2015 IL App (1st) 140102-U
No. 1-14-0102

THIRD DIVISION
Order filed September 9, 2015
Modified upon denial of rehearing January 20, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NAZMI NOMAT, Plaintiff-Appellee, v. RICHARD MOTA and KENNICOTT BROTHERS COMPANY, an ILLINOIS CORPORATION, Defendants-Appellants, FLORISTS' MUTUAL INSURANCE CO., Plaintiff-Appellant, v. NAZMI NOMAT, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. Nos. 12 L 1732 & 10 M6 2163 (consolidated) The Honorable Lorna Propes, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justice Hyman and Presiding Justice Mason concurred in the judgment.

O R D E R

¶ 1 *Held:* (1) The trial court abused its discretion in barring the entirety of the defense expert's opinion regarding reasonableness of medical bills. While the expert's opinion regarding insurance reimbursement rates from her database program was properly excluded, it was an abuse of discretion to bar the expert's testimony regarding the reasonableness of medical bills, office visits, and the markup for plaintiff's surgical hardware. (2) The trial court's ruling allowing plaintiff's treating surgeon to testify regarding the reasonableness of other medical bills was not an abuse of discretion where the physician testified that he has knowledge of the services rendered and was familiar with the usual and customary charges and that he reviewed the bills. (3) Any error in not allowing testimony of Dr. Michael's attorney's prior inconsistent statement regarding whether Dr. Michael had offices in Illinois was harmless error where no impeachment would have resulted because Dr. Michael testified he had three offices in Illinois. (4) The trial court did not err in granting summary judgment in plaintiff's favor on the insurer's claim under the insurance fraud statute based on lack of standing, because even if plaintiff made allegedly false statements, those statements were made to the defendants in the underlying lawsuit, not the insurer, and the claims were not made on a policy of insurance. (5) The trial court's ruling quashing defendants' subpoenas but allowing additional disclosures by plaintiff within 60 days of trial was an abuse of discretion. (6) The jury's damages award for future lost wages was too speculative and was against the manifest weight of the evidence, and admission of plaintiff's expert's testimony on future lost wages was error, where the evidence at trial established that plaintiff had not been employed as a butcher, was unemployed for 18 months prior to the accident, and had not even accepted the job with the wage amount relied upon by plaintiff's expert for calculation of lost wages. The verdict was reversed and remanded for a new trial on all damages, with instructions to the trial court to allow defendants full relevant discovery and to bar plaintiff's expert on future lost wages.

¶ 2 BACKGROUND

¶ 3 Plaintiff, Nazmi Nomat, filed a two-count complaint against defendants Richard Mota and Mota's employer, Kennicott Brothers Company (Kennicott), for damages resulting from a motor vehicle accident that occurred on October 20, 2009. Defendants admitted negligence, and the case was tried on damages only. The following facts are from defendants' statements of facts that have appropriate supporting citations to the record, as plaintiff did not file their own statement of facts or dispute any of the facts in defendants' brief.

¶ 4 After the accident, plaintiff was taken by paramedics to South Suburban Hospital, where plaintiff was diagnosed with strains to his lumbar spine and right ankle. Plaintiff was treated and

released the same day. Plaintiff subsequently was treated by a chiropractor, James Egan, and multiple doctors at Pain Net Medical Group who provided injections and other treatment. Plaintiff completed treatment at Pain Net Medical Group on March 4, 2010. On March 5, 2010, Dr. Egan also discharged plaintiff from his care. Plaintiff claimed injuries to his neck, lower back, left shoulder, and right ankle.

¶ 5 Plaintiff testified that he had temporary relief due to the treatment he received but that his pain returned. Two months later, on May 5, 2010, plaintiff presented to neurosurgeon Ronald Michael, for an independent medical exam and/or treatment, according to plaintiff's testimony, upon referral by plaintiff's attorney. Dr. Michael began treating plaintiff on June 15, 2010.

¶ 6 Dr. Michael performed a cervical plasma disc decompression procedure on March 22, 2011, and treated the plaintiff's neck and back until April 25, 2011, when he discharged plaintiff from his care.

¶ 7 Plaintiff returned to Dr. Michael with worsening lower back pain, however, on July 25, 2011, and so Dr. Michael again began treating plaintiff. After extensive therapy, numerous injections and multiple discograms, Dr. Michael eventually performed a three-level lumbar fusion at Metro South Medical Center on May 17, 2012.

¶ 8 Medical Bills Damages

¶ 9 The total amount of bills for the treatment rendered by Dr. Michael was $373,231.85. Of that amount, Dr. Michael's surgical fee for the lumbar fusion performed on plaintiff on May 17, 2012 was $254,481.62. The bills from Metro South Medical Center for the lumber fusion surgery totaled $367,810.19. Of that amount, $316,890 was for the surgical hardware implants used for the fusion. Dr. Michael testified that plaintiff was permanently and totally disabled as a result of

the accident. Dr. Michael also testified that all of plaintiff's treatment was reasonable, necessary and related to the accident.

¶ 10 Defendants' medical expert, orthopedic surgeon Jesse Butler, testified that as a result of the accident plaintiff suffered cervical and lumbar strains and an exacerbation of cervical and lumbar disc degeneration. Butler opined that none of plaintiff's medical treatment after discharge by Dr. Egan was causally related to the accident.

¶ 11 During his evidence deposition, Dr. Michael was given an exhibit of approximately 125 pages that included all of plaintiff's medical bills from all providers. Dr. Michael testified that all of the charges were usual and customary for the treatment rendered. Plaintiff's Rule 213 disclosures for Dr. Michael stated that Dr. Michael would testify that the amounts of all of plaintiff's medical bills were usual and customary for all treatment rendered to plaintiff.

