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Civil Procedure

*Kenneth Kandaras**
*and Catherine Wozniak***

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I. INTRODUCTION

This article reviews cases decided by the Illinois Supreme Court during the *Survey* period involving issues of civil procedure. The cases discussed cover a variety of areas, including statutes of limitations and repose,¹ jurisdiction,² venue,³ pleadings and discovery,⁴ and appeals.⁵ The article also summarizes legislative changes to the Illinois Code of Civil Procedure enacted during the *Survey* period.

Due to the large volume of Illinois Supreme Court cases decided in the area of civil procedure during the *Survey* period, no appellate court cases are discussed. Although this article is not intended to be a comprehensive guide to Illinois civil procedure case law during the past year, it will highlight significant changes in procedural law and comment on the likely impact of those changes.

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1. See *infra* notes 6-40 and accompanying text.
 2. See *infra* notes 41-88 and accompanying text.
 3. See *infra* notes 89-112 and accompanying text.
 4. See *infra* notes 113-57 and accompanying text.
 5. See *infra* notes 180-251 and accompanying text.

II. STATUTES OF LIMITATION AND REPOSE

A. Rule 103(b) And Voluntary Dismissal

Illinois Supreme Court Rule 103(b)⁶ requires dismissal of a plaintiff's complaint when the plaintiff fails to exercise due diligence in obtaining service of process on the defendant after the complaint is filed. If the failure to exercise due diligence occurs prior to the expiration of the applicable statute of limitations, the entire action or the counts concerning any unserved defendant may be dismissed without prejudice.⁷ If the failure occurs after the expiration of the applicable statute of limitations, the dismissal is with prejudice.⁸

Prior to the Illinois Supreme Court decision in *O'Connell v. St. Francis Hospital*,⁹ a plaintiff could respond to a defendant's motion for a Rule 103(b) dismissal with prejudice by moving for a voluntary dismissal of a complaint pursuant to section 2-1009 of the Illinois Code of Civil Procedure.¹⁰ After a voluntary dismissal, a plaintiff was afforded a minimum of one year to refile the complaint, regardless of whether the applicable statute of limitations had run. Therefore, a plaintiff was given a second chance to effect service properly although the statute of limitations for the claim had expired.

In *O'Connell v. St. Francis Hospital*,¹¹ the Illinois Supreme Court closed this legal loophole.¹² In *O'Connell*,¹³ the supreme court

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

7. *Id.*

8. *Id.*

9. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).

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

11. 112 Ill. 2d 273, 492 N.E.2d 1322.

12. For an example of the utilization of this legal loophole, see *Dillie v. Bisby*, 136 Ill. App. 3d 170, 483 N.E.2d 307 (3d Dist. 1985). In *Dillie*, the appellate court held that a trial court had discretion to consider which motion would be ruled on first. *Id.*

13. The procedural history of *O'Connell* is as follows:

Plaintiff filed a medical malpractice complaint against a hospital and doctors on June 29, 1983, which was the last day before the applicable statute of limitations expired. On February 24, 1984, the first summons was issued. All defendants were served with process between March 12 and March 20, 1984. Defendants then moved to dismiss under Supreme Court Rule 103(b) for lack of due diligence. Plaintiff sought and was granted a continuance on the dismissal hearing until July 23, 1984. In the meantime, plaintiff moved to voluntarily dismiss without prejudice under the Illinois Code of Civil Procedure § 2-1009 and refile pursuant to the Illinois Code of Civil Procedure § 13-217. The circuit court denied defendants' Rule 103(b) motion. Plaintiff then refiled and defendants again moved for a Rule 103(b) motion. The circuit court denied the defendants' motion but certified an appeal to the appellate court under Supreme Court Rule 308. The appellate court denied the appeal and defendants petitioned the

held that a trial court must rule on a defendant's Rule 103(b) motion to dismiss before it considers a plaintiff's motion for voluntary dismissal.¹⁴ In reaching its decision, the supreme court was concerned with the administration of justice without delay.¹⁵ The court stated that due diligence in serving process is essential to rendering justice fairly and promptly. The court reasoned that the plaintiff's actions in failing to exercise due diligence in service, voluntarily dismissing the complaint, and refileing long after the expiration of the applicable statute of limitations, were a clear example of the unnecessary delay of justice.¹⁶ Therefore, the *O'Connell* court held that defendants' Rule 103(b) motion must be heard on its merits prior to a ruling on the plaintiff's motion to dismiss under section 2-1009.¹⁷ The court further held that section 2-1009, to the extent that it dictated a dismissal upon plaintiff's motion, was unconstitutional. Additionally, the *O'Connell* court held that a trial court ruling on a Rule 103(b) motion may consider the circumstances surrounding the service of process of plaintiff's original and refiled complaint.¹⁸

Following the *O'Connell* decision, plaintiffs who have failed to exercise due diligence in service can no longer circumvent a dismissal with prejudice under Rule 103(b) by merely voluntarily dismissing their complaint and refileing it. Defendants now have the opportunity to have their Rule 103(b) motions heard on the merits prior to the plaintiffs voluntarily dismissing their complaints.

O'Connell may affect a class of cases unanticipated by the court. *O'Connell* concerned a plaintiff who sought to refile the complaint in Illinois and thereby circumvent the applicable statute of limitations. The opinion did not address the circumstance of a plaintiff who seeks to dismiss the Illinois complaint and initiate a new suit in a state with a longer statute of limitations. In this instance, a dismissal of the Illinois suit would allow the plaintiff to secure the benefit of the other state's law, rather than circumvent Illinois law.

supreme court. The supreme court heard the appeal and held that the defendants' Rule 103(b) motion should be ruled on first. *O'Connell*, 112 Ill. 2d at 276-78, 492 N.E.2d at 1323-24.

14. *Id.* at 283, 492 N.E.2d at 1327.

15. *Id.* at 282, 492 N.E.2d at 1326.

16. *Id.* See also *Meyers v. Bridgeport Machines of Textron, Inc.*, 113 Ill. 2d 112, 497 N.E.2d 745 (1986) (Ryan, J., dissenting). In his dissent, Justice Ryan criticized the abuse of the privilege granted to plaintiffs of voluntarily dismissing a complaint and refileing. *Id.* at 123, 497 N.E.2d at 750. The *Meyers* case was ready for trial in McHenry County when the plaintiff voluntarily dismissed and refiled in Cook County. *Id.*

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

18. *Id.*

The *O'Connell* decision, however, is categorical in its procedural dictates. According to *O'Connell*, if a defendant's motion to dismiss is meritorious, the court must dismiss the plaintiff's complaint with prejudice. The potential res judicata effect of this dismissal threatens the plaintiff's ability to initiate suit in another state. It remains unsettled whether an involuntary dismissal is a decision on the merits for purposes of res judicata and thereby preclusive of a future suit. If *O'Connell* is strictly applied to a case in which the plaintiff seeks dismissal of the Illinois complaint to initiate suit in a new state, the plaintiff may be barred from seeking relief in another state: a result that impinges on the other state's interest in its administration of justice.

B. Statutes Of Repose

During the *Survey* period, the Illinois Supreme Court interpreted statute of limitations provisions in both the medical malpractice and products liability areas.¹⁹ Under section 13-212 of the Illinois Code of Civil Procedure,²⁰ a medical malpractice action must be brought within two years of the date on which the claimant knew or reasonably should have known of the injury. In either case, the action cannot be brought more than four years after the occurrence of the act or omission alleged to have caused the injury.²¹ The effective date of the amendment providing the four-year repose period was September 19, 1976.²² Under the statute, it is evident that any cause of action occurring after September 19, 1976, must be brought within four years of the occurrence alleged to be the cause of the injury. It is, however, uncertain whether the four-year statute of repose is applicable to injuries sustained prior to September 19, 1976, the effective date of the statute. Moreover, it is unclear whether the four-year statute of repose is applicable to injuries sustained prior to the effective date of the statute, but discovered after the effective date.

In *Mega v. Holy Cross Hospital*,²³ the Illinois Supreme Court provided some clarification of these issues. In *Mega*, the court held that the four-year statute of repose was applicable to injuries sustained prior to the effective date of the statute.²⁴ *Mega* involved the consolidated appeal of two cases. The common issue in the consol-

19. See *infra* notes 20-40 and accompanying text.

20. ILL. REV. STAT. ch. 110, para. 13-212 (1985).

21. *Id.*

22. ILL. REV. STAT. ch. 83, para. 22.1 (Supp. 1976).

23. 111 Ill. 2d 416, 490 N.E.2d 665 (1986).

24. *Id.* at 429, 490 N.E.2d at 671.

idated appeal was whether the plaintiffs' actions arising from medical treatment were barred by the four-year repose period. In the first case, the plaintiff filed a complaint on September 24, 1982, alleging an injury arising from treatment received in 1949. The plaintiff discovered his injury in March of 1981.²⁵ In the second case, the plaintiff filed his action on December 8, 1981, for injuries resulting from treatment received between 1947 and 1954, and discovered on January 8, 1980. In both cases, the treatment occurred more than four years before the effective date of the statute and the actions were filed more than four years after the effective date of the statute.²⁶

The supreme court held that, in both cases, the plaintiffs' actions were barred by the four-year statute of repose.²⁷ The court reasoned that when a statute shortens a limitations period or provides a limitations period where one previously did not exist, a plaintiff whose cause of action arose before that date generally is allowed a reasonable period of time to bring his action.²⁸ The *Mega* court concluded that a reasonable time in this case was the time period provided by the statute of repose, computed from its effective date, September 19, 1976. Because neither plaintiff had filed his claim within this four-year period, their actions were considered untimely.²⁹

The *Mega* court realized that its holding had the effect of barring some actions prior to the time plaintiffs discovered their injuries.³⁰ The court, however, reasoned that the period of repose gave effect to a different policy than the period of limitations.³¹ The court stated that the period of repose was intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of his cause of action.³² Thus, following *Mega*, a cause of action will be barred by the four-year period of repose regardless of whether or not the plaintiff has knowledge of the injury.

Similar to the four-year repose period in the medical malpractice statute of limitations, section 13-213 of the Illinois Code of Civil

25. *Id.* at 419, 490 N.E.2d at 667.

26. *Id.*

27. *Id.* at 429, 490 N.E.2d at 671.

28. *Id.* at 420, 490 N.E.2d at 667.

29. *Id.* at 422, 490 N.E.2d at 668.

30. *Id.*

31. *Id.*

32. *Id.*

Procedure³³ provides for an eight-year period of repose in actions based on strict liability in tort. The statute provides that no action may be brought more than eight years after the date on which the injury, death, or damage occurred.³⁴ Section 13-213 applies to any cause of action occurring on or after January 1, 1979, involving any product that was in the stream of commerce, or entered the stream of commerce prior to, on, or after January 1, 1979.³⁵

The Illinois Supreme Court first evaluated the effect of this provision in *Costello v. Unarco Industries, Inc.*³⁶ In *Costello*, the court held that the plaintiff's cause of action was filed in a timely manner when the action was instituted within three years of the effective date of the statute and two years of discovery of the injury.³⁷ In *Costello*, the plaintiff filed a strict liability tort action in 1981. The plaintiff's injury arose from exposure to asbestos which terminated in 1945. The plaintiff, however, did not discover the resultant injury until 1980.³⁸ Although the court held that the plaintiff's cause of action was timely, the court emphasized that it was not deciding what constituted a reasonable period for discovering conditions after the effective date of the statute.³⁹

The court's holding in *Costello* provides a plaintiff whose injury occurred prior to the effective date of the statute of repose but was discovered after such date, with a reasonable period of time after the effective date of the statute to bring an action. Although the court did not decide specifically what constituted a reasonable period of time, the dissenting opinion asserted that the decision implied that the eight-year period of repose in the statute was the reasonable time period.⁴⁰

III. JURISDICTION

A. *Personal Jurisdiction: Procedure for Challenging Jurisdiction*

In *R. W. Sawant & Co. v. Allied Programs*,⁴¹ the Illinois Supreme Court held that, after a default judgment was entered, a defendant could challenge a court's jurisdiction by filing a special and limited

33. ILL. REV. STAT. ch. 110, para. 13-213 (1985).

34. *Id.*

35. *Id.* at para. 13-213(g).

