2017 IL App (5th) 150451-U

NO. 5-15-0451

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DEBRA A. ZIMMERMAN, Plaintiff-Appellant, v. MICHAEL SCHULTHEIS, M.D., EFFINGHAM OBSTETRICS & GYNECOLOGY ASSOCIATES, S.C., PREECHA TAWJAREON, M.D., and A.M. ADEKUNLE, Defendants (Michael Schultheis, M.D., and Effingham Obstetrics & Gynecology Associates, S.C., Defendants-Appellees).	)	Appeal from the Circuit Court of Effingham County. No. 08-L-55 Honorable Michael D. McHaney, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Moore and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiff violated Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) by not disclosing expert opinions, the trial court's orders striking plaintiff's evidence and granting defendants' motion *in limine* were not an abuse of discretion. Where there is no genuine issue of material fact, the trial court's order granting defendants' motion for summary judgment was correct.

¶ 2 Debra A. Zimmerman appeals from two orders entered on June 9, 2015, that barred her from using certain medical evidence in her medical malpractice case, and granted summary judgment for Michael Schultheis, M.D. and Effingham Obstetrics & Gynecology Associates, S.C. For the reasons that follow, we affirm. We have jurisdiction to hear this appeal on the basis of Illinois Supreme Court Rule 304(a), which provides for situations where the case is final as to one or more but fewer than all of the parties. Ill. S. Ct. R. 304(a) (eff. Feb. 1, 1994). The trial court entered a Rule 304(a) finding in its September 25, 2015, order stating that there was no just reason for delaying this appeal. *Id.*

¶ 3 FACTS

¶ 4 I. Factual Background

¶ 5 Zimmerman went to see her family doctor in January 2006 about ongoing abdominal pain. Her doctor ordered a CT scan. The January 18, 2006, CT scan was read by Dr. Preecha Tawjareon. Dr. Tawjareon found no abnormality. Still in pain, Zimmerman went to a different family doctor who ordered an ultrasound. The February 6, 2006, ultrasound was also interpreted by Dr. Tawjareon. The ultrasound showed a mass which measured 4.5 by 3.1 centimeters. On the basis of the ultrasound results, an MRI was ordered. The February 13, 2006, MRI was interpreted by Dr. Ademakinwa M. Adekunle. Dr. Adekunle found no abnormality.

¶ 6 Thereafter, Zimmerman was referred to Dr. Michael Schultheis, a gynecologist. Dr. Schultheis ordered a diagnostic ultrasound in April 2006, which revealed a complex mass in her abdomen which measured 4.4 by 3.4 by 4.9 centimeters. Dr. Schultheis

recommended that Zimmerman undergo a laparoscopic examination with possible surgical removal of the mass. Dr. Schultheis performed this procedure in April 2006, but did not locate the mass. He diagnosed Zimmerman with pelvic congestion syndrome–a benign condition that can resolve over time without medical intervention. Two weeks later, Zimmerman returned and reported that she still had severe abdominal pain. Dr. Schultheis prescribed pain medication.

¶ 7 Over the next four months, Zimmerman's pain remained severe and ultimately in August 2006, Zimmerman went to the emergency room in Effingham. Pursuant to the emergency physician's directive, Zimmerman followed up with Dr. Schultheis, who ordered a CT scan of her abdomen and pelvis. The CT scan revealed a possible malignant mass on the left side which measured 6 by 6 centimeters. Additionally, from the images, it appeared that the mass had possibly entered the space behind the peritoneum which is the lining of the abdominal cavity.

¶ 8 Dr. Schultheis referred Zimmerman to Washington University physicians in St. Louis, where Dr. David C. Linehan operated on Zimmerman in September 2006. Dr. Linehan found that the mass had extended into the retroperitoneum. He surgically removed the mass, and also removed part of her colon, her left ovary, the left part of her uterus, and her left kidney. The type of cancer involved was leiomyosarcoma (LMS). Almost immediately after the surgery, Zimmerman's cancer returned. She underwent radiation, but the cancer continued to grow. She then began chemotherapy, which was successful. In 2008, the cancer metastasized to her liver and Dr. Linehan performed a surgical resection of two affected areas of the liver. As of 2015 when the orders from

which Zimmerman appeals were entered, she had been cancer-free for seven years. However, Zimmerman was suffering from the decline of kidney function. Her treating nephrologist, Dr. Bashar Alzahabi, believed that at some point in time when her numbers fell to a certain level, Zimmerman would need dialysis.

¶ 9 II. Procedural History

¶ 10 On August 28, 2008, Debra Zimmerman filed a two-count complaint for medical negligence against her physician, Michael Schultheis, M.D., and his employer, Effingham Obstetrics & Gynecology Associates, S.C. (collectively defendants).

¶ 11 Zimmerman initially named two radiologists, Preecha Tawjareon, M.D., and A.M. Adekunle, M.D., as respondents in discovery. Later, after Zimmerman's attorney consulted with expert witnesses, Dr. Tawjareon and Dr. Adekunle were converted from respondents in discovery to defendants.

¶ 12 Dr. Adekunle was served with process, and an attorney entered an appearance on his behalf. Dr. Adekunle was deposed in July 2009. Dr. Adekunle's attorney was allowed to withdraw on March 29, 2010. From our review of the record, no other attorney entered an appearance on Dr. Adekunle's behalf. After completing discovery, in January 2012, Zimmerman filed a motion for summary judgment against Dr. Adekunle. The motion was called for hearing on January 30, 2012; the court noted that Dr. Adekunle had not appeared or responded to the motion; and the trial court entered judgment against Dr. Adekunle as to liability.

¶ 13 A letter in the court file dated June 22, 2012, from a Ure Adekunle of Powder Springs, Georgia, stated that Dr. Adekunle's health had deteriorated since his 2009

deposition, and he needed 24-hour care. The letter concluded with the information that Dr. Adekunle had returned to Nigeria on a permanent basis. We found no further reference to Dr. Adekunle in the record.

¶ 14 Zimmerman settled her case against Dr. Tawjareon after mediation. The amount of the settlement is not included in the record.

¶ 15 *Zimmerman's Expert Witness Disclosures*

¶ 16 On March 2, 2011, Zimmerman filed her witness disclosure. In addition to all of her treating physicians, Zimmerman named two expert witnesses: Richard M. Gore, M.D., and Fred J. Duboe, M.D. Zimmerman stated that both experts were expected to testify to the deviations from the required standard of care and the consequences of those deviations.

¶ 17 On July 6, 2011, August 15, 2011, and January 15, 2013, Zimmerman filed certificates of service of discovery documents certifying that a copy of "Plaintiff's Supplemental Witness Disclosure" was served upon opposing counsel. The record does not contain these supplemental disclosures. However, from a pleading filed on behalf of Dr. Schultheis, we have been able to review both of the 2011 supplemental disclosures. The contents of the 2011 supplemental disclosures are included later in this order at ¶¶ 35-36 and ¶¶ 60-61. The contents of the January 15, 2013, supplemental disclosure remain unknown.

¶ 18 *Scheduling Order, Motions, and Trial Settings*

¶ 19 The final scheduling order was entered after a court hearing on December 6, 2012. Pursuant to this scheduling order, the court gave Zimmerman until March 1, 2013, to

make supplemental witness disclosures and until April 1, 2013, to make any disclosed experts available for deposition. The discovery cutoff was July 1, 2013. Trial was set for September 9, 2013. This trial setting was vacated by the court on July 11, 2013. On July 15, 2014, the trial court held a conference call at which the attorneys agreed to a January 20, 2015, trial setting.

¶ 20 Due to conflicts with Dr. Schultheis's schedule, his attorney filed a motion to continue the January 20, 2015, trial setting. Zimmerman objected to the requested continuance. The trial court did not rule on this motion.

¶ 21 On January 8, 2015, the defendants filed a motion *in limine* seeking to bar certain opinions given by Dr. Duboe in his evidence deposition that went beyond Zimmerman's Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) disclosures. Specifically, they asked the court to bar Dr. Duboe from testifying beyond the opinions given in his discovery deposition−that in a general sense, it is better to detect cancer earlier than later. During his evidence deposition, he again testified to this general rule, but then Dr. Duboe testified that if the LMS was diagnosed earlier, he "thinks" that "the likelihood of the ureteral obstruction, the likelihood of the complexity of the surgery that needed to be performed in September would have been much, much easier." Defendants also asked the trial court to bar two of Zimmerman's treating physicians, Dr. Philip Dy (oncologist) and Dr. Barshar Alzahabi (nephrologist), from testifying to opinions beyond the opinions provided during their depositions. Defendants argued that neither of these two treating physicians provided opinions in their discovery depositions that causally connected any negligence by them to the damages sustained by Zimmerman. Specifically, Dr. Dy

testified that he could not provide opinion testimony within a reasonable degree of medical certainty as to Zimmerman's prognosis or whether her treatment would have been less involved if she had been diagnosed with LMS earlier. Dr. Alzahabi testified that he could not provide opinion testimony within a reasonable degree of medical certainty as to the cause of Zimmerman's kidney failure and her probable future need for dialysis.

¶ 22 Also, on January 9, 2015, defendants filed a motion for summary judgment arguing that Zimmerman had not presented any evidence that "recognition and treatment of the mass at some earlier point in time following April of 2006, would have yielded a different course of treatment and/or outcome than that which was achieved when the mass was resected on September 26, 2006."

¶ 23 In response to these motions, Zimmerman asked the trial court to continue the January 20, 2015, trial date in order to respond to these two motions. On January 22, 2015, the trial court formally entered its order vacating the January 20, 2015, trial setting. No new trial date was scheduled.

¶ 24 At no time did the trial court extend the discovery cutoff past July 1, 2013.

