

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CHRISTOPHER WILLE, RONALD)	Appeal from the Circuit Court
KERSTEIN, and SHIRLEY KERSTEIN,)	of Du Page County.
)	
Plaintiffs-Appellants,)	
v.)	No. 09-L-1313
)	
DAVID A. FREELAND, WEST CHICAGO)	
CHIROPRACTIC LTD., JOHN)	
AIKENHEAD, and ADVANTAGE MRI,)	
)	Honorable
Defendants-Appellees)	John T. Elsner and
)	William I. Ferguson,
(Michael Bauer, D.C., Defendant).)	Judges, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting summary judgment in favor of the appellees on the issue of proximate cause of the plaintiff's surgery.

¶ 2 On June 25, 2013, the circuit court of Du Page County granted summary judgment in favor of the defendants, Dr. David Freeland and Dr. John Aikenhead (and their employers), on the issue of whether their acts or omissions proximately caused the plaintiff, Christopher Wille, to need cervical spinal fusion surgery. The plaintiffs, who include Christopher's parents (moved for reconsideration) and on November 14, 2013, the trial court denied their motion. After the

disposition of the remaining claims, the plaintiffs filed this appeal from the grant of summary judgment on this issue. We reverse and remand.

¶ 3

BACKGROUND

¶ 4 The following facts are drawn from the evidence submitted by the parties in connection with the defendants' motion for summary judgment. Except as noted, they are undisputed.

¶ 5 In the fall of 2007, the plaintiff, Christopher Wille, was a high school senior and the starting quarterback for his high school football team. On October 12, 2007, he collided with another player during a football game and lost consciousness. He suffered a concussion and experienced pain in his left shoulder and head. He did not have any pain radiating into his arms. He sat out the rest of the game. Over the next few days, his recovery from the concussion was monitored by the high school sports trainer. However, his shoulder pain persisted.

¶ 6 On October 17, Christopher visited Dr. Freeland, a chiropractor with the defendant, West Chicago Chiropractic, Ltd. Christopher complained of neck and shoulder pain, with some back pain. He did not have any pain in his arms. Dr. Freeland evaluated Christopher through a physical examination that included a variety of tests of particular areas in Christopher's shoulder, neck, and spine. He also took x-rays of Christopher's cervical spine. He did not perform any spinal adjustment. He treated Christopher's shoulder pain with electrical stimulation, which was effective in decreasing the pain.

¶ 7 That same day, Dr. Freeland reviewed Christopher's x-rays. He also asked Dr. Aikenhead, a chiropractic radiologist employed by the defendant Advantage MRI, to review the x-rays. Dr. Aikenhead stopped by Dr. Freeland's office and they reviewed the x-rays together. There is some dispute over exactly what Dr. Freeland asked Dr. Aikenhead and Dr. Aikenhead's response. However, both agree that the x-rays showed a subluxation (disarrangement) of the C5 vertebra as it rested on the C6 vertebra. Both also agree that, if there is instability of a spinal

joint, the patient is not a good candidate for spinal manipulation. (A finding of subluxation is not in itself a finding of instability.) Dr. Freeland testified that he told Dr. Aikenhead about the nature and history of Christopher's injury, and asked if Christopher was a candidate for chiropractic care and manipulation. He recalls that Dr. Aikenhead said that he did not see any fracture or instability of the joint; that Dr. Aikenhead thought the subluxation might be caused by a muscle spasm pulling on the vertebrae; and that it was "okay to treat the patient," which Dr. Freeland took to mean that spinal manipulation could be done. Dr. Aikenhead testified that he had only a limited recollection of the substance of the informal consultation. He spent about five minutes with Dr. Freeland, and agreed with Dr. Freeland that the x-rays showed a slight anterior slippage of the C5-C6 joint with some slight rotation. He does not recall exactly what he told Dr. Freeland, but his regular practice was to advise chiropractors to conduct further follow-up, and he "would have" told Dr. Freeland to "correlate clinically." This would involve re-reviewing the patient's history and clinical presentation, and perhaps further imaging via oblique x-rays, a CT scan or an MRI.

