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To Boldly Go Where No One Has Gone Before: The Final Frontier of Illinois Expert Winess Testimony in Medical Malpractice Cases

Charles Chapman Honorable
Justice, Illinois Appellate Court, Fifth Judicial District

Robert Robertson

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The Honorable Charles Chapman and Robert Robertson***

I. INTRODUCTION

A visitor from Vulcan discovers the Hubble telescope. His scientific curiosity piqued, he comes to Earth to investigate further and lands in Illinois. Instead of the proverbial, "Take me to your leader," he asks, "Take me to an expert witness." Where would an astute greeter take Mr. Spock's inquisitive friend? To a hearing before some regulatory commission? No, all the members and witnesses might have left the commission for higher paying jobs in industry. To a renowned university? No, the faculty members might all be on sabbatical. Where then should the visitor be taken? The answer is, of course, to any courtroom that has a medical malpractice trial in progress. If there is any type of case that virtually ensures the presence of an expert at some time during its presentation, it is a involving medical malpractice case.

One probably wonders why a Vulcan would want to meet an expert witness instead of a leader of the country or state in which he happens to land. (Then again, one might not have such a sense of wonder depending upon his or her view of the current leaders). Regardless of our visitor's reasons, we at least know where to take him. The next question to consider is what the Vulcan should be told to prepare him for this first encounter with an expert witness. One could turn to the presiding judge in the medical malpractice case for some guidance, but one might very easily find that the judge was equally as unfamiliar with the expert witness' role as the Vulcan. Indeed, a disgruntled lawyer might be tempted to draw additional comparisons between judges and our hypothetical spacey visitor.

Our Vulcan's curiosity aside, this Article is intended to assist judges in acquainting themselves within the more important issues

* Justice, Illinois Appellate Court, 5th Judicial District. B.A. 1963, Southern Illinois University; J.D. 1967, St. Louis University, Law School.

** B.A. 1987, North Park College; J.D. Candidate 1991, Loyola University of Chicago School of Law.

involving expert witnesses that are likely to arise during a medical malpractice action. The Article is divided into three broad sections. Each section explains aspects of the expert witness' role in a particular stage of the medical malpractice litigation, arranged in the order in which each stage of the litigation would occur. The first section addresses preliminary motions, particularly motions to dismiss under section 2-622 of the Illinois Code of Civil Procedure.[1] The second section discusses the role of experts in pretrial motions, particularly motions for summary judgment, and the discovery problems which arise in this context.[2] The final section explores several problems with expert witnesses that may arise during the course of a trial itself.[3]

II. PRELIMINARY MOTIONS

A. Motions to Dismiss for Failure to Satisfy the Requirements of Section 2-622

An expert witness becomes involved in a medical malpractice case at the time the complaint is filed. Section 2-622 requires the plaintiff to attach an affidavit to his complaint declaring that the facts of the case have been reviewed by a qualified health professional, and that both the plaintiff and the health professional have concluded that there is a reasonable and meritorious cause for the filing of the action.[4] The health professional's report must be at-

1. ILL. REV. STAT. ch. 110 para. 2-622 (1989). *See infra* notes 4-107 and accompanying text.

2. *See infra* notes 108-192 and accompanying text.

3. *See infra* notes 193-360 and accompanying text.

4. ILL. REV. STAT. ch. 110, para. 2-622 (1989). Section 2-622 provides in pertinent part:

> (a) In any action, whether in tort, or contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff . . . shall file an affidavit . . . declaring one of the following:
>
> 1. That the affiant has consulted and reviewed the facts of the case with a health professional who . . . has determined in a written report . . . that there is a reasonable and meritorious cause for the filing of such action . . . [T]he affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit. . . .
>
> 2. That the affiant was unable to obtain a consultation as required by paragraph 1 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. . . .
>
> 3. That a request has been made by the plaintiff or his attorney for examina-

tached to the complaint.[5] With few exceptions,[6] a plaintiff's failure to file the necessary report with his complaint constitutes sufficient grounds for the complaint's dismissal under section 2-619.[7]

The Illinois appellate courts disagree as to the constitutionality of section 2-622 because some courts view the provision as an improper usurpation of judicial power. These courts have ruled that if a plaintiff's complaint is dismissed with prejudice pursuant to section 2-622 for failure to attach a health care professional's report, the health care professionals will have the power to screen cases before a court has the opportunity to do so. Such a consequence would encroach upon the courts' functions.[8] The Illinois

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tion and copying of records . . . and the party required to comply under those sections has failed to produce such records. . . .

5. *Id.*

6. A health care professional's affidavit need not be attached to the complaint if the statute of limitations is about to run or the plaintiff is unable to obtain the medical records. *Id.* para. 2-622(a)(2)-(3).

7. *Id.* para. 2-622(3)(g). Section 2-622(3)(g) provides: "The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619." *Id.*

8. In Bloom v. Guth, the second district declared section 2-622 constitutional. 164 Ill. App. 3d 475, 517 N.E.2d 1154 (2d Dist. 1987). The *Bloom* court rejected plaintiff's claims that section 2-622 denied plaintiff due process and equal protection, constituted special legislation, impaired plaintiff's contractual obligations, and deprived plaintiff of his right to a jury trial and to recover for his injuries. *Id.* at 478-79, 517 N.E.2d at 1156-57. Finally, the *Bloom* court rejected the contention that section 2-622 unconstitutionally vested a judicial function in non-judicial personnel, noting that section 2-622 "requires only a determination of *fact* by an expert in the medical field," not a determination of law. *Id.* at 479, 517 N.E.2d at 1157. The second district reaffirmed the *Bloom* decision in Premo v. Falcone, 197 Ill. App. 3d 625, 554 N.E.2d 1071 (2d Dist. 1990). Similar conclusions were reached by the third and fourth districts. Sakovich v. Dodt, 174 Ill. App. 3d 649, 529 N.E.2d 258 (3d Dist. 1988); Alford v. Phipps, 169 Ill. App. 3d 845, 523 N.E.2d 563 (4th Dist. 1988). Both *Sakovich* and *Alford* relied on *Bloom* and did not develop the constitutional arguments in detail. *Sakovich*, 174 Ill. App. 3d at 652, 529 N.E.2d at 259-60; *Alford*, 169 Ill. App. 3d at 850-51, 523 N.E.2d at 566-67.

In DeLuna v. St. Elizabeth's Hospital, the first district court reached a result contrary to *Bloom*, ruling section 2-622 an unconstitutional delegation of judicial power. 184 Ill. App. 3d 802, 810, 540 N.E.2d 847, 852 (1st Dist. 1989). The *DeLuna* court stated that under section 2-622 "the health professional is authorized to make the *legal* conclusion as to whether the plaintiff is entitled to advance beyond the filing of his complaint . . . ." *Id.* at 809, 540 N.E.2d at 852. The court explained that this infringed upon the fundamental purpose of the court " 'to determine whether an action filed by a party has merit.' " *Id.* at 809, 540 N.E.2d at 852 (quoting Berlin v. Nathan, 64 Ill. App. 3d 940, 952, 381 N.E.2d 1367, 1375 (1st Dist. 1979)). The court held that section 2-622 violated article II of the Illinois Constitution, the separation of powers provision, and article VI, sec. 1, which establishes the exclusive power of the judiciary. *Id.* at 806-807, 540 N.E.2d at 850-51. The court stated that the legislature had "no constitutional authority to create a new court or alter the basic character of a court." *Id.* at 806, 540 N.E.2d at 850 (citing Bernier v. Burris, 113 Ill. 2d 219, 497 N.E.2d 763 (1986); People *ex rel.* Rice v. Cunningham, 61 Ill. 2d 353, 336 N.E.2d 1 (1975)).

On the separation of powers question, the *DeLuna* court stated that the "court's authority to exercise its inherent power to hear and determine a cause was effectively

Supreme Court has yet to decide this issue[9] but has addressed whether the dismissal mandated under subsection 2-622(g)[10] must be with prejudice. In *McCastle v. Sheinkop*,[11] the Illinois Supreme Court reviewed the legislative history of section 2-622 and held that section 2-622 did not mandate dismissal with prejudice.[12] The court reasoned that a dismissal with prejudice under section 2-622 "would be a triumph of form over substance. . . . [and] would elevate a pleading requirement designed to reduce frivolous lawsuits into a substantive defense forever barring plaintiffs who initially fail to comply with its terms."[13] The trial court, therefore, has discretion to dismiss without prejudice if the plaintiff fails to attach the appropriate affidavit and report.[14]

Although the courts generally agree on when and what type of report must be filed to satisfy section 2-622, there is disagreement and controversy among the authorities regarding several other issues relating to section 2-622. It is unclear whether a health care professional's report is required in a claim based on *res ipsa loquitur*;[15] whether the plaintiff must obtain a report from the same kind of specialist as the defendant in the action;[16] whether separate reports must be filed for each defendant;[17] and what kind of health care professional's report must be obtained in a claim against a non-specialist, *e.g.*, a nurse or hospital.[18] There is further disagreement regarding whether a plaintiff must file an expert's report with his complaint even if he can prove his case without an expert,[19] and whether a report is required in every case against a medical defend-

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barred" by the requirement in section 2-622 that a health professional determine whether a cause is reasonable and meritorious before a medical malpractice claim can be heard by the court. *Id.* at 807, 540 N.E.2d at 850. The court held that this was an encroachment on an exclusive and inherent judicial power and, therefore, violated Illinois Constitution, art. VI, section 1. *Id.* at 806, 540 N.E.2d at 850.

9. The constitutionality of section 2-622 was raised in McCastle v. Sheinkop, 121 Ill. 2d 188, 520 N.E.2d 293 (1987), but the Illinois Supreme Court decided the case without reaching this issue. *Id.* at 190, 520 N.E.2d at 294.

10. *See supra* note 9.

11. 121 Ill. 2d 188, 520 N.E.2d 293 (1987).

12. *Id.* at 193 520 N.E.2d at 296. The defendant in *McCastle* successfully argued to the trial court that the dismissal must be with prejudice because dismissals under section 2-622 are pursuant to section 2-619, which concerns defects that cannot be cured by amendment, rather than section 2-615, which concerns defects that can be cured by amendment. *Id.* at 191, 520 N.E.2d at 296.

13. *Id.* at 193, 520 N.E.2d at 296.

14. *Id.*

15. *See infra* notes 21-30 and accompanying text.

16. *See infra* notes 31-37 and accompanying text.

17. *See infra* notes 38-48 and accompanying text.

18. *See infra* notes 49-57 and accompanying text.

19. *See infra* notes 58-69 and accompanying text.

ant.[20] Section 2-622 expressly answers each of these questions; yet, the courts differ in their application of the statute as explained below.

1. Is a Report Required in a Claim Based on *res ipsa loquitur*?

Section 2-622 expressly requires a plaintiff to obtain the report of a health professional if the cause of action is based on *res ipsa loquitur*.[21] While the courts recognize this requirement, some disagreement has arisen regarding the appropriate degree of detail the report must contain.[22] For example, in *Alford v. Phipps*,[23] the fourth district stated in dicta that "[a] broad, general conclusion that 'malpractice has occurred,' without any further mention of a defendant's involvement, is sufficient to satisfy . . . the requirements of section 2-622(c)."[24] This liberal approach contrasts with the conservative approach of the third district. In *Batten v. Retz*,[25] the court interpreted section 2-622 as requiring more than a general declaration of malpractice.[26] The court stated that in claims based on *res ipsa loquitur*, the required certificate of merit and written report " 'must state that, in the opinion of the reviewing health professional, negligence has occurred in the course of medical treatment.' "[27]

Thus, the third district's interpretation requires the expert to draft the report in terms of an opinion, whereas the fourth district requires mere allegations of negligence without a pleading of the expert's opinion.[28] Despite this difference, both interpretations remain consistent with the general concept of *res ipsa loquitur*.[29] This theory permits the plaintiff to plead merely the defendant's

20. *See infra* notes 70-83 and accompanying text.

21. ILL. REV. STAT. ch. 110, para. 2-622(c) (1989). Section 2-622(c) provides:

> Where the plaintiff intends to rely on the doctrine of 'res ipsa loquitur', as defined by Section 2-1113 of this Code, the certificate and written report must state that, in the opinion of the reviewing health professional, negligence has occurred in the course of medical treatment. The affiant shall certify upon filing of the complaint that he is relying on the doctrine of 'res ipsa loquitur'.

Id.

22. *Compare* Batten v. Retz, 182 Ill. App. 3d 425, 538 N.E.2d 179 (3d Dist. 1989) *with* Alford v. Phipps, 169 Ill. App. 3d 845, 523 N.E.2d 563 (4th Dist. 1988).

23. 169 Ill. App. 3d 845, 523 N.E.2d 563 (4th Dist. 1988).

24. *Id.* at 854, 523 N.E.2d at 568.

25. 182 Ill. App. 3d 425, 538 N.E.2d 179 (3d Dist. 1989).

26. *Id.* at 429-430, 538 N.E.2d at 182.

27. *Id.* (quoting ILL. REV. STAT. ch. 110, para. 2-622 (1987) (emphasis omitted)).

28. *See supra* notes 23-27 and accompanying text.

29. W. PROSSER AND W. KEETON, PROSSER AND KEETON ON TORTS sec. 39, 242-46 (5th ed. 1984). The doctrine of *res ipsa loquitur* allows the defendant to prove his case solely on circumstantial evidence. *Id.* The requirements are that the accident be an unu-

general negligence because the defendant has exclusive control of the instrumentality which caused the plaintiff's injury.[30] The expert's declaration negligence was present, in his opinion, does not alter the requirement that the pleadings need only state general negligence in a claim of *res ipsa loquitur*.

2. If the Defendant Is a Specialist Must the Report Be From Someone Who Practices in the Same Specialty?

As originally enacted, section 2-622 expressly stated that when the defendant is a specialist, the necessary report must come from a specialist in the same field of practice as the defendant.[31] Despite this apparently unambiguous mandate from the legislature, three appellate districts have ruled that any licensed physician may submit a report against any specialist.[32] The third district, in *Hagood v. O'Conner*,[33] explained its rationale, stating that under Illinois law a licensed general practitioner could unilaterally identify himself as a specialist. Thus, the same specialty requirement of section 2-622 would be satisfied if both the defendant and health care professional were physicians.[34]

Apparently, in response to these cases, the legislature amended section 2-622(a)(1) to require that the health professional have substantial experience in the "same area of health care or medicine that is at issue in the particular action."[35] This amendment attempts to reinforce section 2-622's goal of eliminating frivolous claims at the pleading stage.[36] It also requires a specialist to make the report when the defendant is a specialist. By restricting the potential pool of health professionals eligible to file the required

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sual one, that the defendant has exclusive control of the instrumentality of the injury, and that the event was not a result of a voluntary action by the plaintiff. *Id.* at 244.

30. *Id.* at 242-46.

31. ILL. REV. STAT. ch. 110, para. 2-622(a)(1) (1989).

32. Moss v. Gibbons, 180 Ill. App. 3d 632, 536 N.E.2d 125 (4th Dist. 1989); Hagood v. O'Connor, 165 Ill. App. 3d 367, 519 N.E.2d 66 (3d Dist. 1988); Relaford v. Kyaw, 173 Ill. App. 3d 1034, 527 N.E.2d 1328 (5th Dist. 1988).

33. 165 Ill. App. 3d 367, 519 N.E.2d 66.

34. *Id.* at 372, 519 N.E.2d at 69.

35. ILL. REV. STAT. ch. 110, para. 2-622(a)(1) (1989), *amended by* Pub. Act 86-646 eff. Sept. 1, 1989. Section 2-622 provides in pertinent part:

> That the affiant has consulted and reviewed the facts of the case with a health professional who . . . practices or has practiced . . . or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and . . . is qualified by experience or demonstrated competence in the subject of the case. . . .

Id.

36. *Hagood*, 165 Ill. App. 3d at 371, 519 N.E.2d at 68-69.

health report, the amendment insures that someone sufficiently competent to determine whether the claim is "reasonable and meritorious" will evaluate plaintiff's complaint.[37]

3. When Must Separate Reports Be Filed for Each Defendant?

Section 2-622(b)[38] requires "a separate certificate and written report" for "each defendant named in the complaint."[39] The appellate courts have varied in their interpretation of this provision. Some courts allow a single certificate and report to apply to more than one defendant; others require a separate report for each defendant.

In *Hagood v. O'Connor*, the third district offered the most liberal interpretation of section 2-622(b) to date.[40] The *Hagood* plaintiff filed a single complaint and report detailing alleged malpractice by the defendant physicians. The trial court dismissed the claim with prejudice based upon the numerous defects in the medical report and affidavit, including the lack of a separate certificate and report for each defendant.[41] The appellate court reversed, stating that section 2-622 must be "liberally construed" to protect the parties' substantive rights.[42] The court indicated that the report of a single health care professional satisfies the requirements of section 2-622 in claims against multiple defendants, therefore eliminating the need to file multiple copies of the report.[43]

In *Alford v. Phipps*,[44] the fourth district refused to follow the liberal construction offered in *Hagood* and dismissed claims against

37. This amendment may also affect the ability of plaintiffs to use experts other than medical doctors in support of claims against nurses and/or hospitals.

38. ILL. REV. STAT. ch. 110, para. 2-622(b) (1989). Section 2-622(b) provides: "Where a certificate and written report are required pursuant to this Section a separate certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time." *Id.*

39. *Id.*

40. 165 Ill. App. 3d 367, 519 N.E.2d 66 (3d Dist. 1988).

