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Medical Litigation Newsletter - December 2013

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Is Section 2-622 a Dead Letter After *Gauto*?
Fox v. Gauto, 995 N.E.2d 1026, 2013 WL 4768410 (Ill.App.5th Dist.)

Introduction

On September 5, 2013, the Illinois Appellate Court, Fifth District, published a written opinion in *Rickie Fox and Ruth Fox v. Suzanne Gauto, Executor of the Estate of Nelson Gauto, deceased*, a medical malpractice case. The *Gauto* Court grappled with the issue of what standard applies when considering whether to grant relief to a Plaintiff in a medical malpractice case who is unable to achieve compliance with the Illinois Healing Arts Malpractice Act, 735 ILCS 5/2-622 (the Act). The Act requires that the attorney for Plaintiff in a medical malpractice suit attach an affidavit to the Complaint at the time it is filed certifying, under oath, that he or she has consulted with a qualified expert who deems the lawsuit meritorious. The attorney must also attach a report of the reviewing health professional stating the reasons for that professional's determination of merit. The Act imposes explicit deadlines by which these documents must be filed, if not attached to the Complaint at the time of filing. The Act does not, however, provide a procedural mechanism by which Plaintiffs may seek relief from those deadlines. Reviewing courts in the State of Illinois have handled such requests for relief inconsistently.

While some courts have likened such requests to motions for extension of time, to which the "good cause" standard applies, other courts analogize them to motions to amend the pleadings, to which the "prejudice to defendant" standard applies. On the facts at issue in *Gauto*, the Fifth District Appellate Court determined that Plaintiffs, who had failed to achieve compliance with the Act before expiration of the deadlines set forth therein, were seeking an amendment to the pleadings, rather than an extension of time, and that the "prejudice to defendant" standard applied. Because Defendant could not prove prejudice if the amendment was allowed, the Court determined that the Plaintiffs' failure to comply with the Act was excusable. As set forth more fully below, this decision represents a significant development in the law regarding

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pleadings standards in Illinois medical malpractice cases.

Trial Court Decision

To understand the *Gauto* Court's decision, a brief summary of the trial court proceedings is necessary. At the time of filing the subject lawsuit, attached thereto was a report authored by Dr. A, Plaintiffs' reviewing health professional. The report concluded that, "By the review of the pathology reports and the surgical procedure records, ***I cannot see any management problems in this case***." (Emphasis added). In other words, the report of the reviewing health professional actually certified that the lawsuit ***did not*** have merit. Accordingly, the Defendant sought dismissal of the suit for failure to comply with the Act.

In response, Plaintiffs sought leave to amend the Complaint, to attach a new report from a different physician, fifty-five (55) days after filing the original Complaint. This new reviewing health professional, Dr. K, opined that Plaintiffs had a meritorious cause of action. The trial court denied Plaintiffs' request for leave to amend, stating that the "defendant in the instant case would clearly be prejudiced if the amended complaint were allowed." The trial court also granted Defendant's motion to dismiss and dismissed the Complaint with prejudice.

Plaintiffs then filed a motion to reconsider, in which they explained a number of circumstances surrounding the filing of the report from Dr. A. Plaintiffs' attorney inadvertently filed Dr. A's report, which he believed to be consistent with his initial consultation with Dr. A, in which it was suggested that "there was a violation of the standard of care." Apparently, Dr. A's finding that the case lacked merit was based upon an incomplete review of the medical records. When Dr. A reviewed the entirety of the record, at some point after the lawsuit was filed, he deemed the case to be meritorious. In an affidavit attached to Plaintiffs' motion to reconsider, Dr. A confirmed his opinion that a meritorious cause of action existed against Dr. G. The trial court granted Plaintiffs' motion to reconsider and deemed the reviewing health professional's report filed *instanter*. The trial court then approved Defendant's Rule 308 request and certified questions for appeal.

