SURVEY OF ILLINOIS LAW: MEDICAL MALPRACTICE

Kyle Christopher Oehmke[*] & Katie Oehmke[**]

This article compiles opinions that address Illinois medical malpractice law and topics pertaining thereto. These opinions were issued by the Illinois Supreme Court, Illinois appellate courts, and the Seventh Circuit Court of Appeals between September 1, 2009, and November 1, 2010. They are organized by primary topic.

I. THE IMPACT OF *LEBRON v. GOTTLIEB MEMORIAL HOSPITAL*

Without question, *Lebron v. Gottlieb Memorial Hospital*[1] was the most significant opinion on Illinois medical malpractice law to be issued in the last year. The *Lebron* Court struck down Public Act 94-677, which, *inter alia*, capped recovery of non-economic damages in medical malpractice actions, because it violated the separation of powers clause of the Illinois Constitution.[2]

While this article could chronicle and analyze *Lebron*, last summer's issue of the *Southern Illinois University Law Journal* already did just that.[3] To avoid reinventing the wheel, this article will instead summarize the only recent opinion whose holding turned on *Lebron*.

Knight v. Van Matre Rehabilitation Center, LLC[4]

In *Knight*, the Second District determined whether a medical malpractice complaint should be dismissed with prejudice when a plaintiff

---

* Kyle currently serves as law clerk to the Honorable J. Phil Gilbert, United States District Judge for the Southern District of Illinois. He received his J.D., *cum laude*, from Southern Illinois University School of Law in May 2009. As always, Kyle thanks his wonderful family and friends for their support of all his endeavors.

** Katie Oehmke is a second year law student expecting her J.D. from Southern Illinois University School of Law in May 2012. She too thanks her family and friends for their encouragement and constant support.

1. 237 Ill.2d 217, 930 N.E.2d 895 (2010).
2. *Id*. at 238, 930 N.E.2d at 908.
3. *See* W. Eugene Basanta, et al., *Survey of Illinois Law: Healthcare Law*, 34 S. ILL. U. L.J. 1034–42 (2010). The authors strongly encourage those interested in a review of *Lebron* and tort reform in Illinois to take a look at this comprehensive article.
4. 404 Ill. App. 3d 214, 936 N.E.2d 1152 (2d Dist. 2010).

fails to file a health care professional's report within ninety days of the complaint's filing.

After taking medication prescribed by Dr. Skuli Agustsson, Leoda Knight experienced severe adverse side effects. She thereafter decided to sue Dr. Agustsson and the health care facility where he was completing his residency. In her complaint, Knight noted that "[a]n Affidavit from a Health Care Professional, in accordance with 735 ILCS 5-2-622 will be filed within ninety (90) days."[5] Ninety-eight days later, Knight still had not filed the report; subsequently, Defendants moved for dismissal of the complaint. Knight moved for additional time, but the trial court granted Defendants' motion.[6]

When Knight filed her complaint, the relevant portion of the Illinois Code of Civil Procedure provided as follows: "[A]n affidavit from the plaintiff's counsel . . . and a report from a health care professional similar to the defendant must be filed with the plaintiff's medical malpractice complaint or within 90 days thereafter if the complaint is filed just prior to the expiration of the statute of limitations."[7] As a result of Public Act 94-677, the Code also stated that "[n]o additional 90-day extensions pursuant to this paragraph shall be granted, except where there has been a withdrawal of the plaintiff's counsel."[8] Another amendment by Public Act 94-677 also made clear that "[t]he failure of the plaintiff to file an affidavit and report in compliance with this Section shall be grounds for dismissal under Section 2-619."[9]

Because, the Illinois Supreme Court's decision in *Lebron* "held Public Act 94-677 'invalid and void in its entirety[,]'"[10] the relevant provisions of the Illinois Code of Civil Procedure reverted to what they were prior to August 25, 2005 (the date Public Act 94-677 was enacted).[11] Prior to August 25, 2005, the Code did not explicitly forbid additional ninety-day extensions.[12] In addition, before said date, failure to file the requisite report

---

5. *Id*. at 215, 936 N.E.2d at 1153–54.
6. *Id*.
7. *Id*. at 216, 936 N.E.2d at 1154 (relying upon 735 ILL. COMP. STAT. ANN. 5/2–622(a)(1), (a)(2) (West 2008)).
8. *Id*. (citing 735 ILL. COMP. STAT. ANN. 5/2-622(a)(2) (West 2008)).
9. *Id*. (citing 735 ILL. COMP. STAT. ANN. 5/2-622(g) (West 2008)).
10. *Id*. at 216, 936 N.E.2d at 1155 (citing Lebron v. Gottlieb Mem'l Hosp., 237 Ill.2d 217, 250, 930 N.E.2d 895, 906 (2010)).
11. *Id*. *See* Jackson v. Victory Mem'l Hosp., 387 Ill. App. 3d 342, 346, 900 N.E.2d 309, 346 (2d Dist. 2010) (when a statute is declared unconstitutional, the language therein reverts to what it was prior to amendment).
12. *Knight*, 404 Ill. App. 3d at 216–17, 936 N.E.2d at 1155 (relying upon 735 ILL. COMP. STAT. ANN. 5/2–622(a)(2) (West 2004)).

did not mandate dismissal of the complaint with prejudice.[13] Bearing all of this in mind, the Second District remanded the matter in order for the trial court to determine whether Knight could show good cause for failing to file the report within 90 days of her complaint's filing.[14]

II. THE ELEMENTS OF A MEDICAL MALPRACTICE CLAIM

The elements of a medical malpractice claim should be familiar to those with a legal education or at least some legal training. To sustain a medical negligence claim, a plaintiff must demonstrate the following four elements: "(1) the standard of care in the medical community by which the physician's treatment was measured [i.e. duty]; (2) that the physician deviated from the standard of care [i.e. breach of duty]; and (3) that a resulting injury was proximately caused by the deviation from the standard of care."[15] Assuming a plaintiff proves this *prima facie* case and the physician lacks a meritorious defense, "the physician is liable for damages caused by his medical negligence."[16]

Several recent cases elaborated on these core tenants as they relate to Illinois medical malpractice law.

A. Standard of Care (i.e. Duty)

Hunter v. Amin[17]

The first element in a medical malpractice action, standard of care or duty, was at issue in *Hunter v. Amin*. Specifically the Seventh Circuit Court of Appeals decided, *inter alia*, whether Dr. Hetal Amin owed a duty to inmate Stanley Bell and could therefore be liable for medical malpractice.[18]

Bell, who suffered from bipolar affective disorder, arrived at the St. Clair County jail as a federal pretrial detainee. At the time, he was taking three prescription medications: two anti-depressants and an antihistamine used to treat anxiety during his stint at the jail. Dr. Amin, a psychiatrist under contract with the jail, met with Bell on a weekly basis. During one of

---

13. *Id*. at 217, 936 N.E.2d at 1155.
14. *Id*. at 218, 936 N.E.2d at 1156.
15. Neade v. Portes, 193 Ill.2d 433, 443–44, 739 N.E.2d 496, 502 (2000). *See* Cammon v. W. Suburban Hosp. Med. Ctr., 301 Ill. App. 3d 939, 950, 739 N.E.2d 731, 739 (1st Dist. 1998) ("The breach of duty necessary to support a medical negligence action is the defendant's deviation from the proper medical standard of patient care.").
16. *Neade*, 193 Ill.2d at 444, 739 N.E.2d at 502.
17. 583 F.3d 486 (7th Cir. 2010).
18. *Id*. at 489.

Dr. Amin's visits, Bell became highly agitated and refused to talk with the psychiatrist in the presence of a jail officer despite the jail's policy that a correctional officer be present during all inmate medical examinations. Bell grew increasingly belligerent and refused to participate in an examination until the officer left the room; meanwhile, Dr. Amin refused to conduct the examination without the jail officer being present.[19]

Dr. Amin told Bell that his medications would be discontinued unless he conducted an examination, but Bell refused to cooperate. Dr. Amin thereafter tried to get Bell to sign a release to indicate his refusal of treatment, but Bell persisted in his course of non-cooperation. Believing that Bell was experiencing a manic episode due to an antidepressant he was taking, Dr. Amin discontinued Bell's medication and decided to follow-up with him the following week. Tragically, Bell committed suicide two days later. He left a note stating St. Clair County was responsible for his death because it had taken away his medication.[20]

Bell's sister, Elisha Hunter, sued Dr. Amin for medical malpractice, alleging deviation from the proper standard of care due to the discontinuation of Bell's medication.[21] Finding that Bell's refusal of treatment negated any potential duty between the psychiatrist and his patient, the trial court entered summary judgment in favor of Dr. Amin.[22] Hunter promptly appealed.[23]

The physician-patient relationship obliges a physician to provide competent medical care to his patient, effectively creating a duty upon which a medical malpractice action is predicated.[24] On appeal, Dr. Amin emphasized Bell's express refusal to consent to the examination, which typically neither compels the physician to perform the procedure nor breeds a corresponding duty.[25] Further, believing that Bell was experiencing a manic episode caused by an antidepressant he was already taking, Dr. Amin felt he had no choice but to discontinue the medication.[26] In response, Hunter reminded Dr. Amin that the claim against him was for affirmatively discontinuing Bell's medication.[27] Bell did not refuse to continue his medication, and there was no evidence that it was necessary for Bell to be

---

19. *Id*. at 488.
20. *Id*.
21. *Id*.
22. *Id*. at 489.
23. *Id*.
24. *Id*. at 490.
25. *Id*. at 490–91.
26. *Id*. at 491.
27. *Id*.

examined by Dr. Amin in order for his previously-prescribed medication to continue.[28]

Because "there [was] no evidence to support Dr. Amin's bare assertion that it was necessary for Bell to be examined by him in order for his previously-prescribed medication to be continued[,]"[29] a duty attached when Dr. Amin discontinued dispensation of the antidepressant. The Seventh Circuit placed great stock in the fact that Dr. Amin was not visiting the jail to meet with Bell specifically and the fact that Dr. Amin previously made decisions concerning Bell's medications without examining him.[30]

Because Hunter satisfied the duty element of her claim, the Seventh Circuit reversed the entry of summary judgment and remanded the matter for further proceedings.[31] Meanwhile, Justice Diane Sykes dissented from her colleagues. She believed Bell's refusal to undergo the psychiatric examination precluded the establishment of the physician-patient relationship upon which any standard of care is premised.[32]

B. *Res Ipsa Loquitor*

If successfully invoked, the doctrine of *res ipsa loquitor* allows medical malpractice plaintiffs to circumvent the elements of standard of care and deviation therefrom by pointing to the nature of the accident itself. When a plaintiff relies upon *res ipsa loquitur*, he must plead and prove that he was injured (1) by an occurrence that typically does not happen in the absence of negligence and (2) by an agency or instrumentality within the exclusive control of the defendant.[33] Courts determine whether the plaintiff has met both of these elements by relying upon common knowledge or expert medical testimony.[34]

Raleigh v. Alcon Laboratories, Inc.[35]

In *Raleigh v. Alcon Laboratories, Inc.*, the Fifth District determined whether the plaintiff, William Raleigh, met the elements of *res ipsa loquitur*.

