



## 25th Annual Claims Handling Seminars

FIGHTING THE STRATEGIC BATTLE TO WIN THE WAR

Thursday, May 20, 2010 – Bloomington, Illinois

# WHAT CAN THE PLAINTIFF RECOVER? DAMAGES UPDATE

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## **WHAT CAN THE PLAINTIFF RECOVER? DAMAGES UPDATE**

### **I. NON-ECONOMIC DAMAGES CAPS ON MEDICAL MALPRACTICE CASES ARE UNCONSTITUTIONAL**

*Lebron v. Gottlieb Memorial Hosp.*, Nos. 105741, 105745, 2010 WL 375190 (Feb. 4, 2010) – In *Lebron*, the Supreme Court of Illinois held that the caps on non-economic damages in medical malpractice actions set forth in section 2-1706.5 of the Illinois Code of Civil Procedure violates the separation of powers clause of the Illinois Constitution and are therefore, void. Under the Act that created the section, Public Act 94-677 (effective August 25, 2005), ("Act") non-economic damages were limited to \$1,000,000 against a hospital (and its hospital personnel or hospital affiliates) and \$500,000 against a physician. The Act further provided that in awarding damages in a medical malpractice case, the finder of fact shall render verdicts with a specific award of damages for economic loss, if any, and a specific award for non-economic loss, if any. The court in *Lebron* stated that the crux of its analysis was whether the statute unduly infringed upon the inherent power of the judiciary to correct jury verdicts through remittur.

The court stated that its decision in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997) guided its analysis. In *Best*, the Supreme Court of Illinois considered constitutional challenges to several provisions of Public Act 89-7 (effective March 9, 1995), commonly referred to as the Tort Reform Act of 1995. Among the challenged provisions in that Act was a \$500,000 cap on non-economic damages. The statute defined "non-economic damages" as damages that were intangible, including but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society.

Because Public Act 94-67 contained an inseverability clause, the court held the Act to be invalid in its entirety. Other sections of the Act that were invalidated include section 310, which subjected medical malpractice insurance carriers to greater oversight in reporting requirements; section 315, which modified certain aspects of the disciplinary process for physicians and created an internet-based system for providing public access to information regarding matters such as physician criminal and disciplinary histories, whether a physician's hospital privileges have been revoked or involuntarily restricted and any medical malpractice judgments or arbitration awards which may have been entered against a physician; section 330, which made various changes to the requirement set forth in section 2-622 (requirement of report of a reviewing healthcare professional in a medical malpractice action be attached to the complaint), a provision rendering inadmissible any expression of grief, apology, or explanation made by a healthcare provider to a patient or patient's representative within 72 hours of when the provider knew or should have known of the potential cause of an adverse outcome, and revised expert witness standards; section 340, which expressly included retired physicians within the Good Samaritan Act; and a Sorry Works! Pilot Program Act, which was intended to assess whether prompt apologies by hospitals and physicians for errors in patient care accompanied by prompt

offers of fair settlement had an effect on the costs the hospitals and physicians ultimately expended on healing art malpractice claims.

## **II. AN AFFIRMATIVE PLEADING MAY BE REQUIRED TO PRESERVE A SET-OFF OF SETTLEMENT CREDIT**

### **A. *Thornton v. Garcini***

In *Thornton v. Garcini*, No. 107028, 2009 WL 3471065 (Oct. 29, 2009), the Supreme Court of Illinois found that the defendant had forfeited his claim for a set-off because he had failed to file a pleading. The defendant physician raised his right to a set-off for the first time in his post-trial motion.

In this case, the plaintiff's son, Jason Anthony, was born prematurely in a breech position, at an approximate age of 24 weeks gestation. During childbirth, Jason's head became stuck. The infant died when the nurses at the hospital were unable to complete the delivery. The defendant physician, Dr. Garcini, arrived at the hospital an hour and ten minutes later. Plaintiff's suit contained wrongful death and survival claims, and also included an individual claim for intentional infliction of emotion distress, claiming she suffered emotional distress from the delivery.

At the first trial, the jury found in favor of Dr. Garcini and the nurses on the wrongful death and survival claims and the intentional infliction of emotional distress claim. On the intentional infliction of emotional distress claim against the hospital, the jury found for plaintiff and awarded her \$175,000. Plaintiff filed a post-trial motion against all the defendants. During the pendency of the motion, the hospital and nurses entered into a release of claims and satisfaction of judgment upon payment of \$175,000. The trial court denied the post-trial motion against Dr. Garcini. The plaintiff appealed only the judgment in favor of Dr. Garcini. The Appellate Court reversed and granted plaintiff a new trial.

