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## Your Attack on the Affidavit

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**RICHARD R. HOLMGREN**  
Law Division, Circuit Court of Cook County  
Project Officer, YLS

# Your Attack on the Affidavit

## Illinois Cases, Statutes, and Rules

By: G. Grant Dixon III  
October 16, 1997

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## **I. The Basics: What every affidavit must have.**

All affidavits have certain minimum requirements that must be met before it can be accepted as an affidavit. It must be signed. *Kohls v. Maryland Cas. Co.*, 144 Ill. App. 3d 642, 644, 494 N.E.2d 1174, 98 Ill.Dec. 847 (1st Dist. 1986). The person signing must be sworn under oath that the statements made in the affidavit are true and correct.

*Manuel v. McKissack*, 60 Ill. App. 3d 654, 656, 377 N.E.2d 219, 18 Ill.Dec. 66 (1st Dist. 1978). The affidavit must also be notarized. *Hough v. Weber*, 202 Ill. App. 3d 674, 691, 560 N.E.2d 5, 147 Ill.Dec. 857 (2d Dist.) *appeal denied* 135 Ill.2d 556 (1990) (finding statement not an affidavit). But as with everything, there are exceptions. *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129, 133, 606 N.E.2d 641, 179 Ill.Dec. 809 (2d Dist. 1992); *Lieder v. Chicago Trans. Auth.*, 26 Ill. App. 2d 306, 167 N.E.2d 710 (1st Dist. 1960) (table) (both finding unsigned affidavit still valid).

One of the most important (and most often overlooked) elements of a valid affidavit is that the statements made by the affiant must be of the personal knowledge of the signatory. *Longo v. AAA-Michigan*, 201 Ill. App. 3d 543, 553, 569 N.E.2d 927, 155 Ill.Dec. 450 (1st Dist.) *appeal denied* 135 Ill.2d 557 (1990) (odometer fraud action). The best recollection of the affiant is usually not enough to carry the day; the statements should be based on his specific personal knowledge to be sufficient. *But see Lingerian v. Elgin J. & E Ry. Co.*, 24 Ill. App. 2d 1, 8, 163 N.E.2d 854 (2d Dist. 1960). This is because an affidavit is a factual document. Therefore, the BASIS for the statements must be listed in the affidavit. Moreover, the affidavit can't just list an opinion, it must state the facts to support the opinion. *Steuri v. Prudential Ins. Co. of America*, 668 N.E.2d 1066, 1073, 218 Ill.Dec. 234 (1st Dist. 1996); *Sider v. Outboard Marine Corp.*, 160 Ill. App. 3d 290, 301, 513 N.E.2d 449, 112 Ill.Dec. 35 (2d Dist. 1987). This also means an

affidavit cannot be based on hearsay statements of others that lack the appropriate foundational requirements. *In re Enoch's Estate*, 52 Ill. App. 2d 39, 50, 201 N.E.2d 682 (1st Dist. 1964). But if the foundation is met, nearly any evidence that can be submitted by live testimony can be submitted by use of an affidavit. *Peltz v. Chicago Trans. Auth.*, 31 Ill. App. 3d 948, 952, 335 N.E.2d 74 (1st Dist. 1975) (careful habits can come from an affidavit).

This leaves the following short-list of requirements:

1. Facts stated in the text (and ALL facts needed to support any opinions made);
2. Facts within the personal knowledge of the affiant;
3. Signed by the person with that knowledge;
4. Signatory signed while under oath; and,
5. Have it notarized.

Once an affidavit is admitted, the effect is that the statements must be accepted as true. *Lamkin v. Towner*, 138 Ill.2d 510, 532, 563 N.E.2d 449, 150 Ill.Dec. 562 (1990); *Luciano v. Waubensee Community College*, 245 Ill. App. 3d 1077, 1084, 614 N.E.2d 904, 185 Ill.Dec. 463 (2d Dist. 1993); *Denton Enterprises, Inc. v. Illinois State Toll Highway Auth.*, 77 Ill. App. 3d 495, 507, 396 N.E.2d 34, 32 Ill.Dec. 921 (1st Dist. 1979); *Corpus Christi Bank and Trust Co. v. Pullano*, 69 Ill. App. 3d 604, 608, 388 N.E.2d 180, 26 Ill.Dec. 556 (1st Dist. 1979). These averments override all allegations in the pleadings (to the extent they are not also subscribed to by affidavit). *Conroy v. Andeck Resources '81 Year-End Ltd.*, 137 Ill. App. 3d 375, 385, 484 N.E.2d 525, 92 Ill.Dec. 10 (1st Dist. 1985); *Ligenza v. Village of Round Lake Beach*, 133 Ill. App. 3d 286, 293, 478 N.E.2d 1187, 88 Ill.Dec. 579 (2d Dist. 1985).

Another effect of admission of the affidavit is that any exhibits mentioned (and attested to) in the body of the text become verified and admissible too. *Canzoneri v. Village of Franklin Park*, 161 Ill. App. 3d 33, 37, 513 N.E.2d 1103, 112 Ill.Dec. 494 (1st Dist. 1987). If you forget to have the exhibits attested to, just have that done during the eventual deposition and you're fine. *In re Marriage of Kaplan*, 149 Ill. App. 3d 23, 30, 500 N.E.2d 612, 102 Ill.Dec. 719 (1st Dist. 1986).

