No. 2—09—0991
Order filed February 9, 2011
Modified upon denial of rehearing March 22, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DAWN DEFILIPPIS and FRANK DEFILIPPIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellants,	)	
v.	)	No. 04—L—15
WESTMORELAND OB/GYNE ASSOCIATES, INC., and WILLIAM GARDNER, M.D.,	)	Honorable Christopher C. Starck,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: Where plaintiffs waited three years to disclose medical bills and their expert's opinion regarding the proximate causation of those medical expenses, the trial court did not abuse its discretion in barring that evidence; however, the trial court erred in granting defendants summary judgment on the claims of medical negligence and loss of consortium.

Plaintiffs, Dawn and Frank Defilippis, filed a two-count complaint against defendants, Dr. William Gardner, M.D., and his employer, Westmoreland OB/Gyne Associates, Inc. Dr. Gardner performed surgical procedures on Dawn to treat an ovarian cyst and urinary stress incontinence. The

complaint alleges claims of medical negligence and for loss of consortium. The trial court excluded certain expert testimony regarding Dawn's medical expenses because plaintiffs disclosed the opinion too late. The court eventually granted defendants summary judgment, and plaintiffs appeal.

Defendants argue that we must affirm the summary judgment because plaintiffs have not disclosed or obtained during a deposition an expert opinion that Dr. Gardner's alleged breach of the standard of care proximately caused injury to Dawn. We disagree. We reverse the summary judgment and remand the cause for further proceedings, but we affirm the trial court's exercise of its discretion in excluding the challenged evidence.

FACTS

Defendants allegedly committed medical negligence on May 12, 1999. On May 11, 2001, plaintiffs filed a complaint seeking damages, but the complaint was voluntarily dismissed without prejudice on January 14, 2003. Plaintiffs re-filed a complaint on January 7, 2004, and the following facts are gleaned from the record.

A. Office Consultation

On April 19, 1999, Dawn went to Dr. Gardner, a doctor with specialized training and experience in obstetrics and gynecology, for help with urinary stress incontinence. Dawn told Dr. Gardner that, in 1998, she began experiencing abdominal pain on her right side near the pelvic area. Dr. Gardner recommended that Dawn undergo a retropubic Burch colosuspension procedure (the Burch procedure) to remedy the condition. The Burch procedure is used when the bladder and urethra have fallen from their normal position. The goal is to restore them to their normal position in the pelvis.

Dr. Gardner told Dawn that he would wait until the date of surgery to decide whether he would use a laparotomy or a laparoscopy in performing the Burch procedure. A laparotomy is a surgical procedure involving a large incision through the abdominal wall to gain access into the abdominal cavity. A laparoscopy, which is less invasive than a laparotomy, is a procedure performed in the abdomen or pelvis through small incisions with the aid of a camera.

During the office visit, Dawn gave Dr. Gardner an ultrasound report which showed that she had a cyst on her right ovary. When asked how she wished to proceed, Dawn said she wanted the cyst removed. Dr. Gardner's nurses scheduled with Dawn a right salpingo oophorectomy, which is the surgical removal of the right ovary.

Dawn and Dr. Gardner offer differing accounts of what else transpired during the office visit. Dawn testified in her deposition that she told Dr. Gardner about the problems she was experiencing, but she did not recall him examining her on that date. Dawn testified that Dr. Gardner never explained the risks of or alternatives to the proposed Burch procedure.

Dr. Gardner testified in his deposition that he did not have a specific recollection of what transpired during the office consultation. Dr. Gardner acknowledged that Dawn provided an ultrasound report which showed her right ovarian cyst. Dawn told Dr. Gardner that she had some urinary stress incontinence that was worsening and that she inquired whether both the cyst and the urinary incontinence could be addressed at the same time.

Dr. Gardner testified that he could not recall exactly what Dawn told him about her incontinence or whether her condition could be treated more conservatively. Dr. Gardner testified that he prepared a medical history of Dawn, but the history was dated May 11, 1999, which was the date before the surgery. His records did not contain a history prepared on the date of the office visit.

Dr. Gardner did not dictate notes on the date of the office consultation, but he dictated notes on the day before the surgery. Dr. Gardner prepared the notes using a history he had prepared in connection with previous surgeries he had performed on Dawn. His notes do not indicate whether he discussed alternative treatments, but he insisted that he had done so.

