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Civil Practice and Procedure

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Supreme Court Rule 219(e) and Disclosures of Expert Witnesses in Refiled Actions

The application of Rule 219(e) to discovery following voluntary dismissal is a vexing problem for practitioners and trial courts alike. If at the time of dismissal there is a discovery deadline that has been violated or a discovery sanction imposed, it has often been difficult to determine what discovery may be conducted and what discretion the trial court has in handling that discovery.

In *Boehle v. OSF Healthcare System*, 2018 IL App (2d) 160975, the Illinois Appellate Court, Second District, took up two certified questions under Illinois Supreme Court Rule 308. Those questions were:

> (1) Does Supreme Court Rule 219(e) prevent the use of a voluntary dismissal to avoid the consequences of a court order denying plaintiff's motion to disclose an additional Supreme Court Rule 213(f)(3) witness as untimely, or does it only prevent the use of a voluntary dismissal to avoid the effect of court-ordered sanctions for discovery violations or other misconduct?
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> (2) Does Supreme Court Rule 219(e) prevent a party from disclosing new expert witnesses in a refiled action who were not identified in Rule 213(f)(3) disclosures by a court-ordered deadline in an original action as an abuse of the voluntary dismissal process in order to avoid the consequences of orders in the original action?

Boehle, 2018 IL App (2d) 160975, ¶ 1.

Though the court answered the questions in a manner that defense practitioners may not have favored, there is at least some direction in future handling of these situations.

Underlying Facts and Trial Court Proceedings

Plaintiffs Kelli Boehle and her son, Nikolas, filed a medical malpractice suit against several defendants for failing to diagnose a sarcoma in Nikolas' spine. *Id*. ¶ 4. Nikolas died during the course of the litigation and Kelli Boehle filed an amended complaint, individually and on behalf of her son's estate. *Id*. She thereafter disclosed four Supreme Court Rule 213(f)(3) expert witnesses who would opine regarding the defendants' deviation from the standard of care that caused her son's death. *Id*. The court ordered plaintiff to disclose new experts by March 1, 2014. *Id*. ¶ 5. After the plaintiff

retained new counsel and the court rescheduled the original trial date to September 14, 2015, it ordered that all of the plaintiff's expert witnesses were to be deposed by September 18, 2014. *Id*. ¶ 6.

On June 25, 2015, the plaintiff filed a motion to supplement her Rule 213 (f)(3) disclosures to add Dr. Leonard Wexler, a pediatric oncologist, as an additional expert. *Id*. ¶ 7. The defendants objected and the trial court denied the motion on July 23, 2015. *Id*. The court reasoned that the plaintiff had already been given leave to name two new experts after she switched law firms, but the case had been pending for four years, all experts had been deposed, and the trial was two months away. *Id*. A few weeks later, the trial court granted the plaintiff's motion to voluntarily dismiss without prejudice. *Id*. ¶ 8.

On December 9, 2015, the plaintiff refiled her case against the same defendants and subsequently moved to disclose 10 experts, including Dr. Wexler and four experts not disclosed in the first action. *Id*. ¶ 9. The defendants moved to strike the motion and argued that Rule 219(e) prohibited the plaintiff from using a voluntary dismissal to avoid compliance with the order in the prior proceeding denying her leave to name Dr. Wexler as a witness. *Id.* The defendants also argued that the plaintiff should not be allowed to name other new experts. *Id*.

The trial court denied the defendants' motion to strike, holding that "[t]o bar plaintiff's new expert witnesses under Rule 219(e), the trial court would have to find 'discovery violations in the prior case,' 'misconduct in the prior case,' or 'a deliberate disregard of the court's authority in the underlying case,' none of which was present." *Id*. ¶ 10. The trial court found that the plaintiff's dismissal was "strategic" in nature and not improper. *Id*. ¶¶ 10-11.

The defendants sought appeal under Illinois Supreme Court Rule 308. *Id*. ¶ 11. The application for leave to appeal was originally denied. *Id*. ¶ 12. Thereafter, the Illinois Supreme Court entered a supervisory order directing the Second District Appellate Court to vacate its denial of the defendants' application and to consider the certified questions. *Id*.

Arguments on Appeal

The court initially reviewed Rule 219(e), titled "Voluntary Dismissals and Prior Litigation," which 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 the 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.

Ill. S. Ct. R 219(e) (eff. July 1, 2002).

The Committee comments to the Rule 219(e) state:

> 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 (rev. June 1, 1995).

