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Civil Procedure

Allen Hartman Honorable

Justice, Appellate Court of Illinois, First District, Second Division

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Civil Procedure

Honorable Allen Hartman and Scott C. Bentivenga***

TABLE OF CONTENTS

I.	INTRODUCTION	295
II.	STATUTES OF LIMITATION AND REPOSE	295
	A. <i>Constitutionality and Applicability</i>	295
	B. <i>Rule 103(b) and Voluntary Dismissal</i>	298
	C. <i>Refiling After Voluntary Dismissal</i>	299
	D. <i>Voluntary Dismissal and Refiling for Jury</i> <i>Demand</i>	301
	E. <i>Medical Malpractice</i>	302
III.	JURISDICTION	304
IV.	VENUE AND FORUM NON CONVENIENS.....	305
V.	PLEADINGS AND DISCOVERY.....	309
	A. <i>Disciplinary Charges</i>	309
	B. <i>Experts</i>	310
	C. <i>Discovery Sanctions</i>	310
VI.	JUDGMENTS AND § 2-1401	312
	A. <i>Diligence in Defending Default Judgments</i>	312
	B. <i>Timeliness</i>	313
	C. <i>Newly Discovered Evidence</i>	313
VII.	NEW TRIAL STANDARD.....	314
VIII.	APPEALS	315
	A. <i>Timeliness</i>	315
	B. <i>Eligibility</i>	316
IX.	COLLATERAL ESTOPPEL	317
	A. <i>Finality of Judgment</i>	317
	B. <i>Application</i>	318
X.	SETTLEMENT AND CONTRIBUTION	319
XI.	JUDICIAL DISCRETION: THE JURY	321
	A. <i>Voir Dire</i>	321

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	<i>B. Prejudicial Events During Trial</i>	321
XII.	JURY INSTRUCTIONS: OBJECTIONS ON APPEAL	322
XIII.	CONTINGENT FEE ARRANGEMENTS.....	324
XIV.	SIGNIFICANT CHANGES IN RULES AND STATUTORY LAW	325
	<i>A. New or Modified Illinois Supreme Court Rules</i> .	325
	1. Illinois Supreme Court Rule 203: Where Depositions May Be Taken	325
	2. Illinois Supreme Court Rule 206: Method of Taking Depositions on Oral Examination ..	325
	3. Committee Comment 204(c): Issuance of Subpoenas on Doctors	326
	4. Illinois Supreme Court Rule 282: Representation of Corporations in Small Claims Cases.....	326
	5. Illinois Supreme Court Rule 286: Informal Hearings in Small Claims Cases.....	327
	6. Illinois Supreme Court Rule 287: Leave to File Motions in Small Claims Cases	327
	7. Illinois Supreme Court Rules 86 through 95: Mandatory Arbitration.....	328
	<i>B. New or Modified Illinois Code of Civil Procedure Sections</i>	332
	1. Section 2-604.1: Pleading of Punitive Damages.....	332
	2. Section 2-1207: Remittitur of an Award of Punitive Damages.....	333
	3. Section 2-611: Attorney Sanctions.....	333
	4. Section 2-1003: Discovery and Insurance Information	334
	5. Section 2-1107.1: Jury Instructions on Plaintiff's Contributory Fault	334
	6. Section 2-1116: Limitation on Recovery in Tort Actions Because of Plaintiff's Contributory Fault.....	335
	7. Section 2-1117: Joint Liability in Tort Actions	335
	8. Section 2-1205.1: Reduction in Recovery for Medical Insurance Payments	336
	9. Section 13-212: Statute of Repose for Medical Malpractice Actions by Minors....	336

10. Sections 15-1101 through 15-1706: Illinois Mortgage Foreclosure Law	337
11. Sections 20-101 through 20-105: Recovery of Fraudulently Obtained Public Funds ...	338
XV. CONCLUSION	338

I. INTRODUCTION

During the *Survey* period, the Illinois Supreme and Appellate Courts addressed the constitutionality and application of statutes of limitations, interrelationships of voluntary dismissals and other rules and statutes, jurisdiction, venue and forum non conveniens. The courts also considered pleadings and discovery matters, judgments and post-judgment relief, new trial standards, appeals, collateral estoppel, settlements and contribution, judicial discretion affecting juries, and attorney's fees. Also during the *Survey* period, the Illinois Supreme Court adopted new rules and amended existing rules affecting discovery, small claims procedures, and court-annexed mandatory arbitration.

The Illinois General Assembly enacted significant procedures in pleading actions for punitive damages, amended the truth in pleading law, abolished "pure" comparative negligence by adopting "modified" comparative negligence rules, and modified the "collateral source rule." The legislature also shortened the statute of limitations and repose for medical malpractice actions involving minors, and passed a new and revised mortgage foreclosure law. This article will briefly highlight and explain the potential impact of the most significant cases, rules, and statutory actions.

II. STATUTES OF LIMITATION AND REPOSE

A. *Constitutionality and Applicability*

The various periods of limitation enacted by the legislature are due, in large part, to differences in the activities from which the cause of action arose, and the diverse degrees of harm inherent in those activities. Legislative classifications based upon such legitimate differences carry a strong presumption of validity. These classifications will be overturned only when the classification is clearly unreasonable and palpably arbitrary and, therefore, constitutes special legislation prohibited by the Illinois Constitution.

Section 13-214(a) of the Illinois Code of Civil Procedure¹ pro-

1. ILL. REV. STAT. ch. 110, para. 13-214(a) (1983) (amended Supp. 1987). The

vides a two-year statute of limitations for tort and contract actions involving construction operations. The Illinois Supreme Court recently considered whether section 13-214(a) contravened the constitutional prohibition against unreasonable and arbitrary classifications.² In *People ex. rel. Skinner v. Hellmuth, Obata & Kassbaum, Inc.*,³ the Illinois Supreme Court held that section 13-214(a) does not violate the special legislation provision of article IV, section 13 of the Illinois Constitution.⁴

In *Skinner*, the plaintiff sued the defendant architectural and engineering firm for damages allegedly caused by defects in the design and construction of a building.⁵ The defendant moved to dismiss the complaint as barred by the two-year statute of limitations in section 13-214(a).⁶ In opposition, the plaintiff argued that the statute of limitations in section 13-214(a) violates the special legislation provision of article IV, section 13 of the Illinois Constitution.⁷ The *Skinner* court, however, reiterated the strong presumption in favor of the legitimacy and reasonableness of legislative classifications on the basis of activities.⁸ The court rea-

amendment changed the limitation period from two years to four years. ILL. REV. STAT. ch. 110, para. 13-214(a) (Supp. 1987).

2. *Id.*

3. 114 Ill. 2d 252, 500 N.E.2d 34 (1986).

4. *Id.* at 263, 500 N.E.2d at 38. Article IV, section 13 of the 1970 Illinois Constitution states:

The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

ILL. CONST. art. IV, § 13. This section requires that the laws apply uniformly throughout the state to all persons in like circumstances and conditions. *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 336 N.E.2d 881 (1975). It does not prohibit the legislative classification of persons, but requires that such classifications be reasonably related to the legislative purpose in enacting the legislation. *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), *appeal dismissed*, 449 U.S. 807 (1980).

5. *Skinner*, 114 Ill. 2d at 256, 500 N.E.2d at 35.

6. *Id.*

7. *Id.* at 258-59, 500 N.E.2d at 36.

8. *Id.* at 262, 500 N.E.2d at 38. A presumption exists in favor of the validity of a legislative classification, and the court will not interfere unless the classification is clearly arbitrary or unreasonable. *City of Danville v. Industrial Commission*, 38 Ill. 2d 479, 231 N.E.2d 404 (1967). In *Skinner*, the Illinois Supreme Court stated that it gives particular deference to legislative classifications that are based on activities rather than the status of persons. *Skinner*, 114 Ill. 2d at 262, 500 N.E.2d at 38. The *Skinner* court cited a number of cases in which this distinction was recognized: *Fireside Chrysler-Plymouth, Mazda, Inc. v. Edgar*, 102 Ill. 2d 1, 464 N.E.2d 275, *appeal dismissed*, 469 U.S. 926 (1984) (upholding a statute that prohibited automobile dealers from operating on Sundays because the activities of the dealers was distinguishable from other businesses); *Fujimura v. Chicago Transit Authority*, 67 Ill. 2d 506, 368 N.E.2d 105 (1977) (upholding a statute that applied solely to plaintiffs suing the Chicago Transit Authority (the "C.T.A.") because of the C.T.A.'s unique activities that distinguish it from other defendants); *Davis v. Com-*

soned that, because section 13-214(a) contains a classification on the basis of activities, it deserves the benefit of such a presumption.⁹ The court concluded that the plaintiff failed to rebut this presumption, and, therefore, his claims based on negligent design, supervision, and construction were barred by the two-year limitations period in section 13-214(a).¹⁰

The court, however, refused to apply the protection of section 13-214(a) to sureties.¹¹ In *Skinner*, United States Fidelity and Guaranty Company ("USF&G") was the surety of a general contractor who defaulted on a construction contract.¹² Because of the performance bond between the general contractor and USF&G, a default by the general contractor obligated USF&G to the plaintiff in the amount of the contract between the general contractor and the plaintiff.¹³ USF&G argued that any claims against it as the general contractor's surety were barred because the claims against the general contractor for any alleged default were barred by the statute of limitations.¹⁴ The court rejected this argument for three reasons.¹⁵ First, the court ruled that the statutory language itself precluded application to a surety because the "[i]ssuance of a performance bond cannot be deemed to be engaging in the design, planning, supervision, observation or management of construction, or construction."¹⁶ The court then determined that the bond itself contained no limitation on the time in which suit could be brought.¹⁷ Finally, the court held that claims based upon bonds were subject only to the "normally" applicable ten-year statute of limitations in section 13-206 of the Illinois Code of Civil Procedure.¹⁸ The court concluded, therefore, that the plaintiff's claims based solely on the performance bond were outside the scope of

monwealth Edison Co., 61 Ill. 2d 494, 336 N.E.2d 881 (1975) (upholding a statute that applied only to construction activities). *Skinner*, 114 Ill. 2d at 261-62, 500 N.E.2d at 37-38.

9. *Skinner*, 114 Ill. 2d at 263, 500 N.E.2d at 38.

10. *Id.* The plaintiff did not challenge the trial court's finding that the plaintiff knew of his injury in 1977. *Id.* at 258, 400 N.E.2d at 36. The plaintiff filed the suit six years later in 1983. *Id.*

11. *Id.* at 264, 500 N.E.2d at 39.

12. *Id.* at 263-64, 500 N.E.2d at 39.

13. *Id.*

14. *Id.* at 263, 500 N.E.2d at 39.

15. *Id.* at 264, 500 N.E.2d at 39. The court relied on *People v. Whittemore*, 253 Ill. 378, 97 N.E. 683 (1912). In *Whittemore*, the Illinois Supreme Court stated that "a surety is never discharged because a cause of action . . . against the principal . . . is barred by the statute of limitations." *Id.* at 385, 97 N.E.2d at 686.

16. *Skinner*, 114 Ill. 2d at 263, 500 N.E. 2d at 39.

17. *Id.* at 264, 500 N.E.2d at 39.

18. *Id.* (citing ILL. REV. STAT. ch. 110, para. 13-206 (1983)).

section 13-214(a).¹⁹

B. Rule 103(b) and Voluntary Dismissal

Illinois Supreme Court Rule 103(b)²⁰ requires that a plaintiff be reasonably diligent in effecting the service of process.²¹ If the plaintiff fails to diligently effect service after the expiration of the statute of limitations, the court may, on its own motion or on the motion of any defendant, dismiss the case with prejudice.²² Conversely, section 2-1009 of the Illinois Code of Civil Procedure²³ allows a plaintiff to dismiss voluntarily his case at any time before trial or hearing, regardless of whether service of process is effected after the expiration of the statute of limitations.²⁴ Furthermore, section 13-217 of the Illinois Code of Civil Procedure²⁵ grants a plaintiff, who has voluntarily dismissed his case, one year in which to refile his case, regardless of the expiration of the statute of limitations and his lack of diligence in the service of process.²⁶

In *O'Connell v. St. Francis Hospital*,²⁷ the Illinois Supreme Court held that when a plaintiff invokes sections 2-1009 and 13-217 in order to escape the possibility of involuntary dismissal under a pending rule 103(b) motion, the court must first rule on the rule 103(b) motion before ruling on plaintiff's motion to voluntarily dismiss under section 2-1009.²⁸ The *O'Connell* court further held that, when ruling on a rule 103(b) motion in a case refiled under section 13-217, the court may consider the plaintiff's diligence in the service of process in both his original and refiled case.²⁹

Recently, the Illinois Supreme Court extended the reach of *O'Connell* in *Catlett v. Novak*.³⁰ In *Catlett*, the defendant, Illinois Central Gulf Railroad ("ICG"), never had been served in the original action, which was filed one day before the expiration of the statute of limitations.³¹ The plaintiff then voluntarily dismissed the

19. *Id.* at 263, 500 N.E.2d 39.

20. ILL. S. CT. R. 103(b), ILL. REV. STAT. ch. 110A, para. 103(b) (1985).

21. *Id.*

22. *Id.*

23. ILL. REV. STAT. ch. 110, para. 2-1009 (1985).

24. *Id.*

25. *Id.* at para. 13-217.

26. *Id.*

27. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986). For a discussion of *O'Connell*, see Kandaras & Wozniak, *Civil Procedure, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 317, 319-21 (1986).

28. *O'Connell*, 112 Ill. 2d at 283, 492 N.E.2d at 1327.

29. *Id.*

30. 116 Ill. 2d 63, 506 N.E.2d 586 (1987).

31. *Id.* at 65, 506 N.E.2d at 587.

case under section 2-1009, and refiled the case under section 13-217.³² The plaintiff successfully served process on ICG on the refiled complaint.³³ ICG filed a motion to dismiss on the basis of the expiration of the statute of limitations as well as the plaintiff's lack of diligence in the service of process in the original case.³⁴ Applying *O'Connell*, the court held that the defendant was entitled to a rule 103(b) hearing regarding the plaintiff's diligence in the service of process in both the original case and the refiled case.³⁵ It is noteworthy that the *Catlett* court, without discussion, applied the *O'Connell* rule retroactively, taking into consideration the plaintiff's diligence in serving ICG in the original case.³⁶

C. Refiling After Voluntary Dismissal

Section 2-1009 provides that a voluntary dismissal is to be effected "by order filed in the cause."³⁷ The statute may be interpreted to require the filing of a written order, rather than a docket entry by the clerk. When the clerk makes a docket entry noting an order granting a plaintiff's motion for voluntary dismissal, which does not reflect that a written order is to follow, but a written order is signed subsequently by the same judge several weeks later, an ambiguity may arise about which order shall govern. This is particularly important to a party who must file a timely amended complaint under section 13-217 of the Code of Civil Procedure. In *Swisher v. Duffy*,³⁸ a sharply divided Illinois Supreme Court held that Illinois Supreme Court Rule 272³⁹ determines the entry date of an order granting a voluntary dismissal for purposes of determining whether a case was timely refiled under section 13-217.⁴⁰

32. *Id.* at 66, 506 N.E.2d at 588.