## **II. The limits: What affidavits cannot say or do.**

Everything has its limits and affidavits are no exception. Affidavits are not pleadings and cannot take the place of pleadings. *In re Petition to Annex Certain Property to City of Wood Dale*, 244 Ill. App. 3d 820, 836, 611 N.E.2d 606, 183 Ill.Dec. 343 (2d Dist. 1993). They cannot state what the intent of others was at any particular time or place. *Elliott v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724, 732, 589 N.E.2d 1074, 168 Ill.Dec. 674 (2d Dist. 1992). They cannot be based on "information and belief" of the affiant, only hard facts will do. *Allied American Ins. Co. v. Mickiewicz*, 124 Ill. App. 3d 705, 708, 464 N.E.2d 1112, 80 Ill.Dec. 129 (1st Dist. 1984); *Stephens v. Northern Indiana Public Service Co.*, 87 Ill. App. 3d 961, 409 N.E.2d 423, 42 Ill.Dec. 808 (5th Dist. 1980). Affidavits cannot express opinions on matters of law. *American Mut. Reinsur. Co. v. Calvert Fire Ins. Co.*, 52 Ill. App. 3d 922, 367 N.E.2d 104, 9 Ill.Dec. 670 (1st Dist. 1977). Nor can they contradict what a judge knows in his own mind to be true. *In re Estate of Rice*, 108 Ill. App. 3d 751, 760, 439 N.E.2d 1264, 64 Ill.Dec. 456 (2d Dist. 1982) (affidavit to what occurred in proceeding before judge). This probably also means an affidavit can be discarded by the Court if it seems illogical, improbable, or unreliable.

Affidavits normally cannot be used in the criminal context. *People v. Almodovar*, 235 Ill. App. 3d 144, 157, 601 N.E.2d 853, 176 Ill.Dec. 155 (1st Dist. 1992). In fact, for the most part they are used exclusively in the civil arena in §2-1005, §2-619, and §103(b) motions. *Marquette Nat. Bank v. B.J. Dodge Fiat, Inc.*, 131 Ill. App. 3d 356, 362, 475 N.E.2d 1057, 86 Ill.Dec. 678 (2d Dist. 1985).

An affiant cannot attest to what members of his office know. In *Riley v. Jones Bros. Const. Co.*, 198 Ill. App. 3d 822, 826, 556 N.E.2d 602, 144 Ill.Dec. 924 (1st Dist. 1990), an attorney filed an affidavit that a courthouse clerk advised the lawyer's clerk that the amended complaint need not have the "filed" stamp to be filed as long as it appeared in the computerized system. And, the lawyer attested, that is why there was no filed stamp though the amended complaint was in fact filed. The court held that the statements were not within the personal knowledge of the signatory nor was there an explanation why there was not an affidavit from the person with whom the alleged conversation took place. *Id.* at 830.

Affidavits cannot be admitted to Court posthumously. *Schott v. Short*, 131 Ill. App. 2d 854, 858, 268 N.E.2d 712 (3d Dist. 1971). Even one hour before death probably is not sufficient. *Brenneman v. Dillon*, 296 Ill. 140, 143, 129 N.E. 564 (1921). In those circumstances, better take a deposition.

Exceptions? In *Parks v. McWhorter*, 144 Ill. App. 3d 270, 494 N.E.2d 234, 98 Ill.Dec. 307 (5th Dist.) *appeal denied* 112 Ill.2d 580 (1986), an attorney signed an affidavit stating that his client knows this or that. Though obviously invalid, the court held that alone did not constitute reversible error. *Id.* at 275-76. In theory, affidavits

cannot be used to muddle an already clear record. *Horwich v. Horwich*, 24 Ill. App. 3d 398, 321 N.E.2d 374 (1st Dist. 1974).

### **III. What is NOT an affidavit.**

Perhaps as important as what constitutes an affidavit is what is not an affidavit. For example, a verified pleading is not an affidavit (*Central Clearing, Inc. v. Omega Industries, Inc.*, 42 Ill. App. 3d 1025, 1028, 356 N.E.2d 852, 1 Ill.Dec. 570 (1st Dist. 1976)) and cannot substitute for an affidavit. The reason seems to be that a pleading is rarely detailed enough to give the kind of information needed in most affidavits.

Many other types of sworn documents from both the United States and other countries are not intended to be (and are not) affidavits. The clause at the end of most affidavits is called a Jurat. This is not an affidavit but simply evidence that the affidavit was properly sworn to. *Cintuc, Inc. v. Kozubowski*, 230 Ill. App. 3d 969, 974, 596 N.E.2d 101, 172 Ill.Dec. 822 (1st Dist. 1992). Normally swearing to the validity of documents is not enough to constitute an affidavit but (as always) there are exceptions. *Griffin v. Universal Cas. Co.*, 274 Ill. App. 3d 1056, 1064, 654 N.E.2d 694, 211 Ill.Dec. 232 (1st Dist. 1995) (certification by vice-president was enough).

#### IV. How to challenge an affidavit.

The first thing you can do is file an objection to filing of the affidavit. *See Appendix A for example. Woodfield Ford, Inc. v. Akins Ford Corp.*, 77 Ill. App. 3d 343, 395 N.E.2d 1131, 32 Ill.Dec. 750 (1st Dist. 1979). If you fail to object to it, the averments are accepted as true. *Stone v. McCarthy*, 206 Ill. App. 3d 893, 565 N.E.2d 107, 151 Ill.Dec. 836 (1st Dist. 1990); *Advance Mortg. Corp. v. Concordia Mut. Life Assn.*, 135 Ill. App. 3d 477, 481 N.E.2d 1025, 90 Ill.Dec. 225 (1st Dist. 1985).

