Survey of Civil Practice Cases

TCPA Held to be a Remedial Statute, Rather than a Penal Statute

In *Standard Mutual Insurance Company v. Lay*, the Illinois Supreme Court held that the violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227(b)(3) (the "TCPA"), were remedial in nature, rather than uninsurable as punitive damages. Ted Lay Real Estate Agency contracted with Business to Business ("BTB") to send thousands of fax advertisements to Illinois companies. Unbeknownst to Lay, the people and entities on BTB's fax list did not consent to receive fax advertisements. Recipients of the unsolicited fax advertisements brought a class action against Lay alleging violations of the TCPA, which makes it unlawful to send an unsolicited advertisement to a fax machine and authorizes damages of $500 per negligent violation and $1,500 per occurrence if the actions are deemed to be intentional.

After being served with the suit, Lay tendered its defense of the class action to Standard Mutual Insurance Co. ("Standard Mutual"). Standard Mutual agreed to defend the action, but it also reserved its rights to deny coverage on various grounds and also sued Lay, seeking a declaration that the statutory damages awarded under the TCPA constitute "punitive" damages which are uninsurable under Illinois law. The Appellate Court for the Fourth District of Illinois held that the TCPA is a "penal," not remedial, statute. The Illinois Supreme Court, however, disagreed with Standard and reversed the appellate court, holding that the TCPA is a "remedial" statute rather than a "penal" statute. As a result, it found that the damages awarded pursuant to the TCPA are not punitive damages. The Supreme Court noted that the statutory damages of $500 per violation authorized by the TCPA could be viewed as compensation for the annoyance and inconvenience of receiving unsolicited faxes, as well as an incentive for recipients of unlawful faxes to enforce the TCPA.

Standard Mutual Insurance Company v. Lay, 2013 IL 114617.

Hospital Lien Held to Attach to a Recovery Even Where the Recovery Does Not Contemplate an Award for Medical Expenses

In *Manago v. The County of Cook*, the Appellate Court for the First District of Illinois broadened protection of hospital liens against the plaintiff patient. The Manago case involved a minor plaintiff who was injured after climbing through the ceiling of an elevator located in a Chicago Housing Authority complex. Cook County's Stroger Hospital allegedly provided $66,666 in medical services to the plaintiff and the trial judge awarded $400,000 in damages for scarring, pain and suffering, and loss of normal life, which was subsequently reduced by fifty percent. The minor plaintiff's mother was awarded zero on her claim for medical expenses because she failed to establish who was responsible for paying the minor's medical bills. The plaintiff subsequently brought a petition to strike and extinguish the Hospital's lien. The plaintiff argued that absent an award for medical damages, the Hospital could not recover its lien against the awards for scarring, pain and suffering, and loss of a normal life. The trial court agreed, and granted the plaintiff's motion to extinguish the lien.

The County subsequently appealed this ruling. The First District reversed, concluding that: (a) "the hospital was not required to intervene in the personal injury lawsuit to protect its lien;" (b) "the hospital's lien may properly attach to a recovery by a minor;" and (c) "the hospital's lien may attach to a recovery even where the recovery does not contemplate an award for medical expenses." The First District based its decision on the case *Anderson v. Department of Mental Health & Developmental Disabilities*, which interpreted a prior version of the Health Care Services Lien Act to allow attachment of liens to "any verdict or judgment obtained in any action by the injured person 'based on the negligent or wrongful act.'" 305 Ill. App. 3d 262, 266 (1st Dist. 1999). On the basis of the statute's language, the *Anderson* court concluded that in order for a lien to attach to an award of damages, the underlying action and subsequent award had to be causally tied to the injury for which the medical treatment (and resulting lien) was provided. The Act was amended in 2003 by the legislature removing the language requiring a causal connection between the lien and the negligent or wrongful act. The amendment provided that after serving a lien notice, a healthcare provider's lien would "attach to any verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person." Based on the amended language of the Act and the fact it no longer required a causal connection between the injury, the care, and the award, the *Manago* court held that a hospital's lien could attach to any verdict or judgment recovered by the injured party, regardless of whether the recovery included a specific award for medical expenses.

Manago v. The County of Cook, 2013 IL App (1st) 12136.

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Motion to Substitute Following Death of Party Must be Verified by Someone Involved in the Underlying Transaction or Lawsuit at Issue

In *Mohica v. Cvejin*, Theodore Sarche filed a lawsuit against Biljana Cvejin for damages related to a real estate contract. Theodore died during the pendency of the ensuing litigation. The plaintiff, Carol Mohica, was subsequently appointed special administrator pursuant to Section 2-1008(b) of the Illinois Code of Civil Procedure, allowing the litigation to proceed in Theodore's absence. Plaintiff, who was a paralegal at the law firm that was representing Theodore, signed the motion to spread Theodore's death of record and to appoint a special representative to prosecute the action. According to the appellate court, the individual moving, by verified motion pursuant to 735 ILCS 5/2-1008(b) of the Code of Civil Procedure, for the appointment of a special representative, must be one involved in the underlying transaction or lawsuit or an heir, legatee, or executor of a will. Since the plaintiff had no connection to the real estate transaction at issue, and was not an heir, legatee, or executor of a will, the appellate court held that the Section 2-1008 petition was granted in error.

