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FEATURED ARTICLES

MONOGRAPH

The Illinois Association of Defense Trial Counsel

Law, Equity, Justice

The *IDC Quarterly* is the official publication of the Illinois Association of Defense Trial Counsel. It is published quarterly as a service to its members. Subscriptions for non-members are $75 per year. Single copies are $20 plus $2 for postage and handling. Requests for subscriptions or back issues should be sent to the Illinois Association of Defense Trial Counsel headquarters in Springfield, Illinois. Subscription price for members is included in membership dues.

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

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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.

President's Message

By: Stephen J. Heine
Heyl, Royster, Voelker & Allen
Peoria

For any of you who have been out of the office on an extended holiday vacation, politicians at all levels of government are busy proposing many changes in the judicial system in which we all practice. From the Peoria City council to the White House, tort reform is one of the leading issues of the day. Even the Democrats in Illinois have called for tort reform in medical liability litigation. Local municipalities in Illinois have passed ordinances to limit recovery and otherwise impact professional liability claims against health care practitioners, under the authority of their "home rule" power. The United States Congress will soon consider bills to federalize professional liability claims against physicians and hospitals, create a federal compensation system for asbestos claims, and move many class action state court claims to federal court. To sift through the piles of rhetoric on all sides is nearly impossible.

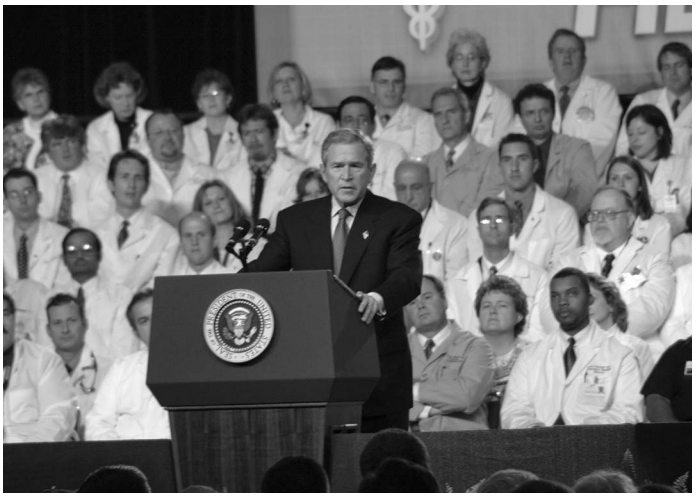
What can we as defense lawyers do to provide some structure and reasoned analysis to the debate? The IDC and its members must continue to be active participants in the ongoing debate.

As the old saying goes, "If you're not part of the solution, you're part of the problem." The IDC has actively supported rational and needed reforms in the tort system, both nationally and in Illinois.

On January 5, 2005, President Bush spoke to about 1500 invited guests in Madison County on the need to reform medical liability laws and the impact of unlimited liability on the nation's health care system. The premise is that "we need to fix a broken medical liability system" (the President's words), a belief deeply, honestly, and almost universally held by health care practitioners of all kinds. In the political arena, perception is often reality because there is no way to know the answers to social science questions with certainty. The medical community, much of the business community, and a fair percentage of the general public believe that the judicial system is unfair. Since it is perceived to be unfair, it is then by definition, unfair. The IDC has asked to be included in discussions concerning medical liability in Illinois chaired by former Cook County Chief Judge O'Connell. As defense practitioners in the field, we can add what those with a vested interest in the outcome cannot – balance and a dispassionate analysis of the perceived unfairness of the system and suggestions for changes acceptable to all.

On January 24, 2005, the Illinois Supreme Court Rules Committee held public hearings on, among other things, Rule 225, which governs class actions in Illinois. The IDC supports the proposed changes and testified in favor of them. Common sense changes to the rule include a requirement of the determination of dispositive motions prior to ruling on class certification, a finding that the class action mechanism is superior to other methods of determining the issues, and a requirement that the class have some reasonable connection to the State of Illinois.

In addition to tort reform issues in medical liability and class actions, issues in asbestos liability are also being addressed. Federal legislation to deal with the financial impact on American industry of asbestos liability will happen at some time. It remains to be seen whether this occurs in the current Congress or not.



The issues surrounding medical liability, class actions, and asbestos liability are not so simple as some of the partisans on either side of the issues would have the public believe. The defense bar is uniquely situated to provide thoughtful insight and scholarly analysis of these complex issues. I urge you to make yourself and your expertise available to your clients and to elected officials.

(Continued on next page)

Editor's Note

By: Rick Hammond
Johnson & Bell, Ltd.
Chicago

I continue to be impressed by the vast amount of information that's gratuitously shared by the *Quarterly*'s authors with their fellow IDC members. I also maintain that the information contained in each issue of the *Quarterly* is, *alone*, worth the price of membership in IDC.

On that note, the Monograph in this issue was organized and includes thoughtful discussions by **Timothy J. Fagan** and **John D. LaBarbera** of *O'Hagan, Smith & Amundsen, L.L.C.* It is remarkable for its depth and scholarly analysis of the collateral effect of the *Alford* plea on the Actual Innocence Rule in legal malpractice actions. From an editor's point of view, the superior fit and finish of the various sections of the Monograph resulted in an impressively coordinated manuscript.

Irrespective of your area of practice, an absolute *must read* is the Professional Liability column authored by **Martin J. O'Hara** of *Quinlan & Carroll, Ltd.* His column focuses on the issue of whether plaintiffs should be permitted to seek lost punitive damages from the alleged negligent lawyer in claims for legal malpractice. The answer may surprise and disturb you.

The Medical Malpractice column authored by **Edward J. Aucoin, Jr.** of *Hall, Prangle & Schoonveld, L.L.C.* delves into the issue of whether courts should allow the personal practices of a defendant's expert witness-physician to be used as a sword to attack the defendant physician's compliance with the standard of care.

Any change in the law regarding spoliation is generally of importance to most litigators. In that regard, more than one of the *Quarterly*'s authors in this issue chose, in their own unique way, to alert the IDC members to the recent Illinois Supreme Court case of *Darden v. Alice Kuehling and State Farm Fire and Casualty Company.* That case raises new issues regarding an insurer's potential liability for the acts of its insured.

As usual, former IDC President, **Willis R. Tribler** of the law firm *Tribler Orpett & Meyer, P.C.*, pulls no punches in his column, "The Defense Philosophy." In this issue he offers thoughtful insight regarding the progress, or lack of progress of merit selection and its predecessor, merit retention of judges.

As always, I encourage you to submit any comments, compliments, or constructive criticisms that you may have regarding the *Quarterly* to me or to any of the Editorial Board members. Also, anyone wishing to write for the *Quarterly* need only contact one of us in sufficient time before the deadline of each issue to discuss your ideas on the topic that you may wish to write about. We invite all readers of the *Quarterly* to reflect on your recent legal writings, and to consider whether you have something worth passing along in the form of an article or recent case comment.

President's Message *(Continued)*

Other changes that members should be aware of (and probably wary of as well), are the new IPI Jury Instructions on increased risk of harm. *See*, *Dillon v Evanston Hospital*, 199 Ill. 2d 483 (2002). There are also new IPI instructions on premises liability which combine the burden of proof and issues instructions, on the discount of future damages to present cash value and how present cash value is to be determined by the jury, on train speeds, and on dog bite cases.

As to upcoming events, the DRI Annual Meeting in 2005 is in Chicago. Our own Chuck Cole is the hospitality chair. Chuck will have a tough time topping his performance at this year's meeting in New Orleans with a cocktail reception for all North Central Region DRI members in the penthouse suite of the Ritz Carlton, but I'm sure he is up to the challenge.

The IDC Spring Defense Tactics Seminar is on March 11, 2005, at the University Club in Chicago. Mike Tootooian and his committee have put together a marvelous program. Note that the seminar is on a Friday this year, rather than the usual Saturday. Please be sure to attend.

Notice of Election

In accordance with the by-laws of the Illinois Association of Defense Trial Counsel, an election must be held to fill the vacancies of the following six (6) directors whose terms expire June, 2005.

The following six Directors' terms will expire at the Annual Meeting, June, 2005:

C. William Busse, *Busse & Busse. P.C.,* Chicago
Rick Hammond, *Johnson & Bell, Ltd..,* Chicago
John L. Morel, *Law Office of John L. Morel*, Bloomington*
Kevin Luther, *Heyl, Royster Voelker & Allen*, Rockford
Anne Oldenburg, *Alholm, Monahan, Klauke, Hay & Oldenburg, L.L.C.*, Chicago
Robert T. Park, *Snyder, Park & Nelson, P.C.*, Rock Island, IL *

*John L. Morel and Robert T. Park are completing their third term and are not eligible to run again.

Recommendations for nominations of six (6) persons to be elected to the Board of Directors are now being solicited from the general membership.

The filing of a nominating petition for election as a director shall consist of:

1. The nominating petition. Each individual nominated must be supported by the signatures of three (3) members in good standing.
2. A statement by that member of his ***availability and commitment to serve actively*** on the board.
3. A black and white (head and shoulders) picture.
4. A Biography.
5. A statement of no more than 200 words on why you think you should be elected to the Board of Directors.

(Following you will find a sample copy of the nominating petition and a commitment to serve.)

Nominations shall be mailed to the attention of Gregory L. Cochran, IDC Secretary/Treasurer at the address shown below, and **must be accompanied with the five items listed above.** All candidates will be featured with their bio, statement and picture in the next issue of the ***IDC Quarterly***, and this same feature will be mailed to the membership with the ballots if more than six petitions are received.

All nominating petitions must arrive at the IDC office no later than Monday, March 15, 2005.

All candidates who have filed a complete nominating petition are eligible to receive a diskette with the IDC membership addresses, sorted either alphabetically, by zip code, or firm upon request.

Nominating Petition Sample

We, the undersigned, hereby declare that we are members in good standing of the Illinois Association of Defense Trial Counsel.

We, the undersigned, further nominate _____
(name of person)

of _____
(firm name, address, city, state, zip)

for the position of Director of the Illinois Association of Defense Trial Counsel.

John Doe _____
(signature of John Doe)

Mary John _____
(signature of Mary John)

Sam Spade _____
(signature of Sam Spade)

Dated this _____ Day of _____, _____ .
(month) *(year)*

Statement of Availability and Commitment Sample

I, _____, hereby declare that I am a member in good standing of the
(name of person)

Illinois Association of Defense Trial Counsel and I do hereby warrant and affirm my ability and commitment to serve actively on the Board of Directors of the Illinois Association of Defense Trial Counsel.

Dated this _____ Day of _____, _____ .
(month) *(year)*

_____
(signature)

Featured Article

HOME:
The Demise of Insurance Equitable Contribution

By: Francis A. Spina
Cremer, Kopon, Shaughnessy & Spina, LLC
Chicago

On December 2, 2004, the Illinois Supreme Court issued its decision in *The Home Insurance Company v. The Cincinnati Insurance Company,* 2004 WL 2749854 (S. Ct. Ill. Dec. 2, 2004). This article will analyze the significant "real world" implications for the Court's decision. The following hypothetical factual scenario will help demonstrate the significant practical problems that *Home* is expected to cause.

John Smith is an ironworker employed by Wobbly Structures, Inc. Wobbly assigns Smith to work on the construction of a new building being erected through general contractor Turnoff Construction.

Turnoff has hired several subcontractors, including Wobbly, an excavator, Diggem Deep, Inc., and a plumbing contractor, Leaky Pipes Company. As part of its standard contract practices, Turnoff required that all of its subcontractors provide Commercial General Liability (CGL) coverage, among other coverages, for Turnoff's benefit. Consistent with their understanding of their contractual obligations, both Diggem Deep and Leaky Pipes obtained from their respective CGL carriers, endorsements to their CGL policies listing Turnoff as an additional insured. Diggem Deep was insured by Shifting Sands Insurance Company. Leaky Pipes was insured by Honest Abe Insurance Company.

Diggem Deep excavated a six-foot deep trench at ground level as part of its contractual responsibilities to Turnoff. The sole purpose for the trench was to allow Leaky Pipes to install piping for water and sewer service for the building. Part of Diggem Deep's job responsibilities was to backfill the trench after Leaky Pipes' work was done.

Prior to the date of the accident, Leaky Pipes had been installing piping in the trench, but had not completed its work. Contrary to its contractual obligations to Turnoff, Leaky Pipes had failed to erect barricades around the perimeter of the trench, such that on the date of the accident, the perimeter of the trench was completely unguarded. After exiting a portable washroom facility located near the trench, Smith encountered the trench and fell into it, sustaining severe injuries.

Smith filed suit in Madison County Circuit Court naming as defendants Turnoff, Diggem Deep, and Leaky Pipes. Turnoff was charged with liability for allowing work to proceed at the job site while the trench was left in an unprotected and therefore dangerous condition. Diggem Deep was charged with liability for excavating the trench and failing to provide perimeter protection. Leaky Pipes was charged with liability for failing to provide perimeter protection consistent with the express terms of its contract.

After being served with process, Turnoff initially asked its own CGL carrier, Give Me Death Insurance Company to protect its interests. Shortly after receiving that request, Give Me Death tendered defense and indemnification of the suit on behalf of Turnoff to both Shifting Sands and Honest Abe. This tender was soon followed by a letter issued on the letterhead of Turnoff to each of those two carriers, in which those carriers were advised that Turnoff was targeting its tender exclusively to Shifting Sands and Honest Abe. Give Me Death was to be relieved of any defense or indemnity obligations, except as "stand-by" coverage.

The CGL policies of both Shifting Sands and Honest Abe contained an identical additional insured endorsement, pursuant to which anyone their respective named insured was were required by contract to obtain coverage for was deemed to be an additional insured. Shifting Sands' policy limited such coverage, however, only to liability arising out of the ongoing operations of its named insured, Diggem Deep. Honest Abe's policy limited coverage to the additional insured for its liabil-

About the Author

Francis A. Spina is a partner with the Chicago firm of *Cremer, Kopon, Shaughnessy & Spina, LLC*. He is a 1980 graduate of DePaul University College of Law. Mr. Spina specializes in representation of management in employment law matters, and he also works in insurance coverage litigation and general tort defense. He is a past member of the Board of Directors of IDC and a past Editor-In-Chief of the *IDC Quarterly*. He is also a member of DRI's Employment Law Committee, as well as the American Bar Association's Section on Labor and Employment Law.

ity arising out of the work of Leaky Pipes for the additional insured. Neither policy contained any language suggesting its coverage was anything other than primary level coverage.

Believing that the facts would prove the accident did not relate to the ongoing operations of Diggem Deep, Shifting Sands accepted Turnoff's tender and agreed to participate in its defense, but under a reservation of rights. However, it steadfastly took no part in negotiations with respect to Turnoff on Smith's suit. Honest Abe also accepted Turnoff's tender and hired defense counsel for Turnoff, for which Shifting Sands agreed to split expenses.

During the course of handling of the *Smith* suit, Honest Abe made repeated efforts to obtain Shifting Sands' participation in settlement negotiations, to no avail. Ultimately due to the severe nature of Smith's injuries, the venue in which the case was pending, and the particular trial judge to whom the case was assigned, Honest Abe unilaterally effected a settlement of Smith's claims against Turnoff for $800,000. Shifting Sands paid nothing on behalf of Turnoff. Shifting Sands had retained separate defense counsel to represent its named insured Diggem Deep, and ultimately contributed $40,000 in order to obtain dismissal of Diggem Deep. Honest Abe did not pay any additional amounts to Smith on behalf of Leaky Pipes, but nevertheless Smith agreed to dismiss Leaky Pipes as part of the overall settlement.

"Ultimately due to the severe nature of Smith's injuries, the venue in which the case was pending, and the particular trial judge to whom the case was assigned, Honest Abe unilaterally effected a settlement of Smith's claims against Turnoff for $800,000."

Prior to the settlement being effected, and frustrated with Shifting Sands' refusal to participate in settling the case on behalf of Turnoff, Honest Abe initiated declaratory litigation against Shifting Sands. In that suit, Honest Abe sought equitable contribution from Shifting Sands for any indemnity payments it might ultimately make on behalf of Turnoff. The matter was stayed while the underlying case was ongoing, as the issue of Turnoff's liability within the scope of Shifting Sands' additional insured endorsement implicated fact issues pending in the underlying case. After the underlying *Smith* case was settled, Honest Abe amended its pleadings to specifically recite the $800,000 indemnity payment that it made for Turnoff. In that amended declaratory pleading, Honest Abe sought reimbursement of 50% of that amount. Shifting Sands filed a declaratory action against Turnoff, seeking a declaration that it owed no coverage for the underlying *Smith* case, but that case essentially remained inactive after its filing.

Based upon this fact scenario, under Illinois law, is Honest Abe entitled to recovery from Shifting Sands of any part of the $800,000 amount that it paid on behalf on Turnoff as indemnification? Logic and common sense business principles suggests that the answer is an unequivocal "yes." But, as a result of the Illinois Supreme Court's decision in *Home*, the answer appears to be an unequivocal "no." As a result of *Home,* Honest Abe will get absolutely no recovery from Shifting Sands, and Shifting Sands will have escaped any financial responsibility with respect to Turnoff simply as a result of its recalcitrance in participating in Turnoff's settlement.

This unfortunate outcome results from the supreme court's exaltation of technical form over practical substance. Apparently failing to consider the practical implications of its decision, the supreme court applied the technical elements of a cause of action for equitable contribution in the insurance setting to deprive a reasonable and responsive carrier from obtaining reimbursement from a non-responsive and unreasonable carrier, for the latter's fair share of its financial responsibility for a suit.

In *Home,* Allied Asphalt Paving Company was the general contractor for a highway project. Allied subcontracted work on the project to Aldridge Electric (insured by Home Insurance Company), and Western Industries (insured by Cincinnati Insurance Company). Allied was named as an additional insured under an identical endorsement on both of those carriers' policies.

After Allied was sued, it tendered its defense to both Cincinnati and Home. Both carriers participated in Allied's defense, subject to a reservation of rights. The claim against Allied was eventually settled for $600,000, with Home paying $500,000 and Cincinnati paying only $100,000. In addition,

(Continued on next page)

Home *(Continued)*

Cincinnati paid another $40,000 to settle the claim against its named insured, Western. *Home*, 2004 WL 2749854 at *1-2.

Home filed a declaratory judgment action over one year after the settlement was effected, asserting theories of equitable contribution and equitable subrogation. The circuit court found that Home was not entitled to equitable contribution from Cincinnati, in part because its policy was excess while Cincinnati's policy was primary, and more significantly because it concluded those two carriers did not insure the same risks. The circuit court also denied the equitable subrogation claim, finding that it had been waived by Home's failure to assert its position that it was an excess insurer. The appellate court adopted the reasoning found in *Schal Bovis, Inc. v. Casualty Insurance Co.,* 315 Ill. App. 3d 533 (1st Dist. 2000) and essentially upheld the result from the circuit court. *Home*, at *3.

With respect to the equitable contribution claim, the supreme court noted that historically, equitable contribution in the insurance setting is an equitable principle arising among co-insurers which permits one insurer which has paid the entire loss or greater than its share of the loss, to be reimbursed from other insurers who are also liable for the same loss. Then, applying an unduly narrow limitation to the scope of the equitable contribution remedy, the supreme court held it would be available only where concurrent policies insure the same entities, the same interests, and the same risks. Conversely, when two insurers cover separate and distinct risks, there can be no contribution among them. The court also expressly noted that equitable contribution is not applicable where one of the carriers provides primary coverage while the other provides excess coverage, since excess insurers cannot seek equitable contribution from primary insurers.

The factual scenario in *Home* is somewhat different from the hypothetical example set forth above. As a result of certain language of the respective policies of Home and Cincinnati not recited by the supreme court, the interplay of those policies was such that the Home policy was excess to the primary Cincinnati policy. Nevertheless, this distinction should not make a difference in the ultimate application of the analysis and holding of *Home* on equitable contribution claims. That is because, in what should be considered dicta but nevertheless appears to be a fundamental point of analysis in its decision, the supreme court discussed at length the "same risk" element of equitable contribution, in the context of the identical additional insured endorsement language of the two policies. *Id*. at *5. Rejecting the practical and reasonable analysis of the Third District appellate court in *Cincinnati Insurance Co. v. River City Construction Co.*, 325 Ill. App. 3d 267 (3rd Dist. 2001) the supreme court concluded that the Cincinnati and Home policies that provided coverage benefits for Allied Asphalt "covered substantially different risks and therefore equitable contribution was not available." *Home*, at *8.

The supreme court looked to the common definition of the word "risk," and concluded that in the context of each of the subject policies, they clearly covered different possibilities or degrees of probability for suffering harm or loss. The Cincinnati policy covered Allied only for liability arising out of Western's work. The Home policy covered Allied only for liability arising out of Aldridge's work. Although, as noted by the court, it was possible that indemnity under both policies could be triggered if Allied's liability arose out of both Western's and Aldridge's work, that did not mean that the policies covered the same risk. Rather than acting to expand the remedy to fit the practical needs of today's business world, the court instead fell back on rote principles and, given the nature of the additional insured endorsement, found those policies necessarily covered different risks. Therefore, the court ruled equitable contribution was not available to Home against Cincinnati. *Id*.

This holding is particularly troublesome because of its broad reach and practical impact. One wonders if the court stopped to consider exactly what circumstances would ever allow an equitable contribution claim to be pursued in the insurance setting. When is a single insured ever going to obtain two separate insurance policies which cover an identical risk, other than the classic situation of its purchase of a primary level CGL policy followed by an umbrella policy (to which by definition equitable contribution will never apply)?

To summarize the implications of the supreme court's ruling on equitable contribution, the Court has written a road map for unreasonable insurance carriers to completely escape making indemnity payments in circumstances where they know another carrier has acted honorably and intends to make indemnification of a mutual additional insured. This is something the *River City* court expressly noted in ruling opposite to the supreme court. The reasonable carrier runs the real risk of being unable to recoup from the recalcitrant carrier any indemnity payments it makes, simply because their policies necessarily do not insure the exact identical risk. In the setting described in the hypothetical, the carriers will never insure the same risk. Yet both have a technical potential obligation to indemnify the additional insured. Does the Court's reasoning not invite carriers in this situation to jointly decline to settle the case? Or invite a carrier with less integrity to foist the whole loss on the scrupulous carrier?

A more reasoned public policy approach, recognizing the realities of the insurance marketplace and the tort litigation

world, would have been a judicial expansion of the equitable contribution theory (something the court clearly could have done, given that the theory is a common law remedy) to allow equitable contribution claims in such circumstances. It appears that the supreme court instead elected to use judicial blinders to the real world application of its academic analysis. Much as with the unfortunate and unique "targeted tender" theory first formally acknowledged in *John Burns Construction Co. v. Indiana Insurance Co*., 189 Ill. 2d 570, 727 N.E.2d 211 (2000), Illinois has thus taken another step away from reasoned principles and common sense in insurance law, and created yet further additional grounds for "clever" insurance carriers to try to "game the system."

"The equitable contribution theory focuses on the risk that the carriers set out to cover, while the subrogation theory only requires that the carries insure the same loss."

But the impact of *Home* does not stop there. The supreme court's decision also discussed the theory of equitable subrogation. In order for equitable subrogation to apply in the first instance, the plaintiff carrier (seeking recovery) must be secondarily liable while the defendant carrier (from which liability is sought) must be primarily liable. In addition, both policies must apply to the "same loss." The supreme court expressly noted that equitable subrogation, an action by an excess carrier seeking reimbursement from a primary carrier, is a distinct remedy from equitable contribution. The equitable contribution theory focuses on the risk that the carriers set out to cover, while the subrogation theory only requires that the carries insure the same loss.

In this particular case, the court reasoned that Allied Asphalt suffered only one loss. If Allied's liability arose in any way of out Western's work, then necessarily the Cincinnati policy applied to the benefit of Allied Asphalt. If Allied's liability also arose, to some extent, from Aldridge's work, then Home's policy might also apply, but even if it did, it would only be on an excess basis.

In order to justify its conclusion that Home was entitled to equitable subrogation as an excess carrier from Cincinnati as a primary carrier, the supreme court was faced with the fact that the underlying case had not proceeded to disposition on the merits, but rather had settled prior to disposition on the merits. As a result, there was no adjudication of the actual basis for Aldridge Asphalt's liability to the plaintiff. The court therefore created what is apparently a rebuttable presumption, which applies to circumstances such as this, that the plaintiff in the underlying case would have prevailed on all of his theories of liability. Based upon this presumption, the burden shifts to the carrier defending against the equitable subrogation claim to demonstrate that the additional insured's liability did not, in fact, arise out of its named insured's work. In the absence of such proof, the presumption stands. In this particular case, since Cincinnati failed to rebut the presumption (one wonders how it knew this previously unknown presumption needed to be rebutted), the Court turned the presumption into a conclusion that Allied Asphalt was liable, at least in part, as a result of the work of Cincinnati's named insured Western.

In a suggestion of its lack of understanding of how the negotiation and settlement process works in the real world, the supreme court bolstered its conclusion that the presumption was valid by noting that Cincinnati had agreed to pay $100,000 toward the settlement package offered on behalf of additional insured Allied Asphalt in the underlying case. Without any basis for doing so, the court arrived at a presumption that Cincinnati had made this payment because Cincinnati "believed that Allied's liability arose at least, in part out of the work of Western."

However, as any attorney or claim representative skilled in tort litigation has experienced, insurance carriers make settlement payments, often of significant sums, for a myriad of reasons which have nothing to do with the prospect that the insured will actually be found to have liability on the merits to the plaintiff. The supreme court appears to have either been unaware of this fact, or to have chosen to ignore it in order to justify its conclusion.

A few examples of circumstances in which insurance carriers make settlement payments despite a clear and strong belief that their insured has no liability include the following: (1) concern over the fairness toward defendants of juries in the venue in which the case is pending (e.g. Madison County and St. Clair County, Illinois); (2) concern over the fairness or objectivity of the particular trial judge to whom the case is as-

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Home *(Continued)*

signed; (3) concern over the relative comparative capabilities of a very strong plaintiff's attorney against a less experienced defense attorney; (4) concern that the poor appearance of the key defendant party witness or other witnesses will cause the jury to ignore the actual defense-favorable facts of the case; (5) concern over possible verdict exposure in excess of policy limits; (6) concern over jury sympathy for a badly injured plaintiff; and (7) internal insurance company protocols and procedures which favor the making of settlement payments simply to avoid the costs and expense of discovery and trial. Experienced defense counsel and claim representatives can certainly add more examples to this list. The ultimate truth is that there is no basis upon which a reasonable presumption can be drawn that simply because an insurance carrier made a settlement payment, it necessarily believed that its insured had liability within the scope of coverage of the policy.

The final component of the supreme court's decision in *Home* relates to a retroactive application of waiver to Home's right to equitable subrogation from Cincinnati, due to some unfortunate but undoubtedly honest language that Home's claim representative used in its letter accepting Allied's defense. In that letter, Home stated that it would be willing to share defense and indemnity on an equal basis with Cincinnati "subject to a review of both policies and any reservation of rights." Ignoring the quoted language, and focusing upon the statement of an agreement to share defense and indemnification equally, the supreme court concluded that Home's conduct was inconsistent with a claim that it would be entitled to full reimbursement from Cincinnati for the settlement. *Home*, at *11-12. Essentially, the court thus imposed upon any carrier accepting coverage for an additional insured, the obligation to know at the time of the acceptance, exactly how that coverage will interplay with any other potentially applicable coverage, or risk waiving its rights.

The problem with this *post hoc* analysis is that quite often, insurance carriers do not know of even the existence of other coverages, let alone the scope and nature of other coverages, at the time they must respond to a tender from an insured. It is true that Home exacerbated its problem by inexplicably seeking from Cincinnati only $300,000, rather than the full $500,000 it paid at the time the settlement was made. Nevertheless, fundamental fairness suggests that a carrier should not be assessed with waiver of substantial economic rights, except pursuant to the standard "knowing and intentional relinquishment" of its rights, which did not appear to have occurred here.

The cautionary tale for all carriers is that, when coverage is accepted for an insured where the potential for other coverage exists, a clear and unequivocal statement must be provided that the accepting carrier reserves its rights to pursue any and all remedies against any and all other carriers whose coverage might be applicable. Then, the claim representative must constantly be on the lookout for facts demonstrating the potential applicability of such other coverage, with immediate and prompt steps being taken to implicate and pursue such other coverage, and to position the carrier's own coverage properly in relation thereto.

One can only wonder whether the fact that Home was ultimately allowed to recover $200,000 from Cincinnati caused the supreme court to believe its ruling effected some sort of "rough justice." Home's half-a-loaf reimbursement came via equitable subrogation. But the equitable contribution analysis stands to wreak havoc in the everyday scenario described in the hypothetical, and in the myriad of similar although different insurance coverage situations that arise particularly in the construction tort case setting. The supreme court could have and should have placed equitable principles and sound business logic above adherence to strict application of an outmoded legal standard.

The court should have recognized the realities of the current business world, where general contractors insist that all subcontractors on a job provide it, and often others, with insurance coverage. This results in the overlap of many policies, none of which insure the identical risk, but all of which insure a sufficiently similar risk to require those carriers to participate in the defense, and often indemnification, of strangers to their policies. But the court failed to do so, and the impact of that oversight is predicted to be substantial, and unfortunate.

Health Law

By: Roger R. Clayton and John M. Redlingshafer
Heyl, Royster, Voelker & Allen
Peoria

What Every Litigator Needs to Know About the Illinois Good Samaritan Act

2005 will mark the fortieth year that physicians can avoid civil liability in applicable situations. Over the course of those forty years, culminating in the current Illinois Good Samaritan Act (745 ILCS 49/1, *et seq*., and hereinafter referred to as the "GSA"), significant expansion has occurred offering protection to even more professionals. While these individuals are now protected collectively under the GSA, the roots of the statute trace back to physicians, and *all* Illinois case law on the GSA revolves around that profession. If the standard in those cases is to be the benchmark for the protection of other qualified professionals, the law truly does appreciate those wishing to help those in peril, for the protection of physicians continues to grow to this day.

A. History of the Good Samaritan Act

1. Early History of the Illinois Good Samaritan Act

In June 1965, the Illinois General Assembly heeded the concern of physicians who, among other things, hesitated to aid those in car accidents for fear of malpractice suits. Within the Illinois Medical Practice Act (now at 225 ILCS 60/1, *et seq*.), the legislature added a law that mandated:

> [a]ny person licensed pursuant to this Act, or any person licensed to practice the treatment of human ailments in any other state or territory of the United States, except a person licensed to practice midwifery, who in good faith provides emergency care without fee at the scene of a motor vehicle accident or in case of nuclear attack shall not, as a result of his acts or omissions, except wilful or wanton misconduct on the part of such person, in providing such care, be liable for civil damages.

Blanchard v. Murray, 331 Ill. App. 3d 961, 966-67, 771 N.E.2d 1122, 1126 (1st Dist. 2002), *citing* Ill. Rev. Stat. ch. 91, par. 2(a) (1965).

As stated, this version only protected physicians and over the next eight years, the legislature extended the immunity available to them even more. In 1969, any physician who provided emergency care "to a victim of an accident" rather than a victim of a *motor vehicle* accident would not face liability. Effective in 1973, a new prerequisite to protection mandated a physician not have "prior notice of the illness or injury" at issue, but the same amendment eliminated the need for an "accident" or "nuclear attack" altogether. By the end of the 1970s, a physician was required to only provide "emergency care" for no fee and without prior notice to receive immunity. Ill. Rev. Stat. ch. 91, par. 2(a) (1973).

Throughout the 1980s and early 1990s, this remained the case. The only major alteration was a transfer to then chapter 111 of the Illinois Code with the rest of the Medical Practice Act. However, sweeping change was on the horizon.

2. Good Samaritan Physicians Get a New Home and New Neighbors

The biggest event in the history of the GSA occurred in 1996, when Public Act 89-607 was signed into law. Its contents were effective on January 1, 1997, and among other

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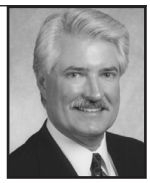
About the Authors



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.

John M. Redlingshafer is an associate with the firm of *Heyl, Royster, Voelker & Allen*. He received his B.A. in International Relations from Bradley University (Magna Cum Laude) in 2001 and his J.D. from DePaul University in 2004. Mr. Redlingshafer is a member of the Illinois State and American Bar Associations.

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things, the prior law protecting physicians became part of an entirely new act protecting numerous careers that were now eligible for immunity from civil liability. This collection of professions collectively formed the new GSA, located at 745 ILCS 49/1, *et seq*.

The General Assembly noted in P.A. 89-607 (and does to this day in 745 ILCS 49/2) that Illinois has "numerous protections for the generous and compassionate acts of its citizens who volunteer their time and talents to help others." P.A. 89-607; 745 ILCS 49/2. It opined there was a need to recodify all prior protective laws into one section. (For example, prior laws granting immunity to certain professionals in other sections now state civil liability is precluded "as provided in the Good Samaritan Act." *See* 50 ILCS 750/15.1). The legislature also felt the GSA was to be "liberally construed," which in future years became very important to physicians involved in litigation. P.A. 89-607; 745 ILCS 49/2.

P.A. 89-607 not only combined existing protections available to certain Samaritans, but also included new professions as well. The bottom line is that each of the following professionals would now be immune from civil liability if the conditions unique to that profession per its relevant statute were met, and the acts or omissions taken were not considered willful and wanton:

1. Emergency telephone workers (currently at 745 ILCS 49/5);

2. Those trained in cardiopulmonary resuscitation (745 ILCS 49/10);

3. Dentists who provide emergency care at an accident scene (745 ILCS 49/15);

4. Dentists who provide their trade at a free dental clinic (745 ILCS 49/20);

5. Nurses who receive compensation in providing emergency care (745 ILCS 49/35);

6. Nurses who do not receive compensation (745 ILCS 49/40);

7. Physical therapists who provide emergency care (745 ILCS 49/45);

8. Podiatrists who provide emergency care (745 ILCS 49/50);

9. Respiratory care practitioners (745 ILCS 49/55);

10. Veterinarians (745 ILCS 49/60);

11. Those assisting victims that are choking at a restaurant (745 ILCS 49/65);

12. Law enforcement officers and firemen (745 ILCS 49/70); and

13. Employers and employees under the Health and Safety Act (820 ILCS 225/.01 *et seq*.), (745 ILCS 49/75).

As noted earlier, physicians also were protected in this new GSA, and the provision granting them immunity in proper situations was now located at 745 ILCS 49/25. The revised § 49/25 stated:

> [a]ny person licensed under the Medical Practice Act of 1987 or any person licensed to practice the treatment of human ailments in any other state or territory of the United States, except a person licensed to practice midwifery, who, in good faith and without prior notice of illness or injury, provides emergency care without fee to a person, shall not, as a result of their acts or omissions, except willful or wanton misconduct on the part of the person, in providing the care, be liable for civil damages. P.A. 89-607.

In addition to protecting physicians in general, 89-607 also extended protection to those in the profession that in good faith and without a fee provided treatment and other medical services in an established free medical clinic. P.A. 89-607; 745 ILCS 49/30. Immunity was also granted to hospitals and other health care providers that provided further treatment and other medical services upon referral from such a clinic. *Id.*

Again, these professionals would also be granted immunity unless while otherwise meeting the requirements, their acts or omissions were deemed to be willful and wanton. P.A. 89-607; 745 ILCS 49/1, *et seq.*

3. Other Recent Legislation

The General Assembly continued to amend the GSA in more recent years in both technical and substantive fashions. For example, more professionals were granted immunity in the proper circumstances. Today, the group now also includes:

1. Advanced practice nurses providing emergency care (745 ILCS 49/34);

2. Optometrists providing emergency care (745 ILCS 49/42);

3. Those trained in emergency care of a person in cardiac arrest that included training on an automatic external defibrillator. (745 ILCS 49/12);

4. Physician assistants (745 ILCS 49/46); and

5. Individuals who work at free medical clinics (besides physicians): advanced practice nurses, physician assistants, nurses, pharmacists, physical therapists, podiatrists, or social workers. (745 ILCS 49/30).

During this time, changes continued to be made to the section protecting physicians as well. While the exception was lifted for a person trained in the practice of midwifery, the most important language removal was the cancellation of the requirement that a physician not have "prior notice of the illness or injury." Thus, the statute then read as it does today:

> [a]ny person licensed under the Medical Practice Act of 1987 or any person licensed to practice the treatment of human ailments in any other state or territory of the United States who, in good faith, provides emergency care without fee to a person, shall not, as a result of his or her acts or omissions, except willful or wanton misconduct on the part of the person, in providing the care, be liable for civil damages. 745 ILCS 49/25.

The removal of this language effective in the late 1990s will continue to prove very important for those physicians who face future litigation and claim immunity under the GSA. After all, one less requirement means protection is more easily attainable. It is worth noting nurses had the exact same language stricken from their statute as well, creating greater protection for them, too. *See* 745 ILCS 49/35.

B. Applying the Good Samaritan Act in the Courts

Despite the existence of numerous careers in the GSA, as noted earlier, Illinois courts have only decided cases dealing with just one - the physician. Indeed, there are not even many cases dealing with physicians. Based on the holdings in these decisions, it would seem likely a Good Samaritan in any profession could defend an action brought against them using the same basic theory: following and meeting the prerequisites that are easily drawn from the clear meaning of their statute. Almost every physician that has requested immunity has received it, and those that prevailed did so because the courts followed the plain meaning of their statute.

1. Johnson v. Matviuw, 176 Ill. App. 3d 907, 531 N.E.2d 970 (1988): a Test is Born

In the first case of its kind in Illinois, the First District of the Appellate Court analyzed the strength of the GSA as it applied to physicians. A pregnant woman was admitted to a hospital under the care of her own physician, after complaining of numbness and pain in her leg, hyperventilation, and chest pain. *Johnson*, at 910. She was 37 weeks pregnant at the time. Several days later, she experienced respiratory and cardiac arrest, and the defendant-doctor, who was attending to one of his own patients, was summoned by nurses. *Id.*

Defendant attempted respiratory and cardiac renunciation until the woman's physician arrived to take over. Roughly one hour after the woman's "code blue" was sounded, both she and her child were pronounced dead. *Id.*, at 910-11.

The administrator of her estate brought suit against the defendant and others, but the defendant asserted no civil liability could be imposed pursuant to the GSA (at the time, Section 2a of the Medical Practice Act, ch. 111). *Id.*, at 911. The trial court granted summary judgment, for *inter alia*, the GSA was applicable under these circumstances to emergency situations in a hospital. *Id.*

The First District affirmed the trial court, even if summary judgment was premature. *Id.* at 916. The court noted the issue of whether the GSA applies to a physician responding to an emergency in a hospital was one of first impression in Illinois, although it had been weighed in other states. *Id.* at 916-17. It found the statutory language was clear and not ambiguous, and therefore exceptions, limitations, and conditions should not be read into it. *Id.* at 917, *citing People v. Goins*, 119 Ill. 2d 259, 518 N.E.2d 1014 (1998).

The court surmised it was beyond its power to limit the ordinary meaning of the word "emergency" by adding "except when occurring in a hospital." *Id.*, at 917. The court felt any change in the scope of the statute's protection is within the realm of the legislature, not that of a court. *Id.*

In the court's opinion, if all other conditions stated in 2a were met (a physician who, in good faith, rendered emergency care without charging a fee without prior notice of the illness), as was the case here, no liability would exist. *Id.* at 918. Thus, the defendant's motion for summary judgment was granted.

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While not expressly laying out a test, the court issued a mandate to future reviewing courts to check for all prerequisites under the statute before ensuring physicians were qualified for immunity under the GSA. As seen in future cases, and based on the clear language of the GSA as it existed prior to 1998, meeting all other conditions stated in 2a (now 745 ILCS 49/25) became a three-part test requiring: (1) the doctor must not have notice of the illness or injury; (2) the doctor must provide emergency care; and (3) the doctor must not charge a fee.

2. Roberts v. Myers, 210 Ill. App. 3d 408, 569 N.E.2d 135 (1991): the First Formal Application of the Three-Part* Johnson *Test

Only three years later, the First District received the opportunity to expound on its test in detail and apply it to another set of somewhat similar facts.

In *Roberts*, a woman was rushed to a hospital. *Id.* at 410-11. She had been under the care of her personal obstetricians, but at some point, they left the hospital, and care was given by other hospital nurses and resident doctors. *Id.* at 411.

