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## *Diminskis v. Chicago Transit Authority:* Circumventing Expert Witness Discovery

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## Case Note

### *Diminskis v. Chicago Transit Authority:* Circumventing Expert Witness Discovery

#### I. INTRODUCTION

The increasing complexity of claims in the modern lawsuit has made expert witness testimony a common evidentiary tool.<sup>1</sup> Because of their high degree of knowledge or experience, expert witnesses may offer specialized testimony that may be crucial to the resolution of legal disputes.<sup>2</sup> Litigants therefore are keenly interested in the identity of an expert and the substance of expert testimony.<sup>3</sup>

Illinois Supreme Court Rule 220 is an essential element in Illinois pretrial practice.<sup>4</sup> Rule 220 defines who is an expert witness and regulates the disclosure of the expert's identity and opinion.<sup>5</sup> The purpose of Rule 220 is to provide all parties with sufficient knowledge about an expert's testimony so that they may adequately prepare for trial.<sup>6</sup> Pursuant to this objective, Rule 220 mandates full disclosure of those experts who will testify at trial.<sup>7</sup> Full disclosure of testifying experts allows claims to be decided on the merit of the legal issues, without any advantage being gained through attorney gamesmanship.<sup>8</sup>

In *Tzystuck v. Chicago Transit Authority*, consolidated for purposes of decision with *Diminskis v. Chicago Transit Authority* (hereinafter "*Diminskis*"), the Illinois Supreme Court held that a

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1. Sloan and Adams, *Illinois Supreme Court Rule 220: The Winning Edge in the Battle of the Experts*, 77 ILL. B.J. 64 (August 1989).

2. Foreman and Mueller, *Timely Disclosure of Expert Witnesses—Analysis of Supreme Court Rule 220*, 74 ILL. B.J. 540 (July 1986).

3. *Id.*

4. 4 R. MICHAEL, ILLINOIS PRACTICE, CIVIL PROCEDURE BEFORE TRIAL § 31.3, at 104 (1989) (In Illinois, full discovery has replaced the adversarial system of litigation).

5. ILL. REV. STAT. ch. 110A, para. 220 (1985). See *infra* note 40 for full text.

6. ILL. ANN. STAT. ch. 110A, para. 220 (Committee Comments) (Smith-Hurd 1989).

7. ILL. REV. STAT. ch. 110A, para. 220(b)(1) (1989). An expert whose opinion is sought in preparation for trial but who does not testify is classified as a "consultant," and his opinion is only discoverable upon a showing of exceptional circumstances. ILL. REV. STAT. ch. 110A, para. 220(c)(5) (1989).

8. ILL. ANN. STAT. ch. 110A, para. 220 (Committee Comments) (Smith-Hurd 1989). See also Foreman and Mueller, *supra* note 2, at 542.

treating physician who offers a medical "expert" opinion at trial is not an expert witness within the meaning of Rule 220.<sup>9</sup> Consequently, Rule 220 does not require a party to disclose the identity or opinions of treating physicians who will offer "expert" testimony at trial.<sup>10</sup> The court thus limited Rule 220 to the disclosure of an expert witness's identity and opinion, not the disclosure of an ordinary witness' "expert" opinion. In doing so, the court created a means to circumvent the disclosure requirements within Rule 220 by allowing ordinary witnesses to offer expert opinions without subjecting these witnesses to mandatory disclosure.<sup>11</sup>

This Note first examines the background of expert witness discovery in Illinois. Next follows a discussion of expert witness discovery under Rule 220 and demonstrates the negative implications of *Diminskis* and subsequent court decisions on pretrial practice. Finally, it analyzes *Diminskis* and subsequent case law and addresses the flaws in the *Diminskis* rationale and its potential impact on expert witness discovery in Illinois.

## II. BACKGROUND

In 1984 the Illinois General Assembly enacted Rule 220<sup>12</sup> in an effort to solve problems of expert witness discovery under the prior discovery rules.<sup>13</sup> Judges, attorneys, and many legal scholars welcomed Rule 220 as a significant step in aiding the pretrial discovery

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9. In deciding whether treating physicians should be treated as expert witnesses, the Illinois Supreme Court consolidated two cases for appeal, *Tzystuck v. CTA*, 124 Ill. 2d 226, 529 N.E.2d 525 (1988) and *Diminskis v. CTA*, 124 Ill. 2d 226, 529 N.E.2d 525 (1988).

*Tzystuck* involved the issue of expert witness fees for payment of a treating physician who testified at trial. The trial court held that the plaintiff's physician was an expert and required the plaintiffs to pay their expert witness fees. *Id.* at 232, 529 N.E.2d at 527. The Illinois Supreme Court accepted *Tzystuck* as a certified question, and after ruling on *Diminskis*, the court held that the plaintiff need pay only the treating physician regular fees, not expert witness fees. *Id.* at 239, 529 N.E.2d at 531. In *Diminskis*, the court held that a treating physician who testifies at trial should not be subject to Rule 220's disclosure requirements. *Id.* at 233, 529 N.E.2d at 528.

This Article focuses on the pretrial discovery of treating physicians and occurrence witnesses. Thus, the Illinois Supreme Court's decision concerning the status of treating physicians will be discussed in the context of the court's reasoning in deciding *Diminskis*, although the citation will refer to *Tzystuck*.

10. *Tzystuck*, 124 Ill. 2d at 236, 529 N.E.2d at 529.

11. See *infra* notes 130-57 and accompanying text (necessity of disclosure discussed).

12. ILL. ANN. STAT. ch. 110A, para. 220 (Historical and Practice Notes) (Smith-Hurd 1989) ("[There is no antecedent in the Supreme Court Rules for the] discovery of material prepared for a party in connection with a trial and the mandatory disclosures of reports and statements of experts.")

13. Foreman and Mueller, *supra* note 2, at 541. The Rule "gives the judge some guidance, while allowing trial counsel to rely upon its provisions as a means of eliminat-

process by eliminating unfair surprise and prejudice to parties.<sup>14</sup> However, to appreciate the importance of Rule 220 today, one must first consider the checkered history of expert witness discovery in Illinois.

The Illinois Supreme Court addressed the use of expert witness testimony in *City of Chicago v. McNally*.<sup>15</sup> In *City of Chicago v. McNally*,<sup>16</sup> the court specifically defined the qualifications of an expert witness and distinguished an expert from an ordinary witness.<sup>17</sup> The court stated that only those individuals who possessed knowledge superior to that of an ordinary person were qualified to offer expert opinions at trial.<sup>18</sup> The court also stated that although non-expert witnesses may offer their subjective evaluation of events, expert witnesses must offer an objective assessment of the facts.<sup>19</sup>

Even though subsequent courts came to recognize that expert witness testimony served as a valuable evidentiary tool, they hesitated to allow pretrial discovery of expert witnesses.<sup>20</sup> Initially, courts limited or banned discovery of expert witness testimony on three bases:<sup>21</sup> attorney-client privilege,<sup>22</sup> unfairness to the party se-

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ing the type of 'surprise' that previously frustrated the process of pretrial preparation and evaluation." *Id.*

14. Sloan and Adams, *supra* note 1, at 643.

15. 227 Ill. 14, 18, 81 N.E. 23, 24-25 (1907); *see also* West Chicago St. R.R. Co. v. Fishman, 169 Ill. 196, 198 (1897) ("where a previous habit or study is essential to the formation of an opinion sought to be put in evidence, only such persons . . . by experience, special learning or training . . ." may testify as an expert.)

16. 227 Ill. at 14, 81 N.E. at 23.

17. *Id.* 227 Ill. at 18, 81 N.E. at 25. The *McNally* court distinguished an ordinary witness from an expert witness by noting that the testimony of an ordinary witness relates to events actually witnessed while an expert's opinion is based on specialized knowledge. *Id.*

18. *Id.*

19. *Id.* *McNally* involved the expert testimony of three physicians in a personal injury suit. *Id.* at 16-17, 81 N.E. at 24-25. The court allowed the expert witness, the plaintiff's treating physician, to base his opinion on the plaintiff's suggestive statements because it was part of the general examination. *Id.* at 18, 81 N.E. at 25.

