No. 3-04-0828

In the
Appellate Court of Illinois
Third Judicial District

RITEN H. SHETH, M.D.,

Plaintiff-Appellant,

vs.

WARREN WUNDERLICH, M.D., et al.,

Defendants-Appellees.

On Appeal from the Circuit Court of the Twelfth Judicial District,
Will County, Illinois, No. 01 L 196.
The Honorable **Amy Bertani-Tomczak**, Judge Presiding.

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

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Oral Argument Requested

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POINTS AND AUTHORITIES

ARGUMENT

I. WITH THE AFFIDAVIT OF DR. WUNDERLICH SUPPORTING IT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED

A. The Affidavit Of Dr. Wunderlich Complies With Supreme Court Rule 191(a)

1. Dr. Wunderlich's Actions Are Within His Personal Knowledge

2. Dr. Wunderlich's Affidavit Sets Forth With Particularity The Facts Comprising The Basis For His Statements

3. Dr. Wunderlich's Statements Consist Of Facts Admissible In Evidence

ISSUES PRESENTED FOR REVIEW

1. Whether the uncontradicted affidavit of Warren Wunderlich, M.D., produced in support of Defendants/Appellees' Motion for Summary Judgment, was in compliance with Illinois Supreme Court Rule 191(a);
2. Whether the uncontradicted affidavit of Dr. Wunderlich is admitted and deemed true;
3. Whether Plaintiff/Appellant's failure to file a Motion to Strike the affidavit of Dr. Wunderlich in the trial court operated as a waiver of any objections to the affidavit on appeal;
4. Whether the Circuit Court erred in granting Defendants/Appellees' Motion for Summary Judgment pursuant to 735 ILCS 5/2-1009 of the Illinois Code of Civil Procedure.

STATEMENT OF FACTS

1. Defendants/Appellees (hereinafter, "Defendants") object to the argumentative tenor of Paragraphs 8 and 13 in the Statement of Facts portion of Plaintiff/Appellant's Appellate Brief, and assert that such arguments are inappropriate in a statement of facts, and impermissible pursuant to Illinois Supreme Court Rule 341(e)(6).

2. Additionally, Defendants object to any portion of the Statement of Facts which is not cited pursuant to Rule 341(e)(6).

3. In his Second Verified Complaint at Law, Plaintiff/Appellant, Riten H. Sheth, (hereinafter, "Plaintiff") alleged that the Defendants, by failing to follow the St. Joseph Medical Center Bylaws (hereinafter, "bylaws"), caused him to incur "substantial financial and other damages." (R. C 839-1012). Plaintiff alleged that this failure to follow the bylaws occurred on August 30, 2000. (R. C 839-1012).

4. In his complaint, Plaintiff asserted that the Medicine Committee summarily suspended him but was not authorized by the bylaws to do so. (R. C 847). This is the "failure to follow the bylaws" of which Plaintiff complains. (R. 855, 858).

5. On August 30, 2000, Plaintiff, a gastroenterologist, derived his clinical privileges from the Medicine Department. (R. C 909). The Medicine Committee is the departmental committee of the Medicine Department. (R. C 79-80). On August 30, 2000, the Medicine Committee reviewed three cases involving the endoscopic care and treatment provided by Plaintiff to three of his patients – cases #21807854, #21842588, and #23137292. (R. C 1644, 1647).

6. Warren Wunderlich, M.D., is a defendant in this action. (R. C 839-1012). Dr. Wunderlich's area of practice is general internal medicine. (R. C 1643). He practices

gastroenterology. (R. C 2074). On August 30, 2000, Dr. Wunderlich was the chairperson of the Medicine Committee, a standing departmental committee. (R. C 1643). As chairperson of the Medicine Committee, pursuant to the bylaws, Dr. Wunderlich had the authority to summarily suspend Plaintiff unilaterally – without any vote from any committee. (R. C 1819).

7. Nonetheless, on August 30, 2000, the Medicine Committee voted to summarily suspend the clinical privileges of Plaintiff. (R. C 1644). The suspension was based on a review of the above three cases which were contained in Plaintiff's record. (R. C 1647). As a result of reviewing these cases, the Medicine Committee felt a concern for the safety of Plaintiff's patients. (R. C 1647).

