FEATURED ARTICLES

SPOLIATION OF EVIDENCE: A Chronology of Judicial Development in Illinois
Page 13

RECENT DEVELOPMENTS IN CONSTRUCTION NEGLIGENCE: An Update of Complexities in Construction Negligence Litigation
Page 43

LAW REFORM, NOT TORT LAW REFORM
Page 64

DEVELOPMENTS IN PRODUCT LIABILITY LAW: The Harm of Hindsight Analysis in Design Defect Cases / The Foolproof Product Redux
Page 76

MONOGRAPH

Municipal Liability: Is a Zoning Hearing Really a Hearing?
IDC QUARTERLY EDITORIAL BOARD

Robert T. Park, Editor-In-Chief
Snyder, Park & Nelson, P.C., Rock Island
rpark@snyderpark.com

Rick Hammond, Executive Editor
Chuhak & Tecson, P.C., Chicago
rhammond@chuhak.com

Linda J. Hay, Associate Editor
Heyl, Royster, Voelker & Allen, Peoria
lhay@illinois-law.com

Joseph G. Feehan, Assistant Editor
Heyl, Royster, Voelker & Allen, Peoria
jfeehan@hrva.com

Kimberly A. Ross, Assistant Editor
Cremer, Kopon, Shaughnessy & Spina, Chicago
kross@cksslaw.com

COLUMNS

Edward Aucoin
Hall, Prangle & Schoonveld, LLC, Chicago

James K. Borcia
Tressler, Soderstrom, Maloney & Priess, Chicago

Michael C. Bruck
Crisham & Kubas, Ltd., Chicago

Roger R. Clayton
Heyl, Royster, Voelker & Allen, Peoria

Jennifer Jerit Johnson
Tressler, Soderstrom, Maloney & Priess, Chicago

Kevin J. Luther
Heyl, Royster, Voelker & Allen, Rockford

Willis R. Tribli
Tribler Orpett & Meyer, P.C., Chicago

CONTRIBUTORS

Eugene G. Doherty
Holmstrom & Kennedy, P.C., Rockford

Thomas H. Fegan
Johnson & Bell, Ltd., Chicago

Sean G. Joyce
Williams Montgomery & John, Ltd., Chicago

THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
P.O. Box 7288 • Springfield, IL 62791
800-232-0169 • 217-636-7960 • FAX 217-636-8812
idcoffice@gcctv.com

SHIRLEY A. STEVENS, Executive Director

TONYA M. VOEPEL, Publications Manager
9865 State Route 124 • P.O. Box 78
Sherman, IL 62684
217-566-2603 • FAX 217-566-2507
tvoepel@direcway.com
Manuscript Policy

Members and other readers are encouraged to submit manuscripts for possible publication in the IDC Quarterly, particularly articles of practical use to defense trial attorneys. Manuscripts must be in article form. A copy of the IDC Quarterly Manuscript Guidelines is available upon request from The Illinois Association of Defense Trial Counsel office in Springfield, Illinois. No compensation is made for articles published, and no article will be considered that has been submitted simultaneously to another publication or published by any other publication. All articles submitted may be subjected to editing and become the property of the IDC Quarterly, unless special arrangements are made.

Statements or expression of opinions in this publication are those of the authors and not necessarily those of the Association or Editors.

A copy of the IDC Quarterly Editorial Policy is available upon request. Letters to the Editor are encouraged and welcome, and should be sent to the Illinois Association of Defense Trial Counsel headquarters in Springfield. Editors reserve the right to publish and edit all such letters received and to reply to them.

IDC Quarterly, Second Quarter, 2004, Volume 14, No. 2. Copyright © 2004 The Illinois Association of Defense Trial Counsel. All rights reserved. Reproduction in whole or in part without permission is prohibited. POSTMASTER: Send change of address notices to IDC Quarterly, The Illinois Association of Defense Trial Counsel, P.O. Box 7288, Springfield, IL 62791. Second-Class postage paid at Springfield, IL and additional mailing offices.

This publication was printed by Gooch & Associates, Springfield, Illinois.
President’s Message

By: Jennifer Jerit Johnson
Tressler, Soderstrom, Maloney & Priess
Chicago

It Has Been An Honor

Amazingly, as I write this final column, the privilege of serving as the President of the IDC is near an end. It has been both an honor serving you and the organization, as well as an opportunity for which I am truly grateful.

First, let me express my congratulations to Steve Heine of Heyl, Royster, Voelker & Allen who becomes the IDC’s President in June 2004. Steve is an outstanding lawyer, excellent leader, and terrific person. He will serve the IDC well in the coming year.

I would also like to express my gratitude to the other IDC Board members and my other brother officers, Glen Amundsen (O’Hagan, Smith & Amundsen, LLP), Steve Puiszis (Hinshaw & Culbertson), and Jeff Hebrank (Burroughs, Hepler, Broom, MacDonald, Hebrank, & True). It has been wonderful working with you. Your time, talent, and support of our organization are most appreciated.

Finally, and most importantly, I extend my greatest gratitude to our Executive Director, Shirley Stevens. Her dedication and wise counsel are the keys to the success of our organization.

We enjoyed an outstanding Spring Seminar in February. For this, we thank Steven Fuoco (O’Hagan, Smith & Amundsen, LLP) for his hard work and the hard work of his committee. The program was superb.

Please mark your calendars the upcoming Fall Seminar on Friday and Saturday, September 10 and 11, 2004 at the Grand Geneva Hotel. Efforts are in progress for another tremendous program in a beautiful venue.

We also hope that you will attend the IDC’s 40th Anniversary Dinner aboard the Odyssey on beautiful Lake Michigan on Friday, June 25, 2004 at 7:00 p.m. Drinks, food, and music will be served to celebrate this important event. Call Shirley Stevens at 1-800-232-0169 for more information, and look for flyers in your mail and e-mail.

As always, we are interested in matters on appeal that affect the defense bar. Please call anytime to alert us to important cases making their way to the appellate and Supreme Courts. In many instances, we are able to provide support through amicus submissions. Call Kathleen Johnson (Kralovec & Marquard, Chartered) or Mike Resis (O’Hagan, Smith, and Amundsen, LLP) if you have suggestions or questions.

The IDC also monitors pending legislation that may impact a level playing field for all litigants. Please call former IDC President Greg Ray (Craig & Craig) or any IDC officer if you become aware of legislative developments of interest to the defense bar.

Finally, in saying goodbye from the President’s post, I wish you well in your professional and personal lives. Life has a funny way of sneaking up on us, so before it catches you off guard, take a little time to perform a random act of kindness for your secretary, support staff, associates, or partners. Take a day off work to be with family or friends to renew your relationships. Pass along a smile to a stranger on the street. These small acts will bounce back to you, increased in measure. Life is good. Thank you for the privilege of serving. Peace.
Editor’s Note

By: Robert T. Park
Snyder, Park & Nelson, P.C.
Rock Island

This issue promises to be one of the biggest and best installments of the IDC Quarterly ever published. With 104 total pages, it is about 33% larger than each of our last three issues. That total includes substantive legal writings, facts about IDC activities and programs, an invitation to the upcoming 40th Anniversary cruise, profiles of the candidates for the Board of Directors, and information about services you can use in your practice.

The legal articles in this issue are also of the highest quality. Tom Kelty, an experienced municipal law specialist from Springfield, has written the Monograph about developments on special use hearings, based on an Illinois Supreme Court decision defining what is required to provide due process for both applicants and adjacent landowners.

Two members were particularly prolific in writing for this issue. In the last issue, Tom Fegan spurred on efforts to abolish joint and several liability in Illinois. This prompted a letter to the editor from Eugene Doherty, to which Mr. Fegan has provided a reply. In addition, Tom has penned a new article advocating legal reform with respect to recipients of punitive damage awards.

Another IDC member, David Mueller of Peoria, who gave an outstanding presentation at the IDC Spring Seminar, has written twice. First, he has updated the construction law article he co-wrote last year (Mueller and Dundas, Complexities in Construction Negligence Litigation, vol. 13, no. 3, page 18). He has also provided a critique of some recent appellate court products liability cases that seem to stretch the concept of “strict liability” beyond the boundaries the Supreme Court has previously set.

The concept of spoliation of evidence is the subject of an article co-written by two of our members, Bradley C. Nahrstadt and Sean G. Joyce. They explore where we have come in the 24 years since Illinois first recognized the concept of spoliation, giving readers a brief synopsis of over three dozen reported cases developing and shaping that concept.

We also have columns from our regular authors on a wide variety of subjects. Some new names and faces are in this group, and we appreciate the willingness of our members to step up and offer their expertise and writing skills.

You all know that IDC members receive copies of the Quarterly. In addition, we provide complimentary copies of each issue to every Illinois judge. (One of the things I have really appreciated is hearing compliments from judges on the content of this publication.)

To broaden the reach of the Quarterly, the Board of Directors has recently authorized an agreement with EBSCO Publishing. EBSCO is an on-line leader, offering over 10,000 periodicals through its Electronic Journals Service. (See its web page index by subject at: ejournals.ebsco.com/info/EJS-Subjects.asp.) The IDC Quarterly will join over 140 other law journals that can be accessed electronically. We will, of course, continue to provide articles on-line via the IDC web site (www.iadtc.org).

This is my fourth and last issue as Editor-In-Chief of this journal. I want to extend my sincere thanks to all of those that have helped make this past year a success. This includes each of the authors who have given so much of their time and talent in writing for the Quarterly. I also greatly enjoyed the chance to work with the other editors: Rick Hammond, Linda Hay, Joe Feehan and Kimberly Ross. They have managed to ably fulfill their responsibilities to this publication while keeping up with the demands of their busy practices.

Most of all, I want to thank the person without whom no issue of the IDC Quarterly would ever be completed, our Publication Manager, Tonya Voepel. Tonya is the person who keeps things straight, making sure that the promised articles have been submitted, edited and approved. She prepares the proofs, makes the final corrections and sees that everything gets delivered to the printer. Even then, her work isn’t done. She also takes care of getting the copies mailed out to our members and those who receive complimentary subscriptions. Tonya does a great job. She has earned my utmost respect and appreciation for her efforts.

It has been my privilege to serve as Editor-In-Chief. We got off to a bit of a rough start initially, but, with the help of many hands, we have persevered and improved. Best of luck to Rick Hammond on performing the Editor-In-Chief’s work during the 2004-2005 year. Thanks to IDC and its members for the opportunity to be associated with this fine publication.
Seven nominations have been received to fill the six vacancies of terms expiring June 2004. In accordance with the bylaws of the Illinois Association of Defense Trial Counsel an election must be held. Also according to the bylaws the Board of Directors shall be representative of all areas of the State of Illinois, and to this end, two Districts are declared: “Cook County” and “Downstate;” no more than four of the six directors elected each year shall office within the same District.

The nominations are listed in the order in which they were received. Ballots are being mailed to all members with a request for membership verification and are due back to the IDC office no later than May 21, 2004. New Directors will be announced at the Annual Meeting on June 25, 2004.

TROY A. BOZARTH

Troy A. Bozarth, born Bloomington, Illinois, is a partner in the law firm of Burroughs, Hepler, Broom, MacDonald, Hebrank & True.

His experience covers trial practice and complex commercial litigation. Practice areas include insurance defense, Jones Act and maritime law, antitrust law, class action, personal injury defense and other commercial cases.

He earned his undergraduate degree in Business Administration from Illinois Wesleyan University (B.A. 1992), his law degree from Drake University School of Law (J.D. 1996)

Statement of Candidacy — Troy A. Bozarth

The Illinois Association of Defense Trial Counsel has been a wonderfully valuable organization in my legal career. I was introduced to the IDC early on and have been an active member ever since. I truly have “grown up” in the IDC, from my first Spring Seminar and Trial Academy attendance to, more recently, my participation as a committee member and speaker at the Fall Seminar. I look forward to bringing my persistence and drive to the Board of Directors. My ability to attack and overcome obstacles has proven to be an immeasurable asset in my legal career, an asset which, as a board member, I feel will advance the purpose and mission of the IDC.

A strong and active defense bar and defense organizations such as the IDC are critical to maintaining a functioning and properly balanced legal system. I look forward to continuing the strong tradition of the IDC as an organization which strives to improve itself, its members, and the legal system of which we all are a part.
and whatever other challenges the IDC may face.

Director, I will commit the time and effort needed to meet these goals and improving their levels of success and satisfaction. As an IDC members' professional stature, improving their economic viability and valued professionals. We should be focused on raising our should reinforce that the defense bar is made up of unique, important Rather, the opportunities to serve should be better publicized, we more than just increasing attendance at meetings and seminars. To attract new members and their talents. We also need to encourage the IDC, we must look beyond our current base of members and work the legislature, the courts and the media. To continue the vitality of the issues that are important to us and our clients and act on them in the Board. With the input of all IDC members, we also need to identify the areas of Workers’ Compensation, Occupational Disease & Kubes, Ltd. in Chicago, where he concentrates his practice in the fields of professional liability defense, complex commercial litigation, and insurance coverage. Mr. Bruck was also a founding partner of Quinlan & Crisham, Ltd. in Chicago and a partner at Hinshaw & Culbertson in Chicago. He received his B.S. degree from Purdue University in 1984 and his J.D. from DePaul College of Law in 1988. Prior to law school, Mr. Bruck was a claims representative with the Kemper Group. Mr. Bruck is an experienced and accomplished litigator. He has successfully tried major commercial and professional liability cases, and argued and won appeals in the Illinois and 7th Circuit appellate courts. Mr. Bruck is currently a member of the DePaul College of Law Alumni Board, on the faculty of the Insurance School of Chicago, chair of subcommittees of the Defense Research Institute’s Committee on Professionalism and Ethics, and a former member of the ISBA Committee on the Attorney Registration and Disciplinary Commission.

Statement of Candidacy — Michael C. Bruck

As a defense trial attorney for over 15 years, I am proud of my achievements and the outstanding achievements of other defense counsel. Our work is not done, however. I believe that defense attorneys are among the finest trial attorneys in the bar. Because most of our assignments come from insurance companies and manufacturers, we tend to see the same types of cases and are able to hone our skills and build a tremendous knowledge base. As an IDC Director, I will better use our collective experience and knowledge base to improve our practices, our profession and our society. Together we can be a force to effect many positive changes. The IDC’s amicus efforts, excellent publications and strides in upgrading its technology to reach and share amongst its members are great starts. However, we can and should be doing more. For example, I recommend we upgrade the IDC website to make it more of a substantive resource for members. We should strongly encourage and make simple the sharing of questions, concerns and ideas among members, perhaps through a members only web log or bulletin board. With the input of all IDC members, we also need to identify the issues that are important to us and our clients and act on them in the legislature, the courts and the media. To continue the vitality of the IDC, we must look beyond our current base of members and work to attract new members and their talents. We also need to encourage greater participation in the IDC by all IDC members. This means more than just increasing attendance at meetings and seminars. Rather, the opportunities to serve should be better publicized, we should reinforce that the defense bar is made up of unique, important and valued professionals. We should be focused on raising our members’ professional stature, improving their economic viability and improving their levels of success and satisfaction. As an IDC Director, I will commit the time and effort needed to meet these goals and whatever other challenges the IDC may face.

Statement of Candidacy — Kenneth F. Werts

I have had the pleasure and benefit of membership in the IDC for many years. As a member of the Fall Conference Committee and eventually co-chair and chair, I had the opportunity to see first hand what can be accomplished by those members who devote time to make the IDC what it is, one of the premier bar organizations in the country. Recently the IDC created a Substantive Law Committee on Workers’ Compensation on which I serve as a co-chair. I will work with the Committee in keeping our members abreast of developments in the law through publications and seminars. As a member of the Board of Directors, my highest priority has been to work with the other board members to maintain this organization’s high standing and presence both in Illinois and nationally. I will work to keep the organization moving forward so that as our practice evolves the IDC evolves with it. I am committed to attracting new members from practice areas such as employment law and commercial litigation.

I have enjoyed the opportunity I have had to work with the talented leadership of the IDC and look forward to the challenges which lay ahead should I have the privilege to continue my service as one of your directors.
DAVID M. BENNETT

David M. Bennett is a partner in the Chicago firm of Pretzel & Stouffer, Chartered. He received his B.S. degree from Purdue University in 1986 and his J.D. degree from the Illinois Institute of Technology, Chicago-Kent College of Law in 1989. Mr. Bennett joined Pretzel & Stouffer in 1989 and was elected partner in 1996. He concentrates his practice in commercial and civil litigation with an emphasis in the amusement and recreational industries throughout Illinois.

Mr. Bennett is a current member of the Board of Directors of the IDC where he serves as chairman of the IDC Rookie seminar, co-chair of the Membership Committee and liaison to the Young Lawyers Committee. He has also served on the Spring Seminar Committee for a number of years.

Statement of Candidacy — David M. Bennett

For the past three years, I have served as an IDC board member. It has been a privilege to work with the dedicated board members throughout Illinois to meet the needs of our membership. We have worked to build on the IDC’s strong foundation and reputation in order to meet the ever increasing challenges faced by the defense bar. The board has continued to be a strong resource for our members by conducting mini-seminars, producing timely newsletters, providing relevant seminars and by making our members’ interests known in the legislature and in the courts. As chairman of the annual Rookie Seminar and co-chair of the Membership Committee, I feel I have contributed to the continued success and growth of our organization.

If elected to a second term, I promise that I will continue to work to maintain and increase our membership and continue to keep our organization relevant to meet the needs of our members. I have worked to attract new members to join the IDC by implementing new membership promotions for attorneys who attend IDC seminars and to attract attorneys who are members of DRI. We are also ready to respond to your needs if continuing legal education becomes mandatory. I promise that I will continue our efforts to use the IDC as a valuable educational tool to maintain and increase our membership. We will continue to search for ways to attract new members and to use their talents to continue to strengthen our organization. I am committed to serving this organization and I ask for your vote to continue to work toward future successes of our organization.

MATTHEW J. MADDOX

Matthew J. Maddox is an equity partner in Quinn, Johnston, Henderson and Pretorius. He practices in the firm’s Springfield office. He received a B.S. degree from the University of Illinois in 1978 and his J.D. from Hamline University School of Law in 1983. He was a partner at Hinshaw and Culbertson, and moved to Quinn, Johnston in 2001. He is a member of DRI, National Association of Railroad Trial Counsel, and the Illinois State Bar Association. Matt serves as the co-chair of the IDC’s Civil Practice and Procedure Committee and co-authored the Monograph in the fall Quarterly.

Statement of Candidacy — Matthew J. Maddox

I have practiced law for twenty years and am a long time member of the IDC. I have always appreciated IDC’s role as one of the leading organizations of attorneys in Illinois. IDC provides the sole voice in this state for those attorneys representing defendants in civil lawsuits and I would like to be a more active participant in furthering that mission. I have contributed to that effort as co-chair of the Civil Practice and Procedure Committee and as a contributor to the IDC Quarterly. Additionally, I have testified on behalf of IDC before the Supreme Court Rules Committee. Those efforts exhibit my commitment to this organization and provide a basis for providing further services by participating on the Board of Directors.

I believe I will bring to the board a variety of perspectives which will be valuable. I have a varied defense practice including professional malpractice, FELA, and more basic tort defense cases. I have experience in a large firm setting and now in a smaller firm. My downstate practice and experience trying cases throughout central and southern Illinois will be valuable in serving an organization designed to represent all defense lawyers of the state.
MICHAEL RESIS

Michael Resis is a founding partner in the law firm of O’Hagan, Smith & Amundsen, L.L.C., where he is chairman of the firm’s appellate department. He has practiced law in Chicago since 1983 and concentrates his practice in insurance coverage as well as appeals. He received his B.A. degree, magna cum laude, from the University of Illinois at Champaign-Urbana in 1978 and his J.D. degree from the University of Illinois at Champaign-Urbana in 1981. Between 1981 and 1983, he clerked for the Honorable Glenn K. Seidenfeld, Presiding Justice of the Illinois Appellate Court, Second Judicial Distract.

Mr. Resis is a past member of the Board of Directors of the Illinois Appellate Lawyers Association and the Illinois Association of Defense Trial Counsel, a chapter author of Commercial and Professional Liability Insurance, published by the Illinois Institute for Continuing Legal Education in 2002, and a speaker before the Chicago Bar Association, the Illinois Association of Defense Trial Counsel and Lohrman Education Services.

Statement of Candidacy — Michael Resis

I have been an active member of the Illinois Association of Defense Trial Counsel for twenty years. In that time, I have spoken at and written materials for the Spring Seminar twice (1988 and 1995), at the request of the Amicus Committee, prepared and filed a number of amicus curiae briefs on the IDC’s behalf, and most recently served on the Board of Directors for the past year where I have served as liaison to the Amicus Committee. First as a young associate and now as a partner, I have taken pride in the mission of the Illinois Association of Defense Trial Counsel and its leading role in support of the defense bar across Illinois.

To continue to serve on the Board of Directors for an elected term of office would be an honor that carries with it a commitment that is personal as well as professional. That commitment is an obligation I take seriously. If elected, I pledge to work for you to meet the challenges of our practice, to maintain the IDC’s high standing among professional organizations, and to ensure that the IDC will continue to be a voice heard in the legal community and a resource for all members of the defense bar.

I ask for your support and for your vote.

DANIEL K. CRAY

Daniel K. Cray is with the Chicago firm of Iwan Cray Huber Horstman & VanAustdal LLC. He is a trial attorney with 20 years experience in the defense of corporate and individual clients in tort and commercial litigation throughout the United States, concentrating in the defense of catastrophic loss cases. Legal experience includes, but is not limited to: products liability, professional liability, toxic tort and commercial litigation. Mr. Cray received his B.S. degree from Illinois State University in 1978 and his J.D. degree from the University of Illinois College of Law, Champaign, in 1981. He is a member of the International Association of Defense Counsel, Defense Research Institute, Illinois Association of Defense Trial Counsel, DuPage County Bar Association and NMMA, Boating Industry Risk Management Council.

Statement of Candidacy — Daniel K. Cray

It has been my privilege to have served on the IDC Board of Directors these past three years. During this time, the IDC has been awarded special recognition by the Defense Research Institute. Through my contact with many state defense organizations around the country, I can confidently say that your IDC is the envy of other state defense organizations. I, along with the current Board of Directors, your president, and the IDC executive committee, remain committed to offering you superior programming, outstanding and timely publications, and an active amicus committee, to help all defense practitioners throughout our state.

Although our organization remains strong and vibrant, there is still work to be done. The IDC must be ready to meet the challenge of mandatory continuing legal education when the Illinois Supreme Court requires this of all attorneys. The voice of the IDC must continue to be heard before the State Legislature and the Illinois Supreme Court as plaintiffs and their attorneys continue their quest to liberalize Illinois law. I would appreciate your support to allow me to continue to strengthen the IDC so that together we can reap the benefits of the preeminent state defense organization in America.
Letter to the Editor & Reply

Dear IDC Quarterly Editor:

I read with great interest Tom Fegan’s article on the law of joint and several liability in the State of Illinois, and the IDC’s “assault” upon it. (Fegan, The IDC’s Assault on the Doctrine of Joint and Several Liability, IDC Quarterly, vol. 14, no. 1, p. 32.) Certainly no doctrine could be more worthy of assault; an “all or nothing” approach to liability has no place in a modern system of justice, which routinely apportions fault on a percentage basis.

Unfortunately, I cannot agree that the demise of joint and several liability can be accomplished in the courts. Mr. Fegan cites to a number of jurisdictions in which joint and several liability was abrogated by the courts in the face of legislative inaction. Such is not the case in Illinois, where the legislature has spoken on the subject.

Section 2-1117 of the Code of Civil Procedure explicitly provides that, in all actions for bodily injury, death, or property damage, any defendant whose fault exceeds 25% of the total fault attributable to the applicable parties “shall be jointly and severally liable.” Furthermore, even those defendants who fall under the 25% fault threshold are explicitly made “jointly and severally liable for plaintiff’s past and future medical and medically related expenses.”

As much as I would love to see joint and several liability become a historical footnote, I see no way to accomplish this through the courts absent some constitutional basis to overturn the legislature’s handiwork.

Eugene G. Doherty
Holmstrom & Kennedy, P.C.
Rockford, IL

Reply

By: Thomas H. Fegan

One of our faithful members, Eugene G. Doherty of Rockford, Illinois, has found the perceived soft spot in my argument that the doctrine should be changed by judicial action. As nearly all defense lawyers do, I had anticipated this argument but wanted to save my answer to the Reply so that I can have the last word. I will address the objection as if it had been made by a brilliant and influential plaintiff’s lawyer.

Mr. Doherty asserts that the change cannot be made by the Illinois Supreme Court because the Illinois legislature has spoken on the topic in Section 2-1117 of the Code of Civil Procedure. Fortunately, this argument is not a bar to judicial change.

The history of the doctrine of contributory negligence in Illinois provides a very good parallel situation and will inform our effort on precisely this point.

In Maki v. Frelk, 85 Ill. App. 3d 439, 229 N.E.2d 284 (1967), the appellate court was urged to abolish the doctrine of contributory negligence in Illinois. In an extensive opinion reviewing the history of the doctrine, the appellate court rejected the argument that the legislature should make the change and it abolished the doctrine.

When the Supreme Court of Illinois accepted the Maki case for review, it reversed the appellate court decision, reviewing many arguments in favor of the change and rejecting them. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). It reversed the appellate court decision and stated that the legislature should make the change. There was an important dissent by Justices Ward and Schaefer, which addressed the very issue raised by the letter of Mr. Doherty and rejected it:

The references in our statutes to our rule of contributory negligence do not, I believe, represent an expression by the legislature that it has approved the rule as such. These statutes indicate to me only a legislative awareness of the rule or a design to avoid the harsh result of its operation. 40 Ill. 2d at 202, 239 N.E.2d at 450.

The Supreme Court at this time refused to change the law. Nevertheless this was an important dissent.

This same argument was raised again in Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). In the appellate court decision in Ribar considering the abolition of contributory negligence, the appellate court held that the relief for the plaintiffs, if any, must still be addressed to the General Assembly for attention. Sub nom. Franzese v. Katz, 78 Ill. App.
The Supreme Court of Illinois granted review. The court noted that (at that time) there were a total of 36 states that had abolished contributory negligence as a defense. It specifically addressed the debate on judicial versus legislative changes. As to the particular argument that the legislature had passed statutes relating to the doctrine the court stated:

In support of their view that the legislature intends to retain the rule, defendants point to various statutes which have incorporated the contributory negligence defense (Ill.Rev.Stat.1979, ch. 24, par. 1-4-4 (regarding liability for injuries caused by firemen); Ill.Rev.Stat.1979, ch. 24, pars. 1-4-5, 1-4-6 (indemnification for injuries caused by policemen); Ill.Rev.Stat.1979, ch. 34, par. 301.1 (indemnity of sheriff or deputy); Ill.Rev.Stat.1979, ch. 121, pars. 385, 386 (tort liability of county superintendent of highways); and Ill.Rev.Stat.1979, ch. 127 1/2, par. 46 (liability of firemen for injuries to person or property)). They claim that these statutes act as a legislative ratification of the doctrine of contributory negligence. We do not agree. We believe that in enacting such statutes the legislature did not focus on the merits of the contributory negligence rule, but, rather, conformed the statutes to the then-existing law as announced by the court. 85 Ill. 2d at 23, 421 N.E.2d at 896.

Thus, the mere fact that there are statutes relating to the doctrine does not impair the Supreme Court’s ability to change the law.

It is abundantly clear that the doctrine of joint and several liability can be abolished by judicial decision. In McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992), the Tennessee Supreme Court adopted comparative fault and abolished joint and several liability. The Tennessee court stated in part:

After exhaustive deliberation that was facilitated by extensive briefing and argument by the parties, amicus curiae, and Tennessee’s scholastic community, we conclude that it is time to abandon the outdated and unjust common law doctrine of contributory negligence and adopt in its place a system of comparative fault. Justice simply will not permit our continued adherence to a rule that, in the face of a judicial determination that others bear primary responsibility, nevertheless completely denies injured litigants recompense for their damages.

We recognize that this action could be taken by our General Assembly. However, legislative inaction has never prevented judicial abolition of obsolete common law doctrines, especially those, such as contributory negligence, conceived in the judicial womb. See, Hanover v. Ruch, 809 S.W.2d 893, 896 (Tenn. 1991) (citing cases). Indeed, our abstinence would sanction “a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court,” Alvis v. Ribar, 85 Ill. 2d 1, 52 Ill. Dec. 23, 421 N.E.2d 886, 896 (1981), thereby prejudicing the equitable resolution of legal conflicts.

... [T]oday’s holding renders the doctrine of joint and several liability obsolete. Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff’s fault was minor in comparison to defendant’s. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault. [Emphasis added.] 833 S.W.2d at 56-58.

Many of the states that have abolished joint and several liability have done so by judicial decision and then there followed a statutory embodiment of the abolition. (See, McIntyre, above).

It must be recognized that the Illinois Supreme Court has never said that it does not have the power to abolish joint and several liability. The Supreme Court was expressly asked to do so in Coney v. J.L.G. Industries, Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983). The Court ruled that the adoption of comparative fault did not necessarily require the abolition of joint and several liability. However, the court was considering developments in the law only up to 1983:

We find nothing in Alvis which mandates either a shift in who shall bear the risk of the insolvent defendant or the elimination of joint and several liability. Defendant has not cited nor have we found persuasive judicial authority for the proposition that comparative negligence compels the abolition of joint and several liability. On the contrary, most jurisdictions which have adopted comparative negligence have retained the doctrine. Therefore, we hold that our adoption of comparative negligence in Alvis does not change the long-standing doctrine of joint and several liability. 97 Ill. 2d at 124,

(Continued on next page)
The Court said it would not do it, not that it could not do it. Given the great changes in the law in the last 20 years and the abolition of joint and several liability by so many states, the Supreme Court of Illinois should reconsider the abolition of the doctrine.

The Supreme Court made reference to its decision in Coney in the decision in Best v. Taylor Machine Works, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997), but it did not think it necessary to resolve the issue:

This court’s reasoning in Coney places into question defendants’ primary justification for abolishing joint and several liability, i.e., that the doctrine requires some defendants to pay for more damages than they caused or for which they are responsible. We need not resolve, however, the conflict between the Coney court’s analysis of joint and several liability and defendants’ justification for abolishing the doctrine. 179 Ill. 2d at 429, 689 N.E.2d at 1087.

Thus, the issue is wide open.

This argument so far should be sufficient to rebut the imagined plaintiff’s argument that the court cannot abolish joint and several liability. However, there are a few more points for those defense lawyers with a defeatist attitude towards this effort. The attempt to change the law can appear to be useless but it can be done if we have the right attitude.

For example, in Torres v. Walsh, 98 Ill. 2d 338, 456 N.E.2d 601 (1983), which was brought in the Illinois Supreme Court, was widely considered a lost cause. One fellow defense lawyer stated that, if he were on the Supreme Court, he would have dismissed the case as frivolous. At least 40 states had adopted the doctrine of intrastate forum non conveniens by statute and only two (Oklahoma and Kansas) had done so by judicial decision. Nevertheless, the Supreme Court judicially adopted the doctrine.

In this assault on joint and several liability, we do not intend to be timid. We want the issue raised not only in Cook County but in every county in the state. We want every cause in every county to be pressed in all five appellate court districts. We want to create controversy, to seek justice clearly and loudly, and to demand that this antiquated, obsolete, feeble remnant of the common law be abolished in accord with the modern trend of the highest courts of each of the states.

We will need one or more appropriate cases (e.g., a hospital and a doctor, and also a product liability case). We will need an amicus brief from the IDC. We will need support from the DRI. We would like some support from other organizations (e.g., healthcare associations), and even the academic community.

The doctrine is reeling and on the ropes. Plaintiffs’ organizations will not be able to save it. The doctrine needs one more right hand punch from Illinois to put it away. The opening bell has rung in this fight and, as Muhammad Ali would shout, “It’s going down!!”
**Feature Article**

**SPOLIATION OF EVIDENCE: A Chronology of Judicial Development in Illinois**

By: Bradley C. Nahrstadt & Sean G. Joyce
Williams Montgomery & John, Ltd.
Chicago

In the last 24 years there have been approximately 40 cases decided by Illinois state and federal courts regarding the issue of spoliation of evidence. From this body of law, three clear-cut principles have emerged. First, Illinois law does not recognize an independent cause of action for spoliation of evidence. Second, a claim based on spoliation of evidence must sound in negligence. A plaintiff alleging such a claim must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and resulting damages. Third, judicial remedies for spoliation of evidence are determined and imposed on a case-by-case basis depending upon the circumstances surrounding the destruction or disposal of the evidence at issue.

Remedies can run the gamut from a spoliation jury instruction to discovery sanctions precluding the admissibility of evidence, or even, in some instances, dismissal of the action. With such a range of remedies, litigants may experience difficulty in accurately predicting what, if any, outcomes may result when an Illinois court is faced with the issue of spoliation of evidence. In the interest of bringing a measure of clarity, the following discussion contains a chronological survey of cases that contributed to the body of precedent in Illinois dealing with the issue of spoliation of evidence.

The first reported decision in Illinois dealing with spoliation of evidence was Stegmiller v. H.P.E., Inc., 81 Ill. App. 3d 1144, 401 N.E.2d 1156 (1st Dist. 1980). The Stegmiller case involved an administrator of an estate who brought a products liability action alleging that an improper insulated swimming pool filter manufactured, sold, and installed by the defendants electrocuted the administrator’s son. An investigator hired by the plaintiff’s attorney picked up the pool filter from the Stegmiller home on August 30, 1972. The filter was stored in the attorney’s office pending examination. After moving his office to a new location, the plaintiff’s attorney was unable to find the pool filter.

Following several unsuccessful requests by the defendants for the plaintiff to produce the pool filter for examination, the trial court dismissed the plaintiff’s complaint for failure to comply with Illinois Supreme Court Rule 219(c). It is clear from a review of the Stegmiller opinion that the dismissal was based not so much on the plaintiff’s loss of the pool filter (and, indeed, the defendants never argued that they were unable to defend the claim based on the fact that the pool filter was lost), but rather on the fact that the plaintiff waited more than three years before attempting to explain why the pool filter could not be produced in response to the defendants’ request to produce.

In Fox v. Cohen, 84 Ill. App. 3d 744, 406 N.E.2d 178 (1st Dist. 1980), the plaintiff, an administrator of the estate of a deceased patient, filed a wrongful death action against the decedent’s physician and Alexian Brothers Medical Center. The plaintiff sued the medical center for negligently destroying EKG tracings and reports concerning the decedent. The plaintiff alleged that the actions of the defendants in destroying the EKG tracings deprived the plaintiff of vital evidence necessary to sustain her burden of proof against the decedent’s physician. The trial court dismissed the spoliation of evidence counts and the plaintiff then appealed.

On appeal, the appellate court affirmed the dismissal of the plaintiff’s spoliation claims. In so doing, the court stated

(Continued on next page)

---

**About the Authors**

**Bradley C. Nahrstadt** is a partner with the Chicago firm of Williams Montgomery & John Ltd. His practice is devoted to litigation, including the defense of product liability, medical malpractice and insurance bad faith cases in state and federal courts. Mr. Nahrstadt received his B.A. from Monmouth College, summa cum laude, in 1989, and his J.D. from the University of Illinois College of Law, cum laude, in 1992. He is a member of the Illinois State Bar Association, IDC and DRI.

**Sean G. Joyce** is an associate with the Chicago law firm of Williams Montgomery & John Ltd. and practices primarily in the areas of product liability and commercial litigation. He received his B.S. in Accountancy from DePaul University and his J.D. from Loyola University Chicago. Mr. Joyce is a member of the IDC, ABA, ISBA and CBA.
Spoliation of Evidence (Continued) the following:

Counts II and III allege that the hospital’s breach of its duty caused the plaintiff to lose her malpractice action against the defendant doctor as alleged in Count I of the complaint. However, plaintiff has not yet sustained any injury. The medical malpractice claim under Count I is still pending . . . That plaintiff will lose her malpractice action because of a missing EKG is, as of now, purely speculative and uncertain. Liability cannot be predicated upon surmise or conjecture as to the cause of the injury . . . Plaintiff’s action under Counts II and III is premature.

Fox, 406 N.E.2d at 183.

The issue of spoliation of evidence was next addressed by the First District Appellate Court in the case of Ralston v. Casanova, 129 Ill. App. 3d 1050, 473 N.E.2d 444 (1st Dist. 1984). In this case, the plaintiff brought a strict products liability action against an automobile manufacturer and a seatbelt manufacturer, alleging that manufacturing and design defects rendered the seatbelt unreasonably dangerous.

After the lawsuit was filed, the defendants moved to preserve the seatbelt assembly and to restrain all parties from destructive testing. The trial court entered two protective orders to that effect. Subsequent to the entry of the protective orders, and concededly in violation thereof, the plaintiffs’ expert, without notice to the defendants, proceeded to disassemble, examine, and test the seatbelt assembly. An independent expert appointed by the court testified that the effect of plaintiffs’ expert’s conduct was to render questionable the results of any subsequent tests performed on the seatbelt assembly.

As a result of the destructive testing, the trial court barred the plaintiffs’ expert from testifying at trial. Since the plaintiffs’ expert was barred from testifying and expert testimony was needed to support the plaintiffs’ strict product liability claim, summary judgment was entered in favor of the defendants. The entry of summary judgment in favor of the defendant was upheld by the appellate court, which reasoned that an order barring the plaintiffs’ expert from testifying at trial was an appropriate sanction due to the expert’s spoliation of evidence.

The case of Applegate v. Seaborn, 132 Ill. App. 3d 473, 477 N.E.2d 74 (4th Dist. 1985), involved a claim seeking recovery for damages arising out of an automobile collision. The plaintiff filed suit against General Motors alleging that the company had negligently designed and manufactured the truck the defendant driver was operating at the time of the accident. In particular, the plaintiff alleged that defects in the front differential housing of the truck caused it to go out of control and collide with the plaintiff’s vehicle.

Following the collision at issue, the defendant driver’s insurer hired a metallurgist to examine the differential housing. That expert prepared a report concluding that a defectively manufactured differential housing casting had been installed in the defendant’s truck. After the inspection, the expert disposed of the differential housing. The plaintiff subsequently learned of the expert’s report and disclosed him as a trial witness. The trial court barred the expert from testifying at trial as a discovery sanction after the plaintiff could not produce General Motors the differential housing examined by the expert.

On appeal, the Fourth District Appellate Court reversed the sanction entered by the trial court. According to the appellate court, the expert who disposed of the parts at issue was retained, originally, not by the plaintiff, but by the defendant’s insurer. There was no basis in the record to conclude that the plaintiff ever had control over the vehicle parts or the expert prior to the disposal of the parts. Based on the plaintiff’s inability to control what the expert did with the parts, the court held that the expert should not have been barred from testifying on behalf of the plaintiff at trial. Applegate, 477 N.E.2d at 76.

In Petrick v. Monarch Printing Corp., 150 Ill. App. 3d 248, 501 N.E.2d 1312 (1st Dist. 1986), the plaintiff brought a direct action for spoliation of evidence against the defendant after the trial court granted summary judgment in favor of the defendant on claims for accrued expenses and retaliatory discharge in violation of public policy. The trial court entered judgment on the pleadings in favor of the defendant, and the plaintiff then appealed.

On appeal, the appellate court noted that destruction of evidence known to be relevant to pending litigation “violates the spirit of liberal discovery.” Petrick, 501 N.E.2d at 1319. The appellate court also noted that, “intentional destruction of evidence manifests a shocking disregard for orderly judicial procedures and offends traditional notions of fair play.” Id.

After making these pronouncements, the appellate court noted that it did not need to decide whether Illinois law would recognize an independent tort of spoliation since, in this case, an indispensable element of such a tort was missing. According to the court, although the plaintiffs’ retaliatory discharge suit was totally unsuccessful, the plaintiff failed to adequately plead a nexus between the failure of the retaliatory discharge suit and the defendant’s destruction of ledger books and other records.

The court found it was the plaintiffs’ failure to present any evidence to support his retaliatory discharge claim or to ex-
plain his lack of any evidence that led to the entry of judgment in favor of defendant. As a result, the appellate court held that judgment for the defendant was proper where dismissal of the underlying claim resulted from the plaintiff’s abandonment of the very theory of liability that the destroyed evidence would have supported. Petrick, 501 N.E.2d at 1322.

In Graves v. Daley, 172 Ill. App. 3d 35, 526 N.E.2d 679 (3rd Dist. 1988), the plaintiffs filed a products liability action against a furnace manufacturer and seller to recover damages caused by a fire that destroyed their home. Following the fire, the plaintiffs’ insurance company, Western States, retained an expert to inspect the premises and prepare a report regarding the cause and origin of the fire.

The insurance company’s expert reported that, in his opinion, a defective condition in the furnace was the probable cause of the fire. The plaintiffs were paid by Western States and wanted to clear away the debris and rebuild their home. Western States then gave the plaintiffs permission to dispose of the furnace, which they did.

After the plaintiffs filed their cause of action, the defendants requested that the plaintiffs produce the furnace for inspection. The plaintiffs responded by indicating that the furnace was unavailable. The defendants then moved for sanctions, requesting that the trial court either dismiss the lawsuit or, in the alternative, bar the plaintiffs from introducing any evidence concerning the condition of the furnace.