20. *See* ILL. ANN. STAT. ch. 110A, para. 220 (Historical and Practice Notes) (Smith-Hurd 1989) ("[h]istorically, there was considerable reluctance to approve the discovery of expert witnesses in litigation.")

21. *See* Keegan, *Privileged Matters and Protective Orders in Discovery Procedure*, 1959 U. ILL. L.F. 801 (1959) (former Illinois rules of discovery followed the English system that restricts discovery to the opponent's own testimony, not that of his witnesses). *See* Note, *Discovery of Non-testifying Expert Witness' Identity Under the Federal Rules of Civil Procedure: You Can't Tell the Players Without a Program*, 37 HASTINGS L.J. 201 (1985) (discussion of the evolution of expert witness discovery under the Federal Rules of Civil Procedure).

22. *See* *City of Chicago v. Harrison-Halsted Corp.*, 11 Ill. 2d 431, 143 N.E.2d 40 (1957) (expert appraiser's evaluation of property in question not discoverable because of

curing the expert witness,<sup>23</sup> and the work product doctrine.<sup>24</sup> Although Illinois courts gradually became less reluctant to permit expert discovery, this did not occur until after the Illinois Supreme Court's landmark decision in *Monier v. Chamberlain*<sup>25</sup> that provided the foundation for today's broad discovery rules.<sup>26</sup>

In *Monier*, the court addressed whether the defendant's insurance company could prevent the discovery of various medical reports, witness statements, and communications between the defendant and his insurance company and his attorney.<sup>27</sup> The court held that only those documents and reports revealing the thoughts of the defendant's attorney in preparation for trial were barred from discovery.<sup>28</sup> The court allowed the discovery of all other materials that contributed to the "truth seeking" process.<sup>29</sup> According to the court, the purpose of the discovery process was to promote the "expeditious and final determination of controversies in accordance with the substantive rights of the parties."<sup>30</sup> The court also stated that "the increasing complexity and volume of present day litigation involves frequent recourse to discovery procedures and to unduly limit their scope would serve only to inhibit pretrial settlements, increase the burden of already crowded court calendars and thwart the efficient and expeditious administration

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attorney-client privilege); *Dickerson v. Dickerson*, 322 Ill. 492, 153 N.E. 740 (1926) (attorney-client privilege prevents the discovery of photographs of a contested deed).

23. *Keegan*, *supra* note 21, at 812 ("[s]ome courts have refused to compel disclosure of experts' reports because of their belief that it is inherently unfair to permit a party . . . to examine an expert for whose work and research they have paid nothing.") *See also* *Yowell v. Hunter*, 403 Ill. 202, 210, 85 N.E.2d 674, 678-79 (1949) (plaintiff not required to divulge either the names of her expert witnesses before trial or materials prepared by these experts).

24. *See* *People v. White*, 8 Ill. App. 2d 428, 436-37, 131 N.E.2d 803, 807-8 (1st Dist. 1957) (attorney could not be held in contempt for refusing to provide a copy of a witness' statement to the plaintiff); *Hayes v. CTA*, 340 Ill. App. 375, 385-86, 92 N.E.2d 174, 177-78 (1st Dist. 1950) (plaintiff not entitled to discovery of statements he made after the accident or in medical report because these were immune from discovery). *Contra* *Krupp v. CTA*, 8 Ill. 2d 37, 132 N.E.2d 532 (1956) (defendant unsuccessfully argued that privilege protected against disclosure of the names and addresses of those who witnessed accident).

25. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

26. *See* *Department of Transp. v. Western Nat'l Bank*, 63 Ill. 2d 179, 347 N.E.2d 161 (1976) (post-*Monier* case that allowed the discovery of expert appraiser's report in order to uphold the policy of "full" discovery initiated by *Monier*). *Contra* *Harrison-Halsted*, 11 Ill. 2d 431, 143 N.E.2d 40 (pre-*Monier* decision that barred discovery of expert appraiser's report).

27. *Monier*, 35 Ill. 2d at 357-58, 221 N.E.2d at 414. The insurance company represented the defendant in a personal injury suit. *Id.* at 358, 221 N.E.2d at 414.

28. *Id.* at 360, 221 N.E.2d at 416.

29. *Id.*

30. *Id.* at 357, 221 N.E.2d at 414.

of justice.”<sup>31</sup>

Although *Monier* provided the impetus for more complete discovery procedures, courts still lacked a clear statutory basis for pretrial discovery of expert witnesses.<sup>32</sup> In 1976 the state legislature responded to the courts’ call for guidance and amended the general witness discovery provision to include expert witnesses.<sup>33</sup> Chapter 110, section 2-1003(c) of the Illinois Code of Civil Procedure allowed a party, upon motion, to obtain the identity of an expert witness “in sufficient time in advance of trial.”<sup>34</sup> However, the amendment failed to improve expert witness discovery because statutory language concerning the timing of disclosure was too imprecise.<sup>35</sup> In some instances, courts permitted late or surprise testimony by experts, thus prejudicing litigants.<sup>36</sup> On the other hand, some courts interpreted section 2-1003(c) so broadly as to improperly exclude expert witness testimony.<sup>37</sup> These errors and inconsistent applications of section 2-1003(c) frequently prejudiced litigants’ rights and unnecessarily delayed trials.<sup>38</sup> To alleviate

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31. *Id.*

32. See *Brown v. Highland Park Hosp.*, 69 Ill. App. 3d 769, 387 N.E.2d 1041 (2d Dist. 1979) (in the absence of statutory guidance (from § 2-1003(c)), the court erred in dismissing the suit for failure to comply with a disclosure order); *Schaefer v. Sippel*, 58 Ill. App. 3d 816, 374 N.E.2d 1092 (1st Dist. 1978) (absent a court order, the plaintiff is not required to disclose experts).

33. ILL. ANN. STAT. ch. 110, para. 2-1003(c) (Smith-Hurd 1989). The legislature intended to allow trial courts to enter orders requiring litigants to disclose their experts in advance of trial in order to avoid unfair surprise. Foreman and Mueller, *supra* note 2, at 540.

34. Chapter 110, section 2-1003(c) states:

A party shall not be required to furnish the names or addresses of his or her witnesses, except upon motion of any other party disclosure of the identity of expert witnesses shall be made to all parties and the court in sufficient time in advance of trial so as to ensure a fair and equitable preparation of the case by all parties.

ILL. ANN. STAT. ch. 110, para. 2-1003(c) (Smith-Hurd 1989).

35. 4 R. MICHAEL, *supra* note 4, § 34.3, at 162-63. In particular, the amendment contained language that required disclosure of experts in sufficient time in advance of trial; however, this language was too vague to provide proper guidance. *Id.*

36. See *Lindley v. St. Mary's Hosp.*, 85 Ill. App. 3d 559, 406 N.E.2d 952 (5th Dist. 1980) (section 2-1003(c) requires disclosure of an expert if the court enters an order but fails to protect against surprise after the interrogatory); *Brumley v. Federal Barge Line, Inc.*, 78 Ill. App. 3d 799, 396 N.E.2d 1333 (5th Dist. 1979) (despite the introduction of an expert witness at trial who had not been disclosed previously, the court held there was no prejudice because defendant should have known about witness); see also *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 328 N.E.2d 301 (1975) (appellate court found error in trial court allowing expert testimony beyond the scope of the pre-trial deposition).