Appellate Court Decision

On appeal, the *Fox* Court premised its analysis on tension it identified among Illinois reviewing courts in handling requests for relief from the requirements set forth in the Act. While some courts have likened such requests to motions for extension of time, to which the "good cause" standard applies, others analogize them to motions to amend the pleadings, to which the "prejudice to defendant" standard applies. In tracing Illinois law on this issue, the Fifth District identified four cases supporting its interpretation that requests for relief from the requirements of the Act that can be characterized as motions for extension of time are treated under the "good cause" standard. *Stoelting v. Betzelos*, 2013 IL App (2d) 120651, para 17, 983 N.E.2d 543 (2013); *Knight v. Van Matre Rehabilitation Center, LLC*, 404 Ill.App.3d 214, 217, 936 N.E.2d 1152, 1155 (2010); *Simpson v. Illinois Health Care Services, Inc.*, 225 Ill.App.3d 685, 588 N.E.2d 471 (1992); *Premo v. Falcone*, 197 Ill.App.3d 625, 630, 554 N.E.2d 1071, 1075 (1990)(trial court has to consider good cause). Under this standard, the Plaintiff must show good cause as to why compliance with the Act was not met within the times frames set forth therein. The *Gauto* court also identified three cases supporting its interpretation that requests for relief from the deadlines set forth in the Act that can be characterized as motions for leave to amend are governed by the "prejudice to defendant standard." *Cookson v. Price*, 393 Ill.App.3d 549, 552, 914 N.E.2d 229, 231 (2009); *Laesk v. Hinrichs*, 232 Ill.App.3d 332, 339, 595 N. E.2d 1343, 1347 (1992); *Apa v. Rotman*, 288 Ill.App.3d 585, 587, 680 N.E.2d 801, 802 (1997). Under that standard, the Defendant must prove that allowing the amendment would cause prejudice beyond mere delay or inconvenience. *Apa*, 288 Ill.App.3d at 591, 680 N.E.2d at 805). Instead, Defendant must show that the delay must operate to hinder the defendant's ability to present his case on the merits. *Banks v. United Insurance Co. of America*, 28 Ill.App.3d 60, 64, 328 N.E.2d 167, 171 (1975).

The *Gauto* Court noted that Plaintiffs timely filed a certificate of merit in an attempt to comply with the requirements of section 2-622(a)(1), despite its shortcomings. The appellate court characterized Plaintiffs' motion to reconsider the trial court's dismissal of the Complaint as one that, in substance, amounted to a request for leave to amend pleadings that were timely filed, not a motion to extend missed deadlines. In that regard, Plaintiffs' attempt to comply with the Act was akin to the facts at issue in *Leask*, *Apa*, and *Cookson*, and distinguishable from *Simpson*, *Knight*, *Stoelting*, and *Premo*. Accordingly, the appellate court applied the "prejudice to defendant" standard. The appellate court affirmed the trial court's ruling on the motion to reconsider, noting that Defendant did not argue she would suffer prejudice as a result of allowing the amendment.

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Analysis

While the result in *Fox v. Gauto* is arguably correct, the means by which the appellate court achieved that result may prove impactful in future cases, given the potential implications of the ruling.

Ultimately, the attorney representing Plaintiffs in the instant case did not exhibit the sheer inadvertence, lack of diligence, or characteristic "bad faith" underlying cases where reviewing courts have upheld dismissals with prejudice for failure to comply with the Act. In fact, Plaintiffs' counsel arguably demonstrated "diligence" in attempting to correct the shortcomings of the initial report, or at least that type of "diligence" which has merited extensions of time in other cases. For example, the *Gauto* Court noted that, within fifty-five (55) days of days of filing the original Complaint, Plaintiffs sought leave to amend to file a new report from a different doctor, who provided the requisite certificate of merit. This occurred within the 90-day "safety valve" provisions expressly provided within the language of Section 2-622. Similar efforts proved sufficient to establish "good cause" in *Simpson*, a case cited by the *Gauto* Court. *Simpson v. Illinois Health Care Services, Inc.*, 225 Ill.App.3d 685, 588 N.E.2d 471 (1992)(failure to file report until forty-seven (47) days after the 90-day extension of time expired excused as attorney proved "good faith" in diligently pursuing the report from his non-responsive expert). In that regard, Plaintiffs arguably could have demonstrated, and the appellate court could have found, "good faith," or at least the absence of circumstances suggesting that they acted in bad faith.