Defendant-doctor cared for his own patients that afternoon. *Id*. However, a nurse later informed him there were decelerations in the fetal heart tones of the woman's baby at issue in the case. *Id.* Defendant did not perform any emergency care at the time, and only did when a resident who had been caring for the woman requested immediate assistance after heart tones were reported to have been lost. *Id.* A nurse had seen the defendant in the doctors' lounge and brought him in to the delivery room. *Id.* Eventually, the child was born, but with quadriplegia and cerebral palsy after a mid-forceps delivery. *Id.*

The trial judge granted summary judgment for the defendant on the ground he was immune pursuant to the GSA. The First District affirmed. The court laid out the three-part test it had implied in *Johnson*, and formally applied it to the facts of this case.

Under the first part of the test, the court had to determine if the defendant had notice of the illness or injury. *Id.* at 415. It was alleged the defendant had notice because he had several contacts with the woman before he delivered the child. *Id.* The record showed the defendant was informed by a nurse that the electronic monitor indicated decelerations, but nothing showed whether the nurse actually gave him the tracing strip or just verbally passed along her observations. *Id.* at 416. Other facts corroborated the lack of notice, including the defendant's reliance on four examinations by prenatal attending doctors indicating normal cephalic presentation (to defeat plaintiff's argument the fetus was in breech and thus a high risk patient per the junior house officer's notations), and that the defendant had retired to the doctors' lounge after performing a routine vaginal examination, feeling there was no indication any significant abnormality existed until the time heart tones were reported to have been lost. *Id.* at 416-17.

The court then moved to part two of its test to see if the defendant provided emergency care. *Id.* at 417. Unlike *Johnson*, there was no "code blue," but the court felt there was "no question that an emergency existed when the nurse failed to hear fetal heart tones." *Id.* The resident doctor deemed it necessary at that time to obtain immediate assistance from another doctor. *Id.* Defendant provided that assistance and performed a mid-forceps delivery, one of the fastest techniques available. *Id.*

"Unlike* Johnson*, there was no 'code blue,' but the court felt there was 'no question that an emergency existed when the nurse failed to hear fetal heart tones.' The resident doctor deemed it necessary at that time to obtain immediate assistance from another doctor"

Finally, the court had to determine if the defendant received a fee for his services. *Id.* The facts showed the defendant did not receive a fee for delivering the child and had no knowledge his employer received one either. *Id.* at 417-18. Therefore, the court held no questions of fact precluded the application of the statute.

3. Villamil v. Benages, 257 Ill. App. 3d 81, 628 N.E.2d 568 (1993): the Intent to Bill is Irrelevant

Again, the First District was faced with a defendant-doctor claiming immunity under the GSA, in yet another case with

similar facts. The plaintiffs alleged, *inter alia*, the defendant committed malpractice during the course of the delivery of their premature infant which allegedly resulted in its death. On the day in question, the defendant was in the hospital attending another patient of his who was in labor. *Id.* at 85. The on-call obstetrician never responded to attempted contact made by nurses helping the plaintiff-mother. *Id.* Therefore, shortly before delivery, the labor room nurse contacted the defendant, who had never met the mother before her delivery. *Id.*

Defendant had no idea how much time had passed since the mother first came into the emergency room. *Id.* Only minutes after the defendant's arrival in the delivery room, the baby was actually delivered. *Id.* The trial court granted the defendant's motion for summary judgment, and the First District affirmed, again using the three-part test from *Johnson*, but this time focusing on part three as to what constituted "without a fee."

Preliminarily, the court held the defendant had no notice of the illness or injury. He had never seen the mother prior to the date of delivery, and nothing contradicted the fact his examination of her just prior to the delivery was the first knowledge he had a premature birth was imminent. *Id.* at 91.

Secondly, the court held the situation was an emergency. The plaintiffs presented no evidence to dispute another doctor was on-call that evening, and that the defendant was asked to take over since no response was received from the doctor on-call. *Id.* at 91-92. The facts showed the mother had such severe labor pains that night she had to go to the nearest hospital, one at which her own doctor was not present. *Id.* at 92.

The court then addressed the issue whether the defendant did or did not receive a fee for his services. The plaintiff argued he did since his office had sent out a request for the plaintiffs' public aid number to receive compensation. *Id.* However, even though such a request was sent per standard operating procedure at the defendant's office, nothing was ever produced to indicate a bill was sent to either the plaintiffs or public aid. *Id.*

The court held the fact the letter was sent is a red herring, since the statute mentions nothing of intent. *Id.* Therefore, even if the letter could be construed as an intent to bill in the future, no bill was ever sent nor payment provided, and thus those facts must control. *Id.*

4. Rivera v. Arana, 322 Ill. App. 3d 641, 749 N.E.2d 434 (2001): What Exactly is an Emergency?

On this occasion, the First District had to further analyze the second part of the *Johnson* test to see if not only the physician had provided emergency care, but also to determine exactly what constitutes an emergency.

In this case, the defendant-doctor treated a minor child for a foot infection when his aunt (who had legal custody) brought him to the defendant's office. *Id.* at 643. Originally, the defendant was seeing one of the aunt's children and she also asked if he would examine the other for infected feet. *Id.*

The defendant noted seeing the other child made him an "add on" and that examining him was "sort of" an emergency since the aunt's request could be seen as such. *Id.* The defendant did not charge for the visit because the aunt did not have any money and she did not have a public aid card. *Id.* at 644. The child made several more visits to the defendant's office for various illnesses in the future, including continued problems with his feet.

Eventually, the defendant learned from his attorney the aunt's husband had been abusing her and the children in their custody. *Id.* A lawsuit was filed by the child's mother, alleging medical malpractice against the defendant, in that he failed to take an adequate history or perform an adequate examination of the child, failed to record signs of child abuse, and failed to report suspected child abuse as required under Illinois law. *Id.* at 643.

The trial court granted the defendant's motion for summary judgment for it felt he was immune from liability under the GSA. The defendant pointed out that nothing during examination manifested itself as evidence of abuse, and the court used the three-part test from *Johnson* to determine immunity was proper. The trial court determined the illness or injury was the purported child abuse and the defendant had no notice of it, received no fee, and that both the aunt and the defendant had classified the visit as an emergency.

The First District, in its analysis, acknowledged the plaintiff did not contest and admitted the fact the defendant had no notice of the injury or illness. *Id.* at 647. Therefore, only the other two parts of the test were left. The court eventually conceded these factors favored the defendant as well, and affirmed the trial court.

The court first recalled its decision in *Villamil* regarding payment for services, to extinguish the plaintiff's argument the defendant had received compensation. *Id.* at 648. Whatever the defendant's intentions were with respect to possible billing in the future for his services, they were still deemed irrelevant. Also, even though the plaintiff contended the number of times the defendant treated the child is material in regard to billing to show anticipated payment, the court rejected that argument as well. *Id.* There was no authority to support that position and like the issue of intent, the defendant's expectations were irrelevant.

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Concerning the remaining part of the test, the plaintiff contended the trial court erred in relying on a case from Oklahoma to define the word "emergency." *Id.* at 650, discussing *Jackson v. Mercy Health Ctr.*, 864 P.2d 839 (Okla. 1993). The plaintiff urged the court to adopt the definition of "emergency" in the dictionary and to limit the conditions to those defined in medical literature. *Id.* at 649.

The court noted no Illinois case addressing the GSA had defined emergency or emergency care. Only three cases had defined it, but in unrelated contexts. *Id.* However, several other jurisdictions addressed the definition with specific reference to Good Samaritan laws, and the court took the opportunity to analyze them as well as medical dictionaries. *Id.* at 649-50.

Essentially, the court rejected the plaintiff's request to define "emergency" with a bright-line rule. *Id.* at 651. It stated there are a variety of situations which may equate to emergency care under the facts of one case, yet may not fall within any specific definition and may not be identified in medical literature as such. *Id.* Thus, a flexible broad definition was adopted, "given the purposes of the Good Samaritan Act and the need for medical providers to intervene and take care of individuals under a variety of situations without the threat of liability." *Id.*

The court held that rather than a bright-line rule, whether an emergency exists is to be resolved "based on the unforeseen, unexpected combination of circumstances presented which require the need for immediate action, assistance or relief." *Id.* Based on that definition, the court concluded that the defendant was presented with an emergency. The child had inflammation and more importantly, an infection in his feet that required immediate attention, which could have easily turned into a more serious and severe infection absent treatment. *Id.*

It is worth noting the claim relating to reporting the abuse was deemed to be waived by the court since the plaintiff had failed to raise the issue in the trial court. *Id.*

5. Blanchard v. Murray, 331 Ill. App. 3d 961, 771 N.E.2d 1122 (2002): Prior Notice is Found and Immunity is Barred

Just one year after *Rivera*, the First District found a physician would not be able to successfully prevail on his motion for summary judgment based on the GSA. Plaintiff-mother, on behalf of her son, filed suit against numerous parties, including the defendant-doctor, alleging negligence in her son's delivery. *Id.* at 963. The trial court granted the defendant's motion for summary judgment based on immunity pursuant to the GSA. The plaintiff contended the lower court erred, and the First District reversed.

The plaintiff was admitted to the hospital with labor pains. *Id.* The defendant was contacted at home to perform a cesarean section delivery on her since he was on-call. *Id*. at 964. During the course of the delivery, the baby suffered an injury to his right ring finger. *Id.*

The plaintiff had arrived at the hospital around midnight and was later informed an emergency cesarean section would have to be performed because the baby's heart rate was dropping. *Id.* She testified the defendant, who to her knowledge was on-call, entered her room and said he would be performing the operation. *Id.*

"After the birth of the baby, the plaintiff first recalled being awakened by a nurse who said something had happened and that the baby had been transferred to another hospital. The defendant later told the plaintiff the baby was cut when he threw his right hand up during the course of the cesarean section."

After the birth of the baby, the plaintiff first recalled being awakened by a nurse who said something had happened and that the baby had been transferred to another hospital. *Id.* The defendant later told the plaintiff the baby was cut when he threw his right hand up during the course of the cesarean section. *Id.*

The defendant testified the plaintiff was not a regular patient, had not seen her before the date of the incident, and he did not conduct any follow-up. *Id.* at 965. He further stated he did not charge for medical services because he was there as a service to the hospital in support of its residency program, and he was not a regular on-call physician and unsure why he was called that night. *Id.*

The appellate court noted the changes the GSA had undergone throughout the previous decades, and noted the post-1998 amendment (eliminating the requirement that a physician have no prior knowledge of an illness or injury) did not apply since statutes are presumed to apply prospectively, and the alleged actions in this case took place before the amendment took effect. *Id.* at 967.

Before fully applying the *Johnson* test, the court first noted the four cases (those previously discussed in this article) in Illinois addressing the GSA within the context of an emergency within a hospital. *Id.* at 970. The court conceded this application may not be consistent with what the legislature may have intended, but the plain language of the GSA justifies its application to emergencies in hospital settings. *Id.* A review of the previous holdings revealed the court has "indeed liberally construed the plain language of the Act" as the legislative purpose requests. *Id.*; 745 ILCS 49/2.

The court compared the facts in this case with the previous four cases, and by applying those decisions and the plain language of the GSA to the case at bar, the court found it "clear that it *does* matter whether [defendant] was on-call when he responded to [a] request for assistance." *Id.* at 972 (emphasis added). Upon receiving a telephone call at home where he was told of the nature of the plaintiff's illness, then electing to leave home, driving to the hospital and performing the surgery, such actions constituted "prior notice of the illness." *Id.*

The court noted the facts in this case were "extremely" different than previous cases. In those instances, immediate, critical concerns presented themselves. *Id.* The court felt this was true even in *Roberts*, where the doctor examined the patient 18 minutes after first being told of a deceleration and began delivery 10 minutes afterward. *Id.* The court pointed out 76 minutes passed from first contact with the defendant here to the time the caesarean section began. *Id.*

Unfortunately for the defendant, the court realized that if the delivery had occurred after the 1998 amendment of the GSA took hold, the lack of prior notice would no longer be a prerequisite to receiving immunity from civil liability. *Id.* at 972-73.

While the defendant's motion was defeated, the court still took it upon itself to continue its analysis under the *Johnson* test since so little case law exists. *Id.* at 973. In deciding the situation was an emergency, the court again noted a bright-line definition and rule was inappropriate. *Id.* It felt in determining whether there was an emergency, "the trier of fact must consider the gravity, the certainty, and the immediacy of the consequences to be expected if no action is taken." *Id.* at 974. The court also solidified its earlier stance that no requirement in the GSA mandates a court to look at the intent behind not charging a fee for services. *Id.* Here, the defendant was working to help the residency program versus volunteering to help patients. *Id.* But, since intent is not the issue, the defendant passed the third part of the test as well, and would have been granted immunity if the events occurred after the 1998 amendment took hold.

6. Somoye v. Klein, 349 Ill. App. 3d 209, 811 N.E.2d 296 (2004): Another Appellate District Sounds Off

In 2004, the Second District of the Appellate Court weighed in on the GSA in two separate decisions, which were related to child-birth as well. The outcomes show that the First and Second Districts are not in conflict regarding the GSA.

Somoye involved yet another defendant-doctor who arrived at the labor and delivery unit of a medical center to deliver the baby of one of his patients. *Id.* at 211. He did not anticipate treating the plaintiff and was not aware of her condition. *Id.* About 15 minutes after he arrived, another doctor asked him in the hallway to recommend a course of action for his patient based on a brief description, since the on-call obstetrical consultant could not be reached. *Id.* Defendant made several recommendations, and then returned to his own patient. *Id.*

About two hours later, the same doctor again encountered the defendant in the hallway and asked for help in evaluating the plaintiff's condition. *Id.* Defendant was told the attending physician (who was at home) recommended the baby be delivered that night. *Id.* He examined the patient and determined a cesarean section was necessary, advised the plaintiff of this, and told the other doctor he would deliver the baby if no other obstetrician was available. *Id.* He delivered his patient's baby about an hour later and then delivered the plaintiff's baby two hours after that. *Id.* It was found that the plaintiff's child suffered from cerebral palsy, seizure disorder, and developmental delay, and thus the plaintiff filed suit alleging negligence on the part of several parties, including the defendant. *Id.* at 211-12.

At the time of the alleged malpractice in the suit, the pre-1998 GSA was still in place, and the court therefore concluded the three-part test from *Johnson* was required. *Id.* at 212-13. The court noted it was undisputed the defendant did not charge a fee for his services. *Id.* at 213. The plaintiffs contended questions of fact only existed regarding the other two factors. *Id.*

The Second District distinguished this case from the *Blanchard* decision in concluding the defendant did not have notice of the plaintiff's condition, and agreed with him in that the facts are more like those in *Roberts*. *Id.* at 213-14

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He was not the on-call obstetrician, and was present only to deliver the baby of one of his own patients. *Id.* at 214. The first encounter he had with the other doctor in consultation was brief, and he did not examine the plaintiff or even learn her name. *Id.* He answered questions in hypothetical terms and suggested a particular test to better ascertain her condition. *Id.* He delivered the baby only after the other doctor told him the attending physician recommended a cesarean be performed. *Id.*

Examining the "emergency" requirement, the court looked at the First District's discussions of the issue in *Rivera*, and expanded on its general sentiment to help in dispensing with the plaintiff's negligence claim against the defendant. *Id.* at 215.

The court held that if no emergency existed, the plaintiff's underlying negligence claim failed regardless of the GSA because it was alleged a negligent failure to act, *i.e.*, to deliver the baby promptly, caused injury. *Id.* at 216. It is undisputed the defendant only had "privileges" at the hospital, and thus, no physician-patient relationship existed and the defendant owed no duty to the plaintiffs before the delivery. *Id.* Conversely, if an emergency existed, the underlying negligence claim survives but the GSA immunizes the defendant because he had no notice of the injury and did not charge a fee for his services. *Id.*

7. Neal v. Yang, 816 N.E.2d 853, 287 Ill. Dec. 886 (2004): Plaintiffs Start Getting Creative

In the most recent case regarding the GSA, a defendant-doctor had finished her elective surgical cases one afternoon and went home, only to be called back to provide anesthesia service for a patient in labor. *Id.* at 888. At the same time, other members of the hospital staff were in a nearby labor and delivery room attempting a forceps delivery of the plaintiff's child. *Id.* Defendant was unaware of this delivery or of the ensuing complications. *Id.*

The doctor performing the forceps delivery did not alert the on-call pediatrician of complications with the plaintiff's delivery in time for him to be present to treat the newborn after birth, and monitors noted the child's heart was in distress. *Id.* Since the on-call physician was not available, the doctor requested that the defendant assist in the child's neonatal resuscitation ("NNR"). *Id.* Defendant was paged, and was not told why, but still arrived and participated in the remainder of the NNR. *Id.* She ended up being the only physician involved in the NNR and was, as such, in charge. *Id.* at 888-89.

Cardiac activity was achieved two minutes after birth, the child was stabilized, and then airlifted to a different hospital. *Id.* However, permanent damage had already occurred. In the plaintiff's amended complaint, the defendant was added on the basis the delay in regaining cardiac and respiratory activity was due to her negligent performance of the NNR. *Id.* Defendant moved for summary judgment, raising the GSA, and the trial court granted the motion. *Id.*

The Second District again noted the GSA was amended in 1998, but concluded since this incident occurred prior to that time, prior notice would still be a part of the test to determine if immunity was properly found. *Id.* at 890.

"It is undisputed the defendant only had 'privileges' at the hospital, and thus, no physician-patient relationship existed and the defendant owed no duty to the plaintiffs before the delivery."

However, the plaintiff did not dispute the defendant satisfied all of the elements in favor of immunity. *Id.* Instead, it was maintained that in a case where a physician has a particular employment contract requiring her to render resuscitation, or in other words, a preexisting duty to render such care to patients, the aid offered is not "voluntary" in the sense of a Good Samaritan, and defeats the purpose of the GSA. *Id.*; 745 ILCS 49/2. The plaintiff argued the GSA only applied to those who volunteer their services and thus a court must address the additional element of whether the person claiming immunity was a "volunteer" with no preexisting duty to render care to the patient. *Id.* at 891.

The appellate court opined that the courts have liberally construed the plain language of the GSA (as required by 745 ILCS 49/2), and thus have applied it to emergencies at hospitals with physicians who allegedly had preexisting duties to assist. *Id.* The court found the plain language of 745 ILCS 49/25 contained no requirement for a physician to prove the absence of a preexisting duty to the patient, and thus, even though the legislature indicated its intent to foster volunteerism, it did not expressly require a doctor to be a volunteer to be granted immunity. *Id.* As it was written, the

law at that time only required no notice, emergency care, and no fee, and thus it was apparent the legislature intended to protect physicians who render emergency medical care from malpractice lawsuits. *Id.*

Based on the "clear language," the court concluded (in apparent agreement with the First District) since a "physician need not prove the absence of a preexisting duty to render aid to the patient in order to be immunized," the on-call status of a physician is only relevant in terms of the notice requirement. *Id.* at 894. Here, the defendant had no prior notice, and thus summary judgment was proper since all parts of the test were met. *Id.*

In dicta, the court reiterated it was clear the GSA grants immunity to encourage physicians to give aid without fear of repercussions in courts. *Id.* Upon amending the act in 1998, the legislature had the opportunity to limit the GSA's protection to doctors who had established the absence of a doctor-patient relationship or a preexisting duty, but instead removed the notice requirement and broadened, rather than limited, the application. *Id.* The court noted it must apply the GSA as written, and any change must be done by the legislature. *Id.*

C. Conclusion

Unless the General Assembly amends the GSA, it appears the 1998 amendment to 745 ILCS 49/25 will give Good Samaritan physicians a broader shield with which to protect themselves from the malpractice and negligence swords. Individuals from other professions should adhere to the same basic theories and principles physicians have undertaken to successfully immunize themselves from liability - they should make sure they follow the clear language of the part of the GSA that applies to them. While it may be more difficult for them to prevail since some of their standards are still stricter than the physicians, they too can still realize the fulfillment of aiding a fellow human in peril without fear of retribution in sharing their talents and gifts if proper precautions are considered.

Workers' Compensation Report

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

Continuously Transversing a Curb is an Increased Risk

In *Nascote Industries v. Industrial Comm.*, 2004 Ill. App. LEXIS 1326 5-03-0706WC (5th Dist. 2004), the appellate court, Industrial Commission Division, had occasion to review what constitutes an increased risk with respect to workers compensation claims. Unfortunately, the appellate court affirmed a decision from the Industrial Commission that awarded compensation.

In *Nascote Industries*, the petitioner worked as a trimmer in a department of a factory that required her, in essence, to trim off excess flash. On the date of the occurrence, while placing a trimmed bumper on a rack, the petitioner turned and then stepped down out of the rack and onto the floor. The step down was approximately four to six inches. As she stepped down, her left foot turned over and popped, causing extreme pain.

The evidence established that there was nothing defective about the floor such as cracks, rocks, dirt, grease or oil. The petitioner stated she simply stepped down onto the concrete floor when she felt pain in her ankle. The petitioner testified she was required to keep up with the press and that there were cycle speeds that were in the range of 70 to 75 seconds. She testified that the work was fast paced.

The petitioner did not immediately report the accident but worked the rest of her shift and the following day. She was off work the entire weekend and then reported the incident to her supervisor on the following Monday. The petitioner had also been treated for tarsal tunnel syndrome in her left foot six months prior to this injury.

The arbitrator found that a compensable accident took place. The Industrial Commission and the circuit court affirmed this finding. The appellate court noted that a petitioner must establish that she suffered a disabling injury that arose out of and in the course of her employment. "Arising out of" originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. A risk incidental to the employment is where it belongs to or is connected with what an employee has to do to fulfill one's own duties. *See, Caterpillar Tractor Co. v. Industrial Comm.*, 129 Ill. 2d 52, 541 N.E.2d 665 (1989).

The employer argued that there was nothing unusual about the premises that contributed to the petitioner's injury and that there was no increased risk of injury because a four- or six-inch step is one that is encountered by the general public on a daily basis. The Appellate Court, Fifth District, found that *Caterpillar* was distinguishable because in *Caterpillar*, the employer was not required to continuously transverse the curb, so there was no increased risk of injury. In *Nascote Industries*, the appellate court reasoned that the petitioner's work was fast paced and that stepping down onto the floor was a part of her work duties. The appellate court, applying the manifest weight of evidence standard, concluded the petitioner was not merely walking down a step, and compensability was affirmed.

Surveillance Can be Successful

In *Robert Ross v. Entenmann's Bakery*, 2004 Ill. App. LEXIS 1246, the petitioner worked as a bakery cleaner. He claimed that while performing his job, he felt a sharp pain in his back. He reported the incident to his supervisor and continued to work.

Twenty-one days after the occurrence, the petitioner began treating with a doctor and gave a history consistent with a work-related accident three weeks earlier. The diagnosis given was lumbar strain and the petitioner was provided with a light-duty restriction.

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.

During the time period that the petitioner was on light duty, surveillance was done and the petitioner was videotaped performing activities such as scooping gravel, raking, attempting to lift or push a stranded motor vehicle, driving a van and lifting a concrete slab. On the date of the surveillance, the petitioner sought treatment with his treating physician and did not identify any of the events that were displayed on the videotape. The treating physician continued to recommend treatment and thereafter continued to note the petitioner's ongoing back pain and problems.

Approximately four months later, the petitioner was taken off work completely due to his back pain for approximately six months. Additional treatment, including physical therapy and a myelogram, was accomplished. The petitioner was released to light-work duties but did not return to work.

"The treating physician testified at deposition and rendered an opinion that the petitioner's back pain could or might be causally connected to the work-related event. On cross-examination, the treating physician was confronted with the surveillance tape."

Thereafter, the petitioner sought treatment at an emergency room because he had injured his back while lifting a mattress while at home. The treating physician testified at deposition and rendered an opinion that the petitioner's back pain could or might be causally connected to the work-related event. On cross-examination, the treating physician was confronted with the surveillance tape. He then testified that he could not state whether the work-related accident or the activities shown on the videotape were a cause of the petitioner's alleged continuing back pain. He further testified that had he reviewed the surveillance tape on the date he examined the petitioner, he probably would have returned the petitioner to work in some capacity.

An independent medical examination was performed and the evaluating physician concluded that the petitioner's physical examination was normal with the exception of mild subjective complaints. The IME physician felt no further treatment was necessary and the petitioner could return to work without restrictions.

The arbitrator held that the petitioner sustained an accidental injury and awarded benefits to the petitioner, including TTD benefits. The Industrial Commission reversed, finding that the petitioner failed to prove an accidental injury. The Industrial Commission found the treating physician's testimony, coupled with the surveillance tape, did not support a finding of causal connection. It noted that the treating physician could not opine, after reviewing the videotape, that the petitioner's condition was a result of work duties. It further stated that the videotape clearly demonstrated the petitioner was engaged in heavy activities during the time period when he alleged he was disabled from work.

The appellate court affirmed the Industrial Commission decision, demonstrating that surveillance is a useful tool in the appropriate claim.

Legal Ethics

By: Michael J. Progar
Doherty & Progar, LLC
Chicago

Duty to Report Misconduct of Non-Practicing Attorney

Attorneys have an ethical obligation to report misconduct committed by a licensed attorney at any time, even if the attorney is not practicing law and the misconduct arises from purely personal activity. That was the conclusion of the American Bar Association's *Standing Committee on Ethics and Professional Responsibility*, in Formal Opinion 04-433, released on November 19, 2004. In its Opinion, the Committee explored the duty of an attorney under Model Rule 8.3(a) to report professional misconduct.

The conduct of attorneys in Illinois is governed by the Illinois Rules of Professional Conduct, which were adopted effective August 1, 1990 and replaced the canons of the Illinois Code of Professional Responsibility. The Illinois Rules of Professional Conduct were based on the ABA Model Rules of Professional Conduct that were originally adopted on August 2, 1983, which have since been amended fourteen times. All but eight states have adopted professional standards based on the Model Rules.

Rule 8.3 of the Illinois Rules of Professional Conduct states:

> *(a) A lawyer possessing knowledge not otherwise protected as a confidence by these Rules or by law that another lawyer has committed a violation of Rule 8.4(a)(3) or (a)(4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.*

There are few reported decisions in which an attorney has been disciplined solely for failing to report the misconduct of another attorney. However, one of the leading decisions is an Illinois case, *In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1989). *Himmel* involved a claimed violation of Rule 1-103(a) of the Illinois Code of Professional Responsibility, which is substantially the same as the current Rule 8.3 of the Illinois Rules of Professional Conduct.

In *Himmel*, an attorney was suspended from the practice of law for failing to report the misconduct of an attorney who formerly represented his client and converted the client's settlement funds. Although the attorney had been directed by the client not to report the former attorney's conduct to the Attorney Registration and Disciplinary Commission, the investigation disclosed that information about the misconduct was received by the attorney in a non-privileged communication. Therefore, the attorney was found to have violated Rule 1-103(a) by failing to report the former attorney's misconduct. He was suspended from the practice of law for one year.

Himmel addressed only the duty to report misconduct by an attorney engaged in the practice of law.[1] It did not, however, address misconduct by an attorney who was not practicing law at the time, which was the subject of Formal Opinion 04-433. For purposes of Formal Opinion 04-433, a non-practicing attorney was considered to be a licensed attorney not actively accepting engagements to provide legal services for clients. Such situations might arise, for example, in the case of a licensed attorney employed by a corporation in a non-legal capacity, or serving on the faculty of a law school.

While it is not binding on Illinois attorneys, Formal Opinion 04-433 is instructive. A duty to report misconduct arises under Rule 8.3(a) whether the misconduct of a licensed attorney arises within or without the context of the practice of law. The duty arises, however, only if certain threshold requirements are met. The attorney must have (1) unprivileged (2) knowledge of (3) illegal conduct involving moral turpitude, or dishonesty, fraud, deceit, or misrepresentation.

About the Author

Michael J. Progar is a partner with the firm of *Doherty & Progar, LLC*. He practices in both the Indiana and Illinois offices. A trial attorney with more than 20 years of civil jury trial experience, Mr. Progar has tried over 50 jury trials to verdict in both state and federal courts. Areas of special concentration include complex product liability and toxic tort litigation, insurance coverage, fraud and bad faith litigation, construction litigation, premises liability and employers' liability. He received his J.D. from DePaul University College of Law in 1981 and his B.A. in American Studies from the University of Notre Dame. Mr. Progar is a member of DRI, IDC, Defense Trial Counsel of Indiana, Indiana State Bar Association, State Bar of Wisconsin and the Lake County, Indiana Bar Association. He has served on various bar association committees in the areas of tort and insurance litigation and alternative dispute resolution.

Rule 8.3(a) refers to knowledge "not otherwise protected as a confidence." The Illinois Rules of Professional Conduct define "confidence" as information protected by the attorney-client privilege. If the attorney learns of the misconduct through a source that does not fall within the scope of the attorney-client privilege, or if the client waives the privilege to that extent, the misconduct must be reported.

The second issue is whether the attorney has "knowledge" of the misconduct. Under the Rules, "knowledge" would be considered to be actual knowledge of the misconduct. Such knowledge may also be inferred from the circumstances. As noted in Formal Opinion 04-433, most cases and ethics opinions have concluded that whether an attorney possesses "knowledge" should be measured by an objective standard. That is, would a reasonable lawyer have formed a firm opinion under the circumstances that the conduct in question had more likely than not occurred. *See*, *Attorney U. v. Mississippi Bar*, 678 So.2d 963, 972 (Miss. 1996).

"If the attorney learns of the misconduct through a source that does not fall within the scope of the attorney-client privilege, or if the client waives the privilege to that extent, the misconduct must be reported."

Finally, if the attorney has unprivileged knowledge of misconduct, such misconduct need only be reported if it constitutes illegal conduct involving moral turpitude, or dishonesty, fraud, deceit, or misrepresentation. *See*, *Himmel*, 125 Ill. 2d at 543, 533 N.E.2d at 794. Examples of such illegal conduct have included conversion of client funds, fabrication of official documents, unauthorized endorsement of a settlement check, suppression of evidence, the creation of false evidence, and various types of criminal conduct.

Illegal conduct involving false statements or deception may occur in either a professional or personal context. Examples include misrepresentations to clients, misrepresentations to opposing counsel or the court regarding material facts, and material misrepresentations or false statements made on personal tax returns, personal employment applications, credit applications, and insurance claim forms.

The Preamble to the Illinois Rules of Professional Conduct recognizes that the practice of law is a public trust. In the state of Illinois, the legal profession enjoys the privilege of regulating itself. It is, therefore, incumbent upon the member of the Illinois Bar to report instances of misconduct by a licensed attorney, whether that misconduct is professional or personal in nature. Such self-policing of attorney misconduct is essential to maintaining public confidence in the integrity of the legal profession.

Endnotes

[1] The Illinois Supreme Court relied, in part, on the *Committee on Ethics and Professional Responsibility's* Informal Opinion 1210, concerning the ABA's Model Code of Professional Responsibility Rule 1-103, noting that the Illinois Code was based upon the Model Code.

Product Liability

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

Defendants In Strict Liability Actions: What Are Sellers, Installers and Manufacturers?

Carollo v. Al Warren Oil Co., Inc.*, 2004 WL 2715547 (1st Dist. November 24, 2004)

In a product liability action, strict liability attaches to all parties in the distributive chain, including all manufacturers, sellers, suppliers, wholesalers, distributors and retailers. *Hammond v. N. Am. Asbestos Corp*., 97 Ill. 2d 195, 454 N.E.2d 210, 73 Ill. Dec. 350 (1983). On occasion, the doctrine has been extended to product installers who sell or supply an allegedly defective product in the regular course of business incident to installation. *See, e.g.*, *Prompt Air, Inc. v. Firewall Forward, Inc*., 303 Ill. App. 3d 126, 707 N.E.2d 235, 236 Ill. Dec. 390 (1st Dist. 1999). Under some circumstances, the doctrine has been stretched to include independent sales agents, manufacturer's representatives or even trademark holders who might play an integral role in the marketing of the allegedly defective product. *See, e.g,. Connelly v. Uniroyal, Inc*., 75 Ill. 2d 393, 389 N.E.2d 155, 27 Ill. Dec. 343 (1979); *Bittler v. White and Co., Inc.*, 203 Ill. App. 3d 26, 560 N.E.2d 979, 148 Ill. Dec. 382 (1st Dist. 1990).

Generally, the imposition of strict liability on a product defendant will hinge on whether the party in question has any "participatory connection, for personal profit or other benefit, with the injury-causing product and with the enterprise that created consumer demand for and reliance upon the product." *Bittler*, supra, 203 Ill. App. 3d at 30, quoting *Kasel v. Remington Arms, Inc*. 24 Cal. App. 3d 711, 725, 101 Cal. Rptr. 314, 323 (1972). The underlying social policy for spreading strict liability along the entire distribution chain recognizes that any party that markets a product has undertaken and assumed a special responsibility to consumers who may be injured by the product. In turn, consumers have the right to expect that products will be reasonably safe, and that sellers will stand behind their goods. *See,* Restatement (Second) of Torts, § 402(A), cmt. c.

Under both Illinois law and the Restatement, the "occasional seller" is exempt from strict liability. The "occasional seller" may be a housewife who, on occasion, sells a jar of jam to a neighbor or the owner of an automobile who might sell to his or her neighbor or even a used car dealer. *See,* Restatement (Second) of Torts, § 402(A), cmt. f. Beyond those examples, however, the Restatement does not provide a rule or test for distinguishing the occasional seller from a party otherwise engaged in business.

While in most product liability cases, the "status" of the product defendant is not in dispute, in the recent case of *Carollo v. Al Warren Oil Co., Inc.,* 2004 WL 2715547 (1st Dist. November 24, 2004), the First District Appellate Court needed to decide whether a trucking company that installed two fuel tanks on a truck chassis and years later sold the tank trucks to another company could be responsible in strict liability for injuries caused by alleged defects in the tank truck as sold. In deciding this issue, the court reviewed and applied Illinois law regarding the legal identity of sellers, installers and manufacturers under the doctrine of strict liability.

In *Carollo*, the plaintiff was burned severely in an explosion that occurred while he was transferring fuel from a large tanker truck (identified as A-3) to a smaller tanker truck (identified

* As of this writing, the plaintiff's petition for leave to appeal to the Illinois Supreme Court is pending.

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.

as A-2). The plaintiff's employer, a fuel distributor, purchased A-2 from the defendants in 1993 and later purchased A-3 from the same defendants in 1994.

Defendant Altom purchased the holding tank on A-2 from the Chicago Fire Department and used it for over eight years before attaching it to a truck chassis and selling it to the plaintiff's employer. Altom's employees spent approximately 200 hours reworking the tank and truck prior to the sale. A-3 was assembled in the same manner. As delivered to the plaintiff's employer, A-2 did not have a "static reel" and a "fill pipe" to reduce the hazard of explosion caused by sparks of static electricity. As its primary business, Altom provided cartage for chemicals and petroleum products in 48 states. Warren Oil distributed motor fuels, oils and chemicals at wholesale and retail prices in the bistate area. The same president, Thomas Warren, owned and operated both companies. At trial, the defendants did not distinguish their individual actions. It was alleged that both companies were responsible for assembling the tank trucks and selling them to the plaintiff's employer.

"The* Carollo *court concluded: 'It is not necessary that a commercial seller be engaged exclusively or even primarily in selling the type of product that injured the plaintiff, provided that the sale of the product is more than occasional or casual.'"

The plaintiff originally filed a two-count complaint against the defendants in strict liability and negligence. The strict liability count alleged both design defects and manufacturing defects. The plaintiff further alleged that the defendants "designed, manufactured, distributed and sold" both tanker trucks in an unreasonably dangerous condition. On appeal, the plaintiff also argued that the defendants were subject to strict liability as "installers."

The defendants moved for summary judgment on the strict liability count, contending they were "mere consumers and resellers of a second hand product." *Id.* at *3. Prior to trial, the court granted the defendants' motion for summary judgment. The case did proceed to trial on the negligence theory, and the jury returned a verdict in excess of $1,000,000.[1]

In support of the motion for summary judgment, the defendants filed the affidavit of Thomas Warren, the president of both defendant corporations. Mr. Warren testified that defendant business, Altom, transported petroleum products, and defendant business Warren distributed oil products. He further testified that neither company was in the business of "designing, manufacturing, distributing or selling new tanker trucks." *Id.* at *5. On the basis of this affidavit, the defendants asserted that they could not be subject to strict liability because they were, at most, an "occasional seller."

But Mr. Warren also gave a deposition. In that testimony, he admitted that both defendants sold trucks and derived income from the sales of trucks such as the one on which plaintiff was injured. Together, both companies sold 13 such trucks prior to the plaintiff's accident, and in addition, sold approximately 25 tractors. The sales of A-2 and A-3 represented 1% or less of the defendants' income.

Based on this record, the appellate court held that the trial court erroneously granted summary judgment. The plaintiff's allegations that the defendants were sellers, installers and manufacturers of the tanker trucks all presented questions of fact as to the application of strict liability under Illinois law.

What is a "Seller"?

The court observed that there was little case law regarding the defendants' claim that they were only "occasional sellers." Citing *Goetz v. Avildsen Tool & Machines, Inc.*, 82 Ill. App. 3d 1054, 403 N.E.2d 555, 38 Ill. Dec. 324 (1st Dist. 1980), the court reviewed the rationale for imposing strict liability on commercial sellers. One who enters the business of supplying products that may endanger persons and property has a "special responsibility" for the public safety of consumers. But this special responsibility is not imposed on the "ordinary individual" who makes an isolated sale in the absence of negligence.

The court held that the defendants in *Carollo* were not "ordinary individuals," but rather commercial vendors. Nor could the sale of the A-2 and A-3 trucks be characterized as an isolated transaction unrelated to the principal business of the seller. Given that both defendant corporations had sold used trucks to other businesses during the 10-year period

(Continued on next page)

Product Liability *(Continued)*

before the accident, there was a genuine issue of material fact regarding whether the defendants engaged in the business of selling tanker trucks. The *Carollo* court concluded: "It is not necessary that a commercial seller be engaged exclusively or even primarily in selling the type of product that injured the plaintiff, provided that the sale of the product is more than occasional or casual." 2004 WL 2715547 at *7.

Using this rationale, the defendants were not occasional sellers. The sale of the trucks was incidental to the defendants' business (although not the primary purpose of the business). Moreover, the sale was not an isolated transaction, but part of a 10-year pattern that occurred when business circumstances dictated the lack of need for such trucks.

What is an "Installer"?

The plaintiff also alleged that the defendants were subject to strict liability based on their role as the installers of the tanks onto the truck chassis. But in moving for summary judgment, the defendants relied on the case of *Hinojasa v. Automatic Elevator Co.*, 92 Ill. App. 3d 351, 416 N.E.2d 45, 48 Ill. Dec. 150 (1st Dist. 1980), which held that strict liability does not apply to the mere installer of the product**.** In *Hinojasa*, the defendant was an elevator installer that assembled an elevator pursuant to the blueprints and specifications of the elevator's supplier. Moreover, the defendant did not sell the elevator. The installer's income was derived from the service alone.

The First District rejected the *Hinojasa* argument since, under the facts, the *Carollo* defendants also sold the tank trucks to the plaintiff's employer. In reaching this conclusion**,** the court relied on *Prompt Air, Inc. v. Firewall Foreward, Inc*., which observed: "One who sells, supplies, or distributes a defective product in the regular course of business incident to the rendition of a service may be held strictly liable in court." 303 Ill. App. 3d 126, 130, 707 N.E.2d 235, 236 Ill. Dec. 390 (1st Dist. 1999). In *Carollo*, the defendants' installation of the tanks was more than incidental, it was part of rebuilding the product that was sold subsequently. Thus, the defendants were not "mere installers."

What is a "Manufacturer"?

Finally, the defendants contended that they were not manufacturers of the tank trucks but "assemblers" who were not subject to strict liability. In response to this argument, the court reviewed the definition of "manufacturing" under Illinois law. In the tax case of *Dolese & Shepard Co. v. O'Connell*, the Illinois Supreme Court defined manufacturing as follows: "Whenever labor is bestowed upon an article which results in its assuming a new form, possessing new qualities or new combinations, the process of manufacturing has taken place." 257 Ill. 43, 45, 100 N.E. 235 (1912).