At the second trial, the plaintiff testified about her emotional state from laying in a hospital bed for over an hour with the infant partially delivered. Plaintiff amended her complaint to conform to the pleadings and submitted a negligent infliction of emotional distress claim to the jury. The intentional infliction of emotional distress claim was not submitted to the jury. The jury found in favor of Dr. Garcini on the wrongful death and survival claims and for plaintiff on the negligent infliction of emotional distress claim. The jury awarded plaintiff \$700,000 in damages. Dr. Garcini filed a post-trial motion, which included a request for set-off of the settlement paid by the hospital.

Section 2-608 of the Illinois Code of Civil Procedure addresses when a claim by a defendant against a plaintiff must be raised. It provides, in relevant part: (a) any claim by one or more defendants against one or more plaintiffs, or against one or more co-defendants, whether in the nature of set-off, recoupment, cross-claim or otherwise, and whether in tort or contract for

liquidated or unliquidated damages, or for other relief, may be pleaded as a cross-claim in any action, and when so pleaded shall be called a counterclaim; (b) the counterclaim shall be part of the answer, and shall be designated as a counterclaim. According to the court in *Thornton*, section 2-608 provides that a set-off claim may be raised as a cross-claim in the defendant's answer. The court cited to its recent decision in *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560, 905 N.E.2d 839, 329 Ill. Dec. 1 (2009), in which it recognized that although the pleading requirements of section 2-608 are framed as permissive, a party cannot be afforded relief without a corresponding pleading. In *MidAmerica*, the court explained that the defendant is required to raise a claim for a set-off in the pleadings to give the plaintiff notice and an opportunity to defend against the claim.

The *Thornton* court went on to hold that the trial court did not err in denying the defendant's request for a set-off when the defendant failed to raise the issue in the pleadings because the plaintiff did not have notice or opportunity to defend against the set-off claim until after the completion of the second trial.

#### **B. *Thornton v. Garcini* – Update**

#### **Opinion Modified Upon Denial of Rehearing April 22, 2010 – This Type of Set-Off May Be Raised at Any Time**

The Supreme Court held in its original opinion that the defendant forfeited his set-off claim by raising it for the first time in his post-trial motion. Upon consideration of defendant's petition for rehearing, the court was persuaded that a modification of the court's opinion was necessary. According to the defendant, a defendant's request for set-off to reflect amounts paid by settling defendants is in the nature of an enforcement action and a set-off that is not a counterclaim to be evaluated by the trier of fact may be brought at any time. In *Star Charters v. Figueroa*, 192 Ill. 2d 47, 48-49 (2000), the court held that a motion for set-off may be brought after trial, as it is in the nature of an enforcement action and does not arise as a result of the trial.

The court explained that the term set-off is used in two distinct ways. A set-off can refer to a situation when a defendant has a distinct cause of action against the same plaintiff who filed suit against him. With this type of set-off, the claim must be raised in the pleadings. A set-off can also refer to a defendant's request for a reduction of the damage award because a third party has already compensated the plaintiff for the same injury. This occurs, for example, when a co-defendant who would be liable for contribution settles with the plaintiff. This type of set-off may be raised at any time.

The court found that in this case, the defendant's set-off request constituted an enforcement action rather than a counterclaim. Therefore, the defendant's claim for set-off was not forfeited simply because it was not raised in the pleadings. The court went on to find, however, that the trial court properly denied defendant's request for set-off because the judgment against the defendant in the second trial was only for Toni Thornton's claim of negligent infliction of emotional distress and the settlement with the hospital was not merely for damages sought by

Toni Thornton, individually, but also for damages sought by Toni Thornton, as special administrator of the estate of Jason Ebner, deceased. In addition, it released a variety of claims against the hospital as well as against the individual nurses who had not been found liable prior to settlement. The court rejected the defendant's argument that he need not establish the proper allocation of the settlement proceeds. The court found that given the multiple parties, injuries, and claims settled in plaintiff's agreement with the hospital, the allocation of the full settlement proceeds to set-off defendant's liability for only the negligent infliction of emotional distress could not be justified in the absence of any supporting proof.

### **III. \$100,000 VERDICT IN A WRONGFUL DEATH CASE NOT MANIFESTLY INADEQUATE**

In *Dobyns v. Chung*, No. 5-07-0568, 2010 WL 1055196 (5th Dist. Mar. 19, 2010), the plaintiff argued that the circuit court erred in denying his post-trial motion for an additur or, in the alternative, a new trial, because the damages awarded by the jury were manifestly inadequate and contrary to the evidence. The court stated in a variety of contexts, courts of review in this state have held that damages for loss of society are difficult to estimate exactly, and no standard of value applies; rather, the assessment is committed to the sound discretion of the jury as to what is reasonable under the circumstances of any given case guided by its observations, experience, and sense of fairness. The plaintiff argued that the damages awarded did not comport with verdicts in similar cases within the State of Illinois.