37. See *Harris Trust and Sav. Bank v. Ali*, 100 Ill. App. 3d 1, 425 N.E.2d 1359 (1st Dist. 1981).

38. *Beasley v. Huffman Mfg Co.*, 97 Ill. App. 3d 1, 4, 422 N.E.2d 241, 243 (3d Dist. 1981) (court stated that delaying trial to depose an expert was one means to avoid unfair

these problems the state legislature enacted Rule 220.<sup>39</sup>

Rule 220<sup>40</sup> consists of four parts, each addressing a different as-

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surprise); *Brown v. Highland Park Hosp.*, 69 Ill. App. 3d 769, 770, 387 N.E.2d 1041, 1042 (2d Dist. 1979) (trial court erroneously dismissed cause of action for failure to list expert witness in pretrial discovery).

39. ILL. ANN. STAT. ch. 110A, para. 220 (Historical Notes and Comments) (Smith-Hurd 1989).

40. Rule 220 provides:

(a) Definitions.

(1) *Definition of Expert Witness.* 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. He may be an employee of a party, a party or an independent contractor.

(2) *Consulting Expert.* A consulting expert is a person who possesses the same qualifications as an expert witness and who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial to render opinions within his area of expertise.

(b) Disclosure.

(1) *Expert Witness.* Where the testimony of experts is reasonably contemplated, the parties will act in good faith to seasonably:

- (i) ascertain the identity of such witnesses, and
- (ii) obtain from them the opinions upon which they may be requested to testify.

In order to insure fair and equitable preparation for trial by all parties the identity of an expert who is retained to render an opinion at trial on behalf of a party must be disclosed by that party either within 90 days after the substance of the expert's opinion first becomes known to that party or his counsel or, if the substance of the expert's opinion is then known, at the first pretrial conference in the case, whichever is later. In any event, as to all expert witnesses not previously disclosed, the trial court, on its own motion, or on the motion of any party after the first pretrial conference, shall enter an order scheduling the dates upon which all expert witnesses, including rebuttal experts, shall be disclosed. The schedule established by the trial court will sequence the disclosure of expert witnesses in accordance with the complexities of the issues involved and the burdens of proof of the respective parties as to those issues. All 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. Upon disclosure, the expert's opinion may be the subject of discovery as provided in paragraph (c) hereof. 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.

(2) *Consulting Expert.* Except as provided in paragraph (c)(5) hereof, a party need not disclose the identity of a consulting expert.

(c) Discovery.

(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 therefor; and
- (iii) his qualifications.

pect of expert witness discovery. The Rule defines the qualifications of expert witnesses<sup>41</sup> and requires parties to identify those experts who will testify at trial.<sup>42</sup> Rule 220 also regulates the discovery of an expert witness's opinion.<sup>43</sup> Although the state legislature sought to establish a uniform system of expert witness discovery when it enacted Rule 220,<sup>44</sup> the Rule regulates expert witness discovery in a flexible manner by providing three alterna-

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(2) The party answering such interrogatories may respond by submitting the signed report of the expert containing the required information.

(3) A party shall be required to seasonably supplement his answers to interrogatories propounded under this rule as additional information becomes known to the party or his counsel.

(4) The provisions of paragraphs (c) and (d) hereof also apply to a party or an employee of a party who will render an opinion within his expertise at the time of trial. However, the provisions of paragraphs (c) and (d) do not apply to parties or employees of entities whose professional acts or omissions are the subject of the litigation. The opinions of these latter persons may be the subject of disclosure by deposition only.

(5) The identity, opinions and work product of consulting experts are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means. However, documents, objects and tangible things as defined in Rule 214 which are in the possession of a consulting expert and which do not contain his opinions may be obtained by a request for that purpose served upon the party retaining him.

(6) Unless manifest injustice would result, each party shall bear the expense of all fees charged by his expert witness or witnesses.

(d) Scope of testimony. To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings through interrogatories, deposition or requests to produce, his direct testimony at trial may not be inconsistent with nor 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 facts or opinions on matters regarding which inquiry was not made in the discovery proceedings.

ILL. REV. STAT. ch. 110A, para. 220 (1989) (emphasis in original).

41. Rule 220(a) defines "expert" very broadly and includes "[a]ny individuals having the requisite knowledge and qualifications . . . regardless of their relationship" to the case. Foreman and Mueller, *supra* note 2, at 541. Rule 220(a) also distinguishes between experts who will be called to testify at trial in 220(a)(1) and qualified experts who will not testify at trial. ILL. REV. STAT. ch. 110A, para. 220(a)(1)-(a)(2).

42. *Id.* para 220(b). See Singh v. Air Illinois, Inc., 165 Ill. App. 3d 923, 931, 520 N.E.2d 852, 857 (1st Dist. 1988) (testimony barred for failure to disclose former employees who would testify as expert witnesses). See also Payne v. Nicholas, 156 Ill. App. 3d 768, 509 N.E.2d 547 (1st Dist. 1987) (expert witness disclosed two weeks before trial could testify because he could be deposed).

43. See James by James v. Yasunaga, 157 Ill. App. 3d 450, 510 N.E.2d 531 (4th Dist. 1987), *appeal denied*, 116 Ill. 2d 559, 515 N.E.2d 109 (plaintiff's expert witness, who became defendant's expert witness, could not testify at trial because the court-ordered deadline for the opinion's disclosure had passed).

44. ILL. ANN. STAT. ch. 110A, para. 220(c), (d) (Committee Comments) (Smith-Hurd 1989).



tive time periods for disclosure.<sup>45</sup>

The Rule first requires a party to disclose the identity of an expert witness at the first pretrial conference if the expert's opinion is known at that time.<sup>46</sup> If the expert's opinion is not known at the first pretrial conference, a party who will use the expert at trial must disclose the expert's identity within ninety days after the substance of the expert's opinion becomes known.<sup>47</sup> Next, if the expert has not been disclosed under the prior two circumstances, the trial court, on its own motion or by a party's motion, must set a date for the completion of expert discovery; the date may not be later than sixty days before trial.<sup>48</sup> Rule 220 also states that an expert witness will be disqualified if a party fails to comply with the disclosure requirements.<sup>49</sup>

Although the drafters intended Rule 220 as a final solution to the problems of expert witness discovery, many problems still exist. In particular, appellate courts have offered divergent interpretations of the sixty-day deadline for disclosure.<sup>50</sup> Additionally, the courts have permitted ordinary witnesses to offer "expert" opinions without subjecting the witnesses to Rule 220's disclosure requirements. The Illinois Supreme Court addressed this in *Tzystuck v. Chicago Transit Authority*.<sup>51</sup>

### III. DISCUSSION

#### A. *Tzystuck v. Chicago Transit Authority*<sup>52</sup>

In February 1983, a Chicago Transit Authority ("CTA") bus struck Victor Diminskis as he crossed the street.<sup>53</sup> Paramedics rushed Diminskis to the hospital where he was treated by Dr. Kelvin Von Roenn. Shortly thereafter, Diminskis filed a personal injury suit against the CTA.<sup>54</sup>

Prior to trial, the CTA requested that Diminskis identify the ex-

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45. 4 R. MICHAEL, *supra* note 4, § 34.3, at 162-63.

46. ILL. ANN. STAT. ch. 110A, para. 220 (b)(1)(ii) (Smith-Hurd 1989).

47. *Id.*

48. *Id.*

49. *Id.*

50. See *Klingler Farms v. Effingham Equity Inc.*, 171 Ill. App. 3d 567, 525 N.E.2d 1172 (5th Dist. 1988) (parties must disclose experts at least sixty days before trial even if the trial court has not set a deadline). *Contra Illini Aviation, Inc. v. Walden*, 161 Ill. App. 3d 345, 514 N.E.2d 551 (4th Dist. 1987) (if no time set by court for disclosure of experts, then parties cannot violate Rule 220).

51. See *infra* notes 107-57 and accompanying text.

52. 124 Ill. 2d 226, 529 N.E.2d 525 (1988).

53. *Id.* at 230, 529 N.E.2d at 527.