Mohica v. Cvejin, 2013 IL App (1st) 111695.

Forum non Conveniens Motion Fails in Legal Malpractice Action

In *Dowd v. Berndtson,* the Appellate Court for the First District of Illinois held that the trial court properly denied the defendant's motion to transfer the plaintiff's legal malpractice action from Cook County to DuPage County based on the doctrine of *forum non conveniens*. According to the Appellate Court, neither the private interest nor public interest factors weighed strongly in favor of transferring the action to DuPage County. In regard to the private interest factors, the plaintiff, who resided in Florida, chose Cook County as a convenient forum for the lawsuit, the defendant resided in Cook County, the underlying marital dissolution proceedings (which gave rise to the alleged malpractice) occurred in Cook County and all potential witnesses identified by the plaintiff resided in Cook County. In regard to the public interest factors, Cook County had a significant interest in deciding the controversy since it involved an underlying dissolution proceeding that was entered and recorded in Cook County, it would not be unfair to impose the trial expense and the burden of jury duty on the residents of Cook County, and data analyzed by the trial court indicated that legal malpractice cases actually reached trial faster in Cook County than in DuPage County.

Dowd v. Berndtson, 2012 IL App (1st) 122376.

Attorney-Client Privilege

Adler v. Greenfield involved an interesting question concerning the attorney-client privilege. Frank Greenfield was retained by Leonard and Muriel Perry to prepare their estate documents. In drafting those documents, Greenfield allegedly made a drafting error which resulted in a significant reduction in the inheritance received by some of the Perrys' descendants. Those descendants then filed a legal malpractice action against Greenfield. During the course of that action, the plaintiffs sought a number of documents from Greenfield, including correspondence between Greenfield and JP Morgan, the company involved in assisting the Perrys with their investments. Greenfield refused to produce the correspondence between himself and JP Morgan, arguing that the documents in question were protected by the attorney-client privilege. The trial court disagreed and ordered Greenfield to produce the documents. When he refused, he was held in contempt.

On appeal, the Appellate Court for the First District of Illinois noted that the communications at issue fell into two broad categories: communications taking place before Muriel Perry's death and communications taking place after her death. The appellate court held that the communications which took place before Muriel's death would fall within the parameters of the attorney-client privilege since JP Morgan was acting as Muriel's agent at the time the communications were exchanged with her lawyer. The appellate court further held that any communications taking place after her death would not be privileged since the death of the principal terminates the authority of the agent. The Appellate Court also held that the attorney-client privilege survives the death of the client, except in cases of a will contest and that in this case the co-trustee of the estate could not waive the privilege.

Adler v. Greenfield, 2013 IL App (1st) 121066.

Dismissal as a Discovery Sanction and Timeliness of Appeal

The Appellate Court for the First District of Illinois affirmed the ruling of the trial court dismissing certain claims against one of the defendants as a sanction for the plaintiff's failure to comply with discovery and for possible misrepresentations to the trial court regarding discovery compliance. The court noted that the appropriate sanction for a party's noncompliance with discovery rules is a matter within the broad discretion of the trial court, and absent an abuse of that discretion, the decision will not be disturbed on appeal. In evaluating the trial court's application of its discretion, the court looked to the record on appeal, which only contained the trial court's written orders compelling discovery and imposing sanctions, and not any record of the hearings that led to the sanctions, despite the fact that the order imposing sanctions seems to have been based largely on the plaintiff's counsel's conduct at one of the hearings. Noting that in the absence of a complete record on appeal to support a claim of error it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis, the appellate court ruled that it had no meaningful way to evaluate whether the imposition of sanctions constituted an abuse of discretion and rejected any claim of error.

In addition to the sanctions issue, the appellate court dismissed a separate aspect of the appeal as being untimely. After the trial court had granted summary judgment in the defendant's favor, the plaintiff filed a motion to extend the time to file a motion challenging the summary judgment order within 30 days of the original order. The hearing on that motion was held after 30 days from the original ruling and was denied. Thereafter, the plaintiff filed a notice of appeal within 30 days of the order denying the extension. In ruling that the appeal was not timely, the Appellate Court held that the motion for extension of time was not directed against the judgment and thus did not qualify as a post-judgment motion. Moreover, the appellate court held that even if the motion for extension was a post-trial motion directed at the judgment, the trial court lost jurisdiction over the case because it did not extend the deadline to file a post-trial motion before the expiration of the 30-day period following the final judgment.

Mo v. Hergan, 2012 IL App (1st) 113179.