Later in another tax case, *Schawk, Inc. v. Zehnder*, the court discussed the definition of "manufacturing" as found in the Illinois Income Tax Statute: "the material staging and production of tangible personal property by procedures commonly regarded as manufacturing, processing, fabrication, or assembling which changes some existing material into new shapes, new qualities or new combinations." 326 Ill. App. 3d 752, 755, 761 N.E.2d 192, 260 Ill. Dec. 348 (1st Dist. 2001), quoting 35 ILCS 5/201 (e)(3) (West 1998).

The *Carollo* court observed that by assembling the parts for A-2 and A-3 – a task that took over 200 hours – "it could be concluded, as a matter of law, that defendants are manufacturers." 2004 WL 2715547 at *9. At the very least, there was a genuine issue of material fact as to whether the defendants were "manufacturers" so as to apply strict liability.

"The* Carollo *court observed that by assembling the parts for A-2 and A-3 – a task that took over 200 hours – 'it could be concluded, as a matter of law, that defendants are manufacturers.'"

Harmless Error

Even though the *Carollo* court spent a majority of the opinion reviewing the trial court's erroneous order of summary judgment, it also concluded that the plaintiff was not entitled to a new trial on the basis of strict liability theory. The court found that the case went to the jury under a negligence theory, and the jury was instructed on the duties owed by the defendants. Since the jury decided that the defendants breached their duties, and further found that the breach was a proximate cause of the plaintiff's injuries and thus awarded damages, the court declined to order a new trial, concluding, "A plaintiff is entitled to one recovery only for his injuries, regardless of the number of theories advanced." *Id.*

at *10.

In summary, the *Carollo* case affirms the view that any participatory connection for profit with an injury-causing product and with the enterprise that created consumer demand and reliance on the product is sufficient to impose strict liability. *Carollo* demonstrates that this expansive test applies to any commercial enterprise along the distributive chain. Thus, the sale of any used product or assembled product with a remote connection or relationship to the seller's business should be enough to take the transaction out of the "occasional sale" category and satisfy the requirements of the doctrine of strict liability.

Endnote

[1] The jury returned a verdict of total damages in the amount of $1,057,600, and allocated fault as follows: plaintiff – 15%, Warren – 15%, Altom – 18%, and the plaintiff's employer – 52%. Originally, the trial court reallocated fault by prorating the employer's 52% among the plaintiff, Warren and Altom. In the meantime, the Illinois Supreme Court decided *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 783 N.E.2d 1024, 270 Ill. Dec. 724 (2002). Upon further posttrial motion, the court entered judgment pursuant to Unzicker and found each defendant only severally liable for its proportionate share of the plaintiff's nonmedical damages. On appeal, the court affirmed the revised fault allocation, finding Unzicker indistinguishable. Significantly, the court also held that the amended Section 2-1117, 735 ILCS 5/2-1117 (effective June 4, 2003) was not retroactive.

Employment Law Issues

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

Age and Sex Discrimination

Plaintiff Failed to Establish Age or Sex Discrimination

In *Kriescher v. Fox Hills Golf Resort and Conference Center,* 384 F.3d 912 (7th Cir. 2004), Judith Kriescher sued her employer, Fox Hills Golf Resort, alleging age and sex discrimination through a hostile work environment and discriminatory discharge. The district court granted summary judgment to the employer and Kriescher appealed.

Kriescher worked at the resort from 1981 to 1994 and then again from 1996 until she was terminated in 1999. Kriescher became the front desk manager in 1998, around the same time the resort hired a new general manager. Kriescher alleged that under the new general manager's leadership, the workplace became a sexually permissive environment permeated with misconduct and rule violations. Kriescher noted in May 1998 the resort hosted a golf event for an adult entertainment

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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.

Employment Law Issues *(Continued)*

club, during which several strippers were found to be using the facilities in the nude with the executive rooms division manager. Kriescher contended the manager should have been disciplined for this incident but was not. *Kriescher*, 384 F.3d at 914.

Kriescher also pointed to an incident in November 1999 in which a security guard found the food and beverage manager to be engaging in what appeared to be activity of a sexual nature with an employee. Although Kriescher was not on duty at the time, the security guard telephoned her at home to report the incident. When the general manager learned of the incident he asked his security manager to investigate. Ultimately, the security manager concluded there was no direct evidence of a sexual encounter. However, during the investigation, the general manager learned Kriescher asked several security guards to keep an eye on the food and beverage manager and report any further misconduct directly to her. The general manager terminated Kriescher, stating she had no authority to direct security personnel to gather information about other managers and that she had failed to maintain confidentiality by spreading rumors to the staff about the November 1999 incident. *Id*.

Kriescher contended in her suit that before her termination, she was subjected to a hostile work environment and her termination resulted from age and sex discrimination. Specifically, she maintained her workplace was a hostile environment for female and older employees because of the sexually permissive atmosphere and the managers' tolerance of rule violations. *Id*.

Although the district court found Kriescher offered proof of a sexually permissive atmosphere in the workplace, it granted summary judgment for the defendant on the hostile environment claim because she offered no proof a reasonable person would find the environment permeated with hostility toward women and older employees. The district court stated Kriescher did not offer any acts or remarks directed at her or anyone else to evidence hostility to women or older employees. The district court also rejected Kriescher's discriminatory discharge claim because she had not identified any similarly situated employees who engaged in comparable misconduct and were disciplined less harshly. *Id*. at 915.

On appeal, the Seventh Circuit upheld the district court's ruling. The appellate court noted that to survive summary judgment, Kriescher must have shown she was subjected to unwelcome harassment on the basis of her age or sex, the harassment was so severe or pervasive as to alter the conditions of her work environment, and there was some basis for employer liability (citing *Williams v. Waste Mgmt. of Illinois*, 361 F.3d 1021, 1029 (7th Cir. 2004)). Further, the relevant conduct must have been sufficiently severe that Kriescher subjectively found it hostile, and a reasonable person also would find it to be hostile (citing *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 807 (7th Cir. 2000)).

The Seventh Circuit found Kriescher failed to present evidence that a reasonable person would find her workplace to be hostile to female or older employees, as she offered no evidence she was exposed to any of the incidents she complained of, and she did not explain how the incidents objectively altered her work environment in any way. Further she did not offer any evidence she was denied any privileges or benefits because she refused any sexual advances. Moreover she did not offer any evidence the resort's sexually charged atmosphere was uniquely hostile for women and older employees. *Kriescher,* 384 F.3d at 915.

In regard to Kriescher's claim that she was terminated because of her age and sex, the Seventh Circuit noted she was proceeding under the indirect burden-shifting method of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that method of proof, Kriescher had to establish a prima facie case of discrimination, which included showing similarly situated employees outside of her protected class who were treated more favorably. While Kriescher argued both the food and beverage manager and executive rooms division manager violated resort rules, the court found she offered no evidence her duties were the same as theirs or that their alleged rule violations were comparable to her conduct. The court determined Kriescher's claim failed without the essential piece of the prima facie case. *Kriescher,* 384 F.3d at 916.

Age and Retaliation

Seventh Circuit Reverses Jury Verdict in Favor of Plaintiff on Retaliation Claim

In *Filipovich v. K & R Express Sys., Inc.*, 391 F.3d 859 (7th Cir. 2004), the plaintiff, Momcilo Filipovich, sued K & R Express Systems, Inc. ("K & R") several times during his employment, alleging the company discriminated against him on various grounds prohibited by Title VII. 42 U.S.C. § 2000e, *et seq*. Filipovich's most recent suit against K & R alleged discrimination on the basis of age and national origin. Filipovich also claimed K & R retaliated against him for bringing earlier complaints. *Filipovich*, 391 F.3d at 861.

Filipovich was a 62-year-old man who worked as a dockman unloading freight from trailers for K & R. After 15 years of employment, he sought a promotion to the position of

spotter. To hold the spotter position, employees had to pass a road test to ensure they knew how to drive a trailer. Filipovich failed the test twice. After failing the test twice, a safety manager at K & R met twice with Filipovich to train him for the road test. However, Filipovich was never contacted to take the qualification test. *Id*. at 861-62.

Believing he was not selected as a spotter because he was thought to be too old, Filipovich filed an Equal Employment Opportunity Commission (EEOC) charge. Following the filing of his charge, Filipovich began to receive disciplinary letters warning him of problems with his loading, unloading and securing freight. As a result of the letters, Filipovich received two suspensions.

"Believing he was not selected as a spotter because he was thought to be too old, Filipovich filed an Equal Employment Opportunity Commission (EEOC) charge."

A jury entered a verdict in favor of Filipovich on his claims of age discrimination and retaliation. However, the district court granted judgment as a matter of law to K & R on the age discrimination claim and remitted the jury's award of punitive damages regarding the retaliation claim. *Id*. at 861. Both parties filed appeals.

K & R argued it refused to promote Filipovich to a spotter position because he failed the test twice. In response to the retaliation claim, K & R also argued that shipping records documented numerous errors made by Filipovich. Filipovich introduced nothing to suggest other dockmen did not receive disciplinary letters when they committed comparable errors. The Seventh Circuit noted the issue was not whether Filipovich presented a prima facie case of discrimination or retaliation, but rather, whether he presented enough evidence at trial to permit the jury to conclude he was the victim of discrimination. The appellate court agreed with the trial court's determination that Filipovich did not present enough evidence. *Id*. at 863.

The court found Filipovich did not present any evidence of younger dockmen being trained for the spotter position and K & R representatives testified it was policy not to train anyone. Therefore, if Filipovich received different treatment at all, he received more favorable treatment than other dockmen seeking the spotter position. The court noted that merely disbelieving an employer's explanation cannot sustain a jury verdict. *Id*. at 864.

In regard to Filipovich's retaliation claim, the Seventh Circuit determined the disciplinary letters were standard procedure when dockmen made mistakes, and the evidence confirmed Filipovich made costly mistakes for K & R that warranted disciplinary letters. Further, Filipovich did not offer any evidence to show K & R applied the disciplinary system in a discriminatory manner or that K & R failed to discipline other dockmen for similar mistakes. Finding that Filipovich did not provide proof of retaliation, the Seventh Circuit reversed the district court's denial of judgment as a matter of law for K & R on the retaliation claim and affirmed the district court's grant of judgment as a matter of law on the age discrimination claim. *Id*. at 865-66.

ADA

Voluntary Accommodations Did Not Establish Employee Was "Regarded as Disabled"

In *Cigan v. Chippewa Falls School Dist.*, 388 F.3d 331 (7th Cir. 2004), the plaintiff, Connie Cigan, was a physical education teacher in Chippewa Falls, Wisconsin. After 30 years of employment, Cigan retired in June 2003. She brought suit against the Chippewa Falls School District under the Americans with Disabilities Act (ADA), contending the district forced her to retire by failing to accommodate her arthritis, bursitis, degenerating spinal discs, scoliosis and spondylitis. *Cigan*, 388 F.3d at 332. As a result of her conditions, Cigan began to take more time off and arrive at school late. She also needed other teachers to cover her duties or adjust the length of her class periods while she rested.

Cigan and the school district disagreed about the adequacy of the school's accommodations. Cigan complained the chair the district supplied her so she could take the breaks her physician recommended was not appropriate for her condition. The school district concluded Cigan either became lazy or had accumulated so many physical problems that she no longer could do the job even with accommodations, thereby

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Employment Law Issues *(Continued)*

excluding her as a "qualified person with a disability."

In January 2003, the superintendent informed Cigan he would recommend the district not renew her contract at the end of the school year. Cigan instead retired, which improved her benefits package. In her suit, she sought to have her retirement treated as a constructive discharge. The district court granted summary judgment in the school district's favor.

On appeal, Cigan did not contend that her working conditions were intolerable. Rather, she contended they were irrelevant because the prospect of discharge lurked in the background. However, the court concluded the prospect of being fired at the conclusion of an extended process was not itself a constructive discharge. *Id*. at 333.

The Seventh Circuit further determined Cigan was not disabled within the meaning of the ADA. The court noted Cigan conceded at her deposition she could carry out the normal tasks of daily life. Cigan maintained the school district regarded her as disabled and thus, she had the same rights as a person with a disability. The court noted a person is "regarded as disabled" when the employer, rightly or wrongly, believes the person has an impairment that substantially limits one or more major life activities. *See*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). Cigan contended that since the district made some efforts at accommodation, it must have regarded her that way. The court rejected this argument, finding the record would not permit a reasonable trier of fact to conclude the school district regarded Cigan as "disabled" since she offered no reason to conclude the principal at her school knew, supposed or cared anything about the effect of her conditions on "major life activities" when providing breaks, chairs and other assistance to her. *Cigan*, 388 F.3d at 334-35.

Race and Retaliation

Plaintiff Failed to Establish Prima Facie Case of Racial Harassment or Retaliation

In *Luckie v. Ameritech Corp.*, 389 F.3d 708 (7th Cir. 2004), Colette Luckie, an African American, began her employment with Ameritech in 1995. Luckie held the position of senior manager of organizational development and planning in the human resources department. Jane Marvin acted as Luckie's second-line supervisor. Marvin left Ameritech in 1999 and was replaced by Gwen Patterson. The company president requested that Patterson focus on widespread client dissatisfaction with human resources by talking to managers of other business units. Patterson contacted several managers as well as Marvin, even though Marvin had left the company. Marvin expressed concern regarding Luckie's performance and her belief Luckie may not be able to meet the expectations of her job. Marvin further suggested Luckie might need a formal performance improvement plan in order to provide her with specific objectives and expectations. Patterson also contacted the director of human resources and the director of Ameritech Institute, who both expressed concern regarding Luckie's performance. *Luckie*, 389 F.3d at 711-12.

Patterson and Luckie met shortly after Patterson's arrival to discuss Luckie's performance of direct reports. Luckie maintained Patterson asked only about the minority employees and stated she wanted to "change the complexion" of the department. Patterson denied making the "complexion" comment, and denied threatening Luckie with scrutinization if Luckie would not create performance issues with minority employees who were her direct reports. Luckie further contended Patterson called an African American employee a "dunce." *Id*. at 712.

"The court noted a person is 'regarded as disabled' when the employer, rightly or wrongly, believes the person has an impairment that substantially limits one or more major life activities."

Despite Patterson discussing her expectations with Luckie, Luckie's performance did not improve, and Patterson documented Luckie's numerous performance problems. Patterson ultimately placed Luckie on a performance plan and gave her 30 days to improve her performance. During the 30-day period, Patterson met with Luckie regularly in the presence of two other employees who did not report to Patterson and who worked in different units. The consensus among the three was Luckie acted defensively during the meetings and was not open to suggestions. At some point during the 30-day period, Luckie contacted the Ameritech internal EEO hotline twice

to complain about Patterson's conduct. Luckie only identified herself by first name and did not name Patterson as the manager about whom she was calling. Luckie was terminated at the end of the 30-day period. She then filed suit against Ameritech. The district court granted summary judgment in favor of Ameritech. *Id.* at 712-13.

On appeal, the Seventh Circuit noted that to state a claim for a hostile work environment, Luckie had to demonstrate: (1) she was subject to unwelcome harassment; (2) the harassment was based on her race; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create a hostile or abusive atmosphere; and (4) there was a basis for employer liability. *See, Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004). Luckie did not allege she was the target of any overtly race-related behavior. Rather, she contended Patterson's comment that she wanted to "change the complexion" of the department, and Patterson's calling an African American employee a "dunce" showed evidence of a campaign of racial harassment. The court determined these comments were not sufficiently connected to race so as to satisfy the second prong of the hostile work environment claim. *Luckie*, 389 F.3d at 713-14.

The court noted that Patterson made the "complexion" comment in the context of discussing the department's organization and ways to increase efficiency, and no reasonable jury could find it was racial in character or purpose. The court further found the events at issue were not severe or pervasive, as was required to satisfy the third element of a racially hostile work environment claim. *Id.* at 714.

In regard to Luckie's retaliation claim, the court noted she could establish a prima facie case for unlawful retaliation under either the direct method or the indirect method. In order to survive summary judgment under the direct method, Luckie had to present direct evidence she engaged in statutorily protected activity, she suffered an adverse employment action, and there was a causal connection between the two. *See, Haywood v. Lucent Tech., Inc.*, 323 F.3d 524, 531 (7th Cir. 2003). Although Luckie contended Patterson placed her on a performance plan and fired her in retaliation for her complaints to the EEO office, the court found Luckie's claim failed under the direct method because she could not prove a causal connection between her complaints and her termination. Luckie could not establish a causal connection either because she was unable to prove Patterson had actual knowledge of her complaints or a reasonable inference of Patterson having such knowledge. *Luckie*, 389 F.3d at 714.

Luckie's claims also failed under the indirect method. Under the indirect method, Luckie had to establish: (1) she engaged in statutorily protected activity; (2) she was performing her job according to Ameritech's legitimate expectations; (3) despite her satisfactory performance she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity. *See, Williams*, 361 F.3d at 1031. The Seventh Circuit found Luckie's claim failed because she did not perform her job according to Ameritech's legitimate expectations at the time of her termination. The record showed Luckie had performance problems prior to being placed on the performance plan, and other managers besides Patterson noted her deficiencies. Moreover, while on the performance plan, she continued to perform below expectations. Thus, the Seventh Circuit upheld the district court's grant of summary judgment in favor of Ameritech. *Id.* at 714-15.

Gender

Plaintiff Failed to Establish Prima Facie Case of Gender Discrimination

In *O'Neal v. City of Chicago*, 392 F.3d 909 (7th Cir. 2004), Brenda O'Neal was a sergeant in the Chicago Police Department. In May 2002 she was transferred from her position as "administrative sergeant" in the narcotics unit to the position of "beat sergeant" in one of the districts. The department claimed O'Neal was transferred from her position in the narcotics unit as a security precaution in response to a rumor that O'Neal had dated a former Chicago police officer who was convicted of selling narcotics and who was about to be released from prison. A male officer replaced O'Neal as sergeant in the narcotics unit. O'Neal claimed that her transfer resulted from racial and gender discrimination. *O'Neal*, 392 F.3d at 910.

O'Neal sought to establish her claim of gender discrimination under the burden-shifting method set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To advance a prima facie case of gender discrimination, O'Neal had to establish: (1) she was a member of a protected class; (2) she performed her job satisfactorily; (3) she suffered an adverse employment action; and (4) defendants treated similarly situated employees outside of her class more favorably. In affirming the district court's grant of summary judgment in favor of the department, the Seventh Circuit determined O'Neal did not support a prima facie case of gender discrimination because she did not present sufficient evidence of a material adverse employment action. *O'Neal*, 392 F.3d at 914.

Although O'Neal argued her transfer was adverse, the court found the two positions held the same rank within the

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Employment Law Issues *(Continued)*

department and received the same pay and benefits. The court noted that a nominally lateral transfer – even with no change in financial terms – can significantly reduce career prospects by preventing the use of skills and experiences. Such lack of use causes skills to atrophy and, therefore, likely stunts career prospects, and can be considered a materially adverse employment action. However, the court determined O'Neal presented no objective evidence, and that sergeants in the narcotics units were more likely to be promoted than sergeants working in the districts. Even if the rumor that led to O'Neal's transfer ultimately diminished her chances for promotion, O'Neal presented no evidence the transfer itself caused the harm. Additionally, O'Neal adduced no evidence of her taking home less pay or having less supervisory responsibility as a result of the transfer. *Id.* at 912.

The court determined O'Neal's complaints about being relegated to a position that resulted in a loss of a flexible work schedule, and holidays and weekends off, fell short of an adverse employment action. O'Neal had to show something more than the ordinary difficulties associated with a job transfer to sustain her suit, which she did not do. Simply being shifted to an essentially equivalent job that O'Neal did not like as much did not create a Title VII claim. *Id*. at 913.

Gender and Race

Plaintiff Failed to Establish Prima Facie Case of Discrimination Based on Race or Gender

In *Dandy v. United Parcel Serv., Inc.*, 388 F.3d 263 (7th Cir. 2004), Brenda Dandy, an African American woman, worked for United Parcel Service ("UPS") for over 25 years. In 1993, after an internal investigation, UPS acknowledged a problem with the promotion and advancement of African Americans and women at the company. In an attempt to combat the problem, UPS implemented a new promotion process, which involved rating employees based on their readiness for promotion. UPS also compensated its employees according to "grades," operational experience and education. Dandy brought suit against UPS pursuant to 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e *et seq.*, alleging UPS discriminated against her on the basis of gender and race in creating a hostile work environment, failing to promote her, paying her a lower salary than her Caucasian co-workers and retaliating against her. *Dandy*, 388 F.3d at 267-68.

The Seventh Circuit upheld the district court's grant of summary judgment in favor of UPS on all claims. In doing so, the court found Dandy failed to state a prima facie case of hostile work environment based on race under § 1981. To be actionable under § 1981, harassment must be: (1) based on race; (2) subjectively and objectively hostile; and (3) sufficiently severe or pervasive to interfere with an employee's ability to perform his or her assigned duties (citing *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 476 (7th Cir. 2004)). Under the objective hostility analysis, courts may consider: (1) the frequency of the conduct; (2) the severity of the conduct; (3) "whether it is physically threatening or humiliating, or a mere offensive utterance"; and (4) whether it unreasonably interferes with the employee's ability to complete his or her assigned duties (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

To support her claim, Dandy relied on comments made by UPS managers dating as far back as 1992 and 1993, in which she claimed they said the lack of promotions available at UPS were due to the "n***ers and c**ts" and that African Americans were "lazy" and women were "ignorant." Due to the application of the four-year statute of limitations when bringing a § 1981 claim, the court determined Dandy could not rely on conduct prior to September 1997 to sustain her hostile work environment claim. *Dandy,* 388 F.3d at 271. Thus, Dandy's claim was based on comments that another African American employee was called "lazy" and a Caucasian female was called "ignorant." The court found Dandy failed to allege the statements were attributable to race or gender. Further, the court noted offhand comments and isolated incidents are insufficient to sustain a hostile work environment claim. *Dandy*, 388 F.3d at 267-68.

The Seventh Circuit also rejected Dandy's claim she had not been promoted due to her race and gender. The court noted a plaintiff may prove intentional discrimination under Title VII or § 1981 through the direct or indirect burden-shifting method described in *McDonnell Douglas* 411 U.S. 792 (1973). In order to establish direct evidence of intentional discrimination, Dandy had to show that the people who ranked her, and therefore thwarted her opportunity for promotion, intentionally ranked her at a lower level because of her race or gender. However, the court determined Dandy presented no evidence that racial animus motivated any of her managers, or that they made any stray remarks to reveal that they evaluated her based on illegal standards. Further, the comments that others were ignorant and lazy did not aid Dandy because co-equals with no influence over the ultimate decision made the comments. *Dandy,* 388 F.3d at 272-73.

Having failed to establish direct evidence discrimination, Dandy had to proceed under the indirect method under the *McDonnell Douglas* burden-shifting approach. To establish a prima facie case of discrimination, Dandy had to prove:

(1) she was a member of a protected class; (2) she had the requisite qualifications for promotion; (3) she was denied the promotion; and (4) a member of the nonprotected class who was not better qualified was promoted instead (citing *Grayson v. City of Chicago*, 317 F.3d 745, 748 (7th Cir. 2003)). While the district court assumed, *arguendo*, that Dandy satisfied her prima facie case and granted UPS's summary judgment based on Dandy's inability to prove pretext, the Seventh Circuit determined Dandy could not establish a prima facie case since she failed to show she was qualified for a promotion. The evidence revealed Dandy's substantive evaluations and her grade rating undermined her argument that she was ready for promotion. Further, the court found Dandy failed to provide the court with a concrete way to measure the candidates she alleged were unlawfully promoted over her. *Dandy,* 388 F.3d at 273-74.

In regard to Dandy's claim that she was paid a lower salary on the basis of race or gender, the court found Dandy failed to identify "similarly situated" nonprotected class members who were treated more favorably. As such, she could not state a prima facie case of disparate compensation. To be "similarly situated" Dandy had to show that her performance, qualifications and conduct were comparable to the nonprotected class members in all material aspects. While Dandy identified several white male employees she alleged were of equal grade and position but paid higher salaries, she did not provide any necessary comparative evidence such as her salary, the salary of her comparators during the relevant time period, when her comparators began working for UPS or her comparators' qualifications, experience or education. *Id*. at 274.

Lastly, the court found that Dandy had not proven she suffered retaliation since she failed to show that any adverse action was taken against her. Dandy's premised her retaliation claim on her belief that she was denied promotion opportunities illegitimately. However, the court noted that Dandy had not proven she was qualified for a promotion, and therefore the denial of a promotion did not constitute an adverse employment action. *Id*. at 275.

Case Note

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

A Lost Counterclaim Gives Plaintiff "A Second Bite"

The recent decision in *Redmond v. Socha,* ___ Ill. App. 3d ___, 817 N.E.2d 1048, 288 Ill. Dec. 398 (1st Dist. Sep. 29, 2004) should make defense counsel take a hard look at filing a counterclaim. The facts and holding of the case are straightforward, but the implications are broad.

Tommie Redmond was riding his motorcycle on Ogden Avenue in Chicago when it was struck from behind by Elaine Socha's car. Mr. Redmond sued for the personal injuries he sustained in the collision. Ms. Socha counterclaimed for the property damage to her car.

At trial, the plaintiff testified that he and some friends were proceeding in a northeast direction in the right lane of traffic. In preparing to make a left turn and before moving into the left lane, he looked over his shoulder and saw a vehicle following his friends who were traveling behind him. As he moved to his left, the defendant's auto "shot" from behind his friends' motorcycles into the left lane, where it struck the left rear of his motorcycle.

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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 is the most recent past Editor-In-Chief of the *IDC Quarterly*.

Case Note *(Continued)*

The defendant testified that she was going northeasterly when the plaintiff, who had been in the right lane, tried to make a U-turn directly in front of her car. Although she tried to stop, the right fender of her car struck the left rear of the plaintiff's motorcycle.[1]

Both parties introduced evidence of their respective damages, which were indisputably the result of the collision. Neither party introduced evidence of any other cause of the accident.

At the close of the evidence, the court instructed the jury according to IPI (Civil) No. B21.04 regarding comparative fault. The instruction gave the jurors a choice of four verdicts: (1) for the plaintiff on his complaint and against the defendant on her counterclaim; (2) for the defendant on her counterclaim and against the plaintiff on his complaint; (3) against both parties; or (4) for both parties. The jury chose the third alternative, finding against the plaintiff on his complaint and against the defendant on her counterclaim.

The plaintiff filed a post-trial motion, asking the court to set aside the verdict and grant a new trial. The trial court obliged, finding that the verdicts were inconsistent and against the manifest weight of the evidence. In so ruling, the judge stated, "It's not possible – not logically possible to find that an accident occurred without being anyone's fault."[2]

The appellate court accepted defendant's Rule 306(a)(1) petition for leave to appeal, and then affirmed the order for a new trial. Finding that the verdicts were legally inconsistent, the court stated:

> In the absence of any evidence of an intervening cause of the collision, one or both of the parties must necessarily have been negligent. Further, because there was but a single accident involving only two drivers, it would be impossible to find that the contributory negligence of both drivers was greater than 50% of the total proximate cause of the collision.[3]

A similar scenario was involved in the case of *Barrick v. Grimes*, 308 Ill. App. 3d 306, 241 Ill. Dec. 825, 720 N.E.2d 280 (4th Dist. 1999); a jury found against both the claimant and the counterclaimant in a two-vehicle accident. The trial court in *Barrick,* however, denied a motion for a new trial and the appellate court affirmed, finding that the jury could have determined neither party proved its respective case. The *Barrick* court noted: "The jury may well have felt that the evidence of which vehicle had the green light was so conflicting, inconclusive and unsatisfactory that it simply could not determine from the evidence presented which party was negligent."

The *Redmond* court declined to follow *Barrick*, stating, "If the jury was unable to determine which of the parties was negligent, a mistrial should have been declared and a new trial ordered."[4] In other words, if neither party proves its case, both sides should be given another attempt to do so.

No other Illinois court has considered the *Barrick* holding, but a Tennessee appellate court followed it in *Secrest v. Haynes*, 2003 WL 22071546 (Tenn.Ct.App. 2003). In *Secrest*, the plaintiff was injured in a multi-vehicle collision and sued two defendants. Depending on which of the defendants was believed, the other defendant was at fault. The jury ruled in favor of both the defendants, and the appellate court affirmed.

The Tennessee court noted that the result seemed unfair because the plaintiff was denied a recovery, even though it was clear one or both of the defendants was at fault in causing the accident. The court stated: "Nevertheless, we believe we have reached the correct result since it was Plaintiff who at all times was required to establish each element of her negligence claim by a preponderance of the evidence, something she did not do."

The *Redmond* decision seems to contradict the language of IPI (Civil) No. B21.04, which allows the jury to find against both parties, and slightly alters the burden of proof. Instead of allowing no recovery at all in the event neither side presents satisfactory proof of fault, *Redmond* gives each party "another bite of the apple," a second chance to prove its claim if both fail to do so at the first trial.

Defense counsel often must decide whether to counterclaim for the defendant's property or personal injury damages. If the plaintiff's injuries are severe and the defendant's counterclaim is small, it may be best not to file the counterclaim in light of the *Redmond* holding. Otherwise, a jury that believes neither side has proven how the accident occurred may rule against both claims, resulting not in a lack of recovery for either party but in a new trial. If the proof is unsatisfactory and the stakes disproportionate, defense counsel may prefer to aim simply for a finding of no liability rather than taking a chance on a second trial.

Endnotes

[1] The appellate court opinion in *Redmond* does not say whether either party presented testimony other than their own respective conflicting versions of the crash.

[2] 817 N.E.2d at 1052, 288 Ill. Dec. at 402.

[3] 817 N.E.2d at 1052-53, 288 Ill. Dec. at 402-03.

[4] 817 N.E.2d at 1053, 288 Ill. Dec. at 403.

Civil Rights Update

By: *Bradford B. Ingram*
Heyl, Royster, Voelker & Allen
Peoria

Freedom of Speech in the Workplace: Limitations to Live by and Remain Employed

First Amendment rights to free speech are not lost by individuals who accept employment with the government. *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811(1968); *Keyishian v. Bd. of Regents of the Univ. of State of N.Y.*, 385 U.S. 589, 605-606, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). An individual's right to free speech is to be balanced and tempered by the government employer's interest in conducting its affairs efficiently and effectively. *Waters v. Churchill*, 511 U.S. 661, 675, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). Public employees do not have an unfettered right to express themselves on matters related to their official responsibilities. The courts are to give due weight to the employer's interest when evaluating First Amendment retaliation claims. *Id.*

A police officer's self-made video sold on eBay showing himself stripping off his police uniform and masturbating, and a prison guard yelling about a lack of staffing in a prison cafeteria in the presence of inmates at mealtime are not forms of protected speech and expression in the workplace. Such speech can be subject to limitation and restraint depending on the subject matter, time, manner and place of such speech. Both the *Cygan v. Wisconsin Dep't of Corr.,* 388 F.3d 1092 (7th Cir. 2004) and *San Diego v. Roe*, 125 S. Ct. 521 (2004) cases were brought pursuant to 42 U.S.C. § 1983 and were analyzed pursuant to Supreme Court decisions in the *Pickering*, 391 U.S. 563 at 568 and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) cases. First Amendment claims challenging free speech in employment require the following steps of analysis:

- A determination must be made as to whether the plaintiff's employment speech was constitutionally protected.
- The plaintiff must establish that the speech was a substantial or motivating factor resulting in termination.
- Defendants then have an opportunity to show that the plaintiff would have been fired even in the absence of protected speech.

I. *San Diego v. Roe*

The United States Supreme Court in *San Diego v. Roe,* 125 S. Ct. 521 (2004) held Roe's termination did not violate his First and Fourteenth Amendment rights to freedom of speech and expression and did not qualify under any view of the "public concern" test required in such cases.

Factual Background

The plaintiff was a San Diego police officer who made a video showing himself stripping off a police uniform and masturbating. He sold the video on eBay with a user name of "Codestud3@aol.com," which was a word play on high-priority police radio calls. The plaintiff also sold custom videos, police equipment and official uniforms of the San Diego police department and various other items such as men's underwear on eBay. His eBay user profile identified him as being employed in the field of law enforcement.

The plaintiff's supervisor came across an official San Diego Police Department uniform for sale, which was offered by an individual with the plaintiff's user name. As he searched for other items, he found listings for the plaintiff's videos depicting his activities. He recognized the plaintiff's picture and printed images of the plaintiff's offerings and shared them up the chain of command.

The San Diego Police Department's internal affairs department investigation revealed the plaintiff's conduct violated specific San Diego Police Department policies against conduct

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About the Author

Bradford B. Ingram is a partner with *Heyl, Royster, Voelker & Allen*. His practice concentrates on the defense of civil rights and municipal entities and the defense of employers in all types of discrimination claims. He is a frequent speaker before local and national bar associations and industry groups.

Civil Rights Update *(Continued)*
unbecoming of an officer, engaging in outside employment and immoral conduct. The plaintiff admitted to selling the videos and police paraphernalia. He was ordered by the San Diego Police Department to stop displaying, manufacturing, distributing or selling sexually explicit material. Roe failed to follow these orders and was cited for disobedience of lawful orders. Termination proceedings began and resulted in the plaintiff's dismissal from the police force.

Citizen Commentary on Matters of "Public Concern" or Not

The plaintiff filed a lawsuit against the city pursuant to 42 U.S.C. § 1983, alleging his termination violated his First Amendment right to free speech. The United States District Court granted summary judgment for the city, indicating the plaintiff had not demonstrated that his expression related to matters of "public concern" under the court's decision in *Connick*, 461 U.S. 138 (1983). The Ninth Circuit Court of Appeals reversed the United States District Court and held Roe's conduct fell within the protected category of citizen commentary on matters of public concern.

The United States Supreme Court reversed the Ninth Circuit indicating "we have little difficulty in concluding that the City was not barred from terminating Roe . . ." *San Diego*, 125 S. Ct. at 524. The Ninth Circuit's reliance on *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995) was, according to the Supreme Court, seriously misplaced. Although Roe's activities occurred outside of the workplace and were about subjects not related to his employment, the San Diego Police Department demonstrated legitimate and substantial interests of its own that were compromised by plaintiff's actions. Roe took deliberate steps to link his videos and other items to his police work in a way that was injurious to his employer. His use of the uniform, law enforcement reference and debased parody of an officer performing indecent acts while in the course of his official duties had a substantial impact on his employer and the professionalism of the department's officers.

The Supreme Court held Roe's speech was detrimental and harmful to the San Diego Police Department and contrary to its policies and regulations regarding the proper function of the police force.

The Supreme Court reviewed the *Pickering* decision and its application of a balancing test with regard to an individual's right to engage in speech and the government's right to protect its own legitimate interests in the performance of its work. Before a balancing test is applied, a threshold inquiry is required. Before the plaintiff's speech merits a *Pickering* balancing test, the public employee speech must touch on the matter of public concern. The *Connick* court held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." 461 U.S. at 138.

Public employee speech regarding matters of public concern is protected by the First Amendment. The *San Diego* court relied on *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) and *Time, Inc. v. Hill*, 385 U.S. 374 (1967) to define matters of public concern as follows: "These cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." 125 S. Ct. at 525-26.

"The plaintiff admitted to selling the videos and police paraphernalia. He was ordered by the San Diego Police Department to stop displaying, manufacturing, distributing or selling sexually explicit material. Roe failed to follow these orders and was cited for disobedience of lawful orders."

The Supreme Court expressed no difficulty in finding Roe's expression in the instant case did not qualify as a matter of public concern under any view of the test. Roe failed to meet the threshold test, and thus the balancing test required in *Pickering* did not come into play.

Connick was controlling precedent for the Court's ruling and showed why the Court believed this case was not even close. Even under the view expressed by the dissent in *Connick,* Roe's speech was not a matter of public concern. Roe's activities did nothing to inform the public about any aspect of

the San Diego Police Department's functioning or operation. Not only was Roe's expression widely broadcast, but it also linked to his official status as a police officer and was designed to exploit his employer's image. His speech was detrimental to the mission and functions of the employer, and there was no basis for finding that it was of concern to the community.

Conclusion

This case provides employers with guidance as to what types of employee speech and expression satisfy the public concern test. The speech in question must be a subject of legitimate news interest and of value and concern to the public at the time of publication, rather than exploitative of an employer's image and detrimental and contrary to the mission, functions and policies of that employer.

II. Cygan v. Wisconsin Department of Corrections

The Seventh Circuit's decision in *Cygan v. Wisconsin Dep't of Corr.,* 388 F.3d 1092 (7th Cir. 2004) is another example of a First Amendment claim made by an employee who was terminated after incidents of speech and expression in the workplace.

Cygan filed a lawsuit against the Wisconsin Department of Corrections and various department officials under 42 U.S.C. § 1983, alleging violations of her constitutional rights by her firing, which she claims was in retaliation for exercising her First Amendment rights.

Factual Background

The plaintiff had worked as a prison guard at the Green Bay Correctional Institution, a maximum security facility operated by the Wisconsin Department of Corrections. Throughout most of her years of work she had positive performance evaluations. In 1997, those supervisors began to document her failure to meet institutional standards and to respect interpersonal relationships in the workplace. In June of 2000 an investigation into her behavior began after a complaint about her use of profanity and derogatory language when referring to junior officers. She received an official letter of reprimand for violating Department of Corrections Work Rule 13, which prohibited such conduct. She also was disciplined on two further occasions in October 2001. The warden eventually directed her to attend training on professionalism. The training instructor, a professor from the University of Wisconsin-Milwaukee, reported she was disruptive, inattentive and disrespectful during the class. This behavior prompted further investigation, resulting in her suspension without pay for a day.

In January of 2002, Cygan became upset that a second shift meal had started without 10 officers present. She yelled in the presence of other staff "This is fucking bullshit. I am sick of this shit." *Cygan*, 388 F.3d at 1096. Inmates working in the serving line overheard this outburst. Cygan also was heard yelling at other officers in the rotunda area outside of the cafeteria, complaining loudly about lack of officer coverage at meals. Her supervisor considered her tone to be loud, profane, inappropriate and unprofessional. He believed her behavior would stop as he walked toward the dining hall, but she continued to yell and use profanity. When the supervisor confronted Cygan in the rotunda area he asked her to move to a different room to continue the conversation. In response Cygan yelled "fine" and then turned to the other officers and yelled "and this is professional." *Id.*

In January 2002, the human resources director requested that Cygan be terminated based on her performance, which had deteriorated significantly in the preceding year, and on her abusive, demeaning and derogatory language directed toward coworkers and inmates. It was noted that she had shown absolutely no willingness to change despite discipline. She was terminated due to her repeated violation of work rules, which prohibit intimidating, abusive and demeaning behavior.

Time, Place, Manner and Potential Disruptiveness of Speech Outweigh the Employee's Right to Comment on Matters of Public Concern

According to Cygan's U.S.C. § 1983 claim, the termination was retaliation for her exercise of rights under the First Amendment. The district court granted summary judgment and the plaintiff appealed to the Seventh Circuit, which affirmed the district court's grant of summary judgment. The Seventh Circuit applied the *Pickering* three-step analysis and held that her speech on January 8 did touch on matters of public concern with reference to prison security issues. Applying the *Pickering* balancing test to the plaintiff's speech, the court found that the time, place and manner of her speech and its potential for disruptiveness weighed heavily against her. Her speech took place in a cafeteria and rotunda of a maximum security prison that housed 1,040 of Wisconsin's violent offenders. The plaintiff yelled and swore about the evening meal starting with insufficient officer coverage. Both staff and inmates were within range of Cygan's speech, which the court described as an angry outburst.

The Seventh Circuit Court of Appeals found the Green Bay Correctional Institution had a very strong interest in maintaining order and control over inmates. The plaintiff's decision to announce the shortage of staff in the presence of inmates could have endangered staff and inmates by exposing them

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Civil Rights Update *(Continued)*

to violence.

Her loud and profane complaints also undermined the authority of her supervisor in the presence of other officers and inmates. The Seventh Circuit determined supervisory authority was essential in front of inmates, where a united front is crucial. That her comment on staff shortages occurred in a jail environment was key to the court's ruling. A jail environment demands the highest degree of personal loyalty and confidence. The plaintiff's protest of a supervisory decision in front of inmates was deemed unacceptable and inappropriate.