41. *Id.* at 372-74, 519 N.E.2d at 68-70. The plaintiff had not properly moved to amend the complaint. *Id.* The court held that a motion to amend first made on appeal will not be granted and that the pleading requirement had to be met in order for the plaintiff to be granted relief. *Id.* at 369-70, 519 N.E.2d at 67-68. The procedural posture of the plaintiff's complaint most likely led the appellate court to interpret the pleading requirements under section 2-622 very leniently. *Id.* at 372-74, 519 N.E.2d 68-70.

42. *Id.* at 371-72, 519 N.E.2d at 70. The court cited the Illinois Code of Civil Procedure's "legislative mandate" that the Code be liberally construed to protect the parties' substantive rights. *Id.* at 371, 519 N.E.2d at 69 (citing ILL. REV. STAT. ch. 110, para. 1-106 (1985)).

43. *Id.* at 371, 519 N.E.2d at 70. The court's holding is consistent with the Illinois Medical Malpractice Act's broad purpose. *Id.*

44. 169 Ill. App. 3d 845, 523 N.E.2d 563. (4th Dist. 1988).

several defendants because the plaintiff failed to attach a separate written report for each of the two defendants.[45] The court confined the *Hagood* rationale to cases in which the filing of additional copies would add "nothing of value to the case."[46] The *Alford* court distinguished *Hagood*, noting that in *Hagood* no confusion had resulted from the plaintiff's failure to file the additional copies of the health care professional's report.[47]

Despite section 2-622(b)'s apparently unambiguous requirement of a separate affidavit and report for each defendant, the imposition of a "confusion" or "add nothing" test allows the courts the flexibility necessary to administer section 2-622 justly and effectively. Vesting the trial court with broad discretion at this early stage of the proceeding permits the courts to consider the potential prejudice to the plaintiff and any extenuating circumstances involved in the case.

4. What Type of Health Professional Report is Required Against a Nurse, Hospital, or Other Non-physician Defendant?

Even though section 2-622 also requires a health professional's report when the defendant is not a physician,[48] the courts have expressed concern over the practical problems of such a requirement.[49] In particular, the courts question the propriety of allowing a physician unfamiliar with an area of health care to determine the appropriate standard of care.[50]

In *Shanks v. Memorial Hospital*,[51] the fifth district held that a physician's report was required because a hospital was the defendant.[52] The court reasoned that hospitals are encompassed by the "all other defendants" language of section 2-622(a)(1).[53] It recognized that requiring a physician's report in claims against a nurse

45. *Id.* at 855, 523 N.E.2d at 569.

46. *Id.* at 855, 523 N.E.2d at 569 (citing *Hagood*, 165 Ill. App. 3d at 374, 519 N.E.2d at 70).

47. *Id.*

48. ILL. REV. STAT. ch. 110, para. 2-622(a)(1) (1989). Section 2-622 (a)(1) provides in part: "For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice medicine in all its branches." *Id.*

49. Shanks v. Memorial Hosp., 170 Ill. App. 3d 736, 525 N.E.2d 177 (5th Dist. 1988) (registered nurse's affidavit insufficient to satisfy requirements of section 2-622).

50. *Id.* at 740, 525 N.E.2d at 180.

51. 170 Ill. App. 3d 736, 525 N.E.2d 177 (5th Dist. 1988).

52. *Id.* at 739, 525 N.E.2d at 180.

53. *Id.* (citing ILL. REV. STAT. ch. 110, para. 2-622(a)(1) (1987)). *See supra* note 49 and accompanying text.

or hospital would probably involve physicians in areas beyond their ken.[54] The resulting potential for confusion would be multiplied by the number of different health care occupations requiring such a report.[55] Despite its recognition that serious problems would arise, the court based its holding on the clear language of the statute. It noted that concern over a physician not being the appropriate party to file a report, in certain circumstances, should be addressed to the legislature.[56]

The requirement of a physician's report in cases involving non-physician defendants is inconsistent with the general philosophy of section 2-622. Originally, and as amended, section 2-622 required medical malpractice plaintiffs to produce a report by a qualified individual stating that the cause of action was reasonable and meritorious. As *Shanks* acknowledged, a physician may not always be the most accurate source for determining when an actionable health care malpractice claim exists. Arguably, an expert or trained professional in the particular field would be more competent, to determine whether negligence might be present, than a physician with minimal contact with the area of medicine involved. Thus, requiring plaintiffs to obtain a report from physicians unfamiliar with the practices in a particular health care field contradicts the intended purpose of section 2-622.

5. Is a Report Required Even Though the Plaintiff Can Prove His Case at Trial Without an Expert?

The fourth district has reached conflicting decisions concerning the necessity of a physician's report when an expert witness would not be needed to prove liability at trial.[57] In *Lyon v. Hasbro Industries Inc.*,[58] plaintiff sued for injuries allegedly sustained during transportation by ambulance to a hospital. The court stated that

54. *Shanks*, 170 Ill. App. 3d at 740, 525 N.E.2d at 180.

55. *Id.* The court's holding would require physicians' reports in cases involving defendants from a variety of health care occupations such as "physical therapists, occupational therapists, operating room and lab technicians, pharmacists, hospital administrators, dieticians, respiratory therapists, X-ray technicians, orderlies, optometrists, oculists, opticians, dental hygienists, medical records personnel, [and] nurses' aides, as well as nurses." *Id.* at 740, 525 N.E.2d at 180.

56. *Id.*

57. Owens v. Manor Health Care Corp., 159 Ill. App. 3d 684, 688, 512 N.E.2d 820, 823 (4th Dist. 1987) (expert witness testimony is not required where "[t]he specific act does not arise from medical diagnoses or treatment"); Lyon v. Hasbro Indus. Inc., 156 Ill. App. 3d 649, 655, 509 N.E.2d 702, 706 (4th Dist. 1987) (an expert witness would not be necessary to prove liability in cases where the negligence is within the "knowledge of ordinary jurors").

58. 156 Ill. App. 3d 649, 509 N.E.2d 702 (4th Dist. 1987).

section 2-622 required a health professional's report because plaintiff claimed that defendant negligently failed to provide the ambulance with necessary health care equipment.[59] The court reasoned that section 2-622 expressly states "that it applies in any action."[60] The court stated that the need for expert testimony at trial and the requirements of section 2-622 are unrelated.[61] However, the court did not require the plaintiffs to provide a physician's report for his allegation that defendant was negligent in the maintenance of the ambulance's engine.[62]

The *Lyon* holding is difficult to reconcile with a contemporaneous decision from the fourth district. In *Owens v. Manor Health Care Corp.*,[63] the fourth district distinguished "[c]ustodial shelter care" from medical treatment in a case that involved alleged negligence by a nursing home.[64] The court noted that the alleged negligent act did not arise from medical diagnosis or treatment, which would have necessitated expert testimony at trial, but was only a result of ordinary negligence.[65] The court held:

> While the term 'healing art malpractice' must be construed broadly within the health-care profession, only those cases that require expert analysis of a medical condition, treatment procedure, or diagnosis, need comply with section 2-622. Where ordinary negligence is alleged, there is no need to comply with the strict pleading requirements of section 2-622.[66]

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59. *Id.* at 655-56, 509 N.E.2d at 707. The plaintiff alleged that the defendant was negligent in its maintenance of the ambulance by failing to have equipment in the ambulance needed to treat plaintiff's subsequent cardiac arrest. *Id.*

60. *Id.* at 655-56, 509 N.E.2d at 707.

61. The court stated "[that] expert testimony would not be needed at trial to establish negligence does not address the necessity of complying with the provisions contained in section 2-622 of the Code at the pleading stage." *Id.* at 655, 509 N.E.2d at 707.

62. *Id.* at 655, 509 N.E.2d at 706. The court stated that while the failure to provide adequate transportation and to render the necessary emergency medical care required compliance with section 2-622, the allegation that defendant was negligent in maintaining the ambulance fell outside the scope of the statute. *Id.* The court did not explain why the negligent maintenance of an ambulance did not come within the scope of 2-622. *Id.*

63. 159 Ill. App. 3d 684, 512 N.E.2d 820 (4th Dist. 1987). *Owens* involved a claim against a nursing home facility brought by a resident who fell because he was negligently restrained in his wheelchair. *Id.* at 685, 512 N.E.2d at 821.

64. *Id.* at 688, 512 N.E.2d at 823.

65. *Id.* at 688-89, 512 N.E.2d at 823.

66. *Id.* at 689, 512 N.E.2d at 823-24. Another fourth district case addressing the failure to restrain a patient is Taylor v. City of Beardstown, 142 Ill. App. 3d 584, 491 N.E.2d 803 (4th Dist. 1986). *Taylor* was decided before the enactment of section 2-622 and dealt with a summary judgment motion. *Id.* at 590, 491 N.E.2d at 807. One of the bases for affirming the trial court's grant of summary judgment was that the claim of negligence based on the failure to restrain a patient required expert testimony. *Id.* at 600-01, 491 N.E.2d at 814.

Because the *Owens* plaintiff alleged only ordinary negligence in its complaint against the nursing home, the court did not require compliance with the pleading requirements of section 2-622.[67]

The requirement of a report for the failure to carry certain ambulance equipment and the relaxation of the rule for a claim against a nursing home appear contradictory. Even more difficult to reconcile is the *Lyon* court's requirement of an affidavit even if no expert would be needed at trial with the *Owens* court's finding that only cases needing expert analysis need comply with section 2-622.

If the medical malpractice plaintiff had to file a health professional's report in cases of ordinary negligence the purpose of section 2-622 would be defeated. Section 2-622 places a heavier burden on medical malpractice plaintiffs for the sole purpose of ensuring that only reasonable and meritorious claims progress past the pleading stage.[68] To require a health professional's report when a plaintiff brings an ordinary negligence action would result in placing a heavier burden on certain plaintiffs based not on their cause of action, but on the defendant's identity.

6. Is a Report Required in Every Case Against a Medical Defendant?

Under section 2-622, the affidavit and the health professional's report need only be filed with the complaint when the case involves "medical, hospital, or other healing art malpractice."[69] The Illinois courts have differed greatly on what is considered "healing art malpractice."[70]

In *Kolanowski v. Illinois Valley Community Hospital*,[71] the third district approved the dismissal of the plaintiff's complaint for failure to comply with section 2-622 in a claim against a hospital's respite care program.[72] *Kolanowski* distinguished the factually similar *Owens*[73] on two grounds. First, the court noted that the plaintiff in *Kolanowski* was not in the hospital for custodial shelter

67. *Owens*, 159 Ill. App. 3d at 689, 512 N.E.2d at 824.

68. *Lyon*, 156 Ill. App. 3d at 655, 509 N.E.2d at 706-07. (quoting 84th Ill. Gen. Assem., General House Proceedings, May 23, 1985, at 406 (Rep. Hawkinson)).

69. ILL. REV. STAT. ch. 110, para. 2-622 (1989).

70. *See e.g.*, *Owens*, 159 Ill. App. 3d at 688, 512 N.E.2d at 823 (finding no healing art malpractice involved where the patient fell from a wheelchair); *Lyon*, 156 Ill. App. 3d at 651, 509 N.E.2d at 704 (finding healing art malpractice to encompass negligent conditions in an ambulance).

71. 188 Ill. App. 3d 821, 544 N.E.2d 821 (3d Dist. 1989).

72. *Id.* at 825, 544 N.E.2d at 825.

73. Both *Owens* and *Kolanowski* involved a confused patient who was unrestrained

care like the *Owens* plaintiff, even though Kolanowski had not been evaluated as needing the highest level of care.[74] Second, in *Kolanowski*, the plaintiff's injury resulted from the defendant's failure to provide proper medical treatment, whereas in *Owens* the injury resulted from plaintiff's attempt to leave his wheelchair.[75] Based on these differences, the *Kolanowski* court held that the hospital's actions constituted a form of healing art malpractice and, therefore, compliance with section 2-622 was required.[76]

Although neither of the stated reasons are particularly persuasive,[77] *Kolanowski* reached the appropriate result. Section 2-622 is applicable because the question of whether a patient should be restrained, required medical judgment. In contrast, *Owens* involved no question of medical judgment.

In addition to distinguishing between the type of care patients receive, courts have also looked to the underlying nature of the action to determine whether the plaintiff must comply with the requirements of section 2-622. In *Mooney v. Graham Hospital Association*,[78] the court held that a plaintiff who allegedly slipped on an accumulation of liquid on the floor of her room[79] did not need to attach a health care professional's report to her complaint.[80] The court stated that the plaintiff did not have to comply with the requirements of section 2-622 "[a]s long as the standard of care which a plaintiff is attempting to establish is not related to a patient's treatment or the hospital's medical standard of care."[81] The court held that since the plaintiff was not attempting to establish a medical standard of care, compliance with section 2-622 was unnecessary.[82]

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and fell. *Kolanowski*, 188 Ill. App. 3d at 822, 544 N.E.2d at 822; *Owens*, 159 Ill. App. 3d at 685, 512 N.E.2d at 821.

74. *Kolanowski*, 188 Ill. App. 3d at 824-25, 544 N.E.2d at 824.

75. *See also* Edelin v. Westlake Community Hosp., 157 Ill. App. 3d 857, 510 N.E.2d 958 (1st Dist. 1987). *Edelin* involved an unescorted patient who fell when she was leaving the hospital after surgery. *Id.* at 859, 510 N.E.2d at 959. The directed verdict for the defendant was reversed; the court held that expert testimony was not necessary to establish a standard of care under those facts. *Id.* at 862, 510 N.E.2d at 961-62.

76. *Kolanowski*, 188 Ill. App. 3d at 825, 544 N.E.2d at 825.

77. Whether a patient is admitted "for the purpose of being restored to a normal physical or mental state" as in *Kolanowski*, or for continuing nursing care as in *Owens*, an institution is not excused from exacerbating the patient's condition. Additionally, the distinction between a fall from a wheelchair or a fall from a bed is inconsequential.

78. 160 Ill. App. 3d 376, 513 N.E.2d 633 (3d Dist. 1987).

79. *Id.* at 378, 513 N.E.2d at 634-35.

80. *Id.* at 382, 513 N.E.2d at 637.

81. *Id.*

82. *Id.*

The distinction between the *Mooney* and *Kolanowski* holdings depends on whether the defendant's medical standard of care is in question, not on the particular defendant or the type of injury. Plaintiffs bringing ordinary negligence claims would be unaffected by section 2-622 if compliance is required only when a medical standard of care is questioned. A basic rule that section 2-622 must be complied with whenever a medical standard of care needs to be established will undoubtedly result in a rule requiring that section 2-622 be complied with in all cases requiring an expert witness. This would be consistent with the purpose and philosophy of section 2-622.

B. Preliminary Motions

There are two additional types of preliminary motions that may cause unique problems for the medical malpractice plaintiff. First, section 2-1009 allows plaintiffs to move for voluntary dismissal prior to trial and to refile the claim at a later time. Second, Rule 220 allows the court, on its own motion, to compel a party's disclosure of expert witnesses' identities and opinions. Two problems arise in relation to these two preliminary motions: first, whether the plaintiff may take a voluntary dismissal, without prejudice, when faced with an adverse ruling;[83] second, whether a plaintiff who takes a voluntary dismissal to avoid a court's Rule 220 order, to disclose expert materials, can be precluded from refiling as a sanction for abuse of the discovery process.[84]

1. Voluntary Dismissal

Traditionally, a plaintiff had an absolute right to take a voluntary nonsuit at any time before a hearing began.[85] Recently, however, this right has been somewhat restricted.[86] In *Gibellina v. Handley*,[87] the Illinois Supreme Court held that a trial court may consider a filed dispositive motion, even if a plaintiff moves for voluntary dismissal beofre the dispositive motion has been decided.[88]

83. *See infra* notes 87-95 and accompanying text.

84. *See infra* notes 96-107 and accompanying text.

85. ILL. REV. STAT. ch. 110, para. 2-1009 (1989). *See also* Kahle v. John Deere Co., 104 Ill. 2d 302, 472 N.E.2d 787 (1984).

86. Gibellina v. Handley, 127 Ill. 2d 122, 535 N.E.2d 858 (1989); O'Connell v. St. Francis Hosp., 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).

87. 127 Ill. 2d 122, 535 N.E.2d 858 (1989).

88. *Id.* at 137-138, 535 N.E.2d at 866. The court stated that " '[t]he present wording of the statute . . . is an apparent compromise between two extremes: the view that a plaintiff has an unfettered ability to dismiss his case, and the view that the inconvenience and expense suffered by a defendant can thwart a plaintiff's right of dismissal.' " *Id.* at

The court noted that the procedural device of voluntary dismissal has been used for purposes other than its original objective. As originally enacted it was designed to permit correction of procedural or technical deficiencies in the pleadings. The court noted that today, many litigants use the device to avoid adjudication on the merits.[89] This abuse has contributed to the "crowded dockets" and has "infringed on the authority of the judiciary to discharge its duties fairly and expeditiously."[90] The court held that to remedy these problems, the trial court must have discretion to consider a dispositive motion before it considers a motion for voluntary dismissal.[91]

The *Gibellina* holding takes on added significance in the medical malpractice field because a trial court has discretion to dismiss a case with prejudice under section 2-622 upon the opposing party's motion.[92] Under *Gibellina*, therefore, a dispositive ruling under section 2-622 may be made before the court considers a plaintiff's motion for voluntary dismissal.[93] Thus, the potential for precluding a plaintiff's action at a very early stage of the proceedings is increased. Consequently, courts should use their discretion judiciously in order to protect the parties' substantive rights.