Discretion of the Trial Court and Discovery Sanctions

The Appellate Court for the Second District of Illinois affirmed two trial court orders that barred the plaintiff from testifying as a discovery sanction and denied the plaintiff's motion for leave to file an amended complaint. The case stemmed from the plaintiff's termination from defendant and originally was filed as a breach of contract claim to pay the plaintiff for legal services he provided and *quantum meruit*. Throughout the case there was a long and contentious history of discovery-related disputes and several motions to compel and for sanctions filed by the defendant that went on for years. Eventually, the trial court ordered the parties to finalize written discovery and conduct party depositions. The defendant served the plaintiff with a notice of deposition, yet despite being properly notified, he failed to appear and the defendant never received any communication from the plaintiff regarding his absence or dates to reschedule. The defendant filed yet another motion for sanctions and the court entered an order barring the plaintiff from testifying and awarding attorneys' fees and costs to the defendant related to the plaintiff's refusal to cooperate and appear for his deposition as a sanction. The plaintiff did not appear at the hearing. Thereafter, the plaintiff filed a motion to vacate. The trial court ruled that the plaintiff would be permitted to testify upon payment of the fees and costs award. The plaintiff failed to pay the fees and costs, and therefore was barred from testifying. The defendant then moved for summary judgment and in response, the plaintiff sought leave to file an amended complaint seeking to add claims for wrongful termination and promissory estoppel. The trial court denied the motion for leave to amend and granted summary judgment in the defendant's favor. The plaintiff appealed, arguing that the trial court erred in barring him from testifying where he missed one deposition appointment and in denying his motion for leave to file an amended complaint—both of which led to summary judgment being entered against him.

Despite acknowledging that barring a witness from testifying is a drastic sanction that should be imposed sparingly, especially when that witness is the party's only witness, the Second District affirmed the trial court's ruling. The appellate court found that the plaintiff's conduct in failing to appear for his deposition, failing to attempt to reschedule, failing to comply with other discovery orders, failing to pay the defendant's fees and costs, and failing to explain his conduct, showed a consistent pattern of disregarding court rules, orders, and deadlines that supported the trial court's decision to bar him from testifying. The appellate court also pointed out that the plaintiff could have avoided the drastic nature of the sanction because the trial court attempted to ensure a trial on the merits by refashioning its sanction order and allowing the plaintiff to testify if he paid defendant's fees and costs, but the plaintiff chose not to comply.

In deciding whether the trial court abused its discretion in denying the plaintiff an opportunity to file an amended complaint, the court focused its analysis on whether the proposed amendment concerned matters known to the plaintiff when the original pleading was filed and whether the plaintiff provided a good reason for not filing at that time. Finding that the alleged facts underlying the proposed wrongful termination and promissory estoppel claims were entirely within the plaintiff's knowledge at the time he filed the original complaint, that the plaintiff failed to make any attempt to amend the complaint in a timely manner, and that adding new claims four years after litigation had been ongoing would have prejudiced the defendant, the appellate court held that it was not an abuse of discretion in denying the plaintiff's request to amend the complaint.

Rosen v. The Larkin Center, Inc., 2012 IL App (2d) 120589.

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Spoliation Actions: "Special Circumstance" Under the First Prong of the *Boyd* Test

Kilburg v. Mohiuddin concerned a claim for spoliation of evidence. Plaintiff was a passenger in a taxi and was injured in a motor vehicle accident. She alleged that multiple defendants failed to preserve the event data recorder in the taxi, which she claimed might have allowed her to prove up a sudden/uncontrollable acceleration claim against the vehicle manufacturer, among others. Just three days after the accident, Plaintiff's counsel sent a letter to certain defendants requesting preservation of the vehicle; four days later she filed a complaint for damages and two days after that, the trial court entered a protective order requiring preservation of the taxi. The event data recorder disappeared from the taxi during that timeframe. Defendants filed motions to dismiss the spoliation claims under Section 2-615 of the Code of Civil Procedure. The trial court granted the motions to dismiss.

The Appellate Court for the First District of Illinois first reaffirmed that there is no general duty to preserve evidence under Illinois law, citing to *Boyd v. Travelers Insurance Co.*, and the more recent *Martin v. Keeley & Sons, Inc.* There are, however, exceptions to the general rule in spoliation claims. The *Boyd* test is composed of two parts, both of which must be satisfied in order to establish some duty to preserve evidence. First, a plaintiff must show that a duty to preserve evidence arises from some agreement, contract, statute, special circumstance, or voluntary undertaking, and second, that the duty extends to the specific piece of evidence at issue, *i.e.*, that "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action."

Plaintiff's complaint failed to allege that a duty to preserve arose out of an agreement, contract, or statute. Plaintiff argued that her counsel's correspondence demanding the preservation of evidence, the filing of a civil action, and the court's order to preserve evidence, coupled with the Defendant's knowledge of these actions, and their knowledge of the unique circumstances surrounding the underlying accident, created a "special circumstance" under which the Defendant's duty to preserve evidence arose pursuant to the first prong of the *Boyd* test.

The appellate court concluded that notice to preserve the subject evidence coupled with the Defendant's possession and control of the evidence was sufficient to support the existence of a "special circumstance." However, the appellate court also held that mere knowledge of circumstances suggesting that evidence may be material to a subsequent claim or possession or control of the subject evidence without more does not give rise to a "special circumstance." Once the opposing party takes affirmative steps to provide notice to the party in possession of the subject evidence, whether by correspondence, service of a pending judicial action, or a judicial order to preserve evidence, a "special circumstance" is implicated, and a duty to preserve evidence exists.