---

28. *Id*.
29. *Id*.
30. *Id*.
31. *Id*. at 492.
32. *Id*. at 492–93.
33. Raleigh v. Alcon Labs., Inc., 403 Ill. App. 3d 863, 869, 934 N.E.2d 530, 536 (5th Dist. 2010).
34. *Id*.; 735 ILL. COMP. STAT. ANN. 5/2-1113 (West 2010).
35. *Raleigh*, 403 Ill. App. 3d 863, 934 N.E.2d 530.

Raleigh underwent cataract surgery, whereby an intraocular lens was implanted in his eye. While there were no complications during surgery, Raleigh later experienced pain and vision problems in that eye. A few weeks later, doctors discovered a rare fungus in the same eye, necessitating the eye's removal. Soon thereafter, Raleigh brought a medical malpractice action against the hospital under a theory of *res ipsa loquitur*, alleging that the hospital was in exclusive control of the instrumentality that injured him.[36]

During trial, Raleigh put on numerous medical experts, including Dr. Frank LaFranco and Dr. Michael Rinaldi. Dr. LaFranco testified that, although he had no way of knowing for certain, "something that occurred in the operating room was the cause of [Raleigh's] infection[.]"[37] Meanwhile, Dr. Michael Rinaldi testified that the most likely source of the fungus was the intraocular lens, however, he acknowledged that the source could have been the operating suite personnel, ophthalmic solutions used during the procedure, surgical instruments, or the operating room environment.[38] Dr. Rinaldi also stated that the development of a fungal infection does not necessarily equate to negligence.[39] The trial court dismissed Raleigh's claim under *res ipsa loquitor* against the hospital, and Raleigh timely appealed therefrom.[40]

The Fifth District found Raleigh had not met the two elements of *res ipsa loquitur* and affirmed the holding of the trial court.[41] In reaching this conclusion, the Fifth District stated that Raleigh's own experts established that he could not show that the injury would not have normally occurred in the absence of negligence.[42] Moreover, Raleigh did not prove that the injury was caused by an instrumentality within the defendant's exclusive control.[43] Specifically, while Raleigh's medical experts opined that the surgery most likely caused the infection, they could not make a definitive determination as to the source of the fungal infection.[44]

Similarly, the appellate court found that Raleigh could not proceed under a general theory of medical negligence.[45]

---

36. *Id*. at 865, 934 N.E.2d at 532.
37. *Id*. at 867, 934 N.E.2d at 534.
38. *Id*.
39. *Id*.
40. *Id*. at 868, 934 N.E.2d at 535.
41. *Id*. at 869, 934 N.E.2d at 536.
42. *Id*. at 870, 934 N.E.2d at 536.
43. *Id*. at 869, 934 N.E.2d at 536.
44. *Id*. at 869–70, 934 N.E.2d at 536–37.
45. *Id*. at 870–72, 934 N.E.2d at 537–38.

C. Proximate Cause

Robinson v. Boffa[46]

Another element of medical malpractice, proximate cause, was at issue in *Robinson v. Boffa*.

Upon learning of a cancerous tumor in her colon, Wanda Boone saw Dr. James Boffa to have the mass removed. While Dr. Boffa eventually removed a tissue mass from Boone's colon, it was not the cancerous tumor. Five days later, Boone underwent a second surgery to remove the cancerous tumor. She died a mere month later.[47]

Boone's estate filed a negligence action against Dr. Boffa, alleging violation of the applicable standard of care by failing to remove the cancerous tumor during the first surgery and by performing the second surgery too soon.[48] While the estate maintained that the stress of the second surgery caused Boone's death, a jury did not share this belief and found for Dr. Boffa.[49]

On appeal, the estate argued that the trial court erred in instructing the jury on proximate cause.[50] The jury instruction at issue stated, in pertinent part, as follows: "[I]f you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant."[51] Boone's estate pointed out that, per the instruction's notes, this paragraph should only be read when there is evidence tending to show that the sole proximate cause of the occurrence was a third person.

Dr. Boffa countered with two proximate cause defenses.[52] First, Dr. Boffa claimed that Ms. Boone's preexisting health problems caused her to die from multisystem organ failure.[53] Second, Dr. Boffa pointed to a gastroentologist's failure to precisely pinpoint the location of the tumor in the colonoscopy report.[54]

The Third District Court of Appeals immediately discarded Dr. Boffa's second defense because the standard of care required Dr. Boffa to understand and appreciate that the gastroentologist's measurement of the

---

46. 402 Ill. App. 3d 401, 930 N.E.2d 1087 (1st Dist. 2010).
47. *Id*. at 401–02, 930 N.E.2d at 1089.
48. *Id*. at 402, 930 N.E.2d at 1089.
49. *Id*.
50. *Id*.
51. *Id*. at 402, 930 N.E.2d at 1089–90.
52. *Id*. at 407, 930 N.E.2d at 1093.
53. *Id*.
54. *Id*.

tumor's location was an estimate.[55] Dr. Boffa had an independent duty and responsibility to determine whether the suspected tissue mass was cancerous.[56] Even if failure to give an exact location of the tumor was the proximate cause of death, the gastroentologist could not have reasonably foreseen that a surgeon would rely on a colonoscopy report to conclusively determine whether a suspected mass was in fact cancerous.[57] Thus, the Third District concluded, the gastroentologist could not be an intervening third party onto which liability could shift, and the trial court erred in including the second paragraph in the jury instructions.[58]

Nevertheless, the estate could not show that it was prejudiced by the instructional error because there were other defense theories upon which the jury could make a finding of non-liability.[59] "[W]here two issues are submitted to a jury, only one of which is infected with error, the appellate court will assume the jury found for the prevailing party on the issue which was error-free, unless it can be determined from the form of verdict that the error was prejudicial."[60] Because Dr. Boffa had maintained an alternate proximate cause defense—that Ms. Boone died from multisystem organ failure—the burden was on Boone's estate to show that the jury did not rely on this defense in reaching their verdict.[61] The estate did not meet this burden; accordingly, the Third District ruled that the estate was not prejudiced by the improper jury instruction.[62]

D. Damages

Dobyns v. Chung[63]

In the case of *Dobyns v. Chung*, Jay Dobyns sought damages pursuant to the Wrongful Death Act, 740 ILCS 180/0.01, *et seq*., against Dr. David Chung and Sparta Community Hospital. Specifically, Dobyns alleged negligence in defendants' failure to properly evaluate and treat his wife Angie's pain syndrome and failure to inform and warn about the dangers of her prescribed medications.[64]

---

55. *Id*. at 404, 930 N.E.2d at 1091.
56. *Id*. at 405, 930 N.E.2d at 1092.
57. *Id*.
58. *Id*. at 406, 930 N.E.2d at 1092.
59. *Id*. at 406, 930 N.E.2d at 1093.
60. *Id*. (citing Tomlian v. Grenitz, 782 So. 2d 905, 906 (Fla. Dist. Ct. App. 2001)).
61. *Id*.
62. *Id*. at 408, 930 N.E.2d at 1094.
63. 399 Ill. App. 3d 272, 926 N.E.2d 847 (5th Dist. 2010).
64. *Id*. at 273, 926 N.E.2d at 849.

Following deliberations, the jury returned a verdict in Dobyns' favor.[65] The jury found damages to be $100,000 but reduced this amount to $50,000 due to Angie's contributory negligence.[66] Unsatisfied with this award, Dobyns filed unsuccessful post-trial motions for additur, a new trial on the issue of damages, and a new trial on all issues.[67] Dobyns thereafter appealed the denial of his post-trial motions.

The gist of Dobyns' primary argument on appeal was that the damages award did not comport with verdicts in similar Illinois cases.[68] In taking up this argument, the Fifth District reiterated the well-settled rule that "[t]he issue of damages is particularly within the discretion of the jury[,] and courts are reluctant to interfere with the jury's exercise of its discretion."[69] It then explained that "it is impossible to measure the propriety of damages awards under the Wrongful Death Act by comparison with other wrongful death cases . . . because the propriety of those awards is not subject to exact mathematical computation and cannot be measured by comparison with other verdicts."[70] This rationale, in conjunction with a lack of concrete evidence relating to specific lack of money or other economic loss resulting from the death of Angie, dictated affirmation of the jury's verdict and the trial court's rulings.[71] Meanwhile, believing the verdict was too low given Angie's role and relationship with her immediate family, Justice Melissa Ann Chapman issued a dissent that recommended a new trial on all issues.[72]

Vincent v. Alden-Park Strathmoor, Inc.[73]

In *Vincent v. Alden-Park Strathmoor, Inc.*, the Second District became the first appellate court in Illinois to decide whether common law punitive damages survive the death of the decedent in a Nursing Home Care Act case.[74] The Vincent Court ultimately answered this question in the

65. *Id*. at 285, 926 N.E.2d at 858.
66. *Id*.
67. *Id*. at 286, 926 N.E.2d at 859.
68. *Id*. at 287, 926 N.E.2d at 860.
69. *Id*. at 286, 926 N.E.2d at 859 (citing Chrysler v. Darnall, 238 Ill. App. 3d 673, 678, 606 N.E.2d 553, 558 (1st Dist. 1992)).
70. *Id*. at 287, 926 N.E.2d at 860.
71. *Id*. at 288, 926 N.E.2d at 860–61.
72. *Id*. at 289–90, 926 N.E.2d at 861–62.
73. 399 Ill. App. 3d 1102, 928 N.E.2d 115, 117 (2d Dist. 2010).
74. *Id*. at 1104, 928 N.E.2d at 117.

negative—finding no statutory basis or strong equitable considerations allowed survival of punitive damages under the Act.[75]

III. JURISDICTIONAL AND PROCEDURAL CONSIDERATIONS

Between September 1, 2009, and November 1, 2010, several Illinois appellate courts decided jurisdictional and procedural issues arising in medical malpractice actions.

A. Venue

Kaiser v. Doll-Pollard[76]

In *Kaiser v. Doll-Pollard*, the Fifth District decided the standard of review that applied to an order determining venue. Often, venue motions present mixed questions of fact and law.[77] Appellate courts review factual determinations by determining whether they are against the manifest weight of the evidence and review conclusions of law de novo.[78] When there is no dispute as to the facts underlying the trial court's decision, the appellate court reviews the entire ruling de novo.[79]

Here, Defendants argued that the trial court did not make any findings of fact in denying their motion to change venue; thus, they contended that a de novo standard of review applied on appeal.[80] Meanwhile, because the parties disagreed on whether any portion of the underlying transaction occurred in St. Clair County, Plaintiffs maintained that the trial court implicitly made factual findings it did not articulate in its venue order.[81] Thus, they sought application of the manifest-weight-of-the-evidence standard.[82]

Bearing in mind that the parties asked the appellate court to determine whether the trial court correctly determined the legal effects of the facts pled by the plaintiffs, not whether those allegations were true, the Fifth District agreed with Defendants' arguments.[83] Whether the facts took place

---

75. *Id*. at 1115, 928 N.E.2d at 128.
76. 398 Ill. App. 3d 652, 923 N.E.2d 927 (5th Dist. 2010).
77. *Id*. at 655, 923 N.E.2d at 931.
78. *Id*.
79. *Id*.
80. *Id*.
81. *Id*.
82. *Id*.
83. *Id*. at 656, 923 N.E.2d at 931.

in a particular county and formed a part of the (venue) transaction test is a legal question necessitating application of the de novo standard.[84]

B. *Forum Non Conveniens*

Shirley v. Kumar[85]

In *Shirley v. Kumar*, the First District decided whether the trial court's denial of a motion for transfer of venue based on the doctrine of *forum non conveniens* was an abuse of its discretion.