After a hearing on the defendants’ motion, the trial court entered an order barring the plaintiffs from presenting any evidence regarding the condition of the furnace. The plaintiffs’ motion to reconsider was denied and the defendants moved for summary judgment. That motion was granted and an appeal followed.

In discussing the issue of spoliation, the appellate court stated:

The plaintiffs destroyed the furnace after receiving permission to do so from Western States [the real party in interest]. This is not a case where the evidence was innocently or negligently destroyed. In the instant case, the plaintiffs willingly caused the furnace to be destroyed with Western State’s approval. The plaintiffs and Western States had complete control of the furnace from the date of the fire . . . . In the instant case, Western States and the plaintiff knew, or should have known that a defective condition of the furnace, the item they allege caused the fire, was a crucial piece of evidence and should have been preserved.

Graves, 526 N.E.2d at 681-82.

Based on the foregoing, the entry of summary judgment in favor of the defendants was upheld.

In the case of Rodgers v. St. Mary’s Hospital of Decatur, 198 Ill. App. 3d 871, 556 N.E.2d 913 (4th Dist. 1990), the plaintiff filed a medical malpractice suit in his capacity as the administrator of his late wife’s estate against St. Mary’s Hospital and the obstetricians and radiologists responsible for her care during the days immediately prior to her death. Two years after the plaintiff filed suit, a jury returned a verdict in favor of the defendant radiologists and against the plaintiff.

The plaintiff then filed a separate cause of action against St. Mary’s Hospital. In that action, the plaintiff requested damages based on the hospital’s alleged loss of all abdominal x-rays taken of his wife for the five years prior to her death. The plaintiff alleged that the missing x-rays were critical and important evidence, which, either alone or in combination with other evidence, would have established the radiologists’ negligence in treating his wife.

In dealing with the plaintiff’s spoliation of evidence claim, the appellate court declined to decide whether a cause of action for spoliation of evidence existed under Illinois law. Instead, the appellate court held that the plaintiff’s complaint stated a statutory cause of action since Illinois statutes require hospitals to retain x-ray films for, depending on the circumstances, up to 12 years after the films are taken. Rodgers, 556 N.E.2d at 916.

(Continued on next page)
Spoliation of Evidence (Continued)

The Supreme Court affirmed the decision of the appellate court in Rodgers v. St. Mary’s Hospital of Decatur, 149 Ill. 2d 302, 597 N.E.2d 616 (1992), holding that a private cause of action exists under the X-ray Retention Act, that the husband had stated a claim under the Act, and that the husband’s claim was not barred by waiver or res judicata.

In Argueta v. Baltimore and Ohio Chicago Terminal Railroad Co., 224 Ill. App. 3d 11, 586 N.E.2d 386 (1st Dist. 1991), the First District Appellate Court upheld the trial court’s decision that the defendants’ expert report concerning the cause of a fractured crane spindle pin was inadmissible due to the inadvertent destruction of the pin prior to trial. According to the appellate court, “a trial court is not required to find that a party intentionally destroyed evidence in order for the court to bar testimony regarding that evidence . . . [and] the trial court had discretion to conclude that the other parties in the suit were prejudiced by their inability to conduct tests of their own on this material piece of evidence.” Argueta, 586 N.E.2d at 393 (emphasis added).

In American Family Insurance Co. v. Village of Pontiac GMC, Inc., 223 Ill. App. 3d 624, 585 N.E.2d 1115 (2nd Dist. 1992), the plaintiffs, William and Nancy Gill, purchased a 1981 Pontiac Grand Prix from Village Pontiac/GMC in Naperville, Illinois. Approximately a month after the plaintiffs purchased their car, a fire occurred at their home. The fire severely damaged the home and other personal property.

After the fire, the plaintiffs’ homeowner’s insurer, American Family Insurance Company, hired an investigator to determine the cause and origin of the fire. In the investigator’s opinion, which was based in part on the opinions of an electrical engineer hired by the investigator, the origin of the fire was in the area along the trunk light wire beneath the left end of the rear seat, and the cause of the fire was a short circuit which resulted when a copper trunk light circuit wire with damaged insulation contacted a ground wire.

The cause and origin expert removed the copper wire that he believed caused the short circuit and took numerous photographs of the trunk area of the car. Following the inspection, the plaintiffs transferred title of the car to their automobile insurance company, and a salvage company destroyed the car itself seven months later after the plaintiffs’ insurer transferred title to that company.

After the plaintiffs filed suit to recover damages associated with the destruction of their home and its contents, the defendant car manufacturer, General Motors Corporation, filed a motion to bar the plaintiffs from introducing any evidence regarding the condition of the car because the car had been destroyed. The trial court granted that motion and barred the plaintiffs from presenting “any evidence, direct or circumstantial, concerning the condition of the Pontiac Grand Prix which is at issue in this case, at the trial of this cause.” American Family, 585 N.E.2d at 1117. After entering this order, the trial court granted the defendant’s motion for summary judgment based on the plaintiffs’ inability to use any evidence concerning the condition of the car.

In affirming the entry of summary judgment in favor of the defendants, the appellate court stated as follows:

In this case, plaintiffs intentionally allowed the most crucial piece of evidence in this case to be destroyed. Plaintiffs should have known the potential defendants to a case alleging negligence and product liability would undoubtedly want to inspect, as plaintiffs’ experts had done, and perhaps test the object alleged to have caused the damage . . . . Indeed, Farmers Insurance in anticipation of its subrogation claim allowed the car to be destroyed only after its experts had thoroughly examined the car and had issued their opinions on the cause of the fire . . . . Plaintiffs were the only individuals who had first-hand knowledge of the physical evidence which was far more appropriate under these circumstances in determining whether the vehicle caused the fire than photographs and two wires taken from the trunk area . . . . We do not believe that the trial court’s order barring all evidence, direct or circumstantial, concerning the condition of the car was an abuse of discretion.

American Family, 585 N.Ed.2d at 1118.

In Marrocco v. General Motors Corp., 966 F.2d 220 (7th Cir. 1992), the Seventh Circuit Court of Appeals had an opportunity to analyze the proper sanctions for destruction of key evidence. In this case, the plaintiffs filed a products liability action against General Motors when the plaintiffs lost control of their vehicle, crossed the centerline of a divided highway and crashed into a semi-trailer truck. The plaintiffs alleged that the accident was caused by a pre-collision fracture of the rear axle of their automobile.

During the discovery phase of the case, the plaintiffs retained experts disassembled the left rear axle bearing assembly of the automobile, thereby irretrievably losing the sequence of the roller bearing which was contained in the assembly. This destructive testing was performed after the trial court had entered a protective order requiring both parties to preserve the condition of the car and its components.

Based on the foregoing, the Seventh Circuit Court of Appeals upheld the dismissal of the plaintiff’s cause of action against the defendants stating, “given the record before us, it
would be hard to imagine plaintiffs more deserving of civil sanctions than the Marroccos.” *Marrocco*, 966 F.2d at 223.

A similar result was reached in the case of *State Farm Fire & Casualty Co. v. Frigidaire*, 146 F.R.D. 160 (N.D. Ill. 1992). Here, the district court held that barring all evidence, which was the equivalent of a dismissal of the plaintiffs’ products liability action, was an appropriate sanction for the plaintiff allowing its subrogor to dispose of a dishwasher, alleged to have caused a home fire, after their expert had an opportunity to complete an inspection of the appliance.

“The key to this decision was the fact that, ‘the plaintiffs do not allege that they have lost any cause of action that they might have against the manufacturer or distributors; they only allege that their opportunity to establish liability has been prejudiced.’”

Chronologically, the next Illinois case to discuss spoliation of evidence was *Fitzpatrick v. ACF Properties Group, Inc.*, 231 Ill. App. 3d 690, 595 N.E.2d 1327 (2d Dist. 1992). However, an analysis of this case does not advance an understanding of the issue of spoliation of evidence since the appellate court merely held that the plaintiff failed to plead a cause of action for spoliation of evidence in her underlying complaint and failed to preserve the issue for appeal.

In *Mayfield v. Acme Barrel Co.*, 258 Ill. App. 3d 32, 629 N.E.2d 690 (1st Dist. 1994), the court was once again faced with the issue of whether or not an independent tort of spoliation of evidence would be recognized in this state. According to the First District Appellate Court, the Illinois Supreme Court recognized an implied statutory cause of action for spoliation of evidence under the X-Ray Retention Act with its decision in *Rodgers v. St. Mary’s Hospital*. However, the court also said the issue of whether Illinois would recognize a common law tort for spoliation of evidence had yet to be resolved.

Recognizing the lack of finality regarding this issue, the court noted that, “the cases which have addressed the issue are unanimous in their holding that an indispensable prerequisite to the maintenance of such an action, if it does exist, is a showing of an actual injury proximately caused by the loss or destruction of the evidence in question . . . . The threat of some future harm that has not yet been realized is insufficient to satisfy this element of the claim and, as such, no action for spoliation can be brought until the underlying claim which is dependent upon the missing evidence is lost.” *Mayfield*, 629 N.E.2d at 695.

According to the *Mayfield* court, the plaintiffs’ claims for alleged spoliation of evidence were premature since the plaintiffs had pending viable claims against the putative tortfeasors. Id. at 696. As a result, the trial court affirmed the dismissal of the plaintiffs’ spoliation claims without prejudice. The key to this decision was the fact that, “the plaintiffs do not allege that they have lost any cause of action that they might have against the manufacturer or distributors; they only allege that their opportunity to establish liability has been prejudiced.” Id. at 695-696.

In *H and H Sand and Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 632 N.E.2d 697 (2nd Dist. 1994), the Second District Appellate Court held that a sanction precluding a trial on the merits is only appropriate when the defense has incurred prejudice by the alteration or destruction of a crucial piece of evidence.

In this case, the appellate court determined that exclusion of the plaintiffs’ expert witness from testifying at trial was not an appropriate discovery sanction since the acetylene cylinder at issue was available for investigation and inspection by the defense (even though it was dismantled by the plaintiff’s expert and component parts were discarded following his inspection), as were photographs and notes taken during the plaintiffs’ expert’s examination. The court also held that the defendants’ declination of its right to conduct an inspection of the acetylene cylinder at issue diffused its claim of prejudice.

According to the *H and H Sand* court, at trial the defendant would be allowed to call its own expert to testify regarding his investigation into the explosion at issue. That expert could testify that, in his opinion, the explosion was caused by the ignition of gasoline vapors, and not by a leaking acetylene gas cylinder. The defendant would be able to present the testimony of his own designers, manufacturers, and installers to refute the plaintiffs’ allegation that the acetylene gas cylinder was unreasonably dangerous. Also, the defendant would be able to cross-examine the plaintiffs’ expert regarding his handling and alteration of the acetylene cylinder, valve, generator, and

(Continued on next page)
Spoliation of Evidence (Continued)

The court concluded, assuming the evidence adduced at trial created a factual issue regarding the missing evidence, the defendant could request that the trial court give I.P.I. Civil 3rd Number 5.01, the jury instruction that is designed to inform the jury that if a party has failed to offer evidence within its power to produce, the jury may infer that the evidence would have been adverse to that party. In the court’s view, the availability of all these measures indicated that the trial court abused its discretion in barring the plaintiffs’ expert from testifying as a discovery sanction and a reversal of summary judgment in favor of the defendants was warranted. *H and H Sand*, 632 N.E.2d at 705.

In *Shelbyville Mutual Insurance Co. v. Sunbeam Leisure Products Co.*, 262 Ill. App. 3d 636, 634 N.E. 2d 1319 (5th Dist. 1994), the Fifth District Appellate Court rejected the arguments made by the Second District in the *H and H Sand* case. The appellate court held that it was not an abuse of discretion for the trial court to bar the plaintiff from introducing evidence of any defects that allegedly existed in the plaintiff’s grill, or any testimony regarding the origin or spread of the fire within the grill, after the wooden grill frame was inadvertently discarded from the plaintiff’s office. Specifically, the court noted:

The insurance company argues . . . that Sunbeam did not suffer any prejudice because [their expert] was able to form “an opinion” contrary to the opinion of [the plaintiff’s expert]. However, the insurance company did not file any affidavit or other evidence to refute Sunbeam’s claim that it was prejudiced because it was not able to examine the grill in its precise post-fire condition and that such an examination may have provided evidence to further support [their expert’s] opinion and to refute [the plaintiff’s expert’s] findings . . .

By the inadvertent destruction of a portion of the grill, the insurance company effectively foreclosed a possible affirmative defense of what may have been the actual cause of the fire. Sunbeam thus lost any opportunity to present affirmative defenses of alternative causes of the fire and was limited by the insurance company’s action to merely rebutting [the plaintiff’s] opinion. Mere rebuttal of the theory of the insurance company’s expert may not be nearly as an effective defense as a presentation to the jury by Sunbeam that the fire was actually caused by something other than a defective product. In light of these limitations on Sunbeam’s ability to defend itself and a reasonable probability that the insurance company’s acts foreclosed the truth as to the cause of the fire from ever being ascertained, we cannot say that the trial court erred in barring evidence or testimony about the allegedly defective grill.

*Shelbyville Mutual Insurance Co.*, 634 N.E.2d at 1324.

In *Allstate Insurance Co. v. Sunbeam Corp.*, 865 F. Supp. 1267 (N.D. Ill. 1994), the United States District Court for the Northern District of Illinois once again had an opportunity to review whether or not the dismissal of a complaint was an appropriate sanction for spoliation of evidence.

The *Allstate* case revolved around a fire that was allegedly caused by a release of propane gas in or around the insured’s barbecue grill. Allstate contended that the fire started as a leak somewhere in the “gas train,” the system of pipes, valves, and hoses conveying gas from the cylinder to the burners in the grill. The fire grew until it overheated the propane tank, causing it to vent a large quantity of propane.

Sunbeam, on the other hand, contended that it was more likely that a spare tank of propane had been stored beneath or directly behind the grill, and that this spare tank had been overfilled with liquid propane, leaving insufficient room for expansion of the propane. According to Sunbeam, expansion of the propane brought on by heat from the sun, the hot ambient air, and the nearby operating grill caused the explosion.

In support of this theory, Sunbeam pointed to photographs of the scene taken by investigators two days after the fire, as well as a home videotape taken by the homeowners approximately eight hours after the fire, all of which showed a

“In the court’s view, the availability of all these measures indicated that the trial court abused its discretion in barring the plaintiffs’ expert from testifying as a discovery sanction and a reversal of summary judgment in favor of the defendants was warranted.”
second propane tank among the remains of the grill in addition to the service tank used for fueling the grill at the time of the explosion.

In the trial court, Sunbeam argued that it had a major difficulty in proving its theory: first, the second tank shown in the photographs and videotape could not be found or examined and, second, the grill frame with accessories which could have shown burn marks and patterns supporting Sunbeam’s theory were also nowhere to be found.

Shortly after the fire, an Allstate investigator, in the performance of a cause and origin investigation, preserved only the service tank that was connected to the grill, the connecting fittings, the remains of the regulator, and the remains of the burners. He directed that everything else be thrown away, which included the third burner, the grill frame, any wood accessory remnants, and the second propane tank shown in the videotape and photographs.

The district court held that the defendant was entitled to a dismissal of the products liability action brought against it due to evidence spoliation. According to the court, the parts of the grill and spare propane tank found near the grill were disposed of at the insurer’s direction, and it was impossible without those items to prove or disprove the manufacturer’s defense that the fire at issue was caused not by the operation of the grill but by the spare tank being over-pressurized and heated.

The court reasoned that, without the evidence, “which a reasonable investigator would have preserved, Sunbeam’s defense has been seriously and materially weakened. Accordingly, in the face of the disruption of this material evidence, we recommend that the complaint be dismissed.” Allstate, 865 F. Supp. at 1279.

The federal district court’s decision was upheld by the Seventh Circuit Court of Appeals in Allstate Insurance Co. v. Sunbeam Corp., 53 F.3d 804 (7th Cir. 1995).

A similar result was reached in Thomas v. Bombardier-Rotax Motorenfabrik, 909 F. Supp. 585 (N.D. Ill. 1996), where the court found that the defendant’s motion to bar evidence and for summary judgment should be granted based on the plaintiff’s intentional destruction of evidence that deprived the defendant of an ability to establish its case.

In Farley Metals, Inc. v. Barber Coleman Co., 269 Ill. App. 3d 104, 645 N.E.2d 964 (1st Dist. 1995), the First District Appellate Court held that the trial court was justified in imposing a sanction of dismissal after it determined that explosion artifacts stored at a warehouse and covered by a protective order were destroyed due to the plaintiff’s counsel’s failure to timely pay storage bills.

The court recognized that several courts in Illinois had declared that dismissal is proper only as a last resort when the offending party’s actions demonstrate a deliberate, contumacious, and unwarranted disregard for the court’s authority and where a trial on the merits would prejudice the opposing party. Yet, the court ruled that the negligent or inadvertent destruction or alteration of evidence may result in a harsh sanction, including dismissal, when the opposing party is disadvantaged by the loss. Farley Metals, 645 N.E.2d at 968.

The court went on to hold that in cases where belated compliance with discovery is impossible due to the permanent loss of evidence, trial courts ought not to dwell on whether the offending party’s noncompliance was contumacious or deliberate, but rather should focus upon whether the imposition of less severe sanctions will promote the overriding concern for the search for truth. Therefore, in determining the reasonableness of the noncompliance, the court may consider, inter alia, the importance of the information sought. Id.

Once the trial court orders sanctions under Supreme Court Rule 219(c), the sanctioned party has the burden of showing that its noncompliance was reasonable or warranted by extenuating circumstances. However, when crucial information or evidence is destroyed, the offending party’s intent becomes significantly less germane in determining a proper sanction. A showing that the plaintiff’s noncompliance was reasonable does not hinge on intent. The critical issue is how important the undisclosed material was to the opposing party. Id.

In this case, the appellate court upheld the dismissal of the case as a sanction despite the fact that the defendants had had numerous opportunities to inspect the artifacts prior to their disposal. Id. at 970-971.

The seminal Illinois case regarding spoliation of evidence is Boyd v. Travelers Insurance Co., 166 Ill. 2d 188, 652 N.E.2d 267 (1995). On February 4, 1990, Tommy Boyd was working inside a van belonging to his employer, Superior Foods. To keep the van warm, Boyd was using a propane catalytic heater that was designed, manufactured, and distributed by Coleman. An explosion occurred, allegedly caused by propane gas escaping from the heater. Boyd sustained serious personal injuries and other damages. The heater was Boyd’s personal property.

Boyd filed a claim for workers’ compensation benefits against his employer and Travelers Insurance Company, his employer’s workers’ compensation insurer. On February 6, 1990, a Travelers claim adjuster visited the Boyd residence. He took possession of the Coleman heater, telling Boyd’s wife that Travelers needed the heater in order to investigate her husband’s workers’ compensation claim. He also told the plaintiff’s wife that Travelers would inspect and test the heater

(Continued on next page)
**Spoliation of Evidence (Continued)**

to determine the cause of the explosion.

Travelers’ adjuster transported the heater to a Travelers office and stored it in a closet. Subsequently, when Boyd asked that the heater be returned to him, Travelers was unable to locate it. On September 27, 1991, Boyd sought a court order compelling Travelers to return the heater. Travelers admitted that its employee took possession of the heater and placed it in a closet from which it later disappeared. Travelers never tested the heater.

The Boyds filed a five-count complaint in the Circuit Court of Cook County. Counts I and II alleged negligent and willful and wanton spoliation of evidence against Travelers. The plaintiffs alleged that they had been injured by Travelers’ loss of the heater because no expert could testify with certainty as to whether the heater was defective or dangerously designed. Therefore, they alleged, Travelers’ loss of the heater had irrevocably prejudiced and adversely affected their products liability action against Coleman.

Travelers filed a motion to dismiss counts I and II of the plaintiffs’ complaint, contending that negligent and intentional spoliation of evidence are not recognized torts under Illinois law. In the alternative, Travelers claimed that, even if Illinois was to recognize either cause of action, the plaintiffs’ claims were premature because the underlying products liability action against Coleman was still pending. Travelers argued that, until the plaintiffs lost the underlying action, they had suffered no actual injury, a necessary element to any cause of action.

The trial court granted Travelers’ motion to dismiss counts I and II without prejudice. The trial court agreed with Travelers that the plaintiffs’ claims were premature unless and until they lost the underlying suit against Coleman, thereby sustaining an actual injury. The trial court then certified the issue for appeal to the Illinois Supreme Court.

On appeal, the Supreme Court was asked to determine whether Illinois courts recognize “spoliation of evidence” as an independent cause of action. The court recognized that many jurisdictions have long afforded redress for the destruction of evidence and, according to the court, traditional remedies adequately address the problem presented in the Boyd case. Thus, an action for negligent spoliation of evidence could be stated under existing negligence law in Illinois without creating a new tort.

In discussing the spoliation of evidence cause of action, the Supreme Court noted that the general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. In addition, the court recognized that a defendant may voluntarily assume a duty to preserve evidence through its affirmative conduct. According to the court, in any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.

The justices of the Supreme Court disagreed with Travelers’ assertion that for the plaintiffs to allege actual injury from the loss of the heater, they first had to pursue and lose the underlying claim. According to the court, in a negligence action involving the loss or destruction of evidence, a plaintiff must merely allege sufficient facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit.

Accordingly, a plaintiff need not show that, but for the loss or destruction of the evidence, the plaintiff would have prevailed in the underlying action. The court believed that this was too difficult a burden for the plaintiff to bear, as it may be impossible to know what the missing evidence would have shown.

In outlining precisely what a plaintiff must prove, the court stated, “A plaintiff must demonstrate, however, that but for the defendant’s loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit. In other words, if the plaintiff could not prevail in the underlying action even with the lost or destroyed evidence, then the defendant’s conduct is not the cause of the loss of the
lawsuit. This requirement prevents a plaintiff from recovering where it can be shown that the underlying action was merit-
less.” Boyd, 652 N.E.2d at 271.

According to the court, actual damages must be alleged as well. A threat of future harm, not yet realized, is not actionable. The wrongful conduct must impinge upon a person. Conse-
quently, a plaintiff is required to allege that a defendant’s loss or destruction of the evidence caused the plaintiff to be unable to prove an otherwise valid, underlying cause of action. Boyd, 652 N.E.2d at 272.

In light of the fact that the court held that a claim for spo-
lation of evidence could be stated under existing negligence
law, the court declined to recognize intentional spoliation of
evidence as a new tort in this state. Id. at 273.

In Murphy v. General Motors Corp., 285 Ill. App. 3d 278, 672 N.E.2d 371 (1st Dist. 1996), a police officer who was injured when the seat in his squad car suddenly collapsed brought an action for negligent repair. He alleged that two months prior to the accident one of the defendants, Palos Auto Glass & Trim, Inc. (“Palos”), negligently repaired his car seat frame. According to the plaintiff, Palos repaired the seat by performing a “mig” weld on its frame, but General Motors’ product specifications provided that “spot resistance” welding should be used to repair the type of seat in his squad car.

Following the accident in question, the squad car was taken to an auto repair business owned by Raymond Holzinger. Mr. Holzinger testified at a deposition that when the vehicle arrived, he examined the front seat and concluded that, due to its condition, it could not be repaired. Therefore, the front seat was removed from the vehicle and a replacement front seat was installed.

After removing the seat, Holzinger disposed of it. Before he discarded it, however, he examined it and discovered that repair work had previously been performed on the seat frame. Specifically, he noted an apparent break in the frame that had been repaired by a weld. Although the weld had not broken in the accident, there was a “bend” in the frame one to two inches from the point of the weld.

When Palos learned that the seat had been discarded, it moved for summary judgment asserting that because the car seat had been destroyed the plaintiff could not prove that its conduct in repairing the seat frame proximately caused the plaintiff’s injuries.

In opposing the motion for summary judgment, the plaintiff presented the affidavit of Dr. Crispin Hales, an engineering and metallurgic expert. Dr. Hales reviewed the plaintiff’s complaint, the relevant depositions, and the engineering specifications for the seat frame issued by General Motors. The specifications included information about the seat frame’s metal composition and physical properties. The specifications also indicated that only spot-welding should be used to repair such seats.

Based upon the above information, Dr. Hales was of the opinion that, assuming the seat frame had been manufactured in accordance with GM’s specifications, the mig weld performed by Palos would have reduced the strength of the seat frame and caused it to fail. The court struck Dr. Hales’ affidavit in its entirety because it considered his opinions speculative. Because the seat was unavailable, the plaintiff could not presume that the seat had, in fact, been manufactured according to GM’s specifications. The judge ruled that, since the plaintiff was precluded from relying upon Dr. Hales’ opinion as to the propriety of mig welding, the plaintiff could not establish negligence on the part of Palos. Therefore, the court entered summary judgment in favor of the defendant.

On appeal, summary judgment for the defendant was reversed. According to the court, the plaintiff’s expert should have been allowed to testify even though the car seat at issue was disposed of because that expert assumed that the seat was manufactured to General Motors’ specifications and, therefore, a mig weld was an improper fix. In the expert’s opinion, that improper fix led to the plaintiff’s injuries. Essentially, the appellate court held that the plaintiff could rely on “circumstantial” evidence to support his claim despite the fact that any direct evidence of the defendant’s negligence had been destroyed. Murphy, 672 N.E.2d at 374.

The case of Miller v. Gupta, 174 Ill. 2d 120, 672 N.E.2d 1229 (1996), is another case involving the destruction of x-rays. The plaintiff, Cindy Miller, filed an action in the Circuit Court of Marion County against Dr. Nerenda K. Gupta, alleging medical malpractice and spoliation of evidence. The circuit court dismissed the plaintiff’s complaint in its entirety.

The appellate court reversed, finding that the trial court abused its discretion in dismissing the plaintiff’s medical mal-
practice count on the basis that the plaintiff had not attached the required medical provider affidavit. The appellate court also remanded the case so that the plaintiff could amend her pleadings regarding spoliation of evidence.

On further appeal, the Illinois Supreme Court held that a patient is not excused from the requirement that she file an affidavit from a health professional declaring that the plaintiff has a meritorious cause of action even in those instances where the evidence necessary to support such an affidavit has been destroyed. The court recognized that in those cases where a plaintiff is unable to obtain the affidavit of a health care

(Continued on next page)
**Spoliation of Evidence (Continued)**

practitioner because of the destruction of evidence, the proper cause of action for the plaintiff is not a medical malpractice action, but rather a cause of action against the individual who has destroyed the evidence.

According to the court, a plaintiff claiming negligent spoliation of evidence must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and damages flowing therefrom. *Miller*, 672 N.E.2d at 1233.

In light of the foregoing, the Supreme Court remanded the plaintiff’s case and provided her with an opportunity to amend her spoliation of evidence claim to conform to the mandates of *Boyd v. Travelers Insurance Co.*

In *Braverman v. Kucharik Bicycle Clothing Co.*, 287 Ill. App. 3d 150, 678 N.E.2d 80 (1st Dist. 1997), a bicyclist who suffered head injuries in an accident brought a products liability action against the manufacturer of his leather bicycle helmet alleging defective design. The Circuit Court of Cook County granted summary judgment in favor of the defendant manufacturer on the basis that the helmet had been lost by the plaintiff.

On appeal, the court held that the absence of a product is not necessarily fatal to a plaintiff’s cause of action. According to the court, it is possible to introduce sufficient evidence to establish a *prima facie* case of strict liability even in the absence of the allegedly defective product if there is circumstantial evidence that will support a claim of a product defect.

The appellate court noted that the trial court made no finding of bad faith on the plaintiff’s part, the court did not strike the deposition testimony and affidavits of the plaintiff’s expert (who had examined an exemplar helmet and provided the opinion that it was defectively designed, unreasonably dangerous, and not fit for its intended use), and the court did not exclude the literature that the defendant distributed or the exemplar helmet itself.

All of the circumstantial evidence remained in the record and, based on that circumstantial evidence and the testimony of his expert, the plaintiff had established sufficient evidence of a *prima facie* case of strict liability. As a result, the appellate court reversed the entry of summary judgment in favor of the defendant manufacturer. *Braverman*, 678 N.E.2d at 85.

In *Chidichimo v. University of Chicago Press*, 289 Ill. App. 3d 6, 681 N.E.2d 107 (1st Dist. 1997), the First District Appellate Court held that there is no duty to preserve records in a workers’ compensation proceeding. The appellate court also held that the plaintiff in *Chidichimo* was collaterally estopped in his civil action from relitigating the question of whether the destruction of his records amounted to a spoliation of evidence.

In *Jackson v. Michael Reese Hospital and Medical Center*, 294 Ill. App. 3d 1, 689 N.E.2d 205 (1st Dist. 1997), the Illinois Appellate Court had an opportunity to address several interesting issues regarding spoliation of evidence. The plaintiffs in *Jackson* filed a medical malpractice action against several defendants on August 14, 1985. This action alleged negligence based on injuries suffered by the minor plaintiff in the course of treatment for serious medical problems, including the absence of an anus.

---

“The court recognized that in those cases where a plaintiff is unable to obtain the affidavit of a health care practitioner because of the destruction of evidence, the proper cause of action for the plaintiff is not a medical malpractice action, but rather a cause of action against the individual who has destroyed the evidence.”

---

The plaintiffs voluntarily dismissed their medical malpractice claim against all of the defendants and filed a new complaint alleging negligent spoliation of evidence against Michael-Reese Hospital and Medical Center. Their claim alleged that the defendant’s loss or destruction of certain x-rays taken of the child caused the plaintiffs to be unable to prove their original medical malpractice claim.

The plaintiffs’ first complaint was dismissed, and the trial court granted the plaintiffs leave to file an amended complaint. The plaintiffs’ first amended complaint asserted a claim under the X-ray Retention Act that the trial court subsequently dismissed. In their second amended complaint, the plaintiffs alleged a cause of action for spoliation of evidence under *Boyd v. Travelers Insurance Co.* The plaintiffs also filed an
emergency motion to reconsider the dismissal of their first amended complaint.

The trial court denied the plaintiffs’ motion to reconsider the dismissal of the first amended complaint, which asserted a claim under the X-ray Retention Act. The court granted the defendant’s Section 2-619 motion to dismiss for failure to attach a certificate of merit under Section 2-622 of the Illinois Code of Civil Procedure and granted the defendant’s Section 2-615 motion to dismiss for failure to state a cause of action for negligent spoliation of evidence. The plaintiffs then appealed.

On appeal, the appellate court noted that the X-ray Retention Act requires hospitals to retain x-rays as part of their regularly maintained records for a period of five years. The Act further provides that if a hospital has been notified in writing by an attorney at law before the expiration of the five-year period that there is litigation pending in court involving a particular x-ray, then the hospital must retain the x-ray for a period of 12 years from the date that the x-ray film was produced.

According to the court, a duty to retain x-rays for a longer period of time is only triggered by the receipt of written notice from an attorney before the expiration of the five-year retention period that litigation involving the x-ray in question is pending. The court held that the plaintiffs’ request for x-rays, prior to the filing of their lawsuit, did not give rise to a duty on the part of the defendant to preserve the x-rays in question.

In addition to the foregoing, the appellate court held that Section 2-622’s requirement for submission of a certificate of merit does not apply to a claim of negligent spoliation of evidence arising from a medical malpractice action.

Although the court held that the plaintiffs could not proceed with a cause of action under the X-ray Retention Act, the court analyzed whether they could proceed with a cause of action for negligent spoliation of evidence. To state such a cause of action, a plaintiff must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and damages.

The appellate court determined that the complaint in Jackson failed to sufficiently allege what affirmative conduct was voluntarily undertaken by the hospital regarding the retention, preservation, and maintenance of the minor plaintiff’s x-rays. With respect to proximate cause, the court held that the complaint was also deficient. The court noted as follows:

In arriving at a standard for pleading causation in cases alleging spoliation of evidence the Supreme Court, in Boyd, recognized the difference between factually alleging that the spoliation caused plaintiff to be unable to prove the underlying lawsuit and the more difficult burden of factually alleging that but for the spoliation plaintiff would have prevailed in the underlying lawsuit . . . . Under the Boyd standard, a plaintiff must show that but for the spoliation there was a reasonable probability of succeeding in the underlying suit.

* * *

Applying the Boyd causation standard, the complaint must allege sufficient facts to support a claim that the spoliation of evidence caused the plaintiff to be unable to prove the underlying medical malpractice lawsuit and that, but for the defendant’s spoliation, the plaintiff had a reasonable probability of succeeding in the underlying medical malpractice suit.

Jackson, 689 N.E.2d at 214.

In regard to the damages aspect of a spoliation claim, the court again reinforced the fact that actual damages must be alleged in an action for negligent spoliation of evidence. A threat of future harm, not yet realized, is not actionable. The court stated:

In medical malpractice cases, the plaintiff has the burden of proving (1) the proper standard of care against which the physician’s conduct is to be measured, (2) the unskilled or negligent failure to comply with that standard, and (3) the resulting injury proximately caused by the lack of skill or care . . . According to allegations in the record, plaintiffs were damaged as to the loss of x-rays significantly prejudiced plaintiffs’ ability to prove their medical malpractice case at trial. However, the pleadings do not allege how the loss or destruction of the x-rays caused the plaintiffs to be unable to prove each element of their cause of action, resulting in actual damages. Rather, the pleadings simply contain vague allegations that the missing x-rays caused plaintiffs to be unable to establish a deviation from the standard of care and thus they were forced to non-suit the claim. Missing is the nexus between the x-rays and plaintiffs’ ability to prove the underlying suit for medical malpractice as required when pleading damages in a spoliation of evidence claim under Boyd . . . .

Jackson, 689 N.E.2d at 216.

(Continued on next page)
Spoliation of Evidence (Continued)

Based on the foregoing, the appellate court affirmed the trial court’s finding that the plaintiffs failed to state a cause of action for negligent spoliation of evidence.

In Shimanovsky v. General Motors Corp., 181 Ill. 2d 112, 692 N.E.2d 286 (1998), the Illinois Supreme Court ruled that the plaintiff’s destructive testing of an allegedly defective power steering component prior to the commencement of the lawsuit warranted the imposition of a discovery sanction, but dismissal of the lawsuit was an unreasonable sanction.

The court agreed with the appellate court that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence. This duty is based on the court’s concern that, were it unable to sanction a party for the pre-suit destruction of evidence, the potential litigant could circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint. Shimanovsky, 692 N.E.2d at 290.

Having determined that the trial court had the authority to impose a sanction on the plaintiffs for the destructive testing of evidence, the Supreme Court next addressed whether dismissal was the appropriate sanction. The court ruled that an order of dismissal with prejudice or a sanction which results in a default judgment is a drastic sanction to be invoked only in those cases where the party’s actions show a deliberate, contumacious, or unwarranted disregard of the court’s authority. Being such a drastic sanction, dismissal should only be employed as a last resort after all of the court’s other enforcement powers have failed to advance the litigation. Id. at 291.

The court addressed the various factors that a trial court is to use when determining what sanction, if any, is to apply. These factors include:

(1) The surprise to the adverse parties;

(2) The prejudicial effect of the proffered testimony or evidence;

(3) The nature of the testimony or evidence;

(4) The diligence of the adverse party in seeking discovery;

(5) The timeliness of the adverse party’s objection to the testimonial evidence; and

(6) The good faith of the party offering the testimony or evidence.

Applying these factors, the Supreme Court found that the majority of the factors weighed in favor of the plaintiffs. Therefore, a dismissal of the plaintiffs’ products liability action was an unreasonable discovery sanction for the plaintiffs’ destructive testing of the automobile’s allegedly defective power steering components. Id.

Of particular importance to the court was the fact that the plaintiffs did not destroy or dispose of the entire allegedly defective product. All the components of the power steering mechanism and the remainder of the automobile were still available for the defendant’s investigation. Although certain additional tests of the power-steering mechanism, which the defendant claimed were impossible to perform following the spoliation of the power-steering mechanism, may have provided the defendant with further evidence to support its defense, the power-steering components still existed in such a condition that the defendant’s experts were able to form their opinions that the mechanism contained no defect.

The court also determined that the defendant’s claims of prejudice were weakened by its lack of diligence in seeking production of the product at issue. Id. at 293.

According to the court, a party is not automatically entitled to a specific sanction just because evidence is destroyed or altered. Rather, a court must consider the unique factual situation that each case presents and then apply the appropriate criteria to those facts to determine what particular sanction, if any, should be imposed.

The court further held that dismissing the plaintiff’s cause of action solely because evidence was altered, without any regard to the unique factual situation or the relevant factors that should be considered in determining an appropriate sanction, serves only to punish the party and does nothing to further the objects of discovery. Hence, a careful analysis of the actions of the party that destroyed the evidence, as well as the effect of the lack of that evidence on the opposing party, must be made prior to fashioning a sanction.

In Cammon v. West Suburban Hospital and Medical Center, 301 Ill. App. 3d 939, 704 N.E.2d 731 (1st Dist. 1998), the appellate court held, for the first time, that spoliation of evidence claims are subject to the five-year statute of limitations found in 735 ILCS 5/13-205.

In Kelly v. Sears Roebuck and Co., 308 Ill. App. 3d 633, 720 N.E.2d 683 (1st Dist. 1999), the plaintiff filed a four-count complaint seeking to recover damages based on Sears’ sale of used batteries as new. In counts I and II of his complaint, the plaintiff alleged that Sears violated the Illinois Consumer Fraud and Deceptive Business Practices Act, and committed common law fraudulent concealment, by selling batteries to customers as if they were new without disclosing its practice of intermingling new and used batteries. In counts III and IV of his complaint, the plaintiff sought damages for intentional and negligent spoliation of evidence.
The plaintiff argued that, if purchasers of the batteries were required to prove that the batteries they bought were indeed used, Sears should be liable for failing to preserve the evidence identifying which of the batteries it sold were new and which were used. The Circuit Court of Cook County dismissed the plaintiff’s claims with prejudice and an appeal followed.

On appeal, the First District Appellate Court, in addressing the spoliation issue, reiterated that, in order to prevail in a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim on Sears’ part. Plaintiff has also failed to demonstrate that he had a reasonable probability of prevailing in the underlying suit but for defendant’s failure to warn him of the destruction of the potential evidence. Indeed, the exhibits attached to plaintiff’s complaint demonstrated that the great majority of batteries sold by Sears were new. Therefore, had Sears retained receipts indicating whether the batteries purchased by plaintiff were new, it is much more probable than not that those receipts would show that the batteries were new when purchased.

Kelly, 720 N.E.2d at 694-695.

In Stinnes Corp. v. Kerr-McGee Coal Corp., 309 Ill. App. 3d 707, 722 N.E.2d 1167 (5th Dist. 1999), a man trip manufacturer claimed the employer of two coal miners was guilty of negligent spoliation of evidence for failing to preserve the component parts of a man trip after it overturned and injured the miners. The plaintiff essentially alleged that as a result of the defendant’s failure to use due care in preserving the parts of the man trip at issue, it was unable to establish which component parts of the axle failed, whether such parts were replacement parts, or whether Kerr-McGee had inadequately maintained the vehicle and its parts.

The plaintiff asserted that but for the loss of the evidence, it had a reasonable probability of succeeding in its defense of the personal injury suits brought by the injured miners. Moreover, the plaintiff suffered money damages because it was forced to settle the personal injury suits brought by the miners since it was unable to refute, with a reasonable probability of success, the miner’s claims.

The plaintiff also claimed that the defendant had a policy of tagging and preserving parts of its machinery that were involved in accidents resulting in injuries to its workers, the defendant did so in this case, and at the time it undertook to preserve relevant parts of the man trip at issue it knew or reasonably should have known that those parts were material to a potential action for product liability.

The plaintiff further alleged that, despite segregating the parts and knowing such parts were evidence in a potential future lawsuit, the defendant failed to preserve the evidence in that it disposed of the parts prior to the miners filing their lawsuits.

Based on these allegations, the appellate court held that the plaintiff adequately stated the elements of a cause of action for negligent spoliation of evidence, including properly alleging a duty on the part of the employer to preserve the destroyed evidence. The court, echoing Shimanovsky, stated that “a

(Continued on next page)
Spoliation of Evidence (Continued)

potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence. This duty is based on the court’s concern that, were it unable to sanction a party for the pre-suit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability by simply destroying the proof prior to the filing of a complaint.” Stinnes, 722 N.E.2d at 1173.

The Stinnes court also held that the Mormon Doctrine does not trump a spoliation claim, the employer’s settlement with the miners did not preclude the spoliation claim, and the Federal Mine Safety and Health Act did not preempt the plaintiff’s spoliation action.

In Natale v. Gottlieb Memorial Hospital, 314 Ill. App. 3d 885, 733 N.E.2d 380 (1st Dist. 2000), the plaintiff filed a medical malpractice action against his surgeon and Gottlieb Memorial Hospital, seeking damages for emotional distress he allegedly suffered after being invaded by a non-sterile, contaminated endoscope. The plaintiff also filed a count alleging spoliation of evidence since the endoscope that was used during his procedure was discarded.

The court entered summary judgment in favor of the defendants on the plaintiff’s emotional distress claim since the plaintiff was never told by anyone that the endoscope used during his procedure carried any infectious organism, the plaintiff had no evidence that he was actually exposed to HIV, hepatitis, or any other infectious disease, and all the tests that were performed on the plaintiff for any communicable diseases were negative. Since the plaintiff had no evidence of actual exposure, the court entered summary judgment in favor of the defendants.