2. Rule 220 Orders of Disclosure

A plaintiff who fails to comply with a Rule 220 order to identify expert witnesses and disclose experts' reports can be sanctioned under Rule 219 for aubse of discovery.[94] These sanctions, including entry of a default judgment against plaintiff, arguably could be imposed if a plaintiff moved for voluntary dismissal of his complaint to avoide compliance with a Rule 220 disclosure order. Most courts, however, appear reluctant to impose sanctions under

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132-33, 535 N.E.2d at 863 (quoting *In re* Marriage of Wright, 92 Ill. App. 3d 708, 711, 415 N.E.2d 1196, 1199 (1st Dist. 1980)).

The court also stated that the Illinois Code of Civil Procedure has two goals: the speedy and final determination of disputes and the settlement of suits in accordance with the parties' substantive rights. *Id.* at 134, 535 N.E.2d at 864. The court cautioned, however, that a party's substantive rights should not be sacrificed for the sake of a swift judicial determination. *Id.*

89. *Id.* at 137, 535 N.E.2d at 865.

90. *Id.* at 137, 535 N.E.2d at 866.

91. *Id.* at 137-38, 535 N.E.2d at 866.

92. McCastle v. Sheinkop, 121 Ill. 2d 188, 520 N.E.2d 293 (1987).

93. *Gibellina*, 127 Ill. 2d 122, 137-38, 535 N.E.2d 858, 866.

94. ILL. REV. STAT. ch. 110A, para. 219(c) provides for sanctions to be levied against a party who "unreasonably refuses to comply" with any court order or other provision of the rules. These sanctions include staying the proceedings and entering a default judgment. *Id.*

Rule 219 for the refiling of claims voluntarily dismissed and subsequently refiled under section 2-1009.

In *Heuer Sons Implement Co. v. Dukes*,[95] the first district stated that the Rule 219 sanctions would not carry over to plaintiff's refiled case, even though plaintiff moved for a voluntary dismissal primarily to avoid the Rule 219 sanctions.[96] The court based its reasoning in part on the theory that the right to a voluntary dismissal is absolute.[97] However, the *Heuer* court stated that the Illinois Supreme Court's decision in *Gibellina v. Handley* applied to cases filed after that decision.[98] Thus, the *Heuer* court ruled the *Gibellina* holding inapplicable because *Gibellina* was decided after the *Heuer* case was initially filed.[99]

Other courts, while not sanctioning a plaintiff's misuse of a voluntary dismissal, have urged the legislature to limit the plaintiff's right to voluntarily dismiss or refile a claim to prevent "unfairness and abuse."[100] Obviously, the courts may follow the lead of the Illinois Supreme Court in *Gibellina* and restrict the right of a plaintiff to avoid the imposition of sanctions by seeking a voluntary dismissal.

Courts have consistently held that sanctions imposed under Rule 219, for violation of a Rule 220 order compelling disclosure of expert witnesses and their opinions, do not carry over to a case refiled after a voluntary dismissal.[101] *Highland v. Stevenson*,[102] which involved only Rule 220 order, is directly on point.[103] Although the complaint in *Highland* had not been refiled, the court's opinion unambiguously indicated that the Rule 220 order would carry over to the refiled case.[104] The court reasoned that Rule 220 would have its intended effect by requiring disclosure of witnesses before a trial

95. 183 Ill. App. 3d 56, 538 N.E.2d 1180 (5th Dist. 1989).

96. *Id.* at 58, 538 N.E.2d at 1182.

97. *Id.* (citing Lafin v. Allstate Ins. Co., 168 Ill. App. 3d 1075, 1078, 523 N.E.2d 106, 108-09 (1st Dist. 1988)). The court also stated that the right to voluntarily dismiss and refile would be meaningless if plaintiff's sanctions from an earlier suit were levied in the refiled suit. *Id.*

98. *Id.* at 59, 538 N.E.2d at 1182.

99. *Id.*

100. *Lafin*, 168 Ill. App. 3d at 1079, 523 N.E.2d at 109 (Rizzi, J., concurring).

101. *Heuer*, 183 Ill. App. 3d 56, 538 N.E.2d 1180; *Lafin*, 168 Ill. App. 3d 1075, 523 N.E.2d 106. Both of these cases involved claims that were refiled after Rule 219 sanctions had been imposed; both courts held that it was inappropriate to consider the sanctions in the subsequently refiled case. *Heuer*, 183 Ill. App. 3d at 58, 538 N.E.2d at 1182; *Lafin*, 168 Ill. App. 3d at 1078, 523 N.E.2d at 108-09.

102. 153 Ill. App. 3d 390, 505 N.E.2d 776 (3rd Dist. 1987).

103. *Id.* at 396, 505 N.E.2d at 780.

104. *Id.*

in a refiled action.[105] The court, therefore, denied the defendant's motion to dismiss the complaint with prejudice for failure to comply with Rule 220.[106]

The availability of pre-trial motions such as motions to dismiss for failure to comply with section 2-622 or a Rule 220 order permits greater judicial economy. Crowded dockets and the added costs of extended litigation are problems that need to be solved. The courts' consideration of such motions, however, must be conducted such that the parties' substantive rights are protected and preserved. Consequently, the courts must exercise great caution is using their power to dismiss cases with prejudice, or to enter a default judgment based upon a party's failure to comply with either section 2-622 of Rule 220.

III. Expert Witnesses and Summary Judgment

While the trial court is vested with considerable discretion over motions made during pre-trial proceedings,[107] judicial discretion is far more limited with respect to motions for summary judgment.[108] This lack of judicial discretion is consistent with the underlying purpose of summary judgment, which is to address the merits of the case. Expert testimony in medical malpractice cases often is decisive in determining whether a motion for summary judgment will be granted.

A. The Need for an Expert Witness Affidavit to Avoid Summary Judgment

Generally, a plaintiff must have an expert witness to establish a prima facie case of medical malpractice.[109] In *Purtill v. Hess*,[110] the Illinois Supreme Court held that summary judgment is appropriate in a medical malpractice case if the plaintiff fails to present competent expert testimony on the applicable standard of care.[111] In sub-

105. *Id.*
106. *Id.*
107. *See supra* notes 5-106 and accompanying text.
108. Ill. Rev. Stat. ch. 110, para. 2-1005(c) provides in pertinent part:

> The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.
109. Borowski v. Von Solbrig, 60 Ill. 2d 418, 328 N.E.2d 301 (1975). *See* 4 R. Michael, Illinois Practice: Civil Procedure Before Trial, § 39.3 (1989).
110. 111 Ill. 2d 229, 489 N.E.2d 867 (1986).
111. *Id.* at 250, 489 N.E.2d at 876. *See also* Addison v. Whitenburg, 124 Ill. 2d 287,

sequent cases, courts have generally required the plaintiff to provide an expert witness' affidavit.[112]

Some appellate courts, however, have held that a plaintiff may establish a prima facie case based on the defendant physician's own testimony when the defendant physician does not object.[113] These courts have held that when the defendant did not object to the absence of plaintiff's expert witness testimony[114] or when the defendant physician's own testimony could satisfy the expert testimony requirement,[115] a plaintiff's failure to provide an expert witness would not result in a grant of summary judgment.[116]

Considerable controversy exists among the appellate courts over the circumstances under which a plaintiff's request for additional time to obtain experts' affidavits in opposition to a motion for summary judgment should be granted. Three cases from the first district illustrate this debate.[117]

In *Castro v. South Chicago Community Hospital*,[118] the first district affirmed the trial court's grant of summary judgment because the plaintiff failed to disclose an expert witness before the court-imposed deadlines for such disclosure.[119] The court ruled that

299, 529 N.E.2d 552, 557 (1988) (holding that in a medical malpractice case summary judgment may be granted when a plaintiff fails to produce competent expert testimony as to the applicable standard of care). The *Addison* court also noted that expert testimony was not required in cases involving common treatment or gross negligence. *Id.* at 297, 529 N.E.2d at 556.

112. *See* 4 R. MICHAEL, *supra* note 109, at § 39.3. Because expert testimony is required at trial, courts have held that a medical malpractice plaintiff's burden of production includes expert testimony on the essential elements of the claim. *Id.* Although Professor Michael discusses this issue in the context of a defendant physician's attempt to avoid entry of summary judgment on the basis of his own affidavit, he asserts that the actual rationale in cases allowing such use of a defendant physician's affidavit has been based on the plaintiff's inability to provide expert testimony. *Id.*

113. Casey v. Penn, 45 Ill. App. 3d 1068, 362 N.E.2d 1373 (2d Dist. 1977); Anderson v. Martzke, 131 Ill. App. 2d 61, 266 N.E.2d 137 (1st Dist. 1970).

114. *Casey*, 45 Ill. App. 3d at 1069, 362 N.E.2d at 1375.

115. *Anderson*, 131 Ill. App. 2d at 65, 266 N.E.2d at 139 (court stated that the defendant physician's testimony "may be sufficient" to satisfy the expert witness requirement).

116. *Casey*, 45 Ill. App. 3d at 1069, 362 N.E.2d at 1375; *Anderson*, 131 Ill. App. 2d at 65, 266 N.E.2d at 139.

117. Castro v. South Chicago Comm. Hosp., 166 Ill. App. 3d 479, 519 N.E.2d 1069 (1st Dist. 1988); Cometo v. Foster McGaw Hosp., 167 Ill. App. 3d 1023, 522 N.E.2d 117 (1st Dist. 1988); Kubian v. Labinsky, 178 Ill. App. 3d 191, 533 N.E.2d 22 (1st Dist. 1988).

118. 166 Ill. App. 3d 479, 519 N.E.2d 1069 (1st Dist. 1988).

119. *Id.* at 485, 519 N.E.2d at 1073. The plaintiff had disclosed an unfavorable expert, who testified at his deposition that the defendant did not deviate from the standard of care. *Id.* at 481, 519 N.E.2d at 1070. The defendant moved for enforcement of the court-imposed disclosure deadlines and summary judgment. *Id.* Even though the plain-

under Rule 220,[120] the trial court has the discretion to disqualify a proffered expert and only a "clear showing of abuse of discretion" would warrant a reversal of the trial court's decision.[121]

The first district reached an opposite result in *Cometo v. Foster McGaw Hospital*.[122] In *Cometo*, the court stated that the trial court failed to consider that circumstances had changed[123] after initial imposition of Rule 220 sanctions against the plaintiff.[124] The trial court granted summary judgment without reviewing whether discovery should be reopened.[125] In reversing the trial court, the appellate court stated that a grant of summary judgment following the failure to reopen discovery was too harsh, especially in the context of a medical malpractice case.[126] The appellate court, therefore, reopened discovery to provide the plaintiff with the opprtunity to obtain evidence necessary to avoid summary judgment.

Similarly, in *Kubian v. Labinsky*,[127] the first district reversed the trial court's dismissal of the plaintiff's claim as a sanction for his repeated failure to disclose experts pursuant to court orders.[128] The appellate court noted that the judge's frequent attempts to compel discovery were repeatedly frustrated by an attorney who no longer represented the plaintiff.[129] Further, the court noted that plaintiff had informed the court of the expert witness' refusal to

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tiff was given additional time, he failed to respond to the motions. *Id.* After the court-imposed deadlines had passed, plaintiff disclosed an expert favorable to his position. *Id.* The trial court denied the plaintiff's request for more time and denied the request to use any expert except the previously disclosed unfavorable expert. *Id.*

120. Illinois Supreme Court Rule 220 provides in pertinent part: "Failure to . . . comply with the discovery contemplated herein will result in disqualification of the expert as a witness." ILL. REV. STAT. ch. 110A, para. 220(b)(1) (1989).

121. *Castro*, 166 Ill. App. 3d at 482, 519 N.E.2d at 1071.

122. 167 Ill. App. 3d 1023, 522 N.E.2d 117 (1st Dist. 1988).

123. *Id.* at 1030, 522 N.E.2d at 122. *Cometo* involved a Rule 220 disclosure order that had been entered twice. Plaintiff's expert witness refused to testify at his scheduled deposition. The defendant moved to bar the use of any expert, and later for summary judgment. *Id.* at 1026, 522 N.E.2d at 119. The plaintiff filed the original expert witness' counter-affidavit because the expert had changed his mind and agreed to testify after all. *Id.* at 1027, 522 N.E.2d at 119. The appellate court reversed the grant of summary judgment for defendant apparently because the parties had agreed to a continuance and because enought time existed for the defendant to obtain the expert's discovery deposition before trial. *Id.* at 1027-29, 522 N.E.2d at 120-22.

124. *Id.* at 1030, 522 N.E.2d at 122.

125. *Id.*

126. *Id.*

127. 178 Ill. App. 3d 191, 533 N.E.2d 22 (1st Dist. 1988).

128. *Id.* at 198, 533 N.E.2d at 26-27.

129. *Id.* at 200-201, 533 N.E.2d at 27-28.

testify and had taken appropriate measures to replace the expert.[130] In light of these circumstances, the court stated that "plaintiff's noncompliance with the court's orders did not rise to the level of deliberate, contumacious disregard for the court's authority to warrant dismissal of the action."[131] Having reversed the trial court, the appellate court allowed the plaintiff to present the medical expert testimony needed to avoid summary judgment.

These three cases, all decided within a year's time and within the same appellate district, demonstrate the difficulty appellate courts have experience in defining the boundaries of a trial court's discretionary power to grant a plaintiff additional time to obtain expert witness testimony to oppose summary judgment. The *Castro* court accorded the trial court's use discretion great deference, whereas the *Kubian* and *Cometo* courts were more willing to circumscribe the use of this discretion.[132] Thus, the boundaries of a trial court's discretion in this area appears unresolved and will undoubtedly be subject to future litigation in the first district.

In contrast, the fourth district upheld severe sanctions levied by the trial court, even though the trial court had entered only one Rule 220 order prior to the imposition of sanctions in *James v. Yasunaga*.[133] The *James* plaintiffs had not disclosed an effective expert witness within the time limits set by the court and the defendant filed a motion for summary judgment.[134] The plaintiff finally tendered another expert's affidavit on the day scheduled for oral argument of the summary judgment motion.[135] The trial court struck the additional affidavit and granted summary judgment for the defendant.[136] The appellate court rejected plaintiff's contention that the trial court had abused its discretion,[137] reasoning that the trial court's imposition of an "affirmative obligation on *all* parties to disclose their experts" was within the court's discretion.[138] The appellate court considered the plaintiff's failure to meet this

130. *Id.* at 201, 533 N.E.2d at 28.

131. *Id.*

132. *Castro*, 166 Ill. App. 3d at 482, 519 N.E.2d at 1071; *Kubian*, 178 Ill. App. 3d at 201, 533 N.E.2d at 28.

133. 157 Ill. App. 3d 450, 510 N.E.2d 531 (4th Dist. 1987).

134. *Id.* at 453-54, 510 N.E.2d at 534.

135. *Id.* at 455, 510 N.E.2d at 535.

136. *Id.* at 455-56, 510 N.E.2d at 535.

137. *Id.* at 457, 510 N.E.2d at 536. The plaintiff argued that the trial court abused its discretion because the case was not set for trial for some months and the overall discovery cut-off date had not been reached at the time the motion for summary judgment was granted. *Id.*

138. *Id.* (emphasis in original). In affirming the trial court's dismissal, the *James* court distinguished its earlier decision in Hansbrough v. Kosyak. *Id.* at 460, 510 N.E.2d

obligation sufficient cause for the trial court's grant of summary judgment.

The Illinois Supreme Court has described summary judgment as "an important tool in the administration of justice" and encourages its use to avoid "congestion of trial calendars and the expense of unnecessary trials."[139] However, an order of summary judgment after a plaintiff's failure to comply with a single discovery order is perceived by many as being too harsh. The benefits of clear dockets and judicial economy should never be allowed to take precedence over the rights of the parties to have their claims determined on the merits by a court of law.[140] Although the smooth operation of the discovery process is necessary to an efficient judicial system, if the cost of such efficiency is the substantive rights of the parties, the price is too high.

B. Requirements of the Expert Witness' Affidavit

After determining that a qualified expert has been selected by the plaintiff, the court must examine the specificity of the expert witness' affidavit. Determining how specific an expert witness' affidavit must be to preclude summary judgment revolves around the apparent conflict between Supreme Court Rule 191[141] and the Illinois Supreme Court's decision in *Wilson v. Clark*.[142] Rule 191 provides that an affidavit in support of a motion for summary judgment must state with *"particularity the facts"* underlying the claim and *"shall not consist of conclusions."*[143]

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at 538 (citing Hansbrough v. Kosyak, 141 Ill. App. 3d 538, 490 N.E.2d 181 (4th Dist. 1986)).

In *Hansbrough* the court stated that "every reasonable opportunity" should be granted to medical malpractice plaintiffs to establish their case and avoid summary judgment. 141 Ill. App. 3d 538, 490 N.E.2d 181. The *James* court distinguished *Hansbrough* on the basis that the *Hansbrough* trial court had not entered a Rule 220 order setting deadlines for disclosure of experts. *James*, 157 Ill. App. 3d at 460, 510 N.E.2d at 538.

139. Allen v. Meyer, 14 Ill. 2d 284, 292, 152 N.E.2d 576, 580 (1958). *See also* 4 R. MICHAEL, *supra* note 109, at § 38.2 (summary judgment is intended to "pierce the pleadings and test whether the pleadings raise factual issues which warrant a trial").

140. 4 R. MICHAEL, *supra* note 109, at § 38.2.

