EVIDENCE AND PRACTICE TIPS

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The Laws of Intestate Succession Permit Only Descendants to Share in the Proceeds of a Wrongful Death Suit Where the Decedent Had No Spouse but Left Surviving Siblings

Morris v. William L. Dawson Nursing Center, Inc., Docket No. 86708, ___ Ill. 2d ___, ___ N.E.2d. ___, ___ Ill. Dec. ___ , 1999 WL 740193 (Opinion filed Sept. 23, 1999)

The Wrongful Death Act, 740 ILCS 180/2, sets forth who may bring suit for wrongful death and for whose benefit such an action may be maintained. The Act provides:

> Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person . . . . 740 ILCS 180/2 (West 1998)

The Act also delineates how the proceeds of a wrongful death suit are to be apportioned among the eligible beneficiaries:

> The amount recovered in any such action shall be distributed by the court in which the cause is heard or, in the case of an agreed settlement, by the circuit court, to each of the surviving spouse and next of kin of such deceased person in the proportion, as determined by the court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person. 740 ILCS 180/2 (West 1998)

The Wrongful Death Act does not define the statutory phrase "next of kin."

In *Morris*, the trial court apportioned the settlement of claims arising out of the death of the decedent, allocating 60 percent of the total proceeds to settlement of the personal injury survival action and the remaining 40 percent for settlement of the wrongful death claim. The decedent left surviving two adult grandchildren and seven adult brothers and sisters. The trial court distributed the personal injury settlement proceeds to the two grandchildren. With respect to the wrongful death proceeds, it determined the percentage of dependency of each of the grandchildren and the brothers and sisters.

One grandchild appealed, claiming that only the decedent's grandchildren and not her surviving brothers and sisters were the decedent's "next of kin" and that only the grandchildren were entitled to any recovery under the Wrongful Death Act.

Section 2-1(b) of the Illinois Probate Act, 755 ILCS 5/2-1(b), provides that the estate of a decedent leaving no surviving spouse but who is survived by descendants is to be distributed among those descendants *per stirpes*. Therefore, under the laws of intestate succession, the decedent's grandchildren should share in the decedent's estate to the exclusion of the decedent's brothers and sisters.

In *Morris,* the court reviewed amendments to the Wrongful Death Act and determined that the General Assembly still intended that the laws of intestacy were the means for identifying the members of the class of eligible beneficiaries under the Wrongful Death Act. The distribution to the members of that class was to be determined based upon the extent and relative dependency of each member of that class.

Based upon the *Morris* decision, evidence of the loss of society sustained by persons who are not the "next of kin" of the decedent is irrelevant in any wrongful death suit.

A Parent of a Decedent May Not Maintain a Separate Cause of Action Under the Wrongful Death Act When the Decedent Leaves a Surviving Spouse but No Children

Mio v. Alberto-Culver Co., 306 Ill. App. 3d 822, 715 N.E.2d 309, 239 Ill. Dec. 864 (2nd Dist. 1999)

The decedent, Catherine Mio Anderson, was married to Craig Anderson for only 26 days before she died in an airplane crash. She had no children. The only asset of her estate was the claim for her death. Her surviving husband filed a wrongful death lawsuit. That suit did not seek any recovery on behalf of the decedent's surviving mother.

After the decedent's husband had filed suit, the decedent's mother alleged that she was eligible to be appointed special administrator of decedent's estate. She commenced her own wrongful death and survival actions against the defendants, and she asked to be appointed special administrator. The mother alleged that she was "a beneficiary entitled to recover under the Wrongful Death Act."

The defendants moved to dismiss the suit filed by the mother, alleging that the mother was not the decedent's "next of kin" under the Probate Act, 755 ILCS 5/1-1 *et seq*.