Dr. Gardner could not recall specifically what he told Dawn about the risks of the Burch procedure. He testified that he mentioned the possibility of problems with the bladder, bleeding, and bowel, but he could not remember what he specifically discussed about each of those issues. Dr. Gardner's chart did not refer to any discussion with Dawn about the risks of problems with the bladder, bleeding, and bowel; and Dr. Gardner did not recall what Dawn said regarding those issues. The chart is silent as to whether Dr. Gardner explained the risks of the Burch procedure or whether Dawn said she understood the risks. Dr. Gardner acknowledged that he did not know whether he told Dawn that urinary retention was a potential complication of the Burch procedure. Urinary retention is the inability to urinate.

B. The Surgical Procedures

On May 12, 1999, Dr. Gardner performed a laparotomy, a right salpingo oophorectomy, and the Burch procedure. The oophorectomy was performed to address the ovarian cyst, and the Burch procedure was performed to address the urinary stress incontinence. Plaintiffs' complaint does not allege any negligence associated with the oophorectomy or laparotomy. Rather, the complaint focuses on the Burch procedure and the office visit that preceded it.

Dawn recalled that she arrived at Lake Forest Hospital at 6 a.m. on May 12, 1999. At 7:15 a.m., Dr. Gardner arrived and told Dawn that he still was unsure about whether he would employ a laparotomy or laparoscopy to complete the Burch procedure. Dawn testified that she and Dr.

Gardner did not discuss the risks of the Burch procedure at the time of surgery or at any other time. Dr. Gardner testified that, on the date of the surgery, he did not have any conversations with Dawn besides greeting her at the hospital.

C. Complications

Dawn testified that she was in severe pain following the surgical procedures. While she was recuperating at home, she sweated profusely, vomited, suffered migraines, and otherwise could not function. Dawn complained of painful urination, inability to urinate, and problems with being catheterized. Dawn suffered subtle urinary tract infections, fevers, chills, and infections with the catheter. Dawn knew something was not right because she felt constant pain while voiding. Dawn testified that Dr. Gardner referred her to various urologists from May to August 1999. Dawn suffered from urinary retention, and she underwent several surgical procedures to correct the complications.

Dawn testified that, if Dr. Gardner had explained the various alternatives and risks of the Burch procedure, she would not have proceeded with it. Instead, Dawn would have treated her urinary incontinence condition conservatively.

In his testimony, Dr. Gardner confirmed Dawn's various problems after the Burch procedure. Dr. Gardner acknowledged that Dawn's problems were unusually severe.

E. Pretrial Procedure

The complaint alleges that Dr. Gardner was negligent for (1) failing to advise Dawn of the risks associated with the Burch procedure; (2) failing to advise her of alternative treatments; (3) failing to advise her of his limited experience in performing the Burch procedure; (4) failing to evaluate Dawn for urinary incontinence before performing the Burch procedure; (5) failing to employ

urodynamic testing before the procedure to assesses how the bladder and urethra were storing and releasing urine; and (6) discharging her with emesis, which is the medical term for vomiting. Count I alleges Dawn's personal injury, and count II alleges Frank's loss of consortium as a proximate result of Dr. Gardner's negligence.

This is the second appeal involving this matter. In the previous appeal, the trial court ordered defendants to disclose the names and addresses of other patients on whom Dr. Gardner performed the Burch procedure. We reversed the evidentiary ruling and the related contempt finding because compelling disclosure would have violated the physician-patient privilege. *Defilippis v. Gardner*, 368 Ill. App. 3d 1092, 1096 (2006).

1. Disclosure of Plaintiff's Expert Witness

Before the first appeal, on February 2, 2005, plaintiffs disclosed Dr. Steven Bernstein, an expert urologist, as a controlled expert pursuant to Supreme Court Rule 213(f). See Ill. S. Ct. R. 213(f) (eff. July 1, 2002). Plaintiffs disclosed that "Dr. Bernstein will testify that Dr. Gardner deviated from the standard of care as identified in his affidavit attached to the complaint." Attached to the complaint is Dr. Bernstein's report which consists of opinions regarding the standard of care necessary for obtaining a patient's informed consent, including descriptions of the risks associated with the Burch procedure, alternatives to the procedure, the type of physical evaluation needed before performing the procedure, the degree to which a treating physician must disclose to the patient his experience with the procedure, and whether a patient should be discharged with emesis.

