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TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Stapleton v. Moore: Cross-examination of a medical expert with a learned treatise

By Hon. Daniel T. Gillespie

Supreme Court Rule 213(g) requires a party to reasonably notify the other side of any experts it intends to call and documents it intends to use. The argument has been made that, generally speaking, if a party can reasonably foresee that he or she will be using or relying on a particular treatise to cross-examine an expert on the other side, that party should notify the other party in advance. At least that has been the understanding of the rule for many, especially before the 2002 amendment of the rule, which added language regarding cross-examination under 213(g).

In *Stapleton v. Moore,* 2010 Ill. App. Lexis 572 (1st Dist. 2010), the appellate court, in an opinion authored by Justice Toomin, declared that a party need not disclose in advance of trial under Rule 213(g) that it intends to cross-examine the other party's expert witness with a particular treatise or learned text. In *Stapleton,* the trial judge allowed defense counsel to cross-examine plaintiff's expert with a medical article that was not disclosed in discovery. The appellate court affirmed, with a spirited dissent from Justice Lavin.

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Collateral estoppel: It is not an absolute

By Patrick M. Kinnally, Kinnally, Flaherty, Krentz & Loren PC, Aurora, Illinois

In trial practice, often we are presented with arguments that either claims and/or issues are constrained by prior adjudication. This doctrine, called *res judicata*, and its variant, collateral estoppel (*Collins v. St. Jude Temple*, 157 Ill.App.3d 708 (1st Dist. 1987)), is seen as a complete bar to relitigation of prior issues already decided. A recent Supreme Court opinion reminds us why this is not always accurate. *Hurlbert v. Charles*, 2010 WL 3705182, Sept. 23, 2010.

James Hurlbert ("James") was arrested in 2003 for driving under the influence of alcohol, a criminal charge. As we know, when this occurs, driving privileges are statutorily suspended (625 ILCS 5/2-118.1(b)). James filed a petition to rescind the suspension of his driver's license in a civil proceeding. The trial court denied the petition, concluding the officer who arrested him, Andrew Charles, had probable cause to make the arrest. The criminal charge, upon motion, was later dismissed, with prejudice.

Four years later, James filed a civil complaint in the circuit court against the arresting officer and the City of Urbana for malicious prosecution based upon his prior arrest. Both defendants filed motions for summary judgment. They argued, because the trial court found there was probable cause to arrest James in the statutory summary suspension hearing, James was collaterally estopped from relitigating the probable cause issue in his claim for malicious prosecution.

The issue of probable cause, or the lack thereof, is a central element for a party who wishes to prevail in a malicious prosecution action. *Swick v.*

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Stapleton v. Moore: Cross-examination of a medical expert with a learned treatise

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The appellate court declared the issue to be whether the use of a medical journal article on cross-examination of an expert witness is permissible when only the reliability of the author is established and not the reliability of the particular article or the text itself. In this case, the infant Keenan Stapleton suffered a permanent left-side brachial plexus injury known as Erb's palsy. A note made on the medical chart shortly after birth described a normal spontaneous vaginal birth with shoulder dystocia, which means a difficult delivery of the baby's shoulders.

Plaintiff mother, as guardian of the child, contended this was the result of malpractice by the attending physician during birth. She contended that the defendant, Doctor Monica Moore, applied too much traction to the baby's head, causing him to sustain the brachial plexus injury. Dr. Moore contended she complied with the standard of care and applied an appropriate level of traction to the baby's head during delivery and that the injury resulted from the force of uterine contractions on the infant's body when his left shoulder became caught on a ridge in the sacral promontory area of the mother's spine. Dr. Moore denied that she pulled or twisted the baby's head during delivery.

Plaintiff's expert, Dr. Stuart Edelberg, board certified in obstetrics and gynecology, had been practicing in the field for more than 40 years. He testified that the shoulder dystocia that occurred during delivery was a medical emergency. Accordingly, he testified, such a delivery requires the McRoberts maneuver and the application of suprapubic pressure.

The McRoberts maneuver involves flexing the mother's legs toward her shoulders as she lies on her back, thus expanding the pelvic outlet. Suprapubic pressure involves applying pressure at the pubic bone, not at the top of the uterus. This should allow the shoulder enough room to move under the pubis symphysis. Dr. Moore asserted that suprapubic pressure was applied and that she performed the McRoberts maneuver properly.

Dr. Edelberg offered the expert opinion that the injury to the newborn occurred be-

cause Dr. Moore placed excess lateral traction on Keenan's head during delivery. Dr. Edelberg testified that traction places pressure on the baby's head, which stretches the brachial plexus. Dr. Edelberg testified that an application of greater-than-gentle lateral traction caused the baby's permanent injury and was a deviation from the standard of care. He testified further that transient brachial plexus injuries can result from pressure inside the womb and without any physician negligence, but permanent brachial injuries, as in this case, are different because they result from lateral force.