8. Dr. Wunderlich's deposition proceeded on October 2, 2002. (R. C 1642-1672). Dr. Wunderlich testified under oath that he was aware of these cases at the August 30, 2000, Medicine Committee meeting. (R. C 1644, 1647).

9. When questioned by Plaintiff's attorney, Dr. Wunderlich testified under oath that, after reviewing Plaintiff's cases on August 30, 2000, he had a concern for Plaintiff's patients. (R. C 1646). Dr. Wunderlich went on to testify under oath that, on August 30, 2000, he felt that Plaintiff should be summarily suspended. (R. C 1646).

10. Dr. Wunderlich testified under oath that he felt suspension was warranted because two of the three reviewed endoscopic cases involved fatalities. (R. C 1646). Additionally, Dr. Wunderlich cited a finding of the Medicine Committee that Plaintiff had an "unacceptable variance in outcome" in the administration of drugs. (R. C 1646).

11. At his deposition, Dr. Wunderlich testified that he was unfamiliar with the bylaws on August 30, 2000, the date of the Medicine Committee meeting. (R. C 1647). He testified under oath that as a consequence of being unfamiliar with the bylaws, he was unaware that, as

the Medicine Committee chairperson, he was authorized to unilaterally suspend Plaintiff. (R. C 1647).

12. On May 26, 2004, Defendants filed a Motion for Summary Judgment based on Plaintiff's inability to prove proximate causation. (R. C 1599-1676). Specifically, Defendants asserted that if they had followed the bylaws, Dr. Wunderlich would have unilaterally suspended Plaintiff. (R. C 1606-07). Thus, Defendants argued, even without a failure to follow the bylaws, Plaintiff would have been summarily suspended and suffered damages. (R. C 1605).

13. In support of their motion, Defendants attached the sworn affidavit of Dr. Wunderlich. (R. C 1675-76). In this sworn affidavit, Dr. Wunderlich reiterated key points of his deposition. (R. C 1645-46, 1675-76).

14. Dr. Wunderlich testified that he was the chairperson of the Medicine Committee in August 2000. (R. C 1675). He testified that on or about that time, he reviewed the records of Plaintiff, related to cases #21807854, #21842588, and #23137292. (R. C 1675).

15. He testified that, based on his review of those records, particularly the above cases, he felt that summary suspension was warranted. (R. C 1675). He testified that, based on his review of these records, he felt that Plaintiff posed a danger to his patients, and that a failure to take prompt action may have resulted in immediate danger to those patients. (R. C 1676).

16. Dr. Wunderlich further testified that on August 30, 2000, he was unfamiliar with the bylaws. (R. C 1676). He testified that, as a consequence of this unfamiliarity, he was unaware that he possessed the authority to summarily suspend Plaintiff unilaterally. (R. C 1676).

17. Dr. Wunderlich testified that since that Medicine Committee meeting of August 30, 2000, he reviewed the bylaws and had become aware that on August 30, 2000, he possessed the authority to summarily suspend Plaintiff unilaterally. (R. C 1676).

18. Finally, Dr. Wunderlich testified that had he reviewed and followed the bylaws in August 2000, he would have summarily suspended Plaintiff, unilaterally, based on his review of Plaintiff's records, particularly cases #21807854, #21842588, and #23137292. (R. C 1676).

19. On June 18, 2004, Plaintiff filed his response to Defendants' Motion for Summary Judgment. (R. C 1683-2123). At no time did Plaintiff file a motion to strike Dr Wunderlich's affidavit. Nor did Plaintiff file a motion to strike the Motion for Summary Judgment.

20. On August 12, 2004, Judge Bertani-Tomczak granted Defendants' Motion for Summary Judgment. (R. C 2323-24).

21. On August 30, 2004, Plaintiff filed a Motion to Reconsider. (R. C 2162-2297).

22. On October 15, 2004, Judge Bertani-Tomczak denied Plaintiff's Motion to Reconsider. (R. C 2325).

23. On October 27, 2004, Plaintiff timely filed an appeal of the grant of Defendants' Motion for Summary Judgment. (R. C 2322-25). With his appeal, Plaintiff challenges the sufficiency of Dr. Wunderlich's affidavit. (R. C 2322-25).