The proper attack is a motion to strike the affidavit. The motion can allege defects in any one of several areas. Important questions are:

1. Are the statements made by the affiant within her personal knowledge?
2. Are the opinions given simply a legal opinion on an issue that is ultimately reserved for the judge to decide?
3. Are there sufficient facts stated sufficient to support any opinion given?
4. Does the affidavit meet the requirements of the Rule they are using? See Section V below.
5. Are there personal opinions contained in the affidavit? If so, are they supported by the affiant?
6. Does the affidavit address the issues of the motion?

The best basis for a challenge is the “personal knowledge of affiant” requirement. If the person doesn’t know it, he or she can’t say so. A good example of this is *Holub v. Holy Family Soc.*, 164 Ill. App. 3d 970, 518 N.E.2d 419, 115 Ill.Dec. 894 (1st Dist. 1987). An expert signed an affidavit that said the plaintiff relied on assurances of a defendant in making health care decisions. *Id.* at 974. The affidavit was discarded as rubbish because the expert had no way of knowing this. *Id.*

An example of the “legal opinion” affidavit is the recent case of *Steuri v. Prudential Ins. Co. of America*, 282 Ill. App. 3d 753, 668 N.E.2d 1066 (1st Dist. 1996).

In response to a summary judgment motion, an employee of a defendant signed an affidavit stating the general contractor maintained control over the job site for the purposes of the Structural Work Act. *Id.* at 763. Not only did the employee not have this personal knowledge, this statement is a conclusory legal opinion and was the heart of the motion to be resolved. *Id.* Therefore, the averments in the affidavit were improper. *Id.* at 763-64. *See also, American Mut. Reinsurance Co. v. Calvert Fire Ins. Co.*, 52 Ill. App. 3d 922, 925, 367 N.E.2d 104, 9 Ill.Dec. 670 (1st Dist. 1977) *cert. denied* 436 U.S. 906 (1978).

Whether to exclude an affidavit is within the discretion of the trial court. *In re Marriage of Kusper*, 195 Ill. App. 3d 494, 497, 552 N.E.2d 1023, 142 Ill.Dec. 282 (1st Dist. 1990). If you are looking to exclude or strike an affidavit on technicalities, you probably won't win. *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 15, 545 N.E.2d 965, 137 Ill.Dec. 204 (1st Dist. 1989); *Hoover v. Crippen*, 151 Ill. App. 3d 864, 868, 503 N.E.2d 848, 105 Ill.Dec. 8 (3d Dist. 1987) (affidavits with technical abnormality still accepted). Substance rules over form—if they get the information out there in some form, it will likely be accepted. *Mount Prospect State Bank v. Forestry Recycling Sawmill*, 93 Ill. App. 3d 448, 459, 417 N.E.2d 621, 48 Ill.Dec. 889 (1st Dist. 1980). Nor will mere surplusage render ineffective an otherwise complete and sufficient affidavit. *In re Village of Mettawa*, 33 Ill. App. 2d 38, 43, 178 N.E.2d 895 (2d Dist. 1961).

A case demonstrating how to NOT challenge an affidavit is *Allerion, Inc. v. Nueva Icacos, S.A.*, 283 Ill. App. 3d 40, 669 N.E.2d 1158, 218 Ill.Dec. 632 (1st Dist. 1996). There the Appellate Court was asked to consider whether there was jurisdiction over a Mexican company flowing from contract negotiations which ultimately resulted in

litigation. In support of an objection, Nueva submitted the conclusory affidavit of its General Administrative Manager. *Id.* at 42. Allerion responded with four affidavits from its people. *Id.* These four contained specific facts about the jurisdictionally-sufficient contacts of the respondent. *Id.* at 42-43. Nueva complained the statements in the affidavits were not compliant with Rule 191 and therefore should be stricken but never counted any of the statements in the group of four affidavits. *Id.* at 47. Consequently, when the affidavits were found to comply with the strictures of Rule 191, the unconverted facts were accepted as true. *Id.*

## **V. Specific Rules and Statutes for Affidavits.**

Some statutes specifically address affidavits. Some are general, some specific. The most widely cited ones are detailed below.

### **A. 735 Ill. Comp. Stat. §5/2-1103**

Section 2-1103 is *the* rule on affidavits in Illinois. If your affidavit fails to comply with this rule, chances are good its is improper and subject to challenge. The text of the statute is important enough to repeat here:

- (a) All affidavits presented to the court shall be filed with the clerk.
- (b) If evidence is necessary concerning any fact which according to law and the practice of the court may now be supplied by affidavit, the court may, in its discretion, require the evidence to be presented, wholly or in part, by oral examination of the witnesses in open court upon notice to all parties not in default, or their attorneys. If the evidence is presented by oral examination, an adverse party shall have the right to cross-examination. This Section does not apply to applications for change of venue on grounds of prejudice.

As with all affidavits which are governed by a specific statute, your best bet is to comply literally with the statute. *In re Village of Mettawa*, 33 Ill. App. 2d 38, 178 N.E.2d 895 (2d Dist. 1961). The statute, when read closely, makes it clear that when an affidavit is supplied, the opposition has the right to ask for a deposition of the affiant, though the request need not be granted. If you are confronted with an affidavit, make sure you demand a deposition. If you are presenting one, argue that the affidavit is sufficiently clear that a deposition is not needed. Experience seems to dictate the request for the deposition of the affiant is likely to be granted. *See Wilson v. Wilson*, 56 Ill. App. 2d 187, 205 N.E.2d 636 (2d Dist. 1965).