36. 111 Ill. 2d 476, 490 N.E.2d 675 (1986).

37. *Id.* at 484, 490 N.E.2d at 678.

38. *Id.* at 477-78, 490 N.E.2d at 675.

39. *Id.* at 484, 490 N.E.2d at 678.

40. *Id.* at 486, 490 N.E.2d at 680 (Clark, C.J., concurring).

41. 111 Ill. 2d 304, 489 N.E.2d 1360 (1986).

appearance.⁴² In *Sawant*, the trial court entered a default judgment against the defendant Allied. Allied then filed a special and limited appearance contesting jurisdiction and a motion to quash the service of summons. Allied's motion, filed approximately six months after it was served with process and over a month after entry of the judgment, raised the question of whether Allied was amenable to in personam jurisdiction in Illinois. Allied argued that neither the long-arm statute nor the due process clause would permit the court to exercise jurisdiction in the pending case. The trial court ruled that section 2-301, which permits the defendant to file a special appearance to challenge jurisdiction, was inapplicable after the entry of a judgment, and treated the motion as a section 2-1401 post-trial attack upon a final judgment. The *Sawant* court held that, pursuant to section 2-1401, petitioners must demonstrate affirmatively their diligence in seeking relief.⁴³ Considering Allied's delay in seeking relief, the trial court concluded that Allied had not acted with due diligence and denied its motion.⁴⁴ The supreme court, however, held that the defendant could contest a judgment entered without in personam jurisdiction and without regard to time or diligence by filing a special appearance pursuant to section 2-301.⁴⁵

Sawant revitalizes a long-recognized procedure for challenging a void judgment. The court held a judgment is void if entered without in personam jurisdiction, without valid service of process, or if rendered by a court lacking subject matter jurisdiction over the controversy. Though section 2-1401 appears to codify post-trial attacks on judgments in a nearly exclusive manner, subsection (f) states that the section does not preclude other existing methods of attack on void judgments.⁴⁶ Historically well-rooted, the availability of an independent attack upon a void judgment has been underutilized. In several cases, reviewing courts have invoked the principle *sua sponte* to relieve a party from his apparent inability to comply with section 2-1401.⁴⁷ Similarly, the *Sawant* court provided that a special appearance pursuant to section 2-301 may be used to challenge a void judgment, regardless of time or the de-

42. *Id.* at 310, 489 N.E.2d at 1363.

43. *Id.* at 308, 489 N.E.2d at 1362.

44. *Id.*

45. *Id.* at 310, 489 N.E.2d at 1363.

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

47. *Home State Savings Ass'n v. Powell*, 73 Ill. App. 3d 915, 392 N.E.2d 598 (1st Dist. 1979); *G. Brock Stewart, Inc. v. Valenti*, 43 Ill. App. 3d 673, 357 N.E.2d 180 (1st Dist. 1976).

defendant's lack of due diligence.⁴⁸

Sawant may adversely affect a plaintiff who, due to the passage of time, is unable to prove that his judgment is premised on jurisdiction over the defendant. The passage of time and defendant's lack of diligence become significant when they result in the unavailability of evidence and facts needed by the plaintiff to oppose defendant's challenge. For example, a witness who could testify to service of process or a defendant's contacts with the forum may become unavailable due to the defendant's delay. *Sawant* presented no facts that the defendant's delay prejudiced the plaintiff. The decision, however, establishes that a defendant's lack of diligence is not a relevant consideration in vacating a judgment.⁴⁹

B. Personal Jurisdiction: Long-Arm Jurisdiction

In *R. W. Sawant & Co. v. Allied Programs*,⁵⁰ the Illinois Supreme Court held that the Illinois Insurance Code could not provide a basis for jurisdiction if the long-arm statute did not.⁵¹ In *Sawant*, a New York insurance carrier insured an Illinois importer through a New York broker. When several of the claims were not paid, the New York broker was sued. The plaintiffs argued that the defendant was subject to jurisdiction under certain portions of the Illinois Insurance Code.⁵² The court rejected the plaintiffs' argument, and held that the Illinois Insurance Code could not provide jurisdiction

48. *Sawant*, 111 Ill. 2d at 309, 489 N.E.2d at 1363.

49. *Id.* at 309-10, 489 N.E.2d 1363. There is a distinction between the absence of subject matter jurisdiction and in personam jurisdiction. The broad ruling in *Sawant* is most appropriate when the rendering court lacks subject matter jurisdiction. In this instance, no actions by the parties can cure the infirmity. Jurisdiction cannot be conferred by the parties' consent, nor is the issue affected by evaporative evidence. Moreover, curbing the wrongful exercise of judicial power aids not only the defendant, who is relieved of the judgment, but also protects the community at large from the rendering court's continued usurpation of power.

In personam jurisdiction, however, is quite different. The court has long recognized that the defendant may consent to in personam jurisdiction and waive any objection to the sufficiency of service of process. Thus, the infirmity may be obviated by defendant's voluntary consent to jurisdiction. Conversely, a defendant's lack of diligence in pursuing relief is itself a volitional act. Should the delay prejudice the opponent, it is hard to imagine why Illinois ought to afford the defendant relief from the judgment. This form of relief certainly is not compelled by the United States Constitution. Though the due process clause insures that no state can enter a binding judgment without an appropriate basis of in personam jurisdiction and notice reasonably calculated to apprise him of the suit, states are nonetheless free to adopt reasonable procedures for the invocation of constitutional rights. See U.S. CONST. amend. XIV. Absent compliance, the individual may be deemed to have waived the right. See *Henry v. Mississippi*, 379 U.S. 443 (1965).

50. 111 Ill. 2d 304, 489 N.E.2d 1360.

51. *Id.* at 311, 489 N.E.2d at 1364.

52. ILL. REV. STAT. ch. 73, para. 733-3 (1985).

when the long-arm statute did not.⁵³

The court also concluded that the defendant was not subject to jurisdiction under the long-arm statute itself.⁵⁴ Under the Illinois long-arm statute, any person who transacts business in Illinois or commits a tortious act in Illinois submits to the jurisdiction of Illinois courts for any cause of action arising from those acts.⁵⁵ The supreme court in *Sawant* observed that all of defendant Allied's activities took place in New York. Noting that Allied was contacted for the job in New York, conducted all its services in New York, and paid for the job in New York,⁵⁶ the court concluded that Allied was not transacting business in Illinois.⁵⁷ Additionally, the court reasoned, jurisdiction was not proper under the tortious-act section of the long-arm statute because the only injury was an economic loss felt in Illinois.⁵⁸ The court concluded that this loss was insufficient to confer jurisdiction in Illinois when all defendant's activities occurred outside of Illinois.⁵⁹

Sawant provides some guidance in determining when jurisdiction exists as a result of the defendant's transaction of business within the state. Consistent with earlier supreme court decisions,⁶⁰ a defendant is not subject to jurisdiction under the long-arm statute when the defendant has not solicited business from an Illinois party or substantial performance of the contract is not required in Illinois.⁶¹ A defendant does not transact business in Illinois merely

53. *Sawant*, 111 Ill. 2d at 311, 489 N.E.2d at 1364.

54. *Id.* at 312, 489 N.E.2d at 1364.

55. ILL. REV. STAT. ch. 110, para. 2-209 (1985).

56. *Sawant*, 111 Ill. 2d at 312, 489 N.E.2d at 1364.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See, e.g.,* Cook Associates, Inc. v. Lexington United Corp., 87 Ill. 2d 190, 429 N.E.2d 847 (1981); Green v. Advance Ross Electronics Corp., 86 Ill. 2d 431, 427 N.E.2d 1203 (1981).

61. A United States District Court for the Northern District of Illinois summarized the prevailing approach to Illinois' long-arm statute as follows:

Illinois courts make a clear distinction between contacts initiated in Illinois by an agent of a nonresident defendant and contacts made by an agent of the plaintiff in the non-resident defendant's state. In the former situation the defendant has entered the state and contacted the plaintiff here, and consequently the courts have found jurisdiction. . . .

Where the plaintiff's agent has gone into a foreign jurisdiction to initiate or obtain a sale, however, the courts have found no jurisdiction absent other significant contacts. . . .

. . . Illinois courts have examined . . . where the contract or transaction was performed.

Caicos Petroleum Service Corp. v. Hunsaker, 551 F. Supp. 152 (N.D. Ill. 1982).

The court noted that jurisdiction is likely to be found when either party was required to

because its contract conferred rights upon an Illinois party. *Sawant* underscores the need to establish that the defendant sought to conduct some business activity in the state before asserting jurisdiction under section 2-209(a)(1).⁶²

In *Yates v. Muir*,⁶³ the Illinois Supreme Court again interpreted the tortious-act section of the long-arm statute.⁶⁴ The supreme court in *Yates* held that an Illinois court could not exercise long-arm jurisdiction over a Kentucky attorney who had performed legal services in Kentucky for an Illinois resident.⁶⁵ In *Yates*, the defendant attorney was a resident of Kentucky who was licensed to practice law in Kentucky. The plaintiff was an Illinois resident who retained the defendant to represent him in a federal disability retirement claim. The prosecution of the claim was unsuccessful and the defendant failed to execute a timely appeal.⁶⁶ The plaintiff subsequently filed a legal malpractice claim in Madison County, Illinois, and the defendant contested jurisdiction.⁶⁷

The defendant argued that Illinois did not have jurisdiction because all of the legal services were provided in Kentucky. The plaintiff responded that Illinois jurisdiction was proper because the defendant was required to file the appeal in Chicago, which would have constituted the "last act" necessary for the tort charge.⁶⁸ The court agreed with the defendant that Illinois did not have jurisdiction.⁶⁹ The court reasoned that the plaintiff had retained the defendant, a Kentucky attorney, for services regarding a federal administrative claim. Because these services did not require the attorney to appear in any court in Illinois, the *Yates* court held that

perform major portions of a contract within the state. The court further explained that, the Illinois long-arm statute required a higher threshold of contacts for asserting in personam jurisdiction than the minimum contacts test implicit in the due process clause. *Id.* at 154-56.

62. *Sawant*, 111 Ill. 2d 304, 489 N.E.2d 1360 (1986). See also *Young v. Colgate Palmolive Co.*, 790 F.2d 567 (7th Cir. 1986). In *Young*, the court rejected the theory of "impact jurisdiction" as a basis of in personam jurisdiction under the Illinois long-arm statute. See generally Angst and Finks, *Jurisdiction Over Nonresidents In Illinois — Recent Developments*, 64 CHGO. BAR REC. 306 (1983).