54. *Id.*

pert witnesses who would testify on his behalf.<sup>55</sup> Diminskis informed the CTA that treating physicians would testify at trial, but he failed specifically to name Dr. Von Roenn.<sup>56</sup> Previously, in response to an interrogatory requesting a list of expert witnesses, Diminskis disclosed Von Roenn's identity to the CTA and provided the physician's medical records.<sup>57</sup> At trial, Dr. Von Roenn testified over the defendant's objection and offered an opinion as to the severity of Diminskis's injuries and his prospects for recovery. The jury returned a verdict for the plaintiff.<sup>58</sup>

On appeal, the CTA claimed that the trial court should have excluded Von Roenn's testimony concerning the long-term effects of the accident. The CTA contended that it suffered prejudice as a result of the plaintiff's failure to disclose Dr. Von Roenn's expert status, as is required under Rule 220(b). The appellate court held that a treating physician retained to testify at trial is subject to the disclosure requirements of Rule 220.<sup>59</sup> The court concluded, however, that the CTA had not been prejudiced by Dr. Von Roenn's testimony and affirmed the trial court's decision.<sup>60</sup>

Upon rehearing, the appellate court again affirmed.<sup>61</sup> The court held that a treating physician is not an expert witness and, therefore, need not be disclosed under Rule 220.<sup>62</sup> The appellate court reasoned that a treating physician differs from an expert witness physician because the relationship to the litigant is that of a healer; in contrast, an expert physician consults with litigants solely for the purpose of offering testimony at trial.<sup>63</sup> Thus, the court considered a treating physician to be an ordinary witness, not an expert witness.<sup>64</sup>

The CTA appealed to the Illinois Supreme Court. The supreme court held that a treating physician who offers an "expert" opinion

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55. *Id.* at 231, 529 N.E.2d at 527.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 232, 529 N.E.2d at 527.

63. *Diminskis*, 155 Ill. App. 3d at 590-91, 508 N.E.2d at 219. For the appellate court, this distinction in the type of relationship between the treating physician and the patient and that of the expert and the plaintiff explained why a treating physician is not "retained" for trial as stated in Rule 220(b)(1). *Id.* The appellate court also relied on federal court precedent that excludes treating physicians from expert discovery. *Id.* (citing FED. R. CIV. P. 26(b)(4) and *Baran v. Presbyterian Hosp.*, 102 F.R.D. 272 (W.D. Pa. 1984)).

64. *Id.* at 591, 508 N.E.2d at 219.

at trial is not an expert witness within the meaning of Rule 220.<sup>65</sup> In addressing this issue, the supreme court first considered whether a treating physician was an expert under the definitional section of Rule 220.<sup>66</sup> The court acknowledged that Rule 220's broad definition of an expert appeared to include *any* witness with knowledge superior to that of an ordinary person.<sup>67</sup> The court reasoned, however, that the definitional provision of Rule 220 did not allow for the characterization of treating a physician as an expert.<sup>68</sup> The court further stated that disclosure of expert witnesses and their opinions was to be governed by whether a witness was retained to give an opinion at trial or actually witnessed the events surrounding the litigation.<sup>69</sup>

The supreme court then considered whether a treating physician is "retained to render an opinion at trial" within the meaning of Rule 220(b)(1).<sup>70</sup> The CTA argued that this language should be interpreted broadly and should include any witness who is "requested" to offer an opinion at trial within that witness's field of expertise.<sup>71</sup> The court rejected this argument, stating that treating physicians are not retained for trial but for medical purposes.<sup>72</sup> The court explained that a treating physician is more like an occurrence witness because his or her opinion results from personal observation and treatment of a patient; in contrast, an expert physician forms an opinion in contemplation of testifying at trial.<sup>73</sup> To buttress its opinion further, the court noted that federal courts do not require a party to disclose the identity or opinions of treating physicians who will testify at trial.<sup>74</sup> The Illinois Supreme Court found this notion especially supportive because the drafters of Rule 220 had relied on the comparable federal rule for guidance

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65. *Tzystuck*, 124 Ill. 2d at 235, 529 N.E.2d at 529.

66. *Id.* at 234-235, 529 N.E.2d at 528-29.

67. *Id.*

68. ILL. ANN. STAT. ch. 110A, para. 220(a)(1) (Smith-Hurd 1989).

69. *Tzystuck*, 124 Ill. 2d at 233, 529 N.E.2d at 528.

70. *Id.* at 234, 529 N.E.2d at 528. Under Rule 220(b)(1), a qualified expert witness who is "retained to render an opinion at trial" must be disclosed according to Rule 220. ILL. ANN. STAT. ch. 110A, para. 220(b)(1) (Smith-Hurd 1989).

71. *Tzystuck*, 124 Ill. 2d at 234, 529 N.E.2d at 528.

72. *Id.*

73. *Id.* The court stated that "[s]uch an opinion . . . is simply the product of a physician's observations while treating the patient."

74. *Id.* at 236, 529 N.E.2d at 529 (citing *Sipes v. United States*, 111 F.R.D. 59 (S.D. Cal. 1986) (Rule 26(b)(4) is not applicable because the federal common law never recognized a special relationship of physician-patient privilege) and *Baran v. Presbyterian Hosp.*, 102 F.R.D. 272 (W.D. Pa. 1984) (treating physicians are not expert witnesses within the meaning of Rule 26(b)(4) because they acquire their facts in treating a patient, not in anticipation of trial)).

in formulating the Illinois Rule.<sup>75</sup> The court also stated that treating physicians should not be subject to Rule 220's disclosure requirements because litigants lack control over them.<sup>76</sup> The court reasoned that parties who retain expert witnesses for trial are more able to influence these physicians and can, therefore, more readily satisfy Rule 220's stringent discovery obligations.<sup>77</sup> In concluding, the Illinois Supreme Court stated that Rule 220's purpose, facilitating trial preparation and avoiding unfair surprise, would not be thwarted by the exclusion of treating physicians from Rule 220's disclosure requirement.<sup>78</sup> The court indicated that treating physicians are discoverable under Rule 201(b) and may be deposed under Rule 204(c).<sup>79</sup>

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75. *Tzystuck*, 124 Ill. 2d at 235, 529 N.E.2d at 529 (citing ILL. ANN. STAT. ch. 110A, para. 220 (Committee Comments) (Smith-Hurd 1989)). The court discussed Federal Rule of Civil Procedure 26(b)(4) which is the functional equivalent of Rule 220. *Id.* Rule 26(b)(4) provides in pertinent part:

(4) Trial preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

FED. R. CIV. P. 26(b)(4) (1988).

76. *Tzystuck*, 124 Ill. 2d at 237, 529 N.E.2d at 530 ("party generally does not have that ready access to or control over treating physicians" who are only involved in the trial to offer an opinion as evidence).

77. *Id.* See *supra* note 40 (full text of Rule 220).

78. *Tzystuck*, 124 Ill. 2d at 238, 529 N.E.2d at 530 (*Diminskis* case).

79. Illinois Supreme Court Rule 201(b) provides in part:

Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts.

ILL. ANN. STAT. ch. 110A, para. 201(b) (Smith-Hurd 1989). Illinois Supreme Court Rule 204(c) provides:

The discovery depositions of physicians and surgeons being deposed in their professional capacity may be taken only with the agreement of the parties and

*B. Illinois Cases After Diminskis v. CTA*

Although Illinois courts have applied the *Diminskis* holding to a variety of fact patterns,<sup>80</sup> two decisions in particular demonstrate the breadth of the holding: *Wilson v. Chicago Transit Authority*<sup>81</sup> and *Smith v. Central Illinois Public Service*.<sup>82</sup>

In *Wilson*, the plaintiff was injured while disembarking from a CTA bus.<sup>83</sup> As a result of the accident, Wilson received treatment from an orthopedic specialist for a three-month period.<sup>84</sup> Wilson then brought suit against the CTA, and three and one-half years later the case went to trial.<sup>85</sup> Although the plaintiff identified the orthopedic specialist as her treating physician prior to trial, the physician had not treated her since the accident.<sup>86</sup> At trial, the plaintiff's attorney asked the orthopedist to provide his opinion on the permanency of Wilson's injury.<sup>87</sup> The defendant objected, arguing that the physician should not be allowed to render an opinion concerning the permanency of the plaintiff's injury based on an examination that had occurred over three years prior to trial.<sup>88</sup> The basis for his argument was that only an expert can testify to the permanency of an injury based on an exam before trial.<sup>89</sup> The physician then revealed that he had examined the plaintiff just

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subsequent consent of the deponent or under a subpoena issued upon order of court. A party shall pay a reasonable fee to a physician or surgeon for the time he or she will spend testifying at any such deposition. Unless the physician or surgeon was retained by a party for the purpose of rendering an expert opinion at trial (see Rule 220(c)(6)), or unless otherwise ordered by the court, the fee shall be paid by the party at whose instance the deposition is taken.