The appellate court held that because the decedent left no children, her husband was her only "next of kin." Therefore, only the husband could bring suit under the Act to the exclusion of all others, including the mother. The Probate Act permits only the surviving spouse and next of kin to maintain a cause of action, and therefore, the decedent's mother lacked standing to sue. The plaintiff's mother in this suit argued that the Wrongful Death Act granted a right to recovery to both the surviving spouse *and* the next of kin. The plaintiff based her argument upon a decision of the Second District Appellate Court in *Johnson v. Village of Libertyville*, 150 Ill. App. 3d 971, 502 N.E.2d 474, 104 Ill. Dec. 211 (2nd Dist. 1986). In *Johnson*, the court stated that:

> Where there are no children of the decedent surviving [citation omitted], the parents of the decedent are considered to be the next of kin. Since decedent had no children, the petitioners, as decedent's parents, are her next of kin within the meaning of this statute. *Johnson*, 150 Ill. App. 3d at 973-74.

The *Mio* court rejected the *Johnson* court's notion that, where there is a surviving spouse but no children, the surviving parent or parents of a decedent are considered to be next of kin under the Act. The court construed the Probate Act to determine which of the decedent's relatives have
standing to institute a wrongful death action. Section 2-1 of the Probate Act states:

> The intestate real and personal estate of a resident decedent . . . descends and shall be distributed as follows:
>
> * * *
>
> (c) If there is a surviving spouse but no descendent of the decedent: the entire estate to the surviving spouse. 755 ILCS 5/2—1 (West 1996).

Therefore, where there is a surviving spouse but no descendent of the decedent, only the surviving spouse is qualified to be appointed special administrator for purposes of prosecuting a wrongful death action.

Proper Use of Special Interrogatories

Niewold v. Fry, 306 Ill. App. 3d 735, 714 N.E.2d 1082,
239 Ill. Dec. 785 (2nd Dist. 1999)

This suit arose out of a head-on collision between the plaintiffs' and defendant's vehicles. The defendant was driving eastbound when his vehicle crossed the centerline and hit the plaintiffs' vehicle. The defendant claimed that a deer jumped in front of his vehicle and that the subsequent collision with the deer caused his car to cross the centerline and hit the plaintiffs' car.

The court submitted a special interrogatory which read as follows:

Did [defendant] fail to use reasonable care at the time of the accident?

At trial, the jury returned a defense verdict and answered the special interrogatory in favor of the defendant and against the plaintiffs. The evidence at trial was conflicting.

The plaintiffs claimed that the trial court had committed reversible error when it allowed the defendant to propound a special interrogatory to the jury which did not include all of the elements of negligence, proximate cause, and injuries resulting therefrom.

The plaintiffs relied upon *Lundquist v. Nickels*, 238 Ill. App. 3d 410, 435, 605 N.E.2d 1373, 179 Ill. Dec. 150 (1st Dist. 1992), *appeal denied*, 151 Ill. 2d 565, 616 N.E.2d 336, 186 Ill. Dec. 383 (1993), which held that to be in proper form, a special interrogatory must include all of the elements of the claim, and absent such elements, the special interrogatory was not in proper form and should be refused.

In contrast to *Lundquist*, the Appellate Court for the Fourth District in *Snyder v. Curran Township*, 281 Ill. App. 3d 56, 59, 666 N.E.2d 818, 217 Ill. Dec. 149 (4th Dist. 1996), *appeal denied*, 168 Ill. 2d 625, 671 N.E.2d 743, 219 Ill. Dec. 576 (1996), held that a special interrogatory is in proper form if it: (1) relates to an ultimate question of fact upon which the parties' rights depend, and (2) an answer responsive to the special interrogatory might be inconsistent with the general verdict. The court in *Snyder* further held that a special interrogatory is in proper form if: (1) it contains a single question; (2) it relates to an ultimate issue of material fact so that a response to the interrogatory would control over an inconsistent general verdict; (3) its terms are simple, understandable, and unambiguous so that a jury would know what it was deciding; and (4) it is not repetitive, confusing or misleading.