63. 112 Ill. 2d 205, 492 N.E.2d 1267 (1986).

64. *Id.* at 208, 492 N.E.2d at 1268.

65. *Id.* at 210, 492 N.E.2d at 1269.

66. *Id.* at 206-07, 492 N.E.2d at 1267.

67. *Id.*

68. *Id.* at 208-09, 492 N.E.2d at 1268. In *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 435, 176 N.E.2d 761, 763 (1961), the Illinois Supreme Court established the "last event doctrine," holding that the place of a wrong for the tortious act provision of the long-arm statute is where the "last event" takes place.

69. *Yates*, 112 Ill. 2d at 209-10, 490 N.E.2d at 1269.

Illinois jurisdiction was improper.⁷⁰

Yates adds significant meaning to the provision in the long-arm statute that jurisdiction may be exercised over a nonresident who commits a tortious act in the state. In 1961, the Illinois Supreme Court held that jurisdiction was appropriate when the last event necessary for establishing liability occurred in Illinois.⁷¹ Reasoning that liability in tort arises only when the plaintiff is injured and sustains damages, the court held that jurisdiction was proper when the defendant could reasonably foresee that its conduct outside the state would cause injury in the state of Illinois. Clearly, *Yates* limits the scope of in personam jurisdiction under the tortious-act provision. Thus, without evidence of an intent to commit a tort in Illinois, a defendant is not subject to jurisdiction simply because he has breached a duty to an Illinois resident, or because the economic consequence of a tort ultimately is felt in Illinois.

The effect of *Yates* may be most profound in its treatment of professional malpractice suits. The *Yates* holding is consistent with the due process clause; a defendant cannot be compelled to attend a trial outside of the state in which his professional services were performed or marketed.⁷² The *Yates* court relied on a federal district court case⁷³ which reasoned, because professional services are personal in nature, a plaintiff who seeks out those services from someone in another state may not subject that person to jurisdiction in the plaintiff's state of residence.⁷⁴ Accordingly, in *Yates*, because all the services were performed in Kentucky, the defendant could not be compelled to attend a trial in Illinois.

Another case interpreting the tortious-act section of the Illinois long-arm statute was *In re Marriage of Highsmith*.⁷⁵ In *Highsmith*, the Illinois Supreme Court held that an out-of-state divorced father who sent his child to live in Illinois without providing for her sup-

70. *Id.*

71. *Gray*, 22 Ill. 2d 432, 176 N.E.2d 761.

72. *See also* *Cabbage v. Merchant*, 744 F.2d 665, *cert. denied*, 470 U.S. 1005 (9th Cir. 1984) (defendants held to be marketing services in forum state though plaintiff sought defendants' services and was treated at defendants' facility); *S.R. v. City of Fairmont*, 280 S.E.2d 712 (W. Va. 1981) (defendant was required to travel to the forum state because it indirectly marketed its services by accepting referrals from a forum state facility); *Kenson v. Stevenson*, 604 F.Supp. 792 (D. Maine 1985) (defendant held to be "doing business" within the forum state).

73. *Gelineau v. New York University Hospital*, 375 F. Supp. 661 (D.N.J. 1974).

74. *Gelineau*, 375 F. Supp. at 667. The *Gelineau* court acknowledged that the effect of a defendant's negligence may be felt only in the plaintiff's state. Nevertheless, the court reasoned that it would be fundamentally unfair to require the defendant to travel to whatever distant jurisdiction the plaintiff may venture into. *Id.*

75. 111 Ill. 2d 69, 488 N.E.2d 1000 (1986).

port had committed a tortious act within Illinois which gave Illinois courts jurisdiction over him.⁷⁶ In *Highsmith*, the father was awarded custody of his daughter in 1970 after a dissolution proceeding in California.⁷⁷ In 1981, the father sent the child to live with her maternal grandparents in Illinois without seeking a modification of the dissolution decree.⁷⁸ Subsequently, the child's mother moved to Illinois and was awarded custody of the child and child support.⁷⁹ When the father failed to make child support payments, the mother filed a petition for payment of the money in the Circuit Court of Henry County, Illinois.⁸⁰ The father challenged the court's jurisdiction over his person.⁸¹

In holding that jurisdiction was proper, the *Highsmith* court reasoned that the father had submitted to the jurisdiction of Illinois courts by his commission of a tortious act within the state.⁸² The court noted that the defendant had an implied duty under the California judgment to support his child.⁸³ When the defendant removed the child from the family's home in California and left her with her grandparents in Illinois, the court reasoned that the defendant had placed in the state an individual who might be totally unsupported.⁸⁴ Accordingly, defendant's subsequent failure to pay child support was the commission of a tortious act within the state.⁸⁵

Highsmith is significant in two respects. First, the decision elucidates the fact that jurisdiction under the tortious-act provision of the long-arm statute may be premised upon the breach of any duty imposed by law.⁸⁶ In *Highsmith*, the court relied upon the defendant's implied duty to support his child. This duty arose from the decree of dissolution that awarded the defendant custody of the child.⁸⁷ Second, *Highsmith* lends important clarification to the scope of the tortious-act provision. In *Sawant*⁸⁸ and *Yates*⁸⁹, the Illinois Supreme Court held that the mere breach of a duty to an

76. *Id.* at 75-76, 488 N.E.2d at 1004.

77. *Id.* at 70, 488 N.E.2d at 1001.

78. *Id.*

79. *Id.* at 71, 488 N.E.2d at 1001.

80. *Id.* at 71, 488 N.E.2d at 1002.

81. *Id.*

82. *Id.*

83. *Id.* at 74, 488 N.E.2d at 1003.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See *supra* notes 49-61 and accompanying text.

89. See *supra* notes 62-73 and accompanying text.

Illinois resident did not constitute the commission of a tort in the state. In *Highsmith*, however, the defendant's breach of an implied duty was sufficient to sustain jurisdiction. These cases may be distinguished by noting that the defendant in *Highsmith* sent the child to Illinois and subjected her to risk by withholding child support. Thus, in *Highsmith*, any injury to an Illinois resident was caused by the defendant's breach of duty.

IV. VENUE

A. *Intrastate Forum Non Conveniens*

In *Meyers v. Bridgeport Machine Division of Textron, Inc.*,⁹⁰ the court denied the defendant's motion to transfer a case based on the doctrine of forum non conveniens. In *Meyers*, the plaintiff, a resident of McHenry County, Illinois, was injured in McHenry County by one of defendant's machines. The plaintiff subsequently sued the defendant, a Cook County business, in a Cook County Circuit Court. After noting that the facts and witnesses were distributed evenly among Cook, McHenry, Lake, and Kane Counties,⁹¹ the court held that the plaintiff's choice of a forum was reasonable.⁹² Specifically, the court noted that the private interest of the parties did not favor defendant's request that the case be litigated in McHenry County.⁹³ The court concluded that the Cook County suit permitted reasonable accessibility to witnesses and sources of proof, and presented no decided obstacles to a fair trial. Because the defendant did business in Cook County, the filing of a suit in that county insured that the claim would be tried in a community with a relationship to the controversy.⁹⁴

The court's decision in *Meyers* highlights two areas of significance. First, the court rejected the defendant's contention that the private interest of the parties was subordinate to the public interest aspect of forum non conveniens. The *Meyers* court specifically held that the two interests are of equal value. Second, in applying

90. 113 Ill. 2d 112, 497 N.E.2d 745 (1986).

91. *Meyers*, 113 Ill. 2d 112, 497 N.E.2d at 745 (1986). In *Meyers*, the plaintiff, a resident of McHenry County, was injured at his grinding machine job in McHenry County. He received medical care in McHenry County. The plaintiff's attending surgeon maintained an office in Lake County while the defendant's medical expert was from Kane County. The grinding machine that injured the plaintiff was manufactured in Kane County, whereas defendant corporation had a registered agent in Cook County, and the expert engineers resided in Cook County. *Id.* at 120-21, 497 N.E.2d at 748-49.

92. 113 Ill. 2d at 121, 497 N.E.2d at 749.

93. *Id.* at 121, 497 N.E.2d at 749.

94. *Id.* at 120-21, 497 N.E.2d at 748.

the public interest consideration, the court implicitly distinguished between interstate and intrastate cases. In interstate cases,⁹⁵ a claim by a foreign plaintiff pursuing a claim unrelated to Illinois may be dismissed unless other justification for suit exists. In intrastate cases, a court is reluctant to disturb the plaintiff's choice of forum. *Meyers* was factually posited in an intrastate context. The plaintiff resided and was injured in McHenry County. Thus, despite Cook County's tenuous connection to the claim, the court was reluctant to disturb the plaintiff's choice of forum.⁹⁶

B. *Interstate Forum Non Conveniens*

In *Brummett v. Wepfer Marine, Inc.*,⁹⁷ the Illinois Supreme Court denied the defendant's motion to dismiss based on the doctrine of forum non conveniens. The plaintiff in *Brummett* was employed as a cook on the defendant's ship.⁹⁸ The plaintiff claimed she suffered an injury on the vessel while it was docked near Madison County, Illinois. Relying upon the Jones Act, a federally created cause of action, the plaintiff filed the complaint in the Circuit Court of Madison County.⁹⁹ The defendant contended that Madison County was not a convenient forum for litigating the claim because both the plaintiff and defendant were residents of Tennessee, the defendant did not conduct business in Illinois, eight of nine crew members were residents of Tennessee, all records of the vessel were in Tennessee, and all of plaintiff's treating physicians practiced in Tennessee.¹⁰⁰

The court denied the defendant's motion to dismiss and held that, because the tort occurred in the state, Illinois had a significant public interest in providing a forum for the injured party.¹⁰¹ In reaching its decision, the court drew upon a United States Supreme Court decision¹⁰² that identified two relevant considerations in deciding an issue of forum non conveniens: the private in-

95. See *infra* notes 96-107 and accompanying text.

96. *Meyers*, 113 Ill. 2d at 121, 497 N.E.2d at 749. For a criticism of the deference paid by the majority to plaintiff's choice of forum, see the dissenting opinion of this case by Judge Ryan. *Id.* at 123, 497 N.E.2d at 750 (Ryan, J., dissenting). Justice Ryan criticized the plaintiff's alleged abuse of the voluntary dismissal privilege. *Id.* For further discussion of the abuse of voluntary dismissal privilege, see *infra* notes 6-18 and accompanying text.

97. 111 Ill. 2d 495, 490 N.E.2d 694 (1986).

98. *Id.* at 497, 490 N.E.2d at 696.

99. *Id.* at 497, 490 N.E.2d at 695.

100. *Id.* at 498, 490 N.E.2d at 696.

101. *Id.* at 499-500, 490 N.E.2d at 697.

102. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

terest of the parties in having a convenient forum in which to present their evidence,¹⁰³ and the public interest of the forum state and other interested states.¹⁰⁴ Despite the parties' accessibility to a Tennessee court, the *Brummett* court reasoned that Illinois had a strong public interest in protecting persons and property within the state from unsafe practices and conditions.¹⁰⁵

Brummett largely may preclude the use of forum non conveniens as a basis for dismissing claims within which a significant act occurred in Illinois. Though the plaintiff did not rely upon Illinois substantive law for relief, the *Brummett* court reasoned that Illinois had an interest in providing the plaintiff a forum to redress the defendant's locally occurring wrongful conduct. Thus, whether the issue is one of tort or contract, *Brummett* supports the conclusion that Illinois has a significant interest in considering the legality of activity occurring within the state.