In reaching its finding, the Appellate Court, Fifth District found there was no concrete evidence in the record of any specific loss of money or other economic loss resulting from the death of Angela Dobyns. Along with the evidence of the close familial ties between Ms. Dobyns (she was approximately 35 years old at the time of her death), her widower, and her teenage sons, as well as their feelings of grief and loss, the jury was presented with a host of evidence regarding Ms. Dobyns' physical and mental health.

Ms. Dobyns' death was caused by respiratory arrest as a result of the combination of drugs in her system. She had been treating with her physician, Dr. Chung, for back pain for several years. The plaintiff alleged that defendant physician Dr. Chung was negligent in failing to properly evaluate and treat Ms. Dobyns' pain syndrome, prescribing inappropriate types and amounts of pain and other medications, and in failing to provide adequate information and warnings regarding the prescribed medications and the risk of potential harm from taking those medications. The jury also entered a finding of contributory negligence on the part of the deceased, so the amount of the \$100,000 award was reduced by 50 percent. Based on the number of pills in her prescription bottles, she had taken more pills than what Dr. Chung had prescribed. An autopsy was performed and the number of missing pills was consistent with the supertherapeutic levels found in her body.

*The new recovery for grief, sorrow or bereavement suffered by the surviving spouse or next-of-kin under the Wrongful Death Act that was effective May 31, 2007, did not apply in this case (Ms. Dobyns died in 2004). The jury verdict may have been higher if it had applied.*

#### **IV. DAMAGES FOR INCONVENIENCE AND DISCOMFORT TOO NEBULOUS BASED ON FACTS OF CASE**

In *Mayer v. Chicago Mechanical Services, Inc.*, No. 2-09-0239, 2010 WL 989033 (2d Dist. Mar. 16, 2010), the issue was whether plaintiffs, who alleged that a defective heating and air conditioning system furnished and installed by one of the defendants caused mold growth that rendered their homes temporarily uninhabitable, were entitled to compensation for discomfort and inconvenience associated with being displaced from their homes. The Appellate Court, Second District stated that while it left open the possibility that damages for discomfort and inconvenience might be available under appropriate circumstances, it held that those damages were not available as they were too nebulous.

The defendant argued that damages for inconvenience and discomfort were not recoverable as a matter of law and that theory of damages had not been properly pled or disclosed during discovery. The plaintiffs argued that they were entitled to compensation for the discomfort and inconvenience of being forced to leave their homes to escape the dangerous condition caused by the defective heating and air conditioning system. The court found that the question of whether damages may be awarded for the inconvenience and discomfort associated with temporary housing arrangements appeared to be a question of first impression in Illinois.

The court looked to *VanBrocklin v. Gudema*, 50 Ill. App. 2d 20, 199 N.E.2d 457 (2d Dist. 1964). In *VanBrocklin*, manure from the defendant's barn contaminated the plaintiffs' well. The plaintiffs were required to get drinking water from a filling station and take sponge baths for eight months. The issue considered by the court was whether the law permitted recovery for the elements of inconvenience and discomfort entailed in the temporary loss of a water supply caused by the negligence of another. The *VanBrocklin* court quoted *Gempp v. Bassham*, 60 Ill. App. 84 (3d Dist. 1894), for the proposition that where the injuries to physical discomfort results in deprivation of the comfortable enjoyments of a home, the measure of damages is not the depreciation in the rental value of the premises occupied by the plaintiff, but compensation for such physical discomfort and deprivation of the use and comforts of the home.

The *Mayer* court stated that a rule strictly limiting damages for inconvenience and discomfort to cases where plaintiffs remain in their home or on their land might produce arbitrary results. The court found that in this case, the plaintiffs largely ignored the practical effects of being displaced from their homes, and instead focused principally on the abstract sense of satisfaction associated with one's home. In essence, the plaintiffs' theory of damages was rooted more in the sentimental attachment to their homes than in the tangible comforts and convenience of living in those homes.

At oral argument, the plaintiffs' attorney contended that one's home is a unique environment for which there can be no substitute and that damages for discomfort and inconvenience are appropriate no matter how luxurious the alternative quarters might be. By virtue of this reasoning, one could seek compensation for displacement without regard to his or her actual living conditions. The court found that they could not subscribe to such a sweeping view, and

found that the type of harm for which plaintiffs sought recovery was simply too nebulous to serve as a basis for an award of damages.