¶ 12 Defendant's Expert Opinion Regarding Medical Bills

¶ 13 Defendants' expert regarding plaintiff's medical expenses was Mary Rossi, a certified legal nurse consultant. Rossi prepared five reports regarding the reasonableness of plaintiff's medical charges, which were cumulative reports as plaintiff received additional treatment. The last report included opinions on all the bills. Copies of all of Rossi's reports were produced to plaintiff. Defendants disclosed that Rossi would testify at trial consistent with her reports and her discovery deposition. During Rossi's discovery deposition, she testified that she reviewed bills from neurosurgeons and spine surgeons in the Chicago area, including bills for more than ten other three-level fusions. Rossi's opinions regarding the reasonableness of medical charges were based largely on information from her employer's bill review database and a proprietary software program which analyzed and compared billing codes in specific geographic regions. Rossi testified that the charges would be unreasonable only if they exceeded the amount billed by 80%

of other providers in the same geographic region for the same treatment. The software program compared the prices of hundreds of thousands of bills for individual services and procedures in the Chicago area. Rossi entered the codes from plaintiff's medical bills into this software program to arrive at her opinion. Rossi also testified to broader opinions regarding the reasonableness of care rendered to plaintiff and the appropriateness of charges. Rossi opined that plaintiff's medical bills were unreasonable and hundreds of thousands of dollars higher than charges for the same procedures in the same geographic region.

¶ 14 During written discovery and prior to Rossi's deposition, defendants objected to producing information regarding the proprietary software program. Plaintiff did not ask Rossi about the program during her deposition. Plaintiff also did not file a motion to compel or request any further information from defendants regarding the software program.

¶ 15 Plaintiff did, however, file a motion *in limine* to bar Rossi's testimony at trial, arguing that Rossi was not qualified to render opinions as an expert. The court ruled that Rossi was not qualified to give an opinion regarding whether the medical bills were usual and customary to the extent that the database she used would allow her to give a range "median or [] mean" charges. The court ruled Rossi could not testify to her opinion based on her 80% figure because such a "hybrid" opinion based on her employer's database and the proprietary software program, which included insurance company reimbursement guidelines, mixed with an opinion about what is reasonable and customary. The court stated, "reasonableness is the standard, not reimbursement, and her opinion is all bound up in reimbursement."

¶ 16 The court also ruled that the analysis of the codes and other charge amounts in certain geographic regions as a basis for her opinions was not disclosed during discovery and so was a "213 violation."

¶ 17 The court further found that Rossi's opinion regarding reasonableness was "dependent on her opinions regarding the appropriateness of treatment which she is unqualified to express."

¶ 18 The court granted plaintiff's motion *in limine* to bar Rossi's testimony. Defense counsel stated, "I understand your ruling, your Honor, and I acknowledge the ruling. I'm not going to contest it." Defense counsel then made an oral motion *in limine* "to bar the plaintiff from any comment or argument that the defense has failed to call a witness to challenge Dr. Michael's opinion that [the medical bills were] fair and reasonable."

¶ 19 Plaintiff's Disclosures of Medical Bills

¶ 20 From October 25, 2011 to March 12, 2012, defendants sent seven Rule 201(k) letters to plaintiff requesting a complete set of Dr. Michael's records. On October 31, 2012, the court set trial for May 20, 2013, and ordered plaintiff to produce all records and bills related to his surgery.

¶ 21 On April 10, 2013, defendants filed a motion to continue trial for additional time for discovery based upon plaintiff's continued treatment and updated witness disclosures. On April 16, 2013, the court granted the motion and continued trial until October 21, 2013.

¶ 22 On May 23, 2013, defendant subpoenaed Metro South Medical Center for records and receipts concerning the hardware used in plaintiff's surgery. On July 15, 2013, defendants followed up with Metro South Medical Center requesting a response. On July 16, 2013, defendants presented a motion to compel the production of updated medical records, which was entered and continued until August 8, 2013. The court then ordered the parties to return on September 18, 2013, for status on discovery. Metro South Medical Center responded to defendants' subpoena and provided documentation regarding the surgical hardware costs.

¶ 23 On August 9, 2013, defendants issued additional subpoenas for records, bills, and depositions of person most knowledgeable from Metro South Medical Center and CEM Medical, LLC (the company which sold the surgical hardware to Metro South Medical Center) concerning the reasonableness of the costs of the surgical hardware. These subpoenas were issued 74 days prior to the scheduled trial. The document responses were requested by August 23, 2013, 60 days prior to trial, and depositions were requested for August 30, 2013, 53 days prior to trial.

¶ 24 On August 21, 2013, plaintiff presented an emergency motion to quash defendants' subpoenas for these records, bills, and depositions from Metro South Medical Center and CEM Medical, LLC. The court granted the motion to quash because the trial date was only 60 days away.

¶ 25 On September 10, 2013, 41 days prior to the scheduled trial date, plaintiff disclosed over 250 pages of medical records, bills, and updated Rule 213(f) witness disclosures. Plaintiff also produced additional bills and witness disclosures on September 17, 2014, 34 days prior to the scheduled trial date. Defendants moved to bar plaintiff's disclosures as untimely. The court allowed plaintiff's disclosures made up to September 18, 2013 to stand but barred all subsequent disclosures.

¶ 26 Plaintiff then filed an emergency motion to continue the trial, and trial was continued until December 2, 2013.

¶ 27 Wage Loss Damages and Claim for Insurance Fraud

¶ 28 During written discovery, defendants asked plaintiff whether he intended to make a wage loss claim and, if so, the basis of the claim. On September 28, 2010, plaintiff answered that "he is not employed." Plaintiff did not disclose that there was an offer of employment as a butcher in August 2009. Plaintiff also did not mention this job offer in his discovery deposition. Rather,

plaintiff testified at his deposition that at the time of the accident he was actually on the way to look for a job.

¶ 29 In a settlement demand letter dated October 7, 2011, plaintiff stated that his lost earnings "will approach and probably exceed $1,000,000." These lost earnings were based on the fact that plaintiff "had secured employment" as a butcher prior to the accident. The settlement demand letter asked defendants' counsel to forward a copy of the letter to defendants' insurer, Florists' Mutual Insurance Company (Florists).