Ekaterina Shirley filed a medical malpractice action on behalf of her mother in Cook County, Illinois, based on allegedly insufficient care and treatment rendered by two DuPage County physicians. The physicians timely moved to transfer venue to DuPage on the grounds of *forum non conveniens*. After the trial court denied their motion, Defendants filed an appeal to the First District.[86]

Ultimately, the First District affirmed the trial court's decision. Venue was proper in Cook County because the public and private interest factors did not strongly favor a venue of DuPage County.[87] The hospital that treated Shirley's mother for six months was located in Cook County, and one of the defendant physicians—Dr. Kumar—was a resident of Cook County at the time he was served.[88] Additionally, numerous witnesses to the case either worked or lived in Cook County.[89] Even though Shirley herself did not live in Cook County, the First District emphasized that the county was where Shirley worked and where her mother's guardianship proceedings took place.[90] And, because the courthouse in Cook County was only 32 miles away from the courthouse in DuPage County, there would only be a slight inconvenience, if any, to Defendants and their witnesses.[91]

84. *Id*.
85. 404 Ill. App. 3d 106, 935 N.E.2d 638 (1st Dist. 2010).
86. *Id*. at 107, 935 N.E.2d at 639.
87. *Id*.
88. *Id*. at 111, 935 N.E.2d at 642.
89. *Id*. at 111, 935 N.E.2d at 643.
90. *Id*.
91. *Id*.

C. *Res Judicata* and Claim-Splitting

Green v. Northwest Community Hospital[92]

In *Green v. Northwest Community Hospital*[93] the First District took up the doctrines of *res judicata* and claim-splitting. *Res judicata*, also known as claim preclusion, prevents multiple lawsuits between the same parties where the facts and issues are the same.[94] Claim-splitting, which is forbidden under Illinois law, means that a plaintiff cannot divide a cause of action in order to prosecute separate lawsuits when the cause of action is inherently entire and indivisible.[95]

William J. and William F. Green filed a medical malpractice action on behalf of Frankie Green against Northwest Community Healthcare ("Northwest") and others. Northwest eventually moved for summary judgment, and the trial court granted its motion in part, namely on the claims for wrongful death, loss of consortium, and survival. The Greens then moved to voluntarily dismiss the case, which the trial court allowed. When they refiled their case, the Greens brought claims for wrongful death, survival, loss of consortium, consumer fraud, and healthcare fraud. Upon Northwest's motion, the trial court dismissed the new complaint on grounds of *res judicata*. The Greens appealed from this dismissal.[96]

On appeal, the First District discussed and relied upon *Hudson v. City of Chicago*, wherein the Illinois Supreme Court held that a plaintiff engages in claim-splitting if that plaintiff voluntarily dismisses a claim after another part of the cause of action has gone to final judgment and subsequently refiles that claim.[97] Because the Greens' wrongful death, survival, and loss of consortium claims did reach final judgment in the first action, the trial court did not err in promptly dismissing them.[98] The trial court, however, erred in dismissing the consumer fraud and healthcare fraud claims, which did not reach final judgment in the first action and which the original trial judge had granted leave to refile.[99] As such, those causes of action were not estopped by *res judicata*.[100]

---

92. 401 Ill. App. 3d 152, 928 N.E.2d 550 (1st Dist. 2010).
93. *Id*.
94. *Id*. at 154, 928 N.E.2d at 553.
95. *Id*.
96. *Id*. at 152–53, 928 N.E.2d at 552.
97. *Id*. at 154, 928 N.E.2d at 553 (relying upon Hudson v. City of Chi., 228 Ill.2d 462, 482, 889 N.E.2d 210, 222 (2008)).
98. *Id*. at 157, 928 N.E.2d at 555.
99. *Id*.
100. *Id*.

D. Law of the Case, Collateral Estoppel, and Service of Process

Long v. Elborno[101]

In *Long v. Elborno*, the appeal revolved around service of process as it related to the doctrines of the law of the case and collateral estoppel.

The first issue was whether the trial court's determination that Long failed to exercise reasonable diligence in serving the defendant hospital (resulting in dismissal of that defendant with prejudice pursuant to Illinois Supreme Court Rule 103(b)) became the law of the case for all subsequent stages of litigation, including service of Dr. Elborno.[102] The law of the case doctrine generally bars relitigation of an issue that has already been decided in the same case.[103] Here, when the trial court dismissed Long's complaint against the hospital, both the hospital and Dr. Elborno had been served and were parties to the lawsuit.[104] The First District held that Long's decision to voluntarily dismiss and refile her claim against Dr. Elborno created an entirely new action; thus, Long's failure to exercise reasonable diligence in serving the hospital did not become the law of the case with respect to Dr. Elborno.[105]

The second issue was whether Long should be collaterally estopped from asserting reasonable diligence in her service of Dr. Elborno.[106] The collateral estoppel doctrine prevents one from relitigating an issue decided in a prior proceeding.[107] Its elements are as follows:

> (1) the issue decided in the prior adjudication is identical with the one presented in the suit in question; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privy with a party to the prior adjudication.[108]

The First District concluded that all three elements were met in the case at bar.[109] The first factor was met because both issues were whether

---

101. 397 Ill. App. 3d 982, 922 N.E.2d 555 (1st Dist. 2010).
102. *Id.* at 988, 922 N.E.2d at 560.
103. *Id.* at 989, 922 N.E.2d at 560 (citing Krautsack v. Anderson, 223 Ill.2d 541, 552, 861 N.E.2d 633, 642 (2006)).
104. *Id*. at 989, 922 N.E.2d at 561.
105. *Id.*
106. *Id.* at 988, 922 N.E.2d at 560.
107. *Id.* at 990, 922 N.E.2d at 561.
108. *Id.* at 990–91, 922 N.E.2d at 562.
109. *Id.* at 992, 922 N.E.2d at 563.

Long exercised reasonable diligence in serving Defendants.[110] The second factor was satisfied because the trial court granted the hospital's motion to dismiss and the corresponding order stated that judgment was final.[111] And, lastly, the third factor was obviously fulfilled because Long was a party in her case against the hospital.[112] Therefore, unlike the law of the case doctrine, collateral estoppel effectively prevented Long from asserting that she was reasonably diligent in serving Dr. Elborno.[113]

As a final matter, the First District considered "whether [Illinois] Supreme Court Rule 103(b) permit[ted] Long to be given a credit for the time it took her to secure a health professional's report, pursuant to [735 ILCS 5/2-622] when analyzing her reasonable diligence in serving Dr. Elborno."[114] The Court answered this question in the negative, finding that the statutorily-provided, 90-day extension to file the health professional's report did not excuse Long's duty to diligently attempt service on Dr. Elborno.[115]

E. Amending the Complaint

Johnson v. Ingalls Memorial Hospital[116]

In *Johnson v. Ingalls Memorial Hospital*, Chakena Johnson, individually and on behalf of her deceased minor daughter's estate, brought a wrongful death and survival action against numerous Defendants. Johnson had undergone an emergency cesarean section, whereupon medical staff discovered she ruptured her uterus and the baby was inside her abdominal cavity. While Johnson ultimately gave birth, doctors diagnosed her daughter with brain damage, and she died shortly thereafter.[117]

The gist of Johnson's claims was that Defendants deviated from the standard of care by failing to advise her of the risks of her pregnancy (due, in large part, to two previous cesarean sections) and failing to evaluate, follow up, and act upon her complaints about the pregnancy.[118] The circuit court entered summary judgment in Defendants' favor due to a lack of

---

110. *Id.* at 991, 922 N.E.2d at 562.
111. *Id*. at 991, 922 N.E.2d at 563.
112. *Id*. at 992, 922 N.E.2d at 563.
113. *Id*.
114. *Id*.
115. *Id*. at 994, 922 N.E.2d at 564–65.
116. 402 Ill. App. 3d 830, 931 N.E.2d 835 (1st Dist. 2010).
117. *Id*. at 831–34, 931 N.E.2d at 837–40.
118. *Id*. at 834–38, 931 N.E.2d at 840–42.

proximate cause between the alleged deviation from the standard of care and Johnson's daughter's death.[119]

Before addressing the merits of the case, the First District decided whether Johnson's failure to obtain leave of court prior to filing her first amended complaint deprived the circuit court of jurisdiction and rendered the amended complaint a nullity.[120] The court found the cases equating failure to obtain leave to a jurisdictional defect to be "without any rationale or analysis of the modern trend of cases related to jurisdiction, and without any discussion specifying which aspect of jurisdiction the court was considering."[121] Undeterred, the court took up both subject matter jurisdiction and personal jurisdiction in its analysis. The court found subject matter jurisdiction existed despite Johnson's failure to obtain leave because her case was "a justiciable matter to which the court's constitutionally granted original jurisdiction extends."[122] The court further found the service of summons on Defendants and their entries of appearance established personal jurisdiction.[123] In its holding, the court found "the failure to obtain leave of court to add a party is not, in and of itself, a jurisdictional defect, rendering the amendment a 'nullity.' Rather, the failure to obtain leave of court to amend is a procedural deficiency and any failure to timely object to it is subject to forfeiture."[124]

After addressing the necessary procedural rigamarole, the court turned to the substantive issue: "[W]hether Johnson's expert adequately established a material question of fact regarding whether defendants' alleged negligent treatment proximately caused the injury and subsequent death [of Johnson's daughter.]"[125] Johnson's expert witness had testified that the primary deviation from the standard of care was allowing Johnson to return home two days before she gave birth without explaining the significance of her moderate contractions or her increased chance of uterine rupture.[126] The expert postulated that, had Johnson been made aware of the importance of her contractions, she would have demanded the appropriate

---

119. *Id*. at 838, 931 N.E.2d at 843.
120. *Id*. at 839, 931 N.E.2d at 843.
121. *Id*. at 841, 931 N.E.2d at 845.
122. *Id*. (citing Belleville Toyota, Inc. v. Toyota Motor Sales U.S.A., Inc., 199 Ill.2d 325, 340, 770 N.E.2d 177, 188 (2002)) (quotation marks omitted).
123. *Id*. at 842, 931 N.E.2d at 846 (relying upon *In re* M.W., 232 Ill.2d 408, 426, 905 N.E.2d 757, 770 (2009)). Moreover, Defendants forfeited any objection as to personal jurisdiction by filing a responsive pleading and several motions. *See* 735 ILL. COMP. STAT. ANN. 5/2-301(a-5) (West 2004).
124. *Johnson*, 402 Ill. App. 3d at 842, 931 N.E.2d at 846.
125. *Id*. at 843, 931 N.E.2d at 847.
126. *Id*. at 844, 931 N.E.2d at 847–48.

care to prevent the rupture.[127] But, the First District placed emphasis on the lack of reliable expert testimony "regarding what developments in [Johnson's] condition would have occurred even had she understood the significance of her risk and returned the [day before she actually gave birth] that would have caused an obstetrician to intervene and do a cesarean section prior to [Johnson's frequent, stronger contractions]."[128] There was also no expert testimony on whether referral to a delivering obstetrician would have led to earlier surgical intervention or whether lengthier fetal monitoring, an ultrasound, or a vaginal exam would have shown intervention to be necessary earlier.[129] The court found the possibility of a causal connection to be insufficient under proximate causation standards and upheld summary judgment in Defendants' favor.[130]

Wilson v. Schaefer[131]

In *Wilson v. Schaefer*, the Fourth District addressed the relation-back doctrine in the context of a medical malpractice action.