¶ 25 On February 27, 2015, Zimmerman filed a response to both motions. Attached to this response was an undated affidavit of Dr. Richard M. Gore that contained the opinion that if Zimmerman's cancer had been discovered and surgically removed in late spring or in early summer of 2006, the cancer would not have spread to organs and metastasized.

¶ 26 In response, the defendants filed a motion to strike Dr. Gore's new affidavit and argued that this was an undisclosed new opinion and thus, Zimmerman should be barred from using it because the discovery deadline had passed. Defendants also argued that

they would be prejudiced if Zimmerman was allowed to use Dr. Gore's affidavit at trial. Defendants explained that the new opinions were not included in Dr. Gore's discovery deposition, and that their own expert witnesses were obtained in response to the earlier disclosed opinions. The trial court granted this motion on June 9, 2015.

¶ 27 On January 12, 2015, the trial court denied the motion *in limine* because the attorneys representing the defendants did not contemporaneously object to Dr. Duboe's deposition testimony that the September 2006 surgery would probably have been less involved if Zimmerman had been diagnosed earlier. On March 5, 2015, defendants filed a motion to reconsider. The trial court granted this motion on June 9, 2015.

¶ 28 On June 9, 2015, the trial court granted summary judgment against Zimmerman stating that no genuine issue of material fact remained and that she was unable to prove proximate cause.

¶ 29 III. Zimmerman's Expert Witnesses

¶ 30 *Fred J. Duboe, M.D.*

¶ 31 A. Dr. Duboe's August 27, 2008, Report

¶ 32 On September 3, 2008, Zimmerman's attorney filed an affidavit with the court pursuant to section 2-622(a)(1) of the Code of Civil Procedure (735 ILCS 5/2-622(a)(1) (West 2006)). Attached to the affidavit was a letter from Dr. Duboe, a board-certified gynecologist, in which he reviewed all of Zimmerman's relevant care and concluded that she had a meritorious cause of action against Dr. Schultheis and Effingham Obstetrics & Gynecology Associates, S.C. Specifically, he stated that Dr. Schultheis should have ordered additional diagnostic testing after he found no mass during the April 2006

laparoscopy, and/or referred Zimmerman to a general surgeon to pursue further identification of the mass, and that his failure to do so was negligent.

¶ 33 B. Dr. Duboe's June 14, 2011, Discovery Deposition

¶ 34 Dr. Duboe testified that he found that Dr. Schultheis did not meet the required standard of care in this case. Specifically, he concluded that in light of the April 14, 2006, ultrasound findings and Dr. Schultheis's inability to confirm those findings during the subsequent laparoscopic procedure, Dr. Schultheis should have referred Zimmerman to a surgeon or a surgical oncologist or alternatively, he should have ordered a repeat imaging study. Furthermore, Dr. Duboe testified that if Dr. Schultheis had ordered a repeat ultrasound, more likely than not, the ultrasound would have confirmed the presence of the mass. However, Dr. Duboe did not render any specific opinions regarding early diagnosis and surgical intervention for this type of cancer, stating that the cancer cell growth rate for this type of tumor was out of the realm of his expertise. He merely testified that in a general sense when a patient has been diagnosed with cancer, early detection is better than late detection.

¶ 35 C. Dr. Duboe's August 8, 2011, Supplemental Report

¶ 36 On August 17, 2011, Zimmerman filed a supplemental witness disclosure expanding upon Dr. Duboe's expected opinions based upon his report dated August 8, 2011. Dr. Duboe stated that the ultrasound showed a 4.4 by 3.5 by 4.9 complex mass in the left lower quadrant that was clearly separate from the left ovary. He stated that within a reasonable degree of medical certainty, the mass visualized on the April 14, 2006, ultrasound was the same mass seen on the August 25, 2006, CT scan. The mass had

grown in size between April and August 2006. He opined that there was no evidence that Zimmerman had pelvic congestion syndrome as claimed by Dr. Schultheis because the Doppler flow studies that were part of the ultrasound revealed normal vascular flow to both ovaries. The supplemental report contained no new contentions that Dr. Schultheis deviated from the appropriate standard of care.

¶ 37 D. Dr. Duboe's July 3, 2012, Evidence Deposition

¶ 38 Dr. Duboe testified that the standard of care of an obstetrician/gynecologist is the same across the nation. In other words, all doctors in this practice are held to the same standard of care whether the doctor practices in Effingham or in Chicago.

¶ 39 Dr. Duboe reviewed the repeat ultrasound ordered by Dr. Schultheis to confirm or clarify the earlier February 2006 ultrasound. Dr. Duboe testified that the April 2006 ultrasound showed a complex mass of unknown etiology in the left adnexa–the areas next to organs. Dr. Duboe reviewed both of the ultrasounds himself and testified that this mass was solid. He contrasted typically benign fluid-filled masses with solid masses like the one seen on Zimmerman's ultrasound. Generally, a solid mass raises cancer concerns. Dr. Duboe testified that the mass depicted in both ultrasounds was more likely than not the same mass.

¶ 40 Dr. Duboe also reviewed and testified about the laparoscopy performed by Dr. Schultheis. Dr. Duboe explained that the reason for the laparoscopy was to determine the cause of her pain, to try to ascertain more information about the complex mass, and to ideally treat the problem. Although Dr. Schultheis indicated in his preoperative report that if he found this left-sided adnexal mass that he planned to remove it, he did not find

the adnexal mass during the surgery. Dr. Duboe reviewed and testified about the color photographs taken during the laparoscopy. He testified that all organs identified in the photographs are within the peritoneal cavity, and that the mass was likely located behind the peritoneal cavity–the retroperitoneal area. The photographs did not contain a full and clear depiction of the left ovary. Overall, Dr. Duboe testified that the photographs depicted an essentially normal pelvis.

¶ 41 Dr. Duboe next testified that on May 8, 2006, Dr. Schultheis met with Zimmerman and informed her that he believed her problem to be pelvic congestion syndrome. Dr. Duboe testified that pelvic congestion syndrome is a condition where prominent veins exist on either side of the fallopian tubes and ovaries in the adnexa. Zimmerman's pain at this appointment remained the same. According to the medical records, Dr. Schultheis did not make any additional recommendations and did not order any additional diagnostic studies.

¶ 42 From his review of Zimmerman's records, Dr. Duboe testified that in August 2006, Zimmerman returned for medical care complaining of increased pain. Dr. Schultheis ordered another abdominal CT scan. This CT scan showed a multilobulated malignant-appearing mass in the left abdomen measuring 6 by 6 centimeters in size. Additionally, fluid in the abdominal cavity was obstructing a ureter. Dr. Schultheis immediately referred Zimmerman to a St. Louis-based gynecological oncologist. Dr. Duboe testified that the mass seen on the August 2006 CT scan was the same mass identified on the April 2006 ultrasound.

¶ 43 Dr. Duboe testified that in his practice he had encountered only one patient with a LMS, and that his expertise was not in gynecological oncology. However, he concluded that Dr. Schultheis failed to meet the required standard of care in one aspect. Dr. Duboe testified that Dr. Schultheis's care was deficient as follows:

> "that knowing what Dr. Schultheis knew going into the laparoscopy, knowing what the findings were that he, himself, had interpreted regarding the complex mass, knowing that the patient had the visualization of a solid mass on the initial exam 2/6/06 followed by the 4/14/06 exam in his office, once he goes in laparoscopically and visualizes essentially what would appear to be normal left and right ovaries, knowing what he knew he can do one of two things: If he has the skills to perform a laparoscopic inspection of the retroperitoneal area, I think that's one thing he should do. In this case I don't criticize him for not doing it because he says he doesn't do retroperitoneal exams, and that's fine.
>
> But in this case I think a light has to go off in his head. Knowing that she had normal vascular flow at the time of these prior imaging studies, knowing that the ovaries appear to be normal, and knowing that she had a solid or complex mass that simply didn't go away, I think he's obligated at this point to perform a postoperative imaging study, be it an ultrasound, be it a CT, be it an MRI–I think any one is acceptable–or alternatively, referring to a surgeon who can perform a retroperitoneal evaluation or dissection.
>
> *** [I]t's only logical to believe at this point in time, knowing what you know that there may be a retroperitoneal mass present. And under the circumstances *** he's ruled out that there were any ovarian pathology based on his dictation. So at least when the patient is coming back with pain symptoms that haven't gotten better and I think are far beyond the scope of pelvic congestion syndrome with this persistent pain, I think at this point he has to either refer to another surgeon or to obtain follow-up imaging studies knowing that the pelvis appeared relatively normal at the time of the laparoscopic procedure."

¶ 44 Additionally, Dr. Duboe agreed with Dr. Schultheis's diagnosis that Zimmerman had at least some degree of pelvic congestion syndrome. However, he testified that Zimmerman's level of pain was inconsistent with pelvic congestion syndrome. Additionally, pelvic congestion is typically bilateral and symmetrical, and not

predominantly on one side. Furthermore, the syndrome does not manifest itself in the form of a solid mass, and the minor amount of congestion discovered during the surgery was not the mass seen earlier on the ultrasounds.

¶ 45 Dr. Duboe was also asked his opinion on what Zimmerman's course of treatment would have been if Dr. Schultheis had complied with the standard of medical care required. Dr. Duboe testified that he believed she would have been diagnosed with cancer earlier, and that the likelihood of ureteral obstruction and the complexities of the surgery she had would have been diminished. However, he acknowledged that with certain cancers, the date that the cancer is ultimately diagnosed is not relevant. Dr. Duboe would not render an opinion on Zimmerman's prognosis other than to testify that if a malignant mass is removed earlier, generally the outcome is better.

¶ 46 On cross-examination by Dr. Schultheis's attorney, Dr. Duboe acknowledged that the earlier CT and MRI reports available to Dr. Schultheis were misread and did not indicate the presence of a mass. Dr. Duboe also agreed with the statement that the CT and MRI studies were more sensitive for diagnosing soft tissue masses than was an ultrasound. He also agreed that Dr. Schultheis could initially rely upon these negative radiology studies.