## **V. PUNITIVE DAMAGES DO NOT SURVIVE DEATH**

In *Marston v. Walgreen Co.*, 389 Ill. App. 3d 337, 907 N.E.2d 851, 330 Ill. Dec. 38 (1st Dist. 2009), the court addressed whether punitive damages for personal injuries can survive death of the injured party. Defendant Walgreen admitted liability in providing the wrong prescription to the 77-year-old decedent. The plaintiff alleged that the decedent suffered injury and ultimately death as a result of the prescription. The prescription was written for an anti-gout medicine called Allopurinol. The pharmacist gave the decedent a bottle of pills labeled Allopurinol, but containing Glipizide pills, a medication used to treat diabetes by lowering a person's blood sugar. The jury awarded \$6,351,107 in compensatory damages and \$25 million in punitive damages.

The Appellate Court, First District stated that the Supreme Court of Illinois has consistently held that, absent specific statutory authority or very strong equitable reasons, punitive damages are not permitted in Illinois in an action under the Survival Act (735 ILCS 5/27-6) or as part of a common law action for wrongful death. The court looked at *Froud v. Celotex Corp.*, 98 Ill. 2d 324, 456 N.E.2d 131, 74 Ill. Dec. 629 (1983). The *Froud* court considered whether the holding of *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. App. 2d 31, 330 N.E.2d 509 (1975) should be overturned. The *Froud* court very clearly reaffirmed *Mattyasovszky* noting that the legislature had taken up and rejected a bill which would have amended the Survival Act to permit punitive damages to survive the death of the injured party. The *Marston* court found it to be clear that the exception noted in *Mattyasovszky* for punitive damages contemplated cases where there were strong equitable considerations in which a party would otherwise be left without a remedy. The *Marston* court stated that in the case before it, it was also clear that the plaintiff was entitled to recover compensatory damages, and thus did not find that an equitable resolution or remedy was required. The narrow exception referenced in *Mattyasovszky* was inapplicable to the facts.

The *Mattyasovszky* case cited two cases from other jurisdictions which allowed punitive damages where a party would otherwise be left without a remedy: *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970) (although Federal Maritime Law permitted punitive damages for deaths resulting from unseaworthy vessels, when the death occurred within the territorial waters of a state which did not allow such damages, the party would otherwise be left without a remedy); *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222 (1972) (common law cause of action for wrongful death recognized where minor plaintiffs would have otherwise been barred from recovery because of the statute of limitations for minors).

The *Marston* court stated that actions for punitive damages will not survive the death unless the legislature specifically authorizes such an action or there are strong equitable reasons for allowing the recovery of punitive damages. An ample compensatory damages award does not fit the narrow exceptions to the principle.

The court next considered whether the award of compensatory damages in the amount of \$6,351,107 was excessive. The decedent was given the prescription on January 1, 2001. He was found unresponsive on January 2, 2001, and hospitalized until January 22, 2001. While there, he suffered acute kidney failure, persistent hypoglycemia, decreased mental functioning and pneumonia. Because of his kidney problems, he was placed on dialysis, which was to last until the end of his life. During the remaining 22 months of his life, the decedent required full-time care. He underwent dialysis regularly, was hospitalized for 136 days, placed in a rehabilitation facility, had multiple surgeries, and required a feeding tube. He suffered a stroke, had episodes of aspiration pneumonia, and became severely depressed. On November 8, 2002, he directed that his dialysis be discontinued, telling a friend he could no longer face life. He died on November 11, 2002.

The court stated that unless a jury verdict is so large as to clearly establish it was the result of passion or prejudice, it should not be disturbed. The court found that there was ample evidence of the grievous and ultimately deadly condition into which the decedent was placed through the negligence and misconduct of Walgreen and its pharmacist. The amount awarded by the jury matched what the plaintiff requested. The court stated that when confronted with a man whose entire life was put into a downward spiral, which likely resulted in his decision to cease dialysis treatment, and ultimately led to his death, it borders on futility to compare the amounts awarded to other victims or their representative in unrelated cases. The court noted, however, that similar amounts of compensatory damages have been awarded in other cases.

## **VI. PLAINTIFF ENTITLED TO RECOVER VALUE OF SICK TIME LOST DESPITE HIS EMPLOYER'S ALLOWANCE OF SICK TIME**

*Cummings v. Jha*, 394 Ill. App. 3d 439, 915 N.E.2d 908, 333 Ill. Dec. 837 (5th Dist. 2009) – In this case, the defendant, Dr. Lakshmanan, performed a laparoscopic cholecystectomy on the plaintiff. The plaintiff suffered a common postoperative complication, a bile leak, which went undiagnosed by Dr. Lakshmanan and the defendant, Dr. Jha. The jury returned a verdict in favor of the plaintiff and awarded damages in the amount of \$210,000.