The February 2, 2005, Rule 213 disclosure states that Dr. Bernstein would testify as follows:

> "Based on the discovery obtained to date, Dr. Bernstein's opinions are: (i) the defendants failed to conduct any significant incontinence evaluation of [Dawn]. Specifically

there was no documented history regarding Dawn's incontinence problems in terms of patient complaints or description of the problems; (ii) Issues that should have been addressed include the onset of the incontinence, contributing factors, fluid intake, and any attempts at conservative management such as behavioral modification, pelvic floor exercises and medical management; (iii) There was also no documentation of pertinent physical examination findings such as the presence or lack of satisfactory support of the bladder and bladder neck and the plaintiff's response to challenge with a full bladder (Marshall Test); (iv) [For] a patient such as [Dawn] with a prior suspension (Anterior Repair 1990), a more thorough evaluation with urodynamics is clearly indicated; (v) There was no documentation of any appropriate discussion with [Dawn] by [Dr. Gardner] regarding the technical aspects of the procedure, the risks, complications, recovery process, alternative procedures, use of catheters, etc.; (vi) The performance of a Burch procedure by Dr. Gardner was a poor choice for [Dawn]. It is generally accepted that most patients who have [a prior] failed interior repair will do better with a sling procedure than any other suspension procedure such as the Burch or Marshall Marchetti; (vii) *Dr. Bernstein will also testify that such failures on the part of Dr. Gardner constituted deviations from the standard of care and that such deviations proximately caused the various pain and suffering incurred by [Dawn] following the surgery performed by Dr. Gardner in 1999.*" (Emphasis added.)

Dr. Bernstein was deposed on September 15, 2005, and his testimony was consistent with plaintiffs' Rule 213 disclosures of his opinions. Based on his review of the medical records in the case, Dr. Bernstein testified that Dawn presented with abdominal pain and bladder control problems. Dr. Bernstein opined that bladder control problems have many possible causes, such as fluid

consumption, infrequent voiding, external compounds like caffeine, neurologic conditions like multiple sclerosis, Parkinson's disease or a spinal cord injury, or anatomical problems related to the bladder neck or urethra. He further explained that incontinence might be observed in people with psychoses or neurotic conditions, gastrointestinal issues, constipation, irritable bowel syndrome, gynecologic issues like pelvic abscesses or pelvic tumors, or endocrine issues like diabetes. Dr. Bernstein had no reason to doubt the May 11, 1999, history that Dawn suffered from incontinence, but the medical records did not indicate what had caused it.

Dr. Bernstein described the Burch procedure as a modification of the Marshall-Marchetti-Krantz (MMK) procedure in the 1950s that was designed to rebuild the support of the bladder neck and urethra. The Burch procedure is done transabdominally where several pairs of stitches are placed into the periurethral fascia and secured to a ligament on each side.

Dr. Bernstein opined that the MMK procedure and the Burch procedure were adopted by urologists and gynecologists initially. However, as years passed, the pubovaginal sling procedure had been shown to be superior to the Burch procedure, particularly when a previous surgical repair needed to be revisited. The sling procedure addresses urinary incontinence due to either a breakdown of support of the bladder neck or of the functional seal of the bladder neck. The technical aspects of performing the sling procedure are more demanding than the Burch procedure, so the sling procedure was adopted by urologists before gynecologists, who initially had lacked the necessary equipment.

Dr. Bernstein described Dawn's postoperative problems according to the medical records. Two days after the procedure, Dawn suffered from nausea, vomiting, a headache, and a wound infection that was treated with antibiotics. These minor complications subsided, but she later

suffered urinary retention. One of the stitches had been placed incorrectly, which caused significant pain and required multiple corrective surgeries and ongoing treatment with electronic devices and catheters. Dr. Bernstein admitted that a misplaced stitch is a "known complication" that can occur in the absence of negligence, and he conceded that Dr. Gardner's misplaced stitch did not necessarily mean he had deviated from the standard of care.

