

**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).

2016 IL App (4th) 160069-U

NO. 4-16-0069

**FILED**

November 22, 2016  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

JAMES R. MUSHRUSH,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
SAMUEL J. FEINBERG, M.D.; PROVENA-COVENANT	)	No. 13L5
MEDICAL CENTER; and CHRISTIE CLINIC, LLC, an	)	
Illinois Limited Liability Corporation,	)	Honorable
Defendants-Appellees.	)	Michael Q. Jones,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.  
Justices Holder White and Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's judgment is affirmed because the court did not err in (1) denying plaintiff's motions for sanctions for alleged discovery violations, (2) entering a directed verdict for defendant physician based on a lack of expert testimony establishing the alleged medical negligence proximately caused plaintiff's injuries, and (3) denying as a matter of law plaintiff's vicarious liability claims because plaintiff could not establish the underlying negligence claim. Plaintiff forfeited any argument (1) the jury's verdict on the informed consent claims was against the manifest weight of the evidence or (2) the trial court erred in entering summary judgment on behalf of defendants on plaintiff's institutional negligence claims.

¶ 2 On January 24, 2014, plaintiff, James R. Mushrush, filed his fourth amended complaint against defendants, Dr. Samuel J. Feinberg, Provena-Covenant Medical Center (Provena), and Christie Clinic (Christie). Prior to trial, the trial court granted Provena's and Christie's respective summary judgment motions on all the claims against Provena and the institutional negligence claim against Christie. At trial, the court entered a directed verdict in

favor of Dr. Feinberg and Christie on the negligence claims. The jury returned a verdict in favor of Feinberg and Christie on the informed consent claims. Plaintiff appeals. We affirm.

¶ 3

## I. BACKGROUND

¶ 4 Plaintiff's medical malpractice claim centered on Dr. Feinberg's performance of a laparoscopic cholecystectomy (gallbladder removal) on plaintiff and Feinberg's subsequent care and treatment of plaintiff. Plaintiff's bowel was nicked during the surgery. Plaintiff's fourth amended complaint contained eight counts. Count I was directed against Feinberg, alleging medical negligence. Count II was directed at Provena, alleging vicarious liability for Feinberg's medical negligence. Count III was directed at Feinberg, alleging he failed to receive informed consent from plaintiff. Count IV was aimed at Provena, alleging Provena was responsible for plaintiff's lack of informed consent because of its alleged agency relationship with Feinberg. Count VII alleged Christie was vicariously liable for Feinberg's negligence. Count VIII, again based on its alleged agency relationship with Feinberg, alleged Christie was responsible for Feinberg's failure to get plaintiff's informed consent. Counts X and XIII alleged Provena and Christie, respectively, were guilty of institutional negligence. We note the counts in plaintiff's fourth amended complaint are not in numerical order because counts from previous complaints had been dismissed by the trial court.

¶ 5

On March 27, 2015, the trial court granted Provena's motion for summary judgment with regard to count II and count IV of plaintiff's fourth amended complaint. On August 28, 2015, the court granted Provena's motion for summary judgment on count X. On October 28, 2015, the court granted Christie's motion for summary judgment on count XIII.

¶ 6

The trial in this case began on November 3, 2015. On November 9, 2015, after the plaintiff rested, defendants Feinberg and Christie moved for directed verdicts on all counts.

The trial court entered a directed verdict in favor of Feinberg with regard to count I (medical negligence) and Christie with regard to count VII (medical negligence/vicarious liability) because it found plaintiff failed to introduce evidence that any of Feinberg's allegedly negligent acts proximately caused plaintiff's injuries. The trial court denied defendants' motions with regard to the informed consent counts against Feinberg and Christie.