¶ 30 Florists then filed an action against plaintiff for insurance fraud. The insurance fraud action was consolidated with plaintiff's case.

¶ 31 During plaintiff's discovery deposition, plaintiff testified that he did not work at the cell phone store in any capacity after March 2008. Plaintiff's brother-in-law, Raji Roumeh, testified, however, that plaintiff and his wife were both working at the store in 2011. Roumeh also testified that plaintiff "works all the time."

¶ 32 Plaintiff's tax returns from 2009 and 2010 showed earnings from both unemployment benefits and from wages earned as a manager at the cell phone store.

¶ 33 Plaintiff filed a motion for summary judgment on Florists' insurance fraud claim. As part of his motion, plaintiff filed an affidavit averring that he never rejected Figuigui's job offer and intended to accept the offer unless he found a higher-paying job elsewhere, and that he was training his wife to run the cell phone store. The court granted plaintiff's motion for summary judgment and dismissed Florists' insurance fraud claim.

¶ 34 In the court's written opinion granting the summary judgment motion, the trial court ruled that statements made in the demand letter were inadmissible because they were made during settlement negotiations. The basis for granting the motion for summary judgment, however, was

the court's legal holding that a third party cannot be civilly liable for insurance fraud, and that an insurance company can only bring an action for fraud against its own policy holders. Florists' motion to reconsider was denied. The court declined to make its ruling immediately appealable pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)).

¶ 35 Trial

¶ 36 Rachid Figuigui, an extended relative of plaintiff, testified that, prior to the accident, he had offered plaintiff a job as a butcher in August 2009 with a salary of $1,000 per week. Plaintiff told Figuigui he needed time to consider the offer. After not hearing from plaintiff, Figuigui eventually called plaintiff to ask if plaintiff planned on accepting the job. Plaintiff responded that he had been in a car accident and was unable to work. According to Figuigui's affidavit, however, plaintiff applied for the job in October 2009 but then called Figuigui later that month to say that he could not work because he was in a car accident.

¶ 37 Plaintiff testified that he was unemployed at the time of the accident. Plaintiff had applied for unemployment benefits before the accident. Plaintiff testified that he used to earn $500 per week when he worked in a cell phone store which he owned with his wife, but he had not worked in the store or received a paycheck for 18 months prior to the accident. During that period, plaintiff was looking for another job but had difficulty finding one. Plaintiff continued to spend time at the store to help his wife. Plaintiff testified that he did not accept the job right away because he had to train his wife to run the cell phone store on her own. Plaintiff also wanted to look for a job closer to home. Plaintiff testified that he planned to accept the job in November 2009 because that was when the grocery industry was busier.

¶ 38 Plaintiff's economic expert, Dr. Charles Linke, testified that plaintiff's combined lost earnings prior to trial and lost future earnings ranged from $945,836 to $1,014,318. Linke

testified that his calculations were based upon the representation from plaintiff's attorney that plaintiff "expected to begin working" as a butcher, for the stated wage of $1,000 per week, in mid-November 2009. Linke testified his calculations would not differ regardless of whether plaintiff accepted the job because the offer was evidence of earning capacity.

¶ 39 Damages Award

¶ 40 The jury awarded plaintiff $1,115,000 for the reasonable expenses of medical treatment and services received and the present value of the reasonable expenses of medical care in the future. The jury awarded $750,000 for pain and suffering and $750,000 for loss of a normal life. The jury awarded plaintiff the full amount of lost earnings, $945,836, based on plaintiff's expert's calculations of lost earnings. Defendants and Florists timely appealed.

¶ 41 ANALYSIS

¶ 42 Defendants appeal the damages award, and the court's order granting plaintiff's motion for summary judgment on Florists' counter-claim under the insurance fraud statute. Defendants argue that the trial court erred in the following: (1) barring defendants' medical expense expert; (2) quashing the subpoenas regarding plaintiff's medical expenses; (3) entering summary judgment against defendants on their claim under the Illinois insurance fraud statute (720 ILCS 5/17-10.5 (West 2012)); (4) allowing plaintiff's treating surgeon to testify regarding the reasonableness of other medical bills without sufficient foundation; and that (5) the verdict for lost earnings was against the manifest weight of the evidence where plaintiff never even accepted the job. Defendants argue that the "[n]umerous improper rulings prior to and during trial unfairly prohibited Defendants from presenting competent evidence to rebut plaintiff's alleged damages and warrant reversal for a new trial on all damages" We agree.

¶ 43 I. The Court Abused Its Discretion in Barring the Entirety of the

Defense Expert's Testimony Regarding Reasonableness of Medical Bills.

¶ 44 Defendants first argue that the trial court erred and abused its discretion in barring Rossi's expert opinion regarding the reasonableness of plaintiff's medical bills. Plaintiff argues that defendants waived this issue at trial and cannot now raise it on appeal.

¶ 45 A motion *in limine* is an interlocutory order and remains subject to reconsideration by the court throughout the trial. Thus, a party whose motion *in limine* has been denied must object when the challenged evidence is presented at trial in order to preserve the issue for review, and the failure to raise such an objection constitutes a waiver of the issue on appeal. (Internal citations omitted.) *Krengiel v. Lissner Corp*., 250 Ill. App. 3d 288, 294-95 (1993). Even where a court makes a definitive ruling on a motion *in limine*, an objection must be made and preserved. The supreme court has instructed that failure to renew an objection to a ruling on a motion *in limine* at trial results in forfeiture. *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002). See also *Davis v. City of Chicago*, 2014 IL App (1) 122427, ¶ 77 ("[the] argument that a trial court's definitive ruling on a motion *in limine* renders any further objection unnecessary has previously been considered and rejected by this court."). "This court made clear that in order to preserve objections related to evidence sought to be excluded *in limine* for appellate review, the party must make a contemporaneous objection." *Id.* See also *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1132 (2000) (because the trial court may reconsider at trial its ruling on a motion *in limine*, a party must repeat its objection at trial).