ILL. ANN. STAT. ch. 110A, para. 204(c) (Smith-Hurd 1989).

80. See generally *Voyles v. Sanford*, 183 Ill. App. 3d 833, 539 N.E.2d 801 (3d Dist. 1989) (defendant's witness not an expert within Rule 220's disclosure requirements because he provided testimony as an employee not retained solely for trial); *In re Marriage of Hartian*, 172 Ill. App. 3d 440, 526 N.E.2d 1104 (1st Dist. 1988) (party's psychologist was not listed as an expert witness and thus was barred from testifying); *Dugan v. Weber*, 175 Ill. App. 3d 1088, 530 N.E.2d 1007 (1st Dist. 1988) ("The physician's relationship to the case, not the substance of his testimony, qualifies him as a Rule 220 expert.")

81. 126 Ill. 2d 171, 533 N.E.2d 894 (1988).

82. 176 Ill. App. 3d 482, 531 N.E.2d 51 (4th Dist. 1988).

83. *Wilson*, 126 Ill. 2d at 173, 533 N.E.2d at 895.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 175, 533 N.E.2d at 896.

88. *Id.* at 173, 533 N.E.2d at 895-96. The defendant objected on the basis of *Hendricks v. Nyberg*, 41 Ill. App. 3d 25, 353 N.E.2d 273 (1st Dist. 1988), which stated that a treating physician must have examined the patient within a reasonable time before trial in order to offer an expert opinion. *Id.*

89. *Wilson*, 126 Ill. 2d at 176, 533 N.E.2d at 895-96.

prior to offering his testimony.<sup>90</sup> The trial court admitted the testimony.<sup>91</sup> The defendant again objected, arguing that the orthopedist's testimony should have been barred because he was not disclosed as an expert witness. The trial court overruled the objection.<sup>92</sup>

On appeal, the CTA asserted that the orthopedist offered an expert opinion that should have been subject to the disclosure requirements of Rule 220(b)(1).<sup>93</sup> Because the plaintiff failed to satisfy these requirements, the CTA argued that the physician's testimony regarding the permanency of the plaintiff's injuries should have been barred.<sup>94</sup> The appellate court, however, rejected this contention and affirmed the lower court.<sup>95</sup>

On appeal to the supreme court, the court held that the orthopedist was a treating physician and, therefore, subject only to the disclosure requirements of a regular witness.<sup>96</sup> Relying on *Tzystuck*, the court held that the defendant had not been prejudiced by the testimony of the plaintiff's physician because treating physicians are discoverable under Rule 201.<sup>97</sup> The court concluded by stating that the defendant could have avoided surprise through proper trial preparation and should not have relied on Rule 220 for "protection."<sup>98</sup>

One appellate court decision demonstrates the extension of the *Diminskis* rationale beyond treating physicians. In *Smith v. Central Illinois Public Service*,<sup>99</sup> the plaintiff, a construction worker, was injured when he slipped on some stairs at the defendant's energy plant.<sup>100</sup> Smith then brought a personal injury suit against the defendant. At trial, an employee of the defendant gave his professional opinion regarding the safety of the facility's stairs and walkways.<sup>101</sup> The plaintiff objected, arguing that the witness, an experienced engineer, offered an expert opinion and should have

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90. *Id.* at 174, 533 N.E.2d at 896.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Wilson*, 159 Ill. App. 3d 1043, 513 N.E.2d 443 (1st Dist. 1987).

96. *Wilson*, 126 Ill. 2d at 176, 533 N.E.2d at 897 (citing *Tzystuck v. CTA*, 124 Ill. 2d 226, 529 N.E.2d 525 (1988)).

97. *Id.* at 176, 533 N.E.2d at 897. In dissent, Justice Ryan stated that the CTA had been "bushwhacked" under Rule 204(c) and could not have prevented this type of surprise. *Id.* at 177, 533 N.E.2d at 897 (Ryan, J., dissenting).

98. *Id.* at 175, 533 N.E.2d at 896.

99. 176 Ill. App. 3d 482, 531 N.E.2d 51 (4th Dist. 1988).

100. *Id.* at 485, 531 N.E.2d at 53.

101. *Id.* at 493, 531 N.E.2d at 58.

been disclosed as an expert, pursuant to Rule 220.<sup>102</sup> The trial court admitted the testimony over the plaintiff's objection,<sup>103</sup> and subsequently, the jury returned a verdict for the defendant.<sup>104</sup>

The appellate court, relying on *Diminskis*, affirmed the trial court's admission of the testimony. The court held that an employee who is associated with the subject matter of the litigation need not be disclosed as an expert witness.<sup>105</sup> The employee in *Smith* was closely involved in plant operations and therefore did not constitute an expert witness for purposes of Rule 220's disclosure requirements; consequently, the employee's opinion need not have been disclosed prior to trial.<sup>106</sup>

#### IV. ANALYSIS AND IMPACT

The *Tzystuck* court held that a treating physician who offers an "expert" opinion at trial is not an expert within the contemplation of Rule 220.<sup>107</sup> The underlying rationale for the court's decision is that Rule 220's disclosure requirements apply only to witnesses retained to provide "expert" testimony at trial; the Rule does not apply to treating physicians whose "expert" testimony stems from their personal involvement in the subject matter of the litigation.<sup>108</sup> Based upon this rationale, subsequent courts have allowed occurrence witnesses to offer "expert" opinions yet remain outside the rubric of Rule 220's disclosure requirements.<sup>109</sup> These decisions are problematic for two reasons. First, by allowing ordinary witnesses to offer "expert" opinions, courts have created confusion between two distinct types of testimony,<sup>110</sup> thus subverting the meaning of an expert under Rule 220(a). Second, occurrence witnesses may be used to circumvent Rule 220's disclosure require-

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102. *Id.* The witness was a licensed engineer who worked for the defendant for more than twenty years.

103. *Id.*

104. *Id.* at 498, 531 N.E.2d at 59.

105. *Id.* at 494, 531 N.E.2d at 59.

106. *Id.*

107. *See supra* notes 65-79 and accompanying text.

108. *Tzystuck*, 124 Ill. 2d at 237, 529 N.E.2d at 530. *See also* *Fawcett v. Reinerstein*, 168 Ill. App. 3d 1090, 523 N.E.2d 382 (3d Dist. 1988) (a treating physician was permitted to testify on the standard of care, normally a question for an expert witness physician, without prior disclosure as an expert). *See supra* note 80 (other cases applying the *Diminskis* rationale).

109. *See* *Voyles v. Sanford*, 183 Ill. App. 3d 833, 539 N.E.2d 801 (3d Dist. 1989); *Smith v. CIPS*, 176 Ill. App. 3d 482, 531 N.E.2d 51 (4th Dist. 1988).