That said, Dr. Bernstein testified that, based on a reasonable degree of medical certainty, Dr. Gardner deviated from the standard of care for a reasonably well-qualified gynecologist and obstetrician in providing care for Dawn. Dr. Bernstein testified that standard office intake form for Dawn was inadequate in that sections were left blank for a history, physical examination findings, miscellaneous notes, the impression of what might be wrong, and the plan based on the impression. Dr. Bernstein surmised the plan from a notation that Dawn was scheduled for a laparoscopy with the possibility of a laparotomy and laser standby. Failing to chart the blank sections amounted to a deviation from the standard of care.

Dr. Bernstein conceded that the mere failure to *chart* the history, the examination, the impression, and the plan would not have proximately caused Dawn's injury, but he opined that the failure to *complete* those tasks would have proximately caused the injury. Because the chart contained no details about those tasks, Dr. Bernstein concluded that Dr. Gardner did not complete them, and thus, proximately caused Dawn's injury. Specifically, Dr. Bernstein concluded that Dr. Gardner had failed to (1) take an incontinence history; (2) take an incontinence examination; (3) discuss with Dawn the findings of the history and the examination; and (4) address the various behavioral and surgical options and the risks, benefits, complications, and alternatives of each. According to Dr. Bernstein, the standard of care in 1999 required Dr. Gardner to determine the type

of incontinence, any factors that might have made it better or worse, any treatments that had been tried and the results of those treatments, a definable quantity of leakage through a Marshall test, and the patient's subjective assessment of how the condition affected her quality of life.

Dr. Bernstein noted that, 10 years before the treatment at issue, Dr. Gardner had performed on Dawn a procedure known as an anterior repair. An anterior repair brings together tissue that has been torn or broken down over time by maturity and childbearing. Dr. Bernstein had no criticisms of the anterior repair that Dr. Gardner had performed.

Doctors had used several variations of the anterior procedure in the past, but those are no longer acceptable treatments. In Dawn's case, the previous anterior repair should have affected how Dr. Gardner treated her in 1999. Dr. Bernstein emphasized that Dawn's previous repair meant that using the Burch procedure likely would be unsuccessful. He stated that the Burch procedure had a small chance of being successful, but the likelihood of success could be gauged only with complex urodynamic testing, which Dr. Gardner had not used. Dr. Bernstein opined, "[i]n the absence of complex urodynamics, if one is to play the odds of what is going to be best for a patient who has stress incontinence 10 years after an anterior repair, there is no question now or in 1999 that a sling is a better choice."

Dr. Bernstein described the alternative treatments and the corresponding risks in detail and opined that Dr. Gardner had not obtained Dawn's informed consent because he failed to discuss those issues. Dr. Bernstein stated that an informed consent requires a discussion of the proposed procedure, the technical aspects and logistics of the procedure, the potential risks and complications, and the recovery process. Informed consent also requires documentation that the patient knows and understands the discussion. An informed consent form dated May 11, 1999, contained an

affirmation that the doctor discussed the risks and complications of the treatment and that the patient consented to the treatment. The form showed Dr. Gardner's signature but not Dawn's. Dr. Bernstein opined that "the discussion [was] not thoroughly documented; therefore, in medical practice, if something is not thoroughly documented, it didn't happen."

Dr. Bernstein concluded that the minimum standard of care required Dr. Gardner to tell Dawn that he believed her incontinence was caused by hypermobility of the bladder neck and that Dr. Gardner believed that the Burch procedure would be the best procedure available to treat her hypermobility in light of the previous failed anterior repair. The discussion would involve a diagram, the success rate of the procedure when considering the failed previous anterior repair, and postoperative recovery. Dr. Gardner would also need to discuss alternative procedures, such as the sling procedure, as well as the risks and complications.

Dr. Bernstein opined that, in 1999, Dr. Gardner deviated from the standard of care by failing to inform Dawn of the risks of the Burch procedure, including bleeding, infection, organ damage, subsequent incontinence, urinary retention, the risk of anesthesia, and the possible need for subsequent procedures.