Once summary judgment was entered on the emotional distress claim, the trial court dismissed the plaintiff’s spoliation of evidence claim. An appeal then followed.

On appeal, the court affirmed the entry of summary judgment in favor of the defendants on the plaintiff’s emotional distress claim noting that with no evidence of actual exposure, summary judgment was properly granted.

The appellate court further held that the entry of judgment in favor of the defendants on the plaintiff’s fear of illness claim precluded the plaintiff’s negligent spoliation of evidence claim. The appellate court could not prove that he suffered compensable damages as a result of the negligence in the underlying tort, the plaintiff was unable to prevail on his spoliation of evidence count. Natale, 733 N.E.2d at 385.

In Cosgrove v. Commonwealth Edison Co., 315 Ill. App. 3d 651, 734 N.E.2d 155 (2nd Dist. 2000), a plaintiff who was injured in a fire that occurred when a downed electric power line ignited gas leaking from an underground pipeline sued the gas and electric companies. The trial court granted summary judgment to the utility companies on the plaintiff’s negligence, res ipsa loquitur, and spoliation of evidence claims.

On appeal, the appellate court reinstated the plaintiff’s res ipsa loquitur claim against the gas company and, as a result, the court held that the plaintiff’s negligent spoliation of evidence claim had become moot. According to the court:

... with a valid res ipsa loquitur claim in place, the burden is on [the gas utility company] NiGas to dem-

“In its third-party complaint, the defendant alleged that the owner of the truck was in possession of the wheel assembly and that he knew or should have known that the wheel assembly was material to a potential civil action arising from the incident.”

Cosgrove, 734 N.E.2d at 161.

In Fremont Casualty Insurance Co. v. Ace-Chicago Great Dane Corp., 317 Ill. App. 3d 67, 739 N.E.2d 85 (1st Dist. 2000), the appellate court was asked to decide for the first time whether a spoliation of evidence claim is a claim for “bodily injury” for insurance coverage purposes. The appellate court answered in the negative. It held that a spoliation of evidence claim was not a claim for “bodily injury” within the scope of an employer’s liability policy and, therefore, the insurer had
no duty to defend or indemnify against the spoliation claim.

The case of Jones v. O’Brien Tire & Battery Service Center, Inc., 322 Ill. App. 3d 418, 752 N.E.2d 8 (5th Dist. 2001), revolved around a spoliation of evidence claim that arose after a truck rear wheel assembly was discarded.

The defendant, O’Brien Tire & Battery Service Center, filed a third-party action against the owner of the truck and his insurance company for spoliation of evidence. In its third-party complaint, the defendant alleged that the owner of the truck was in possession of the wheel assembly and that he knew or should have known that the wheel assembly was material to a potential civil action arising from the incident.

In response, the truck owner argued that there is no duty to preserve evidence where there is no “special relationship” between the plaintiff and the defendant and, furthermore, there is no duty to preserve evidence where there is no pending litigation between the parties or any order of protection in place with respect to the evidence at issue.

The appellate court rejected both of the owner’s arguments, specifically finding that, “a plaintiff in a negligence case based upon spoliation of evidence need only allege that a reasonable person in the defendant’s position should have foreseen that the evidence in question was material to a potential civil action. There is no requirement that the plaintiff allege the existence of any “special relationship” which would give rise to that knowledge.” Jones, 725 N.E.2d at 12.

In rejecting the argument that there is no duty to preserve evidence where there is no litigation pending between the parties or any order of protection in place with respect to the evidence at issue, the court stated that, “to hold that a duty to preserve evidence does not arise until an action was filed would encourage the destruction of evidence.” Id. at 13.

In Thornton v. Shah, 333 Ill. App. 3d 1011, 777 N.E.2d 396 (1st Dist. 2002), the appellate court was asked to decide whether parents who brought an action against their physician and HMO after their child died in utero had alleged sufficient facts to state a claim for negligent spoliation of evidence.

The plaintiffs alleged that they, and members of the HMO, had several after-hours conversations with the defendant. The plaintiffs further alleged that their HMO had a duty to retain all records related to the mother’s medical care, including all records of telephone conversations between the plaintiffs and the after-hours HMO nurse, the nurse and the defendant, and the plaintiff and the defendant, particularly in view of the severe and emergency nature of the mother’s medical condition prior to the baby’s birth.

Furthermore, the plaintiffs alleged that their HMO negligently or willfully lost or destroyed records of telephone conversations from several days prior to the birth of their child. The plaintiffs pled that as a direct and proximate result of their HMO’s loss or destruction of the records of telephone calls, which were a part of the plaintiff’s medical records, that plaintiffs were missing key evidence relevant to proving a case of medical negligence against the defendant doctor and the plaintiffs’ HMO, thereby sustaining injury.

The appellate court held that, although the plaintiffs’ complaint properly pled a duty and a breach of that duty, the complaint did not contain sufficient allegations regarding the element of causation. According to the court, the paragraph of the plaintiffs’ complaint dealing with causation in regard to the spoliation of evidence claim:

... does not assert specific facts explaining how the missing telephone records caused the plaintiffs to be unable to prove an underlying lawsuit. Accordingly, the circuit court’s dismissal of Count VI [the spoliation count] under Section 2-615 was appropriate because plaintiffs’ complaint fails to allege facts sufficient to state a cause of action for negligent spoliation.

Thornton, 777 N.E.2d at 404-405.

In Schusse v. Pace Suburban Bus, 334 Ill. App. 3d 960, 779 N.E.2d 259 (1st Dist. 2002), the appellate court held that an employer’s spoliation of evidence concerning an employee’s products liability claim did not arise out of or in the course of the employee’s employment and, as a result, was not compensable under the workers’ compensation statute. Thus, the employee’s action against the employer for spoliation of evidence was not precluded by the exclusivity provision of the Illinois Workers’ Compensation Statute.

The Schusse court also reiterated that the limitations period for the commencement of a negligence action for spoliation of evidence is the five-year limitation period set forth in 735 ILCS 5/13-205.

The case of Bagnola v. SmithKline Beecham Clinical Laboratories, 333 Ill. App. 3d 711, 776 N.E.2d 730 (1st Dist. 2002), involved the destruction of laboratory specimens. The plaintiff, James Bagnola, was ordered by the Chicago Police Department to submit to random drug testing. The plaintiff submitted two urine specimens, which were sent to SmithKline Beecham Clinical Laboratories (“SBCL”) for testing. Both specimens tested positive for cocaine. The Superintendent of the Chicago Police Department brought charges against the plaintiff seeking to discharge him from his position as a Chicago police officer for knowingly possessing and using cocaine.

(Continued on next page)
Spoliation of Evidence (Continued)

Almost two years after the department began proceedings to discharge the plaintiff from his position as a police officer, the plaintiff requested the production of both bottles of his urine. SBCL notified the plaintiff that both urine specimens had been destroyed. Destruction of the urine specimens was contrary to the terms of the contract between SBCL and the City of Chicago, which required SBCL to keep all positive specimens for at least three years.

During the course of his administrative hearing, the plaintiff filed a lengthy motion seeking to dismiss the charges against him. In that motion, the plaintiff alleged that the City and/or SBCL willfully and intentionally destroyed his urine specimens and, as a result, he was prevented from having those specimens independently tested by another laboratory. The plaintiff argued that his inability to have the specimens independently tested destroyed his ability to successfully defend himself in the administrative hearing.

At the conclusion of the hearing, the review board found the plaintiff guilty of the charges related to the positive drug tests and ordered him discharged from his job. The board also found that SBCL “inadvertently” destroyed the urine samples and that this inadvertent destruction of the urine samples did not warrant dismissal of the charges against the plaintiff.

Prior to his dismissal from the police force, the plaintiff filed a civil action for spoliation of evidence against the City and SBCL. The trial court granted summary judgment in favor of the defendants in the plaintiff’s action based on the doctrines of res judicata and collateral estoppel.

On appeal, the appellate court held that, since the plaintiff raised his claims of spoliation of evidence in his administrative hearing, those claims were barred from being litigated in the plaintiff’s civil action under the doctrines of res judicata and collateral estoppel. In Veazey v. LaSalle Telecommunications, Inc., 334 Ill. App. 3d 926, 779 N.E.2d 364 (1st Dist. 2002), the plaintiff, Darryl Veazey, was employed by LaSalle from 1989 until October 25, 1996. In September of 1996, the plaintiff’s immediate supervisor, Ralph Newcomb, received a threatening message on his voicemail. Several individuals for whom the message was played believed that the voice on the message was that of the plaintiff.

On October 22, 1996, the plaintiff was summoned to LaSalle’s regional office and questioned regarding the threatening messages by Mike Mason and Jack Burke. The plaintiff denied leaving any threatening messages on Newcomb’s voicemail but was, nevertheless, ordered to read a transcript of the threatening message so that a recording of his voice could be made for comparison purposes. The plaintiff refused and was suspended from his job without pay.

The plaintiff next met with Mason and Burke on October 25, 1996, and was again ordered to provide a recording of his voice reading a transcript of the threatening message. When the plaintiff refused, his employment with LaSalle was terminated.

The plaintiff filed a three-count complaint against LaSalle. Count I alleged that the plaintiff was fired in retaliation for invoking his rights against self-incrimination as protected by the Illinois and United States Constitutions. Count II alleged a claim for civil conspiracy charging that Mason and Burke conspired to terminate the plaintiff because he was black and because he refused to leave incriminating voicemail messages.

Count III purported to set forth a claim for negligent spoliation of evidence, alleging that LaSalle had lost, misplaced, or destroyed certain evidentiary materials, including the plaintiff’s personnel file and microcassette recordings of the threatening voicemail messages left on Newcomb’s voicemail, making it “more difficult for him [the plaintiff] to succeed in his litigation to recover the damages to which he is entitled.” Veazey, 779 N.E.2d at 367.

The trial court entered an order dismissing the plaintiff’s complaint in its entirety, with prejudice, and the plaintiff appealed. In affirming the dismissal of the plaintiff’s complaint, the appellate court stated the following in regard to the plaintiff’s spoliation of evidence claim:

In order to satisfy the causation element of an action for negligent spoliation of evidence, a plaintiff must allege “specific facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit.” Boyd, 166 Ill. 2d at 196, 209 Ill. Dec. 727, 652 N.E.2d 267.

* * *

In count III of his complaint, the plaintiff incorporated all of the allegations contained in counts I and II, his retaliatory discharge and conspiracy claims, respectively. He asserts that LaSalle’s loss or destruction of certain evidence “will make it more difficult for him to succeed in his litigation.” However, the plaintiff fails to identify any alleged causes of action he has or might have had against LaSalle other than those alleged in counts I and II of his complaint. Having found, for reasons other than the absence of evidence, that the plaintiff could not prevail on a claim of retaliatory discharge or civil conspiracy, we conclude that he has not met his burden to plead facts which satisfy the causation element of
an action for negligent spoliation of evidence. As a consequence, we also affirm the trial court's dismissal of count III of the plaintiff's complaint.

“*The plaintiff denied leaving any threatening messages on Newcomb's voicemail but was, nevertheless, ordered to read a transcript of the threatening message so that a recording of his voice could be made for comparison purposes.*”

*Veazey*, 779 N.E.2d at 371-72.

In *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788, 788 N.E.2d 1 (1st Dist. 2003), the plaintiff filed a products liability action against Ford Motor Company (“Ford”) for injuries sustained when the airbag in his car failed to deploy during a traffic accident. After the accident, the City of Chicago towed the plaintiff’s vehicle to the auto pound and notified the plaintiff that he had 15 days to either retrieve his vehicle or request a hearing; otherwise, the vehicle would be destroyed.

One day prior to the expiration of the 15-day period, the plaintiff arranged to have the vehicle photographed at the pound in anticipation of filing a lawsuit, but never responded to the City’s notice. Instead, the plaintiff wrote a letter to Ford, warning the company to take immediate action by contacting the pound to arrange for preservation of the auto. Ford claimed that it never received such a letter. The car was subsequently destroyed.

Upon learning that the vehicle was destroyed, Ford filed a motion to bar evidence of the automobile’s alleged defect and moved for summary judgment. Both motions were granted and the plaintiff filed an appeal claiming that he took no affirmative action to destroy the vehicle and even photographed the car before it was destroyed.

In affirming the trial court’s rulings, the appellate court held that, even though the plaintiff did not have actual custody of the evidence, he did have control of the automobile since it was “in the hands of a bailee subject to instruction from the bailor.” *Kambylis*, 788 N.E.2d at 6.

According to the court, the lack of a court order to preserve evidence does not give a plaintiff the right to stand idly by while evidence crucial to the resolution of a case is destroyed. This is particularly true in cases where plaintiff knows where the evidence is and has the authority to prevent its destruction, especially when destruction of the evidence prohibits effective defense against the plaintiff’s claims. The court stated, “[w]e find no case law . . . which would excuse passive spoliation, *i.e.*, spoliation through inaction.” *Id.* at 7.

The appellate court affirmed the trial court’s order barring the plaintiff from introducing photographs of the condition of the vehicle and the plaintiff’s expert’s report as a sanction for allowing the vehicle to be destroyed. Also, the court affirmed the entry of summary judgment in favor of the defendant because, after the plaintiff was barred from introducing photographs and his expert’s report, there was no evidence left to support the plaintiff’s claim of an alleged defect.

In *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 793 N.E.2d 962 (2nd Dist. 2003), the plaintiff filed a wrongful death, product liability, negligence, and survival action in connection with the death of his father, Daniel Andersen, who was killed in a work-related accident. The plaintiff’s complaint alleged that Daniel was killed on February 14, 2000, when a hydraulic hose in the hoist mechanism of the truck he was operating for BFI Waste Systems of North America (“BFI”) ruptured causing the mechanism to fail and the load to lower onto him. Mack Trucks, Inc. manufactured the truck involved and Galbreath, Inc. manufactured the hoist mechanism at issue.

Galbreath filed a third-party complaint against BFI that alleged that the Waukegan police, OSHA and an engineering consulting firm had each investigated the accident that killed Daniel Andersen. Three days after the accident, BFI’s Waukegan District Manager wrote to Galbreath informing it of the fatality and requesting that a service representative inspect the equipment. The letter also informed Galbreath that BFI intended to place the equipment back in service on March 1, 2000.

On February 21, 2000, Galbreath’s engineering manager made a “brief visual inspection” of the equipment at BFI’s Waukegan facility. Sometime shortly after the inspection, Galbreath sent the Waukegan District Manager a letter requesting that he turn over evidence relating to Daniel Andersen’s death, including the ruptured hose. Galbreath asked that the hose be preserved if it could not be turned over.

(Continued on next page)
Spoliation of Evidence (Continued)

On April 1, 2000, BFI sold the equipment in question to Onyx Waste Services, Inc. BFI did not inform Galbreath of the sale of the equipment at the time the third-party complaint was filed and did not comply with discovery demands for the production of the equipment. Galbreath ultimately succeeded in locating the truck at the Onyx facilities, but the hoist and the hose at issue were never recovered.

As part of its third-party complaint for spoliation of evidence, Galbreath alleged that had the equipment at issue been preserved, it would have established the lack of defect attributable to Galbreath and/or the merit of one or more affirmative defenses based upon third-party modification or other intervening causes. Galbreath also alleged that absent that evidence, it may not be able to prove its affirmative defenses and its ability to defend itself in the underlying litigation had been impaired.

BFI moved to dismiss the third-party complaint alleging spoliation of evidence. That motion was granted, with prejudice. An appeal followed.

On appeal, the appellate court noted that Boyd articulates a two-prong test for the existence of a duty to preserve evidence: (1) an agreement, contract, statutory requirement, or other special circumstance such as the assumption of the duty by affirmative conduct (the relationship prong), and (2) that a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action (the foreseeability prong). According to the court, unless both prongs are satisfied, there is no duty to preserve evidence. Andersen, 793 N.E.2d at 967.

In holding that the third-party plaintiff had not stated a cause of action for spoliation of evidence, the Andersen court stated as follows:

In this case, Galbreath does not allege any contract or agreement between BFI and itself, nor does it allege that BFI had any statutory or regulatory duty to preserve the evidence . . . Galbreath suggests that its undated letter sent “shortly after” its inspection of the truck, requesting that BFI turn over or preserve the hose and related evidence, constitutes a special circumstance imposing a duty to preserve evidence. We decline to hold that a mere request that a party preserve evidence is sufficient to impose a duty absent some further special relationship . . . .

The plaintiff in a spoliation of evidence case must also plead breach of the duty to preserve evidence. In the usual case, where the plaintiff has had no opportunity to inspect the evidence in contemplation of litigation, establishing the inadequate protection of the evidence would be sufficient to plead the breach of the duty . . . . Here, Galbreath had the opportunity to, and did in fact, inspect the equipment before it was lost. Arguably, the duty could have terminated with the inspection. The scope of the duty to preserve evidence has not been at

“Sometime shortly after the inspection, Galbreath sent the Waukegan District Manager a letter requesting that he turn over evidence relating to Daniel Andersen’s death, including the ruptured hose. Galbreath asked that the hose be preserved if it could not be turned over.”

issue in other Illinois spoliation cases, but, by natural extension of the reasoning in Boyd, we conclude that the duty remains as long as the defendant should reasonably foresee that further evidence material to a potential civil action could be derived from the physical evidence in the defendant’s possession, e.g., testing, microscopic examination, chemical analysis, etc.

* * *

Further, Galbreath’s complaint does not sufficiently allege an injury proximately caused by the alleged breach of duty . . . . Galbreath here alleges that the loss of the evidence caused it to be unable to prove an affirmative defense based on third-party modification of the equipment or another intervening cause.

BFI has argued that Galbreath has other defenses not dependent on the lost evidence . . . . To remain consistent with Boyd, clearly the plaintiff must allege that the destruction of evidence has caused the plaintiff to be unable to defend the underlying lawsuit. Thus, Galbreath must allege specific facts that if proven would show that, due to the loss of evidence, it will lose the
underlying case, and not that one specific defense will become unavailable to it.

* * *

... Galbreath fails to plead specifically what it could have done with the equipment that it cannot do now, or what it could have done in addition to its original inspection, and why this is critical to its defense. Further, Galbreath has not alleged facts that would show why it can reasonably rely only on the defense it alleges it has lost. (Emphasis added.)

Andersen, 793 N.E.2d at 968-970.

Although the court held that the plaintiff had not stated the requisite elements to proceed with a claim for spoliation of evidence, the court reversed the dismissal of the third-party complaint, insofar as it was dismissed with prejudice, and remanded the case to the trial court to allow Galbreath to re-pled a cause of action for spoliation of evidence. Id.

The latest Illinois case to discuss the issue of spoliation of evidence is Dardeen v. Kuehling, 344 Ill. App. 3d 832, 801 N.E.2d 960 (5th Dist. 2004). In Dardeen, the plaintiff, a newspaper carrier, was delivering newspapers with his daughter early in the morning on September 1, 1999, when he tripped over a hole on a brick sidewalk located on the property of the defendant, Alice Kuehling, and sustained injuries.

The plaintiff’s daughter called Kuehling later that day and notified her of the plaintiff’s accident. Moreover, in the evening on the day of the accident, the plaintiff, accompanied by his neighbor, returned to Kuehling’s property to inspect the hole and tell Kuehling about his accident. Kuehling’s daughter and son-in-law were present at the evening meeting and observed the condition of the area where the plaintiff fell.

The day of the accident, Kuehling reported the plaintiff’s fall to her State Farm insurance agent, Ronald Couch. Kuehling asked Couch whether she could remove the uneven bricks from the sidewalk to prevent anyone else from falling. Couch told her she could remove the bricks. Within one week of the accident, Kuehling removed between 25 and 50 bricks without first photographing or videotaping the sidewalk where the accident occurred.

On August 1, 2000, the plaintiff filed a complaint against Kuehling and the City of Mt. Carmel alleging failure to repair the hole in the sidewalk and/or failure to warn others that the hole existed. Subsequently, the plaintiff voluntarily dismissed the count against Mt. Carmel and filed an amended complaint adding counts against both Kuehling and State Farm for negligent spoliation of evidence.

The plaintiff alleged that State Farm had a duty to preserve the sidewalk when it became aware of the plaintiff’s claim via its agent, Ronald Couch, and breached its duty by authorizing Kuehling to remove the bricks without first photographing or videotaping the sidewalk. The plaintiff further alleged that by removing the bricks, Kuehling changed the appearance of the accident site and, as a result, destroyed material evidence the plaintiff needed to prove his personal injury case.

State Farm filed a motion for summary judgment on the negligent spoliation of evidence count of the plaintiff’s complaint. On April 30, 2002, the trial court granted State Farm’s motion and the plaintiff appealed.

On appeal, the appellate court reversed the trial court’s grant of summary judgment for State Farm. In support of its decision, the court relied upon the holdings of Boyd v. Travelers Insurance Co. (a duty to preserve evidence may arise through an agreement, a contract, or other special circumstances such as the assumption of a duty by affirmative conduct) and Shimanovsky v. General Motors Corp. (a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence).

The court emphasized that State Farm had a contractual relationship with Alice Kuehling, Kuehling notified State Farm’s agent, Ronald Couch, of the accident, and Kuehling relied on Couch’s advice before removing the bricks. As a State Farm agent, Couch was well aware that the sidewalk was material to any potential civil litigation. Nevertheless, Couch authorized the removal of the bricks without recommending that Kuehling photograph or videotape the site.

Furthermore, Couch could have sent an investigator to preserve the site prior to the removal of the bricks, but chose not to. As a result of State Farm’s actions, the ongoing cases of both the insured, Kuehling, and the plaintiff have been impaired since neither has photographic evidence showing the condition of the sidewalk at the time of the incident.

In its defense, State Farm argued that it had no duty to preserve evidence because it never possessed or retained control over the sidewalk nor prevented the plaintiff or anyone else from inspecting the sidewalk. Moreover, the plaintiff improperly attempted to broaden the scope of a spoliation of evidence claim by imposing liability on a party who never had possession or control over the evidence in question.

In support of its argument, State Farm cited the case of Jones v. O’Brien Tire & Battery Service Center, Inc., discussed supra, and noted that the court in Jones emphasized that possession of evidence was paramount in finding that a party has a duty to preserve evidence.

(Continued on next page)
Spoliation of Evidence *(Continued)*

While showing deference to the holding in *Jones*, the court stated that *Jones* does not absolutely require that a party “have possession of the evidence before a duty to preserve evidence is imposed.” *Dardeen*, 801 N.E.2d at 965.

Seemingly, the *Dardeen* court broadened the concept of “possession or control of evidence” in concluding that, “State Farm did not have possession of the sidewalk but, instead, exercised control or had the opportunity to exercise control. It was reasonably foreseeable that the condition of the sidewalk at the time of the accident was a crucial issue. Without a doubt, this evidence should have been preserved.” *Id.* (Emphasis added).

Additionally, State Farm asserted that, if it encouraged Kuehling to destroy the brick sidewalk, it was simply complying with Illinois public policy favoring improvements that enhance public safety. In response, the court noted that in *Boyd*, “the Illinois Supreme Court also declared that it is against public policy to destroy evidence. It is clear that both these policies could have been advanced had State Farm simply directed Kuehling to photograph or videotape the sidewalk prior to removing between 25 and 50 bricks.” *Id.* at 966.

Finally, in reversing the trial court’s grant of summary judgment in favor of State Farm, the appellate court took issue with the trial court’s finding that there was ample evidence on the condition of the sidewalk at the time of the incident given that at least eight people viewed the sidewalk prior to its destruction. The court stated, “[w]hat the trial court failed to consider, however, was that the key piece of evidence has been destroyed. Even though several witnesses may be able to testify about the condition of the sidewalk, their descriptions on the scene differ. A photograph or videotape of the condition of the sidewalk at the time of the accident would be conclusive.” *Id.*

In conclusion, these cases constitute the current state of judicial law in Illinois concerning the issue of spoliation of evidence. Given the frequency in which Illinois courts have grappled with this issue over the past 24 years, spoliation of evidence issues requiring judicial determination will likely continue to surface. As a result, the Illinois judiciary will be called upon to provide guidelines to litigants and attorneys alike as to the proper handling of evidence whether litigation is on the horizon or has already been initiated.
Product Liability

By: James W. Ozog*
Wiedner & McAuliffe, Ltd.
Chicago

Medical Devices


The First District Appellate Court recently reshaped Illinois product liability law as it relates to medical devices. The decision may have significance given America’s aging population and the corresponding increase in the demand for medical devices such as artificial joints.

The plaintiff, in Mele, underwent hip replacement surgery as a result of the severe arthritis. The plaintiff was fitted with a Dall-Miles trochanter cable grip system, which secured the two pieces of his femur that had been separated for surgery. The cable system caused the plaintiff extreme discomfort, and he was forced to undergo an additional surgery to have the cables removed. A hospital study released four years later disclosed that the cable grip system manufactured by the defendant caused problems in a significant number of cases. The plaintiff made a design defect claim against the manufacturers and was awarded $400,000 at trial. The plaintiff and the defendant both cross-appealed. The appellate court found the plaintiff had properly pled the elements of a design defect claim, but the trial court erred when it refused to hear evidence concerning the potential benefits of the defendant’s product.

The defendant challenged the trial court’s decision on three fronts. First, the defendant argued that the evidence presented by the plaintiff was not sufficient to meet the unreasonable danger test derived from Comment i of Section 402(A) of the Restatement (Second) of Torts and refined by the Illinois Supreme Court in Lamkin v. Towner, 138 Ill. 2d 510, 563 N.E.2d 449 (1990). Additionally, the defendant argued that Illinois should adopt Section 6(c) of the Restatement (Third) of Torts: Product Liability. Finally, the defendant argued the trial court should have applied an integrated view of the current unreasonable danger test, like the appellate court in the Third District did in Besse v. Deere & Co., 237 Ill. App. 3d 497, 504 N.E.2d 998 (1992), and erred when it did not accept evidence concerning the beneficial nature of the product it manufactured.

I. Unreasonable Danger Test

Generally to succeed in a design defect products liability case a plaintiff must prove that the design of the product includes a defect that presents an unreasonable danger to the consumer. In Lamkin, the Illinois Supreme Court held that a consumer can prove unreasonable danger by introducing evidence the product failed to perform as safely as an ordinary consumer would expect or by introducing evidence the product’s design caused his injury, which then shifts the burden to the defendant to show that the benefits of the product outweigh the risk inherent in its design.

In Mele, the medical device manufacturer argued the plaintiff had no expectations regarding the safety of the medical device and even if he did, it was the doctors who should be considered consumers in design defect cases where the product is a medical device. The appellate court disagreed. The court observed even if the plaintiff did not have any particular expectations about the safety of the product at hand, he may have had “relevant expectations about the safety of the artificial hip as a whole.” The court further stated the expectation test rarely requires a plaintiff to bring forth evidence of ordinary consumer expectations because it is up to the jury to determine what an ordinary consumer might expect from the product. The defendant’s argument that, for the purposes of a products liability suit, doctors are the ordinary consumers of medical devices failed to persuade the court. The appellate court concluded the jury should assess the dangers posed

(Continued on next page)

About the Author

James W. Ozog is a partner in the Chicago firm of Wiedner & McAuliffe, Ltd. He received his undergraduate degree from Northwestern University and law degree from Washington University in 1977. Mr. Ozog concentrates his practice in product liability defense matters and commercial litigation. In addition to his Illinois defense practice, he is National Trial Counsel for several product manufacturers. He has appeared as lead defense counsel in over twenty states and tried cases to verdict in seven states besides Illinois. He also represents clients on a regular basis in matters before the United States Consumer Products Safety Commission. He is a member of the American Bar Association, DRI, IDC and the Propane Gas Defense Association.

* We wish to thank Ben Riddle of Wiedner & McAuliffe, Ltd. for his assistance in preparing this article.
Product Liability ( Continued)
to a patient from the components of a medical device from
the standpoint of an ordinary implantee rather than from the
standpoint of an ordinary doctor to determine whether or not
those dangers should be expected.

II. The Restatement (Third) of Torts

The defendant device manufacturer next asked the court to
adopt Section 6(c) of the Restatement (Third) of Torts: Product
Liability. Section 6(c) specifically addresses “design defects”
in medical devices and provides:

A prescription drug or medical device is not reasonably
safe due to defective design if the foreseeable risks
of harm posed by the drug or medical device are suf-
ficiently great in relation to its foreseeable therapeutic
benefits that reasonable health-care providers, knowing
of such foreseeable risks and therapeutic benefits, would
not prescribe the drug or medical device for any class
of patients.

Thus according to the Restatement (Third) a medical
device is not defective in design unless the risks posed by
the use of that device outweigh its therapeutic benefits such
that a reasonable health care provider would not prescribe
the device for any class of patients. Section 6(c) eliminates
a consumer’s expectations of risk from a medical device in
a products liability action, and perhaps provides manufac-
turers of medical devices with more extensive protection
from liability. The court in Mele felt such a drastic change
in products liability law should not be made by the judiciary
but should come from the legislature. Mele, 2004 WL 503860
at 11.

III. An Integrated Test to Prove Defect

The court in Mele then revisited the consumer expectation
test set out in Lamkin, in response to the defendant’s appeal
of the trial court’s exclusion of evidence of the benefits of
the medical device at issue in this case. The trial court had
granted the plaintiff’s motion in limine to exclude evidence of
the benefits of the device, reasoning the design’s benefits
and risks were “irrelevant” regarding the ordinary consumer’s
expectations. Recall the court earlier recognized, per Lamkin,
a consumer can prove unreasonable danger by introducing
evidence that the product failed to perform as safely as an
ordinary consumer would expect or by introducing evidence
the product’s design caused his injury, which then shifts the
burden to the defendant to show the benefits of the product
outweigh the risk inherent in its design. The court acknowl-
edged that there are two separate tests. However, the Third
District of Illinois had held in Besse: “The two tests are not
mutually exclusive and should be applied together except
where the nature of the danger is particularly obvious and the
mechanism itself is particularly simple.”

The Mele court concluded this particular medical device
was not a simple device. Therefore, the tests from Comment
i should be synthesized to allow evidence of the product’s
risks and benefits to be admitted as well as evidence of what
a reasonable consumer should expect from the product.

“The Mele court opined that Illi-
ois courts should decide whether
or not to apply comment k to a
particular medical device on a
case-by-case basis in keeping with
precedent set in Illinois and other
jurisdictions.”

Furthermore, the appellate court held the trial court erred
when it did not consider whether or not to apply comment
k to Section 402A of the Restatement (Second) of Torts to
a medical device. Comment k provides that, if a product is
“unavoidably unsafe” and the benefit of that product justifies
its use, the manufacturer of that product should not be held
to a strict liability standard because of the unfortunate conse-
quences that may arise as a result of that product’s use. The
Mele court opined that Illinois courts should decide whether
or not to apply comment k to a particular medical device on
a case-by-case basis in keeping with precedent set in Illinois
and other jurisdictions. See, e.g., Glassman v. Wyeth Labo-
ratories, Inc., 238 Ill. App. 3d. 533, 539, 606 N.E.2d 338 (1st
Dist. 1992), appeal denied 148 Ill. 2d. 641; Castrignano v. E.R.
Squibb & Sons, Inc., 546 A.2d 775, 781 (R.I.1988); Patten v.

In this case the defendant presented evidence to show that
its product was an “unavoidably unsafe” product by definition
but the trial court did not make such a determination under
comment k. If the trial court had considered this issue and found the product was “unavoidably unsafe,” the trial court “should have permitted defendant to present evidence that the product design cannot be considered unreasonably dangerous because its benefits outweighed its risks.” *Mele* at 14.

IV. Conclusion

The significance of the court’s holding in *Mele* is twofold. First, it is apparent that a plaintiff with a potential products liability claim concerning a medical device will have little trouble stating a cause of action. The plaintiff only has to allege that he was injured by a medical device and provide opinion proof the design of the medical device was defective under the “expectation” test. The good news for the plaintiff ends there, however, as the holding of in *Mele* permits any defendant manufacturer of medical devices to admit evidence regarding the potential benefits of the product versus the risks. The practical result of the court’s holding curiously resembles the same legal effect as what would have happened if the court had adopted the Restatement (Third) of Torts, which the court verbally refused to adopt.

On balance, *Mele* appears to be a good result for the medical device manufacturers. Being able to defend a medical device on the basis risk/utility should permit a wide variety of evidence to be admissible during any trial. This will probably include FDA studies and pre-market approval reports and testing. Such evidence should be very persuasive to the average juror despite the plaintiff’s proof that any given medical device might be dangerous or have risks.

---

**Health Law**

By: Roger R. Clayton
Heyl, Royster, Voelker & Allen
Peoria

**What Every Litigator Needs to Know About Recent Changes in EMTALA**

**Introduction**

The Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd, was enacted in 1986 as part of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA) to prevent hospitals from engaging in practices known as “patient dumping.” The law was drafted following Congressional findings that some hospitals were refusing to treat patients who presented for treatment in the hospitals’ emergency departments. The refusal was based on a variety of factors, including the inability of the presenting patient to pay for treatment. EMTALA has been interpreted broadly by surveyors of the Centers for Medicare and Medicaid Services (CMS) and the HHS Office of Inspector General (OIG), but has been interpreted more narrowly by most courts. CMS and some courts have expanded the reach of EMTALA to inpatients, outpatient departments, and other areas on a hospital’s campus through a broad definition of the terminology “comes to the emergency department.” Recent changes in

(Continued on next page)

**About the Author**

Roger R. Clayton is a partner in the Peoria office of Heyl, Royster, Voelker and Allen where he chairs the firm’s healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of IDC, the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, a board member of the Illinois Association of Healthcare Attorneys, and the current president of the Illinois Society of Healthcare Risk Management.
Health Law (Continued)

the final rule issued by CMS have narrowed the emergency care responsibility of hospitals in some respects and have provided clarification of hospitals’ obligations. Those of us who regularly defend hospitals are regularly seeing alleged EMTALA violations included in traditional malpractice complaints. This article will serve as a brief introduction to EMTALA, discuss the recent changes in the regulations, and discuss current case law in which the courts have attempted to interpret this statute.

EMTALA requires that hospitals receiving federal Medicare funding and having emergency facilities must provide a medical screening examination within the capability of the hospital’s resources to any individual coming to the emergency department regardless of the patient’s diagnosis, financial status, race, color, national origin, or handicap if the patient requests such an examination or the request is made on the patient’s behalf. 42 U.S.C. § 1395dd(a) (2004). If the patient demonstrates an emergency medical condition, the hospital must provide treatment sufficient to stabilize the patient’s condition or make arrangements to transfer the patient to a facility capable of treating the patient’s condition. 42 U.S.C. § 1395dd(b)-(c) (2004). Although only those facilities receiving federal Medicare monies must comply with EMTALA’s requirements, the statute’s protections extend to all patients, not just those insured by federal health care programs.

Violations of the statute can be costly. The statute is enforced by civil fines and possible exclusion from participation in the Medicare program. Both hospitals and physicians can be liable for violations of the act. 42 U.S.C. § 1395dd(d) (2004). In addition to financial enforcement, hospitals and physicians found liable for EMTALA violations often find themselves dealing with a public relations nightmare. Hospitals can be fined from $25,000 to $50,000 for each violation. 42 U.S.C. § 1395dd(d)(1)(A) (2004). Physicians participating in the wrongful transfer of a patient may be liable for a maximum fine of $50,000. 42 U.S.C. § 1395dd(d)(1)(B) (2004). Further, patients harmed by violations of the statute and any hospital which may have suffered a financial loss due to another hospital’s violation of the statute possess a private right of action. 42 U.S.C. § 1395dd(d)(2)(A)-(B) (2004).

Changes in the EMTALA Regulations

Within the last several months, CMS made several changes to the EMTALA regulations. These changes were primarily for the purpose of clarifying existing regulations.

Prior Authorization

The first change that CMS discussed in its commentary to the final rule was the issue of prior authorization for medical services. The agency addressed the tension that exists between this requirement of insurance companies and the appropriateness of asking emergency patients for insurance information. The main concern is that the authorization process results in a delay in providing screening or stabilization services. The prior EMTALA regulations strictly prohibited a participating hospital from seeking such authorization prior to providing screening or stabilizing treatment. The final rule states that the hospital may not delay appropriate medical screening or stabilization by seeking insurance information from the patient. Similarly, the hospital may not delay treatment by directing the patient to seek authorization for treatment. 42 C.F.R. 489.24(d)(4)(i)-(ii) (2004).

However, the final rule states that an emergency physician or nonphysician practitioner may contact the patient’s physician at any time for advice regarding the patient’s condition or treatment. 42 C.F.R. 489.24(d)(4)(iii) (2004). In addition, a hospital may follow reasonable registration procedures with an individual covered by EMTALA, which may even include asking whether an individual is insured, and if so what the insurance is. Neither contact with the patient’s physician nor hospital registration procedures may cause unreasonable delay in the patient’s treatment. Further, registration processes may not act to discourage a patient’s desire to remain in the hospital for further evaluation. 42 C.F.R. 489.24(d)(4)(iv) (2004).

“Comes to the Emergency Department”

Perhaps the portion of EMTALA that caused the most concern for hospitals was the broad interpretation of the term “emergency department” and the phrase “comes to the emergency department.” The final rule defines emergency department to mean:

Any department or facility of the hospital, regardless of whether it is located on or off the main hospital campus, that (1) is licensed by the state or which is located under applicable state law as an emergency room or emergency department; (2) is held out to the public (by name, posted signs, advertising or other means) as a place that provides care for emergency medical conditions on an urgent basis, without requiring a previously scheduled appointment, or (3) . . . provides at least one-third of all of its out-patient visits for the examination or treatment of emergency medical conditions. 42 C.F.R. 489.24(b) (2004).

EMTALA does not apply to departments or offices located outside the hospital’s main campus such as physician of-
offices, rural health centers, skilled nursing facilities, or other entities that participate separately under Medicare. 42 C.F.R. 489.24(b) (2004). EMTALA does apply to urgent care centers operated by a hospital outside its main campus. In the commentary to the final rule, CMS was asked to except urgent care centers from the definition of “dedicated emergency department.” The agency declined the request, reasoning that a patient in need would not likely be able to distinguish between an “emergency” room and an “urgent” care facility. Therefore, CMS stated simply, “if the department or facility is held out to the public as a place that provides care for emergency medical conditions, it would meet the definition of a dedicated emergency department.” 68 F.R. 53222, 53231 (Sept. 9, 2003).

“Comes to the emergency department” is drafted broadly to include not just the hospital’s physical emergency room or dedicated emergency department, but also hospital property within the main hospital campus other than the dedicated emergency department and ground or air ambulances owned and operated by the hospital for the purpose of examination and treatment for a medical condition at a hospital’s dedicated emergency department, or non-owned air or ground ambulances on hospital property. Id. Careful reading of this definition, however, demonstrates that a patient may “come to the emergency department” through the dedicated emergency department and request that he or she be treated for a medical condition, or present on hospital property, requesting treatment for an emergency medical condition. Id.

**Clarification of Hospital-owned Ambulances as “Coming to the Emergency Department”**

As to hospital-owned ambulances, the final rule clarified the responsibility of hospitals under EMTALA. The rule states that where a patient is in a ground or air ambulance owned and operated by the hospital, the patient is not deemed to have “come to the emergency department” of the owning hospital if the ambulance is directed under communitywide emergency medical service protocols to transport the individual to a hospital other than the hospital that owns the ambulance. In such an instance, the patient is deemed to have come to the emergency department of the hospital to which the ambulance was directed at the time the ambulance enters the hospital’s property. The patient is also not deemed to have come to a hospital’s emergency department if the ambulance is owned by the hospital but directed by a physician who is not employed or otherwise affiliated with the hospital. 42 C.F.R. § 489.24(b) (2004)

**EMTALA Responsibilities Do Not Extend to Inpatients**

CMS further clarified the regulations by stating that when a hospital admits the individual patient as an inpatient for further treatment after screening, the hospital’s obligations under EMTALA end. 42 C.F.R. § 489.24(a)(ii) (2004). CMS stated that “this clarification will allow hospitals to find an end point to their EMTALA obligations, specifically when the patient’s emergency medical condition has stabilized.” This proposed change was met with a great deal of concern that the responsibilities related to patient stabilization and transfer should extend to admitted patients. CMS rejected this approach, however, citing case law which interpreted the statute to end a hospital’s EMTALA obligations upon admission. 68 F.R. 53222, 53244 (Sept. 9, 2003).

**On-Call Requirements**

The change that has arguably affected health care facilities the most is the portion which was added to the regulations which applies to on-call coverage. The final rule requires hospitals to keep a list of physicians who are on-call to stabilize patients in the emergency department. 42 C.F.R. § 489.24(j)(1) (2004), available at 68 F.R. 53222, 53262 (Sept. 9, 2003). The rule further requires that the hospital have written policies and procedures in place:

(i) To respond to situations in which a particular specialty is not available or the on-call physician cannot respond because of circumstances beyond the phy-

(Continued on next page)
Health Law (Continued)

sician’s control; and (ii) To provide that emergency services are available to meet the needs of patients with emergency medical conditions if it elects to permit on-call physicians to schedule elective surgery during the time that they are on call or to permit on-call physicians to have simultaneous on-call duties. 42 C.F.R. § 489.24(j)(2) (2004).