Kilburg v. Mohiuddin, 2013 IL App (1st) 113408.

Right of Publicity Actions: Actual and Punitive Damages Explained

In *Trannel v. Prairie Ridge Media, Inc.*, the Appellate Court for the Second District of Illinois addressed whether the defendant, the publisher of a magazine highlighting local people and events in McHenry County, was liable for actual and punitive damages under the Right of Publicity Act (Act). Plaintiff alleged that the defendant unlawfully published a photograph of the plaintiff and her daughter for commercial purposes while soliciting advertising services in a magazine media kit. A person who violates the Act can be liable for actual damages, profits derived from the unauthorized use, or both, or $1,000. The appellate court agreed that the publication violated the Act, but disagreed with the plaintiff's claimed damages.

In seeking the profits derived from the unauthorized use of the photograph, the plaintiff claimed that she was entitled to $38,933. This figure was calculated by simply aggregating total profits generated by advertising customers who Plaintiff theorizes may have seen the photograph in the media kit and decided to place an advertisement as a result. However, the appellate court found that Plaintiff failed to provide evidence that the specific photograph at issue was solely responsible for generating those profits. The appellate court noted that Plaintiff did not take depositions of the advertisers to prove up the basis for their advertising purchase, and was persuaded by the defendant's argument that the plaintiff's damages were speculative and lacked foundation. The Act requires that the plaintiff prove the gross revenue directly attributable to the unauthorized use. Without evidence of a crucial link connecting gross revenue, profit, and the plaintiff's photograph, the appellate court was unable to award those damages to the plaintiff.

Plaintiff additionally requested punitive damages, which the Act allows for in certain circumstances. The appellate court explained that punitive damages are generally disfavored in Illinois, and there must be evidence that the unauthorized use of the plaintiff's photograph was malicious and willful such that the plaintiff or her daughter suffered mental anguish, ridicule, humiliation, or emotional distress as a result of the defendant's actions. The appellate court added that punitive damages might be appropriate under the Act when a defendant exploits some trait specific to the plaintiff for commercial gain. Defendant must do more than simply violate the Act; indeed, the defendant's conduct must be "egregious."

Trannel v. Prairie Ridge Media, Inc., 2013 IL App (2d) 120725.

Resolution of Underinsured-Motorist Claim Was Determined to be a Settlement to Which a Lien can Attach

In *McRoberts v. Porter*, plaintiff was involved in an auto accident and received $50,000 in underinsured-motorist benefits. After the resolution of the claim, health care providers filed liens in compliance with the Illinois Health Care Services Lien Act (770 ILCS 23/1 to 999 (West 2008)). The trial court held that according to the Health Care Services Lien Act, 40% of the settlement amount of $50,000 was to be disbursed to lien holders. Finding no case precedent, the court held that the phrase "all claims and causes of action" included in the Act.

The Health Care Services Lien Act provides that any health care provider "that renders any service in the treatment, care, or maintenance of any injured person . . . shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person.

The Health Care Services Lien Act provides that any health care provider "that renders any service in the treatment, care, or maintenance of any injured person . . . shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person. The total amount of all liens under this Act, however, shall not exceed 40% of the verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person on his or her claim or right of action." 770 ILCS 23/10(a). Furthermore, the lien shall attach "to any verdict, judgment, award, settlement, or compromise secured by or on behalf of the injured person." 770 ILCS 23/20.

The appellate court agreed with the trial court that the legislative intent of the statute was broad and intended to be inclusive. While the plaintiff contended that a contractual payment from an insurance company to a beneficiary did not meet the commonly understood definitions of the terms "verdict, judgment, award, settlement or compromise," he could provide no case law in support of his legal argument.

Citing *Progressive Universal Insurance Co. of Illinois v. Taylor*, 375 Ill. App. 3d 495, 874 N.E.2d 910 (2007), the appellate court found that McRoberts had established a "claim" and that a resolution of a claim was a "settlement" to which a lien can attach. Finding that the defendants had perfected their liens pursuant to the Health Care Services Act, the appellate court affirmed the trial court and concluded that the defendants were entitled to 40% of the underinsured motorist coverage.

McRoberts v. Porter, 2013 IL App (5th) 120017.

Moorman Doctrine Barred Tort Action for Negligence in International Check Scam Case

In *Dixon, Laukitis and Downing, P.C. v. Busey Bank*, the law firm had a client trust account with the bank. In 2011, the firm deposited a check into its trust account, unaware that they had just been victimized by an international check scam. Within a matter of weeks, the firm returned those funds to the payor only to learn shortly thereafter that the check was uncollectible. The firm then filed a negligence action against the bank arguing that the bank breached its duty of ordinary care. The firm argued that the bank breached its duty by (1) failing to inquire how the firm acquired the check, (2) failing to recognize the check as counterfeit, (3) failing to advise the firm that funds should not be withdrawn against the check until final payment was made and (4) failing to notify the firm as soon as it recognized the check would not be paid.