B. *Summary Judgment - Rule 191*

Affidavits submitted pursuant to Illinois Supreme Court Rule 191 are the most often encountered affidavits. They appear in one of two situations. First, in support of the motion for summary judgment (a Rule 191(a) affidavit). Second, in response to motions when “material facts are not obtainable” (a Rule 191(b) affidavit). The rules governing these are essentially the same. The critical difference is the affiant. A Rule 191(b) affidavit is usually prepared by attorney responding to the motion. *See Rule 191(b) Affidavit* (Appendix A); *but see, Giannoble v. P & M Heating & A.C.*, 233 Ill. App. 3d 1051, 175 Ill.Dec. 169, 599 N.E.2d 1183 (1st Dist. 1992) (party must prepare). A Rule 191(a) affidavit is signed by someone else, normally an expert. The same rules normally apply here as detailed above.

As with all affidavits, Rule 191 affidavits must have the oath signed. *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 7, 610 N.E.2d 806, 182 Ill.Dec. 937 (4th Dist.) *appeal denied* 622 N.E.2d 1211 (1993). The affiant must be competent to testify to the material

contained in the affidavit (*Rinchich v. Village of Bridgeview*, 235 Ill. App. 3d 614, 623, 176 Ill.Dec. 504, 601 N.E.2d 1202 (1st Dist. 1992)), and the testimony given must be admissible. *Larson v. Decatur Mem. Hosp.*, 236 Ill. App. 3d 796, 802, 176 Ill.Dec. 918, 602 N.E.2d 864 (4th Dist. 1992). Statements made on information and belief (*Beattie v. Lindelof*, 262 Ill. App. 3d 372, 382, 199 Ill.Dec. 236, 633 N.E.2d 1227 (1st Dist.) *appeal denied* 642 N.E.2d 1273 (1994)) or which are conclusory are inadmissible. *Smith v. United Farm Mut. Reinsur.*, 249 Ill. App. 3d 686, 188 Ill.Dec. 899, 619 N.E.2d 263 (5th Dist. 1993). And, the affiant must list sufficient facts to make every statement. *Glassman v. Wyeth Labs, Inc.*, 238 Ill. App. 3d 533, 179 Ill.Dec. 506, 606 N.E.2d 338 (1st Dist. 1992). As always, the best practice is to follow the rule to the letter. *Allied American Ins. Co. v. Mickiewicz*, 124 Ill. App. 3d 705, 464 N.E.2d 1112, 80 Ill.Dec. 129 (1st Dist. 1984). When there is a deviation, the slip may cause the affidavit to be stricken.

#### C. *Physicians Affidavits - 2-622*

The alleged purpose of Section 2-622 is to deter frivolous filings of medical malpractice cases. *Cato v. Attar*, 210 Ill. App. 3d 996, 569 N.E.2d 1111, 155 Ill.Dec. 500 (2d Dist. 1991). But a cottage industry has grown up here—motions to strike 2-622 affidavits. In nearly every case, there will be a motion to strike the affidavit, the attorney certification, or both. The disavowed but well-known purpose seems to be to make the plaintiff's attorney prove her case long before trial and to take a free swing at the theory. There are no magic bullets here, every case is different. However, attached in Appendix B are examples of an affidavit and attorney's certification that has been approved. Your best bet is to prepare for the eventual motion to strike when you file because you will certainly see it.

A few points to remember. First, even if you don't attach one to the complaint, the case should not be dismissed. *Huff v. Hadden*, 160 Ill. App. 3d 530, 513 N.E.2d 541, 112 Ill.Dec. 127 (4th Dist. 1987). But you had better be diligent in getting one. *Simpson v. Illinois Health Care Servs.*, 225 Ill. App. 3d 685, 588 N.E.2d 471, 167 Ill.Dec. 830 (2d Dist. 1992) (abuse in discretion not to allow filing after diligence shown). Second, you are most subject to criticism if your affidavit contains a laundry-list of opinions without factual basis. 197 Ill. App. 3d 625, 554 N.E.2d 1071, 144 Ill.Dec. 32 (2d Dist.) *appeal denied* 133 Ill.2d 572 (1990). Third, you can usually amend at a later time. *Ebbing v. Prentice*, 225 Ill. App. 3d 598, 587 N.E.2d 1115, 167 Ill.Dec. 500 (3d Dist. 1992). Fourth, if you do get dismissed, it will likely be without prejudice to refile. *See, e.g., Kus v. Sherman Hosp.*, 204 Ill. App. 3d 66, 561 N.E.2d 381, 149 Ill.Dec. 103 (2d Dist. 1990). But the standard on appeal is an abuse of discretion so you had better make your record clear. *Alford v. Phipps*, 169 Ill. App. 3d 845, 523 N.E.2d 563, 119 Ill.Dec. 807 (4th Dist. 1988).

#### D. *Product Liability Affidavits - 2-623*

A new section added by the legislature under the guise of reform was 735 Ill. Comp. Stat. 5/2-623 (1995). This section of the statute was intended to make it more difficult to file a product liability action by requiring a certificate of merit. The statute is set forth in Appendix C. The author's hope is that the statute is unconstitutional and will be stricken. At least one trial court has, as of this writing, agreed. Nevertheless, if one is needed, the case law is scant as of yet. What case law exists is discussed below.

The statute applies to all actions **FILED** after March 9, 1995. *Moran v. Ortho Pharm.*, 907 F.Supp. 1228 (N.D.Ill. 1995). An attorney signing the affidavit is probably

not good enough. *Irizarry v. Digital Equip.*, 919 F.Supp. 301 (N.D.Ill. 1996). But the dismissal for failure to comply should be without prejudice. *Id.* Though no known cases discuss it, the best bet is to comply strictly with the statute. But as with the 2-622 affidavits, a cottage industry in making motions to strike the 2-623 certifications, is probably starting to grow right now.