The Seventh Circuit held the following:

> . . . her frustration with the situation did not justify a profanity-laced fit about short staffing within earshot of inmates and staff. In her anger, she could have caused the very danger she was apparently seeking to avoid through her complaints. This episode, on the heels of similar incidents and apparently unheeded disciplinary measures, could certainly cause GBCI to doubt Cygan's future effectiveness. 388 F.3d at 1101.

As a matter of law, the potential disruptiveness of her speech outweighed any First Amendment right she may have had to comment on prison guard staffing at mealtimes.

Conclusion

This case demonstrates how employee speech on matters of public concern can be limited given the time, place and manner of such speech. Similar comments made by a plaintiff at a different time and place and in a different manner may well receive First Amendment protection. While employees' First Amendment rights to free speech are not lost upon acceptance of employment with the government, employees do not have an unfettered right to express themselves at any time and place and in any manner.

Both of these cases provide guidance for employers and employees with respect to the First Amendment and an employee's right to free speech and expression in the workplace. Public employee speech on matters of public concern will be protected subject to reasonable time, place and manner restrictions.

Medical Malpractice

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

Should Courts Allow the Personal Practices of an Expert Physician to be Used as a Sword to Attack a Defendant Physician's Compliance with the Standard of Care?

Practically every defense trial attorney has a standard set of Motions in Limine, which he or she files at the beginning of a medical malpractice trial. Those motions can address areas that range from barring witnesses from the courtroom to barring mention of the wealth of the parties. Often, the same motions will be presented by all parties, or at least by all defense counsel. When presented, these motions typically are met with little resistance, and are almost given the status of a "gimme."

Common practice at trial in a medical malpractice case includes a motion in limine to bar any questioning or reference to an expert physician's personal practices. The argument for this motion is simply that the physician's personal practice

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. Aucion'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.

in a given medical situation is irrelevant to establishing the standard of care or whether there was a breach therefrom. *Walski v. Tiesenga*, 72 Ill. 2d 249, 381 N.E.2d 279 (1987).

On December 20, 2004, the Appellate Court, Fourth District released its opinion in *Gallina v. Watson*, 2004 WL 2958726 (Ill. App. 4th Dist. December 20, 2004), whereby it challenged the practice of excluding testimony of an expert physician's personal practices at trial. In doing so, the court addressed the Illinois Supreme Court's holding in *Walski*, but failed to persuasively argue how *Gallina* was different enough to warrant a deviation from the holding in *Walski*.

In *Gallina*, the patient, Vito Gallina, was injured in a head-on car collision while traveling over 85 miles per hour. He was taken to Memorial Medical Center in Springfield, where he was determined to have fractured his jaw, left femur, pelvis, hand, and both ankles. He also ruptured his spleen and suffered a loss of blood. Dr. Watson, the on-call physician, treated the fracture of Gallina's talus bone by immobilizing the fracture with a splint. At trial, Dr. Watson testified that he did not operate on Gallina's right ankle at the time of the initial hospitalization because it was acceptable not to do so and another surgery could have threatened Gallina's life due to the multiple surgeries already performed the night of admission. *Gallina*, 2004 WL 2958726 at *2.

Subsequently, Gallina filed a medical malpractice action against Dr. Watson, and Memorial Medical Center, alleging that Dr. Watson failed to provide proper treatment and that the Hospital was responsible for the actions of Dr. Watson under the theory of actual or apparent agency. In January 2004, counsel for Dr. Watson filed a motion in limine to exclude testimony relating to the personal practices of Dr. Watson's expert witness, Dr. Joseph Whalen, in treating different types of fractures.

The hospital joined in the motion in limine and after oral arguments, the trial court granted the motion, which resulted in the deletion of testimony from Dr. Whalen's evidence deposition. *Gallina*, at *2. Specifically, the court excised portions of Dr. Whalen's testimony in which he had stated that he surgically treats all type II ankle fractures. Dr. Watson testified that he agreed with his resident's assessment in the preoperative diagnosis section of the operative report that Gallina had a type II ankle fracture, but that he treated the injury non-operatively. The jury subsequently found against Gallina and for Dr. Watson and Memorial Medical Center. *Id.*

On appeal, Gallina argued that allowing Dr. Watson and Memorial Medical Center's motion in limine deleting the portion of Dr. Whalen's evidence deposition regarding his personal treatment preferences was reversible error. Gallina also argued that it was error for the trial court to deny Gallina's request to send copies of the defendants' expert disclosure into the jury room during the jury's deliberations. The Fourth District agreed, reversing and remanding the case to the trial court.

In addressing the propriety of granting the motion in limine, the Fourth District addressed both the relevance of the excluded testimony and what effect allowing the testimony could have on the credibility of the witness. On appeal, Dr. Watson and Memorial Medical Center argued that the excluded testimony of Dr. Whalen was not relevant to establish the standard of care for the treatment at issue. They cited the Illinois Supreme Court's decision in *Walski* to support their argument, specifically relying on the following language:

> It is insufficient for plaintiff to establish a prima facie case merely to present testimony of another physician that he would have acted differently from the defendant, since medicine is not an exact science. It is rather a profession which involves the exercise of individual judgment within the framework of established procedures. Differences in opinion are consistent with the exercise of due care. *Walski*, 72 Ill. 2d at 261, 381 N.E.2d at 285.

While still accepting the holding of *Walski*, the Fourth District found the case distinguishable from the one it was facing. Specifically, the court found that unlike the facts in *Walski*, Gallina was not attempting to establish his prima facie case with the testimony of the defendants' expert, Dr. Whalen. Rather, the plaintiff's own expert witness had already established plaintiff's prima facie case. *Gallina*, at *3.

The Fourth District also rejected the applicability of two First District opinions on the issue: *Stevenson v. Nauton*, 71 Ill. App. 3d 831, 28 Ill. Dec, 71, 390 N.E.2d 53 (1st Dist. 1979), and *Mazzone v. Holmes*, 197 Ill. App. 3d 886, 145 Ill. Dec, 416, 557 N.E.2d 186 (1st Dist. 1990). Comparing the facts in *Stevenson*, the Fourth District found *Stevenson* inapplicable because in that case the plaintiff had failed to elicit testimony that established the standard of care. As for *Mazzone*, the Fourth District outright rejected the First District's finding, which was presumably that an expert's statements as to what he or she would have done are never relevant. Instead, the Fourth District found that "the *Mazzone* court unjustifiably stretched the holdings in both *Walski* and *Stevenson*, on which the *Mazzone* court solely relied and which we have already distinguished from the case at bar."

The Fourth District provided no further support for its presumption that the *Mazzone* opinion stands for the premise

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that an expert's statements as to what he or she would have done are never relevant. A review of the *Mazzone* opinion demonstrates that the facts are very similar to those before the Fourth District in *Gallina*. In *Mazzone*, the defendant's expert stated in his deposition testimony that he would not have used a particular type of surgical pin used by the defendant physician in 1978 and that such pins were known in the orthopedic community to break. On cross examination at trial, the defense expert testified that the standard of care had not changed since 1978, and that the standard required, if possible, the removal of the surgical pin intact.

According to the First District, that standard concerned the removal of the pin, not the use of the particular pin in treating shoulder separations. Thus, whether the expert or any other physician would have used that particular pin in the first instance had no bearing on the applicable standard of care in this case. *Mazzone*, 145 Ill. Dec, at 423. Further, the defense expert testified that if the surgical pin broke during application of pressure by the doctor, the doctor's acts would not fall below the applicable standard of care. Thus, the expert testified that the defendant doctor did not deviate from the standard of care. Whether the expert would have used the pin or whether such pins were known to break did not contradict that testimony because more than one procedure may be consistent with the applicable standard of care. Therefore, the First District found the exclusion of testimony regarding the expert's personal practices proper. *Id.*

In Gallina, the plaintiff cited language from the Fourth District's decision in *Rush v. Hamdy*, 255 Ill. App. 3d 352, 194 Ill. Dec, 477, 627 N.E.2d 1119 (4th Dist. 1993). In *Rush*, the defendants' expert testified the use of an achalasia balloon to treat Schatzki's ring, a narrowing of the esophagus, was within the acceptable standard of care. However, at his deposition, the defendants' expert testified if the plaintiff had been his patient, he would have treated her with a "Savary" dilator. The plaintiffs in *Rush* argued that:

> [T]here is a difference in the persuasive value of an expert witness who testifies a certain procedure is within the standard of care and is the procedure which the expert himself would have used under the same circumstances and an expert who testifies a certain procedure is within the standard of care, but that he would not have utilized that procedure under the same circumstances." *Rush*, 255 Ill. App. 3d at 362.

The Fourth District in *Rush* agreed but found the trial court did not abuse its discretion in not allowing this line of inquiry because the trial court had allowed the plaintiffs to elicit testimony from the defendants' expert "that he had never used an achalasia balloon to dilate a Schatzki's ring, and in all of his years of practice [the defendant doctor's] treatment of [the plaintiff] was the only case he knew of in which an achalasia balloon had been used to dilate a Schatzki's ring." (Emphasis omitted.) *Id*. at 363. The court in *Rush* further stated "[t]his testimony sufficiently tested the credibility of [the defendants' expert's] opinion that the use of an achalasia dilator was within the acceptable standard of care to the jury." *Id*.

Using the *Rush* opinion, the court in *Gallina* found that while a plaintiff cannot establish a prima facie case of medical negligence based solely on the testimony of another physician that he or she would have done things differently, the excluded portion of Dr. Whalen's testimony was relevant because it affected the persuasive value of Dr. Whalen's opinions. *Gallina*,

"In* Mazzone*, the defendant's expert stated in his deposition testimony that he would not have used a particular type of surgical pin used by the defendant physician in 1978 and that such pins were known in the orthopedic community to break."

at *4. Since Dr. Watson testified at trial that he did not disagree with the diagnosis of a type II talar fracture, the court found that Dr. Whalen's testimony regarding his personal practices was relevant to Dr. Watson's decision not to operate on the ankle.

According to the court, "if no evidence suggested Dr. Watson believed Gallina had a type II fracture when he treated Gallina on the night of the accident, defendants would be correct in asserting Dr. Whalen's testimony he always treats type II fractures by open reduction would be irrelevant." *Id*. at *5. Further, "while Dr. Whalen's excluded testimony far

from proves Dr. Watson breached the standard of care by not performing an open reduction on plaintiff, Dr. Whalen's excluded testimony goes to the credibility and persuasive value of his opinion Dr. Watson's actions were within the standard of care." *Id*. Therefore, the Fourth District found that the trial court abused its discretion in excluding the testimony from the jury and remanded the case.

The court's reasoning in *Gallina* begs the question: Has the Fourth District created two levels of standard of care? By allowing testimony of the expert physician's personal practices, has the court, in effect, created a distinction between what a reasonably well qualified physician and an even more reasonably well qualified physician would do in like circumstances? It appears that in both *Gallina* and *Rush*, there was testimony that the actions by the defendant physician met the standard of care. By allowing testimony from the expert witness that he or she personally would not have treated the patient in the same manner, has the court simply allowed the jury to judge the credibility of the expert's standard of care opinion or has it confused the jury into believing that while the physician met the minimum standard of care, he should have done something differently? This would hold physicians to an unfair standard and would be contrary to the Fourth District's own recognition in *Gallina* that differences in opinion are consistent with conformity to the applicable standard. *Gallina*, at *3-4.

Since it appears that there is a difference in opinion on the issue between the First and Fourth Districts, perhaps this is an issue the Illinois Supreme Court needs to revisit. Until that time, however, there seems to be one apparent solution to avoiding, or at least mitigating, the effect of the admission personal practice testimony from your expert physician: make sure to retain an expert that not only supports your physician's actions, but also at least occasionally practices them.

Evidence and Practice Tips

By: Joseph G. Feehan
Heyl, Royster, Voelker & Allen
Peoria

Trial Court Properly Held That Surveillance Videotape of Plaintiff's Activities is Not Privileged from Disclosure as Work Product

In *Shields v. Burlington Northern & Santa Fe Railway Co.,* 818 N.E.2d 851, 288 Ill. Dec. 916 (1st Dist. 2004), the plaintiff was injured in a car accident while working for the defendant, Burlington Northern & Santa Fe Railway Company ("Burlington"). The plaintiff sued Burlington and the owner of the car that struck the plaintiff's vehicle, Hammer Express. The plaintiff served interrogatories on Burlington that asked it to "[i]dentify all persons who have followed and in any way conducted surveillance of plaintiff on behalf of the defendant since the incident(s) described in plaintiff's Complaint." *Shields*, 818 N.E.2d at 852. The plaintiff also sought production of "[a]ny and all reports, films, or other documents concerning any surveillance of plaintiff or investigation of plaintiff's activities." *Id.*

Burlington objected to producing the requested informa-

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About the Author

Joseph G. Feehan is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen*, where he concentrates his practice in commercial litigation, products liability and personal injury defense. He received his B.S. from Illinois State University and his J.D. (*Cum Laude*) from the Northern Illinois University College of Law. Mr. Feehan is a member of the ISBA Tort Law Section Council and is also a member of the Peoria County, Illinois State and American Bar Associations. He can be contacted at jfeehan@hrva.com

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tion, documents and surveillance films based on the work product privilege. Burlington contended that such items were not discoverable unless it decided to introduce them as evidence at trial. Burlington's objections stated: "if any surveillance material is to be used at trial, it will be disclosed to plaintiff a sufficient time in advance of trial to allow plaintiff to prepare for the admission of such evidence." *Id.*

The plaintiff moved to compel Burlington to respond to the interrogatories and document request. The trial court granted the motion and ordered Burlington to respond to the discovery requests. Burlington refused to comply with the court's order and ultimately was found in contempt.

On appeal, Burlington relied on Supreme Court Rules 201(b)(2) and 201(b)(3) and argued that any surveillance tapes or films prepared either by Burlington or by any videographer working for Burlington constitute work product prepared by or for a party in preparation for trial. The First District Appellate Court rejected this argument, noting, "Illinois law supports discovery of videotapes prepared by consultants in preparation for litigation." *Id.* at 854. In reaching this conclusion, the *Shields* court rejected Burlington's invitation to apply the broader definition of "work product" employed under the Federal Rules of Civil Procedure.

Burlington also argued that surveillance videotapes should not be discoverable until after the plaintiff was deposed so that the videotapes retained their impeachment value at the deposition. The appellate court also rejected this argument, stating:

> We do not see any material distinction between surveillance videotapes, with their substantive evidence of the plaintiff's physical limitations, and tape-recorded or transcribed statements from witnesses, or data collected from attempts to recreate an accident. All such evidence can have powerful impeaching effect if one party can conceal it from the other, at least through the depositions of the parties and their principal witnesses. When defense witnesses learn of the statements of a plaintiff's witnesses concerning the manner in which an accident occurred, the defense witnesses can tailor their testimonies to explain what those witnesses saw in a manner that might exonerate the defendant. Concealing substantive evidence from the opposing party always gives a tactical advantage, and it often permits greater impeachment of the opposite party's witnesses. Full discovery, demanded by supreme court rules, allows each party's witnesses to tailor their testimony to the opposite party's evidence. We see no reason to deviate from the policy of full disclosure here, as we see no need for special treatment of the substantive evidence in a surveillance videotape. Because surveillance videotapes constitute substantive evidence and not work product within the meaning of discovery rules, we find that the trial court correctly ordered Burlington to produce any surveillance videotapes of plaintiff.
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> Surveillance videotapes contain substantive evidence concerning the extent of a plaintiff's injuries, and they do not reveal mental processes, opinions or other conceptual data. Thus surveillance videotapes do not count as work product, and the trial court correctly ordered Burlington to produce its surveillance videotapes in response to discovery. *Id.* at 856.

Trial Court Properly Allowed Plaintiff to Introduce Day-in-the-Life Video That Was Not Disclosed to Defendants Until Day of Trial

In *Velarde v. Illinois Central R.R. Co.*, 820 N.E.2d 37, 289 Ill. Dec. 529 (1st Dist. 2004), the plaintiffs were injured when their Ford Explorer collided with a train owned and operated by defendant Chicago Central & Pacific Railroad Company ("CC&P"). Plaintiff Lilia Apulello ("Lilia") was driving at the time of the accident, and her parents, Fidel and Francisca Velarde ("Velardes") were passengers. The accident occurred on railroad tracks owned and maintained by Canadian National Illinois Central Railroad Company ("CNIC"). At the time of the accident, CNIC knew that snow and road salt had caused the railroad crossing's warning gates and lights to malfunction. CNIC was using a stop-and-flag procedure to control traffic at the crossing until the signals were repaired. However, a CNIC dispatcher mistakenly advised a CC&P train engineer that the signal problem had been fixed and the train proceeded through the intersection at 50 miles per hour, striking the plaintiffs' vehicle. Lilia and the Velardes each suffered internal and closed head injuries when the Explorer was broadsided and then rolled several times. The plaintiffs filed negligence actions against both CNIC and CC&P.

The case proceeded to trial on January 28, 2002. Ten months before the trial, in March 2001, the defendants issued Rule 213 interrogatories to the plaintiffs that included a question as to whether any photographs, movies and/or videotapes had been taken of the accident scene or the vehicle or persons

involved. In June 2001, Lilia answered this question: "None." Fact and opinion discovery closed in mid-November 2001. The day-in-the-life video was recorded during the first two weeks of January 2002, and Lilia's attorney finished editing the raw video footage on January 25, 2002. On the first day of trial, January 28, 2002, Lilia's attorney told defense counsel that he had the video and intended to use it at trial. The video was discussed for the first time on the record that day, during the presentation of numerous motions in limine. At that point, neither the trial judge nor the defendants had viewed the recording and the judge deferred ruling on its admissibility.

The video was next addressed immediately after jury selection on January 29, 2002, when Lilia's attorney again raised the subject. Lilia's attorney described the film as demonstrative rather than substantive evidence of the nature and extent of Lilia's injuries and indicated that the parties were still exchanging demonstrative exhibits. The defendants' attorneys acknowledged that they were still working on a diagram but objected to the use of the video because it was "way past any discovery disclosure time" and contained "testimonial" audio and unnecessary scenes. *Velarde,* 820 N.E.2d 37, 44, 289 Ill. Dec. 529. Lilia's attorney then offered to use the video without the audio track, said that he would take out scenes showing Lilia's sister and nephew cleaning the house, and suggested the attorneys could meet that evening about what else to take out. The trial judge approved, and then proceeded to address other aspects of the trial. The attorneys then met that evening and, according to a sworn statement from Lilia's attorney, he edited scenes from the video immediately after the attorneys met, in "strict accordance" with defense counsel's request, and that this version of the video was used at trial. At trial, Lilia's attorney played a few minutes of the video without the audio track during his opening statement without objection from the defendants. The defendants also did not object when Lilia's sister and husband narrated portions of the silenced recording while they described Lilia's activities.

"The defendants' attorneys acknowledged that they were still working on a diagram but objected to the use of the video because it was 'way past any discovery disclosure time' and contained 'testimonial' audio and unnecessary scenes."

At the end of the first week of trial, defense counsel renewed their objections to the videotape because Lilia's attorney failed to remove the audio and produce the video outtakes. Lilia's attorney responded that the outtakes from the original footage were privileged as attorney work product pursuant to the Illinois Supreme Court's decision in *Cisarik v. Palos Community Hosp.*, 144 Ill. 2d 339, 579 N.E.2d 873, 162 Ill. Dec. 59 (1991). Lilia's attorney further stated that he was still willing to give the defense the edited version of the film he intended to use at trial, including the scenes that defense counsel edited from the original version when the attorneys met to review the videotape. The trial judge then reviewed the *Cisarik* opinion and determined that the outtakes were privileged from discovery.

The jury awarded the plaintiffs more than $54 million. On appeal, the defendants contended that they were "ambushed" on the first day of trial with a 22-minute day-in-the-life video about Lilia. The defendants argued that they were surprised by the video's existence, had properly objected to its presentation to the jury, and ultimately suffered a predictable "bloodbath" in an excessive damage award when the video unfairly elicited sympathy for Lilia. The defendants requested that the appellate court vacate the jury award and order the case retried without the video. The defendants further contended that the video contained fact and opinion testimony and therefore amounted to "substantive evidence," which should have been barred because it was not disclosed in a timely fashion in response to the defendant's Rule 213 interrogatories. The First District Appellate Court reviewed the *Cisarik* decision in detail and concluded that a day-in-the-life videotape is *demonstrative* evidence, rather than *substantiv*e evidence. The *Velarde* court stated:

> Similarly, defendants now contend they were "ambushed" by the video and "in the age of full disclosure, the proceedings below are hard to fathom." Defendants' arguments do not persuade us to contravene *Cisarik* and

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> conclude that [Lilia's] video should have been treated as additional testimony or substantive evidence, because it is not within our authority to overrule the supreme court or modify its decisions.
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> [Lilia's] video was disclosed and tendered at the first opportunity. Filming began about three weeks before trial and took about one week to complete. The raw footage was then reviewed and edited by [Lilia's] attorney during the week preceding trial, and was finalized on a Friday. [Lilia's] attorney disclosed and tendered the video on the following Monday, supplementing the prior interrogatory answer that there was no video of the accident victims. Defendants' additional contention that the video should have been barred outright because [Lilia] delayed in creating it and did not disclose it at least 60 days before trial pursuant to Supreme Court Rule 218(c) is unpersuasive, given that the record suggests the court modified the discovery deadline. Defendants do not deny [Lilia's] assertion that depositions were being taken by both sides until a week before trial. Moreover, since the purpose of the video was to illustrate the evidence regarding Lilia's life at the time of trial, it would make little sense to record her activities months in advance. *Velarde* at 47-48.

The defendants also contended that the trial court improperly applied the *Cisarik* decision in concluding that the outtakes were privileged from discovery under the work product doctrine. The *Velarde* court found that the defendants waived any contention that they were prejudiced by their lack of access to the outtakes because they failed to object when the edited video was first shown to the jury during the opening statements and when it was used to illustrate witness testimony. The *Velarde* court added that even if the issue had not been waived, the trial court properly applied *Cisarik* in concluding that the outtakes were privileged from discovery as work product.

Finally, the defendants argued that the day-in-the-life video should not have been admitted into evidence because any probative value was outweighed by the danger of prejudice to the defendants. The *Velarde* court soundly rejected this argument, stating:

> We have watched the exhibit at issue. It shows Lilia engaging in ordinary activities, including waking up, eating meals with her family, taking oral medication, dressing, brushing her hair, stripping linens from her bed, loading the clothes washer and dryer, putting on an overcoat, getting into the passenger's seat of a sport utility vehicle, and visiting her mother's house and a grocery market. We note that in many scenes, a family member prompts Lilia or helps Lilia in some other way to complete the activity, such as when she is encouraged to take the oral medication or do the laundry. Noteworthy exceptions to this pattern are at her mother's house, where Lilia rearranges the pillows on the living room sofa so that she can nap, and at the market where she strays away while her sister fills the shopping cart. Throughout the film, Lilia appears anxious and easily confused and she is frequently tearful. In our opinion, however, the film does not dwell on her discomfort. Additionally, the film seems to illustrate the impact of head trauma and possibly resulting medication on Lilia's life, consistent with witness testimony indicating, as examples, that Lilia took medication prescribed by her neurologist, had difficulty sustaining attention, needed someone to "cue her in" and give reminders, could not think flexibly or find solutions to problems, could not manage utensils, and was frustrated, fearful, anxious and extremely depressed. Testimony to that effect would have been given even if the illustrating video was never presented to the jury. Furthermore, the testimony regarding Lilia's life after the collision was not closely balanced and we cannot conclude that the video tipped the verdict in plaintiffs' favor. In addition, although defendants contend that some of the scenes were irrelevant and that the probative value of other

"We note that in many scenes, a family member prompts Lilia or helps Lilia in some other way to complete the activity, such as when she is encouraged to take the oral medication or do the laundry."

scenes was destroyed because they were cut short, these contentions are unpersuasive, given that the video was edited to the satisfaction of defense counsel before it was used during opening statements. We also reject defendants' unsubstantiated suggestion that the video may have included exaggerated and self-serving behaviors. Defendants do not cite any portion of the record indicating they objected to use of the video on this basis at trial; thus, they cannot now complain of error. (Citation omitted.) Furthermore, defendants chose not to have their own medical expert examine Lilia and never called upon Lilia to testify, giving up opportunities to discredit the staged evidence, if in fact, it was staged. Defendants now protest that calling Lilia herself would have made defendants "look cruel and heartless," actually lending credibility to a video in which Lilia appears to this court to be confused and easily upset. In addition, the silenced video was narrated by trial witnesses whose testimony was subject to additional objection, cross-examination, and curative instruction, if warranted, and defendants are not arguing that the trial judge improperly rejected defendants' attempts to limit the impact of the video through these means. We conclude it is most improbable that the jury was unduly influenced by a film which shows Lilia engaging in commonplace activities in a manner that conformed with trial testimony about her injuries and disabilities. It was not an abuse of discretion to allow the jury to see the video. *Id.* at 50-51.

Trial Court Properly Denied Motion for Substitution of Judge as a Matter of Right Where Trial Judge Participated in Informal Discussions at Several Pretrial Conferences and Status Hearings

In re Estate of Gay, 353 Ill. App. 3d 341, 818 N.E.2d 860, 288 Ill. Dec. 925 (3rd Dist. 2004), the Third District Appellate Court affirmed the denial of the defendant's motion for substitution of judge as a matter of right pursuant to 735 ILCS 5/2-1001. In 1995, defendant Caroline Hetrick was appointed guardian of the estate of Helen Jean Gay. Gay eventually moved into Hetrick's home and Hetrick provided for Gay's daily needs. In January 2000, a beneficiary of the estate brought an action in probate court alleging that Hetrick improperly used Gay's assets. Judge William Banich ordered Hetrick to file an accounting report by March 2, 2000. Gay died on February 5, 2000 and on February 17, 2000, Judge Banich ordered that the guardianship remain open pending the opening of Gay's estate. On March 31, 2000, Judge Banich again requested a final accounting report from Hetrick. On May 30, 2000, Judge Banich continued the case to allow Hetrick additional time to file the report. The matter was then continued on several additional occasions and Judge Banich ultimately entered a rule to show cause why Hetrick should not be discharged as guardian of the estate for failure to file the report.

On September 13, 2000, Judge Banich held another status conference. Hetrick personally appeared at the hearing and provided a narrative of her care of Gay and certain financial information. The matter was then continued on several more occasions and Hetrick repeatedly failed to file the accounting report. On November 27, 2000, Judge Banich entered yet another order requiring that Hetrick file the report. On December 15, 2000, Hetrick presented a motion for substitution of judge as a matter of right. Hetrick argued that she was entitled to a substitution of judge because Judge Banich had not yet entered a substantive order. Counsel for the beneficiary argued that the judge had "tipped his hand" at pretrial conferences on certain issues raised by the pleadings. Judge Banich agreed and recalled that he had discussed a number of issues concerning the case in chambers. Judge Banich stated, "I clearly indicated, you know, my position and my feelings concerning what the guardian was going to have to do if anybody came in and filed [an objection]." *In re Estate of Gay*, 818 N.E.2d at 862. Based on these discussions, Judge Banich denied the motion for substitution.

The Third District Appellate Court affirmed. The appellate court recognized that it is customary for trial judges to hold informal discussions of the merits and issues at pretrial conferences without a court reporter present. The court stated:

> Here, Hetrick and her attorney had participated in several pretrial conferences and status hearings which were not memorialized. Based on his own recollection, Judge Banich determined that the motion was untimely because the parties had an opportunity to assess his feelings and views on some of the issues during those proceedings. Hetrick argues that we cannot rely on the trial judge's own recollections in determining whether the denial of the motion was correct.
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> * * *
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> Here, Judge Banich considered the motion and ruled that it was untimely. In so doing, he relied on his recollection of off-the-record pretrial conferences that he

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Evidence and Practice Tips *(Continued)*

had indicated his position and feelings concerning the burden Hetrick needed to overcome if an objection was filed. Nothing in the record, either before or after the substitution motion was made, contradicts that recollection. Therefore, it was permissible for the judge to rely on his own memory regarding the substance of the pretrial proceedings.

During pretrial conferences it is common for a judge to express an opinion or make a recommendation to the parties on an issue. The record indicates that this case had been before Judge Banich for several months. He had discussed the merits of the action during pretrial conferences and had suggested that the burden of proof would be significant. Hetrick does not claim that she did not participate in the conferences. Considering all the circumstances surrounding the pretrial proceedings, the motion for substitution of judge was untimely because it was made after Hetrick had an opportunity to form an opinion as to the judge's reaction. The trial judge's suggestions and comments during the pretrial conferences gave her a unique ability to determine the court's attitude concerning certain issues. Accordingly, Judge Banich properly denied Hetrick's motion for substitution. *Id.* at 863-64.

Technology Law

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

Betamax Revisited, Again

I. Introduction

Over 20 years ago the United States Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) made way for the proliferation of the VCR. The Court found that VCR manufacturers are not secondarily liable for copyright infringement for producing a device (a VCR) that allowed users to copy protected works. Today, a similar battle is raging over downloading music, movies and other protected works from the Internet through what are known as peer-to-peer file sharing ("P2P") services; probably the most notable being Napster. On one side, recording, film and other industry groups ("the Copyright Owners") contend that 90% of the files distributed by P2P users are copyrighted, and that their unauthorized distribution is having a significant, negative impact on the market for such copyrighted works. On the other side, producers of P2P software ("the Software Distributors") concede that much of the traffic on P2P networks consists of copyrighted works, but insist that P2P networks are also used for legitimate distribution of public domain and other

About the Author

Michael C. Bruck is a partner in the Chicago law firm of *Crusham & 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.

noncopyrighted material. The debate over whether the distributors of P2P software may be held secondarily liable for the copyright infringements of their users is now headed to the Supreme Court because, on December 10, 2004, the Court granted *certiori* to review the Ninth Circuit's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004). Notably, the Ninth Circuit's decision announced a test for secondary liability that is directly contrary to that set forth by the Seventh Circuit in another recent P2P case, *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003). The Supreme Court's decision in *Grokster*, which is expected sometime in mid-2005, portends to be one of the most important technology law decisions in the last 20 years. Which test the Supreme Court adopts will determine not only the propriety of current P2P services, but also very likely may define the parameters by which future technological innovations will have to abide.

II. Background: The U.S. Supreme Court's Holding on Secondary Liability in *Sony Corp. of America v. Universal City Studios, Inc.*

Copyright Owners and Software Distributors agree that up to 90% of file-sharing traffic consists of the unauthorized and illegal distribution of the Copyright Owners' music, films and other works. Because suing millions of individual P2P end users for copyright infringement is impractical, the Copyright Owners instead targeted the Software Distributors (the makers of popular file-sharing applications such as Napster, Grokster, Kazaa, Morpheus, etc.) for secondary liability, under theories of contributory or vicarious infringement (the copyright equivalent to aiding and abetting in criminal law; *see, Aimster*, 334 F.3d at 651). "Contributory infringement" applies when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *CoStar Group, Inc. v. LoopNet, Inc*., 373 F.3d 544, 550 (4th Cir. 2004) (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971)). "Vicarious liability" applies when the defendant "enjoys a direct financial benefit from the infringing activity and 'has the right and ability to supervise' the infringing activity." *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). The Software Distributors do not dispute that their products are used for illegal purposes, but argue that they cannot be held secondarily liable because their products are *also* used for *some* legal purposes. For the last 20 years, the landmark case on this issue (which the Ninth and Seventh Circuits interpreted differently in *Grokster* and *Aimster*, respectively), has been *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

The *Sony* case arose from the sale of Betamax videocassette recorders in the 1970s and 1980s, which gave consumers the then-novel ability to build personal libraries of broadcast movies and other programs. Universal and other owners of copyrighted television programming opposed the new technology, contending that VCRs (referred to as "VTRs," or "video tape recorders" in the 1984 decision) were being used to infringe their copyrighted works, and that Sony, as the manufacturer of the machines, should be held secondarily liable for that infringement. The Supreme Court found that VCRs were indeed being used to make unauthorized copies of copyrighted programming, but declined to hold Sony secondarily liable for such infringement because the machines also were used for legitimate, noninfringing purposes. In particular, the Court found that many VCR owners used their machines to "time shift," or record a program to be watched at a later, more convenient time. Such use, the Court held, amounted to noninfringing fair use, and since VCRs were at least *capable* of such use, "Sony's sale of such equipment to the general public does not constitute contributory infringement of [plaintiffs'] copyrights." *Sony*, 464 U.S. at 456. The *Sony* court also set forth a simple bright line test, which has been the settled law in this area for the last two decades:

> [T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

Sony, 464 U.S. at 442.

The recent, explosive proliferation of P2P networks–which all parties concerned agree are used *mainly* for the unauthorized distribution of copyrighted materials–has led to the close examination of this axiom from *Sony*. The Ninth and Seventh Circuits have come to different interpretations of *Sony*, with the Ninth Circuit placing predominant importance on the "merely be capable of substantial noninfringing uses" language, and the Seventh Circuit focusing on "if the product is widely used for legitimate, unobjectionable purposes."

III. The Ninth Circuit's Holding in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*

Relying on the Supreme Court's endorsement of the legitimacy of VCRs in *Sony*, the Ninth Circuit has taken the view

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that if a file-sharing application is capable of even minimal noninfringing use, its producer is essentially shielded from secondary liability.

In *Grokster*, the Copyright Owners (comprised of a class of 28 major entertainment companies and over 27,000 smaller songwriters and music publishers) brought suit against the distributors of the popular Morpheus, Grokster and Kazaa file-sharing programs, alleging that they were contributorily or vicariously liable for their end users' copyright infringements. The district court granted partial summary judgment in favor of the Software Distributors, finding that their activities did not give rise to liability under either theory. *Grokster*, 380 F.3d at 1160. The Copyright Owners appealed.

In affirming, the Ninth Circuit agreed with the district court that the Software Distributors could not be vicariously liable for their end users' conduct because such liability requires that the Software Distributors have the right and ability to supervise their end users' activities. *Id.* at 1164. While earlier providers of P2P software (*e.g.*, the providers of the seminal P2P service, Napster), had been held liable under this theory of secondary liability, the Ninth Circuit summarily held that the *Grokster* defendants were shielded from such liability because the configuration of their software removed much of the Software Distributors' ability to supervise end user conduct. *Id.* at 1164-66.

The bulk of the Ninth Circuit decision, however, was concerned with an analysis of whether the Software Distributors were *contributorily* liable for end user copyright infringement, which entailed the analysis of *Sony*. Three elements are required to prove a defendant liable under the theory of contributory copyright infringement: (1) direct infringement by a primary infringer, (2) knowledge of the infringement, and (3) material contribution to the infringement. *Grokster,* 380 F.3d at 1160. The existence of direct infringement was undisputed, and the element of material contribution was found to be intertwined with the knowledge element (due in part to the particular configuration of the defendants' software, which also precluded vicarious liability). The dispositive portion of the *Grokster* court's analysis thus was directed at whether the second element, knowledge of infringement, had been demonstrated.

In an earlier P2P case, *A&M Records, Inc. v. Napster, Inc*., 239 F.3d 1004 (9th Cir. 2001), the Ninth Circuit construed *Sony* to apply to the knowledge element of contributory copyright infringement, in that if a defendant could show that its product was capable of substantial or commercially significant noninfringing uses, then constructive knowledge of the infringement could not be imputed. *See, Grokster*, 380 F.3d at 1160. Rather, if substantial noninfringing use was shown, the copyright owner would be required to show that the defendant had reasonable knowledge of *specific infringing files*. *Id.* at 1161.

Guided by the Supreme Court's analysis of the VCR's potential for noninfringing use, the Ninth Circuit found that the Grokster, Morpheus and Kazaa technology had numerous legitimate, noninfringing uses, such as "significantly reducing the distribution costs of public domain and permissively shared art and speech, as well as reducing the centralized control of that distribution." *Id.* at 1164. The Ninth Circuit gave examples of such legitimate use of P2P networks with which it was particularly impressed:

> One striking example provided by the Software Distributors is the popular band Wilco, whose record company had declined to release one of its albums on the basis that it had no commercial potential. Wilco repurchased the work from the record company and made the album available for free downloading, both from its own website and through the software user networks. The result sparked widespread interest and, as a result, Wilco received another recording contract. Other recording artists have debuted their works through the user networks. Indeed, the record indicates that thousands of other musical groups have authorized free distribution of their music through the internet. In addition to music, the software has been used to share thousands of public domain literary works made available through Project Gutenberg as well as historic public domain films released by the Prelinger Archive. In short, from the evidence presented, the district court quite correctly concluded that the software was capable of substantial noninfringing uses and, therefore, that the *Sony-Betamax* doctrine applied.

Id. at 1161-62.

Having determined that the Software Distributors' products were sufficiently capable of substantial noninfringing uses, the Ninth Circuit concluded the Copyright Owners could not impute constructive knowledge of infringement to the Software Distributors, and would instead have to show that they had knowledge of *specific* infringing files on the P2P networks utilized by their end users. The Copyright Owners could not meet this burden given the decentralized design of the Software Distributors' programs. Accordingly, the Ninth Circuit affirmed the district court's grant of summary judg-

ment on the issue of secondary liability.

The Copyright Owners appealed the Ninth Circuit decision to the Supreme Court, arguing that the Ninth Circuit's reliance on the "capable of substantial noninfringing uses" language from *Sony* was in acknowledged conflict with the Seventh Circuit's interpretation of that case. *See,* Copyright Owners' Petition for a Writ of Certiorari at p. i, 2004 WL 2289200 (Oct. 8, 2004). On December 10, 2004, the U.S. Supreme Court agreed to hear the appeal. *Grokster*, 73 U.S.L.W. 3247, 2004 WL 2289054 (U.S.).

IV. The Seventh Circuit's Position in *In re Aimster Copyright Litigation*

The Seventh Circuit has also relied on the Supreme Court's *Sony* ruling in determining whether the distributors of P2P software may be held liable for the contributory infringement of their end users. However, the Seventh Circuit's interpretation of the dispositive language in *Sony* places a greater emphasis on how a product is *actually* used, rather than how it *could* be used.

The Ninth Circuit concedes that "the Seventh Circuit has read *Sony*'s substantial noninfringing use standard differently." *Grokster*, 380 F.3d 1154 at n. 9. The Seventh Circuit case alluded to by the Ninth Circuit – *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) – places preeminent importance not on the *Sony* decision's "capable of substantial noninfringing uses" language, but rather on its "widely used for legitimate, unobjectionable purposes" wording. In *Aimster*, the Copyright Owners sought an injunction against the distributor of the Aimster P2P file-sharing program, alleging contributory liability under circumstances essentially identical to those in *Grokster*. The Seventh Circuit rejected the argument made by Aimster, that "all [a Software Distributor] has to show in order to escape liability for contributory infringement is that its file-sharing system *could* be used in noninfringing ways." *Aimster*, 334 F.3d at 651 (emphasis in original). Were that the law, the Seventh Circuit reasoned, "the seller of a product or service used *solely* to facilitate copyright infringement, though it was capable in principle of noninfringing uses, would be immune from liability for contributory infringement. That would be an extreme result, and one not envisaged by the *Sony* majority." *Id.* (emphasis in original).

The Seventh Circuit realized that copyright owners, by nature, seek to characterize any entity that facilitates even a single infringing use as a contributory infringer, and that "[t]o the Aimsters of this world, a single noninfringing use provides complete immunity from liability." *Id.* The Seventh Circuit rejected both characterizations. In deciding where between those opposing poles to situate Aimster's conduct, the Seventh Circuit seized on the tutorial that accompanied the Aimster software, which *only* gave examples of file-sharing copyrighted works. While the Seventh Circuit *sua sponte* conceived of five examples of noninfringing use the Aimster software might be used for, the court concluded that "[a]ll five of our examples of actually or arguably noninfringing uses of Aimster's service are *possibilities*, but as should be evident from our earlier discussion the question is how *probable* they are. It is not enough, as we have said, that a product or service be physically capable, as it were, of a noninfringing use." *Id.* at 653 (emphasis added). The court thus affirmed the district court's injunction. Though the Software Distributor's appeal to the Supreme Court was denied (*See, Deep v. Recording Industry Ass'n of America, Inc.*, 540 U.S. 1107 (2004)), the Seventh Circuit's application of *Sony* will be reviewed next to the Ninth Circuit's interpretation this summer, when the Supreme Court considers *Grokster*.

