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Partial use of depositions: Illinois Supreme Court Rule 212(c)

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Introduction

Illinois Supreme Court Rule 212(c) states as follows:

> (c) Partial Use. If only a part of a deposition is read or used at trial by a party, any other party may at that time read or use, or require him to read, any other part of the deposition which ought in fairness to be considered in connection with the part read or used.[1]

In essence, Illinois Supreme Court Rule 212(c) is a codification of the common law rule of completeness as it applies to depositions.[2] The rule of completeness provides that, whenever part of a statement has been admitted into evidence, the omitted part should also, in fairness, be admitted. However, before it is admitted, the trial court must decide that the omitted part of the statement "explains or modifies" the part of the statement that has been admitted.[3] If the omitted part neither explains nor modifies the admitted part of the statement, it is improper for the trial court to admit the omitted part.[4]

Discovery depositions

In the case of *Smith v. City of Rock Island*,[5] the plaintiff sued the City of Rock Island for injuries sustained in a collision that occurred when the plaintiff went through a stop sign at an intersection. The plaintiff alleged that she did not see the stop sign because it was improperly maintained. At that time, plaintiff had the burden of proving her freedom from contributory negligence.

At trial, the defendant's attorney impeached the plaintiff from her deposition in which the plaintiff testified that she "just glanced" at the intersection before she entered it. The trial court did not allow the plaintiff to introduce on her re-direct examination another part of her deposition in which she explained what she meant when she earlier used the word "glanced."

The Illinois Appellate Court held that it was reversible error for the trial court not to have allowed the plaintiff to have introduced the part of her deposition in which she explained what she meant by using the word "glanced."[6]

The meaning of "agreement" was at issue *In Re Estate of Stewart* (*Stewart*).[7] The plaintiff in Stewart was barred by the trial court on her re-direct examination from explaining her understanding of the word "agreement" as it was used to impeach her from her deposition testimony. On her re-direct examination, the plaintiff wanted to introduce another part of her deposition to explain that, when she said earlier in her deposition "there was no agreement," she meant that there was "no written or more formal express agreement." Although the Illinois Appellate Court held that it was error for the trial court not to have allowed the plaintiff to use her deposition to give an explanation as to what she meant when she used the word "agreement," it also held the error was not prejudicial.[8]

The Illinois Appellate Court in *Morse v. Hardinger,*[9] held that Rule 212(c) applied to the introduction of admissions as well as impeachment. In Morse, the plaintiff sued the estate of a physician, who had died in an unrelated accident, alleging medical negligence. The trial court allowed the plaintiff to introduce fourteen passages from the physician's discovery deposition as admissions.

Defense counsel objected to any part of the defendant's discovery deposition being admitted, but also argued that, if any part of the defendant's deposition were to be read, then the entire deposition must also be read in accordance with Rule 212(c). The trial court agreed, in part, with the defendant's argument and held that, if the deposition was admissible in part, it must also be admissible in its entirety.

The Illinois Appellate Court, acknowledging that Rule 212(c) must not be an excuse to sweep irrelevant material into evidence, held that it was reversible error to have admitted the defendant's discovery deposition in its entirety. Therefore, the Appellate Court suggested that, if the plaintiff on re-trial wanted to use parts of the defendant's discovery deposition as admissions, the trial court should consider each admission individually and then determine how much of the surrounding deposition should be admitted in the interest of fairness.[10]

Illinois has long held that a witness may not be corroborated on direct examination by proof of prior statements consistent with his or her testimony.[11] Likewise, when a witness is impeached by a prior inconsistent statement, a prior consistent statement of that witness is not admissible unless the consistent statement either disproves or explains the meaning of the inconsistent statement.[12]

The Illinois Appellate Court in *Turner v. Chicago Transit Authority,*[13] applied the common law rule barring prior consistent statements to Rule 212(c). In *Turner*, the plaintiff testified during cross-examination that he had been drinking at approximately 12:30 a.m. on the morning of the accident. Defense counsel thereafter impeached the plaintiff with a statement from the plaintiff's deposition that the plaintiff had been drinking as late as 2:30 a.m. that morning.

On re-direct examination, over defense counsel's objection, plaintiff's counsel rehabilitated the plaintiff with a statement from the same deposition in which the plaintiff testified that he had been drinking at 12:30 a.m. or 1:00 a.m. Relying on Rule 212(c), the trial court allowed the rehabilitation. The Illinois Appellate Court, although concluding that the plaintiff's rehabilitation was harmless and not grounds for reversal, nonetheless held that, because the admitted rehabilitation statement neither explained nor clarified the impeaching statement but only contradicted it, the rehabilitation statement was improperly admitted.[14]

In *Seldin v. Babendin,*[15] one plaintiff, a back-seat passenger in the defendant's automobile, testified during his cross-examination from his discovery deposition that, "We were driving in the middle lane. There were two cars on the right and the second car on the right moved into the middle lane and that caused the accident."