Dr. Bernstein believed that, even if Dr. Gardner had discussed the procedure with Dawn on May 11, 1999, as the form suggests, any consent would not have been informed because informed consent is obtained before the procedure is actually scheduled. Dr. Bernstein concluded that, unless Dr. Gardner had documentation to the contrary, Dawn was taken to the operating room without a signed consent form, which would be a deviation of the standard of care. Dr. Bernstein agreed that the remainder of the care, including the surgery and postoperative treatment, was within the standard

of care of a reasonably well-qualified obstetrician and gynecologist in treating Dawn's urinary stress incontinence.

Dr. Bernstein testified that, when treating urinary stress incontinence, the risk of long-term urinary retention ordinarily is about the same when using the Burch procedure or the sling procedure. However, Dr. Bernstein opined, Dawn's prior anterior repair meant that Dr. Gardner deviated from the standard of care in using the Burch procedure, which had a much lower likelihood of success, and that practitioners in 1999 generally knew of the increased risk of using the Burch procedure on a patient like Dawn. Dr. Bernstein conceded that, because he was a urologist, he could not speak to the general knowledge among obstetricians and gynecologists like Dr. Gardner, but he also explained at length that the standard of care is not measured by the practitioner's background but by the procedure being performed.

2. Supplemental Disclosure

On November 26, 2008, plaintiffs disclosed for the first time that "Dr. Bernstein will offer the opinion, to a reasonable degree of certainty, that [Dawn's medical] bills incurred were both reasonable, necessary and related to the problems and complications that [Dawn] experienced as a result of the Burch procedure performed by Dr. Gardner." Plaintiffs' supplemental disclosure states that counsel provided Dr. Bernstein with "copies of [Dawn's] medical bills reflecting her care rendered to date." The medical expenses amount to $100,156, but the supplemental Rule 213 disclosure shows only a table of dates, the names of care providers, and dollar amounts, without a description of any service.

Five months later, on April 27, 2009, defendants moved to bar Dr. Bernstein from testifying about Dawn's medical expenses and to any other opinions disclosed after his September 15, 2005,

deposition. It appears that plaintiffs filed copies of the medical bills for the first time by attaching them to their response to defendants' motion to bar the supplemental opinion. Plaintiffs had delayed filing the bills while attempting to reach a stipulation regarding how the information would be shown to a jury. Plaintiffs wished to avoid showing a jury copies of the actual bills because they referred to Dawn's insurance coverage. Defendants agreed to stipulate only that "the medical expenses that were actually paid were reasonable and customary for those medical services."

On June 10, 2009, the trial court granted the motion and barred Dr. Bernstein from testifying that Dr. Gardner's performance of the Burch procedure proximately caused plaintiffs to incur the medical expenses shown in the supplemental disclosure. The record contains neither a report of proceedings, such as a verbatim transcript of the hearing, nor an alternative, such as a bystander's report or an agreed statement of facts. The record contains only a written order stating "with regard to the defendants' motion to bar, the defendants' motion is granted." During oral argument before this court, the parties confirmed the scope of the evidentiary ruling: the trial court excluded all of Dawn's medical bills as well as Dr. Bernstein's opinion regarding the proximate cause of those expenses.

Plaintiffs filed two motions for reconsideration of the June 10, 2009, order. On July 14, 2009, plaintiffs asked the court to admit at least the medical expenses and opinion testimony related to the Burch procedure itself, which cost $2,581. On September 9, 2009, plaintiffs argued that the supplemental disclosure was timely and that the court should admit all of the medical expenses as well as Dr. Bernstein's opinion that they were proximately caused by the absence of informed consent. The court entered each motion in the record and stated it would revisit the matter at the time of trial.

2. Motion for Summary Judgment

On June 23, 2009, defendants moved for summary judgment based on the theory that plaintiffs had failed to disclose expert testimony that plaintiffs' injuries were proximately caused by Dr. Gardner's alleged deviation from the standard of care in obtaining Dawn's informed consent for the Burch procedure. The trial court granted the summary judgment, noting only that plaintiffs had failed to establish the proximate cause element of their claim.