33. *Id.*

34. *Id.*

35. *Id.* at 71, 506 N.E.2d at 590.

36. *Id.*

37. ILL. REV. STAT. ch. 110, para. 2-1009 (1985).

38. 117 Ill. 2d 376, 512 N.E.2d 1207 (1987).

39. ILL. S. CT. R. 272, ILL. REV. STAT. ch. 110A, para. 272 (1985). Rule 272 determines when final orders are entered for purposes of determining the time allowed for appeal. *Stoermer v. Edgar*, 104 Ill. 2d 287, 293, 472 N.E.2d 400, 402 (1984). Rule 272 states:

If at the time of announcing final judgment the judge requires the submission of a form of written judgment to be signed by him, the clerk shall make a notation to that effect and the judgment becomes final only when the signed judgment is filed. If no such written judgment is to be filed, the judge or clerk shall forthwith make a notation of the judgment and enter the judgment of record promptly, and the judgment is entered at the time it is entered of record.

ILL. S. CT. R. 272, ILL. REV. STAT. ch. 110A, para. 272 (1985).

40. *Swisher*, 117 Ill. 2d at 379, 512 N.E.2d at 1209. Section 13-217 grants a plaintiff

In *Swisher*, the trial court granted the plaintiff's motion for a voluntary dismissal.⁴¹ Three weeks later, the trial court signed a written order of the voluntary dismissal of the case.⁴² One year after the written order was signed, the plaintiff refiled the case pursuant to section 13-217.⁴³ The trial court, however, granted the defendant's motion to dismiss because the plaintiff failed to refile his case within one year of the voluntary dismissal order,⁴⁴ as required by section 13-217.⁴⁵ On appeal, the plaintiff argued that the one-year refiling period did not begin to run until the trial court signed the written voluntary dismissal order.⁴⁶ He claimed that Illinois Supreme Court Rule 272, which governs final judgments, did not apply because the voluntary dismissal was not a final and appealable order.⁴⁷ The plaintiff further contended that Supreme Court Rule 271⁴⁸ established the entry date of the voluntary dismissal order.⁴⁹ The Illinois Supreme Court held that a voluntary dismissal order is final and appealable,⁵⁰ and, therefore, that rule 272 determined the entry date of the order.⁵¹ The court further explained that rule 272 requires a written order of judgment only when the judge requests one.⁵² In *Swisher*, the trial court did not request a written order at the time it granted the voluntary dismissal.⁵³ Accordingly, the order was final when orally pronounced by the

who voluntarily dismissed his case one year in which to refile his case. ILL. REV. STAT. ch. 110, para. 13-217 (1985).

41. *Swisher*, 117 Ill. 2d at 377, 512 N.E.2d at 1208.

42. *Id.*

43. *Id.*

44. *Id.* at 379, 512 N.E.2d at 1209.

45. ILL. REV. STAT. ch. 110, para. 13-217 (1985).

46. *Swisher*, 117 Ill. 2d at 379, 512 N.E.2d at 1209.

47. *Id.*

48. ILL. S. CT. R. 271, ILL. REV. STAT. ch. 110A, para. 271 (1985). Rule 271 states:

When the court rules upon a motion other than in the course of trial, the attorney for the prevailing party shall prepare and present to the court the order or judgment to be entered, unless the court directs otherwise.

Id. Rule 271 requires the entry of a written order before the judgment is enforceable. *Stewart v. Stewart*, 35 Ill. App. 3d 236, 240, 341 N.E.2d 136, 139 (1st Dist. 1976).

49. *Swisher*, 117 Ill. 2d at 379, 512 N.E.2d at 1209.

50. *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 472 N.E.2d 787 (1984).

51. *Swisher*, 117 Ill. 2d at 380-81, 512 N.E.2d at 1209-10.

52. ILL. S. CT. R. 272, ILL. REV. STAT. ch. 110A, para. 272 (1985). Section 2-1009 of the Illinois Code of Civil Procedure states that a plaintiff may obtain a voluntary dismissal "by order filed in the cause." ILL. REV. STAT. ch. 110, para. 2-1009 (1985). In *Swisher*, the Illinois Supreme Court held that this language does not mean that a written order is required, and therefore, that section 2-1009 does not affect the application of Rule 272. *Swisher*, 117 Ill. 2d at 381, 512 N.E. 2d at 1210.

53. *Swisher*, 117 Ill. 2d at 380, 512 N.E.2d at 1210.

court.⁵⁴ Because the plaintiff did not refile within one year of the court's voluntary dismissal order, the trial court properly dismissed the case.⁵⁵

D. *Voluntary Dismissal and Refiling for Jury Demand*

The appellate courts have limited the effect of *O'Connell*⁵⁶ to rule 103(b) cases when the effect of section 2-1009 is considered in relation to statutes other than rule 103(b). For example, in *Kern v. Peabody*,⁵⁷ the Illinois Appellate Court for the Fifth District held that a plaintiff who failed to file a jury demand when it filed its original case had an absolute right to dismiss voluntarily the case under section 2-1009 and refile the case under section 13-217 in order to file a jury demand.⁵⁸

In *Kern*, the plaintiffs sued the defendant coal mining company and sought damages for allegedly illegal and unauthorized mining by the defendant on the plaintiffs' land.⁵⁹ The plaintiffs did not demand a jury at the time they filed their complaint.⁶⁰ The defendant answered the complaint and admitted most of the allegations.⁶¹ Thereafter, the plaintiffs voluntarily dismissed their case, refiled it on the same day, and demanded a jury.⁶² The defendant moved to set aside the order granting the plaintiffs' voluntary dismissal.⁶³ Citing *O'Connell*,⁶⁴ the defendant argued that the plaintiffs were not entitled to a voluntary dismissal because it permitted them to circumvent the requirements for filing a jury demand.⁶⁵ The *Kern* court distinguished *O'Connell* on the grounds that the rule 103(b) issue that was present in *O'Connell* was absent in *Kern*.⁶⁶ In addition, the defendant argued that allowing the plaintiffs a jury trial, to which they were not entitled in the original case, denied the defendant his right to due process and equal protection under the

54. *Id.* at 381, 512 N.E.2d at 1210.

55. *Id.*

56. For a discussion of *O'Connell*, see *supra* notes 27-29 and accompanying text.

57. 151 Ill. App. 3d 807, 502 N.E.2d 1322 (5th Dist. 1987).

58. *Id.* at 811, 502 N.E.2d at 1325.

59. *Id.* at 808, 502 N.E.2d at 1323.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. For a discussion of *O'Connell*, see *supra* notes 27-29 and accompanying text.

65. *Kern*, 151 Ill. App. 3d at 811, 502 N.E.2d at 1325.

66. *Id.* The defendant in *Kern* did not challenge the plaintiff's diligence in the service of process. *Id.* The only issue in *Kern* was whether the plaintiff could voluntarily dismiss and refile in order to demand a jury. *Id.* at 808, 502 N.E.2d at 1323.

law guaranteed by the United States and Illinois Constitutions.⁶⁷ The *Kern* court held that section 2-1009 does not violate the due process or the equal protection clauses of the Fourteenth Amendment to the United States Constitution⁶⁸ or article I, section 2 of the Illinois Constitution.⁶⁹ The court stated that the plaintiff's right to a voluntary dismissal does not extinguish the right of either party to demand a jury.⁷⁰

Another case in which the right to voluntary dismissal was at issue is *Rohr v. Knaus*.⁷¹ In *Rohr*, a medical malpractice action, witnesses, including the plaintiff's expert medical witnesses, were deposed, and extensive hospital records were produced in discovery.⁷² Subsequently, the defendants moved for summary judgment under section 2-1005.⁷³ Prior to the summary judgment motion hearing date, the plaintiff successfully moved for voluntary dismissal under section 2-1009.⁷⁴ The appellate court affirmed the voluntary dismissal order.⁷⁵ The appellate court ruled that *O'Connell*⁷⁶ did not apply, and, because the right to voluntary dismissal had existed at common law in a more extensive form and by statute for many years, further restriction on the voluntary dismissal privilege should be addressed to the General Assembly or the Supreme Court.⁷⁷

E. Medical Malpractice

In *Penkava v. Kasbohm*,⁷⁸ the Illinois Supreme Court considered whether the statute of limitations and repose provided by section

67. *Id.* at 807-08, 502 N.E.2d at 1323. For the text of the due process and equal protection clauses of the United States and Illinois Constitutions, see *infra* notes 68 and 69.

68. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

69. *Kern*, 151 Ill. App. 3d at 812, 502 N.E.2d at 1326 (citing Ill. Const. art. I, § 2). Article I, section 2 of the Illinois Constitution states: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." ILL. CONST. art. I, § 2.

70. *Kern*, 151 Ill. App. 3d at 812, 502 N.E.2d at 1326.

71. 153 Ill. App. 3d 1013, 506 N.E.2d 634 (5th Dist. 1987).

72. *Id.* at 1014, 506 N.E.2d at 635.

73. *Id.*

74. *Id.*

75. *Id.* at 1017, 506 N.E.2d at 637.

76. For a discussion of *O'Connell*, see *supra* notes 27-29 and accompanying text.

77. *Rohr*, 153 Ill. App. 3d at 1017, 506 N.E.2d at 637.

78. 117 Ill. 2d 149, 510 N.E.2d 883 (1987). For a further discussion of *Penkava*, see *infra* notes 208-19 and accompanying text.

22.1⁷⁹ protected registered nurses.⁸⁰ In *Penkava*, the plaintiff brought a medical malpractice action against a hospital and a registered nurse employed by the hospital.⁸¹ The trial court granted the defendant's motions to dismiss because the claims were barred by the statute of limitations.⁸² The appellate court reversed the dismissal as to the nurse, holding that the statute of limitations applied only to actions against physicians and hospitals.⁸³ The appellate court reasoned that the statute, as originally enacted, did not specifically include registered nurses, but was amended subsequently to include registered nurses.⁸⁴ Accordingly, the appellate court ruled that the legislative amendment to include registered nurses supported the conclusion that prior to the amendment, registered nurses were excluded from the statute of limitations.⁸⁵

The Illinois Supreme Court disagreed with the appellate court and concluded that the term "hospitals" in section 22.1 as originally enacted, implicitly included registered nurses as employees caring for patients in hospitals.⁸⁶ The court explained that the statute was amended in order to protect all registered nurses and not just those nurses employed by hospitals.⁸⁷ The defendant nurse in *Penkava*, therefore, was protected by the statute as originally enacted because she was employed by the co-defendant hospital.⁸⁸

79. ILL. REV. STAT. ch. 83, para. 22.1 (1981) (amended and currently found at ILL. REV. STAT. ch. 110, para. 13-212 (1985)). The 1981 version of section 22.1 stated:

No action for damages for injury or death against any physician, dentist or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death except as provided in Section 22 of this Act.

If the person entitled to bring the action is, at the time the cause of action occurred, under the age of 18 years, or insane, or mentally ill, or imprisoned on criminal charges, the period of limitations does not begin to run until the disability is removed.

Id.

80. *Penkava*, 117 Ill. 2d at 157, 510 N.E.2d at 886-87.

81. *Id.* at 151, 510 N.E.2d at 883.

82. *Id.* at 151, 510 N.E.2d at 883-84.

83. *Id.* at 152, 510 N.E.2d at 884.

84. *Id.*

85. *Id.*

86. *Id.* at 156, 510 N.E.2d at 886.

87. *Id.* at 157, 510 N.E.2d at 886-87.

88. *Id.* at 157-58, 510 N.E.2d at 887.

III. JURISDICTION

Section 2-203(a) of the Illinois Code of Civil Procedure⁸⁹ provides the requirements for the service of summons upon an individual defendant.⁹⁰ It has long been the rule in Illinois that a judgment rendered by a court that lacks personal or subject matter jurisdiction may be challenged and vacated at any time or in any court, either collaterally or directly.⁹¹ Substituted service of summons under section 2-203(a) must strictly comply with every statutory requirement; the presumption of validity that applies to a return reciting personal service does not apply to substituted service.⁹² This policy is so strong that it recently was applied in a case involving intervening third party rights. In *State Bank of Lake Zurich v. Thill*,⁹³ the Illinois Supreme Court held defective an affidavit that failed to show compliance with all the requirements of section 2-203(a) in serving the defendant.⁹⁴

In *Thill*, the defendant, who had not previously appeared in the matter, entered a special and limited appearance in order to attack the circuit court's personal jurisdiction.⁹⁵ The defendant claimed that he had never been served properly with summons and, therefore, that the judgment against him was void.⁹⁶ The plaintiff, acknowledging that the affidavit was incomplete, claimed that proper service had been made on the defendant.⁹⁷ In addition, the plaintiff

89. ILL. REV. STAT. ch. 110, para. 2-203(a) (1985). Section 2-203(a) states:

Service on individuals. (a) Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy thereof with the defendant personally or (2) by leaving a copy at the defendant's usual place of abode, with some person of the family, of the age of 13 years or upwards, and informing that person of the contents thereof, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. The certificate of the officer or affidavit of the person that he or she has sent the copy in pursuance of this Section is evidence that he or she has done so.

Id.

90. *Id.*

91. *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 489 N.E.2d 1360 (1986).

92. *Werner v. W. H. Shons Co.*, 341 Ill. 478, 173 N.E.2d 486 (1930).

93. 113 Ill. 2d 294, 497 N.E.2d 1156 (1986).

94. *Id.* at 311, 497 N.E.2d at 1163. The affidavit failed to state that: (1) the summons was served on the defendant, (2) a copy of the summons was left with the defendant's wife for substituted service, and (3) a copy of the summons was mailed to the defendant.

Id.

95. *Id.* at 303, 497 N.E.2d at 1157. The trial court had entered a default judgment of foreclosure and sale against him. *Id.*

96. *Id.* at 307, 497 N.E.2d at 1159.