In response to the suit, the banked moved to dismiss the complaint for failure to state a cause of action. The bank argued that the economic loss doctrine (also known as the *Moorman* doctrine—see *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982)) precluded any recovery by the firm on its negligence action. In support of its motion, the bank attached the account agreement. The agreement stated that the account holders were responsible for overdrafts. The UCC also provides a remedy for check processing under circumstances where the risk of loss is on the depositor. The bank offered evidence that the check appeared genuine as it complied with the applicable legal standards and that the bank notified the firm the same day it learned that the check was uncollectible.

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The trial court granted the bank's motion to dismiss, finding a contractual remedy existed and that the *Moorman* doctrine prohibited a tort remedy. On appeal the Appellate Court for the Third District of Illinois noted that the UCC governs bank deposits and collections and sets forth standards by which a bank's ordinary care can be measured. The UCC allows a collecting bank to charge a customer's account when it makes provisional settlement but does not receive final payment if the bank gives notice to its customer by midnight of the next banking day. 810 ILCS 5/4-214(a) (West 2010). The appellate court found that on this issue the UCC displaced common law negligence principles and that "UCC compliance is nonnegligent as a matter of law." The appellate court rejected the firm's argument that a common law duty of ordinary care existed, instead finding that account agreement between the parties and the UCC governed the duties the parties owed one another. Both the UCC and the account agreement placed the risk of loss on the firm prior to the time a final settlement was reached. The appellate court based its dismissal on the fact that the firm had failed to allege that the bank breached any duties under the account agreement or the UCC and the lack of any further common law duty.

Under the *Moorman* doctrine, "a plaintiff cannot recover for solely economic loss under a tort theory of negligence." *Moorman,* 91 Ill.2d 69, 91-91 (1982). The *Moorman* doctrine applies in cases of both goods and services, and claims against a service provider are barred when the "duty of the party performing the service is defined by the contract" between the parties. In such a case contract law and the UCC provide the parties with a remedy where there is no personal injury or property damage. Because the firm was claiming solely economic loss, it was prohibited by the *Moorman* doctrine from pursuing a tort action and the appellate court affirmed the dismissal of the suit.

Dixon, Laukitis and Downing, P.C. v. Busey Bank, 2013 IL App (3d) 120832.

Trial Court Properly Denied Motion for Protective Order to Limit the Use of Evidence That Would Potentially Exacerbate Defendant's Post-Traumatic Stress Disorder

In *Payne v. Hall*, the estate of a decedent filed a wrongful death action against the Chicago Transit Authority and its bus driver, Donald Hall. The decedent was killed when he fell under a Chicago Transit Authority bus. The accident was recorded by video cameras on Hall's bus, as well as the bus located directly behind Hall's bus. Hall, who allegedly suffered from post-traumatic stress disorder (PTSD) as a result of the accident, filed a motion for a protective order to exclude the accident videos and photographs from being used during his deposition and trial testimony. Affidavits of Hall's physician and a licensed social worker, which were attached to the motion, indicated that Hall suffered from PTSD and that viewing the photographs and videos would be detrimental to his recovery. Hall did not seek to have the photographs or videos excluded from being used with other witnesses or at trial. The trial court denied Hall's motion for a protective order and found him in "friendly" contempt of court when he refused to view the videos or photographs.

On appeal, the Appellate Court for the First District of Illinois looked to Supreme Court Rule 201(c) for guidance. Rule 201(c) allows a court to enter a protective order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. S. Ct. R. 201(c). The First District held that the reason for Hall's motion for a protective order—the potential worsening of his PTSD condition caused by the accident—does not fall under any of the reasons for issuing a protective order under Rule 201(c). Furthermore, the appellate court could not find any case law where the use of evidence was limited by a protective order because the evidence could exacerbate a party's medical or mental health condition. The First District determined that the trial court did not abuse its discretion in denying the motion for protective order and affirmed the trial court's ruling.

Payne v. Hall, 2013 IL App (1st) 113519.

Employee Barred from Bringing Common-Law Action Against Employer for Injuries She Received Compensation for Under Workers' Compensation Act

In *Glasgow v. Associated Banc-Corp.*, the plaintiff, an employee of the defendant banks, filed a complaint against the defendants for injuries she sustained while working for the defendants during a bank robbery. The plaintiff alleged that the defendants knowingly failed to provide adequate security to deter bank robberies and should have known that the bank could reasonably be expected to be robbed. The plaintiff also filed a workers' compensation claim against the defendants for her injuries and received benefits under the Workers' Compensation Act from the defendants' insurer.

The defendants filed a motion to dismiss the plaintiff's complaint, arguing that the plaintiff's acceptance of benefits under the Workers' Compensation Act for her injuries barred her from bringing an intentional tort claim against the defendants. The trial court granted the defendants' motion to dismiss.

The plaintiff appealed to the Appellate Court for the Second District of Illinois, asserting that the trial court erred in granting the defendants' motion to dismiss because the Workers' Compensation

Act does not constitute an exclusive remedy under the circumstances of her case and the complaint established a cause of action against the defendants.