¶ 46 Defendants, however, characterize plaintiff's motion as a "motion to bar" rather than a motion *in limine*. Defendants argue that a motion to bar is not interlocutory and therefore an immediate objection was not necessary to preserve the issue for review, citing to *Guski v. Raja*, 409 Ill. App. 3d 686, 705 (2010). We first note that there is no page 705 for this case in the

Illinois Appellate reported decisions. Second, to the extent defendants rely on *Guski*'s discussion of *McMath v. Katholi*, 304 Ill. App. 3d 369 (1999), *rev'd on other grounds*, 191 Ill. 2d 251 (2000), the holding of *McMath* concerning motions to bar testimony during trial is somewhat distinguishable, as in *McMath*, the motion to bar the witness's testimony was made on the last day of trial (*McMath v. Katholi*, 304 Ill. App. 3d at 376), while in this case the motion was filed as a pre-trial motion *in limine* before trial commenced. Plaintiff filed his motion *in limine* to bar Rossi's testimony as the ninth motion *in limine* in a series of motions *in limine* prior to trial, and defendants filed their response to the motion *in limine* a day before jury selection. Plaintiff's motion was treated by defendants as a motion *in limine* both in their response to the motion, asking that the court "deny Plaintiff's Motion in Limine #9 and allow Mary Rossi to testify at trial," and at trial during argument before the court. The court was correct in treating both the title and the substance as a motion *in limine*.

¶ 47 Plaintiff filed a petition for rehearing after our previous order, arguing that the rule requiring a contemporaneous objection and an offer of proof to preserve an objection to an *in limine* ruling is "absolute" in civil cases under *People v. Denson*, 2014 IL 116231. Plaintiff then also filed a motion for leave to cite the recent change in Rule 103(b) of the Illinois Rules of Evidence as authority for the distinction between civil and criminal cases with respect to whether an objection or offer of evidence must be used to preserve error concerning a motion *in limine* ruling. See Ill. R. Evid. 103(b) (eff. Oct. 15, 2015). We granted plaintiff's motion for leave to cite the recent change in the amendment of Rule 103 to add new subsection (b). In this modified order, we acknowledge the new rule requiring that "[*i*]*n civil and criminal trials* where the court has not made a previous ruling on the record concerning the admission of evidence, a

contemporaneous trial objection or offer of proof must be made to preserve a claim of error for appeal." (Emphasis added.) Ill. R. Evid. 103(b)(1) (eff. Oct. 15, 2015).

¶ 48 Nevertheless, plaintiff's motion *in limine* was presented on the first day of trial and ruling on the motion was continued to the following day to allow the trial court to review Rossi's deposition. The lawyers then had an extended hearing on the admissibility of Rossi's opinions and the trial court ultimately concluded and ruled on the record that she would not be allowed to testify. Defense counsel's objection to the admissibility of the testimony was extensively argued. The court made its ruling after the jury was dismissed for the day, prior to the day Rossi was to testify. When the court granted plaintiff's motion *in limine* and barred Rossi's testimony, counsel for defendants stated, "I understand your ruling, your Honor, and I acknowledge the ruling. I'm not going to contest it." In their reply brief, defendants argue that counsel's statement "simply acknowledged that he understood the Court had ruled and would not continue to argue." This did not mean that counsel waived his continuing objection. We do not read defense counsel's statement that he would "not contest" the ruling as an indication that he intended to abandon the ability to claim error in the exclusion of her testimony on appeal. Rather, because the ruling was made after trial began, counsel was merely indicating that he would not press the issue further with the trial judge.

¶ 49 Plaintiff further argues that the court's ruling barring Rossi's testimony was waived also where defendants did not make an offer of proof. When a motion *in limine* is granted, the key to preserve review of any error in the exclusion of evidence is an adequate offer of proof at trial. *Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003) (citing *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 471 (2001)). In this case, however, the parties and the court were well aware of what the substance of Rossi's testimony would be, as the parties argued at length about it before the court during the hearing on plaintiff's motion *in limine* to bar her testimony. "[A]n offer of proof is not required

where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced." *Dillon v. Evanston Hospital,* 199 Ill. 2d 483, 495 (2002). Making an offer of proof was unnecessary in this case. Because the court excluded Rossi's testimony entirely based on the court's review of her deposition, there was no need to either re-raise the issue during trial or make an offer of proof. Further, because Rossi's deposition is in the record, we have an adequate basis on which to review the trial court's ruling without an offer of proof.

¶ 50 As to the merits of defendants' argument that the court erred in excluding Rossi's testimony, while we agree that Rossi's opinions based on insurance billing and reimbursement in the database were inappropriate and inadmissible, we find that certain portions of Rossi's testimony were entirely appropriate. The database maintained by Rossi's employer allows her to opine regarding the reasonableness of medical bills for office visits, treatment, and markups for the hardware used in plaintiff's surgery. Rossi's testimony that a mark-up of 10-25% is reasonable had a sufficient basis. Rossi's opinion that a mark-up of 450% on the hardware used in plaintiff's three-level lumbar fusion was unreasonable was appropriate. This evidence should have been presented to the jury. This is particularly true since Dr. Michael was allowed to testify that the mark-up was reasonable given that for-profit hospitals have to pay so many people to run the hospital. Rossi also opined that Dr. Michael's charges (>$300,000) for the lumbar fusion were unreasonable, again based on the information in her database. In her deposition, plaintiff's counsel asked her what charges of other neurosurgeons for lumbar fusion surgery she had reviewed and she could not identify anyone by name. But Rossi's inability to list specifics of charges for other lumbar fusions she had reviewed goes to the weight, not the admissibility of her testimony.