97. *Id.* at 304, 497 N.E.2d at 1159.

stated that the findings of proper jurisdiction over the parties recited by the circuit court in the judgment were determinative of the jurisdiction issue.⁹⁸ An unusual aspect of this case was that intervening third parties had purchased the subject property and claimed their rights as innocent purchasers, which could not be collaterally attacked even for an alleged jurisdictional defect, unless the defect affirmatively appeared in the record.⁹⁹

The court held that the trial record affirmatively showed that service on the defendant was contrary to section 2-203(a), and the intervenors could not rely upon their purported status as innocent third party purchasers to prevent collateral attack upon the judgment.¹⁰⁰ The court further held that the failure of the authorized process server to recite in the affidavit any of the requirements of section 2-203 rendered the affidavit defective.¹⁰¹ Moreover, the court stated that the findings of valid service in the judgment cannot cure the defects.¹⁰² A defective affidavit, however, does not invalidate the service of process if it was actually completed.¹⁰³ The court, therefore, remanded the matter to the circuit court with directions to conduct a hearing on whether the substituted service of process on the defendant was valid.¹⁰⁴

IV. VENUE AND FORUM NON CONVENIENS

Issues concerning the correct application of forum non conveniens principles to particular facts frequently arise. Innovative arguments occasionally raise issues thought to have been settled in other cases. For example, a plaintiff must plead and prove the residency of a corporation or the county in which the transaction or some part of it occurred for venue purposes under sections 2-101 and 2-102 of the Code of Civil Procedure. The question arises, therefore, whether that same plaintiff should carry the burden of proving those facts when a defendant challenges venue under the doctrine of forum non conveniens. The Illinois Supreme Court re-

98. *Id.*

99. *Id.* at 307, 497 N.E.2d at 1161. The intervening third parties relied on section 2-1401(e) of the Illinois Code of Civil Procedure, ILL. REV. STAT. ch. 110, para. 2-1401(e)(1985).

100. *Thill*, 113 Ill. 2d at 314, 497 N.E.2d at 1164.

101. *Id.* at 314, 497 N.E.2d at 1162 (citing *Werner v. W.H. Shons Co.*, 341 Ill. 478, 173 N.E. 486 (1930)).

102. *Id.* at 314, 497 N.E.2d at 1164.

103. *Id.* at 312, 497 N.E.2d at 1163.

104. *Id.* at 317, 497 N.E.2d at 1166.

cently addressed this question, applying settled principles to arrive at its determination.

In *Weaver v. Midwest Towing, Inc.*,¹⁰⁵ the Illinois Supreme Court held that the circuit court did not abuse its discretion in denying the defendant's motion to dismiss for improper venue or forum non conveniens.¹⁰⁶ The *Weaver* court stated that the defendant, as movant, had the burden of stating specific facts to demonstrate that the plaintiff's choice of forum was improper or inconvenient.¹⁰⁷ Furthermore, the court stated that "any doubts arising from the inadequacy of the record will be resolved against the defendant."¹⁰⁸ Because the defendant's motion contained conclusory statements unsupported by specific facts,¹⁰⁹ the court ruled that the defendant did not successfully demonstrate that the plaintiff's choice of forum was improper or inconvenient.¹¹⁰

In *Gardner v. International Harvester Co.*,¹¹¹ the Illinois Supreme Court held that proper venue in St. Clair County was not established because the defendant did not conduct its usual and customary business in that county.¹¹² The court recognized that the defendant conducted a number of activities in St. Clair County,¹¹³ but stated that these activities were incidental to the

105. 116 Ill. 2d 279, 507 N.E.2d 838 (1987).

106. *Id.* at 286-87, 507 N.E.2d at 841.

107. *Id.* at 285, 507 N.E.2d at 840.

108. *Id.* (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984)).

109. For example, the defendant stated that it occasionally did "fleet and barge" work in the forum. *Id.* at 286, 507 N.E.2d at 840. The defendant also failed to set out the identity or location of any witnesses or other sources of relevant proof. *Id.* at 289, 507 N.E.2d at 842. The court stated that "[t]he defendant did not set out sufficient facts to enable the trial court to determine" the extent of its business in the forum. *Id.* at 286, 507 N.E.2d at 841.

110. *Id.* at 285, 507 N.E.2d at 840. In addition, the *Weaver* court stated that because the plaintiff adequately alleged that part of the injury occurred in the forum, and the defendant did not deny the allegation, venue was proper in the forum. *Id.* at 287, 507 N.E.2d at 841.

111. 113 Ill. 2d 535, 499 N.E.2d 430 (1986).

112. *Id.* at 542, 499 N.E.2d at 433. The court relied on its holding in *Stambaugh v. International Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984), in which the court decided the same issue on substantially the same facts as in the present case. *Gardner*, 113 Ill. 2d at 539, 499 N.E.2d at 432.

113. *Gardner*, 113 Ill. 2d at 539-42, 499 N.E.2d at 432-33. The court recognized that International Harvester: (1) sold products to independent dealers, (2) had sales representatives visit dealers to solicit business, (3) had a cooperative advertising program, (4) had a wholly owned subsidiary that financed purchases by dealers, (5) purchased products from companies, (6) required the dealers to perform warranty work on its products, (7) mailed rebate checks directly to customers, (8) operated a gas cap replacement program, and (9) accepted payments due its subsidiary in St. Clair County. *Id.*

defendant's usual and customary business.¹¹⁴ The court concluded that venue was not proper in St. Clair County.¹¹⁵

In *Bland v. Norfolk and Western Railway Co.*,¹¹⁶ the Illinois Supreme Court held that the circuit court abused its discretion when it denied the defendant's motion to transfer on the basis of forum non conveniens.¹¹⁷ In *Bland*, the plaintiff filed his Federal Employers' Liability Act ("FELA")¹¹⁸ claim in the circuit court of Madison County, Illinois.¹¹⁹ The defendant moved to transfer the case to Macon County on the basis of forum non conveniens.¹²⁰

The *Bland* court held that the factors offered by the plaintiff in favor of Madison County as his choice of forum¹²¹ did not provide a significant factual connection to the litigation and were relatively unimportant when compared to the factors offered by the defendant in favor of Macon County.¹²² The court stated that Macon County had significant factual connections to the litigation and was the more convenient forum.¹²³ The court also considered significant the one-hundred mile distance between the two counties and the resulting expense to the defendant of transporting witnesses and records.¹²⁴ Furthermore, the court stated that a non-resident plaintiff's choice of forum deserves less deference than when the plaintiff chooses his home forum.¹²⁵ Accordingly, the court directed the circuit court of Madison County to grant the defendant's motion to transfer the case to Macon County.¹²⁶

114. *Id.* at 542, 499 N.E.2d at 433 (citing *Stambaugh*, 102 Ill. 2d at 263, 464 N.E.2d at 1016)). International Harvester's usual and customary business was the design, manufacture, advertisement, finance, and sales of its products. *Id.*

115. *Id.*

116. 116 Ill. 2d 217, 506 N.E.2d 1291 (1987).

117. *Id.* at 231, 506 N.E.2d at 1298.

118. 45 U.S.C. § 51-60 (1976).

119. *Bland*, 116 Ill. 2d at 220-21, 506 N.E.2d at 1292.

120. *Id.* at 221, 506 N.E.2d at 1292.

121. The plaintiff gave three factors supporting his choice of forum. First, he occasionally worked in Madison County. Second, two of the plaintiff's five treating physicians had offices in Madison County. Third, the defendant transacted business in Madison County. *Id.* at 225-26, 506 N.E.2d at 1295.

122. *Id.* at 225-29, 506 N.E.2d at 1295-96. The defendant claimed that it transacted business, the plaintiff's injury occurred, the plaintiff was a resident, all of the witnesses worked, the plaintiff's hospital medical records were held, and the docket was less congested in Macon County. *Id.* at 221-30, 506 N.E.2d at 1293-97.

123. *Id.* at 226-29, 506 N.E.2d at 1295-97.

124. *Id.* at 227, 506 N.E.2d at 1295.

125. *Id.* at 228, 506 N.E.2d at 1296 (citing *Brummett v. Wepfer Marine Inc.*, 111 Ill. 2d 495, 490 N.E.2d 694 (1986); *Satkowiak v. Chesapeake & Ohio Railway Co.*, 106 Ill. 2d 224, 478 N.E.2d 370 (1985); *Weiser v. Missouri Pacific R.R. Co.*, 98 Ill. 2d 359, 456 N.E.2d 98 (1983)).

126. *Id.* at 231, 506 N.E.2d at 1298.

*Barnes v. Southern Railway Co.*¹²⁷ also involved a motion to dismiss based on forum non conveniens in an FELA case. In *Barnes*, the Illinois Supreme Court held that the defendant was not required to file a motion to dismiss on the basis of forum non conveniens within any specific time limit.¹²⁸ In *Barnes*, the defendant filed a motion to dismiss based on forum non conveniens five months after it filed its answer.¹²⁹ Although the trial court found that the case had no connection to St. Clair County, the county in which it was filed, the trial court denied the motion for untimeliness.¹³⁰ The trial court reasoned that the defendant waived the forum non conveniens issue because it was not raised before the date by which the defendant was required to answer.¹³¹

The Illinois Supreme Court reversed, holding that the forum non conveniens motion is not waived if filed after the date within which the defendant must answer.¹³² The court stated that although the defendant's delay in filing a forum non conveniens motion may be considered when deciding the motion, the defendant was not required to file the motion within any specific time limit.¹³³

127. 116 Ill. 2d 236, 507 N.E.2d 494 (1987). For a further discussion of *Barnes*, see *infra* notes 195-205 and accompanying text.

128. *Barnes*, 116 Ill. 2d at 249, 507 N.E.2d at 500. *But see infra* note 133 for a discussion of new Supreme Court Rule 187, which establishes a time limit in which a forum non conveniens motion must be brought.

129. *Barnes*, 116 Ill. 2d at 239, 507 N.E.2d at 495-96. The plaintiff's failure to comply with discovery delayed the defendant's filing of its forum non conveniens motion. *Id.* at 249, 507 N.E.2d at 500. The plaintiff did not answer the defendant's interrogatories until a year after they were submitted, and only after the court ordered the plaintiff to comply with discovery. *Id.* at 249, 507 N.E.2d at 501.

130. *Id.* at 240, 507 N.E.2d at 496.

131. *Id.* at 248, 507 N.E.2d at 500. The trial court relied on *Herbert v. Louisville & Nashville Railroad Co.*, 130 Ill. App. 3d 624, 474 N.E.2d 848 (5th Dist. 1985). The *Herbert* court held that a forum non conveniens motion is analogous to an improper venue motion and must, therefore, be filed in the same manner, on or before the date upon which the defendant is required to answer. *Id.* at 626-27, 474 N.E.2d at 850-51.

132. *Barnes*, 116 Ill. 2d at 249, 507 N.E.2d at 500 (citing *Grant v. Stark*, 96 Ill. App. 3d 297, 421 N.E.2d 268 (1st Dist. 1981)).

133. *Id.* at 249, 507 N.E.2d at 500 (citing *Bell v. Louisville and Nashville Railroad Co.*, 106 Ill. 2d 135, 478 N.E.2d 384 (1985)). The *Barnes* court noted the recent adoption of Illinois Supreme Court Rule 187, which requires that forum non conveniens motions after August 1, 1986 be filed not later than ninety days after the last day allowed for filing that defendant's answer. *Barnes*, 116 Ill. 2d at 250, 507 N.E.2d at 501. For a discussion of Illinois Supreme Court Rule 187, see *Kandarus & Wozniak, Civil Procedure, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 317, 350-51 (1986).

V. PLEADINGS AND DISCOVERY

A. *Disciplinary Charges*

In *In re Elias*,¹³⁴ the Illinois Supreme Court considered whether the defendant was given sufficient notice in the complaint of the charges against him such that he was not denied due process.¹³⁵ In *Elias*, the Attorney Registration and Disciplinary Commission (the "ARDC") charged the defendant with commingling and converting clients' funds in six bank accounts.¹³⁶ The complaint, however, did not contain the names of the clients whose funds were commingled and converted.¹³⁷ Relying on *In re Ruffalo*,¹³⁸ the defendant claimed that his right to due process was violated because the Review Board of the ARDC based its disbarment recommendation on incidents not specifically charged in the complaint.¹³⁹ In *Ruffalo*, a charge was added to the complaint after the defendant had testified to refute the original charges.¹⁴⁰ The court distinguished *Ruffalo* by stating that the defendant in *Elias* was confronted not with new charges, but only with evidence supporting the charges already contained in the complaint.¹⁴¹ The court stated that although the counts in the complaint did not contain the names of all the clients whose funds were involved in the violations, the complaint gave the defendant sufficient notice of the nature of the charges because it specifically named the six bank accounts involved in the violations.¹⁴² The court thus held that the defendant was not denied due process because the complaint filed by the Administrators of the ARDC gave the defendant sufficient notice to prepare his defense against the charges.¹⁴³

134. 114 Ill. 2d 321, 499 N.E.2d 1327 (1986), *cert. denied*, 107 S. Ct. 1351 (1987).

135. *Id.* at 335-36, 499 N.E.2d at 1332-33. Neither the defendant nor the *Elias* court explained whether the due process right at issue was based on the federal or state constitution. *Id.* at 336-37, 499 N.E.2d at 1332-33.

136. *Id.* at 325-26, 499 N.E.2d at 1328.

137. *Id.* at 336, 499 N.E.2d at 1333.

138. 390 U.S. 544 (1968). In *Ruffalo*, the United States Supreme Court held that an attorney can be disciplined only on charges contained in the complaint. *Id.* at 551-52. The Supreme Court held that the defendant had been denied due process because he had not been given the notice necessary to defend against the new charge. *Id.* at 550-52.

139. *Elias*, 114 Ill. 2d at 335, 499 N.E.2d at 1332. The charges involved the funds of individual clients whose names were not mentioned in the complaint. *Id.* at 336, 499 N.E.2d at 1333.

140. *Ruffalo*, 390 U.S. at 549.

141. *Elias*, 114 Ill. 2d at 336, 499 N.E.2d at 1333.

142. *Id.*

143. *Id.* at 336-37, 499 N.E.2d at 1333.