Nevertheless, the *Fox* Court treated Plaintiffs' request for relief from the requirements of the Act as a motion for leave to amend and applied the "prejudice to defendant" standard. [1] This aspect of the ruling may prove problematic in future cases. First, the *Gauto* opinion does not clearly specify whether trial courts in future cases must consider the conduct of the Plaintiff and his or her attorney(s) in ruling on a motion for leave to amend under the Act. In *Cookson* and *Laesk*, the court considered whether allowing the amendment would prejudice defendant, but only after making the threshold finding that Plaintiff acted under circumstances exhibiting "good faith". *Cookson v. Price*, 393 Ill.App.3d 549, 552, 914 N.E.2d 229, 231 (2009); *Laesk v. Hinrichs*, 232 Ill.App.3d 332, 339, 595 N.E.2d 1343, 1347 (1992). In *Apa*, whether Plaintiff demonstrated "good faith" was not at issue because Plaintiff actually complied with the Act. *Apa v. Rotman*, 288 Ill.App.3d 585, 587, 680 N.E.2d 801, 802 (1997)(Plaintiff sought 90-day extension of time pursuant to the Act and filed certificate of merit within deadline, but Defendant did not receive it because certificate was not transferred with file to transferee forum). In these cases, therefore, the courts factored Plaintiff's conduct into their decision-making, in addition to considering whether allowing the amendment would cause prejudice to defendant. The *Gauto* opinion suggests that lower courts need only consider one element, prejudice to defendant, in considering whether to grant leave to amend in future cases.

Second, while it is true that, as a matter of law, the standards courts apply in considering motions to leave versus motions for extension of time differ, in the context of the Act that distinction might not warrant different legal outcomes. Ultimately, until the requirements of the Act have been met fully, the documents attached to the Complaint could be considered a legal nullity. In that regard, where Plaintiffs have failed to achieve full compliance with the Act's requirements, they are technically always seeking an extension of missed deadlines, as one cannot seek leave to amend something that never existed. But with this distinction governing the standard applied in future cases, this decision might invite litigants to always couch a request for relief from the requirements of the Act as a motion for leave to amend, as opposed to a motion for extension of time, whether they have previously attempted compliance with the Act or not. In doing so, future Plaintiffs can essentially shift the burden to Defendants by improperly elevating form (i.e., simply changing the title of their court filing) over substance.

Finally, the *Gauto* Court's ruling might invite future Plaintiffs to attempt compliance with the Act by cobbling together any report they can find, whether it complies with the statute or not, to buy additional time to widen or continue their search for a supportive expert. Because in such a case the Court would be required to apply the "prejudice to Defendant" standard in considering whether to allow the amendment, if or when such a favorable consult is obtained, Plaintiffs will undoubtedly preserve this almost guaranteed right to amend in most cases. While in some cases this strategy could save a meritorious claim from being eliminated by the deadlines in the Act, in a vast majority of cases this will serve only to needlessly delay the inevitable. Perhaps the accumulation of lingering cases as a result of this loophole may encourage more stringent judicial enforcement of the Act's requirements.

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Plaintiffs Beware - Case Law Updates

Two decisions out of the Illinois Appellate Court, First District, are significant medical malpractice cases for physicians, hospitals, risk managers, insurance carriers and their counsel, one decision reflecting the importance of diligent opposition to plaintiff's late expert disclosures and the other decision depicting the crucial language of hospital consent forms for treatment rendered by independent practitioners, despite plaintiffs attempts at repudiating their recollection of the terms and/or circumstances under which the consent was executed. Both cases are well reasoned opinions by the First District and demonstrate the Appellate Court's careful legal and practical analysis and application of the law.