¶ 51 Also, Rossi was of the opinion that Michael incorrectly coded office visits other than the initial consultation with the CPT 99245 (a code denoting an initial consultation and an 80-minute visit). Following his initial consultation with plaintiff, Michael continued to use the 99245 code (except for an office visit on 6/21110 for which he used a code indicating a 40-minute visit), instead of codes designating office visits of shorter duration. Rossi's opinion was that because there was no indication that, in fact, Michael spent 80 minutes with plaintiff every time plaintiff came to his office, his use of that code was not reasonable and, therefore, his charges were overstated. This was an appropriate admissible opinion. Particularly since Dr. Michael was allowed to offer the opinion that every provider's bills and services were reasonable with little or no foundation, we believe it was an abuse of discretion to exclude Rossi's testimony in its entirety.

¶ 52 We therefore reverse and remand for a new trial on damages to allow testimony regarding reasonableness of medical bills by the defense expert, whether defendants should choose to again disclose Rossi as their expert or obtain another expert.

¶ 53 II. The Court Abused its Discretion in Quashing Defendants' Subpoenas Regarding Medical Expenses.

¶ 54 Next, defendants argue that the trial court improperly quashed their subpoenas regarding plaintiff's updated medical treatment and bills as untimely while allowing plaintiff's subsequent disclosures. Defendants also argue that the court erred in quashing their subpoenas and not allowing them to seek records and depose material witnesses concerning plaintiff's treatment and surgical hardware. Defendants sought discovery regarding the amount of the markup of the cost of the surgical hardware used in plaintiff's surgery. Defendants argue that, had they been allowed to introduce evidence concerning the drastic overbilling by plaintiff's medical providers, Dr.

Michael's credibility regarding the causal relationship between the accident and plaintiff's need for medical treatment and inability to return to work would have been undermined. According to defendants, "[w]ith Dr. Michael's testimony regarding medical expenses called into question, the jury likely would have further questioned his testimony regarding the causal relationship between the accident at issue and the surgeries he performed and his opinions regarding the plaintiff's ability to return to work."

¶ 55 The decision to quash subpoenas is reviewed for an abuse of discretion. *Mistler v. Mancini*, 111 Ill. App. 3d 228, 233 (1982). The trial court quashed defendant's subpoenas pursuant to Illinois Supreme Court Rule 218(c) (Ill. S. Ct. R. 218(c) (eff. Oct. 4, 2002)), which requires that all discovery be completed 60 days prior to trial. Rule 218(c), in relevant part, provides as follows:

> "All dates set for the disclosure of witnesses, including rebuttal witnesses, and the completion of discovery shall be chosen to ensure that discovery will be completed not later than 60 days before the date on which the trial court reasonably anticipates that trial will commence, unless otherwise agreed by the parties. This rule is to be liberally construed to do substantial justice between and among the parties." Ill. S. Ct. R. 218(c) (eff. Oct. 4, 2002).

¶ 56 Defendants argue that their subpoenas should not have been quashed because they were issued more than 60 days prior to trial, and they were promptly issued upon learning of the identity of the proper entities with knowledge of the charges for the hardware used in plaintiff's surgery.

¶ 57 Defendants also alternatively argue that even if the court's decision to quash defendants' subpoenas was not abuse of discretion, allowing additional disclosures by plaintiff thereafter was

improper and prejudicial. Defendants maintain that the court abused its discretion by enforcing the 60-day rule against defendants, but not against plaintiffs.

¶ 58 We agree with defendants. We note that Rule 218(c) is not inflexible. Rule 218(c) further provides: "This rule is to be liberally construed to do substantial justice between and among the parties." Ill. S. Ct. R. 218(c) (eff. Oct. 4, 2002). Plaintiff disclosed over 250 additional pages of medical records and bills for treatment over a number of years, as well as updated Rule 213 witness disclosures, on September 10, 2013 and on September 17, 2013, just 41 and 34 days, respectively, prior to the scheduled trial date. We acknowledge plaintiff's point that he had a duty to supplement his discovery responses. See Illinois Supreme Court Rule 213(i) (eff. July 1, 2002)). See also *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 453-54 (2004) ("A party has a duty to supplement seasonably or amend prior answers or responses whenever new or additional information becomes known to that party."). To quash defendants' subpoenas, while simultaneously allowing plaintiff's supplemental discovery with over 250 additional pages of medical records within 60 days of trial, was unfair and prejudiced defendants. "To allow either side to ignore the plain language of Rule 213 defeats its purpose and encourages tactical gamesmanship." *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 454 (2004) (citing *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109-10 (2004), citing *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 537 (1998)).

¶ 59 Here, the trial court abused its discretion in enforcing Rule 218(c) against defendants while allowing plaintiff's supplemental disclosures within 60 days of trial. Defendants were diligent in attempting to obtain updated disclosures specifically concerning the cost of plaintiff's surgical hardware. On May 23, 2013, defendants subpoenaed Metro South Medical Center for records and receipts concerning the hardware used in plaintiff's surgery. On July 15, 2013,

defendants followed up with Metro South Medical Center requesting a response. On July 16, 2013, defendants moved to compel the production of updated medical records, which was entered and continued until August 8, 2013. The very next day, on August 9, 2013, defendants issued additional subpoenas for records, bills, and depositions of person most knowledgeable from Metro South Medical Center and CEM Medical, LLC, concerning the reasonableness of the costs of the surgical hardware. These subpoenas were issued 74 days prior to the scheduled trial. Meanwhile, the court allowed plaintiff to disclose over 250 pages of additional medical records 41 days prior to trial. To not allow the requested material and depositions, for which subpoenas were issued 74 days prior to trial, but allow plaintiff's disclosures 41 days prior to trial, was an abuse of discretion.

¶ 60 Further, the trial court allowed plaintiff's treating surgeon to testify to the cost of the markup of the surgical hardware used in plaintiff's surgery, but did not allow defendants their requested discovery regarding this issue.