The *Brummett* court noted two instances in which the principle of forum non conveniens commonly is invoked: when the plaintiff is a non-resident and the cause of action did not arise in Illinois,¹⁰⁶ and when the parties would be inconvenienced greatly and subjected to excessive litigation expenses if required to try the case in Illinois.¹⁰⁷ Additionally, the court in *Brummett* stated that a trial court would be justified in dismissing an action based upon the forum's congested court calendar, only if a foreign forum would resolve the dispute more expeditiously.¹⁰⁸

Another significant forum non conveniens case decided by the Illinois Supreme Court during the *Survey* period was *Kemner v. Monsanto Co.*¹⁰⁹ In *Kemner*, the court held that appellate and supreme court denials of a defendant's petitions for leave to appeal from an adverse forum non conveniens ruling have no res judicata effect.¹¹⁰ *Kemner* illustrates that relitigation of the forum issue will not be barred merely by an appellate or supreme court denial of

103. *Id.* at 509. The factors relevant to the issue of the private interests of the parties in having a convenient forum are the relative cost of litigation in the forum, the location and availability of witnesses, and the source of the parties' proof. *Id.*

104. *Id.* The matters relevant to the public interest of the forum state include the desire and duty of a community, through its courts and juries, to pass judgment upon conduct occurring within its locale; the state's relative interest in applying its laws, both substantive and conflict of laws, to events that the state has an interest in controlling; and, the state's interest in affording the plaintiff a forum. *Id.*

105. *Brummett*, 111 Ill. 2d at 499-500, 490 N.E.2d at 697.

106. *Id.* at 499, 490 N.E.2d at 697.

107. *Id.* at 502, 490 N.E.2d at 698.

108. *Id.* at 502-03, 490 N.E.2d at 698.

109. 112 Ill. 2d 223, 492 N.E.2d 1327 (1986).

110. *Id.* at 240-41, 492 N.E.2d at 1335.

leave to appeal from an adverse ruling.¹¹¹ Although it did not affect the disposition of the case before it, the *Kemner* court noted the adoption of new Illinois Supreme Court Rule 187,¹¹² which requires that forum non conveniens motions be filed not later than ninety days after the last day allowed for the filing of a party's answer. Rule 187 also requires that hearings on motions of forum non conveniens be scheduled to allow sufficient time to conduct discovery on issues of fact.¹¹³ Consistent with *Kemner*, an initial denial of the motion does not bar the defendant from making a timely motion to reconsider newly acquired evidence.

V. PLEADINGS AND DISCOVERY

A. Amendment of Pleadings

In *Zeh v. Wheeler*,¹¹⁴ the Illinois Supreme Court interpreted the meaning of the "same transaction or occurrence" requirement and the relation back rule¹¹⁵ in the context of amended pleadings. In *Zeh*, the supreme court held that an amendment changing the location in a slip-and-fall case does not relate back to the original complaint.¹¹⁶ The plaintiff, Josephine Zeh, filed a complaint on February 2, 1981, alleging that she had sustained personal injuries while descending the stairway of an apartment building. The original complaint named John B. Wheeler, John B. Wheeler Company, and Claud and Agnes Hess as co-defendants. The defendants operated, managed, and controlled the apartment building located at 4400 South Wallace in Chicago. Defendant John B. Wheeler filed a motion to dismiss the complaint, alleging that he was a trustee under a land trust and held only legal title to the property. The court granted Wheeler's motion to dismiss and held that the owners of the property named in the complaint were Claud and Agnes Hess. The remaining defendants, John B. Wheeler Company and Claud and Agnes Hess, answered the complaint, admitting ownership of the premises, but generally denying

111. *Id.*

112. Ill. S. Ct. R. 187, Ill. Rev. Stat. ch. 110A, para. 187 (1985).

113. *Id.* For an expanded discussion of new Illinois Supreme Court Rule 187, see *infra* notes 253-58 and accompanying text.

114. 111 Ill. 2d 266, 489 N.E.2d 1342 (1986).

115. ILL. REV. STAT. ch. 110, para. 2-616(b) (1986). When certain requirements are met, the Illinois Code of Civil Procedure, under the relation back rule, permits an amended pleading to avoid the impact of the statutes of limitations by relating back to the date of the filing of the original pleading. *Zeh*, 111 Ill. 2d at 270, 489 N.E.2d at 1344.

116. *Zeh*, 111 Ill. 2d at 282, 489 N.E.2d at 1349-50.

the remaining allegations.¹¹⁷

On February 1, 1983, an order was entered allowing the plaintiff to amend her complaint to change the address on the complaint from 4400 South Wallace to 4400 South Lowe. Oral arguments revealed that the two addresses were two blocks apart, that John B. Wheeler managed both properties, and that Claud and Agnes Hess were the beneficial owners of the property at 4400 South Wallace, but had no interest in the property at 4400 South Lowe, which was owned by another man.¹¹⁸

On March 15, 1983, defendants John B. Wheeler Company and Claud and Agnes Hess moved to dismiss the amended complaint, arguing that the amended complaint did not relate back to the filing of the original complaint because the amendment stated a new and different cause of action which did not arise out of the same transaction or occurrence set forth in the original complaint. On July 8, 1983, the plaintiff voluntarily dismissed Claud and Agnes Hess. On October 25, 1983, the circuit court granted defendants' motion and dismissed the amended complaint with prejudice.¹¹⁹ The appellate court affirmed the judgment of the circuit court and the Illinois Supreme Court granted plaintiff's petition for leave to appeal.¹²⁰

The Illinois Supreme Court affirmed the dismissal of the complaint with prejudice.¹²¹ The court held that the correct location of a slip-and-fall accident is a material element of the negligence action, and changing the location substantially changes the occurrence.¹²² The court was unpersuaded by plaintiff's argument that the change of address was merely a redescription of the place where the incident occurred.¹²³ Although the court acknowledged that Illinois courts are liberal in allowing amendments to pleadings after the applicable statute of limitations has expired, the court held that the failure to properly plead the location of the injury is not a technical defect that can be cured after the running of the

117. *Id.* at 268-69, 489 N.E.2d at 1343.

118. *Id.* at 269, 489 N.E.2d at 1343.

119. *Id.* at 270, 489 N.E.2d at 1344.

120. *Id.* at 268, 489 N.E.2d at 1343.

121. *Id.* at 283, 489 N.E.2d at 1350.

122. *Id.* at 276-77, 489 N.E.2d at 1347.

123. *Id.* *But see* Harastej v. Reliable Car Rental, Inc., 58 F.R.D. 197 (D.P.R. 1972), in which an amendment changing "1020 Ashford Ave." to "1010 Ashford Ave." was permitted because the original complaint also stated that the accident occurred at the defendant's place of business. Because the defendant owned only one business on Ashford Avenue, the defendant was not prejudiced by the amendment. The facts in the complaint, aside from the erroneous address, identified the correct location. *Id.* at 200.

statute of limitations.¹²⁴

The court reasoned that the location of the accident was significant because it gave the defendants notice of the occurrence which would serve as the basis of the complaint against the defendant.¹²⁵ Although the defendant John B. Wheeler Company managed both properties, the court noted that nothing in the record showed that John B. Wheeler Company knew or had any notice that the plaintiff's original complaint invoked a claim for an injury arising at the amended address.¹²⁶ Because the facts alleged in the original complaint failed to put all the defendants on notice of the matter covered by the amendments, the court held that plaintiff's amended complaint would not be allowed to relate back to the filing of the original complaint.¹²⁷

The court in *Zeh* considered a problematic issue in the relation back doctrine. Application of the doctrine is simple when the amendment merely poses a different form of liability than that alleged in the original pleading. Thus, the original pleading provides the defendant with sufficient cause to investigate the transaction or occurrence. Literal application of the rule, however, is more troublesome when, as in *Zeh*, the amendment seeks to correct a mistaken date or location. Not infrequently, a pleading mistakenly identifies the location or time of a critical event. A subsequent amendment substituting a different location or date may refer to a completely different transaction or occurrence.

The court in *Zeh* employed a pragmatic approach to the rule. Drawing upon decisions interpreting an analogous federal rule,¹²⁸ the court held that factors to be considered in determining whether an amended complaint relates back to the time of filing of the original complaint are whether the defendant received adequate notice of the claim against him and whether the defendant would be prejudiced unfairly if the amendment is allowed to relate back.¹²⁹

The *Zeh* decision did not address the effect of the defendant's timely knowledge of facts learned outside the pleadings. The court noted that there was no contention that the defendant actually knew of the location relied upon by the plaintiff. The court, however, stated that it need not decide to what extent such notice may be considered in determining whether an amendment related back

124. *Zeh*, 111 Ill. 2d at 278, 489 N.E.2d at 1347.

125. *Id.* at 280, 489 N.E.2d at 1349.

126. *Id.* at 281, 489 N.E.2d at 1349.

127. *Id.* at 282, 489 N.E.2d at 1349-50.

128. FED. R. CIV. P. 15(c).

129. *Zeh*, 111 Ill. 2d at 280, 489 N.E.2d at 1348.

under the provisions of its code.¹³⁰ In *Zeh*, the court distinguished between the Illinois Code of Civil Procedure and Federal Rule of Civil Procedure 15(c). In federal cases, the court noted that Rule 15(c) provided ample support to look beyond the pleadings to determine whether the defendant was aware of the correct transaction or occurrence.

B. Affidavits

In *Purtill v. Hess*,¹³¹ the Illinois Supreme Court held that a counteraffidavit in a medical malpractice case was sufficient to withstand a motion for summary judgment under Supreme Court Rule 191(b) although it did not demonstrate affirmatively the expert's competency to testify to the appropriate local standard of care.¹³² In *Purtill*, the dispute concerned whether the defendant exercised proper care in the examination and diagnosis of the plaintiff's condition. The defendant moved for summary judgment, filing his own affidavit in support. The affidavit stated that his conduct conformed to the applicable standard of care exercised by reasonably well-qualified physicians in his locality.¹³³ It further stated that additional diagnostic tests would have been too painful and unnecessary in the absence of other symptoms. The affidavit did not explain that a more accurate diagnosis was difficult because of limited medical resources in the defendant's locality.¹³⁴

A counter-affidavit provided by plaintiff's expert stated that the expert was familiar with the nationally observed minimum standards of acceptable medical care of the plaintiff's condition and that the defendant had violated the standard in several regards. The trial court struck the plaintiff's counteraffidavit, concluding that it did not affirmatively demonstrate the expert's competency to testify to the appropriate local standard of care.¹³⁵ In the absence of the plaintiff's counter-affidavit, the court granted the defendant's motion for summary judgment and the appellate court

130. *Id.* at 282, 489 N.E.2d at 1349.

131. 111 Ill. 2d 229, 489 N.E.2d 867 (1986).

132. *Id.* at 251, 489 N.E.2d at 876.

133. *Id.* at 236-37, 489 N.E.2d at 869-70.