¶ 47 *Richard M. Gore, M.D.*

¶ 48 A. Dr. Gore's November 3, 2008, Report

¶ 49 On January 12, 2009, Zimmerman's attorney filed an affidavit with the court pursuant to section 2-622(a)(1) of the Code of Civil Procedure. Attached to the affidavit was a letter from Dr. Gore, a board-certified radiologist, in which he reviewed all of

Zimmerman's relevant care, and concluded that she had a meritorious cause of action against the two radiologists–Dr. Tawjareon and Dr. Adekunle. Dr. Gore based his report upon his review of Zimmerman's January 18, 2006, CT scan, the February 6, 2006, ultrasound, and the February 11, 2006, MRI.

¶ 50 Dr. Gore found fault with Dr. Tawjareon's review of the January 2006 CT scan in that he failed to notice and report a 4.0 centimeter retroperitoneal mass located in the lower quadrant. However, Dr. Tawjareon identified and reported this same mass on the February 2006 pelvic ultrasound study. Dr. Gore also found fault with Dr. Adekunle's review of the February 2006 MRI in that he failed to diagnose and report this mass. Dr. Gore characterized these failures as deviations from the standard of care, and concluded that there was a reasonable and meritorious cause or basis for a claim against either or both radiologists.

¶ 51 Dr. Gore did not express opinions regarding the standard of care provided by Dr. Schultheis or his employer, Effingham Obstetrics & Gynecology Associates, S.C.

¶ 52 B. Dr. Gore's May 25, 2011, Deposition

¶ 53 Dr. Gore provided the following testimony in his deposition. He reviewed three studies: the January 18, 2006, CT scan, the February 6, 2006, ultrasound, and the February 13, 2006, MRI. Dr. Gore also reviewed the report of the April 14, 2006, ultrasound. A family medicine physician ordered the original CT. Dr. Tawjareon reported that there was no abnormality detected by the CT scan. However, Dr. Gore testified that this reading was incorrect. He stated that the CT showed a mass which measured 4.3 by 3.2 centimeters. Thereafter, another family physician ordered the February 2006

ultrasound. Dr. Tawjareon interpreted this ultrasound and reported that the study revealed a mass which measured 4.5 by 3.1 centimeters. As a result of the ultrasound results, the MRI was ordered. Dr. Adekunle interpreted this February 13, 2006, MRI and reported that there was no abnormality detected. Dr. Gore stated that this reading was also incorrect. He testified that there was a mass visible on the MRI that measured 3.8 by 3.0 by 4.7 centimeters. The report of the ultrasound ordered by Dr. Schultheis in April 2006 revealed a left lower quadrant mass which measured 4.4 by 3.4 by 4.9 centimeters. Dr. Gore testified that based upon these studies, the mass was adjacent to the psoas muscle (a muscle that is next to the lower spine and the pelvis) but had not invaded the muscle, and that there was no metastasis to the liver, spine, adrenal glands, or lung bases.

¶ 54 Dr. Gore testified that in his opinion within a reasonable degree of medical certainty, Dr. Tawjareon's failure to detect the mass on the CT scan and his failure to recheck the CT scan after finding the mass on the ultrasound 19 days later was not within the standard of care required. The applicable standard of care was "to report the presence of the mass." Additionally, Dr. Gore testified that it was more probably true than not that if Dr. Tawjareon had properly read the CT, he would have contacted the ordering physician to recommend a biopsy or additional testing. However, Dr. Gore also testified that in his opinion, the plaintiff's outcome did not change during those 19 days.

¶ 55 Dr. Gore testified that in his opinion within a reasonable degree of medical certainty, Dr. Adekunle's failure to detect the mass on the MRI was not within the standard of care required. Dr. Gore did not render any additional opinions regarding Dr. Adekunle.

¶ 56 Dr. Gore testified that after these diagnostic studies, Dr. Schultheis ordered an ultrasound in April 2006 that revealed a 4.4 by 3.4 by 4.9 centimeter "region of vascular congestion in the left adnexa." Although this finding matched the size detected on all studies, Dr. Gore testified that he remained uncertain if it was the same mass because Dr. Schultheis indicated that he saw no sign of cancer and did not see a need for a biopsy.

¶ 57 Subsequent to his initial review and report, Dr. Gore reviewed the August 25, 2006, CT scan. Dr. Gore testified that by August, the mass was larger; had invaded the psoas muscle; was blocking the left ureter; and was invading the adjacent bowel. Initially, Dr. Gore testified that he would have to defer to an oncologist on the issue of whether earlier diagnosis would have altered Zimmerman's outcome, stating that generally an earlier cancer diagnosis is better than a later cancer diagnosis. Later in the deposition, Dr. Gore testified that in his opinion Zimmerman's September 2006 surgery would not have been as extensive if the diagnosis and surgery had occurred in January or February 2006.

¶ 58 Ultimately, Dr. Gore believed that the mass he saw on the January and February 2006 studies was the same mass surgically removed in September 2006. Dr. Gore based his opinion on the location of the mass.

¶ 59 At the end of the deposition, Dr. Gore testified that he had no standard of care concerns regarding Dr. Schultheis, but stated that he believed that given the April 2006 ultrasound findings, he should have inquired as to whether or not there had been other imaging tests. Dr. Gore stated on the record that he would like the opportunity to review the actual April 2006 ultrasound at issue. Zimmerman's attorney stated on the record that

he would provide the ultrasound to Dr. Gore, and that "if [opposing counsel] need[s] to do any follow-up, we'll make Dr. Gore available."

¶ 60 C. Dr. Gore's Supplemental Report Dated June 25, 2011

¶ 61 Subsequent to Dr. Gore's discovery deposition, Dr. Gore was provided with the April 2006 ultrasound. After his review, he prepared a supplemental report. On July 6, 2011, this report was provided to defense counsel pursuant to Zimmerman's supplemental witness disclosure. In this report, Dr. Gore identified a 4.4 by 3.5 by 4.9 centimeter complex mass. He also determined that this mass was not attached to the left ovary. Finally, Dr. Gore stated that this mass is the same mass seen on the January 18, 2006, ultrasound, the February 6, 2006, ultrasound, the February 13, 2006, MRI, and the August 25, 2006, CT. Dr. Gore provided no opinions regarding the standard of care rendered by Dr. Schultheis in this report, merely noting that the mass on the April 2006 ultrasound was in fact the same mass as in the earlier studies and that the mass had grown in size by August 2006 as depicted in the CT scan.

¶ 62 D. Dr. Gore's Undated Affidavit

¶ 63 On February 27, 2015, in response to the motion for summary judgment filed by the defendants, Zimmerman attached Dr. Gore's previously disclosed June 2011 report. *Additionally, Zimmerman attached an undated affidavit of Dr. Gore.* The attorney representing the defendants claimed that they were first notified of Dr. Gore's new opinions when Zimmerman filed her response to their summary judgment motion. Our review of the record on appeal contains no reference to this affidavit until February 27, 2015, when Zimmerman's attorney filed it as an exhibit to his response.

¶ 64 In this affidavit, Dr. Gore states that if the tumor mass had been identified and removed in the spring or early summer of 2006 that "it would most likely not have spread or metastasized to the psoas muscle, left adnexa, left ovary, colon or other adjacent structures." Additionally, he stated that "[b]ecause of the delay in diagnosing the malignant mass, it was allowed to metastasize, resulting in the removal of the left ureter, left kidney, left adnexa, left ovary and a section of the colon and the apparent inability to remove all of the cancer where it was located closer to the external iliac artery and in the psoas muscle." His affidavit concluded with the statement that these opinions are within a reasonable degree of medical certainty.

¶ 65 IV. Relevant Opinion Testimony of Zimmerman's Treating Physicians

¶ 66 *Dr. David C. Linehan*

¶ 67 Dr. Linehan is Zimmerman's surgical oncologist. In his September 2, 2010, discovery deposition, he testified that pathological testing determined that Zimmerman had a high grade LMS–a smooth muscle tumor with a high likelihood of recurrence at both local and distant sites. This tumor was located in the retroperitoneum, meaning that the tumor likely developed behind the abdominal cavity. Dr. Linehan could not render an opinion about precisely where the tumor originated, but testified that it did not likely begin in the ovary, ureter, kidney, or colon. He testified that retroperitoneum tumors are difficult to diagnose early because of the location. Dr. Linehan additionally testified that this tumor involved most of Zimmerman's contiguous organs–her left ovary, left ureter, and colon. Because the ureter was destroyed, the left kidney could no longer function and so he surgically removed it. Dr. Linehan explained that involvement of other organs is a

common occurrence for LMS tumors and that typically the tumors grow quite large before diagnosis. He testified that this was a very unusual case because Zimmerman had such a rapid recurrence after her September 2006 surgery.

¶ 68 Dr. Linehan testified that he did not have an opinion on whether the mass visualized in the April 2006 ultrasound was the same mass he surgically removed in September 2006. But, Dr. Linehan testified that the mass described in the February 6, 2006, ultrasound report was possibly the same as the one he surgically removed because the mass was described as solid in nature and was in the general area of Zimmerman's September 2006 surgery. He also testified that even if Zimmerman had been diagnosed in January 2006, she would have needed surgery. Finally, Dr. Linehan agreed with the general proposition that it is better to remove a malignant tumor when it is small. However, in this case he would not render an opinion that Zimmerman's outcome would have changed if the tumor had been removed months earlier.