E. *Out of State Affidavits*

Just because an affidavit is prepared and signed out of Illinois does not, by itself, make it improper. As long as the same requirements are met, the affidavit will probably be upheld as valid. *See Schmidt v. Reader's Digest Assn.*, 349 Ill. App. 252, 110 N.E.2d 538 (1st Dist. 1953). *But see, Bauer v. Parker*, 17 N.E.2d 335 (Montreal affidavit not good enough); *Affiliated Underwriters Loan & Finance Co., Inc., v. Waits & Baxter Lumber Co.*, 284 Ill. App. 650, 3 N.E.2d 154 (1st Dist. 1936) (Iowa notary not good enough because no showing there was authority to administer oaths).

## VI. Summary

In sum, affidavits are creatures of statutes and rules. The attorney preparing the affidavit is best served by reviewing the statute or rule and then preparing the affidavit to comply strictly with it. When attacking the affidavit, look for lack of sufficient factual basis, personal knowledge, and conclusions. Those attacks are most likely to succeed.

**APPENDIX A**

**Motion to Strike Affidavit**

GGD/lm

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION

MARY KOTZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 96 L 12345
	)	
GRANT DIXON,	)	
	)	
Defendant.	)	

**PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT  
OF ELIZABETH MILLER, PhD.**

Plaintiff, MARY KOTZ, by her attorneys, CORBOY & DEMETRIO, move this Court for entry of an order striking the affidavit of Elizabeth Miller, PhD., for the reasons set forth below:

1. On July 1, 1995, Mary Kotz suffered the traumatic amputation of her leg when the vehicle operated by defendant, Grant Dixon, crushed between that vehicle and a concrete wall.
2. On May 1, 1996, Defendant, Grant Dixon, moved for summary judgment contending the motor vehicle was not unreasonably dangerous.
3. In support of this motion, defendant attached the purported affidavit of Elizabeth Miller, PhD. See Affidavit of Elizabeth Miller, PhD. (attached as Exhibit A).
4. Illinois Supreme Court Rule 191(a) governs the content of affidavits filed in support of motions for summary judgment. The Rule requires that affidavits filed in support of motions shall:
  - a. Be made on the personal knowledge of the affiant;

- b. Set forth with particularity the facts upon which the defense is based;
- c. Have attached certified copies of all papers upon which the affiant relies;
- d. Not consist of conclusions but of facts admissible in evidence; and
- e. Affirmatively show that the affiant can testify competently thereto.

III. Supreme Court Rule 191(a).

6. Dr. Miller's affidavit fails on several fronts. First, she states she has "reviewed documentation regarding the maintenance of the subject vehicle," yet she fails to attach any of the documentation reviewed. This alone makes the affidavit inadmissible *Standard Oil Co., Div. of Amer. Oil Co. v. Lachenmeyer*, 6 Ill. App. 3d 356, 360 (1st Dist. 1972).

7. Second, Dr. Miller states her opinions are based on her "information and belief." Affidavits must be made on trial admissible testimony, not information and belief. *Longo v. AAA - Michigan*, 201 Ill. App. 3d 543, 553 (1st Dist. 1990).

8. Third, Dr. Miller avers that defendant, Grant Dixon, "fulfilled its duty of care in the maintenance of the subject" vehicle. Whether a party has satisfied its duty of care in an inadmissible legal conclusion reserved for the trial court and, therefore, should be stricken. *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 8 (4th Dist. 1993).

9. Fourth, affidavits must be made on the personal knowledge of the affiant. *Consolidated Freightways of Delaware v. Peacock Eng'g Co.*, 256 Ill. App. 3d 68, 72 (1st Dist 1993). Dr. Miller was not present at the time the maintenance was performed. Moreover, she has never even seen the vehicle other than in photographs. Her conjecture as to the sufficiency of any maintenance is nothing more than that.

WHEREFORE, plaintiff, MARY KOTZ, requests entry of an order striking the affidavit of Elizabeth Miller, PhD., for the reasons set forth above.

Corboy & Demetrio, P.C.  
Attorneys for Plaintiff  
33 North Dearborn Street  
21st Floor  
Chicago, Illinois 60602  
Cook County I.D. 02329

---

Corboy & Demetrio, P.C.  
By: G. Grant Dixon III

## **Rule 191(b) Affidavit**

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - LAW DIVISION**

DAWN WOODS and VARNER WOODS,  
Independent Administrators of the  
Estate of MYLES WOODS, Deceased,  
and DAWN and VARNER WOODS,  
Individually,

Plaintiffs,

v.

ST. FRANCIS HOSPITAL of EVANSTON,  
d/b/a ST. FRANCIS HOSPITAL, et al.,

Defendants.

No. 94 L 16684

**PLAINTIFFS' MOTION PURSUANT TO SUPREME COURT RULE 191(b)**

NOW come the plaintiffs, DAWN WOODS and VARNER WOODS, Individually and as Independent Administrators of the Estate of MYLES WOODS, Deceased, by their attorneys, CORBOY & DEMETRIO, P.C., pursuant to Supreme Court Rule 191(b) for a briefing schedule so that they can adequately respond to the Motion for Summary Judgment of defendants, Joseph O. Sherman, M.D. and Joseph O. Sherman, M.D., S.C. In support thereof, plaintiffs state:

1. This matter involves the failure to timely diagnose and treat a midgut volvulus in a neonate.
2. Myles Woods was born on November 23, 1993 at St. Francis Hospital in Evanston, Illinois. At about 12 hours of age, he had bilious vomiting and subsequently developed bloody stools.