The two decisions from the First District are *Smith v. Murphy*, 2013 IL App (1st) 121839, 994 N.E.2d 617 and *Frezados v. Ingalls Memorial Hospital*, 2013 IL App (1st) 121835, 991 N.E.2d 817. The *Smith* opinion addresses and upholds the exclusion of plaintiff's late expert disclosure as admissible evidence at trial and further refuses to consider the expert opinion as a basis to defeat summary judgment. The *Frezados* opinion affirms summary judgment in a medical malpractice case for the hospital, with the court holding that there was no genuine issue of material fact raised by the plaintiff as to whether the hospital "held out" the physicians as employees of the hospital.

Discovery Sanctions Bar Plaintiff's Expert Disclosure

In *Smith v. Murphy*, 2013 IL App (1st) 121839, 994 N.E.2d 617 (appeal pending), the First District of the Illinois Appellate Courts examined the plaintiff's late expert disclosure, scrutinized the underlying trial court record, including the factual and legal arguments presented, and affirmed summary judgment in favor of the defendant physicians. The court held that the plaintiff's late filing of an affidavit of a new previously undisclosed expert that the defendant physicians had committed malpractice, which the plaintiff submitted in opposition to the defendants' Motion for Summary Judgment, was appropriately excluded as admissible evidence as a discovery sanction. The Appellate Court further rejected the plaintiff's argument that despite the new expert opinion being excluded as admissible evidence at trial, that the affidavit should still be considered as raising a genuine issue of fact to prohibit summary judgment. Notably, the Appellate Court examined the reality of permitting the case to proceed to trial, envisioned the absurd end result, and upheld summary judgment in favor of the defendants.

The Appellate Court opinion in *Smith* noted that after the plaintiff's expert witness testified in his deposition that he held no opinions the defendants deviated from the standard of care, that the plaintiff, despite numerous opportunities to bring the issue to the court's attention, did not do so, did not abide by the mandates set forth in Supreme Court Rule 213 with respect to controlled expert witnesses, made no attempt to seasonably supplement or amend the Rule 213 disclosures, and did not comply with the trial court discovery order. It was only after defendants disclosed their Rule 213 experts, submitted their experts for deposition, the deadline for discovery as set forth in the trial court's case management order had closed, a trial date was set, and the defendants filed their Motion for Summary Judgment that the plaintiff submitted an unsigned proposed affidavit of a previously undisclosed retained expert, filed in opposition to the Defendant's Motion for Summary Judgment. The Appellate Court affirmed the trial court order which barred the plaintiff's expert's opinions and entered Summary Judgment in favor of the defendant physicians.

The Appellate Court in *Smith*, citing the Illinois Supreme Court decision in *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 282 Ill. Dec. 348 (2004), indicated that in deciding whether exclusion of a witness's testimony in court or by affidavit is an appropriate sanction for nondisclosure, the court examines the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the witness's testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timeliness of the objection to the witness's testimony; and (6) the good faith of the party seeking to offer the testimony. The *Smith* court examined each of the pertinent factors and held that the trial court appropriately weighed all of those factors when issuing its decision to bar the testimony of plaintiff's expert.

The *Smith* opinion further addressed the plaintiff's argument that even if the disclosure of the expert was untimely, that the affidavit of the physician critical of the defendants should still be allowed to defeat the defendants' Motion for Summary Judgment. The plaintiff argued that the procedure permitted under the Code of Civil Procedure, 735 ILCS 5/2-1005(c) which allows a party to contest summary judgment by the filing of affidavits, should trump any discovery sanctions imposed by a trial court. The court found the plaintiff's argument unpersuasive, noting both practical and legal authority in their decision. The court stated that the "Plaintiff is, in effect, requesting that we require the trial court to allow the parties to proceed to trial, only to then grant a directed verdict for the two defendant-doctors as there would be no admissible

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evidence to show any medical professional negligence against them. This would result in wasting the court's and all the parties' time, incur costs and expend energy on what everyone knows is a useless proceeding. '[T]he law does not require the doing of a useless act.'" *Smith* at 623 citing *Stone v. La Salle National Bank*, 118 Ill.App.3d 39, 45, 73 Ill.Dec. 811, 454 N.E.2d 1060 (1983).

