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Appellate Court Addresses Standard for Proximate Cause Opinion Testimony and Plaintiff's Use of Voluntary Dismissal as a Tool to Disclose Additional Experts

In its recent decision *Freeman v. Crays*, 2018 IL App (2d) 170169, the appellate court addressed two important subjects. First, the court considered the necessary foundation for expert testimony on proximate cause. Second, the court addressed whether a plaintiff may voluntarily dismiss a claim on the eve of trial to avoid a directed verdict, and add necessary expert witnesses in a refiled action. To avoid pitfalls that might arise from the *Freeman* decision, counsel should carefully consider its implications throughout the litigation process.

Background

The defendant was a family practice physician who treated the decedent for hypertension and prescribed medication. After the decedent suffered sudden cardiac arrest, a lawsuit was filed alleging that the defendant failed to diagnose the decedent's enlarged heart and severe coronary artery disease and failed to refer the decedent to a cardiologist. *Freeman*, 2018 IL App (2d) 170169, ¶ 4.

The only opinion witness the plaintiff disclosed was a family practice physician, Dr. Finley Brown. The plaintiff did not disclose a cardiology expert. *Id.* ¶¶ 4, 6. At the final pre-trial conference, the plaintiff filed a motion *in limine* to bar undisclosed witnesses, which was granted without objection. The trial court also granted, without objection from the plaintiff, the defendant's motion *in limine* barring Dr. Brown from offering opinions regarding the standard of care of a cardiologist or treatment that a cardiologist would have recommended. The plaintiff readily admitted Dr. Brown could not provide such testimony because he "is not a cardiologist." *Id.* ¶ 6. As a result, the trial court expressed skepticism that the plaintiff would be able to prove proximate cause, but the case proceeded. *Id.*

Dr. Brown's evidence deposition was then taken. Contrary to the trial court's order, Dr. Brown testified that the defendant physician's failure to refer the decedent to a cardiologist deprived the decedent of a chance to survive because a cardiologist would have provided treatment to improve circulation. *Id.* ¶ 7. Dr. Brown admitted he did not have "the skill, or the training, or the knowledge to complete a detailed and comprehensive cardiac work-up." *Id.* ¶ 33 (internal quotation marks omitted). Nonetheless, Dr. Brown asserted that he was qualified to provide testimony about how a cardiologist would have treated the decedent because he: (1) had worked closely with cardiologists and was familiar with the treatments that might have been administered; (2) had taken a special interest in the field of advanced lipidology; and (3) had attended several lectures and completed a two-day course. *Freeman*, 2018 IL App (2d) 170169, ¶ 7. Dr. Brown testified that a cardiologist *might* have performed bypass surgery, angioplasty, stent placement or prescribed medication. But, Dr. Brown admitted he was not certain how a cardiologist *would* have treated the decedent, and the choice of which

procedure to implement is always left to a cardiologist. *Id.* ¶¶ 7, 33. Dr. Brown even admitted that a cardiologist would have to evaluate whether prescribing lipid-lowering drugs was safe. Dr. Brown repeatedly admitted that he could not say what a cardiologist actually would have done. *Id.* ¶¶ 7-8. Based upon this testimony, the trial court barred Dr. Brown from opining that a cardiologist would have prevented the decedent's death. Dr. Brown's opinions were all based upon the premise that the decedent should have been referred to a cardiologist, and Dr. Brown admitted that he did not know how a cardiologist would have treated the decedent. *Id.* ¶ 8.

After a jury was selected, but before it was sworn, the plaintiff moved for voluntary dismissal. The defendant did not object to the plaintiff's motion or request sanctions pursuant to Supreme Court Rule 219(e), and the trial court granted the plaintiff's motion to voluntarily dismiss with the parties to bear their own costs. *Id.* ¶ 9.

Just days later, the plaintiff refiled her claim and disclosed an intent to call an expert cardiologist. The defendant physician then moved to adopt the discovery and *in limine* orders from the prior case, and requested the trial court bar the plaintiff from disclosing additional expert witnesses pursuant to Rule 219(e). *Id.* ¶ 11. The trial court granted the motion to adopt the discovery and *in limine* orders from the prior case, effectively barring testimony from the plaintiff's newly disclosed cardiology expert. Although the plaintiff had an absolute right to voluntarily dismiss and refile, the trial court found this was "exactly the type of refiling that should be barred under Supreme Court Rule 219(e)" because "[a]ll the rulings were made, the cards were on the table, the plaintiff was facing a very likely motion for directed verdict, and then voluntarily dismissed . . . to avoid the consequences of the Court's rulings on the proximate cause issue." *Freeman*, 2018 IL App (2d) 170169, ¶ 12. The trial court later granted the defendant's motion for summary judgment and dismissed the plaintiff's claim with prejudice. *Id.* ¶ 14.