Marc Wilson underwent hip surgery and later developed sciatic nerve palsy. In August 2006, he and his wife filed a timely two-count complaint against the surgeon, Dr. Robert Schaefer, and his practice, alleging failure to obtain Marc's informed consent to the surgery by not disclosing the risks, results, or medical alternatives. The Wilsons eventually voluntarily dismissed this complaint. Then, in May 2008, the Wilsons filed a six-count complaint against the same Defendants after the original statute of limitations had lapsed. In their new complaint, the Wilsons brought the two informed-consent claims, two new counts of negligence, and two other new counts based on a *res ipsa loquitor* theory. Upon Defendants' motion, the trial court dismissed the new counts with prejudice, stating that they were time-barred as they did not relate back to the original complaint.[132]

To determine whether a complaint relates back to a predecessor complaint, the essential consideration "is whether the cause of action asserted in the newly filed pleading 'grew out of the same transaction or occurrence' set up in the pleadings that were filed within the limitations

127. *Id*.
128. *Id*. at 845, 931 N.E.2d at 849.
129. *Id*. at 845–46, 931 N.E.2d at 848–49.
130. *Id*. at 848, 931 N.E.2d at 851.
131. 403 Ill. App. 3d 688, 941 N.E.2d 870 (4th Dist. 2009).
132. *Id.* at 689–90, 941 N.E.2d at 870–71.

period."[133] Here, the allegations in the informed-consent claim were entirely different from those relating to the purportedly negligent performance of the surgery.[134] Indeed, the original complaint did not contain a single allegation of negligence with respect to the surgical procedure or postsurgical care and treatment.[135] Because of this, nothing in the original complaint put Defendants on notice of any wrongful conduct in the performance of the surgery or subsequent care.[136] The Fourth District refused to let the Wilsons circumvent the statute of limitations; accordingly, it affirmed the dismissal entered by the trial court.[137] Justice James Knecht dissented.[138]

IV. PRETRIAL CONSIDERATIONS

While nearly every case referenced in this article raises pretrial considerations that medical malpractice attorneys should bear in mind, the following two cases focus on the oft-important principles governing expert witness reports and disclosures.

Walsh v. Chez[139]

In Walsh v. Chez, the Seventh Circuit Court of Appeals decided whether plaintiff's expert reports were so lacking under the applicable standard of care that they should be deemed inadmissible.

Jason Walsh suffered from autism, so his parents took him to see Dr. Michael Chez. Dr. Chez put Jason on 50 milligrams of prednisone a day. While taking this dosage of prednisone, Jason developed pneumonia. Dr. Chez instructed Jason's parents to reduce the daily dosage of prednisone to two doses a week, but, a week later, Jason developed a high fever. Dr. Chez instructed Jason's mother not to make any changes to the new prednisone schedule. A few days later, Jason had to be intubated and placed on a ventilator. After doctors concluded that his chances of recovery were remote, Jason's parents discontinued life support. Jason died two months later from complications related to adrenal insufficiency.[140]

---

133. *Id.* at 691, 941 N.E.2d at 872 (citing Porter v. Decatur Mem'l Hosp., 227 Ill.2d 343, 346, 882 N.E.2d 583, 585 (2008)); 735 ILL. COMP. STAT. 5/2-616(b) (2010).
134. *Wilson*, 403 Ill. App. 3d at 691, 941 N.E.2d at 872.
135. *Id.* at 696–97, 941 N.E.2d at 876.
136. *Id.* at 696, 941 N.E.2d at 876.
137. *Id*. at 697, 941 N.E.2d at 876–77.
138. *Id.* at 697–98, 941 N.E.2d at 877 (Knecht, J., dissenting).
139. 583 F.3d 990 (7th Cir. 1990).
140. *Id*. at 991–92.

Jason's parents sued Dr. Chez, alleging medical malpractice in the drastic reduction of Jason's dosage of prednisone.[141] To support this proposition, the Walshes submitted expert reports from two doctors.[142] Dr. Chez promptly moved to strike said reports for insufficiency in that they did not adequately state the applicable standard of care.[143] The trial court agreed and granted Plaintiff's leave to amend their reports.[144] In their amended reports, the doctors opined that the abrupt discontinuation of Jason's prednisone was not consistent with the relevant standard of care, but they still did not specify what the standard of care was.[145] The trial court held these amended reports were insufficient as well, excluded them from evidence, and ultimately dismissed the Walshes' case for failure to present evidence on the critical element of standard of care.[146]

On appeal, the Seventh Circuit explained that the purpose of expert reports is not to replicate exactly what an expert might say on the stand, rather they reveal the substance of an expert's opinion.[147] Expert reports also provide a party-opponent with a means of rebutting, cross-examining, or otherwise discrediting an expert's testimony.[148] Expert reports need not be excluded just because they are somewhat incomplete; to the contrary, lawyers often put together a case with testimony about one thing from one expert, another thing from another expert, and so on.[149]

With the aforementioned principles in mind, the Seventh Circuit found the amended reports provided evidence as to the applicable standard of care. Namely, a reasonable trier of fact could credit the Walshes' experts and conclude that no responsible doctor would have performed in the manner that Dr. Chez did.[150] Further, the reports put Dr. Chez on notice as to what the Walshes were asserting in their case-in-chief from which he could conjure up a defense.[151] Ultimately, the Seventh Circuit held that it was error for the trial court to strike the Walshes' expert reports from the record, and it reversed and remanded the matter accordingly.[152]

---

141. *Id*. at 992.
142. *Id*. at 993.
143. *Id*.
144. *Id*.
145. *Id*. at 994.
146. *Id*.
147. *Id*.
148. *Id*.
149. *Id*.
150. *Id*.
151. *Id*.
152. *Id*. at 994–95.

Wilbourn v. Cavalenes[153]

In *Wilbourn v. Cavalenes*, the First District decided, *inter alia*, whether the striking of an expert witness' testimony was proper and whether it affected the outcome of trial.

Tonya Wilbourn brought a medical malpractice action against Dr. Mark Cavalenes and his employer, Rush Oak Park Hospital, for insufficient care and treatment of her fractured femur. Dr. Cavalenes placed an allegedly narrow compression plate on Wilbourn's fractured femur to set the bone; unfortunately, the plate failed within a month, and Wilbourn had to undergo a second surgery to have it removed. After the second surgery, the compression plate was sent to pathology, never be seen again.[154]

During her case-in-chief, the Wibourns' expert witnesses testified that Dr. Cavalenes deviated from the standard of care if he used a narrow compression plate due to Wilbourn's obesity.[155] At the close of trial, the jury found in favor of Defendants.[156] Wilbourn appealed, arguing that the trial court erred in instructing the jury to disregard one of her expert's statements.[157] The statement at issue was that of Dr. Robert Kregor, a board-certified orthopaedic surgeon. He testified that he had "never seen or heard of a broad plate failing or breaking in the first month after implantation."[158] Of course, the implication of this statement is that Dr. Cavalenes must have implanted a narrow plate, thereby breaching the standard of care.

The trial court struck Dr. Kregor's statement because it represented undisclosed material in violation of Rule 213.[159] "Rule 213 imposes on each party a continuing duty to inform the opponent of new or additional information when such information becomes known to the party."[160] At his discovery deposition, Dr. Kregor testified that a narrow plate was used because the screws appeared to form a straight line and the plate appeared narrow, and he never indicated that timing of the plate failure was a basis for his opinion.[161] Because the Wilbourns did not elicit Dr. Kregor's testimony about the use of a broad plate at his deposition and because they did not inform opposing counsel about this testimony via Rule 213

153. 398 Ill. App. 3d 837, 923 N.E.2d 937 (1st Dist. 2010).
154. *Id*. at 838, 923 N.E.2d at 941.
155. *Id*. at 839, 923 N.E.2d at 942.
156. *Id*.
157. *Id*.
158. *Id*.
159. *Id*. at 848, 923 N.E.2d at 949.
160. *Id*. (citing ILL. SUP. CT. R. 213(I)).
161. *Id*. at 851, 923 N.E.2d at 951.

responses, the First District held that it was not an abuse of discretion to strike Dr. Kregor's statement and to tell the jury to disregard it.[162] In addition, the First District found that the Wilbourns waived their argument by not developing it on appeal and that the striking was a proper sanction for nondisclosure.[163] Finally, the appellate court held that the statement at issue did not constitute opinion testimony but an expression of personal experience that could be excluded from the record.[164] The judgment of the trial court was ultimately affirmed.[165]

V. TRIAL CONSIDERATIONS

The vast majority of Illinois medical malpractice opinions discuss issues that arise during trial—from pretrial *in limine* orders to closing arguments. Several of these issues often come packaged together in an appeal, and they often receive meticulous attention and disposition from the state's appellate courts.

A. *In Limine* Orders and Pretrial Sanctions Orders

Jackson ex rel. Jackson v. Reid[166]

In *Jackson ex rel. Jackson v. Reid*, Ken and Jody Jackson brought suit on behalf of their daughter, Morgan, against Churphena Reid, M.D., and Affiliated Urology Specialists, Ltd.[167] The Jacksons alleged various instances of medical negligence relating to Dr. Reid's performance of a bilateral ureteral implantation on Morgan.[168] After a jury returned a verdict in defendants' favor, the Jacksons timely appealed on numerous grounds.[169]

One ground on which the Jacksons successfully appealed was denial of their motion for a mistrial.[170] The trial court had entered an *in limine* order that excluded reference to any information concerning insurance or

---

162. *Id*.
163. *Id*. at 851–53, 923 N.E.2d at 952–53.
164. *Id*. at 854, 923 N.E.2d at 954.
165. *Id*. at 858, 923 N.E.2d at 957. The First District also took up other arguments raised by the Wilbourns on appeal. These arguments revolved around allegedly prejudicial remarks made by defense counsel during cross-examination of Dr. Kregor and during closing arguments. *Id*. at 854–58, 923 N.E.2d at 954–57.
166. 402 Ill. App. 3d 215, 935 N.E.2d 978 (3d Dist. 2010).
167. *Id*. at 217, 935 N.E.2d at 981.
168. *Id*. at 232, 935 N.E.2d at 992.
169. *Id*. at 229, 935 N.E.2d at 990.
170. *Id*.

whether Morgan had been insured at the time of surgery.[171] According to the Third District, when plaintiffs' counsel called Dr. Reid as an adverse witness, she implied that Morgan's parents determined the date of surgery and subsequently "injected an unfair inference into the trial which the court clearly directed the defense to avoid in order to insure a fair trial for plaintiffs."[172] As such, the appellate court held that Dr. Reid violated the *in limine* order and denied plaintiffs their right to a fair trial; consequently, the trial court abused its discretion and should have granted the Jacksons' motion for mistrial.[173]

The Third District held that the Jacksons had been denied a fair trial on another ground as well. In an *in limine* order that relied upon attorney-client privilege and work product considerations, the trial court held that plaintiffs' counsel could not cross-examine Dr. Reid, who testified as an expert opinion witness, about articles she reviewed to prepare for her deposition and later destroyed.[174] The appellate court found this ruling to be in error, noting that "the scope of disclosure required by [Illinois Supreme Court] Rule 213(f)(3) does not limit or restrict the scope of *cross examination* for plaintiffs when testing Reid's opinion testimony."[175] Moreover, the work product doctrine only applies to documents prepared by counsel, and any attorney-client privilege had been waived once Dr. Reid decided to testify as an opinion witness.[176] The Third District concluded by stating "that an expert witness, who is also a party, is subject to the same scope of rigorous cross-examination as other Rule 213(f) witness."[177]

Because it was remanding the matter for retrial, the Third District also took up several evidentiary rulings that the parties appealed, which this article will not discuss.[178]

---

171. *Id*. at 230, 935 N.E.2d at 991.
172. *Id*. at 232, 935 N.E.2d at 992. Notably, defense counsel skirted the line of the *in limine* order during opening statements as well.
173. *Id*.
174. *Id*. at 233, 935 N.E.2d at 993.
175. *Id*. at 234, 935 N.E.2d at 994 (emphasis in original).
176. *Id*. at 234, 935 N.E.2d at 994.
177. *Id*. at 235, 935 N.E.2d at 994–95.
178. *Id*. at 235–238, 935 N.E.2d at 995–97. Justice Robert Carter dissented with respect to one of these evidentiary rulings (cross-examination of one of plaintiff's experts about Morgan's bed-wetting). *Id*. at 238–39, 935 N.E.2d at 997–98 (Carter, J., concurring in part and dissenting in part).

