



## Medical Malpractice Update

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### The Relevancy of a Medical Expert's Own Personal Practice

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Illinois cases speak to the proposition that the standard of care of the defendant-physician in a medical malpractice case must be established through testimony of an expert witness. *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 423 (1975). That witness must be familiar with the issues that are the subject of the alleged negligence. *Garley v. Columbia LaGrange Mem. Hosp.*, 351 Ill. App. 3d 398, 407 (1st Dist. 2004). The expert has typically performed the same procedure, made the same diagnoses, or otherwise experienced similar patient conditions as the defendant physician. A natural and possibly important question then arises for the expert: What would you have done? But is an expert's personal practice admissible, and is it relevant. It is well-established in Illinois that a medical expert's personal practice cannot be the exclusive foundation for establishing standard of care. *Schmitz v. Binette*, 368 Ill. App. 3d 447, 461 (1st Dist. 2006) (citing *Walski v. Tiesenga*, 72 Ill. 2d 249, 261-62 (1978)). However, the subject may be relevant to a jury for evaluating the credibility of an expert and his or her opinions, especially in the case where the expert's practice differs from the defendant's. *Schmitz*, 368 Ill. App. 3d. at 461.

The Illinois Supreme Court weighed in on this issue in *Walski v. Tiesenga*, 72 Ill. 2d 249 (1978). In *Walski*, the plaintiff received treatments for her thyroid over several years, including prior surgeries that left scar tissue. *Walski*, 72 Ill. 2d at 253. Plaintiff began experiencing post-operative difficulty breathing and speaking following a subtotal thyroidectomy performed by the defendant, general surgeon. *Id.* Plaintiff filed suit, alleging that the surgeon failed to identify the left recurrent laryngeal nerve and because of this failure, the nerve was severed, resulting in her injuries. *Id.* at 254. The trial court entered a directed verdict in favor of the defendants after the plaintiff failed to present evidence of the standard of care to which the general surgeon must adhere. *Id.* at 252. The Illinois Appellate Court First District affirmed, as did the Illinois Supreme Court. At issue was whether the testimony of the plaintiff's expert established the standard of care on identifying the laryngeal nerve during a thyroidectomy. *Id.* at 255. Plaintiff's expert stated that he could only testify "on the basis of my own opinion as to what I consider the proper option." *Id.* He also could not say whether other institutions taught differently, he could speak to what was taught where he was trained." *Id.* The expert never testified as to what the generally-accepted practice was in this situation, and instead, plaintiff's only evidence on standard of care was based upon the expert's own personal practice. *Id.* at 259. The supreme court held that standard of care cannot be established solely by showing that another physician would have acted differently. *Id.* at 261.

Cases decided since *Walski* have maintained this principle and illustrated when an expert's own practice is relevant. For instance, a jury may find it relevant that the expert's personal practice differs from what he has stated is the standard of care. *Schmitz*, 368 Ill. App. 3d at 459-62. In *Schmitz*, the plaintiff brought a claim alleging negligence against a gynecologist following surgery for urinary incontinence. *Id.* at 449. During surgery, the plaintiff claimed that a stitch was placed through her ureter, causing an obstruction. *Id.* The plaintiff's expert testified that the defendant-physician deviated from the standard of care by not performing a dye test to verify the integrity of the ureter. *Id.* at 450. Contrarily, defendant's expert testified that a dye test is not required to meet the standard of care. *Id.* However, defendant's expert also testified at his discovery deposition that he routinely performs the dye test during bladder surgeries. *Id.* Plaintiff's

counsel filed a motion *in limine* asking the court to allow cross-examination of the defense expert on that issue, and the court denied the motion, finding that the expert's personal practice was not relevant because the expert's practice met and exceeded the standard of care. *Id.* at 451. The jury found for the defendant and the plaintiff appealed. *Id.* The Illinois Appellate Court First District reversed. *Id.* at 462. Specifically, while the court agreed with *Walski*, and confirmed that an expert's personal practice cannot be the exclusive foundation for establishing standard of care, it also held that what a physician expert witness would do in the same situation that is at issue in the case is relevant to a jury in its evaluation of the expert's credibility. *Id.* at 458.

In *Gallina v. Watson*, 354 Ill. App. 3d 515 (4th Dist. 2004), the Illinois Appellate Court Fourth District distinguished *Walski*. The medical issue in *Gallina* involved the defendant surgeon's decision not to operate on the patient's ankle fracture. *Gallina*, 354 Ill. App. 3d at 517. In his discovery deposition, the defendant's expert testified that he typically operates on Type II fractures, but may not operate on a Type I. *Id.* at 518. This was significant because the defendant testified that the ankle fracture was a Type II. *Id.* The trial court granted defendant's motion *in limine* to exclude this testimony, finding that the defense expert's personal practice was irrelevant to the determination of the standard of care. *Id.* at 517. Plaintiff appealed, and the appellate court reversed. *Id.* at 523. On appeal, the defendant relied upon *Walski*, arguing that the expert's personal practice is irrelevant to the determination of the standard of care. *Id.* at 519. The Fourth District, however, found that while the defendant's expert's testimony did not establish that the defendant breached the standard of care, evidence of his personal practice is relevant because it can assist the fact finder in assessing the "credibility and persuasive value" of the expert's opinions. *Id.* at 520. Similar to *Schmitz*, the appellate court distinguished *Walski* because in that case, the plaintiff presented no evidence to establish the standard of care other than the expert's personal preferences. *Id.* at 519. The *Gallina* plaintiff did not rely upon the defense expert to establish his prima facie case.

Likewise, the First District has also held that a defendant-physician may not use an expert's personal practice as evidence establishing that the defendant complied with the standard of care. *Bergman v. Kelsey*, 375 Ill. App. 3d 612 (1st Dist. 2007). In *Bergman*, plaintiff's expert based his opinions in part on his work experience at various hospitals. *Bergman*, 375 Ill. App. 3d at 615. The defendant introduced guidelines from those hospitals upon cross-examination of the plaintiff's expert for impeachment purposes. *Id.* at 622. However, at trial the defendant was barred from introducing hospital guidelines and testimony relating to the expert's personal practice as evidence of standard of care. *Id.* at 634. Defendant argued that because he was allowed to impeach the expert with the guidelines, he should also be able to use that evidence to prove that he did not deviate from the standard of care. *Id.* at 635. The appellate court disagreed, however, finding that the defendant should not be able to introduce evidence of other physicians' personal practice in establishing standard of care. *Id.*

## Conclusion

The prevailing Illinois cases speak to the proposition that neither party may rely upon a medical expert's personal practice to establish the standard of care in a medical malpractice case, and such testimony can be properly barred. However, expert testimony as to personal practice may well be relevant and admissible for the purpose of evaluating the credibility and opinions of the expert. In practice, counsel should be aware of what their experts would have done and what they typically do when faced with the same medical situation at issue in the case, and if it differs, they should have solid reasoning as to why it differs.



### About the Author

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