¶ 8 The next day, October 18, Christopher's concussion hold was lifted and he was cleared to resume football practice. Christopher visited Dr. Freeland, who again performed electrical stimulation but did not perform any spinal adjustments. Christopher told Dr. Freeland about his desire to play football the next night, as it would be the last football game of the season. Dr. Freeland cleared Christopher to play in the game.

¶ 9 On October 19, Christopher played almost the entire football game. He reported no neck pain, although his shoulder continued to hurt. The next day, he visited the defendant, Dr. Michael Bauer, a chiropractor who was in practice with Dr. Freeland. Dr. Bauer did not perform any spinal adjustments.

¶ 10 On October 24, Christopher returned to Dr. Freeland for further treatment of his shoulder pain, which had been slowly improving. He was not experiencing any neck or arm pain. Dr. Freeland performed a chiropractic adjustment to Christopher's neck, placing one hand under his chin and one hand on top of his head and twisting. Christopher heard a loud pop and felt an excruciating pain in his neck. He developed radiculopathy (pain, numbness, tingling, and weakness related to pressure on a nerve root) in his left shoulder and arm.

¶ 11 After the adjustment on October 24, Christopher continued to have neck pain and pain radiating through his left shoulder and arm. Dr. Gimre, the team doctor, saw Christopher on October 30. In addition to Christopher's description of constant neck and arm pain, Dr. Gimre noted atrophy of Christopher's left shoulder muscles and mild weakness of his left arm. He referred Christopher to Dr. John Andreshak, an orthopedic surgeon who specialized in spinal surgeries.

¶ 12 Dr. Andreshak first saw Christopher on November 14. Christopher said he had hurt his shoulder in a football game; he did not mention the intervening chiropractic treatment. Dr. Andreshak observed weakness and atrophy of Christopher's left shoulder and arm muscles, and "obvious instability of his neck." He determined that Christopher was a candidate for spinal fusion surgery. He took x-rays and an MRI, which did not show any fracture. However, he also ordered a CT scan, which showed a facet fracture of the C6 vertebra. This reinforced his opinion that Christopher needed surgery.

¶ 13 Dr. Andreshak performed surgery on November 20. He found that the ligaments at the C5-C6 joint were stretched and torn, and a bone fragment from the C6 vertebra was pressing on the C6 nerve root. He removed the fragment and fused Christopher's cervical spine at C5-C6, inserting rods and screws along with a bone graft. Christopher continued to see Dr. Andreshak post-operatively. At a visit in August 2008, Christopher reported that his arm and neck pain and

numbness were gone and Dr. Andreshak felt he had returned to normal function. Since the surgery, Christopher has continued to be physically active and play sports, but he has been told he should not play football, snowboard, or do martial arts. According to Christopher, he still has some residual neck pain and stiffness upon waking, and sometimes experiences tingling down his arms. He treats this with ibuprofen.

¶ 14 Christopher and his parents filed suit in 2009. As amended, their complaint contained 12 counts. The first four counts (counts I through IV) alleged that Dr. Freeland was negligent in failing to have Christopher's x-rays of October 17, 2007, read by a board certified radiologist or other qualified neuroradiologist, in failing to refer him to a medical doctor, in misdiagnosing him, and in manipulating Christopher's spine despite contraindications. These counts sought damages for Christopher's pain and suffering, and for the medical expenses paid by his parents. Two of the counts were against Dr. Freeland directly, and two of them were against his employer. The next four counts (counts V through VIII) alleged that Dr. Aikenhead was negligent in reading the x-rays and failing to advise Dr. Freeland to refer Christopher to a medical doctor; they were brought by both Christopher and his parents, against both Dr. Aikenhead and his employer. The last set of four counts (counts IX through XII) was directed against Dr. Bauer and his employer, and alleged similar negligence.

¶ 15 In October 2012, all of the defendants moved for summary judgment. Dr. Bauer moved for summary judgment in his favor on counts IX through XII, on the ground that no one had criticized the care he provided. His motion was granted, and his dismissal from the case is not challenged here. This appeal solely concerns counts I through VIII.