V. Conclusion

As the Ninth Circuit pointed out in *Grokster*, "[f]rom the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners, often resulting in federal litigation." 380 F.3d at 1158. File-sharing networks and the MP3 files found on them have proven not to be an exception, and regardless of how carefully the Supreme Court crafts its ruling in *Grokster*, it is likely that future technological innovations will create conflicts that the existing case law is ill-suited to address. Nevertheless, the Supreme Court's decision in *Grokster* likely will be a seminal one, as it will largely determine the extent to which applications for the distribution of movies, music, software and other digital media over the Internet may be developed lawfully. It is difficult to imagine how different the world would be today had the Supreme Court issued a ruling in *Sony* that would have effectively halted the proliferation of VCRs and related consumer electronics. Regardless of how the Court might rule, the *Grokster* decision will have a tremendous impact, and is therefore one to watch very closely.

Featured Article

Premises Liability Exposure in Construction Injury Cases

By: David B. Mueller
and Andrew D. Cassidy
Cassidy & Mueller
Peoria

Since the demise of the Structural Work Act, considerable energy has been expended in cobbling together a substitute under Section 414 of the Restatement of Torts. *See,* Restatement (Second) of Torts § 414 (1965); *see also*, *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 726 (2000); *Rangel v. Brookhaven Contractors*, 307 Ill. App. 3d 835, 719 N.E.2d (1999). That provision imposes a common law duty of ordinary care upon owners, contractors and others who possess the requisite degree of control over the work of subcontractors on the job site, in lieu of a supreme court decision on the subject. *Brooks v. Midwest Grain Products Co.*, 311 Ill. App. 3d 871, 726 N.E.2d 153 (2000). While the substantive and evidentiary elements required to establish control remain the subject of intense dispute, the current trend of appellate decisions favors the "operative details" approach. *See, Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (2004); *Shaughnessy v. Skender Construction Co.*, 342 Ill. App. 3d 730, 794 N.E.2d 937 (2003). That approach defines a contractor's duty in terms of control over the means and methods of a subcontractor's work, as opposed to the retention of broad general powers over the construction project.[1]

Whether influenced by the difficulties in establishing a duty under Section 414, the desire for an alternative basis for liability, or both, plaintiffs have turned to premises liability theories in cases against *general contractors* where the injury is a result of a hazardous *condition* at the construction site. *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 776 N.E.2d 774 (2002); *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 770 N.E.2d 1175 (2002). In doing so, the plaintiffs employ the traditional analysis that is afforded by Section 343 of the Restatement (Second) of Torts, which provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
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> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965). It has long been recognized that Section 343 applies to general contractors on a construction site. In *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430, 566 N.E.2d 239 (1990), the supreme court found that a general contractor qualifies as a "possessor"

About the Authors

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.

Andrew D. Cassidy is partner in the Peoria firm of *Cassidy & Mueller* and a member of the Board of Directors of the Illinois Association of Defense Trial Counsel. His areas of practice include products liability, medical malpractice and insurance coverage litigation. He received his undergraduate degree from Marquette University in 1994 and graduated from Norther Illinois University College of Law in 1989. He is a member of the Peoria County and Illinois State Bar Associations and is admitted to practice in all U.S. District Courts in the State of Illinois and U.S. Court of Appeals, Seventh Circuit.

within the Restatement's definition of the term. As such, it owes a duty to keep the construction site reasonably safe for the benefit of construction workers on the job. *Deibert*, 141 Ill. 2d at 434-35. While use of a premises liability theory in construction negligence cases following *Deibert* has been limited, a few courts have considered it as an adjunct to or an alternative for construction negligence claims under Section 414. *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583*; Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269. However, because the possessor's duty is qualified by the patency of the hazardous condition under Section 343A of the Restatement, that option has met with limited success. In both *Kotecki* and *Bieruta*, the court affirmed summary judgments in favor of the defendant on construction negligence and premises liability theories. *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583*; Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269. In considering the latter, the First District in both cases rejected the plaintiff's claims that because he was distracted the open and obvious rule should not apply.

Technically, the patency of a risk is not a defense. Rather, it qualifies the hazard and thereby limits the possessor's duty. *Dunn v. Baltimore & Ohio Ry. Co.*, 127 Ill. 2d 350, 365, 537 N.E.2d 738, 744 (1989). Simply stated, except under extraordinary circumstances, the defendant has no reason to anticipate harm from a hazard which is self-evident. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448, 665 N.E.2d 826, 832 (1996). The focus on the risk is through the eyes of the possessor. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 143-45, 554 N.E.2d 223, 228, 229 (1990). The same is true of the two exceptions which make an otherwise patent hazard actionable under Section 343(b) and (c). Restatement (Second) of Torts § 343(b), (c)(1965). If the defendant had reason to anticipate that persons upon the premises might be distracted and therefore not appreciate the risk, there is potential exposure. *Ward v. K Mart Corp.*, 136 Ill. 2d 132; *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430. Also, if the defendant has reason to believe that persons on the property might deliberately encounter the condition, a duty exists to protect them against it. *Lafever v. Kemlite*, 185 Ill. 2d 380, 396-97, 706 N.E.2d 441, 450 (1998).

The open and obvious rule and its exceptions apply with full vigor in construction injury cases which are brought under a premises liability theory. For example, in *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, the plaintiff was injured when he stepped in a tire rut as he was exiting a portable bathroom at the construction site. At the time he was looking "skyward" to discover whether construction materials were falling from overhead and he did not see the ruts. Despite the fact that the "ruts" were obvious, the court found a duty on the part of the general contractor because it knew that construction materials were dropped from above in the area and therefore had reason to know that construction workers might be "distracted" from looking at the road ahead. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430.

As discussed above, the use of premises liability theories in construction injury cases met with scant success following *Deibert*, because of the "open and obvious" limitation upon a possessor's duty. In *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 770 N.E.2d 1175 (2002), the plaintiff turned and fell into a ditch when a co-worker called his name from behind him. The suit was brought under construction negligence and premises liability theories. Summary judgment for the defendant was granted by the trial court and affirmed on appeal. The First District Appellate Court held that the owner and general contractor, Klein Creek, could not be expected to anticipate that workers at the site might be distracted when their names were called. Specifically, the court stated:

> Here, we find that it was not reasonable that Klein Creek would anticipate that a co-worker calling out Bieruta's name would distract Bieruta's thereby causing him to fall into the trench. In *Deibert* and the other cases mentioned by the plaintiff, the distractions were known to the possessor of the land or caused by the possessor.

Bieruta v. Klein Creek Corp., 331 Ill. App. 3d at 273.

Similarly, in *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 776 N.E.2d 774 (2002), the court affirmed a summary judgment on the plaintiff's Section 414 and premises liability claims. There, the plaintiff, a painter, fell as he was descending a ladder with his paint supplies and equipment. In addition to a number of other infirmities, which defeated the plaintiff's claim that the construction site was hazardous, the appellate court rejected the contention that the presence of "multiple workers" at the site was a distraction. In doing so it recognized: "*A distraction-free environment on a construction project would be an impossible burden to meet . . .*" *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 540, 776 N.E.2d 774, 780 (1st Dist. 2002).

Contrary to past precedent is the recent First District decision in *Clifford v. The Wharton Business Group, LLC,* 353 Ill. App. 3d 34, 817 N.E.2d 1207, 288 Ill. Dec. 557, 2004 WL 2192558 (2004). *Clifford* is significant for its expansion of the "distraction exception" in construction site injury cases which involve "open and obvious" conditions. There the plaintiff was employed as a carpenter by one of the subcontractors

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Premises Liability *(Continued)*

which Wharton, the general contractor, had employed on a 10-unit townhome project. Construction had progressed to the point where on each of the upper floors a four-foot by ten-foot stairway opening had been made. Earlier in the day Clifford and his fellow employees had put up and braced an interior wall. As the plaintiff worked in its vicinity the wall collapsed. Clifford put his hands up in an attempt to stop it and apparently fell or was thrown into the stairwell opening.

The original complaint was brought under Section 414 of the Restatement. After a dispositive motion was filed, a second count for premises liability was brought. It alleged that the unguarded stairwell was an actionable condition of the property. Summary judgment for the defendant was entered on both claims.

On appeal the First District Appellate Court specifically held that construction negligence and premises liability theories are viable alternative grounds for recovery. In so doing, the court stated, "We clarify that sections 343 and 414 are not mutually exclusive; rather, each one offers an independent basis for recovery." *Clifford v. The Wharton Business Group, LLC,* 353 Ill. App. 3d at 47.

It then went on to affirm summary judgment on the construction negligence theory, and followed the operative details analysis.

> [T]here is no indication that Wharton exercised the level of control necessary to subject it to liability under section 414. Wharton clearly did not control the operative detail of O'Toole's methods of work, such that O'Toole was not entirely free to do the work in its own way. Wharton did not supply any equipment to O'Toole's employees, did not direct the carpenters how to perform their tasks, and did not hold safety meetings or maintain safety rules for its subcontractors.

Clifford v. The Wharton Business Group, LLC, 353 Ill. App. 3d at 48.

The court, however, reversed the summary judgment which had been entered in favor of the general contractor on the plaintiff's premises liability theory. In doing so it agreed that the stairwell opening was not only obvious but known to the plaintiff. Nonetheless, it held that Wharton had reason to expect that construction workers might be distracted and thereby overlook and forget the hazard. This aspect of the opinion flies in the face of *Bieruta* and *Kotecki* and broadens the distraction exception to the point where it subsumes the open and obvious rule in construction site cases.

As discussed above, the *Bieruta* court held that a general contractor had no reason to anticipate the *type* of distraction which took place there, namely the plaintiff's response to having his name called. The *Kotecki* court denied the presence of other workers as a distraction, and in doing so refused the argument that general commotion on the job was sufficient to justify inattention. *Clifford* rejects the rationale of both *Bieruta* and *Kotechi*. First, it holds that the defendant need not anticipate the type of distraction which took place stating, "Contrary to Wharton's position it is not necessary for a defendant to foresee the precise nature of the distraction." Second, the *Clifford* court adopts a distraction exception the breadth of which devours the open and obvious rule which it is intended to qualify. In doing so, it stands the more restrictive reasoning in *Kotecki* on its head by holding that virtually every activity on a construction site can constitute a qualifying distraction. Specifically, the *Clifford* court held that "[a]ll that is required is the defendant's awareness that those in proximity to the open and obvious hazard are likely to become distracted *in some way* and forget about the presence of the hazard." (Emphasis supplied). *Clifford v. The Wharton Business Group, LLC,* 353 Ill. App. 3d at 46.

Contrary to the holding in *Kotecki* that a distraction-free environment on a construction project would be an impossible burden to meet, *Clifford* holds that the defendant must carry that "burden" if it is to overcome the plaintiff's assertion that he was distracted in "some way" and therefore failed to heed the warning of peril which his senses would otherwise have imparted. In expanding the exception, the *Clifford* court relies upon the supreme court decision in *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 796 N.E.2d 1040 (2003) for the proposition that the distraction standard has a low threshold. In *Rexroad*, the student manager of a high school football team was injured when he stepped into a hole in an adjacent city parking lot, which was about 64 square feet in size, four inches deep, and was filled with sand. At the time he was on his way from the locker room to the practice field with a helmet which he had retrieved and was focusing his attention on the player who needed the helmet. The hole was unquestionably open and obvious. The trial court agreed and entered summary judgment for the defendant. The Fourth District affirmed *Rexroad*, 331 Ill. App. 3d 545, 772 N.E.2d 821 (2002). The plaintiff relied upon the distraction exception and the supreme court reversed.

> We find the present case to be similar to *Ward*. It was reasonably foreseeable that students may fail to avoid the risk posed by the hole by becoming distracted or momentarily forgetful. The record contains some evi-

dence that this was the case. Matthew testified he was distracted from the hole because of his focus on carrying a football helmet to the player who needed it . . .

Rexroad, 207 Ill. 2d 33, 45, 796 N.E.2d 1040, 1047 (2003).

The *Clifford* decision also relies upon *Shaffer v. Mays*, 140 Ill. App. 3d 779, 489 N.E.2d 35 (1986) in which the plaintiff fell into a stairwell opening while helping to remodel a house which was owned by the defendant, his father-in-law. At the time the plaintiff was helping to move a heavy and awkward object into place when he stepped into the uncovered hole and fell to the basement, sustaining severe injuries. A verdict for the plaintiff was affirmed despite the plaintiff's testimony that he was aware of the stairwell. The court found a distraction in that plaintiff was looking upward and toward the person helping him. *Shaffer v. Mays*, 140 Ill. App. 3d 779, 489 N.E.2d 35 (1986).

Given the breadth of the distraction exception that is enunciated by the court in *Clifford* 353 Ill. App. 3d 34 (2004), it is likely that construction injury claims will be increasingly brought on premises liability theories, as well as construction negligence theories. It is important to understand that the premises liability theory depends upon possession of the construction site. Consequently, the theory appears to be viable only against owners and general contractors, as opposed to downstream subcontractors whose involvement would be defined by Section 414 of the Restatement. Moreover, it remains to be seen whether other divisions of the First District, and other appellate districts, will follow the reasoning in *Clifford* or the more restrictive rationale of *Bieruta* and *Kotecki*.

Endnotes

1 *See*, *Complexities in Construction Negligence Litigation*, 13 IDC Quarterly vol. 13, no. 3, page 20 (2003); *See also*, *Recent Developments in Construction Negligence; An Update Of Complexities In Construction Negligence Litigation*, 14 IDC Quarterly vol. 14 no. 2, page 41 (2004).

Recent Decisions

By: Stacy Dolan Fulco
Cremer, Kopon, Shaughnessy & Spina, LLC
Chicago

First District Analyzes Allocation of Fault Under Section 2-1117 and Inclusion of Employer on Verdict Form

Carollo v. Al Warren Oil Company, Inc., 2004 WL 2715547 (1st Dist., November 24, 2004).

The plaintiff, Jack Carollo, was seriously injured in an explosion at work. He was employed by third party defendant Premier Fuel & Cartage, Inc., which provided fueling services at McCormick Place using a tanker truck referred to as A-2. Premier purchased the A-2 from defendant Altom and defendant Warren provided the motor fuel. At the time of the explosion, the plaintiff was filling the A-2 with fuel from a larger tanker.

When the case went to trial, only a negligence claim remained. The jury found for the plaintiff with damages in the amount of $1,057,600 and allocated the percentage of fault as follows: plaintiff – 15%; Warren – 15%; Altom – 18%; and Premier - 52%. Relying on *Lily v. Marcal Rope & Rigging, Inc.*, 289 Ill. App. 3d 1105, 682 N.E.2d 481 (5th Dist. 1997), the trial court ruled that the employer, Premier, should not

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About the Author

Stacy Dolan Fulco is an associate at the Chicago law firm of *Cremer, Kopon, Shaughnessy & Spina, LLC*. She practices primarily in the areas of premises liability, products liability and wrongful death defense. Ms. Fulco received her undergraduate degree from Illinois State University and her J.D./M.B.A. degree from DePaul University. She is a member of the IDC.

Recent Decisions *(Continued)*

be considered in the allocation of fault under Section 2-1117 and redistributed Premier's 52% of fault, *pro rata*, among the plaintiff and defendants. The Illinois Supreme Court then decided *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 783 N.E.2d 1024 (2002), so the trial court entered judgment whereby each defendant was only severally liable for its proportionate share of plaintiff's non-medical damages and jointly and severally liable for his medical expenses. The plaintiff then appealed.

In the plaintiff's appeal, the plaintiff argued that Section 2-1117 required that the defendants should have been found jointly liable to the plaintiff, rather than severally liable. The appellate court disagreed with the plaintiff.

Section 2-1117 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1117) makes a tortfeasor only severally liable when its percentage of fault for the plaintiff's injuries is less than 25% of the total fault. The plaintiff argued that under *Lily*, his employer should not have been included in the allocation of fault so the fault would have been distributed among the other parties. The appellate court found the plaintiff's reliance on *Lily* unpersuasive and determined that the Illinois Supreme Court's decision in *Unzicker* was dispositive.

The *Unzicker* court stated, "the clear legislative intent behind section 2-1117 is that minimally responsible defendants should not have to pay entire damage awards. The legislature set the line of minimal responsibility at less than 25%." The *Unzicker* court concluded that it would not be in accordance with this legislative intent to ignore the party who was found to be 99% responsible for the plaintiff's injuries – the plaintiff's employer – and require that the party found 1% responsible to pay all of the non-medical damages. Therefore, the *Unzicker* court held that the plaintiff's employer could be considered in the division of fault under section 2-1117. This decision overruled *Lily*.

In response to *Unzicker*, the legislature amended section 2-1117 by specifically providing that a plaintiff's employer should *not* be considered in the allocation of total fault. (Pub. Act No. 93-10, eff. June 4, 2003). The appellate court in this case noted that this statutory amendment is not retroactive so it did not apply. Therefore, employer Premier was correctly included in the allocation of fault for the purposes of section 2-1117, making the defendants only severally liable for their proportionate share of plaintiff's non-medical damages.

Illinois Supreme Court Holds Insurer Did Not Have Duty to Advise Property Owner to Preserve Evidence

Dardeen v. Kuehling, 2004 WL 2745653 (IL Sup. Ct., December 2, 2004).

James Dardeen was injured while delivering newspapers with his daughter when he fell in a hole on a brick sidewalk outside of defendant Alice Kuehling's house. The plaintiff described the hole as 12 inches wide and 4-6 inches deep. On the day of the accident, the plaintiff's daughter called the defendant to notify her of the incident and request the name of her insurance carrier. The defendant asked for the plaintiff to stop over to her house later so they could talk.

The defendant contacted her insurance carrier, State Farm. She told State Farm that several bricks were "cocked up" where the plaintiff fell, making the sidewalk uneven. The defendant then asked State Farm "Would it be all right if I removed those bricks before this happened again?" or "Could I remove those bricks before somebody else gets hurt on it?" and the State Farm representative responded "yes." *Dardeen*, 2004 WL 2745653 at *1.

On the evening of the incident, the plaintiff returned to the site of the accident with the defendant. The plaintiff's wife photographed the plaintiff's injuries for litigation purposes but no one photographed the hole in the sidewalk. A few days later, the defendant removed between 25 and 50 bricks from the area. *Id.* at *1.

Nearly a year later, the plaintiff filed a premises liability suit and in an amended complaint, alleged negligent spoliation of evidence against the individual defendant and State Farm. Against State Farm, he alleged that the hole in the brick sidewalk was material evidence to the claim and State Farm had a duty to preserve that evidence once its agent was advised of the accident. The plaintiff alleged that this duty was breached when the State Farm agent authorized the defendant to remove the bricks without first photographing the area. *Id.*

State Farm filed a motion for summary judgment as to the spoliation of evidence count and the motion was granted. *Id.* The plaintiff then appealed and the appellate court reversed the ruling, holding that there was sufficient evidence to impose a duty on State Farm to preserve evidence. *Id.* at *2. State Farm then petitioned the Illinois Supreme Court and the petition for leave to appeal was granted.

The Illinois Supreme Court first noted that *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188 (1995), remains the leading case on spoliation of evidence. In *Boyd*, the Illinois Supreme Court declined to recognize spoliation of evidence as an independent tort and instead held that a spoliation of evidence

claim can be stated under existing negligence principles. The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, contract, statute or another special circumstance. In addition, a defendant may voluntarily assume a duty by affirmative conduct. In any of these 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. *Boyd*, 166 Ill. 2d at 195.

This general rule became a two-prong test for determining when there is a duty to preserve evidence. The court must first determine whether such a duty arises by agreement, contract, statute, special circumstance, or voluntary undertaking. *Dardeen*, 2004 WL 2745653 at *4. If so, the court must then determine whether that duty extends to the evidence at issue – *i.e.* whether a reasonable person should have foreseen that the evidence was material to a potential civil action. If the plaintiff does not satisfy both prongs, there is no duty to preserve the evidence at issue. *See*, *Boyd*, 166 Ill. 2d at 195. In this case, the supreme court determined that the second prong (the foreseeability prong) did not need to be evaluated because the plaintiff did not satisfy the first prong (the relationship prong). *Id.*

"Since State Farm had neither possession nor control over the defendant's sidewalk, it did not owe a duty to preserve the sidewalk. For this reason, summary judgment for State Farm was found to be appropriate."

The plaintiff argued that the insurance contract between the defendant and State Farm was a contract that satisfied the relationship prong. The supreme court responded that in *Boyd,* when it ruled that a duty to preserve evidence could arise by an agreement or contract, it meant an agreement or contract between the parties to the spoliation claim. *See*, *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 217, 793 N.E.2d 962 (2nd Dist. 2003). The defendant and State Farm had an insurance contract of which the plaintiff was not a privy, so it was not sufficient to create a duty. *Dardeen*, 2004 WL 2745653 at *4.

The plaintiff's argument mirrored the appellate court's ruling that the insurance contract created a special circumstance that satisfied the relationship prong. The plaintiff argued that when the defendant asked permission from State Farm to alter the area, "State Farm was invested with the power or authority to guide or manage the actions of its insured. At that precise moment, State Farm was in a position to control the sidewalk before it was lost or destroyed."

The supreme court admitted that it hinted at what special circumstances might give rise to a duty to preserve evidence in *Miller v. Gupta*, 174 Ill. 2d 120 (1996), but unlike in *Miller*, the plaintiff in this case never contacted the defendant or State Farm and requested that the evidence be preserved or its condition documented. The plaintiff also visited the site hours after the accident and he failed to photograph the hole. Furthermore, State Farm never possessed the evidence at issue. *Dardeen*, 2004 WL 2745653 at *5.

The court pointed out that no Illinois court has held that a mere opportunity to exercise control over the evidence at issue is sufficient to meet the relationship prong. However, the court would not state that possession is required in every negligent spoliation case. For the plaintiff to avoid summary judgment in this case, he needed to show something more than State Farm's agent answering affirmatively to the defendant's question as to whether the bricks could be removed. *Id.*

Since State Farm had neither possession nor control over the defendant's sidewalk, it did not owe a duty to preserve the sidewalk. For this reason, summary judgment for State Farm was found to be appropriate.

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Recent Decisions *(Continued)*

Case of First Impression – Dismissal on Grounds of Interstate Forum Non Conveniens Precludes Re-Filing in Another Illinois County

Wakehouse v. The Goodyear Tire & Rubber Co., 2004 WL 2659028 (3rd Dist., Nov. 18, 2004)

This is a case of first impression in Illinois. Gary Wakehouse, was killed in Burt County, Nebraska, while changing a tire on a Caterpillar road grader. His wife filed suit in St. Clair County, Illinois alleging product liability and negligence claims. The defendants filed a motion to dismiss based on improper venue due to interstate *forum non conveniens*. *Wakehouse*, 2004 WL 2659028 at *1.

The circuit court denied the motion and the appellate court affirmed the ruling. *Id.* The Illinois Supreme Court entered a supervisory order vacating the appellate court's order and remanding for reconsideration in light of *Vinson v. Allstate*, 144 Ill. 2d 306, 579 N.E.2d 857 (1991). The circuit court then found that either Burt County, Nebraska or Onawa, Iowa, where the decedent resided and was employed, would be a more convenient forum. The court then dismissed the case and the order provided that the defendants would accept service if the plaintiff re-filed in another forum within six months. *Wakehouse*, 2004 WL 2659028 at *1.

The plaintiff refiled her case in Peoria County, Illinois. Peoria is the world headquarters and principal place of business of defendant Caterpillar. The defendants filed motions to dismiss, asserting that the previous dismissal on the grounds of interstate *forum non conveniens* precluded plaintiff from refiling in any Illinois county. These motions were denied by the Peoria County circuit court, which certified the following question for interlocutory appeal under Rule 308: "Is the trial court correct in its ruling that dismissal pursuant to Supreme Court Rule 187(c)(2) - on the grounds of interstate *forum non conveniens* - of a suit, then pending in one county in the State of Illinois, does not preclude the filing of the suit in another county in the State of Illinois?" *Id.* *2. The appellate court held that the case should be in Nebraska or Iowa, not in Peoria County, Illinois.

Forum non conveniens has two potential applications: interstate and intrastate. The interstate branch of *forum non conveniens* considers whether Illinois is an appropriate state in which to litigate the controversy, and the intrastate branch of the doctrine considers whether the case is being litigated in the most convenient county within Illinois. *Id.* A circuit court ruling on an interstate *forum non conveniens* motion does not generally consider and weigh any connections the litigation may have to every county in Illinois in which venue may be proper. Instead, the court compares the county in which suit has been filed to the specific courts in other states suggested as alternative forums by the defendants.

In this case, the plaintiff and the decedent were residents of Onawa, Iowa, the accident occurred in Burt County, Nebraska and the two defendant businesses had principal places of business in Illinois (but not St. Clair County). Even though the defendants had a strong connection to Illinois, the supreme court's directive to review *Vinson* suggested that this factor played little or no role in a consideration of a motion to dismiss under the doctrine of *forum non conveniens*. Therefore, the appellate court noted that it must find the private-interest and the public-interest factors weigh strongly in the defendants' favor and outweigh the plaintiff's choice of forum. *Id.* at *3.

> ***"A circuit court ruling on an interstate* forum non conveniens *motion does not generally consider and weigh any connections the litigation may have to every county in Illinois in which venue may be proper."***

The appellate court further noted that a finding that another state provides a more convenient forum does not, as a matter of *fact,* mean that a comparison with some other Illinois county would yield the same result. This case, in which Peoria County had a markedly stronger connection to the litigation than St. Clair County, illustrated that point. The more significant question was whether, as a matter of *law,* a dismissal on the basis of interstate *forum non conveniens* bars the plaintiff from refiling in another county in Illinois. *Id.*

The appellate court determined that the *forum non conveniens* doctrine itself precluded the plaintiff from re-filing in another Illinois county. *Id.* at *5. *Forum non conveniens*

is an equitable doctrine that "is based on considerations of fundamental fairness and sensible and effective judicial administration." *Dawdy v. Union Pacific RR Co.*, 207 Ill. 2d 167, 171, 797 N.E.2d 687 (2003). It allows a court to decline jurisdiction and direct the litigation to a forum that can better serve the convenience of the parties and the ends of justice. The appellate court determined that the purposes underlying the doctrine would be ill served by allowing plaintiffs who have fully litigated and lost an interstate *forum non conveniens* motion to avoid its effects by simply choosing a different Illinois county. Permitting such a practice would, in defendants' words, "make the first 4 1/2 years of this litigation all for nothing, and would require the defendants to prove the non-existence of a convenient forum in all 102 counties in the State of Illinois." It would also promote forum shopping, a practice that is contrary to the purposes behind the venue rules. *Wakehouse*, 2004 WL 2659028 at *5.

For these reasons, the appellate court found that the plaintiff was precluded from refiling a lawsuit in another Illinois county following dismissal based on interstate *forum non conveniens* unless a motion to transfer to another county within Illinois has previously been filed. In that situation the trial court may, if it is appropriate, transfer the case rather than dismiss it.

Two Recent Decisions Analyze Sanction of Barring Party From Rejecting Mandatory Arbitration Award

Nationwide Mutual Ins. Co. v. Kogut, 2004 WL 2584912 (1st Dist., Nov. 15, 2004) and *Anderson v. Pineda*, 2004 WL 2624913 (1st Dist., Nov. 18, 2004).

In two recent cases out of the First Municipal District of Cook County, the appellate court addressed the appropriateness of barring a party from rejecting the mandatory arbitration award as a sanction.

In *Nationwide Mutual Ins. Co. v. Kogut*, the plaintiff Nationwide Mutual filed a subrogation action against defendant Kogut following a motor vehicle accident involving Kogut and the plaintiff's insured, Irene Mika. The case was assigned to mandatory arbitration and the hearing was attended by counsel for both parties, an agent for the plaintiff, an interpreter for Mika and the defendant. The plaintiff's insured, Mika, failed to appear at the hearing. *Kogut*, 2004 WL 2584912 at *1.

An award was entered for the defendant and the plaintiff filed a timely notice of rejection of the award. The defendant moved to bar the plaintiff's rejection under Supreme Court Rule 91(b) arguing that the plaintiff failed to participate in the arbitration in good faith and in a meaningful manner because the plaintiff did not produce Mika at the hearing. The plaintiff responded that it made reasonable but unsuccessful attempts to produce Mika. The trial court granted defendant's motion and barred the plaintiff from rejecting an arbitration award on the sole ground that it failed to produce its insured at arbitration. The plaintiff appealed and the appellate court found that this sanction was an abuse of discretion. *Id.*

The appellate court analyzed whether the trial court abused its discretion by barring the plaintiff from rejecting the arbitration award. Under Supreme Court Rule 91(b), a party participates in good faith and in a meaningful manner by subjecting the case to the type of adversarial testing that would be expected at trial. The standard to be applied when deciding whether to bar a party from rejecting an arbitration award is whether its conduct amounted to a deliberate and pronounced disregard for the rules and the court. *See*, *Ruback v. Doss*, 347 Ill. App. 3d 808, 811, 807 N.E.2d 1019 (1st Dist. 2004).

There is also a line of cases that hold that a party fails to participate in good faith and in a meaningful manner where the party's preparation for the arbitration is "inept." *See*, *Ruback*, 347 Ill. App. 3d at 811, 807 N.E.2d 1019; *Givens v. Renteria*, 347 Ill. App. 3d. 934, 808 N.E.2d 1009 (1st Dist. 2003); *Anderson v. Mercy*, 338 Ill. App. 3d 685, 788 N.E.2d 765 (3rd Dist. 2003); *State Farm Mutual Ins. Co. v. Nasser*, 337 Ill. App. 3d 362, 785 N.E.2d 934 (1st Dist. 2002); *State Farm Ins. Co. v. Harmon*, 335 Ill. App. 3d 687, 781 N.E.2d 335 (1st Dist. 2002); *Saldana v. Newman*, 318 Ill. App. 3d 1096, 743 N.E.2d 663 (1st Dist. 2001). This line of cases can be traced to *Employer's Consortium, Inc. v. Aaron*, 298 Ill. App. 3d 187, 698 N.E.2d 189 (2nd Dist. 1998), where the court said: "A trial court need not find intentional obstruction of the arbitration proceeding. The purposes of Rule 91(b) are defeated whether a party's conduct is the result of *inept preparation or intentional disregard for the process.*" (Emphasis added.) *Employer's*, 298 Ill. App. 3d at 191.

After reviewing this line of cases, the appellate court determined that the "inept preparation" language appears to have crept into the cases recently (1998) out of a characterization in a brief, rather than a published opinion, and has no basis in Illinois law. In support of its holding that "inept preparation" constitutes lack of good faith and meaningful participation under Rule 91(b), the *Employer's* court cited *Martinez v. Gaimari*, 271 Ill. App. 3d 879, 649 N.E.2d 94 (2nd Dist. 1995). However, *Martinez* did not hold that inept preparation constitutes a failure to participate in good faith and in

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Recent Decisions *(Continued)*

a meaningful manner. The appellate court further noted that Rule 91(b) was adopted in 1993 in response to complaints by arbitrators that parties were attending the arbitration hearings but refusing to participate.

The appellate court determined that there was nothing in the record that suggested the plaintiff's failure to produce its insured amounted to an intentional disregard for the arbitration process. The plaintiff appeared at the arbitration personally, both through its agent and by counsel. The plaintiff presented testimony from its agent and the defendant as an adverse witness and it presented evidence of damages through a Rule 90(c) package. The court also noted that the plaintiff attempted to produce its insured at the hearing and believed that the insured was going to appear, as was evidenced by the presence of a translator. The fact that the insured did not attend despite the plaintiff's efforts to secure her as a witness is not sanctionable conduct. *See*, *Ruback*, 347 Ill. App. 3d at 815.

Finally, the appellate court noted that even if the plaintiff's failure to produce its insured amounted to a failure to participate in good faith and in a meaningful manner, it would still reverse because the trial court's sanction was unreasonably harsh and unjustified. Among the sanctions available to it under Rule 219(c), the court could have stayed the arbitration proceedings until the plaintiff was able to produce its insured or ordered attorney fees and costs associated with the hearing to the defendant. Dismissing an action against a plaintiff or entering judgment against a defendant "is the most drastic of sanctions and should be imposed reluctantly and only as a last resort when all other enforcement powers at the court's disposal have failed to advance the litigation." *Kogut*, 2004 WL 2584912 at *6. These sanctions should be imposed only "where the actions of the party show a deliberate, contumacious and unwarranted disregard of the court's authority. *Easter Seal Rehabilitation Center for Will-Grundy Counties, Inc. v. Current Development Corp*., 307 Ill. App. 3d 48, 51, 716 N.E.2d 809 (3rd Dist. 1999).

Since there was no indication in this case that the plaintiff's conduct amounted to a deliberate, contumacious or unwarranted disregard for the court's authority or the arbitration process, the trial court's ruling was reversed. *Kogut*, 2004 WL 2584912 at *6.

Several days after the *Nationwide Mutual* decision, the appellate court ruled on *Anderson v. Pineda*, 2004 WL 2624913. In *Anderson*, the defendants were barred by the trial court from rejecting the arbitration award ($30,000 in favor of the plaintiff) due to pre-arbitration discovery violations. The defendants appealed the ruling, arguing that the sanction was unduly harsh and the appellate court upheld the sanction. *Anderson*, 2004 WL 2624913 at *1.

Prior to the mandatory arbitration hearing, the defendants failed to answer written discovery from the plaintiff so an order was entered against the defendants to answer the outstanding discovery by a date certain or the defendants would be barred from testifying and presenting evidence at trial or arbitration. By the deadline for such discovery, the defendants produced only unsigned answers to interrogatories and failed to respond to production requests. The plaintiff then filed a rule to show cause and the trial court granted the motion in part, barring the defendants from testifying and presenting evidence at trial or arbitration. The parties attended the arbitration hearing and the panel found for the plaintiff. There was no finding of bad faith participation against either party. *Id.*

"The plaintiff presented testimony from its agent and the defendant as an adverse witness and it presented evidence of damages through a Rule 90(c) package."

The defendants filed a notice of rejection of the arbitration award and the plaintiff filed a motion to debar the rejection pursuant to Rule 91(b) due to the defendants' bad faith during written discovery. The trial court granted the plaintiff's motion and ordered that the defendants were debarred from rejecting the arbitration award pursuant to Rule 91(b) because the defendants failed to participate in the arbitration process in a good faith manner (due to repeated failures to comply with discovery) and defendants failed to explain the failures by way of affidavit and/or response to plaintiff's motion. *Id.* at *2. Judgment was entered for the plaintiff and the defendants appealed.

The appellate court analyzed two of its own decisions which have contrary approaches to resolve this issue, *Amro v. Bellamy*, 337 Ill. App. 3d 369, 785 N.E.2d 939 (1st Dist.

2003) and *Glover v. Barbosa*, 344 Ill. App. 3d 58, 800 N.E.2d 519 (1st Dist. 2003). In *Amro*, the defendant was barred from testifying after missing two discovery deadlines and the trial court debarred the defendant from rejecting the award because of sanctions for failure to comply with discovery. On appeal, the court held that the trial court abused its discretion because there was no finding that the defendant participated in the arbitration hearing in bad faith. *Amro*, 337 Ill. App. 3d 369, 785 N.E.2d 939.

In *Glover*, the defendant failed to comply with discovery and was barred from presenting evidence and testimony at trial or arbitration. During the six months between the sanction date and the arbitration hearing, the plaintiff made no attempt to comply with discovery or vacate the ruling. At the arbitration, the panel ruled for the plaintiff but did not include a finding of bad faith on the part of the defendant. The plaintiff moved to bar the defendant from rejecting the award and the trial court granted the motion. The appellate court affirmed the ruling because it was the defendant's own inaction that prevented her from participating at the hearing so sanctions were appropriate. *Glover*, 344 Ill. App. 3d 58, 800 N.E.2d 519.

In this case, the appellate court determined that *Glover* was more persuasive than *Amro*. It stated that it must be conscious of the fact that a litigant who fails to modify, vacate or comply with sanctions imposed due to a discovery violation that occurs outside of the arbitration hearing may be incapable of participating in the arbitration in a meaningful manner. Since the defendants in this case had the ability to take steps to ensure that they could participate meaningfully in the hearing, but refused to do so, the appellate court determined that Rule 91(b) sanctions barring the defendants from rejecting the arbitration award was proper. *Anderson*, 2004 WL 2624913 at *3-4.

Seventh Circuit Warns to Request Extension of Time Before Brief Due Date

Ramos v. Ashcroft, 371 F.3d 948 (7th Cir. 2004).

This case involves immigration proceedings. Within the opinion, the Seventh Circuit addressed the issue of filing motions for extensions of time in lieu of briefs. The court noted that this practice is a form of "self-help extension" that has become increasingly common even though it is not authorized by any rule, either national or local.

A brief must be filed when it is due. The Seventh Circuit stated that if a party needs more time, a request for an extension of time must be filed in advance of the due date and if the time is not granted, the party must file the brief as scheduled. The court outlined the following example as the current common practice: "Oops! My brief is due today but is not ready. It is too late to seek an extension, and I don't have a good reason for one anyway. So I'll whip up a short motion. Whew!" This is not acceptable. *Ramos*, 371 F.3d at 950.

The court noted that if events justify a last-minute motion concerning jurisdiction, venue, sanctions or any other subject, then that motion may *accompany* the brief, but is not the substitute for a brief.

Supreme Court Watch

By: Beth A. Bauer
Burroughs, Hepler, Broom, MacDonald, Hebrank and True
Edwardsville

Insurance Company Refuses to Foot the Bill: Cancels Contract with Podiatrists Who Failed to Maintain Certificate of Registration

Chatham Foot Specialists, P.C. v. Health Care Service Corp., 1st Dist. No. 1-03-3425, Gen. No. 99067

The plaintiff entered into a contract with the defendant, which does business as Blue Cross Blue Shield of Illinois, to become a participating provider in the defendant's PPO plans. According to the plaintiff, the contract did not require it to maintain a certificate of registration. The plaintiff rendered services to the defendant's insureds throughout 2000 and 2001 and received payment from the defendant for most services rendered in 2000. In late 2001, the defendant terminated its contract with the plaintiff. The plaintiff obtained a certificate of registration in 2002.

The plaintiff filed a complaint against the defendant seeking compensatory and punitive damages for the defendant's refusal to pay its claims since 2000. The trial court granted the defendant's motion for summary judgment finding that the plaintiff's failure to maintain its registration precluded it from enforcing its contract with the defendant.

On appeal, the Appellate Court of Illinois, First District, affirmed the trial court's ruling, holding that the plaintiff's failure to obtain the requisite certificate of registration rendered its contract with the defendant void and precluded it from maintaining an action to recover fees under any theory.

The plaintiff seeks leave to appeal in the Illinois Supreme Court because the order creates a split among the districts of the appellate court on two related issues: (1) whether the Professional Service Corporation Act's ("PSCA") certificate of registration requirement is intended to protect public safety; and (2) whether a medical professional corporation's failure to comply with the PSCA's certificate of registration requirement voids an otherwise valid contract.

The plaintiff contends that the First District erred in finding that the PSCA's certificate of registration requirement is intended to protect public safety, which is based on that court's mistaken interpretation of the PSCA's use of the terms "license" and "certificate of registration." According to the plaintiff, the First District equated those terms, which are not supported by Section 3.3 of the PSCA which define "license" or the PSCA as a whole. The plaintiff further claims that this reading of the PSCA is in conflict with the Second District's decision in *Riggs v. Woman to Woman, Obstetrics & Gynecology, P.C.*, 2004 Ill. App. LEXIS 848 (2d Dist. July 8, 2004), which held there was a difference between the lack of a certificate of registration under the PSCA to practice as a professional corporation and the lack of a license to practice medicine.

The plaintiff further argues that the First District was in error because the legal authority upon which it relied does not support the conclusion that the PSCA's certificate of registration requirement implicates public safety. To the contrary, the plaintiff argues that case law finds that the PSCA's certification requirement was *not* intended to protect public safety, citing *Riggs*, *Brockett v. Davis*, 325 Ill. App. 3d 727 (3d Dist. 2001), and *Joseph P. Storto, P.C. v. Becker,* 341 Ill. App. 3d 337 (2d Dist. 2003), *cert. denied*, 275 Ill. Dec. 153 (Dec. 3, 2003). The plaintiff contends that both the *Riggs* and *Storto* courts found a distinct public policy difference between requiring an individual to maintain a license to practice a profession and requiring a professional corporation to maintain a certificate of registration, and that only the license requirement for the practice of podiatric medicine implicates public safety.