¶ 69 *Dr. Philip Dy*

¶ 70 Dr. Dy is Zimmerman's oncologist. In his September 27, 2011, discovery deposition, Dr. Dy testified about the course of Zimmerman's radiation and chemotherapy treatments. He testified that patients who have had a retroperitoneal LMS have a poor long-term prognosis. Dr. Dy testified that the tumor was likely smaller in April 2006 than it was in August 2006, but that the tumor would always have been classified as high grade. He would not render an opinion that her outcome would have changed had the tumor been discovered earlier than it was mainly because LMS is an aggressive fast-growing cancer. He testified:

"You could always assume that if smaller, maybe there is not as much microscopic spread in the vicinity then. But, once again, it is very, very difficult to say. I don't think anybody would really dare say."

¶ 71 *Dr. Bashar Alzahabi*

¶ 72 Dr. Bashar Alzahabi is Zimmerman's nephrologist. In his July 12, 2012, discovery deposition, he testified about the development of and treatment for Zimmerman's failing remaining kidney. Dr. Alzahabi began treating Zimmerman on October 19, 2011. He testified that Zimmerman had stage five kidney disease with only 11 to 14% kidney function.

¶ 73 Dr. Alzahabi provided his opinions on why Zimmerman's kidney had decreased functionality. First, he noted that she only had one kidney, and second, she had chronic focal segmental glomerulosclerosis (FSGS). Dr. Alzahabi testified that FSGS is a hardening of the kidney which causes loss of function. He further testified that common causes of FSGS are hypertension, immune disorders, and having one kidney. Although Dr. Alzahabi commented that it was possible Zimmerman developed FSGS because she had her left kidney removed, he would not provide a medical opinion as to the specific cause in her case. He testified that patients with FSGS lose kidney function. Dialysis is typically used when the kidney function drops lower than 10%. Dr. Alzahabi stated that Zimmerman's kidney function would not improve, and that inevitably she would require dialysis. He testified that Zimmerman was not a candidate for a kidney transplant because she had had cancer. Finally, Dr. Alzahabi testified that advanced kidney disease that requires dialysis lowers life expectancy by a few years.

¶ 74 LAW AND ANALYSIS

¶ 75 On appeal, Zimmerman raises several issues. She contends that the trial court erred in striking Dr. Gore's affidavit; erred in granting motions *in limine* that barred some of Dr. Duboe's opinions and potential opinions of other experts; and erred in granting summary judgment for the defendants.

¶ 76 I. Dr. Gore's Supplemental Affidavit

¶ 77 We are first asked to determine if the trial court's order striking Dr. Gore's affidavit was correct. The trial court barred Dr. Gore's opinions−that surgical removal of the mass in the spring of 2006 would likely have prevented metastasis and that the surgery would have been less complicated. Zimmerman maintains that these opinions were logical extensions of opinions Dr. Gore provided in his discovery deposition; that the defendants were not prejudiced; and that striking the affidavit was erroneous. *Jones v. Beck*, 2014 IL App (1st) 131124, ¶ 16, 16 N.E.3d 289; *Hendrix v. Stepanek*, 331 Ill. App. 3d 206, 214, 771 N.E.2d 559, 566 (2002). She also claims that the defendants cannot show any prejudice because there was no set trial date when she provided the new affidavit.

¶ 78 In contrast, defendants argue that the trial court correctly struck Dr. Gore's affidavit because the opinions in the affidavit are completely new opinions in violation of Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007). They assert that Dr. Gore's new opinions went further than the opinions he gave in his deposition testimony−that in January 2006, the mass had not metastasized; and that the mass seen in April 2006 was the same mass seen in August 2006, although larger. Defendants claim that the new

opinions prejudiced them because they had already obtained expert witnesses in response to Dr. Gore's earlier opinions; that they had no opportunity to cross-examine Dr. Gore about these new opinions in his depositions; and that they had no opportunity to elicit rebuttal opinions from their own experts. Noting that this case was filed eight years ago, defendants argue that allowing discovery to be reopened for the sole purpose of allowing Zimmerman to disclose new expert opinions would be prejudicial and untimely. As additional support, defendants claim that Zimmerman's argument that they were not prejudiced because there was no set trial date is disingenuous because she was the party who asked for the trial continuance.

¶ 79 *Violation of Supreme Court Rule 213*

¶ 80 We first look to the language of Supreme Court Rule 213. Supreme Court Rule 213(f)(3) addresses the identity and testimony of controlled expert witnesses, which includes a party's retained expert. For each expert witness, "the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007). A controlled expert can only give opinion evidence at trial if the opinions were included in Rule 213(f)(3) disclosures. Ill. S. Ct. R. 213(g). That said, upon objection by the opponent, the party offering new opinion testimony at trial bears the burden "to prove the information was provided in a Rule 213(f) answer or in the discovery deposition." *Id.* Finally, Rule 213(i) provides that a party bears a duty to "seasonably" supplement or

amend any prior responses "whenever new or additional information subsequently becomes known to that party." Ill. S. Ct. R. 213(i).

¶ 81 The purpose of these discovery rules is "to avoid surprise and to discourage strategic gamesmanship." *Thomas v. Johnson Controls, Inc.*, 344 Ill. App. 3d 1026, 1032, 801 N.E.2d 90, 95 (2003); *Morrisroe v. Pantano*, 2016 IL App (1st) 143605, ¶ 37, 65 N.E.3d 931. In fact, Rule 213 disclosures are mandatory and require strict compliance. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109, 806 N.E.2d 645, 651 (2004). The supreme court explained that Rule 213 requires the parties to "drop down to specifics" in their disclosures. *Id.* The wording used by an expert does not have to be identical to earlier disclosures or testimony, and can be expanded so long as the expert's testimony is a "logical corollary to the disclosed opinion and not a new basis for the opinion." *Morrisroe*, 2016 IL App (1st) 143605, ¶ 37, 65 N.E.3d 931 (citing *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 37, 934 N.E.2d 506, 521 (2010); *Foley v. Fletcher*, 361 Ill. App. 3d 39, 46-47, 836 N.E.2d 667, 674 (2005)). Specifically, the expert's testimony "must be encompassed by the original opinion." *Id.* (citing *Scassifero v. Glaser*, 333 Ill. App. 3d 846, 860, 776 N.E.2d 859, 871 (2002); *Bachman v. General Motors Corp*., 332 Ill. App. 3d 760, 800, 776 N.E.2d 262, 297 (2002)).

¶ 82 We will not reverse a trial court's determination that an expert witness's opinions were not disclosed or exceeded the scope of the Rule 213 disclosures unless the trial court's ruling was an abuse of its discretion. *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 576, 755 N.E.2d 1021, 1029 (2001); *Morrisroe*, 2016 IL App (1st) 143605, ¶ 38, 65 N.E.3d 931.

¶ 83 We next compare Zimmerman's Rule 213 disclosures and Dr. Gore's reports and testimony with the 2015 affidavit at issue.

¶ 84 Dr. Gore's report dated November 3, 2008, focused on the January 2006 CT scan and the February 2006 MRI and the failures of the two radiologists to identify and report the mass. Dr. Gore concluded that both Dr. Tawjareon and Dr. Adekunle deviated from the standard of care. In contrast, Dr. Gore expressed no opinions regarding Dr. Schultheis or his employer.

¶ 85 Zimmerman's written disclosure of Dr. Gore's opinions was filed on March 2, 2011, and indicated that Dr. Gore was "expected to testify to the deviations from the required standard of care and the consequences of those deviations" and referenced a report that was attached to the disclosure. That report is not included in the record on appeal. However, in their brief on appeal, defendants state that this report simply concluded that the mass found in August 2006 was the same mass seen in the January and February 2006 radiological studies.

¶ 86 In support of her argument, Zimmerman provides the following exchange from Dr. Gore's May 2011 discovery deposition about whether the mass reportedly visualized on the January 2006 CT scan and the April 2006 ultrasound report was the same mass later seen on the August 2006 CT scan:

> "A. Yes, That is definite but was much smaller though in January and it wasn't invading stuff.
>
> Q. Although by August 25, 2006, it had grown and invaded those other structure that you've testified about today?

A. That is correct."

¶ 87 In Dr. Gore's June 25, 2011, supplemental report, he concluded that the mass seen in the April 2006 ultrasound ordered by Dr. Schultheis was the same as was depicted in the January 2006 CT scan, the February 2006 ultrasound and MRI, and the August 2006 CT scan. Dr. Gore provided no opinions regarding the standard of care provided by Dr. Schultheis or Effingham Obstetrics & Gynecology Associates, S.C.

¶ 88 With the 2015 affidavit, Dr. Gore shifted his focus from the radiologist defendants to Dr. Schultheis. Dr. Gore made this shift by focusing on the April 2006 ultrasound in isolation, stating that if the mass had been detected in April, the mass would not have metastasized, and that because it had metastasized, Zimmerman's later surgery was more complex. By inference, Dr. Gore's opinion was that if the surgery took place in the spring or early summer of 2006 as opposed to early fall of 2006, the surgeon would not have had to remove the left ureter, left kidney, left adnexa, left ovary, and part of the colon, and that the surgeon would likely have been able to remove all of the tumor.

¶ 89 Here, Zimmerman contends that the opinions expressed by Dr. Gore in this 2015 affidavit were simply logical extensions of his earlier testimony.

¶ 90 We find that *Sullivan v. Edward Hospital* is instructive on the issue of what is and what is not a logical extension of earlier disclosed expert opinions. Juanita and her husband Burns Sullivan (who subsequently died) filed this medical malpractice claim against Burns's primary care physician and a hospital in which he had been admitted. *Sullivan*, 209 Ill. 2d at 105, 806 N.E.2d at 649. Burns sustained injuries after falling from

his hospital bed. *Id.* At issue was the nursing care provided at the hospital and his physician's orders on the evening that he fell. *Id.*

¶ 91 Plaintiff filed Rule 213 disclosures that included a thorough description of expected testimony of her expert witness. *Id.* at 107, 806 N.E.2d at 650-51. Plaintiff indicated that the expert would testify that Dr. Conte-Russian and Edward Hospital deviated from applicable standards of care by disregarding the decedent's status "as a level II fall risk" because of cognitive impairment and his immediate past history of trying to climb out of his bed. *Id.* at 107, 806 N.E.2d at 651. Plaintiff also stated that her expert would testify that the defendants should have restrained the decedent; that the attempted sedation was improperly performed; that the decedent was not properly monitored during the attempted sedation; and that the injuries sustained were the result of medical negligence. *Id.* at 107-08, 806 N.E.2d at 651.