¶ 16 Dr. Freeland also moved for summary judgment, arguing that there was no evidence that any of his acts or omissions had contributed to (that is, proximately caused) Christopher's need for surgery. Dr. Aikenhead moved for summary judgment on the same basis. Drs. Freeland and

Aikenhead asserted that the deposition testimony was uncontradicted that: Christopher had sustained an injury to the ligaments at C5-C6 during the October 12, 2007, football game; ligamentous injury would not heal through conservative treatment; and spinal surgery was required to resolve the ligamentous injury. Further, they argued that one of Christopher's expert witnesses, Dr. Avi Bernstein, an orthopedic surgeon, had stated that he did not have an opinion about whether the spinal adjustment performed by Dr. Freeland had worsened the facet fracture or the ligamentous injury. In response, the plaintiffs pointed out that Dr. Bernstein had criticized Drs. Freeland and Aikenhead for failing to refer Christopher to an orthopedic surgeon despite abnormal findings on his x-rays, and Dr. Bernstein had opined that, if Christopher had been referred, he would have been placed in a hard cervical spine collar that would have allowed him to heal without surgery. In Dr. Bernstein's opinion, facet fractures require surgical intervention only when: (1) there is demonstrated cervical instability on flexion or extension; (2) there is significant ligamentous damage severe enough to show up on an MRI; or (3) there are radicular symptoms. Christopher did not have any of these conditions until after the spinal adjustment. Dr. Bernstein opined that the spinal adjustment (performed by Dr. Freeland, allegedly with an okay by Dr. Aikenhead) caused Christopher increased pain and the onset of radicular symptoms in his left arm, thereby necessitating surgery. Specifically, Dr. Bernstein opined that Dr. Freeland's adjustment caused the facet fracture to change position so that it impinged on the C6 nerve root.

¶ 17 The trial court (Judge John Elsner presiding) granted the defendants' motions for summary judgment on the issue of whether their acts or omissions proximately caused Christopher to need surgery. In reaching this conclusion, the trial court concluded that the ligamentous injury seen by Dr. Andreshak during the surgery resulted solely from Christopher's football injury, and the existence of the ligamentous injury necessitated surgery (as it would not

heal on its own). Thus, the trial court concluded, even if Drs. Freeland and Aikenhead had been negligent, their negligence had not created the need for surgery, and they were entitled to summary judgment on that issue. However, the trial court concluded that there was conflicting evidence over the separate issue of whether the spinal adjustment caused Christopher additional pain prior to the surgery, and so summary judgment on that issue was inappropriate.

¶ 18 The plaintiffs moved for reconsideration as to both Dr. Freeland and Dr. Aikenhead. The trial court denied the motion for reconsideration as to Dr. Freeland on November 14, 2013. In the spring of 2014, the case was transferred to Judge William Ferguson. On July 31, 2014, Judge Ferguson denied the motion for reconsideration as to Dr. Aikenhead. Thereafter, the plaintiffs voluntarily waived their remaining claim, which was for Christopher's pain and suffering after the spinal adjustment and before the surgery, and a final judgment was entered. This appeal followed.

¶ 19 ANALYSIS

¶ 20 A motion for summary judgment is properly granted where the pleadings, depositions, admissions, and affidavits establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). A triable issue precluding summary judgment exists where material facts are disputed or where the material facts are undisputed but reasonable persons might draw different inferences from the undisputed facts. *Id.* In reviewing

a trial court's grant of this relief, we do not assess the credibility of the testimony presented but, rather, only determine whether the evidence presented was sufficient to create an issue of fact. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001). We review the grant of summary judgment under a *de novo* standard (see *Morris*, 197 Ill. 2d at 35), and will reverse if we find that a genuine issue of material fact exists.

