions were not unreasonable for them. A jury should decide whether defendants' actions proximately caused Marc's injuries. Summary judgment was improper.

¶ 53 Defendants further argue no triable issue on proximate cause exists because Marc consented to the anesthesia knowing paralysis was a risk. Defendants point to the expert testimony showing foot drop was a form of paralysis and the expert testimony showing the injuries defendant incurred could have been caused by anesthesia. Defendants contend a lack of informed consent cannot be the proximate cause when Marc knew of the risk of the injury he sustained and decided to undergo the surgery.

¶ 54 Plaintiffs contend Marc consented to the risk of paralysis associated with anesthesia, or the act of hitting the spine through anesthesia, and not to the risk of "foot drop" from the act of replacing a hip. Plaintiffs also argue Dr. Schaefer was required to inform Marc of the risk of foot drop, and the general risk of paralysis accompanying anesthesia did not relieve Dr. Schaefer of his duty.

¶ 55 The trial court concluded when Marc accepted the risk of paralysis through anesthesia, he accepted the risk of paralysis from surgery. The court found plaintiffs could not establish proximate cause on this ground.

¶ 56 We agree with plaintiffs. Consenting to risks from anesthesia is different from

consenting to risks associated with the physical removal and replacement of a hip. A person who previously and successfully underwent surgeries while anesthetized may be willing to accept the risk of paralysis from anesthesia but may be unwilling to accept the risk of a specific type of paralysis from the procedure itself. Plaintiffs' expert testified Dr. Schaefer had the duty to inform Marc of the specific risk of foot drop from hip replacement. A warning of general paralysis from an anesthesiologist—a warning provided after the decision to undergo surgery has been made—does not satisfy Dr. Schaefer's duty. Nor does such a warning negate proximate cause. At best, the evidence may be used to question Marc's testimony he would not have undergone the surgery had he known of the risk of foot drop.

¶ 57 We also disagree with defendants' contention Marc must show his injuries resulted not from the anesthesia he received but from Dr. Schaefer's conduct because Marc accepted the risk of paralysis from anesthesia. The test for recovery under the theory of failure to inform requires proof (1) the physician had a duty to warn of a particular risk of a medical procedure, (2) the physician failed to warn adequately of that risk, (3) the failure directly and proximately caused the patient to consent to treatment to which he would not otherwise have consented, and (4) the injury of which the patient was not warned occurred. *Coryell*, 274 Ill. App. 3d at 546, 653 N.E.2d at 1319. The test does not require a plaintiff to establish or explain the scientific or medical cause of his injuries.

¶ 58 The burden proposed by defendants would unfairly affect patients who are unconscious when the injury occurs and who lack expertise in medical procedures necessary to timely identify the cause. For example, in this case, Dr. Smith opined he wanted postoperative evaluations to consider whether anesthesia or the hip replacement caused Marc's foot drop, but

none were completed and Marc was "left to hope and pray that [he] get[s] better." Defendants were in a better position than Marc after his procedure to determine the medical explanation for Marc's injury. If a scientific or medical cause exists that would exonerate the physician, the physician bears the burden of establishing that cause as a defense.

¶ 59 III. CONCLUSION

¶ 60 We reverse the trial court's judgment and remand for additional proceedings.

¶ 61 Reversed and remanded.