B. Experts

In *Diminskis v. Chicago Transit Authority*,¹⁴⁴ the Illinois Appellate Court for the First District held that a treating physician is not considered an expert witness, and, therefore, does not have to be disclosed as a testifying expert witness pursuant to an Illinois Supreme Court Rule 220¹⁴⁵ request.¹⁴⁶ The *Diminskis* court stated that the Illinois Supreme Court relied on Rule 26(b)(4) of the Federal Rules of Civil Procedure¹⁴⁷ when promulgating Rule 220 and, therefore, Rule 220 should be construed consistent with the federal rule.¹⁴⁸ Accordingly, the court held that a treating physician is not considered an expert retained solely to give his opinion at trial under Rule 220.¹⁴⁹

C. Discovery Sanctions

In *Lubbers v. Norfolk and Western Railway Co.*,¹⁵⁰ the Illinois Appellate Court for the Fourth District held that granting a new trial to the plaintiff as a discovery sanction against the defendant for a non-wilful discovery violation was improper and an abuse of discretion, particularly when the evidence withheld on discovery was not relevant to the plaintiff's case.¹⁵¹ In *Lubbers*, the plaintiff sued the defendant railroad company seeking damages for injuries

144. 155 Ill. App. 3d 585, 508 N.E.2d 215 (1st Dist. 1987), *appeal granted*, 116 Ill. 2d 552, 515 N.E.2d 105 (1987).

145. ILL. S. CT. R. 220, ILL. REV. STAT. ch. 110A, para. 220 (1985). Supreme Court Rule 220 states in relevant part:

Expert witness. Where the testimony of experts is reasonably contemplated, the parties will act in good faith to reasonably:

- (i) ascertain the identity of such witnesses, and
- (ii) obtain from them the opinions upon which they may be requested to testify.

Upon interrogatory propounded for that purpose, the party retaining or employing an expert witness shall be required to state:

- (i) the subject matter on which the expert is expected to testify;
- (ii) his conclusions and opinions and the bases therefor; and
- (iii) his qualifications.

Id.

146. *Diminskis*, 155 Ill. App. 3d at 591, 508 N.E.2d at 220.

147. FED. R. CIV. P. 26(b)(4). A treating physician is not considered a testifying expert under the federal rules. *See, e.g.*, *Baran v. Presbyterian University Hospital*, 102 F.R.D. 272 (W.D. Penn. 1984).

148. *Diminskis*, 155 Ill. App. 3d at 590-91, 508 N.E.2d at 219.

149. *Id.*

150. 147 Ill. App. 3d 501, 498 N.E.2d 357 (4th Dist. 1986), *appeal denied*, 113 Ill. 2d 576, 505 N.E.2d 354 (1987). For further a discussion of *Lubbers*, see *infra* notes 177-88 and accompanying text.

151. *Id.* at 519, 498 N.E.2d at 369.

he suffered when the truck he was driving was hit by the defendant's train.¹⁵² The defendant filed a counterclaim against the plaintiff seeking compensation for the damage to the train.¹⁵³ At the conclusion of the trial, the jury found in favor of the defendant.¹⁵⁴ In addition, the jury found that the plaintiff's own negligence was a proximate cause of the accident, and, therefore, awarded the defendant damages on the counterclaim.¹⁵⁵ Two years after the judgment, the plaintiff learned that evidence, which showed improper inspection and post-accident repair of the defendant's crossing signals at the intersection involved in the accident, was withheld by the defendant during discovery.¹⁵⁶ Thereupon, the plaintiff filed a petition under section 2-1401 of the Illinois Code of Civil Procedure,¹⁵⁷ requesting that the trial court vacate the judgment and grant a new trial because of the withheld evidence.¹⁵⁸ The plaintiff alleged that the defendant had given false answers to interrogatories that specifically requested the withheld evidence before trial.¹⁵⁹ The trial court vacated the judgment and awarded the plaintiff a new trial as a sanction against the defendant, finding that the defendant "committed serious and gross violations of the rules of discovery" regarding the central issue in the case.¹⁶⁰ The trial court, however, found that the defendant's violations were not wilful.¹⁶¹ The trial court noted that the withheld evidence would not have affected the plaintiff's position at trial, but would have allowed him to file an action against the manufacturer of the crossing signals.¹⁶²

The appellate court reversed the trial court's order granting the plaintiff a new trial as a sanction for the discovery violations.¹⁶³ The appellate court found ample support in the record for the trial court's conclusion that the defendant's discovery violations were nonwilful.¹⁶⁴ The appellate court concluded that the trial court

152. *Id.* at 503, 498 N.E.2d at 359.

153. *Id.*

154. *Id.* at 505, 498 N.E.2d at 360.

155. *Id.*

156. *Id.* at 505, 498 N.E.2d at 360-61.

157. ILL. REV. STAT. ch. 110, para. 2-1401 (1985). Section 2-1401 provides for relief from final orders and judgments. *Id.*

158. *Lubbers*, 147 Ill. App. 3d at 505, 498 N.E.2d at 361.

159. *Id.*

160. *Id.* at 509, 498 N.E.2d at 364.

161. *Id.*

162. *Id.* at 509-10, 498 N.E.2d at 364.

163. *Id.* at 519, 498 N.E.2d at 370.

164. *Id.* at 518, 498 N.E.2d at 369. The defendant provided testimony that the discovery violation was the result of a misunderstanding. *Id.* Additionally, a strike at the

erred in granting a new trial as a discovery sanction because the discovery violation was nonwilful.¹⁶⁵ The appellate court stated that sanctioning a party by granting a new trial should occur only when the noncompliance with discovery is substantial, wilful, and in bad faith.¹⁶⁶

VI. JUDGMENTS AND § 2-1401

A. Diligence in Defending Default Judgments

In *Smith v. Airoom, Inc.*,¹⁶⁷ the Illinois Supreme Court held that the circuit court did not abuse its discretion in denying the defendant's petition to vacate the default judgment that the circuit court entered against the defendant.¹⁶⁸ In *Smith*, the plaintiff served the defendant with a summons and complaint, but the defendant failed to file an answer or appearance to avoid a default judgment.¹⁶⁹

After the trial court denied the defendant's request to vacate the judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure,¹⁷⁰ the defendant appealed.¹⁷¹ The Illinois Supreme Court held that the defendant had established no valid excuse for its failure to present diligently a defense in the original action.¹⁷² The court therefore held that the defendant lacked due diligence in defending the case.¹⁷³

The defendant in *Smith* argued that the circuit court should have relaxed the due diligence standard¹⁷⁴ under its equitable powers because the plaintiff failed to give the defendant notice of the

railroad company at the time of discovery hindered its operations. *Id.* The appellate court stated that the plaintiff had failed to show any bad faith on the part of the defendant during discovery. *Id.*

165. *Id.* at 518-19, 498 N.E.2d at 369.

166. *Id.* at 518, 498 N.E.2d at 369.

167. 114 Ill. 2d 209, 499 N.E.2d 1381 (1986).

168. *Id.* at 231, 499 N.E.2d at 1391.

169. *Id.* at 224-25, 499 N.E.2d at 1388.

170. ILL. REV. STAT. ch. 110, para. 2-1401 (1985). Section 2-1401 provides for relief from final orders and judgments. *Id.*

171. *Smith*, 114 Ill. 2d at 220, 499 N.E.2d at 1386.

172. *Id.* The court stated that "Airoom's dilemma is the result of its own negligence and indifference to or disregard of the circuit court's process." *Id.*

173. *Id.* at 225, 499 N.E.2d at 1388. The allegations of a section 2-1401 petition must be proven by a preponderance of the evidence, and when the petition is controverted by the respondent's answer, a full and fair evidentiary hearing must be held. *Id.* at 223, 499 N.E.2d at 1387. Because the petitioner waived the evidentiary hearing, the issue of whether due diligence was proved by the required quantum of competent evidence was ascertained on the bases of the pleadings, affidavits, and other supporting evidentiary materials. *Id.*

174. Due diligence requires that the section 2-1401 petitioner have a reasonable excuse for failing to act within the appropriate time. *Id.* at 222, 499 N.E.2d at 1386.

default proceedings and the default judgment within thirty days of its entry.¹⁷⁵ The court disagreed, stating that the plaintiffs were under no legal duty to give notice of the default proceedings or judgment to the defendant because no appearance had been entered for Airoom.¹⁷⁶

B. Timeliness

In *Lubbers v. Norfolk and Western Railway Co.*,¹⁷⁷ the court considered whether the plaintiff's amended section 2-1401¹⁷⁸ petition was timely.¹⁷⁹ The plaintiff in *Lubbers* filed his section 2-1401 petitions after the two-year limitations period had run.¹⁸⁰ In a separate appeal, the Illinois Supreme Court held that the allegations of the defendant's fraudulent concealment of discoverable evidence contained in plaintiff's original section 2-1401 petition tolled the section's statute of limitations period. Therefore, the plaintiff's original motion was timely.¹⁸¹ Because the Illinois Supreme Court's order provided for liberal amendments to the original petition, the Fourth District held that the amended petition also was filed timely.¹⁸²

C. Newly Discovered Evidence

In *Lubbers v. Norfolk and Western Railway Co.*,¹⁸³ the Illinois Appellate Court for the Fourth District held that the plaintiff was not entitled to relief under section 2-1401 of the Illinois Code of

175. *Id.* at 226, 499 N.E.2d at 1388.

176. *Id.* at 226, 499 N.E.2d at 1388-89. The court stated that professional courtesy "arguably" may require such notice. *Id.* at 226, 499 N.E.2d at 1388.

177. 147 Ill. App. 3d 501, 498 N.E.2d 357 (4th Dist.), *appeal denied*, 113 Ill. App. 3d 576, 505 N.E.2d 354 (1986). For further a discussion of *Lubbers*, see *supra* notes 150-66, and *infra* notes 183-88 and accompanying text.

178. ILL. REV. STAT. ch. 110, para. 2-1401 (1985).

179. *Lubbers*, 147 Ill. App. 3d at 510, 498 N.E.2d at 364.

180. *Id.*

181. *Id.* at 511, 498 N.E.2d at 365. The Illinois Supreme Court already had decided the issue in this case on a separate appeal. *Lubbers v. Norfolk and Western Railway Co.*, 105 Ill. 2d 201, 473 N.E.2d 955 (1984), *later proceeding*, 147 Ill. App. 3d 501, 498 N.E.2d 357 (4th Dist. 1986), *appeal denied*, 106 Ill. Dec. 48, 505 N.E.2d 354 (1987).

182. *Lubbers*, 147 Ill. App. 3d at 511, 498 N.E.2d at 365. The *Lubbers* court also held, relying on *People v. B.R. Mackay & Sons, Inc.*, 141 Ill. App. 3d 137, 490 N.E.2d 74 (1st Dist. 1986) (limited discovery is allowed when a party petitions to vacate a judgment under section 2-1401), that the circuit court properly allowed both parties to engage in discovery in connection with the plaintiff's section 2-1401 petition. *Lubbers*, 147 Ill. App. 3d at 513, 498 N.E.2d at 366.

183. 147 Ill. App. 3d 501, 498 N.E.2d 357 (4th Dist. 1986), *appeal denied*, 113 Ill. 2d 576, 505 N.E.2d 354 (1987). For a further discussion of *Lubbers*, see *supra* notes 150-66 and 177-82 and accompanying text.

Civil Procedure because he failed to show that the withheld evidence would have changed the decision.¹⁸⁴ Two years after the judgment against him, the plaintiff in *Lubbers* discovered evidence that the defendant had not disclosed to the plaintiff during discovery.¹⁸⁵ On the basis of the withheld evidence, the plaintiff filed a petition to vacate the judgment under section 2-1401.¹⁸⁶ The appellate court refused to grant section 2-1401 relief, reasoning that the plaintiff failed to prove that if he had received the information withheld by the defendant, it would have prevented the judgment against him.¹⁸⁷ The appellate court stated that there was no causal connection between the withheld information and the accident that caused the injuries to the plaintiff and the defendant.¹⁸⁸

VII. NEW TRIAL STANDARD

In *Junker v. Ziegler*,¹⁸⁹ the Illinois Supreme Court held that the manifest weight of the evidence standard should be applied by the courts in determining whether a new trial should be granted in comparative negligence cases.¹⁹⁰ In *Junker*, the trial court used the manifest weight standard when considering the plaintiff's post-trial motion for a new trial.¹⁹¹ The defendant suggested that a standard more deferential to the jury's verdict should be used in comparative negligence cases.¹⁹² The Illinois Supreme Court, however, refused to modify the standard that it has applied consistently,¹⁹³ and

184. *Lubbers*, 147 Ill. App. 3d at 516, 498 N.E.2d at 368 (citing ILL. REV. STAT. ch. 110, para. 2-1401 (1985)).

185. *Id.* at 505, 498 N.E.2d at 360-61. The alleged withheld information included records of inspection and repair of crossing signals before and after the accident. *Id.*

186. *Id.* at 505-06, 498 N.E.2d at 361-62. The petitioners alleged that the defendant fraudulently had given incomplete and false answers to interrogatories and falsified and failed to turn over various records when requested. *Id.*

187. *Id.* at 516, 498 N.E.2d at 368. The court cited *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 433 N.E.2d 253 (1982), for the proposition that, in order to receive section 2-1401 relief, the plaintiff must show that "if the ground for relief had been known at trial, it would have prevented the entry of judgment against him." *Lubbers*, 147 Ill. App. 3d at 514, 498 N.E.2d at 367 (citing *Ostendorf*, 89 Ill. 2d at 283, 433 N.E.2d at 257).

188. *Lubbers*, 147 Ill. App. 3d at 514, 498 N.E.2d at 367. The appellate court stated that, because the plaintiff was never advised that the crossing lights might flash when no train was coming, he could not have relied on such information. Therefore, it could not have been a cause of the accident. *Id.*

189. 113 Ill. 2d 332, 498 N.E.2d 1135 (1986).

190. *Id.* at 339, 498 N.E.2d at 1138.