110. R. HUNTER, *THE TRIAL HANDBOOK FOR ILLINOIS LAWYERS*, § 43.4, at 547 (6th ed. 1989).

ments,<sup>111</sup> thereby subjecting parties to surprise testimony from previously undisclosed expert witnesses.<sup>112</sup>

### A. *Expert and Ordinary Witnesses*

Applying the *Diminskis* rationale, courts have permitted ordinary witnesses to offer "expert" testimony.<sup>113</sup> In so doing, these courts have ignored the significant differences between expert witness testimony and the testimony given by an ordinary witness.<sup>114</sup> An expert witness testifies on a complicated subject matter that can be fully comprehended only with specialized knowledge or a particular skill.<sup>115</sup> More importantly, an expert witness may draw inferences and conclusions from the facts that the jury would not be competent to draw.<sup>116</sup> To the contrary, an ordinary witness's testimony is limited to a statement based on the facts of the case and a reasonable opinion about these facts.<sup>117</sup> The ordinary witness may not draw conclusions of law for the trier of fact from the facts presented.<sup>118</sup> In allowing an ordinary witness who possess specialized knowledge to offer an "expert" opinion, the *Tzystuck* court ignored this crucial distinction.<sup>119</sup> *Diminskis* therefore is problem-

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111. ILL. ANN. STAT. ch. 110A, paras. 220(b), (c) (Smith-Hurd 1989).

112. See *infra* notes 130-157 and accompanying text.

113. See, e.g., *Smith*, 176 Ill. App. 3d at 493, 531 N.E.2d at 58 (4th Dist. 1988).

114. See *Broussard, ETC. v. Huffman Mfg. Co.*, 108 Ill. App. 3d 356, 362-63, 438 N.E.2d 1217, 1221 (3d Dist. 1982) (an individual must have knowledge in the particular field of training before he may offer an expert opinion on the subject. There is no general presumption that an [ordinary witness] is competent to give an opinion.)

115. C. MCCORMICK, MCCORMICK ON EVIDENCE § 13, at 33 (3d ed. 1984). In order for a party to be able to use an expert witness, two conditions must be met: the subject matter of the litigation must be sufficiently complicated as to be beyond the knowledge of the average person, and the expert must possess a specialized knowledge or skill closely related to the subject matter of the litigation. *Id.*

116. *Id.* An expert, because of his special knowledge, may weigh probabilities, especially in scientific matters. See also R. HUNTER, *supra* note 110, § 45.1, at 560.

117. C. MCCORMICK, *supra* note 115, § 12, at 30-31 ("There is a kind of statement by the witness which amounts to no more than a general expression as to how the case *should* be decided or as to the amount of unliquidated damages which should be given. It is believed all courts would exclude such extreme expressions." However, a trend permitting the opinions of ordinary witnesses began in 1942, and now, most courts allow as admissible, opinions by lay and expert witnesses on the ultimate facts of the case.) See also *People v. Rosenbaum*, 299 Ill. 93, 132 N.E. 433 (1921).

118. C. MCCORMICK, *supra* note 115, §§ 12-13, at 30-31, 33. Another difference between the two types of testimony is that ordinary witnesses may offer a subjective opinion on their medical condition and history, while expert physicians should offer objective opinions and not relate the patient's personal statement during examination. *Id.* at 841. Thus, when treating physicians act as experts, the two types of testimony overlap.

119. In *Diminskis*, the plaintiff's treating physician was an ordinary witness because his testimony stemmed from personal observation. *Tzystuck*, 124 Ill. 2d at 231, 529 N.E.2d at 528. The court, however, allowed this ordinary witness to testify to the long-



atic because it permits an ordinary witness to give an opinion at trial that draws certain inferences and conclusions. Such testimony may improperly prejudice the jury<sup>120</sup> because when one person acts as both a lay witness and an expert witness, the two types of testimony easily can be confused.<sup>121</sup> In turn, this confusion may prejudice the opposing party or handicap and prolong jury deliberation.<sup>122</sup> In order to avoid this problem and permit the jury to function effectively, ordinary witness testimony must be segregated from expert witness testimony.

Furthermore, the *Diminskis* rationale fails to recognize that Illinois law carefully distinguishes between an expert witness and an ordinary witness. Rule 220 explicitly provides special rules for a separate category of witnesses who provide a certain type of testimony.<sup>123</sup> These rules apply only to expert witnesses who offer testimony based on specialized knowledge or skill. Before an individual may testify as an expert, *all* of the qualifications stated in Rule 220(a) must be met.<sup>124</sup> Under Rule 220(a), an individual is an expert if that person possesses a certain level of knowledge or a particular skill and is retained to testify at trial.<sup>125</sup> Courts that apply the *Diminskis* rationale, however, erroneously permit an occurrence witness possessing specialized knowledge, who is not "retained" solely for purposes of testifying at trial, to offer "expert" testimony.<sup>126</sup>

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term effects of the injury, thereby allowing Dr. Von Roenn to offer an "expert" opinion. *Id.*

120. ILL. ANN. STAT. ch. 110A, para. 220 (Committee Comments) (Smith-Hurd 1989) (experts who testify at trial are those retained to testify at trial *and possess* expertise in an area beyond that of the average person).

121. C. MCCORMICK, *supra* note 115, § 12, at 31.

122. *Id.* Yet, the Federal Rules of Evidence, as well as most courts, permit lay witnesses to offer an opinion on the ultimate fact because to do otherwise "is unduly restrictive with many possible close questions of application." *Id.* Nevertheless a lay witness's opinion may be excluded because of prejudice or judicial economy. *Id.* *Contra* M. DOMBROFF, EXPERT WITNESS IN CIVIL TRIALS § 1.5, at 12 (1988) (juries may develop hostile feelings toward one witness who professes to know everything).

123. ILL. ANN. STAT. ch. 110A, para. 220(a) (Smith-Hurd 1989). "Rule 220(a) embodies the common law by defining an 'expert witness' as one whose knowledge of a technical or specialized area is beyond the '[k]en of the average juror,' and whose opinion would assist the jury in deciding a material fact issue." Foreman and Mueller, *supra* note 2, at 541.

124. Foreman and Mueller, *supra* note 2, at 541.

125. ILL. ANN. STAT. ch. 110A, para. 220(a)(1) (Smith-Hurd 1989). *See supra* note 40 (full text of Rule 220).

126. This misconception is especially apparent when courts allow parties to list employees as ordinary witnesses and permit their employees to offer "expert" opinions. *See* Voyles v. Sanford, 183 Ill. App. 3d 833, 837, 539 N.E.2d 801, 803 (3d Dist. 1989) (defendant's employee not an expert subject to Rule 220's disclosure requirements because

The *Diminskis* court's decision creates uncertainty for future litigants attempting to prove liability in medical malpractice suits. Prior to *Diminskis*, courts usually required plaintiffs to provide expert testimony in order to establish liability in these types of cases.<sup>127</sup> Plaintiffs who failed to produce sufficient evidence risked a summary judgment against them.<sup>128</sup> Because *Diminskis* allows occurrence witnesses to offer "expert" opinions, courts, perhaps, will no longer require a Rule 220 expert to prove liability in medical malpractice suits.<sup>129</sup> It may suffice to allow an occurrence witness with special knowledge to provide the requisite "expert" testimony. Because of the conflict between these prior holdings and *Tzystuck*, however, both plaintiffs and defendants are left with a great deal of uncertainty.

### B. Necessity of Disclosure

Rule 220 mandates disclosure of expert witnesses.<sup>130</sup> After *Tzystuck*, litigants may offer expert testimony while avoiding Rule 220's disclosure requirements by using an occurrence witness's

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he was closely associated with the defendant's business and not retained solely for trial). *Voyles* is contrary to the language of Rule 220 that explicitly states that employees possessing special knowledge should be considered experts. ILL. ANN. STAT. ch. 110A, para. 220(a)(1) (Smith-Hurd 1989). See *Meyer v. Caterpillar Tractor Co.*, 179 Ill. App. 3d 268, 283, 533 N.E.2d 386, 395-96 (1st Dist. 1988) (appellate court excluded the "expert" testimony of the plaintiff's five workers because of non-disclosure), *affirmed on other grounds*, 1990 Ill. Lexis 6 (1990).

