



## Newsletters

### Competency of an Expert Witness and Rule 219(e) Questioned by Illinois Court of Appeals in Medical Malpractice Decision

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*Freeman v. Crays*, 2018 IL App (2d) 170169 provides guidance for defending medical malpractice cases on the competency of an expert witness to give opinion testimony outside of their specialty. It also provides a framework for sanctions when a case is refiled after a voluntary dismissal.

The case involved a family practice physician's alleged failure to diagnose a latent cardiac condition leading to 37-year-old-man's sudden cardiac arrest and death. Before voluntarily dismissing the case, the plaintiff's only expert was Dr. Finley Brown, a family practitioner. He testified that the deceased's severe coronary artery disease increased his risk for sudden cardiac death.

While Dr. Brown was critical of the defendant for not referring the patient to a cardiologist, he admitted at his deposition that he was not certain exactly how the cardiologist would have treated the deceased if the referral had been made.

The trial court granted defendant's motion in limine barring Dr. Brown from giving his causation opinion testimony that a cardiologist would have prevented the sudden death. In light of the ruling, the court was prepared to issue a directed verdict in the case. Rather than face a directed verdict, the plaintiff moved to voluntarily dismiss the complaint without prejudice.

Upon refileing, the plaintiff indicated that he intended to disclose an expert cardiologist. The defendant objected and moved to bar the additional witness pursuant to Rule 219(e), which precludes a party from avoiding compliance with discovery orders by voluntarily dismissing a suit. The plaintiff argued in response that she had not violated any discovery orders or missed any discovery deadlines. The circuit court agreed with the defendant and barred any testimony from the plaintiff's newly disclosed cardiologist, entered summary judgement, and the appeal followed.

#### Competency of a Witness to Give Opinions on Causation

In upholding the trial court's decision to bar Dr. Brown from offering causation opinion, the *Freeman* court did not go as far as to say that an expert from one field of medicine could not testify as to the standard of care in another specialty. Rather, the decision seemed to hinge on the admissions made by Dr. Brown

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during his deposition.

For instance, Dr. Brown admitted in that he "refers 100% of his patients with cardiovascular issues to a cardiologist" and that he "(does not) have the skill, or the training or the knowledge to complete a detailed and comprehensive cardiac work-up." While he testified that he works daily with cardiologists and was generally aware of treatments a cardiologist might have recommended, the choice of which procedure to implement was always left to a cardiologist. Moreover, despite his declared "special interest" in the field of advanced lipidology, Dr. Brown admitted that he would need to consult with a cardiologist even to determine whether it was safe for him to administer lipid lowering drugs.

In light of those admissions, Dr. Brown's causation opinions were "contentious and speculative." The *Freeman* court explained, "Although Dr. Brown might have had some degree of familiarity with the standard of care for a cardiologist, he was still unable to testify to a reasonable degree of medical certainty as to *how* a cardiologist would have *effectively* treated [the plaintiff.]" (§33) (emphasis in original)

Therefore, it was not enough for Dr. Brown to testify that if the defendant had referred the deceased to a cardiologist, the specialist could have administered a treatment plan.

#### Rule 219(e)

Turning to Supreme Court Rule 219(e), the court noted the dual purpose of Rule 219(e) was to: (1) provide for monetary sanctions in terms of costs paid to the defense of the dismissed action; and (2) to limit the scope of the discovery and evidence in the refiled action so the dismissing party cannot avoid discovery orders. *Freeman* is relevant because it articulates that different standards should be applied for each of those mechanisms.

*Freeman* concluded that the circuit court abused its discretion by precluding the plaintiff from disclosing a new expert cardiologist in the re-filed action because the circuit court "applied the standards that govern the imposition of monetary sanctions associated with a voluntary dismissal." (§60). Instead of focusing on whether the plaintiff voluntarily dismissed the case to avoid a directed verdict, the circuit court should have looked at the case prospectively in analyzing whether to limit discovery.

In considering the application of Rule 219(e) to bar witnesses in a refiled action, courts should use the same factors that are used to determine whether the exclusion of a witness in an appropriate action in any case. Those factors include: "(1) surprise to the adverse party, (2) the prejudicial effect of the witness's testimony, (3) the nature of the witness's testimony, (4) the diligence of the adverse party, (5) whether objection to the witness's testimony was timely, and (6) the good faith of the party calling the witness." (§52).

*Freeman* also made clear that there need not be a specific finding of misconduct in the original action before Rule 219(e) could be applied to the refiled claim. Rather, a trial court has a duty to "consider the prior litigation in determining what discovery would be permitted and whether any witnesses or evidence would be barred." (§43). Thus, misconduct of the party's individual action is "merely a factor to be considered by the trial court in the refiled action where it determines what witnesses and evidences will be permitted." (§49).

#### Analysis

There are two takeaways from this case. First, on the issue of the competency of an expert, the decision will be important to litigators because it provides a road map to preclude an expert in a complex medical malpractice case from offering opinions on both standard of care and causation. While experts may offer opinion testimony in other fields of medicine, the case hinged on the admissions that this particular expert made in his deposition where he admitted a general lack of knowledge as to the specific treatment options available to a cardiologist. This would be particularly important in cases involving failure to refer a patient to surgery, failure to diagnose cancer, and just about any other cases which involve allegations of failure to refer to a specialist. For this reason alone, *Freeman v. Crays* should be a case to include in a lawyer's trial notebook.

The second issue involves attempts to bar new witnesses in a refiled action. Defense counsel should include analysis of the seven factors outlined in the *Freeman* case in any motion to bar, pursuant to Rule 219(e).



## The Hinshaw Health Care Bulletin Blog Highlights

Since the last edition of the Health Care Newsletter, our health care blog has published several posts, including:

- [OIG Targets Chiropractors Yet Again in Report Recommending Aggressive Audit Procedures](#)
  - [Reviewing Important Illinois Healthcare Court Rulings: Doctrine of Apparent Agency](#)
  - [4-1-1 on Telehealth: What the New Illinois Telemedicine Law Means for Hospitals and other Healthcare Providers](#)
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