¶ 7 On November 10, 2015, the trial court submitted the informed consent counts (counts III and VIII) to the jury. (Plaintiff erroneously contends in his brief only count III was submitted to the jury.) The jury returned verdicts in favor of Feinberg and Christie on these counts. On December 4, 2015, plaintiff filed a posttrial motion, which the trial court denied on January 7, 2016.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Before we begin our analysis in this case, we note the long-standing rule this court is not a depository for an appellant to dump the burden of argument and research. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 522 (2001). "Mere contentions, without argument or citation of authority, do not merit consideration on appeal." *Id.* at 533, 755 N.E.2d at 521-22. In addition, Illinois Supreme Court Rule 341(h)(6), (7) (eff. Jan. 1, 2016) provides an appellant's brief to the appellate court will contain the following:

"(6) Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal \*\*\* or to the pages of the abstract \*\*\*. Exhibits may be cited by reference to pages of

the abstract or of the record on appeal or by exhibit number followed by the page number within the exhibit \*\*\*.

(7) Argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal or abstract, if any, where evidence may be found. Citation of numerous authorities in support of the same point is not favored. Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

Plaintiff's brief to this court is difficult to understand as he intermingles issues, provides inaccurate information, and offers little in the way of analysis. As a result, we will not address the issues in the order plaintiff raised them.

¶ 11 A. Sanctions for Discovery Violations

¶ 12 We first address plaintiff's argument the trial court erred in its handling of plaintiff's two motions for sanctions against Feinberg. The first motion for sanctions against defendant Feinberg was for not disclosing, in response to a discovery request, his involvement in another malpractice action until shortly before trial. According to plaintiff's brief, the trial court acknowledged defense counsel had made a mistake but declined to impose any of the sanctions requested by plaintiff.

¶ 13 We will only disturb a trial court's denial of sanctions for an alleged discovery violation if the trial court's ruling constitutes an abuse of discretion. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120, 692 N.E.2d 286, 289 (1998). Plaintiff requested severe

sanctions, including a judgment against Feinberg with regard to liability or, alternatively, barring Feinberg's expert witness from testifying. Our supreme court has stated:

"When imposing sanctions, the court's purpose is to coerce compliance with discovery rules and orders, not to punish the dilatory party. [Citations.] An order of dismissal with prejudice or a sanction which results in a default judgment is a drastic sanction to be invoked only in those cases where the party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority. [Citations.] Being such a drastic sanction, dismissal should only be employed as a last resort and after all the court's other enforcement powers have failed to advance the litigation.

[Citations.]" *Id.* at 123, 692 N.E.2d at 291.

Plaintiff does not provide any real argument why the court abused its discretion in denying the severe sanctions he requested. Plaintiff acknowledges in his brief the court offered to continue the case or provide plaintiff time to depose Feinberg's expert during the trial with regard to the other undisclosed malpractice lawsuit.

¶ 14 As noted earlier, this court is not a depository for an appellant to dump the burden of argument and research. *Elder*, 324 Ill. App. 3d at 533, 755 N.E.2d at 522. Simply saying the trial court abused its discretion does not constitute argument. We find plaintiff forfeited this argument. Regardless, it does not appear the trial court abused its discretion in denying the severe sanctions plaintiff requested.

¶ 15 Plaintiff also argues the trial court should have granted his second motion for sanctions because Feinberg and Christie did not disclose they knew plaintiff's expert, Dr. Simon,

initially had been denied admittance to medical school and failed his first attempt at board certification. It is unclear whether this second motion for sanctions made it into the record. In addition, plaintiff also intermingles an argument regarding the admissibility of this undisclosed information regarding Simon's educational background.

¶ 16 When cross-examining Simon, counsel for Feinberg and Christie asked Simon about his initial failure to get into medical school and his initial failure to pass his board certification exams. At the time, plaintiff only objected to the relevancy of the question about his failure to initially be accepted for admission to medical school. He did not object on the ground defendants failed to disclose this information to him.

¶ 17 Plaintiff argues this line of questioning deprived him of a fair trial. As stated earlier, plaintiff only objected to the question regarding Dr. Simon not initially being admitted to medical school. However, he failed to raise this specific issue in his posttrial motion. After his objection was overruled, he did not ask for a continuing objection with regard to additional questions on this topic. Plaintiff also did not object to the questions about Simon's board certification exam. To preserve an evidentiary error for appellate review, a party must make both a contemporaneous objection and raise the issue in a posttrial motion. *Moller v. Lipov*, 368 Ill. App. 3d 333, 345, 856 N.E.2d 664, 675 (2006). Plaintiff failed to properly preserve these objections. As a result, we hold plaintiff forfeited these evidentiary objections.