Wilson v. Humana Hospital[179]

One medical malpractice case that discussed the potential significance of a pretrial sanction order is *Wilson v. Humana Hospital*.

While Plaintiff Heide Wilson made no less than ten appellate arguments regarding the allegedly inappropriate conduct of defense counsel near and during trial, Wilson inexplicably focused on a pretrial sanction order. This order barred Humana Hospital from mentioning or eliciting testimony at trial about a note that provided "information that would appear to any informed observer to stand in absolute contradiction to plaintiff's medical theory" due to its failure to produce related preliminary and final reports.[180] Wilson made the argument that the circuit court did not enforce this sanction order, which the First District found to be a "breathtaking contention, given the inarguable fact that the sanction order was incredibly draconian in the way it hamstrung defendant and how it allowed plaintiff to skirt the damning effect of [other significant evidence]."[181] The opinion of the appellate court strongly suggested that, even if Wilson had prevailed at trial, the sanction order would have necessitated reversal on appeal because "allowed a case to proceed on what was essentially a falsehood" and "it could have operated to allow plaintiff to prevail on a theory that would appear to be factually, legally and medically untenable."[182]

B. Opening Statements and Closing Arguments

Lovell v. Sarah Bush Lincoln Health Center[183]

In the summer of 2005, Clinton Dean Lovell sued the Sarah Bush Lincoln Health Center ("Sarah Health Center") for medical negligence following his prostatectomy. In short, Lovell developed a post-prostatectomy fistula between his bladder and rectum after a nurse gave him a tap-water enema, which had not been approved by Lovell's urologist.[184] After a full trial, the jury returned a verdict in Lovell's favor in the amount of $2,378,258.[185]

---

179. 399 Ill. App. 3d 751, 926 N.E.2d 821 (1st Dist. 2010).
180. *Id*. at 755, 926 N.E.2d at 826.
181. *Id*. at 761, 926 N.E.2d at 830.
182. *Id*. at 761, 926 N.E.2d at 831.
183. 397 Ill. App. 3d 890, 931 N.E.2d 246 (4th Dist. 2010).
184. *Id*. at 892-93, 931 N.E.2d at 248–49.
185. *Id*. at 896, 931 N.E.2d at 251.

On appeal, Sarah Health Center first argued that it was entitled to a new trial because of argumentative and prejudicial comments made by Lovell's counsel during his opening statement.[186] The Fourth District was not persuaded—it found the trial court's curative instruction to the jury, which was given three times, remedied any potential harm.[187] More significantly, the lack of contemporaneous objections by the Sarah Health Center resulted in the waiver of this argument on appeal.[188]

Sarah Health Center next made a similar argument with respect to comments made by Lovell's counsel in his closing argument; specifically, the medical provider took issue with mention of the bathroom accommodations that the trial court afforded Lovell and any implications arising therefrom.[189] Here, the appellate court agreed that Lovell's attorney improperly remarked upon the trial court's accommodation. Nevertheless, because the jury had been explicitly and impliedly made aware of Lovell's constant need to use the restroom throughout the trial, the reference in his closing argument did not constitute harmful error because it did not "infect[] the fundamental fairness of the trial."[190]

Finally, despite Sarah Health Center's argument to the contrary, the Fourth District held that the trial court properly admitted literature linking Lovell's enema to his fistula due to its circumstantial implications on the element of causation.[191] Notably, this literature included a medical textbook that Sarah Health Center mandated its nurses use, "which cautioned that the administration of an enema is contraindicated following a prostatectomy."[192]

C. Scientific Evidence, Expert Testimony, and Expert Examination

Northern Trust Co. v. Burandt and Armbrust, LLP[193]

Northern Trust Co. v. Burandt and Armbrust, LLP discussed the *Frye* standard, which governs the admissibility of scientific evidence.

Plaintiffs sued Dr. Steven Armbrust and his practice for allegedly causing Benjamin Hayes (a minor) to suffer neurological injuries at birth by

---

186. *Id*. at 896, 931 N.E.2d at 251–52.
187. *Id*. at 898, 931 N.E.2d at 253.
188. *Id*.
189. *Id*. at 898–99, 931 N.E.2d at 253.
190. *Id*. at 899, 931 N.E.2d at 254 (citing People v. Bishop, 218 Ill.2d 232, 251, 843 N.E.2d 365, 376 (2006) (quotation marks omitted)).
191. *Id*. at 901–02, 931 N.E.2d at 255–56.
192. *Id*.
193. 403 Ill. App. 3d 260, 933 N.E.2d 432 (2d Dist. 2010).

delaying his mother's cesarean section. While plaintiffs' theory of the case was that decreased oxygen flow, also known as hypoxia or asphyxia, caused the injuries, defense counsel sought to establish a preexisting condition as the source of the harm to Benjamin.[194] The trial court held the defense experts passed the "general acceptance" promulgated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) but nevertheless excluded their opinions for being too speculative.[195]

At the conclusion of the case, the jury found in plaintiffs' favor in the amount of $12 million dollars.[196] Defendants appealed on grounds that the trial court abused its discretion in prohibiting the infection-causation defense and that the verdict was against the manifest weight of the evidence.[197]

The Second District first reaffirmed the core tenant of the *Frye* doctrine—namely, "scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'"[198] Rejecting plaintiffs' attempt to construe *Frye* as requiring scientific unanimity, the Second District held that the trial court properly found the defense experts' methodology passed *Frye* muster.[199]

Next, the appellate court determined the implications of *Frye* compliance on the admissibility of the infection-causation defense.[200] Here, the court rejected Defendants' proposition that the trial court was required to admit infection-causation evidence because "no expert opinion involving well-settled principles could be excluded, regardless of the paucity of the evidence to support the opinion."[201] Instead, the court "agree[d] with plaintiffs that a *Frye* determination is a threshold matter and that opinion evidence surviving a *Frye* challenge may nevertheless be excluded if it lacks an evidentiary foundation."[202] With that said, the appellate court determined that the trial court abused its discretion when it barred the inspection-causation defense for being overly speculative.[203] While the trial court emphasized the general lack of bacteria demonstrating a preexisting condition, the Second District enumerated eight "objective indicators" that

194. *Id*. at 262, 933 N.E.2d at 435.
195. *Id*. at 263, 933 N.E.2d at 435–36.
196. *Id*. at 263, 933 N.E.2d at 436.
197. *Id*.
198. *Id*. at 275, 933 N.E.2d at 445 (citing Frye v. United States, 239 F. 1013, 1014 (D.C. Cir. 1923)).
199. *Id*. at 277, 933 N.E.2d at 446–47.
200. *Id*. at 277, 933 N.E.2d at 447.
201. *Id*. at 277–78, 933 N.E.2d at 447.
202. *Id*. at 278, 933 N.E.2d at 448.
203. *Id*. at 278, 933 N.E.2d at 447.

provided "some evidence" to corroborate the defense experts' medical opinions.[204]

Finally, the Second District explained that the trial court did not err in denying defendants' motions for directed verdict and judgment notwithstanding the verdict.[205] There was testimony that Dr. Armbrust did not properly react to the urgency presented by Benjamin's birth, nor did he inform medical staff that Benjamin's condition was an emergency.[206] Reasonable minds could draw different conclusions from Dr. Armbrust's course of conduction, and directed verdict and judgment notwithstanding the verdict would therefore be improper.[207]

Ultimately, the court remanded the matter for a new trial and instructed the trial court to allow introduction of evidence regarding defendant's infection-causation defense.[208]

Martinez v. Elias[209]

In *Martinez v. Elias*, a jury determined that Dr. Sarmed Elias performed unwarranted surgeries on Thomas Martinez's spine and subsequently returned a $500,000 verdict against the doctor.[210] The trial court disagreed with this assessment of damages, granting defendants' request for a remittitur and reducing the verdict to $400,000.[211] Defendants thereafter appealed on grounds that admission of a financial motive for the surgery was error and that the verdict was against the manifest weight of the evidence; meanwhile, Martinez cross-appealed as to the remittitur.[212]

Martinez worked as a journeyman carpenter. He injured his lower back and right shoulder while lifting a sheet of drywall in late 2000 and was referred to Dr. Elias by his primary care physician. After Martinez underwent an MRI, X-rays, and an EMG, Dr. Elias recommended a discogram, to which Martinez consented. "A discogram is an outpatient diagnostic procedure where dye is injected into a disc space, increasing pressure in the space."[213] This pressure is meant to reproduce the patient's pain and to determine the disc, if any, that is the source of the problem. The

---

204. *Id*. at 278–79, 933 N.E.2d at 447–48.
205. *Id*. at 281, 933 N.E.2d at 450.
206. *Id*.
207. *Id*.
208. *Id*.
209. 397 Ill. App. 3d 460, 922 N.E.2d 457 (1st Dist. 2009).
210. *Id*. at 461, 922 N.E.2d at 459.
211. *Id*.
212. *Id*.
213. *Id*. at 462, 922 N.E.2d at 460.

results of the discogram led Dr. Elias to recommend an endoscopic discectomy, "an outpatient surgical procedure to remove degenerated, nonfunctioning disc material[,]" and an intradiscal electrothermal therapy ("IDET") procedure, where Dr. Elias would "insert[] a small catheter into the disc to attempt to seal the tear in the annulus, the outer shell of the disc, using a temperature-controlled heat source inside the catheter."[214] Martinez consented to these procedures as well; after their completion, he began to experience pain in his right leg for the first time. After another doctor eventually diagnosed Martinez with right lumbar radicular syndrome, which caused pain to radiate from his lower back down to his right leg, Martinez successfully sued Dr. Elias and his employer.[215]