¶ 61 Defendants also argue that plaintiff's motion to quash their subpoenas should not have been granted where plaintiff did not comply with Illinois Supreme Court Rule 201(k) (Ill. S. Ct. R. 201(k) (eff. July 1, 2002)) and include the required language regarding efforts to resolve discovery differences in their motion. Defendants are correct that plaintiff was required to include Rule 201(k) language in their motion to quash the subpoenas and deposition notices. Although subpoenas alone are not a discovery device subject to Rule 201(k), because under a subpoena the materials sought technically must be returned to the court, subpoenas coupled with notices of deposition *are* a "discovery procedure" falling under the requirement of Rule 201(k). *In re Marriage of Riemann*, 217 Ill. App. 3d 270, 272 (1991). But, as plaintiff argues, defendants forfeited this argument by not raising this particular objection below before the trial court. We

need not reach this ground, however, as we hold that the trial court abused its discretion in granting the motion to quash defendants' subpoenas and depositions notices for the reasons stated above.

¶ 62 We therefore reverse based in part on this erroneous ruling and order a new trial on damages, instructing the court to allow defendants full relevant discovery.

¶ 63 III. Allowing Dr. Michael to Testify Regarding the Reasonableness of Other Bills Was Not An Abuse of Discretion.

¶ 64 Next, defendants argue that the trial court improperly allowed plaintiff's treating surgeon, Dr. Michael, to testify to his opinion regarding the reasonableness of plaintiff's medical bills of other providers, without sufficient foundation.

¶ 65 We disagree. A claimant can prove medical bills are reasonable by either (1) presenting testimony that the bills were paid, or (2) if the bills are unpaid, by presenting medical expert testimony that the bills were reasonable. *Arthur v. Catour*, 216 Ill. 2d 72, 82-83 (2005). To introduce an unpaid bill into evidence, a party must establish that the bill is reasonable for the services of the nature provided. *Id*. A party seeking admission of an unpaid bill into evidence " 'can establish reasonableness by introducing the testimony of a person having knowledge of the services rendered and the usual and customary charges for such services.' " *Arthur*, 216 Ill.2d at 82 (quoting *Baker v. Hutson*, 333 Ill. App. 3d 486, 493 (2002). This includes establishing that the charges are usual and customary charges for services in a similar geographic area in which the services were provided. See, e.g., *Tsai v. Kaniok*, 185 Ill. App. 3d 602, 604-05 (1989). Expert testimony is admissible "if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence." *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003). We may not disturb a circuit court's

decision on whether to exclude an expert witness' testimony absent an abuse of discretion. *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006).

¶ 66 Although defendants argue that Dr. Michael did not review the bills prior to his evidence deposition, the record reveals that Dr. Michael reviewed those bills during his deposition and testified that the bills were usual and customary and that the treatment plaintiff received was reasonable and necessary. See *Kunz v. Little Co. of Mary Hosp. and Kunz v. Little Co. of Mary Hospital and Health Care Centers*, 373 Ill. App. 3d 615, 625 (2007) (held that the practicing nephrologist's testimony regarding the reasonableness of all unpaid charges relating to the plaintiff's dialysis was properly admitted where the doctor testified that he was familiar with the operation of dialysis centers and facilities and "the reasons why dialysis charges are charged the way they are" and that he reviewed plaintiff's medical bills and found that they were reasonable, customary, and necessary).

¶ 67 Defendants also argue that Dr. Michael should not have been allowed to testify regarding the reasonableness of the bills from other providers because plaintiff's Rule 213 disclosure that he would testify that all bills were usual and customary was inadequate. We find no merit to this argument. Although defendants portray the disclosure as a "catch-all" disclosure, we find that plaintiff's Rule 213 disclosure specifically disclosed that Dr. Michael would testify not only to the reasonableness of his own bills but also that "all" bills were usual and customary for the treatment rendered.

¶ 68 The ruling by the trial court allowing Dr. Michael to testify to the reasonableness of plaintiff's other medical bills was not an abuse of discretion and is not one of our grounds for reversing the verdict and remanding for a new trial on damages.

IV. Any Error in Barring Impeachment of Dr. Michael With

His Attorney's Prior Inconsistent Statement Was Harmless.

¶ 69 Defendants also argue that the trial court improperly barred their attempted impeachment of Dr. Michael with his attorney's prior statement that Dr. Michael had no offices in Illinois, which was inconsistent with Dr. Michael's deposition testimony that he had three offices in Illinois. Defendants cite to *People v. Purrazzo*, 95 Ill. App. 3d 886, 896 (1981), which recites the general proposition that a witness may be impeached during cross-examination with his own statements or acts which are at variance with his trial testimony and *Lowe v. Kang*, 167 Ill. App. 3d 772, 776 (1988), for the general proposition that attorneys are considered agents of their clients for purposes of making admissions. In their reply brief, defendants cite to *People v. Saunders*, 288 Ill. App. 3d 523, 526 (1997), for the general proposition that an agent is authorized by a principal to act for or in place of him.

¶ 70 A statement can be used as a prior inconsistent statement for impeachment purposes when the statement is specifically attributable to the witness. *People v. Mays*, 81 Ill. App. 3d 1090, 1097 (1980). Although plaintiff argues in response that there is no agency between Dr. Michael and his attorney because Dr. Michael is not a party, this court has found that an attorney is the client's agent and statements made by the attorney are binding on the client as admissions. See *Lowe v. Kang*, 167 Ill. App. 3d 772, 776 (1988). See also *People v. Accardo*, 195 Ill. App. 3d 180, 195 (1990) (holding, in a criminal setting, that statements made by a witness's attorney at an earlier proceeding are arguably proper for impeachment purposes as prior inconsistent statements).