Over plaintiff's objections, Edelberg was also confronted with an article written by Doctors Harry Lerner and Eva Salamon, which reported a case of a baby born vaginally without physician traction that resulted in permanent brachial plexus injury. Edelberg later testified that the article related to a case in which Dr. Lerner was the defense expert for Dr. Salamon.

Although plaintiff objected on the basis of foundation and nondisclosure pursuant to Supreme Court Rule 213, the court allowed the testimony for impeachment purposes. Edelberg discounted the validity and application of the article to the case at trial.

He was also cross-examined about the 2005 PRECIS, a text by the American College of Obstetrics and Gynecology, which acknowledged that, although there is support for the view that brachial palsy is caused by the application of excess lateral traction, recent evidence suggests that most brachial palsies are not caused by traction and occur in uncomplicated deliveries. That text suggests that these injuries occur because of the way the infant presents in the mother's pelvis during delivery.

Dr. Edelberg was cross-examined about an additional article which suggested that it is most likely that maternal expulsive forces of delivery may be partly or totally responsible for an injury of the type that occurred here.

Defendant's expert, Dr. Mark Neerhof, a board certified physician in obstetrics/gynecology, opined that the available evidence did not suggest that Dr. Moore applied excessive traction. He testified that the gentle downward traction applied by Dr. Moore during delivery was within the standard of care. Although he agreed that the baby's injury occurred during delivery, he testified that nothing that Dr. Moore did or did not do caused that injury. The jury returned a verdict for Doctor Moore.

On appeal, plaintiff contended that the trial court erred in allowing the defense to use the Lerner and Salamon article to impeach plaintiff's expert, Dr. Edelberg. Plaintiff argued the article was misleading, fraudulent, and not disclosed in accord with Supreme Court Rule 213(g).

The appellate court noted that such issues are reviewable on an abuse of discretion standard and that, further, a party is not entitled to reversal unless the evidentiary ruling was substantially prejudicial and affected the outcome of the trial, citing *Simmons v. Garcia*, 198 Ill. 2d 541, 566-67 (2002).

The court observed that defendant was able to secure testimony from her expert, Dr. Neerhof, that Dr. Lerner was a reliable authority in the field of shoulder dystocia and brachial plexus injuries. Accordingly, the appellate court found that defendant demonstrated the authoritativeness of the article used to impeach plaintiff's expert through the testimony of defendant's expert, Dr. Neerhof.

The appellate court declared that Rule 213(g) does not require that a party disclose journal articles that the party intends to use in cross-examining the opposing party's opinion witness, citing *Maffett v. Bliss*, 329 Ill. App. 3d 562, 577 (4th Dist. 2002). The appropriate section of Rule 213(g) reads:

> Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness.

A clear reading of Rule 213(g) would seem to support the majority's position. The majority opinion observed that the sentence cited above was reflected in the Illinois Supreme Court's amendment to Rule 213, effective July 1, 2002. The majority noted, however, that, unlike the situation under Federal Rule of Evidence 803(18), the learned treaty exception to the hearsay rule, where such learned treatises or medical articles may be read into the record as substantive evidence, under Illinois rules they are not admitted into evidence and are merely allowed for impeachment purposes.

In his dissent, Justice Lavin asserted that Rule 213 is designed not only to prevent surprise at trial but also to provide litigators with a ready guide to the evidentiary issues that will be dealt with by the expert witnesses who testify. The purpose of the discovery

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rule is to discourage surprise and strategic gamesmanship, he observed. Allowing a party to employ undisclosed medical articles is "contrary to the letter and spirit of the rule and it should be condemned by the court," he declared.

Justice Lavin argued that it was unfair that on direct examination an expert is not permitted to refer to the findings of any literature or treatise even if he would testify that his opinions are based, in part, on the literature in question, while he can be cross-examined utilizing reliable and authoritative literature. He observed this situation results in a conundrum where medical literature cannot be effectively utilized to support an expert's theory on direct examination but can be used as a sword to undermine an opposing expert's testimony.

Justice Lavin observed that the use of the medical article violated Rule 213(g). He questioned whether defendant had presented an adequate foundation for the authoritativeness of the article in question. He noted that the publisher had launched an inquiry into that article.

Justice Lavin also suggested defendant did not lay a sufficient foundation for the article used in cross examination of the expert. He asserts that a witness with sufficient knowledge should be able to testify that the article is authoritative.