The Second District affirmed that the plaintiff could not continue to pursue her common-law action against her employers after she began receiving workers' compensation payments under the Workers' Compensation Act. The Second District also held that the plaintiff's complaint was properly dismissed because she failed to plead a specific intent to harm by the defendants. If an employee can show that her injury was not accidental, did not rise out of her employment, was not suffered during the course of employment, or was not compensable under the Workers' Compensation Act, then the employee is allowed to bring a common-law action against her employer. The plaintiff's complaint failed to allege any of these exceptions. Though the plaintiff did assert that the defendants knowingly failed to provide adequate bank security to deter the robbery, she did not plead that the defendants specifically intended that action to harm her.

Glasgow v. Associated Banc-Corp, 2012 IL App (2d) 111303.

Rebuilding a Retaining Wall Does Not Constitute an Improvement to Real Property That Would Restart the Construction Statute of Repose Period

In *Schott v. Halloran Construction Co.*, the plaintiff filed a personal injury lawsuit for injuries he sustained when he fell off a retaining wall originally built by the defendants. Plaintiff alleged that the defendants were negligent by failing to place a guardrail or other barrier on top of the retaining wall to prevent people from falling off the wall.

The retaining wall was originally built by the defendants in 1990, ten years prior to the plaintiff's fall in 2001. A portion of the retaining wall collapsed in a rain storm in 1994, and was subsequently rebuilt. The portion of the wall where plaintiff fell was not damaged or rebuilt in 1994.

Defendants asserted throughout the lower court proceedings that the plaintiff's claims were barred by the construction statute of repose, 735 ILCS 5/13-214(b), which bars any claims regarding construction to real property ten years after the completion of construction. The defendants' motions for summary judgment and directed verdict based on the statute of repose were denied. The jury returned a verdict in favor of plaintiff.

The defendants appealed to the Appellate Court for the Fifth District of Illinois, which reversed the trial court's rulings on the statute of repose defense. The Fifth District found that the work to rebuild the retaining wall in 1994 did not constitute a "construction of an improvement to real property" under the statute of repose, which would have restarted the repose period. The rebuilding of the wall after the washout in 1994 was a repair to the property and simply returned the property to the condition in which it had been prior to the rainstorm. The wall was rebuilt in the exact same manner as it was originally constructed, and the work did not increase the value or use of the property. The appellate court further reasoned that the plaintiff's claim was barred by the statute of repose because the portion of the wall from which the plaintiff fell was part of the original construction of the wall in 1990, and was not damaged or repaired in 1994. An improvement to a portion of a property other than the portion on which a plaintiff was injured should not extend or renew the statute of repose for a plaintiff's injuries. As such, the Fifth District reversed the judgment of trial court and entered judgment in favor of the defendants.

Justice Chapman issued a dissenting opinion, indicating that he would have affirmed the trial court's decision, as the evidence supported that the reconstruction of the retaining wall was an improvement to the property, and thus restarted the statute of repose. Justice Chapman cited the defendants' claim in a previous lawsuit regarding damage to the retaining wall that it cost approximately $7,800 to repair the wall and surrounding property following the washout. The original construction of the retaining wall, along with two other retaining walls on the property, was $6,174.

Schott v. Halloran Construction Co., 2013 IL App (5th) 110428.

Parol Evidence Not Allowed to Alter Incorrect Loan Date in Guaranty

Ringgold Capital IV, LLC v. Finley involved a personal guaranty securing a mortgage and note to finance the construction of an athletic training facility. When the mortgage went into default, the Bank filed an action against, *inter alia*, Finley on his limited guaranty. The trial court granted Finley's motion to dismiss the guaranty count and the Bank appealed.

The Bank had conditioned its approval of a loan on the Finley guaranty, which was prepared by the Bank's attorneys and based on an assumption that the loan would be made on July 27, 2007. Ultimately, the loan was not made on July 27, but instead on August 24 and memorialized in a note and mortgage bearing that same date. The Finley guaranty was never changed to reflect the new date of the loan.

The Statute of Frauds provides that a promise to guaranty the debt of another is unenforceable unless the promise is in writing and signed by the parties against whom judgment is sought. A guarantor's liability is determined from the guaranty contract, which is

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interpreted by the general principles of contract construction. A guarantor is a favorite of the law, and when construing his liability, the court affords the guarantor the benefit of any doubts that may arise from the language of the contract. The court does not extend by implication, construction or presumption liability beyond the precise terms of the contract. A guarantor is only liable for that which he has guaranteed. Guaranty agreements are strictly construed in favor of the guarantor, especially when the guaranty agreement is prepared by the creditor. Where a guaranty is unequivocal, it must be construed according to the terms and language used, as it is presumed the parties meant what the language imports.

The guaranty at issue stated:

> To induce [the Bank] at any time or from time to time to make loans or extend other accommodations to [Borrower] or to engage in other transactions with [Borrower], Finley guarantees to Lender the prompt and full payment and performance of the debt, liability, and obligation under [sic] incurred under that certain loan agreement between Old Second National Bank and Attack Properties, LLC dated July 27, 2007 all such debts, liabilities and obligations being hereinafter collectively referred to as the 'Indebtedness.'