141. ILL. REV. STAT. ch. 110A, para. 191 (1981). Rule 191 provides in pertinent part:

> (a) Requirements. Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure . . . shall be made on the personal knowledge of the affiants; *shall set forth with particularity the facts* upon which the claim, counterclaim, or defense is based; . . . *shall not consist of conclusions*, but of facts admissible in evidence . . . .

Id. (emphasis added).

142. 84 Ill. 2d 186, 417 N.E.2d 1322, *cert. denied*, 454 U.S. 836 (1981).

143. ILL. REV. STAT. ch. 110A, para. 191 (1981) (emphasis added).

In contrast, the Illinois Supreme Court in *Wilson* held that an expert need not give the bases for his opinion on direct examination; instead, he could merely state his opinion if the person proffering him chose to follow that procedure.[144] When viewed together, Rule 191 and *Wilson* reveal an anomaly regarding expert testimony. Apparently, a greater amount of detail is required in an affidavit submitted in opposition to a motion for summary judgment than would be required upon the actual trial of the case. Given this difference, summary judgment could become the crucial point in a medical malpractice trial because the plaintiff's burden regarding expert testimony will be greatest at this stage.

Appellate courts have split as to whether the *Wilson* holding has relaxed the requirement for expert witness affidavits. The first district in *Kosten v. St. Anne's Hospital*[145] affirmed the trial court's order striking a conclusory affidavit and granting the defendant's motion for summary judgment.[146] The court rejected plaintiff's contention that *Wilson* had relaxed the requirements of Supreme Court Rule 191 and required that expert witness affidavits meet the standard sset forth in Rule 191.[147]

Since *Kosten*, there has been a split between the appellate courts as to the standard for judging expert's affidavits.[148] The second and third district have followed the *Kosten* approach and rejected the proposition that *Wilson* relaxed the requirements for expert

144. *Wilson*, 84 Ill. 2d at 194, 417 N.E.2d at 326. *See* 4 R. MICHAEL, *supra* note 109, at § 39.3 n.9 (stating that in *Wilson*, the Illinois Supreme Court "adopted the federal rules relating to an expert's testimony at trial including the rule which places the burden on the adverse party to elicit the facts underlying the expert's testimony on cross-examination").

145. 132 Ill. App. 3d 1073, 478 N.E.2d 464 (1st Dist. 1985).

146. *Id.*

147. 132 Ill. App. 3d at 1080, 478 N.E.2d at 468. The *Kosten* court stated that:

> *Wilson* has no relevance to summary judgment procedure. An affidavit utilized in summary judgment procedure is totally different from testimony at trial. The affidavit cannot be cross-examined as can a witness at trial. Supreme Court Rule 191 is specific in mandating that affidavits cannot consist of conclusions but must set forth the facts admitted in evidence. Wilson did not overrule or modify Rule 191.

Id.

148. Cases following *Kosten* include: Miklos v. Caliendo, 161 Ill. App. 3d 132, 514 N.E.2d 35 (2nd Dist. 1987); Old Second Nat'l Bank v. Aurora Township, 156 Ill. App. 3d 62, 509 N.E.2d 692 (2nd Dist. 1987); Allstate Ins. Co. v. Panzica, 162 Ill. App. 3d 589, 515 N.E.2d 1299 (3rd Dist. 1987).

The fourth district has rejected the *Kosten* approach. *See e.g.* Taylor v. City of Beardstown, 142 Ill. App. 3d 584, 491 N.E.2d 803 (4th Dist. 1986); Beals v. Huffman, 146 Ill. App. 3d 30, 496 N.E.2d 281 (4th Dist. 1986). For a complete discussion of this split between the Illinois appellate courts, see 4 R. MICHAEL, *supra* note 109, at § 39.3 n.13.

witness affidavits to avoid summary judgment.[149] In contrast, the fourth district has rejected the *Kosten* approach and refused to grant summary judgment on the basis of expert witness affidavits which would be considered insufficient to avoid summary judgment under the *Kosten* approach.[150]

The Illinois Supreme Court's decision in *Purtill v. Hess*[151] implicitly rejects the *Kosten* approach. In *Purtill*, the court refused to strike an affidavit which failed to state that the expert was familiar with the local medical standard of care.[152] The *Purtill* decision undermines the rigid approach of *Kosten* by allowing an otherwise insufficient affidavit to forestall a grant of summary judgment. Although the result in *Purtill* is analogous to the *Wilson* decision, the underlying rationale of *Wilson*, that the expert is subject to cross-examination, is inapplicable to affidavits at the summary judgment stage. This absence of cross-examination necessitates imposing a higher standard to affidavits submitted in support of a summary judgment motion. Therefore, it appears that the *Kosten* approach, which refuses to relax the standards that an expert witness' affidavit is judged by, is correct.

C. Expert Witnesses and the Discovery Process

Illinois Supreme Court Rule 220 became effective on October 1, 1984. In Rule 220, the supreme court recognized that trial courts encounter recurring difficulties when parties are dilatory in their disclosure of expert witnessess' identities or opinions. Late disclosure may lead to the need for either a continuance or an order barring the undisclosed witness' testimony. Continuances fostered delay and judicial inefficiency while the barring expert testimony often precluded a resolution of action on their merits.[153] To provide trial courts with a more effective mechanism to deal with these problems, the supreme court adopted Rule 220.[154]

Under Rule 220, an expert's identity and opinion must be disclosed even if an interrogatory or request to disclose has not been

149. *See infra* note 156.

150. *Id.*

151. 111 Ill. 2d 229, 489 N.E.2d 867 (1986). *See* 4 R. MICHAEL, *supra* note 109, at § 39.3. Michael states that in *Purtill*, the Illinois Supreme Court rejected the ruling in the *Kosten* case *sub silentio*. *Id.* at 249-50.

152. *Purtill*, 111 Ill. 2d at 248-50, 489 N.E.2d at 875-76.

153. ILL. ANN. STAT. ch. 110A, para. 220 (Committee Comments at 438-39) (Smith-Hurd 1985). *See also* Sloan & Adams, *Illinois Supreme Court Rule 220: The Winning Edge in the Battle of Experts*, 77 ILL. B.J. 642 (1989); Foreman & Mueller, *Timely Disclosure of Expert Witnesses—Analysis of Supreme Court Rule 220*, 74 ILL. B.J. 540 (1986).

154. ILL. REV. STAT. ch. 110A, para. 220 (1985).

filed. Four appellate districts have held that the provisions of Rule 220 are self-effectuating.[155] The primary exception to the general disclosure rule arises when the trial court does not set a discovery schedule. In *Illini Aviation, Inc. v. Walden*,[156] the fourth district addressed the limited question of whether a trial court could impose the sanction of deposition costs on the plaintiff for disclosing an expert for the first time during trial.[157] In reversing the trial court,[158] the appellate court stated that the plaintiff had not violated Rule 220 because the trial court failed to set a discovery schedule.[159]

In order to avoid some of the difficulties that result from late disclosure of expert witnesses' identities or opinions, a trial court may enter an order of disclosure *sua sponte*. These orders should be entered *after* preliminary discovery[160] has been completed. Any order entered before preliminary discovery has been completed will invariably result in an expert being deposed before the expert has all the relevant information necessary to render a complete opinion. Premature deposition of experts will in turn result in disclosure of revised or changed opinions later, after further information is furnished. At the very least, these later disclosures will require the redeposing of an opponent's experts — an expensive and time-consuming process. More importantly, these new opinions may

155. Klingler Farms Inc. v. Effingham Equity, Inc., 171 Ill. App. 3d 567, 571, 525 N.E.2d 1172, 1175 (5th Dist. 1988) (ruling the "disclosure of witnesses [is] mandatory, regardless of whether the trial court . . . establish[es] a schedule for disclosure of experts"); Jarmon v. Jinks, 165 Ill. App. 3d 855, 863, 520 N.E.2d 783, 788 (1st Dist. 1987) (excluding an expert witness because defendant lacked "good faith" in failing to disclose the expert witness within 90 days of learning the expert's opinion); McDonald's Corp. v. Butler Co., 158 Ill. App. 3d 902, 910-911, 511 N.E.2d 912, 918 (2nd Dist. 1987) (citing the need to prepare adequately for trial when excluding an expert witness to be called on rebuttal who was not disclosed until the last day of trial); Fischer v. G & S Builders, 147 Ill. App. 3d 168, 172, 497 N.E.2d 1022, 1025 (3rd Dist. 1986) (excluding an expert witness who was not properly disclosed, since the power to exclude was within the trial court's discretion and should not be disturbed "absent a clear showing of abuse").

156. 161 Ill. App. 3d 345, 514 N.E.2d 551 (4th Dist. 1987).

157. *Id.* at 346, 514 N.E.2d at 552.

158. *Id.* The trial court denied defendant's motion to bar the witness but did order the plaintiff to reimburse the defendant for deposition expenses. *Id.*

159. *Id.* at 347, 514 N.E.2d at 552. The appellate court may have been influenced by the plaintiff's recent discovery of the witness and notice to the defendant within the ninety day period prescribed by Rule 220. *Id.*

160. "After preliminary discovery" is defined for the purposes of this article as the time after interrogatories have been answered and the depositions of the occurrence witnesses, doctors, nurses, plaintiffs, etc., have been taken. Entry of a disclosure order after this discovery may be difficult to implement in circuits which have a master assignment call, but this procedure is a feasible approach for circuits where cases are individually assigned from the time of filing.

not be disclosed until the eve of trial; this is the very evil Rule 220 was intended to prevent. Thus, to avoid this problem, any disclosure order entered by the trial court should be entered after preliminary discovery has been completed.

Upon a finding that a party's disclosure of an expert's identity or opinion was untimely, the court must decide on the appropriate sanction. Illinois Supreme Court Rule 220 specifically identifies the appropriate sanction for failure to make proper disclosure: the expert will be disqualified as a witness.[161] A literal interpretation of this statute leaves the trial court with little discretion in determining the appropriate sanction.[162]

Several courts have held, however, that the trial court retains discretion to impose a variety of sanctions for Rule 220 violations.[163] In *Fischer v. G & S Builders*,[164] for example, the court held that the trial court had the discretion to determine the appropriate sanctions for failure to disclose an expert witness.[165] The appellate court stated that the trial court had the discretion to either grant a continuance or bar the expert and that there was no abuse of discretion in barring the expert.[166]

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161. ILL. REV. STAT. ch. 110A, para. 220(b) (1989). Rule 220 states: "Failure to make the disclosure required by this rule or to comply with the discovery contemplated herein will result in disqualification of the expert as a witness." *Id.*

162. McDonald's Corp. v. Butler Co., 158 Ill. App. 3d 902, 511 N.E.2d 912 (2nd Dist. 1987). *See* Phelps v. O' Malley, 159 Ill. App. 3d 214, 511 N.E.2d 974 (2nd Dist. 1987). In *Phelps*, the second district explicitly rejected the plaintiff's contention that the trial court should have broad discretion in imposing sanctions. *Id.* at 224, 511 N.E.2d at 981. In comparing Rule 220 to Rule 219(c) the court stated:

> Rule 220 . . . does not list a range of possible sanctions as does Rule 219. The only sanction provided for in Rule 220 is disqualification of the expert witness, and the trial court's discretion is thus severely limited. We feel such limited discretion is appropriate. *If each instance of nondisclosure of an expert is treated uniquely, litigants and trial courts will be faced with the same uncertainties mentioned above."*

Id. (emphasis added).

163. Dietrich v. Jones, 172 Ill. App. 3d 201, 526 N.E.2d 450 (1st Dist. 1988); Fischer v. G & S Builders, 147 Ill. App. 3d 214, 511 N.E.2d 974 (2nd Dist. 1987); Renfro v. Allied Indus. Equip. Corp., 155 Ill. App. 3d 140, 507 N.E.2d 1213 (5th Dist. 1987).

164. 147 Ill. App. 3d 168, 497 N.E.2d 1022 (3rd Dist. 1986).

165. *Id.* at 172, 497 N.E.2d at 1025. In *Fischer*, the plaintiff obtained a plumbing inspection report early in the litigation but didn't designate its author as an expert witness until the final pretrial conference. *Id.* at 171, 497 N.E.2d at 1024. After the plaintiff resisted the defendant's motion for a continuance, the trial court barred the witness' expert testimony but allowed the witness to testify concerning his occupation and observations he made during the inspection. *Id.* at 171-72, 497 N.E.2d at 1024.

166. *Id.* at 172, 497 N.E.2d at 1024-25. The plaintiff argued that the defendants were not prejudiced by late disclosure because the expert's identity had been disclosed and defendants were aware of the report. *Id.* However, the appellate court held that because the witness had not been disclosed as an "expert" he could have been a "consultant."

The first district has adopted the rationale established in *Fischer*. In *Dietrich v. Jones*,[167] the court rejected the defendant's contention that Rule 220 mandates an inflexible sanction of disqualification.[168] The plaintiff had furnished an appraisal report, but had not disclosed its author as an expert witness. The court found that furnishing the report constituted sufficient compliance with Supreme Court Rule 220.[169] Distinguishing *Fischer*,[170] the *Dietrich* court concluded that the trial court did not abuse its discretion by allowing the expert to testify.[171]

The fifth district has also accorded the trial court discretion in choosing the appropriate sanction for failure to disclose witnesses. In *Renfro v. Allied Industrial Equipment Corp.*,[172] the court implied that for the purposes of the instant case, Rule 220 did not alter the broad discretion given to the trial court under preexisting law.[173] Citing a pre-Rule 220 decision, the court stated,

> As with the decision to impose sanctions for an unreasonable failure to comply with discovery requests, the decision to allow or exclude expert testimony is a matter committed to the sound discretion of the trial court. The discretion given to the trial court is broad and will not be interfered with unless it appears to have been abused.[174]

In those cases holding that the trial court had discretion to im-

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Thus, plaintiff's late disclosure prevented defendants from obtaining full discovery of the expert's opinions. *Id.* at 172-73, 497 N.E.2d at 1024-25.

167. 172 Ill. App. 3d 201, 526 N.E.2d 450 (1st Dist. 1988).

168. *Id.* at 205, 526 N.E.2d at 453-54.

169. *Id.* at 205, 526 N.E.2d at 453.

170. *Id.* The court noted that the plaintiff in *Dietrich*, unlike the opposing party in *Fischer*, had offered to continue the trial in order to allow the defendant to depose the expert but the defendant refused that offer. *Id.*

171. *Id.* at 205, 526 N.E.2d at 453.

172. 155 Ill. App. 3d 140, 507 N.E.2d 1213 (5th Dist. 1987).

173. *Id.* at 161-62, 507 N.E.2d at 1230-31. In *Renfro*, defendant Monsanto had disclosed an expert witness and furnished a copy of his report in July, 1984. *Id.* Plaintiff's counsel indicated that he would depose the expert witness, but this was never done because Monsanto subsequently advised the plaintiff that it would not call the expert in his capacity as an expert. *Id.* at 161, 507 N.E.2d at 1230. Co-defendant Logisticon sent a notice to plaintiff's counsel on July 31, 1984, stating that " '[i]n addition to those witnesses disclosed by plaintiff . . . and her attorney and defendant Monsanto Company,' it might call medical, vocational, rehabilitation, economic and engineering professionals." *Id.* Logisticon sent another letter three weeks later in which it specifically listed two experts, neither of whom was the original expert witness. *Id.* Logisticon then indicated when the trial was more than halfway complete, that it intended to call the original expert witness. *Id.* The trial court subsequently barred Logisticon from calling the expert witness and was affirmed on appeal. *Id.* at 161-62, 507 N.E.2d at 1230-31.

174. *Id.* at 161-62, 507 N.E.2d at 1230-31 (citing Appelgren v. Walsh, 136 Ill. App. 3d 700, 703, 483 N.E.2d 686, 689 (1985) involving the predecessor to Rule 220).

pose sanctions for Rule 220 violations, the courts have not referred to the 1985 amendment to Supreme Court Rule 219(c). The purpose of the amendment to Rule 219 was to "make it clear that the sanctions provided therein applied to violations of new Rules 220 . . . as well as any new discovery rules . . . enacted in the future."[175] Given this amendment, the disqualification sanction of Rule 220 is not the sole sanction available to trial courts.[176]

In light of the text of Rule 219(c) as amended and the legislative comments accompanying the amendment, courts undoubtedly have available to them the full range of Rule 219 sanctions for Rule 220 violations. The original language of Rule 220[177] and the second district's decision in *Phelps v. O'Malley*,[178] however, suggest that barring the expert witness should be the preferred sanction when disclosure is made on the eve of trial.

D. Defendant's or Treating Physicians' Testimony on Summary Judgment

After addressing when an expert is needed, how specific the expert's affidavit must be and what the potential sanctions for failure to disclose an expert are, the court next must focus on the manner in which the testimony of the defendant or treating physicians may be used. Specifically, courts have considered whether the testimony of the defendant physician may be used to establish the standard of care[179] and, alternatively, whether the testimony of a treating physician can be used to establish the applicable standard of care.[180]

Under Rule 220(c)(4) defendant physicians can only be compelled to answer a question concerning the standard of care during a deposition.[181] In *Fawcett v. Reinertsen*,[182] the Illinois Supreme

175. ILL. ANN. STAT. ch. 110A, para. 219(c) (Committee Comments at 89) (Smith-Hurd 1989).

176. *Id.* The earlier version of the rule provided that "[i]f a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply *with any provision of Rules 201 through 218*" the court may impose one of the sanctions listed in Rule 219. ILL. REV. STAT. ch. 110A, para. 219(c) (1987) (emphasis added). In contrast, the amended rule provides "[i]f a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply *with any provision of part E of article II of the rules of this court*," the court may impose sanctions. ILL. REV. STAT. ch. 110A, para. 219(c) (1989) (emphasis added).

