



## Alerts

### Expert Demonstrations Must Meet Substantially Similar Standard

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Health Care Alert

*This alert was featured in Hinshaw's Annual Guide to Illinois Medical Malpractice Decisions: 2020 Edition*

#### Issues

Must an expert's demonstration be made under substantially similar conditions and circumstances as those which surrounded the occurrence? Can an expert opine regarding the permanency of injuries without recent medical data?

*Nicole Ackerman v. Digestive Health Services, S.C., Advocate Health and Hospitals Corporation, d/b/a Advocate Good Samaritan Hospital, et al.*, 2020 IL App (1st) 182708

#### Case Summary

A gastroenterologist lacerated plaintiff's esophagus while performing an endoscopy to remove a 2.5cm dental appliance with a "long and tortuous wire," described as "almost like a fishhook," she had swallowed while kissing her boyfriend. Plaintiff's expert maintained that defendant should have used an "overtube" to protect against injury during the EGD removal. At trial, the jury returned a verdict for defendants. Plaintiff appealed, in part, due to the trial court's refusal to allow her expert to demonstrate how use of an overtube could have avoided the laceration, and to testify that her resulting pain and constipation were permanent.

The appellate court found that plaintiff's expert's proposed demonstration of how the overtube could be slipped over an exemplar of the dental appliance by hand was not substantially similar to that undertaken by defendant, which involved the use of an endoscope. Because the proposed demonstration involved the use of manual force to draw the appliance within the overtube, the demonstration appeared deceptively easy. In addition, the proposed demonstration involved a dental appliance being drawn into the overtube while lying flat on a table, as opposed to within a patient's esophagus with limited visibility. The court concluded that the trial court did not abuse its discretion in refusing to allow such demonstration.

The appellate court also determined that the trial court did not abuse its discretion in prohibiting plaintiff's expert from opining about the permanency of plaintiff's injuries. None of the depositions or medical records established that plaintiff's injuries were permanent. Plaintiff's expert never examined plaintiff, viewed her surgical scar, or consulted with her treating physicians. In fact, no treating physician had examined the patient in the two years before trial, which resulted in a paucity of medical data from which plaintiff's expert, or any physician, could reasonably rely upon to opine regarding the permanency of her pain and/or constipation.

#### Takeaway

Expert demonstrations must meet the "substantially similar" standard and the absence of testimony, recent medical records, or other medical data can undermine opinions regarding the permanency of injuries.



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