However, the majority declared that a learned text is admissible for impeachment purposes if the cross-examiner proves the author's competence by a witness with expertise in the subject matter, citing *Darling v. Charleston Community Memorial Hospital,* 33 Ill. 2d 326, 336 (1965). In addition, the majority notes, Dr. Edelberg was questioned extensively concerning several other articles supporting the view that brachial plexus injuries can occur spontaneously during delivery without excessive traction by the physician. ■

Collateral estoppel: It is not an absolute

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Liautaud, 169 Ill.2d 504 (1996). The Appellate Court agreed with the trial court (*Hurlbert v. Charles*, 393 Ill.App.3d 211 (4th Dist. 2009)), finding that James had a full opportunity to litigate whether probable cause for his arrest existed at the time of the rescission hearing. Additionally, the Appellate Court observed that actions for malicious prosecution are "disfavored because public policy encourages the exposure of crime and cooperation from people with knowledge about crime." *Aguirre v. City of Chicago*, 382 Ill.App.3d 89 (1st Dist. 2008).

The Supreme Court reversed the trial and appellate courts. *Hurlbert v. Charles,* 2010 WL 3705182, Sept. 23, 1010. The court first defined what collateral estoppel denotes. This is:

- The issue decided in the prior adjudication is identical with the one presented in the suit in question;
- There was a final judgment on the merits in the prior adjudication; and
- The party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication.

Citing *Gumma v. White,* 216 Ill.2d 23, 38 (2005).

The Supreme Court agreed that all of the elements of the collateral estoppel doctrine were present. It held that the probable cause issue decided in the statutory summary suspension hearing was identical to the probable cause component of the malicious prosecution claim and the same parties were present in the prior proceeding which resulted in a final judgment. (See, *People v. Moore,* 138 Ill.2d 162 (1990)).

Collateral estoppel is a judge-made rule. Its foundation rests on principles of judicial economy, the focus being the prevention of relitigation of previously decided issues. Whereas, *res judicata* precludes relitigation of entire claims as well as issues, collateral estoppel precludes relitigation of specific issues. *Morris v. Union Oil*, 96 Ill.App.3d 148 (5th Dist. 1981); see also, *Ballweg v. City of Springfield*, 114 Ill.2d 107 (1986). Because collateral estoppel is of judicial origin, it is subject to equitable considerations.

Generally, collateral estoppel should not be applied if the party against whom it is asserted did not have a full and fair opportunity to litigate the issue previously or if the application of the doctrine would cause an injustice. *Collins v. St. Jude*, 151 Ill.App.3d 708, 712 (1st Dist. 1987). Also, it should not be appropriate where the quality and completeness of the procedures followed in the original venue where the issue was litigated were limited or cursory in the quality of proof needed to prove or negate the issue in controversy. (See, *People v. Filitti*, 190 Ill.App.3d 884 (2nd Dist. 1989), citing Restatement (Second) of Judgments, Sec. 28(3) (1982).

The *Hurlbert* court noted in *People v. Moore,* 138 Ill.2d 162 (1990) that the nature of the proceeding for suspending a license summarily was to be expeditious and within a defined sphere of inquiry. In such statutory summary suspension proceedings, the court may rely on police reports as evidence, not live testimony. Accordingly, it held that the caliber of those proceedings did not cause the relitigation of the probable cause issue to be precluded in the malicious prosecution complaint James filed.

In *Moore*, the issue presented was whether the decision on the issue of probable cause to arrest at a statutory summary suspension hearing should be given collateral estoppel effect at the subsequent criminal trial for driving under the influence. The Supreme Court declined to do so. It observed the rescission hearings are akin to administrative ones focusing on very few issues and a limited inquiry. The *Hurlbert* court reemphasized this point and in this context concluded the use of collateral estoppel as a bar to relitigation of an issue was no different for civil or criminal litigation.

The Supreme Court then remanded the case to the trial court to determine whether another issue – whether James presented evidence of malice – another essential element of a malicious prosecution action, was sufficiently alleged. The trial and appellate courts had never considered this issue which the Supreme Court declined to entertain for the first time on appeal.

Hurlbert is a salutary opinion for trial practitioners. Its focus on issue preclusion, within the context of the doctrine of collateral estoppel, makes clear that prior adjudication of an issue is not *a fait accompli* to litigation. Equitable concerns, including an analysis of the character of the prior proceeding , as well as whether an injustice would occur if relitigation is not permitted, must be taken into consideration. This is, for the most part, in this area of law, a bright-line rule to which, perhaps, we need to be more mindful. ■

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Thursday, 11/4/10- Lombard, Lindner Learning Center—Real Estate Update 2010. Presented by the ISBA Real Estate Section. 9-4:45.