127. See generally *Purtill v. Hess*, 111 Ill. 2d 229, 242, 489 N.E.2d 867, 872 (1986) ("Unless the physician's negligence is so grossly apparent or treatment so common as to be within the everyday knowledge of a lay person, expert medical testimony is required to establish the standard of care and the defendant physician's deviation from that standard". See also *Harris v. Bethlehem Steel Corp.*, 124 Ill. App. 3d 449, 464 N.E.2d 634 (1st Dist. 1984) (court will consider opinion of expert witness in ruling on motion for summary judgment).

128. *Id.* See also *Loizzo v. St. Francis Hosp.*, 121 Ill. App. 3d 172, 459 N.E.2d 314 (1st Dist. 1984) (because the plaintiff failed to produce any evidence that a catheter was improperly left in his body, court granted summary judgment). *Contra Barkei* by *Barkei v. Delnor Hosp.*, 176 Ill. App. 3d 681, 531 N.E.2d 413 (2d Dist. 1988) (under *res ipsa loquitur* theory of negligence, plaintiff may establish a prima facie case of negligence based on the occurrence facts).

129. This notion is especially true in medical malpractice cases when there is more than one treating physician. In such a case, one of the treating physicians could testify as a witness and offer "expert" testimony against the defendant.

130. ILL. ANN. STAT. ch. 110A, para. 220 (Smith-Hurd 1989). See *Klingler Farms v. Effingham Equity Inc.*, 171 Ill. App. 3d 567, 525 N.E.2d 1172 (5th Dist. 1988) ("the most reasonable interpretation of [Rule 220] is that disclosure of expert witnesses is mandatory.") Presently, this rule does not include the situation where the trial court fails to set a deadline for disclosure because the appellate courts are split on this subject. See *supra* note 50.

"expert" opinion.<sup>131</sup> Without the benefit of mandatory pretrial disclosure, an attorney's ability to respond to expert testimony is impaired. Parties are therefore left without the protection of Rule 220's safeguards.<sup>132</sup> Although other discovery procedures are available, in comparison with Rule 220, they are limited in scope.

The supreme court in *Tzystuck* held that a treating physician could offer an "expert" opinion without being subject to Rule 220's disclosure requirements.<sup>133</sup> In concluding that this is the proper interpretation of Rule 220, the court stated that parties would not suffer prejudice from surprise testimony because treating physicians are discoverable under Supreme Court Rules 201(b)(1) and 204(c).<sup>134</sup> Under Rule 201(b), a party may discover a treating physician's identity and most medical records;<sup>135</sup> nevertheless, there are significant limitations on the discovery of a treating physician's opinion. Under Rule 204(c), a party may depose a physician or surgeon only when the parties have agreed to the deposition or "upon order of the court."<sup>136</sup> Absent such an agreement, the court will require a showing of cause before ordering the deposition.<sup>137</sup> By requiring an agreement or showing of just cause, Rule 204(c) somewhat restricts the ability of parties to obtain information about the substance of a treating physician's opinion.

Additionally, although a treating physician's records generally are discoverable, certain medical reports and documents are ex-

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131. *Tzystuck*, 124 Ill. 2d 226, 237, 529 N.E.2d 525, 530 (1988). See also *Voyles v. Sanford*, 183 Ill. App. 3d 833, 836, 539 N.E.2d 801, 803 (3d Dist. 1989); *Smith v. CIPS*, 176 Ill. App. 3d 495, 531 N.E.2d 59 (4th Dist. 1988).

132. See *Meyer v. Caterpillar Tractor Co.*, 179 Ill. App. 3d 263, 283, 533 N.E.2d 386, 395-96 (1st Dist. 1988) (failure to disclose five employees who would be called to testify resulted in reversal of trial court as it violated Rule 220's disclosure requirements).

133. *Tzystuck*, 124 Ill. 2d at 237, 529 N.E.2d at 528.

134. *Id.* at 238, 529 N.E.2d at 528. In addition, the court cited the Committee Comments to Rule 220 that reveal the drafters of Rule 220 had relied heavily on Federal Rule of Civil Procedure 26(b)(4), which had been interpreted by federal courts to exclude treating physicians from expert disclosure. *Id.* at 235-236, 529 N.E.2d at 526. However, in the first appellate hearing, the court stated that Rule 220 requires parties to disclose treating physicians because an expert is a knowledgeable witness who is "retained, employed, or requested to testify at trial." *Diminskis v. CTA*, No. 85-2912, slip op. at 8-9 (1st Dist. January 15, 1987), *rev'd on reh'g*, 155 Ill. App. 3d 585, 508 N.E.2d 215 (1st Dist. 1987). The court stated this language differed from Rule 26(b)(4) which states that a party is an expert witness if his opinion is formed in anticipation of trial. *Id.* See *supra* notes 40 and 75 (for a comparison of the two rules).

135. ILL. ANN. STAT. ch. 110A, para. 201(b) (Smith-Hurd 1989). See *supra* note 79 (text of the rule).

136. ILL. ANN. STAT. ch. 110A, para. 204(c) (Smith-Hurd 1989).

137. *Id.* para. 204(c) (Committee Comments) ("the trial court will exercise discretion in ordering the issuance of a subpoena upon a physician or surgeon and will refuse to do so unless there is some preliminary showing of good cause.")

empt from the discovery process. The Medical Studies Act,<sup>138</sup> for example, provides that certain medical reports that concern a hospital's internal operations or a part of a medical study are privileged and therefore are not discoverable.<sup>139</sup> This limitation may prove especially damaging because attorneys often need this type of information in order to present expert opinions of their own.<sup>140</sup> Thus, because of the limited alternatives to discovery of a treating physician's opinion, the *Tzystuck* court's holding that a treating physician's "expert" opinion is not subject to Rule 220's mandatory disclosure requirements creates a serious and substantial gap in the discovery process.

This gap is more pronounced in the context of non-medical testimony. Although there are alternatives of discovery for the treating physician, the disclosure requirements for ordinary witnesses are minimal. Under section 2-1003 of the Illinois Code of Civil Procedure,<sup>141</sup> a party has a duty to reveal the identity of individuals who possess knowledge of the relevant facts.<sup>142</sup> Otherwise, a party is not required to identify those individuals who will testify at trial or to describe the substance of such testimony.<sup>143</sup> Hence, in order to avoid unfair surprise at trial, the parties must resort to other discovery rules to obtain the identity and substance of opinions from occurrence witnesses who may offer "expert" testimony. These alternative rules may provide only limited information.

The overall effect of allowing parties to avoid Rule 220's expert witness disclosure requirements is that trial preparation is seriously hampered, and parties may be prejudiced by surprise testimony.<sup>144</sup> For example, attorneys cannot properly prepare for cross-examination of a witness without prior disclosure of the substance of an

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138. ILL. ANN. STAT. ch. 110, para. 8-2101 (Smith-Hurd 1989).

139. See *Flannery v. Lin*, 176 Ill. App. 3d 652, 531 N.E.2d 403 (2d Dist. 1988) (Code Blue report from the hospital was not subject to discovery because it was part of the hospital's internal quality control). The Mental Health Code may also prevent discovery of some medical records. ILL. REV. STAT. ch. 91, para. 1-100 (1989).

140. See *Fultz v. Peart*, 144 Ill. App. 3d 364, 494 N.E.2d 212 (5th Dist. 1986) (disclosure of an expert's records and opinion is necessary in order to discuss the substance of his opinion with a party's own experts in order to properly prepare for trial).

