IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

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This article discusses a recent Illinois Appellate Court decision addressing limitations on expert testimony concerning proximate cause as well as the plaintiff's use of voluntary dismissal to avoid a directed verdict and hire new experts.

Illinois Appellate Court Issues Opinion Limiting Expert Testimony Regarding Proximate Cause and on Plaintiff's Use of Voluntary Dismissal to Avoid Directed Verdict and Retain Additional Experts

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The Illinois Appellate Court recently issued its decision in *Freeman v. Crays*, 2018 IL App (2d) 170169. In this case, the appellate court addressed two important subjects. First, the court considered whether a family practice physician could testify regarding how a cardiologist would have treated a patient. Second, the court considered whether a plaintiff can voluntarily dismiss a claim on the eve of trial to avoid a directed verdict, and add necessary expert witnesses in a refiled action. This decision is positive from the aspect of limiting expert testimony, but presents challenges regarding a plaintiff's use of a voluntary dismissal and right to refile the action.

Background

The defendant was a family practice physician who treated the decedent for hypertension and prescribed medication. A lawsuit was filed after the decedent suffered cardiac arrest, alleging that the defendant physician failed to diagnose severe coronary artery disease and enlarged heart and failed to refer the decedent to a cardiologist.

The plaintiff's only expert witness was a family practice physician, Dr. Finley Brown. The plaintiff did not have a cardiology expert. At the final pre-trial conference, the trial court granted the defendant physician's motion to bar Dr. Brown from offering opinions regarding the standard of care of a cardiologist or treatment that a cardiologist would have recommended. In fact, the plaintiff did not object to this motion, and readily admitted Dr. Brown could not provide such testimony because he "is not a cardiologist." In light of this, the trial court expressed skepticism that the plaintiff would be able to prove proximate cause (*i.e.* that the alleged breaches of the standard of care caused the plaintiff's death), but the case proceeded.

Dr. Brown's evidence deposition was then taken. Contrary to the trial court's order, Dr. Brown testified that the defendant physician's failure to refer the decedent to a cardiologist deprived the decedent of a chance to survive because a cardiologist would have provided treatment to improve circulation. Dr. Brown admitted he did not have "the skill, or the training, or the knowledge to complete a detailed and comprehensive cardiac work-up." Nonetheless, Dr. Brown claimed he was qualified to provide testimony about how a cardiologist would have treated the decedent because he: (1) had worked closely with cardiologists and was familiar with the treatments that might have been administered; (2) had taken a special interest in the field of advanced lipidology; and (3) had attended several lectures and completed a two-day course. Dr. Brown testified that a cardiologist *might* have performed bypass surgery, angioplasty, stent placement or prescribed medication. But, Dr. Brown admitted he was not certain how a cardiologist *would* have treated the decedent, and he further admitted that the choice of how to treat is always left to a cardiologist. Dr. Brown even admitted that a

cardiologist would have to evaluate whether prescribing lipid-lowering drugs was safe, rather than a family practice physician like himself. Dr. Brown repeatedly admitted that he could not say what a cardiologist actually would have done.

Based upon these admissions, the trial court barred Dr. Brown from testifying that a cardiologist would have prevented the death. Dr. Brown's opinions were all based upon the premise that a cardiology referral should have been made, and Dr. Brown admitted that he did not know what treatment a cardiologist would actually provide.

Trial began and a jury was selected, but before the jury was sworn in, the plaintiff moved for voluntary dismissal. The defendant did not object to the plaintiff's motion for voluntary dismissal or request sanctions pursuant to Illinois Supreme Court Rule 219(e), and the trial court granted the plaintiff's motion to voluntarily dismiss with the parties to bear their own costs.

Within a few days, the plaintiff refiled her claim, which is allowed by Illinois law within one year of a voluntary dismissal. However, the plaintiff also disclosed an intent to call an expert cardiologist in the refiled case. The defendant physician asked the trial court to adopt the orders from the prior case, and requested that the trial court bar the plaintiff from calling the cardiology expert pursuant to Supreme Court Rule 219(e). The trial court granted this motion and barred the plaintiff's newly disclosed cardiology expert. Although the plaintiff had an absolute right to voluntarily dismiss and refile, the trial court found this was "exactly the type of refiling that should be barred under Supreme Court Rule 219(e)" because "[a]ll the rulings were made, the cards were on the table, the plaintiff was facing a very likely motion for directed verdict, and then voluntarily dismissed . . . to avoid the consequences of the Court's rulings on the proximate cause issue." The trial court then granted the defendant's motion for summary judgment and dismissed the plaintiff's claim.

Proximate Cause Opinions Must Always be Expressed to a Reasonable Degree of Medical Certainty

The plaintiff first argued that Dr. Brown's causation opinions should not have been barred because a lower threshold should be applied to Dr. Brown's causation testimony since the plaintiff was presenting a "lost chance" theory (*i.e.* decreased chance of survival) , rather than a traditional medical malpractice claim.

The appellate court flatly rejected this argument. It found that proximate cause testimony must be expressed to a reasonable degree of medical certainty, even in a "lost chance" case. The plaintiff argued that, in a "lost chance" case, an expert does not have to testify that subsequent treatment *would* have been effective, but only that it *could* have been. The court rejected this argument, finding that the bar for causation opinions is not

lowered in a "lost chance" case. Instead, an expert must testify to a reasonable degree of medical certainty that the negligence proximately caused the lost chance of recovery. The court noted that the "door is not opened for speculation as to whether a defendant doctor's negligence deprived the patient of the opportunity to undergo treatment that could have been effective," and the expert's opinions must be expressed to a reasonable degree of medical certainty.