¶ 71 In this case, however, Dr. Michael's attorney's prior inconsistent statement regarding whether Dr. Michael had offices in Illinois was only relevant to the issue of whether Dr. Michael was familiar with the charges in the geographic area for plaintiff's treatment. Dr. Michael

testified that he was indeed familiar with the charges and that he had three offices in Illinois, an easily verifiable fact. The prior inconsistent statement by Dr. Michael's attorney would not have resulted in impeachment of Dr. Michael. We hold that any error in not allowing testimony of Dr. Michael's attorney's prior inconsistent statement regarding whether Dr. Michael had offices in Illinois was harmless error. See *Hall v. Northwestern University Medical Hall v. Northwestern University Medical Clinics*, 152 Ill. App. 3d 716, 725 (1987) (held the trial court's refusal to permit plaintiff to attempt impeachment of physician sitting at defendant's table regarding payment by plaintiff was harmless error where no impeachment would have resulted because the physician would have testified he was not paid). We do not base our reversal and remand for a retrial on this ground advanced by defendants.

V. Summary Judgment was Properly Granted in Plaintiff's Favor on Florists' Claim Under the Insurance Fraud Statute Because Florists is Not Plaintiff's Insurer and Plaintiff Did Not Make Any False Claims On a Policy of Insurance.

¶ 72 Defendants and Florists also argue that the court improperly granted summary judgment in plaintiff's favor on Florists' insurance fraud claim against plaintiff based on lack of standing. Defendants and Florists argue that Florists has standing to sue plaintiff for insurance fraud. Defendants and Florists argue that the Insurance Fraud statute is not limited to first party claims against its own insurers, and that the statute provides that "a person" shall be liable for making a "false claim" against an insurance company. 720 ILCS 5/17-10.5(e)(1) (West 2012). Defendants and Florists also argue that, once past the threshold issue of standing, summary judgment was also improperly granted on Florists' insurance fraud claim where there are genuine issues of material fact regarding whether plaintiff ever intended to work as a butcher and whether plaintiff intentionally made false claims regarding alleged lost earnings.

¶ 73 "The trial court may grant a summary judgment after considering the pleadings, depositions, admissions, exhibits, and affidavits on file." *Id*. However, " 'a summary judgment is a drastic method of terminating litigation.' " *Id*. (quoting *Trtanj v. City of Granite City*, 379 Ill. App. 3d 795, 799 (2008)). We will reverse an order granting a summary judgment when we conclude "that a material issue of fact exists or that the summary judgment was based upon an erroneous interpretation of the law." *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 909 (1994).

¶ 74 We review *de novo* a trial court's decision to grant or deny a motion for summary judgment. *Taylor v. Bi-County Health Department*, 2011 IL App (5th) 090475, ¶ 26. We also review the trial court's order granting summary judgment based on lack of standing *de novo*. *A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 22; *Malec v. City of Belleville*, 384 Ill. App. 3d 465, 468 (2008).

¶ 75 Florists does not have standing under the facts of this case to bring a claim against plaintiff pursuant to the Illinois insurance fraud statute of the Criminal Code of 1961, which provides for civil damages in cases of insurance fraud (720 ILCS 5/46-5 (West 2012)), as plaintiff did not make any false claims on a policy of insurance. The Act provides the following:

> "(a) Insurance fraud.
>
> (1) A person commits insurance fraud when he or she knowingly obtains, attempts to obtain, or causes to be obtained, by deception, control over the property of an *insurance company* or self-insured entity by the *making of a false claim or by causing a false claim to be made on any policy of insurance issued by an insurance company* or by the making of a false claim or by causing a false claim to be made to a self-insured entity, intending

to deprive an *insurance company* or self-insured entity permanently of the use and benefit of that property.

* * *

(e) Civil damages for insurance fraud.

(1) A person who knowingly obtains, attempts to obtain, or causes to be obtained, by deception, control over the property of any *insurance company* by the *making of a false claim or by causing a false claim to be made on a policy of insurance* issued by an *insurance company*, or by the making of a false claim or by causing a false claim to be made to a self-insured entity, intending to deprive an insurance company or self-insured entity permanently of the use and benefit of that property, shall be *civilly liable to the insurance company or self-insured entity* that paid the claim or against whom the claim was made or to the subrogee of that insurance company or self-insured entity in an amount equal to either 3 times the value of the property wrongfully obtained or, if no property was wrongfully obtained, twice the value of the property attempted to be obtained, whichever amount is greater, plus reasonable attorney's fees." (Emphases added.) 720 ILCS 5/46-5(a)(1), (e)(1) (West 2012).

¶ 76 The doctrine of standing was summarized recently by this court in *Schacht v. Brown*, 2015 IL App (1st) 133035:

"The doctrine of standing ensures that issues are raised only by those parties with a real interest in the outcome of the controversy. *Wexler v. Wirtz Corp*., 211 Ill. 2d 18, 23 *** (2004). To have the requisite standing to maintain an action, a plaintiff must complain of some injury in fact to a legally cognizable interest. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 *** (1988). The alleged injury must be: (1)

distinct and palpable, (2) fairly traceable to the defendants' actions, and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id*. at 492-93 ***. *** Dismissal is mandated where a plaintiff lacks standing, because such a deficiency negates the very cause of action. *Id*." *Schacht*, 2015 IL App (1st) 133035, ¶ 14.

¶ 77 Here, the facts of this case do not support an insurance fraud claim because the claim for damages was made against the insured, not to Florists. Florists does not have standing to maintain a claim under the insurance fraud statute against plaintiff because plaintiff did not make any claim on Florists' policy of insurance. While plaintiff did file the lawsuit, his claim was against defendants Mota and Kennicott and the claim was not made on a policy of insurance. Florists filed its action later and then the cases were consolidated and Florists became a party to the case. Even assuming *arguendo* that plaintiff's claim for lost wages is false, the alleged false claim was made to defendants Mota and Kennicott Brothers Company in the underlying lawsuit, not to Florists; plaintiff's false claim was not "made on any policy of insurance *** issued by an insurance company," nor "to a self-insured entity." 720 ILCS 5/46-5(a)(1), (e)(1) (West 2012). The Act specifies civil liability only "to the insurance company or self-insured entity," not to defendants who are insured and then, in turn, are defended by their insurers in a lawsuit. 720 ILCS 5/46-5(e)(1) (West 2012). As the trial court ruled, plaintiff's allegation of damages for lost earnings was not a statement to Florists but, rather, to defendants Mota and Kennicott as part of his allegation of damages in this lawsuit. We thus affirm the trial court's grant of summary judgment to plaintiff on defendant Florist's claim under the insurance fraud statute.