177. *Id.* para. 220(b) (failure to disclose "will result in disqualification of the expert").

178. *See supra* text accompanying note 162.

179. *See infra* notes 186-190 and accompanying text.

180. *See infra* notes 191-196 and accompanying text.

181. ILL. REV. STAT. ch. 110A, para. 220(c)(4) (1989). Rule 220(c)(4) prohibits ob-

Court held that a plaintiff can inquire about a deviation from the standard of care at the deposition of the defendant physician even if the plaintiff has not listed the physician as an expert witness.[183] The court reasoned that the defendant physician is obviously a treating physician and does not come within the disclosure requirements of Rule 220[184] Under the court's decision in *Fawcett*, a plaintiff can conceivably use a defendant physician's testimony to establish both the standard of care and the deviation from that standard even though the defendant physician is an "expert witness" and arguably should be subject to disclosure under Rule 220.[185]

The courts have not specifically addressed whether a defendant can call plaintiff's treating physician to testify as to the standard of care. However, the third district has held that the testimony of a treating physician does not necessarily constitute a breach of a confidential relationship.[186] Several cases have noted, but failed to reach, the question of whether the plaintiff's treating doctor can be called to testify for the defendant on the the standard of care issue.[187] These cases carefully avoid this issue by reasoning that the testimony in question concerns the actual treatment afforded by

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taining this information through interrogatories. *Id.* Rule 220(c)(4) provides that "parties or employees of entities whose professional acts or omissions are the subject of the litigation" are exempt from having to respond to interrogatories as an expert witness. *Id.*

182. 131 Ill. 2d 380, 546 N.E.2d 558 (1989).

183. Under Rule 220, the plaintiff is required to identify all expert witnesses who will be called to establish the standard of care. *Id.* at 384, 546 N.E.2d at 559. However, in the case of a defendant physician, the plaintiff need not identify him as an expert even though the defendant will be called to establish the standard of care. *Id.* at 384-85, 546 N.E.2d at 560.

184. *Id.* at 384, 546 N.E.2d at 560. The court applied the reasoning of Tzystuck v. Chicago Transit Authority, holding that defendant physicians do not have to be disclosed because "his involvement in the case is clearly 'treatment-related' rather than 'litigation-related.'" *Id.* at 384-85, 546 N.E.2d at 560 (citing *Tzystuck*, 124 Ill. 2d 226, 529 N.E.2d at 525 (1988)). The *Fawcett* court did note, however, that the defendant physician is still subject to the general discovery rules if he is to be a witness. *Id.* at 385, 546 N.E.2d at 560.

185. *Fawcett*, 131 Ill. 2d at 385, 546 N.E.2d at 560 (citing Waleski v. Tiesenga, 72 Ill. 2d 249, 381 N.E.2d 279 (1978)).

186. Greene v. Rogers, 147 Ill. App. 3d 1009, 498 N.E.2d 867 (3rd Dist. 1986). The court relied on the statutory waiver contained in section 8-802 of the Illinois Code of Civil Procedure. *Greene*, 147 Ill. App. 3d at 1018, 498 N.E.2d at 873 (citing ILL. REV. STAT. ch. 110, para. 8-802 (1985)). Section 8-802 provides an exception to the general statutory rule prohibiting a physician from disclosing confidential patient-information. ILL. REV. STAT. ch. 110, para. 8-802 (1985). Under section 8-802, the requirement of confidentiality is not applicable in actions brought by or against the patient. *Id.*

187. Atkins v. Thapedi, 166 Ill. App. 3d 471, 476-77, 519 N.E.2d 1073, 1076-77 (1st Dist. 1988); Waterford v. Halloway, 142 Ill. App. 3d 668, 491 N.E.2d 1199, 1204 (1st Dist. 1986); *Greene*, 147 Ill. App. 3d at 1018-19, 498 N.E.2d at 873-74.

the witness rather than any opinions on the standard of care.[188] The courts' reluctance to decide this issue probably stems from the desire to avoid the finding that the plaintiff's treating physician is an expert witness. Such a finding would necessitate subjecting the plaintiff's treating physician to the disclosure requirements of Rule 220. This result would violate the express exclusion of treating physicians from Rule 220's disclosure requirements.

Recently, in *Tzystuck v. Chicago Transit Authority*,[189] the Illinois Supreme Court resolved the confusion as to the status of the plaintiff's treating physician when testifying to the standard of care. The court held that a treating doctor did not have to be disclosed pursuant to Rule 220.[190] Consequently, a treating physician may testify on the applicable standard of care without being subject to Rule 220's disclosure requirements.[191]

The expert witness' role is extremely important at the summary judgment stage because it is the first time the court will examine the merits of the case. Given the expert's vital role, especially in medical malpractice cases, the requirements concerning the need for expert testimony, the specificity of expert testimony, and the possible sanctions for failure to comply with discovery rules must be closely examined by the litigants and the court. The primary goal of this examination should be to ensure that only claims containing a genuine issue of material fact pass beyond the pleading stage. As always, however, the parties' substantive rights must be protected and preserved.

III. Expert Witness Issues at Trial

Having discussed several of the pre-trial issues associated with expert witnesses, the role of the expert witness at trial must now be examined. In particular, five general topics relating to expert witness testimony in medical malpractice trials warrant consideration: 1) the ubiquitous Rule 220 at trial;[192] 2) the disclosure of the expert's opinion;[193] 3) the qualifications for expert witnesses;[194] 4) the

188. *Atkins*, 166 Ill. App. 3d at 475-76, 519 N.E.2d at 1075; *Waterford*, 142 Ill. App. 3d at 679, 491 N.E.2d at 1206-07; *Greene*, 147 Ill. App. 3d at 1019, 498 N.E.2d at 874.

189. 124 Ill. 2d 226, 529 N.E.2d 525 (1988).

190. *Id.* at 235, 529 N.E.2d at 529.

191. Defendants, however, may encounter logistical problems in contacting and conferring with the treating doctors in view of Petrillo v. Syntex Labs., Inc., 148 Ill. App. 3d 581, 499 N.E.2d 952 (1st Dist. 1986).

192. *See infra* notes 197-245 and accompanying text.

193. *See infra* notes 246-291 and accompanying text.

194. *See infra* notes 292-318 and accompanying text.

standard of care and deviation from that standard;[195] and 5) cross-examination and jury instructions.[196]

A. The Ubiquitous Rule 220 at Trial

In addition to the problems posed by Rule 220 during the pre-trial stages of a case, Rule 220 presents many problems during trial. Although many Rule 220 questions can be addressed and answered before trial, pre-trial resolution of disclosure problems is not always possible.[197] In particular, courts have struggled to deal with expert opinions developed near or during trial. Under Rule 220, expert witnesses disclosed near or during trial are precluded from testifying.[198] Allowing such testimony subverts the goal of Rule 220, *i.e.*, providing parties with adequate time to prepare for trial. Despite the unambiguous language and intent of Rule 220, however, several appellate courts have permtted use of newly disclosed opinions at trial.[199]

1. The Potential Conflict Between Rule 220(b) and Rule 220(d)

One of the problems with disclosure under Rule 220 arises from the last sentence of Rule 220(d),[200] which provides that the expert

195. *See infra* notes 319-344 and accompanying text.

196. *See infra* notes 345-359 and accompanying text.

197. If no objection is made to the failure to disclose, any possible error is waived. *See* Puskar v. Hughes, 179 Ill. App. 3d 522, 531, 533 N.E.2d 962, 968 (2d Dist. 1989) (holding that defendant waived any objection to the testimony's admissibility since he did not object at trial to the witness' testimony on the value of certain machinery); Oakleaf of Ill. v. Oakleaf & Assocs., Inc. 173 Ill. App. 3d 637, 651, 527 N.E.2d 926, 935 (1st Dist. 1988) (holding that plaintiff waived the right to challenge the expert witness' testimony because plaintiff's objection to the testimony at trial was not directed at the expert testimony issue); Crawford County State Bank v. Grady, 161 Ill. App. 3d 332, 514 N.E.2d 532, 537 (4th Dist. 1987) (holding that defendant waived opportunity to challenge the physician's expert testimony when the defendant failed to object to the testimony on the basis of Rule 220); Mazur v. Lutheran Gen. Hosp., 143 Ill. App. 3d 528, 493 N.E.2d 62 (1st Dist. 1986).

198. ILL. REV. STAT. ch. 110A, para. 220 (1989).

199. *See, e.g.*, Ramos v. Pyati, 179 Ill. App. 3d 214, 534 N.E.2d 472 (1st Dist. 1989); Fogarty v. Parichy Roofing Co., 175 Ill. App. 3d 530, 529 N.E.2d 1055 (1st Dist. 1988); Swaw v. Klompien, 168 Ill. App. 3d 705, 522 N.E.2d 1267 (1st Dist. 1988); Northern Trust Co. v. St. Francis Hosp., 168 Ill. App. 3d 270, 522 N.E.2d 699 (1st Dist. 1988); Singh v. Air Ill., Inc., 165 Ill. App. 3d 923, 520 N.E.2d 852 (1st Dist. 1988); Georgacopoulos v. University of Chicago, 152 Ill. App. 3d 596, 504 N.E.2d 830 (1st Dist. 1987); *Mazur*, 143 Ill. App. 3d 528, 493 N.E.2d 62.

200. Rule 220(d) provides in pertinent part:

> To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings through interrogatories, depositions, or requests to produce, his direct testimony at trial may not be inconsistent with or go beyond the fair scope of the facts known or opinions disclosed in such discovery proceedings. However, he shall not be prevented from testifying as to

witness "shall not be prevented from testifying as to facts or opinions on matters regarding which inquiry was not made in the discovery proceedings."[201] The interpretation of this provision seems to conflict with the sanction provision of Rule 220(b), which disqualifies an improperly disclosed expert witness.[202]

Apparently, allowing Rule 220(d) to excuse compliance with Rule 220(b)'s disclosure provisions poses several problems. First, surprise at trial raises serious questions of fairness. Second, requiring a party to take the deposition of an expert *during* trial is one of the primary problems Rule 220 was intended to eliminate.[203] A party cannot adequately prepare for trial when new information or opinions are disclosed at trial. Third, allowing the late disclosure of expert witnesses promotes unfair or unwarranted legal maneuvering by the parties.[204]

Based in part on the last sentence of 220(d), the first district in *Fogarty v. Parichy Roofing Co.*[205] allowed the defendant to introduce into evidence two undisclosed expert opinions that were developed during trial.[206] One undisclosed opinion concerned a different branch of medicine; the other involved the effect of a preexisting condition.[207] On appeal, the plaintiff argued that the trial court should have prevented the physician from giving the undis-

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facts or opinions on matters regarding which inquiry was not made in the discovery proceedings.

ILL. REV. STAT. ch. 110A, para. 220(d) (1987).

201. *Id.*

202. ILL. REV. STAT. ch. 110A, para. 220(b) (1989) provides in pertinent part: "Failure to make the disclosure required by this rule or to comply with the discovery contemplated herein will result in disqualification of the expert witness." *Id.*

203. *Fogarty*, 175 Ill. App. 3d at 541, 529 N.E.2d at 1063.

204. *Mazur*, 143 Ill. App. 3d 528, 493 N.E.2d 62. The *Mazur* court stated that courts are "ordinarily loathe to interfere with strategies conceived and implemented by the parties; however, a trial is intended to be systematized, orderly and efficacious search for the truth, rather than a battleground of stratagems and wits." *Id.* at 534, 493 N.E.2d at 66 (citing Krupp v. Chicago Transit Auth., 8 Ill. 2d 37, 41, 132 N.E.2d 532, 535 (1956)).

205. 175 Ill. App. 3d 530, 529 N.E.2d 1055 (1st Dist. 1988).

206. *Id.* at 541, 529 N.E.2d at 1063. In *Fogarty*, the defendant's expert witness had given a deposition one and a half years before trial, in which he limited his opinions to his orthopedic findings based upon his physical examination of the plaintiff. *Id.* at 533, 529 N.E.2d at 1058. At trial, however, the expert witness began to testify about his neurological findings. *Id.* The trial court recessed the proceedings and allowed plaintiff's counsel to depose the expert witness for the second time. *Id.* at 534, 529 N.E.2d at 1058. During this deposition the witness stated that these new opinions had not been requested until the third day of trial. *Id.* After the second deposition, defense counsel showed the plaintiff's medical records to the expert witness. *Id.* At trial, the witness again testified that the plaintiff's condition was preexisting and was not the result of the accident in question. *Id.*

207. *Id.* at 541, 529 N.E.2d at 1063.

closed opinions.[208]

Acknowledging Rule 220's purpose as the prevention of newly-disclosed opinions on the eve of trial, the court stated that the "testimony of an expert at trial may not be inconsistent with nor go beyond the fair scope of facts known or opinions disclosed in the discovery period."[209] Citing the last sentence of Rule 220(d), the court held that because the area was not explored during discovery, the expert witness, even though newly disclosed, was not barred from testifying on the subject before trial.[210]

Although factually different, the court in *Swaw v. Klompien*[211] also relied on the last sentence of 220(d) in allowing a previously undisclosed expert's testimony. In *Swaw*, the appellate court held that opinions "concerning the extent and permanency" of plaintiff's injuries were not developed during the course of the expert's deposition.[212] Because the facts of the opinion were not explored during discovery, the court allowed the expert to testify under Rule 220(d).[213]

There is no indication that *Swaw* involved the type of legal maneuvering that was employed by defense counsel in *Fogarty*. However, even without this legal maneuvering, the *Swaw* result is questionable. Rule 220 requires counsel to supplement prior discovery seasonably in order to make any new opinions known to opposing counsel.[214] Therefore, even in the absence of inquiry by defense counsel, the plaintiff's attorney should have supplemented the expert's prior testimony with the new opinions.

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208. *Id.*

209. *Id.*

210. *Id.*

211. 168 Ill. App. 3d 705, 522 N.E.2d 1267 (1st Dist. 1988). In *Swaw*, plaintiff's counsel successfully introduced new opinions on the extent and permanency of plaintiff's injuries. *Id.* at 715, 522 N.E.2d at 1274.

212. *Id.* at 715, 522 N.E.2d at 1274.

213. In contrast to the holdings of the first and fourth district, the second district has taken a more restrictive approach in determining whether expert testimony may be admissable at trial, even though the proffered information was not disclosed during discovery. In Stringham v. United Parcel Serv., Inc., 181 Ill. App. 3d 312, 536 N.E.2d 1292 (2nd Dist. 1989), the court barred an economist from offering an opinion at trial on the present value of decedent's future earnings because discovery had disclosed only his opinion on present value of future costs of support. *Id.* at 322, 536 N.E.2d at 1298. The court noted that the purpose of Rule 220(d) was to "permit litigants to ascertain and rely upon the opinions of experts retained by their adversaries and it limits the permissible scope of an expert's testimony to those opinions expressed in response to discovery." *Id.* (citing ILL. ANN. STAT. ch. 110A, para. 220, (Committee Comments at 438) (Smith-Hurd 1985)).

214. ILL. REV. STAT. ch. 110A, para. 220(c)(3) (1989).

2. Change in an Expert's Opinion

Closely related to the problem of expert opinion developed near or during trial is the problem presented by a change in an expert's opinion. Rule 220 addresses this problem and provides that the expert's trial testimony "may not be inconsistent with . . . the fair scope of the facts known or opinions disclosed in such discovery proceedings."[215] Rule 220 is intended to encourage, and indeed to require, early and complete disclosure of all expert opinions. Appropriately, the burden to disclose the relevant information is placed upon the proponent of the evidence because that party is most knowledgeable about the opinions important to the theory of the case and the facts necessary to establish a basis for those opinions.

In *Northern Trust Co. v. St. Francis Hospital*,[216] the defendant's expert witness gave two different opinions concerning the decedent's chances of survival, one at the deposition and the other at trial.[217] The change in the expert's opinion resulted from a change in the facts upon which his initial opinion was based.[218] The appellate court found no error and characterized these differences as "two separate opinions based on two separate scenarios."[219] The court noted that plaintiff's cross-examination "ably clarified and harmonized" the evidence.[220] The court concluded that the undisclosed change in the expert's opinion did not violate Rule 220.[221]

Although *Northern Trust* correctly recognizes that under certain circumstances a change in an expert's opinion will not violate Rule 220's disclosure requirements, this conclusion raises a potential conflict with the goals of Rule 220. The liberal approach of *Northern Trust* allows disclosure during trial of a previously undisclosed opinion if the opinion arises from a change in the facts underlying the previously disclosed opinion. Classifying an essentially new opinion as a mere change, however, does not mitigate the damages of unfair surprise. The change of an expert's opinion presents the same dangers as the disclosure of a "new" expert opinion.

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215. *Id.* para. 220(d).

216. 168 Ill. App. 3d 270, 522 N.E.2d 699 (1st Dist. 1988).

217. *Id.* at 281-83, 522 N.E.2d at 706-07.

218. *Id.* In *Northern Trust*, the deceased was admitted to the hospital at 1:30 a.m., was sent home, and then was readmitted at 6:30 a.m. *Id.* The defendant's expert witness testified in his deposition that when plaintiff was admitted to the hospital at 1:30 a.m. his chances of survival were 50 to 60 percent. *Id.* At trial, he testified that when the decedent was admitted at 6:30 a.m. his chances of survival were only 10 to 15 percent. *Id.*

219. *Id.* at 282, 522 N.E.2d at 707.