On appeal, Defendants primarily argued that the trial court erred when denying their motion *in limine* that sought to exclude any argument or evidence that financial motivation played a part in Dr. Elias' care of Martinez.[216] Defendants argued that the admission of such argument and evidence at trial wrongfully insinuated financial motive as a necessary part of the standard of care element of a medical malpractice claim.[217] The First District found that any financial motive went to whether Dr. Elias breached the standard of care, not why he would have done so.[218] As such, the appellate court held that the trial court did not err in permitting evidence of financial motive in the limited and specific context of defendants' compliance with the standard of care.[219]

Defendants also contended that the verdict was against the manifest weight of the evidence.[220] Specifically, Defendants argued that Martinez did not prove the standard of care and proximate cause relating to Dr. Elias' performance of the endoscopic discectomy and IDET procedure.[221] The appellate court, however, found the very performance of these procedures to be negligent as they were conceivably not warranted by the discogram results.[222] In addition, the appellate court deferred to the jury's findings of credibility and weight of evidence on whether the post-discogram procedures proximately caused Martinez's right leg pain and numbness.[223]

---

214. *Id*. at 463, 922 N.E.2d at 460–61.
215. *Id*. at 461–66, 922 N.E.2d at 460–63.
216. *Id*. at 466–67, 922 N.E.2d at 463.
217. *Id*. at 467, 922 N.E.2d at 464.
218. *Id*. at 468, 922 N.E.2d at 465.
219. *Id*. at 469, 922 N.E.2d at 466. Justice Garcia dissented from this holding. *Id*. at 476–81, 922 N.E.2d at 470–74 (Garcia, J., dissenting).
220. *Id*. at 470, 922 N.E.2d at 466.
221. *Id*.
222. *Id*. at 471, 922 N.E.2d at 467.
223. *Id*. at 471–73, 922 N.E.2d at 467–69.

Having dismissed defendants' arguments on appeal, the First District took up Martinez's cross-appeal of the remittitur. In reducing the verdict, the trial judge found that the amount dedicated to future medical expenses was not supported by the evidence.[224] The First District disagreed, finding that the deposition testimony of one of Martinez's expert witnesses supported the amounts of the original verdict tendered by the jury.[225] Accordingly, the appellate court affirmed the verdict as to liability and remanded the matter so that the trial court could vacate the remittitur and reinstate the original verdict.[226]

Cetera v. DiFilippo[227]

In *Cetera v. DiFilippo*, Charles and Elizabeth Cetera brought a medical malpractice action against Dr. Mary DiFilippo, alleging negligent diagnosis and treatment of an infection sustained by Charles following coronary bypass surgery. After the jury returned a verdict in favor of Dr. DiFilippo, the Ceteras appealed on the grounds that several reversible errors were committed by the trial court.[228]

First, the Ceteras argued that the trial court wrongfully admitted into evidence a licensing reprimand against their expert.[229] Because a medical expert generally may be cross-examined with evidence of discipline affecting his medical license, the First District discarded this argument even though the underlying discipline did not result in a restriction on the expert's practice.[230]

The Ceteras next argued that the trial court erred in allowing Dr. DiFilippo's independent expert witness to present undisclosed opinion testimony.[231] With respect to independent expert witnesses, a party must only disclose "the subjects on which the witness will testify and the opinions the party expects to elicit."[232] Contrary to the Ceteras' assertions, the First District found Dr. DiFilippo's disclosures complied with this requirement, especially since it was disclosed that the expert would be

224. *Id*. at 473, 922 N.E.2d at 469.
225. *Id*. at 475, 922 N.E.2d at 470.
226. *Id*.
227. 404 Ill. App. 3d 20, 934 N.E.2d 506 (1st Dist. 2010).
228. *Id*. at 23, 934 N.E.2d at 510–11.
229. *Id*. at 32, 934 N.E.2d at 517.
230. *Id*. at 34–35, 934 N.E.2d at 519–520.
231. *Id*. at 36, 934 N.E.2d at 521.
232. *Id*. at 39, 934 N.E.2d at 523 (citing ILL. SUP. CT. R. 213(f)(2)) (quotation marks omitted).

testifying consistent with his discovery deposition and the medical records.[233]

The Ceteras made a number of other arguments, all of which were met with defeat. For example, they argued that the trial court erred in barring them from questioning an expert about whether his insurance carrier was the same as Dr. DiFilippo's.[234] This argument was a non-starter because reference to the fact that a defendant is insured is typically improper.[235] They also unsuccessfully argued that one of their experts was improperly cross-examined about his proximate cause opinion, that their nonpattern loss of chance instruction was wrongfully refused, and that the trial court made arbitrary and erroneous rulings that went to the jury's verdict.[236]

Stapleton ex rel. Clark v. Moore[237]

In the matter of *Stapleton ex rel. Clark v. Moore*, Felicia Clark brought a medical negligence action individually and on behalf of her minor son, Keenan Stapleton. With the assistance of Dr. Monica Moore, Clark gave birth to Keenan via normal spontaneous vaginal delivery with a difficult delivery of the baby's shoulders, otherwise known as shoulder dystocia. While doctors successfully employed the McRoberts maneuver and suprapubic pressure to combat the shoulder dystocia, Kennan suffered Erb's palsy, a permanent left-side brachial plexus injury. Clark thereafter filed suit, alleging Dr. Moore applied greater-than-gentle pressure to Keenan's head.[238]

During trial, one of Stapleton's key expert witnesses was Dr. Stuart Edelberg, who opined that Dr. Moore deviated from the standard of care by placing excessive traction (pressure) on Keenan's head during his delivery that ultimately resulted in his injury. During cross-examination, defense counsel confronted Dr. Edelberg with an article that discussed a case of vaginal birth sans physician traction that nevertheless resulted in permanent brachial plexus injury to the baby. Although plaintiff's attorneys objected to the introduction of this article because it had not been disclosed pursuant to Illinois Supreme Court Rule 213, the trial judge denied their objection and let the article in for purposes of impeachment. At the close of evidence, the jury found for Dr. Moore, and the trial court denied

233. *Id*.
234. *Id*. at 40, 934 N.E.2d 523.
235. *Id*. at 40, 934 N.E.2d at 524.
236. *Id*. at 44–47, 934 N.E.2d at 527–30.
237. 403 Ill. App. 3d 147, 932 N.E.2d 487 (1st Dist. 2010).
238. *Id*. at 149–50, 932 N.E.2d at 492–93.

Stapleton's motion for a new trial and motion for a judgment notwithstanding the verdict.[239]

Stapleton's primary grounds for appeal—alleged error in the trial court's admission of the journal article—represented an uphill battle that would not be won. The standard of review was abuse of discretion, and any error must have been substantially prejudicial and affected the outcome of trial.[240]

First, the First District found little significance in Dr. Moore's failure to disclose the article, holding "[t]he disclosure requirements of Rule 213 simply do not apply to cross-examination of an opposing party's opinion witness."[241] Stapleton and the dissent made much ado about the fact that there was never any testimony about the reliability of the article, but the court reaffirmed the principle "[t]he *author's* competence is established if the judge takes judicial notice of it, or if it is established by a witness expert in the subject."[242] And, because Dr. Moore's expert testified as to the reliability of the article's author, it was properly deemed authoritative.[243] Assuming arguendo the trial court erred in admitting the article, the appellate court stated that a showing of substantial prejudice could not be made.[244] Put simply, the court decided that defense counsel properly cross-examined Dr. Edelberg with the undisclosed article.[245]

Stapleton next argued the existence of error in the jury instruction on the standard of care.[246] Although the trial judge gave a standard of care instruction that referenced "excessive" traction used by Dr. Moore in delivering Keenan, Stapleton wanted an instruction that mentioned "greater than gentle" lateral traction.[247] Because Dr. Edelberg, Stapleton's own expert, had mentioned that Dr. Moore breached the standard of care by applying "excessive" traction, the court found that the instruction given was consistent with plaintiff's theory of the case and therefore proper.[248]

As with Stapleton's abovementioned grounds for appeal, the First District was not persuaded by his other arguments—namely, that the trial

---

239. *Id*. 152–55, 932 N.E.2d at 493–96.
240. *Id*. at 156, 932 N.E.2d at 496.
241. *Id*. at 156, 932 N.E.2d at 497.
242. *Id*. at 157, 932 N.E.2d at 497 (citing Darling v. Charleston Cmty. Mem'l Hosp., 33 Ill.2d 326, 336, 211 N.E.2d 253, 259 (1965)) (emphasis in original) (quotation marks omitted).
243. *Id*. at 159, 932 N.E.2d at 499.
244. *Id*. at 162, 932 N.E.2d at 501.
245. In his dissent, Justice Terrence Lavin disagreed. *Id*. at 167–73, 932 N.E.2d at 505–10 (Lavin, J., dissenting).
246. *Id*. at 163, 932 N.E.2d at 502.
247. *Id*. at 164, 932 N.E.2d at 503.
248. *Id*.

court erred in barring testimony relating to whether an "arrest of labor" occurred and that the trial court committed error in denying his motion for a new trial or, alternatively, his motion for judgment notwithstanding the verdict.[249]

D. Jury Instructions

Auten v. Franklin[250]

The case of *Auten v. Franklin* focused on, *inter alia*, jury instructions in the context of a medical malpractice lawsuit.

Dawn Auten was in an automobile accident with Christine Franklin. Auten received medical treatment and was diagnosed with a two-bone fracture of her right forearm. Dr. Larry Nord performed surgery on Auten and saw her thirteen times for follow-up care. After extensive treatment, it was discovered that Auten's right index finger had been dislocated.[251]

Auten filed suit against Franklin for all of the injuries that she sustained, and she sued Dr. Nord and his employer ("the medical Defendants") for failing to diagnose her dislocated index finger.[252] A jury returned a verdict in Auten's favor and awarded her $307,000.[253] The medical Defendants thereafter appealed on three different grounds relating to jury instructions.[254]

First, the medical Defendants argued error in the jury instructions and verdict form's failure to differentiate between the injury caused to Auten's forearm (for which Franklin was allegedly liable) and the injury caused to her index finger (for which all Defendants were allegedly liable).[255] Indeed, the verdict form did not require the jury to make separate damages calculations for the two injuries.[256] Agreeing with the medical Defendants' argument that they were not responsible for all injuries arising from the accident, the Fourth District held that the two separate and distinct injuries required distinction in the verdict form.[257] This ultimately necessitated reversal and remand of the cause.[258]

---

249. *Id*. at 164–65, 932 N.E.2d at 504.
250. 404 Ill. App. 3d 1130, 942 N.E.2d 500 (4th Dist. 2010).
251. *Id*. at 1134, 942 N.E.2d at 505.
252. *Id*. at 1133, 942 N.E.2d at 504.
253. *Id*. at 1136, 942 N.E.2d at 506.
254. *Id*. at 1136, 942 N.E.2d at 507.
255. *Id*.
256. *Id*. at 1137, 942 N.E.2d at 507.
257. *Id*. at 1144, 942 N.E.2d at 513. Justice Sue Myerscough dissented from this holding due to her belief that the corresponding jury instruction accurately stated the law, the jury was not misled by

The medical Defendants next argued that insurance coverage was erroneously injected into the trial because a collateral-source jury instruction violated the trial court's *in limine* order prohibiting any reference to insurance.[259] The Fourth District did not agree with this contention. Even though the word "insurance" had not been used during trial, there was testimony that indicated the vast majority of Auten's medical bills had been paid for despite the modest living of Auten and her husband.[260] This testimony supported a reasonable inference that insurance paid Auten's medical bills; thus, it was not improper for the trial court to include the disputed instructions.[261]

Lastly, the medical Defendants argued that two instructions conflicted and likely lead to the jury disregarding expert testimony.[262] The first instruction essentially stated that the testimony of the expert witnesses was opinion and that the jury did not have to accept all expert testimony as true.[263] Meanwhile, the second instruction informed the jurors that, to discern standard of care, they had to rely on the opinion testimony of the expert witnesses.[264] The medical Defendants contended that these instructions either confused the jury or had the jurors set the standard of care instead of the medical experts.[265] The Fourth District again disagreed, finding that the instructions did not conflict and that the two instructions read together stated that the jury should rely on some (but not necessarily all) expert testimony to determine the standard of care.[266]

E. Weight of the Evidence

Hardy v. Cordero[267]

In *Hardy v. Cordero*, the Third District decided whether a jury could disregard the allegedly uncontradicted opinion of plaintiff's expert witness.