¶ 21 In order to prevail on malpractice claims such as those raised in this case, a plaintiff must prove that the defendant breached the applicable professional standard of care and that this breach proximately caused the plaintiff some injury. *Buck v. Charletta*, 2013 IL App (1st) 122144, ¶ 57. Proximate causation exists where the defendant's negligence was "a material and substantial element in bringing about the injury." *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258 (1999). The defendant's negligence need not be the sole cause of the plaintiff's injury; the defendant may be liable if his conduct contributed in whole or in part to the injury. *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 79. Proximate cause presents a question of fact to be determined by a jury, unless the undisputed facts show that the plaintiff would never be entitled to recover. *Garest v. Booth*, 2014 Ill. App (1st) 121845, ¶ 41 (citing *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257-58 (2004)).

¶ 22 Where there are conflicting expert opinions about whether the defendants' alleged negligence caused the plaintiffs' injuries, summary judgment is inappropriate. See *Jarke v. Jackson Products, Inc.*, 282 Ill. App. 3d 292, 300 (1996) ("The task of resolving conflicting experts' opinions is one for the jury."); *Nicholas v. City of Alton*, 107 Ill. App. 3d 404, 408 (1982) (reversing trial court's grant of summary judgment where conflicting expert opinions demonstrated the existence of an issue of fact). In this case, although both Dr. Bernstein and Dr. Andreshak agreed that, after the spinal adjustment, Christopher needed surgery, they disagreed about the reason that Christopher needed surgery. In Dr. Andreshak's opinion, Christopher's

neck was unstable, and this made him a candidate for surgery. Dr. Andreshak's opinion was bolstered by the ligamentous injury he found during the surgery. Dr. Andreshak believed this injury must have been sustained during the October 12 football game, and thus existed all along. However, he did not know about the spinal adjustment when he formed this opinion, and thus he gave no testimony regarding whether the spinal adjustment could have been a contributing cause of Christopher's injuries (both the ligamentous injury and the facet fracture) and the instability of his neck. Notably, Dr. Freeland testified that, based on Christopher's reports and the results of his physical examinations of the area, Christopher's neck was not unstable at the time Dr. Freeland performed the spinal adjustment.

¶ 23 In contrast to Dr. Andreshak's opinions, Dr. Bernstein believed that, before the spinal adjustment, Christopher was not a candidate for surgery. Rather, in his opinion, subluxation and even some degree of ligamentous injury did not, by themselves, require surgery. Surgery was required only when imaging on flexion and extension showed cervical instability, or the ligamentous injury was severe enough to show up on an MRI, or the patient developed radicular symptoms. None of these existed before the spinal adjustment was performed. As for the fracture of the C6 vertebra, it would have healed through conservative treatment such as the use of a stiff neck brace, and even the bony fragment removed by Dr. Andreshak would have been resorbed and would not have caused a problem had the spinal adjustment not caused the fragment to press on Christopher's C6 nerve root, resulting in radicular symptoms. Given this conflict among the expert witnesses about whether the spinal adjustment proximately caused Christopher to need surgery, summary judgment on this issue was not appropriate.

¶ 24 The defendants argue that Dr. Bernstein conceded that ligamentous injury of the degree seen by Dr. Andreshak during the surgery probably required surgery, and would not heal through non-surgical means. From this, they argue that "[i]t is undisputed that the ligamentous tear

caused the need for surgery.” Paired with Dr. Andreshak’s opinion that the ligamentous tear was caused by the football game, they argue that Christopher would always have needed surgery, regardless of Dr. Freeland’s spinal adjustment.

¶ 25 This argument (which was accepted by the trial court and became the basis for its grant of summary judgment) distorts Dr. Bernstein’s actual deposition testimony. Dr. Bernstein did not concede that the existence of ligamentous tear caused Christopher to need surgery. Rather, Dr. Bernstein testified that, in his opinion, surgery for a ligamentous tear was not always necessary. Although conservative treatment would not heal a ligamentous tear, surgery was required only when one of the three factors listed above was present, and they were not present for Christopher until after the spinal adjustment. Thus, Dr. Bernstein’s testimony does not refute his opinion that the spinal adjustment caused Christopher to need surgery.

¶ 26 In a one-sentence paragraph, Dr. Aikenhead contends that Dr. Bernstein, a non-treating expert witness, should not be permitted to opine that Christopher could have been treated without surgery, when a treating physician, Dr. Andreshak, determined that the surgery was necessary. To support this contention, he cites generally to *Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7 (1999). However, he provides no pinpoint cite or any other description of how this case supports his argument, and accordingly we find that argument forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Mikolajczyk v. Ford Motor Co.*, 374 Ill. App. 3d 646, 677 (2007).

