Chicago Daily Law Bulletin®

Serving the profession since 1854

August 26, 2020

Dispositive motions should only proceed after expert discovery

By Donald P. Eckler
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. His views are his own and not those of his firm or its clients.

Earlier this year at oral argument in *Guo v. Kamal*, 2020 IL App (1st) 190090, a medical malpractice case in which the trial court granted summary judgment on causation to one of the defendants before the parties had engaged in expert discovery, three justices of the Illinois Appellate Court questioned such a procedure.

Justice Carl Anthony Walker: "What was going on in the trial court that the dispositive motions had to be argued prior to taking expert depositions?"

Justice Michael B. Hyman: "Is there anything in the record that would show that any parties objected to that procedure?"

Walker: "You can't show proximate cause without expert testimony. So how did you bypass expert depositions and decide the issue proximate cause? It doesn't even make sense to me."

Justice Daniel J. Pierce: "This stuff happened too soon. You were not finished with the case. You guys are not complete in your discovery and my volunteered admonishment to everybody is: if you get a standing order from anybody, any motion judge or any judge that doesn't assist you in presenting your case competently and fairly and thoroughly, you have to put on the record that 'judge we want [a] hearing,' 'we're not ready,' 'we can't do this.' Make a record. I mean, if the judge insists on doing what they want to do, you have to have a record to come to court to say this shouldn't have happened because we weren't finished. … You just should not sit idly by while a judge submits and order makes you do things that just don't fit with the reasonable handling of a lawsuit."

Not surprisingly, the court held that even if the circuit court requires dispositive motions to be filed prior to expert discovery, parties may file dispositive motions after the close of expert discovery because "completion of expert discovery is critical to the issue of proximate cause…."

It is against this backdrop many case management orders in the Law Division are currently being entered with the requirement that dispositive motions be filed prior to expert discovery even commencing.

Though this procedure may be appropriate in a small number of cases, in the vast majority of cases, dispositive motions should be allowed to be filed and noticed for hearing 45 days prior to trial as provided by Cook County Local Rule 2.1(f). This scheduling is logically appropriate and in accord with the requirement of Supreme Court Rule 218(c) that discovery be completed 60 days before trial. In contrast, the current standard orders require dispositive motions to be filed seven months before trial certification in Category 1 cases and 18 months before trial certification in Category 2 cases.

But as the appellate court recently observed, expert testimony is critical to the issues involved in dispositive motions. Where the plaintiff fails to present expert testimony, summary judgment may be appropriate. *Ocasio v. Guerrero*, 2016 IL App (1st) 143859-U ("Without expert testimony, the plaintiff could not make out a prima facie case" of medical negligence); *Madeo v. Tri-Land Properties, Inc.*, 239 Ill.App.3d 288, 294 (2nd Dist. 1992) (providing "circumstantial evidence through an expert" is one of the methods that plaintiff can use in order to defeat a motion for summary judgment in cases arising from falls on ice). Expert testimony can positively refute evidence in order to support a grant of summary judgment. See *Hadrys v. Liebherr-Werk Biberach GmbH*, 2011 Ill. App Unpub. LEXIS 990, *14 (1st Dist. 2011). Expert opinions are also regularly used to defeat dispositive motions. *Stone v. Clifford Chrysler-Plymouth, Inc.*, 333 Ill.App.3d 363, 369 (1st Dist. 2002); *American States Ins. Co. v. Whitsitt*, 193 Ill.App.3d 270, 275 (4th Dist. 1990).

The procedure imposed is also contrary to the requirement that objections to the sufficiency of an expert be brought as a motion for summary judgment, not as a motion in limine. *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill.App.3d 674, 681 (1st Dist. 2003). In professional liability cases generally, and medical malpractice cases specifically, expert testimony is required not only as to causation, but, in most cases, the standard of care. If the plaintiff fails to disclose an expert that is qualified to give such opinions (which must be in the same field of medicine in medical malpractice cases), then the defendants are in a situation where they could be barred from raising the issue prior to trial and may be stuck trying a case and moving for directed verdict only after having expended substantial resources. *Silverstein v. Brander*, 317 Ill.App.3d 1000, 1005-1006 (1st Dist. 2000). The problems of prematurely requiring dispositive motions is not confined to procedural disadvantages to defendants, as the *Guo* case was a case in which a plaintiff was required to respond to a dispositive motion before completing expert discovery.

Delay in getting cases ready for trial is not typically caused by dispositive motions, so this procedure will have little to no effect on how quickly cases proceed to trial. No process in civil litigation typically takes longer than written discovery. In personal injury cases there are a couple of simple reasons: motion judges are not allowed to enforce with sufficient efficacy their orders for written discovery and, as written in this space previously, acquisition of medical records is delayed by the absence of a uniform HIPAA qualified protective order. It is rare that a party delays in disclosing its experts because the penalty for doing so is so great.

Moreover, deficiencies in expert qualifications and disclosures or concessions by experts during depositions will be unable to be brought by plaintiffs or defendants through dispositive motions prior to trial, leading to the unnecessary expenditure of the parties' and the court's resources either right before or during trial; trials may be conducted that would not otherwise be required if dispositive motions were allowed to be filed after the close of expert discovery.

All benefit from moving cases toward resolution expeditiously. But that process must be fair and logical for justice to be achieved. The observations of Walker, Hyman and Pierce and their opinion in *Guo v. Kamal* should be heeded: Dispositive motions should not be required until after expert discovery is concluded.