On the plaintiff's re-direct, his counsel attempted to introduce more of the quote from his deposition in which he said, "It precipitated a movement by the car we were driving in which eventually led to this car that we were driving in, hitting the center wall on the Eden's Expressway." The trial court did not allow admission of the plaintiff's proffered testimony on re-direct examination. The Illinois Appellate Court upheld the trial court's exclusion of the evidence because the initial passage on the plaintiff's cross-examination was in no way clarified by the second passage that counsel attempted to offer on the plaintiff's re-direct.[16]

Evidence depositions

Pursuant to Illinois Supreme Court 212(b), in conjunction with the Illinois Code of Civil Procedure and the Illinois Rules of Evidence, an evidence deposition may be used by any party for any purpose. An evidence deposition is not the "property" of the party who takes it, and either party may offer any part of any evidence deposition.[17]

Furthermore, Illinois Supreme Court 206(c)(2) provides that, in an evidence deposition, the examination and cross-examination shall be the same as though the deponent were testifying at trial. Therefore, if a party who takes an evidence deposition declines to introduce the evidence deposition into evidence at trial, the other party may do so.[18]

As in the case of a discovery deposition, Rule 212(c) is also applicable to an evidence deposition. In *Dombrowski v. Laschinski,*[19] in his case-in-chief, the defendant read to the jury only the entire direct examination of the evidence deposition of an eyewitness to the automobile accident at issue. Instead of reading the witness' entire cross-examination, the plaintiff chose to read only three separate questions and answers relating to the lighting conditions surrounding the scene of the accident that were also described in the direct examination.

Invoking Rule 212(c), the defendant requested that plaintiff's counsel read the entire cross-examination of the evidence deposition to the jury. The trial court granted the defendant's request, and plaintiff's counsel read the entire cross-examination to the jury.

Upon consideration of the plaintiff's post-trial motion, the trial court concluded that it had committed reversible error in requiring plaintiff's counsel to read the remainder of the deposition and ordered a new trial.

The Illinois Appellate Court agreed with the trial court. The three questions originally offered by the plaintiff all related to the lighting conditions surrounding the scene of the accident that were described in the direct examination. Because the remainder of the cross-examination neither explained nor modified the three questions and answers read by the plaintiff, the Illinois Appellate Court concluded that the trial court was correct in ordering a new trial. Furthermore, the court reasoned that the defendant had the opportunity to read any or all of the evidence deposition to the jury but chose to read only the direct examination. The defendant, therefore, waived his right to complain that the entire cross-examination was necessary to assess the credibility of the deponent.[20]

Conversely, in *Schmidt v. Blackwell,*[21] the plaintiff introduced into evidence in her case-in-chief several isolated statements from the evidence depositions of two passengers in the defendant's automobile at the time of the accident. Pursuant to Rule 212(c), the defendant successfully persuaded the trial court to require the plaintiff to read the remainder of the two evidence depositions.

The Illinois Appellate Court agreed with the trial court holding that the fairness standard enunciated in Rule 212(c) required that the entire depositions be read because the two witnesses were passengers in the automobile at the time of the accident and were important eyewitnesses whose testimony was relevant and whose credibility needed to be assessed because they were not present at trial. Plaintiff, by using the evidence deposition, made the deponents her witnesses, and the jury, in fairness, was entitled to hear the entire testimony of each witness.[22]

Finally, in *Adams v. Sarah Bush Lincoln Health Center,*[23] plaintiff introduced the evidence deposition of a physician who performed surgery to repair plaintiff's injury. The defendant on cross-examination had questioned the physician regarding the applicable standard of care. At trial, the plaintiff successfully barred the defendant from cross-examining the physician regarding the standard of care because the plaintiff did not question the physician regarding the standard of care on her direct and, therefore, the defendant's questioning of the physician regarding the standard of care was beyond the scope of the plaintiff's direct exam.

The defendant then moved, pursuant to Rule 212(c), to have the physician's cross-examination entered as part of the defendant's case-in-chief. The plaintiff objected because of the defendant's use of leading questions, and the trial court denied the defendant's motion.