In the winter of 2006, Marilyn Hardy underwent surgery for cancer and was administered Adriamycin via intravenous (IV) infusion by nurse

---

this instruction, and the medical Defendants did not suffer prejudice because of this instruction. *Id*. at 1159, 942 N.E.2d at 523 (Myerscough, J., dissenting).

258. *Id*. at 1156, 942 N.E.2d at 522.
259. *Id*. at 1146, 942 N.E.2d at 514.
260. *Id*. at 1148, 942 N.E.2d at 516.
261. *Id*.
262. *Id*. at 1149, 942 N.E.2d at 516.
263. *Id*. at 1148, 942 N.E.2d at 516.
264. *Id*. at 1149, 942 N.E.2d at 516.
265. *Id*. at 1149, 942 N.E.2d at 516–17.
266. *Id*. at 1149–50, 942 N.E.2d at 517.
267. 399 Ill. App. 3d 1126, 929 N.E.2d 22 (3d Dist. 2010).

Martha Cordero. Adriamycin is a substance that can cause tissue blistering if it leaks from a blood vessel. While administering the Adriamycin, Cordero noticed a very small redness, initially the size of the tip of a pinky finger, near the IV site. Cordero did not find the redness unusual and continued the normal course of treatment. The redness, however, presented because there was a leakage of the Adriamycin.[268]

Hardy thereafter sued Cordero for malpractice for various damages, claiming violation of the standard of care in not identifying the extravasation and stopping the infusion.[269] Hardy produced an expert who testified that the treatment should have been stopped once the redness was noticed.[270] Meanwhile, Cordero testified as an expert on her own behalf.[271]

At the close of evidence, the trial judge denied Hardy's motion for directed verdict and gave the case to the jury, which returned a verdict for Cordero.[272] Her post-trial motion for judgment notwithstanding the verdict was met with defeat as well.[273]

On appeal, Hardy argued the trial court incorrectly denied her motions for directed verdict and for judgment notwithstanding the verdict.[274] Hardy argued that her expert, whose testimony was purportedly uncontradicted, "unequivocally" established a prima facie case of negligence.[275] Hardy further argued that once the case went to the jury, it was not free to disregard her expert's opinion.[276]

The Third District sided with the trial court. Directed verdict would have been improper because Cordero (again, testifying as an expert on her own behalf) and Hardy's expert expressed different views, which created questions of fact for the jury to resolve.[277] Regarding Hardy's motion for judgment notwithstanding the verdict, the granting of such a motion would be improper because the jury had the right to use the expert's testimony as it saw fit.[278] Put simply, the trial judge and jury acted properly in finding for Cordero and against Hardy.

---

268. *Id*. at 1128, 929 N.E.2d at 24.
269. *Id*.
270. *Id*. at 1129, 929 N.E.2d at 25.
271. *Id*. at 1128, 929 N.E.2d at 24.
272. *Id*. at 1129, 929 N.E.2d at 25.
273. *Id*.
274. *Id*. at 1130, 929 N.E.2d at 25–26.
275. *Id*. at 1130, 929 N.E.2d at 26.
276. *Id*. Hardy also appealed a number of supposed evidentiary errors that did not warrant reversal of the jury's verdict. *Id*. at 1133–35, 929 N.E.2d at 28–30.
277. *Id*. at 1132, 929 N.E.2d at 27.
278. *Id*. at 1132–33, 929 N.E.2d at 28.

Pavnica v. Veguilla[279]

In *Pavnica v. Veguilla*, Leonard and Patricia Pavnica brought a medical malpractice and loss of consortium action against two defendant doctors and an emergency services facility. At the close of trial, the jury returned a verdict in favor of Defendants.[280]

In their appeal, the Pavnicas made two arguments. First, they argued error in the denial of their motion *in limine* relating to testimony about the defendant doctors' military service.[281] The Third District disagreed—such testimony did no more than give the jurors some background information about the defendant doctors.[282] Moreover, the testimony was relevant to one of the defendant doctor's credentials as an expert physician.[283] Next, the Pavnicas contended error in the denial of their motion for judgment notwithstanding the verdict because the jury verdict was "wholly unwarranted, arbitrary, unreasonable, and was against the manifest weight of the evidence."[284] The Third District again disagreed—the evidence adduced at trial did not overwhelmingly favor the Pavnicas, and the jury merely determined the disputed issues in favor of Defendants.[285]

Davis v. Kraff[286]

The trial in *Davis v. Kraff* represented "a classic battle of experts."[287] After receiving an unfavorable verdict in her malpractice action against Dr. Colman Kraff and the Kraff Eye Institute, Ltd., Marla Davis appealed.[288] Her malpractice suit had been premised upon defendants' failure to warn about the increased risk (due to her large night-adjusted pupils) of vision problems posed by two LASIK (laser-assisted in situ keratomileusis) eye surgeries.[289]

This case centered around the doctrine of informed consent, which is comprised of the following four elements: "(1) the physician had a duty to disclose material risks; (2) he failed to disclose or inadequately disclosed

279. 401 Ill. App. 3d 731, 929 N.E.2d 52 (3d Dist. 2010).
280. *Id*. at 738, 929 N.E.2d at 58.
281. *Id*. at 732–33, 929 N.E.2d at 54.
282. *Id*. at 741, 929 N.E.2d at 60.
283. *Id*. at 741, 929 N.E.2d at 60–61.
284. *Id*. at 732–33, 929 N.E.2d at 54.
285. *Id*. at 740, 929 N.E.2d at 60.
286. 405 Ill. App. 3d 20, 937 N.E.2d 306 (1st Dist. 2010).
287. *Id*. at 26, 937 N.E.2d at 309 (1st Dist. 2010).
288. *Id*.
289. *Id*.

those risks; (3) as a direct and proximate result of [such] failure to disclose, the patient consented to treatment she otherwise would not have consented to; and (4) plaintiff was [thereby] injured by the proposed treatment."[290] Davis' appeal focused on the third and fourth elements, contending that

> [T]he circuit court committed reversible errors by allowing defense experts to testify that postsurgical studies called into question the purported link, commonly accepted by ophthalmologists in 1999 and earlier, between abnormally large dilated pupils and nighttime vision problems, and by allowing defense experts to testify that Ms. Davis's abnormally large dilated pupils at the time of trial were caused by [antiallergy and antidepressant] medications.[291]

The First District, however, disagreed with Davis' contentions. It found testimony about the postsurgical studies to be probative on the fourth element of informed consent—whether Davis was in fact injured by the LASIK surgeries.[292] Further, with respect to defense experts' testimony about the significance of Davis' medications, "it was the province of the jury to resolve this battle between the experts."[293] The court also concluded that there was ample evidence for the jury to decide Davis' dim-light pupils were no more than six millimeters prior to surgery, which would effectively negate defendants' duty to disclose.[294] As such, the First District had no choice but to affirm the jury's defense verdict.

VI. APPELLATE CONSIDERATIONS

Two Illinois appellate courts rendered decisions in medical malpractice cases that provided important considerations to bear in mind when appealing an unfavorable trial ruling.

Childs v. Pinnacle Health Care, LLC[295]

In *Childs v. Pinnacle Health Care, LLC*, the Second District determined whether Jeannie Childs preserved allegations dismissed by the trial court. In *Childs*, the "*Foxcroft* rule" was at issue, which states,

---

290. *Id*. at 28–29, 937 N.E.2d at 314–15 (citing Coryell v. Smith, 274 Ill. App. 3d 543, 546, 653 N.E.2d 1317, 1319 (1st Dist. 1995)).
291. *Id*. at 28, 937 N.E.2d at 314.
292. *Id*. at 33, 937 N.E.2d at 318.
293. *Id*. at 38, 937 N.E.2d at 322.
294. *Id*. at 39, 937 N.E.2d at 323.
295. 399 Ill. App. 3d 167, 926 N.E.2d 807 (2d Dist. 2010).

"[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes, being in effect abandoned and withdrawn."[296]

To avoid the repercussions of the *Foxcroft* rule, a party that wishes to preserve a challenge to an order dismissing fewer than all of the counts in her complaint has a few options.[297] First, the party can elect to stand on the dismissed counts and argue them at the appellate level.[298] Second, the party can file an amended complaint referring to the claims set forth in the prior complaint.[299] Finally, the party can perfect an appeal from the order dismissing fewer than all counts before filing an amended pleading that does not refer to the dismissed counts.[300]

The Second District found that Childs had circumvented the *Foxcroft* rule in two distinct ways.[301] First, the record established that Childs perfected her appeal prior to filing an amended pleading that did not reference the dismissed counts.[302] Specifically, Childs mailed in a notice of appeal on June 12, 2009, and it was file stamped by the clerk of the circuit court on June 16, 2009.[303] The filing date of said notice was the date it was received by the circuit clerk, June 16, 2009.[304] The plaintiff also filed her first amended complaint on June 16, 2009.[305] While there was no time on the stamps of the notice of appeal and the first amended complaint to indicate which had been stamped first, the appellate court concluded the notice of appeal was filed first because it preceded the complaint in the record.[306] Thus, the notice of appeal was timely, and it was not forfeited by the filing of the first amended complaint.[307]

Second, Childs preserved the counts against defendants when she filed her first amended complaint.[308] When Childs filed a motion for leave to file the first amended complaint, she noted that her original complaint was "a matter of record and was incorporated herein by reference as though fully

---

296. *Id.* at 175–76, 926 N.E.2d at 814 (citing Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp., 96 Ill.2d 150, 154, 449 N.E.2d 125, 126 (1983)) (quotation marks omitted).
297. *Id*. at 176, 926 N.E.2d at 815.
298. *Id*.
299. *Id*.
300. *Id*. at 177, 926 N.E.2d at 815.
301. *Id*.
302. *Id*.
303. *Id*. at 177, 926 N.E.2d at 816.
304. *Id*.
305. *Id*. at 178, 926 N.E.2d at 816.
306. *Id*.
307. *Id*.
308. *Id*.

set forth."[309] Therefore, even though Childs did not explicitly reference the dismissed allegations in her first amended complaint, the appellate court deduced that she did not intend to abandon those allegations.[310]

Hemminger v. Nehring[311]