ARGUMENT

Plaintiff raises three issues on appeal, all of which question the propriety of the Circuit Court's grant of Defendants' Motion for Summary Judgment based on Plaintiff's inability to prove proximate causation to sustain his case. Specifically, Plaintiff asserts that Dr. Wunderlich's affidavit is speculative and cannot be used to support Defendants' Motion for Summary Judgment.

In response, Defendants submit that Dr. Wunderlich's affidavit is in compliance with Illinois Supreme Court Rule 191(a). Further, because the affidavit is uncontradicted, the facts therein were admitted and deemed true. Moreover, since Plaintiff failed to move the Circuit Court to strike the affidavit, said failure constitutes a waiver, which bars Plaintiff from challenging it on appeal. Finally, circuit courts may grant motions for summary judgment premised on a plaintiff's inability to prove proximate causation.

For all of these reasons, Plaintiff's appeal must fail.

I. WITH THE AFFIDAVIT OF DR. WUNDERLICH SUPPORTING IT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED

As previously stated, in Plaintiff's complaint, he alleged that Defendants' "failure to follow the bylaws caused him to incur "substantial financial and other damages." (R. C 839-1012). "A fundamental principle of tort law is that the plaintiff has the burden of proving by a preponderance of the evidence that the defendant caused the complained-of harm." Smith v. Eli Lilly & Company, 137 Ill.2d 222, 232, 560 N.E.2d 324, 328 (1990). Proximate cause is made up of two elements, actual cause and legal cause. First Springfield Bank & Trust v. Galman, 188 Ill.2d 252, 257-8, 720 N.E.2d 1068, 1072 (1999). Actual cause is cause in fact. Simmons v. Garces, 198 Ill.2d 541, 558, 763 N.E.2d 720, 732 (2002).

"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. [*Citation omitted.*] A defendant's conduct is a material element and a substantial factor in bringing about an injury if, absent that conduct, the injury would not have occurred." Galman, at 258, 720 N.E.2d at 1072. Put another way, a plaintiff must prove "but for" causation linking the acts or omissions of a defendant to the alleged harm. Id.

The Third District agrees. Alvis v. Henderson Obstetrics, S.C., 227 Ill.App.3d 1012, 1019, 592 N.E.2d 678, 683 (3rd Dist. 1992). It holds that negligent conduct cannot be the proximate cause of an injury, unless there is evidence that but for the conduct, the injury probably would not have occurred. Id. Therefore, to sustain the current case, Plaintiff had to prove that but for Defendants' failure to follow the bylaws, he would not have been summarily suspended. However, as decreed by the Circuit Court, Plaintiff was unable to make this requisite showing. (R. C 2325). This is because it was not a failure to follow the bylaws which caused Plaintiff injury. Rather, if Plaintiff sustained any injury, it was caused by a review of the morbidity rates associated with endoscopic procedures performed by him.

This notion is amply illustrated by the affidavit of Dr. Wunderlich. Indeed, this affidavit was paramount in demonstrating Plaintiff's inability to prove proximate causation. Defendants assert that this affidavit, which remains uncontradicted, wholly complies with Supreme Court Rule 191(a). Defendants respectfully submit that should this Honorable Court find that the affidavit of Dr. Wunderlich complies with Rule 191(a), it must, for this reason as well as others, affirm the decision of the Circuit Court.

A. The Affidavit Of Dr. Wunderlich Complies With Supreme Court Rule 191(a)

Supreme Court Rule 191(a) governs affidavits that support motions for summary judgment, and reads in pertinent part:

> Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure...shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. *Ill. S. Ct. R. 191(a).*

1. Dr. Wunderlich's Actions Are Within His Personal Knowledge

Dr. Wunderlich has attested that the information contained in his affidavit is based on his own personal knowledge. (R. C 1675-76); Ill. S. Ct. R. 191(a). The Third District is loathe to deem a party affidavit insufficient even when it lacks this "personal knowledge" statement. Hoover v. Crippen, 151 Ill.App.3d 864, 868, 503 N.E.2d 848, 852 (3rd Dist. 1987). In fact, the Third District focuses on whether "it appears that an affidavit is based on the personal knowledge of the affiant and a reasonable inference is that the affiant could competently testify to the contents of the affidavit at trial." Id.