The *Smith* court noted in its decision that "Plaintiff's attachment of a previously undisclosed expert opinion in an affidavit in response to a motion for summary judgment was nothing more than a thinly veiled attempt to circumvent the trial court's discovery orders and its authority to reasonably regulate the parties' discovery process in the interests of justice during litigation." *Smith* at 624, citing Ill. S.Ct. R. 201 (eff. July 1, 2002).

In conclusion, the First District in *Smith* found, after their review of the trial court record, that the lower court adhered to its prior court orders referable to discovery cutoff dates and expert disclosures, adhered to the Illinois Supreme Court Rules, and did not abuse its discretion in barring the plaintiff's newly disclosed expert to defeat defendants' Motion for Summary Judgment. As such, judgment in favor of the defendants and against the plaintiff was affirmed by the Appellate Court.

Consent Form Trumps Plaintiff's Testimony

In *Frezados v. Ingalls Memorial Hospital*, 2013 IL App (1st) 121835, 991 N.E.2d 817, the plaintiff presented to the hospital and was treated in the Urgent Aid Center by a physician. When the patient arrived at the hospital, he testified that he was provided a "Consent for Treatment" form by a person working at the intake desk.

The consent form read, in pertinent part, as follows:

> "I have been informed and understand that physicians providing services to me at Ingalls, such as my personal physician, Emergency Department and Urgent Aid physicians, radiologists, pathologists, anesthesiologists, on-call physicians, consulting physicians, surgeons, and allied health care providers working with those physicians are not employees, agents or apparent agents of Ingalls but are independent medical practitioners who have been permitted to use Ingalls' facilities for the care and treatment of their patients. I further understand that each physician will bill me separately for their services."

Frezados at 819.

At the time the plaintiff was deposed, he testified that he signed an identical form in 2002, but did not recall signing the form. At the time of the care and treatment rendered at the Urgent Aid Center in the case at hand, he testified he did not read the form before he signed because he was in too much pain and simply wanted treatment.

The plaintiff testified he believed the physician he saw at the Urgent Aid Center was an employee of the hospital because the doctor was present in the hospital that day. The plaintiff also testified that he believed another physician (hereinafter "specialist") was an employee of the hospital because the specialist worked in the building where the Urgent Aid Center was located and because the physician who had rendered treatment in the Urgent Aid Center had referred him to the specialist.

In addition to the consent form the plaintiff denied reading, the hospital also had a sign posted in the waiting and examination rooms which read that the doctors at the hospital are "not employees or agents of the hospital. They are independent contractors. Billing for their services will be provided separately from the hospital charges. Urgent Aid Physicians, CT, MRI, Mammography, Ultrasound, Cardiology, Radiology, Pathology."

The defendant hospital moved for summary judgment on the grounds that there was not an issue of fact as to whether the two physicians were the actual or apparent agents of the hospital so as to support recovery on the theory of vicarious liability. The defendant hospital submitted supporting evidence that the physicians were not employees, that they may have privileges and lease agreements, but were not employed by the hospital nor did the hospital provide the physicians with compensation.

The First District in *Frezados*, noted that the leading decision by the Illinois Supreme Court in *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511, 622 N.E.2d 788 (1993), held that a hospital may be vicariously liable for medical or professional negligence if there is an apparent agency relationship between the hospital and physician. Prior to *Gilbert*,

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hospitals could only be held vicariously liable for the negligent acts of their actual agents. The *Frezados* court noted that the decision in *Gilbert* reflected the "reality of modern hospital care" in which patients rely on the reputation of the hospital, rather than individual doctors, in seeking emergency treatment and naturally assume the doctors are hospital employees, citing *Gilbert*. The *Frezados* court stated that it was for this reason that the Illinois Supreme Court in *Gilbert* expanded the scope of a hospital's liability to include negligent acts of apparent, in addition to actual, agents.