191. *Id.*

192. *Id.*

193. *Id.* (citing *Jardine v. Rubloff*, 73 Ill. 2d 31, 44, 382 N.E.2d 232, 234 (1978) (when ruling on a motion for a new trial, the trial judge should consider whether the verdict was against the manifest weight of the evidence)).

held that the circuit court used the proper standard in considering the motion for a new trial.¹⁹⁴

VIII. APPEALS

A. Timeliness

In *Barnes v. Southern Railway Co.*,¹⁹⁵ the Illinois Supreme Court held that the defendant's petition for leave to appeal the denial of its motion to reconsider based on forum non conveniens was timely under Illinois Supreme Court Rule 306(a)(1),¹⁹⁶ and, therefore, that the appellate court erred in dismissing it for lack of jurisdiction.¹⁹⁷ In *Barnes*, both the defendant's original motion to dismiss and its subsequent motion to reconsider were denied by the circuit court.¹⁹⁸ The defendant then petitioned the appellate court for leave to appeal the denial of its motion to reconsider.¹⁹⁹ The appellate court dismissed the appeal for lack of jurisdiction because it was not filed within thirty days of the denial of the defendant's original motion to dismiss.²⁰⁰ The appellate court reasoned that the thirty-day limit for filing a petition for leave to appeal from an order denying a motion to dismiss based upon forum non conveniens was not tolled by filing a motion to reconsider.²⁰¹

The defendant, however, did not argue that the thirty-day period

194. *Id.*

195. 116 Ill. 2d 236, 507 N.E.2d 494 (1987). For a further discussion of *Barnes*, see *supra* notes 127-33 and accompanying text.

196. ILL. S. CT. R. 306(a)(1), ILL. REV. STAT. ch. 110A, para. 306(a)(1) (1985). Supreme Court Rule 306(a)(1) states in relevant part:

Petition for Leave to Appeal. An appeal may be taken in the following cases only on the allowance by the Appellate Court of a petition for leave to appeal:

.....
(ii) from an order of the circuit court denying a motion to dismiss on the grounds of forum non conveniens; or from an order of the circuit court allowing or denying a motion to transfer a case to another county within this State on such grounds.

The petition shall contain a statement of the facts of the case, supported by reference to the record, and of the grounds for the appeal. It shall be duplicated, served, and filed in the Appellate court in accordance with the requirements for briefs within 30 days after the entry of the order.

Id.

197. *Barnes*, 116 Ill. 2d at 242, 506 N.E.2d at 497.

198. *Id.* at 240, 506 N.E.2d at 496.

199. *Id.* at 241, 507 N.E.2d at 497.

200. *Id.*

201. *Id.* at 241-42, 507 N.E.2d at 497. The appellate court relied on *Leet v. Louisville and Nashville Railroad Co.*, 131 Ill. App. 3d 763, 475 N.E.2d 1390 (5th Dist. 1985) (the 30 day period within which to file a petition for leave to appeal from an order denying a motion to dismiss based on forum non conveniens may not be tolled by filing a motion to reconsider the denial).

was tolled.²⁰² Instead, the defendant argued that, because the defendant's motion to reconsider presented new matter for consideration, it was an independent and original motion to dismiss that was independently appealable.²⁰³ The Illinois Supreme Court agreed, holding that the defendant's petition for leave to appeal from the denial of its motion to reconsider was essentially a new and original motion, which was filed within the thirty-day time limit.²⁰⁴ Therefore, the appellate court erred in dismissing the appeal for lack of jurisdiction.²⁰⁵

B. Eligibility

Illinois Supreme Court Rule 318(a)²⁰⁶ permits "any appellee, respondent, or co-party" to an appeal from the appellate to the supreme court to seek any relief available based on the record on appeal without filing a separate petition for leave to appeal.²⁰⁷ In *Penkava v. Kasbohm*,²⁰⁸ the Illinois Supreme Court held that the plaintiff was not eligible for relief under Rule 318(a).²⁰⁹ In *Penkava*, the plaintiff sued defendants Kasbohm, Hon, and Northwest Hospital for medical malpractice.²¹⁰ The trial court granted the defendant's motion to dismiss the complaint because of the expiration of the statute of limitations.²¹¹ On the plaintiff's appeal, the appellate court reversed and remanded only the claim against Hon.²¹² The Illinois Supreme Court granted Hon's petition for leave to appeal the reversal of the dismissal of the claim against her, but denied the plaintiff's petition for leave to appeal the affirmance of the dismissal of her claims against Kasbohm and Northwest Hospital.²¹³ The plaintiff then filed a cross-appeal that

202. *Barnes*, 116 Ill. 2d at 252, 507 N.E.2d at 497. The defendant argued before the Illinois Supreme Court that *Leet* was inapplicable to the present case. *Id.*

203. *Id.* at 244, 507 N.E.2d at 498 (citing *Kemner v. Monsanto*, 112 Ill. 2d 223, 492 N.E.2d 1327 (1986) (raising new matter in a motion to reconsider creates a new and independently appealable motion)). For a discussion of *Kemner*, see Kandaras & Wozniak, *Civil Procedure, 1985-86 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 317, 332-33 (1986).

204. *Barnes*, 116 Ill. 2d at 247, 507 N.E.2d at 499.

205. *Id.*

206. ILL. S. CT. R. 318(a), ILL. REV. STAT. ch. 110A, para. 318(a) (1985).

207. *Id.*

208. 117 Ill. 2d 149, 510 N.E.2d 883 (1987). For a further discussion of *Penkava*, see *supra* notes 78-88 and accompanying text.

209. *Penkava*, 117 Ill. 2d at 154, 510 N.E.2d at 885.

210. *Id.* at 151, 510 N.E.2d at 883.

211. *Id.* at 151, 510 N.E.2d at 883-84.

212. *Id.* at 151, 510 N.E.2d at 884.

213. *Id.*

was the same as her petition for leave to appeal which had been denied.²¹⁴ She claimed that Rule 318(a) granted her the right to this cross-appeal.²¹⁵ The Illinois Supreme Court, however, dismissed the plaintiff's cross-appeal.²¹⁶ The court stated that, for purposes of the cross-appeal, the plaintiff must be either an appellee, respondent, or co-party, as required by Rule 318(a).²¹⁷ The court reasoned that, because the plaintiff's cross-appeal involved Kasbohm and Northwest Hospital, neither of whom appealed, the plaintiff was not an appellee, respondent, or co-party under Rule 318(a) for purposes of the appeal.²¹⁸ The court, therefore, dismissed the cross-appeal.²¹⁹

IX. COLLATERAL ESTOPPEL

A. Finality of Judgment

The doctrine of collateral estoppel can be asserted to prevent the "relitigation of previously adjudicated claims"²²⁰ when three criteria are met.²²¹ First, the issues in both cases must be identical.²²² Second, the judgment in the previous case must have been on the merits and final.²²³ Finally, "the party against whom estoppel is asserted must be a party or in privity with a party to the prior adjudication."²²⁴ In *Ballweg v. City of Springfield*,²²⁵ the Illinois Supreme Court held that the doctrine of collateral estoppel did not apply because the judgment of the previously adjudicated case was not final.²²⁶

214. *Id.* at 154, 510 N.E.2d at 885.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113, 499 N.E.2d 1373, 1375 (1986) (citing *Morris v. Union Oil Co.*, 96 Ill. App. 3d 148, 421 N.E.2d 278 (5th Dist. 1981)). For further discussions of *Ballweg*, see the *Evidence* and *Torts* articles of this *Survey*.

221. *Id.* at 113, 499 N.E.2d at 1375 (citing *Illinois State Chamber of Commerce v. Pollution Control Board*, 78 Ill. 2d 1, 7, 398 N.E.2d 9, 12 (1979)).

222. *Id.*

223. *Id.*

224. *Id.*

225. 114 Ill. 2d 107, 499 N.E.2d 1373 (1986). For a further discussion of *Ballweg*, see *infra* notes 248-59 and accompanying text.

226. *Id.* at 113, 499 N.E.2d at 1375. In *Ballweg*, two girls were killed in a boating accident. *Id.* at 111, 499 N.E.2d at 1375. Separate actions were brought on behalf of each of the decedents. *Id.* The cases involved identical issues and defendants. *Id.* The defendants were found liable in the first action. *Ogg v. City of Springfield*, 121 Ill. App. 3d 25, 458 N.E.2d 1331 (4th Dist. 1984). The plaintiff in *Ballweg* claimed that the finding of

In *Ballweg*, the court stated that for the purposes of collateral estoppel, a case is final only if the potential for appellate review has been exhausted.²²⁷ Because the previously adjudicated case was on appeal during the pendency of the motion, the court held that the trial court properly denied the application of collateral estoppel because of lack of finality.²²⁸

B. Application

In *Kahle v. John Deere Co.*,²²⁹ the Illinois Appellate Court for the First District held that the trial court was not bound in the refiled case by the determination of the identical motion to transfer venue in the original case.²³⁰ In *Kahle*, the plaintiff originally filed his case in Cook County.²³¹ The trial court then granted the defendant's motion to transfer venue to another county.²³² The plaintiff was later granted a voluntary dismissal under section 2-1009 of the Illinois Code of Civil Procedure.²³³ Subsequently, the plaintiff, under section 13-217 of the Illinois Code of Civil Procedure,²³⁴ refiled the same lawsuit in Cook County.²³⁵ The defendants moved to transfer venue to another county as they had in the original case.²³⁶ After the trial court struck the motion and denied reconsideration, the defendants were granted a supervisory order by the supreme court.²³⁷ The supreme court ordered the trial court to vacate its order striking defendant's motion to transfer venue, and further, to reassign the case to a different judge to determine the venue question.²³⁸ Upon remand and reassignment, the trial judge ruled that he was bound by *res judicata*, collateral estoppel, or the law of the case by the determination of the venue issue in the

liability in *Ogg* collaterally estopped the defendants from denying liability in the second case. *Ballweg*, 114 Ill. 2d at 113, 499 N.E.2d at 1375.

227. *Ballweg*, 114 Ill. 2d at 113, 499 N.E.2d at 1375 (citing *Relph v. Board of Education*, 84 Ill. 2d 436, 420 N.E.2d 147 (1981)).

228. *Id.* at 113, 499 N.E.2d at 1375.

229. 151 Ill. App. 3d 139, 502 N.E.2d 1172 (1st Dist. 1986), *appeal granted*, 108 Ill. Dec. 418, 508 N.E.2d 729 (1987).

230. *Kahle*, 151 Ill. App. 3d at 141, 502 N.E.2d at 1174.

231. *Id.* at 139, 502 N.E.2d at 1172-73.

232. *Id.*

233. *Id.* at 139-40, 502 N.E.2d at 1173 (citing ILL. REV. STAT. ch. 110, para. 2-1009 (1985)).

234. ILL. REV. STAT. ch. 110, para. 13-217 (1985).

235. *Kahle*, 151 Ill. App. 3d at 140, 502 N.E.2d at 1173.

236. *Id.*

237. *Id.*

238. *Id.*

original case.²³⁹

On appeal, the appellate court stated that such a ruling is inconsistent with the legislative purpose behind section 2-1009, which is to secure an absolute right to voluntary dismissal before trial or hearing.²⁴⁰ Furthermore, the court stated that a literal reading of the supervisory order directs the trial court to make a de novo determination of the venue issue on the merits.²⁴¹ The court, therefore, held that the determination of the motion to transfer venue in the voluntarily dismissed case did not bind the court when ruling on the identical motion after the case was refiled.²⁴²

X. SETTLEMENT AND CONTRIBUTION

The public policy of this state supports and encourages the compromise settlement of disputed claims because such settlements promote peace, prevent unnecessary litigation, and are conducive to the termination of litigation already in progress.²⁴³ Some statutory provisions govern the implementation of settlements because the validity of a settlement that terminates the rights of others who are not parties to the settlement can lead to drastic results. Nevertheless, the courts have been reluctant to add limitations to a settlement or statute because such action would cause those who wish to end litigation to be "wary and uncertain of what they could accomplish by settlement."²⁴⁴

The Illinois courts continue to be concerned with settlements under the Contribution Among Joint Tortfeasors Act,²⁴⁵ the provisions of which have the potential for authorizing denials of contribution under given circumstances.²⁴⁶ Among issues receiving continuing consideration is whether a settlement was entered into by the parties in "good faith." The Illinois Contribution Among Joint Tortfeasors Act releases a tortfeasor who settles in "good faith" from all liability for contribution to a joint tortfeasor.²⁴⁷

In *Ballweg v. City of Springfield*,²⁴⁸ the Illinois Supreme Court held that the settlement between the plaintiff and Henrici, the

239. *Id.*

240. *Id.* at 141, 502 N.E.2d at 1173.

241. *Id.* at 140, 502 N.E.2d at 1173.

242. *Id.* at 141, 502 N.E.2d at 1174.

243. *See Rakowski v. Lucente*, 104 Ill. 2d 317, 472 N.E.2d 791 (1984).

244. *Id.* at 325, 472 N.E.2d at 795.

245. ILL. REV. STAT. ch. 70, paras. 301-305 (Supp. 1987).

246. *See, e.g., Rakowski*, 104 Ill. 2d 317, 472 N.E.2d at 791 (1984).

247. ILL. REV. STAT. ch. 70, para. 302(c)(d) (Supp. 1987).

248. 114 Ill. 2d 107, 499 N.E.2d 1373 (1986). For a further discussion of *Ballweg*, see *supra* notes 225-28 and accompanying text.

third-party defendant, was made in "good faith."²⁴⁹ In *Ballweg*, two of the defendants filed a third-party complaint seeking contribution from Henrici.²⁵⁰ Before trial, however, Henrici entered into a settlement agreement with the plaintiff.²⁵¹ Because the circuit court found that the settlement was made in "good faith,"²⁵² it dismissed the contribution claim against Henrici.²⁵³

In the appellate court,²⁵⁴ the defendants argued that the trial court erred in dismissing their contribution claim against Henrici.²⁵⁵ They argued that the settlement agreement between the plaintiff and Henrici lacked "good faith" because at the time of the settlement, the plaintiff's claims against Henrici had expired under the statute of limitations.²⁵⁶ The appellate court held that, because the plaintiff's claims against Henrici had expired, the settlement agreement lacked consideration and, therefore, was not made in good faith.²⁵⁷

The supreme court reversed, holding that the settlement agreement was made in good faith because the plaintiff gave consideration for the settlement.²⁵⁸ The court reasoned that Henrici was still potentially liable to the plaintiff because Henrici had never raised the defense of the statute of limitations to bar any of the claims the plaintiff might have brought against him.²⁵⁹

249. *Id.* at 123, 499 N.E.2d at 1380.

250. *Id.* at 121, 499 N.E.2d at 1379.

251. *Id.*

252. *Id.*

253. *Id.* at 111-12, 499 N.E.2d at 1375.

254. *Ballweg v. City of Springfield*, 130 Ill. App. 3d 241, 473 N.E.2d 342 (4th Dist. 1984).

255. *Id.* at 251, 473 N.E.2d at 348.