134. *Id.*

135. *Id.* at 237-39, 489 N.E.2d at 870. In determining the standard of care for judging the defendant physician's alleged negligence, Illinois courts have followed the "similar locality" rule, which requires "a physician to possess and apply that degree of knowledge, skill, and care which a reasonably well-qualified physician in the same or similar community would bring to a similar case under similar circumstances." *Id.* at 242, 489 N.E.2d 872.

affirmed.¹³⁶

The supreme court reversed. In reversing, the *Purtill* court distinguished between the sufficiency of an expert's affidavit in a summary judgment context and the sufficiency of expert testimony at trial.¹³⁷ The court conceded that summary judgment is proper in a medical malpractice action when the plaintiff fails to demonstrate an ability to offer competent evidence at trial regarding the applicable standard of care. Nevertheless, the court held that the plaintiff's affidavit was sufficient because it questioned whether the defendant violated a nationally observed minimum standard of care.¹³⁸ The court stated that summary judgment might be appropriate if further discovery showed that the plaintiff's expert lacked the competence to testify. The court, however, recognized that a pretrial motion rarely provides the type of illumination found at trial. The court opined that the testimony of the plaintiff's expert and the underlying dispute may be developed fully and accurately at trial. The *Purtill* court thus asserted that the trial stage is a more appropriate time for the court to consider whether the plaintiff has carried his burden of proof on the issue of standard of care.¹³⁹

Purtill effects a significant change in the substantive law of medical malpractice and the utilization of motions for summary judgment practice. Prior to *Purtill*, in cases in which expert testimony was needed to prove fault, the "similar locality" rule required that plaintiff's expert have knowledge of the medical practice in defendant's locality or one similar to it.¹⁴⁰ When a local expert was unavailable, the plaintiff was required to find an expert familiar with similar communities, regardless of whether defendant's alleged malpractice related to the exigencies of practice within his community. *Purtill* addressed this anomaly and tailored the "similar locality" rule to apply only in those circumstances in which the lack of support facilities in the community limited the range of available medical treatment. Thus, if the alleged act of malpractice would be condemned regardless of the locality, plaintiff's expert could testify to a national, minimum standard of conduct.¹⁴¹

136. *Id.* at 233, 489 N.E.2d at 868.

137. *Id.* at 244, 489 N.E.2d at 873.

138. *Id.* at 250, 489 N.E.2d at 876.

139. *Id.* at 244, 489 N.E.2d at 873.

140. *Purtill*, 111 Ill. 2d at 246-47, 489 N.E.2d at 874-75.

141. The *Purtill* court summarized the options as follows:

The physician's professional conduct must be judged in light of the conditions and facilities with which he must work. If a plaintiff's expert is familiar with

Pursuant to Illinois Supreme Court Rule 191, the court in *Purtill* emphasized that affidavits in support of summary judgments must demonstrate that the affiant is competent to testify to the recited facts. In this regard, the court noted that the content of the affidavit must be judged like that of the witness's in court testimony; an affidavit that fails to establish the witness's foundation to testify should be stricken.¹⁴² Despite this foundational requirement of competency, an expert most likely will not be required to provide the factual basis underlying his opinions.¹⁴³

C. Discovery

1. Protective Orders

In *Statland v. Freeland*,¹⁴⁴ the Illinois Supreme Court held that a lower court has broad discretion in issuing protective orders. In *Statland*, the trial court granted the defendant's motion for a protective order that prevented financial documents obtained in discovery from being used outside of the lawsuit. Prior to the entering of the protective order, plaintiff had informed the defendants that he intended to use the documents in an ongoing Internal Revenue Service investigation.¹⁴⁵ In moving to vacate the protective order, the plaintiff contended that the trial court failed to abide by Illinois Supreme Court Rule 201, which specifies when a court will allow a protective order.¹⁴⁶ The plaintiff further noted that the defendants

the standards of care applicable to conditions and facilities available to the defendant doctor, then he is qualified to testify. If, as in the cases discussed hereafter, there are certain uniform standards that would be applicable to a given situation regardless of the locality, then the lack of familiarity with the practice in a particular locality will not disqualify the expert. However, if conditions and facilities that are available are relevant, then before an expert can express an opinion as to a physician's conduct, he must be acquainted with accepted standards of care under similar circumstances.

Id. at 247, 489 N.E.2d at 874-75.

142. *Id.* at 251, 489 N.E.2d at 876 (citing ILL. S. CT. R. 191, ILL. REV. STAT. ch. 110A, para. 191 (1985)).

143. *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322, cert. denied, 454 U.S. 836 (1981). In *Wilson*, the court adopted Federal Rules of Evidence 703 and 705. Both rules greatly simplified the presentation of an expert's testimony. As Federal Rule of Evidence 705 indicates, unless directed otherwise by the court, the expert may offer an opinion without first testifying to the factual basis which supports it. Though good trial strategy would never dictate offering an unsupported opinion, the rules permit it. Thus, while the court in *Purtill* weighed the sufficiency of the expert's affidavit, its unarticulated premise was that the plaintiff was under no duty to state specifically the facts supporting his conclusions. See FED. R. EVID. 703, 705.

144. 112 Ill. 2d 494, 493 N.E.2d 1075 (1986).

145. *Id.* at 497, 493 N.E.2d at 1076-77.

146. *Id.* at 499, 493 N.E.2d at 1077 (citing ILL. S. CT. R. 201, ILL. REV. STAT. ch. 110A, para. 201 (1985)).

were required to allege any facts showing that the entry of a protective order was necessary, pursuant to Rule 201.¹⁴⁷

The Illinois Supreme Court rejected the plaintiff's request, stating that Illinois Supreme Court Rule 201(c)(1) does not set forth specific requirements for protective orders,¹⁴⁸ but instead mandates only information which "justice requires."¹⁴⁹ The court thus held that a trial court has broad discretion to grant protective orders in discovery proceedings.¹⁵⁰ Because there was no showing of circumstances that would warrant the supreme court's exercise of supervisory authority, plaintiff's motion to vacate the protective order was denied.¹⁵¹ The supreme court's deference to the protective order in *Statland* is consistent with the general philosophy of permitting a trial court judge to use protective orders to shape and control discovery.

2. Privileged Matters: Interrogatories

In *Richter v. Diamond*,¹⁵² the Illinois Supreme Court held that a hospital was not privileged, and instead was required to divulge information concerning disciplinary actions against a physician on staff.¹⁵³ In *Richter*, Northwestern Memorial Hospital was found in civil contempt for its refusal to answer supplemental interrogatories propounded by the plaintiff. The plaintiff in *Richter* sought to discern whether the defendant physician's staff privileges were restricted.¹⁵⁴ Northwestern objected to answering the questions, relying on sections 8-2101 and 8-2102 of the Illinois Code of Civil Procedure, which protect from disclosure select information concerning internal hospital proceedings.¹⁵⁵

The court in *Richter* rejected Northwestern's argument and held that the information requested by the supplemental interrogatories was outside the scope of sections 8-2101 and 8-2102 and therefore was not privileged.¹⁵⁶ The court reasoned that the statutory privilege protected only the hospital's peer-review process,¹⁵⁷ a protection necessary to ensure the effectiveness of professional self-

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 499, 493 N.E.2d at 1078.

151. *Id.*

152. 108 Ill. 2d 265, 483 N.E.2d 1256 (1985).

153. *Id.* at 270, 483 N.E.2d at 1258.

154. *Id.* at 268, 483 N.E.2d at 1257.

155. ILL. REV. STAT. ch. 110, para. 8-2101 to -2102 (1985).

156. *Richter*, 108 Ill. 2d at 270, 483 N.E.2d at 1258.

157. *Id.* at 269, 483 N.E.2d at 1258.

evaluation by members of the medical profession. The *Richter* court held, however, that the privilege did not extend to restrictions imposed by the hospital as a result of the peer-review process.¹⁵⁸

The *Richter* decision reflects an insightful view of the peer-review privilege. The desired goal in the peer-review process is to encourage medical facilities to root out incompetent staff members. The existing privilege adequately promotes this goal by protecting the secrecy of the peer-review process while allowing publicity of the results of the review.

VI. PROVISIONAL REMEDIES

In *Buzz Barton & Associates v. Giannone*,¹⁵⁹ the Illinois Supreme Court upheld the constitutionality of section 11-110 of the Illinois Code of Civil Procedure.¹⁶⁰ Section 11-110 provides that a party wrongfully granted a preliminary injunction is liable for damages resulting from the injunction. In *Buzz Barton*, the plaintiff sought to have section 11-110 declared unconstitutional on equal protection and due process grounds and because it denied the plaintiff free access to the courts.¹⁶¹ The plaintiff raised two principal contentions. First, the plaintiff asserted that it was treated differently¹⁶² than other parties seeking relief through the courts because others were not required to pay damages if the relief they were granted initially was later dissolved.¹⁶³ Secondly, the plaintiff argued that liability for damages caused by a preliminary injunction constituted an unreasonable restraint upon its right to seek judicial redress.¹⁶⁴

The supreme court rejected the plaintiff's arguments, reasoning that preliminary injunctions are distinguishable from other types of litigation because a party seeking a preliminary injunction is not

158. *Id.*

159. 108 Ill. 2d 373, 483 N.E.2d 1271 (1985).

160. *Id.* at 388, 483 N.E.2d at 1278.

161. *Id.* at 381, 483 N.E.2d at 1275.

162. *Id.* The dissimilar treatment between a party who seeks a preliminary injunction that is later dissolved and a party granted other relief that is later dissolved stems from the fact that instead of merely restoring any benefit received from the erroneous judgment or decree, the party who is wrongfully issued a preliminary injunction is liable for all damages caused by the wrongful issuance. *Id.*

163. *Id.* In *Buzz Barton*, the trial court issued a preliminary injunction in favor of the plaintiff to enforce a restrictive covenant contained in an employment contract. When the appellate court reversed the order granting the preliminary injunction, the defendants filed a motion for assessment of damages under section 11-110 of the Illinois Code of Civil Procedure. *Id.* (citing ILL. REV. STAT. ch 110, para. 11-110 (1985)).

164. *Buzz Barton*, 108 Ill. 2d at 383, 483 N.E.2d at 1276.

required to present evidence which would entitle him to relief on the merits.¹⁶⁵ The court noted that when a preliminary injunction is granted, a party is allowed to interfere in the activities of another party on the mere showing that the plaintiff is likely to prevail on the merits. The *Buzz Barton* court stated that this extraordinary characteristic of a preliminary injunction justified holding the moving party liable for all damages upon a subsequent finding that the issuance of the injunction was wrongful.¹⁶⁶

Section 11-110 of the Illinois Code of Civil Procedure applies only to the issuance of a temporary restraining order or a preliminary injunction.¹⁶⁷ Thus, *Buzz Barton* illustrates that no liability exists under the section for a wrongfully issued permanent injunction. Indeed, the court noted that parties and courts move frequently from consideration of preliminary relief to consideration of permanent injunction.¹⁶⁸ Nevertheless, a party may be forced to seek preliminary injunctive relief, and thereby incur the risk of liability as established in *Buzz Barton*, if a congested trial calendar delays the jury trial for several years.

VII. INDISPENSABLE PARTIES

In *Feen v. Ray*,¹⁶⁹ the Illinois Supreme Court dismissed a taxpayer's derivative suit on behalf of a school district when the school district was an indispensable party and the plaintiff voluntarily had allowed the district to be dismissed from the litigation. In *Feen*, the plaintiff initiated the suit as a taxpayer in the school district.¹⁷⁰ The original defendants in the litigation included Fred Ray, Zion State Bank & Trust Company, School District No. 126, and the Lake County regional superintendent of schools.¹⁷¹ The plaintiff alleged that Fred Ray had invested most of the school district's funds in accounts bearing little or no interest in Zion State Bank. Ray was an officer and stockholder of Zion State Bank at

165. *Id.* at 382, 483 N.E.2d at 1275.