3. At approximately 20 hours of age, he was transferred to Evanston Hospital. After transfer to Evanston Hospital, he was subsequently transferred at approximately 30 hours of age to Children's Memorial Hospital for surgical evaluation to rule out a volvulus.

4. In order to properly respond to defendants' Motion for Summary Judgment, it is necessary to take the deposition of the Evanston Hospital Nurse who spoke with a physician at St. Francis Hospital regarding the transfer and the two individuals who spoke with Doctor Sherman about Baby Woods. It is also necessary to determine via Supplemental Interrogatories if other individuals at Evanston Hospital had contact with Doctor Sherman concerning Baby Woods.

5. Supreme Court Rule 191(b) states as follows:

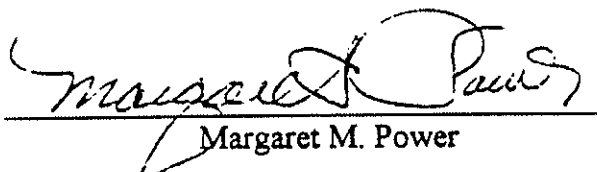
When Material Facts Are Not Obtainable By Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing papers or documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of papers and documents so furnished, shall be considered with the affidavits in passing upon the motion.

6. The individuals listed in paragraph 4 above are either a defendant or defendant's employees. As such, they are hostile as a matter of law to plaintiffs and, further, plaintiffs are barred from speaking to them either directly or through plaintiff's counsel as the defendants/potential deponents are represented by their own attorneys and any discovery or

information sought from them may only be procured through the recognized discovery channels set forth by the Supreme Court of the State of Illinois Rule 201 et seq. Since informal discovery is not permitted pursuant to the applicable discovery rules, depositions must be obtained from these defendants rather than an affidavit which is no longer available from them once a lawsuit has been filed.

7. It is expected that the persons identified in paragraph 4 will testify regarding the transfer of Baby Woods from St. Francis Hospital to Evanston Hospital and the telephone conversations Doctor Sherman had with individuals at Evanston Hospital. Plaintiff maintains this belief based upon the medical records, the deposition testimony and affidavit of Doctor Sherman.

WHEREFORE, Plaintiffs ask this Honorable Court grant them time within which to take the above depositions and receive the written discovery in order to respond to the Motion for Summary Judgment of defendants, Joseph O. Sherman, M.D. and Joseph O. Sherman, M.D., S.C.

  
Margaret M. Power

CORBOY & DEMETRIO, P.C.  
Attorneys for Plaintiffs  
33 North Dearborn, Suite 2100  
Chicago, Illinois 60602  
(312) 346-3191

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - LAW DIVISION**

DAWN WOODS and VARNER WOODS,  
Independent Administrators of the  
Estate of MYLES WOODS, Deceased,  
and DAWN and VARNER WOODS,  
Individually,

Plaintiffs,

v.

ST. FRANCIS HOSPITAL of EVANSTON,  
d/b/a ST. FRANCIS HOSPITAL, et al.,

Defendants.

No. 94 L 16684

**AFFIDAVIT PURSUANT TO RULE 191(b)**

We, the plaintiffs, DAWN WOODS and VARNER WOODS, being duly sworn on oath, depose and state:

1. We are the plaintiffs in the above-entitled matter.
2. We are the parents of Myles Woods.
3. This matter involves the failure to timely diagnose and treat a midgut volvulus in our son.
4. Myles Woods was born on November 23, 1993 at St. Francis Hospital in Evanston, Illinois. At about 12 hours of age, he had bilious vomiting and subsequently developed bloody stools.
5. At approximately 20 hours of age, he was transferred to Evanston Hospital. After transfer to Evanston Hospital, he was subsequently transferred at approximately 30 hours of age to Children's Memorial Hospital for surgical evaluation to rule out a volvulus.

6. In order to properly respond to defendants' Motion for Summary Judgment, it is necessary to take the deposition of the Evanston Hospital Nurse who spoke with a physician at St. Francis Hospital regarding the transfer and the two individuals who spoke with Doctor Sherman about Baby Woods. It is also necessary to determine via Supplemental Interrogatories if other individuals at Evanston Hospital had contact with Doctor Sherman concerning Baby Woods.

7. Supreme Court Rule 191(b) states as follows:

When Material Facts Are Not Obtainable By Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing papers or documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of papers and documents so furnished, shall be considered with the affidavits in passing upon the motion.

8. The individuals listed in paragraph 4 above are either a defendant or defendant's employees. As such, they are hostile as a matter of law to plaintiffs and, further, plaintiffs are barred from speaking to them either directly or through plaintiff's counsel as the defendants/potential deponents are represented by their own attorneys and any discovery or information sought from them may only be procured through the recognized discovery channels set forth by the Supreme Court of the State of Illinois Rule 201 et seq. Since informal discovery is not permitted pursuant to the applicable discovery rules, depositions must be obtained from

these defendants rather than an affidavit which is no longer available from them once a lawsuit has been filed.

9. It is expected that the persons identified in paragraph 4 will testify regarding the transfer of Baby Woods from St. Francis Hospital to Evanston Hospital and the telephone conversations Doctor Sherman had with individuals at Evanston Hospital. Plaintiff maintains this belief based upon the medical records, the deposition testimony and affidavit of Doctor Sherman.

---

Dawn Woods

---

Varner Woods

SUBSCRIBED and SWORN to before  
me this 31st day of May, 1996.