¶ 27 Dr. Aikenhead next suggests that the plaintiffs’ attorney conceded, during oral argument on the motions for summary judgment, that the plaintiffs did not contend that Christopher’s ligamentous injury occurred or was exacerbated by the spinal adjustment. This is an exaggeration. The record reveals that, although the plaintiffs’ attorney stated that the plaintiffs would not argue that the ligamentous injury was *caused* by the spinal adjustment, he never

conceded that the spinal adjustment did not make the ligamentous injury *worse*. Accordingly, we reject this argument.

¶ 28 The defendants also argue that Dr. Bernstein was equivocal on the issue of whether Dr. Freeland's spinal adjustment of Christopher's cervical spine worsened the facet fracture or the ligamentous injury. The record reflects that Dr. Bernstein testified in different ways on various aspects of this issue. For instance, he stated that he did not have an opinion as to whether the atrophy and mild weakness noted by Dr. Gimre on October 30 were caused by the spinal adjustment. However, he opined that other radicular symptoms, including the pain in Christopher's left shoulder and arm, were caused by the adjustment. This pain in turn caused the need for surgery. He also stated that he could not say whether the spinal adjustment made the fracture worse, because there were no CT scans taken before the adjustment so that he could make a comparison. However, he opined that the adjustment caused the bone fragment to move and impinge on the nerve root.

¶ 29 It is possible that at trial the defendants could attack Dr. Bernstein's testimony as inconsistent or contradictory and induce a jury to accord less weight to his opinions. However, any such contradiction indicates the existence of a disputed question that must be resolved by the jury, not on summary judgment. See *Burns v. Grezeka*, 155 Ill. App. 3d 294, 299 (1987). The defendants have not shown that Dr. Bernstein's opinions lacked a scientific basis such that those opinions could be disregarded entirely. Thus, their criticism goes only to the weight to be accorded Dr. Bernstein's testimony, a matter firmly within the jury's province. *Snelson v. Kamm*, 204 Ill. 2d 1, 27 (2003) ("the weight to be assigned to an expert opinion is for the jury to determine").

¶ 30 The conflict between the opinions of the expert witnesses is apparent despite the nuanced or possibly contradictory nature of Dr. Bernstein's testimony regarding the effect of the spinal

adjustment: Dr. Bernstein stated flatly that, in his opinion, the spinal adjustment performed by Dr. Freeland caused Christopher to need surgery. Accordingly, there was a material factual dispute for the jury to resolve, and the trial court erred in granting summary judgment.

¶ 31 Finally, if summary judgment was improperly entered for Dr. Freeland, it was improperly entered for Dr. Aikenhead as well. As we have noted, the testimony of Drs. Freeland and Aikenhead differs regarding the content of Dr. Aikenhead's informal consultation with Dr. Freeland regarding the October 17 x-rays of Christopher's cervical spine. Dr. Aikenhead testified that Dr. Freeland asked him for an informal consultation and that, although he did not recall exactly what he told Dr. Freeland, his usual practice with x-rays showing conditions similar to Christopher's was to advise the chiropractor to obtain more information before proceeding with chiropractic treatment. By contrast, Dr. Freeland testified that he asked Dr. Aikenhead whether, in light of the x-rays, Christopher could be treated through ordinary chiropractic treatment (which would include spinal adjustment) and that Dr. Aikenhead said that would be all right. Dr. Freeland also testified that he would not have performed the spinal adjustment if not for Dr. Aikenhead's okay. This conflicting testimony raises a factual question as to whether Dr. Aikenhead's conduct was a contributing cause of Christopher's injuries. Accordingly, the trial court's grant of summary judgment in favor of Dr. Freeland and Dr. Aikenhead (and their respective employers) must be reversed.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed as to counts I through VIII. The cause is remanded for further proceedings consistent with this opinion.

¶ 34 Reversed in part and remanded.