Naturally, whatever actions Dr. Wunderlich takes or would have taken are within his personal knowledge. With his affidavit, he did not speculate as to another's actions. Nor did he prognosticate as to events unknown. He simply attested that had he been aware of a condition, he would have chosen a different path to effectuate a desired result. (R. C 1675-76). His assertion is no different than that of a physician who testifies that had he been aware of a patient's true ailment, he would have undergone a different course of treatment. Holton v. Memorial Hospital, 176 Ill.2d 95, 109, 679 N.E.2d 1202, 1208 (1997). ***Both examples***

constitute testimony under oath as to an individual's personal knowledge of an action taken, by that individual, upon the existence of a condition preceding the action. Such testimony is admissible. Id.

2. Dr. Wunderlich's Affidavit Sets Forth With Particularity The Facts Comprising The Basis For His Statements

As explained above, Dr. Wunderlich swore under oath that had he been aware that he was authorized to summarily suspend Plaintiff on August 30, 2000, he would have done so. (R. C 1675-76). Not only is this statement logical and supported by the record, (R. C 1646), but the facts comprising it are set forth with particularity in the affidavit, pursuant to Rule 191(a).

The facts comprising Dr. Wunderlich's claim that he would have summarily suspended Plaintiff had he known he was authorized, are: 1) the authority bestowed upon him as chairperson of the Medicine Committee pursuant to the bylaws (R. C 1819); 2) his review of Plaintiff's cases reflecting an unacceptable morbidity rate during endoscopic procedures (R. C 1646); 3) the knowledge of his belief that Plaintiff posed a danger to his patients (R. C 1648); and 4) the knowledge of his belief that the failure to take action would result in immediate danger.[1] (R. C 1648). These facts are admitted. (R. C 1646, 1648, 1819). With these facts, Dr. Wunderlich has laid a proper foundation pursuant to Rule 191(a).

Rule 191(a) also reads: the affiant shall attach to his affidavit sworn or certified copies of all papers upon which the affiant relies. Ill. S. Ct. R. 191(a). This provision is inapplicable here. Defendants have attached no exhibits to Dr. Wunderlich's affidavit. (R. C 1675-76); Ill. S. Ct. R. 191(a).

[1] It is important to understand the difference between attesting as to a belief and attesting to the knowledge of one's belief. It is clear from his appellate brief that Plaintiff does not understand the distinction. Dr. Wunderlich has attested to the knowledge of his August 30, 2000 belief. In such an instance, the actual beliefs are irrelevant. They merely set the backdrop for the factual statements. Thus, Dr. Wunderlich's beliefs are germane only insofar as his knowledge of them sets the factual basis upon which his affidavit rests (i.e., because he knows that on August 30, 2000, he had certain beliefs (concern for patients, danger imminent), he knows he would have acted a certain way (suspending Plaintiff) based upon the necessary condition (awareness of authority to suspend)).

3. Dr. Wunderlich's Statements Consist Of Facts Admissible In Evidence

It is well-settled that "[u]nsupported assertions, opinions, and self-serving or conclusory statements do not comply with Rule 191(a)." Jones v. Dettro, 308 Ill.App.3d 494, 499, 720 N.E.2d 343, 347 (4th Dist. 1999).[2] This holding reflects the concern of another foundational provision in Rule 191(a) - the requirement that an affiant's statement not consist of conclusions but of facts admissible in evidence. Ill. S. Ct. R. 191(a).

This is not a case where the affidavit fails to list the specific matters which caused the affiant to come to his conclusion. *See*, O'Rourke v. Oehler, 187 Ill.App.3d 572, 585, 543 N.E.2d 546, 555 (4th Dist. 1989). This is precisely the opposite. Dr. Wunderlich's affidavit culminates with the statement "[i]f I had reviewed and followed the [bylaws] in August [2000], I would have summarily suspended [Plaintiff], unilaterally, based on my review of his records..." (R. C 1675-76). This statement is not conclusory, but rather it is an assertion entirely supported by the enumerated facts described above. These facts are admitted. Because the affidavit explained the factual basis for Dr. Wunderlich's conclusion, it complied with Rule 191(a). Jones, at 499, 720 N.E.2d at 347.