An issue on appeal was whether Dr. Jha was entitled to a new trial because the circuit court abused its discretion by instructing the jury that the plaintiffs may recover damages for the value of the sick time that Cummings used. Dr. Jha argued that the previously accumulated sick time had no intrinsic value and that Cummins' accumulation of as much sick time as his employer allows squarely refutes the notion that his use of sick time represented any loss at all, let alone a compensable one. The plaintiff countered that Illinois law clearly provided that the plaintiff, who was required to use a benefit to replace earnings he would have earned, but for his absence from work by reason of the tortious conduct of Dr. Jha, was entitled to recover the value of that benefit.

In Illinois, a plaintiff is entitled to recover the full value of time lost from work, without regard to benefits received from his employer. The justification for this rule is that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the insured party and third persons.

In *Hoobler v. Voelpel*, 246 Ill. App. 69 (2d Dist. 1927), the plaintiff was away from work approximately six weeks. The plaintiff received pay from his employer for the time he was unable to work because he was allotted time for vacation and sick leave. The plaintiff exhausted six weeks of his accumulated sick leave and vacation periods. The court concluded that the employer's payment for sick time to the plaintiff could not operate to reduce the damages recoverable against the tortfeasor. In *Boden v. Crawford*, 196 Ill. App. 3d 71, 552 N.E.2d 1287, 142 Ill. Dec. 546 (4th Dist. 1990), the plaintiff suffered an injury to his back and lost time from work. Pursuant to the terms of his employment, he was entitled to a disability leave and received a payment of more than 50 percent of the previous year's salary. The Appellate Court held that the plaintiff was entitled to recover the full value of the time he lost from work, without regard to the disability benefit received by the plaintiff from his employer.

The evidence at the trial demonstrated that Cummings' hourly rate in 1999 was \$25.49, and that he used 280 hours of sick leave. The jury awarded him \$7,000 as the reasonable value of benefits lost ( $280.00 \times \$25.49 = \$7,137.20$ ). Pursuant to Illinois law, Cummings was entitled to recover the value of the time lost from his employment, despite his employer's allowance of sick time.

## **VII. JURY VERDICT ATTRIBUTING 50 PERCENT OF LIABILITY FOR INJURIES TO EACH OF TWO TORTFEASORS WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE**

In *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 909 N.E.2d 353, 330 Ill. Dec. 640 (1st Dist. 2009), the plaintiff's complaint alleged that she was injured in two separate car accidents that occurred three months apart. The first accident involved defendant Campbell and the second accident involved defendant Walters. The jury found both defendants responsible for an amount totaling approximately \$518,000 in damages. Before the jury returned a verdict, one of the defendants settled for \$150,000. The trial court entered a judgment of one-half the total verdict against the remaining defendant.

Plaintiff argued on appeal that the trial court erred in awarding plaintiff only 50 percent of the \$518,000 verdict from the non-settling defendant. Rather, the non-settling defendant – based on a theory of joint and several liability – should have been responsible for the entire verdict, less only the \$150,000 received from the settling defendant. The *Sakellariadis* court rejected plaintiff's theory of recovery and affirmed the ruling of the trial court.

The evidence at trial showed plaintiff was treated for injuries to her eyes, shoulder, spine, and knee. Plaintiff testified that the airbag in her car deployed in the first accident, causing burns to her eyes. She went to the hospital for her injuries, which included pain in her upper back.

Plaintiff was treated and released. After the second accident, when her car's airbag again deployed, plaintiff first went home, but later went to the hospital after experiencing leg and back pain. She later had surgery on her shoulder, knee, lower back, and eyes. She said, with all sincerity, it was the second accident that really "killed her."

In the jury instruction conference, the attorney for the defendant involved in the second accident argued that the defendants were consecutive and not concurrent tortfeasors. He maintained that there were two separate accidents and that the court should tender to the jury a separate verdict form for each accident. Plaintiff's counsel argued plaintiff's injuries were indivisible. The trial court called the action a novel case, noting plaintiff had pre-existing conditions before the first accident. The trial court observed that after the first accident, plaintiff still had the original pre-existing conditions plus injuries from the first accident that had become pre-existing conditions. The alleged injuries in the second accident were added to these pre-existing conditions.

The trial court tendered to the jury the verdict form proposed by plaintiff. The form required jurors to assign monetary amounts and percentages of responsibility to each defendant in 14 categories of past or future injuries. For example, one category was the reasonable expense of the medical care, treatment, and services received for back surgery. To the right of this category was a blank for the jury to fill in a dollar amount. To the right of this, were two blanks for the jury to fill in percentages of responsibility for Campbell and Walters. Walters' counsel objected to the verdict form, arguing it provided no option for finding Walters not guilty. The jury returned an itemized verdict of approximately of \$518,000, attributing 50 percent of the liability to each defendant. The jury award included \$200,000 for past and future pain and suffering, \$102,000 for the reasonable expense of future medical care, and \$100,000 for future disability. The jury awarded lesser amounts for past and future back surgery, future neck surgery, and other past medical care. The trial court then entered its judgment against Walters for 50 percent of the verdict. The court concluded that plaintiff had consolidated two separate, distinct torts into a single complaint for purposes of judicial expediency. The court further concluded that the jury had determined which accident caused which injuries and had apportioned the damages accordingly.