The issue presented to the court in *Frezados* was not one of actual agency, for which a hospital may be found liable, but was instead the issue of apparent agency, which, if proven, may also establish liability against a hospital, as pronounced in *Gilbert*. The First District stated in *Frezados*, that:

> "in order to establish apparent agency, a plaintiff must show: '(1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence.'"

Frezados at 820, citing *Gilbert*, quoting *Pamperin v. Trinity Memorial Hospital*, 144 Wis.2d 188, 423 N.W.2d 848, 856 (1988).

The *Frezados* court first turned its attention to the "holding out" element, namely, whether the hospital or the physicians in the case at hand reasonably led the plaintiff to believe that the doctors were the hospital's employees or agents. The court noted that in *Gilbert*, the Illinois Supreme Court found this "holding out" element to be satisfied if the hospital (1) presents itself as a provider of emergency room care and (2) does so without advising the patient that the care is being provided by independent contractors. In distinguishing *Gilbert*, the court noted that the hospital in *Gilbert* did not inform its patients they were independent contractors, but instead, actually had a consent form stating that the patient would be treated by "physicians and employees of the hospital." Unlike the facts presented to the Supreme Court in *Gilbert*, in *Frezados*, the "Consent for Treatment" form included a disclaimer that the physicians are not employees, agents or apparent agents of the hospital, but were instead independent contractors. The court took note as well of the signs posted in the waiting and examination areas.

The First District made specific reference in *Frezados* of other similar consistent decisions made by their court to the effect that a patient's signature on a consent form containing similar language disclaiming an agency relationship is an important factor to consider in determining whether the "holding out" element has been met. The court reviewed and cited the plaintiff's deposition testimony that other than the physician's presence in the hospital and the rendering of care to the plaintiff, that there was nothing the physician said and nothing the hospital did which led the plaintiff to believe that the physician was employed by the hospital. The court found that this testimony, in conjunction with the signed consent form, which explicitly and clearly disclaimed any employer-employee status between the physician and hospital, to suggest that no reasonable person could have believed the doctors were the agents of the defendant. The court in *Frezados* specifically found, however, that the consent form in the case pending before it was a clear disclaimer of an agency relationship between the hospital and the physicians. The court referenced other cases where the hospital consent forms also contained disclaimers of agency relationships between physicians and hospitals, but noted that the forms in those cases were found to have some language or formatting found by the courts to have triable issues of fact for a jury to decide the issue of apparent agency.

Of interest in *Frezados* is that the court, having found the consent form to clearly disclaim an agency relationship between the hospital and physicians, also addressed the plaintiff's argument that his signature did not foreclose the existence of a genuine issue of fact because his pain prevented him from reading the form prior to signing. The court pointed to multiple other cases, in other business arenas, where the courts have routinely held that a party has a duty to read documents prior to signing them and a failure to read the documents will not necessarily raise an issue of fact as to the party's knowledge of the document's contents. The First District stated in *Frezados*, that they "see no reason not to extend this well-established principle to consent for treatment forms. Indeed, we have never been persuaded by plaintiffs who have opposed motions for summary judgment on the basis that they did not read the form or that their shock prevented them from understanding the form's provisions. Significantly, a holding to the contrary would drastically diminish the value of independent contractor disclaimers. Nearly everyone who seeks emergency treatment is in some physical or emotional

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distress, and were we to hold that such distress could operate to nullify provisions in an otherwise duly signed treatment consent form, hospitals would always be required to proceed to trial on claims of vicarious liability."

The First District in *Frezados* held that the plaintiff failed to raise a factual question as to the "holding out" element of his cause of action. Given that the plaintiff must prove every element of his cause of action, the court found no reason to address the arguments or evidence as to whether the plaintiff could prove justifiable reliance. As such, the First District affirmed the trial court's order granting summary judgment in favor of the hospital and against the plaintiff.