Meanwhile, the Third District in *Hemminger v. Nehring* examined whether Daniel Hemminger's failure to file a notice of appeal within 30 days of an order granting summary judgment rendered that order final and unappealable.[312]

Illinois Supreme Court Rule 304 states that the time for filing a notice of appeal shall be as provided in Rule 303,[313] which in turn states that a notice of appeal must be filed within 30 days after entry of final judgment.[314] Rule 303 also states that a motion for reconsideration tolls the time for appeal until the order disposing of the motion is entered.[315]

In *Hemminger*, the court granted summary judgment on two different issues—a statute of limitations issue and an immunity issue. Hemminger filed a timely motion to reconsider the order granting summary judgment and referred only to the statute of limitations issue. Defendants argued that only the statute of limitations issue was tolled under Rule 303(a)(2), and Hemminger only had 30 days from the date of summary judgment to give notice of appeal on the immunity issue. Since that date had already passed, the appellate court would not have jurisdiction and would be unable to hear the appeal.[316]

The Third District opted not to follow defendants' logic and concluded that Rule 303(a)(2) did toll the time on the immunity issue.[317] When the trial court granted summary judgment, it did so in a single order.[318] The summary judgment order stated, "*This ruling* is final and appealable pursuant to Supreme Court Rule 304(a)."[319] Since the express language of the ruling made clear that it was a single order, Hemminger's motion to reconsider effectively tolled the deadline for a notice of appeal as

309. *Id*. (quotation marks and brackets omitted).
310. *Id*. at 178–79, 926 N.E.2d at 817.
311. 399 Ill. App. 3d 1118, 927 N.E.2d 233 (3d Dist. 2010).
312. *Id*. at 1121, 927 N.E.2d at 236.
313. ILL. SUP. CT. R. 304(a).
314. ILL. SUP. CT. R. 303(a)(1).
315. *Id*. at (a)(2).
316. *Hemminger*, 399 Ill. App. 3d at 1121–22, 927 N.E.2d at 236.
317. *Id*. at 1122, 927 N.E.2d at 236.
318. *Id*.
319. *Id*. at 1122, 927 N.E.2d at 237 (emphasis added).

to both issues.[320] As such, the Third District had appellate jurisdiction over the case.[321]

VII. MISCELLANEOUS CASES

A number of cases touched upon Illinois medical malpractice law but defied placement in any of the categories discussed throughout this article.

A. Negligent Infliction of Emotional Distress—Impact Rule

Barnes v. Anyanwu[322]

In the unpublished opinion of *Barnes v. Anyanwu*, the Seventh Circuit acknowledged "there is no indication from case law or any general trend in Illinois that suggests the Illinois Supreme Court would hold that the impact rule [that relates to negligent infliction of emotional distress claims] does not apply in medical malpractice cases."[323] This is because Illinois law does not recognize any special class of victims in its requirement that a direct victim of alleged negligent infliction of emotional distress must demonstrate physical injury or impact.[324]

B. Illinois Nursing Home Care Act

Childs v. Pinnacle Health Care, LLC[325]

The case of *Childs v. Pinnacle Health Care, LLC*, which is discussed *supra* in Section VI, provides a great overview of the Illinois Nursing Home Care Act, 210 ILCS 45/3-601, as it relates to medical malpractice claims in the motion to dismiss context. It reiterated the Illinois Supreme Court's holding that "[s]uits against individuals [for medical malpractice]

---

320. *Id*.

321 *Id*. The Court thereafter determined that a relevant provision of the Tort Immunity Act, 745 ILL. COMP. STAT. 10/6–105 (2010), applied because the conduct at issue involved screening tests "that [were] clearly part of the diagnostic process[,]" effectively shielding Defendants from Hemminger's malpractice claims. *Id*. at 1126, 927 N.E.2d at 239.

322. 391 Fed. App'x 549 (7th Cir. 2010).

323. *Id*. at 553.

324. *Id*. at 554.

325. 399 Ill. App. 3d 167, 926 N.E.2d 807 (2d Dist. 2010).

must be asserted independently of the Nursing Home Care Act[, which does not allow for suits against individual employees]."[326]

C. Statute of Repose's Effect on Counterclaim

Uldrych v. VHS of Illinois, Inc.[327]

In *Uldrych v. VHS of Illinois, Inc.*, the First District decided whether an implied indemnity claim was barred by a medical malpractice statute of repose.

The case began when Rudolph Uldrych brought a medical malpractice action against Dr. Christopher Joyce, Dr. Jeffery Zawacki, Suburban Surgical Associates, and MacNeal Hospital. MacNeal Hospital filed a counterclaim against the other three defendants that sought indemnification, alleging it agreed to pay $1,000,000 to settle the underlying medical malpractice action. The trial court dismissed the core action pursuant to a settlement agreement, but the counterclaim remained pending. MacNeal Hospital filed an amended counterclaim, alleging that the other three defendants were bound by an implied quasi-contractual obligation for indemnification because Dr. Joyce and Dr. Zawacki were its actual or apparent agents. The doctors and Suburban Surgical Associates thereafter moved to dismiss the counterclaim on grounds that it did not fall within a four-year medical malpractice statute of repose. MacNeal Hospital unsuccessfully responded by arguing that the statute of repose was inapplicable.[328]

The statute of repose at issue stated, in pertinent part, as follows: "[N]o action for damages for injury or death against any physician, . . . *arising out of patient care* shall . . . be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death."[329] In determining the applicability of this statute, courts do not focus on the actual labeling of the underlying claims; rather, the focus is on whether the claims arose out of patient care.[330] "Arising out of patient care" requires causal connection between the medical care the patient received and the injury the patient

326. *Id*. at 180, 926 N.E.2d at 818 (citing Eads v. Heritage Enters., Inc., 204 Ill.2d 92, 108–09, 787 N.E.2d 771, 780 (2003)) (quotation marks and emphasis omitted).
327. 398 Ill. App. 3d 696, 927 N.E.2d 82 (1st Dist. 2010).
328. *Id*. at 697, 927 N.E.2d at 83–84.
329. *Id*. at 698, 927 N.E.2d at 85 (citing 735 ILL. COMP. STAT. ANN. 5/13–212(a) (2010)) (emphasis in original).
330. *Id*. at 699, 927 N.E.2d at 85.

sustained.[331] "[T]o determine whether an injury has its origin in or is incidental to a patient's medical care and treatment and, thus, falls within the scope of the medical malpractice statute of repose, courts must look past the nature of the injury itself and, instead, examine the facts from which the injury arose."[332]

Here, because MacNeal Hospital's counterclaim arose out of the nature of Uldrych's injury, the statute of repose applied thereto.[333] And, because MacNeal filed the counterclaim one-and-a-half years after the statute of repose's expiration, the First District deemed it time-barred and affirmed the judgment of the trial court.[334]

D. A Defendant's Right to "Setoff"

Thornton v. Garcini[335]

In *Thornton v. Garcini*[336] the Illinois Supreme Court addressed, *inter alia*, the validity of a damages "setoff."

Jason Anthony was born prematurely in a breech position. During birth, Jason's head became stuck in his mother's vagina. Dr. Francisco Garcini arrived on the scene an hour and ten minutes later. While waiting on Dr. Garcini to arrive, nurses were unable to complete delivery of Jason, and he died.[337]

Jason's estate sued Dr. Garcini for medical malpractice, alleging claims of wrongful death, survival, and negligent infliction of emotional distress.[338] At the close of trial, a jury found for Jason's estate on the emotional distress claim and awarded damages in the amount of $700,000.[339] Dr. Garcini filed a post-trial motion for judgment notwithstanding the verdict, which argued that he was entitled to a setoff because of a settlement reached between the plaintiff and the hospital.[340]

The Illinois Supreme Court originally held Dr. Garcini forfeited any setoff claim by failing to raise it until his post-trial motion.[341] However,

---

331. *Id*.
332. *Id*. at 701, 927 N.E.2d at 87.
333. *Id*. at 702, 927 N.E.2d at 87.
334. *Id*.
335. 237 Ill.2d 100, 928 N.E.2d 804 (2010).
336. *Id*. at 111, 928 N.E.2d at 811.
337. *Id*. at 104, 928 N.E.2d at 806–07.
338. *Id*. at 104, 928 N.E.2d at 807.
339. *Id*. at 106, 928 N.E.2d at 807.
340. *Id*.
341. *Id*. at 112, 928 N.E.2d at 811.

upon petition for rehearing, the Illinois Supreme Court modified its original opinion.[342] Dr. Garcini thereafter argued that a setoff claim may be brought at any time so long as it is not a counterclaim to be evaluated by the trier of fact.[343]

The term "setoff" is used in two different ways.[344] Setoff may "'refer[] to the situations when a defendant has a distinct cause of action against the same plaintiff who filed suit against him' and is subsumed procedurally under the concept of counterclaim."[345] This type of setoff must be raised in the pleadings.[346] Setoff may also "refer to a defendant's request for a reduction of the damage award because a *third party* has already compensated the plaintiff for the same injury."[347] This variety of setoff can be raised at any time, even in a post-trial motion.[348] Because the setoff sought by Dr. Garcini represented an enforcement action as opposed to a counterclaim, the Illinois Supreme Court held that Dr. Garcini did not forfeit his right to request a setoff.[349]

E. Medical Malpractice Insurance

Ismie Mutual Insurance Co. v. Michaelis Jackson & Associates, LLC[350]

In the case of *Ismie Mutual Insurance Co. v. Michaelis Jackson & Associates, LLC*, a medical malpractice insurer brought a declaratory judgment action against its insureds.[351] Specifically, the insurance company requested a declaration that it had no duty to defend or indemnify its insureds from a qui tam action brought against them under the False Claims Act, 31 U.S.C. § 3729.[352] The Fifth District affirmed the judgment on the pleadings and summary judgment in the insurance company's favor because "the proof required to sustain a claim for personal injuries, like a medical malpractice claim, is clearly distinct from the proof required for a claim for false filings of claims for medical reimbursement."[353] This was

342. *Id*.
343. *Id*. at 113, 928 N.E.2d at 811.
344. *Id*.
345. *Id*. at 113, 928 N.E.2d at 811–12 (quoting Matsuhita Elec. Corp. of Am. v. Home Indem. Co., 907 F. Supp. 1193, 1198 (N.D. Ill. 1995)).
346. *Id*. at 113, 928 N.E.2d at 811.
347. *Id*. at 113, 928 N.E.2d at 812 (emphasis in original).
348. *Id*.
349. *Id*. at 113, 928 N.E.2d at 811.
350. 397 Ill. App. 3d 964, 921 N.E.2d 1156 (5th Dist. 2009).
351. *Id*. at 965, 921 N.E.2d at 1159.
352. *Id*.
353. *Id*. at 972, 921 N.E.2d at 1164.

perhaps best evidenced by the fact that the qui tam relators were not suing and could not sue for medical malpractice on behalf of Defendants' patients.[354] The appellate court also held that the insurer was not estopped from disclaiming its duty to defend and indemnify because "[e]stoppel cannot be utilized in order to create coverage if none existed otherwise."[355] Moreover, the insurer timely instituted the underlying action by bringing suit within two months of exhaustion of the policy's Medicare investigation provision.[356]

354. *Id*.
355. *Id*. at 974, 921 N.E.2d at 1166.
356. *Id*.