In a program memorandum issued by CMS after the above provisions were proposed, the agency referred to its State Operations Manual in clarifying the hospital’s responsibility for on-call physicians, stating:

Each hospital has the discretion to maintain the on-call list in a manner that best meets the needs of its patients. Physicians, including specialists and subspecialists, are not required to be on-call at all times. A hospital must have policies and procedures to be followed when a particular specialty is not available or the on-call physician cannot respond because of situations beyond his or her control.


The memorandum went on to state that there is no specific ratio required by CMS identifying how many days a hospital must provide on-call physicians based upon the number of physicians on staff for that particular specialty, such as the previous understanding that at least 3 physicians in a specialty required on-call coverage 24 hours per day, seven days per week. Id., see also 68 F.R. 53222, 53250 (Sept. 9, 2003).

CMS allows hospitals flexibility in maintaining a level of on-call coverage within their capability and that all relevant facts and circumstances will be taken into account. Centers for Medicare and Medicaid Services program memorandum, Ref. S&C-02-34 (June 13, 2002) citing State Operations Manual (SOM) (Appendix V, page V-15, Tag A404), available at http://www.cms.hhs.gov/medicaid/survey-cert/letters.asp (last visited April 1, 2004). This flexibility is extended to allowing two hospitals located in the same geographic area to share on-call coverage so that together they are providing 100 percent call coverage for a particular specialty so long as all hospitals involved are aware of the on-call schedule and their independent obligations under EMTALA. Id.

The on-call schedule may not merely list a physician group as being on call. Id. Rather, individual physician names must be identified on the list. Id. Although hospitals are required to maintain the list of on-call physicians, the hospital, physician, or both may be responsible under the EMTALA statute to provide emergency care if the physician or the on-call list fails or refuses to appear within a reasonable period of time. 68 F.R. 53222, 53250 (Sept. 9, 2003).

Interpretive Caselaw

One of the areas in which the courts have been split is in the interpretation of EMTALA’s subsections. Subsection (a) relates to the medical screening requirement, while subsections (b) and (c) may be read together to require stabilization before an appropriate transfer. The confusion lies in the determination as to whether subsection (a) is read conjunctively or disjunctively with subsections (b) and (c). The conjunctive reading would interpret the statute as giving a patient a single cause of action for violations of all three requirements. The disjunctive reading would give the patient two separate rights of action under the medical screening requirement and the requirement to stabilize and implement an appropriate transfer.

This confusion is illustrated by a recent decision in the Tenth Circuit. In Dollard v. Allen a Wyoming District Court interpreted prior Tenth Circuit decisions as using the disjunctive approach. 260 F. Supp. 2d 1127 (D. Wyo. 2003). The plaintiff entered her local medical facility for pain management of a herniated disk. Bypassing the emergency department, she was directed to the medical/surgery unit and underwent surgery five days later. The surgery revealed that the plaintiff suffered from a rare neurological disorder which caused the compression of her sacral nerve root. The plaintiff sued the hospital under EMTALA, alleging that the hospital failed to stabilize her emergency medical condition. The hospital moved for summary judgment, arguing that because the plaintiff never presented in the emergency medical department for a screening examination, EMTALA was inapplicable. The district court agreed with the plaintiff, citing the Tenth’s Circuit’s disjunctive reading of the statute to hold that the plaintiff need not demonstrate a violation of the medical screening requirement in subsection (a) to maintain an action under subsections (b) and (c). Id at 1134.

The Dollard court acknowledged that the Eleventh, Fourth, Sixth, and Ninth Circuits appear to follow this approach to EMTALA. Id. at 1132. However, the First Circuit and three district courts have followed the disjunctive approach. Id. The Seventh Circuit has not reached this issue.

EMTALA was not intended to be utilized as a federal malpractice statute. However, EMTALA is often utilized in suits as an attempt to create a federal cause of action for negligence
or medical malpractice. This rule is illustrated by a 2001 case from the Northern District of Illinois. In McCullum v. Silver Cross Hosp., No. 99-C-4327, 2001 U.S. Dist. LEXIS 19477, 2001 WL 1516731 (N.D. Ill. Nov. 28, 2001), the plaintiff, a pregnant woman of African-American descent, arrived in the hospital’s emergency room and was found to be in moderate distress and not stabilized. She had been diagnosed the prior day as having a urinary tract infection. She prematurely delivered a baby that died. The plaintiff brought suit alleging multiple violations of federal law, including a civil rights claim under 42 U.S.C. § 1981 and an EMTALA claim. The basis for her suit was that the defendants had purposefully discriminated against her by requiring her to wait three hours for treatment while Caucasian and Hispanic pregnant patients were seen ahead of her. The Northern District of Illinois found that the plaintiff had been screened according to the hospital’s standards, the failure to stabilize her or to send her to obstetrics was not a violation of EMTALA, and the plaintiff’s ability or inability to pay was not a factor motivating the actions, as the nurse involved had followed the same procedures for all pregnant women. The court concluded by stating that this suit was truly a negligence suit disguised as an EMTALA claim, and instances of negligence were not actionable under EMTALA. McCullum, 2001 U.S. Dist. LEXIS 19477 at * 12-13, citing Marshall v. East Carroll Parish Hosp. Serv. Dist., 134 F.3d 319, 323 (5th Cir. 1998); and Summers v. Baptist Medical Ctr. Arkadelphia, 91 F.3d 1132 (8th Cir. 1996).

Conclusion

The Emergency Medical Treatment and Active Labor Act is a broadly-drafted statute that has left a great deal open to interpretation by CMS and the courts. For practitioners who are unfamiliar with it, this article has attempted to demonstrate just a glimpse of the many facets of this statute and its varied interpretations. Despite ongoing attempts by CMS to clarify the statute through new regulations, various program memoranda and advisory bulletins, a great deal is left unsettled and interpretation of EMTALA will continue to evolve.
Civil Rights Update

By: David A. Perkins
Heyl, Royster, Voelker & Allen
Peoria

The Difficulty in Demonstrating a Failure to Train Claim Under 42 U.S.C. Section 1983

Inadequate police training may serve as a basis for a civil rights claim under 42 U.S.C. § 1983. However, in order for liability to attach, the entity’s failure to properly train its officers must amount to a deliberate indifference, and the specific deficiency in the training program must be the proximate cause of the constitutional violation. A finding of deliberate indifference is derived from an entity’s failure to act in the face of actual or constructive notice that such a failure likely will result in a constitutional deprivation. 42 U.S.C. § 1983 imposes no constitutional duty to provide law enforcement officers with advanced or specialized training based on a general history of criminal activity in the community.

Demonstrating the difficulty in establishing failure-to-train liability, the Seventh Circuit has warned:

A particular officer’s unsatisfactory training cannot alone suffice to attach liability to the state. An officer’s faults . . . may result from factors other than the deficient training program. Nor can plaintiffs prevail merely by proving that an accident or injury could have been avoided had an officer received enhanced training forestalling the particular conduct resulting in the injury. Even adequately trained officers sometimes err, and such error says little about their training program or the legal basis for liability . . . . This is why claims alleging a constitutional deprivation due to failure to provide training . . . yield liability only if that defendant’s failure to train demonstrates its “deliberate indifference” to the constitutional rights of its residents. Erwin v. County of Manitowoc, 872 F.2d 1292, 1298 (7th Cir. 1989).

A recent Seventh Circuit opinion further demonstrates the difficulty in establishing a failure-to-train claim. In Ross v. Town of Austin, 343 F. 3d 915 (7th Cir. 2003), Tamra Ross filed a § 1983 claim against the Austin, Indiana, Police Department, and Police Chief Marvin Richey. Ross alleged that Officer Lonnie Noble’s inadequate training resulted in the death of her husband, Kenneth Ross.

On the morning of February 28, 2000, Officer Noble, who was on routine patrol, observed Gregory Miller get out of his vehicle and attempt to shoot his estranged wife. Officer Noble exited his police vehicle armed with a shotgun and ordered Miller to drop his weapon. Officer Noble, who was not wearing a bulletproof vest, took cover behind a nearby truck. Despite several opportunities to fire a clear shot at Miller, Noble was unwilling to discharge his shotgun, which expelled a wide pattern of multiple projectiles. As a result of Officer Noble’s position in the parking lot, Miller was free to enter an adjacent liquor store where he took Kenneth Ross, a store manager, hostage. Thereafter, law enforcement dispatchers telephoned the liquor store and Miller advised that he would release Kenneth Ross only if he could speak to his estranged wife by phone. Gunshots were heard after Miller abruptly terminated his heated telephone conversation with his wife. Police later discovered the bodies of Kenneth Ross and Miller inside with fatal gunshot wounds – Miller’s self-inflicted.

Tamra Ross was critical of the police department’s failure to provide Noble with tactical combat and hostage negotiation training. According to Ross, had Noble received such training, he would have conducted himself in a way that would have better protected Kenneth Ross from Miller’s actions. She reasoned that proper training might have led Noble to: (1) avoid “channeling” Miller into the liquor store, (2) select a weapon (other than a shotgun) better suited for the situation, and (3) secure a peaceful resolution to the hostage situation.

About the Author

David A. Perkins is a partner in the Peoria firm of Heyl, Royster, Voelker & Allen. He concentrates his practice in the areas of civil rights, municipal liability, insurance fraud, and first party property claims. Mr. Perkins received his B.A. in 1985 from the University of Illinois at Springfield and his J.D. from the University of Iowa in 1987. He is a member of the Peoria County, Illinois State, and American Bar Associations.
Defendants moved for summary judgment, which was granted by the trial court. The plaintiff promptly appealed. The Seventh Circuit observed that failure to properly train officers may serve as the basis for § 1983 liability only where the failure to train amounts to a deliberate indifference to the rights of the person with whom the police come into contact, citing City of Canton v. Harris, 489 U.S. 378, 388, 103 L.Ed. 2d 412, 109 S. Ct. 1197 (1989). The court determined that the Austin Police Department’s past dealings with armed felons did not obligate them to anticipate the utility of hostage negotiation or tactical combat training. The court further noted:

The fact that Noble, a police officer in a town with a population of fewer than 5,000, completed training from the Indiana Law Enforcement Academy and had met all other statutorily mandated training standards, is further evidence that, as a matter of law, it was not the policy of Appellees to inadequately train police officers. By creating a law requiring municipalities to exceed the standards for police training established by state law, not only would this court exceed the scope of our judicial authority by usurping the policy-making authority of state legislators, but we would also impose upon smaller municipalities such as Austin, the untenable burden of maintaining the same standards of law enforcement training specialization as those of large cities or even national armies. Even were it within the province of this court to establish such a policy, it seems neither wise nor practical. (Emphasis added)

343 F.3d 915, 918-919.

Finally, the Seventh Circuit concluded Kenneth Ross was not the victim of a constitutional injury and therefore affirmed the entry of summary judgment.

The Seventh Circuit wisely concluded in the Ross case that statutorily mandated training standards provide sufficient training for smaller governmental entities. One may reasonably conclude, based upon the Seventh Circuit’s analysis, that the larger the governmental entity, the greater the obligation to provide specialized training that may exceed existing statutory training standards.

---

Workers’ Compensation Report

By: Kevin J. Luther
Heyl, Royster, Voelker & Allen
Rockford

Parking Lot Slip and Falls

The Industrial Commission Division of the appellate court recently examined another “parking lot” case. In Janice Mores-Harvey v. Industrial Commission, 345 Ill. App. 3d 1034, 804 N.E.2d 1086 (3rd Dist. February 6, 2004), the appellate court discussed at length two exceptions to the general premises rule which provide that accidental injuries sustained on an employer’s premises within a reasonable time before and after work are generally deemed to arise in the course of employment.

In Mores-Harvey, the claimant was a waitress injured when she slipped and fell in her employer’s parking lot. The petitioner claimed it was dark, cold, and had just snowed when she fell. The parking lot had not been shoveled. Upon her arrival at work, she parked her car behind the restaurant and, as she exited her car, she put one foot down and slipped and fell on ice. She hit her head on the car door and landed on her back.

The employer was responsible for maintaining the parking lot, and directed employees to park on the side or in back of the building so customers could park in front of the restaurant. The claimant stated she typically parked her automobile behind the restaurant, as there was no street parking. The arbitrator

(Continued on next page)

About the Author

Kevin J. Luther is a partner in the Rockford firm of Heyl, Royster, Voelker & Allen where he concentrates his practice in areas of workers’ compensation, employer liability, professional liability and general civil litigation. He also supervises the workers’ compensation practice group in the Rockford office. Mr. Luther received his J.D. from Washington University School of Law in 1984. He is a member of the Winnebago County, Illinois State and American Bar Associations, as well as the IDC.
Workers’ Compensation Report (Continued)

found in favor of the petitioner, and the industrial commission reversed, finding the injuries did not arise out of and in the course of her employment. The circuit court reversed the industrial commission decision and reinstated the arbitrator’s decision of compensability. The appellate court affirmed.

Generally speaking, an injury occurs “in the course of” employment when it occurs during employment, at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. As stated previously, accidental injuries that take place on an employer’s premises within a reasonable time before or after work generally are deemed to arise in the course of employment. Where an employee slips and falls somewhere off of the employer’s premises while traveling to or from work, the general rule provides that the resulting injuries do not arise out of and in the course of the claimant’s employment and, therefore, are not compensable under the Illinois Workers’ Compensation Act.

The court in Mores-Harvey examined the above “general premises rule” and noted two exceptions. One exception exists if the petitioner is injured when exposed to a hazardous or defective condition in a parking lot provided by and under the control of the employer. Another exception exists when the employee’s presence at the place where the accident occurred was required in the performance of his or her duties, and the employee also is exposed to a risk of injury greater than a risk common to the general public.

The Mores-Harvey decision noted that the factual situation could be found compensable on the first exception alone. Because there was a hazardous or defective condition in the parking lot (snow and ice) under the control of the employer, compensability would follow. However, because of two recent parking lot slip-and-fall cases that analyze the second exception, the Mores-Harvey decision went further and examined the second exception to the general premises rule as well. The two appellate court decisions distinguished by Mores-Harvey were Homerding v. Industrial Commission, 327 Ill. App. 3d 1050, 765 N.E.2d 1064, 262 Ill. Dec. 456 (1st Dist. 2002), and Wal-Mart Stores, Inc. v. Industrial Commission, 326 Ill. App. 3d 438, 761 N.E.2d 768, 260 Ill. Dec. 585 (4th Dist. 2001).

The court in Mores-Harvey distinguished the Wal-Mart Stores decision because in the Wal-Mart factual scenario, the petitioner was not walking to or from her parked car, but rather was being picked up by a friend. There was no evidence in Wal-Mart that anyone had asked the claimant’s friend to park where she did. Accordingly, the claimant was not acting under the employer’s control or restriction when she left the store to go on break and so could not have faced any risks to a greater extent than those faced by the general public. The Mores-Harvey court emphasized that the general public could park anywhere in the Wal-Mart lot, but the claimant’s choices allegedly were restricted. Even though Mores-Harvey was not exposed to a risk greater than the general public because snow and ice covered the entire parking lot and not just where she happened to park, the court reasoned that by restricting where the claimant could park her vehicle, the employer exercised control over its employees’ actions. The court reasoned this “control” increased an employee’s risk to a greater degree than the general public even though snow and ice covered the entire parking lot.

The Mores-Harvey decision examines the two exceptions to the general premises rule, even though it states that it could have found compensability on the first exception. The appellate court’s decision suggests that both exceptions need to be analyzed when dealing with a parking lot slip-and-fall claim. It would seem that, from a compensability standpoint, an employer is better off not restricting where its employees park because any restriction apparently means control, which allegedly increases the risk of injury.

“As stated previously, accidental injuries that take place on an employer’s premises within a reasonable time before or after work generally are deemed to arise in the course of employment.”
Since our earlier article on construction negligence (IDC Quarterly, vol. 13, no. 3, page 8), there have been some developments on the control/duty issue which merit discussion. In our earlier article we pointed out that the current trend of the appellate decisions favors an “operative details” analysis, as opposed to consideration of whether or not the defendant has retained broad and general authority over the project (IDC Quarterly, vol. 13, no. 3, page 20). The operative details analysis focuses upon supervision of how the work is performed, i.e. manner, means, and methods in the dual contexts of retained authority and the exercise of that authority. The broad and general authority analysis turns on the powers which are vested in the owner or contractor with emphasis upon the contract documents. Also implicit in the “mix” is actual knowledge or reason to know of the hazardous condition or unsafe act.

The “operative detail” cases are less likely to find the requisite knowledge, which generally attends the details of the work, than those which center on contract language. Where the contract controls, the courts are more likely to find “knowledge” from the implication that the retention of a broadly based right to supervise presupposes the obligation to inspect and therefore to know.

The comments to Section 414 of the Restatement (Second) of Torts clearly favor the “operative details” approach. In doing so they condemn the contractual “general control” analysis, stating:

c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

The reason for the Restatement position is self-evident. In the construction industry it is unusual to find an agreement between equals. Construction contracts are prepared “top down” and contemplate a dominant/servient relationship. The servient party typically agrees to accept full control of the project, including the safety of workers on the job. If that language alone controlled, the existence of a duty would cease to be multi-factorial. Instead, a duty to supervise the work of downstream contractors for the protection of workers on the site would descend from the owner through the general contractor and thence to every subcontractor on the job.

Three recent cases, two from the First District and one from the Fourth, reflect conceptual differences on this significant issue. In Shaughnessy v. Skender Construction Co., 342 Ill.

About the Author

David B. Mueller is a partner in the Peoria firm of Cassidy & Mueller. His practice is concentrated in the area of products liability, construction injury litigation, and insurance coverage. He received his undergraduate degree from the University of Oklahoma and graduated from the University of Michigan Law School in 1966. He is a past co-chair of the Supreme Court Committee to revise the rules of discovery, 1983-1993 and presently serves as an advisory member of the Discovery Rules Committee of the Illinois Judicial Conference. He was member of the Illinois Supreme Court Committee on jury instructions in civil cases and participated in drafting the products liability portions of the Tort Reform Act. He is the author of a number of articles regarding procedural and substantive aspects of civil litigation. He was defense counsel in Prewein v. Caterpillar Tractor Co., 108 Ill. 2d 141 (1985), on the issue of comparative fault under the Structural Work Act.
Recent Developments (Continued)
App. 3d 730, 794 N.E.2d 937 (1st Dist. 2003) the court affirmed a summary judgment in favor of the defendant, utilizing the “operative details” approach, and despite the existence of broad contractual empowerments. The opposite result was reached by the Fourth District in Moss v. Rowe Construction Co., 344 Ill. App. 3d 772, 801 N.E.2d 612 (2003), where the court literally wedded the questions of control and legal duty to the language of the prime contract. In doing so the court referred to Shaughnessy, but felt that the First District had failed to consider the retained powers which were found in the agreement. (344 Ill. App. 3d at 777). That set the stage for Martens v. MCL Construction Corp., 2004 WL 369143 (2004).

In that case another division of the First District reaffirmed the rationale of Shaughnessy and, in doing so, took the Moss court to task (page 9). The accompanying juxtaposition of the contractual language in each of these cases, together with a discussion of the divergent reasoning between the Districts demonstrate the theoretical battlefield upon which future litigation in the area will be fought.

JUXTAPOSITION OF CONTRACTUAL PROVISIONS

Shaughnessy
The contract between the racquet club and Skender was a standard form agreement approved by the Associated General Contractors of America. The contract provided that Skender would supervise and direct the work and be responsible for and control the construction means, methods, techniques, sequences and procedures for coordinating all portions of the work, unless the contract provided otherwise. Skender also agreed to be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the contract and to employ a superintendent whose duties included the prevention of accidents.

Guinea (Skender’s project manager) acknowledged that, contractually, superintendent Williams had the authority to stop the work if he detected unsafe practices or conditions, but Skender did not employ a safety person for the project.

Moss
Under the general contract between IDOT and Rowe, Rowe was required to maintain control of safety on the project: Article VIII. Safety: Accident Prevention stated:

1. In the performance of this contract the contractor shall comply with all applicable [f]ederal, [s]tate, and local laws governing safety, health, and sanitation (23 CFR [§] 635). The contractor shall provide all safeguards, safety devices[,] and protective equipment and take any other needed actions as it determines, or as the SHA [State Highway Agency] contracting officer may determine to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

2. It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous[,,] or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR [§] 1926) promulgated by the Secretary of Labor, in accordance with [s]ection 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. [§] 333).

Further, the general contract required:

“The contractor shall furnish (a) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) * * *.”

Martens
Only a few provisions of the general conditions document between the owner and MCL are relevant to the matters raised on appeal. Specifically, MCL was responsible for and had control “over construction means, methods, techniques, sequences and procedure and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.” MCL required subcontractors to be bound by the terms of the contract documents and to assume toward MCL all the obligations an responsibilities MCL assumed toward the owner and architect. MCL was “responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.” Regarding safety, MCL would give notices and comply with applicable laws, ordinances, rules and regulations bearing on the safety of persons or property or their protection from damage, injury or loss; erect and maintain, as required by existing conditions and performance of the contract, reasonable safeguards for safety and protection; and designate a member of MCL at the site whose duty was to prevent accidents.
Shaughnessy

In Shaughnessy, the plaintiff, an employee of a sub-subcontractor, was injured when a wooden board, which he had placed to “bridge” an opening, broke. Using a construction negligence theory under Section 414 of the Restatement, he sued the general contractor and the steel deck subcontractor, neither of which was present when the accident took place. Nor did either know of the plaintiff’s use of the board. Moreover, the plaintiff acknowledged that he received all of his orders from his employer and had no contact with either of the defendants. Nor did either defendant control the “manner by which the plaintiff did his work.”

The circuit court granted defendant’s motion for summary judgment on the control/duty issue. The plaintiff appealed, based largely on the terms of the contract regarding the defendants’ retention of control. The appellate court affirmed, holding that there was no evidence that the general contractor, or the subcontractor, either had or exercised control over how the plaintiff or his employer did their work. 343 Ill. App. 3d at 738-40. To the contrary, and in accordance with Section 414, it found that they were free to do that work “in their own way.” Addressing the contract, the court found that both the prime and subcontracts merely reflected the reservation of a general right to stop, start and inspect the progress of the work.” 343 Ill. App. 3d at 738.

Of equal, if not paramount significance, was the fact that the unsafe practice, i.e. placing and walking on the board, was transient and created by the plaintiff. Consequently, neither defendant knew or had reason to know of its existence. That basis for the holding emphasizes recognition that a negligence theory is involved. Liability is not strict. Rather, even assuming the existence of a duty borne of control, a plaintiff must still prove that the defendant knew or had reason to know of the dangerous condition or practice. This is in contradistinction to the Structural Work Act in which the question was whether the defendant, “having charge of the work,” could have discovered the violation; not whether it should have been aware of it. Thus, the Shaughnessy court emphasizes:

. . . Moreover, no one from Skender or Garbe saw plaintiff engage in the unsafe practice that led to his injury or even had notice that the plaintiff intended to engage in such conduct. Plaintiff, who was injured on his first day at the job site, admitted that he was only on the board for a “fraction of a second” before the board broke and that only his co-worker was in the area . . .

. . . Moreover, there was no evidence that Skender or Garbe knew or had notice of the hazardous method the plaintiff employed to descend into the basement. (Shaughnessy, 342 Ill. App. 3d at 739-41).


Moss

The Fourth District in Moss eschewed the multi-factorial approach in favor of a doctrinal analysis which started and ended with the language of the contracts. There the decedent was employed by the electrical subcontractor on the job, Laesch Electric, Inc. Laesch had a subcontract with the defendant, Rowe Construction. Rowe was working under an agreement with the Illinois Department of Transportation. That prime contract obligated Rowe to comply with all safety laws and regulations. In addition, Rowe was to have a safety representative on the project who was to be “in charge of all operations.” The decedent was killed when a derrick, which his employer was using to load concrete foundations, overturned crushing him.

There was no evidence that Rowe had anything to do with that operation. Nor was there any indication that Laesch was not free to lift the foundations as it saw fit. Consequently, the trial court entered summary judgment in favor of the defendant.

Not only did the Fourth District reverse, its reliance on the contract to create a duty overwhelmed the traditional factors that usually control the analysis. In addressing those “traditional factors” Justice Myerscough specifically disavowed the “operative details” approach in favor of using “contractual terms” as the foundation of Section 414 liability stating:

In granting summary judgment in the present case, the trial court reasoned as follows:

“[R]etain control’ means the contractual language and/or practices of the contractor/sub] contractor must demonstrate control by the general contractor over the means and methods of performance by the sub-contractor of the job which leads to the injury. Here the contractual language does not specifically address supervision of the means or methods of the sub] contractors removing concrete structures; the work that led to the death of plaintiff decedent.”

(Continued on next page)
Recent Developments (Continued)

However, this is not the appropriate question. The issue is not control of the “means and methods” of performing the task, but rather who contractually and/or physically has the duty to control safety of the project. First, the contractual language must be reviewed to determine what terms address the duty to control for safety. The facts must then be reviewed to determine whether the duty was physically fulfilled under the contract. (344 Ill. App. 3d at 776-77).

And

In the face of this contractual duty to control safety, the trial court erred in considering whether the general contractor retained control over the means and methods over the performance of the job of removing the concrete structures and not the contract language. The law requires the trial court to review the contractual language regarding the general contractor’s duty to maintain safety of workers. (344 Ill. App. 3d at 783).

As is evident from the preceding language, the Fourth District believes that the issues of duty and breach can both be resolved from the terms of the prime and subcontracts. Control/duty derives from what the contractor or subcontractor is contractually bound to do in the area of accident prevention. Breach is measured by the quality of the defendants’ performance of those undertakings. Implicit in the analysis is the recognition that an affirmative, albeit boiler-plate, covenant to provide a safe workplace or program, carries with it the duty to inspect and discover. Lost in the rationale is the legal fact that the cause of action is based upon negligence and therefore turns upon what the defendant knew or reasonably should have known.

The Moss court paid lip service to the First District’s reasoning in Shaughnessy. It chose not to directly criticize the multi-factorial basis for that decision. Instead, it elected to distinguish its opinion from that in Shaughnessy by finding that the First District had failed to properly consider the underlying contracts. As it is significant to the discussion of Martens v. MCL Construction Corp., 2004 WL 369143 (February 27, 2004), another division of that court considered the control/duty question in the context of the conflicting viewpoints of Shaughnessy and Moss. There, the defendants were the construction manager, MCL, and the steel fabrication subcontractor, Shelco. Shelco subcontracted the steel erection work to the plaintiff’s employer. The plaintiff was injured when he fell from a steel beam while engaged in the process of landing, positioning, and connecting steel bar joists to the beams. The plaintiff was not “tied off” and the cause of action under Section 414 was based upon the defendants’ failure to provide adequate fall protection.

Despite contractual provisions which made the construction manager responsible for: (1) construction means, methods, techniques, sequences, and procedures, and (2) initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract, MCL was not directly involved in the operative details of the steel erection contractor’s work. Moreover, the testimony of that subcontractor’s supervisors, and other parties, consis-
ently disclaimed interference with the means and methods of plaintiff’s work. Consequently, the battle lines were clearly drawn between the Shaughnessy and Moss approaches.

The Martens court elected the former. In so doing it responded to the Fourth District’s criticism of Shaughnessy in kind. First, it pointed out that the former did not disregard the pertinent contract language. To the contrary, it found that the Shaughnessy court specifically considered the agreement and noted an absence of facts which indicated that “. . . defendants failed to comply with those contractual responsibilities.” Elaborating on that point, the Martens opinion further recognizes that the Shaughnessy defendants’ general rights to monitor and supervise did not entail “extensive supervision and monitoring” to the point where they “knew the worker created the unsafe condition that led to his injury.” (page 7).

Of greater significance, the Martens’ court specifically condemned the contractual analysis which underpins the Moss decision. In doing so it recognized that the caveats which are found in the comments to Section 414 would be vitiated by a simplistic approach in which control/duty is defined by contract, and breach is measured in the context of performance. In that regard it concurred with the multi-factorial analysis of Shaughnessy stating:

In Shaughnessy v. Skender Construction Co., 342 Ill. App. 3d 730, 738 (2003), the court reviewed similar contract language and determined such a general statement of control between the owner and the general contractor did not mean that the independent contractor was controlled as to his methods of work or as to operative detail. We agree with the Shaughnessy court; if such general contract language alone was sufficient to subject a general contractor to liability under section 414, then the distinction in comment c to section 414 between retained control versus a general right of control would be rendered meaningless. (Italics supplied). (page 7).

Conclusion

The opinions in Shaughnessy, Moss and Martens can neither be synthesized nor reconciled. Clearly, the Fourth District believes that the stock adhesion language which appears in virtually all downstream construction contracts, albeit general, is sufficient to impose a duty under Section 414. Moreover, the breach of that duty can then be measured by the defendants’ compliance with its covenants under the agreement. Conversely, the First District in Shaughnessy and Martens defines control by the authority which a contractor has and exercises over the operative details of the work which the plaintiff was performing, particularly as they bear upon the safety of that work. In that context the negligence underpinnings of Section 414 are preserved, as the defendant’s conduct is evaluated based upon what it knew or should have known, as opposed to what it could or was obligated to learn in the performance of its contract.

Ultimately the Illinois Supreme Court will have to chose between these divergent approaches. However, the author submits that adoption of the Moss analysis would come close to creating a comparative fault version of the Structural Work Act.

Endnote

1 It should be noted that Shaughnessy recognizes a linkage between continuous and pervasive control which would be sufficient to give rise to a duty and a likelihood that the defendant would know of the unsafe practice. See, 342 Ill. App. 3d 730 at 739-40.
Employment Law Issues

By: Kimberly A. Ross*
Cremer, Kopon, Shaughnessy & Spina, LLC
Chicago

Age Discrimination in Employment Act (ADEA)

Supreme Court Rules Discrimination Against Relatively Young Outside ADEA’s Protection

In General Dynamics Land Systems v. Cline, 124 S. Ct. 1236 (2004), the United States Supreme Court held that discrimination against the relatively young is outside the protection of the Age Discrimination in Employment Act (ADEA).

General Dynamics Land Systems, Inc., (General Dynamics) maintained a collective-bargaining agreement (CBA) that eliminated General Dynamics’ obligation to provide health benefits to subsequently retired employees, except as to then-current workers at least 50 years old. General Dynamics’ employees who were then at least 40, and thereby protected by the ADEA, but under 50 and without the promise of benefits, claimed the CBA violated the ADEA by discriminating against them because of their age.

In determining the ADEA did not protect the young from the old, the court looked to Congress’ intent when enacting the ADEA. The court noted the Congressional hearings dwelled on unjustified assumptions about the effect of age on ability to work, and the impediments suffered by older workers in their efforts to retain and regain employment. There was nothing in the hearing records suggesting that younger workers registered complaints about discrimination in favor of seniors.

The court concluded the statutory objectives were to promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment. The court also concluded the ADEA’s ban on “arbitrary limits” applied to age caps that exclude older applicants, necessarily to the advantage of younger ones.

In coming to its determination, the court noted although none of its prior decisions directly addressed the question presented, all of them showed the court’s consistent understanding that the text, structure and history point to the ADEA as a remedy for unfair preference in favor of those relatively young, leaving the complaints of the relatively young outside statutory concern. Therefore, the court reversed the decision of the Sixth Circuit Court of Appeals, and reinstated the district court’s dismissal of the ADEA claim.

Americans With Disabilities Act (ADA)
Compensatory and Punitive Damages Not Available in Retaliation Case

In Kramer v. Banc of America Securities, LLC, 355 F.3d 961 (7th Cir. 2004), the defendant employed the plaintiff as a managing director. After the defendant merged with another financial institution, the plaintiff began reporting to a new supervisor. After seven months of supervision, the new supervisor was critical of the plaintiff’s job performance and replaced her as team leader with another employee. However, the plaintiff retained her salary and title as managing director. The plaintiff also received a memorandum stating she needed to improve her performance within the next 90 days.

The plaintiff responded to the demotion and memorandum through a letter from her lawyer. The letter demanded that the plaintiff be reinstated as team leader, and also revealed the plaintiff suffered from multiple sclerosis (MS). This letter was the defendant’s first notice of the plaintiff’s disease.

Four months later, the plaintiff received another memorandum directing her to improve her performance within the next 30 days or face termination. In response, the plaintiff filed a charge of disability discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC). The plaintiff was discharged within a week of receiving a Notice

About the Author

Kimberly A. Ross is a partner with the law firm of Cremer, Kopon, Shaughnessy & Spina, LLC. She received her J.D. from DePaul University College of Law and her B.A. from the University of Michigan. Her practice areas include employment law and general tort litigation. Ms. Ross is an Assistant Editor of the IDC Quarterly. In addition to IDC, she is a member of the Defense Research Institute, Decalogue Society of Lawyers and the Women’s Bar Association.

* The author acknowledges the assistance of Jennifer L. Colvin, an associate with Cremer, Kopon, Shaughnessy & Spina, LLC, in the preparation of this article.
of Right to Sue from the EEOC. In response, the plaintiff filed a second charge of discrimination with the EEOC, alleging retaliatory discharge. After receiving her second Notice of Right to Sue, the plaintiff filed suit in federal court.

The district court granted the defendant’s motion for summary judgment with respect to the plaintiff’s disability claims, but denied the defendant’s motion with respect to the claim of retaliatory discharge. The district court also granted the defendant’s motion to exclude compensatory and punitive damages from those damages recoverable by the plaintiff at trial. The court further found that since compensatory and punitive damages were not an available remedy, the plaintiff was not entitled to a jury trial. After a bench trial in which the court ruled in favor of the defendant, the plaintiff appealed.

In a case of first impression, the Seventh Circuit found the ADA’s statutory language revealed no basis for the availability of compensatory and punitive damages. The court disagreed with the plaintiff’s argument that the 1991 Civil Rights Act expanded the remedies available to a party bringing an ADA claim. The court looked directly to the 1991 Civil Rights Act’s statutory language and found while it permitted compensatory and punitive damages for certain claims as enumerated, claims of retaliation under the ADA were not specifically listed and, therefore, were not available.

In addressing the plaintiff’s right to a jury trial, the Seventh Circuit agreed with the lower court and found that because the plaintiff was not entitled to recover compensatory and punitive damages, she had no statutory or constitutional right to a jury trial. The court noted that there is no right to a jury where the only remedies sought or available are equitable.

Although this case was one of first impression for federal circuit courts when the arguments were heard, two other courts ruled on this issue around the same time the Seventh Circuit issued its opinion. Shortly before this opinion was released, the U.S. District Court for the District of Colorado made a similar holding that compensatory and punitive damages may not be awarded in retaliation cases under the ADA, and that plaintiffs are not entitled to a jury trial for alleged violations of the ADA’s nonretaliation provision. However, the Fifth Circuit departed from the Seventh Circuit ruling and affirmed a retaliation verdict under the Texas Commission on Human Rights Act.

**ADA/ADEA**

**Promise of Consulting Work Establishes Nexus to Employment for Retaliation Claim**

In *Flannery v. Recording Industry Association of America*, 354 F.3d 632 (7th Cir. 2004), the defendant, Recording Industry Association of America (RIAA), employed the plaintiff as an investigator. In 1997, the plaintiff was diagnosed with an irregular heartbeat, and in August 2000 he was diagnosed with sleep apnea. The plaintiff maintained that in March 2000, his supervisors told him he would have to leave his employment because his health was poor and he was getting older.

The plaintiff responded by stating that he did not want to leave. Nonetheless, in June 2001, the plaintiff received a written letter informing him that he was being terminated effective October 2001, but that he would receive continued work in a consulting capacity. At the time of his termination, the plaintiff was 63 years old and had worked for RIAA for 22 years. The plaintiff filed a charge with the EEOC shortly after his discharge. RIAA never contacted him regarding the consulting work promised in the June 2001 letter.

The district court granted the defendant’s motion to dismiss and determined the plaintiff’s discriminatory discharge claims were time-barred. The district court also determined the retaliation claims failed to state a claim upon which relief could be granted. The district court further noted that neither the ADEA nor the ADA protects independent contractors, and therefore the plaintiff’s alleged retaliation claim did not have a nexus to employment because it affected a potential independent contractor relationship.

On appeal, the Seventh Circuit reversed and remanded. The court noted in discriminatory discharge cases there are two elements necessary to establish the date on which the “unlawful employment practice” occurred. First, there must be a final, ultimate, nontentative decision to terminate the employee. An employer who communicates willingness to change a final decision of termination later does not render a final, nontentative decision for the purposes of beginning the limitations period. Second, the employer must give the employee unequivocal notice of its final termination decision. Both elements are necessary to start the limitations period.

Although the defendant contended the March 2000 conversation between the plaintiff and his supervisors constituted a final decision with unequivocal notice, the court disagreed and found that the it was not until the June 2001 letter that the plaintiff received final notice of his termination. Thus, the court found the plaintiff’s claim was not time-barred.

Turning to the plaintiff’s retaliation claim, the court noted that both parties agreed the ADEA and ADA only protect employees and not independent contractors. However, the court concluded the plaintiff was not suing as an independent contractor, but as a former employee. Former employees who complain of retaliation that impinges on their future employ-

*(Continued on next page)*
Employment Law Issues (Continued)
ment prospects or that otherwise have a nexus to employment have the right to sue their former employers.

The court found that it was unquestionable the plaintiff’s consulting arrangement grew out of his employment relationship with the defendant. More importantly, the independent contracting arrangement was one part of his severance package. Since the package grew out of his employment, denial of any part of the package would satisfy the employment nexus.

The court noted that the very purpose of retaliation provisions is to prevent employers from deterring employees from exercising their rights, including the right to file a charge of discrimination. As such, the court found that an employer’s withdrawal of part of an employee’s severance package undoubtedly would make other employees think twice before filing a discriminatory termination charge. Thus, the court concluded that the plaintiff’s retaliation claims had the requisite nexus to employment and were actionable.

ADA/RETALIATION

Plaintiff Fails to Establish Adverse Employment Action

In Griffin v. Potter, 356 F.3d 824 (7th Cir. 2004), the plaintiff brought suit against her former employer, the United States Postal Service, alleging it discriminated against her because of her age and then retaliated against her when she complained. The district court granted the defendant’s motion for summary judgment, finding the plaintiff did not establish a prima facie case of discrimination or retaliation because the defendant’s evidence of her unsatisfactory job performance was undisputed. On appeal, the Seventh Circuit affirmed, but focused on the plaintiff’s failure to establish she suffered any adverse employment action.

The plaintiff filed two formal internal EEO charges in 1997, alleging she was being discriminated against due to race, sex, age and disability. With the plaintiff’s complaints pending in investigation, she was transferred to another office in the summer of 2001. As a result of the transfer, the plaintiff filed an informal EEO precomplaint form alleging the transfer was prompted by her age and the defendant’s desire to retaliate against her for filing the 1997 charges. The defendant informed the plaintiff it was ending its review of her informal charge because she had been uncooperative in communicating with investigators. At that time, the plaintiff took no further action in regard to her claims.

When the plaintiff retired in January 2002, she promptly filed suit alleging age discrimination and retaliation. The plaintiff alleged she suffered adverse employment actions when she was transferred to another facility, unfairly disciplined, assigned to difficult cases in her role as an EEO investigator, given additional work and refused annual leave requests when work was backlogged. The Seventh Circuit determined none of these allegations significantly altered the terms and conditions of the plaintiff’s job, and therefore she did not suffer an adverse employment action.

The court further found the plaintiff did not establish her supervisor’s hostility toward her amounted to an adverse employment action. The court noted a supervisor’s hostility and comments do not qualify as adverse employment actions unless the hostility is severe and pervasive. In this matter, the court found that the supervisor’s comments that the plaintiff was a “bad influence on the office” might have created an unpleasant environment, but the comments were not so severe and pervasive as to be actionable. Griffin, 356 F.3d at 829. Since the court found the plaintiff failed to demonstrate a genuine issue of material fact concerning whether she suffered an adverse employment action, the Seventh Circuit affirmed the district court’s decision granting summary judgment to the defendant.
SEXUAL HARASSMENT
Unreasonable, Meritless Charges Motivated by Bad Faith Not Protected Under Title VII

In Mattson v. Caterpillar, Inc., 2003 U.S. Dist. LEXIS 7477, 2004 WL 395890 (7th Cir. March 4, 2004), the defendant employed the plaintiff as an electrician. The plaintiff's supervisor was female. The plaintiff was generally uncooperative with his female supervisor and resisted taking her orders. The plaintiff and two co-workers told a maintenance manager they were concerned about physical contact from their female supervisor. The plaintiff’s complaint consisted of a single instance where one of his supervisor’s breasts touched his arm during a conversation in a testing area, and one instance where his supervisor reached around him to get a clipboard but had not touched him.

The defendant’s EEO coordinator interviewed the plaintiff about the incident where his supervisor’s breast allegedly touched him, but the plaintiff stated he did not know whether the touch was suggestive, and he did not believe his supervisor was attracted to him. The plaintiff also stated that the contact might have been inadvertent. As a result of the plaintiff’s comments, he was issued a warning letter for making false accusations of sexual harassment. However, the plaintiff’s supervisor also was counseled to be careful about standing close to people.

Three months after being issued the warning, the plaintiff filed a charge of discrimination with the Illinois Department of Human Rights (IDHR) and the EEOC based on the aforementioned incidents with his supervisor. Another EEO coordinator investigated the charge on behalf of the defendant and learned from the plaintiff’s co-worker the female supervisor’s breast never touched the plaintiff, and the plaintiff had stated his goal was to get rid of his supervisor. After its investigation, the defendant concluded the plaintiff’s charges against his supervisor were made in bad faith in an attempt to retaliate against her. The defendant thereafter decided to discharge the plaintiff. The plaintiff filed suit and the district court granted summary judgment in favor of the defendant.