Plaintiff argued she should have received the entire jury verdict from Walters, minus only \$150,000 for Campbell's settlement, because each defendant was jointly and severally liable for the entire verdict. She maintained that defendants were successive or joint tortfeasors who caused her indivisible injuries.

The court considered whether the evidence supported plaintiff's contention that defendants were joint tortfeasors who were jointly and severally liable for the entire amount of the verdict. The common law doctrine of joint and several liability holds joint tortfeasors responsible for the plaintiff's entire injury, allowing plaintiff to pursue all, some, or one of the tortfeasors responsible for his injury for the full amount of the damages. Where two or more persons, under circumstances creating primary accountability, directly produce a single, indivisible injury by their concurrent negligence, they are jointly and severally liable even though there is no

common duty, common design, or concerted action. The existence of a single, indivisible injury is necessary to establish that multiple defendants are jointly and severally liable.

The court stated that *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 593 N.E.2d 522, 170 Ill. Dec. 633 (1992), is a seminal case on indivisible injury and joint liability. Where defendants, albeit sharing no common purpose or duty, and failing to act in concert, nevertheless acted concurrently to produce an indivisible injury to the plaintiff, courts found them to be joint tortfeasors. The court in *Burke* adopted the test of jointness in section 433(a) of the Restatement which provides that damages are to be apportioned among two or more causes under these limited circumstances: (a) when each injury is distinct from the other injuries; or (b) when there is a reasonable way of deciding each tortfeasor's contribution to a single harm. An injury cannot be apportioned among two or more tortfeasors unless it fits into category (a) or (b). The explanatory notes to this section of the Restatement recognize that certain kinds of harm cannot be divided in a logical, reasonable, or practical way. On the other hand, the Restatement acknowledges that one defendant should not be liable for the distinct harm inflicted by another defendant merely because it would be *difficult* to apportion the damages. If a plaintiff's injuries can be apportioned among multiple tortfeasors, then the tortfeasors are not jointly and severally liable. The plaintiff's allegation that she was injured twice on the same part of her body will not transform two injuries into one. Where a party negligently aggravates a pre-existing injury caused by another's negligence, he has committed a tort that is separate and distinct from the tort committed by the first wrongdoer and the injuries inflicted by each are separate and distinct injuries.

The plaintiff in this case alleged she suffered injuries in each accident. The testimony supported the conclusion that the injuries in the first accident were aggravated by the second accident. The court found that the jury's verdict attributing 50 percent of the liability for plaintiff's injuries to each defendant was not against the manifest weight of the evidence.

### **VIII. JURY VERDICT WAS IRRECONCILABLY INCONSISTENT**

In *Stamp v. Sylvan*, 391 Ill. App. 3d 117, 906 N.E.2d 1222, 329 Ill. Dec. 611 (1st Dist. 2009), following a motor vehicle accident, which occurred on May 24, 1996, the defendant admitted liability and the case was tried on the issue of damages. The plaintiff testified at trial that after the impact, she experienced extreme, lower back spasms, a headache and stiffness in her neck. A neurologist testified as the defendant's medical expert. He testified that based upon a reasonable degree of medical certainty, the plaintiff's soft tissue injury to her neck would have healed by approximately six months.

The plaintiff testified at trial that she still experienced pain and continued to see a chiropractor two times a week due to her continued pain. She testified that she could walk and participate in low impact exercise, but that she could not dance, ride horseback, or play tennis. She also testified that she could not lift heavy packages or stand for long periods of time. Plaintiff testified that she also suffered from digestive problems and experienced pain in her low

abdominal area, which occasionally prevented her from walking. She testified that she was restricted in what she could eat.

The jury returned a verdict for plaintiff for past medical expenses in the amount of \$4,348. The jury awarded \$0 in damages for pain and suffering and \$0 in damages for loss of a normal life. Plaintiff filed a motion for a new trial on damages. The circuit court granted plaintiff's motion for a new trial, finding the objective evidence supported an award for pain and suffering and loss of normal life for a period of six months after the automobile accident. The plaintiff appealed, contending the court erred by restricting the amount of damages that could be presented at the new trial.