The Bank asserted that although the limited guaranty referenced a certain loan agreement dated July 27, Finley in fact intended to guarantee the Facility Loan made on August 24, thereby establishing liability for the debt arising from the August 24 loan. The Bank argued that although the Facility Loan did not close as expected on July 27, the integration clause in the guaranty referenced related loan documentation, and therefore, Finley was guarantying the loan that was documented, the Facility Loan, not a specific July 27 loan.

When parties dispute the meaning of a contract provision, the initial question is whether the contract is ambiguous. An ambiguity does not exist simply because the parties disagree as to the meaning of the contractual provision. An ambiguity exists when the contractual provision contains language that is susceptible to more than one reasonable interpretation. If, after review and consideration of the language of the agreement, a court determines that a provision is ambiguous the court will then look beyond the agreement to ascertain the intent of the parties. If there is no ambiguity, parol evidence is not permitted to alter the contract. If the contract purports on its face to be a complete expression of the whole agreement, it is to be presumed that the parties introduced into it every material item and term, and parol evidence cannot be admitted to add another term even if the writing contains nothing on the particular term to which the parol evidence is directed.

The Bank's first amended verified complaint alleged Finley intended to guarantee obligations created under a July 27 loan agreement that admittedly did not occur and, on repleading, the verified allegations changed to generally state Finley intended to guarantee the Facility Loan regardless of when the loan was made. However, the Bank was bound by the judicial admission contained in its first amended verified complaint. A party cannot create a factual dispute by contradicting a previously made judicial admission. As such, the Bank could not plead reconfigured facts to expand Finley's agreement to encompass the August 24 loan agreement. Additionally, despite the Bank's efforts to establish an ambiguity through its second amended verified complaint, the guaranty was attached as an exhibit to the verified complaint. If any conflicts exist between the pleadings and the exhibit, the exhibit controls.

Finally, in addition to being held to its judicial admission, the Bank's argument failed because the guaranty at issue was unambiguous. The Bank contended that the intention of the parties was for Finley to guarantee the Facility Loan, regardless of the loan closing date, as evidenced by the use of the term "that certain loan agreement." However, that argument directly conflicted with the express language of the limited guaranty and judicial admissions contained in the first verified complaint. Although the Bank drafted the guaranty, there was no reference to the term "Facility Note" or "Facility Loan" or the purpose for which the loan agreement was made. Thus, to determine the extent of Finley's liability, the guaranty directs one to documents created "under that *certain* loan agreement dated July 27, 2007" to ascertain what obligations Finley undertook.

The word "certain" carries considerable weight in its own right. By using the word "certain," the Bank identified and made known precisely, without mistake or ambiguity, free from doubt, that the loan agreement dated July 27 was the agreement Finley obligated himself to guarantee. Since there is no mention of either the Facility Note or Facility Loan in the guaranty, the court could not find an ambiguity and resort to extrinsic evidence to explain or understand either term.

The Bank also argued that the term "related loan documents" used in the integration clause created an ambiguity. The court rejected that argument on the basis that the existence of an integration clause in a facially unambiguous agreement makes it improper to consider parol evidence. The court noted the many policy considerations prohibiting parol evidence where the agreement is facially unambiguous. Lenders require certainty that written agreements will be honored and not easily avoided by consideration of extrinsic evidence. The time and expense expended in documentation of commercial lending transactions supports the conclusion that this agreement reflects the intent of the parties. Guaranty agreements that were once embodied in a few paragraphs on a single page now routinely consist of multiple paragraphs spread over several pages evidencing an attempt to address every possible contingency that may occur to either establish or defeat the liability. The Bank was attempting to rewrite the guaranty to include terms favorable to its interests, terms that were materially different from the unambiguous language embodied in the guaranty. The court conceded that while it was entirely possible the Bank's contentions regarding the scope of Finley's commitment were correct, the executed guaranty does not reflect this intention and Finley's liability would not be extended by construction or implication.

Finally, the court rejected the Bank's argument that there was an inherent ambiguity in the language. The Bank drafted the document and any ambiguity would be held against it. Moreover, the court noted there was nothing ambiguous in the provisions of the contract. The language reflected the willingness of the Bank to make a loan because of Finley's limited guaranty and the recognition that the guaranty relates to a loan dated July 27. There was no reference in the guaranty to future loans or the purpose of any loan, so the language used referred to the certain loan which precisely identified the debt being guaranteed.

The court concluded that the terms of the guaranty were not ambiguous and, therefore resort to parol evidence was unnecessary. The guaranty clearly referred to the July 27 loan agreement and not another agreement made at a later date. Consideration of extrinsic evidence would add to and materially change the guaranty as written. The court affirmed the trial court's dismissal with prejudice of the guaranty count.

Ringgold Capital IV, LLC v. Finley, 2013 IL App (1st) 121702.

Failure to File Rule 222 Affidavit Does Not Limit Amount of Recovery

Dovalina v. Conley considered the effect of plaintiff's failure to file the affidavit required by Supreme Court Rule 222(b) regarding the amount of damages sought. Plaintiff filed a complaint in the Law Division of the Sixth Municipal District Court seeking damages "in an amount in excess of $50,000." Plaintiff did not file the required Rule 222(b) affidavit stating whether "the total money damages sought does or does not exceed $50,000." The trial court later entered a default judgment against defendant in the amount of $128,101.20.