Proximate Cause Opinions Must be Expressed to a Reasonable Degree of Medical Certainty, Even in a "Lost Chance" Case

On appeal, the plaintiff first argued that a lower threshold should be applied to Dr. Brown's causation testimony because the plaintiff was presenting a "lost chance" theory, rather than a traditional medical negligence claim. *Id.* ¶ 20.

The appellate court readily rejected this argument. Proximate cause testimony must be expressed to a reasonable degree of medical certainty, even in a "lost chance" case. *Id.* ¶ 21. The plaintiff argued that, in a "lost chance" case, an expert does not have to testify that subsequent treatment *would* have been effective, but only that it *could* have. *Id.* ¶ 23. The court rejected this argument, noting that the foundational bar for causation opinions is not lowered in a "lost chance" case. Instead, an expert must testify to a reasonable degree of medical certainty that the negligence proximately caused the injury. *Id.* ¶ 24. The court noted that the "door is not opened for speculation as to whether a defendant doctor's negligence deprived the patient of the opportunity to undergo treatment that could have been effective," and the expert must still express opinions to a reasonable degree of medical certainty. *Freeman*, 2018 IL App (2d) 170169, ¶ 26.

Plaintiff's Family Practice Expert Was Not Qualified to Render Opinions as to How a Cardiologist Would Have Treated the Decedent

The plaintiff acknowledged in the trial court that Dr. Brown was unqualified to testify to the standard of care of a cardiologist, which should have resolved this issue. Nonetheless, the plaintiff argued on appeal that Dr. Brown was

qualified because he worked closely with cardiologists and was familiar with the methods, procedures, and treatments a cardiologist might recommend. *Id.* ¶ 27.

The appellate court rejected this argument. The court acknowledged that a physician in one expertise is not prohibited from testifying as to the care of another expertise, but the plaintiff failed to establish adequate foundation for Dr. Brown's opinions in this case. *Id.* ¶¶ 31-32, citing *Gill v. Foster*, 157 Ill. 2d 304, 315-16 (1993); *Silverstein v. Brander*, 317 Ill. App. 3d 1000, 1002 (1st Dist. 2000); *Ayala v. Murad*, 367 Ill. App. 3d 591, 601-02 (1st Dist. 2006).

Dr. Brown testified that he referred his patients with cardiovascular issues to a cardiologist, and that he did not have the "skill, or the training, or the knowledge to complete a detailed and comprehensive cardiac work-up." *Freeman*, 2018 IL App (2d) 170169, ¶ 33. Although Dr. Brown may have had general awareness of the treatments a cardiologist might have recommended for the decedent, he admitted that the ultimate decision is always left to a cardiologist. Dr. Brown could not say how a cardiologist would actually have treated the decedent. *Id.* ¶ 33.

The court found Dr. Brown's opinions contingent and speculative. *Id.* ¶ 36, citing *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill. App. 3d 967 (1st Dist. 1997); *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289 (1st Dist. 2008). Because Dr. Brown could not testify to a reasonable degree of medical certainty how a cardiologist would have effectively treated the decedent, Dr. Brown lacked the foundation to testify that the defendant physician's alleged negligence was a proximate cause of the death. *Freeman*, 2018 IL App (2d) 170169, ¶ 36.

Application of Rule 219(e) In Determining Whether to Bar Evidence or Witnesses

The appellate court then considered the trial court's application of Rule 219(e), barring the plaintiff from presenting a cardiology expert. Illinois Supreme Court Rule 219(e) provides:

> A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges.

The committee comment at issue provides:

> Paragraph (e) addresses the use of voluntary dismissals to avoid compliance with discovery rules or deadlines, or to avoid the consequences of discovery failures, or orders barring witnesses or evidence. This paragraph does not change existing law regarding the right of a party to seek or obtain a voluntary dismissal. However, this paragraph does clearly dictate that when a case is refiled, the court shall consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred. The consequences of noncompliance with discovery deadlines, rules or orders cannot be eliminated by taking a voluntary dismissal. Paragraph (e) further authorizes the court to require the party taking the dismissal to pay

> the out-of-pocket expenses actually incurred by the adverse party or parties. . . . Paragraph (e) does not provide for the payment of attorney fees when an action is voluntarily dismissed.

Ill. S. Ct. R. 219(e), Committee Comments (adopted June 1, 1995).

First, the court determined that any time a case is refiled, Rule 219(e) "requires the court to consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred." *Freeman*, 2018 IL App (2d) 170169, ¶ 42, quoting *Morrison v. Wagner*, 191 Ill. 2d 162, 167 (2000) (internal quotation marks omitted). In so finding, the court rejected the plaintiff's argument that the trial court lacked jurisdiction to consider this issue in the newly filed action just because the defendant did not seek relief at the time the underlying motion for voluntary dismissal was filed. *Freeman*, 2018 IL App (2d) 170169, ¶ 43.