¶ 92 At trial, the expert testified to the opinions previously disclosed but also testified that the nurse deviated from nursing standards by failing to communicate Burns's condition to Dr. Conte-Russian during a telephone conversation that evening. *Id.* at 108, 806 N.E.2d at 651. After the expert finished his testimony, Edward Hospital moved to strike this new opinion and argued that the testimony violated Rule 213. *Id.* The trial court granted the motion. *Id.*

¶ 93 On appeal, plaintiff argued that although she had not included this conversation in her Rule 213 disclosures, this opinion was an elaboration on those disclosures. *Id.* at 109, 806 N.E.2d at 652. The trial court and the appellate court disagreed with plaintiff's argument. *Id.* The supreme court also agreed that the trial court's decision to strike the

expert's testimony about the telephone conversation was correct, stating that Rule 213 disclosures must be specific and compliance with the rule is strict. *Id.* at 109-10, 806 N.E.2d at 652. The court noted that the hospital was surprised by this new opinion and that "the nature of the testimony and its prejudicial effect are manifest." *Id.* at 111, 806 N.E.2d at 652-53.

¶ 94 Similarly, the appellate court in *Morrisroe v. Pantono* provides guidance on the importance of detailed Rule 213 disclosures and what may constitute an elaboration on those opinions. In *Morrisroe*, the special administrator of the estate of Viola Morrisroe filed a medical malpractice action against Dr. John Pantono and Suburban Lung Associates, S.C. *Morrisroe*, 2016 IL App (1st) 143605, ¶ 1, 65 N.E.3d 931. At issue was a bronchoscopy and biopsy performed by Dr. Pantano on Viola to assess a lung mass that he found had increased in size. *Id.* ¶¶ 5-6. Complications during the surgery led to Viola's death. *Id.* ¶ 6. The plaintiff filed his Rule 213 disclosure identifying an expert who would testify that Dr. Pantano breached the standard of care in two ways: (1) Viola had already undergone testing and her provider concluded that no additional evaluation was needed; and (2) a CT scan done at the time that Dr. Pantano recommended the bronchoscopy and biopsy reflected no change in the size of the mass. *Id.* ¶ 9. The expert testified that the size of the mass had not changed from the first CT scan to the second CT scan. *Id.* ¶ 10. This opinion was based on his review of the CT scans, his measurements of the mass, and the report from the most recent CT scan. *Id.*

¶ 95 However, at trial, the expert testified that the bronchoscopy was not necessary because the later CT scan showed that the mass was "relatively stable, if not slightly

smaller." *Id.* ¶ 14. Defendants objected that this opinion had not been disclosed. *Id.* ¶ 15. In explanation of this opinion, the expert explained that the two CT scans did not have comparable images because they were taken at different level of the chest; that only one of the scans was with contrast dye; that the two scans were taken on two different machines; and that the earlier scan had far less detail because the images were taken further apart. *Id.* Defendants objected again, and after a sidebar conference, the trial court sustained the objection. *Id.* ¶ 16. The court indicated that the expert had previously only testified that there was no change between the two CT scans. *Id.* After the expert finished his testimony, the plaintiff's attorney made an offer of proof in which the expert further testified that he looked at each slice of both CT scans in reaching the conclusion that the mass had not changed. *Id.* ¶ 19. In particular, the expert testified that by changing the contrast on the later CT scan, he determined that the mass was "just lung tissue that is not inflated." *Id.*

¶ 96 On appeal, the plaintiff argued that the expert's opinion remained unchanged−that the bronchoscopy was unnecessary because the mass size remained the same−and that the change in screen contrast testimony was just an elaboration on the basis of that opinion. *Id.* ¶ 35. In opposition, the defendants argued that the testimony at issue was an entirely new basis for the expert's original opinion that the mass had not increased in size. *Id.* ¶ 36. The appellate court concluded that the expert's proposed testimony about the contrast levels of the later scan was not testimony encompassed by his original testimony that the size of the mass was the same in both CT scans. *Id.* ¶ 42.

¶ 97 We also disagree with Zimmerman's argument that the new affidavit merely elaborated on Dr. Gore's earlier opinions. Zimmerman retained and utilized Dr. Gore for her claims against the two radiologist defendants. And, Dr. Gore's opinions were confined to the alleged radiological failures from January and February 2006. When Dr. Gore was deposed in May 2011, he did not know whether the mass identified by Dr. Schultheis in the April 2006 ultrasound was the same mass depicted on all other studies. Although he opined that removal of any mass is better if done earlier than later, he would not render an opinion that these alleged radiological failures made any difference through April 2006–apparently because the mass size measured in all of the studies through April was fairly consistent. Indeed, Dr. Gore testified that he had no standard of care concerns regarding Dr. Schultheis. However, Dr. Gore did request the opportunity to review the April 2006 ultrasound. He reviewed the study and in June 2011, he reported that the mass was the same mass as seen in the other studies and that as of April 2006, the mass was not attached to the left ovary. This statement about the left ovary seems to indicate that Dr. Gore did not believe that as of April, the mass had not grown into the left ovary. However, the report went no further than that statement. In this 2011 report, Dr. Gore rendered no opinions that Dr. Schultheis violated the standard of care.

¶ 98 We find that the opinions in the new affidavit mark a considerable shift in Dr. Gore's opinions. Dr. Gore confined his opinions to the time when Dr. Schultheis was active in Zimmerman's care. Now, Dr. Gore opined that if Dr. Schultheis had diagnosed the tumor earlier and if Zimmerman had the tumor removed in early summer 2006, her

cancer would not have metastasized to multiple organs. With these statements, Dr. Gore is now rendering an opinion that implicates Dr. Schultheis.

¶ 99 If Zimmerman intended to use Dr. Gore as an expert witness as to the standard of care required by Dr. Schultheis, then she was required to supplement her Rule 213 disclosures. She did not do so. Dr. Gore's new opinion was very specific. As stated earlier in this order, discovery rules exist in order to avoid surprise and to discourage strategic gamesmanship. *Thomas*, 344 Ill. App. 3d at 1032, 801 N.E.2d at 95. Disclosure is mandatory and must be specific. *Sullivan*, 209 Ill. 2d at 109, 806 N.E.2d at 651. Compliance with the rules is strict. *Id.* Supreme Court Rule 213 does not contain inspirational legal guidelines. Generic Rule 213 interrogatory responses intended to be a catchall of an expert's anticipated opinions are no longer specific enough. We find that Dr. Gore's opinion that Dr. Schultheis violated the standard of care in April 2006 and that his medical negligence resulted in multiple metastases is not encompassed by his earlier opinion: that he had no opinion about whether Dr. Schultheis violated the standard of medical care required.

¶ 100 Here, the alleged malpractice occurred in 2006. The case was filed in 2008. The trial court set a discovery cutoff date of July 1, 2013. Trial was set for January 20, 2015. Zimmerman asked the court to continue the trial setting in order to allow her to respond to the motion for summary judgment. Zimmerman filed Dr. Gore's new affidavit on February 27, 2015–three years and nine months after his May 2011 discovery deposition; one year and seven months after the discovery cutoff date had passed; and seven years after she filed suit. We find that Zimmerman's disclosure of Dr. Gore's new opinions was

untimely. Hence, we find that the trial court's order finding that Dr. Gore's new opinions were a violation of Rule 213 is not an abuse of discretion. *Prairie*, 324 Ill. App. 3d at 576, 755 N.E.2d at 1029.

¶ 101 *Sanctions for Violation of Rule 213*

¶ 102 When a party does not comply with Rule 213, the trial court should sanction the party because the rule requires strict compliance. *Sullivan*, 209 Ill. 2d at 110, 806 N.E.2d at 652 (citing *Firstar Bank of Illinois v. Peirce*, 306 Ill. App. 3d 525, 533, 714 N.E.2d 116, 120-21 (1999)). To conclude that the exclusion of the expert testimony is a proper sanction, the court must consider six factors: "(1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness." *Id.* (citing *Warrender v. Millsop*, 304 Ill. App. 3d 260, 268, 710 N.E.2d 512, 517-18 (1999)). A trial court's decision to impose sanctions for failure to comply with Rule 213 is within the court's discretion. *Id.* And thus, we will not reverse the order of sanctions unless we conclude that the trial court abused its discretion. *Id.*

¶ 103 Here, Zimmerman contends that *Smith v. Murphy*, 2013 IL App (1st) 121839, 994 N.E.2d 617, supports her argument that the defendants could not have been surprised or prejudiced by Dr. Gore's 2015 affidavit, and therefore the trial court erred in granting their motion to strike. While we agree that the facts of this case are similar to those in *Smith v. Murphy*, we disagree with Zimmerman that the case supports her theory.

¶ 104 In 2007, the plaintiff filed a medical malpractice action against two resident physicians who were involved in postsurgical treatment. *Smith*, 2013 IL App (1st)

121839, ¶ 4, 994 N.E.2d 617. The trial court entered a deadline for disclosure of Rule 213 expert witnesses by September 2010. *Id.* ¶ 5. The plaintiff named one expert witness. *Id.* Two months later, this expert was deposed, and during the deposition, the expert withdrew his opinion that the residents deviated from the standard of care, stating that they should not be held accountable and that the responsibility was with the attending physician. *Id.* ¶ 6.