---

NOTARY PUBLIC

Corboy & Demetrio, P.C.  
Attorneys for Plaintiffs  
33 North Dearborn Street  
Suite 2100  
Chicago, Illinois 60602  
312/346-3191

**APPENDIX B**

**Physicians' Affidavits/Certifications**

§ 2-622. Healing art malpractice. (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action. If the affidavit is filed as to a defendant who is a physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, a podiatrist, or a psychologist, the written report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice medicine in all its branches. In either event, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit. The report shall include the name and the address of the health professional.

2. That the plaintiff has not previously voluntarily dismissed an action based upon the same or substantially the same acts, omissions, or occurrences and that the affiant was unable to obtain a consultation required by paragraph 1 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be

filed within 90 days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until 30 days after being served with a certificate required by paragraph 1.

3. That a request has been made by the plaintiff or his attorney for examination and copying of records pursuant to Part 20 of Article VIII of this Code [FN1] and the party required to comply under those Sections has failed to produce such records within 60 days of the receipt of the request. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days following receipt of the requested records. All defendants except those whose failure to comply with Part 20 of Article VIII of this Code is the basis for an affidavit under this paragraph shall be excused from answering or otherwise pleading until 30 days after being served with the certificate required by paragraph 1.

(b) Where a certificate and written report are required pursuant to this Section a separate certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time.

(c) Where the plaintiff intends to rely on the doctrine of "res ipsa loquitur", as defined by Section 2-1113 of this Code, the certificate and written report must state that, in the opinion of the reviewing health professional, negligence has occurred in the course of medical treatment. The affiant shall certify upon filing of the complaint that he is relying on the doctrine of "res ipsa loquitur".

(d) When the attorney intends to rely on the doctrine of failure to inform of the consequences of the procedure, the attorney shall certify upon the filing of the complaint that the reviewing health professional has, after reviewing the medical record and other relevant materials involved in the particular action, concluded that a reasonable health professional would have informed the patient of the consequences of the procedure.

(e) Allegations and denials in the affidavit, made without reasonable cause and found to be untrue, shall subject the party pleading them or his attorney, or both, to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal. In no event shall the award for attorneys' fees and expenses exceed those actually paid by the

moving party, including the insurer, if any. In proceedings under this paragraph (e), the moving party shall have the right to depose and examine any and all reviewing health professionals who prepared reports used in conjunction with an affidavit required by this Section.

(f) A reviewing health professional who in good faith prepares a report used in conjunction with an affidavit required by this Section shall have civil immunity from liability which otherwise might result from the preparation of such report.

(g) The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619.

(h) This amendatory Act of 1995 does not apply to or affect any actions pending at the time of its effective date, but applies to cases filed on or after its effective date.

**Attorney Affidavit  
to Be Filed With Doctor's Certificate**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - LAW DIVISION

DAWN WOODS and VARNER WOODS,  
Independent Administrators of the  
Estate of MYLES WOODS, Deceased,  
and DAWN and VARNER WOODS,  
Individually,

Plaintiffs,

v

ST FRANCIS HOSPITAL of EVANSTON,  
d/b/a ST FRANCIS HOSPITAL, et al.,

Defendants.

No. 94 L 16684

**AFFIDAVIT**

1. Margaret Power, being first duly sworn on oath, deposes and states as follows:

1 I am a member of the law firm of Corboy & Demetrio, P.C., and am one of the attorneys responsible for representing the Plaintiffs, DAWN and VARNER WOODS, Independent Administrators of the Estate of MYLES WOODS, Deceased, and DAWN and VARNER WOODS, Individually.

2. I have consulted with a physician licensed to practice his profession in all its branches, specializing in pediatric surgery. I reasonably believe the consultant (i) is knowledgeable in the relevant issues involved in this particular action; (ii) practices within the last six years in the same area of medicine that is at issue in the particular action; and (iii) is qualified by experience in the subject of the case.

3 The physician has provided the written report which is attached hereto.

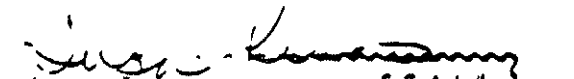
EXHIBIT C

4 The physician has determined that negligent care was provided to MYLES WOODS and there is a reasonable and meritorious cause for filing this lawsuit.

5 I have determined on the basis of my review of this case and consultation with this physician, that there is a reasonable and meritorious cause for the filing of this lawsuit and that negligence occurred in the course of the decedent's medical treatment by JOSEPH O SHERMAN, M.D. while Baby Woods was at Evanston Hospital.

  
Margaret M. Power

SUBSCRIBED and SWORN to before me  
this 21st day of November, 1995.

  
SEAL  
NOTARY PUBLIC : J. J. RAS  
STATE OF ILLINOIS  
EXPIRES 9/1/98

Corboy & Demetrio  
33 North Dearborn Street  
Suite 2100  
Chicago, Illinois 60602  
312/346-3191  
Firm I.D. No. 02329

# **Doctor's Certificate**

Ms. Margaret M. Power  
Corboy & Demetrio  
33 North Dearborn Street  
21st Floor  
Chicago, Illinois 60602

Re: Myles Woods

Ms. Power:

I am a physician licensed to practice medicine in all of its branches, specializing in pediatric surgery. At your request, I have reviewed the following materials regarding Myles Woods:

1. Prenatal records of Gina Wehrmann, M.D.
2. St. Francis Hospital records of Mother and Baby Woods, including x-ray report of Baby Woods.
3. Superior Ambulance Service Records.
4. Evanston Hospital records of Baby Woods.
5. Children's Memorial Hospital records of Baby Woods.
6. Northwestern Perinatal Center Affiliation Agreement.
7. Office records of Dr. Sherman.
8. Deposition of Dr. Sherman.
9. One (1) St. Francis Hospital x-ray of Baby Woods.
10. Two (2) Evanston Hospital x-rays of Baby Woods.