4. Dr. Wunderlich's Affidavit Affirmatively Shows That, If Sworn As A Witness, He Could Competently Testify As To His Statements

Dr. Wunderlich has attested that he is competent to testify as to the statements contained in his affidavit. (R. C 1675-76); Ill. S. Ct. R. 191(a). His statements are based on personal knowledge and a review of Plaintiff's record, namely the cases reflecting an unacceptable morbidity rate during endoscopic procedures. (R. C 1646, 1675-76). As a gastroenterologist and

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[2] *See also,* Krueger v. A.P. Green Refractories Co., 283 Ill.App.3d 300, 306, 669 N.E.2d 947, 951 (3rd Dist. 1996) (court held that affiant attesting to something "as best as [he] can tell" was insufficient to support summary judgment affidavit.); *see also,* Tipsord v. Unarco Industries, Inc., 188 Ill.App.3d 895, 899, 544 N.E.2d 1198, 1201 (4th Dist. 1989) (court held that affiant's statements were insufficient where based on review of summary submitted by co-worker).

chairperson of the Medicine Committee, Dr. Wunderlich is qualified to assess morbidity rates associated with endoscopic procedures. (R. C 2074, 1643). With the factual and logical statements contained in his affidavit, Dr. Wunderlich has laid a proper foundation and, in doing so, has affirmatively demonstrated that he could competently testify as to those statements. (R. C 1675-76); Ill. S. Ct. R. 191(a).[3]

B. Because The Affidavit of Dr. Wunderlich Is Uncontradicted, The Statements Contained Therein Were Admitted And Deemed True

"Where facts contained in the affidavit in support of a motion for summary judgment are not contradicted by counteraffidavit, such facts are admitted and must be taken as true." Heidelberger v. Jewel Companies, Inc., 57 Ill.2d 87, 92-3, 312 N.E.2d 601, 604 (1974). This proposition from Heidelberger, promulgated in 1974, remains the law in Illinois. Illinois courts have even held that the facts of an affidavit are admitted and deemed true when the opponent untimely files his counter-affidavit. *See,* Hall v. DeFalco, 178 Ill.App.3d 408, 411-12, 533 N.E.2d 448, 451 (1st Dist. 1988) (holding that trial court did not abuse its discretion by deeming facts of affidavit in support of motion for summary judgment admitted and true, and by refusing to consider plaintiff's untimely counter-affidavit).

Here, Plaintiff cannot complain that the trial court did not consider his untimely counter-affidavit in its ruling on the motion for summary judgment – he never filed a counter-affidavit. Not only is Dr. Wunderlich's affidavit compliant with Rule 191(a), as described above, but it remains absolutely uncontested. Therefore, the facts and statements contained in Dr. Wunderlich's affidavit "are admitted and must be taken as true." Heidelberger, at 92-3, 312 N.E.2d at 604. Because Dr. Wunderlich's affidavit was admitted as true, Plaintiff could not

[3] Again, the Third District requires only that an affidavit provide "a reasonable inference [] that the affiant could competently testify to the contents of the affidavit at trial." Hoover v. Crippen, 151 Ill.App.3d 864, 868, 503 N.E.2d 848, 852 (3rd Dist. 1987). Surely, Dr. Wunderlich's affidavit provides this inference.

prove that it was a "failure to follow the bylaws" which caused him injury. *See,* Galman, at 258, 720 N.E.2d at 1072. Since Plaintiff still cannot make this showing of proximate causation, his appeal must fail. Id.

II. PLAINTIFF'S FAILURE TO MOVE THE CIRCUIT COURT TO STRIKE DR. WUNDERLICH'S AFFIDAVIT OPERATES AS A WAIVER, BARRING CHALLENGE ON APPEAL

And yet, the meritorious arguments above are moot. That is because the Supreme Court has held that "the sufficiency of an affidavit [in support of a motion for summary judgment] cannot be tested for the first time on appeal where no objection was made either by motion to strike, or otherwise, in the trial court." Fooden v. Board of Governors of State Colleges and Universities, 48 Ill.2d 580, 587, 272 N.E.2d 497, 501 (1971). In fact, Illinois courts deem this failure to object a waiver barring challenge on appeal. Id.; *See,* Independent Trust Corporation v. Hurwick, 351 Ill.App.3d 941, 950, 814 N.E.2d 895, 903 (1st Dist. 2004); *see also,* Soderlund Brothers, Inc. v. Carrier Corporation, 278 Ill.App.3d 606, 623, 663 N.E.2d 1, 13 (1st Dist. 1995).