The court also rejected the plaintiff's argument that, for Rule 219(e) to apply, a plaintiff must have committed some misconduct in the voluntarily dismissed action. *Id.* ¶¶ 44-46. Instead, the court found that the misconduct of a plaintiff in the underlying action is only a factor that the trial court should consider when determining what witnesses and evidence will be allowed in the refiled action. *Id.* ¶ 49, citing *Smith v. P.A.C.E.*, 323 Ill. App. 3d 1067 (1st Dist. 2001).

However, the court found that the plaintiff should not have been barred from calling a cardiology expert without further hearing, in which the trial court considered the traditional factors for barring evidence or witnesses, including: (1) 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) whether there was a timely objection to the witness's testimony, and (6) the good faith of the party calling the witness. *Freeman*, 2018 IL App (2d) 170169, ¶ 52, citing *Smith*, 323 Ill. App. 3d at 1076. Within this framework, a trial court should assess the "misconduct of a party in the original action and any sanctions entered against him therein." *Freeman*, 2018 IL App (2d) 170169, ¶ 53 (citing *Smith*, 323 Ill. App. 3d at 1074).

The appellate court reversed the trial court's order barring the cardiologist and entering summary judgment, and directed the trial court to reconsider the issue in light of this framework. *Freeman*, 2018 IL App (2d) 170169, ¶ 61. According to the appellate court, the trial court applied the wrong standard, inappropriately barring the cardiologist solely because the plaintiff moved for voluntary dismissal to avoid an inevitable directed verdict. *Id.* ¶¶ 56, 61. While the appellate court did not explicitly find that the plaintiff should be allowed to present the cardiology expert in the refiled action, it did agree with the plaintiff's argument that she had been "essentially a compliant litigant" in the underlying action and simply failed to anticipate the trial court's finding that Dr. Brown could not provide proximate cause testimony. *Id.* ¶ 57. The appellate court excused the plaintiff's actions as merely a case of "poor legal judgment." *Id.* ¶ 58. The appellate court distinguished this situation from other precedent by implying that the plaintiff could not have known that Dr. Brown lacked foundation to provide proximate cause testimony. *Id.* ¶ 57, citing *Jones v. Chicago Cycle Center, Inc.*, 391 Ill. App. 3d 101, 104 (1st Dist. 2009). Yet, this is hard to reconcile with the fact that the plaintiff readily acknowledged at the final pre-trial conference that Dr. Brown could not say how a cardiologist would have treated the decedent – surely the plaintiff did not just come to this conclusion at the hearing, and in fact, knew this long before the final pre-trial conference.

Seeking Expenses Under Rule 219(e)

After the plaintiff moved to voluntarily dismiss the initial action, the trial court's order granting the motion provided that the parties were to bear their own costs. Apparently, the defendant did not request costs or expenses under Rule

219(e), a courtesy which might commonly be appreciated. *Freeman*, 2018 IL App (2d) 170169, ¶ 9. Going forward, however, defense counsel should carefully consider requesting costs and expenses when confronted with a similar situation.

The *Freeman* court suggested that the trial court could have imposed monetary sanctions on the plaintiff before allowing the voluntary dismissal. *Id.* ¶¶ 57, 60. Other courts have approved the imposition of hundreds of thousands of dollars in costs and expenses against a plaintiff moving for voluntary dismissal on the eve of trial. *Jones*, 391 Ill. App. 3d at 111.

If a defendant requests costs and expenses under Rule 219(e), it could blunt the *Freeman* court's more liberal findings about adding witnesses in a refiled action. For instance, if a defendant is awarded costs and expenses, the parties could agree to wave payment if the plaintiff forgoes refiling the action. Facing significant costs and expenses, a plaintiff may carefully consider such a deal.

Conclusion

Freeman is useful to support motions to bar an opinion witness from providing expert testimony outside the scope of the witness's expertise. In that regard, it is positive for defense counsel. The court's findings about adding witnesses following a voluntary dismissal, on the other hand, are troubling. Defense counsel should consider the court's reasoning, and work to distinguish *Freeman* before the trial court when confronted with similar circumstances. Additionally, defense counsel should carefully consider seeking costs and expenses in such situations to potentially gain leverage against the claim being refiled.

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Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice, and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the Illinois Association of Defense Trial Counsel (IDC), the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, president and board member of the Illinois Association of Healthcare Attorneys, and past president and board member of the Illinois Society of Healthcare Risk Management. He co-authored the Chapter on Trials in the IICLE Medical Malpractice Handbook.

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