220. *Id.*

221. *Id.*

Although the accommodation of a change in an expert's opinion due to a change in the underlying facts is undoubtedly laudable, this flexible approach to the disclosure requirements should not be allowed to subvert the goals of Rule 220.

3. Updating an Expert's Opinion

Updating an expert's opinion presents problems similar to those caused by a change in the expert's opinion. Unlike the changed opinion, however, Rule 220 does not specifically address how an expert's opinion may be updated. In fact, Rule 220 implicitly prevents experts from updating their opinions. Rule 220(b) provides that "[a]ll dates set by the trial court shall be chosen to insure that *discovery* regarding such expert witnesses will be completed not later than 60 days before the date on which the trial court reasonably anticipates the trial will commence."[222] This provision seemingly prevents an expert from issuing an updated opinion after the close of discovery.

In *Singh v. Air Illinois, Inc.*,[223] the first district addressed the effect of Rule 220 on the disclosure of an updated expert's report. Singh's expert economist updated his report on the decedent's earning capacity just prior to trial.[224] The appellate court rejected the defendant's contention that the update violated the sixty day requirement of Rule 220(b).[225] The court found that the expert's revisions did not amount to a "shift in theory or belief"; rather, the revisions merely updated the previously disclosed opinion. Consequently, the court held that these revisions did not violate Rule 220.[226]

Although this result apparently was appropriate, the *Singh* court incorrectly focused its inquiry on Rule 220(c), rather than Rule 220(b). The *Singh* court stated that "[s]ection 220(b) . . . merely allows a trial court to establish a disclosure schedule if an expert witness is not otherwise disclosed."[227] Because the expert witness in *Singh* had not been disclosed, the court reasoned that Rule 220(b) did not apply.[228]

Rule 220(b) expressly contemplates not only disclosure, but the

222. ILL. REV. STAT. ch. 110A, para. 220(b) (1989) (emphasis added).
223. 165 Ill. App. 3d 923, 520 N.E.2d 852 (1st Dist. 1988).
224. *Id.* at 929, 520 N.E.2d at 856.
225. *Id.* at 930, 520 N.E.2d at 856.
226. *Id.*
227. *Id.* at 929, 520 N.E.2d at 856.
228. *Id.*

completion of discovery sixty days before the trial date.[229] This is not a matter of semantics. If the holding of *Singh* expressed the true intent of the rule, then the mere disclosure of an expert sixty-five days before trial would allow changes in expert opinions up to and even during the trial itself. This is obviously not the purpose of Rule 220(b). Rule 220(b) was intended to promote disclosure of *all* relevant opinions sixty days before trial, not merely those opinions available sixty days before trial.

4. Expert Witness' Disclosure of New Facts at Trial

The disclosure of new facts at trial raises additional problems under Rule 220. Rule 220(c) provides "that in answer to an interrogatory an expert witness must state (i) the subject matter [of his testimony] . . . (ii) his conclusions and opinions and the bases therefor; and (iii) his qualifications."[230] Despite the seemingly broad scope of this disclosure requirement, some materials are noticeably excluded.

The first district addressed this problem in *Georgacopoulos v. University of Chicago*.[231] In *Georgacopoulos*, a medical expert witness offered a previously undisclosed theory regarding the cause of plaintiff's heart attack.[232] The defendant objected to the witness' testimony as "beyond the fair scope of the facts known or opinions disclosed in . . . discovery proceedings."[233] The court overruled this objection and held that Rule 220(c) required only disclosure of the expert witness' "conclusions and opinions and the bases therefor."[234] Because the facts in question did not form the basis of expert's opinion, the court held that they were not subject to disclosure under Rule 220.[235]

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229. *Id.*

230. ILL. REV. STAT. ch. 110A, para. 220(c) (1989).

231. 152 Ill. App. 3d 596, 504 N.E.2d 830 (1st Dist. 1987).

232. *Id.* The *Georgacopoulos* plaintiff had a catheter placed in her superior vena cava to provide additional nutrition before her surgery for stomach cancer. *Id.* at 598, 504 N.E.2d at 832. While the catheter was in place, plaintiff suffered a cardiac arrest causing serious injuries. *Id.* Plaintiff's expert testified both in deposition and during trial that the cause of her cardiac arrest was a clot in her lung that originated in the superior vena cava or in the subclavian vein. *Id.* at 601, 504 N.E.2d at 834. During the trial, plaintiff's attending physician, testified that he could not explain why there was no blood return in the catheter thirteen hours after the cardiac arrest. *Id.* The defendants contended that the expert's three explanations for the absence of blood constituted a new basis for his opinion on the cause of the cardiac arrest and, therefore, violated Rule 220. *Id.*

233. *Id.* at 600-01, 504 N.E.2d at 833-34 (quoting ILL. REV. STAT. ch. 110A, para. 220(d) (1989)).

234. *Id.* (quoting ILL. REV. STAT. ch. 110A, para. 220(c) (1989)).

235. *Id.*

Georgacopoulos illustrates the gaps in the disclosure requirements of Rule 220. Not all evidence elicited at trial can be foreseen and addressed during discovery. Although *Georgacopolous* appeared to reach the correct result, two potential problems may arise from its holding. First, dicta in *Georgacopolous* suggests that *only* expert opinions or the bases of the opinions that concern the standard of care are subject to disclosure. This is clearly incorrect. Rule 220 defines an expert as a "person who, because of education, training or experience, possesses knowledge of a specialized nature beyond that of the average person on a factual matter *material to a claim or defense* in pending litigation."[236] This specialized knowledge of material facts arguably falls within the scope of discovery because it may form the basis of an expert's opinion or conclusion.[237] Consequently, material factual matters, particularly those concerning the standard of care, should be disclosed under Rule 220(c).

A second potential problem caused by *Georgacopoulos* stems from the court's statement that the expert's testimony "was offered to explain a fact in evidence."[238] This statement supports the assertion that explanations of facts are not opinions. Although in some contexts this contention could be valid, this contention will rarely, if ever, be valid in the medical malpractice setting. Once an expert medical witness goes beyond a recitation of what he observed and starts explaining the facts in evidence he has provided his opinions of the facts. The explanation of the facts is only necessary because the fact finder is unable to understand the factual matters without the expert's explanation. Because the expert is required to explain the facts to the jury, these facts should also be disclosed during the discovery process.[239]

In *Mazur v. Lutheran General Hospital*,[240] the court allowed expert witness testimony that exceeded the scope of the expert's deposition testimony because the expert was unaware of certain facts

236. ILL. REV. STAT. ch 110A, para. 220(a) (1989).

237. *Id.* para. 220(c). Rule 220(c) provides in pertinent part:

> (1) Upon interrogatory propounded for that purpose, the party retaining or employing an expert witness shall be required to state:
>
> (i) the subject matter on which the expert is expected to testify;
>
> (ii) his conclusions and opinions and the bases thereof; and
>
> (iii) his qualifications.

Id.

238. *Georgacopoulos*, 52 Ill. App. 3d at 601, 504 N.E.2d at 834.

239. ILL. REV. STAT. ch. 110, para. 220(a) (1989).

240. 143 Ill. App. 3d 528, 493 N.E.2d 62 (1st Dist. 1986).

when his deposition was taken.[241] The expert's opinion as to the cause of decedent's death changed between the time of the deposition and the time of trial because previously unavailable test results were shown to the expert. The court stated that under Rule 220(d) an expert can testify to "facts or opinions on matters regarding which inquiry was not made in the discovery proceedings."[242] The court reasoned that because the expert witness was unaware of an addendum to the medical report, on which he had based his opinion, his trial testimony based on the amendment was admissable.[243]

The *Mazur* court's holding implies that when new evidence is allowed, the court will also permit introduction of a new opinion based on the new evidence.[244] Yet, this implication is also undermined by the *Mazur* court's ruling that the plaintiff waived her objection to the opinion by refusing the court's offer to strike the opinion. To the extent *Mazur* held that introduction of evidence which forms the basis of a new opinion constitutes a waiver of any objection to that evidence, *Mazur* was incorrect. Evidence is useful to a party for reasons other than its ability to form the basis of an opinion. Therefore, parties should be allowed to object to the introduction of the facts on which the expert bases his opinion, even if the party has not objected to the expert's opinion.[245]

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241. *Id.* at 533, 493 N.E.2d at 65.

242. *Id.* at 532, 493 N.E.2d at 65.

243. *Id.*

244. *See infra* note 245.

245. In dicta, the fourth district indicated its predilection to follow the approach the first district's *Mazur* approach. *See infra* notes 248-54 and accompanying text. In Crawford County State Bank v. Grady, 161 Ill. App. 3d 332, 514 N.E.2d 532 (4th Dist. 1987), the defendant Lakeview Medical Center filed a motion *in limine* to prevent the plaintiff's expert, Dr. Herbst, from presenting any criticisms of defendant's care beyond those criticisms he had offered in his deposition. *Id.* at 334, 514 N.E.2d at 534. The trial court granted the motion, but at trial the plaintiff's attorney was permitted to ask Dr. Herbst about a nurse's failure to notify the patient's family physician of the patient's changing condition. *Id.* at 343, 514 N.E.2d at 540.

The court held that any Rule 220 violation was waived by counsel's failure to object that the admission of the testimony violated Rule 220. *Id.* at 343, 514 N.E.2d at 540. The court, however, stated that the expert witness was not asked about the subject in question during discovery, and, therefore, Rule 220(d) was not violated. *Id.* at 340, 514 N.E.2d at 537 (citing ILL. REV. STAT. ch. 110A, para. 220(d) (1989)). The court held that since the expert was not "specifically asked" about the nurse's breach of the standard of care, it could not "conclusively determine that Supreme Court Rule 220 was violated in any way." *Id.* Like the *Mazur* decision, the *Crawford* decision is incorrect to the extent it finds that the introduction of evidence forming the basis of a new opinion waives all objections to the admission of that new evidence based on Rule 220.

B. Wilson v. Clark and Its Progeny

In *Wilson v. Clark*,[246] the Illinois Supreme Court adopted Federal Rules of Evidence 703[247] and 705.[248] In general, these rules allow the opinions of expert witnesses to be admitted into evidence if the opinions are based on reliable data.[249] This data does not have to be admissible for the opinion of the expert to be admitted into evidence.[250]

1. The Adoption of Federal Rules of Evidence 703 and 705

Rules 703 and 705 recognize that experts routinely rely on certain materials in making decisions which would otherwise be inadmissible at trial because of potential hearsay problems. Because experts would normally make important decisions based on this type of evidence outside the courtroom, Rules 703 and 705 permit this evidence to serve as the basis for the expert's opinion. In other words, the value of these materials is not solely an evidentiary one; therefore, the evidence is likely to be impartial and reliable.

The adoption of these rules also has a practical effect. The *Wilson* court noted that a great deal of time, effort, and money would be wasted by attempting to substantiate materials that are already relied on outside the legal process.[251] Judicial economy would be served by allowing experts to testify based upon materials reasonably relied on by the expert in his practice.

2. The Potential Conflict Between Rules 703 and 705 and Rule 220

Despite the salutary purposes and rationale of Federal Rules of Evidence 703 and 705, these rules potentially conflict with the dis-

246. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

247. Federal Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

248. Federal Rule of Evidence 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

FED. R. EVID. 705.

249. FED. R. EVID. 703; FED. R. EVID. 705.

250. *Id.*

251. *Wilson*, 84 Ill. 2d at 194, 417 N.E.2d at 1326.

covery requirements under Rule 220(c)(1)(ii).[252] Rule 703 provides that "the facts or data . . . upon which an expert bases an opinion . . . may be those . . . made known . . . at or before the hearing."[253] In contrast, Illinois Supreme Court Rule 220(c)(1)(ii) requires the advance disclosure of the experts' "conclusions and opinions and the bases therefor."[254] Thus under the Federal Rules of Evidence the basis of an expert's opinion may be disclosed during the trial whereas the Illinois rule which governs discovery requires disclosure before trial.

Although no cases have addressed this apparent contradiction, the two rules can be reconciled if the application of each rule is limited in scope. Federal Rule of Evidence 703, which addresses the admissibility of evidence offered at trial, would only govern evidence offered at trial; Rule 220, which addresses discovery, would govern the preparation of the case for trial.[255] Dicta in *Wilson v. Clark*[256] supports this proposition. The court stated that the admission into evidence of an expert opinion without the underlying facts was not unfair to the cross-examining party "[i]n light of Illinois' extensive pretrial discovery procedures."[257] If the court is going to rely on the "extensive pretrial discovery procedures" to preserve fairness in the litigation process, then Rule 220, which provides for sanctions if the proper information is not disclosed before trial, should control.

An expert opinion supporting plaintiff's case is generally necessary, but standing alone it is insufficient to make out plaintiff's prima facie case. By allowing facts that the expert relied on to be introduced as substantive evidence, a party presenting only expert testimony in his case could avoid a directed verdict. Substantive use of the facts relied upon by the expert would, therefore, excuse the party proffering the expert from proving the factual element of the claim by other means. Courts must remain aware that *Wilson* did not create an exception to the hearsay rule by allowing an expert to relate facts to the jury for use as substantive evidence. The plaintiff must still prove the necessary factual elements of his

252. ILL. REV. STAT. ch. 110A, para. 220(c)(1)(ii) (1989).

253. FED. R. EVID. 703. *See supra* note 247 for text of Rule 703.

254. ILL. REV. STAT. ch. 110A, para. 220(c)(1)(ii) (1989).

255. If it is not possible to reconcile Rule 220 and Federal Rule of Evidence 703, Rule 220 should control because of the underlying policy considerations of avoiding unfair surprise and allowing for adequate trial preparation.

256. 84 Ill. 2d 186, 417 N.E.2d 1322, *cert. denied*, 454 U.S. 836 (1981).

257. *Id.* at 194, 417 N.E.2d at 1327 (discussing the adoption of FED. R. EVID. 705).

case.[258]

3. Reliability of Materials Used for the Basis of an Expert's Opinion

There are two requirements under the Federal Rules of Evidence for determining what materials may be used by an expert witness in formulating his opinion. First, the expert must rely on the material when forming his opinion. Second, the material must be of a type reasonably relied upon by experts in the field. The latter requirement causes greater difficulties than the former.

Generally, courts have been lenient in identifying materials considered sufficiently reliable to form the basis of expert testimony.[259] Some materials are of course considered unreliable, but the list is not as extensive as those materials considered reliable.[260] A great

258. The Illinois Supreme Court has held that materials relied on by experts in formulating their opinions are not transformed into substantive evidence merely because the expert relied on them. *See* People v. Anderson, 113 Ill. 2d 1, 495 N.E.2d 485, *cert. denied* 479 U.S. 1012 (1986). In *Anderson*, the court noted that a limiting instruction should be given to clarify the purpose of the recitation of the basis of the opinion. *Id.* at 12, 495 N.E.2d at 490. Consequently, these materials cannot be considered by the court as substantive evidence when deciding a motion for a directed verdict. *Id.*

Additionally, the fourth district, in Mayer v. Baisier, 147 Ill. App. 3d 150, 497 N.E.2d 827 (4th Dist. 1986), held that the opinion of the plaintiff's expert on the issue of the applicable standard of care, without corroborating proof of the underlying facts, is insufficient to withstand a motion for directed verdict. *Id.* at 160, 497 N.E.2d at 833. The Illinois Supreme Court has not yet addressed this issue.

259. *See, e.g.*, Department of Transp. v. Amoco Oil Co., 174 Ill. App. 3d 479, 528 N.E.2d 1018 (2nd Dist. 1988) (comparable sales information in condemnation proceedings); Piano v. Davidson, 157 Ill. App. 3d 649, 510 N.E.2d 1066 (1st Dist. 1987) (articles and learned treatises); *In re* Scruggs, 151 Ill. App. 3d 260, 502 N.E.2d 1108 (1st Dist. 1986) (statements made by an apartment manager to a clinical psychologist concerning actions by a tenant); People v. Sassu, 151 Ill. App. 3d 199, 502 N.E.2d 1047 (1st Dist. 1986) (results of a marijuana blood test received by the expert over the phone from a Canadian laboratory); Thome v. Palmer, 141 Ill. App. 3d 92, 489 N.E.2d 1163 (3d Dist. 1986) (discovery depositions of defendant doctors); Mayer v. Baisier, 147 Ill. App. 3d 150, 497 N.E.2d 827 (4th Dist. 1986) (contents of medical records); Thomas v. Brandt, 144 Ill. App. 3d 95, 493 N.E.2d 1142 (5th Dist. 1986) (results of blood/alcohol tests that had not been admitted into evidence); Henry v. Brenner, 138 Ill. App. 3d 609, 486 N.E.2d 934 (3rd Dist. 1985) (materials include medical reports prepared by other doctors within the testifying physician's group); Hatfield v. Sandoz-Wander, Inc., 124 Ill. App. 3d 780, 464 N.E.2d 1105 (1st Dist. 1984) (the deposition testimony of other doctors, pharmacists and the plaintiff); People v. Castro, 113 Ill. App. 3d 265, 446 N.E.2d 1267 (1st Dist. 1983) (contents of test results on a party's I.Q. and social maturity tests); Manning v. Mock, 119 Ill. App. 3d 788, 457 N.E.2d 447 (4th Dist. 1983) (nursing home records); Kinsey v. Kolbe, 103 Ill. App. 3d 933, 431 N.E.2d 1316 (1st Dist. 1982) (testimony by a medical doctor about a psychologist's test results and findings).