On appeal, the Seventh Circuit found the plaintiff’s charge about the incident with the IDHR and EEOC was both objectively and subjectively unreasonable, as well as made with the bad faith purpose of retaliating against his female supervisor. Nonetheless, the plaintiff claimed that Title VII protects those who file charges that are unreasonable, false, and even malicious and defamatory. The court disagreed, noting that Title VII was designed to protect the rights of employees who, in good faith, protest the discrimination they believe they have suffered and to ensure such employees remain free from reprisals or retaliatory conduct. The court further noted Title VII was not designed to arm employees with a tactical coercive weapon by which employees could make baseless claims simply to advance their own retaliatory motives and strategies.

In making its determination, the court emphasized that its decision set a low bar for receiving Title VII protection. The court noted that protection is not lost simply because an employee is mistaken on the merits of his or her charge or if an employee drafts a complaint as best he or she can but does not state an effective legal claim.

SEX DISCRIMINATION/HARASSMENT/RETALIATION
Plaintiff Fails to Establish Discrimination Despite Prevalent Pornography in Workplace

In Rhodes v. Illinois Department of Transportation, 359 F.3d 498 (7th Cir 2004), the plaintiff worked as a full-time seasonal highway maintainer from 1996 through 1999. At the beginning of the plaintiff’s third season, the lead worker assigned her a shorter snowplow route as a result of several complaints from motorists. As a result of the change in routes, the plaintiff engaged in a verbal altercation with the lead worker and asked for her job back. The request was refused.

The plaintiff claims that after complaining about the route change her work conditions deteriorated and the lead worker often called her derogatory gender-based names. She also alleged pornographic magazines and movies were prevalent in the workplace, and pornographic pictures were placed in her work locker. The lead worker and the plaintiff’s co-workers’ pornographic magazines had been prevalent in the workplace for nearly 20 years, and the plaintiff never looked at or complained about the magazines or films. Despite being asked by the Illinois Department of Transportation to interview for a permanent highway maintainer position, the plaintiff declined to return to work after her last scheduled day.

The defendant maintained that it emphasizes a “zero tolerance” policy regarding harassment and discrimination. The defendant asserted it conducted yearly training sessions and posted civil rights materials in the workplace. Further, on the one occasion the plaintiff reported she found a pornographic picture taped to her locker, the lead worker immediately held a meeting with the plaintiff’s co-workers and informed them such conduct was not permitted.

On appeal, the Seventh Circuit affirmed the district court’s grant of summary judgment to the defendant, finding the plaintiff failed to establish she suffered an adverse employ-

(Continued on next page)
Employment Law Issues (Continued)

ment action. The court found the undisputed evidence was the plaintiff voluntarily quit her job. Further she did not allege any significant changes in her employment status, and did not allege that she suffered a substantial change in benefits.

The court found the plaintiff’s allegations of sex discrimination amounted to driving a truck without heat for a few days, having her route changed, having to wash her truck in cold weather and being marked absent on her last day of work. The court determined the allegations constituted mere temporary inconveniences and did not rise to the level of an adverse employment action.

Additionally, the court found the plaintiff failed to establish a prima facie case of hostile work environment. Although the defendant conceded the plaintiff was subjected to unwelcome, sexually related conduct severe or pervasive enough to create a hostile work environment, the court found the plaintiff failed to establish a basis for employer liability. The court noted employers become liable when the alleged harasser was the plaintiff’s supervisor instead of a mere co-worker. An employer may be found liable for a hostile work environment created by an employee who was not the plaintiff’s supervisor only where the plaintiff proves the employer has been negligent either in discovering or remedying the harassment.

The court concluded the plaintiff failed to establish the lead worker was her supervisor because she did not submit any competent evidence the lead worker had the authority to make decisions affecting the terms and conditions of her employment, such as the authority to hire, fire, promote, demote, discipline or transfer. The court further found the plaintiff failed to establish the defendant was negligent either in discovering or remedying the harassment directed at her.

Although the plaintiff argued the defendant should have been aware of the pornography in the workplace because such material was present for several years, there was no evidence the plaintiff or anyone else complained about the pornographic magazines or movies. Further, the court noted the defendant’s highest-ranking employee at the yard discarded pornographic magazines whenever he saw them and there was no evidence he either watched the films or knew there was a TV and VCR at the yard. The court also found important that male co-workers kept a lookout to alert them if a woman approached while watching a movie. Moreover, the court found the plaintiff’s single complaint about the picture taped to her locker did not impute knowledge to the defendant of the pornographic magazines or films.

Lastly, the plaintiff claimed the defendant retaliated against her by marking her absent without pay on her final day of employment. In determining whether the plaintiff established a prima facie case of retaliation, the court stated that it was unclear as to whether the plaintiff engaged in protected activity because she failed to comply with the defendant’s request to complain formally in writing. Nonetheless, the court determined it did not need to resolve the issue. The plaintiff was marked absent for failing to follow the lead worker’s instruction to tell him she would be absent, and therefore the defendant had a legitimate nonpretextual reason for marking her absent without pay.

RACE

Employer’s Prompt Response to Complaints Defeats Harassment Claim

In Williams v. Waste Management of Illinois, Inc., 361 F.3d 1021 (7th Cir. 2004), the defendant hired the plaintiff, an African-American, as a laborer. The plaintiff interacted well with his supervisors, one Caucasian and one African-American. However, he believed his co-workers harassed him due to his race.

The plaintiff alleged there were two incidents with two separate Caucasian co-workers in which the co-workers told him racist jokes. After each incident, the plaintiff told the offending co-worker he would not tolerate such jokes and to keep racist comments to himself. The plaintiff also asserted one of the co-workers used the “n” word to refer to him when the co-worker did not think the plaintiff was present. The plaintiff further asserted the two co-workers fashioned an extension cord into a hangman’s noose and left it for him on his workbench.

Even though the plaintiff did not report any of these incidents to management, the plaintiff’s Caucasian supervisor approached him and asked if any of the workers were hassling him in terms of racial comments or slurs. The plaintiff lied and stated that everything was fine and no one was hassling him. However, after being pressed by the supervisor, the plaintiff informed him about each of the incidents. The plaintiff’s supervisor informed the plaintiff that he would tell his superior and also speak with the offending co-workers’ supervisor.

After the plaintiff complained to his supervisor, he was certain the co-workers had been spoken to about the harassment because one of the co-workers told the plaintiff it was a shame he was making trouble by complaining about their behavior. However, the plaintiff had no other problems with racially harassing behavior after complaining.

Although the plaintiff claimed no further racially harassing behavior, he asserted after he complained his co-workers engaged in retaliatory behavior. The alleged retaliatory be-
behavior included his co-workers loosening a screw on a riding lawnmower blade in an attempt to create a safety hazard for him, and baiting him into a verbal confrontation over his use of a weed eater.

After the verbal confrontation, the plaintiff complained to his African-American supervisor, and a meeting was held with the supervisor of the co-worker who engaged in the confrontation. At that meeting, both the co-worker and the plaintiff explained the incident differently. Both supervisors concluded they could not decide who was telling the truth and despite his knowledge that doing so was the appropriate step to take under of the defendant’s harassment policy. Further, once the plaintiff’s supervisor became aware of the plaintiff’s complaint, both he and the co-workers’ supervisor took prompt action, within 24 hours, which included effective remedial measures calculated to end the harassment. The court noted as a result of the defendant’s actions, the race-based harassment indeed came to an end.

Although the plaintiff argued he had been retaliated against and constructively discharged, the court rejected the argument that he had been forced to abandon his position. While the court sympathized with the plaintiff’s concern that his co-workers had the will and means to physically harm him, it found the plaintiff did not give management, which has been approachable and supportive, fair notice of his fears or an opportunity to address them, prior to resigning his position.

“An employer may be found liable for a hostile work environment created by an employee who was not the plaintiff’s supervisor only where the plaintiff proves the employer has been negligent either in discovering or remedying the harassment.”

gave each individual a verbal warning.

At no time during the meeting did the plaintiff inform management he believed the co-worker’s actions were retaliatory or racially motivated. Despite expressing satisfaction with how management handled his complaints, the plaintiff did not return to work and stated he refused to return because he felt the supervisors considered the problem with his co-workers to be a mutual problem between him and his co-workers.

In affirming the district court’s grant of summary judgment in favor of the defendant, the Seventh Circuit found the defendant took prompt, appropriate corrective action when informed of the plaintiff’s complaint. As such, the defendant was relieved from liability under Title VII.

The court found the defendant was not negligent in discovering the plaintiff may have been subjected to a racially harassing work environment because the plaintiff never complained to either of his supervisors about his co-workers’ conduct,
Medical Malpractice

By: Edward J. Aucoin, Jr.
Hall, Prangle & Schoonveld, LLC
Chicago

The Future of Expert Physician Testimony on Nursing Standard of Care

When the Illinois Supreme Court announced in June 2003 it would review the Second District’s decision in Sullivan v. Edward Hospital, 335 Ill. App. 3d 265, 781 N.E.2d 649 (2nd Dist. 2002), many medical defense attorneys simultaneously felt hope and fear. The hope was that the court would not only affirm the Second District’s holding that a physician was barred from offering opinions on the standard of care for nurses, but would also expand the holding to bar opinions by a physician on the sufficiency of communications by nurses to physicians, otherwise known as the Wingo exception. Wingo v. Rockford Memorial Hospital, 292 Ill. App. 3d 896, 686 N.E.2d 722 (2nd Dist. 1997). The fear was that the Supreme Court would affirm or overrule the Second District’s bar of the expert physician’s testimony as a discovery sanction, and then recognize the Wingo exception in dicta within the decision.

In an admirable show of judicial restraint, the Supreme Court did neither in its decision. Instead, the court simply stated, since the Second District did not discuss the merits of Wingo, it would also abstain from doing so. Taken on face value, that statement would lead one to believe that the Supreme Court’s decision in Sullivan v. Edward Hospital, 209 Ill. 2d 100, 2004 WL 228956 (Feb. 5, 2004), has no effect on the Wingo exception. However, one can argue that the court’s reasoning regarding general medical expert testimony in Sullivan tipped its hand as to the future treatment of the Wingo exception when that issue comes before the court: namely that physicians are not qualified to offer any opinions as to the standard of care for nurses because they are not licensed in the same school of medicine.

Sullivan v. Edward Hospital

Compliance With Supreme Court Rule 213

The Illinois Supreme Court issued its opinion in Sullivan v. Edward Hospital on February 5, 2004. The first issue that the court addressed in Sullivan was the propriety of the trial court striking, as a discovery sanction, the testimony of Dr. William Barnhart, the plaintiff’s expert physician, relating to Nurse Carrie Lewis’ communications with Dr. Amelia Conte-Russian, the patient’s treating physician. While the court upheld the trial court’s sanction, and affirmed the Second District’s ruling on the issue, the reasoning was based upon the old version of Supreme Court Rule 213, prior to the July 1, 2002, amendment that changed the classification and requirements for trial witness disclosures.

Using the pre-amendment version of Rule 213, the court applied the “strict compliance” holdings of Seef v. Ingalls Memorial Hospital, 311 Ill. App. 3d 7, 724 N.E.2d 115 (1st Dist. 1999), appeal denied 188 Ill. 2d 584, and Warrender v. Mill spun, 304 Ill. App. 3d 260, 710 N.E.2d 512 (2nd Dist. 1999), to determine whether the plaintiff had properly disclosed her expert physician’s opinions regarding the communications between the nurse and physician. Once the plaintiff conceded that the specific opinion regarding the nurse’s failure to adequately communicate the patient’s condition to the treating physician was not included in her Rule 213 disclosure, the court waxed poetically on the purpose of the former Rule 213 and why the sanction of excluding the testimony was appropriate and not an abuse of discretion by the trial court. Sullivan, 2004 WL 228956 at *7-8.

While the requirements for disclosure of retained expert testimony have remained largely the same under revised Supreme Court Rule 213, the inclusion of the words “this rule is to be liberally construed to do substantial justice . . .” in Section (k) has had a practical effect in the courtroom since July 1, 2002. In fact, the plaintiff’s argument that the opinion was a “logical corollary” or “elaboration” might find a more sensitive ear under the amended Rule 213. The primary effect of the Sullivan court’s Rule 213 ruling was that it did not have to directly address the substance of the proffered testimony.

About the Author

Edward J. Aucoin, Jr. is an associate in the Chicago firm of Hall, Prangle & Schoonveld, LLC. He has eight years of experience in medical malpractice defense, commercial litigation, and contract litigation practice. Mr. Aucoin’s substantial client base includes private hospitals and medical practice groups, physicians and other medical professionals, and national commercial corporations. He has extensive experience in preparing complex litigation for trial, and has second-chaired medical malpractice trials in Cook County and DuPage County. Mr. Aucoin received his B.A. from Loyola University of New Orleans and his J.D. from Loyola University of New Orleans School of Law. He is also a member of the IDC.
and therefore determine whether the Second District’s holding in Wingo was consistent with the Supreme Court’s prior decisions regarding standard of care testimony.

Physician’s Competency to Offer Testimony on Nursing Standard of Care

The trial court also struck the properly disclosed testimony of the plaintiff’s expert physician regarding the nursing standard of care, ruling that because the physician lacked a nursing license, he was incompetent to offer the testimony. The plaintiff argued to the Supreme Court that the trial court erred in striking her expert physician’s testimony relating to the nursing standard of care because Illinois law no longer holds that a health professional expert witness must always be a licensed member of the school of medicine about which the expert proposes to testify. Id. at *9. In support of this contention, the plaintiff cited the Illinois Supreme Court’s prior rulings in Jones v. O’Young, 54 Ill. 2d 39, 607 N.E.2d 224 (1992), and Gill v. Foster, 157 Ill. 2d 304, 626 N.E.2d 190 (1993), as well as Section 2-622 of the Illinois Code of Civil Procedure (735 ILCS 5/2-622), and the Second District’s ruling in Wingo.

When citing to Jones and Gill, the plaintiff focused on language in those decisions that reasoned that whether an expert was qualified to testify in a matter was not dependent on whether he is a member of the same specialty or subspecialty as the defendant, but rather, whether the opinions he intends to offer are matters within his knowledge and observation. This language, according to the plaintiff, signaled a retreat “from any rigid, formalistic rule” that the expert physician must be licensed in the same school of medicine as the target of his opinions. Sullivan, 2004 WL 228956 at *8.

The Supreme Court rejected the plaintiff’s arguments regarding Jones and Gill, recognizing that both decisions adopted the three-step analysis for admission of expert medical testimony as stated by the Illinois Supreme Court in Purtill v. Hess, 111 Ill. 2d 229, 489 N.E.2d 867 (1986). In the Purtill decision, the court articulated the requirements necessary to demonstrate an expert physician’s qualifications and competency to testify. The first requirement, citing Dolan v. Galluzzo, 77 Ill. 2d 279, 396 N.E.2d 13 (1979), was that the physician must be a licensed member of the school of medicine about which he proposed to testify. The second requirement was that the physician must demonstrate familiarity with the methods, procedures, and treatments ordinarily observed by other physicians, in either the same or a similar community. Finally, once the foundational requirements have been met, the trial court must determine whether the physician is qualified and competent to state his opinion as an expert regarding the standard of care. Purtill, 489 N.E.2d at 872. Should the expert physician fail to satisfy any of these foundational requirements, the trial court must disallow the expert’s testimony. Jones, 607 N.E.2d at 226.

The first requirement of Purtill, that a physician be licensed in the same school of medicine, was the focus of the Illinois Supreme Court’s analysis in Sullivan v. Edward Hospital.

“In the Purtill decision, the court articulated the requirements necessary to demonstrate an expert physician’s qualifications and competency to testify.

In coming to its conclusion, the court presented a detailed explanation of its previous holding in Dolan. In Dolan, the court found that the Illinois legislature had recognized various schools of medicine, each with their own tenets, practices and regulations. Respecting this recognition, the court found as a result, the practitioner of a particular school of medicine is entitled to have his or her conduct tested by the standards of that school. The only way to ensure this entitlement, and to ensure fairness, is to require the expert witness to be licensed in the same school of medicine as the medical care provider to whom the testimony is directed. Dolan, 396 N.E.2d at 16. Therefore, the court ruled that the three-step analysis of Purtill, including the licensing requirement from Dolan, remains the law in Illinois regarding admissibility of expert medical testimony.

The plaintiff next argued that Section 2-622 of the Code of Civil Procedure evinced a legislative intent that physicians are competent to testify about the standard of care for the nursing profession. Section 2-622 requires, among other things, that the plaintiff attach to the complaint a written report from a physician supporting the allegations of negligence. If negligent conduct is alleged against a nurse, the report must be completed by a physician. 735 ILCS 5/2-622(a)(1).

The court dismissed this argument, stating the report required by Section 2-622 is merely a pleading requirement and has no bearing on the type of evidence relied upon at trial. Sullivan, 2004 WL 228956 at *10-11, citing DeLuna v. St.
Medical Malpractice (Continued)

Elizabeth’s Hospital, 147 Ill. 2d 57, 588 N.E.2d 1139 (1992), and Lyon v. Hasbro Industries, Inc., 156 Ill. App. 3d 649, 509 N.E.2d 702 (4th Dist. 1987). The court further rejected the plaintiff’s argument by recognizing that both Jones and Gill were decided subsequent to the enactment of Section 2-622 and both cases upheld Dolan’s license requirement.

The plaintiff’s final argument in support of her position that Illinois law no longer requires that a health professional expert witness be a licensed member of the school of medicine about which the expert proposes to testify centered on the Second District’s decision in the Wingo case. The plaintiff reasoned that the Wingo exception should not be an exception at all, but rather the rule, thereby allowing her expert physician to offer standard of care opinions against the nurse at issue. The court rejected this argument, stating that the appellate court correctly reasoned that Wingo did not apply in this case. Sullivan, 2004 WL 228956 at *11. Most significantly, the Supreme Court stated that, since the Second District did not discuss the merits of Wingo, neither would the high court.

Having found all of the plaintiff’s arguments for the admission of her expert physician’s opinions on the nursing standard of care lacking, the court applied the licensing requirement set forth in Dolan to the facts of the case and determined the expert physician was not competent to testify. The court found that Dolan, in specifically recognizing the legislature’s establishment of nursing as a unique school of medicine, “unequivocally required that a health-care expert witness must be a licensed member of the school of medicine about which the expert testifies. Id. at *12.

Does Sullivan v. Edward Hospital Reveal the Supreme Court’s Position on Wingo v. Rockford Memorial Hospital?

Attribute it to wishful thinking or an overreading of the court’s opinion, but a majority of the medical defense attorneys with whom I have discussed the Sullivan decision have concluded that the court is tipping its hand in regards to the Wingo exception. They base this belief on several statements within the Sullivan decision.

First, the court “expressly reaffirm[ed] the license requirement of Dolan and its progeny and decline[ed] plaintiff’s invitation to deviate therefrom.” Id at *13. Further, the plaintiff portrayed the Dolan license requirement as “rigid and formalistic,” and the court made no attempt to dispute that portrayal.

Next, the Supreme Court recognized as persuasive the amicus brief filed by the American Association of Nurse Attorneys (TAANA) and agreed with its argument that the expert physician should not be allowed to offer expert testimony against the nurse at issue based upon his observation of nurses in general. Id. The court even cited the following portion of TAANA’s argument: “Nor would a nurse be permitted to testify that, in her experience, when she calls a physician, he/she usually responds in a certain manner. Such testimony would be, essentially, expert testimony as to the standard of medical care.” Id. at *12. The court also agreed with TAANA that a physician who has not completed an accredited program in nursing can neither qualify for licensure as a registered nurse nor even sit for the exam. Does the inclusion of these portions of the TAANA brief hint at the court’s leanings on the issue of the Wingo exception? Or is it simply surplusage in the opinion?

The court also cited to legal articles on the issue, such as Proving Nursing Negligence from the May 1991 issue of Trial magazine. P. Sweeney, Proving Nursing Negligence, 27 Trial 34, 36 (May 1991). In that article, the author argued “[a] physician’s statement that he or she often observes nurses and therefore knows what they do may be inadequate.”

“The plaintiff reasoned that the Wingo exception should not be an exception at all, but rather the rule, therefore allowing her expert physician to offer standard of care opinions against the nurse at issue.”

The main rationale of the Second District’s decision in Wingo was there was no harm of a higher standard of care being imposed by the physician’s testimony relating to the nursing standard of care, because the standard of care at issue (what a nurse is required to communicate to a physician) was the same for physician and nurse. Wingo, 686 N.E.2d at 728-29. In so doing, the Second District recognized the communication at issue as standard of care testimony, rather than some hybrid communication. Therefore, the exception that the Wingo court created ignored the plain language of Dolan. The Illinois Supreme Court’s decision in Dolan simply does
not provide an exemption for the licensing requirement that is dependent on the character of the standard of care testimony being offered. Neither is the licensing requirement dependent on whether the standard of care at issue is different between the schools of medicine at issue.

While the validity of the Second District’s decision in Wingo has not been addressed by the Illinois Supreme Court, federal courts have not been as hesitant. In a non-published opinion, Swanson v. Keen, M.D., 2003 WL 21504722 (N.D. Ill.), the United States District Court for the Northern District of Illinois, used the Wingo decision as support for its holding that whether a physician is competent to testify as to the standard of care for nurses is dependent on the particular nursing practice in question. In Swanson, the Northern District found a physician competent to testify about the nurse’s failure to take an adequate medical history, because the history provided the physician with necessary information. Swanson 2003 WL 21504722 at *1. The court’s decision was devoid of any analysis of the Dolan licensing requirement.

**Conclusion**

While one could argue that this interpretation overreaches the Illinois Supreme Court’s decision in Sullivan, it is clear that the merit of the Wingo exception was at least debated by the panel. Justice Rarick’s dissent forcefully argued: “any factual distinctions are insignificant where the rationale behind the Wingo decision fully applies.” Sullivan, at *15. Justice Rarick reasoned that since the plaintiff’s expert physician’s particular expertise encompassed the proper standard of care for both physicians and nurses pertaining to patient fall protection, he would invoke the Wingo exception and allow the physician to testify on that issue.

So, while we wait for the Supreme Court to measure and weigh the Second District’s decision in Wingo, we must be content in knowing that none of the other justices on the panel joined Judge Rarick in his dissent. Perhaps this was just a case of judicial restraint, or perhaps this was the first shot across the bow of the Wingo exception. Either way, one cannot help but anticipate that the Illinois Supreme Court will address the issue sooner rather than later.

**Case Note**

**By:** Robert T. Park  
Snyder, Park & Nelson, P.C.  
Rock Island

**Testing the Limits of Spoliation**

While refusing to recognize spoliation of evidence as a new theory of tort liability, the Illinois Supreme Court in Boyd v. Travelers Ins. Co., 166 Ill. 2d 188, 193, 652 N.E.2d 267, 270 (1995), held that an action for negligent spoliation can be stated under existing negligence law. Plaintiffs in Illinois have sought to apply a spoliation theory of liability to a variety of items, from a propane heater in Boyd, to a hoist mechanism (Andersen v. Mack Trucks, Inc., 341 Ill. App. 3d 212, 793 N.E.2d 962, (2nd Dist. 2003)), a van tire (Williams v. General Motors Corp., 1996 WL 420273 (N.D. Ill. 1996)), and an underground mine vehicle (Stinnes Corp. v. Kerr-McGee Coal Corp., 309 Ill. App. 3d 707, 722 N.E.2d 1167, (5th Dist. 1999)).

In the medical arena, cases have involved destroyed X-rays, (Miller v. Gupta, 174 Ill. 3d 2d 120, 672 N.E.2d 1229 (1996)), a missing endoscope (Natale v. Gottlieb Memorial Hospital, 314 Ill. App. 3d 885, 733 N.E.2d 380 (1st Dist. 2000)), and even lost urine specimens (Bagnola v. SmithKline Beecham Clinical Laboratories, 333 Ill. App. 3d 711, 776 N.E.2d 730 (1st Dist. 2002)). Elsewhere in this issue is a comprehensive

(CaContinued on next page)

**About the Author**

Robert T. Park is a principal in the firm of Snyder, Park & Nelson, P.C. He received his B.A. and J.D. from the University of Illinois. For 30 years, he has practiced law in Rock Island, concentrating in defense of civil cases. Mr. Park is a member of DRI, ISBA and IDC, serving since 1993 as an IDC Director. He currently holds the position of Editor-In-Chief for the 2003-04 IDC Quarterly.
In the last *IDC Quarterly*, John Lynch discussed an insurer’s duty to see that its insured preserved a faulty brick sidewalk. *(Recent Decisions, Insurer Has a Duty to Preserve Evidence in Control of Its Insured, IDC Quarterly, vol. 14, no. 1, pages 45-46, discussing Dardeen v. Kuehling, 344 Ill. App. 3d 832, 801 N.E.2d 960 (5th Dist. 2003)). A Louisiana court has also recently held that the defendants who repaired an allegedly dangerous sidewalk on which the plaintiff fell were potentially liable for intentional spoliation of evidence. *Quinn v. RISO Investments, Inc.*, 2004 WL 585835 (La.App. Mar. 3, 2004).  

For the reasons expressed by Justice Kuehn in his dissent in *Dardeen*, some defense lawyers may have thought that that Fifth District Appellate Court decision had stretched the envelope of spoliation about as far as it could go. However, in a recent Iowa case, the plaintiff sought an even greater expansion of the concept. 

In *Smith v. Shagnasty’s Inc.*, __ N.W.2d __, 2004 WL 434160 (Iowa App. Mar. 10, 2004), a woman was visiting a Cedar Rapids bar when another female patron shoved her, called her an obscene name, and then struck her with a beer bottle, causing her to fall down. The woman sued the bar for her injuries on a dram shop theory of liability. Because of the plaintiff’s failure to prove such things as the sale of liquor to her attacker, the trial court granted the defendant’s motion for summary judgment. 

A major problem with proving her case was the plaintiff’s inability to identify the woman wielding the beer bottle. She therefore asserted a spoliation theory, contending that the failure of the bar to detain or otherwise identify the assailant constituted spoliation; that is, the intentional concealment or destruction of evidence needed to prove her dram shop claim. 

The Iowa Court of Appeals rejected this argument. It said that “spoliation” is the term used to describe the nonproduction, alteration or destruction of evidence, often evidence unfavorable to the party responsible for its absence or material change. Although the term is primarily used for obstructive conduct involving physical evidence, it may also be applied to “spiriting” a key witness out of the jurisdiction. (Citing Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 Yale Law Journal 226, 236 (1935)). 

The Iowa court noted that, while there was a permissible inference that the spoiled evidence would be unfavorable to the offending party, it was unable to find any case where the spoliation inference was substituted as substantive proof of a party’s claim. It therefore upheld the trial court’s grant of summary judgment for the defendant bar.

Perhaps a more daring court will someday expand the duty to preserve evidence to require the detention of witnesses. For now, plaintiffs will have to settle for enforcing the preservation of defective sidewalks.

**Endnotes**

1. The dictionary defines “spoliation” as “The intentional destruction, mutilation, alteration, or concealment of evidence, usually a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible.” Black’s Law Dictionary (7th Edition, 1999).

2. There appears to be some tension between the concept that there is “a strong public policy [that] favors encouraging improvements to enhance public safety,” *Herzog v. Lexington Township*, 167 Ill. 2d 288, 300, 657 N.E.2d 926, 932 (1995), and the idea that an owner should preserve a defective sidewalk in order to assist an injured party in proving the dangerous nature of the surface upon which he fell.

3. For those who visit Cedar Rapids, the former location of Shagnasty’s bar, according to the Cedar Rapids Gazette, Sep. 6, 2003, is now The Father’s House Vineyard Christian Fellowship (see http://www.crvineyard.org/GAZETTE.htm).
Technology Law

By: Michael C. Bruck*
Crisham & Kubes, Ltd.
Chicago

Understanding and Making the Most of Section 230 of the Communications Decency Act in Illinois

I. Introduction

The recent decision by the Illinois Court of Appeals Second District in Barrett v. Fonorow, 343 Ill. App. 3d 1184, 799 N.E.2d 916, 279 Ill. Dec. 113 (2d Dist. 2003), joins the overwhelming majority of jurisdictions that hold Section 230 of the Communications Decency Act of 1996 (“CDA”) preempts state defamation claims and basically grants a “license to defame,” so long as it is done on the Internet. Ironically, when the CDA was first enacted, it was widely criticized as a dangerous threat to free speech and free expression on the Internet. The U.S. Supreme Court largely agreed, and abrogated many of the more troubling aspects of the CDA (See, e.g., Reno v. ACLU, 521 U.S. 844 (1997)). Now, the remaining portions of the Act are widely criticized for protecting speech that clearly would be considered defamatory had it occurred in any nononline medium. These rulings not only make one question the veracity of any Internet report because of the broad immunities offered by the CDA, but they also provide defense counsel with an important tool to defend Internet-based defamation claims that, if abused by the public, may someday be lost.

II. Background

The CDA was first proposed in 1995 by former Senators James Exon (D-Neb.) and Slade Gorton (R-Wash.) to address what many at that time felt to be a troubling proliferation of sexually-explicit Internet content. The legislation was immediately controversial, with its opponents labeling it as vague, overbroad and contrary to basic First Amendment principles. Critics, such as the Electronic Frontier Foundation, likened it to “the online equivalent of making anyone who builds a street liable for the fact that you can go to the red light district on it.” (Alicia Mundy, Casting a Narrower Net, Adweek, March 20, 1995). In particular, critics feared that under the legislation’s wording, Internet service providers (ISPs), such as America Online (AOL) or EarthLink, could be held liable for simply enabling the transmission of materials deemed obscene under the CDA. In response to this concern, Congress included a “safe harbor” provision in the CDA to exempt ISPs from being held liable for providing the means by which otherwise prohibited communications were transmitted:

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.


Just as intended, Section 230(c)(1) has frequently (and successfully) been invoked as a shield from liability when persons aggrieved by online content have sought to sue the companies that enabled its transmission over the Internet. See, e.g., Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003); Zeran v America Online, 129 F.3d 327 (4th Cir. 1997); Patentwizard, Inc. v. Kinko’s, Inc., 163 F. Supp. 2d 1069 (D.S.D. 2001); Ben Ezra, Weinstein, & Co. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000).

It is hardly debatable that providers of server space, ISPs or providers of publicly accessible computer terminals (such as GTE, America Online or Kinko’s Copies, the defendants in the above cases) are entities clearly intended to be shielded by 47 U.S.C. § 230. As the commonly-accepted rationale goes, ISPs should be no more liable for allowing the transmission of prohibited matters over the Internet than phone companies.

(Continued on next page)

About the Author

Michael C. Bruck is a partner in the Chicago law firm of Crisham & Kubes, Ltd. He is a trial lawyer focusing on the defense of professionals in malpractice actions, commercial cases and intellectual property litigation. Mr. Bruck received his B.S. from Purdue University in 1984 and his J.D. from DePaul College of Law in 1988. He is a member of DRI, IDC, ISBA, CBA and the Illinois Society of Trial Lawyers.

* The author wishes to thank John R. Bowley of Crisham & Kubes, Ltd. for his capable assistance as co-author of this article.
Technology Law (Continued)
should be liable for allowing the transmission of actionable
conduct over long-distance lines. See, Lunney v. Prodigy
that, in enabling Internet communication, “an ISP, like a tele-
phone company, is merely a conduit.”). What is more surpris-
ing, however, and controversial, is how far the protections of
Section 230 have been held to extend. As discussed below,
these holdings are of critical importance to Illinois defense
counsel whose clients maintain any kind of a presence on the
Internet.

III. The Current Controversy

To appreciate the current controversy, consider the fol-
lowing example: Suppose Marsha, an attorney aggrieved by
her former law partner, Christopher, wrote a scathing letter
accusing him of incompetence, dishonesty and fraud, and
mailed it to the local legal newspaper. Suppose further the
accusations were false, and that Christopher, having gotten
wind that Marsha was planning on sending the letter, had sent
his own letter to the newspaper, which showed conclusively
that Marsha’s accusations were untrue. If the newspaper were
to publish Marsha’s letter, Christopher would have a very
solid case for defamation against the paper, since publication
of a false statement, when done with knowledge of its falsity
or in reckless disregard of its truth or falsity, will support a
cause of action for defamation, even in the face of a qualified
privilege. See, Davis v. John Crane, Inc., 261 Ill. App. 3d 419,
course, nothing is surprising about that scenario. However,
what if the newspaper, rather than running Marsha’s letter in
its letters-to-the-editor section, had instead simply published
it on their website? Would the newspaper still be liable to
Christopher for defamation? According to nearly every court
that has considered 47 U.S.C. § 230, the answer is an emphatic
“no.” The Second District’s recent decision in Barrett, 343
Ill. App. 3d 1184 (2d Dist. 2003), is solidly in agreement with
this view.

Barrett v. Fonorow

In Barrett v. Fonorow, the Second District affirmed the
dismissal of a defamation and false light claim brought by a
physician (Stephen Barrett), who alleged that the operator of
a website (Owen R. Fonorow) posted numerous articles dis-
paraging him. Dr. Barrett is a medical journalist and consumer
advocate who operates the website quackwatch.com, the
aim of which is to warn consumers of “unfounded” medical
claims, particularly those involving “alternative” medicine or
therapies. Fonorow is also a consumer advocate of sorts who
operates a website (internetwks.com) that, among other things,
warns consumers of physicians who are hostile to alternative
health theories. Not surprisingly, Barrett and Fonorow have
clashed online. Between January and May 2001, Fonorow
posted a series of articles authored by another alternative
health proponent (Patrick “Tim” Bolen) on internetwks.com,
the gist of which was that Barrett was a liar and a charlatan.
Accordingly, Barrett promptly filed suit against Fonorow,
alleging claims for defamation and false light, for posting
Bolen’s defamatory statements on his website. The trial court
dismissed Barrett’s cause under 735 ILCS 5/2-619(a), finding
that Barrett’s claims were barred in toto by 47 U.S.C. § 230.
Barrett appealed.

On appeal, the Second District Appellate Court (after
acknowledging that Section 230 preempts any contrary

“As such, anyone who maintains,
or simply uses, a website (or posts
to a newsgroup or participates
in a chat room) is afforded the
same protections under the Act
as an ISP.”
333 F.3d 1018, 1030 (9th Cir. 2003) (rejecting the contention that “only services that provide access to the Internet as a whole are covered by this definition” and that furthermore, “the language of Section 230(c)(1) confers immunity not just on ‘providers’ of such services, but also on ‘users’ of such services”). As such, anyone who maintains, or simply uses, a website (or posts to a newsgroup or participates in a chat room) is afforded the same protections under the Act as an ISP.

Barrett next argued that Section 230 did not apply to publication of statements that were known to be defamatory, as his complaint had alleged the statements posted by Fonorow were. The appellate court found that it did not even have to address that issue, since Section 230 provided that no “provider or user of an interactive computer service” – a class found to encompass maintainers of websites such as Fonorow – shall be treated as a “publisher or speaker” of information (so long as it was created by a third party). Because defamation and false light both include the element of publication, the court reasoned, Barrett was thus precluded, ab initio, from setting forth a cause of action for either tort. The court also rejected Barrett’s argument that the “term ‘publisher’ as used in Section 230(c)(1) was intended not as a reference to the ‘publication’ element of defamation and false light, but to the ‘publisher/distributor’ dichotomy in defamation law and to the differing standards of liability that attach to ‘publishers’ and ‘distributors.’” Barrett, 343 Ill. App. 3d at 1192. The appellate court described the well-recognized common law distinction that:

An entity that exercises some degree of editorial control over the dissemination of the defamatory material will be generally liable for its publication (i.e., publisher liability). A newspaper, for example, may be liable for defamation if a letter to the editor that it publishes contains false and defamatory statements. Second, an entity that distributes but does not exercise editorial control over defamatory material may only be liable if such entity knew or had reason to know of the defamation (i.e., distributor liability). News vendors, bookstores, and libraries generally qualify for this standard of liability.

Id. at 1192-93 (citing J. Friedman & F. Buono, Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act, 52 Fed. Comm. L.J. 647, 650-51 (2000)).

The appellate court declined to follow Barrett’s suggestions that “publisher” in Section 230 referred not to an element of a tort, but rather to the publisher/distributor dichotomy, and that Fonorow, as a “distributor,” was outside the purview of the statute. In doing so, the court noted that every state and federal court to address the issue in a published decision had held that “Congress intended Section 230 to prevent the element of ‘publication’ from being satisfied in a state tort cause of action.” Barrett, supra, at 1193.

Finally, the court addressed whether the statements disseminated by Fonorow had been “provided by another information content provider,” so as to bring Fonorow within the immunity-conferring language of Section 230. The court concluded that Fonorow qualified because he had simply repeated what a third party – Bolen – had given him. Because Barrett had not alleged that Fonorow had contributed any original content to the Bolen articles or even edited them, the court concluded that Fonorow was squarely within the protections of Section 230, and therefore affirmed the trial court’s dismissal.

IV. Application of Section 230 in Illinois after Barrett

The Illinois Supreme Court declined to hear Dr. Barrett’s appeal, Barrett v. Fonorow, 2004 Ill. LEXIS 292 (Jan. 28, 2004), and no other appellate court case has yet addressed 47 U.S.C. § 230, making the Second District’s decision in Barrett v. Fonorow the controlling authority on the subject in Illinois. From this decision, the following black-letter law in this developing field can now be distilled: One is absolutely shielded from defamation liability in Illinois state courts if 1) the allegedly defamatory material was disseminated only over the Internet; 2) the allegedly defamatory material was provided by a third party; and 3) no alterations, additions or edits were made to the material that was received from the third party. This immunity applies no matter what the content of the material, and even if the disseminator was on notice that the material was defamatory.

This very broad and very powerful proposition is worth noting by Illinois defense counsel. First, it provides for a strong bargaining position in any litigation in which a client is accused of defamatory conduct online. So long as the defamatory statements were made only online, and were not altered after being provided by a third party, it very likely will provide for an unassailable defense. Secondly, defense counsel involved with advising clients who are considering running statements made by others that are potentially defamatory should be advised of the option of distributing the materials only online and unaltered as received from a third party. However, it is worth noting that, for a statute whose interpretation in the state and federal courts has been almost universally consistent, Section 230 is the recipient of an unusual amount of scholarly criticism, as discussed below, and is susceptible to potential abuses that conceivably may

(Continued on next page)
Technology Law (Continued)
cause an Illinois court in the future to hold differently than the Second District did.

V. Criticism of Section 230, and Some Precautions for Illinois Defense Counsel

Around the same time the Second District was considering Barrett v. Fonorow, a California appellate court, in what may foreshadow future Illinois rulings on Section 230, reached an opposite result in an almost identical case involving Dr. Barrett. In that case, Barrett v. Rosenthal, 112 Cal. App. 4th 749, 5 Cal. Rptr. 3d 416 (1st Dist. 2003), modified on rehearing, Barrett v. Rosenthal, 114 Cal. App. 4th 1379, 9 Cal. Rptr. 3d 142 (1st Dist. 2004); as corrected, Barrett v. Rosenthal, 2004 Cal. App. LEXIS 139 (1st Dist. February 3, 2004), which was factually similar to the Illinois case, Barrett and another physician, Terry Polevoy, brought defamation claims against Rosenthal for allegedly posting defamatory remarks of alternative health advocate Patrick “Tim” Bolen (also the “third party” in the Illinois case) online. Rosenthal claimed she was immune from the claims by virtue of Section 230, just as Fonorow did in the Illinois case. However, the California appellate court reached a very different conclusion from the Illinois Court of Appeals, and held that Section 230 did not shield the defendant from liability.

The Rosenthal court, similar to the Second District, acknowledged that run-of-the-mill end-users of the Internet (i.e., chat-room participants, newsgroup posters, website maintainers, etc.) are within the protective ambit of Section 230, just as ISPs are. However, taking notice of the large body of scholarly criticism directed at Section 230, the California court declined to follow federal precedent and explicitly rejected the same case law the Illinois appellate court had relied on in finding that Section 230 operated to shield Fonorow from Barrett’s charges of defamation. Specifically, the Rosenthal court held that the term “publisher,” as used in Section 230, does refer to the publisher/distributor dichotomy, and therefore only publishers of online material fall within the protections of Section 230. Accordingly, given that Rosenthal could not be considered a publisher (because she did not create the allegedly defamatory material), and merely recited online remarks by another party (which Polevoy alleged she knew to be defamatory), she was considered by the court to be a distributor, and thus unable to avail herself of the protections Section 230’s explicit language gives to publishers. As such, the California court held, Rosenthal was potentially liable as a distributor for knowingly transmitting defamatory matter.

The California decision is troubling because it confers more protection on publishers (e.g., newspapers and TV stations) than it does on distributors (e.g., libraries and newsstands), while at common law distributors have traditionally been afforded more protection from defamation claims than publishers. Additionally, despite its close examination of the term “publisher” in the online context, and its accompanying contention that “[had Congress] intended Section 230 to immunize providers and users not merely from primary publisher liability but also from distributor liability it would have made this clear, as, for example, by adding the word ‘distributor’ [to the statute],” the California court wholly failed to consider the effect of the “or speaker” language that appears in conjunction with “publisher” in Section 230. Barrett, 112 Cal. App. 4th at 768.