It is beyond dispute that Plaintiff never filed with the trial court a motion to strike the affidavit of Dr. Wunderlich. Nor did Plaintiff move to strike the motion for summary judgment based on a purported deficiency of the affidavit. In fact, Plaintiff did not even informally object to the affidavit in his response to the motion for summary judgment. (R. C 1683-2123). Rather, Plaintiff's challenge of the affidavit was confined to variously labeling it "self-serving," "bold," and consisting of "speculation." (R. C 1694, 1692).[4] This does not preserve the issue for appeal. *See,* Fooden, at 587, 272 N.E.2d at 501.

[4] Plaintiff also suggests in his appellate brief that Defendants are attempting to use ignorance of the law as a defense. (Appellate Brief at p. 9). Plaintiff misunderstands the thrust of Defendants' argument. Defendants are not using ignorance of the law as a defense. Ignorance of the law is not a legal defense. In re Yasmine P., 328 Ill.App.3d 1005, 1010, 767 N.E.2d 867, 871 (3rd Dist. 2002). Rather, Defendants argue that the facts and statements regarding Dr. Wunderlich's ignorance of the bylaws in August 2000 (which are contained in his deposition and affidavit testimony) support the motion for summary judgment based on plaintiff's failure to prove proximate causation,

A. Plaintiff's Reliance On *Pietruszynski* And *Parker* Is Misplaced

Defendants argue that any argument by Plaintiff that Dr. Wunderlich's affidavit is insufficient has been waived. Id. Even still, the cases Plaintiff enlists to promote his position are completely irrelevant to the issue at hand. To support the argument that Dr. Wunderlich's affidavit is not sufficient pursuant to Rule 191(a), Plaintiff cites two First District cases that do not even involve Rule 191(a): Pietruszynski v. McClier Corporation, 338 Ill.App.3d 58, 788 N.E.2d 82 (1st Dist. 2003), and Parker v. House O'Lite Corporation, 324 Ill.App.3d 1014, 756 N.E.2d 286 (1st Dist. 2001).

Pietruszynski, a retaliatory discharge case, did not involve the sufficiency of an affidavit but rather the determination of whether a "statement made out of court by a party to an action" is admissible under hearsay analysis. Pietruszynski, at 65, 788 N.E.2d at 87. Parker is similarly off the mark. In Parker, a defamation case, the issue was whether defendant's investigation was sufficient as to avail her of the protections of a qualified privilege. Parker, at 1029, 756 N.E.2d at 299-300. Neither issue is germane to the current discussion. Indeed, without even referring to Rule 191(a) to argue that the affidavit is insufficient, and by instead relying on two irrelevant First District cases, it is the Plaintiff's assertions that are "conclusory," not the affidavit.

As explained above, Plaintiff never contradicted the affidavit of Dr. Wunderlich. Perhaps he was unable to do so. However, that inability cannot explain why Plaintiff did not, at the very least, file a motion to strike the affidavit or a motion to strike the motion for summary judgment based on a purported deficiency of the affidavit. Defendants respectfully submit that this Honorable Court cannot test the sufficiency of the uncontradicted, unchallenged affidavit of Dr Wunderlich. Fooden, at 587, 272 N.E.2d at 501. Plaintiff's failure to move to strike the affidavit

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which is a legal defense. First Springfield Bank & Trust v. Galman, 188 Ill.2d 252, 257-8, 720 N.E.2d 1068, 1072 (1999).

or to object, formally or informally, to the affidavit precludes him from challenging it on appeal. Id.