260. *Hatfield*, 124 Ill. App. 3d 780, 464 N.E.2d 1105. In *Hatfield*, the first district ruled that conversations with other physicians on the adequacy of warnings in the Physician's Desk Reference were unreliable because none of the residents with whom the expert had spoken had actually read the relevant sections of the P.D.R. *Id.* at 788, 464

deal of latitude has been, and should continue to be, given to experts in their choice of materials. Experts, however, do not have *carte blanche* in the courtroom. The trial judge retains discretion to determine which materials are sufficiently reliable to be used as the basis for an expert witness' opinion. Even after a finding of reliability, the trial court must still balance the probative value of the material against its likely prejudicial impact or tendency to create confusion.[261]

In addressing the reliability question, the Illinois Supreme Court has considered the issue of whether a party's statements can be used as the basis of an expert witness opinion.[262] Initially, the court appeared to be extremely lenient in allowing expert testimony based in whole or part on statements made by a party to the expert.[263] For example, in *J.L. Simmons Co. ex rel. Hartford Insurance Group v. Firestone*,[264] the supreme court held that an expert witness could express his opinion even though his testimony was based *entirely* on statements made by a party to the litigation

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N.E.2d at 1110. The court stated that because none of the physicians had read the work in question, such a conversation could not be the type of information reasonably relied on by experts in the field. *Id.*

See also People v. Britz, 123 Ill. 2d 446, 462, 528 N.E.2d 703, 711 (1988) (expert could not base his opinion solely on the defendant's self-serving statements regarding his alleged substance abuse problem); Dugan v. Weber, 175 Ill. App. 3d 1088, 530 N.E.2d 1007 (1st Dist. 1988) (holding that a doctor's report prepared in anticipation of trial, rather than for purposes of treatment could not be utilized by another expert as the basis of his opinion); Lovelace v. Four Lakes Dev. Co., 170 Ill. App. 3d 378, 523 N.E.2d 1335 (2nd Dist. 1988) (evidence of the closing of other outdoor skating rinks was properly excluded as a basis of the expert's opinion); Denny v. Burpo, 124 Ill. App. 3d 73, 78, 463 N.E.2d 1074, 1077 (5th Dist. 1984) (holding that a conversation with the head of a hospital's medical division at a seminar two days before the testimony was elicited at trial was inadmissable hearsay).

See generally Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43 (1986) (proposing that before a court allows the expert to use material as a basis of his opinion, the proponent of the evidence should satisfy the court that the material is of a type customarily relied upon and that the material is sufficiently trustworthy to make such reliance reasonable).

261. *See* People v. Anderson, 113 Ill. 2d 1, 495 N.E.2d 485, *cert. denied*, 479 U.S. 1012 (1986).

262. People v. Britz, 123 Ill. 2d 446, 528 N.E.2d 703 (1988); Melecosky v. McCarthy Bros. Co., 115 Ill. 2d 209, 503 N.E.2d 355 (1986); People v. Anderson, 113 Ill. 2d 1, 495 N.E.2d 485 (1986); J.L. Simmons *ex rel.* Hartford Ins. Group v. Firestone, 108 Ill. 2d 106, 483 N.E.2d 273 (1985). The general objection to this testimony is that is constitutes hearsay. The hearsay problem arises because the expert bases the opinion on an out-of-court statement.

263. *Melecosky*,, 115 Ill. 2d 209, 503 N.E.2d 355; *Anderson*, 113 Ill. 2d 1, 495 N.E.2d 485; *Firestone*, 108 Ill. 2d 106, 483 N.E.2d 273.

264. *Firestone*, 108 Ill. 2d 106, 483 N.E.2d 273.

during interviews.[265] The court stated that expert testimony based on "data presented to the expert 'outside of court and other than by his own perception' " was admissible.[266] The court commented that the source of the expert's opinion was only relevant to the jury's determination, and not to the admissibility of the testimony.[267]

The court took a similar position in *People v. Anderson*,[268] in which the court allowed a psychiatric expert to base his testimony entirely on the statements of the defendant.[269] The court noted that psychiatrists "customarily rely" on a patient's statements in forming a diagnosis and therefore held the psychiatrist's testimony admissible.[270]

Similarly, in *Melecosky v. McCarthy Brothers Co.*,[271] the supreme court reversed the appellate court and allowed expert testimony based on the plaintiff's statements to the expert as well as the expert's examination of the plaintiff.[272] The court noted that the material relied upon was of the type regularly used in the expert's field to make decisions. The mere reliance of the expert's testimony in part on the plaintiff's statements did not justify the total exclusion of that testimony.[273] The court held, therefore, that admission of the testimony into evidence was consistent with Federal Rule of Evidence 703.[274]

Less than four years after these decisions were rendered, the Illinois Supreme Court abruptly adopted a narrower view of an ex-

265. *Id.* at 116-17, 483 N.E.2d at 282. In *Firestone*, the injured party was hurt while installing a beam after slipping on a piece of visquine at the defendant's plant. *Id.* at 110, 483 N.E.2d at 280. The plaintiff, the injured party's employer, who was aligned with the injured party, sought to exclude a statement the injured party made to a vocational counselor. *Id.* at 116-17, 483 N.E.2d at 282. The Illinois Supreme Court held that a vocational counselor was properly allowed to express his expert opinion, even though his testimony was based *entirely* on statements the plaintiff made to the counselor during interviews. *Id.*

266. *Id.* at 117, 483 N.E.2d at 282 (quoting FED. R. EVID. 703).

267. *Id.*

268. 113 Ill. 2d 1, 495 N.E.2d 485 (1986),

269. *Id.* at 12-13, 495 N.E.2d at 490. *Anderson* involved a double murder case in which defendant raised an insanity defense. *Id.* at 3, 495 N.E.2d at 486. The defendant objected to the use of the state psychiatrist's testimony because it was based on defendant's statements. *Id.* at 7, 495 N.E.2d at 487.

270. *Id.* at 12, 495 N.E.2d at 490.

271. 115 Ill. 2d 209, 503 N.E.2d 355 (1986).

272. *Id.* at 213, 216, 503 N.E.2d at 358-59.

273. *Id.* at 216-17, 503 N.E.2d at 358. The court reasoned that any weaknesses in the reliability of the expert's opinion could be exposed through cross-examination. *Id.* at 216, 503 N.E.2d at 358.

274. *Id.* at 217, 503 N.E.2d at 358.

pert's reliance on a party's statements for the basis of the expert opinion.[275] In *People v. Britz*,[276] the Illinois Supreme Court held that the defendant experts' opinions were properly barred because the experts "relied substantially, if not totally, on defendant's self-serving statement regarding his alleged substance abuse disorder."[277] The *Britz* court distinguished earlier cases, stating that the experts in those cases had data in addition to the parties' statements on which to base their opinion.[278] The shift in the court's approach undoubtedly stems from its concern with possible hearsay problems that are likely to occur when an expert relies on a party's statement.[279]

Prior to *Britz*, the court implied that the potential hearsay dangers when an expert relies on a party's statements were negligible because the defendant could cross-examine the expert on the basis his opinion.[280] The *Britz* court, however, asserted that a definite hearsay problem existed because the defendant's story would be told "without the possibility of . . . cross-examin[ation]."[281] The *Britz* court explained that allowing these types of "self-serving" statements to be entered into evidence conflicted directly with the meaning and intent of the Federal Rules of Evidence.[282] Apparently, the traditional hearsay dangers posed by the declarant's absence from the stand are now a consideration in determining whether an expert should be able to relate a party's self-serving statement when the expert's opinion is based on those statements. Judging from the court's holding in *Britz*, it appears that the court

275. People v. Britz, 123 Ill. 2d 446, 528 N.E.2d 703 (1988).

276. *Id.*

277. *Id.* at 462, 528 N.E.2d at 711 (citing *Melecosky*, 115 Ill. 2d 209, 503 N.E.2d 355).

278. *Britz*, 123 Ill. 2d at 461-62, 528 N.E.2d at 710-11. This distinction arguably supported the exclusion of the expert testimony based entirely on a party's statement. Several excluded opinions, however, were based upon the party's statements as well as additional information. *See, e.g.*, *Melecosky*, 115 Ill. 2d 209, 503 N.E.2d 355 (testimony based upon patient's statements as well as treating physician's examination of the patient). The court failed to note this distinction in the various expert's testimony and, consequently, ordered the exclusion of all the testimony.

279. A comparison of the language in *Anderson* and *Britz* illustrates clearly the court's increased concern with the potential hearsay problems. In *Anderson*, the court stated, "[t]o the extent that a savvy defendant's statements tending to show mental illness might be consciously self-serving, this possibility can adequately be brought out on cross-examination of the expert." *Anderson*, 113 Ill. 2d at 13, 495 N.E.2d at 490. In contrast, the *Britz* court stated that "[i]f this court were to allow such testimony, it would open the door for a defendant to tell his side of the story without the possibility of being cross-examined." 123 Ill. 2d at 462, 528 N.E.2d at 711.

280. *Anderson*, 113 Ill. 2d at 3, 528 N.E.2d at 486.

281. *Britz*, 123 Ill. 2d at 462, 528 N.E.2d at 711.

282. *Id.*

will not allow the basis of the expert's opinion to be related to the jury in this situation.

Another question associated with the court's inquiry into the reliability of the expert's opinion focuses on whether the materials on which the expert relied in formulating his opinion can be related to the jury.[283] The Illinois Supreme Court directly addressed this question in *People v. Anderson*.[284] In *Anderson*, the court held that these materials could be disclosed to the jury,[285] but it limited the possibility of such disclosure to instances in which the underlying materials helped to "[explain] the basis of the expert witness' opinion."[286] The court also held that the trial court has the discretion to exclude the evidence if the prejudicial effect of the evidence outweighs its probative value.[287]

The conflict between the court's holding in *Wilson v. Clark*,[288] holding that an expert's opinion could be based on materials presented to him at trial, and Rule 220(c)(ii) which requires advanced disclosure of expert opinions "and the bases thereof," may also arise in the situtation involving the duty to disclose the articles and books relied on by the expert.[289] Under *Wilson*, the expert could be presented with "new" authorities at trial and proceed to give an opinion which was never disclosed to the opposing party. In contrast, Rule 220(c)(1)(ii) requires the expert to disclose "conclusions and opinions *and the bases therefor*"[290] and, thus, would require the expert to disclose any books, treatises or other authorities upon which he relied in formulating his opinion. The underlying principles of discovery, requiring disclosure of certain materials in order to eliminate unfair surprise necessitate that Rule 220

283. *Cf.* Mayer v. Baisier, 147 Ill. App. 3d at 158, 497 N.E.2d at 831 (citing Henry v. Brenner, 138 Ill. App. 3d 609, 486 N.E.2d 934 (3d Dist. 1985), and People v. Anderson, 113 Ill. 2d 1, 495 N.E.2d 485, *cert. denied*, 479 U.S. 1012 (1986), for the proposition that the content of the materials on which the expert relies may be admitted into evidence for the purpose of "explaining the basis of his opinion."). *See also* Henry v. Brenner, 138 Ill. App. 3d 609, 614, 486 N.E.2d 934, 937 (3rd Dist. 1985) (admitting the evidence underlying the expert's opinion, but stating that the evidence could only go to the "illustrate and explain" the expert's opinion); Mielke v. Condell Mem. Hosp., 124 Ill. App. 3d 42, 463 N.E.2d 216 (2nd Dist. 1984) (prohibiting the jury from hearing the contents of the materials).

284. 113 Ill. 2d 1, 495 N.E.2d 485, *cert. denied*, 479 U.S. 1012 (1986).

285. *Id.* at 12, 495 N.E.2d at 490.

286. *Id.*

287. *Id.*

288. 84 Ill. 2d 186, 417 N.E.2d 1322, *cert. denied*, 454 U.S. 836 (1981).

289. That no appellate court has decided this issue suggests attorneys are generally aware of the materials used by an expert because of their own research. Yet, this issue may arise in the future.

290. ILL. REV. STAT. ch. 110A, para. 220(c)(1)(ii) (1989) (emphasis added).

control.[291]

C. *The Qualifications Necessary to Give Expert Testimony*

An expert must meet several criteria in order to be qualified to render an opinion in a medical malpractice case. First, the proposed expert must possess knowledge beyond that of the ordinary person in order to give an expert opinion.[292] Whether the expert possess greater knowledge than the average person is rarely questioned; rather, at issue most often is whether an expert is qualified when required to have particular knowledge which exceeds the general standard for expertise. Issues concerning the particular qualifications of the expert witnesses often arise in medical malpractice cases because being a licensed physician will not necessarily ensure that the witness is a proper expert. Questions concerning the qualifications will generally arise when a defendant is licensed to practice in one field of medicine and the proposed expert is licensed in a different field of medicine,[293] or when the expert may be unfamiliar with the local standard of care.[294]

1. Identical Licensure Requirement

Initially, the Illinois Supreme Court held that an expert testifying in a medical malpractice trial had to be licensed in the particular discipline in which testimony was given in order to establish the standard of care owed by the defendant.[295] This requirement recognizes that in the interests of basic fairness defendants should be

291. Tangentially related to this topic is the case of Webb v. Angell, 155 Ill. App. 3d 848, 508 N.E.2d 508 (2nd Dist. 1987), which addressed whether the trial court properly barred the use of authorities during cross-examination. *Id.* at 860, 508 N.E.2d at 512. Interestingly, the *Webb* court based its decision on neither *Wilson* nor Rule 220. *Id.* In *Webb*, the defendant had directed interrogatories to the plaintiff on the source of the expert's opinion. *Id.* at 859, 508 N.E.2d at 512. The plaintiff neither answered the interrogatories nor indicated to the defendant that the authority would be used in an attempt to impeach the defendant's expert. *Id.* at 859-60, 508 N.E.2d at 512. *Webb* held that the trial court had discretion to bar testimony when discovery interrogatories where not properly answered. *Id.* at 860, 508 N.E.2d at 512.

292. ILL. REV. STAT. ch. 110, para. 220(a)(1) (1989). Rule 220(a)(1) provides in pertinent part:

> An expert is a person who, because of education, training or experience, possesses knowledge of a specialized nature beyond that of the average person on a factual matter material to a claim or defense in pending litigation and who may be expected to render an opinion within his expertise at trial.

Id. See also Johnson v. Commonwealth Edison Co., 133 Ill. App. 3d 472, 478 N.E.2d 1057 (1st Dist. 1985).

293. *See infra* notes 304-323 and accompanying text.

294. *See infra* notes 324-329 and accompanying text.

295. Dolan v. Galluzzo, 77 Ill. 2d 279, 396 N.E.2d 13 (1979).

judged by the standards in their field of medicine. Inequity would result if physicians outside the defendant's area of expertise were allowed to testify concerning the applicable standard of care.[296]

The identical licensure requirement has been criticized, however, as too formalistic.[297] Critics of this requirement note that it prevents professors in a field from testifying. This requirement also precludes a medical doctor from testifying against a nurse.[298]

The Illinois Supreme Court has allowed non-medical doctors to testify if the court considers the witness to be qualified to give expert witness testimony. In *Greenberg v. Michael Reese Hospital*,[299] the court denied defendant's motion for summary judgment, relying on the allowed an affidavit of a health physicist.[300] The court reasoned that the testimony of a non-practitioner of any school of medicine could establish the existence of a genuine issue of material fact.[301] Noting the diverse functions performed by hospital administrators, the court explained that a wide variety of evidence could be used to establish the relevant standard of care and that the identical licensure requirement was inapplicable.[302] Thus, the court found the expert amply qualified to testify to the standard of care for the therapy at issue, even though the expert was not a medical professional.[303]

The *Greenberg* decision has been criticized for refusing to extend the identical licensure requirement to a case involving hospital neg-

296. *Id.* at 285, 396 N.E.2d at 16. The determination of a witness' qualifications lies within the sound discretion of the trial court.

297. *Id.* at 287, 396 N.E.2d at 17 (Ward, J., dissenting).

298. *Id.* at 286-87, 396 N.E.2d at 17 (Ward, J., dissenting).

299. 83 Ill. 2d 282, 415 N.E.2d 390 (1980).

300. *Id.* at 294, 415 N.E.2d at 395. In *Greenberg*, several children who had been subjected to radiation treatment in the 1940's and early 1950's for tonsil problems brought suit. *Id.* at 284, 415 N.E.2d at 391. The plaintiff filed the affidavit of a health physicist, who had a bachelors degree in physics, a masters degree in radiological physics, and was working on a dissertation on the risks and benefits of pediatric radiology for a doctorate in radiological health physics. *Id.* at 286, 415 N.E.2d at 392.

301. *Id.* at 293-94, 415 N.E.2d at 395. The defendant had challenged the health physicist's qualifications under the rule established in *Dolan* because the expert was not a practitioner of any school of medicine. *Id.* at 292, 415 N.E.2d at 395. The defendant contended that the witness was not qualified to express opinions about conduct that involved medical judgment. *Id.*

302. *Id.* at 293, 415 N.E.2d at 395. Speaking to the diversity of hospital functions, the court noted that hospital functions extend "far beyond the narrow sphere of medical practice" and that medical judgments "do not constitute the entirety of a hospital's function." *Id.* Given this diversity, a medical professional was not necessary to establish the relevant standard of care. *Id.*

303. *Id.*

ligence.[304] Although *Greenberg* appears to relax significantly the identical licensure requirement, it does not hold that the identical licensure requirement is entirely inapplicable to cases of hospital negligence. *Greenberg* addressed only the sufficiency of the affidavit to raise a genuine issue of fact.[305] The court refrained from deciding whether the non-practitioner's testimony as to the standard of care could be used by the plaintiff as part of its prima facie case.[306]

Recently, the Illinois Supreme Court has retreated from its earlier formalistic approach requiring identical licensure.[307] In *Witherall v. Weimer*,[308] the supreme court gave more discretion to the trial court in determining whether the expert witness was qualified to testify.[309] The court affirmed the trial court's decision to allow a pharmacologist to testify on the standard of care for prescribing oral contraceptives.[310] Although the expert lacked a medical license, the court allowed the expert's testimony because the defendant was not prejudiced by the admission of the testimony.[311]

The *Witherell* decision suggests that identical licensure will not always be a preliminary qualification to an expert witness' testimony regarding the standard of care.[312] The extent to which the

304. Bartimus v. Paxton Community Hosp., 120 Ill. App. 3d 1060, 1069, 458 N.E.2d 1072, 1079 (4th Dist. 1983).

305. *Greenberg*, 83 Ill. 2d at 293-94, 415 N.E.2d at 395.