The Rosenthal decision was only certified for partial publication, and has not, as of this writing, been cited by any other court. Every published federal and state decision interpreting Section 230 has held essentially as the Second District did. Furthermore, Illinois state court holdings on federal preemption make it very unlikely that an Illinois appellate court would disregard uniform and unbroken federal (including the Seventh Circuit: See, Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003)) precedent interpreting a federal statute that is explicitly worded to supersede contrary state law. See, Barrett, 343 Ill. App. 3d at 1194-96. Nevertheless, Section 230 has met with particularly sharp academic criticism nationwide (see, e.g., the numerous law review articles cited by the Rosenthal court, including Sewali K. Patel, Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go? 55 Vand. L. Rev. 647 (2002); Robert T. Langdon, The Communications Decency Act § 230: Make Sense? Or Nonsense? – A Private Person’s Inability to Recover if Defamed in Cyberspace, 73 St. John’s L. Rev. 829

“Accordingly, Illinois defense practitioners should be wary, lest their case be the one an appellate court picks to distinguish, or overturn, Barrett v. Fonorow.”
(1999); Annemarie Pantazis, Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability, 34 Wake Forest L. Rev. 531 (1999); and David Wiener, Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran? 39 Santa Clara L. Rev. 905 (1999)). As such, the Rosenthal decision may be a harbinger of decisions to come. Accordingly, Illinois defense practitioners should be wary, lest their case be the one an appellate court picks to distinguish, or overturn, Barrett v. Fonorow.

In particular, the Rosenthal court took notice of a hypothetical scenario posed by Barrett and Polevoy, which, under the prevailing interpretation of Section 230, would allow:

[A] ‘clever libeler’ [to] easily escape liability by having some other Internet user who is not subject to the jurisdiction of the Court, or who is anonymous, or who is judgment proof, publish libelous statements which another ‘Internet user’ is free to republish. In [Barrett and Polevoy’s] view, such an interpretation would convert an act designed to promote “decency” into a shield for “indecency.”

Barrett, 114 Cal. App. 4th at 1392.

Certainly, such a dodge is not what the drafters of Section 230 had in mind. And almost as certainly, it is probably only a matter of time before a defendant in Illinois is accused of employing Section 230 to accomplish just that. Such a flagrant abuse may well prompt an appellate court to someday at least distinguish the Second District’s opinion in Barrett, and thereby greatly dilute what is a currently an extremely powerful tool for defense counsel involved in defamation litigation. In the meantime, however, Illinois practitioners should take particular notice of the appellate court’s recent, and controlling, pronouncement on this subject in Barrett v. Fonorow, and use it wisely – while they still can.
Feature Article

LAW REFORM,

NOT TORT LAW REFORM

By: Thomas H. Fegan
Johnson & Bell, Ltd.
Chicago

It is interesting how long our legal system can allow a riddle to exist in its corpus without much effort to resolve it. The riddle is as follows: 1) An injured plaintiff is entitled to be compensated for all of his or her injuries by compensatory damages. 2) Punitive damage awards are not intended to compensate victims, but rather to punish the tortfeasor for his or her wanton conduct. 3) The distribution of a punitive damage award to the already-compensated plaintiff would be an undeserved windfall. 4) In the absence of a better alternative, the court might as well let the already-compensated plaintiff have it anyway.

This riddle has existed as long as punitive damages have been allowed in the United States. In Bass v. Chicago & N.W. Ry., 42 Wisc. 654, 672 (1877), Chief Justice Ryan stated:

It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished. [Emphasis added.]

More recent decisions have noted the exact same riddle. In Shepard Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612, 619 (1991), the Iowa Supreme Court wrote:

We have stated that punitive damages are not allowed as a matter of right and are discretionary. Berryhill v. Hatt, 428 N.W.2d 647, 656 (Iowa 1988). We have also indicated that punitive damages are not intended to be compensatory and that a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it. Berenger v. Frink, 314 N.W.2d 388, 391 (Iowa 1982).

This article argues that the compensated plaintiff should get none of the punitive damage award. It is time to resolve this riddle by giving the punitive damages to someone or something other than the undeserving plaintiff. The most deserving recipient is the state in which the judicial system awarded the damages.

Many states have adopted the theory of split recovery of punitive damages, wherein the plaintiff must share part of the punitive damages with the state.

Alaska Statutes § 09.17.020(j) (2004) provides for a 50-50 split after the subtraction of attorney’s fees and costs. Illinois provides at 735 ILCS 5/2-1207 (2003) that judges have discretion to decide how much of a punitive award should go to the State of Illinois Department of Human Services. Indiana Code § 34-51-3-6 (2004) stipulates that the state treasurer receives 75% of a plaintiff’s punitive award for deposit in the state’s violent crime victims’ compensation fund. Iowa Code § 668 A.1(2)(b) (2003) provides that the state take 75% of a plaintiff’s award. Missouri Revised Statutes § 537.675(3) (2004) orders there be a 50-50 split with the state after deducting attorney’s fees and expenses. Oregon Revised Statutes § 18.540(1)(b) (2001) provides that the state take 60% of a punitive damages award. Finally, Utah Code Annotated § 78-18-1 (3)(a) (2003) calls for a 50-50 split with the state of a punitive damages award in excess of $20,000, after fees and costs.

The American Bar Association also has proposed such a rule. The disposition of these funds by each state is discussed in Victor E. Schwartz, I’ll Take That: Legal and Policy Problems Raised by Statutes That Require Punitive Damages

About the Author

Thomas H. Fegan is a partner in the firm of Johnson & Bell, Ltd. and has concentrated in appellate practice for nearly his entire career. He received his J.D. from St. John’s University School of Law and is admitted to practice in the States of Illinois and New York, several Circuits of the United States Court of Appeals, and the Supreme Court of the United States. He is head of the Appellate Department in his firm and has handled hundreds of appeals in the Illinois reviewing courts and the U.S. Court of Appeal. Mr. Fegan is the author of The Illinois Appellate Practice Manual (West) and has written extensively on the subject of appellate practice in publications such as the Illinois Bar Journal, the Chicago Bar Record, the Appellate Law Journal, the IDC Quarterly and the Chicago Daily Law Bulletin. He is also a member of the Illinois Appellate Lawyers Association, the Illinois Bar Association, the Chicago Bar Association, and the IDC.
Split-recovery statutes also vary in the public purpose that they are designed to support. Three states—Alaska, Georgia, and Utah—deposit their share of punitive damages awards into a large pot known as the “general fund.” In these states, punitive damages awards are not earmarked for any particular purpose, but rather provide a new revenue source for the state treasury.

Several other states deposit their portion of punitive damages awards into a fund designated to further a particular social good. For example, Iowa deposits its bounty into a “Civil Reparations Trust Fund” administered by the state court administrator for indigent civil litigation programs or insurance assistance programs if the defendant’s conduct was not directed specifically at the plaintiff. Missouri places punitive damages awards receipts into a “Tort Victims’ Compensation Fund,” which provides compensation to individuals who have sustained personal injuries and are unable to collect the full amount of a judgment. Missouri further allocates twenty-six percent of the “Tort Victims’ Compensation Fund” to a “Legal Services for Low-Income People Fund” that is distributed among legal service organizations. Oregon provides for the allocation of award money to a “Criminal Injuries Compensation Account” which provides eligible crime victims and their survivors with medical and hospital expenses, counseling expenses, loss of earnings, rehabilitation, and funeral expenses. Indiana’s punitive damages allocation statute provides that an award of punitive damages is to be paid to the clerk of the court, and the clerk is to pay seventy-five percent of it to the state’s “Violent Crime Victims’ Compensation Fund” and twenty-five percent to the plaintiff. Illinois sends its allocation of punitive damages awards to the State Department of Human Services. In a case alleging a health insurance company’s bad faith denial of a claim related to the plaintiff’s cancer treatment, the Ohio Supreme Court ordered the distribution of two-thirds of the punitive damages award into a cancer research fund at a state institution.

These state split-recovery statutes were noted without criticism in a dissent by Justice Ginsburg in *BMW of North America v. Gore*, 517 U.S. 559 (1996).


**VI. Proposed Split-recovery Statute**

**Model Statute**

Section: Punitive Damages; split-recovery

(1)(a) In all civil actions resulting in an award of punitive damages, 50% of the amount of punitive damages awarded in excess of $20,000 shall be remitted to a special compensation fund designed to reimburse plaintiffs unable to collect against insolvent defendants.

(b) Calculation and payment of a claimant’s attorney fees, if payable from the judgment, are based solely on the portion of the judgment payable to the claimant under Section (1)(a) with respect to any punitive damage recovery.

(2)(a) At no time prior to entry of judgment shall the state or any public fund obtain an interest in the punitive damage claim, nor shall the state or any public fund control or influence any settlement negotiations between the parties.

(b) The fund designated in Section (1)(a) becomes a judgment creditor upon entry of a verdict awarding the plaintiff punitive damages.

(c) Any settlement agreement between the original parties to the action after the verdict must remit to the designated fund the share required in Section (1)(a). The portion of the damages treated as punitive in the new agreement will be determined by the proportion of the damages treated as punitive in the original verdict.

(3) If insolvency prevents the party awarded punitive damages from collecting the outstanding compensatory and punitive damages due to that party, the designated fund takes no interest in the award until satisfaction of these unpaid debts by the insolvent party.

(4) The jury shall not be informed or instructed of the provisions of this section.

The remainder of the article shows how such a statute would survive constitutional challenges.

The problem with these statutes is that they answer a logical question with an illogical answer. The question is why should an individual plaintiff be entitled to punitive damages at all. The premise of these statutes is that the plaintiff already has

(Continued on next page)
Law Reform, Not Tort Law Reform (Continued)
been completely compensated and, therefore, is not entitled
to receive the punitive damages awarded. It is no answer to say, “That is true, so we will take part of the punitive award away.” The answer should be, “That’s true, so we will give it to the state where the judicial system was burdened with the case and where the plaintiff chose to seek his or her recovery.”

The rationale for giving all of the punitive damages to the state and none to the plaintiff has been well expressed in E. Jeffrey Grube, Note: PUNITIVE DAMAGES: A MISPLACED REMEDY, 66 S. Cal. L. Rev. 839, 850-853 (1993):

B. WHY THE STATE, NOT CIVIL PLAINTIFFS, SHOULD BE AWARDED PUNITIVE DAMAGES

1. Plaintiffs Have No Right to Punitive Damages

Deterrence alone does not justify paying punitive damages to civil plaintiffs rather than to someone else — deterrence can be achieved regardless of the parties to whom punitive damages awards are payable. Although courts generally acknowledge that punitive damages “are not available as a matter of right to any plaintiff” and that the trier of fact has complete discretion as to whether it will award punitive damages to the plaintiff, two justifications are generally given for awarding punitive damages to plaintiffs anyway: (1) as an incentive to bring defendants to justice (the “private attorney general” rationale) and (2) as compensation for otherwise uncompensable losses (the “compensation” rationale). Both justifications, however, are flawed. The private attorney general rationale is one of expediency; it does not vest in plaintiffs any “right” to punitive damages. This Note proposes an alternative means to bring defendants to justice. And the compensation rationale is inappropriate; compensation should be achieved through compensatory damages alone. If some entity must be compensated for the malicious, aggravated, or outrageous conduct of the defendant, it should be society rather than the plaintiff.

a. The private attorney general rationale does not vest in plaintiffs any right to punitive damages: The private attorney general rationale suggests that the “[a]vailability of punitive damages may make it worthwhile for plaintiffs to sue defendants who should be sued but who, in the absence of punitive awards, would not be, because of the trifling nature of the actual damages suffered by the plaintiff.” These private attorneys general bring to justice those wrongdoers who would not otherwise be

prosecuted, and they relieve an already overburdened criminal justice system. Society pays punitive damages to plaintiffs as an incentive for them to perform this service.

Therefore, plaintiffs are paid punitive damages as a matter of expediency only — not because they have an inherent right to receive such payments. If society identifies a better “attorney general” or decides that paying plaintiffs to perform this service is too costly, then society would have no reason or obligation to continue paying punitive damages to plaintiffs.

b. The compensation rationale is inappropriate: “Compensation” has been defined as “[t]hat which is necessary to restore an injured party to his former position.” The compensation rationale for punitive damages is inappropriate because plaintiffs should be fully compensated for all damages, special and general, by compensatory damages alone. If plaintiffs are not fully compensated (and for a variety of reasons this may be the case) and it is thought that they should be, then the system of compensatory damages should be revised: Courts should not hide this recovery in the guise of punitive damages. “Punitive” damages are to punish, not to compensate. “By using punitive damages to increase compensation in cases where punitive damages are otherwise unnecessary, courts would be merely awarding two categories of compensatory damages. It seems preferable to expand the law of compensatory damages . . . .”

The article further demonstrates the practicality of the system and answers constitutional challenges.

Conclusion

It is plain that a change is needed, but it should not be labeled “tort reform.” That label forever will be associated with efforts by the defense bar to unduly reduce the alleged rights of the plaintiff. This article does not do so, and therefore it should simply be considered “law reform” because it does not lessen the duty of defendants to pay punitive damages. It merely directs where the punitive award should have gone from the beginning.
Recent Decisions

By: John P. Lynch, Jr.
Cremer, Kopon, Shaughnessy & Spina, LLC
Chicago

Illinois Supreme Court Rules Utility Owes Consumer a Duty to Warn of Dangerous Product Not in Its Control


Decedent, Janice Adams, lived in a house in Calumet City. On the evening of December 7, 1995, she arrived home, opened the door and stepped inside. The house exploded and was engulfed in flames, causing her death. Following an investigation, it was unanimously determined the explosion and fire was caused by the failure of a flexible brass gas connector that connected the kitchen range to the gas supply. The brand name of the connector was “Cobra.”

The plaintiff, one of decedent’s daughters, brought a wrongful death action in a two-count complaint. Count II named Northern Illinois Gas Company (NI-Gas) as a defendant. The plaintiff alleged that NI-Gas knew that Cobra brand natural gas appliance connectors were defective and prone to failure resulting in natural gas leaks and explosions. The plaintiff alleged that NI-Gas had a duty to warn its customers, including the decedent, about the existence of these defective products and the dangers of gas leaks, explosions and fires associated with them.

The Cobra Hose Company, which has been out of business since 1979, manufactured the connector. The connector is a corrugated flexible brass tube with threaded brass connectors at each end that connect a gas appliance to the hard pipe gas source. The threaded connectors were fastened to the ends of the corrugated brass tube by a process known as brazing. The compound used in the brazing process is composed of phosphorized brazing alloys containing a substantial amount of phosphorus and a high percentage of copper.

Natural gas, in its original state, is odorless. Consequently, NI-Gas is required by law to odorize natural gas with a sulfur component. When sulfur is added to natural gas, a chemical reaction begins to occur between the phosphorus brazing alloy and the sulfur. This chemical reaction causes the brazed joint to corrode and deteriorate and, over time, the deterioration will cause the brazed connector to fail.

In 1968, the American National Standards Institute (ANSI) revised its standards on gas connectors and banned phosphorus brazing. NI-Gas was aware of this and the danger presented by Cobra connectors. In 1979, the United States Consumer Products Safety Commission informed the American Gas Association (AGA) that Cobra connectors caused a number of fires in homes. NI-Gas is a member company of the AGA. In “Consumer News” notices that NI-Gas sent to its customers in the late 1970s and early 1980s, NI-Gas warned that old connectors could crack, creating an unsafe condition when the appliance is moved. It also warned that certain appliance connectors manufactured prior to 1968 may be unsafe.

NI-Gas was also aware that failed Cobra connectors were determined to have caused many explosions and fires within its service area, including Aurora, Evanston and Rockford. NI-Gas received a specific warning in the 1970’s in its Glenwood district office, the district that includes the decedent’s home, about brazed connectors causing fires. NI-Gas also instructed its service members on the potential danger of Cobra connectors. When a NI-Gas employee encountered a brazed connector, the employee was required to tag the connector and advise the customer that the connector needed to be replaced as soon as possible. The record reflected NI-Gas had been present in the decedent’s home to read the gas meter in the utility room and to check a gas leak related to the installation of a new clothes dryer. There was no evidence in the record that NI-Gas was specifically aware the decedent was using a Cobra connector.

(Continued on next page)
Recent Decisions (Continued)

NI-Gas moved for summary judgment contending it did not owe the decedent a duty to warn her the Cobra connector was potentially hazardous because the decedent owned the connector and not NI-Gas. The circuit court granted the motion and the plaintiff appealed. The appellate court initially affirmed the circuit court’s decision but then, in a modified opinion, reversed itself. The appellate court held as a matter of law a utility company that has actual knowledge of a dangerous condition associated with the use of its product has a responsibility to its customers to warn them of that danger. The Illinois Supreme Court then allowed NI-Gas’ petition for leave to appeal and affirmed the appellate court’s decision.

A gas company must exercise the requisite degree of care, which can range from “reasonable” to “high,” so that no injury occurs in the distribution of gas while it is under the company’s control. Such responsibility is limited to the time the gas is in the company’s own pipes. In the absence of notice of defects it is not incumbent upon a gas company to exercise reasonable care to ascertain whether or not service pipes under the control of the property owner or the consumer are fit for the furnishing of gas.

The common law rule of no duty of a gas company with respect to consumer’s pipes or fittings is premised on the gas company’s lack of knowledge or notice of a gas leak. Where it appears, however, a gas company has knowledge gas is escaping in a building occupied by one of its consumers, it has a duty to shut off the gas supply until the necessary repairs have been made, even though the defective pipe or apparatus does not belong to the company and is not in its charge or custody. The knowledge that would impose such a duty is not limited to actual knowledge, but may include constructive knowledge or notice. It is sufficient if the gas company received facts, which would have made the defects known to an ordinary prudent person. This duty is applicable not only to actual gas leaks, but also to defects.

There is no dispute NI-Gas had actual knowledge of the danger related to Cobra connectors. It was aware the sulfides in the gas corroded brazed connectors, ultimately causing the connectors to leak gas. The only real question was when the connector would fail. Based on its superior knowledge and the fact it helped to create the dangerous condition, the Illinois Supreme Court held that NI-Gas owed a common law duty of reasonable care with respect to the brazed connectors. Since the plaintiff during oral argument expressly stated the extent of NI-Gas’ duty of reasonable care should be to warn its customers of the dangers in question, the court limited its holding to the warning issue. It did not express a specific opinion regarding a duty to inspect, but the body of the opinion suggests the distinct possibility it may find such a duty in the right case. Finally, the court ruled the public utility tariff filed by NI-Gas with the Illinois Commerce Commission did not preclude the plaintiff’s cause of action.

First District Affirms Rangel Analysis


The plaintiff was an ironworker employed by F.K. Ketler Company. He fell from a steel beam and sustained injuries. He then filed suit against MCL Construction Corporation, the construction manager, and Shelco Steel Works, Inc., a subcontractor hired to fabricate and erect the steel for a multi-story condominium. Shelco entered into a sub-subcontract with Ketler to perform the actual steel erection work.

MCL did not perform any construction work. Rather, it hired qualified, union-licensed contractors who were in charge of how they performed their own work. MCL supervised only its own work, not the work of the subcontractors. MCL’s contract with the owner stated it had responsibility for and had control over “construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work . . . unless the Contract Documents give other specific instructions concerning these matters.” MCL was also responsible for initiating, maintaining and supervising all safety precautions and programs relative to the work.

According to the contract between MCL and Shelco, Shelco was responsible for providing materials, equipment and labor with proper supervision of the steel fabrication and erection. Shelco excluded responsibility for OSHA safety cables from the contract. Pursuant to its contract with Shelco, Ketler was responsible for furnishing the required field labor and facilities to unload and erect structural steel in accord with the plans and specifications. Ketler was also responsible for OSHA safety cables. All applicable OSHA requirements were part of the subcontract along with the American Institute of Steel Construction (AISC) Code of Standard Practice. According to the AISC Code, the fabricator was not responsible for erection safety if others erected the structure. Ketler provided a safety manual to MCL describing its fall protection procedures and stating its foreman had the greatest burden of responsibility for putting the safety rules into practice. The plaintiff, an ironworker with 22 years of experience, took all his directions from Ketler foremen.

MCL had a project manager on site on a daily basis. It also had a safety director who visited this site weekly. Through these individuals, MCL could make safety recommendations.
Second Quarter 2004

and impose fines, but they could not stop the work. MCL’s project manager ran progress and safety meetings on a regular basis on site. When he observed ironworkers walking on beams without tying off, he discussed this with a Ketler foreman. Shelco did not have a regular presence on site. Its project manager visited the jobsite for a couple of hours once a week. It relied on Ketler as the expert in steel erection and did not inspect Ketler’s work. Shelco’s project manager could not supervise the ironworkers or tell them how to do their job.

On the day of the accident, the plaintiff fell from a beam on the seventh floor of the structure to the fifth floor where decking was in place. The plaintiff had a safety line with him but was not tied off because he had to move freely as part of the job. The Ketler safety manual provided that those “working aloft on skeleton steel shall tie off their safety lines except when moving from one point to another.” Ketler had no tie off requirement of its own and simply followed the OSHA and union rules regarding ironworkers tying off at heights more than two floors or 25 feet above a deck. Because the plaintiff was working two floors and less than 25 feet above the fifth floor decking, there was neither a requirement nor a need for him to tie off. Ketler’s foreman supervised the plaintiff’s work and at no time consulted with anyone from MCL or Shelco regarding the operative details of that work.

MCL and Shelco filed motions for summary judgment arguing that they lacked a duty to the plaintiff as they did not retain sufficient control over Ketler’s work. Those motions were granted and the plaintiff appealed. The appellate court affirmed.

As a general rule, one who employs an independent contractor is not liable for the acts or omissions of the latter. The rationale for the general rule is that a principal generally does not supervise the details of an independent contractor’s work and thus, is not in a good position to prevent negligent performance. The essence of employment is that the employee submits to the employer’s right to monitor and direct the details of the work in exchange for wages. An independent contractor’s employees are compensated for the risks of their employment by a combination of wages, benefits and entitlement to workers’ compensation in the event of an accident. Because the principal pays for that compensation indirectly by the contract price, the principal is motivated to ensure safe working conditions to reduce contract costs and contingent liability if the contractor fails to carry workers’ compensation insurance and pay those benefits itself.

An exception to the general rule that a principal is not liable for the acts or omissions of an independent contractor, is set forth in Section 414 of the Restatement (Second) of Torts. Under this exception, one who entrusts work to an independent contractor, but retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by its failure to exercise his control with reasonable care. The demarcation between retained control and the lack thereof is not clear-cut. When a principal contractor entrusts a part of the work to subcontractors but superintends the entire job through a foreman, the principal contractor is subject to liability if he (1) fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, (2) knows or should know the work was being so done, and (3) had the opportunity to prevent it by exercising his retained power of control. However, the contractor is not liable where he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations, which need not necessarily be followed, or to prescribe alterations and deviations. There must be such a retention of right of supervision that the contractor is not entirely free to do the work in his own way.

Here, the court found that the plaintiff failed to raise a question of fact on whether MCL or Shelco the retained a right of control over Ketler or exercised sufficient supervision or operational control over Ketler to be held liable. The

(Continued on next page)
Recent Decisions (Continued)
court rejected the plaintiff’s argument that the defendant’s contractual relationship created an issue of retained control. The court found the contract between the owner and MCL established only that MCL reserved a general right to control the work. Although MCL was responsible for initiating and supervising its safety program, the court refused to equate those safety responsibilities with control over the means and methods of Ketler’s steel erection work since Ketler maintained contractual control over the supervision and safety of its ironworkers. In its discussion of the contracts, the court was critical of the Fourth District Appellate Court’s decision in Moss v. Rowe Construction Co., 344 Ill. App. 3d 772 (2003).

The court further found that the plaintiff failed to establish the defendants supervised Ketler’s work or maintained and extensive work-site presence. Shelco simply did not have a regular presence on the jobsite. Similarly, MCL’s safety director visited the site only twice a week, although its project manager was onsite on a daily basis. Although the Shelco and MCL representatives could raise safety concerns to Ketler’s foremen, they could not stop the work or instruct or supervise the ironworkers. Moreover, there was no evidence that the iron erection work was done in an unreasonably dangerous manner where the plaintiff was working on an interior bay and complying with the OSHA tie-off standard, the ironworker standards, MCL’s and Ketler’s safety manuals, and the instructions and supervision of Ketler’s foremen.

The court rejected the plaintiff’s assertion that the central issue was the defendants’ ability to affect worker safety. Instead, the court opined the central issue is retained control of the independent contractor’s work, whether contractual, supervisory, operational, or some mix thereof. The party who retains control is the logical party upon whom to impose a duty to ensure worker safety. Penalizing a general contractor’s efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work-site safety. A party who retains some control over the safety of the work has a duty to exercise that control with ordinary care. Nevertheless, the existence of a safety program, safety manual or safety director does not constitute retained control per se; the court must still conduct an analysis pursuant to Section 414. The court recognized, however, that if a defendant’s safety program sufficiently affected a contractor’s means and methods of doing its work, then that program could bring the defendant within the ambit of the retained control exception.

Second District Appellate Court Limits Fireman’s Rule to Negligence Claims Only

The defendants in this case were construction contractors. On April 29, 1999, they were working for Western Cable Communications installing underground television cable along a public utility easement granted to Western in Romeoville, Illinois. The defendants’ employees laid the cable underground through the use of a directional boring machine. During this work, a natural gas main was punctured. Northern Illinois Gas Company (“NICOR”) employees and members of the Lockport Fire Protection District were dispatched to the scene. The plaintiff, a member of the LFD, was in the vicinity of the leaking gas when it was ignited by an unknown source and was injured in the resulting explosion.

The plaintiff filed a complaint alleging negligence and willful and wanton misconduct on the part of the defendants. The plaintiff’s negligence claim alleged the defendants failed to determine the location of the underground gas mains where they were working, to properly expose the gas main by hand digging before boring into the ground, or to arrange with NICOR in advance to turn off the gas prior to digging. The willful and wanton claim set forth the same general facts but added the allegation that the defendants acted with actual knowledge that a gas main was located within the utility easement where the defendants were conducting their drilling activities. The trial court granted the defendants’ motion to dismiss, and dismissed the claims on the ground the fireman’s rule prohibited plaintiff’s cause of action. The plaintiff asserted on appeal, inter alia, that the defendants could not avail themselves of the fireman’s rule because the rule did not bar actions based on willful and wanton misconduct and the defendants are not considered owners or occupiers of Western’s utility easement.

The court noted that there was conflicting authority in Illinois as to whether the fireman’s rule bars a cause of action based on willful and wanton misconduct, and then traced the history of the rule from its adoption in Illinois in 1892 through the present. The current rule provides that while a landowner owes a duty of reasonable care to maintain his property so as to prevent injury occurring to a fireman from a cause independent of the fire, he is not liable for negligence in causing the fire itself. Accordingly, a firefighter can recover for injuries that result from an act unrelated to the specific reason he was summoned to the scene, but not from negligent acts that cause the emergency. This rule begs the question of whether a fireman can recover for willful and wanton misconduct that causes an emergency. The court pointed out that in 1975 the Third
the fireman’s rule. The court agreed that in order for someone
who does an act or carries on an activity upon land on behalf
of the possessor is subject to the same liability, and enjoys
the same freedom from liability, for physical harm caused
to others upon and outside of the land as though he were the
possessor of the land. Here, in accordance with Section 383,
the defendants were carrying on their drilling activity to lay
cable within the utility easement on behalf of Western, the
possessor of the land, and thus share the same freedom from
liability as that entity. Accordingly, the court concluded that
the defendants come within the scope of the protections of
the fireman’s rule.

The plaintiff also argued on appeal that the defendants’
status as contractors working on behalf of the landowner
precluded them from availing themselves of the protections
of the fireman’s rule. The court agreed that in order for someone
to be an occupier of land, he must occupy the land with the
intent to control it, but disagreed with the plaintiff’s conclu-
sion that the defendants did not fit within that description.
Under Section 383 of the Restatement (Second) of Torts, one
who does an act or carries on an activity upon land on behalf
of the possessor is subject to the same liability, and enjoys
the same freedom from liability, for physical harm caused
to others upon and outside of the land as though he were the
possessor of the land. Here, in accordance with Section 383,
the defendants were carrying on their drilling activity to lay
cable within the utility easement on behalf of Western, the
possessor of the land, and thus share the same freedom from
liability as that entity. Accordingly, the court concluded that
the defendants come within the scope of the protections of
the fireman’s rule.

Parent Entitled to Recover Reasonable
Value of Services Rendered to Child
Injured as Result of Defendant’s
Negligence, But Not Lost Wages

Worley v. Barger, 2004 WL 692673 (Ill. App. 5 Dist., March
31, 2004)

Kelli Worley is the mother and custodial parent of her minor
child, Kelly Barger. On June 28, 1999, Kelly Barger was a
passenger in an automobile operated by the defendant, Kara
Barger. The automobile left the road and overturned, resulting
in injuries to Kelly. A settlement was reached on behalf of
Kelly against the defendant. After the settlement, the plaintiff,
Kelli Worley, filed a complaint attempting to recover for lost
wages she claimed to have sustained in order to provide care
for Kelly as a direct result of the negligence of the defendant.
The defendant filed a motion to dismiss pursuant to Section
2-619 of the Code of Civil Procedure claiming the defendant
owed no duty to the plaintiff that would allow her to collect
the claimed lost wages. After a dismissal and the filing of an
amended pleading, the trial court entered an order finding
that the plaintiff’s amended complaint did not state a cause
of action. The plaintiff appealed.

Although the motion to dismiss was filed as a Section
2-619 motion, the court chose to analyze it as a motion based
on Section 2-615, since the motion challenged the legal suf-
ficiency of the complaint. At the outset, the court stated that
there was surprisingly little case law addressing the issue of
whether a parent has a right to recover the wages lost while
caring for a child who was injured as a result of a defendant’s
negligence. However, it noted it was well established that a
parent is allowed to recover the child’s loss of earnings and
medical and caretaking expenses during the child’s minority,
and cited the Comment to Illinois Pattern Jury Instruction
30.08, which states the loss of earnings and medical caretaking
expenses during the child’s minority are recoverable by the
parents in actions for damages arising out of an injury to an
unemancipated minor. The court also cited to 1897 and 1899
appellate opinions in support of its conclusion.

Section 703 of the Restatement (Second) of Torts provides
that one who is liable to a minor child for bodily harm is
subject to liability to the parent who is under a legal duty to
furnish medical treatment and for any expenses reasonably
incurred or likely to be incurred for the treatment during the
child’s minority. According to Comment g of the Restate-
ment, medical expenses may include the reasonable value of
services of a parent who misses work to care for the child.

(Continued on next page)
In Doe v. Montessori School of Lake Forest, 287 Ill. App. 3d 289 (2nd Dist. 1997), the appellate court determined that although parents do not have a primary cause of action against a defendant for injuries to their child, it was universally recognized that parents may maintain an action in their own right for any impairment of parental rights caused by the injuries, particularly for any pecuniary losses suffered as a result of the injuries. The court also cited to cases of other jurisdictions in support of its conclusion that a parent has his or her own cause of action for the reasonable value of such caretaking services. Since a minor plaintiff would be entitled to recover for such damages, there is no valid reason that a parent could not do so.

The court, however, rejected the plaintiff’s request for loss wages, finding that it would insert a level of unforeseeability that is not necessary in order for a plaintiff to receive a reasonable recovery for the care of the minor child.

Seventh Circuit Questions Validity of Northern District Local Rule On Removal

Rubel v. Pfizer, Inc, 361 F.3d. 1016 (7th Cir. 2004)

Janet Wrobel filed a state court action complaining that the defendants had improperly promoted a prescription drug for off-label uses and sought restitution of the amount she had paid for the drug, an injunction forbidding alleged improper promotion of the product, disgorgement of all profits made from product sales, punitive damages and national class certification. Neurontin was the medication involved. The complaint did not attempt to estimate the amount in controversy.

The defendants removed the case to federal court asserting diversity jurisdiction. The notice of removal asserted in conclusory fashion that the amount in controversy exceeded $75,000. The court noted that while it is certainly plausible that the amount in controversy exceeded $75,000, the defendants did not attempt to quantify the losses to which it would be exposed, and the case was remanded back to state court. In particular, the defendants failed to comply with the Northern District of Illinois’ local rule 81.2(a), which requires a notice of removal to include: (1) a statement by each of the defendants that it is his, her or its good faith belief that the amount in controversy exceeds $75,000 and (2) an acknowledgement (or a refusal to deny) from at least one plaintiff in the action that the amount in controversy exceeds $75,000. The local rule also states: Where the defendant or defendants do not include the statement required by paragraph (1) of this rule, or do not comply with one of the alternatives described in paragraph (2) of this rule, the action will be subject to remand to the state court for failure to establish a basis of federal jurisdiction.

The defendants appealed the district court’s remand. The Seventh Circuit dismissed the appeal, stating that 28 U.S.C. Section 1447(d) does not permit an appeal of a district court’s remand when it is based on a defect in the removal procedure or a lack of subject matter jurisdiction. However, the court did seem to call into question the validity of Local Rule 81.2 and suggested it should be considered by the Judicial Counsel of the Seventh Circuit. The court stated that the Northern District of Illinois did not comply with 28 U.S.C. Section 2071(d) by presenting the new rule to the Counsel after it was promulgated in 1997. It also failed to respond to the Circuit Executive’s request for further information on the rule, which was sought in May of 2000. Accordingly, the court stated that the validity of the rule has yet to be properly evaluated.

Also of note is the court’s statement that although the rule initially requires removing parties to submit both the defendants’ statement that the amount in controversy exceeds the jurisdictional amount and at least one plaintiff’s acknowledgement of that fact, the final sentence of the rule, set forth above, implies that either will suffice. Accordingly, even if no plaintiff concedes the stakes exceed $75,000 or refuses to accept a cap on recovery, a defendant can satisfy the rule by supplying a statement by each of the defendants that the amount in controversy exceeds the jurisdictional amount.
Professional Liability

By: Martin J. O’Hara
Quinlan & Carroll, Ltd.
Chicago

Protecting Attorneys Who Have Been Discharged by Their Clients From Legal Malpractice Actions

Attorneys know the attorney-client relationship is an at-will relationship where the client has the right to discharge an attorney at any time. While the attorney may seek to recover the value of the services provided to the client during the course of representation, the attorney cannot represent a client when the client no longer desires the attorney’s services. Because the attorney has no right to demand that he or she remain as counsel for the client, it is important that the discharged attorney not be liable for damages caused to the client as a result of the successor attorney’s conduct. A recent decision reaffirmed this important proposition and provides additional protection for attorneys discharged by their clients. Cedeno v. Gumbiner, 2004 Ill. App. LEXIS 228, 2004 WL 487730 (1st Dist. March 11, 2004).

In Cedeno, the plaintiff, Petra Cedeno, was injured on April 29, 1999, when she fell while exiting a Chicago Transit Authority (“CTA”) bus. Cedeno retained James Gumbiner in connection with the filing of a personal injury action. Gumbiner referred the matter to the law office of Steinberg, Polacek & Goodman (“Goodman”). On September 8, 1999, Goodman sent a notice of claim for personal injuries (“notice”) to the CTA. Sec. 41 of the Metropolitan Transit Authority Act (“MTAA”) requires that within six months of the accident, notice has to be given to the CTA providing various information about the accident and the person injured. 70 ILCS 3605/41. Sec. 41 additionally provides that where the CTA has notice of an accident or injury, it is required to furnish a copy of Section 41 to the CTA and the person injured. 70 ILCS 3605/41. Sec. 41 provides that the CTA must furnish a copy of Section 41 to the person injured if the CTA fails to provide notice of an accident or injury.

On January 13, 2000, Cedeno discharged Goodman and retained Patrick Cummings and the law offices of Ciardelli & Cummings (“Cummings”). On April 20, 2000, nine days before the statute of limitations expired, Cummings filed suit against the CTA. In her complaint, Cedeno asserted that the accident occurred on April 29, 1999. The CTA denied this assertion in its answer.

Thereafter, the CTA moved for summary judgment based on Cedeno’s failure to strictly comply with the provisions of Section 41. In particular, the CTA asserted that Cedeno’s notice contained the wrong accident date, and the date set forth in the notice differed from the date asserted in her complaint. Cedeno responded that the CTA was precluded from relying on Section 41 because it had failed to furnish her with a copy of Section 41. The trial court rejected Cedeno’s argument and granted summary judgment in favor of the CTA, finding that the CTA was not required to furnish a copy of Section 41 because the notice had contained the wrong accident date. Cedeno filed a notice of appeal from the trial court’s order. However, the appellate court dismissed Cedeno’s appeal for want of prosecution.

After the dismissal of the appeal, Cedeno filed a legal malpractice action against Gumbiner, Goodman and Cummings. Gumbiner and Goodman moved to dismiss Cedeno’s complaint, asserting that because the notice was sufficient to trigger the CTA’s duty to furnish Cedeno with a copy of Section 41, despite the incorrect accident date, the inclusion of the wrong date in the notice did not cause any damage to Cedeno. Gumbiner and Goodman asserted that the trial court in the underlying case had erred in granting summary judgment for the CTA. The trial court agreed, and dismissed Cedeno’s claims against Gumbiner and Goodman.

On appeal, Cedeno contended that Gumbiner and Goodman identified the date of the accident as April 30, 1999. The CTA did not furnish Cedeno with a copy of Section 41.

About the Author

Martin J. O’Hara is a partner with the Chicago firm of Quinlan & Carroll, Ltd. His practice is devoted to litigation including commercial cases and the defense of professionals in malpractice actions. Mr. O’Hara received his B.A. from Illinois State University and J.D. with honors from John Marshall Law School. He is a member of DRI, IDC, ISBA and CBA.
were negligent for providing defective notice of her accident to the CTA. Cedeno asserted the notice with an incorrect accident date was the equivalent of not providing any notice under Section 41. Cedeno additionally asserted that had the correct accident date been included in the notice, the CTA would not have had a basis for moving for summary judgment, and the trial court would not have had a basis for entering judgment in favor of the CTA. Gumbiner and Goodman responded that any injury caused to Cedeno resulted from Cummings’ failure to pursue the appeal from the entry of judgment in favor of the CTA, not the inclusion of the wrong date in the notice. Gumbiner and Goodman asserted the trial court erred in granting judgment in favor of the CTA, and that had an appeal been pursued Cedeno would have prevailed, thereby allowing her to prosecute her claim against the CTA.

The _Cedeno_ court began its analysis by recognizing that “where the conduct of a successor attorney constitutes the independent and superseding cause of plaintiff’s damages, the discharged attorney cannot be found to have committed legal malpractice.” 2004 Ill. App. LEXIS 228 at *9. In support of this proposition, the _Cedeno_ court cited to _Mitchell v. Schain, Firsel & Burney, Ltd.,_ 332 Ill. App. 3d 618, 773 N.E.2d 1192, 266 Ill. Dec. 122 (1st Dist. 2002), and _Land v. Greenwood, 133 Ill. App. 3d 537, 478 N.E.2d 1203, 88 Ill. Dec. 595 (4th Dist. 1985)_.

In _Mitchell_, the court held that the successor attorney’s failure to refile a suit within one year of the entry of the dismissal for want of prosecution constituted the independent and superseding cause of the plaintiff’s damages, thereby precluding a claim against the predecessor counsel for allowing the matter to be dismissed for want of prosecution. _Mitchell, 332 Ill. App. 3d at 621-622_. Similarly, in _Land_, the court held that successor counsel’s failure to voluntarily dismiss the action and refile it constituted the independent and superseding cause of the plaintiff’s damages, thereby precluding a claim against the predecessor counsel for failing to obtain timely service on the defendants. _Land, 133 Ill. App. 3d at 540_. The _Land_ court held that because the cause of action was viable at the time of the predecessor counsel’s discharge, “It therefore follows that plaintiff can prove no set of facts which connect defendant’s conduct with any damage sustained by plaintiff.” _Id. at 541_.

In light of these principles, the court considered Cedeno’s claim against Gumbiner and Goodman, predecessor counsel to Cummings. The court initially held that the inclusion of the incorrect accident date in the notice did not relieve the CTA of its requirement to furnish Cedeno with a copy of Section 41. The court held that the CTA’s obligation to furnish a copy of Section 41 was to be liberally construed, and that the notice including all of the information required under Section 41 was sufficient, despite the incorrect accident date. The CTA’s failure to furnish a copy of Section 41 thus precluded it from seeking a dismissal of Cedeno’s complaint.

After holding that the notice was sufficient, the _Cedeno_ court further held that Gumbiner and Goodman could not be liable to Cedeno. Although recognizing that the CTA would not have moved for summary judgment, and the trial court would not have granted summary judgment in the absence of the error in the notice, the court found these facts insufficient to create liability on the part of Gumbiner and Goodman. In so holding the _Cedeno_ court stated:

Where her claim remained actionable after defendants’ discharge, and the circuit court’s misapplication of the law served as an intervening cause, it cannot be said that plaintiff’s damages proximately resulted from defendants’ Notice.