¶ 78 VI. The Damages Award for Future Lost Wages Was Too Speculative.

¶ 79 Finally, defendants argue that the jury's verdict must be reversed where the damages award for lost wages was against the manifest weight of the evidence. Defendants argue that

Dr. Linke's opinions regarding lost earnings based on alleged future employment with Figuigui as a butcher was against the manifest weight of the evidence where the testimony at trial was that plaintiff never accepted the job offer. We agree.

¶ 80 In some situations the future earnings are so uncertain or speculative that evidence of them cannot be admitted. *Christou v. Arlington Park-Washington Park Race Tracks Corp*., 104 Ill. App. 3d 257, 260 (1982). A jury's verdict will be reversed if it is against the manifest weight of the evidence. *Linhart v. Bridgeview Creek Development, Inc*., 391 Ill. App. 3d 630, 635-36 (2009).

¶ 81 Plaintiff relies on *Morris v. Milby*, 301 Ill. App. 3d 224 (1998), to support his award for future lost earnings, but we find the facts of *Morris* are distinguishable. In *Morris*, the plaintiff had lost a promotion at the job she held at the time of the accident because she could not perform a new job task that required lifting as a result of the accident that occurred in that case. The new job would have made the plaintiff eligible for a further promotion to assistant manager, but because of the accident and resulting injuries, plaintiff could not participate in the new job task.

¶ 82 We note that evidence of future earnings is only proper if said earnings were "reasonably certain to occur." *Morris*, 301 Ill. App. 3d at 229. The court in *Morris* held that the evidence established with reasonable certainty that the plaintiff would have attained the job advancement she claimed as a result of normal career advancement. *Morris*, 301 Ill. App. 3d at 230.

¶ 83 Here, however, there was no such reasonable certainty that the alleged future earnings would have occurred. Linke's opinion was based on the assumption, provided to him by plaintiff's counsel, that plaintiff would have earned $52,000/year as a butcher. There is no evidentiary support for this assumption. Although plaintiff previously worked as a butcher with his relative by marriage in the late 80's or early 90's, there was no evidence as to what he earned

in that occupation. When plaintiff went to Georgia from 1998 to 2003, he worked as a "meat cutter," but again, there was no evidence of what he earned. From 2003 to 2008, plaintiff never made more than $26,000/year as the owner and manager of a cell phone store and he testified he was unemployed for 18 months prior to the accident. Thus, in order to accept Linke's premise regarding plaintiff's earning capacity, we would also have to assume that he was voluntarily under-employed and unemployed for several years prior to the accident. Further, plaintiff had not yet performed even a single day of work as a butcher for the alleged offered job, nor was he yet in training for the job. Indeed, the evidence at trial was that plaintiff had not yet even accepted the job offer. Because Linke's critical assumption regarding plaintiff's earning capacity is unsupported by the evidence, his opinion regarding lost earnings is speculative and should not be admitted on retrial.

¶ 84 We therefore hold that the jury's verdict regarding future lost earnings was against the manifest weight of evidence, and this is another reason we reverse and remand for a new trial on damages. We further instruct that Linke not be permitted to testify on retrial.

¶ 85 CONCLUSION

¶ 86 We hold that the trial court abused its discretion in barring the entirety of the defense expert's opinion regarding reasonableness of medical bills. While the expert's opinion regarding insurance reimbursement rates from her database program was properly excluded, it was an abuse of discretion to bar the expert's testimony regarding the reasonableness of medical bills, office visits, and the markup for plaintiff's surgical hardware.

¶ 87 We also hold that the trial court's ruling allowing plaintiff's treating surgeon to testify regarding the reasonableness of other medical bills was not an abuse of discretion where the

physician testified that he has knowledge of the services rendered and was familiar with the usual and customary charges and that he reviewed the bills.

¶ 88 We also hold that any error in not allowing testimony of Dr. Michael's attorney's prior inconsistent statement regarding whether Dr. Michael had offices in Illinois was harmless error where no impeachment would have resulted because Dr. Michael testified he had three offices in Illinois.

¶ 89 We further hold that the trial court did not err in granting summary judgment in plaintiff's favor on Florist's claim under the insurance fraud statute based on lack of standing, as Florists is not plaintiff's insurer and plaintiff did not make any claim on a policy of insurance. Even assuming arguendo that false claims were made, any claims made by plaintiff were in the underlying lawsuit, and were made to defendants Mota and Kennicott. We affirm the court's grant of summary judgment in plaintiff's favor on Florists' insurance fraud claim.

¶ 90 We further hold that the trial court's ruling quashing defendants' subpoenas but allowing additional disclosures by plaintiff within 60 days of trial was an abuse of discretion.

¶ 91 We also hold that jury's damages award for future lost wages was too speculative and was against the manifest weight of the evidence, and admission of plaintiff's expert's testimony on future lost wages was error, where the evidence at trial established that plaintiff had not even accepted the job with the wage amount relied upon by plaintiff's expert for calculation of lost wages.

¶ 92 We reverse and remand for a new trial on all damages, and instruct the court to allow defendants full relevant discovery. We further instruct that Plaintiff's lost and future wages expert not be permitted to testify upon retrial, as his opinion was entirely baseless and speculative.

¶ 93 Reversed in part; affirmed in part; remanded with instructions.