306. *Id.*

307. Witherall v. Weimer, 118 Ill. 2d 321, 515 N.E.2d 68 (1987). At least one appellate court declined to follow the blanket prohibition against allowing a physician licensed in one field of medicine act as an expert against a physician from another field of medicine. In *Bartimus*, the court stated in dicta that "where the professionals involved are licensed under the same statute, even though the philosophies underlying their respective methods of treatment may differ in some respects, the principles advanced by . . . [the identical licensure requirement] are not threatened." 120 Ill. App. 3d at 1069, 458 N.E.2d at 1079. The court recognized the policy behind the identical licensure rule, but expanded the scope of the types of experts which would be allowed to testify. *Id.*

308. 118 Ill. 2d 321, 515 N.E.2d 68 (1987)

309. *Id.* at 334, 515 N.E.2d at 74-75. The *Witherell* expert was a medical doctor who also held a masters degree in pharmacology, but he was not licensed to practice medicine in any state. *Id.*

310. *Id.*

311. *Id.* The court noted that the witness was a medical doctor, had a master's degree in pharmacology, worked for pharmaceutical manufacturers, and taught pharmacology. *Id.* In the court's opinion, these accomplishments amply established the expert's qualification in the field of pharmacology.

312. For example, in a case decided after *Witherell*, Novey v. Kishwaukee Community Health Center, 176 Ill. App. 3d 674, 531 N.E.2d 427 (2d Dist. 1988), the appellate court precluded a licensed occupational therapist from testifying against a licensed physical therapist. 176 Ill. App. 3d at 678-79, 531 N.E.2d at 430. The court applied a strict same school of medicine test. It also noted that even if the expert witness were licensed in the same field as the defendant, she was unfamiliar with the applicable standard of care

court has relaxed the "same school of medicine" requirement, however, is uncertain. Future cases will surely redefine the standards governing an expert witness' qualifications.

2. Similar Locality Requirement

Expert witnesses must establish that they are familiar with medical standards in a "similar locality." In *Purtill v. Hess*,[313] the Illinois Supreme Court addressed the issue of whether a party needs to establish that his expert witness is familiar with local standards, and not only with minimal standards which were uniform throughout the United States.[314] The court held that the expert "must be acquainted with accepted standards of care under similar circumstances in order to provide a proper opinion."[315] Moreover, a proper expert witness "must be familiar with the standards of care applicable to conditions and facilities available to the defendant doctor."[316] If there were certain uniform standards, however, and if they were applicable without regard to the particular locality, then lack of familiarity with the standard of practice in a particular area would not necessitate the expert's disqualification.[317] Thus, the locality requirement only applies when the particular local conditions and facilities are relevant.[318]

D. Standard of Care and Causation Issues

The primary function of an expert witness at a medical malpractice trial is to establish the applicable standard of care. The Illinois appellate courts have recently questioned the specificity of the expert testimony needed to establish the standard of care.[319] In *Smith v. Menet*,[320] the second district addressed the issue of whether the phrase "the standard of good medical care" was equivalent to the traditional standard of care used in medical malpractice cases.[321] The court initially noted that the phrase

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and therefore did not meet the second requirement of *Dolan*. *Id.* (citing Dolan v. Galuzzo, 77 Ill. 2d 279, 396 N.E.2d 13 (1979)).

313. 111 Ill. 2d 229, 489 N.E.2d 867 (1986).

314. *Id.* at 242-43, 489 N.E.2d at 872.

315. *Id.*

316. *Id.* at 247, 489 N.E.2d at 874-75.

317. *Id.*

318. *Id.* The local conditions requirement often arises in cases involving rural practitioners or hospitals that may not have all the facilities of urban hospitals.

319. Smith v. Menet, 175 Ill. App. 3d 714, 530 N.E.2d 277 (2d Dist. 1988).

320. *Id.*

321. *Smith*, 175 Ill. App. 3d at 718, 530 N.E.2d at 279-80. The traditional standard of care as articulated by *Smith* is "whether a doctor possessed and applied the knowledge

"[s]tandard of good medical care" was not as precise as the standard Illinois Pattern Jury Instruction ("IPI").[322] The court also went on to state that if " 'good' is interpreted to mean better than average, [the phrase "standard of good medical care"] contradicts the applicable standard as set forth in *Northern Trust Co. v. Skokie Valley Community Hospital.*"[323] Because the proponent of the expert witness used the phrase "standard of good medical care" when questioning the witness, the court held that this portion of the expert's testimony was improperly admitted at trial.[324]

In dissent, Justice Nash stated that he did not share the majority's "hypertechnical concern" that the jury applied the wrong standard of care when deciding the case because of the questioned statement.[325] The dissent stated that the use of dictionary definitions of "good" by the majority were "unnecessary, and perhaps misleading." It then concluded by citing prior case law and an IPI instruction which used the word "good" to describe the physician's standard of conduct.[326] The dissent believed that this precedent demonstrated that the use of the word "good" when describing the standard of care did not warrant the exclusion of the expert's testimony.

The committee comments to the IPI[327] on the duty of a physician and the *Smith v. Menet*[328] decision indicate that an objective standard is to be used to judge a defendant physician's conduct.[329] The physician is not required to be the best physician or even a "good" physician.[330] Rather, a defendant physician is merely re-

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and used the skill and care that is ordinarily used by reasonably well-qualified doctors in similar circumstances." *Id.*

322. *Id.* at 719, 530 N.E.2d at 280. By adding the term "good" to the standard of care, the standard became more subjective resulting in a more imprecise standard to apply.

323. *Id.* at 719, 530 N.E.2d at 280 (citing Northern Trust Co. v. Skokie Valley Community Hosp., 81 Ill. App. 3d 1110, 401 N.E.2d 1246 (1st Dist. 1988)).

324. *Id.*

325. *Id.* at 723, 530 N.E.2d at 283 (Nash, J., dissenting).

326. *Id.* (Nash, J., dissenting).

327. The Illinois Pattern Jury Instruction provides:

> In treating a patient, a doctor must possess and apply the knowledge and use the skill and care that is ordinarily used by reasonably well-qualified doctors in the locality in which he practices or in similar localities in similar cases and circumstances. A failure to do so is a form of negligence that is called malpractice.

Illinois Pattern Jury Instructions, Civil No. 105.01 (2d ed. 1971).

328. 175 Ill. App. 3d 714, 530 N.E.2d 277.

329. *See* Illinois Pattern Jury Instruction Civil No. 105.01; *Smith*, 175 Ill. App. 3d at 719, 530 N.E.2d at 280.

330. Illinois Pattern Jury Instruction Civil No. 105.01.

quired to conduct himself as would a "reasonably well-qualified" doctor.[331] Thus, an expert testifying to the standard of care is only required to state what the applicable standard of care is for the reasonably well-qualified physician. The expert need not define what constitutes "good medical care."

The question of whether expert testimony is necessary to establish causation has also been addressed by the Illinois courts. In *Ohligschlager v. Proctor Community Hospital*,[332] the court held that *no* expert testimony was necessary to establish causation under the facts of that case.[333] The court ruled that a defendant's deviation from a drug manufacturer's recommendations is prima facie evidence of negligence.[334] Proceeding to the causation issue, the court ruled that the "plaintiff was [not] required to adduce expert testimony to show specifically" which of the possibly negligent actions caused the plaintiff's injury.[335] Therefore, the court allowed the defendant's deviation from the manufacturer's recommendation to establish both the breach of the applicable standard of care and the causal connection between that breach and the plaintiff's injury.

The *Ohligschlager* approach can be contrasted with the approach used in *Russell v. Subbiah*.[336] In *Russell*, the court required the plaintiff to provide expert testimony to prove causation by a preponderance of the evidence.[337] The defendant filed a summary judgment motion based on, among other things, a change in the discovery deposition of the plaintiff's expert.[338] During the exchange between counsel and the witness, the expert stated that defendant's actions were not the proximate cause of plaintiff's injury.[339] In opposition to the motion for summary judgment, the plaintiff submitted an affidavit from the expert which stated that the defendant's acts were "a concurrent and a proximate cause," to plaintiff's injury.[340] The court held that the expert's "statements

331. *Id.*

332. 55 Ill. 2d 411, 303 N.E.2d 392 (1973).

333. *Id.* at 419, 303 N.E.2d at 397. *Ohligschlager* involved a plaintiff who was injured by a drug, Sparine, which had been administered through an intravenous tube. *Id.* at 413-14, 303 N.E.2d at 395.

334. *Id.* at 418, 303 N.E.2d at 396.

335. *Id.* at 418-19, 303 N.E.2d at 397.

336. 149 Ill. App. 3d 268, 500 N.E.2d 138 (3rd Dist. 1986). The pivotal issue in *Russell* was whether the defendant's alleged misdiagnosis of a spinal cord tumor and the subsequent delay in treatment caused increased injury to the plaintiff's right leg. *Id.* at 269, 500 N.E.2d at 139.

337. *Id.* at 272, 500 N.E.2d at 141.

338. *Id.* at 268-69, 500 N.E.2d at 140.

339. *Id.* at 270, 500 N.E.2d at 141.

340. *Id.* at 271, 500 N.E.2d at 141.

with respect to proximate cause fall short of the requisite burden of proof."[341] The court noted that since the plaintiff's expert had given the probability that defendant proximately caused the injury as only 50/50, the testimony was insufficient to satisfy the plaintiff's burden of proof on the essential element of causation.[342]

In dissent, Justice Barry noted that the confusing comments made by plaintiff's expert were a result of "defendant's attorney wrongly defin[ing] 'proximate' as 'direct.' "[343] The dissent argued that the defendant "should not be able to take advantage of the ambiguity introduced by his own attorney."[344] The dissent stated that the expert's affidavit, coupled with the deposition testimony, provided ample evidence of causation to defeat the motion for summary judgment.

In addition to presenting a good example of the disparate approaches to the issue of causation adopted by the Illinois courts, the *Russell* case illustrates the problem attending proof of causation with expert testimony. Specifically, the *Russell* case exemplifies the problems medical experts experience with legal jargon.

E. Cross-examination of Expert Witnesses

Within the last five years the Illinois Supreme Court has considerably expanded the scope of cross-examination of expert witnesses.[345] Generally, cross-examination is limited to the scope of direct examination. However, the court has allowed the expert witnesses to be questioned on matters outside the scope of direct on matters such as the number of referrals received,[346] the frequency with which the expert testifies for plaintiffs or defendants,[347] and the expert's earnings from giving expert testimony.[348]

In *Sears v. Rutishauser*,[349] the court held that the trial court erred when it prohibited the cross-examination of plaintiff's experts regarding the number and frequency of referrals from the plaintiff's attorney over the preceding four years.[350] The supreme

341. *Id.* at 272, 500 N.E.2d at 141.

342. *Id.* (citing Borowski v. VonSolbrig, 60 Ill. 2d 418, 328 N.E.2d 301 (1975)). For a discussion of proof of causation, see Howard, *Proving Causation with Expert Opinion: How much Certainty is Enough?*, 74 ILL. B.J. 580 (1986).

343. *Russell*, 149 Ill. App. 3d at 274, 500 N.E.2d at 142 (Barry, J., dissenting).

344. *Id.* (Barry, J., dissenting).

345. Sears v. Rutishauser, 102 Ill. 2d 402, 466 N.E.2d 210 (1984).

346. *Id.* at 411, 466 N.E.2d at 214.

347. *Id.*

348. Trower v. Jones, 121 Ill. 2d 211, 218-20, 520 N.E.2d 297, 300-01 (1988).

349. 102 Ill. 2d 402, 466 N.E.2d 210 (1984).

350. *Id.* at 411, 466 N.E.2d at 214.

court, however, limited the scope of cross-examination to the subjects of "the number of referrals, their frequency, and the financial benefit derived from them."[351]

The Illinois Supreme Court expanded the *Sears* holding in *Trower v. Jones.*[352] In *Trower*, the plaintiff contended that allowing inquiry into the earnings of the expert witness would require extensive redirect examination on the reasonableness of the fees charged and the merits of the other cases in which the expert testified.[353] Despite this objection, the *Trower* court held that it was proper to cross-examine an expert as to his earnings from rendering expert testimony during the past two years and the frequency with which he testified for a particular side.[354] Recognizing the impracticality of an in-depth examination of these areas, the court suggested that this inquiry should not be extensive.[355] The trial has the discretion to determine the appropriate limits on this inquiry into the expert's earnings from and frequency of testifying as an expert.[356]

The Illinois appellate courts have designated other areas on which an expert can be cross-examined. In *Poole v. University of Chicago*,[357] for example, the court held that it is within the trial court's discretion to determine whether "collateral matters revealing the past conduct of the witness" are relevant and admissable on cross-examination.[358] However, the court limited the actions that counsel could take to impeach the witness. The court stated that " '[i]f the answer [regarding the witness' past conduct] is unsatisfactory to the cross-examiner because he believes or knows it to be untrue, he is nevertheless bound by it and cannot

351. *Id.*

352. 121 Ill. 2d 211, 520 N.E.2d 297 (1988). *Trower* overruled McMahon v. Chicago City Ry. Co., 239 Ill. 334, 88 N.E. 223 (1909); Chicago City Ry. Co. v. Smith, 226 Ill. 178, (1907); and Chicago and E. Ill. R.R. Co. v. Schmitz, 211 Ill. 446, 71 N.E. 1050 (1904).

353. *Trower*, 121 Ill. 2d at 219, 520 N.E.2d at 301.

354. *Id.* at 218-20, 520 N.E.2d at 300-01.

355. *Id.* at 219-20, 520 N.E.2d at 301. The Illinois Supreme Court in *Sears* and *Trower* cited Graham, *Impeaching the Professional Expert Witness by Showing of Financial Interest*, 53 IND. L. J. 35 (1977). Professor Graham asserts that it is very difficult to cross-examine an expert on his "qualifications, basis, assumptions or reasoning" because of the expert's extensive knowledge in the area. Graham, *supra*, at 40-41. This difficulty is compounded by experienced experts who are "exceptionally proficient in the art of expert witness advocacy." *Id.* Therefore, Graham contends that the ability to impeach the expert by showing bias on the basis that the expert received payment for his testimony is the most effective form of cross-examination. *Id.* at 41.

356. *Trower*, 121 Ill. 2d at 219-20, 520 N.E.2d at 300-01.

357. 186 Ill. App. 3d 554, 542 N.E.2d 746 (1st Dist. 1989).

358. *Id.* at 561, 542 N.E.2d at 750-51 (quoting S. GARD, ILLINOIS EVIDENCE MANUAL § 22:12, at 449 (2d ed. 1979)).

impeach the answer of the witness by other evidence.' "[359]

The role of the expert witness at trial presents numerous problems affecting the substantive rights of the litigants. The solution to these problems may in turn create new problems. For example, although the potential of unfair surprise is minimized by the potential for discovery sanctions under Rule 220, these sanctions carry with them the potential to undermine or eliminate a party's prima facie case; therefore, they ought be used sparingly. Additionally, allowing the expert to rely on and to relate to the jury otherwise inadmissable materials or statements may promote judicial economy and be consistent with Rules 703 and 705, but it may also result in the jury basing its verdict on matters not admitted into evidence. With the difficulties experienced by the courts with these and other problems, it is likely that the issues surrounding the use of the medical malpractice expert witness will be present in the future.

IV CONCLUSION

The expert witness is involved in every phase of medical malpractice litigation. His presence ensures the presence of legal issues such as the proper qualifications of the expert, the substance of the expert's testimony, and most importantly, the effect on the substantive rights of the litigants when the court decides whether to admit expert testimony or bar its use. The court's decision on the appropriateness of expert witness testimony, in all its forms, will influence, if not determine the outcome of the litigation.

The trial court must initially address all the issues surrounding expert testimony and has therefore been given the necessary broad grant of discretion to allow it to resolve issues associated with expert witnesses effectively and efficiently. Although necessary, this broad grant of discretion must be carefully exercised. The trial court must take guidance in all phases of the litigation from the broad purpose of the Illinois Code of Civil Procedure to preserve the substantive rights of the parties involved. Judicial economy and compliance with the rules of procedure are admittedly important aspects of an effective court system. However, if these two

359. *Id.* (quoting S. GARD, ILLINOIS EVIDENCE MANUAL § 450 (2d ed. 1979)). *But cf.* People v. Downey, 53 Ill. App. 3d 532, 368 N.E.2d 595 (1977); E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE §§ 607.2, 608.5 (3d ed. 1979) (matters concerning credibility, such as the competency of an expert witness, are not collateral; credibility of witness may not be attacked by questions concerning specific acts of misconduct not leading to a conviction).

goals are permitted to take precedent over the substantive rights of the parties our court system becomes not only more efficient, but also more unjust.