The plaintiff also urges review by the supreme court

About the Author

Beth A. Bauer concentrates her practice in the area of appellate practice at *Burroughs, Hepler, Broom, MacDonald, Hebrank and True* in Edwardsville. She graduated *cum laude* from St. Louis University School of Law in 2000 and received her B.A. with honors from Washington University in 1997. Ms. Bauer is a member of the Illinois and Missouri State Bar Associations and National Christian Legal Society.

because the First District's order creates a split among the districts of the appellate court regarding whether compliance with the PSCA's certificate of registration requirement renders a professional corporation's contracts void.

The plaintiff argues that when a statutory violation does not harm the public welfare, Illinois courts, both state and federal, have upheld the contracts of the non-compliant party. The plaintiff reasoned that because it has shown that the PSCA was not enacted to protect the public safety that this court should follow its previous ruling in *Grody v. Scalone*, 408 Ill. 61 (1955); as well as the 7th Circuit case of *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic,* 980 F.2d 449 (7th Cir. 1992); the Northern District of Illinois case of *Parkman & Weston Assocs. v. Ebenezer African Methodist Episcopal Church,* 2003 U.S. Dist. LEXIS 17434 (N.D. Ill. Sept. 29, 2003) and the Appellate Courts of Illinois decision of *South Ctr. Plumbing & Heating Supply Co. v. Charles,* 90 Ill. App. 2d 15 (1st Dist. 1967).

"The plaintiff reasoned that because it has shown that the PSCA was not enacted to protect the public safety that this court should follow its previous ruling."

Finally, the plaintiff argues that the Court should grant the Petition for Leave to Appeal because the First District's order creating conflict among the appellate districts is of great general importance to the provision of professional services in Illinois. The plaintiff claims that in effect the First District's order wipes out all fees owed by insurance companies to 62% of the active professional corporations and 50% of the active medical corporations in Illinois because such corporations are currently operating without certificates of registration in violation of PSCA Section 12 and the Medical Corporation Act Section 5.

Illinois Supreme Court to Address Fifth District's Reasoning for Repeatedly Rejecting Binding Arbitration Clauses

Austin v. Illinois Farmers Ins. Co., 5th Dist. No. 5-03-0579, Gen. No. 99192

The insured submitted her medical bills to the insurer for reimbursement pursuant to the medpay provisions of her auto insurance policy after allegedly sustaining injuries in a car accident. The insurance policy provides that the insurer may submit claims for medical expenses to outside evaluation services to assist in determining the reasonableness and medical necessity of those expenses. The insurer submitted the insured's medical bills to a peer review firm, which recommended that the insurer refuse to reimburse the insured after a certain date.

The insured filed a lawsuit on behalf of herself and a putative class of insureds claiming breach of contract, failure to properly reimburse, and a violation of the Illinois Consumer Fraud Act, 815 ILCS 501/1 - /12. In response, the insurer provided notice to the insured of its intent to invoke the binding arbitration remedy contained in the insurance policy and then filed a motion to compel arbitration. According to the insurer, the insurance policy allows for arbitration if it and the insured do not agree that the insured is entitled to recover for medical services, that the medical services are the result of a covered accident, or as to the nature, frequency, or costs of the medical services. The policy further states that the arbitrator shall determine if the medical services are as a result of a covered accident, if the medical services incurred are reasonable expenses and necessary medical services, and the amount of any payment.

The circuit court denied the insurer's motion to compel arbitration, holding that the arbitration clause was unenforceable because: (1) the insurer allegedly used biased reports as part of a fraudulent scheme to not pay all of its insured's medical bills; and (2) arbitration would cost the insured more than the amount she was seeking in damages, relying on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

The Fifth District affirmed the trial court's ruling, relying on two of its recent decisions, *Hanke v. American International South Ins. Co.,* 335 Ill. App. 3d 1164, 782 N.E.2d 328 (5th Dist. 2002), *appeal denied*, 203 Ill. 2d 506, 788 N.E.2d 728 (2003), and *Travis v. American Manufacturers Mut. Ins. Co.*, 335 Ill. App. 3d 1171, 782 N.E.2d 322 (5th Dist. 2002), *appeal denied*, 203 Ill. 2d 571, 788 N.E.2d 735 (2003), to hold that the arbitration clause could be disregarded in its entirety

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Supreme Court Watch *(Continued)*
because the insured's claims of "fraudulent" peer review scheme raised additional, allegedly non-arbitrable issues.

The insurer seeks review in the Illinois Supreme Court, claiming that this case is the latest in a series of Fifth District decisions in which the court departs from longstanding federal and Illinois precedent regarding the enforceability of arbitration clauses in putative class actions. The insurer further argues that the Fifth District's decision rests on a novel legal theory: that, despite the existence of indisputably arbitrable issues, the presence of other, allegedly non-arbitrable issues renders an arbitration clause unenforceable in its entirety. Such reasoning of the appellate court is contrary to well-established precedent of the United States Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); this court in *Board of Managers v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 697 N.E.2d 727 (1998); and Illinois appellate courts including a recent decision of the Second District, *Weis v. State Farm Mut. Auto. Ins. Co.*, 333 Ill. App. 3d 402, 776 N.E.2d 309 (2d Dist. 2002).

The insurer also argues that the "fraudulent scheme" argument is circular in that there is no way to determine that the insured fraudulently failed to reimburse as promised under the contract of insurance without first determining what actually was due under that contract. Determining what is due under the contract indisputably falls within the scope of the arbitration clause. Under the Fifth District's decisions, the critical threshold step of determining what is due is omitted. Instead, according to the insurer, the Court prejudges the merits of the insured's claims, effectively ruling in the insured's favor upon the very issues that must be decided in the arbitration itself, and then uses that ruling as a justification for not conducting the arbitration in the first place.

Finally, the insurer argues that the Fifth District's decision sets a dangerous precedent in that it would allow parties to circumvent binding arbitration agreements simply by bringing additional claims that could be characterized as "not arbitrable." Such reasoning threatens to reverse decades-long public policy, both at the federal and state level, of enforcing arbitration agreements in a wide variety of commercial contexts, including but not limited to the insurance industry.

Enforceability of Consequential-Damages Exclusions

Razor v. Hyundai Motor America, 1st Dist. No. 1-03-1359, Gen. No. 98813

The plaintiff purchased a Hyundai Sonata from a dealership and received the new vehicle limited warranty, which among other provisions provided no coverage for incidental or consequential damages including loss of time, inconvenience, loss of use of the vehicle, or commercial loss. The plaintiff also purchased a remote starter system, which was installed at the dealership by a company that was merely renting space and not affiliated with Hyundai, thus, according to the defendant, the plaintiff was aware it was not part of the car's original equipment. The plaintiff complained of being unable to start the car on several occasions and filed suit against the defendant for breach of warranty. In Counts I, II and III, the plaintiff sought relief under the Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.* alleging breach of written warranty, breach of the implied warranty of merchantability, and revocation of acceptance. In Count IV, the plaintiff alleged a violation of the Illinois Lemon Law, 815 ILCS 380/1 *et seq.* At trial, plaintiff's testimony that she, "would not pay what she spent for a new car with the problems of a used car," was the only evidence on the value of the car.

The defendant asserted several defenses including its disclaimer of consequential damages. The jury returned a verdict for the plaintiff, awarding her warranty damages, consequential damages, consisting of compensation for aggravation and inconvenience and loss of use of the car. The only evidence of the value of the car was the plaintiff's testimony itself that she "would not pay what she spent for a new car with the problems of a used car."

The First District affirmed the judgment – both the diminished value award and the award of consequential damages. According to the defendant, the First District followed the minority position regarding consequential-damages exclusions in finding that the limited warranty was breached, the limited remedy failed of its essential purpose, and that therefore the defendant's disclaimer of consequential damages would not be given effect.

The defendant seeks review in the Illinois Supreme Court on two bases. First, the defendant asserts the court should grant leave to appeal to resolve a question – how to determine, under the Illinois Uniform Commercial Code, the enforceability of a consequential-damages exclusion contained in a limited warranty – that has bedeviled courts and legal scholars across the country. The defendant explains that the majority adheres

to the express language of Section 2-719(3), under which an exclusion of consequential damages in a limited warranty is void only where the exclusion itself is unconscionable. A minority of jurisdictions, according to the defendant, ignore the unconscionability requirement altogether and instead import a standard from Section 2-719(2) that voids a consequential-damage exclusion in a limited warranty when it fails of its essential purpose, without regard to unconscionability. Additionally, a few jurisdictions decide the enforceability of a consequential-damages exclusion on a case-by-case basis.

The defendant argues that the Illinois Appellate Court has adopted both the majority and minority approaches, although the two cannot be reconciled. Specifically, the defendant contends that the First District erroneously adopted the minority approach, by ignoring the three-part test established by a previous First District case, *Intrastate Piping & Controls, Inc. v. Robert-James Sales, Inc.*, 315 Ill. App. 3d 248, 733 N.E.2d 718 (1st Dist. 2002) (adopting the independent approach), and instead followed the Second District's dependent approach as stated in *Lara v. Hyundai Motor America*, 331 Ill. App. 3d 53, 770 N.E.2d 721 (2d Dist. 2002).

". . . the First District erroneously adopted the minority approach, by ignoring the three-part test established by a previous First District case."

The defendant also seeks review of this case because the First District's opinion is in conflict with another First District opinion issued the day after the instant case, *Kim v. Mercedes-Benz, U.S.A., Inc.*, ___ Ill. App.3d ___, 2004 WL 1366050 (1st Dist. June 17, 2004). *Kim* was a similar failure-to-repair case involving breach of a limited warranty in which the First District set forth a specific three-part test that a plaintiff must satisfy to establish a proper foundation for his or her testimony on the diminished value of personal property in a breach-of-warranty case. The defendant contends that the instant case and *Kim* provide guidelines that are mutually conflicting and irreconcilable.

Professional Liability

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

Should Plaintiffs be Permitted to Seek Lost Punitive Damages in Claim for Legal Malpractice?

The Illinois Supreme Court currently is considering a petition for leave to appeal involving an issue of significant importance to attorneys in Illinois. In October 2004, the Second District Court of Appeals held that a plaintiff in a legal malpractice action may recover as compensatory damages those damages he or she would have been awarded as punitive damages in the underlying case, where the loss of the punitive damages resulted from the attorney's negligence. *Tri-G, Inc. v. Burke, Bosselman and Weaver*, 817 N.E.2d 1230, 288 Ill. Dec. 580 (2nd Dist. 2004). Because of the importance of this issue, numerous organizations, including the Illinois State Bar Association and the Illinois Justice Center, have sought to participate as amicus curie in support of the petition for leave to appeal.

Tri-G involves numerous issues that could be discussed and debated, although this article focuses on lost punitive

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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.

Professional Liability *(Continued)*

damages. *Tri-G* initially presents a fact pattern that every attorney should be on guard against. Tri-G began a relationship with Elgin Federal Bank ("Elgin Federal") in 1978 related to financing for the construction of a residential subdivision. By the late 1970s that relationship had deteriorated, and in 1981 Tri-G filed suit against Elgin Federal. Tri-G's case remained pending for years, "during which time Tri-G was represented successively by several law firms." *Id*. at 1238. Eventually, the court set a trial date of May 11, 1987. Thereafter, in January 1987, Tri-G retained Burke, Bosselman and Weaver ("BBW") to represent it in its suit against Elgin Federal. On May 11, 1987, BBW answered "not ready" on behalf of Tri-G when the case was called for trial. The trial court therefore dismissed Tri-G's case with prejudice.

Tri-G then filed a legal malpractice action against BBW, alleging that "BBW was negligent for (1) failing to file an appearance before May 4, 1997; (2) failing to advise Tri-G's witnesses and discuss their testimony in advance of depositions; (3) failing to attend certain depositions; (4) failing to properly prepare the case for trial; and (5) failing to seek a voluntary nonsuit on the date of trial." *Id.* Just prior to trial in the malpractice action, Tri-G was permitted to amend its complaint to assert that BBW was additionally negligent in failing to amend Tri-G's complaint against Elgin Federal to add claims that had not been contained in Tri-G's original 1981 complaint against Elgin Federal.

Tri-G sought to recover significant damages from BBW. Tri-G asserted that but for BBW's negligence, it would have recovered both compensatory and punitive damages against Elgin Federal. Following the trial on Tri-G's claims, the jury returned a verdict finding that BBW was negligent in handling the lawsuit against Elgin Federal. The jury further found that but for BBW's negligence, Tri-G would have recovered a verdict against Elgin Federal for $1,168,775 in compensatory damages and $1,168,775 in punitive damages. The court therefore entered judgment in favor of Tri-G and against BBW in the amount of $2,337,550.

On appeal, BBW raised numerous issues, including the issue of lost punitive damages. With respect to all issues other than the lost punitive damages issue, the *Tri-G* court found unanimously in favor of Tri-G in an opinion authored by Justice O'Malley. Although not relevant to this article, attorneys practicing in the defense of legal malpractice claims should read these portions of the *Tri-G* opinion, particularly with respect to the court allowing Tri-G to include lost profits in its compensatory damages calculation against BBW. The *Tri-G* court's position is important because the trial court in the underlying action had specifically held that Tri-G could not recover lost profits against Elgin Federal. The court's ruling, in that respect, placed Tri-G in a better position in its legal malpractice claim against BBW than it would have been in its actual claim against Elgin Federal. Such a result contravenes the most basic foundations of the law of the legal malpractice.

Justice Bowman authored the portion of the opinion relating to lost punitive damages, with the concurrence of Justice O'Malley. The majority affirmed Tri-G's recovery of lost punitive damages in its legal malpractice action against BBW despite Section 2-1115 of the Illinois Code of Civil Procedure, which precludes the recovery of punitive damages against attorneys in legal malpractice actions. 735 ILCS 5/2-1115. In reaching its holding, the majority found that no Illinois case had decided previously whether lost punitive damages could be recovered against an attorney in a legal malpractice action. The *Tri-G* court therefore conducted a survey of decisions from foreign jurisdictions that had addressed this issue.

"Allowing lost punitive damages to be recovered against a negligent attorney would transfer the punishment from an intentional wrongdoer to a party who was merely negligent."

Among the leading cases against the recovery of lost punitive damages is the California Supreme Court's decision in *Ferguson v. Lieff, Cabraser, Heimann and Bernstein, LLP*, 69 P.3d 965 (Cal. 2003). In *Ferguson*, the court set forth five public policy considerations that militated against allowing a plaintiff to recover lost punitive damages as compensatory damages in a legal malpractice action. First, the *Ferguson* court believed that allowing such recovery would defeat the purpose behind punitive damages, which is to punish the party whose wrongful action was intentional or malicious. Allowing lost punitive damages to be recovered against a negligent attorney would transfer the punishment from an intentional

wrongdoer to a party who was merely negligent.

Second, allowing lost punitive damages would violate the public policy against speculative damages. Because an award of punitive damages constitutes a moral determination, lost punitive damages are too speculative to support a cause of action for attorney malpractice.

Third, the complex standard of proof applicable to claims for lost punitive damages militates against the recovery of such damages in a legal malpractice action. To allow recovery of lost punitive damages, a plaintiff would have to "prove by a preponderance of the evidence that but for attorney negligence the jury would have found clear and convincing evidence of oppression, fraud or malice." *Id.* at 972. (Original emphasis removed.)

Fourth, allowing recovery of lost punitive damages might hinder the ability of trial courts to manage and resolve mass tort actions. Attorneys would be hesitant to settle claims that might potentially involve punitive damages for fear of being sued for failure to recover punitive damages.

Lastly, the *Ferguson* court found that allowing recovery of lost punitive damages as compensatory damages in a legal malpractice action may exact a considerable social cost. Exposing attorneys to such claims could significantly increase the cost of malpractice insurance, or result in insurers excluding coverage for such damages in their professional liability policies. Accordingly, the California Supreme Court held that lost punitive damages could not be recovered as compensatory damages in a legal malpractice action. *See also, Summerville v. Lipsig*, 270 A.D.2d 213 (N.Y. App. Div. 2000).

In contrast, the United States District Court for the District of Columbia reached an opposite conclusion in *Jacobsen v. Oliver*, 201 F. Supp. 2d 93 (D.C. 2002). There, a former terrorist hostage brought a legal malpractice action against his attorneys, alleging that their failure to sue the Iranian Ministry of Information and Security for punitive damages in addition to compensatory damages constituted malpractice. The *Jacobsen* court found that the issue did not relate to the purpose of punitive damages, but rather the purpose of compensatory damages, which is to give a party what he or she lost as a result of the attorney's negligence. The court held that the punitive damages recoverable from the original tort feasor become compensatory damages recoverable from the lawyer. The court also believed that allowing lost punitive damages serves a public policy purpose in that "attorneys who appreciate that they will be liable in malpractice actions for 'lost punitives' will be motivated to exercise reasonable care in investigating or defending punitive damages claims." *Id*. at 101-02. *See also, Elliott v. Videan*, 791 P.2d 639 (Ariz. Ct. App. 1990); *Scognamillo v. Olsen*, 795 P.2d 1357 (Colo. Ct. App. 1990); *Hunt v. Dresie*, 740 P.2d 1046 (Kan. 1987).

After reviewing the competing lines of cases addressing the issue, the *Tri-G* court rejected *Ferguson* and the other cases that similarly precluded the recovery of lost punitive damages in legal malpractice cases. The *Tri-G* court held that the proper analysis is to "view the lost punitive damages in the underlying case as compensatory damages in the malpractice case." 817 N.E.2d at 1259. The court believed that the proper focus is to determine what would make the plaintiff whole with respect to the defendant attorney's negligence. Where a jury determines that the plaintiff would have been entitled to punitive damages but for the negligence of the attorney, such punitive damages must be recoverable in order for the plaintiff to be made whole.

The court found that this stance was consistent with the general principle that "[a] legal malpractice plaintiff is entitled to recover those sums which would have been recovered if the underlying suit had been successfully prosecuted." *Id*., quoting *Weisman v. Schiller, DuCanto & Fleck*, 314 Ill. App. 3d 577, 580, 733 N.E.2d 818, 248 Ill. Dec. 143 (1st Dist. 2000). The *Tri-G* court thus held "[b]ased on (1) our view of lost punitive damages as compensatory and (2) the fact that such damages are not imposed for the purpose of punishing the attorney who commits malpractice, we hold that Section 2-1115 does not bar the recovery of lost punitive damages in a legal malpractice case." 817 N.E.2d at 1259.

In dissent, Justice Gilleran Johnson found that the majority's holding was inconsistent with Illinois law with respect to punitive damages. The dissent stated that under Illinois law, punitive damages may be awarded "only when torts are committed with fraud, actual malice, deliberate violence or oppression, wilful conduct, or gross negligence in disregard of the rights of others." *Id*. at 1263, citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978). The dissent further noted that Section 2-1115 is consistent with that principle in that it provides that a plaintiff may not seek punitive damages in a legal malpractice action.

The dissent found that the holding of the majority circumvents Illinois law and Section 2-1115 by "mischaracterizing punitive damages lost due to attorney malpractice as compensatory damages." *Id*. The dissent believed that the majority's mischaracterization ignores the well-settled principle that punitive damages are not awarded as compensation or to make a plaintiff whole.

The dissent noted that punitive damages are not compensation for loss and have nothing to do with the detriment suffered by a plaintiff. Instead, the function of punitive damages

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Professional Liability *(Continued)*

is similar to that of a criminal penalty in that it is intended to punish the wrongdoer. A plaintiff is intended to be made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so outrageous that it warrants the imposition of further sanctions to achieve punishment or deterrence. The dissent believed that for the majority to – in effect – turn punitive damages into compensatory damages is violative of well-established principles relating to punitive damages.

The dissent further found that transferring punishment and deterrence from a wrongdoer to another who has not acted with such a wanton disregard is inconsistent with Illinois public policy. The dissent noted that in Illinois insurers may not insure against liability for punitive damages that arise out of an insured's own misconduct. The rationale behind this rule is that allowing a person to shift the burden of punitive damages to an insurance company would diminish the purpose behind awarding punitive damages. Because there is no equitable need to punish an attorney who is merely negligent, particularly where the statutory scheme in Illinois precludes punitive damages against attorneys, the dissent reasoned that there is no basis or rationale for allowing a party to seek lost punitive damages in a legal malpractice action.

The dissent concludes by articulating the "slippery slope" that is created by the majority's holding. The dissent raises the following questions that result from the majority's decision:

> If attorneys can be liable for lost punitive damages, can they also be liable for inadequate punitive damages awards? And if attorneys can be liable for inadequate punitive damages awards, can they also be liable for failing to seek punitive damages? And if attorneys can be liable for failing to seek punitive damages, how can they be discouraged from seeking punitive damages in cases in which they may be only remotely, if at all, recoverable?

Id. at 1265.

The questions raised by the dissent raise very real concerns. A reading of *Tri-G* leads one to the definite conclusion that Tri-G's malpractice claim against BBW was significantly better than its claims against Elgin Federal. While that conclusion should not be the case, it too often occurs in the area of legal malpractice. To now allow a plaintiff to assert that his or her attorney should have sought punitive damages, or should have sought and received a greater punitive damages award, creates a significant problem for attorneys. The entire area of punitive damages is inherently speculative. To allow a plaintiff to seek lost punitive damages raises the possibility of the plaintiff being in a better position in its malpractice action than it would have been in the underlying case.

"A plaintiff is intended to be made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so outrageous that it warrants the imposition of further sanctions to achieve punishment or deterrence."

Importantly, *Tri-G* is not an isolated case. Case law from around the country demonstrates that the issue is being litigated elsewhere. The author knows of at least one other similar claim currently pending in the Circuit Court of Cook County. Because of the importance and magnitude of this issue, it appears to be an issue that the Illinois Supreme Court should decide as a matter of public policy. Hopefully, by the time this article is published, the Illinois Supreme Court will have accepted the petition for leave to appeal and will be considering this important issue.

Property Insurance

By: Tracy E. Stevenson
Chuhak & Tecson P.C.
Chicago

New Issues are Raised as to an Insurer's Potential Liability for the Acts of its Insured?

The Illinois Supreme Court has issued its December 2, 2004 opinion in *Dardeen v. Alice Kuehling and State Farm Fire and Casualty Company*, 34 Ill. App. 3d 832, 801 N.E.2d 960 (2003). The case is of interest due to the way in which the appellate court and, ultimately the Illinois Supreme Court, considered the manner in which an insurance company can potentionally become liable for the actions of its insured in a spoliation of evidence case. The opinion raises multiple issues as to how an insurance company may potentially be deemed liable for actions committed by its insured and the manner in which it may be determined that an insurer has "control" over the property of its insured. This article considers the language of the decisions and the foreseeable impact these courts' rulings may have on future claims.

Facts of the Case

James Dardeen, the plaintiff, slipped and fell while walking on the property of Alice Kuehling, and claimed injury. Mr. Dardeen alleged that a hole in Ms. Kuehling's brick work caused him to fall. The plaintiff alleged in his Complaint that the incident was caused by Kuehling's failure to repair the hole in the brick sidewalk and/or failure to warn others that the hole existed. At the time of the incident, State Farm was Ms. Kuehling's property insurer. Ms. Kuehling notified State Farm of the incident, which occurred on her property, and sought advice from a State Farm Insurance agent as to whether she could repair the area where the bricks were "cocked up" so as to prevent further injuries to others. Ms. Kuehling asserted in her pleadings that State Farm acquiesced in her request to alter the sidewalk six days after the incident. Kuehling ultimately defended the lawsuit by denying that the hole existed. At no time did the plaintiff take photographs of the area in which he fell. Ms. Kuehling also failed to photograph the site as it existed on the date of loss.

Ultimately, Mr. Dardeen filed a Second Amended Complaint adding counts against Kuehling and her insurer, 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" the individual whom Ms. Kuehling contacted following the incident. The plaintiff alleged that Couch was "acting within the course and scope of the agency and authorized Kuehling to remove the bricks without first taking pictures or video taping the area where he fell." State Farm filed a Motion for Summary Judgment on the negligent spoliation of evidence claim. In response to the motion, the plaintiff argued that a genuine issue of material fact existed as to whether "State Farm should have foreseen that Kuehling's brick sidewalk was material to a potential civil action and that the destruction of the sidewalk could mean that the plaintiff would be unable to prove his personal injury lawsuit." The plaintiff sought an appeal after the trial court granted summary judgment in favor of State Farm. After the appellate court overturned the trial court's grant of summary judgment in favor of State Farm, State Farm appealed to the Illinois Supreme Court.

Applicable Law

It is undisputed that in order to prove a cause of action for spoliation of evidence, the plaintiff must plead the existence of a duty, a breach of that duty, an injury approximately caused by the breach, and damages. *Boyd v. Travelers Insurance Company*, 166 Ill. 2d 188, 652 N.E.2d 267 (1995). Illinois courts have held that there is generally no duty to preserve evidence. *See*, *Boyd,* 166 Ill. 2d at 195. However, 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. *See*, *Boyd,* 166 Ill. 2d at 195.

The Illinois Supreme Court has also held in *Shimanovsky v.*

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About the Author

Tracy E. Stevenson is a partner in the Chicago firm of *Chuhak and Tecson, P.C.*, where she concentrates her practice in medical malpractice defense and insurance defense. She has defended cases on behalf of physicians and hospitals and represented various major insurance companies in claims for personal injury. She is licensed in Michigan as well as Illinois.

Property Insurance *(Continued)*

General Motors Corporation, 181 Ill. 2d 112, 121, 692 N.E.2d 286 (1998) that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence so that such a potential litigant can not circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a Complaint against him or her.

Analysis

The Appellate Court's Decision

After reviewing the record on appeal, the appellate court ultimately ruled that the trial court erred in granting summary judgment on the negligent spoliation of evidence claim in favor of State Farm, as the evidence demonstrated that circumstances existed sufficient to impose a duty on State Farm to preserve evidence based upon State Farm's contractual relationship with Alice Kuehling, its insured. *Dardeen v. Alice Kuehling and State Farm Fire and Casualty Company*, 34 Ill. App. 3d 837, 801 N.E.2d 960 (2003). The appellate court looked to *Boyd v. Travellers Insurance Co. supr*a for the proposition that a duty to preserve evidence may arise by contract. The Appellate court apparently relied upon the insurance contract between Kuehling and State Farm to pass this aspect of the legal analysis. *Dardeen*, 344 Ill. App. 3d at 837. The court relied upon the fact that because the agent did not recommend that Kuehling take pictures or video tape the sidewalk, or send an investigator to do so prior to the alteration of the fall area, that he breached State Farm's duty as a potential litigant.

The Appellate court next looked to *Shimanovsky v General Motors Corp.*, 181 Ill. 2d 112, 121, 692 N.E.2d 286 (1998), and its holding that "a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence." The appellate court found that the *Dardeen* facts satisfied the *Shimonavsky* standard in that the evidence demonstrated that State Farm was aware that an injury had occurred and further that a material fact existed as to whether State Farm was aware that Kuehling intended to alter the sidewalk and did not instruct her to photograph the area to preserve that material evidence. As an agent for State Farm, the appellate court reasoned, "Couch . . . was well aware that the sidewalk was material to any potential civil litigation resulting from the plaintiff's fall." *Dardeen,* 344 Ill. 2d at 837. Thus, Couch was not free to allow Kuehling to destroy it. *Id.*

The appellate court also considered the issue of possession of the evidence which was alleged to have been negligently destroyed. The court acknowledged in its opinion that State Farm did not have possession of the sidewalk but, the appellate court asserted, State Farm, did exercise control or had an opportunity to exercise control over the property because it contractually had some control over Kuehling under the cooperation clause in the insurance policy. The appellate court also acknowledged that "apparently State Farm knew the importance of this evidence," based upon the fact that pictures were taken days after the accident and after the subsequent alteration of the sidewalk, and those photos had a claim number. The appellate court in its analysis contemplated the trial court's finding on the spoliation issue that various people viewed the sidewalk at or near the time of loss and could testify as to its condition even without photographs. Nevertheless, the appellate court overturned the trial court's entry of summary judgment, finding that issues of material fact existed as to the nature and extent of State Farm's duties to preserve the evidence in question.

The Supreme Court's Decision

The matter was then appealed to the Illinois Supreme Court for further review. *Dardeen v. Alice Kuehling and State Farm Fire and Casualty Company*, Docket No. 97900, 2004 Ill. Lexis 2029 (2004). The supreme court in its analysis considered the *Boyd* case, referring to it as the watershed case on spoliation issues. Pursuant to the *Boyd* analysis, the supreme court noted that in a spoliation of evidence case, the determination as to whether a duty to preserve evidence exists is a two prong test. *Anderson v. Mac Trucks, Inc.*, 341 Ill. App. 3d 212, 793 N.E.2d 962 (2003). Specifically, prong one of the test is whether a duty to preserve evidence arises by agreement, contract, statute, special circumstance, or voluntary undertaking. *Dardeen* at p. 11 citing *Boyd*, 166 Ill. 2d at 195. Only after that decision is made must the court determine whether the duty extends further and "whether a reasonable person should have foreseen that the evidence was material to a potential civil action." *Boyd* 166 Ill. 2d at 195. The supreme court held that a plaintiff is required under the law to satisfy both prongs before finding a defendant liable in a spoliation of evidence claim.

After setting forth the manner of the analysis to be undertaken, the supreme court applied the *Dardeen* facts to the requisite test. Specifically, the Illinois Supreme Court ruled that the *Boyd* case stood for the proposition that a duty to preserve evidence could arise by an agreement or contract but only if that ". . . agreement or contract was between the parties to the spoliation claim." (*Anderson v. Mac Trucks* 341 Ill. App. 3d at page 217). There was no evidence presented at hearing that Dardeen was privy to the insurance contract between Kuehling and State Farm. Further, the record was devoid of evidence that Dardeen and State Farm had any relationship

whatsoever which would rise to the level of an agreement or contract or other special circumstances. The court rejected Dardeen's argument that the insurance contract was enough. Thus the court held that Dardeen failed to meet the requisite proofs as to the first prong. Nevertheless, the supreme court in its opinion questioned whether a duty would [could] arise if Dardeen had asserted that he was a third party beneficiary of the contract between Kuehling and State Farm and also raised the question of whether such a contractual duty was owed by State Farm to Kuehling within the insurance policy. As the insurance policy was not part of the record, these questions could not be answered in the context of the facts before the court.

ITLA raised issues in this case through an Amicus Curiae brief. In part, ITLA requested clarification of the court's holding in *Shimanovsky* as to whether those parties who "held a direct stake in the outcome of the litigation owe a duty *** to preserve and/or document the existence and condition of relevant and material evidence.' " *Dardeen*, at p 13. The plaintiff argued that " 'State Farm was invested with the power or authority to guide or manage the actions of its insured.' " *Dardeen* at p. 13. Thus, under plaintiff's theory, State Farm rose to the status of a potential litigant who had a direct stake in the outcome. But, the supreme court differentiated those cases which give rise to a special duty to preserve evidence. (*See*, *Miller v Gupta*, 174 Ill.2d 120, 672 NE2d 1299 (1996)). Here, Dardeen never contacted State Farm himself to ask that State Farm preserve the evidence. There is no dispute that State Farm never possessed the evidence in question. Thus, the line of cases requiring a potential litigant to preserve evidence under certain circumstances were in opposite to the facts. In fact, the supreme court stressed in its analysis that no Illinois court has held that a mere opportunity to exercise control over the evidence at issue is sufficient to meet the relationship test. *Anderso*n, 341 Ill. App. 3d at 214. *See also, Jones v. O'Brien Tire and Battery Service Center, Inc.* 322 Ill. App. 3d 418, 752 N.E.2d 8 (2001). The supreme court specified that by this decision it was not making a final determination as to whether possession is required in every negligence spoliation case. In fact, the court made it clear that they did not make that determination one way or the other by this holding. The supreme court held that as State Farm in this case was neither in possession or control of the evidence in question, it owed no duty to Dardeen to preserve evidence.

"In fact, the supreme court stressed in its analysis that no Illinois court has held that a mere opportunity to exercise control over the evidence at issue is sufficient to meet the relationship test."

Conclusion

Ultimately, the supreme court found in favor of State Farm and upheld the trial court's entry of summary judgment based upon the facts specific to this case. Nevertheless, the case is of interest in that it appears that arguments exist which may lead to a finding adverse to an insurer. The issues raised but not determined by the court should be seen as flags to be addressed in future cases. First, does the policy of insurance create a duty between the insurer and its insured to preserve evidence? If so, is a party who suffers an injury on the insured's property a beneficiary of that duty? In this case Ms. Kuehling did not raise her own spoliation of evidence claim against State Farm (in fact she did not participate in the appeal). If she had done so, can the plaintiff attach an insurer's dollars by obtaining a spoliation award against the insured? Finally, would the courts' analysis have been different had the injured party, here Dardeen or his attorney, called the insurer and himself advised State Farm that he was making a claim? Review of the language within the courts' opinion leaves room for these issues to arise in circumstances only slightly different from the ones presented in the *Dardeen* case. Perhaps insurers and their insureds need to behave even more proactively at the onset of litigation to protect themselves against these spoliation claims.

But, then does the insurer simply create evidence that may ultimately be used against it?

Appellate Practice Corner

By: Brad A. Elward
Heyl, Royster, Voelker & Allen
Peoria

New Supreme Court Rule 310.1 Provides for Pilot Appellate Settlement Conference Program In Certain Civil Appeals

On October 29, 2004, the Illinois Supreme Court adopted Rule 310.1, providing for a settlement conference program as a means for resolving certain civil appeals. According to the supreme court's administrative order of the same date, and its November 1, 2004 Press Release, the program will begin on an experimental basis in the Appellate Court, First District.[1] The program is slated to last two years, until December 31, 2006.[2] The new Rule 310.1 builds on the prior but little used Rule 310, which provides for pre-hearing conferences to simplify the issues or matters so as to otherwise dispose of pending appeals.[3] It further brings Illinois in line with a number of other states and all federal circuit courts of appeals, which have been using appellate conferences for some time.[4]

Effective January 1, 2005, the new program is "intended to give parties to an appeal an opportunity and forum to discuss their case, simplify or limit the issues, negotiate settlement and consider any matters that may aid in disposition of the appeal or resolution of the action or proceeding."[5] As was noted in a 1997 publication of the Federal Judicial Center, "[c]onference sessions are generally structured to help parties communicate, clarify their understanding of underlying interests and concerns, identify the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options."[6]

Rule 310.1(b) notes that only certain civil appeals are eligible for assignment to the Program, and specifically exempts the following types of proceedings or actions: (1) juvenile court proceedings; (2) adoption proceedings; (3) paternity proceedings; (4) actions where the custody of a minor is the sole issue; (5) actions where the mental capacity of a party is at issue; (6) contempt; (7) petitions for extraordinary relief such as *mandamus*; (8) petitions for writs of *habeas corpus*; (9) actions for judicial review of decisions of the Illinois Workers' Compensation Commission; and (10) elections contests.[7] Also ineligible are appeals from a judgment or order imposing sanctions upon a litigant or attorney or incarcerating a party.

Each appellate district is empowered to adopt local rules for conducting its program consistent with the provisions of Rule 310.1, and shall be approved in advance by the Illinois Supreme Court.[8] At a minimum, the rules adopted by an appellate district shall address issues including actions eligible for inclusion in the programs (consistent with Rule 310.1(b)), appointment of mediators, selection of cases referable for mediation, scheduling of mediation conferences, conduct of the conference and the role of the mediator, and termination, report, and finality of the conference.[9] Confidentiality of the proceedings will also be addressed on a district-by-district basis, but consistent with Rule 310.1(h).[10]

A mediation committee consisting of two or more judges appointed under that district's rules would administer the programs in each district.[11] The clerk of each appellate court is permitted to assist or serve as a member of the mediation committee. According to Rule 310.1(e), cases may be selected for mediation on the basis of a "Settlement Status Report" prepared by the parties or on motion of a party or the presiding judge of the court or panel. Upon receipt of the Settlement Status Report or recommendation from a presiding judge, the mediation committee will evaluate the case to determine if it is eligible for assignment to the Program.[12] If no objection is filed and the case is otherwise eligible for mediation, the court will assign the case to the program and transfer it to a settlement docket.[13] This transfer then stays the filing of the record on appeal and/or any briefs pending further order of the court. The case will be removed from the program if a party objects to the assignment. However, once a party agrees to

About the Author

Brad A. Elward is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen*. He practices in the area of appellate law, with a sub-concentration in workers' compensation appeals and asbestos-related appeals. He received his undergraduate degree from the University of Illinois, Champaign-Urbana, in 1986 and his law degree from Southern Illinois University School of Law in 1989. Mr. Elward is a member of the Illinois Appellate Lawyers Association, the Illinois State, Peoria County, and American Bar Associations, and a member of the ISBA Workers' Compensation Section Counsel.

submit a case to the program, a failure to participate in good faith or a failure to attend or comply with conference rules may subject the party to sanctions under Rule 375.[14]

In addition to potentially resolving a case through settlement, Rule 310.1 looks alternatively to narrow the issues presented for review. In that event, "an order shall be prepared reciting the agree terms" and it shall be binding on the parties unless modified by a subsequent order of the court.[15] At that time, the case will be reassigned to the active docket for a new briefing schedule.

Confidentiality will play a large role in the conduct of program. Rule 310.1(h) specifically states that "[t]he settlement conference and all documents prepared by the parties, the appellate mediator, and the settlement administrator shall be confidential."[16] Moreover, "[n]o transcript or recording shall be made of any settlement conference and no mention of settlement discussions shall be made in any brief***or in oral argument." In addition, other than orders entered by the court or stipulations of the parties, no documents from the program will be included in the appellate record. All documents will be destroyed upon dismissal of the case or its removal from the program.

Appellate courts in other states and in the United States Court of Appeals for the Seventh Circuit have similar programs.[17] Rule 33 conferences before the Seventh Circuit often provide the parties with a good opportunity to discuss the issues in the case and obtain objective feedback from the settlement counselors. Not only does this help the case's settlement potential, it further assists counsel in identifying the strengths and weaknesses of the issues. The First District is expected to release its mediation rules in early 2005.

If the conduct of Seventh Circuit settlement conferences is any guide, counsel receiving notice of a Rule 310.1 assignment should be very prepared for the appellate court mediations and should know the record and all relevant pleadings and issues, as well as be thoroughly versed in the circuit court's reasoning and his or her opponent's positions. It would also be wise to revisit the issue of settlement authority in advance and to have your client available by telephone or in person to discuss any late-breaking developments or settlement proposals. It is certainly not uncommon for Seventh Circuit conferences to last two-to-three hours.

Funding for the pilot program comes from an increase in filing and appearance fees for cases filed in the First District. Beginning January 1, 2005, filing fees increased to $100, $75 of which is earmarked for the First District Appellate Settlement Conference Program.[18] Appearance fees also increased from $10 to $50, with the additional $35 going to the Reviewing Court Alternative Dispute Resolution Fund, 710 ILCS 40/10.[19] Participation in the program will have no other court costs for the parties beyond the appellate filing fees.[20]

Eootnotes

[1] Order, *In re: Appellate Settlement Conference Pilot Project Appellate Court, First District*, M.R. 19788, Oct. 29, 2004.

[2] *Id.* The Court will then review the program for full implementation in all five districts.

[3] 188 Ill. 2d R. 310. Rule 310 was fashioned after Federal Rule of Appellate Procedure 33, with the added provision that a judge who presides over a settlement conference cannot participate in the decision of the case. Supreme Court Rule 310, Committee Comments. Former Historical and Practice Notes to Rule 310 and recently to Rule 218 (1995) suggested that subjects for pre-hearing conference should be identical to those identified in Rule 218 as topics for pretrial conferences. *See also,* Illinois Appellate Court First District Rule 16.