The Supreme Court of Illinois has held that a jury's award of damages is entitled to substantial deference by the court and a trial court can upset a jury's award of damages only if it finds that: (1) the jury ignored a proven element of damages; (2) the verdict resulted from passion or prejudice; or (3) the award bore no reasonable relationship to the loss sustained. Plaintiff argued that she was properly awarded a new trial on damages because the jury's verdict awarding nothing for pain and suffering or for loss of a normal life ignored the objective proof of injury presented at trial.

The *Stamp* court found that the uncontroverted evidence was that the plaintiff suffered a soft tissue injury to her neck and back that would heal in approximately six months. An award of \$0 damages for pain and suffering for a six-month period, along with an award of medical expenses for the same six-month period, ignored a proven element of damages the jury was not free to disregard. Therefore, the court found that the circuit court's determination granting a new damages trial was not an abuse of discretion where the jury's verdict was irreconcilably inconsistent.

The plaintiff introduced into evidence a summary of medical bills which was broken down into the following three components: (1) medical bills for the six months after the accident – \$4,348; (2) medical bills after six months, if the jury felt the injury lasted longer than six months – \$22,936.50; and (3) if the jury found the Crohn's disease was related to the accident, then an additional \$28,423.33 in medical bills.

The *Stamp* court stated that the jury obviously found plaintiff's injuries and damages only lasted for six months and awarded plaintiff medical expenses of \$4,348. The only inconsistency in the verdict, therefore, was the failure to award pain and suffering, and loss of a normal life damages for a period of six months. The court went on to find that the circuit court's remand was appropriately limited to the period of six months from the date of plaintiff's accident where there was sufficient evidence presented at trial to support an award of damages pertaining to pain and suffering and loss of a normal life for that time period.

## **IX. JURY VERDICT WAS NOT INCONSISTENT**

In *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 899 N.E.2d 1115, 326 Ill. Dec. 464 (1st Dist. 2008), the defendant struck a motor vehicle occupied by the plaintiffs (Marie, age 15, and Joseph, age 17). The plaintiffs brought the action in the Circuit Court of Cook County seeking to recover damages for injuries sustained as a result of the accident. Defendant admitted negligence prior to trial. The jury rendered verdicts in favor of the plaintiffs. The jury awarded Marie a total of \$30,100, allocated as follows: \$24,100 for past and future medical expenses, \$6,000 for past and future pain and suffering, and \$0 for disability experienced and reasonably certain to be experienced in the future, and \$0 for loss of a normal life experienced and reasonably certain to be experienced in the future. The jury awarded Joseph a total of \$9,000, allocated as follows: \$7,000 for past and future medical expenses, \$2,000 for past and future pain and suffering, \$0 for disability experienced and reasonably certain to be experienced in the future, and \$0 for loss of a normal life experienced and reasonably certain to be experienced in the future.

Plaintiffs filed a post-trial motion for a new trial, arguing that the jury's verdicts were against the manifest weight of the evidence. Plaintiffs argued that the jury verdicts were internally inconsistent and inadequate. In the alternative, plaintiffs' post-trial motion sought an additur. The trial court denied plaintiffs' post-trial motion and plaintiffs appealed.

Marie testified that she began to feel pain in her neck and back on the way to the hospital. She testified that her neck pain eventually subsided, but that she continued to have low back pain in the lumbar area. She testified that her lower back pain was still present at the time of trial, six years after the accident. She testified she was eventually able to return to dancing, but that she was unable to do backbends, or bend forward. Bending her back forward or backward would result in a radiating pain down her right leg. She testified that it was hard to put on socks or shoes or tie her shoes. She could not clean the bathtub. She could not take out the garbage. She could not lift anything heavy. She testified that as a result of her injury, she could never have the dance career that she always desired. Joseph was an avid go-cart racer before the accident. After the accident, he could not get out of the go-cart under his own power. He had trouble getting up in the morning and would "walk like an old man" for several minutes until his back warmed up. The testimony at trial on behalf of Joseph at the time was primarily from his father, Charles, because Joseph was away at college in Arizona. His father could not testify as to his son's limitations or current pain level at the time of trial.

Prior to the Supreme Court of Illinois' decision in *Snover v. McGraw*, 172 Ill. 2d 438, 667 N.E.2d 1310, 217 Ill. Dec. 734 (1996), a line of Illinois cases held that an award for medical expenses without an award for pain and suffering and/or disability required reversal *per se*. In *Snover*, the Supreme Court of Illinois examined that line of cases and held that a jury may award pain related medical expenses and, at the same time, may also determine that the evidence of pain and suffering was insufficient to support a monetary award. After rejecting the reversal *per se* rule, the court held that an award of medical expenses alone could still be inconsistent. In any event, it was clear that the reversal *per se* rule with regard to charges of internally inconsistent jury verdicts has been rejected in the state. The court stated that it could overturn a jury's award

only if the jury ignored an element of damages, acted out of passion or prejudice, or made an award not reasonably related to loss. When evaluating this reasonable relationship, the court must keep in mind that disability and loss of normal life are separate and distinct from either past and future medical expenses or pain and suffering. Unlike economic damages, such as loss of earnings, a disability or loss of normal life award is not as readily calculable in money and jurors must draw on their real life experience in making an award.