Representative Matters

Dawn A. Sallerson recently obtained a dismissal with prejudice in a medical malpractice action brought against a doctor (represented by Hinshaw) and hospital which were sued by a patient alleging injuries sustained as a result of the table plaintiff was lying on collapsing while she was undergoing an epidural injection. The plaintiff's attorney filed the lawsuit on April 16, 2013, about a week before the two year statute of limitations for medical malpractice claims expired, but did not attach the required attorney's affidavit and health professional report as required by the Illinois Healing Arts Malpractice Act, 735 ILCS 5/2-622 (the Act). As a result, the doctor moved to dismiss on those grounds. This prompted plaintiff's counsel to file a request for leave to amend, arguing that the case sounded in battery and ordinary negligence, and therefore, did not need to comply with the statutory requirements under the Act.

Thereafter, plaintiff's counsel filed an affidavit claiming a request for the medical records from the co-defendant hospital prior to filing suit, but as the statute of limitations period approached, was required to file the case without the records for review. The plaintiff further claimed a continued inquiry for the records but did not receive them until August 16, 2013. Accordingly, plaintiff claimed that pursuant to the Act, plaintiff should be entitled to ninety days (90) from the receipt of the records, or until November 16, 2013, to provide the required health professional report. Ultimately, the court ruled that plaintiff's claims sounded in medical malpractice and therefore denied her leave to file battery or ordinary negligence claims, and as a result, the court found that plaintiff was required to comply with the Act's requirements of filing an attorney's affidavit and health professional report. The court further found that plaintiff's attorney's affidavit should have been filed at the time the complaint was filed, but stated that since dismissal with prejudice was a drastic measure, the court reserved ruling on the motion to dismiss until after November 16, 2013.

Relying on the Fifth District Appellate Court of Illinois' recent *Fox v. Gauto*, 2013 IL App (5th) 110327, decision, which held, among other things, that when a plaintiff requests an extension of the deadlines provided for under the Act, additional time may be granted if the plaintiff can show "good cause" for his or her failure to comply with the deadlines, the doctor argued that plaintiff's counsel could not show "good cause." Specifically, the doctor pointed out that plaintiff had still failed to comply with the Act's requirement of providing a health professionals report and that plaintiff could have moved for Court ordered enforcement to produce the records, 735 ILCS 5/8-2001(e), which requires production within thirty (30) days unless an extension is granted, and in no event allows for an extension later than sixty (60) days after the request was sent, but plaintiff's counsel did not and could did not show "good cause" in failing to comply with the Act. The court agreed, and dismissed plaintiff's complaint with prejudice.

Jill M. Munson and Michael P. Russart obtained a summary judgment dismissing a medical malpractice action which had been pending since 2009. The case had significant exposure as the claim was that the use of nitrous oxide anesthesia during surgery resulted in permanent severe neurologic injury in a six-month old. The claim was based, in great part, on a published medical journal article for which one of the defendant doctors was listed as an author. The article discussed the potential that using nitrous oxide as an anesthesia agent where the patient may have vitamin K deficiency could be associated with severe neurologic injury. The article was an anonymous case study of the anesthesia care of the minor plaintiff. The court found the plaintiffs' experts lacked the necessary foundation to offer testimony at trial and dismissed the case.

In *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, the jury returned a $1.5 million verdict against the emergency room physician and Hinshaw's client, the hospital, on an apparent agency theory. The mother of the adult patient directed the ambulance to the hospital and once there, the patient signed a consent which advised her that most of the physicians she would see were not hospital employees and agents. The patient also disclaimed any reliance on an agency or employment relationship between the doctors and the hospital in that form. Nancy G. Lischer argued before the appellate court which determined that the sole evidence was the patient's signed form in which she disclaimed reliance, and the

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mother's testimony regarding reliance was not probative because the patient was an adult. It reversed, ordered that judgment be entered in favor of the hospital. Based on trial error, it also reversed the verdict against the physician, but remanded for a new trial. The plaintiff has appealed to the Illinois Supreme Court, which should decide whether to accept the case for review in the next several months.

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