256. *Id.*

257. *Id.* at 252, 473 N.E.2d at 349 (citing *LeMaster v. Amsted Industries, Inc.*, 110 Ill. App. 3d 729, 442 N.E.2d 1367 (5th Dist. 1982)). The *LeMaster* court held that a settlement is not made in "good faith" when it lacks consideration. *LeMaster*, 110 Ill. App. 3d at 736, 442 N.E.2d at 1373.

258. *Ballweg*, 114 Ill. 2d at 122, 499 N.E.2d at 1380. The court also noted that the trial judge was involved in the settlement process and had approved of the settlement. *Id.* at 122-23, 499 N.E.2d at 1380.

259. *Id.* at 122, 499 N.E.2d at 1380 (citing *Doyle v. Rhodes*, 101 Ill. 2d 1, 461 N.E.2d 382 (1984)). The *Doyle* court held that "the potential for tort liability exists until the defense [of the statute of limitations] is established." *Doyle*, 101 Ill. 2d at 10-11, 461 N.E.2d at 387.

XI. JUDICIAL DISCRETION: THE JURY

A. Voir Dire

In *Kingston v. Turner*,²⁶⁰ the Illinois Supreme Court held that the trial court did not abuse its discretion in conducting *voir dire*.²⁶¹ In *Kingston*, the plaintiffs sued the owners of two taverns under the Liquor Control Act,²⁶² seeking recovery for injuries received in an automobile accident.²⁶³ During *voir dire*, without limitation as to scope, the trial court allowed both parties' counsel to question all of the prospective jurors.²⁶⁴ After acceptance of the panel by both parties, plaintiff's counsel discovered potential biases in two of the four jurors²⁶⁵ and asked the trial court to reopen *voir dire* for further questioning of the two jurors.²⁶⁶ The trial court refused to reopen *voir dire*, stating that the panel must remain as accepted.²⁶⁷

The Illinois Supreme Court affirmed the decision of the trial court on the grounds that the plaintiff's counsel had ample opportunity to question the jurors about their biases before tendering them.²⁶⁸ The court stated that plaintiff's counsel waived any objections to these two jurors when he tendered the panel.²⁶⁹

B. Prejudicial Events During Trial

In *Campbell v. Fox*,²⁷⁰ the Illinois Supreme Court ordered a new trial because the jury had been unduly influenced by the defend-

260. 115 Ill. 2d 445, 505 N.E.2d 320 (1987). For a further discussion of *Kingston*, see *infra* notes 283-96 and accompanying text.

261. *Kingston*, 115 Ill. 2d at 465, 505 N.E.2d at 329.

262. ILL. REV. STAT. ch. 43, para. 135 (1981). Section 135, in relevant part, states:

Every person who is injured in person or property by any intoxicated person, has a right of action in his or her own name, severally or jointly, against any person who by selling or giving alcoholic liquor, causes the intoxication of such person.

Id.

263. *Kingston*, 115 Ill. 2d at 452, 505 N.E.2d at 322-23.

264. *Id.* at 465, 505 N.E.2d at 329.

265. The attorney discovered that one juror's father had owned a bar, and another juror's father had tended bar. *Id.* at 452-53, 505 N.E.2d at 323.

266. *Id.* at 453, 505 N.E.2d at 323.

267. *Id.*

268. *Id.* at 465, 505 N.E.2d at 329. During *voir dire*, plaintiff's counsel asked the first panel of jurors whether they had any relatives who were associated with dram shops. *Id.* at 452, 505 N.E.2d at 323. Plaintiff's counsel, however, failed to ask the same question of the two jurors on the second panel, which was the panel tendered and accepted for the trial. *Id.*

269. *Id.* at 465, 505 N.E.2d at 329.

270. 113 Ill. 2d 354, 498 N.E.2d 1145 (1986).

ant's assistance of a juror who had collapsed during opening statements at trial.²⁷¹ In *Campbell*, the plaintiff brought a medical malpractice action against the defendant, Dr. Fox.²⁷² During opening statements at trial, one of the jurors collapsed in the jury box.²⁷³ The defendant came to the juror's aid by carrying her from the jury box to the counsel's table where she regained consciousness.²⁷⁴ The jury was removed from the courtroom, and paramedics took the ill juror to the hospital.²⁷⁵ The trial court denied the plaintiff's motion for a mistrial because of the potential for prejudice of the jury after the events.²⁷⁶ The trial court, however, conducted limited *voir dire* to determine if the jurors had been prejudiced by the events.²⁷⁷ Because all of the jurors stated that they were not prejudiced and could still be fair and impartial, the trial continued, resulting in a verdict for the defendant.²⁷⁸

The supreme court concluded that the events at trial prejudiced the jury in the defendant's favor.²⁷⁹ The court doubted whether the jurors could make an impartial evaluation of the credibility of the defendant's testimony.²⁸⁰ Because the credibility of the parties was the pivotal factor in the case,²⁸¹ the court held that a new trial was required.²⁸²

XII. JURY INSTRUCTIONS: OBJECTIONS ON APPEAL

In *Kingston v. Turner*,²⁸³ the Illinois Supreme Court held that a party is not limited, on an appeal regarding the validity of the trial

271. *Id.* at 359, 498 N.E.2d at 1147.

272. *Id.* at 356, 498 N.E.2d at 1146.

273. *Id.* at 357, 498 N.E.2d at 1146.

274. *Id.*

275. *Id.*

276. *Id.* at 358, 498 N.E.2d at 1146.

277. *Id.* at 358, 498 N.E.2d at 1146-47. The trial court read two questions tendered by the plaintiff's counsel: (1) "Do you still feel you can be fair and impartial?" and (2) "Did the treatment rendered to the juror by Dr. Fox prejudice you in any way?" *Id.* at 358, 498 N.E.2d at 1147.

278. *Id.*

279. *Id.* at 358-59, 498 N.E.2d at 1147.

280. *Id.* at 359, 498 N.E.2d at 1147.

281. *Id.* The case centered on what the defendant told the plaintiff during the plaintiff's appointments. *Id.* at 357, 498 N.E.2d at 1146. The plaintiff testified that the defendant did not tell her that the left prosthesis would have to be removed. *Id.* Her testimony was contradicted by the defendant and his nurse who both testified that the plaintiff "refused to allow the defendant to remove the prosthesis" when the defendant told her it had to be removed. *Id.*

282. *Id.*

283. 115 Ill. 2d 445, 505 N.E.2d 320 (1987). For a further discussion of *Kingston*, see *supra* notes 260-69 and accompanying text.

court's refusal to tender a jury instruction, if the ruling is correct on any ground, to raising only those objections made during the instruction conference.²⁸⁴ In *Kingston*, the plaintiffs sued the owners of two taverns under the Liquor Control Act.²⁸⁵ During the conference on jury instructions, the plaintiffs tendered an instruction that purported to define the term "cause of intoxication" used in the Liquor Control Act.²⁸⁶ Both defendants objected to the instruction on the grounds that the definition contained therein was contrary to the provisions of the Liquor Control Act.²⁸⁷ The trial court refused to give the instruction.²⁸⁸

On appeal to the Illinois Supreme Court, the defendants presented their initial objection to the instruction raised at trial as well as a number of other objections not raised at trial.²⁸⁹ The plaintiffs argued that under Illinois Supreme Court Rule 239(b),²⁹⁰ the defendants may raise, in this appeal, only the objection that they specifically made during the instruction conference.²⁹¹ The Illinois Supreme Court disagreed.²⁹² The supreme court stated that if the trial court's refusal of a jury instruction was correct on any ground, it will stand even if based on an incorrect ground at trial.²⁹³ The supreme court, therefore, held that it may consider all of the defendants' specific objections to the instruction made on this appeal.²⁹⁴ Relying on *Pioneer Hi-Bred Corn Co. v. Northern Illinois Gas Co.*,²⁹⁵ the supreme court reasoned that without such a holding, a party at trial would be burdened with raising all possible

284. *Kingston*, 115 Ill. 2d at 456, 505 N.E.2d at 324.

285. *Id.* at 452, 505 N.E.2d at 322. For the relevant text of the Liquor Control Act, ILL. REV. STAT. ch. 43, para. 135 (1981), see *supra* note 262.

286. *Kingston*, 115 Ill. 2d at 453, 505 N.E.2d at 323. The tendered instruction was not contained in the Illinois Pattern Jury Instructions. *Id.*

287. *Id.* at 454, 505 N.E.2d at 323.

288. *Id.*

289. *Id.* at 455-56, 505 N.E.2d at 324.

290. ILL. S. CT. R. 239(b), ILL. REV. STAT. ch. 110A, para. 239(b)(1985). Rule 239(b) states in pertinent part:

Counsel may object at the conference on instructions to any instruction prepared at the court's direction, regardless of who prepared it, and the court shall rule on these objections as well as objections to other instructions. The grounds of the objections shall be particularly specified..

Id.

291. *Kingston*, 115 Ill. 2d at 455, 505 N.E.2d at 324.

292. *Id.*

293. *Id.* at 455-56, 505 N.E.2d at 324.

294. *Id.* at 456, 505 N.E.2d at 324.

295. 61 Ill. 2d 6, 329 N.E.2d 228 (1985). *Pioneer* held that if the trial court was correct in rejecting a tendered instruction on any ground, the decision will stand even if originally based on an improper ground. *Id.* at 13, 329 N.E.2d at 231.

objections to tendered jury instructions even after the trial court had sustained one of the objections.²⁹⁶

XIII. CONTINGENT FEE ARRANGEMENTS

In *Leonard C. Arnold, Ltd. v. Northern Trust Co.*,²⁹⁷ the Illinois Supreme Court held that contingent fee arrangements entered by a guardian on a minor's behalf are enforceable unless the court determines that the terms are unreasonable.²⁹⁸ The court stated that prior approval of the agreement by the trial court is unnecessary.²⁹⁹

In addition, the *Arnold* court held that Circuit Court Rule 9.20(e)³⁰⁰ of the Nineteenth Judicial Circuit is valid.³⁰¹ Rule 9.20(e) provides that the attorney's fees received in the settlement of cases involving personal injuries to minors or incompetents can not exceed twenty-five percent of the minors' or incompetents' settlement recovery, unless the attorney can substantiate by itemization a greater fee.³⁰² The court stated that this procedural rule is consistent with the requirement that contingent fee arrangements made on a minor's behalf be reasonable.³⁰³ The court held that it was imperative that the local rule not be interpreted to limit attorneys to a *quantum meruit* recovery.³⁰⁴ The rule also must not be interpreted so as to require the attorneys to prove the reasonableness of a fee of twenty-five percent or less in every case.

296. *Kingston*, 115 Ill. 2d at 455-56, 505 N.E.2d at 324. In addition, the *Kingston* court recognized that needless repetition in jury instructions should be avoided. *Id.* at 458, 505 N.E.2d at 325-26. Similarly, the practice of paraphrasing language from court opinions for use as jury instructions should be avoided because the decision may have too broad or narrow an application. *Id.* at 460, 505 N.E.2d at 326.

297. 116 Ill. 2d 157, 506 N.E.2d 1279 (1987).

298. *Id.* at 166, 506 N.E.2d at 1282.

299. *Id.* at 165-66, 506 N.E.2d at 1282.

300. Nineteenth Judicial Circuit Court Rule 9.20(e).

301. *Arnold*, 116 Ill. 2d at 167, 506 N.E.2d at 1283.

302. Nineteenth Judicial Circuit Court Rule 9.20(e).

303. *Arnold*, 116 Ill. 2d at 169, 506 N.E.2d at 1284.

304. *Id.* *Quantum meruit* means the reasonable value of the services rendered. Black's Law Dictionary 1119 (5th ed. 1968).

XIV. SIGNIFICANT CHANGES IN RULES AND STATUTORY LAW³⁰⁵

A. *New or Modified Illinois Supreme Court Rules*

1. Illinois Supreme Court Rule 203: Where Depositions May Be Taken

Effective August 1, 1987, Illinois Supreme Court Rule 203³⁰⁶ was amended.³⁰⁷ Amended Rule 203 provides that attorneys shall take depositions of plaintiffs in the county where the action is pending, unless otherwise agreed.³⁰⁸ The rule also provides that attorneys shall take depositions of other deponents in the county where they reside, are employed or transact business.³⁰⁹ The rule provides that the attorney and the deponent may agree on an alternative location at which to take the deposition.³¹⁰ Most significantly, the rule provides that the court may, in its discretion, order only a party or officer, director, or employee of a party to appear to be deposed at any place designated by the court.³¹¹

2. Illinois Supreme Court Rule 206: Method of Taking Depositions on Oral Examination

Effective August 1, 1987, Illinois Supreme Court Rule 206³¹² was amended by the addition of subsections (a)(1) and (a)(2).³¹³ An explanation of the amendments appears in the committee comments. Amended Rule 206(a)(1) provides that when a party names a corporation, partnership, association, or governmental agency as a deponent in the notice and subpoena, and describes with reasonable particularity the matters on which examination is requested, the deponent organization must designate the person or persons that will testify for it in the deposition.³¹⁴ The organization may set forth the matters on which each designated person will testify.³¹⁵ The designated persons must testify to matters known or

305. See also Wright, *Trial Briefs*, 33 I.S.B.A. Newsletter 1 (1987).

306. ILL. S. CT. R. 203, ILL. REV. STAT. ch. 110A, para. 203 (Supp. 1987).

307. *Id.*

308. *Id.* The change was effected in order to protect nonparty witnesses from unwarranted interference with their personal or business activities when amended Rule 206(a) is employed. The court may no longer designate by order an alternative place to depose a non-party. See ILL. REV. STAT. ch. 110A, para. 206(a) committee comment (1987).

309. ILL. S. CT. R. 203, ILL. REV. STAT. ch. 110A, para. 203 (Supp. 1987).

310. *Id.*

311. *Id.*

312. ILL. S. CT. R. 206, ILL. REV. STAT. ch. 110A, para. 206 (1987).

313. *Id.*

314. *Id.* at para. 206(a)(1).