¶ 18 We next address plaintiff's argument the trial court abused its discretion in not sanctioning defendants for failing to disclose this information regarding Dr. Simon's background. In denying the motion for sanctions, the court noted this information about Dr. Simon was available to plaintiff if plaintiff had adequately vetted his own witness. In other words, this was not a situation where defendants failed to disclose information to which plaintiff's counsel did

not have access. In addition, plaintiff requested the same severe sanctions discussed above. We cannot say the trial court abused its discretion in denying the severe sanctions plaintiff requested.

¶ 19

#### B. Proximate Cause

¶ 20

We next address whether the trial court erred in entering a directed verdict for Feinberg on the negligence count based on a lack of expert testimony showing Feinberg's alleged negligence was the proximate cause of plaintiff's injuries. The trial court found plaintiff did not present expert testimony that any negligent act by Dr. Feinberg was a proximate cause of plaintiff's injuries.

¶ 21

Generally, in medical malpractice cases, "[t]o establish proximate cause, a plaintiff must show that 'defendant's negligence "more probably than not" caused plaintiff's injury.' [Citation.] Such proof 'must be established by expert testimony to a reasonable degree of medical certainty \*\*\*. [Citation.]' " *Vanderhoof v. Berk*, 2015 IL App (1st) 132927, ¶ 60, 47 N.E.3d 1080. Plaintiff argues his posttrial motion established there was testimony establishing a deviation from the standard of care. However, he does not identify this expert testimony in his brief, nor does he claim he produced evidence this deviation proximately caused plaintiff's injuries. We will not search the record on plaintiff's behalf. It is an appellant's obligation to clearly set out his argument and reasoning and inform this court where the information upon which he relies is found in the record. Because plaintiff failed to identify in his brief the expert testimony stating Dr. Feinberg's negligent conduct was the proximate cause of plaintiff's injuries, we find this argument forfeited.

¶ 22

We do note Feinberg admitted he nicked plaintiff's bowel during the initial surgery. However, Feinberg notes in his brief plaintiff's expert, Simon, testified incidental enterotomies are a recognized complication of cholecystectomy and can occur in the absence of

negligence. In fact, Simon testified Feinberg's only violation of his standard of care during the surgery was failing to specifically document he reinspected plaintiff's bowel in his postoperative report.

¶ 23 In the alternative, plaintiff claims an exception to the general rule requiring expert testimony applies here. Plaintiff cites *Gulino v. Zurawski*, 2015 IL App (1st) 131587, 43 N.E.3d 1102, for the proposition expert testimony is not required if the plaintiff's injury was caused by conduct so grossly negligent that a layperson could determine the medical provider's actions deviated from the standard of care. However, plaintiff did not make this argument to the trial court. Instead, plaintiff's counsel told the trial court he believed his expert testimony had established the proximate cause of plaintiff's injury was a deviation from the standard of care. Regardless of forfeiture, this is not the type of case where a layperson could determine plaintiff's injuries were proximately caused by Feinberg's medical negligence.

¶ 24 C. Informed Consent

¶ 25 We next look at the issues raised by plaintiff with regard to his informed consent claims. The trial court allowed the informed consent claims against Feinberg (count III) and Christie (count VIII-agency) to be decided by the jury. Plaintiff initially states in his brief to this court: "The trial court erred in entering summary judgment on the only count (informed consent) that the court allowed to go to the jury." Plaintiff continues:

"The presence or lack of informed consent was hotly disputed between the parties. Consequently it was a question of fact completely tainted by the disparagement of Simon's educational background with improperly tainted cross-examination as hereinbefore set out. Considering that it was the Defendant's word



versus Simon's word[,] it is arguable if not overwhelming factored [sic] by the trial court allowing tainted evidence to go in over the objection of Plaintiff's counsel. Consequently, the verdict of the jury was contrary to the manifest weight of the evidence and Plaintiff should be given a new trial. To rule otherwise would be tantamount to the court directing a verdict on the issue of negligence."