The defendants argued that "Rule 219(e)'s plain language prohibits a party from avoiding compliance with discovery deadlines or orders by voluntarily dismissing a lawsuit and that the committee comments likewise state that the rule prohibits the use of voluntary dismissals to avoid complying with discovery orders." *Id*. ¶ 18. Defendants further argued that although Rule 219(e) "requires the trial court to consider 'any misconduct' in the prior case, it does not require misconduct before relief may be imposed." *Id*. ¶ 21 (internal citation omitted). Defendants pointed to case law providing that "unreasonable noncompliance" or "misconduct" is sufficient to warrant imposing costs or sanctions under the Rule. *Id*. Citing *Scattered Corp. v. Midwest Clearing Corp.*, 299 Ill. App. 3d 653, 600 (1st Dist. 1998), the defendants also urged that Rule 219(e) prohibits strategic dismissals to avoid the effect of untimely disclosure of experts in the prior lawsuit. *Boehle*, 2018 IL App (2d) 160975, ¶ 23.

The plaintiff argued that the defendants incorrectly described Dr. Wexler as being barred in the original case and that her request for leave to disclose him after the close of discovery was denied solely because it was too close to trial. *Id*. ¶ 28. The plaintiff maintained "that she had the right not only to dismiss her case but also to refile it and that it is well established that a refiled case is not a continuation of the original case but instead a new action." *Id*. (citing *Dubina v. Mesirow Realty Dev., Inc.*, 178 Ill. 2d 496, 504 (1997)). The plaintiff further contended that the language in Rule 219(e) that parties "shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit," is policy language that normally is not considered when determining the scope of an enacted rule. *Boehle*, 2018 IL App (2d) 160975, ¶ 28.

The plaintiff also argued that the trial court was not required to apply previous orders in the refiled case because there is no rule that such orders must be reinstated upon refiling. *Id*. The plaintiff also contended that Rule 219 relates to the unreasonable failure to comply with discovery and allows the court to impose sanctions; thus Rule 219(e) which aims to carry that remedy provision into refiled cases, requires a preliminary finding of misconduct. *Id*. ¶ 30. Finally, the plaintiff argued that Rule 219(e) sanctions are discretionary and should be used sparingly. *Id*. ¶ 32.

In reply, the defendants asserted that although Rule 219(e) applies to unreasonable noncompliance and misconduct, the plaintiff never explained why an untimely witness disclosure did not constitute unreasonable noncompliance with the discovery order. *Id*. ¶ 33. They further argued that the only issue was "whether a voluntary dismissal designed to avoid an order denying the untimely disclosure of a witness is subject to Rule 219(e) relief, despite the trial court's belief here that it lacked discretion to provide such relief absent a discovery sanction in the original lawsuit." *Id*.

The Appellate Court's Opinion

Answering the first question, the appellate court concluded that "nothing in Rule 219(e) prevents a plaintiff from *attempting* to use a voluntary dismissal to avoid the consequences of a court order denying the plaintiff's motion to

disclose an additional witness, or to avoid the effect of court-ordered sanctions for discovery violations or other misconduct." *Id*. ¶ 2 (emphasis in original). However, trial courts have discretion to sanction a plaintiff for misconduct or unreasonable noncompliance by conditioning the granting of the voluntary dismissal upon the plaintiff paying expenses to the defendants, and "could additionally or alternatively bar or limit witnesses and/or evidence in the refiled action." *Id*.

With respect to the second question, the court concluded that Rule 219(e) does not prevent a plaintiff from disclosing a new expert witness in a refiled action. *Id*. ¶¶ 2, 45. However, the court noted that it is within the trial court's discretion to bar a witness in a refiled action and "that the trial court should apply the same factors used to determine whether barring a witness is an appropriate sanction in an original action." *Id.* ¶ 45. These are the same considerations courts apply in determining whether to assess sanctions under Rule 219(e).

Conclusion

In finding that a trial court has discretion in issuing sanctions against a plaintiff who voluntarily dismisses a case at a time when the plaintiff is not in full compliance with the trial court discovery orders, the court has effectively read the first sentence of Rule 219(e) out of the Rule. Nearly every voluntary dismissal in the circumstance of the plaintiff in *Boehle* is "strategic" and designed to avoid the trial court's discovery orders in the original case. To succeed in defeating tactics similar to those employed by the plaintiff in *Boehle*, defense practitioners will need create as complete of a record as possible of the plaintiff's misconduct and the improper purpose underlying the voluntary dismissal of the case.

About the Authors

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

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