ANALYSIS

A. Expert Testimony Regarding Medical Expenses

Plaintiffs argue that the trial court erred in barring Dr. Bernstein from testifying about Dawn's medical bills and that they were proximately caused by Dr. Gardner failing to obtain Dawn's informed consent. Supreme Court Rule 213(g) requires that, upon written interrogatory, a party must disclose the subject matter, conclusions, opinions, qualifications, and all reports of a witness who will offer any opinion testimony. Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007). Further, Rule 213(i) imposes on each party a continuing duty to inform the opponent of new or additional information whenever such information becomes known to the party. Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007). The Rule 213 disclosure requirements are mandatory and subject to strict compliance by the parties. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004). The admission of evidence pursuant to Rule 213 is within the sound discretion of the trial court, and the court's ruling will not be disturbed absent an abuse of that discretion. *Sullivan*, 209 Ill. 2d at 109.

The record lacks any indication of how the trial court reached its decision to bar the medical bills and Dr. Bernstein's supplemental opinion. Plaintiffs have provided neither a report of proceedings, such as a verbatim transcript of the hearing, as required by Supreme Court Rule 321

(Ill. S. Ct. R. 321 (eff. June 1, 1994)) nor an alternative, such as a bystander's report or an agreed statement of facts, as prescribed by Rule 323 (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)). The record contains only a written order indicating that the motion to bar was granted.

Our supreme court long has recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch*, 99 Ill. 2d at 391. "An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral*, 217 Ill. 2d at 156. Without an adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms with the law. *Corral*, 217 Ill. 2d at 157; *Foutch*, 99 Ill. 2d at 392. On the record before us, we presume that the trial court's order had a sufficient factual basis and that it conforms with the law.

Regardless of the deficiency of the record, we conclude that the trial court did not abuse its discretion under the circumstances. First, plaintiffs argue that they "reasonably supplemented" their discovery; however, all but two of the medical expenses that were the subject of the supplemental opinion were incurred before Dr. Bernstein gave his deposition. Second, plaintiffs argue that Dr. Bernstein's deposition testimony contained his opinion that Dr. Gardner's conduct caused plaintiffs' pain, suffering, and medical problems. However, his deposition contains no opinion about the reasonableness and necessity of the medical expenses that Dawn actually incurred. Third, plaintiffs argue that they were diligent because they supplemented disclosure soon after the parties'

negotiations for a stipulation fell through. Plaintiffs were unreasonable to wait years to make a disclosure on the ground that they hoped to reach a stipulation with opposing counsel. Moreover, defendants point out that the negotiations involved whether the expenses were reasonably and necessarily incurred for the services rendered, not whether the expenses were proximately caused by Dr. Gardner's conduct. Fourth, plaintiffs argue that defendants waived any challenge to the timeliness of the supplemental disclosure by waiting five months to file the motion to bar. However, plaintiffs' supplemental disclosure was made three years after Dr. Bernstein was disclosed as an expert. The trial court had the opportunity to weigh plaintiffs' three-year delay against defendants' five-month delay, and we cannot say the trial court abused its discretion in finding plaintiffs' delay to be more egregious.

Our ruling does not bar *all* evidence of the cost of the Burch procedure itself. Dawn testified in her deposition that, if Dr. Gardner had explained the various alternatives and risks of the Burch procedure, she would not have proceeded with it. At trial, Dawn may testify that, had she not elected to have the procedure, she would not have incurred the expense.

B. Summary Judgment

Next, plaintiffs argue that we must reverse the entry of summary judgment. Plaintiffs argue that, when construed in the light most favorable to them, the record shows that a reasonable person in Dawn's circumstance would have declined to pursue the Burch procedure after being properly informed of its risks and alternatives.

The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment is appropriate where the pleadings, affidavits, depositions, and

admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2—1005(c) (West 2008); *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597, (2004). In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). If a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka*, 348 Ill. App. 3d at 597.

The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams*, 211 Ill. 2d at 43. However, summary judgment is a drastic means of disposing of litigation that should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007).

To recover damages for medical negligence, a plaintiff must show: (1) the standard of care in the medical community by which the physician's treatment was measured; (2) the physician's deviation from the standard of care; and (3) an injury that was proximately caused by the deviation from the standard of care. *Purtill v. Hess*, 111 Ill. 2d 229, 241-42 (1986). If a physician deviates from the standard of care and that deviation proximately causes injury to a patient, the physician is liable for damages caused by his medical negligence. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000).