[4] The United States Court of Appeals for the Second Circuit first instituted an appellate mediation program in 1974 when Chief Judge Irving R. Kaufman established the Civil Appeals Management Plan, or CAMP. *See*, Kaufman, Irving R., *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 Colum. L. Rev. 1094 (1974). The Seventh Circuit adopted a settlement program in 1994. *See. e.g*., Dick, S. Gale, *The Surprising Success of Appellate Mediation*, 1995 CPR Institute for Dispute Resolution: Alternatives to the High Cost of Litigation, Vol. 13, No. 4, p. 41 (April 1995).

[5] Rule 310.1(a).

[6] Niemic, Robert J., *Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers*, Federal Judicial Center , p. 3 (1997).

[7] Rule 310.1(b). Most federal Courts of Appeals have similar exclusions.

[8] Rule 310.1(c).

[9] Rule 310.1(c)(2).

[10] Rule 310.1(c)(2)(x), (h).

[11] Rule 310.1(d). At this time, the First District is likely to use appellate judges or retired judges to handle settlement conferences.

[12] Rule 310.1(e)(1), (2).

[13] *Id*.

[14] Rule 310.1(i).

[15] Rule 310.1(g).

[16] Rule 310.1(h).

[17] Seventh Circuit Rule 33 notes that "[a]t the conference the court may, among other things, examine its jurisdiction, simplify and define issues, consolidate cases, establish the briefing schedule, set limitations on the length of briefs, and explore the possibility of settlement."

[18] Order, *In re: Appellate Settlement Conference Pilot Project Appellate Court, First District*, M.R. 19788, Oct. 29, 2004.

[19] This Fund was established by the General Assembly in 2004 to serve as a repository for the fees to fund the settlement program.

[20] *Id*.

The Law in Review

By: Bradley C. Nahrstadt
Williams Montgomery & John Ltd.
Chicago

• In *Personal Jurisdiction and the Internet*: *Seeing Due Process Through the Lens of Regulatory Precision,* 98 Nw.U.L.Rev. 411 (Winter 2004), Alan R. Stein discusses attempts by the courts to grapple with the jurisdictional implications of the Internet. Stein begins his article by discussing a state's interest in adjudicating disputes within its borders. According to Stein, a state's interest in adjudicating disputes can be divided into two related interests: an ex-post interest in providing a remedy to an injured resident and an ex-ante interest which regulates the events underlying the claim. Both are ultimately based on territorialist conceptions of state authority; to promote the welfare of persons within the state, the state regulates conduct and remedies injuries.

Following a discussion of a state's interest in protecting the interests of the citizens of the state, Stein provides an overview of the recent decisions concerning personal jurisdiction in Internet-related cases. According to Stein, most courts have settled on an arbitrary "sliding scale," based on whether the offending website at issue is "interactive" or "passive." Thus, if a website simply conveys information, but does not have the programming mechanism to consummate a sale, the courts will not find purposeful availment in the defendant's maintenance of the website and, accordingly, will not find that the courts of the state where the website was accessed can exercise personal jurisdiction over the defendant corporation.

Stein also provides a comprehensive overview of the cases, which deal with specific jurisdiction. In those cases, there is a logical connection between the defendant's Internet activity and the underlying claim. The cases of specific jurisdiction fall into two general categories: 1) cases where the relationship between the parties was established over the Internet, but the subsequent injury involved other conduct and 2) cases where the injury itself was inflicted over the Internet. According to Stein's review of the cases, the role of the Internet in Internet-related claims is indistinguishable from the role of other solicitation media such as the telephone, print or magazine advertising, or broadcasting. Typically, where a defendant's only contact with the forum was solicitation there, but the claim does not involve that solicitation per se, the jurisdictional significance of the solicitation will turn on the type of claim asserted. In contract cases, jurisdiction is frequently upheld, particularly where the parties have entered into a long-term relationship. In tort cases, jurisdiction seems to rarely be upheld.

The real problem with these cases, according to Stein, is those cases where the entire course of dealings between the parties was electronic. In these types of cases the defendant may not have known where its conduct would have consequences, and it may or may not have the ability to control the reach of the communication. Most courts that have dealt with this particular circumstance have followed the well-established precedent that untargeted advertising in broadcast or national print media does not constitute purposeful availment and, therefore, the court cannot exercise personal jurisdiction.

Stein takes issue with this approach and argues that jurisdiction for Internet-related torts should be determined pursuant to a regulatory precision perspective. The regulatory precision perspective asks what kind of burden jurisdiction would impose upon non-forum-directed conduct. In other words, how difficult or expensive would it be for a defendant to differentiate its conduct in regard to the potential effects in specific jurisdictions? Stein argues that where it is not difficult or expensive for defendants to differentiate behavior toward the citizens of a particular state versus others, the courts of that state should be allowed to exercise personal jurisdiction over claims, which arise out of Internet-related activities. On the other hand, in those cases where the costs of forum-differentiated behavior are fairly high, courts should not be allowed to exercise personal jurisdiction.

• In *A New Cure for Contraindication*: *Illinois Supreme Court Prescribes a Duty to Warn on Pharmacists*: *Happel v. Wal-Mart Stores, Inc.*, 28 So.Ill.U.L.J. 483 (Winter, 2004),

About the Author

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.

Bob Neiner explores a judicially created exception to the learned intermediary doctrine that applies to pharmacists in the state of Illinois. Neiner's case note focuses on the case of *Happel v. Wal-Mart Stores, Inc.*, 766 N.E.2d 1118 (Ill. 2002). The plaintiff in that case, Heidi Happel, called her primary care physician seeking a more effective pain reliever to alleviate severe menstrual cramps. Heidi was allergic to aspirin, Ibuprofen, and acetaminophen, and, therefore, was unable to take those or other related drugs. Her physician, who was aware of her drug allergies, prescribed Toradol, and his office telephoned the prescription to a Wal-Mart pharmacy in McHenry, Illinois. At the time that he prescribed Toradol, the plaintiff's physician did not know that it was contraindicated for patients with allergies to aspirin.

The plaintiff had visited the Wal-Mart pharmacy where the prescription was filled six times prior to the date she arrived to pick up her prescription for Toradol. Each time, pharmacy employees asked her if she had any drug allergies prior to dispensing the medication. The plaintiff always stated that she was allergic to aspirin, Ibuprofen, and acetaminophen. On the day that she picked up the Toradol prescription, the plaintiff informed the pharmacist that she was allergic to aspirin, Ibuprofen, and acetaminophen, and, despite this information, the pharmacist finished filling the prescription. The pharmacist who filled the prescription was aware that Toradol was contraindicated for people who were allergic to aspirin. The bottle of Toradol that was given to the plaintiff contained directions for taking the medication, but it did not contain any warnings about contraindications.

Within 40 minutes of taking the first dose of Toradol, the plaintiff began suffering from respiratory distress. She called the Wal-Mart pharmacy that filled the prescription to find out if this was a reaction to her medication. She was told there should be no reaction with this drug. The plaintiff then called a different pharmacist, a friend of hers, who was aware of her allergies. He told her to begin a nebulizer treatment and to go to the emergency room if her condition did not improve. The plaintiff went to the emergency room and was diagnosed with anaphylactic shock.

In analyzing whether a pharmacist has a duty that extends beyond merely filling a prescription accurately, the Illinois Supreme Court looked at four factors: (1) the reasonable foreseeability of harm; (2) the likelihood of an injury occurring; (3) the magnitude of a burden; and (4) the consequences of imposing a duty on pharmacists. The supreme court found that all four factors weighed strongly in favor of the expansion of a pharmacist's duty of care and held that there is a narrow duty to warn either the prescribing physician or the patient of the potential danger that exists where a pharmacy has patient-specific information about drug allergies and knows that the drug prescribed is contraindicated for the individual patient.

Although Neiner appears to be pleased with the court's ruling in *Happel*, he believes that the court did not go far enough. Neiner argues in his note that using the same four factors the supreme court considered in its analysis in *Happel*, the Illinois Supreme Court should further expand the pharmacist's duty to warn to include those situations where the pharmacist's professional training and special knowledge alerts him or her to a danger on the face of a prescription, especially where the prescription is for an excessive dose of the subject medication.

"The supreme court found that all four factors weighed strongly in favor of the expansion of a pharmacist's duty of care and held that there is a narrow duty to warn either the prescribing physician or the patient of the potential danger that exists . . ."

- In *Spoiling an Illinois Personal Injury Plaintiff's Spoliation Claim for Routinely Maintained Items,* 28 So.Ill.U.L.J. 455 (Winter, 2004), Joe Wetzel provides an interesting analysis of those cases in which a plaintiff's claim for spoliation of evidence arises out of the routine maintenance of a product that has allegedly caused the plaintiff injury. Wetzel spends the majority of his case note discussing the claim of spoliation of evidence in the state of Illinois and provides a rather detailed overview of many of the cases that deal with this issue.

Wetzel explains that there is an inherent problem with the reciprocal duty to preserve evidence that most spoliation of evidence cases recognize. While the plaintiff simply has a duty not to destroy evidence, which may be used when he decides to file a lawsuit, the defendant's duty is to try to foresee a potential lawsuit and preserve all evidence, which a plaintiff

(Continued on next page)

The Law in Review *(Continued)*

may wish to include as evidence. According to Wetzel, this result places too great a burden upon the defendant to attempt to ascertain which items of evidence may be needed to be preserved for trial. In the case of an item that is routinely maintained, a defendant must not alter it and he must try to predict which routinely maintained items the plaintiff may wish to bring into a potential lawsuit. In Wetzel's view, the burden on defendants is too large because imposing such a realistically impractical duty upon the defendant is expensive, unsafe, and may disrupt the usual flow of business, especially for smaller businesses with limited storage capabilities.

According to Wetzel, in order to resolve the inequity the spoliation doctrine imposes upon the defendant in a situation involving routinely maintained items, a requirement of reasonable notification should be placed upon the plaintiff. Wetzel postulates that adding an element to the usual jury instruction given for a spoliation claim would address this issue. The added element would place the burden upon the plaintiff to notify the defendant of the need for certain evidence within a reasonable timeframe by combining contributory negligence and mitigation of damage theories. Thus, under Wetzel's proposal, failure to notify a defendant of the need for particular evidence within a reasonable time after an injury should bar a spoliation claim if the item at issue was routinely maintained by the defendant and had been altered only because of such maintenance.

- Finally, in *Witness Disclosure in Illinois*, 28 S.Ill.U.L.J. 225 (Winter, 2004), Keith H. Beyler discusses the rules in Illinois regarding witness disclosure. Beyler's well-written article traces the history of former Illinois Supreme Court Rule 220 and the various versions of Illinois Supreme Court Rule 213. Beyler's article contains a discussion of a number of recent cases interpreting Illinois Supreme Court Rule 213 as well as a discussion of a number of articles that have recently been published on the implications of an application of this omnipresent rule.

Beyler concludes his note by concluding that the time has come to consider two questions in regard to Illinois Supreme Court Rule 213: (1) how should the expense of discovering a treating physician's opinions be allocated; and (2) how can those expenses be reduced? Beyler submits that the expense of discovering a treating physician's opinions should be split evenly between the plaintiff and the defendant. Under Beyler's scenario, the plaintiff should pay the physician's consultation fee with the right to receive half of the fee from the defendant. The party that takes the physician's discovery deposition should pay the physician's deposition fee with the right to receive half of the fee from the opponent. In Beyler's view, a split of the consultation and deposition fees in this way will promote efficient disclosure and discovery and it will allocate fees more fairly.

In regard to expense reduction, Beyler proposes that the supreme court adopt a new discovery rule to permit a brief medical conference between the lawyers and a non-party treating physician. At this medical conference, each lawyer would have the chance to ask the physician a few key questions the lawyer needs answered to evaluate the case for settlement purposes. The lawyers could rephrase their questions, if necessary, and ask follow-up questions. The medical conference could be conducted in person, by telephone, or by other remote electronic means. There would be no court reporter and no oath. According to Beyler, this proposal would not threaten the plaintiff's physician-patient relationship. Even when the defendant initiated the medical conference, the defendant's lawyer would have no ex parte contact with the physician. The plaintiff's lawyer would hear all the questions asked by the defendant's lawyer and could make any proper privacy or privilege objections and would additionally hear the physician's answers. Beyler's article concludes with a proposed Rule 221 governing medical conferences with non-party treating physicians.

"Under Beyler's scenario, the plaintiff should pay the physician's consultation fee with the right to receive half of the fee from the defendant."

Commercial Law

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

Alleged Infringer Raising Fair Use Defense to Trademark Infringement Claim Does Not Bear Burden to Disprove Likelihood of Confusion

KP Permanent Make-up, Inc. v. Lasting Impression I, Inc., 125 S. Ct. 542 (2004).

Parties using descriptive terms accused of trademark infringement frequently raise the defense of fair use of those descriptive terms. Under the Lanham Act a trademark may be used by someone other than the owner of the trademark provided that the terms are used (i) "otherwise than as a trademark" and (ii) descriptively and in good faith to describe that party's goods and services. 15 U.S.C. § 1115(b)(4). Courts have differed over the significance of the likelihood of confusion to a fair use defense, and the obligation of an accused infringer raising such a defense to show that its use is unlikely to cause confusion.

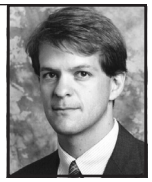
The United States Supreme Court recently attempted to resolve this uncertainty. In *KP Permanent Make-up, Inc. v. Lasting Impression I, Inc.*, the Court held that courts must consider whether a purported fair user caused an unacceptable amount of confusion. Nevertheless, the Court overturned the Ninth Circuit Court of Appeals on the basis that it inappropriately placed on the "fair user" accused of infringement the burden of disproving a likelihood of confusion.

In *KP Permanent* the Court examined the parties' use of the terms "micro color" in connection with the sale of permanent makeup. KP Permanent Make-up, Inc. ("KP") claimed to have used the terms in its advertising since 1991. However, lasting Impression I, Inc. ("Lasting"), was issued a federal trademark registration for the mark MICRO COLORS in 1993. In 1999, KP distributed an advertising brochure prominently displaying the term "micro color" to describe its products. Lasting claimed that KP's brochure infringed its MICRO COLORS trademark. In response, KP filed suit seeing a declaratory judgment that its use did not infringe Lasting's registered trademark, raising the fair use defense. After finding that Lasting conceded that KP had only used the term in the brochure to describe its goods and not as a trademark, and that KP had continuously employed the term before Lasting adopted its mark, the district court granted Lasting's motion for summary judgment, holding that KP had acted fairly in its use of the "micro color" term. Without any inquiry into whether KP's actions were likely to cause confusion, the district court held that KP had established its fair use defense and entered summary judgment in its favor. The Ninth Circuit reversed the decision, holding that the district court should have addressed the matter of possible customer confusion, and placed the burden on KP to show the lack of any likelihood of confusion.

The Supreme Court vacated and remanded the Ninth Circuit's decision. In doing so, the Court noted that it is the accusing party's burden to prove likelihood of confusion. The Court then reasoned that if an alleged infringer were required to disprove likelihood of confusion, then by definition the accusing party would not be able to establish its case, and the alleged infringer would have no need to assert the fair use defense. In other words, placing such a burden on an alleged infringer would essentially vitiate the fair use defense. Although the Supreme Court decided that an alleged infringer asserting a fair use defense does not bear the burden of negating a likelihood of confusion, it also held that a court must consider the extent of any likelihood of confusion in determining whether a use can be found to be objectively fair. The Court also noted that some possibility of consumer confusion must be compatible with fair use.

Overall, the *KP Permanent* decision is a significant victory for those accused of infringing a trademark containing descriptive terms. However, there is uncertainty as to what degree of confusion courts will permit and still determine that a use is fair.

About the Author



James K. Borcia is a partner with the Chicago firm of *Tressler, Soderstrom, Maloney & Priess*, and is active in the firm's litigation practice with an emphasis on commercial and complex litigation. He was admitted to the bar in 1989 after he received his J.D. from Chicago-Kent College of Law. Mr. Borcia is a member of the Chicago and Illinois State Bar Associations, as well as the IDC and DRI.

The Defense Philosophy

By: Willis R. Tribler
Tribler Orpett & Meyer, P.C.
Chicago

Wanted: Another Solomon

It is again time to observe the progress, or lack of progress, of merit selection and its predecessor, merit retention of judges.

After a concerted effort by the Illinois State Bar Association, the Chicago Bar Association, and other organizations to deny retention to those judges who were rated unqualified, every single judge in Cook County was retained. In fact, the only Illinois judge who was denied retention in 2004 was Justice Gordon Maag of the Fifth District Appellate Court, and it is fair to say that his defeat was the fallout of a bruising race for a seat on the Supreme Court.

I recognize full well that defense interests have reason to be pleased with the demise of Judge Maag, who has strongly opposed intrastate forum non conveniens. *See*, *Peile v. Skelgas, Inc.*, 242 Ill. App. 3d 550, 610 N.E.2d 813, 182 Ill. Dec. 944 (5th Dist. 1993). Nevertheless, it has to be a concern if the only time that a judge will be denied retention is if he concurrently runs for a higher judicial office.

Merit retention was part of the 1962 amendments to the 1870 Illinois Constitution. After that amendment, a judge needed the affirmative votes of a majority of the voters voting on the question to be retained. When the 1970 Constitutional Convention came around, there was a debate between those who wanted to require a 70% approval rating and those who wanted it to remain at 50%. The present 60% retention requirement was a compromise in the Convention.

Nevertheless, no matter how hard the bar associations and good government people try, it is very rare for a judge to be denied retention.

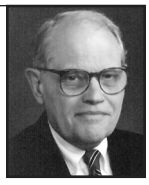
The 1970 convention also instituted a separate referendum as to the adoption of pure merit selection. The proposition had to carry both Cook County and the remainder of Illinois to go into effect. It carried Cook County but lost in the rest of the state. The problem outside Chicago was that people in smaller counties knew the lawyers and the judges and did not want the Governor appointing their judges.

It is hard to imagine that Illinois will get pure merit selection in the near future. Therefore, most efforts are directed toward the retention system. The most innovative proposal is for a panel, composed of heaven knows who, to review the qualifications of a judge and either retain that judge without a retention election or require the judge to face a retention ballot. Obviously, such an opinion by an officially constituted panel would be devastating to a judge. The second proposal would increase the requirement for retention to 70% or 75%. That could be bad from the other side, as a certain percentage of the voters, maybe as much as 10%, automatically votes to deny retention to all the judges.

"The problem outside Chicago was that people in smaller counties knew the lawyers and the judges and did not want the Governor appointing their judges."

The point of all this is that the system does not work. It does not reach its intended goal of removing unqualified judges from the bench. It should be fixed, and I do not know how to fix it. What we need is someone with the wisdom of Solomon to concoct a way out of this mess. If you are that Solomon, or know someone who is, please let me know. That person is badly needed.

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.

Alternative Dispute Resolution

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

I. Mediation

Mediation is a great process to use to represent your clients in an efficient and cost-effective way. Mediation cases are resolved more quickly and with greater client satisfaction with the process, the result and you.

Some lawyers do not like mediation because they believe it requires more preparation and proceeds at a slower pace than judicial settlement conferences. Judges have limited time and tend to evaluate cases and direct the settlement negotiations toward that evaluation. Therefore, judicial settlement conferences usually proceed at a faster pace than mediation.
Which sets the worse precedent, a settlement or an adjudicated result? The appropriateness of settlement and the efficiency of accomplishing it eliminates the risk of an adjudicated result. Although some may disagree, selecting a mediator is very easy and the attorney's mind-set in mediation frequently is different than during litigation. Many counsel believe that the mediator should not be someone who favors the defense, but rather someone the opponent trusts and respects as a mediator. If opposing counsel believes that the recommended mediator has a close relationship to the defense, he or she will perceive the unfairness or bias and refuse to participate. It is not that difficult to select a neutral mediator.

One of mediation's benefits is that no one can impose any decision on the attorney or the client. Mediation is nothing more than focused settlement negotiations that only become binding when the parties reach a mutual agreement. Some lawyers will perceive any suggestion of mediation as a sign of weakness. It is anything but that.

Mediation also is cost effective, providing a less expensive option than a trial. Moreover, a mediator also can act as a "devil's advocate" to help with defusing any unrealistic positions and demands. It is never too early to participate in a mediation. Others will disagree and contend that one should engage in mediation only after completing extensive discovery and learning the other parties' weaknesses and strengths.

On the contrary, if an early mediation does not result in settlement, the attorney then can prepare for trial without the psychological and time demands of last-minute settlement negotiations. Considering the savings in time, money and emotion, mediation should serve as an incentive to an early settlement. With a resolution in mediation, the parties and their attorneys all will come out of the dispute feeling like winners.

II. Arbitration

Past articles have lauded arbitration for its less costly and less time-consuming resolution of disputes than through the court system.

The court system is designed to provide uniform interpretation and application of laws through published decisions. These decisions create binding precedent for future cases. At the same time, arbitration requires the parties to prepare their cases in isolation. There aren't any previous successes or disappointments of similarly situated parties. Loss of access to precedent equates to a loss of uniformity. Uniform interpretation of laws through published decisions provides that consistency.

Since arbitration proceedings are essentially shrouded in secrecy, the settlement, or resolution, often prevents the parties from disclosing the terms of the settlement. Counsel may be fortunate enough to discuss a claim with another attorney who may not be barred from disclosing the settlement terms of a similarly situated claim. However, such discussion still may not be beneficial, as past arbitration panels or arbitrators probably will be different from the present panel or arbitrator. Keep in mind that a court's review of arbitration decisions is thought to be one of the narrowest standards of judicial review

(Continued on next page)

About the Author

John L. Morel concentrates his practice 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, FDCC, 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.

Alternative Dispute Resolution *(Continued)*

in American jurisprudence.

In the formation of an employment contract, arbitration may be a condition of employment. An employer should not impose an arbitration clause through an employee handbook or through a unilateral contract distributed during an employment relationship. Employers should take into consideration the conditions under which they present the contract terms to the employees. They should explain to employees the arbitration provisions, not merely provide them with a handbook in which the provisions appear. It would be beneficial to have a clause, or document, in which the employees acknowledge that the terms and conditions of employment, including the provision for arbitration, have been read and explained to them, and that they understand and accept the terms and conditions. Despite the contentions of some, the arbitration requirements for employment do not waive any substantive rights. Care must be taken, however.

Association News

HEADS UP! A Helpful Reminder from the Honorable Henry Tonigan

Lake County Local Rule 2.04(a)(3)

The Honorable Henry C. Tonigan, Presiding Judge of the Law Division of Lake County, has asked the IDC to pass on this message to its membership. The judges in the Division would request compliance with the 19th Judicial Circuit's Local Rule 2.04(a)(3) which provides for submission of a separate Statement of Material Facts when a Motion for Summary Judgment is filed. This Local Rule has been in effect for some time, being modeled after the Federal Local Rules. It is recognized that this is different from other circuits. However, given the increasing caseloads, sizes of briefs/exhibits and a propensity to "editorialize" facts in argument by some, the rule 2.04(a)(3) should be followed. Failure to so comply can result in a severe procedural sanction, rather than a ruling by the Court on the merits of a motion. The Law Division Judges can be requested at their uncontested calls to amend briefing schedules on those current instances where no separate Statement of Material Facts was filed.

Local Rule 2.04(3) provides as follows:

Rule 2.04 Motions for Summary Judgment

(a) With each motion for summary judgment filed pursuant to 735 ILCS 5/2-1005 and concerning a count in which the prayer for relief exceeds $50,000, or in a Chancery or Miscellaneous Remedy Action, the moving party shall serve and file or cause to be received by Circuit Court Clerk:.

3. a statement of material facts as to which the moving party contends there is no genuine issue and that entitles the moving party to judgment as a matter of law, and that also includes:

   a. a description of the parties

   b. all facts supporting venue and jurisdiction in this Court.

The statement referred to in (3) shall consist of short numbered paragraphs, including within each paragraph specific references to affidavits, part of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. **Failure to submit such a statement constitutes ground for denial or striking the motion.**

If additional material facts are submitted by the opposing party pursuant to section (b) of this rule, the moving party may submit a concise reply in the form prescribed in section (b) for a response. All material facts set forth in the statement filed pursuant to section (b) will be deemed admitted unless controverter by the statement of the moving party.

Firm Announcements

Tressler, Soderstrom, Maloney and Priess is pleased to announce that **Janelle K. Christensen** has become a partner in the Lincolnshire office. She practices in the area of general civil litigation, with an emphasis in insurance and personal injury defense. Ms. Christensen is a Board member of the IDC. She is licensed to practice in Colorado and Illinois and before the U.S. District Court, Northern Illinois. She received her undergraduate degree, with distinction, from University of Colorado and went on to receive her law degree, cum laude, from University of Miami.

Meyer, Kruezer, Esp & Cores is pleased to announce that **Michael A. Arnold** has recently become a partner in the Wheaton firm. He will continue to assist clients with insurance defense, products liability and appellate work.

Querrey & Harrow is pleased to announce the recent election of **Daniel A. Kirk** as shareholder. He concentrates his practice in commercial, product liability and construction litigation. Mr. Kirk received his B.A. degree from Eastern Illinois University and his J.D. degree from Chicago-Kent College of Law. He is a member of the IDC and the Chicago Bar Association.

Amicus Committee Report

By: Michael L. Resis
O'Hagan, Smith & Amundsen, L.L.C.
Chicago

Since the last Amicus Committee report, the Illinois Supreme Court has handed down two decisions in which the Association participated, successfully, as *amicus*.

In *Paszkowski v. The Metropolitan Water Reclamation District of Greater Chicago*, Docket No. 96220, the issue before the Illinois Supreme Court was which of two statutory limitation periods, the longer four-year period in section 13-214(a) of the Code of Civil Procedure generally applicable for construction-related causes of action against any body politic, or the shorter one-year period in section 8-101 of the Local Governmental and Governmental Employees Tort Immunity Act applicable to tort actions against local public entities, governed a construction worker's bodily injury action against a metropolitan water reclamation district. The defendant was considered to be both a body politic and a local public entity, and under the plain language of the two statutes, either could apply in the absence of the other. In reversing the appellate court, which had applied the four-year statute, the Illinois Supreme Court found it irrelevant that the four-year limitation period in the Code of Civil Procedure was the more recently enacted legislation, and the specificity of the legislation was irrelevant as well. Instead, to resolve the conflict between statutes, the Illinois Supreme Court held that the General Assembly intended that the Local Governmental and Governmental Employees Tort Immunity Act broadly apply to any possible claim against a local public entity and its employees, and that the one-year period in section 8-101 necessarily controlled over any other statutes of limitations or repose.

Jay S. Judge of Judge, James & Kujawa L.L.C., authored the *amicus* brief for the Association and the IDC is grateful for his fine effort.

In *Dardeen v. Kuehling*, Docket No. 97900, the Illinois Supreme Court once more reversed the appellate court, and unanimously held that a homeowner's insurer owed no duty to preserve a hole, described as "the size of a dinner plate," in a brick sidewalk where a newspaper carrier had fallen. The supreme court reiterated the general rule that there is no duty to preserve evidence, but that a duty can arise through agreement, a contract, a statute, a special circumstance or voluntary undertaking. This is sometimes referred to as the relationship prong. If the relationship prong exists, it must then be determined whether a reasonable person should have foreseen that the evidence was material to a potential civil action (sometimes known as the foreseeability prong). In holding that the insurer was not liable to the pedestrian on a negligent spoliation theory, the court determined that the plaintiff did not satisfy the first, or relationship, prong, and thus did not have to address the second, or foreseeability, prong. The court rejected the plaintiff's argument that the insurance policy was a contract to preserve evidence that satisfied the relationship prong. The pedestrian was not a party to the insurance contract, which was between the homeowner and the insurer, and the record did not show that the policy contained a provision whereby the insurer had a duty to preserve evidence from being destroyed by the homeowner. The court further rejected the argument that the insurance contract created a special circumstance that satisfied the relationship prong. The court noted that the plaintiff never contacted the insurer to request the preservation of this evidence, never requested evidence from the insurer, and never asked the insurer to preserve the sidewalk or to document its condition. Without deciding if possession was required in every negligent spoliation case, the court held that the insurer could not be liable under the circumstances here when it did not have possession of the evidence or control of the sidewalk.

Defense counsel was **Russell K. Scott**, an IDC member with *Greensfelder, Hemker & Gale, P.C.*, and the *amicus* brief for the Association was authored by **Michael Resis** of *O'Hagan, Smith & Amundsen, L.L.C.*

About the Author

Michael L. Resis is a founding partner and chairman of *O'Hagan, Smith & Amundsen*'s appellate department. He concentrates his practice in the areas of appellate, insurance coverage and toxic, environmental and mass torts. He has practiced law in Chicago for 20 years and handled more than 400 appeals. Mr. Resis has represented government, business and professional organizations as *amicus curiae* before the Illinois Supreme Court and the Illinois Appellate Court. He received his B.A. degree, *magna cum laude,* from the University of Illinois at Champaign-Urbana in 1978, and a J.D. degree from the University of Illinois at Champaign-Urbana in 1981. Mr. Resis currently serves on the Board of Directors for IDC.

As a reminder for future submissions, the *amicus curiae* committee members are:

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

Second Judicial District
James DeAno
Norton, Mancini, Argentati, Weiler & DeAno
109 N. Hale Street
Wheaton, Illinois 60187
(312) 668-9440

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

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

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

While we cannot file an *amicus* brief in every case in which a request is made, we encourage your participation to make the views of our members known to the reviewing courts on the legal issues that affect us. We need your input and your support. If you are interested in writing an *amicus* brief or submitting a case for review by the committee, please contact any of us.

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THE IDC MONOGRAPH:

THE COLLATERAL EFFECT OF THE *ALFORD* PLEA ON THE ACTUAL INNOCENCE RULE IN LEGAL MALPRACTICE ACTIONS

Timothy J. Fagan and John D. LaBarbera
O'Hagan, Smith & Amundsen, L.L.C.
Chicago, Illinois

Courts throughout the United States have long recognized that criminal defendants may plead guilty to criminal charges while maintaining their innocence of their crimes without violating due process protections afforded under the U.S. Constitution. This type of plea agreement is referred to as an *Alford* plea.[1] Some jurisdictions have held that the guilty plea would not have a collateral effect on the malpractice proceeding.[2] Other jurisdictions have held that the plea would collaterally estop criminal defendants from relitigating their innocence in subsequent civil proceedings.[3]

In *Talarico v. Dunlap*, the Illinois Supreme Court held that a guilty plea entered over protestations of innocence would have no collateral effect on subsequent civil litigation.[4] The collateral effect of the guilty plea is significant to the criminal malpractice case based on the judicial application of the actual innocence rule in criminal malpractice actions.

Illinois courts, as do a majority of jurisdictions,[5] require that criminal defendants plead and prove their innocence before they may recover for their criminal defense attorney's malpractice.[6] This requirement has been referred to as the "actual innocence rule." The rule, premised variously on concepts of collateral estoppel, proximate causation and public policy, seeks to balance the constitutional mandate that defendants are entitled to the effective assistance of counsel in criminal proceedings with tort law concepts that injured plaintiffs can only recover damages to their legally protected interests.[7]

Courts have employed the actual innocence rule for various purposes. For example, some courts have used the rule to extend the accrual of criminal defendants' claims for professional malpractice that may lie against criminal defense counsel.[8] Conversely, the rule has been employed to bar criminal defendants' claims for legal malpractice when applied as a substantive element of the *prima facie* case of professional malpractice.[9]

The question addressed by this article is whether *Talarico* should have any effect on the application of the actual innocence rule in the criminal malpractice case. Part I will provide the conceptual framework underlying the *Alford* plea and the collateral effect of criminal convictions in subsequent civil proceedings.[10] Part II sets forth the actual innocence rule as applied by the Illinois courts, including a discussion of the public policy statements underlying the rule in the legal malpractice setting.[11] Part III will discuss the effect of the *Alford* plea on the actual innocence rule, and also will set forth an argument explaining the actual innocence rule as arising from the case-within-a-case doctrine and not estoppel *per se*.[12] Because the rule is not a creature of the estoppel doctrine, *Talarico* should have no substantive effect on the application of the actual innocence rule.

I.

In *North Carolina v. Alford*, the United States Supreme Court held that a trial court does not violate due process by accepting guilty pleas from criminal defendants accompanied by protestations of innocence.[13] In that case, the defendant was indicted for first-degree murder in 1963.[14] At that time, if a criminal defendant pleaded innocent of the crime, but was later convicted of first-degree murder, North Carolina law mandated the automatic imposition of the death penalty.[15] North Carolina law also called for a mandatory life imprisonment sentence for defendants pleading guilty to first-degree murder charges.[16] Alford claimed he was innocent of the first-degree murder charges. However, almost all of the witnesses interviewed by his court-appointed defense counsel indicated that he had committed the murder. Based on this strong evidence, Alford's counsel advised him to plead guilty to the lesser charge of second-degree murder offered by the state.[17]

During arraignment, Alford testified that he had not killed the victim, but wished to plead guilty to avoid the almost-certain death penalty he would face if he contested the charge.[18] The trial judge sentenced Alford to the maximum penalty for second-degree murder at the time – 30 years in prison.[19] Alford appealed his conviction, claiming that fear of the imposition of the death penalty coerced his guilty plea and thus invalidated it.[20] The United States Court of Appeals for the Fourth Circuit overturned his conviction.[21]

The United States Supreme Court reversed the Fourth Circuit's decision, holding that a guilty plea representing a voluntary and intelligent choice among the alternative courses

About the Authors

Timothy J. Fagan is a founding partner and the co-chair of O'Hagan, Smith & Amundsen, L.L.C.'s Professional Liability Practice group. His practice includes the defense of professionals, including accountants, attorneys, insurance brokers and agents, and real estate brokers. He represents clients in litigation matters throughout the United States in both federal and state court proceedings. He received his J.D. from Loyola University in 1989.

John D. LaBarbera is an associate with O'Hagan, Smith & Amundsen, L.L.C. His practice includes the defense of professionals, including attorneys, accountants and insurance brokers. He received his J.D. from the Illinois Institute of Technology, Chicago-Kent College of Law in 2001.

of action is not compelled within the meaning of the Fifth Amendment and does not violate due process.[22] The Court noted there was no material difference between a guilty plea accompanied by an assertion of innocence and a *nolo contendere* plea.[23] The Court, however, couched its ruling by requiring that defendants' guilty pleas: (1) be based on intelligent conclusions by defendants that their interests require the entry of a guilty plea; and (2) that the records before the trial court contain strong evidence of actual guilt.[24]

As described above, the *Alford* plea is merely a variant of the guilty plea and must satisfy the basic requirements for a guilty plea in order to be effective. The main distinction between typical guilty pleas and an *Alford* plea is that the trial judge must be particularly careful to establish the requisite factual basis for the *Alford* plea. While typical guilty pleas satisfy this requirement by the criminal defendant's admissions, with *Alford* pleas, the trial court must establish this factual basis of guilt independently from the criminal defendant's statements. These independent factual bases substitute for the criminal defendant's admissions of guilt.[25]

A. Illinois Courts' Application of the *Alford* Doctrine

Illinois is among the jurisdictions that recognize *Alford* pleas.[26] Nonetheless, pleas proffered under the *Alford* doctrine must satisfy the rules governing plea agreements in criminal cases.[27] Supreme Court Rule 402 governs guilty pleas entered by Illinois courts.[28] Rule 402(c) is based on Rule 11 of the Federal Rules of Criminal Procedure and provides that "[t]he court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea."[29]

Illinois courts hold that "[t]he rule requires that the judge determine that the conduct which the defendant admits constitutes the offense charged."[30] Because a guilty plea brings the criminal defendant within the State's power to punish, courts recognize that "[t]he purpose of setting forth a factual basis for the plea is to protect a defendant from pleading guilty to a charge he did not commit and which was beyond his acts."[31]

Criminal defendants who assert their innocence, nonetheless, do not have an absolute right to have the courts accept their guilty pleas.[32] There is no statutory right in Illinois to plead guilty in such circumstances, and Supreme Court Rule 402, which governs pleas of guilty, confers no authority on a trial court to accept a plea of guilty absent a factual basis shown in the record.[33] Where a strong factual basis showing a defendant's guilt exists, a court may accept such a plea without constitutional error.[34]

The Illinois Supreme Court has held "[a]lthough a record which shows an absence of a factual basis for a plea would reflect noncompliance with Rule 402(c), a court is not precluded from accepting a plea of guilty, in spite of a defendant's claim of innocence, if the record reflects a factual basis from which a jury could find the defendant guilty of the offense to which the plea was entered."[35]

B. The Effect of an *Alford* Plea on Subsequent Civil Actions

Few Illinois cases have addressed what effect, if any, an *Alford* plea would have on subsequent civil litigation, and no action for attorney malpractice has addressed this issue directly. However, the development of the courts' treatment of criminal convictions in subsequent civil litigation provides a framework for understanding the potential application of such convictions in the legal malpractice arena.