141. ILL. ANN. STAT. ch. 110A, para. 2-1003(c) (Smith-Hurd 1989). See *supra* note 34 (text of the Rule).

142. ILL. ANN. STAT. ch. 110A, para. 2-1003(c) (Smith-Hurd 1989)

143. *Id.*

144. See *Fultz*, 144 Ill. App. 3d at 376, 494 N.E.2d at 221 ("Adequate trial preparation requires timely disclosure of expert witnesses. Time needed is prior to trial to investigate the credentials of proposed expert witnesses and to discuss the substance of the expert's testimony with one's own experts in order to properly prepare for cross-examination.")

"expert" opinion.<sup>145</sup> Moreover, without prior disclosure of an "expert" witness's opinion, attorneys will be further hindered in their trial preparation because they lack the necessary time to investigate the basis of the witness's opinion and gather the appropriate evidence to rebut or impeach the witness' testimony.<sup>146</sup> This is especially true in highly technical cases.<sup>147</sup> Also, even if the court allows a brief recess or continuance to depose an occurrence witness, such a brief time period usually is inadequate to gather sufficient information to conduct an effective cross-examination of the witness.<sup>148</sup>

As a result, legal issues will be decided based on the basis of an attorney's ability to obstruct discovery of occurrence witnesses, rather than on the merits of the issue. In allowing this result, the *Diminskis* holding runs contrary to the intent of Rule 220 to impose mandatory disclosure requirements upon expert testimony.<sup>149</sup> Moreover, *Diminskis* contradicts the basic principles of discovery to ascertain the truth "for the purpose of promoting either a fair settlement or a fair trial."<sup>150</sup>

Under the appropriate analysis of Rule 220, only those witnesses who have qualified for expert status under Rule 220(a), and who have disclosed the subject matter of their testimony, should be al-

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145. *Id.* See also *Diaz v. CTA*, 174 Ill. App. 3d 396, 528 N.E.2d 398 (1st Dist. 1988) (court held that a treating physician could offer expert testimony but acknowledged that without prior notice an attorney would be hampered in preparing for cross-examination of the witness).

146. See *Phelps v. O'Malley*, 159 Ill. App. 3d 214, 223-24, 511 N.E.2d 974, 982 (2d Dist. 1987) (appellate court reversed the trial court's ruling, which had granted a continuance to the adverse party in order to depose the "surprise" witness, and held that his testimony should have been barred). *Contra Ziekert v. Cox*, 182 Ill. App. 3d 926, 931-32, 538 N.E.2d 751, 755 (1st Dist. 1989) (trial court need not exclude testimony of plaintiff's treating physician because defendant could have deposed the witness prior to his testimony).

147. *Fultz*, 144 Ill. App. 3d at 376, 494 N.E.2d at 220-21 (the trial court properly limited the testimony of physician, who offered "expert" testimony yet was only disclosed as a post-occurrence witness, because expert testimony regarding standard of care and proximate cause in a medical malpractice case is critical to both parties, and, therefore, it requires extensive discovery of the exact nature of the "expert's" opinion).

148. See *Ashford v. Zeimann*, 99 Ill. 2d 353, 370, 459 N.E.2d 940, 948 (1984) ("a deposition taken the day before testimony is given, does not obliterate the surprise factor . . .")

149. ILL. ANN. STAT. ch. 110A, paras. 220(b), 220(c) (Smith-Hurd 1989). See *Klingler Farms v. Effingham Equity Inc.*, 171 Ill. App. 3d 567, 571, 525 N.E.2d 1172, 1176 (5th Dist. 1988).

150. See 4 R. MICHAEL, *supra* note 4, § 31.3, at 104 ("Under modern discovery, the weapon of surprise, which was concomitant of an unmodified adversary system, has been replaced by full disclosure in order to prevent some of the injustices which arose from an over-emphasis on the adversary nature of the proceedings.") See also *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 433 N.E.2d 253 (1982).

lowed to offer an expert opinion at trial.<sup>151</sup> Occurrence witnesses should be barred from offering an "expert" opinion unless their identity and the relevant portion of their testimony has been disclosed prior to trial.<sup>152</sup> Application of this Rule 220 interpretation would avoid disclosure problems because only qualified experts would be able to offer an expert opinion.

In contrast, the *Diminskis* analysis permits both occurrence and expert witnesses to offer "expert" opinions because an occurrence witness's "expert" testimony is not subject to disclosure. Thus, parties may be subjected to surprise testimony.<sup>153</sup> Under *Diminskis*, an occurrence witness who is not disclosed as an expert may nonetheless offer "expert" testimony.<sup>154</sup> The decision thus favors attorneys who seek to avoid disclosure of expert witnesses. If an occurrence witness is listed as an expert but is disclosed after one of the Rule 220 deadlines, the occurrence witness will be barred from testifying as an expert.<sup>155</sup> The occurrence witness who is listed as an expert but disclosed after the agreed deadline is barred from testifying because of unfair surprise to an adverse party and the prejudicial effect of his or her testimony.<sup>156</sup> Yet, the same witness would be permitted to offer an expert opinion if listed as an ordinary witness despite any unfair surprise or prejudice caused by the testimony.<sup>157</sup> In allowing this somewhat anomalous result, the

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151. See *Meyer v. Caterpillar Tractor Co.*, 179 Ill. App. 3d 268, 283, 533 N.E.2d 386, 395-96. *Contra Corrales v. American Cab Co.*, 170 Ill. App. 3d 907, 911-12, 524 N.E.2d 923, 925 (1st Dist. 1988) (failure to disclose treating physician should not have prevented the witness from offering an "expert" opinion).

152. This is appropriate because a party normally calls an occurrence witness for the purpose of relating the facts or events, not to provide an expert opinion. C. MCCORMICK, *THE LAW OF EVIDENCE*, 19-20 (1954) (although an occurrence witness may offer an opinion based on his witnessing the event, an expert opinion applies specialized knowledge to the facts, drawing conclusions for the jury).

153. See *Ashford v. Zeimann*, 99 Ill. 2d 353, 370, 459 N.E.2d 940, 946-47 (1984) (in considering whether exclusion of a witness's testimony is proper, surprise and prejudice as well as the intentional behavior of the party who calls the witness is relevant).

154. *Tzystuck v. CTA*, 124 Ill. 2d 226, 237, 529 N.E.2d 525, 527 (1988).

155. *In re Marriage of Hartian*, 172 Ill. App. 3d 440, 447, 526 N.E.2d 1104, 1110 (1st Dist. 1988). In *Hartian*, the plaintiff failed to disclose the opinions of the expert he intended to present at trial. *Id.* The expert was the plaintiff's treating physician. *Id.* The court barred the testimony because of possible prejudice to the defendant. *Id.* at 448, 526 N.E.2d at 1110.

156. See *Renfro v. Allied Indus. Equip. Corp.*, 155 Ill. App. 3d 140, 162, 507 N.E.2d 1213, 1231 (5th Dist. 1987) ("the factors to be considered by the trial court in making its decision [concerning admitting testimony] include the surprise to the adverse party, the prejudicial effect of the testimony, the nature of the testimony, the diligence of the adverse party, the timely objection to the testimony, and the good faith of the party calling the witness.")

157. Application of the *Renfro* court's criteria clearly shows that an undisclosed ex-

*Diminskis* holding rewards attorneys who avoid Rule 220 while punishing parties who attempt to comply.

## V. CONCLUSION

The *Tzystuck* court created a means for parties to circumvent the stringent disclosure requirements of Rule 220 by allowing ordinary witnesses to offer expert opinions. Concerns with fairness and ascertainment of the truth will no longer matter as attorneys are encouraged to circumvent expert witness disclosure. In the future, the success of a claim will depend on an attorney's tactical use of witnesses and surprise at trial. Unfortunately, this development constitutes a step backward for the discovery process in Illinois courts.

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pert should not be permitted to testify at trial. This inconsistency is magnified when one considers that a party acting in good faith who fails to complete Rule 220's disclosure requirements may have his witness barred. On the other hand, a party who in bad faith uses the *Diminskis* rationale to circumvent disclosure will be permitted to have his witness testify.