III. COURTS GRANT MOTIONS FOR SUMMARY JUDGMENT PREMISED ON A PLAINTIFF'S FAILURE TO PROVE PROXIMATE CAUSATION

Not much need be said regarding this point. Plaintiff claims courts cannot grant summary judgment as to proximate causation. *Appellate Brief* (hereinafter "*App. Br.*") *at p. 12*. This is false. It is an axiom of tort law that a plaintiff must prove proximate causation. Galman, at 256, 720 N.E.2d at 1071. In Galman, the Supreme Court overruled the Fourth District appellate court, and held that defendant-movant was entitled to a judgment notwithstanding the verdict. Id. at 262, 720 N.E.2d at 1074. Thus, the Court held that a plaintiff must prove proximate causation or, as a matter of law, he cannot sustain his action. Id. at 258, 720 N.E.2d at 1072. As previously noted, the Third District has acknowledged this burden. Alvis, at 1019, 592 N.E.2d at 683.

The cases cited by Plaintiff also illustrate the propriety of summary judgment when a plaintiff cannot prove proximate causation. Adams v. Northern Illinois Gas Co, 211 Ill.2d 32, 809 N.E.2d 1248 (2004); Bajwa v. Metropolitan Life Insurance Co., 208 Ill.2d 414, 804 N.E.2d 519 (2004). For instance, Adams holds that "[t]he issues of breach and proximate cause are factual matters for a jury to decide, *provided there is a genuine issue of material fact regarding those issues*." Adams, at 44, 809 N.E.2d at 1257. (Emphasis added). Though Plaintiff chooses to ignore the italicized portion of his own Adams holding, it is precisely this portion that makes the summary judgment in the current case appropriate. Dr. Wunderlich's affidavit, along with all of the supporting evidence in the record, eliminates any issue of material fact as it relates to proximate causation.

IV. NO MATERIAL ISSUES OF FACT EXIST THAT MAKE THE GRANT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IMPROPER

Again, because Dr. Wunderlich's affidavit complies with Rule 191(a), and it is uncontradicted, the affidavit was deemed admitted and was taken as true. Heidelberger, at 92-3, 312 N.E.2d at 604. Therefore, summary judgment was proper. Id. Moreover, because Plaintiff failed to object in the trial court to either the affidavit or the motion for summary judgment, he cannot challenge the affidavit on appeal. Fooden, at 587, 272 N.E.2d at 501. Still, in his appellate brief, Plaintiff inundates this Court with irrelevant and inaccurate information in a futile attempt to create a material issue of fact. None of these inaccuracies touch upon the dispositive issue of proximate causation as argued by Defendants. At the risk of doing themselves a disservice, Defendants feel compelled to address the most glaring of these inaccuracies.

A. The Beliefs And Opinions Of Other Defendants And Witnesses Are Irrelvent To The Current Appeal

First, Plaintiff argues that Defendant, Daniele DiGirolami, M.D., now believes that there was no immediate danger to Plaintiff's patients necessitating summary suspension. *App. Br. at p. 3.* Plaintiff also reports that Satish Kathpalia, M.D., has a current, similar belief. *App. Br. at p. 4.* He argues that these beliefs create a material issue of fact. *App. Br. at p. 3.* Plaintiff urges this Court to consider this testimony in overturning the trial court decision. Id.

Even if this Court accepts Plaintiff's characterizations of the statements of Dr. DiGirolami and Dr. Kathpalia as "admissions," it still must find that the motion for summary judgment was properly granted. That is because the uncontradicted affidavit which made summary judgment possible was authored by Dr. Wunderlich, not Dr. DiGirolami, and not Dr. Kathpalia. Neither of these individuals had the authority to unilaterally suspend Plaintiff. (R. C

1819).[5] Therefore, the beliefs and opinions of Dr. DiGirolami and Dr. Kathpalia, even if accurately portrayed to this Court, do nothing to affect the propriety of granting summary judgment based on the affidavit of Dr. Wunderlich.

B. Plaintiff Reads Into The Bylaws Requirements Which Do Not Exist

Plaintiff argues that the Medicine Committee failed to make "a showing of 'an immediate danger'" in suspending him. *App. Br. at p. 11.* The bylaws do not mandate that that there be a "showing" of immediate danger. (R. C 1819). Plaintiff has inserted this provision into the bylaws. The bylaws merely require that an immediate danger exist. (R. C 1819). Plaintiff himself demonstrates that there was an immediate danger to patients. (R. C 847). His complaint explains that "[o]n the day Dr. Sheth was summarily suspended, he was forced to have another physician handle two of his patients on a last minute basis for endoscopic procedures." (R. C 847).