2004 Ill. App. LEXIS 228 at *16.

This holding by the _Cedeno_ court is most important. Although _Mitchell_ and _Land_ have become well-settled law, their application in _Cedeno_ furthers a discharged attorney’s protection. _Cedeno_ allows discharged attorneys to make arguments in their malpractice suits that they could not make in the underlying action as a result of being discharged. In other words, discharged attorneys are not bound by the result obtained by successor counsel, but rather can assert that had the matter been handled appropriately, the result would have been different. Thus, _Cedeno_ provides a discharged attorney the ability to rely on _Mitchell_ and _Land_ to argue that the cause of action was viable at the time of discharge, even when the court in the underlying action determined otherwise.

Accordingly, the primary focus in defending legal malpractice actions against attorneys discharged during the course of the underlying litigation must be on whether the action was viable at the time of the attorney’s discharge, regardless of the actual outcome of the underlying action. This focus allows the court in the legal malpractice case to determine whether the predecessor counsel’s conduct _caused_ the damages asserted by the client. As causation arguably is the most critical element of a legal malpractice action, attorneys who defend legal malpractice actions should familiarize themselves with the analysis and holding in _Cedeno_.

---

IDC Quarterly
Feature Article

DEVELOPMENTS IN PRODUCT LIABILITY LAW

The Harm of Hindsight Analysis in Design Defect Cases

The Foolproof Product Redux

By: David B. Mueller
Cassidy & Mueller
Peoria

The Tort Reform Amendments of 1993 contained a substantial number of substantive and procedural provisions which redefined and moderated product liability law. The legal doctrine was a substantial number of substantive and procedural provisions which redefined and moderated product liability law. The legal doctrine was designed to control the determination of whether a product is unreasonably dangerous, or in the parlance of negligence, poses an “unreasonable risk of harm.” The following discussion is directed at that threshold inquiry.

Historically, there are two types of product liability cases which proceed on alternative but complimentary theories. Products are defective either by manufacture or design. Strict liability and negligence claims can be and are brought in either instance.

Background

The touchstone of any legal duty is “anticipation.” Anticipation is an objective concept which is measured by reasonable foreseeability. Thus, a condition, whether found on real estate or in a product, is actionable because the party charged had reason to anticipate that it might cause harm. Thus, the same anticipatory standards apply to all dangerous condition cases to which the following inquiries apply:

Is the peril open and obvious?
Are there warnings or would warnings have made a difference?
Did the plaintiff have actual knowledge of the condition?
Did the person responsible for the condition have reason to anticipate that the plaintiff would act in derogation of his senses and intellect?

The pregnant consideration is whether foresight, measured objectively, as opposed to hindsight born of the event, should control the determination of whether a product is unreasonably dangerous, or in the parlance of negligence, poses an “unreasonable risk of harm.” The following discussion is directed at that threshold inquiry.

As the following analysis demonstrates, those opinions consider product cases from the alternative perspectives of strict liability and negligence. Despite the application of disparate theories, the First District holds that a product may be considered unreasonably dangerous not because it is likely to cause injury but because it could have been made safer. The Fourth District applies the more traditional analysis in recognizing that a product is not actionable, either by design or manufacture, where its potential for harm is patent. Spanning the conceptual divide is the Supreme Court decision in Sollami v. Eaton, 201 Ill. 2d 1 (2002), which applies an objective standard vis à vis the mechanism of injury in determining whether a product is “unreasonably dangerous.”

(Continued on next page)

About the Author

David B. Mueller is a partner in the Peoria firm of Cassidy & Mueller. His practice is concentrated in the area of products liability, construction injury litigation, and insurance coverage. He received his undergraduate degree from the University of Oklahoma and graduated from the University of Michigan Law School in 1966. He is a past co-chair of the Supreme Court Committee to revise the rules of discovery, 1983-1993 and presently serves as an advisory member of the Discovery Rules Committee of the Illinois Judicial Conference. He was member of the Illinois Supreme Court Committee on jury instructions in civil cases and participated in drafting the products liability portions of the Tort Reform Act. He is the author of a number of articles regarding procedural and substantive aspects of civil litigation. He was defense counsel in Prewein v. Caterpillar Tractor Co., 108 Ill. 2d 141 (1985), on the issue of comparative fault under the Structural Work Act.
The advantage of “strict liability” is twofold. First, it focuses upon the condition of the product without regard to fault in its design, manufacture or sale. Second, at least prior to the Tort Reform Amendments of 1986, contributory negligence was not a defense to a strict liability action. On the other hand, negligence requires proof that the defendant failed to act with ordinary care in designing, manufacturing or selling the product. Both depend upon the circumstances which existed when the product was under the defendant’s control. Woodill v. Parke Davis, 79 Ill. 2d 26, 33-36 (1980), and Pitts v. Basile, 35 Ill. 2d 49, 54 (1966).

Strict liability in Illinois had its genesis in Suvada v. The so-called “consumer expectation test” remained the standard for judging whether a product was “unreasonably dangerous” in Illinois until 1980. In Palmer v. Avco Distributing Corp., 82 Ill. 2d 211 (1981), the Supreme Court, while recognizing the consumer expectation rule, added the concept of risk/benefit in design defect cases.

In Palmer the court stated that the “unreasonable danger of [a] fertilizer spreader” could be proved in two ways. The first is by the customary consumer expectation method. However, it added as a second “… introducing evidence that the Avco spreader could have been designed to prevent a foreseeable harm without hindering its function or increasing its price . . .”

As to the latter, the court cited with approval Kerns v. Engelke, 76 Ill. 2d 154, 161-666 (1979), in which it held that in proving a design defect the plaintiff must show the existence of a feasible alternative. Thus, the Kerns opinion adopts the following instruction:

There is no duty upon the manufacturer of the [product] to manufacture the product with a different design, if the different design is not feasible. Feasibility includes not only the elements of economy, effectiveness and practicality, but also technological possibilities under the state of the manufacturing art at the time the product was produced. (Kerns at 164).

The risk/benefit approach to design defects had little impact until the Supreme Court again considered it in Lamkin v. Towner, 138 Ill. 2d 510, 529 (1990). There the court applied both the consumer expectation and risk/benefit analyses to the claim that ordinary window screens were “unreasonably dangerous” because they were not “child-proof.” The court held as a matter of law that the purpose of window screens is to admit light and air, a use which is commonly understood by the general public. Moreover, it specifically found that the plaintiffs had failed to prove how the “window screens’ design could have been altered to create a safer screen . . . or any evidence of the form or feasibility of the alternative screen design.”

The holding in Lamkin is significant for what follows in that the opinion clearly submerges the concept of “risk/benefit” to common sense, i.e. falling through a lightweight screen, when the court holds:

. . . A non-defective product that presents a danger that the average consumer would recognize does not give rise to strict liability. See, Hunt, 74 Ill. 2d 203 (Lamkin at 528).
Developments in Product Liability Law (Continued)

... Virtually any manufactured product can cause or be a proximate cause of injury if put to the certain uses or misuses (Hunt, 74 Ill. 2d at 211), but strict liability applies only when the product is “dangerous to an extent beyond that which would be contemplated by the ordinary [person]... with the ordinary knowledge common to the community as to its characteristics.” Palmer, 82 Ill. 2d at 216, quoting Restatement (Second) of Torts, Section 402A, comment i (1965); see also Hunt, 74 Ill. 2d at 211-12. (Lamkin at 529-30).

Nonetheless, the risk/benefit concept remained viable, reaching its critical mass in Hansen v. Baxter Health Care Corp., 198 Ill. 2d 420 (2002). There the court discussed the risk/benefit standard (also known as the Risk/Utility Test) in the context of friction-fit and Luer-lock IV line connectors. The latter was a marketed alternative to the former which failed. Thus, the court was able to readily apply the risk/benefit theory to the product, despite common knowledge in the medical profession that friction-fit connectors were more likely to disconnect than those with the Luer-lock.

Hansen is therefore significant for its recognition that the consumer expectation and risk/benefit concepts are alternative means of proving a defective design. In other words, the harm which resulted may be within the consumer’s reasonable expectation but nonetheless the product may be actionable because a safer design was feasible.

In discussing the risk/benefit alternative, the Hansen court specifically adopts the following language from Lamkin v. Towner, at 529:

A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: ... (2) by introducing evidence that the product’s design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs. (Italics supplied).

In applying the Risk/Utility Test in Hansen the court specifically reaffirmed its reasoning in Kerns v. Engelke, 76 Ill. 2d 154, 162-63 (1979), that a design defect may be proved “... by presenting evidence of an alternative design that would have prevented the injury and was feasible in terms of cost, practicality and technological possibility.”

The preceding reliance of the Supreme Court upon the alternative design and feasibility requirement of Kerns v. Engelke is significant in understanding what has happened to some design defect cases after Hansen v. Baxter Health Care Corp. First, it is important to note the italicized language in the quotation from Lamkin v. Towner, above. Arguably, under the risk/benefit standard all a plaintiff would have to show is that the design of a product “proximately caused his injury.” Upon that showing the burden of going forward with the evidence would shift to the designer to “prove that on balance the benefits of the challenged design outweigh the risk inherent in such designs.”

“The interrelationship between ‘objective foreseeability’ and the concept of an ‘unreasonably dangerous’ condition served the structure of product liability law well over the years.”

As the plaintiff’s burden is limited to proximate cause, the pregnant question is that of what must be shown? From Hansen it would appear that, at a minimum, the plaintiff would have to satisfy Kerns v. Engelke by proving the existence of an alternative design which was “feasible.” However, that logical requisite has been recently eroded to the point where it appears that a plaintiff may be able to prove a strict liability claim, based upon a hypothetical defect, by simply showing that he was injured by the product. Wortel v. Somerset Industries, Inc., 331 Ill. App. 3d 895 (1st Dist. 2002).

An even greater rent in the fabric of common law duty principles is found in Blue v. Environmental Engineering, Inc., 345 Ill. App. 3d 455 (1st Dist. 2004), where identical risk/benefit concepts are engrafted upon negligence claims without regard to either the knowledge of the designer/manufacturer at the time the product leaves its control or the definition of “negligence” which embodies an “unreasonable risk of harm.”

Admittedly, the doctrine of strict liability in tort represents social engineering by the judiciary. To encourage the design,
manufacture and sale of safer products the courts perceived
the need to focus liability upon a product’s condition, as op-
posed to the conduct which created it. Even so, the definitional
requirement of Section 402A involved a defective condition
which rendered a product “unreasonably dangerous to the user
or consumer.” Comment i defined “Unreasonably dangerous”
as “. . . dangerous to an extent beyond that which would be
contemplated by the ordinary consumer who purchases it,
with the ordinary knowledge common to the community as
to its characteristics.”

This was in line with the common understanding that a
product would not be “unreasonably dangerous” where its
potential for harm was open, apparent and self-evident; or,
alternatively, where the product was accompanied by warn-
ings regarding its harmful characteristics. Fanning v. LeMay,
38 Ill. 2d 209 (1968), and Winnett v. Winnett, 57 Ill. 2d 7, 12
(1974), in which the court, viewing the question from the
manufacturer’s perspective stated:

Foreseeability means that which it is objectively rea-
sonable to expect, not merely what might conceivably
occur.

Thus, the Winnett opinion further recites:

. . . While in retrospect it can be asserted that the manu-
facturer of the forage wagon should have foreseen that
the unfortunate event in this case might conceivably
occur, we do not believe its occurrence was objectively
reasonable to expect. It cannot, in our judgment, fairly
be said that a manufacturer should reasonably foresee
that a four-year old child will be permitted to approach
an operating farm forage wagon or that the child will
be permitted to place her fingers in or on the holes of
its moving screen. (Winnett at 13).

The interrelationship between “objective foreseeability”
and the concept of an “unreasonably dangerous” condition
served the structure of product liability law well over the
years. (See, Lamkin v. Towner, supra). Obviously, the same
reasoning would and did insulate a product supplier from
exposure to negligence claims. Mealey v. Pittman, 202 Ill.
App. 3d 771, 778-79 (3rd Dist. 1990), and Pitts v. Basile, 35
Ill. 2d 49, 51-52 (1966).

Even where the risk/benefit analysis was employed, the
courts recognized a common sense exception for open and
obvious perils in so-called “simple” products. Scohy v. Vulcan-
Hart Corp., 211 Ill. App. 3d 106, 110-12 (4th Dist. 1991), and
Lamkin v. Towner, supra. Where those elements are present
only the “consumer-user contemplation test” applies. (Scoby
at 112).

Wortel and Blue

Unfortunately, the principles of common sense which
have thus far prioritized rationality to recovery are under
attack. Experience in the evaluation and defense of product
liability cases fosters the ineluctable conclusion that there is
no product-related injury which, by hindsight, could not have
been prevented by altering the condition of the instrumentality.

Thus, it is common for plaintiffs to “start with the
problem and work to the answer” in formulating theories. It is equally
common that they are able to find experts who are willing to
either assist in the initial process or place their stamp of ap-
proval on the conceptual result. Given those realities, we can
anticipate an ever-expanding number of design defect cases in
which the plaintiff will be able to show that he was injured as
a result of his exposure to the product and thereafter sit back
while the burden of going forward with the evidence shifts to
the manufacturer to prove that the product’s benefits or utility
exceeded the risk.

Nowhere is that extraordinary potential for exposure more
likely than in instances where the risk of injury was so open
and obvious or known to the plaintiff that the claim could not
proceed under the consumer expectation standard. Wortel v.
Somerset Industries, Inc., supra, and Blue v. Environmental
Engineering, Inc., supra, are prime examples of what is and
may yet be in product liability cases based respectively upon
strict liability in tort and negligence.

In Wortel the plaintiff stuck her hand in a pizza dough roll-
ing machine where it was caught and crushed in the rollers.
The manufacturer obtained summary judgment on the premise
that the “risk” was open and obvious. The parties fought over
the consumer expectation test at the trial level but neither
made a record regarding the alternative risk/utility test.

While the First District reversed as to the former on grounds
that the plaintiff might not reasonably anticipate that her hand
would follow the dough into the rollers, it elected to discuss
and apply the latter with a vengeance. In doing so it held that
the risk/benefit standard is an alternative means of proving
that a product was defective. Consequently, the open and ap-
parent nature of the peril, as well as the existence of warnings
regarding its potential, while factors to be considered, are not
dispositive.

The Wortel opinion then goes on to hold that the plaintiff
need only prove a causal relationship between the product
and his injury before the burden of proving that “. . . the benefit
of the challenged design outweighs the risk of danger inher-
ent in such designs” shifts to the defendant. Moreover, the
Developments in Product Liability Law (Continued)

First District further holds that the plaintiff’s burden does not include proof of “alternative design feasibility.”

Therefore, according to Wortel, a plaintiff’s work is done by simply: (1) showing that the injury was caused by a product and (2) alleging in some hypothetical form that the injury could have been prevented by an alternative design.

In order to make certain that defendants, even in the most egregious design cases, will not be able to obtain summary judgment the court: (1) finds that “…the defendant must show that, by balancing the product’s risk against its utility, the lack of a defect is plain and undisputable, (italics supplied), and (2) the “simple nature” exception applies only to products wholly lacking in complexity.

In other words, the fact of placing one’s hand in proximity to the crushing mechanism of a dough rolling machine accounts for little where the machine itself is a complex mechanism.

The procedural and substantive harm which was worked by Wortel v. Somerset Industries, supra, was then compounded by another division of the same court in Blue v. Environmental Engineering, Inc. There the identical strict liability concepts were carried over to a plaintiff’s negligence claim against the manufacturer of a commercial trash compactor.

The plaintiff’s strict liability claim was barred by the statute of repose, leaving only a negligence cause of action. His leg was crushed when, without stopping the machine, Blue stuck it into the moving compactor to “push refuse down.” As might be expected, he failed to extricate his extremity in a timely fashion and the leg was pulled into the compactor where it was “thereafter hit by the ram approximately three times, resulting in a broken pelvis, leg and foot.”

Obviously, Blue understood the potential for injury in sticking his leg into an operating compactor. Thus, the peril was not only “open and obvious” but understood by the claimant. Nonetheless, he received a verdict in excess of $1,000,000, which was reduced to $762,000 by his contributory negligence. However, judgment was entered for the defendant based upon the jury’s affirmative response to the following special interrogatory:

Was the risk of injury by sticking a foot over or through a gate into a moving compactor open and obvious?

In reversing, the appellate court held that “open and obvious” is not a defense in a negligence case where the plaintiff claims a “defective design.” Instead, as with strict liability, a claimant is entitled to proceed on the basis of “risk-utility” which supersedes the “open and obvious doctrine” and further requires proof by the defendant that “…the benefits of the challenged design outweighed the risk of danger inherent in the design.”

As discussed above, negligence principles are wedded by definition to the concept of an “unreasonable risk of harm.” (Restatement (Second) Torts § 282). As in premises liability cases, that risk focuses upon what was “objectively foreseeable” to the defendant. However, in contradistinction to real property claims, foreseeability in a product case is tested by what was known or reasonably should have been known at the time the product was designed and manufactured. Modelski v. Navistar, 302 Ill. App. 3d 879, 888 (1st Dist. 1999), and Woodill v. Parke Davis, 79 Ill. 2d 26, 33-36 (1980).

Bates

The author submits that the court in Wortel misapprehended the fundamental basis for liability in any strict liability case and that misapprehension was compounded in Blue. A product is actionable because of its propensity to injure. It is unreasonably dangerous because it is likely to cause harm. The triggering propensity or likelihood derives from the nature of the risk which it poses, viewed in the context of the mechanism of injury, and not from the complexity of its operation or the variety of its moving parts which are unrelated to that injury. Scoby v. Vulcan-Hart Corp., 211 Ill. App. 3d 106, 111-12 (4th Dist. 1991).

Thus, the risk/benefit analysis should not be employed where the peril presented is so straightforward and fundamental that to require its correction would be equivalent to making the product foolproof. That traditional and common sense approach was again recognized and applied by the Fourth District in Bates v. Richland Sales Corp., 346 Ill. App. 3d 223 (4th Dist. 2004). There the decedent was using a front-end loader that his employer had modified by removing

(Continued on next page)
a factory installed roll bar. As Bates was backing the loader in the process of moving steel pipes into a building, his back came into contact with "low hanging internal structures of the building" and he was crushed against the steering wheel.

It was undisputed that: "If the roll bar had been in place, the diagonal wall-rods would have pressed against the vertical columns of the roll bar, behind the driver's seat, instead of against Bates' back, and he would have escaped injury."

The plaintiff pursued both negligence and strict liability claims, arguing that the loader was defective because the roll bar was easily removed and the supplier should have anticipated that fact and the risk of injury which it presented. The negligence claims were substantively dismissed on the premise that the hazard of being crushed against fixed internal structures of a building while backing equipment "was an open and obvious danger."

That rationale was affirmed on appeal with the court specifically holding in the context of the plaintiff's failure to warn claims:

To be precise, however, the dangerous propensity was not the lack of a roll bar but, rather, the loader's propensity, by the force of its engine, to crush the human anatomy. Objectively, an ordinary person would know that without some sturdy intervening structure between the driver and the horsepower of that engine, the engine will prevail. Richland had no duty to warn consumers that if they drove the loader toward a guy wire hanging at chest level, without any protective structure between them and the guy wire, they could get hurt. Everyone already knew that, and the warning would have been pointless. See, Smith v. American Motors Sales Corp., 215 Ill. App. 3d 951, 957, 576 N.E.2d 146, 151 (1991). Essentially, plaintiff asks us to impose on Richland a duty to warn against an obvious danger. We decline to do so. See, Sollami, 201 Ill. 2d at 7, 772 N.E.2d at 219. (Bates at 233).

The plaintiff did not attempt to engraft the "risk benefit" test upon her negligence claims. However, that approach was discussed and rejected in the context of strict liability. Bates contended that strict liability theories were alternatively viable under the: (1) consumer expectation approach and (2) "danger-utility test." Both were urged on a design defect basis in light of the availability of roll bars which were difficult to detach or which had a "lower clearance." The Fourth District had little difficulty in rejecting each in the process of affirming summary judgment for the supplier.

The consumer expectation theory was refused because the hazard of contacting a fixed object while backing an end loader was patent. In that regard the court held:

Plaintiff contends it was reasonably foreseeable that Grand Prairie would remove the roll bar and, therefore, using the loader without the roll bar was "use[] in [a] *** reasonably foreseeable manner." See, Lamkin, 138 Ill. 2d at 529, 563 N.E.2d at 457. To defeat the motion for summary judgment, however, plaintiff had to come forward with evidence that this reasonably foreseeable manner of using the loader (i.e., without the roll bar) made the loader perform less safely than the ordinary consumer would have expected. See, Lamkin, 138 Ill. 2d at 529, 563 N.E.2d at 457. An ordinary consumer would have fully expected that if this powerful machine, without a roll bar, pushed his or her body against an unyielding object, injury would result. (Bates at 35).

Of greater significance in the setting of Wortel and Blue is the Fourth District's limitation of the "risk-benefit" or "danger-utility" test to cases which involve concealed hazards and complex products. In Bates the plaintiff contended that the danger was hidden "... because an ordinary person thinks of a roll bar as protection against a rollover, as the name implies, and not as protection against backing into a low-hanging object."

As the court pointed out, the fallacy in that argument was its predicate supposition that the peril involved was rolling over. To the contrary, "... the dangerous propensity was not the lack of a roll bar but, rather, the loader's propensity, by the force of its engine, to crush the human anatomy. Objectively, an ordinary person would know that without some sturdy intervening structure between the driver and the horsepower of that engine, the engine will prevail." Bates at 233.

That common sense consideration led the court to emphasize, as it did in Scoby, supra, that application of the "danger-utility" test requires both: (1) a concealed "propensity" to injure and (2) a complex mechanism which produces the injury. As conversely expressed:

In Scoby, 211 Ill. App. 3d at 109, 569 N.E.2d at 1149, we called the first method, in the passage quoted above, the "consumer-user contemplation test" and the second method the "danger-utility test." We held that if the dangerous propensity of the product was obvious and the "mechanism involved" was simple, a court should apply the consumer-user contemplation test rather than the danger-utility test. Scoby, 211 Ill. App. 3d at 112, 569 N.E.2d at 1151.
Developments in Product Liability Law (Continued)

The dangerous power of the loader was obvious, and the mechanism of the injury was simple. Therefore, we will apply the consumer-user contemplation test rather than the danger-utility test. See, Scoby, 211 Ill. App. 3d at 112, 569 N.E.2d at 1151. (Bates at 234).

Bates v. Richland Sales Corp. squarely contradicts the reasoning in Wortel and Blue. In doing so it rejects the menu approach in patent danger cases by recognizing the “danger-utility test” is objectively subsumed by the consumer’s expectations where common sense predicts an avoidable injury.

Lamkin and Sollami

Consideration of the Supreme Court’s most recent decisions in the patent harm area supports the reasoning in Scoby and Bates, as opposed to that of Wortel and Blue. Lamkin v. Towner, supra, involved the peril of gravity when relying upon a mesh screen for restraint. However, the screens were not unreasonably dangerous because even the most primitive exercise of reason dictates that screens are not to be relied upon for that purpose. While the risk/benefit alternative received lip service, the controlling analysis was common sense.

That same approach dictated the outcome in Sollami v. Eaton, 201 Ill. 2d 7-14 (2002). It is significant to note that while Sollami is the Supreme Court’s most recent pronouncement on the subject, and deals squarely with the “open and obvious issue,” its product liability implications are not mentioned in Blue, and the author submits would have been controlling in Wortel, which was decided by a majority two weeks before.

In Sollami the plaintiff was injured while “rocket jumping” on a trampoline which was manufactured by the defendant, Icon Health & Fitness Co., d/b/a Jumpking. Completing a rocket jump requires three or four persons to jump simultaneously on the perimeter of a trampoline mat, while one person jumps to the center and is thereby propelled higher than the other jumpers.

The product liability count of the complaint against Jumpking alleged that the trampoline contained a number of manufacturing or design defects which rendered it “not reasonably safe for its intended use.” Specifically:

. . . It was alleged that Jumpking (1) permitted the trampoline and could not be removed, and (4) failed to adequately warn persons, including [the plaintiff and the owner], that the trampoline would be used only under the direct supervision of a qualified instructor recommended by the United States Gymnastics Federation.

Jumpking brought a Motion for Summary Judgment on grounds that the danger of jumping on a trampoline is “open and obvious.” The motion was allowed by the trial court but the judgment was reversed on appeal. The Fourth District found that the “thrust capacity” of the trampoline was not obvious and the risks it presents might therefore not be “. . . appreciated or understood by foreseeable purchasers and users.”

The Supreme Court accepted the case, and in so doing made a definitive analysis of the “open and obvious danger rule” as

“Thus, a product is not unreasonably dangerous where the peril is known to the user, either by application of his senses or information conveyed through a warning.”

it applies in product liability cases. In that analysis the court recognized that the doctrine is simply the reverse side of the “duty to warn.” Both focus on obviating the potential danger of a product through user awareness.

Thus, a product is not unreasonably dangerous where the peril is known to the user, either by application of his senses or information conveyed through a warning. In these respects the court held:

To recover in a product liability action, a plaintiff must plead and prove that the injury resulted from a condition of the product, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the manufacturer’s control. Haudrich v.
Howmedica, Inc., 169 Ill. 2d 525, 540 (1996); Korando v. Uniroyal Goodrich Tire Co., 159 Ill. 2d 335, 343 (1994). A product may be found unreasonably dangerous by virtue of a physical flaw, a design defect, or a failure of the manufacturer to warn of the danger or instruct on the proper use of the product as to which the average consumer would not be aware. Renfro v. Allied Industrial Equipment Corp., 155 Ill. App. 3d 140, 155 (1987). A manufacturer has a duty to warn where the product possesses dangerous propensities and there is unequal knowledge with respect to the risk of harm, and the manufacturer, possessed of such knowledge, knows or should know that harm may occur absent a warning. Goldman v. Walco Tool & Engineering Co., 243 Ill. App. 3d 981, 992 (1993); Smith v. American Motors Sales Corp., 215 Ill. App. 3d 951, 957 (1991).

No duty to warn exists where the danger is apparent or open and obvious.

Of equal, if not paramount significance is the court’s recognition that the determination of whether the condition of a product is actionable, i.e. whether it is unreasonably dangerous in the sense of a likelihood to injure, requires an “objective analysis.” In that context the issue of a duty to warn becomes one of law. As the court holds:

It is settled law that a manufacturer has no duty to warn of “those inherent propensities of a product which are obvious to all who come in contact with the product.” McColgan v. Environmental Control Systems, Inc., 212 Ill. App. 3d 696, 700 (1991). We see no reason to depart from this rule.

No duty to warn arises when the risk of harm is apparent to the foreseeable user, regardless of any superior knowledge on the part of the manufacturer.

Sollami stands for the proposition that the sine qua non for liability in a products case is an unreasonably dangerous product. Whether the product falls within that category is determined objectively by the likelihood that it will injure an “ordinary person.” Absent that likelihood it makes no difference that additional guards or components might have made it safer. As otherwise expressed, where the mechanism of the injury which took place was a result of a patent condition of a product, the risk/benefit analysis has no role as a priori the product is not unreasonably dangerous.

Applying Sollami, Scoby and Bates to Wortel and Blue requires affirmance of the trial court in the latter cases and rejection of the risk/benefit reasoning of the appellate court. In Blue the hazard of placing one’s leg beneath the moving ram of a compactor is so self-evident as to defy contradiction. The same is true in Wortel where the plaintiff interjected her hand into the path of the rollers of a “dough rolling machine.” In both instances the mechanism of injury was simple and the hazard of disregarding it was apparent.

Conclusion

The preceding analysis is lengthy because of the necessity of describing the current theoretical conflict in its evolutionary context. However, the conflict is real and the problem which it poses is potentially acute. Focus should remain upon the nature of the product, including any warnings, in the context of the injury which occurred. Those primary elements should control the analysis as opposed to the myopic menu approach which limits consideration to the theory which is chosen by the plaintiff.

In that regard, the trial and appellate courts must be shown that: (1) the risk/benefit doctrine applies only in strict liability cases and (2) that alternative should be considered only where the mechanism of injury is sufficiently complex to merit predesign consideration by the defendant. Moreover, in the latter instance the burden of going forward with the evidence should not shift unless and until the plaintiff has proved the feasibility of an alternative design under the standard of Kerns v. Engelke, supra.

Endnotes

1 See Sections 343(a) and comment i to Section 402(A) of the Restatement (Second) of Torts.
2 The Tort Reform Amendments of 1986 engrafted the common denominator of “fault” as a comparative defense in negligence and “product liability” cases. The jury is still “out” on the issue of whether the statute contemplates contributory negligence as a defense to strict liability. Freislinger v. Emro Propane Co., 99 F.3d 1412 (7 Cir. 1996).
3 Sollami is discussed in Blue in the context of premises liability and Section 343A of the Restatement (Second) of Torts.
4 319 Ill. App. 3d at 619.
Your Customer List is Your Property and Must Be Protected

Generally, when we contemplate protecting our property, we consider the tangible items in our possession such as vehicles, homes, office furnishings and real estate. But many other types of property may have as much, or even more value to us because such items may not be readily replaceable. Take for instance a small business which specializes in customer service. The most valuable asset of that business is invariably the list of customers or potential customers with whom the business has day-to-day dealings. If you lose the customers on that list due to “poaching” by a competitor, the small business is doomed. Happily, customer lists and other “less tangible” property interests are protected under the law if a business uses reasonable efforts to ensure the confidentiality of these items. This article will discuss the applicable law which protects these assets and the manner in which a business may avail itself of the law in the event that one of their competitors attempts to misappropriate a trade secret.

The Illinois Trade Secret Act

Specifically, Illinois has enacted a statute commonly known as the Illinois Trade Secrets Act (ITSA), 760 ILCS 1065/2, which affords, in part, individuals and businesses with the legal protection necessary to safeguard a party’s interest in its customer list techniques, processes and data. Under the Act, protection is triggered when a ‘trade secret’ is misappropriated by another and used in the other’s business. Delta Medical Systems v. Mid-America, Inc., 331 Ill. App. 3d 777 (1st Dist. 2002). The Act relies on the use of the specific term “trade secret,” which is defined as follows:

A “trade secret” is:

Information, including, but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or supplier, that:

1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and,

2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality. 765 ILCS 1065/2.

At first blush, it appears that a “trade secret” can be anything involved in one’s business, if one considers only the first paragraph of the definition. But, a true trade secret is protected only when the elements of subparagraphs 1) and 2) are also met. Keeping information privileged in many circumstances is not terribly difficult. But, what occurs if the disclosure of the names of the people on the customer list is required in order to complete a business deal, to abide by a contractual obligation or in furtherance of simply transacting business? How do we protect our trade secrets when business itself requires the disclosure of the “confidential” information?

What Happens When There is a Voluntary Disclosure of Trade Secrets?

There are several cases on point which discuss the issue of the voluntary disclosure of a trade secret. In C & F Packing Co., Inc. v. IBP, Inc., 224 F. 3d 1296 (U.S. App. 2000), the court held that when a party disclosed its trade secrets for a particular purpose, and the parties had signed a confidentiality agreement, that the party’s disclosure of its trade secrets to a limited number of outsiders for a particular purpose under the protection of a confidentiality agreement does not destroy the secret nature of the information constituting the trade secret

(Continued on next page)
nor the protection afforded that information under the Illinois Trade Secret Act.

Likewise, in Rockwell Graphic Systems, Inc. v. DEV Industries, Inc., 925 F.2d 174 (7th Cir. 1991), the court held that a party’s disclosure of a trade secret to a limited number of outsiders for a particular purpose did not forfeit trade secret protection. Furthermore, the court stated that “on the contrary, such disclosure, which is often necessary to the efficient exploitation of a trade secret, imposes a duty of confidentiality on the part of the person to whom the disclosure is made.” Id. Confidentiality is supreme. Businesses must ensure that whoever has access to the trade secret is aware that the information is confidential, is to be used for a limited, specific purpose and is not to be disseminated. A confidentiality agreement is one way to demonstrate the intent of the parties sharing the trade secret. (As an aside, the fact that a confidentiality agreement is oral rather than written does not in any way reduce the protection available under the ITSA. Learning Curve Toys, infra, 342 F.3d at 724).

According to the ITSA, confidential trade secret information only has to be the “subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.” 765 ILCS 1065/2. Fortunately for small business owners in Illinois, the parameters in which the Illinois courts have recognized that the expectations for ensuring secrecy are different for small companies than for large companies.

See Jackson v. Hammer, 274 Ill. App. 3d 59, 653 N.E.2d 809, 815 (4th Dist. 1995). (“The determination of what steps are reasonably necessary to protect information is different for a large company than for a small one.”); see also Elmer Miller, Inc. v. Landis, 253 Ill. App. 3d 129, 625 N.E.2d 338, 342 (4th Dist. 1993); Learning Curve Toys, Inc. v. PlayWood Toys, Inc., 342 F.3d 714, 724 (U.S. App., 2003). The disparity in the treatment of large and small businesses is largely based upon the differences in the technology between small businesses and large, as well as, the need for small businesses to work together to create a product which may mandate the “voluntary” disclosure set forth above. Thus, the courts adhere to the premise that the disclosure of a trade secret to a “limited number of outsiders for a particular purpose” does not result in the forfeiture of trade secret protection.

C & F Packing Co., Inc. v. IBP, Inc. and Pizza Hut, Inc., 1998 WL 1147139 at 5 (N.D. Ill. 1998). On the contrary, such disclosure, which is often necessary to the efficient exploitation of a trade secret, imposes a duty of confidentiality on the part of the person to whom the disclosure is made. Rockwell Graphic Systems, Inc. v. DEV Industries, Inc., 925 F.2d 174, 177 (7th Cir. 1991). Thus, the court seems to hold that a presumed duty arises out of the use of the trade secret even when the parties fail to enter into an express confidentiality agreement.

Who Determines Whether an item Falls Within the Purview of Trade Secret

The recent case of Learning Curve Toys, Inc. v. PlayWood Toys, Inc., 342 F. 3d 714 (7th Cir. 2003), is instructive on the issue of some of the difficulties in determining the extent to which a “business secret” rises to the level of a propriety business trade secret. The court in Learning Curve Toys, Inc., held that a trade secret is one of the most difficult concepts in the law to define and, therefore, the question of whether certain information constitutes a trade secret is best resolved by the finder of fact after a full presentation of evidence from each side. Likewise, in Pedrick v. The Peoria and Eastern Railroad Co., 37 Ill. 2d 494 (1967), the court held that “judges should carefully preserve the right of the parties to have a substantial factual dispute resolved by the jury for it is here that assessment of the credibility of the witnesses may well prove decisive.” The Pedrick court further held that a directed verdict or judgment n.o.v. can only be entered when all of the evidence, when viewed in a light most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict could ever stand. Id.

These cases exemplify the difficulty of deciding issues related to trade secrets prior to a full trial on the merits. Motions for summary judgment, while not unheard of, are not the customary manner in which trade secret issues are resolved. Thus, use of the Trade Secret Act may not be a “quick” resolution of a matter. It is the trier of fact who determines whether the claimed secret is “sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use.” 765 ILCS 1065/2.

Conclusion

While businesses large and small ensure against loss, theft or damage of their tangible property, the intangible secrets which are often the core of any business may be a secondary priority. Fortunately, laws exist which are designed to protect these business assets and, when adopted, can successfully protect a business, the injuries caused by theft of items such as client lists, data compilations and methodology. By taking the precautions noted within the statutes, especially the standard use of confidentiality agreements, small businesses (as well as large) can protect their most valuable assets yet still perform and work together so that each can prosper.
Commercial Law

By: James K. Borcia
Tressler, Soderstrom, Maloney & Priess
Chicago

Seventh Circuit Adopts Abuse of Discretion Standard For Indispensability

Extra Equipamentos E Exportacao Ltd. v. Case Corporation, 361 F.3d 359 (7th Cir. 2004)

The Seventh Circuit recently adopted the abuse of discretion standard for review of a determination of party indispensability. Extra Equipamentos E Exportacao Ltd. v. Case Corp., 361 F.3d 359 (7th Cir. 2004), involved a fraud case brought by a distributor against a manufacturer. Case Corporation’s wholly owned subsidiary, Case Brasil, entered into a distribution contract with Extra whereby Extra would serve as Case Brasil’s distributor in Brazil. In 1999, Extra sued Case Brasil in Brazil claiming that corrupt employees of Case Brasil had caused Case Brasil to overcharge Extra. A settlement agreement was negotiated and signed in Illinois by representatives of Extra and Case Corporation (hereafter “Case”), and the Brazilian case was dismissed. Extra subsequently filed an action in Brazil against Case Brasil relating to the settlement agreement. Extra also filed an action in federal court in Illinois against Case Brasil’s parent company, Case, alleging that Case had defrauded Extra by inducing it to enter into the settlement agreement when Case knew that the subsidiary would not be bound by the agreement and would not perform its obligations under the agreement.

Case subsequently moved to dismiss the Illinois suit on the ground that, since Case Brasil was a party to the settlement agreement, Case Brasil was an indispensable party to the suit. Id. Had Extra sued Case Brasil as well as Case in Illinois there would be no federal jurisdiction because diversity jurisdiction does not extend to a suit in which there is a U.S. citizen only on one side of the suit and foreign parties on both sides of the suit. The district court dismissed the case based upon indispensability. Extra then appealed to the Seventh Circuit.

The Seventh Circuit outlined that the first step in determining indispensability is to decide whether the person could be joined, the person would have to be joined. One of the circumstances in which a party would have to be joined would be if the party claims an interest relating to the subject of the action and is so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest. Fed. R. Civ. P. 19(a)(2). The second step is to determine if the person cannot be joined “whether in equity and good conscience the action should proceed among the parties before [the court] or should be dismissed.” The Seventh Circuit noted that the two most important factors are: 1) to what extent a judgment rendered in the absence of the person might be prejudicial, and 2) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

The Seventh Circuit court found that the second factor supported the district court’s ruling, in that Extra could still bring the claims against Case Brasil in state court or in a Brazilian court. However, the Seventh Circuit reversed the dismissal on the grounds that the district court failed to adequately analyze the first factor. The Seventh Circuit first noted that just because Case Brasil would be a witness would not be relevant. An indispensable witness is not an indispensable party. Conspicuously missing from the district court’s analysis was the effect a judgment in Extra’s favor in Illinois would have on the Brazilian litigation between Extra and Case Brasil.

The Seventh Circuit also observed that the parties failed to give the district court guidance on the issue of collateral estoppel and its application to a ruling in Illinois. The court noted that the district judge failed to consider the fact that Case Brasil was a wholly owned subsidiary of Case. The court found difficulties in establishing how a 100% subsidiary could ever be an indispensable party to a case where the subsidiary’s parent company was a party. The court remanded the case to

(Continued on next page)
the district court to determine the weight a Brazilian court would give a United States judgment in Extra’s favor, and the significance of Case’s sole ownership of the Case Brasil. While the Seventh Circuit pronounced that abuse of discretion is the standard of review for district court rulings on whether a missing party is indispensable, the parties must also give the district court a sufficient basis to make that determination. This ruling aligns with the general concept that federal courts jealously guard their jurisdiction.

### Legislative Update

By: Gregory C. Ray
Craig & Craig
Mattoon

The spring session of the Illinois General Assembly has been dominated by budget issues, which has been typical of the sessions during Governor Blagojevich’s tenure. Other than in the medical malpractice area, there has been only modest activity in the tort and employment law fields, and as of the time of the preparation of this article, nothing significant passed through both Houses or was on its way to the Governor. The newspapers have generated significant coverage of the medical malpractice crisis, which allegedly has prompted the movement of physicians out of the state. Counties such as Madison and St. Clair have been especially hard hit, although Jackson County (Carbondale) has also been the subject of considerable debate. It seems likely in this election year that at least some apparent effort will be made to address the crisis, but caps are reportedly not open for discussion, according to the leadership.

Governor Blagojevich has proposed many changes in the structure of state government, including a merger of the Illinois Department of Human Rights with the Illinois Human Rights Commission. The House Committee on State Government Administration held hearings, with testimony, in late March concerning the operation of the Department and the

---

**About the Author**

Gregory C. Ray is a partner with firm of Craig & Craig in its Mattoon office. He is a 1976 graduate of the University of Illinois Law School. He is an officer of IDC and a member of the IDC and Illinois Appellate Lawyers Association. He has served as a member of the Board of Directors of IDC and is a past Editor-in-Chief of the IDC Quarterly. His primary practice areas include trials of tort matters, appellate practice, and workers’ compensation defense. Mr. Ray is the immediate Past President of the IDC.
Legislative Report (Continued)

Commission. These hearings were apparently for the purpose of establishing a procedural roadblock to any action by the Governor without the approval of the legislature. No bill was pending at the time of the hearings which would change any of the statutes concerning the Department or the Commission. The testimony heard by the committee primarily addressed delays in proceedings before the Department and the Commission. Some of the witnesses at the hearings proposed that a complainant be permitted to secure a “right to sue” letter from the Department at a relatively early stage, similar to the process used in the Equal Employment Opportunity Commission at the federal level.

House Bill 6846 (Hoffman, D-Collinsville) amends the respondent in discovery statute (735 ILCS 5/2-402) to permit the trial court discretion, for good cause, to extend the six-month period of discovery within which a respondent in discovery must be converted to a defendant. Good cause may include but is not limited to a failure or refusal on the part of a respondent to comply with timely filed discovery. The Bill carries an immediate effective date and would apply to all pending actions. At the time of the preparation of this article, the Bill was set for a third reading in the House. This Bill may be a negotiating tool with the plaintiffs’ bar, to be used in connection with the passage of some type of legislation addressing the medical malpractice crisis.