166. *Id.* at 384, 483 N.E.2d at 1276.

167. ILL. REV. STAT. ch. 110, para. 11-110 (1985). In a related provision, section 11-103 provides that the court, in its discretion, may require a party seeking a temporary restraining order or preliminary injunction to post a bond sufficient to cover the costs and damages that might be incurred by the opponent should the relief be wrongly issued. *Id.* at para. 11-103.

168. *See, e.g.,* Power Electric v. Maywood-Proviso State Bank, 60 Ill. App. 3d 685, 377 N.E.2d 142 (1st Dist. 1978).

169. 109 Ill. 2d 339, 487 N.E.2d 619 (1985).

170. *Id.* at 342, 487 N.E.2d at 619.

171. *Id.* at 343, 487 N.E.2d at 620.

the time.¹⁷² The plaintiff taxpayer sought to recover the lost interest.¹⁷³ The plaintiff stipulated to an order dismissing School District No. 126 from the lawsuit, with prejudice to future action.¹⁷⁴ The remaining defendants then filed a motion to dismiss, alleging that the School District was an indispensable party, the absence of which rendered plaintiff's complaint defective.¹⁷⁵ The supreme court agreed and granted defendants' motion to dismiss.¹⁷⁶

In holding that the school district was an indispensable party, the *Feen* court noted that the interests of the school district were not affected merely by the litigation, but instead provided the entire basis for the lawsuit.¹⁷⁷ The plaintiff did not claim injury to himself; he sought recovery solely on behalf of the school district.¹⁷⁸ Moreover, absent the district, no party before the court could be awarded relief if the plaintiff prevailed on the merits.¹⁷⁹ The court further observed that the school district did not lose its status as a necessary party merely because the district sought its own dismissal from the plaintiff's action.¹⁸⁰

VIII. APPEALS

A. Supreme Court Authority To Review

In *Wimmer v. Koenigseder*,¹⁸¹ the Illinois Supreme Court held that an issue may be considered on appeal although not raised at trial when the record contains all the factual materials necessary to decide the issue.¹⁸² In *Wimmer*, pursuant to section 2-301, the defendants filed special appearances contesting the court's exercise of in personam jurisdiction. Consistent with procedures controlling a special appearance, the defendants limited their argument to the jurisdictional issue and never objected that the complaint failed to state a legally sufficient cause of action.¹⁸³ The appellate court held that the defendants were subject to jurisdiction under two provisions of the long-arm statute:¹⁸⁴ first, defendants transacted busi-

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 344, 487 N.E.2d at 620.

176. *Id.* at 349, 487 N.E.2d at 623.

177. *Id.* at 344, 487 N.E.2d at 621.

178. *Id.* at 344-45, 487 N.E.2d at 621.

179. *Id.* at 347, 487 N.E.2d at 621.

180. *Id.* at 345-46, 487 N.E.2d at 622.

181. 108 Ill. 2d 435, 484 N.E.2d 1088 (1985).

182. *Id.* at 439, 484 N.E.2d at 1090.

183. *Id.*

184. *Id.* (citing ILL. REV. STAT. ch. 110, para. 2-209(a)(1), (2) (1985)).

ness within the state; and second, they committed a tortious act within the state. The supreme court elected not to decide the jurisdictional issue and instead considered the legal sufficiency of the complaint. The court reasoned that judicial resources were wasted by continued rulings on the jurisdictional issue when it was clear from the record that the complaint failed to state a cause of action.¹⁸⁵

The decision in *Wimmer* may provide an impetus for changing the procedures used to challenge in personam jurisdiction. Currently, a defendant who files a special appearance must limit his objection to the issue of jurisdiction.¹⁸⁶ Objections not related to jurisdiction constitute a general appearance and waive any defect of in personam jurisdiction.¹⁸⁷ *Wimmer* illustrates the wasteful character of this method. By ignoring jurisdiction and determining the sufficiency of the complaint, the court in *Wimmer* chose an economical approach, though one specifically prohibited for defendants challenging jurisdiction. Although several grounds may support the dismissal of an action, Illinois' special appearance rule precludes the defendant from raising any of them until resolution of the jurisdictional issue. The decision in *Wimmer* highlights the value of abandoning the present rule in favor of a procedure that permits all objections to be raised initially.¹⁸⁸

Another recent decision of the Illinois Supreme Court concerns the flexibility of the supreme court in exercising its rulemaking authority over the appellate process. In *Johnson v. Colley*,¹⁸⁹ the Illinois Supreme Court granted a motion for leave to file a motion for reconsideration after the denial of a leave to appeal.¹⁹⁰ The plaintiff in *Johnson* argued that the denial of the petition for leave to appeal was a final order and that the rules of the court made no provision for a motion for reconsideration.¹⁹¹ The court allowed the motion for reconsideration to be filed in accordance with Illinois Supreme Court Rule 361,¹⁹² although the Rule made no provision for the filing of a motion for reconsideration after the denial of a petition for leave to appeal. The *Johnson* court reasoned that it

185. *Wimmer*, 108 Ill. 2d at 439, 484 N.E.2d at 1090.

186. ILL. REV. STAT. ch. 110 para. 2-301(a) (1985).

187. *Id.*

188. See FED. R. CIV. P. 12(b). In *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), the Court forestalled a decision on a difficult issue of jurisdiction by dismissal of the action on the basis of improper venue.

189. 111 Ill. 2d 468, 490 N.E.2d 685, *cert. denied*, 107 S. Ct. 113 (1986).

190. *Id.* at 472-73, 490 N.E.2d at 686-87.

191. *Id.* at 472, 490 N.E.2d at 686.

192. ILL. S. CT. R. 361, ILL. REV. STAT. ch. 110A, para. 361 (1985).

was vested with rulemaking authority sufficiently comprehensive to regulate all aspects of the appellate process,¹⁹³ including pending appeals.¹⁹⁴

B. *New Trial*

In *Marotta v. General Motors Corp.*,¹⁹⁵ the Illinois Supreme Court held that an entry of a judgment on the verdict is not a prerequisite, under Illinois Supreme Court Rule 306, for allowing a petition for leave to appeal from an order granting a new trial.¹⁹⁶ In *Marotta*, the jury returned verdicts on which the circuit court refused to enter judgment, stating the verdicts were inconsistent and incongruous.¹⁹⁷ The circuit court then granted motions for a new trial. The court found the jury verdicts confusing and defense counsel's closing argument prejudicial.¹⁹⁸ Pursuant to Supreme Court Rule 306(a)(1)(i), which provided for appeal in the instance of a new trial, the defendant, General Motors, sought leave to appeal the new trial order to the appellate court. The appeal was denied.¹⁹⁹ The supreme court, however, allowed General Motors' petition for leave to appeal.²⁰⁰

Before the supreme court ruled on the propriety of the new trial order,²⁰¹ the court addressed plaintiff's contention that the circuit court had entered no appealable order.²⁰² The plaintiff contended that, because no judgment was entered on the allegedly inconsistent verdicts, the effect of the order was to declare a mistrial — an order not appealable under Rule 306.²⁰³ The *Marotta* court rejected the notion that there was a distinction between a new trial granted after a mistrial and one occurring after entry of judgment.²⁰⁴ The court held that Rule 306 did not require an entry of judgment on

193. 111 Ill. 2d at 472, 490 N.E.2d at 686.

194. *Id.* Plaintiff's petition for a writ of certiorari was premised on the argument that, based on the existing rules, he gained a protected property interest in his judgment when the Illinois Supreme Court initially denied defendant's petition for leave to appeal. He argued that the Illinois Supreme Court's reversal constituted a deprivation of his property interest without due process of law. *Id.*

195. 108 Ill. 2d 168, 483 N.E.2d 503 (1985).

196. *Id.* at 175, 483 N.E.2d at 505-06 (citing ILL. S. CT. R. 306, ILL. REV. STAT. ch. 110A, para. 306 (1985)).

197. *Id.* at 172, 483 N.E.2d at 504.

198. *Id.* at 174-75, 483 N.E.2d at 505.

199. *Id.* at 172, 483 N.E.2d at 504.

200. *Id.*

201. *See infra* notes 209-13 and accompanying text.

202. *Marotta*, 108 Ill. 2d at 175, 483 N.E.2d at 505.

203. *Id.*

204. *Id.*

the verdict as a prerequisite to a petition for leave to appeal from an order granting a motion for a new trial.²⁰⁵

The *Marotta* court, however, further noted that the trial court erred in not promptly entering judgment upon return of the verdict.²⁰⁶ Section 2-1202(b) requires that the trial court promptly enter judgment unless the verdict fails to express clearly the jury's intent.²⁰⁷ The court emphasized that compliance with the rule was essential to providing a uniform system of time limits within which post-trial motions must be filed.²⁰⁸

On the merits of the appeal, the court held that the trial court had abused its discretion in granting a new trial.²⁰⁹ In reaching its decision, the following conduct in defendant's closing argument was discounted as harmless error: the defendant's violation of the terms of an in limine order which barred reference to a loan agreement made between the plaintiff and a co-defendant; and the defendant's reading and overhead display of plaintiff's deposition and earlier trial testimony, neither of which had been admitted into evidence during the trial.²¹⁰ The court reasoned that the errors were not likely to affect the jury's deliberations²¹¹ because disclosure of plaintiff's prior testimony was not sufficiently prejudicial to grant a new trial; and further, defendant's statement made in violation of the court's order likely was misunderstood by the jury.²¹² With respect to the latter proposition, the court held that plaintiff's untimely objection to defendant's argument rendered the error presumptively harmless. After noting that the plaintiff waited to object until the defendant concluded its argument, the court noted that the expected procedure to preserve an issue for review requires that a party object contemporaneously to an erroneous argument and then request remedial relief such as an instruction to disregard the comment or a mistrial.²¹³

Marotta undercuts the authority of the trial courts. A trial

205. *Id.* at 175, 483 N.E.2d at 505-06.

206. *Id.* at 176, 483 N.E.2d at 506.

207. *Id.*

208. *Id.*

209. *Id.* at 180, 483 N.E.2d at 508.

210. *Id.* at 179-80, 483 N.E.2d at 507-08.

211. *Id.* at 180, 483 N.E.2d at 508.

212. 108 Ill. 2d at 175, 483 N.E.2d at 505. After arguing that the co-defendant's case supported plaintiff's theory of liability against General Motors, defendant told the jury: . . . you'll be given an instruction that you can consider circumstantial evidence, and I think that situation just two and two adds up to the only word I have is a four letter word, but it's D-E-A-L [sic].

Id.

213. *Id.* at 179, 483 N.E.2d at 507.

court's overzealous granting of a new trial might infringe upon the jury's role as trier of fact.²¹⁴ That encroachment is most probable when the court decides that a new trial is needed because the verdict is contrary to the weight of the evidence. No such concern arises when a new trial is granted because of trial error. In the latter instance, the trial judge concludes that the verdict was reached improperly. Generally, given a judge's first-hand assessment of a case, wide latitude is given to his decision to grant a new trial based upon error.²¹⁵ The *Marotta* decision evinces little deference, if any, to the trial judge's authority and ability to assess the consequences of defendant's erroneous comments. Secondly, and perhaps most importantly, the court's decision undermines the trial court's authority to make and enforce in limine orders. Though the trial court's order may have been erroneous,²¹⁶ defendant's closing argument communicated to the jury a fact that the trial judge previously had found inadmissible. Thus, the *Marotta* court contravened the trial judge's assessment of the error's harmful effect.