Plaintiff's Family Practice Expert Was Not Qualified to Testify How a Cardiologist Would Have Treated the Decedent

The plaintiff admitted in the trial court that Dr. Brown was not qualified to testify about a cardiologist's standard of care, which should have resolved this issue. Contrary to this admission, on appeal the plaintiff argued that Dr. Brown was qualified because he worked closely with cardiologists and was familiar with the methods, procedures, and treatments a cardiologist might recommend.

The appellate court rejected this argument. The court acknowledged that a physician in one expertise is not prohibited from testifying as to the care of a physician in another expertise, but the plaintiff failed to establish adequate foundation for Dr. Brown's opinions in this case.

Dr. Brown admitted that he referred all of his patients with cardiovascular issues to a cardiologist, and that he did not have the "skill, or the training, or the knowledge to complete a detailed and comprehensive cardiac work-up." The court noted that, although Dr. Brown may have had general awareness of the treatments a cardiologist *might* have recommended, he admitted that the ultimate decision is always left to a cardiologist. Dr. Brown could not say how a cardiologist would actually have treated the decedent.

The court found that Dr. Brown's testimony was properly barred because it was contingent and speculative. Because Dr. Brown could not testify to a reasonable degree of medical certainty how a cardiologist would have effectively treated the decedent, Dr. Brown lacked the foundation to testify that the defendant physician's alleged negligence was a proximate cause of the death.

Application of Rule 219(e) In Determining Whether the Plaintiff Could Add a Cardiology Expert in the Refiled Case

The appellate court then considered the trial court's application of Rule 219(e), barring the plaintiff from presenting a cardiology expert. Illinois Supreme Court Rule 219(e) provides:

> A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders

> entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges.

The committee comment at issue provides:

> Paragraph (e) addresses the use of voluntary dismissals to avoid compliance with discovery rules or deadlines, or to avoid the consequences of discovery failures, or orders barring witnesses or evidence. This paragraph does not change existing law regarding the right of a party to seek or obtain a voluntary dismissal. However, this paragraph does clearly dictate that when a case is refiled, the court shall consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred. The consequences of noncompliance with discovery deadlines, rules or orders cannot be eliminated by taking a voluntary dismissal. Paragraph (e) further authorizes the court to require the party taking the dismissal to pay the out-of-pocket expenses actually incurred by the adverse party or parties. . . . Paragraph (e) does not provide for the payment of attorney fees when an action is voluntarily dismissed.

Applying Rule 219(e) in this case, the appellate court found that the plaintiff should not have been barred from calling a cardiology expert without further hearing, at which the trial court should consider the traditional factors for barring evidence or witnesses, including: (1) surprise to the adverse party, (2) the prejudicial effect of the witness's testimony, (3) the nature of the testimony, (4) the diligence of the adverse party, (5) whether there was a timely objection to the witness's testimony, and (6) the good faith of the party calling the witness. Within this framework, a trial court should assess the "misconduct of a party in the original action and any sanctions entered against him therein."

The appellate court reversed the trial court's order barring the cardiologist and dismissing the plaintiff's claim. The appellate court directed the trial court to reconsider the issue in light of the six-factor framework. According to the appellate court, the trial court applied the wrong standard, inappropriately barring the plaintiff's cardiologist solely because the plaintiff moved for voluntary dismissal to avoid an inevitable directed verdict.

While the appellate court did not actually find that the plaintiff should be allowed to present the cardiology expert in the refiled action, it agreed with the plaintiff's argument that she had been "essentially a

compliant litigant" in the underlying action and simply failed to anticipate the trial court's finding that Dr. Brown could not provide proximate cause testimony. The appellate court excused the plaintiff's actions as merely "poor legal judgment." The appellate court implied that the plaintiff could not have known that Dr. Brown lacked foundation to provide proximate cause testimony. However, this is hard to square with the plaintiff's admission at the final pre-trial conference that Dr. Brown could not say how a cardiologist would have treated the decedent – presumably the plaintiff knew this long before the final pre-trial conference, and did not just come to this conclusion at the time of hearing.

Defendants Should Consider Seeking Expenses Under Rule 219(e)

The trial court's order granting the plaintiff's motion to voluntarily dismiss provided that the parties were to bear their own costs. Apparently, the defendant did not request costs or expenses under Supreme Court Rule 219(e), a courtesy often extended. In the future, however, defendants should carefully consider requesting costs and expenses when confronted with a similar situation.

The *Freeman* court suggested that the trial court could have imposed monetary sanctions under Supreme Court Rule 219(e) before allowing the voluntary dismissal. Other courts have approved the imposition of hundreds of thousands of dollars in costs and expenses against a plaintiff requesting voluntary dismissal on the eve of trial.

If a defendant requests costs and expenses under Supreme Court Rule 219(e), it could blunt the *Freeman* court's more liberal findings about adding expert witnesses in a refiled action. For instance, if a defendant is awarded costs and expenses, the parties could agree to waive payment if the plaintiff agrees not to refile the action. Facing significant costs and expenses, a plaintiff may agree to such a deal.

Conclusion

Freeman is useful to support motions to bar an opinion witness from providing expert testimony outside the scope of the witness's expertise. It is positive for medical professional defendants in that regard. The court's findings about disclosing additional expert witnesses following a voluntary dismissal, on the other hand, are troubling. Defense attorneys can establish facts contrary to *Freeman* in the trial court in order to limit the impact of the opinion. Additionally, defendants should consider seeking costs and expenses in such situations, which might provide leverage to prevent the claim being refiled.

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