Page Two

Based upon my review of the above materials it is my opinion that there is a reasonable and meritorious basis for filing a medical negligence claim against Joseph O. Sherman, M.D. If Doctor Sherman was not given complete information regarding Baby Woods' condition at the initial telephone conversation on 11/24/93 at 7:45 a.m., Doctor Sherman was under an obligation under the standard of care to ask the following questions regarding the baby:

1. Has the baby had bilious vomiting or bilious nasogastric drainage;
2. Has the baby passed any stool;
3. Has the baby passed blood in the stool;
4. Is the abdomen distended;
5. Is the abdomen tender to palpation;
6. Have plain abdominal x-rays been done, and if so, what do they reveal;
7. Is the baby alert and vigorous or lethargic;

Had Doctor Sherman asked the above questions, he would have determined that Baby Woods vomited bile on 11/23/93 at 5:30 p.m. and passed a large amount of grossly bloody stool on 11/24/93 at 3:00 a.m. When Doctor Sherman obtained the above information he should have treated Baby Woods as an urgent surgical emergency.

It is my opinion, based upon a reasonable degree of medical certainty, and the aforementioned material, that Joseph O. Sherman, M.D. deviated from the acceptable standard of care and committed medical negligence in failing to ask the above questions at the initial telephone call about Baby Woods and in failing to treat Baby Woods as an urgent surgical emergency.

Whether other acts or omissions were also deviations from the standard of care awaits further information from you. These opinions are subject to revision or modification pending review of further materials.

Sincerely,

**Attorney Affidavit  
If SOL Running and  
No Doctor's Certificate**

MED:sk

4N-307

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - LAW DIVISION

GERALD LEGERSKI and

ARLINE LEGERSKI,

Plaintiffs,

v.

STEVEN GELSOMINO, D.P.M.,

Defendant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No.

**AFFIDAVIT IN SUPPORT OF  
PLAINTIFF'S MALPRACTICE CLAIM**

I, MARY E. DOHERTY, declare under oath as follows:

1. I am one of the attorneys responsible for representing GERALD LEGERSKI and ARLINE LEGERSKI.

2. I have been unable to obtain a medical review as outlined by Illinois Code of Civil Procedure, Chapter 110, Section 2-622 (A)(1) prior to a possible expiration of the statute of limitations.

3. In order to protect my clients, I have filed this lawsuit.

4. This affidavit is filed in compliance with Section 2-622 of the Illinois Code of Civil Procedure.

FURTHER YOUR AFFIANT SAYETH NOT.

\_\_\_\_\_  
MARY E. DOHERTY

SUBSCRIBED AND SWORN to before me  
this \_\_\_\_ day of \_\_\_\_\_, 1995.

\_\_\_\_\_  
NOTARY PUBLIC

CORBOY & DEMETRIO, P.C.  
Attorneys for Plaintiff  
33 North Dearborn Street  
21st Floor  
Chicago, Illinois 60602  
Firm I.D. No. 02329

**APPENDIX C**

**Product Liability Affidavits**

§ 2-623. Certificate of merit; product liability.

(a) In a product liability action, as defined in Section 2-2101, in which the plaintiff seeks damages for harm, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

(1) That the affiant has consulted and reviewed the facts of the case with a qualified expert, as defined in subsection (c), who has completed a written report, after examination of the product or a review of literature pertaining to the product, in accordance with the following requirements:

(A) In an action based on strict liability in tort or implied warranty, the report must:

(i) identify specific defects in the product that have a potential for harm beyond that which would be objectively contemplated by the ordinary user of the product; and

(ii) contain a determination that the product was unreasonably dangerous and in a defective condition when it left the control of the manufacturer.

(B) In any other product liability action, the report must identify the specific act or omission or other fault, as defined in Section 2-1116, on the part of the defendant.

(c) In any product liability action, the report must contain a determination that the defective condition of the product or other fault was a proximate cause of the plaintiff's harm.

(2) That the plaintiff has not previously voluntarily dismissed an action based upon the same or substantially the same acts, omissions, or occurrences and that the affiant was unable to obtain a consultation required by paragraph (1) because either a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations or despite a good faith effort to comply with this Section, the plaintiff was prevented by another person from inspecting or conducting nondestructive testing of the product. If an affidavit is executed pursuant to this paragraph, the affidavit required by paragraph (1) shall be filed within 90 days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until 30 days after being served with an affidavit required by paragraph (1). No plaintiff shall be afforded the 90-day extension of time provided by this paragraph (2) if he or she has voluntarily dismissed an action for the same harm against the same defendant.

(b) When the defective condition referred to in the written report required under paragraph (1) of subsection (a) is based on a design defect, the affiant shall further state that the qualified expert, as defined in subsection (c), has identified in the written report required under subsection (a) either: (I) a feasible alternative design that existed at the time the product left the manufacturer's control; or (ii) an applicable government or industry standard to which the product did not conform.

(c) A qualified expert, for the purposes of subsections (a) and (b), is someone who possesses scientific, technical, or other specialized knowledge regarding the product at issue or similar products and who is qualified to prepare the report required by subsections (a) and (b).

(d) A copy of the written report required by subsections (a) and (b) shall be attached to the original and all copies of the complaint. The report shall include the name and address of the expert.

(e) The failure to file an affidavit required by subsections (a) and (b) shall be grounds for dismissal under Section 2-619.

(f) Any related allegations concerning healing art malpractice must include an affidavit under Section 2-622.

(g) This amendatory Act of 1995 applies only to causes of action filed on or after its effective date.