Another *Survey* period case examining whether an order was final and appealable was *In re Marriage of Canon*.²¹⁷ In *Canon*, the supreme court held that the new inclusion of a review provision in a marriage dissolution order does not bar the appealability of the order.²¹⁸ In *Canon*, the circuit court entered an order dissolving the marriage of the parties. This order included property division and maintenance provisions.²¹⁹ The maintenance provision specifically stated that the maintenance award was reviewable by the circuit court within two years.²²⁰ When both parties attempted to appeal the order, the appellate court held that the order was not final and appealable because the circuit court retained jurisdiction to review the order within two years.²²¹

In making its decision, the supreme court distinguished its ear-

214. See generally Johnston, *Jury Subornation Through Judicial Control*, 43 LAW & CONTEMP. PROB. 24 (1980).

215. *Id.*

216. *Marotta*, 108 Ill. 2d at 178, 483 N.E.2d at 507. The supreme court held that evidence of a loan-agreement between plaintiff and a co-defendant is relevant in order to discern the credibility of witnesses who may benefit by the agreement. The *Marotta* court opined that there was no offer of proof that any witnesses knew of, or would benefit from, the agreement. *Id.*

217. 112 Ill. 2d 552, 494 N.E.2d 490 (1986).

218. *Id.* at 556, 494 N.E.2d at 492.

219. *Id.* at 553, 494 N.E.2d at 491.

220. *Id.* at 553-54, 494 N.E.2d at 491.

221. *Id.* at 554, 494 N.E.2d at 491.

lier decision in *In Re Marriage of Leopando*.²²² In *Leopando*, the circuit court entered a permanent custody order concerning the parties' minor child, but reserved for future consideration the issues of maintenance, property division, and attorney fees. The *Leopando* court held that issues in a petition for dissolution, including custody, property disposition and support, are not separate, unrelated claims, but instead are separate issues relating to the same claim. Until all of the ancillary issues are resolved, the court held that a petition for dissolution was not adjudicated fully. Accordingly, the *Leopando* court concluded that the custody order was not final and appealable because all of the matters that were ancillary to the dissolution had not yet been resolved.²²³

In reversing the appellate court decision in *Canon*, the Illinois Supreme Court distinguished its facts from *Leopando* and held that the inclusion in a dissolution order of a provision for review does not render the order unappealable.²²⁴ The *Canon* court held that *Leopando* was distinguishable because the circuit court in *Leopando* had made a decision as to each of the ancillary issues regarding property division, attorney fees, and maintenance.²²⁵

The most significant aspect of *Canon* is the distinction the Illinois Supreme Court made from its opinion in *Leopando*. *Leopando*, in an effort to avoid the piecemeal review of ongoing litigation, strongly implied that all issues involved in the dissolution action should be decided before appeal. The *Canon* decision, on the other hand, suggests a more pragmatic determination of whether the trial court's order is final and appealable. The *Canon* decision, however, fails to address the appealability of a final order that decides only one of the parties' property and financial issues. When the record is suitably developed, it is common for courts to decide one issue but await a further development of the facts to decide the remaining ancillary issues. In this instance, the decision in *Leopando* still may deny an immediate appeal of the decision.

C. *Untimely Appeals*

In *Lombard v. Elmore*,²²⁶ the mistaken interpretation of the trial court's post-judgment order led to plaintiffs' untimely filing of a notice of appeal. On December 14, 1982, the trial court in *Lom-*

222. *Leopando*, 96 Ill. 2d 114, 449 N.E.2d 137 (1983).

223. 112 Ill. 2d at 555, 494 N.E.2d at 492.

224. *Id.* at 555-56, 494 N.E.2d at 492.

225. *Id.*

226. 112 Ill. 2d 467, 493 N.E.2d 1063 (1986).

bard entered judgment in favor of defendant's counterclaim.²²⁷ The judgment specifically provided that it was final and appealable, consistent with Illinois Supreme Court Rule 304(a).²²⁸ On the same day, in response to defendant's motion to amend his counterclaim to conform to the proof, the trial court entered an order staying all matters until further order of the court, establishing a briefing schedule, and setting a hearing date on January 20, 1983 to address defendant's motions.²²⁹ The hearing date exceeded plaintiffs' thirty day period in which to appeal the December 14, 1982 judgment. On January 20, 1983, the trial court dismissed the defendant's motions.²³⁰ On February 17, 1983, plaintiffs filed a post-trial motion attacking the judgment entered against them.²³¹ After extended hearings, the court denied plaintiffs' motion and plaintiff filed a notice of appeal within thirty days of the denial.²³² In support of their appeal, plaintiffs asserted that the December 14, 1982 order staying all proceedings was, in effect, an extension of time for leave to file a post-trial motion.²³³ Accordingly, plaintiffs contended, the post-trial motion and notice of appeal were filed in a timely manner.²³⁴

The appellate court rejected plaintiffs' argument.²³⁵ The court held that the stay order applied only to defendant's post-trial motions. The reviewing court reasoned that the trial court could not enter an appealable judgment and simultaneously stay all proceedings.²³⁶ The supreme court, without discussing plaintiffs' argument, affirmed the appellate court's dismissal of plaintiffs' appeal.

Lombard underscores the importance of accurately ascertaining the terms of post-trial orders. The order in *Lombard* was ambiguous and conceivably interpreted as extending the time for plaintiffs' appeal. The stay was prompted by defendant's motion to amend the complaint that was the basis of the challenged judgment. Thus, plaintiffs might well believe that appealability was forestalled until the terms of the complaint were final. Indeed, the trial court, when pressed by defendant to dismiss plaintiffs' post-trial motion

227. *Id.* at 471, 493 N.E.2d at 1064.

228. *Id.* at 471, 493 N.E.2d at 1065.

229. *Lombard v. Elmore*, 134 Ill. App. 3d 898, 908, 480 N.E.2d 1329, 1336 (1985), *aff'd in part, rev'd in part*, 112 Ill. 2d 467, 493 N.E.2d 1063 (1986).

230. *Id.*

231. *Id.*

232. *Id.* at 908, 480 N.E.2d at 1336-37.

233. *Id.*

234. *Id.*

235. *Id.* at 909, 480 N.E.2d at 1334.

236. *Id.*

as untimely, interpreted the stay order in the same manner as did plaintiffs and considered the motion timely though it was filed on February 17, 1983.²³⁷

Another case decided during the *Survey* period concerning the filing of a notice of appeal was *Ferguson v. Riverside Medical Center*.²³⁸ In *Ferguson*, the Illinois Supreme Court held that a judgment cannot be attacked by motion or appealed during the time period between the announcement of the judgment and the entry of the formal order.²³⁹ In *Ferguson*, the plaintiff sued defendants Riverside Medical Center and doctors Parkhurst, Ehrlich, and Sutton.²⁴⁰ A motion to dismiss with prejudice was granted to defendant Parkhurst on February 3, 1983.²⁴¹ The motion required the attorney for defendant Parkhurst to prepare a formal order.²⁴² The formal order granting defendant Parkhurst's motion to dismiss the complaint with prejudice was filed on March 29, 1983.²⁴³ No finding regarding appealability was made under Illinois Supreme Court Rule 304(a).²⁴⁴ The plaintiff, Ferguson, filed a notice of appeal on February 17, 1983,²⁴⁵ between the time the memorandum opinion was issued and the filing of the formal order. The court ruled that Ferguson's attempt to appeal the order in favor of Parkhurst was premature.²⁴⁶ The *Ferguson* court reasoned that, under Illinois Supreme Court Rule 272,²⁴⁷ when a judge requires the submission of a written judgment to be signed by him, the judgment becomes final when filed.²⁴⁸ If no such written order is required, the judgment is final when recorded.²⁴⁹ The court held that, a judgment cannot be attacked by motion, appealed from, or

237. *Id.*

238. 111 Ill. 2d 436, 490 N.E.2d 1252 (1986).

239. *Id.* at 441, 490 N.E.2d at 1254.

240. *Id.* The only action considered in this discussion is the claim against defendant Parkhurst.

241. *Id.* at 439, 490 N.E.2d at 1253.

242. *Id.*

243. *Id.*

244. *Id.* (citing ILL. S. CT. R. 304(a), ILL. REV. STAT. ch. 110A, para. 304(a) (1985)).

245. *Id.*

246. *Id.* at 440-41, 490 N.E.2d at 1254.

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

248. *Ferguson*, 111 Ill. 2d at 441, 490 N.E.2d at 1254.

249. *Id.* at 440, 490 N.E.2d at 1253. The *Ferguson* court held that plaintiff had filed a timely appeal on May 4, 1983, of an order granting defendant Ehrlich's motion to dismiss. The ruling was docketed on April 12, 1983, and the docket entry did not indicate that a formal order was to follow, though one was filed on April 22, 1983. This order contained a finding under Illinois Supreme Court Rule 304(a), making the judgment appealable. *Id.*

enforced during the time between the announcement of judgment and the entry of the formal order.²⁵⁰ Therefore, because the plaintiff appealed after the entry of the memorandum opinion, but before the entry of the formal order, her notice of appeal was premature and could not confer jurisdiction on the appellate court.²⁵¹ Finally, the court noted that the formal order granting Parkhurst's motion would not have been appealable even if timely filed. Because the order disposed of fewer than all parties, no appeal would be allowed until the trial judge certified that there was no just reason to delay the appeal as required under Illinois Supreme Court Rule 304(a).²⁵²

IX. SIGNIFICANT CHANGES IN STATUTORY LAW²⁵³

A. *New Or Modified Illinois Supreme Court Rules*

1. Illinois Supreme Court Rule 187: Forum Non Conveniens²⁵⁴

New Illinois Supreme Court Rule 187²⁵⁵ became effective Au-

250. *Id.* at 441, 490 N.E.2d at 1254.

251. *Id.*

252. *Id.* at 441-42, 490 N.E.2d at 1254. The court also noted that the timely appeal of the order granting co-defendant Ehrlich's dismissal motion did not operate as an appeal of the earlier ruling on defendant Parkhurst's motion. *Id.*

253. See Wright, *Trial Briefs*, 31 I.S.B.A. NEWSLETTER 10 (1986).

254. See *supra* notes 108-12 and accompanying text.

255. ILL. S. CT. R. 187, ILL. REV. STAT. ch. 110A, para. 187 (1986). Rule 187 reproduced in full, states as follows:

(a) Time for Filing. A motion to dismiss or transfer the action under the doctrine of *forum non conveniens* must be filed by a party not later than 90 days after the last day allowed for the filing of that party's answer.

(b) Proceedings on Motions. Hearings on motions to dismiss or transfer the action under the doctrine of *forum non conveniens* shall be scheduled so as to allow the parties sufficient time to conduct discovery on issues of fact raised by such motions. Such motions may be supported and opposed by affidavits, any competent evidence adduced by the parties shall also be considered. The determination of any issue of fact in connection with such a motion does not consider a determination of the merits of the case or any aspect thereof.

(c) Proceedings Under Granting of Motions.