In *Bulfin v. Eli Lilly & Co.*,[36] the 1st District Appellate Court of Illinois held that a criminal defendant was collaterally estopped in a subsequent civil action from seeking damages based on his guilty plea in a prior criminal proceeding because his plea established that his incarceration resulted from his intentional conduct.[37] In that case, the plaintiff was indicted in Arizona for one count of second-degree murder and two counts of attempted murder in the first degree. During the pretrial proceedings in Arizona, the plaintiff indicated that he intended to raise the defenses of insanity, diminished capacity and involuntary intoxication.[38]

The plaintiff subsequently entered an *Alford* plea, pleading guilty to one count of manslaughter and two counts of aggravated assault. The plaintiff, while consenting to the entry of judgment on his plea without a trial declined to provide the Arizona court with any factual basis for the guilty plea, but maintained his innocence.[39] The prosecutor eventually presented the facts forming the basis for the plea, and the trial court accepted the plea and sentenced the plaintiff to seven and one half years in prison. The plaintiff did not file a direct appeal from his conviction and did not seek postconviction relief.[40]

The plaintiff subsequently filed a lawsuit in Illinois state court seeking recovery from the manufacturers of the drugs Xanex and Prozac, his physician and his health insurer. In that Illinois case, the plaintiff argued that the defendants' negligent acts caused him to suffer involuntary drug-induced intoxication, which in turn caused him – through no fault of his own – to shoot, wound and kill the victims in Arizona. The plaintiff further contended in the civil lawsuit that the defendants' negligent acts were the proximate cause of his conviction.[41]

The defendants sought dismissal of the civil action, arguing that the plaintiff was collaterally estopped from bringing suit because the defendants were not the proximate cause of his

incarceration; rather the plaintiff's knowing and intentional conduct in committing the crimes was the proximate cause of his incarceration. The trial court granted the defendants' motion, and the plaintiff appealed.[42]

The appellate court affirmed the trial court's dismissal, holding that the plaintiff was collaterally estopped from asserting that he had not knowingly committed the crimes in Arizona. In reaching this decision, the court reasoned that the plaintiff was, in fact, a defendant in the Arizona criminal case and that he had been convicted of his crimes. The court further found that the Arizona court, in accepting the plaintiff's *Alford* plea, necessarily had found that he acted knowingly or intentionally because such a mental state is an element of the crime for which he was convicted.[43] Furthermore, in applying Arizona law, the court noted that the plaintiff's guilty plea constituted a waiver of his previously indicated defense of involuntary intoxication. The court also reasoned:

> a person faced with the potential of being sentenced to a substantial term in prison has every incentive to interpose a defense that would constitute a complete defense to the crimes he is charged with committing. It would be an anomaly to suggest that, when plaintiff abandoned his defense, he did so out of a lack of incentive as opposed to a desire to substantially reduce his potential prison term.[44]

This reasoning, that a criminal defendant would have every incentive to assert every potential defense that would present a complete defense to the charges, is obvious on a certain level. Courts, however, have distinguished this reasoning by noting that a criminal defendant may not have the same incentive to litigate an issue at the sentencing phase of the criminal proceeding, as juxtaposed to the guilt phase.[45]

While *Bulfin* appeared to resolve definitively the issue of the collateral effect of *Alford* pleas on civil proceedings, the Supreme Court of Illinois subsequently rejected the reasoning of *Bulfin*. In *Talarico v. Dunlap*, the Supreme Court of Illinois held that the plaintiff's guilty plea would have no collateral effect on his subsequent claim for professional malpractice brought against his doctors.[46] In that case, the plaintiff was a second-year medical student at the Chicago College of Osteopathic Medicine. He suffered from severe acne for many years that had a negative impact on his social life and clinical work as a medical student. The plaintiff sought medical treatment for his condition from the defendant. The defendant prescribed Accutane for his condition, which had some side effects. The plaintiff used the Accutane for a three-month period in 1986.[47]

During that time, the plaintiff committed various crimes resulting in his arrest and charge of aggravated battery, aggravated unlawful restraint, armed violence and aggravated sexual abuse. At the criminal proceeding, the plaintiff entered into a plea agreement whereby he pleaded guilty to two counts of misdemeanor battery. He stipulated to the facts concerning his crimes, admitting to having committed the crimes intentionally and knowingly without legal justification.[48] Some time after the criminal proceedings were completed, the plaintiff received a pardon from the governor, which provided that the plaintiff was acquitted and discharged of and from all further imprisonment and restored to all the rights of citizenship that might have been forfeited by the conviction.[49]

Just as the plaintiff in *Bulfin*, Talarico filed a civil action in Illinois against his physician and the manufacturer of Accutane, alleging that the tortious conduct of the defendants caused him to commit the criminal activity for which he was charged.[50] The defendants moved for summary judgment on Talarico's complaint, arguing that his guilty plea in the criminal proceeding collaterally estopped him from claiming that Accutane had caused his criminal behavior.[51] The trial court granted summary judgment in favor of the defendants. The appellate court reversed the trial court's ruling. The Supreme Court of Illinois accepted review and affirmed the appellate court's decision, holding that the guilty plea and conviction entered by the plaintiff had no collateral effect in the subsequent civil proceeding.[52]

In reaching its decision, the court paradoxically held that the pardon did not negate the fact of his criminal conviction.[53] Rather, the court held that the plaintiff did not have an incentive to litigate the underlying issues.[54] In reaching this decision, the court reviewed the record from the plaintiff's criminal proceedings in detail. Based on this review, the court noted the following: (1) the plea was a compromise, (2) the plaintiff never conceded that the Accutane was not the contributing factor to the plaintiff's criminal conduct, (3) the plaintiff's defense counsel presented mitigating evidence to the trial court regarding Accutane, and (4) the plea offer was generous.[55]

In rejecting the reasoning of *Bulfin* as it related to negotiated pleas, the court held that the facts from the underlying proceeding, as well as the pardon, rebutted the presumption that the plaintiff's admissions on the issues of intent and knowledge were treated by the *Talarico* court with entire seriousness.[56] The court, however, noted that its holding did not establish a bright line rule with respect to plea negotiations in the context of collateral estoppel. Rather, the court counseled that application of the doctrine must be determined on a case-by-case basis, after consideration of all available factors.[57]

Justice McMorrow filed a spirited dissent in *Talarico*.[58] The dissent argued that the majority's opinion ignored the policy considerations set forth in *Bulfin*. Importantly, the dissent noted "the stakes for the people of this state, as well as the defendant, are too high in a criminal prosecution to assume that plea negotiations are anything less than a 'struggle to the finish.'"[59] The dissent further questioned in what sense Talarico's admissions in the criminal proceeding could be deemed a mere technicality. Rather, Justice McMorrow correctly stated, "such an admission goes to the heart of the issue of Talarico's criminal responsibility."[60] Finally, the dissent argued:

> By declining to impose collateral estoppel under the circumstances of this case, the majority allows a defendant to circumvent the finality of his guilty plea and to seek financial gain from third parties for his own criminal acts. Finality of judgments in negotiated plea criminal cases serves an important purpose in our criminal justice system. Once an accused who is represented by counsel decides to plead guilty to criminal charges and accept the consequences of his own conduct, he should not be able to use the civil court system to make a mockery out of the criminal proceedings by repudiating his guilty plea for pecuniary gain. The compensation that Talarico seeks in his civil suit is not limited to medical expenses or physical suffering from the side effects of Accutane. He seeks to be compensated for lost income and profit and lost educational advantage, presumably arising from Talarico's criminal conviction and the resulting impact it may have placed on his medical career. For these reasons, I find no principled basis on which to apply an exception to collateral estoppel in this case.[61]

This argument articulates both the policies underlying the estoppel doctrine in general (*i.e.*, the benefit afforded not only the litigants, but also society by the finality of judgments) and the generally held legal maxim that criminals should not be allowed to profit or offset their criminal liability through third parties.

Since *Talarico*, the Supreme Court of Illinois has had the opportunity to address the collateral effect a criminal conviction may have on subsequent civil proceedings, holding that the criminal conviction would collaterally estop the criminal defendant *qua* plaintiff from prevailing in a subsequent civil proceeding.[62]

In *Am. Family Mut. Ins. Co. v. Savickas*, defendant Michael Savickas was convicted of the murder of Thomas Vinichy.[63] The administrator of Vinichy's estate brought a civil action against Savickas for wrongful death and survival. Savickas's insurer, American Family Mutual Insurance Company, filed a declaratory judgment action against Savickas seeking a declaration that it had no obligation to defend or indemnify Savickas because the insurance policy at issue excused the insurer from providing coverage for bodily injuries expected or intended by the insured.[64] The trial court granted summary judgment in favor of the insurer. The appellate court reversed, holding that it was precluded from according estoppel effect to Savickas's criminal conviction based on *Thornton v. Paul*.[65] The Supreme Court of Illinois granted review.[66]

At issue on appeal was whether Savickas's criminal conviction would bar his claim for coverage based on the intentional acts exclusion contained in his insurance policy. In reversing the appellate court's decision, the Illinois Supreme Court noted that since its decision in *Thornton*, "'in the vast majority of jurisdictions . . . a criminal conviction now acts as a bar and collaterally estops the retrial of issues in a later civil trial that were actually litigated in the criminal trial.'"[67]

The court explained its position by citing the various public policy considerations militating in favor of according the estoppel effect to criminal convictions. The court explained:

> As the authorities have noted, the differences between civil and criminal litigation all favor the criminal defendant. *See*, Restatement (Second) of Judgments § 85, Comment *c* (1982); 40 U. Fla. L. Rev. at 490; 70 Geo. L.J. at 1089; *Zinger*, 336 Ark. at 428, 985 S.W.2d at 740. First and foremost, the State must prove the defendant guilty beyond a reasonable doubt by a unanimous verdict, a greater burden than that faced by any civil litigant. The defendant may remain silent and the State is prohibited from commenting on his silence. Moreover, the defendant has the right to counsel and to a record paid for by the State on appeal. *See, Zinger*, 336 Ark. at 429, 985 S.W.2d at 740-41, quoting *Teitelbaum Furs, Inc. v. Dominion Insurance Co.*, 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962); *Ohio Casualty Ins. Co. v. Clark*, 583 N.W.2d 377, 382 (N.D. 1998); Restatement (Second) of Judgments § 85, Comment *c* (1982); 47 Am. Jur. 2d Judgments § 732, at 209 (1995). These differences militate, if anything, in *favor* of according estoppel effect to criminal convictions because of the greater safeguards in favor of their reliability. It surely could not inspire faith in our judicial system to hold that a criminal conviction, upon which society may deprive a defendant of his liberty, or indeed his very life, is not worthy of the same preclusive effect as may be accorded an ordinary civil judgment.[68]

Focusing on the varying burdens of proof and persuasion found between the criminal and civil laws and the societal benefits conferred by affording preclusive effect to criminal judgments, the court appears to have abandoned the majority's reasoning of *Talarico*, adopting and echoing the dissenting opinion instead.[69]

In light of these considerations, the court held that the estoppel doctrine would operate to bar Savickas's claims for insurance coverage. The court reasoned that by finding him guilty of first-degree murder the jury necessarily found him either to have intended to kill the victim, or at least to have known that his acts created a strong probability of death or great bodily harm.[70] The court concluded that "[t]his finding establishes that he 'intended or expected' the result of his actions, the issue in the declaratory judgment action."[71]

II.

The elements of a legal malpractice action in Illinois are well established. The plaintiff must plead and prove: (1) the existence of an attorney-client relationship giving rise to a duty; (2) a negligent act or omission by the attorney in breach of that duty; (3) proximate cause – that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying case; and (4) actual damages that are recoverable in a legal malpractice action.[72] Additionally, Illinois courts hold that plaintiffs must prove their innocence before they may recover for their criminal defense attorney's malpractice.[73]

In *Kramer v. Dirksen*,[74] the court noted that Illinois follows the majority rule requiring not simply that plaintiffs would have been acquitted but for their criminal defense attorney's malpractice, but rather that they are actually innocent of the crime charged. In adopting this requirement, the court quoted from Levine v. Kling, applying Illinois law as follows:

> Tort law provides damages only for harms to the plaintiff's legally protected interests, *Restatement (Second) of Torts*, § 1, comment d, § 7(1) (1965), and the liberty of a guilty criminal is not one of them. The guilty criminal may be able to obtain an acquittal if he is skillfully represented, but he has no right to that result…and the law provides no relief if the 'right' is denied him.[75]

The court went on to hold that the plaintiff's conviction for reckless homicide acted as a collateral estoppel bar to his legal malpractice action.[76]

In *Moore v. Owens*,[77] another panel of the appellate court, apparently unaware of *Kramer*, independently arrived at the same holding that "require[s] the criminal defendant to prove his innocence in a later legal malpractice action against his criminal defense counsel."[78] There, the court upheld the dismissal of the plaintiff's action when his criminal conviction had been reversed on appeal but he entered into a plea agreement evidencing his willingness to let his conviction stand without retrial.[79]

The same rule was recognized as part of the holding in *Griffin v. Goldenhersh*,[80] where more recently the court held that the statute of limitations for legal malpractice did not commence until the plaintiff's criminal conviction was overturned on appeal.[81]

The Illinois Appellate Court thus far has recognized only one exception to the actual innocence rule – an act of betrayal by defense counsel. As such, Illinois courts hold "[the] 'actual innocence' rule will not be applied to situations where an attorney wilfully or intentionally breaches the fiduciary duties he owes to his criminal defense client."[82]

In *Morris v. Margulis*, the plaintiff was employed at Germania Bank. During his employment at the bank, problems developed in the bank's loan portfolio that led to the seizure of the bank by the Office of Thrift Supervision. The defendant attorneys, of the law firm Bryan Cave, had provided legal advice to Morris over a number of years, as well as to the bank, for which Morris was at various times president, CEO and an "inside" director. As a result of the events leading to the bank's failure, Morris was named as a criminal defendant facing charges of wire and mail fraud. Attorneys from the Bryan Cave firm attended the opening arguments of Morris's criminal case and had drafted a highly detailed list of proposed cross-examination questions containing detailed and specific information about Morris. These questions were provided to the prosecutors. Morris's defense counsel learned of these acts and served a subpoena on the defendant attorneys. Morris was subsequently convicted of his alleged crimes.

Morris brought an action for breach of fiduciary duty and legal malpractice against the attorneys from Bryan Cave. The defendant attorneys argued, among other grounds, that Morris's claim should be dismissed because Morris could not plead that he was innocent of his crimes. The trial court granted the defendant attorneys' motion. The appellate court reversed. In reaching this decision, the court reasoned:

> [W]e are not confronted with a traditional malpractice claim. If Morris had an attorney-client relationship with Bryan Cave, then this case is about *Betrayal!* To apply *Moore* to a situation where a criminal defense attorney intentionally works to insure his client's conviction would be unconscionable. (emphasis in the original).[83]

As of yet, no other exception to the actual innocence rule has been recognized by the Illinois courts.

A number of public policy considerations have been recognized for requiring a plaintiff to allege and prove actual innocence. In *Wiley v. County of San Diego*,[84] the California Supreme Court set forth a thoughtful analysis of public policy considerations underlying the rule. First, "[p]ermitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found [a] claim upon his iniquity, or to acquire property by his own crime."[85]

Second, "allowing civil recovery for convicts impermissibly shifts the responsibility for the crime away from the convict."[86] Plaintiffs convicted of an offense should bear sole responsibility for the consequences of their criminal acts; "[a]ny subsequent negligent conduct by a plaintiff's attorney is superseded by the greater culpability of the plaintiff's criminal conduct."[87]

"The fact that nonnegligent counsel 'could have done better' may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole."[88] Following the long established maxim that criminals should not profit from their crimes, courts hold "[o]nly an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss."[89]

Third, guilty defendants have an adequate remedy in the availability of postconviction relief. In making this important point, the court compared and contrasted the civil and criminal justice systems:

> In a civil malpractice action, the focus is solely on the defendant attorney's alleged error or omission; the plaintiff's conduct is irrelevant. (citation omitted). In the criminal malpractice context by contrast, a defendant's own criminal act remains the ultimate source of his predicament irrespective of counsel's subsequent negligence. Any harm suffered is *not* 'only because of' attorney error but principally due to the client's antecedent criminality. Thus, it is not at all difficult to defend a different rule because criminal prosecution takes place in a significantly different procedural context, 'and as a result the elements to sustain such a cause of action must likewise differ.' (citations omitted). [90]

The *Wiley* court observed that a panoply of constitutional procedural safeguards designed to protect the wrongly accused from conviction were not intended to confer a direct benefit outside the criminal justice system.[91] Instead, it noted:

> . . . the criminal justice system itself provides adequate redress for any error or omission . . . .
>
> * * * *
>
> If, for example, counsel failed to move to suppress unlawfully obtained evidence dispositive of guilt or to raise a claim of double jeopardy or to interpose a meritorious defense, the defendant would not be denied the opportunity to prove he would have prevailed on such a motion or defense and avoided conviction notwithstanding incontrovertible proof he committed a crime (citations omitted). An attorney's dereliction concerning sentencing matters and plea bargaining is likewise subject to postconviction challenge (citations omitted).
>
> In such instances of attorney negligence, postconviction relief will provide what competent representation should have afforded in the first instance: dismissal of the charges, a reduced sentence, an advantageous plea bargain. In the case of trial error, the remedy will be a new trial. If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties (citations omitted). Those courts analogizing to civil actions have not considered the implications of postconviction relief for ineffective assistance of counsel (citation omitted). Given that availability, it is inimical to sound public policy to afford a civil remedy, which in some cases would provide a further boon to defendants already evading just punishment on 'legal technicalities.'
>
> In contrast to postconviction relief available to a criminal defendant, a civil matter lost through an attorney's negligence is lost forever. The litigant has no recourse other than a malpractice claim. The superficial comparison between civil and criminal malpractice is also faulty in other crucial respects (citation omitted). Tort damages are in most cases fungible in the sense that the plaintiff seeks in a malpractice action exactly what was lost through counsel's negligence: money. 'Damages' in criminal malpractice are difficult to quantify under any

> circumstances. Calculating them when, for example, counsel's incompetence causes a longer sentence would be all the more perplexing.[92]

Finally, several courts have reasoned that if criminal attorneys were exposed to malpractice actions, they would practice "defensive" law to insulate their trial decisions – at an additional expenditure of scarce resources.[93]

Critics of the actual innocence rule characterize the rule as providing a "holiday" for criminal defense attorneys.[94] These criticisms of the rule assume, as a matter of faith, that the criminal defendants too often have lawyers who provide negligent legal representation.[95] The criticism of the actual innocence rule does not discuss the collateral effect a criminal conviction has on a subsequent civil action for professional malpractice.[96] In looking to criticism of the collateral estoppel doctrine as applied in the criminal malpractice setting, the criticism of the rule is twofold. First, the critics argue that application of the estoppel doctrine is fundamentally unfair when applied to a determination that the criminal defendant's claim of ineffective assistance of counsel is without merit.[97]

The second argument focuses on the collateral effect of the conviction itself.[98] These arguments focus on whether the criminal defendant can prove a legally cognizable harm and are tethered to the requirement that the criminal defendant obtain postconviction relief as a prerequisite to bringing a civil action against the criminal defense counsel.[99] Alternatively, these critics argue that a comparative negligence model be employed in the criminal malpractice case.[100] However, this model implicitly ignores the very public policy considerations underlying the actual innocence rule.

III.

Even in light of the reasoning of *Savickas*, *Talarico* remains the law in Illinois. As such, a tension exists between the principles advocated in *Talarico* with respect to the estoppel doctrine and the actual innocence rule as articulated by the Illinois courts. Simply put, the tension created by *Talarico* is whether the existence of an *Alford* plea eviscerates the actual innocence requirement.[101]

A. The Effect of *Talarico* on the Criminal Malpractice Action

The courts use the actual innocence rule, in part, to extend the date of accrual of criminal defendants' professional malpractice claims against prior defense counsel. In this vein, criminal defendants' claims of legal malpractice typically are found to have accrued only once the criminal defendant has obtained postconviction relief.[102]

In *Johnson v. Halloran*, the plaintiff brought an action for legal malpractice against several public defenders.[103] The plaintiff was charged with aggravated criminal sexual assault. Pretrial discovery disclosed a discrepancy in the results, providing the plaintiff with a potential defense to the charges brought against him. The defense counsel, rather than seeking to use the information, brought a motion in limine to prohibit the state from introducing any evidence from the suspect lab testing. The motion in limine was granted on September 4, 1992.[104]

Following a bench trial, the plaintiff was convicted and sentenced to 30 years imprisonment. The conviction was vacated on March 8, 1996, pursuant to a postconviction petition based on DNA test results. However, before his release, the plaintiff sent a letter to one of the defendant attorneys complaining about the representation he had received, specifically referencing the discrepancy in the lab results. The plaintiff also sent a letter to the ARDC dated March 3, 1993, complaining about his defense counsel in the criminal proceedings.[105]

The plaintiff filed his action for legal malpractice on November 22, 1996.[106] The defendants moved to dismiss the plaintiff's claims based on the statute of limitations. The trial court denied their motion. The defendants subsequently obtained summary judgment on other grounds and cross-appealed the trial court's denial of their motion to dismiss.[107]

On appeal, the defendants argued that the plaintiff's claim for malpractice had accrued in February or March of 1993, when the plaintiff wrote the defendants and the ARDC complaining of his defense counsel's representation during the criminal trial.[108] The appellate court rejected the defendants' argument, holding that the plaintiff's cause of action did not accrue until his criminal conviction was overturned on March 8, 1996. The court reasoned that until his conviction was overturned, each of the elements of the plaintiff's cause of action were present.[109]

As illustrated in *Johnson*,[110] the collateral effect of his conviction extended the statute of limitations date from 1993 to 1996, thereby allowing his claim for legal malpractice to proceed. However, if the reasoning of *Talarico* were to apply, and criminal defendants pled guilty to their crimes while maintaining their innocence, criminal defendants' claims for malpractice may very well accrue on the date of their convictions because the collateral effect of their guilt would not preclude their claims.

The situation created by *Talarico* not only places criminal defendants in a difficult position, but the criminal defense lawyers as well. On the one hand, the criminal defendants would be required to litigate their convictions on appeal, seeking either exoneration or other postconviction relief,

while at the same time litigating their claims against their criminal defense counsel for professional negligence. On the other hand, the criminal defense lawyers would be placed in the difficult position of arguing for postconviction relief, often premised on ineffective assistance of counsel, while at the same time they would be required to defend the criminal plaintiffs' claims of professional negligence.

As criticized by various courts, *Talarico* could lead criminal attorneys to practice "defensive" law to insulate their trial decisions. This tendency would lead to additional burdens on the criminal justice system, including the cost of defending the criminal action and the increased time necessary to resolve criminal matters. The effect also could reasonably lead to fewer negotiated plea agreements, further burdening the criminal justice system itself.

B. The Actual Innocence Rule as Derived From the Element of Proximate Causation

The potential negative impact of *Talarico* on criminal malpractice actions could be mitigated. While the actual innocence rule appears to be based solely on the estoppel doctrine,[111] analysis of the elements of a legal malpractice claim reveals that it is more properly construed as derived from the proximate cause element of the civil claim. An action for legal malpractice involves a "case within a case." No proximate cause or damages exist unless an attorney's negligence has caused the loss of the underlying case.[112] Hence, Illinois courts hold "no malpractice exists unless the plaintiff proves that, but for the attorney's negligence, plaintiff would have been successful in the underlying action."[113]

Under Illinois law, damages are never presumed in a legal malpractice case. The plaintiff bears the burden of pleading facts that demonstrate the loss of the underlying case was a proximate result of the attorney's claimed negligence and this loss of the underlying case resulted in damages to the plaintiff.[114] Legal malpractice complaints should be dismissed unless the plaintiffs plead sufficient facts to demonstrate that they would have prevailed on their claims but for the alleged negligence of their attorneys.[115]

Applying the "case-within-a-case" doctrine to criminal malpractice actions would necessarily require that the criminal defendants plead and prove that but for their attorneys' negligent conduct they would not have been convicted of their crimes.[116]

The issue in terms of burdens of proof becomes whether the criminal defendants, by a preponderance of the evidence, would not have been convicted of their crimes beyond a reasonable doubt. This burden can be restated in more customary terms as whether, by clear and convincing evidence, that but for attorney error,[117] no rational trier of fact could find proof of guilt of the criminal defendants beyond a reasonable doubt.[118]

This same standard is typically applied in substantive criminal actions where the criminal defendants seek postconviction relief.[119] In the substantive criminal realm, it is well established that the criminal defendants may present evidence of their actual innocence[120] for consideration by the courts.[121] However, this exception in the *habeas* process is predicated on the showing of a constitutional error in the trial proceedings leading up to the criminal defendants' convictions. For this reason, it is well established that federal *habeas* courts, for example, do not sit to correct errors of fact, but rather to ensure that individuals are not imprisoned in violation of the Constitution.[122]

Thus, claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal *habeas* relief absent an independent constitutional violation occurring in the course of the underlying state criminal proceedings.[123] These same principles articulated by the courts within the context of substantive criminal law also set forth the elements of the criminal defendants' claims for professional malpractice against criminal defense counsel. Just as in the substantive criminal context, the criminal defendants must assert a constitutional error on the part of the criminal defense counsel.[124] Only then may the criminal defendants plead their actual innocence in an effort to obtain the relief sought.

Applying these concepts to the case-within-a-case doctrine, it becomes evident that the actual innocence rule is nothing more than the articulation of the element of proximate causation readily accepted in the legal malpractice arena. The rule itself therefore is not a creature of the estoppel doctrine. Using this reasoning, the estoppel doctrine articulated in *Talarico* would have no effect on the application of the actual innocence rule. Because the rule arises from an element of the criminal defendant's *prima facie* case for professional malpractice, plaintiffs would still be barred from proceeding in the absence of their ability to plead and prove their actual innocence, without resorting to the estoppel doctrine.[125]

C. The Broad Policy Considerations Articulated in *Savickas* Support the Application of the Estoppel Doctrine in the Criminal Malpractice Action

While the actual innocence rule can be seen as derived from the judicial treatment of proximate causation in the legal malpractice realm, the estoppel doctrine has been cited in numerous court decisions as a justification and basis for the rule.[126] For these reasons, it is important to acknowledge that the estoppel doctrine cannot be ignored in its entirety. Look-

ing to the broad public policy considerations underlying the actual innocence rule and the policy considerations cited by the *Savickas* court, an argument can be made that the estoppel doctrine should be applied in the criminal malpractice setting.

As discussed previously, the court focused on the policy considerations implicit in the varying burdens of proof required between criminal actions and civil actions and concluded that it would be folly to refuse to give preclusive effect to a criminal conviction in subsequent litigation. In applying the actual innocence rule in the criminal malpractice arena, courts have articulated the same policy considerations.

Even more strongly, the public policy considerations underlying the actual innocence rule have stated further that the constitutional protections afforded the criminal defendants place them in a better position than the civil clients. Under the civil system, clients who lose their cause of action often loses their claim for all time. Conversely, the constitutional protections afforded the criminal defendants afford the opportunity to correct errors and allow for dismissal of the charges. These policy considerations support the application of the estoppel doctrine in criminal malpractice cases.

Conclusion

The overwhelming majority of criminal matters are resolved by guilty pleas entered by the criminal defendants. Furthermore, under certain circumstances, Illinois courts recognize *Alford* pleas. As such, the criminal defendants may enter their guilty pleas while maintaining innocence of their crimes under certain circumstances. The question becomes whether the pleas of guilt coupled with the claims of innocence should have any collateral effect on subsequent actions for criminal malpractice. Should the criminal defendants' protestations of innocence operate to accelerate the accrual of the legal malpractice action? In other words, should the pleas allow claims for criminal malpractice in light of the actual innocence rule?

In criminal malpractice actions, the criminal defendants *qua* plaintiffs must prove their actual innocence. This rule of law articulated by the courts is premised on many different principles of public policy, tort law concepts and in some instances, the estoppel doctrine. By refusing to afford a collateral effect to *Alford* pleas, courts create tension between the policies underlying the *Alford* pleas, the estoppel doctrine and the actual innocence rule.

This tension arises if the actual innocence rule is conceived as derived from the estoppel doctrine. However, the rule is properly conceived as an element of the criminal defendants' *prima facie* claims for professional malpractice. The proximate cause rule, referred to as the case-within-a-case doctrine, requires that legal malpractice plaintiffs plead and prove that but for the defendant attorneys' tortious conduct, the plaintiffs would have prevailed in their underlying cases.

In examining substantive criminal law, looking through the prism of the proximate cause rules governing legal malpractice actions reveals the genesis of the actual innocence rule. As a creature of proximate cause, actual innocence is an element of plaintiffs' claims for malpractice that cannot be overcome by decisions declining to afford a collateral effect to the *Alford* plea.

As an element of the criminal defendants' claims, the burden of pleading and proving actual innocence remains in a criminal malpractice case, even under the holding of *Talarico*. For these reasons, courts adopting the traditional and well-accepted proximate causation analysis in the legal malpractice setting should apply the actual innocence rule to bar the criminal defendants' claims for professional malpractice.

Endnotes

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

[2] *Id.*

[3] *Am. Family Mut. Ins. Co. v. Savickas*, 193 Ill. 2d 378, 739 N.E.2d 445, 250 Ill. Dec. 682 (2000); *Merchants Mut. Ins. Co. v. Arzillo*, 472 N.Y.S.2d 97, 98 A.D.2d 495 (1984); *Cumberland Pharmacy, Inc. v. Blum*, 415 N.Y.S.2d 898, 69 A.D.2d 903 (1979).

[4] 177 Ill. 2d 185, 685 N.E.2d 325, 226 Ill. Dec. 222 (1997).

[5] *Glenn v. Aiken*, 409 Mass. 699, 569 N.E.2d 783 (Mass. 1991) (defendant must show innocence); *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498 (Mo. Ct. App. 1985) (same); *Wiley v. County of San Diego*, 19 Cal. 4th 532, 966 P.2d 983, 79 Cal. Rptr. 2d 672 (Cal. 1998) (same); *Moore v. Owens*, 298 Ill. App. 3d 672, 698 N.E.2d 707, 232 Ill. Dec. 616 (5th Dist. 1998) (same); *Carmel v. Lunney*, 70 N.Y.2d 169, 511 N.E.2d 1126, 518 N.Y.S.2d 605 (N.Y. 1987) (defendant must allege colorable claim of innocence); *Morgano v. Smith*, 110 Nev. 1025, 879 P.2d 735 (Nev. 1994) (same); *Harris v. Bowe*, 178 Wis. 2d 862, 505 N.W.2d 159 (Wis. Ct. App. 1993) (defendant must prove innocence, which guilty plea precludes); *Levine v. Kling*, 123 F.3d 580 (7th Cir. 1997) (innocence must be shown when defendant claims he would have been acquitted but for malpractice, but not when defendant challenges failure to press defense such as double jeopardy); *Shaw v. State*, 861 P.2d 566 (Alaska 1993) (lawyer may raise client's guilt as defense).

[6] *Kramer v. Dirksen*, 296 Ill. App. 3d 819, 822, 695 N.E.2d 1288, 1290, 231 Ill. Dec. 169 (1st Dist. 1998); *Moore v. Owens*, 298 Ill. App. 3d 672, 698 N.E.2d 707, 232 Ill. Dec. 616 (5th Dist. 1998).

[7] *Moore*, 298 Ill. App. 3d at 674.

[8] *Griffin v. Goldenhersh*, 323 Ill. App. 3d 398, 404-05, 752 N.E.2d 1232, 257 Ill. Dec. 52 (5th Dist. 2001).

[9] *Kramer*, 296 Ill. App. 3d at 822.

[10] *See, infra.*, Notes 13-71 and accompanying text.

[11] *See, infra*., Notes 72-100 and accompanying text.

[12] *See, infra.*, Notes 101-125 and accompanying text.

[13] 400 U.S. 25, 37-38 (1970).

[14] *Id.* at 27.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 28.

[19] *Id.*

[20] *Id.* at 29-31.

[21] *Id.* at 30.

[22] *Id.* at 31.

[23] *Id.* at 34-36.

[24] *Id.* at 37.

[25] Curtis J. Shipley, Note: *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063 (May 1987).

[26] *People v. Barker*, 83 Ill. 2d 319, 332, 415 N.E.2d 404, 407 Ill. Dec. 399 (1980), *cert. denied*, 452 U.S. 964 (1981).

[27] *Id.* at 329.

[28] Ill. Sup. Ct. R. 402 (2004).

[29] Fed. R. Crim. P. 11 (2004).

[30] *People v. Warship*, 59 Ill. 2d 125, 130, 319 N.E.2d 507 (1974).

[31] *People v. Martin*, 58 Ill. App. 3d 633, 637, 374 N.E.2d 1012, 16 Ill. Dec. 237 (1st Dist. 1978) (citing *McCarthy v. United States*, 394 U.S. 459, 467 (1968); *People v. Quick*, 24 Ill. App. 3d 286, 289, 320 N.E.2d 335, 338 (5th Dist. 1974)).

[32] *People v. Ottomanelli*, 153 Ill. App. 3d 565, 569, 505 N.E.2d 1328, 1331, 106 Ill. Dec. 537 (2nd Dist. 1987).

[33] *Id.*

[34] *Id.* (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)).

[35] *People v. Barker*, 83 Ill. 2d 319, 333, 415 N.E.2d 404, 407 Ill. Dec. 399 (1980), *cert. denied*, 452 U.S. 964 (1981).

[36] 244 Ill. App. 3d 785, 614 N.E.2d 403, 185 Ill. Dec. 269 (1st Dist. 1993), *overruled by Talarico v. Dunlap*, 177 Ill. 2d 185, 685 N.E.2d 325, 226 Ill. Dec. 222 (1997).

[37] *Bulfin,* 244 Ill. App. 3d at 791.

[38] *Id.*

[39] *Id.* at 786-87.

[40] *Id.* at 787.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 789-90.

[44] *Id.* at 791.

[45] *See, e.g.*, *Appley v. West*, 832 F.2d 1021, 1026 (7th Cir. 1987) (holding that because the amount of restitution in a RICO proceeding was not a material fact of the indictment on which the guilty plea was based, no estoppel effect would be afforded in a subsequent civil action).

[46] 177 Ill. 2d 185, 685 N.E.2d 325, 226 Ill. Dec. 222 (1997).

[47] *Id.* at 187-88.

[48] *Id.* at 188.

[49] *Id.*

[50] *Id.* at 189.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 190 (holding "a pardon merely releases an inmate from custody and supervision. (citation omitted) Since the very essence of a pardon is forgiveness or remission of penalty, assessed on the basis of the conviction of the offender, a pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof. citation omitted").

[54] *Id.* at 191 (holding "For collateral estoppel to apply, a decision on the issue must have been necessary for the judgment in the first litigation, and the person to be bound must have actually litigated the issue in the first suit").

[55] *Id.* at 196-97. The court further found that Talarico's pardon should be considered in determining whether an estoppel should operate to bar his civil claims. *Id.* It is difficult to determine, however, the exact influence the pardon had on the court's decision.

[56] *Id.* at 198.

[57] *Id.* at 200.

[58] *Id.* at 200-07.

[59] *Id.* at 202.

[60] *Id.* at 203.

[61] *Id.* at 206.

[62] *Am. Family Mut. Ins. Co. v. Savickas*, 193 Ill. 2d 378, 739 N.E.2d 445, 250 Ill. Dec. 682 (2000).

[63] While *Savickas* does not concern the effect of a guilty plea, the reasoning of the court is nonetheless instructive as to the collateral effect that the criminal conviction would have on subsequent civil litigation.

[64] *Id.* at 380.

[65] 74 Ill. 2d 132, 384 N.E.2d 335, 23 Ill. Dec. 541 (1978).

[66] *Savickas*, 193 Ill. 2d at 382.

[67] *Id.* at 384 (quoting *Zinger v. Terrell*, 336 Ark. 423, 428, 985 S.W.2d 737, 740 (Ark. 1999)).

[68] *Id*. at 385-86.

[69] While seemingly abandoning the application of the facts of *Talarico*, the court nonetheless cites favorably the discussion of collateral estoppel set forth in *Talarico*. *See, Id.*

[70] *Id.* at 389 (citing 720 ILCS 5/9-1(a)(1), (a)(2) (West 1992)).

[71] *Id.* at 388.

[72] *Metrick v. Chatz*, 266 Ill. App. 3d 649, 652, 639 N.E.2d 198, 203 Ill. Dec. 159 (1st Dist. 1994); *Claire Assoc. v. Pontikes*, 151 Ill. App. 3d 116, 122, 502 N.E.2d 1186, 104 Ill. Dec. 526 (1st Dist. 1986).

[73] *Kramer v. Dirksen*, 296 Ill. App. 3d 819, 822, 695 N.E.2d 1288, 231 Ill. Dec. 169 (1st Dist. 1998); *Griffin v. Goldenhersh*, 323 Ill. App. 3d 398, 404-05, 752 N.E.2d 1232, 257 Ill. Dec. 52 (5th Dist. 2001); *Moore v. Owens*, 298 Ill. App. 3d 672, 674, 698 N.E.2d 707, 232 Ill. Dec. 616 (5th Dist. 1998).

[74] 296 Ill. App. 3d at 821-22.

[75] 123 F.3d 580, 582 (7th Cir. 1997).

[76] *Kramer*, 296 Ill. App. 3d at 822-24.

[77] 298 Ill. App. 3d at 673.

[78] *Id.* at 674.

[79] *Id.* at 675.

[80] 323 Ill. App. 3d at 404-05.

[81] *Id.* at 406. *See also*, *Woidtke v. St. Clair County*, 335 F.3d 558, 564-65 (7th Cir. 2003) (applying Illinois law) ("Both Illinois courts and this court have stressed that a successful malpractice action requires that the plaintiff affirmatively establish that he is innocent of the crime charged").

[82] *Morris v. Margulis*, 307 Ill. App. 3d 1024, 1039, 718 N.E.2d 709, 721, 241 Ill. Dec. 138 (5th Dist. 1999), *rev'd on other grounds* 197 Ill. 2d 28, 754 N.E.2d 314, 257 Ill. Dec. 656 (2001).

[83] *Id.*, 718 N.E.2d at 720.

[84] 19 Cal. 4th 532, 536-37, 966 P.2d 983, 985, 79 Cal. Rptr. 2d 672, 674 (1998).

[85] *Id.* at 537.

[86] *Id.*, quoting *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497 (1995).

[87] *Id.* at 538, quoting *Shaw v. State, Dept. of Admin.,* 861 P.2d 566, 572 (Alaska 1993).

[88] *Id.* at 539.

[89] *Id.*

[90] *Id.* at 540.

[91] *Id.* at 541.

[92] *Id.* at 542-43.

[93] *Id.* at 544-45. *See also*, *Canaan v. Bartee*, 276 Kan. 116, 126, 72 P.3d 911, 918 (2003); *Gibson v. Trant*, 58 S.W.3d 103, 115-16 (Tenn. 2001).

[94] *See,* Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 Ga. L. Rev. 1251 (Summer 2003).

[95] *Id.* at 1254; *see also*, Deborah L. Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785 (April 2001).

[96] Duncan, *supra* note 94, at 1265-92.

[97] *Id*. at 1271.

[98] *Id.* at 1282-83.

[99] *Id*. at 1283.

[100] *Id.* at 1293-96.

[101] By conceiving of innocence as collaterally arising from the criminal conviction, other issues from the criminal malpractice arena are directly impacted by the rule set forth in *Talarico* including claim accrual. *See, Woidtke v. St. Clair County*, 335 F.3d 558 (7th Cir. 2003). While the appellate court in *Kramer v. Dirksen* (296 Ill. App. 3d 819, 822, 695 N.E.2d 1288, 231 Ill. Dec. 169 (1st Dist. 1998)) directly recognized *Talarico* and its effect on the criminal malpractice action, the court did not address the question presented in this article, distinguishing *Talarico* because the plaintiff in *Kramer* was convicted of his crimes at trial.

[102] *See, Johnson v. Halloran*, 312 Ill. App. 3d 695, 728 N.E.2d 490, 245 Ill. Dec. 408 (1st Dist. 2000), *aff'd on other grounds*, 194 Ill. 2d 493, 742 N.E.2d 741, 252 Ill. Dec. 203 (2000); *Lucey v. Law Offices of Pretzel & Stouffer*, 301 Ill. App. 3d 349, 703 N.E.2d 473, 234 Ill. Dec. 612 (1st Dist. 1998).

[103] 312 Ill. App. 3d at 696.

[104] *Id.* at 696-97.

[105] *Id*. at 697.

[106] *Id*. at 696.

[107] *Id*.

[108] *Id*. at 700.

[109] *Id*.

[110] *Johnson* illustrates the use of the estoppel doctrine to benefit the criminal defendants *qua* plaintiffs in the legal malpractice setting.

[111] *Kramer v. Dirksen*, 296 Ill. App. 3d 819, 822, 695 N.E.2d 1288, 1290, 231 Ill. Dec. 169 (1st Dist. 1998).

[112] *Claire Assoc. v. Pontikes*, 151 Ill. App. 3d 116, 122, 502 N.E.2d 1186, 104 Ill. Dec. 526 (1st Dist. 1986).

[113] *Sharpenter v. Lynch*, 233 Ill. App. 3d 319, 323, 599 N.E.2d 464, 467, 174 Ill. Dec. 680 (2nd Dist. 1992).

[114] *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525-26, 648 N.E.2d 285, 288, 207 Ill. Dec. 829 (1st Dist. 1995).

[115] *Sheppard v. Krol*, 218 Ill. App. 3d 254, 578 N.E.2d 212, 214, 161 Ill. Dec. 85 (1st Dist. 1991); *Claire Assoc.*, 151 Ill. App. 3d at 122.

[116] *See also*, Restatement (Third), The Law Governing Lawyers § 53 cmt. d (ALI 2000).

[117] In terms of addressing attorney error, the errors must give rise to "constitutional errors" prejudicing the criminal defendants' cases and not mere harmless error by the defendant-attorneys. *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984).

[118] *See,* William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 389 (April 1995).

[119] *See, Sawyer v. Whitley,* 505 U.S. 333 (1992).

[120] *Swidler & Berlin v. United States*, 524 U.S. 399, 413 (1998) ("[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer"), quoting *United States v. Nixon*, 418 U.S. 683, 708-09 (1974).

[121] *Herrera v. Collins*, 506 U.S. 390, 398 (1993).

[122] *See, e.g.*, *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923).

[123] *Herrera*, 506 U.S. at 398.

[124] *Griffin v. Goldenhersh*, 323 Ill. App. 3d 398, 752 N.E.2d 1232, 257 Ill. Dec. 52 (5th Dist. 2001).

[125] The United States Supreme Court has also set forth the requirement of proof of actual innocence in § 1983 damages actions by inmates falling at the margins of the *habeas* process, referred to as the "favorable termination" analysis. *See, Heck v. Humphrey*, 512 U.S. 477, 487 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648 (1997).

[126] *Woidtke v. St. Claire County*, 355 F.3d 558 (7th Cir. 3003);*Canaan v. Bartee*, 276 Kan. 116, 72 P.3d 911 (Kan. 2003); *Coscia v. McKenna & Cuneo*, 25 Cal. 4th 1194, 25 P. 2d 670, 1087 Cal. Rptr. 2d 471 (Cal. 2001); *Wiley v. County of San Diego*, 19 Cal. 4th 532, 966 P.2d 983, 79 Cal. Rptr. 672 (Cal. 1998); *Labovitz v. Feinberg*, 47 Mass. App. Ct. 306, 713 N.E.2d 379 (Mass. App. Ct. 1999); *Gray v. Weinstein*, 2004 Conn. Super. LEXIS 3788 *1 (Conn. .Super. Ct. Dec. 22, 2004).