315. *Id.*

reasonably available to the organization.³¹⁶ Amended Rule 206(a)(2) requires that a party who intends to audio-visually record the deposition must advise all parties to the deposition of that fact in the notice.³¹⁷ The amended Committee Comments state that the procedure under the amended Rule 206(a)(1) is virtually the same as that of Federal Rule of Civil Procedure 30(b).³¹⁸ They also state that the purpose of the amended rule is to discourage representative depositions, and that the amended rule is not intended to expand the court's subpoena power.³¹⁹

3. Committee Comment 204(c): Issuance of Subpoenas on Doctors

New committee comment to Illinois Supreme Court Rule 204(c)³²⁰ became effective July 8, 1986.³²¹ The new comment states that rule 204(c) implies that the trial court, in its discretion, may refuse to issue a subpoena for deposition of a physician or surgeon unless the moving party makes a preliminary showing of good cause for the subpoena.³²² The movant must be able to show that although he has received the medical records in the case, there is a necessity for the deposition.³²³

4. Illinois Supreme Court Rule 282: Representation of Corporations in Small Claims Cases

Effective August 1, 1987, Illinois Supreme Court Rule 282³²⁴ was amended by the addition of subsection (b).³²⁵ Amended Rule 282(b) provides that a corporation cannot appear as a plaintiff, assignee, subrogee, or counterclaimant in a small claims case without counsel.³²⁶ A corporation, however, may represent itself as a defendant in such proceedings, when the claim does not exceed fifteen hundred dollars.³²⁷ By definition, a small claim is a civil

316. *Id.*

317. *Id.* at para. 206(a)(2).

318. *Id.* at committee comments.

319. *Id.*

320. ILL. S. CT. R. 204(c), ILL. REV. STAT. ch. 110A, para. 204(c) committee comment (Supp. 1987).

321. *Id.*

322. *Id.*

323. *Id.*

324. ILL. S. CT. R. 282, ILL. REV. STAT. ch. 110A, para. 282 (Supp. 1987).

325. *Id.*

326. *Id.* at para. 282(b).

327. *Id.*

action for money not in excess of twenty-five hundred dollars.³²⁸ When a small claim exceeds fifteen hundred dollars, therefore, an attorney must be employed to represent a corporate defendant.

Justice Simon's dissent to Rule 282(b)³²⁹ was filed on July 13, 1987.³³⁰ Justice Simon stated that Rule 282(b) conflicts with section 2-416 of the Illinois Code of Civil Procedure,³³¹ which authorizes corporations to represent themselves as plaintiffs and defendants in small claims cases.³³² Justice Simon argued that the courts will be confronted with the problem of deciding which authority, the legislature or supreme court, they will follow when dealing with these inconsistent rules.³³³

5. Illinois Supreme Court Rule 286: Informal Hearings in Small Claims Cases

Effective August 1, 1987, Illinois Supreme Court Rule 286³³⁴ was amended by the addition of subsection (b).³³⁵ Amended Rule 286(b) provides that the court, on its own motion or that of any party, may decide any small claims case under one thousand dollars by means of an informal hearing.³³⁶ The rule also provides that the court, in such an informal hearing, may relax the rules of procedure and evidence, call anyone present to testify, and conduct direct and cross-examination of any witness or party.³³⁷ The court is also required to render judgment at the conclusion of the hearing and explain the reasons for the judgment to all parties.³³⁸

6. Illinois Supreme Court Rule 287: Leave to File Motions in Small Claims Cases

Small claims rules were intended to provide procedures that would simplify and make inexpensive the disposition of small claims. Rulings on procedures that are not specifically prescribed by these rules sometimes made the handling of those cases as difficult and expensive as in other cases. Remedial action by the adoption of even more constricting rules of procedure should ameliorate

328. ILL. S. CT. R. 281, ILL. REV. STAT. ch. 110A, para. 281 (1985).

329. ILL. S. CT. R. 282(b), 107 Ill. 2d xcvi, xcvi (1986) (Simon, J., dissenting).

330. *Id.* (Simon, J., dissenting).

331. ILL. REV. STAT. ch. 110, para. 2-416 (1985).

332. ILL. S. CT. R. 282(b), 107 Ill. 2d xcvi, xcvi (1986) (Simon, J., dissenting).

333. *Id.* (Simon, J., dissenting).

334. ILL. S. CT. R. 286, ILL. REV. STAT. ch. 110A, para. 286 (Supp. 1987).

335. *Id.*

336. *Id.* at para. 286(b).

337. *Id.*

338. *Id.*

this situation. Effective August 1, 1987, Illinois Supreme Court Rule 287³³⁹ was amended by the addition of subsection (b).³⁴⁰ Amended Rule 287(b) provides that no party may file a motion in a small claims case without first obtaining leave of the court.³⁴¹ The amendment to the committee comments to Rule 287(b)³⁴² states that the purpose of the Supreme Court Rules in small claims cases is to simplify procedures and reduce costs.³⁴³ The comments also state that the court should permit motions in small claims cases only if dispositive of the claim and in the interest of justice.³⁴⁴

7. Illinois Supreme Court Rules 86 through 95: Mandatory Arbitration

Enabling legislation enacted by the Illinois General Assembly granted the Illinois Supreme Court the authority to adopt rules implementing the Mandatory Arbitration System.³⁴⁵ The legislation was intended to expedite, with less expensive procedures, civil cases when the claim asserted does not exceed fifteen thousand dollars, or when the circuit court, at a pretrial conference, determines that the amount in controversy does not exceed that amount.³⁴⁶

The Illinois Supreme Court, through its implementing rules, makes arbitration procedures mandatory only in those judicial circuits that elect to utilize this method, when approved by the supreme court, or in those circuits directed to so utilize this system of dispute resolution.³⁴⁷ New Illinois Supreme Court Rules 86 through 95,³⁴⁸ known as the Mandatory Arbitration Rules, became effective June 1, 1987.³⁴⁹ New Rule 86 provides that civil actions solely involving money damages less than fifteen thousand dollars are subject to mandatory arbitration.³⁵⁰ Even if the claim is for more than fifteen thousand dollars, the court may order the case to arbitration if the court believes the claim's value is less than fifteen thousand dollars.³⁵¹ In addition, Rule 86 provides that the Illinois

339. ILL. S. CT. R. 287, ILL. REV. STAT. ch. 110A, para. 287 (1987).

340. *Id.*

341. *Id.* at para. 287(b).

342. *Id.* at committee comments.

343. *Id.*

344. *Id.*

345. ILL. REV. STAT. ch. 110, para. 2-1001A *et seq.* (1985).

346. ILL. REV. STAT. ch. 110, para. 2-1001A (1985).

347. ILL. S. CT. R. 86(a), ILL. REV. STAT. ch. 110A, para. 86(a) (Supp. 1987).

348. ILL. S. CT. RULES 86-95, ILL. REV. STAT. ch. 110A, paras. 86-95 (Supp. 1987).

349. *Id.*

350. *Id.* at para. 86(b). The Illinois Supreme Court must approve of the adoption of this procedure by each judicial circuit. *Id.* at para. 86(a).

351. *Id.* at para. 86(b).

Code of Civil Procedure and Supreme Court Rules apply to the arbitration proceedings whenever the Mandatory Arbitration Rules do not provide guidance.³⁵² The committee comments to Rule 86³⁵³ state that any party may reject the arbitrator's decision and proceed to trial.³⁵⁴

Rule 87 provides that an arbitration panel of one to three members³⁵⁵ shall be appointed from a list of practicing members of the bar and retired judges.³⁵⁶ The rule also provides that the chairman of the panel must either be a retired judge or have practiced law for at least three years.³⁵⁷ In addition, the rule provides for the compensation of the arbitrators.³⁵⁸

New Rule 88 provides that at least sixty days notice of the date, time, and place of the arbitration hearing must be given to the parties.³⁵⁹ In addition, Rule 88 requires that the hearing must be scheduled and held within one year of the filing date, unless the court continues the matter upon the showing by a party of good cause.³⁶⁰ The committee comments to Rule 88 state that the time limitation is not intended to be a period of limitation, but rather, a reasonable expectation.³⁶¹

New Rule 89 provides that all discovery must be completed prior to the arbitration hearing.³⁶² Furthermore, Rule 89 provides that, except by leave of the court for good cause shown, the court shall not permit any discovery after the hearing for the purpose of gathering new evidence for trial.³⁶³ The committee comments to Rule 89 suggest that good cause is shown for additional discovery when a change in circumstances has occurred between the arbitration hearing and a requested trial date.³⁶⁴

New Rule 90 provides the evidentiary rules for arbitration hearings.³⁶⁵ Rule 90(a) provides that the arbitrators have the power to

352. *Id.* at para. 86(a).

353. *Id.* at committee comments.

354. *Id.*

355. *Id.* at 87(b). The arbitration panel consists of three members unless the parties agree to a lesser number. *Id.*

356. *Id.* at para. 87(a).

357. *Id.* at para. 87(b).

358. *Id.* at para. 87(e). Each arbitrator receives one hundred dollars for each half-day of service. *Id.*

359. *Id.* at para. 88.

360. *Id.*

361. *Id.* at committee comments.

362. *Id.* at para. 89.

363. *Id.*

364. *Id.* at committee comments.

365. *Id.* at para. 90.

administer oaths, determine evidentiary issues and decide the facts and law of the case.³⁶⁶ Subsection (b) provides that the established evidentiary rules in Illinois are applicable to arbitration hearings.³⁶⁷ Subsection (c) provides for the presumptive admissibility of documents into evidence without foundation or proof as long as the adverse party is given thirty days written notice with a copy of the document.³⁶⁸ Subsection (d) provides that a party may use the written opinion or testimony of an expert witness at the hearing as long as the adverse party is given thirty days written notice with a statement notifying the adverse party of the expert's name, qualifications, subject matter, basis of conclusions, and opinion.³⁶⁹ Subsection (e) provides that any party, in conformity with section 2-1101 of the Code of Civil Procedure,³⁷⁰ may subpoena the maker of a document admissible under subsection (c), and may examine the maker at the hearing as if on cross-examination.³⁷¹ Subsection (f) provides that section 2-1102 of the Code of Civil Procedure³⁷² applies to arbitration hearings.³⁷³ Subsection (g) similarly provides that Illinois Supreme Court Rule 237³⁷⁴ applies to arbitration

366. *Id.* at para. 90(a). Issues that arise during the hearing are decided by the chairperson of the panel. *Id.*

367. *Id.* at para. 90(b).

368. *Id.* at para. 90(c).

369. *Id.* at para. 90(d).

370. ILL. REV. STAT. ch. 110, para. 2-1101 (1985). Section 2-1101 states:

Subpoenas. The clerk of any court in which an action is pending shall, from time to time, issue subpoenas for those witnesses and to those counties in the State as may be required by either party. Every clerk who shall refuse so to do shall be guilty of a petty offense and fined any sum not to exceed \$100. An order of court is not required to obtain the issuance by the clerk of a subpoena duces tecum. For good cause shown, the court on motion may quash or modify any subpoena or, in the case of a subpoena duces tecum, condition the denial of the motion upon payment in advance by the person in whose behalf the subpoena is issued of the reasonable expense of producing any item therein specified.

Id.

371. ILL. S. CT. R. 90(e), ILL. REV. STAT. ch. 110A, para. 90(e) (Supp. 1987).

372. ILL. REV. STAT. ch. 110, para. 2-1102 (1985). Section 2-1102 states:

Examination of adverse party or agent. Upon the trial of any case any party thereto or any person for whose immediate benefit the action is prosecuted or defended, or the officers, directors, managing agents or foreman of any party to the action, may be called and examined as if under cross-examination at the instance of any adverse party. The party calling for the examination is not concluded thereby but may rebut the testimony thus given by countertestimony and may impeach the witness by proof of prior inconsistent statements.

Id.

373. ILL. S. CT. R. 90(f), ILL. REV. STAT. ch. 110A, para. 90(f) (Supp. 1987).

374. ILL. S. CT. R. 237, ILL. REV. STAT. ch. 110A, para. 237 (1985). Supreme Court Rule 237 provides for compelling the appearance of witnesses at trial. *Id.*

hearings.³⁷⁵

New Rule 91 provides that, if a party fails to attend the arbitration hearing, the panel will make an award in the party's absence.³⁷⁶ The party, by his absence, thereafter waives the right to reject the award and object to the entry by the court of a judgment on the award.³⁷⁷ The court, however, has the discretion to vacate the judgment under sections 2-1301³⁷⁸ and 2-1401³⁷⁹ of the Illinois Code of Civil Procedure, and order a rehearing in arbitration.³⁸⁰

New Rule 92 defines an award as the determination of the case in favor of a party in the arbitration hearing.³⁸¹ Rule 92 provides that the award must dispose of all the claims and cannot exceed fifteen thousand dollars, excluding interest and costs.³⁸² The rule also provides that the court can enter judgment on the award by the motion of any party, unless one of the parties has filed a notice of rejection of the award and a request for trial pursuant to Rule 93.³⁸³

New Rule 93 provides that any party present at arbitration may file, within thirty days of the filing of the award, a written notice of rejection of the award and request to proceed to trial, with a certificate of service of such notice on all parties.³⁸⁴ According to the rule, all of the parties may proceed to trial upon one party's filing of a notice of rejection.³⁸⁵ Subsection (b) provides that no mention of arbitration may be made at trial and no arbitrator may be called to testify at trial.³⁸⁶

New Rule 94 provides the forms of the oath of arbitrators, award of arbitrators and notice of award.³⁸⁷ New Rule 95 sets

375. ILL. S. CT. R. 90(g), ILL. REV. STAT. ch. 110A, para. 90(g) (1987).

376. ILL. S. CT. R. 91, ILL. REV. STAT. ch. 110A, para. 91 (Supp. 1987).

377. *Id.*

378. ILL. REV. STAT. ch. 110, para. 2-1301 (1985). Section 2-1301 states in relevant part:

The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.

Id.

379. ILL. REV. STAT. ch. 110, para. 2-1401 (1985). Section 2-1401 provides for relief from final orders and judgments. *Id.*

380. ILL. S. CT. R. 91, ILL. REV. STAT. ch. 110A, para. 91 (Supp. 1987).

381. ILL. S. CT. R. 92(a), ILL. REV. STAT. ch. 110A, para. 92(a) (Supp. 1987).

382. *Id.* at para. 92(b).

383. *Id.* at para. 92(c).

384. ILL. S. CT. R. 93(a), ILL. REV. STAT. ch. 110A, para. 93(a) (Supp. 1987).

385. *Id.*

386. *Id.* at para. 93(b).

387. ILL. S. CT. R. 94, ILL. REV. STAT. ch. 110A, para. 94 (Supp. 1987).

forth the form of the notice of rejection of the award.³⁸⁸ Under section 2-1008A of the Illinois Code of Civil Procedure,³⁸⁹ an evaluation of the effectiveness of mandatory court-annexed arbitration is to be undertaken and reported to the General Assembly on or before January 31, 1989, and annually thereafter.