Thursday, 11/4/10- Chicago, ISBA Regional Office—Bankruptcy Basics from the Experts. Presented by the Commercial, Banking and Bankruptcy Council. 8:55-4:15.

Friday, 11/5/10- Chicago, ISBA Regional Office—Trial Practice- Voir Dire to Appeal. Presented by the ISBA Civil Practice and Procedure Section. 8:30-5:00.

Friday, 11/5/10- Bloomington, Holiday Inn and Suites—Current Issues in Criminal Law. Presented by the ISBA Criminal Justice Section; co-sponsored by the ISBA Traffic Laws and Courts Section. 9-4:15.

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Thursday, 11/11/10- Teleseminar—Uniform Commercial Code Toolkit, Part 3: Secured Transactions. 12-1.

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Friday, 11/12/10- Chicago, ISBA Regional Office—Federal Tax Conference - Fall 2010. Presented by the ISBA Federal Taxation Section. TBD.

Friday, 11/12/10- Teleseminar—Ethics for Business Lawyers. 12-1.

Tuesday, 11/16/10- Teleseminar—Tax Concepts for Closely Held Companies. 12-1.

Thursday, 11/18/10- Teleseminar—Estate Planning to Avoid Probate. 12-1.

Thursday, 11/18/10- Carbondale, Southern Illinois University—Mechanics Liens and Construction Claims. Presented by the ISBA Special Committee on Construction Law; co-sponsored by the ISBA Commercial, Banking and Bankruptcy Section. TBD.

Friday, 11/19/10- Teleseminar—Claims, Liens and Surety in Construction Law. 12-1.

Friday, 11/19/10- Chicago, ISBA Regional Office—Current Issues in Criminal Law. Presented by the ISBA Criminal Justice Section; co-sponsored by the ISBA Traffic Laws and Courts Section. 9-4:15.

Tuesday, 11/23/10- Teleseminar—Role of Insurance in Real Estate. 12-1.

Tuesday, 11/30/10- Teleseminar—Advanced Techniques in Charitable Giving. 12-1.

Tuesday, 11/30/10- Chicago, Bilandic Building Auditorium—Ethics for Government Lawyers. Presented by the Government Lawyers Committee. 12:30-4:45.

December

Wednesday, 12/1/10- Teleseminar—Estate Planning for Family Businesses, Part 1. 12-1.

Thursday, 12/2/10- Teleseminar—Estate Planning for Family Businesses, Part 2. 12-1.

Tuesday, 12/7/10- Teleseminar—Offers-in-Compromise. 12-1.

Wednesday, 12/8/10- Teleseminar—Structuring Real Estate Investment Vehicles. 12-1.

Thursday, 12/9/10- Chicago, USEPA Region V—Green-Surfing the Internet: A Practical Guide for Environmental Practictioners. Presented by the ISBA Environmental Law Section. 9-11am; 12:30-2:30pm; 3-5. 20 max per session.

Thursday, 12/9/10- Friday, 12/10/10- Chicago, Sheraton Hotel—Mid-Year Master Series Programming. Presented by the Illinois State Bar Association.

Monday, 12/13/10- Teleseminar—Employees V. Independent Contractors: Employment & Tax Implications. 12-1.

Tuesday, 12/14/10- Teleseminar—What Employment Lawyers Need to Know About Social Media. 12-1.

Wednesday, 12/15/10- Teleseminar—Partnership/LLC Agreement Drafting, Part 1. 12-1.

Thursday, 12/16/10- Teleseminar—Partnership/LLC Agreement Drafting, Part 2. 12-1.

Tuesday, 12/21/10- Teleseminar—Family Feuds in Trusts. 12-1.

Wednesday, 12/22/10- Teleseminar—Structuring Joint Ventures in Business. 12-1.

January

Friday, 1/7/11- Chicago, ISBA Regional Office—2011 Family Law CLE Fest. Presented by the ISBA Family Law Section. TBD.

Friday, 1/14/11- Chicago, ISBA Regional Office—New Laws for 2010 and 2011. Presented by the ISBA Standing Committee on Legislation. 12-2.

Friday, 1/21/11- Chicago, ISBA Regional Office—The Health Care Reform Act- An Overview for the Health Care Attorney. Presented by the ISBA Health Care Section. 9-12.

Friday, 1/21/11- Collinsville, Gateway Center- Mississippian Room—Tips of the Trade: A Federal Civil Practice Seminar- 2011. Presented by the ISBA Federal Civil Practice Section. 8:30-11:45. ■

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