ILLINOIS DEFENSE COUNSEL
IDC QUARTERLY

## Health Law

*Mark D. Hansen and Emily J. Galligan**
*Heyl, Royster, Voelker & Allen, P.C.*, Peoria

# Supreme Court Affirms: Experts Redesignated as Consultants Are Entitled to Consultant's Privilege Against Disclosure

In a recent opinion, the Illinois Supreme Court affirmed the First District Appellate Court's decision that a party that previously disclosed a witness pursuant to Illinois Supreme Court Rule 213(f)(3) as a controlled expert may later redesignate that witness to be a consultant pursuant to Illinois Supreme Court Rule 201(b)(3). *Dameron v. Mercy Hospital & Medical Ctr.*, 2020 IL 125219, ¶ 54. This decision is significant because it effectively shielded certain medical studies from discovery. *Dameron*, 2020 IL 125219, ¶ 1.

## Facts and Procedural Posture

The plaintiff, Alexis Dameron, filed a medical malpractice suit against Mercy Hospital and Medical Center and several medical professionals, alleging she sustained injuries during a surgical procedure. *Dameron v. Mercy Hospital & Medical Ctr.*, 2019 IL App (1st) 172338, ¶ 4. In her answers to interrogatories, the plaintiff disclosed David Preston, M.D. as a Rule 213(f)(3) expert witness who would testify as to the results of the comparison electromyogram (EMG) and/or nerve conduction study (EMG study) performed on the plaintiff. *Dameron*, 2019 IL App (1st) 172338, ¶ 5. Thereafter, the plaintiff intended for Dr. Preston to prepare a report about his findings. *Id.*

Months later, the plaintiff filed a motion to designate Dr. Preston as a nontestifying expert consultant pursuant to Rule 201(b)(3) and to preclude discovery of the facts and opinions known to Dr. Preston. *Id.* ¶ 6. In doing so, the plaintiff contended that Dr. Preston had been retained to evaluate the nature and extent of the plaintiff's injuries and perform the EMG and was not retained because Dr. Preston treated her. *Id.* ¶ 7. The plaintiff further contended that opposing counsel was properly and timely notified that Dr. Preston had been withdrawn as a testifying expert witness. *Id.* As a result of the redesignation, the plaintiff argued that Dr. Preston's opinions were privileged from discovery pursuant to Rule 201(b)(3). *Id.*

The trial court denied plaintiff's attempt to redesignate Dr. Preston and ordered the plaintiff to produce Dr. Preston's records of the EMG. *Id.* ¶ 9. The plaintiff refused to comply and the court found her in contempt. *Id.* Thereafter, the plaintiff appealed. *Id.* ¶ 10.

## First District Opinion

In analyzing whether a party that previously disclosed a witness as a controlled expert may thereafter redesignate that witness as a consultant, the First District Appellate Court discussed the Illinois Supreme Court's *Taylor* case, which provided that a party may withdraw an expert witness so long as the opposing party is given clear and sufficient notice. *Dameron*, 2019 IL App (1st) 172338, ¶ 19 (citing *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994)). However, the appellate court noted that the plaintiff in this case also sought to redesignate Dr. Preston from a controlled expert witness to a non-

testifying consultant whose reports and opinions are protected from discovery pursuant to the privilege set forth in Rule 201(b)(3). *Id.* Therefore, the court looked to the federal discovery rules for guidance. *Id.* ¶ 22.

Among the cases analyzed by the court was *San Román v. Children's Heart Center, Ltd.*, which explains that the Federal Rules of Civil Procedure distinguish between an expert whose opinions may be presented at trial and an expert employed only for trial preparation and not expected to testify. *Id.* ¶ 22 (citing *San Román v. Children's Heart Center, Ltd.*, 2010 IL App (1st) 091217, ¶ 23). The court also analyzed a 2009 Seventh Circuit Court of Appeals' decision, *Securities & Exchange Commission v. Koenig*, which noted that "[a] witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report *has been disclosed*, and a deposition conducted, to the status of a trial-preparation expert whose identity and views may be concealed." *Dameron*, 2019 IL App (1st) 172338, ¶ 24 (citing *Securities & Exchange Commission v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009)) (emphasis added). However, neither of the aforementioned cases distinguished situations where only the expert's identity was disclosed from those where the expert's report had been disclosed. *Dameron*, 2019 IL App (1st) 172338, ¶ 24. Another case, *Davis v. Carmel Clay Schools,* No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251, 2013 WL 2159476, at *5-6 (S.D. Ind. May 17, 2013), recognized what constituted a "designation" of an expert witness. In *Davis*, the court noted that once the expert's report was disclosed to the opposing party, the expert ceased to enjoy protection from discovery by the opposing party. *Dameron*, 2019 IL App (1st) 172338, ¶ 25 (citing *Davis*, 2013 U.S. Dist. LEXIS 70251, 2013 WL 2159476, at *5-6).