Plaintiff also argues that, in violation of Article XIII, §1.03, Defendants' notice of Plaintiff's suspension "failed to disclose the cases involved in making the summary suspension decision." *App. Br. at p. 6.* Again, Plaintiff is reading into the bylaws requirements which do not exist. Article XIII, §1.03 reads that "such notice [of adverse action] shall be sufficient if it contains a statement of the areas in which the Individual's qualifications were found deficient." (R. C 1824). Thus, there is no requirement that cases be identified at that stage of the summary suspension proceedings. (R. C 1824).

Clearly, the notice requirement for adverse action was satisfied with the August 30, 2000 correspondence from Provena CEO, Thomas Reitinger, to Plaintiff. (R. C 141). In this

[5] But even if they did have the authority to unilaterally suspend Plaintiff, their statements still would not affect a motion for summary judgment based on the affidavit of another similarly authorized.

correspondence, Mr. Reitinger informed Plaintiff that the area in which he was found to be deficient was endoscopy and, therefore, those privileges were suspended. (R. C 141).

Additionally, Plaintiff claims that because Dr. Wunderlich is an "economic competitor," he should not have been involved in the decision to summarily suspend Plaintiff at the August 30, 2000, Medicine Committee meeting. *App. Br. at p. 5.* Plaintiff cites "Article XII, §3 and Article XII, §2.02 [*sic*]" in support of his proposition. *App. Br. at p. 5.*[6] First, Dr. Wunderlich is not an economic competitor to Plaintiff. (R. C 1652). Secondly, Plaintiff confuses a standing departmental committee like the Medicine Committee, with the type of "ad hoc" committee contemplated by Article XIII, §2.02. (R. C 1826). Thus, it is the Ad Hoc Hearing Committee that shall have no members who are in direct competition with the suspended physician (R. C 1826), not the Medicine Committee.

Plaintiff's reference to Article XIII, §3, in support of his argument is equally flawed. Article XIII, § 3, refers to the Appellate Review Committee. (R. C 1831). This is another "ad hoc" committee. (R. C 1831). This section, like §2.02, has absolutely no bearing on the personnel of a standing departmental committee like the Medicine Committee.

Finally, Plaintiff claims that Defendants "failed to provide him with access to any of the records in order to prepare and present evidence at hearing." *App. Br. at p. 6.* In support, Plaintiff cites Article XIII, §2.04. Id. First, Plaintiff again confuses the duties of the Ad Hoc Hearing Committee under Article XIII, with those of a standing departmental committee, like the Medicine Committee. By its own clear language, Article XIII, §2.04 does not apply to standing departmental committees. (R. C 1826). Secondly, the entirety of Article XIII is silent on any duty to "provide access" to any records. Article XIII, §2.04 merely requires that all participants

[6] Defendants presume Plaintiff meant to reference Article XIII of the bylaws, and not Article XII, as the latter does not contain a §2.02.

"have a reasonable opportunity to be heard and to present relevant oral and documentary information..." (R. C 1828).

Again, all of the points raised in this final portion of Defendants' Response, while accurate, have absolutely no bearing on the true basis of the grant of summary judgment in their favor – Plaintiff's failure to prove proximate causation based, *inter alia*, on the affidavit of Dr. Wunderlich. And, for the sake of brevity, Defendants have chosen not to address all of the irrelevant inaccuracies contained in Plaintiff's Brief. However, the above responses to Plaintiff's woefully tangential arguments serve to further illustrate the propriety of the grant of summary judgment. All of these irrelevant points were considered by the trial court and properly rejected. (R. C 1683-2123).

CONCLUSION

Dr. Wunderlich's uncontradicted affidavit is in compliance with Illinois Supreme Court Rule 191(a). The facts therein were admitted and deemed true. Plaintiff's failure to move the trial court to strike the affidavit constitutes a waiver of challenge on appeal. For these reasons, and because trial courts may grant motions for summary judgment premised on a plaintiff's inability to prove proximate causation, Judge Bertani-Tomczak did not err in granting Defendants' Motion for Summary Judgment.

WHEREFORE, Defendants pray that this Honorable Court affirm the Circuit Court's grant of summary judgment.

Respectfully submitted,

One of the Attorneys for Defendants.

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