The *Poliszczyk* court stated that the evidence in the record permitted the jury to conclude that Marie was not disabled and would not be in the future; likewise, the evidence in the record permitted the jury to award Marie nothing for loss of a normal life. Where evidence is contradicted, or where it is merely based on the subjective testimony of a plaintiff, a jury is free to disbelieve it. Although both Marie and her father testified about the restrictions in Marie's normal life, the jury was free to make its own credibility determinations and reject or accept their testimony. As part of its credibility determination, the jury could have considered the inconsistency between Marie's and Charles' testimony at trial. For instance, with regard to time taken off from dancing, Marie testified that she took two years off from dancing, where Charles testified that Marie took one year off.

The jury was also free to draw reasonable inferences about Joseph's past and future disability and loss of a normal life. The court noted that Joseph's testimony was not included in the record.

#### **X. UPDATE FROM MAY 2009 SEMINAR**

*Clark v. Children's Memorial Hosp.*, 391 Ill. App. 3d 321, 907 N.E.2d 49, 329 Ill. Dec. 730 (1st Dist. 2009) – The appellate decision allowing parents in a wrongful birth suit to now include recovery for the reasonable value of caretaking services for a severely disabled child beyond the age of majority has been appealed to the Supreme Court of Illinois. The Supreme Court of Illinois has granted leave to appeal. The Supreme Court of Illinois' decision is pending.





## Renee L. Monfort

- Of Counsel

Renee joined the Urbana office in December 2009. She brought with her an established professional liability practice and will be an asset to our statewide professional liability practice group. Prior to joining Heyl Royster she was a partner with the law firm of Dobbins, Fraker, Tennant, Joy & Perlstein for almost 20 years, where she trained under the tutelage of Don and Todd Tennant before assuming responsibility for overseeing that firm's professional liability practice group.

Renee's civil litigation practice focuses on the defense of healthcare providers and other professionals (attorneys, accountants, real estate agents, etc.) in professional liability litigation. In addition to representing clients in healthcare related litigation, she also provides general counsel to individual health care professionals, multi-specialty clinics and hospitals on a wide range of administrative, policy and risk management matters. The scope of her practice also includes representation of clients in administrative proceedings before the Illinois Department of Financial and Professional Regulation and the Illinois Human Rights Commission.

Renee is an Adjunct Professor at the University of Illinois College of Law where she teaches Trial Advocacy. She is AV Rated by Martindale-Hubbell and has been designated as one of the "Leading Lawyers" in Illinois by the *Chicago Daily Law Bulletin*.

She has made presentations and participated in programs in a variety of settings. She has lectured for healthcare organizations, insurance companies and educational institutions.

### Public Speaking

- "How to Avoid Litigation When Communicating with Patients and Documenting"  
Christie Clinic 2009
- "Litigation and Risk Management"  
Hudson Healthcare Risk Management Seminar 2008
- "Medical and Legal Risk Mitigation Strategies for Ureter and Bladder Injury and Prevention"  
Panel Member for Risk Management Presentation 2007
- "How to Keep Your Metatarsals from Touching Your Tonsils – The Importance of

Communication in Healthcare"  
Risk Management Seminar 2003

- "A Glimpse at Medical Malpractice"  
Legal Issues in Medicine Seminar sponsored by University of Illinois at Chicago, College of Medicine 2003
- "Winning the Malpractice War"  
Risk Management Seminar 2002
- "Taking and Defending Depositions"  
Illinois Defense Counsel Rookie Seminar 2001

### Professional Recognition

- Martindale-Hubbell AV Rated
- Selected as a *Leading Lawyer* in Illinois. Only five percent of lawyers in the state are named as *Leading Lawyers*.

### Professional Associations

- Defense Research Institute (Alternative Dispute Resolution Committee, 2000-Present; Medical Liability Committee, 2000-Present)
- Illinois Association of Defense Trial Counsel (Alternative Dispute Resolution Committee (2000-Present)
- East Central Illinois Women Attorneys Association
- Illinois Society of Healthcare Risk Management
- Illinois Association of Healthcare Attorneys
- American Health Lawyers Association
- Illinois State Bar Association
- Champaign County Bar Association

### Court Admissions

- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Courts of Appeals, Seventh Circuit

### Education

- Juris Doctor, Stetson University, 1990
- Bachelor of Science - Accounting, Murray State University, 1986