" 'The central issue in a medical-malpractice action is the standard of care against which a doctor's negligence is judged.' " *Mansmith v. Hameeduddin*, 369 Ill. App. 3d 417, 426 (2006), quoting *Curi v. Murphy*, 366 Ill. App. 3d 1188, 1199 (2006). The plaintiff bears the burden to prove by a preponderance of the evidence that the defendant deviated from that standard of care. *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 423 (1975). A deviation from the standard of care constitutes professional negligence, which must be proved by expert testimony. *Borowski*, 60 Ill. 2d at 423.

In this case, plaintiffs argue that Dr. Gardner committed medical negligence by failing to obtain Dawn's informed consent to proceed with the Burch procedure. There are four essential elements a plaintiff must prove in a malpractice action based upon the doctrine of informed consent: "(1) the physician had a duty to disclose material risks; (2) he failed to disclose or inadequately disclosed those risks; (3) as a direct and proximate result of the failure to disclose, the patient consented to treatment she otherwise would not have consented to; and (4) plaintiff was injured by the proposed treatment." *Coryell v. Smith*, 274 Ill. App. 3d 543, 546 (1995). The gravamen in an informed consent case requires the plaintiff to "point to significant undisclosed information relating to the treatment which would have altered her decision to undergo it." *Coryell*, 274 Ill. App. 3d at 546.

Because we conclude that the trial court did not abuse its discretion in excluding Dr. Bernstein's opinions that were disclosed after his September 15, 2005, deposition, the question presented on review is whether the previous disclosure of Dr. Bernstein's opinions adequately established a genuine issue of material fact of whether defendants' conduct proximately caused Dawn's injury. The issue of proximate cause is generally a question of fact, but at the summary judgment stage, the plaintiff must present some affirmative evidence that it is "more probably true

than not true" that the defendant's negligence was a proximate cause of the plaintiff's injuries. *Borowski*, 60 Ill. 2d at 424.

Proximate cause must be established by expert testimony to a reasonable degree of medical certainty, and the causal connection must not be "contingent, speculative, or merely possible." *Ayala v. Murad*, 367 Ill. App. 3d 591, 601 (2006). An expert's opinion is only as valid as the basis for the opinion. *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 293 (2008). Conclusory opinions based on sheer, unsubstantiated speculation are irrelevant. *Wiedenbeck*, 385 Ill. App. 3d at 293.

Defendants argue that summary judgment is appropriate because plaintiffs have failed to establish that Dr. Gardner's alleged negligence in performing the Burch procedure proximately caused Dawn's damages. Specifically, defendants argue that plaintiffs' claims must fail in the absence of any evidence that Dawn's damages were caused by the Burch procedure and not by the ovarian surgery that was performed at the same time. We disagree.

When viewing the pleadings, affidavits, depositions, and admissions on file in the light most favorable to the nonmoving party, we conclude that Dr. Bernstein's timely opinion testimony shows there is a genuine issue of material fact as to whether defendants' alleged negligence proximately caused Dawn's injury. See 735 ILCS 5/2—1005(c) (West 2008); *Klitzka*, 348 Ill. App. 3d at 597. The timely Rule 213 disclosure contained the doctor's expert medical opinion that Dr. Gardner's treatment of Dawn's incontinence was inadequate and that "such failures on the part of Dr. Gardner constituted deviations from the standard of care and that such deviations proximately caused the various pain and suffering incurred by [Dawn] following the surgery performed by Dr. Gardner in 1999."

Dr. Bernstein's deposition testimony was consistent with the timely Rule 213 disclosure. On September 15, 2005, Dr. Bernstein testified that Dr. Gardner had failed to (1) take an incontinence history; (2) take an incontinence examination; (3) discuss with Dawn the findings of the history and the examination; and (4) address the various behavioral and surgical options and the risks, benefits, complications, and alternatives of each. According to Dr. Bernstein, the standard of care in 1999 required Dr. Gardner to determine the type of incontinence, any factors that might have made it better or worse, any treatments that had been tried and the results of those treatments, a definable quantity of leakage through a Marshall test, and the patient's subjective assessment of how the condition affected her quality of life.