(1) *Intrastate transfer of action.* The clerk from which a transfer is granted to another circuit court in this State on the ground of *forum non conveniens* shall immediately certify and transmit to the clerk of the court to which the transfer is ordered the originals of all papers filed in the case together with copies of all orders entered therein. In the event of a severance, certified copies of papers filed and orders entered shall be transmitted. The clerk of the court to which the transfer is ordered shall file the papers and transcript transmitted to him or her and docket the case, and the action shall proceed and be determined as if it had originated in that court. The costs attending a transfer shall be taxed by the clerk of the court from which the transfer is granted, and, together with the filing fee in the transferee court, shall be paid by the party or parties who applied for the transfer.

gust 1, 1986. The Rule concerns the procedural aspects of filing a motion to dismiss or transferring a case under the doctrine of forum non conveniens. The Rule addresses both interstate and intrastate motions, and requires a defendant, or other moving party, to file his motion within ninety days after the last day for filing his answer.²⁵⁶ Under the provisions of Rule 187(a), a later joined defendant is not foreclosed from filing a forum non conveniens motion by another defendant's failure to do so in a timely manner.²⁵⁷

Under Rule 187(b), hearings on the motions must be scheduled to allow the parties to conduct discovery on issues of fact raised by the motion.²⁵⁸ The Rule provides that the motions may be supported or opposed by affidavit, and the court should consider any competent evidence in ruling on the motion.²⁵⁹ Any factual determinations made by the court do not constitute a determination of any aspect of the case.²⁶⁰

2. Illinois Supreme Court Rule 19: Notice of Claims of Unconstitutionality

New Illinois Supreme Court Rule 19²⁶¹ became effective on Au-

(2) *Dismissal of action.* Dismissal of an action under the doctrine of *forum non conveniens* shall be upon the following conditions:

- (i) if the plaintiff elects to file the action in another forum within six months of the dismissal order, the defendant shall accept the service of process from that court; and
- (ii) if the statute of limitations has run in the other forum, the defendant shall waive that defense.

If the defendant refuses to abide by these conditions, the cause shall be reinstated for further proceedings in the court in which the dismissal was granted. If the court in the other forum refuses to accept jurisdiction, the plaintiff may, within 30 days of the final order refusing jurisdiction, reinstate the action in the court in which the dismissal was granted. The costs attending a dismissal may be awarded in the discretion of the court.

Id.

256. *Id.* at para. 187(a).

257. See ILL. ANN. STAT. ch. 110A, para. 187, committee comments (Supp. 1986).

258. ILL. S. CT. R. 187(b), ILL. REV. STAT. ch. 110A, para. 187(b) (Supp. 1986).

259. *Id.*

260. *Id.*

261. ILL. S. CT. R. 19, ILL. REV. STAT. ch. 110A, para. 19 (Supp. 1986). Rule 19 reproduced in full states as follows:

(a) **Notice Required.** In any cause or proceeding in which the constitutionality of a statute, ordinance or administrative regulation affecting the public interest is raised, and to which action or proceeding the State or the political subdivision, agency, or officer affected is not already a party, the litigant raising the constitutional issue shall serve an appropriate notice thereof on the Attorney General, State's Attorney, municipal counsel or agency attorney, as the case may be.

(b) **Contents and Time for Filing Notice.** The notice shall identify the particu-

gust 1, 1986. Rule 19 requires that parties challenging the constitutionality of a statute, ordinance, or administrative regulation affecting the public interest notify the government when the governmental²⁶² entity that is the subject of the challenged law is not already a party.²⁶³ Notice must be given with the first pleading which raises a constitutional question. The notice must identify the particular law being challenged and give a brief description of the nature of the challenge.²⁶⁴ The purpose of the notice requirements is to give the government an opportunity, rather than an obligation, to intervene in cases to defend the validity of its law.²⁶⁵

3. Illinois Supreme Court Rule 216: Admissions of Fact or Genuineness of Documents

Effective August 1, 1985, Illinois Supreme Court Rule 216²⁶⁶ was amended. Amended Rule 216 provides that an admission by a party will be considered an admission for the purpose of a pending lawsuit and any refile of a pending lawsuit within one year under section 13-217 of the Illinois Code of Civil Procedure.²⁶⁷ The admission, however, cannot be used against the party for any other purpose in any other proceeding.²⁶⁸

4. Illinois Supreme Court Rule 204: Compelling Appearance of Deponent

Effective August 1, 1985, a new amendment to subsection (c) of Illinois Supreme Court Rule 204²⁶⁹ requires that the discovery dep-

lar statute, ordinance or regulation, and shall briefly describe the nature of the constitutional challenge. The notice shall be served at the time of suit, answer or counterclaim, if constitutionality is raised at that level, or promptly after the constitutional question arises as a result of a circuit or reviewing court ruling or judgment.

(c) Purpose of Notice. The purpose of such notice shall be to afford the State, political subdivision, agency or officer, as the case may be, the opportunity, but not the obligation, to intervene in the cause or proceeding for the purpose of defending the constitutionality of the law or regulation challenged. The election to intervene shall be subject to applicable provisions of law governing intervention or impeding of interested parties.

Id.

262. *Id.* Governmental entity is defined to include state, political subdivision, government agency, or government office. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. ILL. S. CT. R. 216, ILL. REV. STAT. ch. 110A, para. 216 (1985).

267. *Id.* at para. 216(e).

268. *Id.*

269. ILL. S. CT. R. 204(c), ILL. REV. STAT. ch. 110A, para. 204(c) (1985).

osition of a doctor be taken only with his consent or pursuant to a subpoena issued upon court order. This new amendment applies only to physicians and surgeons being deposed in their professional capacity.²⁷⁰

5. Illinois Supreme Court Rule 222: Limited and Simplified Discovery in Certain Cases

New Illinois Supreme Court Rule 222²⁷¹ became effective on August 1, 1985. The Rule applies to all civil actions based in tort or contract not in excess of \$15,000. It does not apply to actions seeking punitive damages or equitable relief.²⁷² The Rule provides for automatic disclosure by requiring the plaintiff to file a "disclosure statement" with the complaint.²⁷³ The disclosure statement must set forth information including the identity of witnesses, the location of documents, the description of damages, and the identity of any insurance carriers.²⁷⁴ Discovery is limited to twenty interrogatories and three discovery depositions. No evidence depositions are allowed unless all the parties agree or the court orders upon a showing of good cause.²⁷⁵

B. Modified Illinois Code of Civil Procedure Sections

1. Section 2-1005: Summary Judgment

Effective September 15, 1985, subsection (d) was added to section 2-1005²⁷⁶ of the Illinois Code of Civil Procedure. This subsection provides a major innovation in summary procedures by empowering a court to make a summary determination of major issues raised by an action even when those major issues do not de-

270. *Id.*

271. ILL. S. CT. R. 222, ILL. REV. STAT. ch. 110A, para. 222 (1986).

272. *Id.* at para. 222(a).

273. *Id.* at para. 222(b).

274. *Id.*

275. *Id.* at para. 222(c).

276. ILL. REV. STAT. ch. 110, para. 2-1005(d) (1985). Subsection (d) reads as follows:

If the court determines that there is no genuine issue of material fact as to one or more of the major issues in the case, but that substantial controversy exists with respect to other major issues, or if a party moves for summary determination of one or more, but less than all, of the major issues in the case, and the court finds that there is no genuine issue of material fact as to that issue or those issues, the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined issues as are just. Upon the trial of the case, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

termine the whole case. Under new subsection (d), piecemeal determination of a case is allowed by summary procedures. Thus, a party is allowed to move for summary determination of one or more major issues of the case, but is not required to move for summary determination of all of the issues in the case.²⁷⁷

2. Section 2-1302: Notice of Entry of Default Order or Dismissal for Want of Prosecution

Effective January 1, 1986, section 2-1302²⁷⁸ of the Illinois Code of Civil Procedure was amended in two significant ways. First, subsection (a) of section 2-1302 was amended to require an attorney for the party moving for an order of default to give notice of the default order.²⁷⁹ Prior to the amendment, notice had to be given by the clerk of the court. Failure by the attorney to give notice does not impair the validity of the order of default. Also, subsection (d) of section 2-1302 was amended to provide that no notice of a dismissal for want of prosecution is necessary, when the plaintiff has been notified in advance that the court is considering the entry of such an order. Notice, however, may still be required by local rule.²⁸⁰

3. Section 11-102: Preliminary Injunctions

Effective January 1, 1986, section 11-102²⁸¹ of the Illinois Code of Civil Procedure was amended. The preliminary injunction statute now states that no preliminary injunction shall be issued without notice to the other party. Prior to the amendment, if a party could demonstrate that imminent and irreparable injury would occur before notice could be served, the preliminary injunction could be entered without notice to the opponent. The amendment eliminates this exception.²⁸²

Practitioners should note that section 11-101 of the Illinois Code of Civil Procedure,²⁸³ concerning temporary restraining orders, has not been amended. A temporary restraining order still may be entered without notice to the opposing party. Nevertheless, a temporary restraining order is only valid for ten days unless renewed by

277. *Id.*

278. ILL. REV. STAT. ch. 110, para. 1-1302 (1985).

279. *Id.* at para. 2-1302(a).

280. *Id.* at para. 2-1302(d).

281. *Id.* at para. 11-102.

282. *Id.*

283. *Id.* at para. 11-101.

the court.²⁸⁴

4. Section 2-209.1: Actions by and Against Voluntary Associations

Effective November 26, 1985, section 2-209.1 of the Illinois Code of Civil Procedure²⁸⁵ was amended to provide that a voluntary unincorporated association, including a labor union, may sue and be sued in its own name. It is unclear under the statute whether a member can claim a right to be notified of the pending lawsuit and whether the member can challenge enforcement of a judgment by claiming no notice was provided.

5. Section 2-613: Separate Counts and Defenses

Effective September 20, 1985, section 2-613 of the Illinois Code of Civil Procedure²⁸⁶ was amended to reflect the addition of comparative negligence to the list of defenses which must be pled affirmatively. The amended section requires an affirmative pleading that the negligence of a complaining party contributed in whole or in part to the injury which is the subject of the complaint.²⁸⁷

6. Section 2-1109: Itemized Verdicts

Section 2-1109²⁸⁸ of the Illinois Code of Civil Procedure requires that a jury hearing a personal injury case render itemized verdicts. Effective August 15, 1985, the section was amended to require greater itemization in medical malpractice cases. Under the new law, the verdict must be separated into economic and noneconomic loss. The economic loss portion must then be separated into three categories: the amount awarded as compensation for reasonable expenses incurred or future expenses for medical, surgical, x-ray, dental, drugs, therapy and other health or rehabilitation services; the amount awarded as compensation for lost wages or lost earning capacity; and, the amount awarded for all other economic losses.²⁸⁹ The verdict also must be separated into amounts awarded before the verdict was entered and amounts awarded for future losses.²⁹⁰

284. *Id.*

285. *Id.* at para. 2-209.1.

286. *Id.* at para. 2-613.

287. *Id.* at para. 2-613(d).

288. *Id.* at para. 2-1109.

289. *Id.*

290. *Id.*

X. CONCLUSION

The judicial decisions and changes in the Illinois Code of Civil Procedure discussed in this article represent the major developments in Illinois procedural law since July 1985. The most significant judicial decisions concerned statutes of limitations and repose, jurisdiction, venue, pleadings and discovery, and appeals. The legislative changes to the Illinois Code of Civil Procedure were significant in the areas of summary judgment proceedings, forum non conveniens, and itemized verdicts.