The appellate court in *Niewold* rejected the reasoning of *Lundquist* and adopted the reasoning of the court in *Snyder*. It therefore held that a special interrogatory need not contain all of the elements necessary for a finding of guilt in order to be in proper form.

A special interrogatory should use the same terms set forth in the trial court's instructions to the jury. *Slavin v. Saltzman*, 286 Ill. App. 3d 392, 400, 643 N.E.2d 1383, 205 Ill. Dec. 776 (2nd Dist. 1994), *overruled on other grounds*; *Zuder v. Gibson*, 288 Ill. App. 3d 329, 680 N.E.2d 483, 223 Ill. Dec. 750 (2nd Dist. 1997).

The plaintiff claimed that the special interrogatory was also improper because it did not use the term "ordinary care" and rather used the term "reasonable care." The jury instructions defined "ordinary care" in terms of what a "reasonably careful person" would do. The court found that the special interrogatory used the same terms as those set forth in the trial court's jury instructions, and it was not misleading.

Duty of General Contractor to Independent Contractor's Employee on Construction Site

Rangel v. Brookhaven Constructors, Inc., Docket No. 1-99-1031, ___ Ill. App. 3d ___, ___ N.E.2d ___, __ Ill. Dec. ___, 1999 WL 771356 (1st Dist. 1999, opinion filed Sept. 29, 1999)

Brookhaven, the general contractor, entered into contracts with several subcontractors, including plaintiff's employer, Drywall Services, Inc., for rehabilitation work on a building. According to its contract with Brookhaven, Drywall was to provide all labor, materials, tools, plant, equipment, competent full-time supervision and services, and "do all things necessary for the proper performance, installation, construction and completion" of certain work on the project.

One of Drywall's employees, plaintiff Rangel, reported to the job site and was given a work assignment by his supervisor, another employee of Drywall. He was told to work on a scaffold which Drywall had constructed two days previously. He was told by his supervisor that he should step on the braces that extended out from the scaffold when it was necessary to maneuver drywall into place, and he did as instructed. One of the braces gave way, and he fell to the concrete floor below and suffered injuries.

Rangel brought suit against Brookhaven, the general contractor, relying upon section 414 of the Restatement (Second) of Torts, which provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to *exercise his control* with reasonable care. (Emphasis added.) Restatement (Second) of Torts § 414 (1965).

The "retained control" concept is explained in comment (c) to section 414, which states:

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it *does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.* (Emphasis added.) Restatement (Second) of Torts § 414, comment c, at 388 (1965).

The subcontract agreement between Brookhaven and Drywall provided:

> The General Contractor shall have the right to exercise complete supervision and control over the work to be done by the Subcontractor, but such supervision and control shall not in any way limit the obligations of the Subcontractor.

The evidence showed that Drywall was entirely free to perform the work in its own way. The evidence showed the Brookhaven never directed the "operative details" of the work to be performed by Drywall and plaintiff Rangel. Drywall supplied the scaffold, a Drywall supervisor directed the plaintiff to utilize the braces when necessary to position the drywall, and there was nothing to suggest that the general contractor "knew or had notice of the hazardous method employed."

The court held that even where the employer or general contractor retains the right to inspect the work done, or has changes to the specifications and plans, insures that safety instructions are observed and the work is done in a safe manner, no liability will be imposed on the employer or general contractor unless the evidence shows that the employer or general contractor retained control over the "incidental aspects of the independent contractor's work." It relied on *Fris v. Personal Products Co.,* 255 Ill. App. 3d 916, 627 N.E.2d 1265, 194 Ill. Dec. 623 (3d Dist. 1994), *appeal denied*, 157 Ill. 2d 499, 642 N.E.2d 1277, 205 Ill. Dec. 160 (1994).

Rangel provides a clear and well-written explanation of section 414 of the Restatement and the evidence necessary for the plaintiff to reach the jury in post-Structural Work Act claims against general contractors and premises owners for injuries to employees of subcontractors.

ABOUT THE AUTHOR:

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