B. New or Modified Illinois Code of Civil Procedure Sections

As part of the Illinois General Assembly's continuing response to what has been termed the "insurance crisis," several statutes were enacted in 1986 which are intended to discourage further and reduce the number of lawsuits concerned with medical malpractice. One such device is to be effectuated by pleading restrictions with respect to punitive damages. Another device is a remittitur of excessive punitive damages and channelling the punitive damage award to the injured party, his or her attorney, and to a state agency, as set forth in the following sections.

1. Section 2-604.1: Pleading of Punitive Damages

New section 2-604.1 of the Illinois Code of Civil Procedure³⁹⁰ became effective November 25, 1986.³⁹¹ Section 2-604.1 provides that, in all tort cases in which punitive damages are permitted, no prayer for punitive damages can be included in the complaint.³⁹² The plaintiff, however, may later amend the complaint by motion to include a prayer for punitive damages with the permission of the court.³⁹³ The court will grant such motion to amend the complaint if the plaintiff shows a reasonable likelihood of proving facts at trial that would support an award of punitive damages.³⁹⁴ Such a motion must be made within thirty days of the close of discovery.³⁹⁵ Any such amendment is timely under the applicable statute of limitations if the original pleading was timely.³⁹⁶

388. *Id.* at para. 95.

389. ILL. REV. STAT. ch. 110, para. 2-1008A (1985).

390. ILL. REV. STAT. ch. 110, para. 2-604.1 (Supp. 1987). For a further discussion of section 2-604.1, see M. Pope & J. Freveletti, *Tort Reform Act*, 18 LOY. U. CHI. L.J. 839, 848-49 (1986).

391. ILL. REV. STAT. ch. 110, para. 2-604.1 (Supp. 1987).

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

2. Section 2-1207: Remittitur of an Award of Punitive Damages

New section 2-1207 of the Illinois Code of Civil Procedure³⁹⁷ became effective November 25, 1986.³⁹⁸ Section 2-1207 provides that the trial court has the discretion to enter a remittitur and a conditional new trial on the award of punitive damages if it believes the award is excessive.³⁹⁹ In addition, the court can apportion the punitive damages among the plaintiff, his attorney, and the Illinois Department of Rehabilitation Services.⁴⁰⁰

3. Section 2-611: Attorney Sanctions

In an effort to discourage and eliminate ill-founded and frivolous claims in pleadings and other documents, section 2-611 of the Illinois Code of Civil Procedure⁴⁰¹ was amended in order to provide more stringent sanctions for papers filed in litigation that are not well-founded in fact or law, or are interposed for an improper purpose. The amended section is substantially the same as Federal Rule of Procedure 11, which is being utilized considerably in the federal system and may lend impetus to use of amended section 2-611 in the state system.

Amended section 2-611⁴⁰² took effect on November 25, 1986.⁴⁰³ Amended section 2-611 requires that all pleadings, motions, and other papers be signed either by an attorney of record or by the submitting party if he is representing himself.⁴⁰⁴ The signature certifies that the signatory has read the document and believes, after reasonable inquiry, that it is based on fact and supported by existing law or a good faith argument for the modification of existing law.⁴⁰⁵ The document cannot be submitted for any improper purpose.⁴⁰⁶ Unsigned documents presented to the court will be stricken unless signed immediately upon notice of the omission.⁴⁰⁷

397. *Id.* at para. 2-1207. For a further discussion of section 2-1207, see M. Pope & J. Freveletti, *Tort Reform Act*, 18 LOY. U. CHI. L.J. 839, 848 (1986).

398. ILL. REV. STAT. ch. 110, para. 2-1207 (Supp. 1987).

399. *Id.*

400. *Id.*

401. *Id.* at para. 2-611. For a further discussion of section 2-611, see M. Pope & J. Freveletti, *Tort Reform Act*, 18 LOY. U. CHI. L.J. 839, 849-51 (1986).

402. ILL. REV. STAT. ch. 110, para. 2-611 (Supp. 1987).

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* Improper purposes include the submission of the document to harass or to cause unnecessary delay or unnecessary increased cost of litigation. *Id.*

407. *Id.*

Sanctions will be imposed by the court on the person who submits a signed document that violates this section.⁴⁰⁸ Section 2-611 proceedings are to be a part of the civil action in which the document was filed, and are not to be a separate cause of action giving rise to separate proceedings.⁴⁰⁹

4. Section 2-1003: Discovery and Insurance Information

Effective November 25, 1986, subsection (e) was added to section 2-1003 of the Illinois Code of Civil Procedure.⁴¹⁰ This subsection provides that a person does not have to furnish certain insurance information pursuant to a discovery request.⁴¹¹

5. Section 2-1107.1: Jury Instructions on Plaintiff's Contributory Fault

New section 2-1107.1 of the Illinois Code of Civil Procedure⁴¹² became effective November 25, 1986.⁴¹³ This section provides that the court shall instruct the jury in tort actions that the plaintiff is barred from recovery if the jury finds that the plaintiff is more than fifty percent at fault for the proximate cause of his injury.⁴¹⁴ From the statutory language of section 2-1107.1, it is made to appear mandatory that the instruction be given whether or not a plaintiff's contributory fault has been established. Further, the limitation of more than fifty percent puts a cap on recovery in those cases in which a plaintiff could recover some damages irrespective of how blameworthy he or she may have been with regard to the proximate cause of the injury or damage. When read in conjunction with new section 2-1116, discussion of which follows, the General Assembly has put an end to the "pure" comparative negligence doctrine established by the Illinois Supreme Court in *Alvis v. Ribar*,⁴¹⁵ in favor of a "modified" comparative negligence system.

408. *Id.* The sanctions may include the reasonable expenses caused by the filing of the document. *Id.*

409. *Id.*

410. *Id.* at para. 2-1003.

411. *Id.* at para. 2-1003(e).

412. ILL. REV. STAT. ch. 110, para. 2-1107.1 (Supp. 1987). For a further discussion of section 2-1107.1, see M. Pope & J. Freveletti, *Tort Reform Act*, 18 LOY. U. CHI. L.J. 839, 842 (1986).

413. ILL. REV. STAT. ch. 110, para. 2-1107.1 (Supp. 1987).

414. *Id.*

415. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

6. Section 2-1116: Limitation on Recovery in Tort Actions Because of Plaintiff's Contributory Fault

New section 2-1116 of the Illinois Code of Civil Procedure⁴¹⁶ became effective November 25, 1986.⁴¹⁷ This section provides that if the jury finds that the plaintiff is more than fifty percent at fault, the plaintiff's contributory fault bars any recovery for his injury.⁴¹⁸ Conversely, the section provides that if the jury finds that the plaintiff is fifty percent or less at fault, his contributory negligence merely reduces his recovery in proportion to his fault.⁴¹⁹

7. Section 2-1117: Joint Liability in Tort Actions

New section 2-1117 of the Illinois Code of Civil Procedure⁴²⁰ became effective November 25, 1986.⁴²¹ Section 2-1117 states that multiple defendants in a tort action are jointly and severally liable for the plaintiff's past and future medically related expenses.⁴²² This section provides that any defendant who is less than twenty-five percent at fault is severally, but not jointly, liable for any other damages.⁴²³ Conversely, the section provides that any defendant who is twenty-five or more percent at fault is jointly and severally liable for any other damages.⁴²⁴ Medical malpractice and pollution control violation cases are expressly excluded from the operation of section 2-1117 by provisions of section 2-1118.⁴²⁵ A practical effect of section 2-1117 is the elimination from joint liability of those "deep pocket" defendants who occasionally were joined in lawsuits for the purpose of responding in damages where substantially more responsible defendants were impecunious. Any prospect for asserting a viable contribution claim by the target defendant was, of course, dim.

416. ILL. REV. STAT. ch. 110, para. 2-1116 (Supp. 1987). For a further discussion of section 2-1116, see M. Pope & J. Freveletti, *Tort Reform Act*, 18 LOY. U. CHI. L.J. 839, 841-842 (1986).

417. ILL. REV. STAT. ch. 110, para. 2-1116 (Supp. 1987).

418. *Id.*

419. *Id.*

420. *Id.* at para. 2-1117. For a further discussion of section 2-1117, see M. Pope & J. Freveletti, *Tort Reform Act*, 18 LOY. U. CHI. L.J. 839, 844-46 (1986).

421. ILL. REV. STAT. ch. 110, para. 2-1116 (Supp. 1987).

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* at para. 2-1118.

8. Section 2-1205.1: Reduction in Recovery for Medical Insurance Payments

New section 2-1205.1 of the Illinois Code of Civil Procedure⁴²⁶ became effective November 25, 1986.⁴²⁷ Section 2-1205.1 applies to tort cases not covered under section 1205 of the Illinois Code of Civil Procedure.⁴²⁸ Both sections modify the collateral source rule which denied any benefit to a tortfeasor for funds received by a claimant due to contractual benefits that a claimant procured from his or her own private funds such as medical, hospital or other insurance.⁴²⁹ In effect, these statutes merely shift the risk and burden of payment from the tortfeasor's insurance company to the claimant's insurance company. Subrogation actions may vitiate the advantage intended by the shift. Section 2-1205.1 provides that the recovery in tort cases is reduced by the amount of medical expenses in excess of twenty-five thousand dollars that have been paid or have become payable to the plaintiff at the date of judgment by any insurance company not a party to the judgment.⁴³⁰ Section 2-1205.1 also provides that application for such a reduction must be made within thirty days of the date of judgment,⁴³¹ and any reduction shall neither exceed fifty percent of the judgment,⁴³² nor impair another's right of recoupment.⁴³³ In addition, this section provides that damages are increased by the amount of any insurance costs paid by the plaintiff within two years prior to the injury or at any time after the injury for the benefits the plaintiff has received for medical expenses.⁴³⁴

9. Section 13-212: Statute of Repose for Medical Malpractice Actions by Minors

Under former sections 13-211 and 13-212 of the Code of Civil Procedure, if a person entitled to bring an action for medical malpractice was under the age of eighteen, he or she would have been

426. *Id.* at para. 2-1205.1. For a further discussion of section 2-1205.1, see M. Pope & J. Freveletti, *Tort Reform Act*, 18 LOY. U. CHI. L.J. 839, 847 (1986).

427. ILL. REV. STAT. ch. 110, para. 2-1116 (Supp. 1987).

428. *Id.* Section 2-1205, ILL. REV. STAT. ch. 110, para. 2-1205 (1985), covers "action[s] to recover for . . . negligence or other wrongful act, not including intentional torts, on the part of a licensed hospital or physician." *Id.*

429. *Saunders v. Schultz*, 20 Ill. 2d 301, 170 N.E.2d 163 (1960); *Freer v. Rowden*, 108 Ill. App. 2d 335, 345, 247 N.E.2d 635 (1969).

430. ILL. REV. STAT. ch. 110, para. 2-1205.1 (Supp. 1987).

431. *Id.* at para. 1205.1(1).

432. *Id.* at para. 1205.1(3).

433. *Id.* at para. 1205.1(2).

434. *Id.* at para. 1205.1(4).

entitled to bring such an action within two years after the disability was removed. That period now has been shortened by legislation which deletes reference to medical malpractice in section 13-211 and adds a new provision to section 13-212. Effective July 1, 1987 and applicable to cases filed on or after January 1, 1988, subsection (b) was added to section 13-212 of the Illinois Code of Civil Procedure.⁴³⁵ Subsection (b) provides that, except as provided in section 13-215 of the Illinois Code of Civil Procedure,⁴³⁶ a cause of action for medical malpractice that accrued when the plaintiff was under eighteen years of age, is barred if not brought within eight years of the occurrence alleged as the cause of the plaintiff's injury,⁴³⁷ and before the plaintiff's twenty-second birthday.⁴³⁸ Any action that is barred or must be brought within less than three years of July 20, 1987, because of this section, may be brought within three years of July 20, 1987.⁴³⁹

10. Sections 15-1101 through 15-1706: Illinois Mortgage Foreclosure Law

New sections 15-1101 through 15-1706⁴⁴⁰ became effective July 1, 1987.⁴⁴¹ These sections are known as the Illinois Mortgage Foreclosure Law.⁴⁴² Among the significant changes effected by the revised foreclosure procedure is: (1) the provision of a redemption period prior to foreclosure sale, instead of after such sale as required under the old law; (2) the preservation of the borrower's equity and remittance of any surplus to the mortgagor or as otherwise directed by the court; (3) the right of a mortgagor to reinstate the mortgage by curing all defaults then existing within ninety days from the date the court obtains jurisdiction over the mortgagor;

435. ILL. REV. STAT. ch. 110, para. 13-212 (Supp. 1987).

436. ILL. REV. STAT. ch. 110, para. 13-215 (1985). Section 13-215 states:

Fraudulent concealment. If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action and not afterwards.

Id.

437. ILL. REV. STAT. ch. 110, para. 13-212(b) (Supp. 1987).

438. *Id.*

439. *Id.*

440. ILL. REV. STAT. ch. 110, paras. 15-1101 to 1706 (Supp. 1987). For a further discussion of the new Illinois Mortgage Foreclosure Law, see Note, *The New Illinois Mortgage Foreclosure Law and Installment Sales Contracts*, 19 LOY. U. CHI. L.J. 245 (1987).

441. ILL. REV. STAT. ch. 110, paras. 15-1101 to 1706 (Supp. 1987).

442. *Id.* at para. 15-1101.

(4) the requirement of more detailed information in notices of foreclosure and sale than was formerly required; and (5) the provision for physical possession of the mortgaged real estate by the mortgagor during foreclosure and for a period of thirty days after sale confirmation under prescribed circumstances.

11. Sections 20-101 through 20-105: Recovery of Fraudulently Obtained Public Funds

New sections 20-101 through 20-105⁴⁴³ became effective July 1, 1987.⁴⁴⁴ These sections provide for the recovery in a civil action of any remuneration paid by the state or any local government unit and received by a person by any fraudulent means.⁴⁴⁵

XV. CONCLUSION

The foregoing discussion reveals changes in civil procedure in considerable depth and breadth and in a variety of subject areas. Although some of these developments are primarily extensions and modifications of existing law, certain changes present significantly new concepts, particularly in the areas of medical malpractice pleadings and limitations, small claims procedures, court-annexed mandatory arbitration, comparative fault limitations, and the mortgage foreclosure law, which revises some former provisions but also sets forth entirely new provisions effecting this important procedure. All are worthy of closer examination by litigation counsel.

443. *Id.* at paras. 20-101 to 105.

444. *Id.*

445. *Id.* at para. 20-102.