¶ 105 After this deposition, the trial court set a deadline for the defendants to disclose their rebuttal experts. *Id.* ¶ 7. Defendants complied with this deadline. *Id.* The trial court entered a discovery cutoff for mid-May 2011. *Id.* ¶ 8. Trial was set for October 2011. *Id.* In August 2011, the defendants filed a motion for summary judgment. *Id.* ¶ 9. The trial court struck the trial date, and ordered the plaintiff to respond to the motion. *Id.* ¶ 10.

¶ 106 The plaintiff responded to the summary judgment motion by filing an affidavit of a previously undisclosed expert. *Id.* Defendants objected to plaintiff's planned use of this witness. *Id.* The trial court ruled that the disclosure was untimely and prejudicial and barred the plaintiff's expert's opinion from being utilized. *Id.* ¶ 11. In ruling, the trial court noted that the plaintiff could have easily asked for an extension of time after her original expert witness changed his opinion during his deposition. *Id.*

¶ 107 On appeal, the court concluded that the plaintiff violated Rule 213 because she had not disclosed this new expert witness within 28 days after she was served with the interrogatories, and had also not asked the trial court for an extension of time to respond to the interrogatories. *Id.* ¶ 20. The appellate court also noted that the trial court had set a discovery cutoff date in May 2011 and that Supreme Court Rule 218(c) mandated that

discovery had to be complete 60 days before trial. *Id.* ¶ 22 (citing Ill. S. Ct. R. 218(c) (eff. Oct. 4, 2002)). Although the trial court continued the October 2011 trial date in order to allow the plaintiff to respond to the motion for summary judgment, the court noted that the original trial date was October 17, 2011, and that the plaintiff made this belated disclosure on October 14, 2011. *Id.* The appellate court also concluded that the trial court had not abused its discretion by barring the testimony of the plaintiff's proposed new expert witness as a sanction for the Rule 213 violation. *Id.* ¶ 30.

¶ 108 As Zimmerman noted, *Smith v. Murphy* is factually different from this case. She attempts to distinguish this case from *Smith* because Smith obtained a completely new expert witness. She theorizes that the *Smith* defendants were surprised because the identity of the witness was new. In contrast, she argues that in this case the defendants should not have been surprised because Dr. Gore was established in this case as her expert witness. We find that Zimmerman's analysis is flawed. While it would be a surprise to have a new expert witness identified, the important aspect of the surprise is the introduction of new opinions.

¶ 109 We briefly address the six factors to determine if the trial court's sanction for nondisclosure was proper under the unique circumstances of this case.

¶ 110 We find that the first and fifth factors were met and that the record on appeal shows that the defendants were clearly surprised by this new affidavit. Defendants immediately filed their objections in the trial court.

¶ 111 As to the second and third factors, the nature of the new proffered opinions and their prejudicial effect is patent. Discovery ended in July 2013. Trial had been scheduled

for January 2015. If the trial court allowed Dr. Gore to testify to these new opinions, defendants likely would have required new expert witnesses. In essence, expert discovery would restart in a case that was originally filed in 2008. Zimmerman's argument that defendants would suffer no prejudice because there was no current trial date is an artful argument, but as Zimmerman asked the trial court to continue the trial setting, she cannot connect the lack of a set trial date resulting from her own actions to her claim that the defendants would sustain no prejudice.

¶ 112 With the fourth factor, the record on appeal supports our conclusion that the defendants were diligent in requesting discovery and in compliance with the discovery deadlines set by the trial court.

¶ 113 Finally, regarding the sixth factor, we conclude that Zimmerman's late addition of new opinions is not representative of good faith actions. The timeline in this case is important to note. Dr. Gore gave his discovery deposition in May 2011, in which he testified that he had no opinions on whether or not Dr. Schultheis's care was within the appropriate standard of care. In June 2011, Dr. Gore provided a new report in which he determined that the mass depicted in the April 2006 ultrasound was the same as the mass depicted on the earlier 2006 studies, but that in April 2006, the mass was not attached to the left ovary. The trial court set a discovery cutoff for July 2013. Trial was set for January 2015. In February 2015, Zimmerman filed a new undated affidavit with new opinions. Given the fact that the defendants filed a motion for summary judgment on January 9, 2015, the later filing of this undated affidavit on February 27, 2015, as a

response seems contrived. We find no evidence that Zimmerman's untimely disclosure of this affidavit was made in good faith.

¶ 114 We conclude that the trial court did not abuse its discretion in barring Zimmerman from using Dr. Gore's new opinions. *Sullivan*, 209 Ill. 2d at 110, 806 N.E.2d at 652.

¶ 115 II. Motion *in Limine*

¶ 116 Zimmerman next asks this court to find that the trial court erred by granting portions of defendants' motion *in limine*. She contends that the trial court based its *in limine* order on the fact that her experts only provided speculative testimony. The targets of defendants' motion were the opinions Zimmerman's expert Dr. Duboe made in his evidence deposition and any potential opinions at trial by treating physicians on the issue of delay in medical diagnosis and whether the delay was proximately caused by Dr. Schultheis. Defendants contended that the opinions were improper because Zimmerman had not previously disclosed opinions of that nature. Additionally, the defendants claimed that the specific opinions of Dr. Duboe at issue were not rendered within a reasonable degree of medical certainty as mandated by Illinois law. See *Simmons v. Garces*, 198 Ill. 2d 541, 556-57, 763 N.E.2d 720, 731 (2002); *Ayala v. Murad*, 367 Ill. App. 3d 591, 601, 855 N.E.2d 261, 270 (2006).

¶ 117 In Dr. Duboe's evidence deposition, he testified that if Dr. Schultheis had complied with the standard of care, Zimmerman would have been diagnosed earlier and surgery would have been less complicated. We contrast this testimony with Zimmerman's Rule 213 disclosures and Dr. Duboe's discovery deposition testimony. In her Rule 213 disclosures, Zimmerman stated that her expert would testify to deviations

from the standard of care and the resulting consequences. In Dr. Duboe's discovery deposition, he testified that he would not render any opinions regarding an earlier diagnosis and earlier surgical intervention other than the tenet that an earlier cancer diagnosis is better than a later cancer diagnosis.

¶ 118 On review of a trial court's decision to grant or deny a party's motion *in limine*, we must determine if the trial court abused its discretion. *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1, 4, 866 N.E.2d 1243, 1246 (2007).

¶ 119 On appeal, Zimmerman makes several arguments supporting her claim that the trial court abused its discretion. She argues that the objection must be made during the evidence deposition; argues that Dr. Duboe's opinion was an elaboration on an opinion made in his discovery deposition; and argues that the trial court erred in granting the motion *in limine* barring Zimmerman's treating physicians to testify to opinions beyond what was provided during their discovery depositions.

¶ 120 *Objections During the Evidence Deposition*

¶ 121 Initially we must determine whether substantive objections must be made during the evidence deposition or can be raised at trial. The defendants' objection to the opinion is based on a failure to previously disclose the opinion as mandated by Rule 213. Zimmerman alleges that the defendants waived their objection because they did not object during the evidence deposition.

¶ 122 Illinois Supreme Court Rule 211(c)(1) addresses the topic of objections during depositions. Ill. S. Ct. R. 211(c)(1) (eff. Jan. 1, 1967). The rule states that if admissibility of the evidence is the basis for the objection and the admissibility issue is correctable at

that time, then the party is required to object during the deposition. *Id.* However, if the issue is not correctable during the deposition, then the party objecting may make the objection "when the testimony is offered in evidence." *Id.*

¶ 123 Additionally, Supreme Court Rule 213(g) provides guidance on this issue. The rule states: "Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer [the identity and testimony of witnesses] or in a discovery deposition shall not be admissible upon objection at trial." Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007).

¶ 124 Despite the language of the supreme court rules to the contrary, Zimmerman argues that case law supports her theory that *all* objections must be made when the evidence deposition is taken. We find that the two cases she cites are inapplicable.

¶ 125 In *Moore v. Jewel Tea Co.*, the expert witness was asked a hypothetical question that omitted two key facts from the underlying incident that resulted in the lawsuit. *Moore v. Jewel Tea Co.*, 46 Ill. 2d 288, 299, 263 N.E.2d 103, 109 (1970). The defendants did not object during the deposition, but did so at trial arguing that they did not need to object. *Id.* at 299, 263 N.E.2d at 108-09. The supreme court held that this was a circumstance where a contemporaneous objection was required because the concern about the absence of the two key facts could have been rectified at that time. *Id.* at 299-300, 263 N.E.2d at 109 (citing Ill. Rev. Stat. 1969, ch. 110A, ¶ 211(c)).

¶ 126 In *Lundell v. Citrano*, the trial court denied a motion to strike an expert's opinions given during an evidence deposition where the question posed by the attorney did not contain a medical history foundation. *Lundell v. Citrano*, 129 Ill. App. 3d 390, 396-97,

472 N.E.2d 541, 546 (1984). The defendant contended that he did not need to object because the medical history aspect of the opinion could not have been corrected during the deposition. *Id.* at 397, 472 N.E.2d at 546. The appellate court held that questions that assume facts without support–a lack of foundation–must be made during the evidence deposition in order to afford the opposing party the opportunity to correct that foundational defect. *Id.* at 398, 472 N.E.2d at 546-47.

¶ 127 We find that the plain and unambiguous language of Rule 211(c)(1) and Rule 213(g) supports defendants' argument that a contemporaneous objection during Dr. Duboe's evidence deposition was not absolutely necessary. That being said, the analysis of this issue is not complete.

¶ 128 At issue is whether the questions posed to Dr. Duboe in his evidence deposition were of a type that could have been remedied during the deposition. The defendants claim that the opinions at issue had not been previously disclosed and were therefore in violation of Rule 213(f)(3). If the opinions had not been previously disclosed, then we agree with the defendants and the trial court that no objection was required during the evidence deposition because obviously there would be no way for Zimmerman to remedy that defect.