We have already held plaintiff forfeited his arguments with regard to the evidence. Because plaintiff does not argue the jury's verdict on the informed consent claims was against the manifest weight of the evidence based on all the evidence the jury had before it, including the evidence regarding Dr. Simon's background, we need not address this issue any further.

¶ 26

#### D. Agency

¶ 27 We next turn to plaintiff's arguments regarding the counts of his fourth amended complaint against Christie and Provena based on their alleged agency relationship with Dr. Feinberg. Count II and count VII alleged Provena and Christie, respectively, were guilty of negligence based on Dr. Feinberg's alleged negligence. Plaintiff argues the trial court should not have granted defendants' summary judgment motions with regard to counts II and VII.

¶ 28 Christie points out the trial court did not award it summary judgment on count VII. Instead, the court entered a directed verdict against plaintiff on count VII because plaintiff failed to introduce evidence that Feinberg's alleged negligent acts were the proximate cause of plaintiff's injuries. The court's directed verdict was not based on a finding Feinberg was not Christie's agent. In fact, Christie notes in its brief both it and Feinberg admitted in their answers Feinberg was an agent of Christie.

¶ 29            Regardless, according to plaintiff's reply brief, plaintiff presented sufficient evidence Feinberg's negligence was the proximate cause of plaintiff's injuries to survive Christie's motion for a directed verdict on count VII. However, as we noted above, plaintiff failed to establish the trial court erred in finding plaintiff could not prove Feinberg's negligence because plaintiff did not introduce expert evidence showing Feinberg's negligence was the proximate cause of plaintiff's injuries. As a result, plaintiff also failed to establish the trial court erred in entering a directed verdict on a vicarious liability claim against Christie based on Feinberg's alleged negligence. For the same reason, we see no need—and plaintiff offers no reason—for this court to determine whether the trial court erred in granting Provena's motions for summary judgment on counts II or IV, which were vicarious liability claims against Provena based on Feinberg's negligence, considering plaintiff failed to establish Feinberg's negligence was the proximate cause of plaintiff's injuries.

¶ 30            E. Institutional Negligence

¶ 31            Plaintiff also claims the trial court erred in entering summary judgment on behalf of Provena and Christie on plaintiff's institutional negligence claims found in counts X and XIII of his fourth amended complaint. Citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 622 N.E.2d 788 (1993), plaintiff states the question of whether defendants had notice of Feinberg's malpractice constitutes a triable issue of fact. However, even if we assumed the trial court erred in granting summary judgment on these counts, we do not see how plaintiff could be prejudiced by these rulings, considering plaintiff failed to prove his injuries were proximately caused by Feinberg's negligence.

¶ 32            Unlike plaintiff's claims against Provena and Christie based on their alleged agency relationships with Feinberg, an institutional negligence claim seeks to hold a health-care

provider or hospital liable for its own negligent acts. See *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 19, 33 N.E.3d 288. "A hospital is not an insurer of a patient's safety." *Reynolds v. Mennonite Hospital*, 168 Ill. App. 3d 575, 579, 522 N.E.2d 827, 829 (1988). An institutional negligence claim cannot survive without evidence the hospital knew or should have known a physician would engage in malpractice. *Id.* Considering plaintiff did not prove his injuries were proximately caused by Dr. Feinberg's alleged negligence, we do not see how either Christie or Provena could be institutionally negligent for failing to know something plaintiff failed to establish occurred, *i.e.*, Feinberg's negligence. Because plaintiff offers no argument on this point, we find plaintiff forfeited this issue.

¶ 33

### III. CONCLUSION

¶ 34

For the reasons stated, we affirm the trial court's judgment in this case.

¶ 35

Affirmed.