Amicus Committee Report

By: Kathleen A. Johnson
Kralovec & Marquard, Chartered
Chicago

The past six months have been busy ones for the Amicus Committee. Several cases have had amicus briefs written by IDC volunteers, John Piegori of the Amicus Committee testified before the Supreme Court Rules Committee and requests have been made for additional briefs.

Specifically, the Illinois Supreme Court granted leave for Jay Judge to file an Amicus brief on behalf of the IDC as well as other entities that have a vital interest in the Tort Immunity Act. This case, Paszkowski v. Metropolitan Water & Reclamation District, specifically addresses whether a one-year statute of limitation or the construction statute of limitation of four years applies to an injured construction worker.

We are awaiting the decision of the Illinois Supreme Court as to whether it will accept the petition for leave to appeal in the case of Arthur v. Catour. This case, coming from the Third District, addresses whether a personal injury plaintiff is entitled to recover the total amount billed by the medical care provider or the lesser amount paid by the health insurer. The IDC had filed an Amicus brief for the defense at the appellate court level and will be doing so at the Supreme Court level should it be accepted.

We will keep you advised as to the developments in these cases.

John Piegori of Sanchez and Daniels, testified at the hearings of the Illinois Supreme Court Rules Committee regarding proposed changes to Supreme Court Rule 305, which addresses the stay of judgment pending appeal. Mr. Piegori, on behalf of the IDC, testified as to the need for change. This issue was the result of a Fifth District case involving a judgment entered in favor of the plaintiffs in the amount of $10.1 billion. The defendant, Philip Morris Company, represented to the trial and appellate courts that, if forced to comply with the requirements of Supreme Court Rule 305, it would be forced into bankruptcy. (See Price v. Philip Morris, Inc.)

The hearings at the Supreme Court Rules Committee were public and testimony was accepted from all interested parties.

(Continued on next page)
Mr. Piegori, again on behalf of the IDC, voiced our concern that none of our clients should be forced to file bankruptcy in order to file an appeal. He voiced our position that the trial judge should have discretion in this matter and that we were in support of both petitions that recommended this rule be changed.

Many thanks to Mr. Piegori for his appearance in front of this committee and for representing the IDC’s position.

Areas that are “hot” topics, such as the construction liabilities under Section 414 of the Restatement (Second) of Torts, IPI instructions, spoliation cases and product liability issues, have all been presented to this committee in the past year. While we cannot file a brief on every case, we appreciate those attorneys who take the time to contact us about these cases. We encourage your participation in this process as the overall defense position of the IDC should continue to be presented at both the appellate and Supreme Court levels. We need your input to alert us to cases that are on appeal or heading to the Illinois Supreme Court.

Again, many thanks to the authors of the IDC Amicus briefs. Their commitment to expressing the defense position is to be applauded. Jay Judge on the Tort Immunity issue and Anne Oldenburg on the medical expense amount that can be claimed by a plaintiff, are to be commended for their time and good efforts. Throughout the year, other members of the IDC also volunteered to write Amicus briefs that were not accepted by the various courts. While we were not successful in all cases, our volunteers still gave their best efforts . . . all without pay. Our thanks to all of them.

If you are interested in submitting a case for review by the Amicus committee, please contact any of the following people.

The 2003-2004 Amicus Committee Members are:

First District:
Mr. John J. Piegori
Sanchez & Daniels
333 W. Wacker Drive, Suite 500
Chicago, Illinois 60606
(312) 641-1555

Second District:
Mr. James DeAno
Norton Mancini Argentati Weiler & DeAno
109 N. Hale Street
Wheaton, Illinois 60187
(630) 668-9440

Third District:
Karen L. Kendall
Heyl Royster Voelker & Allen
124 SW Adams Street
Bank One Building, Suite 600
Peoria, Illinois 61602
(309) 676-0400

Fourth District:
Mr. Robert W. Neirynck
Costigan & Wollrab, P.C.
308 E. Washington Street, P.O. Box 3127
Bloomington, Illinois 61701
(309) 828-4310

Fifth District:
Mr. Stephen C. Mudge
Reed Armstrong Gorman Coffey Thompson
Gilbert & Mudge
101 North Main Street, P.O. Box 368
Edwardsville, Illinois 62025-0368

— Kathleen Johnson
(312) 346-6027
Kathleen.Johnson@KralovecLaw.com
Alternative Dispute Resolution

By:  John L. Morel
  John L. Morel, P.C.
  Bloomington

The sky is not falling! Our civil justice system isn’t collapsing! Alternate dispute resolution (ADR), also called mediation, has arrived with a significant impact on our system of justice. It is an effective tool for resolving disputes in a timely manner, and will become even more important in the future. A good, experienced trial lawyer should consider mediation as another major weapon in his or her arsenal. It can and will assist a client in attaining a faster and less costly resolution to litigation. The hard-nosed litigator must, however, wear a different hat than usual during mediation. Trial lawyers must learn that mediation is the antithesis of the adversarial litigation system. Mediation is about compromise.

When is ADR appropriate? Disagreements over rights generally do not lend themselves to mediation. For instance, a property title dispute must be settled in a clear, unambiguous way. There is no gray area to split the “right” to that property between parties. Disputes where one party alleges denial of his or her constitutional or statutory rights generally cannot be mediated either. Another example would be the custody of a child in a matrimonial matter. None of these examples can be negotiated because they must be based on evidence. Areas where there is no clear right or wrong, such as the amount of damages in a personal injury case or the value of certain assets or property, tend to work best with mediation. Mediation involves working out a compromise with which both parties can live.

Even when a case does not settle, the mediation procedure provides both sides with a fairer view and comprehension of the opposing party’s position. It can, and usually does, reveal critical information that otherwise could come as an unpleasant and harmful surprise at trial. A defense attorney must have a well thought-out plan before embarking on the mediation process. Start by deciding what type of person would make the best mediator given the personalities of the parties and the nature of the dispute. Develop a written mediation agreement if the mediator doesn’t provide one. Prepare a mediation brief or outline to give the mediator.

Because the mediation process is designed to facilitate a settlement, it represents a different kind of advocacy. It still persuades, but the persuasion is directed to the litigants/parties themselves. Therefore, tailor the advocacy plan to the audience who will receive it. If relations between the parties or their lawyers is emotionally charged, you should, at a minimum, warn the mediator privately in advance of the session. The mediator may need to keep the parties in caucus for much of the time while he or she shuttles back and forth, and bring the parties together only when a resolution is achieved, fails to occur or requires a continuation. Eliminate, or attempt to avoid, any emotional confrontations that could derail the mediation.

An effective mediator should, in every instance, help the parties to conduct their negotiations in such a way that each party can assess whether a negotiated settlement best serves his or her interests. The mediator intervenes as a third party, recognizing that in order to facilitate successful negotiations, he or she must help reorient parties and their lawyers from an adversarial to a problem-solving perspective. Experienced trial lawyers may have trouble seeing the perspective the mediator must adopt in order to be effective, or fail to appreciate how that intervention must be systematic, targeted and strategic.

Successful mediation still requires a good deal of the same pretrial legal work as a trial to ensure its success. It usually results, however, in a quick, mutually agreeable result that costs far less, and takes less time, than a trial.

(Continued on next page)

About the Author

John L. Morel specializes in civil trial and appellate practice, as well as insurance law, at his Bloomington firm of John L. Morel, P.C. He received his B.A. from Western Illinois University and his J.D. from the University of Illinois. Mr. Morel is a member of the McLean County, Illinois State, and American Bar Associations. He is also a member of the IDC, FICC, DRI, National Association of College and University Attorneys and the Illinois Appellate Lawyers Association. Mr. Morel sits on the Board of Directors for the IDC.
The Defense Philosophy

By: Willis R. Tribler
Tribler Orpett & Meyer, P.C.
Chicago

Pulling Your Punches

One of my fondest memories of our seminars is from the 1996 Fall Seminar. One of the members of a panel on ethics said that his test for a possible ethical breach was to ask himself how he would like seeing his conduct reported in the local paper. If not, he would not do it. Professor Monroe Freedman, the ethics guru from the Hofstra Law School, was very displeased. He said, “These are rules, rules. It is not subjective.” While that may be true, at least as to the recognition of conflicts of interest, there is some subjective aspect.

This is part of an excellent little book, Practical Guide for Insurance Defense Lawyers, that was published last fall by the International Association of Defense Counsel. The book covers a wide variety of topics, including identifying the client in the tripartite relationship, determining who is to control settlement, staying away from coverage issues if you are not coverage counsel, the need to exercise independent judgment, how to deal with an uncooperative insured, and a four-page chapter on conflicts.

Retained counsel cannot sacrifice an insured’s interests for the benefit of an insurer or the interests of the insurer for the benefit of the insured. This is easy when there is a real chance of an excess verdict but not so easy when counsel uncovers facts that could allow the insurer to deny coverage. The most invidious conflicts are best described as indirect. Three come to mind:

1. The defendant wants the plaintiff protected, thereby preserving a business, personal or family relationship between the plaintiff and the defendant;

2. A doctor or other professional is hostile to a settlement that would injure his or her reputation; or

3. There is pre-existing hostility between the plaintiff and the defendant, such as a pending criminal accusation or the defendant’s desire to inflict harm on the plaintiff.

It is beyond the scope of this column to tell you how to handle such issues. The point is that they must be reported to both the insurer and insured so they can work it out. Do not let the conflict fester.

Do not consider consent to be a panacea. Even though the claims representative consents to your representing another party, do not do it if it would cause you to pull your punches. Likewise, you have to walk away if the representation, even with consent, might cause you to avoid raising a legal issue that could result in a change of law that is adverse to the insurance industry.

The best rule is never to accept a representation under circumstances where you will give the case less than your best effort.

The book is available for $10 ($7 for orders of five or more) from the International Association of Defense Counsel, One North Franklin, Suite 1205, Chicago, Illinois 60606 (312) 368-1404.

About the Author

Willis R. Tribler is a director of the firm of Tribler Orpett & Meyer, P.C. in Chicago. He is a graduate of Bradley University and the University of Illinois College of Law, and served as President of the IDC in 1984-1985.
Association News

Edward K. Grassé is now a partner with the Chicago firm of Busse & Busse, P.C. and practices in the area of civil litigation, focusing on personal injury, construction negligence, fire and arson, dram shop, coverage questions and other areas of defense work. He received his law degree in 1998 from Chicago-Kent College of Law and has been with Busse & Busse for nearly five years. Mr. Grassé is a member of the IDC, DRI, Chicago Bar Association and chair of the Civil Practice Division III Committee of the CBA.

William C. Lindsay and Stuart N. Rappaport are pleased to announce the formation of Lindsay & Rappaport, LLC. The firm, which previously practiced as The Law Offices of William C. Lindsay & Associates, concentrates in civil defense litigation and related insurance matters. The firm maintains offices in Waukegan and Chicago. For further information contact Stuart Rappaport at srappaport@lindsaylaw.org or at 847-244-4140.

IDC Fall Seminar
September 10 & 11, 2004
Grand Geneva Resort – Lake Geneva, WI

Michael J. Fusz of Tressler, Soderstrom, Maloney & Priess, and Aleen Tiffany of O’Hagan, Smith & Amundsen, LLC, Co-Chairs of the 2004 Fall Seminar, detail some of the topics the committee is working on for this year’s program:

- Updated Evidence and Advocacy from the Judge’s Perspective, presented by Justice Warren D. Wolfson of the First District Illinois Appellate Court
- Understanding and Responding to the Impact of Criminal Investigations and Prosecutions, on Civil Tort litigation, Vincent J. Connelly, Mayer, Brown, Rowe & Maw, L.L.P., Chicago
- Point-Counterpoint discussion between past IDC President, Paul Price, Price, Tunney & Retter, P.C., Chicago and current ITLA president, Michael Schostok of Salvi, Schostak & Pritchard, P.C., Waukegan
- Current analysis of Rule 213 and Opinion Witness Disclosure issues by Cook County Circuit Court Judge Kathy Flanagan
- Panel Discussion by the newly-formed IDC Senior Advisory Committee (made up of the most recent past IDC presidents)
- Significant coverage issues and analysis in construction cases, including additional insured endorsements and issues, tenders of defense, duties of defense and indemnity, by Joseph Postel, Meachum, Spahr, Cozzi, Postel, Zenz, Chicago
- Updated analysis and use of the Collateral Source Rule in reducing plaintiff’s claimed damages by Al Pranaitis, Hoagland, Fitzgerald, Smith & Pranaitis, Alton
- Updated application of Section 2-1117 and Joint & Several Liability: It’s uses and challenges, by Dennis J. Cotter, O’Hagan Smith & Amundsen, LLC
- Outstanding Written Updates on Torts, Insurance, Discovery & Civil Procedure, and Evidence by IDC members
- Second Annual War Story Competition

Hospitality Room Friday (5p.m. – Midnight) and Cocktail Reception.

The IDC block of rooms at Grand Geneva Resort will be available at the following rates until August 10, 2004. Any reservation requests after that date will be accepted on a space available basis at rack rate. Blocked rooms are reserved under the Illinois Defense Trial Counsel. Single or Double, $209 plus taxes.

Call Grand Geneva Resort at (888) 392-8000 to make your room reservations. Check out their web site at http://www.grangeneva.com. Watch the mail for Seminar Brochure and Registration Information.
Welcome... New IDC Members

<table>
<thead>
<tr>
<th>Name</th>
<th>Firm</th>
<th>Sponsor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adnan A. Arain</td>
<td>Alholm, Monahan, Klauke, Hay &amp; Oldenburg, LLC, Chicago</td>
<td>Sponsored by: Anne Oldenburg</td>
</tr>
<tr>
<td>John P. Bergin</td>
<td>Braun, Strobel, Lorenz, Bergin &amp; Millman, P.C., Chicago</td>
<td>Sponsored by: Mark Braun</td>
</tr>
<tr>
<td>Jeremy T. Burton</td>
<td>Cremer, Kopon, Shaughnessy &amp; Spina, Chicago</td>
<td>Sponsored by: John P. Lynch, Jr.</td>
</tr>
<tr>
<td>Thomas W. Hayes</td>
<td>McKenna Storer, Chicago</td>
<td>Sponsored by: Gregory L. Cochran</td>
</tr>
<tr>
<td>James Brandon Hiller</td>
<td>Johnson &amp; Bell, Ltd., Chicago</td>
<td>Sponsored by: J. Hayes Ryan</td>
</tr>
<tr>
<td>Todd Hunnewell</td>
<td>Busse &amp; Busse, P.C., Chicago</td>
<td>Sponsored by: Membership/Academy</td>
</tr>
<tr>
<td>Sean G. Joyce</td>
<td>Williams Montgomery &amp; John, Ltd., Chicago</td>
<td>Sponsored by: Bradley C. Nahrstadt</td>
</tr>
<tr>
<td>Daniel A. Kirk</td>
<td>Querrey &amp; Harrow, Chicago</td>
<td>Sponsored by: Larry S. Kowalczyk</td>
</tr>
<tr>
<td>Nicholas R. Lykins</td>
<td>Johnson &amp; Bell, Ltd., Chicago</td>
<td>Sponsored by: Jack T. Riley</td>
</tr>
<tr>
<td>Craig H. Millman</td>
<td>Braun, Strobel, Lorenz, Bergin &amp; Millman, P.C., Chicago</td>
<td>Sponsored by: Mark Braun</td>
</tr>
<tr>
<td>Rebecca A. Nickelson</td>
<td>Burroughs, Hepler, Broom, MacDonald, Hebrank &amp; True, LLP, Edwardsville</td>
<td>Sponsored by: Membership/Academy</td>
</tr>
<tr>
<td>Jason J. O’Rourke</td>
<td>Lane &amp; Waterman LLP, Rock Island</td>
<td>Sponsored by: John D. Telleen</td>
</tr>
<tr>
<td>W. Jason Rankin</td>
<td>Burroughs, Hepler, Broom, MacDonald, Hebrank &amp; True, LLP, Edwardsville</td>
<td>Sponsored by: Jeff Hebrank</td>
</tr>
<tr>
<td>J. Eve Sorenson</td>
<td>O’Hagan, Smith &amp; Amundsen, LLC, Chicago</td>
<td>Sponsored by: Glen Amundsen</td>
</tr>
<tr>
<td>Holly M. Travis</td>
<td>Swanson, Martin &amp; Bell, Chicago</td>
<td>Sponsored by: James C. Adamson</td>
</tr>
<tr>
<td>Peter J. Weis</td>
<td>Cremer, Kopon, Shaughnessy &amp; Spina, LLC, Chicago</td>
<td>Sponsored by: John Lynch</td>
</tr>
</tbody>
</table>
THE IDC MONOGRAPH:

MUNICIPAL LIABILITY:

IS A ZONING HEARING REALLY A HEARING?

Thomas W. Kelty
Kelty Law Offices, P.C.
Springfield, Illinois
I. Introduction

Until October of 2002, attorneys defending municipalities and counties in zoning matters thought the law was well settled and that the conduct of a zoning hearing was a legislative hearing. Until then, the established practice in Illinois, and many states, was for the zoning board to conduct a public hearing at which it would consider the petition, hear a presentation from the petitioner or their representative, and hear comments or objections from the public in attendance. Questions were entertained by the chair who in turn directed them to the petitioner. The idea of cross-examination of adverse witnesses was not recognized and objectors were deemed not to have the right to directly question petitioner’s witnesses testifying in support of the petition.

The municipal zoning world abruptly changed with the decision of the Illinois Supreme Court in People ex rel. Klaeren v. Village of Lisle, 202 Ill. 2d 164, 781 N.E.2d 223, 269 Ill. Dec. 426 (2002) (herein “Klaeren”), wherein property owners sought to enjoin the Meijer’s retailer from constructing a store on an adjoining parcel. A joint hearing on the retailer’s application for a special use permit involved the Village Board of Trustees, Plan Commission, and Zoning Board. No one was deemed not to have the right to directly question petitioner’s witnesses testifying in support of the petition.

The resolution of the Illinois Supreme Court in People ex rel. Klaeren v. Village of Lisle, 202 Ill. 2d 164, 781 N.E.2d 223, 269 Ill. Dec. 426 (2002) (herein “Klaeren”), wherein property owners sought to enjoin the Meijer’s retailer from constructing a store on an adjoining parcel. A joint hearing on the retailer’s application for a special use permit involved the Village Board of Trustees, Plan Commission, and Zoning Board. No one was deemed not to have the right to directly question petitioner’s witnesses testifying in support of the petition.

The municipal zoning world abruptly changed with the decision of the Illinois Supreme Court in People ex rel. Klaeren v. Village of Lisle, 202 Ill. 2d 164, 781 N.E.2d 223, 269 Ill. Dec. 426 (2002) (herein “Klaeren”), wherein property owners sought to enjoin the Meijer’s retailer from constructing a store on an adjoining parcel. A joint hearing on the retailer’s application for a special use permit involved the Village Board of Trustees, Plan Commission, and Zoning Board. No one was deemed not to have the right to directly question petitioner’s witnesses testifying in support of the petition.

The question of whether to classify special use permit applications for special use permits as an administrative function, at least with respect to municipalities, should be viewed as an administrative act. The decisions from this court which have held to the contrary have been criticized. Further, our appellate court has suggested that, in light of amendments made to the Illinois Municipal Code governing special uses, the General Assembly has indicated a desire to treat the application process for a special use permit as an administrative function, at least with respect to municipalities.

II. Pre-Klaeren Standards

The question of whether to classify special use permit hearings as either legislative matters or administrative matters, in the context of whether a municipality’s decision is subject to administrative review, was addressed in City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc., 196 Ill. 2d 1, 255 Ill. 2d 434, 749 N.E.2d 916 (2001). In Living Word, the Illinois Supreme Court recognized that “the clear weight of authority in the United States holds that a legislative body acts administratively when it rules on applications for special use permits.” Living Word, 196 Ill. 2d at 14.

It further noted:

[T]here is considerable force to the view that the decision of a legislative body to grant or deny an application for a special use permit, whether made by a county or municipality, should be viewed as an administrative act. The decisions from this court which have held to the contrary have been criticized. Further, our appellate court has suggested that, in light of amendments made to the Illinois Municipal Code governing special uses, the General Assembly has indicated a desire to treat the application process for a special use permit as an administrative function, at least with respect to municipalities.

Living Word, 196 Ill. 2d at 15-16.

Thus, in Living Word, the Supreme Court implicitly posed the question of whether it would continue to hold that zoning hearings on special use applications are legislative matters. The resolution of Living Word, however, did not depend upon an answer to that question because the municipality’s decision regarding whether special use permit in Living Word could not be sustained, whether viewed as an administrative decision or a legislative one. See, Living Word, 196 Ill. 2d at 16-26. Subsequently, the court decided Klaeren.

III. Klaeren Issues

Illinois courts have long held that municipal bodies act in a legislative capacity when they conduct zoning hearings. For example, the oft-cited decision in La Salle National Bank of Chicago v. County of Cook, 12 Ill. 2d 40, 145 N.E.2d 65 (1957), articulated:

It is well established that it is primarily the province of the municipal body to determine the use and purpose to which property may be devoted, and it is neither the province nor the duty of the courts to interfere with the discretion with which such bodies are vested unless the legislative action of the municipality is shown to be arbitrary, capricious or unrelated to the public health, safety and morals.

La Salle National Bank, 12 Ill. 2d at 46.

There is considerable force to the view that the decision of a legislative body to grant or deny an application for a special use permit, whether made by a county or municipality, should be viewed as an administrative function.
act. The decisions from this court which have held to the contrary have been criticized. Further, our appellate court has suggested that, in light of amendments made to the Illinois Municipal Code governing special uses, the General Assembly has indicated a desire to treat the application process for a special use permit as an administrative function, at least with respect to municipalities.

*Living Word*, 196 Ill. 2d at 15-16.

The primary issue presented in *Klaeren* is whether a landowner whose property abuts a parcel subject to a proposed annexation, a special use, and a rezoning petition can be wholly denied the right to cross-examine witnesses at a public hearing regarding the petition.

The plaintiffs, residents of the Village of Lisle who resided next to a parcel where the defendant, Meijer, Inc., planned to build a retail store, sought a preliminary injunction to prevent the continuation of site preparation for construction of the store, alleging that procedural defects occurred in the public hearing for the annexation and rezoning of the property. The circuit court of DuPage County granted the preliminary injunction.

The defendants, Meijer, the village, and Saint Procopious Abbey, brought an interlocutory appeal under Supreme Court Rule 307(a) (188 Ill. 2d R. 307(a)). The appellate court held that the complete denial of the right of interested parties to cross-examine witnesses at the village’s joint public hearing was improper. The Supreme Court agreed, holding that, because the joint hearing included a special use petition, due process required that interested parties be afforded the right to cross-examine witnesses.

**IV. Klaeren Hearing**

Meijer sought to open a new store in the village, entering into a contract with the Abbey to purchase a 60-acre parcel of land. As part of the development plan for the store, Meijer requested that the village pass ordinances: (1) annexing the parcel; (2) rezoning the parcel from R-1 (residential) to B-2 (commercial business district); and (3) granting special uses for a planned unit development and for a gasoline service station.

Throughout the municipal zoning process, Meijer was opposed by the plaintiffs, who alleged that the increased traffic, noise and lighting around the new store would diminish their property values and quality of life. The plaintiffs’ challenge to the annexation, rezoning and special use focuses on alleged procedural irregularities that occurred at a joint public hearing that took place on July 9, 1998. On that date, the village board of trustees, the village plan commission, and the village zoning board of appeals each convened a separate public hearing regarding the Meijer proposal at the village hall. Each body then independently moved to recess its hearing and reconvene in a joint hearing at a local junior high school auditorium.

The record reveals that the joint hearing attracted a large audience. The auditorium seats 500 people. On the night of the hearing, audience members were standing in the aisles and in the hall outside, as well as sitting on the stairs leading up to the stage and on the stage itself.

When the hearing reconvened, the Village of Lisle Mayor, who presided over the proceeding, stated:

This is a public hearing. It is not a debate. There will be no attempt at tonight’s hearing to answer any question raised by the audience.

***

To the extent possible the speaker will address questions and concerned [sic] raised by the combined boards this evening.

***

The petitioner will be first subject to any questions by the assembled boards. We will attempt to deal with each individual aspect of the presentation as it’s made.

People in the audience speaking in favor of the proposal will then be heard. People in the audience speaking in opposition of the proposal will then be heard. The petitioner will then be allowed to make closing comments.

After closing comments by the petitioner, the public hearing will be adjourned.

Public records will remain open for written comments by interested parties. Any written comments must be received at the Village offices by 4:30 p.m. Friday, July 31st.

***

To be fair to everyone in the audience, I ask that you limit your comments to two minutes each. I will be the time keeper and will let you know when 15 seconds remain.

***

No one will be allowed to speak a second time until everyone has an opportunity to speak once. That requirement will also be applicable to members of the assembled boards.
Witnesses then spoke on behalf of Meijer. Those witnesses included an architect, a land planner, a traffic consultant, and a hydraulic engineer. During the presentations of each of these witnesses, several members of the village board, the plan commission, and the zoning board asked questions.

Following Meijer’s witnesses, the mayor invited audience members to speak. Two audience members spoke in favor of the development and over 40 individuals spoke in opposition to the proposed project. In response to a question from an opponent of the project, the mayor stated that only a single representative would be allowed to speak on behalf of any group or organization and that the two-minute time limit would be enforced. The mayor further explained:

Rather than try and debate with you the procedure we are going to try and follow, I tried to explain at the beginning of the meeting. My instructions would give everyone who wants to speak or had a written comment an opportunity to be heard. I think that is fair. No matter what we do it is going to be characterized as being unfair. That being the case, we are going to proceed with the suggestion I made.

Various opponents raised individual concerns related to the project. Among these concerns, opponents questioned: (1) whether the proposed development would have a greater impact on traffic than the Meijer representatives predicted; (2) whether the development was inappropriate for the neighborhood and would decrease the quality of life; and (3) whether parking lot traffic, snow removal operations and garbage compactors would create unpredicted noise pollution in the area.

A real estate appraiser also testified on behalf of the opponents. He stated that he was familiar with Meijer stores and had conducted economic-impact analyses on similar, unrelated projects. While the appraiser stated that he had not inspected the neighborhood itself, he opined that homes in the blocks surrounding the development would be adversely impacted not less than 15% and those homes within a one-mile radius would be adversely impacted 5% to 7%.

Many speakers made only general comments, but several identified questions they wanted the assembled bodies to present to the Meijer representatives. On several occasions, the Mayor warned individuals that their time had expired or was about to expire.

Following the joint public hearing, the plaintiffs filed a complaint, seeking, among other relief, an injunction to prevent a vote approving the annexation, rezoning and special use. The trial court denied the injunction, reasoning that the plaintiffs had failed to join all necessary parties. The village board subsequently adopted ordinances and approved resolutions annexing, rezoning, and granting a special use for the parcel. The plaintiffs then amended their complaint to add Meijer and the Abbey as the defendants, and added a claim sounding in quo warranto. At the plaintiffs’ request, the trial court entered a temporary restraining order, halting site preparation, and held a hearing on the plaintiffs’ motion for a preliminary injunction.

During the hearing, the plaintiff, Robert Klaeren, testified that he owned a home abutting the proposed development. Klaeren testified that he was concerned about the increased noise, light pollution and storm water runoff that would be generated by the Meijer development. He also stated that his property value would decrease because of the development and that he feared village services, such as snow removal and police protection, would diminish in the remaining portions of the village because the village would be required to provide these services to a larger area as a result of the annexation.

According to Klaeren, he met with other village citizens prior to the joint public hearing and prepared a presentation. Klaeren stated that the mayor interrupted him before he could finish his presentation and that he would have asked questions of Meijer’s witnesses had he been allowed to do so by the mayor.

The plaintiff, Carle Wunderlich, similarly testified concerning diminished property values and increased noise and traffic. Wunderlich further testified that he had prepared an exhibit of photographs of a Meijer store that he was prevented from bringing into the joint public hearing. According to Wunderlich, he built his home across the street from the proposed Meijer development after his investigation of the parcel’s zoning lead him to believe that the Abbey would use the parcel for institutional purposes.

Ann Duker, a village trustee and former chair of the plan commission, testified on behalf of the plaintiffs. According to Duker, she was unaware of an ordinance authorizing joint hearings for the village board, the zoning board, and the plan commission, but that such hearings were held as a matter of custom and convenience. Duker testified that the plan commission made recommendations to the village board regarding subdivision plans and planned unit developments. Regarding the Meijer development, the plan commission had voted five to one to deny the recommendations and had adopted negative findings of fact. On cross-examination, Duker revealed that she had been elected to the position of village trustee, campaigning as an opponent of the Meijer development.

Steven Stroh, the chair of the zoning board, likewise testified that the zoning board had voted to deny Meijer a special

M-4
use permit to operate a gas station on the development.

Thomas Ewers, the village director of community development and the village building and zoning commissioner, testified on behalf of the plaintiffs. Ewers detailed the procedures used to process the Meijer application, the proposal presented to the village, the modifications of the proposal, and the ultimate approval of a modified agreement for annexation and rezoning.

The plaintiffs also introduced the testimony of Paul Davis, a real estate appraiser, via a videotaped deposition. Davis testified that he reviewed the proposed Meijer development to determine whether it would affect the value of surrounding properties. Davis further testified that he researched the sales of homes in several subdivisions adjacent to commercial developments. According to Davis, houses on the interior of such subdivisions sold for higher average prices than those that abutted the commercial development. Accordingly, Davis opined that the Meijer development would have a negative impact on the value of properties in the surrounding area. On cross-examination, Davis admitted that he had not prepared a written report and that he could not quantify the diminution in value.

Thomas McCabe, an engineer, testifying on behalf of the Abbey. McCabe, concluded that the site-preparation work that was being performed by Meijer would not have an adverse effect on the adjoining property owners. He recommended that the Abbey allow site-preparation work during the pendency of the transaction.

Jacques Gourguechon, a city-planning consultant, testified for the village and Meijer. He described the land uses surrounding the Meijer development. Gourguechon also described the site plan for the proposed development, the open space required for storm water collection and wetlands mitigation, and the use of landscaping as buffering for the adjoining parcels. Gourguechon further produced an artist’s rendering of the completed development and testified that it adequately depicted how the development would appear when viewed from the residential area behind the store. According to Gourguechon, the development would have an impact on the neighboring parcels but the impact would be the same no matter how the Meijer parcel was developed.

Mark Norton, Meijer’s manager for new store construction, testified that soil had to be removed from the site and replaced with suitable fill as part of the construction process. Before the trial court entered the temporary restraining order, such fill was available from an unrelated excavation on another Abbey parcel. According to Norton, alternative fill would cost approximately $40,000. In addition, Meijer had been required to furnish the village with letters of credit at a monthly cost of $1,900. Norton concluded that Meijer would be forced to spend an additional $1.5 to $2.5 million due to new expenses generated by the delay in site preparation in order to complete construction of the new store by the originally contemplated date.

The mayor testified that the purpose of the public hearing in the zoning and development context was to provide an opportunity for input on a legislative process that results in a policy decision. The mayor testified that he believed the joint public hearing procedure used by the village was practical and efficient. Regarding cross-examination, the mayor stated that the hearing was not designed to be “a debate between the petitioner and the proponents or opponents of the development.” He further stated:

So what we wanted to do is *** if you have a comment that you would like to make, please make your comment.

If there are questions that you as one of the members of the public have, raise the question, and some time during the course of what is oftentimes a very lengthy process, those questions are addressed throughout the process.

Part of those questions are addressed also not only by the board members in their representative capacity, but also by the various consultants that the Village retains to review the materials submitted by the petitioner.

When asked whether anyone in the public requested the right to cross-examine witnesses at the joint public hearing, the mayor responded:

I don’t remember the use of the word cross-examine ***. People asked their questions. If they had a question, they would phrase their question and go on. Some were questions that were capable of being answered. Some were questions that were rhetorical. Some were questions that were of a negative parlance. There were a series of types of questions. But cross-examination as we would know it in this room was not part of the process.

The mayor further testified that the village board voted to approve the Meijer development and that an extraordinary majority was needed for the various approvals because the plan commission and the zoning board each recommended denial.

V. A Klaeren Hearing Permits Cross-examination

The issue clearly before the court was whether the special use hearing was a legislative proceeding, as argued by the city,
or an administrative proceeding, as argued by the plaintiffs.

The defendants maintained that the plain language of the Illinois Municipal Code grants only notice and an opportunity to be heard at a public hearing concerning a special use in municipalities with a population of less than 500,000. See, 65 ILCS 5/11-13-7, 11-13-1.1 (West 1998). The defendants contended that the lower courts improperly grafted provisions of the Municipal Code that only apply to larger cities onto the provisions of the Code applicable to the village in this case.

The plaintiffs countered that the right to cross-examine witnesses is implied in the legislature’s requirement of a “public hearing” in zoning matters because a public hearing is meaningless if the audience is not allowed to participate. Plaintiffs further contended that decisions interpreting “public hearing” to include the right to cross-examine witnesses (see, e.g., E & E Hauling, Inc. v. County of DuPage, 77 Ill. App. 3d 1017, 1021, 33 Ill. Dec. 536, 396 N.E.2d 1260 (2nd Dist. 1979); Braden v. Much, 403 Ill. 507, 513, 87 N.E.2d 620 (1949)), predate amendments to the applicable sections of the Code. According to the plaintiffs, the legislature’s decision not to define the term further in light of controlling authority clearly shows that the legislature intended that public hearings include the right to cross-examine.

The appellate court agreed with the plaintiffs, determining that a right of cross-examination was implicit in the applicable Municipal Code sections. Recognizing that the court in E & E Hauling defined the term “public hearing” in relation to the Counties Code then in effect (55 ILCS 5/5-12014), it also noted the E & E Hauling court’s statement that “[t]he general rule is well established that a ‘public hearing’ before any tribunal or body” means “the right to appear and give evidence and also the right to hear and examine the witnesses who are resented by opposing parties.” 316 Ill. App. 3d 770, 780, 737 N.E.2d 1099, 1109, 250 Ill. Dec. 122, 132.

The court observed that zoning boards often deal with important property interests, and a denial of a right to cross-examine may easily lead to the acceptance of testimony at its face value when its lack of credibility, or the necessity for accepting it only with qualifications, can be shown by cross-examination. Id.

A. New Standard

Squarely presented with the question, the Supreme Court held that municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition. As it stated in Living Word, the “clear weight of authority” so holds. Living Word, 196 Ill. 2d at 14. To the extent any prior decisions held the contrary to be true, the court expressly overruled those decisions. Klaeren, 202 Ill. 2d 164, 182, 781 N.E.2d 223, 234, 267 Ill. Dec. 426, 437.

The Klaeren court concluded that the reasons for classifying zoning hearings that deal with special use applications as administrative or quasi-judicial are manifest. In these hearings, the property rights of the interested parties are at issue. The municipal body acts in a fact-finding capacity to decide disputed adjudicative facts based upon evidence adduced at the hearing and ultimately determines the relative rights of the interested parties. As a result, those parties must be afforded the due process rights normally granted to individuals whose property rights are at stake. See, Balmoral Racing Club, 151 Ill. 2d at 405 (the starting point, in any due process analysis, is a determination of whether one of these protectable interests-life, liberty or property—is present); Brown v. Air Pollution Control Board, 37 Ill. 2d 450, 454, 227 N.E.2d 754 (1967) (“a proceeding *** which could affect one’s property rights *** [is] governed by the fundamental principles and requirements of due process of law”). 202 Ill. 2d at 183-84, 781 N.E.2d at 234, 268 Ill. Dec. at 437.

To what extent the full panoply of due process rights commonly associated with quasi-judicial proceedings must be afforded interested parties depends upon the purpose of the hearing. As stated by the U.S. Supreme Court in Hannah v. Larche, 363 U.S. 420, 4 L.Ed.2d 1307, 80 S. Ct. 1502 (1960):

‘Due process’ is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.
Hannah, 363 U.S. at 442, 4 L.Ed.2d at 1321, 80 S. Ct. at 1514-15.

See also, Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 92, 180 Ill. Dec. 34, 606 N.E.2d 1111 (1992) (due process is a flexible concept and requires only such procedural protections as fundamental principles of justice and the particular situation demand); accord Scott v. Department of Commerce and Community Affairs, 84 Ill. 2d 42, 51, 416 N.E.2d 1082 (1981); compare Petersen v. Plan Commission, 302 Ill. App. 3d 461, 468, 236 Ill. Dec. 305, 707 N.E.2d 150 (1998) (all aspects of due process protection need not be afforded at a fact-gathering hearing conducted before a plan commission), with E & E Hauling, 77 Ill. App. 3d at 1022 (failure to permit cross-examination at a zoning board hearing violates due process).

B. Hearing Procedures

The appellate court offered some particularly instructive comments concerning limitations to the right of cross-examination that may be instituted by a municipal body in order to ease its administrative burdens:

[A] municipality could adopt rules limiting the class of individual allowed to exercise a right of cross-examination. A municipality could, within reasonable limits, require those wishing to exercise the right of cross-examination to register in advance of the public hearing. Those wishing to exercise their right of cross-examination could also be required to allege some special interest beyond that of the general public. A municipality could ease the administrative burden of identifying those with a special interest by adopting a rule creating a presumption of the right to cross-examination in favor of an identified class. The legislature made a similar classification when it adopted the 250-foot notice requirement contained in Section 11-13-7. The desires of neighboring property owners alone cannot justify a zoning restriction, but the preservation of property values is one purpose of zoning ordinances, and the diminution of property values in a neighborhood is one factor that should be considered before a change in zoning. [Citations omitted.] A municipality should be free to adopt reasonable limitations on the right of cross-examination uniquely suited to local conditions, but the reasonableness of any limitation on the rights of adjoining property owners must be judged in light of the potential impact on property values in the neighborhood.

Similarly, a municipality may reasonably restrict the right of cross-examination based on subject matter. The presiding officer at a public hearing may identify those witnesses whose testimony will or will not be subject to cross-examination. The factors to be considered include, but are not limited to, the complexity of the issue, whether the witness possesses special expertise, whether the testimony reflects a matter of taste or personal opinion or concerns a disputed issue of fact, and the degree to which the witness’s testimony relates to the factors to be considered in approving the proposal. Such a determination may be made either immediately after the witness’s testimony or may be made in advance based on the anticipated testimony. Additionally, the hearing officer could adopt rules specifying which factual issues are considered relevant to the decision and limiting cross-examination to witnesses addressing those issues. Such a procedure would have the additional benefit of identifying for interested parties those factual issues considered relevant by the decision maker.

VI. Changed World - New Risks

For decades, cities and villages have used the special use as the predominant means of land use control. Zoning ordinances have traditionally set forth a relatively small number of permitted uses in a particular zoning district; the remaining uses are characterized as special uses, allowable only after notice and public hearing. The list of special uses in a zoning district usually vastly outnumber the uses allowable as a matter of right. Most special uses are usually generally recognized as being acceptable within the district, but they may require additional scrutiny because of potential adverse impacts.

Municipalities have customarily used the special use technique as a means of inserting conditions to development approval. Frequently, the conditions do not relate to the characteristics of the proposed use that make the use “special.” The conditions or requirements are not found anywhere in the body of the municipal zoning ordinance. Instead, they ornament the individual special use ordinance as a means of development control.

The special use as an effective zoning control device was cast into doubt by the Supreme Court’s decision in Living Word, when the Supreme Court strongly indicated a municipality acts at its peril if it denies an allowable special use based on general concerns regarding adverse impact on surrounding properties. The court has now definitively held that special use proceedings are administrative and not legislative in nature. The long-term implication of Living Word and Klaeren is that
a municipality may no longer freely turn down a special use request based on a developer’s refusal to accept whatever conditions or development limitations the corporate authorities deem desirable.

The days of “It’s a special use, we can do what we want” are over. In simplest terms, if municipalities turn down a proposal for an allowable special use based on a property owner’s refusal to accept development conditions, then the municipality is doing so at its own serious risk.

VII. Conclusion

While the Illinois Supreme Court found the procedures used by the Village of Lisle to be flawed, it likewise found the analysis by the Second District Appellate Court to be overly broad. It found the court’s analysis of “public hearing” to be too broad, and recognized a distinction between “legislative” hearings and “administrative or quasi-judicial hearings.” Thus, while a municipal hearing body acting in an administrative or quasi-judicial capacity must provide certain constitutionally protected procedures for public participation, the court held the same procedures are not required for legislative hearings. The court’s standard for determining whether a hearing is legislative rather than quasi-judicial is whether “the property rights of the interested parties are at issue.”

Undoubtedly the municipal defense bar is going to be faced with an increasing number of procedural due process or takings claims based upon faulty Klaeren hearings. Success in defending these cases will rely upon a number of steps which must be taken by municipal officials, the most important of which are to (1) create an accurate hearing record, (2) afford a proper hearing, (3) require parties to formally “appear,” (4) conform hearing rules to new procedures, and (5) allow parties sufficient time to state their case.

VIII. Other Sources


7. Jack Waller’s article in April, 2003 Illinois Institute of Local Government Law Newsletter
