



Medical Malpractice Update

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The Use of Party Discovery Depositions

In *Eyster v. Conrad*, 2020 IL App (5th) 180261, the Illinois Appellate Court Fifth District analyzed whether the Illinois Dead Man's Act and Illinois Supreme Court Rule 212(a)(5) bar admission of a deceased defendant's discovery deposition at trial.

Trial Court Proceedings

Kenneth Eyster sued Kenneth Conrad for allegedly causing a motor vehicle accident. Conrad died during the pendency of the action, two years after giving a discovery deposition. *Eyster*, 2020 IL App (5th) 180261, ¶ 1. Following the defendant's death, the administrator of Conrad's estate sought summary judgment based on the Illinois Dead-Man's Act (Act). *Id.* The Act provides, in pertinent part:

§ 8-201. Dead-Man's Act. In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, except in the following instances:

(a) If any person testifies on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify regarding the same conversation or event.

(b) If the deposition of the deceased or person under legal disability is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.

735 ILCS 5/8-201(a)-(b).

The administrator of Conrad's estate argued that because the plaintiff and the decedent were the only witnesses to the motor vehicle accident, the Act barred the plaintiff from testifying about the facts of the accident and his conversations with the decedent. *Eyster*, 2020 IL App (5th) 180261, ¶ 5. Absent this testimony, the administrator argued the plaintiff would have no means to establish the decedent's negligence. *Id.*

The administrator further argued that Illinois Supreme Court Rule 212(a)(5) did not permit the use of the decedent's discovery deposition as substantive evidence at trial. Illinois Supreme Court Rule 212(a)(5) provides:

(a) Purposes for Which Discovery Depositions May Be Used. Discovery depositions taken under the provisions of this rule may be used only:

(5) upon reasonable notice to all parties, as evidence at trial or hearing against a party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is not a controlled expert witness, the deponent's evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity, and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice between or among the parties.

Ill. S. Ct. R. 212(a)(5).

The committee comments for Rule 212(a) indicate that pursuant to the ruling in *Berry v. American Standard, Inc.*, 382 Ill. App. 3d 895 (5th Dist. 2008), "a trial court should have the discretion under subparagraph (a)(5) to permit the use of a party's discovery deposition at trial" in "extremely limited" and "rare, but compelling, circumstances." Ill. S. Ct. R. 212, Committee Comments (adopted Jan. 1, 2011). The administrator argued that the decedent's death prior to trial and lack of an evidence deposition were not the "rare, but compelling, circumstances" justifying the introduction of the decedent's discovery deposition as substantive evidence. *Eyster*, 2020 IL App (5th) 180261, ¶ 7. The administrator emphasized that the plaintiff knew the decedent was 90 years old at the time of his discovery deposition and had plenty of time to preserve the decedent's testimony during the two years between his discovery deposition and death but failed to do so. *Id.* ¶ 7.

In support of his motion for summary judgment, the administrator submitted a memorandum of law attaching the decedent's complete discovery deposition transcript and an affidavit from the police officer who responded to the accident. In response, the plaintiff argued the administrator of Conrad's estate waived the protections of the Act by attaching the affidavit of the responding police officer, and further argued that the testimony and admissions made by the decedent were admissible as substantive evidence at trial pursuant Illinois Supreme Court Rule 212(a). *Id.* ¶¶ 11-12.

The trial court rejected the plaintiff's argument that the administrator waived the privilege by submitting the affidavit of the responding police officer and granted the administrator's motion for summary judgment. *Id.* ¶ 15. The court found that the Act "precluded the plaintiff from testifying as to any events that occurred in Conrad's presence as well as any conversations between the plaintiff and Mr. Conrad." *Id.* The plaintiff appealed the ruling.

Appellate Court Ruling

The appellate court noted that the purpose of the Act is to "protect decedents' estates from fraudulent claims, and also to equalize the position of the parties with respect to giving testimony." *Id.* ¶ 19 (citing *Gunn v. Sobucki*, 216 Ill. 2d 602, 609 (2005)). It is proper to apply the Act in the context of a summary judgment proceeding and a party opposing a motion for summary judgment may not rely on evidence barred by the Act to raise a genuine issue of material fact. *Id.* See also *Rerack v. Lally*, 241 Ill. App. 3d 692, 694 (1st Dist. 1992). While the privilege of invoking the Act belongs to

the decedent's representative, the appellate court noted that the representative "may waive the protections of the Dead-Man's Act either by offering testimony about an event or conversation that took place in the presence of the decedent or by admitting the deposition of the decedent into evidence." *Eyster*, 2020 IL App (5th) 180261, ¶ 20.

Reversing the trial court's ruling, the appellate court held that the administrator waived the protections of the Act by attaching the decedent's discovery deposition to his motion for summary judgment and "asking the court to consider the decedent's testimony in support of his motion." *Id.* ¶ 32. Ruling that the administrator had effectively "called" the decedent as a witness to testify regarding the accident to support his motion for summary judgment, the court held that the plaintiff should have had the same opportunity to present evidence on the same subject. *Id.* ¶ 21. Therefore, the trial court erred in barring the plaintiff's testimony about the accident and any conversations with the decedent, which created a genuine issue of material fact regarding the decedent's negligence. *Id.* ¶ 20. Accordingly, the trial court's entry of summary judgment against the plaintiff was improper. *Id.*

The appellate court further rejected the administrator's narrow interpretation of the committee notes to Rule 212(a) and pointed to multiple factors supporting its decision that the admission of the decedent's discovery deposition was required to obtain substantial justice between the parties. *Id.* ¶¶ 25-28. The court noted that because both the plaintiff and the decedent had given depositions, the dangers of fraudulent testimony were less likely. *Id.* Additionally, although the decedent was of advanced age, there was no indication that death was imminent or that it was otherwise necessary to preserve his testimony via an evidence deposition. *Id.* Therefore, the appellate court concluded the trial court misconstrued Rule 212(a)(5) and erred in refusing to consider the decedent's discovery deposition testimony as substantive evidence of his negligence. *Id.* ¶ 28. Additionally, the appellate court determined that the admissions contained in the decedent's discovery deposition could be used as evidence for purposes of summary judgment and at trial. *Id.* ¶ 29.

Finally, because Office Baxter was not an adverse party or a person directly interested in the action, the appellate court found the Act did not bar him from being called as a witness. *Id.* ¶ 30; 735 ILCS 5/8-201. The court declined to consider the purpose and extent to which his report could be used at trial or the nature and extent of his testimony, stating those would be issues for the trial court to resolve. *Id.*

Practice Tips

A key takeaway from *Eyster* is that counsel must be mindful of applicable evidentiary privileges and avoid any inadvertent waivers of privilege. In cases involving deceased parties, the Dead-Man's Act privilege only belongs to the decedent's representative and only bars testimony from an adverse party or person directly interested in the action about conversations with the decedent or events that occurred in the decedent's presence. Therefore, the privilege would not prevent a non-party witness with no interest in the outcome from testifying about conversations with, or events in the presence of, the decedent. If the privilege belongs to your deceased client, counsel must invoke the privilege and refrain from attaching any statements made by the client prior to death to any dispositive motion; otherwise, the privilege may be waived as it was in the *Eyster* case.



About the Authors

Edna L. McLain of *SmithAmundsen LLC* in Chicago defends hospitals, physicians, nurses and oral surgeons in complex medical negligence cases. She has tried multiple medical negligence cases to defense verdicts and has successfully argued an appeal before the Illinois Second District Appellate Court. Ms. McLain earned her J.D from St. Louis University School of Law and her B.A. from the University of Illinois Urbana-Champaign.

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