On appeal, the court upheld the trial court's rulings. The appellate court first held that the defendant's cross-examination went beyond the scope of the plaintiff's direct examination and, by barring the defendant's cross-examination, the trial court did not abuse its discretion. The court further held that the trial court did not violate 212(c) by its refusal to admit the defendant's cross-examination in the defendant's case-in-chief. Using the standard of fairness as expressed in Rule 212(c), the appellate court reasoned that the defendant's desire to admit the cross-examination was not "connected" to the plaintiff's direct examination. The questions that the defendant posed to the physician were leading questions that are not

allowed on direct examination. The court asserted that the defendant should have properly conducted a direct examination of the physician in the evidence deposition instead of choosing to cross-examine him.[24] ■

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1. The federal equivalent to Supreme Court Rule 212(c) is Federal Civil Procedure Rule 32(a)(6).

2. The common law rule of completeness has been codified in the new Illinois Rules of Evidence at IRE 106. See also FRE 106 for an equivalent codification in the federal system.

3. Buczyna v. Cuomo & Son Cartage Co., 146 Ill.App.3d 404, 496 N.E.2d 1116 (1st Dist. 1986).

4. Pyse v. Byrd, 115 Ill.App.3d 1003, 450 N.E.2d 1374 (3rd Dist. 1983).

5. 22 Ill.App.2d 389, 161 N.E.2d 369 (2nd Dist. 1959). Smith was governed by the predecessor to S.Ct. Rule 212(c), which was S.Ct. Rule 19–10 (4), which used the exact wording of S. Ct. Rule 212(c).

6. Id. at 374-375.

7. 274 Ill.App.3d 298, 652 N.E.2d 1151 (1st Dist. 1995).

8. Id. at 1161-1162.

9. 34 Ill.App.3d 1020, 341 N.E.2d 172 (4th Dist. 1976).

10. Id. at 176. The Illinois Appellate Court also concluded that, if its suggestion regarding Rule 212(c) was not followed in the retrial, the Dead-Man's Act, 735 ILCS 5/8–201, would be waived, which would then allow the plaintiff to testify to her version of the same occurrences. However, if the trial court followed the appellate court's suggestion and admitted only the defendant's admissions, the Dead-Man's Act would not be waived.

11. People v. Powell, 53 Ill.2d 465, 292 N.E.2d 409 (1973). Rule 801 of the new Illinois Rules of Evidence, unlike Federal Rule of Evidence 801, has no provision for prior consistent statements. Instead, the Illinois Rules of Evidence defer to the common law rule generally barring prior consistent statements.

12. People v. Williams, 147 Ill.2d 173, 588 N.E.2d 983 (1991). As a limited exception to the rule, a prior consistent statement of a witness may be admitted where it is charged either (1) that the witness' trial testimony was recently fabricated or (2) that the witness has a motive for testifying falsely and the prior consistent statement was given when the motive to lie was nonexistent or before the effect of the account could be foreseen. Moore v. Anchor Organization For Health Maintenance, 284 Ill.App.3d 874, 884, 672 N.E.2d 826, 834 (1st Dist. 1996).

13. 122 Ill.App.3d 419, 461 N.E.2d 551 (1st Dist. 1984).

14. Id. at 557.

15. 325 Ill.App.3d 1058, 759 N.E.2d 28 (1st Dist. 2001).

16. Id. at 37.

17. Prince v. Hutchinson, 49 Ill.App.3d 990, 365 N.E.2d 549 (2nd Dist. 1977).

18. Dobkowski v Lowe's, Inc., 20 Ill.App.3d 275, 314 N.E.2d 623 (5th Dist. 1974). When a plaintiff desires to introduce an evidence deposition taken by the defendant, the proper procedure is for the plaintiff to ask the defendant in open court whether the defendant intends to use the deposition in his or her case. If the defendant answers affirmatively, the plaintiff may not use the deposition in the plaintiff's case-in-chief. If, after such an exchange, the defendant fails to introduce the evidence deposition, the plaintiff should be permitted to re-open his or her case for the purpose of introducing the

deposition into evidence. If the defendant responds when questioned in open court that he or she does not intend to use the deposition, the plaintiff may introduce the deposition into evidence as a part of his or her case. Id. at 627; Lebrecht v. Tuli, 130 Ill.App.3d 457, 473 N.E.2d 1322, 1335 (4th Dist. 1985).

19. 67 Ill.App.3d 506, 385 N.E.2d 35 (1st Dist. 1978).

20. Id. at 38.

21. 15 Ill.App.3d 190, 304 N.E.2d 113 (3rd Dist. 1973).

22. Id. at 119-120.

23. 369 Ill.App.3d 988, 874 N.E.2d 100 (4th Dist. 2007).

24 Id. at 110-112.

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