¶ 129 In addition, Zimmerman provides no case law holding that the language of Rule 211(c)(1) and Rule 213(g) has a different interpretation than the words used and that the party objecting to a Rule 213 violation must object during the evidence deposition. We have not found any case authority supporting Zimmerman's theory. However, *Gee v. Treece* held that if a Rule 213 violation is claimed, that party must object at a time that

affords the trial court an opportunity to address the claimed violation. *Gee v. Treece*, 365 Ill. App. 3d 1029, 1038-39, 851 N.E.2d 605, 613 (2006). The party cannot wait until the trial has concluded or raise the issue for the first time on appeal. *Id.* The party must object before or during the reading of the evidence deposition at trial. *Id.* Here, the issue was thoroughly briefed and argued, and the trial court had ample time to review and address the alleged violation before it ruled on the motion *in limine*.

¶ 130 We find that Zimmerman's argument, that the defendants were required to make their Rule 213(f) objection during the deposition, is without merit.

¶ 131 *Elaboration on Earlier Disclosures*

¶ 132 1. Dr. Duboe

¶ 133 Zimmerman next asks this court to determine that Dr. Duboe's opinions at issue were a logical extension of his original opinions expressed in his discovery deposition. Defendants asked the trial court to bar any testimony by Dr. Duboe that Zimmerman's damages for the alleged delay in diagnosis of her cancer were proximately caused by Dr. Schultheis.

¶ 134 In the trial court, the defendants first cited Zimmerman's Rule 213 disclosures regarding Dr. Duboe to support their claim that portions of his evidence deposition testimony should be barred as a violation of Rule 213. Zimmerman disclosed that Dr. Duboe was expected to testify to the deviations from the required standard of care and the consequences of those deviations.

¶ 135 The defendants next cited to portions of Dr. Duboe's June 13, 2011, discovery deposition testimony. Zimmerman's attorney asked Dr. Duboe if he believed that early

diagnosis and intervention for this cancer was important to Zimmerman. The defendants' attorneys objected to this question, specifically stating that any opinion rendered was beyond the Rule 213 disclosures. Over the objections, Dr. Duboe testified:

> "I wouldn't make any comments talking about exponential cell growth in this type of tumor. That would be beyond my realm of expertise; but in a general sense–and I've said this before that in a general sense the earlier you make a diagnosis of cancer the better the likely prognosis will be. That much I think I am comfortable saying.
>
> * * *
>
> Right. I can't tell you specifically how–to what percentage diagnosis four months earlier would have improved the metastatic potential of this tumor as opposed to another tumor, but in a general sense I would stand by my opinion that the earlier diagnosis of an aggressive tumor the better chances that the tumor is not going to be as malignant."

Additionally, Dr. Duboe agreed that there were certain types of cancer in which earlier diagnosis does not help.

¶ 136 As far as we can determine from the record on appeal, Zimmerman did not take the opportunity to supplement her Rule 213 disclosures in light of the specific objections during the deposition that any opinion by Dr. Duboe on the issue of earlier diagnosis had not been disclosed. Moreover, Zimmerman does not claim that she supplemented her Rule 213 disclosures.

¶ 137 In his July 3, 2012, evidence deposition, Zimmerman's attorney asked Dr. Duboe what would have happened to Zimmerman if Dr. Schultheis had done what "he should have done" in the management of her care. Dr. Duboe answered as follows:

> "Well, ultimately she would have been diagnosed earlier. And we know that at the time of surgery I believe the mass that was resected was somewhat in the order of 10 centimeters. At the time of these studies we are talking about less than 5. So, in a four-month period the mass doubled in size. I think the likelihood

> of the ureteral obstruction, the likelihood of the complexity of the surgery that needed to be performed in September would have been much, much easier.
>
> As to prognosis, I would defer that, again, staging-wise, but I think in general, as I have at deposition, that if you can remove a mass of a malignant potential earlier, the better the prognosis and the less complex the subsequent surgery is going to be and the less the chance you are going to have the amount of damage that she had to the pelvic organs, particularly ureteral obstruction and to her left kidney."

Later in the deposition, Dr. Duboe acknowledged that he was not an expert on the diagnosis, treatment, or prognosis of leiomyosarcomas (LMS). And, Dr. Duboe again admitted that with certain types of cancer, there is no benefit to early diagnosis.

¶ 138 As with the procedural aftermath of the discovery deposition, the record on appeal contains no amended Rule 213 disclosures to expand upon Dr. Duboe's opinions as provided in his evidence deposition. And, Zimmerman does not claim that she supplemented her Rule 213 disclosures.

¶ 139 Zimmerman asks this court to conclude that Dr. Duboe's testimony was simply an elaboration on his original opinion, a conclusion that would obviate the requirement of amended disclosures. It is true that Dr. Duboe's testimony in both his discovery and evidence depositions involved the same topic–the impact of earlier detection of Zimmerman's cancer. However, as stated earlier in this order, Rule 213 requires expert witness disclosures to "drop down to specifics" in order to avoid surprise. *Sullivan*, 209 Ill. 2d at 109, 806 N.E.2d at 651. And while the expert's language may be expanded in later testimony, the testimony must be a logical corollary to the earlier opinion and cannot be a new basis for the opinion. *Morrisroe,* 2016 IL App (1st) 143605, ¶ 37, 65 N.E.3d 931.

¶ 140 Having reviewed the Rule 213 disclosure and Dr. Duboe's discovery and evidence deposition testimony, we are not able to conclude that the opinions expressed in the evidence deposition were "encompassed by the original opinion." *Id.* Originally, Dr. Duboe was decidedly uncomfortable saying anything more than the general proposition that earlier detection is better. He admitted that he had no expertise with this form of cancer. Yet, in his evidence deposition, he opined that had Dr. Schultheis diagnosed the cancer earlier, the surgery would likely have been less complicated; that the cancer would not likely have caused the ureteral obstruction (which led to the removal of the left kidney); and that the likelihood of pelvic organ involvement would have been reduced. These opinions were far more specific than the "earlier diagnosis is better" original testimony.

¶ 141 We are also concerned that the opinions were not rendered in compliance with Illinois law. Dr. Duboe did not testify that these opinions were made within a reasonable degree of medical certainty. See *Simmons*, 198 Ill. 2d at 556-57, 763 N.E.2d at 731; *Ayala*, 367 Ill. App. 3d at 601, 855 N.E.2d at 270.

¶ 142 We conclude that Zimmerman violated Rule 213 by not disclosing the additional opinions she intended to offer from her expert, Dr. Duboe. We find no basis to conclude that the trial court abused its discretion in granting the motion *in limine*. *Alm*, 373 Ill. App. 3d at 4, 866 N.E.2d at 1246.

¶ 143 To the extent that the trial court granted the motion *in limine* regarding Dr. Duboe's evidence deposition testimony on alternate grounds, we note that we can affirm a trial judge's decision on any basis that appears of record even if our reasoning is

different. See *Wells v. St. Bernard Hospital*, 2013 IL App (1st) 113512, ¶ 49, 987 N.E.2d 1001; *People v. Huff*, 195 Ill. 2d 87, 91, 744 N.E.2d 841, 843 (2001); *People v. Yarber*, 279 Ill. App. 3d 519, 524, 663 N.E.2d 1131, 1134 (1996).

¶ 144 2. Dr. Dy and Dr. Alzahabi

¶ 145 Zimmerman also claims that the trial court erred in granting the motion *in limine* regarding anticipated opinion testimony of two of her treating physicians–Dr. Dy, her treating oncologist, and Dr. Alzahabi, her treating nephrologist. Additionally, the motion encompassed all other potential witnesses who could render similar opinion testimony. At issue was any witness who would render opinions that the delay in diagnosis of Zimmerman's cancer was the proximate result of Dr. Schultheis's alleged medical negligence. More specifically, defendants sought to bar Dr. Alzahabi from testifying at trial to any opinions that Zimmerman's renal failure and potential for future dialysis was caused by the alleged medical negligence of Dr. Schultheis.

¶ 146 Zimmerman never filed a Rule 213 disclosure regarding opinions expected by Dr. Alzahabi. With respect to Dr. Dy, Zimmerman's Rule 213 disclosure indicated that he could offer "possible opinions that a delay in the diagnosis has made it harder to treat Plaintiff's cancer or that earlier treatment would have been better for the Plaintiff."

¶ 147 In Dr. Dy's discovery deposition, he did not render any opinions that the delay in diagnosis from April 2006 to August 2006 was significant or changed Zimmerman's treatment course because LMS is an incredibly aggressive cancer. He testified that Zimmerman's prognosis was poor because of the form of cancer regardless of when she would have been diagnosed.

¶ 148 In Dr. Alzahabi's discovery deposition, he testified that Zimmerman was suffering from renal failure with her second kidney. His opinion as to why Zimmerman had begun to experience renal failure was based upon the loss of her first kidney and a condition known as focal segmental glomerulosclerosis syndrome (FSGS). Dr. Alzahabi did not render an opinion that the loss of her first kidney was caused by a delay in her cancer diagnosis. And, Dr. Alzahabi did testify that he had no opinion on the cause of Zimmerman's FSGS.

¶ 149 Zimmerman did not update her Rule 213 disclosures to supplement the opinions expected from her treating physicians. In light of that, the defendants correctly asked the trial court to anticipatorily bar her from seeking testimony at trial that would expand upon or add opinions provided by her treating physicians in their discovery depositions.

¶ 150 We find no basis in the record or in the briefs on appeal to conclude that the trial court's order granting these motions *in limine* constituted an abuse of discretion. *Alm*, 373 Ill. App. 3d at 4, 866 N.E.2d at 1246.