Dr. Bernstein further testified that, 10 years before the treatment at issue, Dr. Gardner had performed on Dawn an anterior repair, which creates the reasonable inference that the previous repair should have made Dr. Gardner aware that Dawn was a poor candidate for a Burch procedure. Dr. Bernstein further testified that, even if Dr. Gardner had persisted in his desire to use the Burch procedure, he should not have proceeded without using urodynamic testing beforehand. Otherwise, Dr. Bernstein concluded, Dr. Gardner deviated from the standard of care in not employing the sling procedure.

Based on the medical records, Dr. Bernstein testified that Dr. Gardner failed to obtain Dawn's informed consent, which requires a discussion of the proposed procedure, the technical aspects and logistics of the procedure, the potential risks and complications, and the recovery process. Informed consent also requires documentation that the patient knows and understands the discussion. In this case, Dr. Bernstein believed that Dr. Gardner was negligent for failing to discuss

alternative procedures, such as the sling procedure. Finally, Dawn testified that she would not have undergone the Burch procedure if Dr. Gardner had informed her of the risks.

Thus, Dr. Bernstein provided a thorough basis for his opinion as to why the Burch procedure proximately caused the injury. Dr. Bernstein testified that Dr. Gardner was negligent in employing the Burch procedure without Dawn's informed consent and that Dr. Gardner was not negligent in performing the oophorectomy. When read together, the doctor's testimony creates the reasonable inference that the Burch procedure, rather than the oophorectomy, proximately caused Dawn's injury. The possibility that the oophorectomy caused Dawn's injury is a question to be argued to a trier of fact, which precludes the entry of summary judgment for defendants.

The parties cloud the proximate cause issue by misusing the concepts of "injury" and "damages." If a physician deviates from the standard of care and that deviation proximately causes injury to a patient, the physician is liable for damages caused by his medical negligence. *Neade*, 193 Ill. 2d at 444. Dr. Bernstein testified at his deposition that "the deviations from the standard of care resulted in a procedure that most certainly was inappropriate for [Dawn], which clearly caused a tremendous amount of *discomfort and pain, [and] medical problems*." (Emphasis added.) Moreover, Dr. Bernstein opined that Dr. Gardner's conduct "proximately caused the various *pain and suffering* incurred by [Dawn] following the surgery performed by Dr. Gardner in 1999." (Emphasis added.) Finally, he stated that the case amounted to "a combination of the wrong procedure, in the wrong hands, done the wrong way, that resulted in [Dawn's urinary] retention." Thus, Dr. Bernstein testified unambiguously that Dr. Gardner's use of the Burch procedure without Dawn's informed consent proximately caused an injury. Dr. Bernstein stated the injury resulted in pain and suffering and "medical problems," such as urinary retention.

The trial court did not explain the summary judgment ruling, but it appears the court credited defendants' argument that summary judgment was necessary because the court had excluded Dawn's medical bills and Dr. Bernstein's opinion regarding the reasonableness and proximate cause of those bills; and therefore, plaintiffs could not prove that they suffered any damages. While we conclude that the trial court did not abuse its discretion in excluding that evidence, our decision affects the admissibility of only the medical expenses, which are just one type of damages. Dr. Bernstein's opinion specifically mentions pain and suffering and "medical problems," which arguably could include the cost of treating her complications. Also, Dawn may testify that she would not have incurred the cost of the Burch procedure, itself, if she had been fully informed of its alternatives and risks and decided to forego the procedure. At trial, Dawn may testify that, had she not elected to have the procedure, she would not have incurred the expense.

The evidentiary decision to exclude Dr. Bernstein's opinion as to the medical bills likely could Robert D. Mclaren

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diminish plaintiffs' potential recovery following a trial, but it does not entitle defendants to summary judgment on the ground that Dawn suffered no damages resulting from the injury. See *Richardson v. Chapman*, 175 Ill. 2d 98, 113-14 (1997) (compensatory damages for a nonfatal injury include, among other things, the permanency of the plaintiff's condition, the possibility of future deterioration, the extent of the plaintiff's medical expenses, and the restrictions imposed on the plaintiff by the injuries). We offer no further comment on the damages issue except that, on remand,

plaintiffs may not introduce the previously excluded medical bills and Dr. Bernstein's opinion regarding those bills.

For the preceding reasons, the exclusion of the certain medical bills and Dr. Bernstein's untimely opinion testimony is affirmed, the summary judgment entered for defendants is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.