Based on the Illinois Supreme Court Rules and Illinois and federal case law, the First District held that because the court ordered plaintiff's attorney to produce "Dr. Preston's records regarding his June 1, 2017 comparison EMG study," but the EMG study was absent from the record on appeal, the appellate court could not conclude that the material sought was of a purely concrete nature or that the production of the EMG study had the potential to expose Dr. Preston's thought processes. *Dameron*, 2019 IL App (1st) 172338, ¶ 50. Therefore, the court held that Dr. Preston's EMG study was protected by the consultant's work product privilege. *Id.* ¶¶ 52-53. The First District's ruling was appealed by the defendants.

## Supreme Court Opinion

The Supreme Court affirmed the holding from the First District, though the Supreme Court's analysis differed from that of the First District. *Dameron*, 2020 IL 125219, ¶ 54. The Supreme Court focused on the committee comments to Rule 213, which makes clear that the purpose of paragraph (f) "is to prevent unfair surprise at trial, without creating an undue burden on the parties before trial." *Dameron*, 2020 IL 125219, ¶ 31 (citing Ill. S. Ct. R. 213, Committee Comments, paragraph (f) (adopted Mar. 28, 2002)). The plaintiff alerted the defendants of her intention to redesignate Dr. Preston almost a year before the trial date. *Id.* Therefore, the court reasoned that the defendants had almost a year of advance notice that Dr. Preston would not testify as an expert witness. *Id.* Accordingly, Dr. Preston's redesignation would cause defendants no "unfair surprise *at trial*." *Id.* (emphasis in original). The supreme court further reasoned that the defendants could not have come to meaningfully rely on Dr. Preston's participation at trial as an expert witness because the defendants never received Dr. Preston's report. *Id.* ¶ 32. Therefore, the court held that a party is permitted to redesignate an expert from a Rule 213(f) controlled expert witness to a Rule 201(b)(3) consultant in a reasonable amount of time before trial and where a report has not yet been disclosed. *Id.*

Defendants argued that even if Dr. Preston were permitted to be redesignated as a consultant under Rule 201(b)(3), the plaintiff must still turn over Dr. Preston's report and test results which consisted of objective data that was not considered "core work product." *Dameron*, 2020 IL 125219, ¶ 36. The supreme court disagreed, noting that the analysis

should consider the exceptional circumstances portion of the Rule 201(b)(3) definition of consultant, which states that the "identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain *facts* or opinions on the same subject matter by other means." *Id.* ¶ 40 (citing Ill. S. Ct. R. 201(b)(3)). The supreme court noted that in this case, the defendants asserted that the report and results of the EMG constitute concrete factual data, which was expressly protected under the consultant privilege provided in Rule 201(b)(3). *Id.* ¶ 45. Therefore, the disclosure was protected absent any exceptional circumstances. *Id.* Unlike the First District, the Illinois Supreme Court considered whether it was 'impracticable' for a party to otherwise obtain facts or opinions on the same subject. *Id.* ¶¶ 41-42. Concluding it was not for the defendants in the instant case, the Illinois Supreme Court affirmed the First District's ruling. *Id.* ¶ 54.

## Conclusion

The Illinois Supreme Court concluded that a party is permitted to redesignate an expert from a Rule 213(f)(3) controlled expert witness to a Rule 201(b)(3) consultant in a reasonable amount of time before trial and to avoid production of a report created by that expert absent a showing of "exceptional circumstances." *Dameron*, 2020 IL 125219, ¶ 52. When faced with similar circumstances, defense counsel should carefully consider how to demonstrate exceptional circumstances pursuant to Rule 213(b)(3). Counsel should further strive to avoid premature disclosures that could give rise to a similar redesignation issue.

## About the Authors

**Mark D. Hansen** is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He has been involved in the defense of cases involving catastrophic injury, including the defense of complex cases in the areas of medical malpractice, products liability, and professional liability. Mr. Hansen has defended doctors, nurses, hospitals, clinics, dentists, and nursing homes in healthcare malpractice cases. He received his undergraduate degree from Northern Illinois University and law degree from University of Illinois College of Law. Mr. Hansen is a member of the Illinois Association of Defense Trial Counsel and is a former co-chair of the Young Lawyers Committee, former *ex officio* member of the Board of Directors, and has served as chair for various seminars hosted by the IDC. He is also a member of the Illinois Society of Healthcare Risk Management, the Abraham Lincoln American Inn of Court, and the Defense Research Institute.

**Emily J. Galligan** is an associate in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* She concentrates her practice in the areas of employment law, medical negligence/healthcare law, and Section 1983 civil rights litigation. Ms. Galligan defends employers in a variety employment matters, including sexual harassment, discrimination, and retaliation claims against employers. She also spends a large portion of her practice representing hospitals, medical entities, physicians, and nurses in medical negligence actions. Ms. Galligan further represents state actors (clinical therapists and law enforcement officers) in Section 1983 claims, including deliberate indifference, due process, and failure to protect claims.

*The authors would like to thank **Taylor Cascia**, a paralegal with *Heyl, Royster, Voelker & Allen, P.C.*, for her assistance with this column.


## About the IDC

The Illinois Defense Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.IDC.law or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, admin@IDC.law.