¶ 151 To the extent that the trial court based its *in limine* order on alternative bases, we again state that we may affirm a trial judge's decision on any basis that appears of record even if our reasoning is different. See *Wells*, 2013 IL App (1st) 113512, ¶ 49, 987 N.E.2d 1001; *Huff*, 195 Ill. 2d at 91, 744 N.E.2d at 843; *Yarber*, 279 Ill. App. 3d at 524, 663 N.E.2d at 1134.

¶ 152 III. Motion for Summary Judgment

¶ 153 Finally, Zimmerman asks this court to reverse the trial court's order granting the defendants' motion for summary judgment.

¶ 154 Section 2-1005(c) of the Code of Civil Procedure provides the guidelines for a summary judgment. 735 ILCS 5/2-1005(c) (West 2012). When "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact," the party who filed the motion is entitled to summary judgment. *Id.*; see also *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992). The trial court must determine if a factual issue remains in deciding whether to grant or deny a party's motion for summary judgment. *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476, 723 N.E.2d 321, 323 (1999). As part of that process, the trial court strictly construes all evidence in the record against the movant and liberally in favor of the opponent. *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986).

¶ 155 "Summary judgment is a drastic remedy that should be granted only where the movant's right to it is clear and free of doubt." *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357, 726 N.E.2d 1171, 1176 (2000). If reasonable people could draw disparate inferences from the undisputed facts or if a material fact remains in dispute, then the trial court should deny the motion. *Koziol*, 309 Ill. App. 3d at 476, 723 N.E.2d at 323.

¶ 156 On appeal, courts review summary judgment orders *de novo*. *Myers*, 225 Ill. App. 3d at 72, 587 N.E.2d at 497.

¶ 157 Zimmerman argues that the trial court's order was flawed because the trial court seemingly misunderstood the elements necessary for a "lost chance" theory. The trial court's order granting summary judgment simply stated that after careful review of all

depositions and cited case law, there was no genuine issue of material fact and specifically "that proximate cause cannot be proven in this case."

¶ 158 Defendants contend that the theory of "lost chance" was not the foundation of their motion for summary judgment. Instead, defendants' argument was based on the fact that Zimmerman failed to demonstrate that the defendants' alleged negligence was the proximate cause of her injuries and damages.

¶ 159 We have reviewed the transcript of the summary judgment hearing. At the conclusion, the trial court made no statement and took the motion under advisement. As stated earlier in this order, the trial court's written order only referenced Zimmerman's failure to prove proximate cause. Here, Zimmerman was required to prove proximate cause as part of her "lost chance" theory of recovery, and the trial court had to determine whether there was a genuine issue of material fact on that issue. If the trial court somehow misconstrued the theory of "lost chance" in granting summary judgment, we have no way to verify that fact. However, as our review is *de novo*, we are able to review the case and determine whether summary judgment was appropriate under any basis. *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 502, 520 N.E.2d 37, 39 (1988).

¶ 160 In order to prove her medical malpractice case against the defendants, Zimmerman had to prove three elements: the applicable standard of medical care; a negligent failure to comply with the standard of care; and an injury proximately caused by the failure to comply with the standard of care. *Somers v. Quinn*, 373 Ill. App. 3d 87, 90, 867 N.E.2d

539, 543 (2007); *Jinkins v. Evangelical Hospitals Corp.*, 336 Ill. App. 3d 377, 382, 783 N.E.2d 123, 126-27 (2002).

¶ 161 There are two elements to proximate causation: cause in fact and legal cause. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258, 811 N.E.2d 670, 674-75 (2004). The plaintiff is required to prove both elements. *Id.* "A defendant's conduct is a 'cause in fact' of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury." *Id.* at 258, 811 N.E.2d at 675 (citing *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258, 720 N.E.2d 1068, 1071 (1999); *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455, 605 N.E.2d 493, 502 (1992)). The factual basis required for "a material element and substantial factor in bringing about the injury" is met if the injury would not have occurred but for the defendant's involvement. *Id.* In contrast, "legal cause" is primarily an issue of foreseeability. *Id.* To prove legal cause, the plaintiff needs to establish that "the injury is of a type that a reasonable person would see *as a likely result*" of the defendant's conduct. (Emphasis in original.) *Galman*, 188 Ill. 2d at 260, 720 N.E.2d at 1073 (citing *Lee*, 152 Ill. 2d at 456, 605 N.E.2d at 503).

¶ 162 Both elements of proximate cause must be established through expert testimony to a reasonable degree of medical certainty. *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 293, 895 N.E.2d 1067, 1071 (2008). If the plaintiff does not have expert testimony to prove both proximate cause elements, then summary judgment may be appropriate. *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 843, 931 N.E.2d 835, 847 (2010).

¶ 163 The bases for an expert witness's opinions are critical in order for the trial court to consider those opinions. *Wiedenbeck*, 385 Ill. App. 3d at 293, 895 N.E.2d at 1071. Moreover, if the expert makes "conclusory opinions based on sheer, unsubstantiated speculation," the court should disregard the opinions. *Id.* (quoting *Petraski v. Thedos*, 382 Ill. App. 3d 22, 31, 887 N.E.2d 24, 33 (2008)).

¶ 164 Here, Zimmerman contends that the "lost chance" theory of record authorizes the expert witnesses to speculate as to causation. We disagree. In Illinois, the courts have not lowered the standard of proof necessary for recovery in a "lost chance" case. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 117-19, 679 N.E.2d 1202, 1212 (1997). There must be a causal connection between the defendant's conduct and the increased risk of harm or the loss of a chance, and that causal connection must not be " 'contingent, speculative, or merely possible.' " *Johnson*, 402 Ill. App. 3d at 843, 931 N.E.2d at 847 (quoting *Ayala*, 367 Ill. App. 3d at 601, 855 N.E.2d at 270). An educated guess by the expert is also insufficient. *Reed v. Jackson Park Hospital Foundation*, 325 Ill. App. 3d 835, 843-44, 758 N.E.2d 868, 875 (2001) (where the plaintiff's expert provided the opinion that if an eye injury had been discovered earlier, there would have been a better chance of saving the eye, the trial and appellate courts concluded that there was no evidentiary basis for this speculative opinion and therefore summary judgment was warranted); see also *Johnson*, 402 Ill. App. 3d at 837, 843, 846, 931 N.E.2d at 842, 847, 849 (where the plaintiff's expert provided the opinion that contractions reflected on fetal monitoring strips *might* have been meaningful and may have resulted in a better outcome, the trial

and appellate courts concluded that the opinion was speculative and therefore summary judgment was warranted).

¶ 165 We have reviewed all depositions included in the record as well as the briefs on appeal and conclude that Zimmerman failed to establish the cause in fact element of proximate causation through expert testimony.

¶ 166 Dr. Fred J. Duboe, Zimmerman's retained gynecology expert, was unable to provide specific causation opinions. He provided general opinions that earlier diagnosis is typically better than later diagnosis in cancer cases. However, Dr. Duboe acknowledged that he was not qualified to offer any expert opinions in the treatment, diagnosis, or prognosis of LMS. And, he was unable to provide an opinion on the metastatic potential of the cancer between April 2006 and August 2006.

¶ 167 Dr. Richard M. Gore, Zimmerman's retained radiology expert, was able to provide specific causation opinions regarding the standard of care provided by Dr. Tawjareon and Dr. Adekunle in January and February 2006, but no admissible opinions regarding the standard of care rendered by the defendants in April 2006. In his deposition, Dr. Gore expressed his opinion that the mass detected in April 2006 ultrasound was likely the same mass detected in August 2006, but he did not state that this opinion was within a reasonable degree of medical certainty. And, Dr. Gore would not render an opinion that removal of the mass in April 2006 would have increased Zimmerman's odds of recovery.

¶ 168 Dr. David C. Linehan, Zimmerman's treating surgical oncologist, rendered no opinions as to the standard of care provided by the defendants. He testified that retroperitoneum tumors are very difficult to diagnose early because of their location in

the abdomen, and that typically the tumors get quite large before diagnosis. Dr. Linehan had no opinion about whether the mass detected in April 2006 was the mass that he surgically removed in September 2006, stating the mass could "possibly" be the same mass. He would not give an opinion that Zimmerman's outcome would have been different if the tumor had been removed months before.

¶ 169 Dr. Philip Dy, one of Zimmerman's treating oncologists, would not render any opinions about whether removal of the tumor in April 2006 would have changed her outcome. He explained that no matter when this tumor was diagnosed, the tumor would have been classified as a "high grade" type, and that as LMS is an aggressive, fast-growing cancer, the prognosis is poor.

¶ 170 We conclude that Zimmerman simply did not have adequate expert testimony establishing that the defendants' alleged medical negligence was the proximate cause of her injuries and damages. We do believe that Dr. Schultheis failed in the sense that he should have either sought an additional study or referred her to a different provider when he was unable to locate the mass he had seen on the ultrasound. But, that negligence does not equate to proximate causation that this failure made any difference to Zimmerman's care or prognosis. Zimmerman failed to timely disclose any expert opinion that detection in April 2006 coupled with earlier surgical removal would have made any difference in her outcome. In addition, no expert provided an opinion within a reasonable degree of medical certainty connecting the metastasis of the LMS and resulting difficult surgery to the defendants' alleged medical negligence. While there was some speculative testimony about the defendants' conduct, that testimony does not meet the mandated Illinois

standards that the evidence must be established to a reasonable degree of medical certainty. *Holton*, 176 Ill. 2d at 114-15, 679 N.E.2d at 1211. Thus, we find that there was no genuine issue as to any material fact and affirm the trial court's summary judgment.

¶ 171 CONCLUSION

¶ 172 For the foregoing reasons, we affirm the judgment of the Effingham County circuit court.

¶ 173 Affirmed.