More than two years after the default judgment, defendant filed a petition to vacate or modify the default judgment pursuant to Section 2-1401 of the Code of Civil Procedure. The defendant argued that because plaintiff had not filed the Rule 222(b) affidavit, his recovery was limited to $50,000. Defendant argued that the $128,101.20 judgment against him was beyond the court's authority and void under Rule 222. The trial court held that the filing of a Rule 222(b) affidavit was mandatory and plaintiff's failure to attach the affidavit rendered the portion of the default judgment in excess of $50,000 void. The court also held that because the judgment was void, the two-year time limitation for Section 2-1401 petitions did not apply. The court reduced the judgment against defendant to $50,000. Plaintiff appealed.

Supreme Court Rule 222(b) states in part:

> Any civil action seeking money damages shall have attached to the initial pleading the party's affidavit that the total of money damages sought does or does not exceed $50,000. If the damages sought do not exceed $50,000, this rule shall apply. Any judgment on such claim which exceeds $50,000 shall be reduced posttrial to an amount not in excess of $50,000.

Relying on *Grady v. Marchini*, 375 Ill. App. 3d 174 (2007), the only prior published decision on Rule 222(b), defendant argued that, pursuant to Rule 222(b), the court does not have authority to enter a judgment in excess of $50,000 where plaintiff has failed to file an affidavit to his initial pleading and any amount in excess of $50,000 on such claim should be reduced to $50,000.

The appellate court distinguished the *Grady* decision. In *Grady*, the court had interpreted the use of the word "shall" in the Rule to indicate a mandatory intent, and the failure of the plaintiff in that case to file the affidavit limited the recovery to $50,000. The *Grady* court reduced a $97,700 jury verdict to $50,000. However, in the instant case, the appellate court noted that in *Grady*, the plaintiff had sought damages "in excess of $15,000" and designated his case as a LM case. The LM designation indicated total damages were $50,000 or less.

The court rejected defendant's argument that *Grady* held that the failure to file the Rule 222 affidavit in any case limited damages to $50,000. The court concluded that the *Grady* court's reduction of the judgment to $50,000 was based not only on the fact that the plaintiff failed to file the Rule 222 affidavit but also on the amount of damages actually sought. The *Grady* plaintiff having sought damages "in excess of $15,000" and docketing his case as an LM case indicated he was seeking damages of $50,000 or less. Since Rule 222 applies "[i]f the damages sought do not exceed $50,000," Rule 222 clearly applied to the Grady plaintiff's action and the court properly reduced that judgment.

Unlike *Grady*, the plaintiff in the instant case stated that he was seeking damages "in excess of $50,000" and filed his case in the Law Division of the Sixth Municipal District Court, which hears actions for monetary damages in excess of $100,000. The court concluded that the Rule 222 did not apply to his action.

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Although the court granted that Rule 222(b) requires that every plaintiff attach an affidavit to his original complaint stating whether the damages sought do or do not exceed $50,000, the court noted that the Supreme Court Rules are to be construed liberally. The court concluded that what matters in a determination of whether Rule 222 applies to an action is the amount of damages a plaintiff is seeking, whether this is shown by a Rule 222 affidavit or by a complaint, in order to protect the defendant from surprise. Unlike *Grady*, the defendant in the instant case did not have a reasonable expectation that plaintiff's damages would be capped at $50,000. On the contrary, defendant had a reasonable expectation that the judgment would be in excess of $50,000. The court concluded that defendant had ample notice that plaintiff was seeking more than $50,000 in damages and that Rule 222, therefore, did not apply to the action.

The court also rejected defendant's argument that the judgment in excess of $50,000 was void. A void judgment is one entered by a court without personal or subject matter jurisdiction or the inherent power to make or enter the judgment involved and is subject to collateral attack by a Section 2-1401 motion. In contrast, a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack. In Illinois, the circuit courts have jurisdiction over all justiciable matters. Once a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. Even if Rule 222 applied to the case, the judgment entered in excess of $50,000 would be voidable, not void. Therefore, it is not subject to collateral attack under Section 2-1401. The appellate court reversed the trial court with instructions to reinstate the original judgment.

Dovalina v. Conley, 2013 IL App (1st) 103127.

Dissolved Corporation Does Not Have Capacity to Pursue Claim Accruing Post-Dissolution

In *A Plus Janitorial Company, Inc. v. Group Fox, Inc.*, a dissolved corporation brought claims against a company with whom it had a contract prior to dissolution. Defendant filed a motion to dismiss alleging plaintiff lacked standing and the capacity to bring the action. The trial court granted defendant's motion to dismiss holding that plaintiff did not have standing to bring the action and plaintiff appealed.

Plaintiff entered into a maintenance agreement to perform cleaning services for a building operated by defendant. Pursuant to a provision in the contract, the maintenance agreement automatically extended and renewed every two years on December 1. Either party could prevent automatic renewal of the maintenance agreement by providing written notice to the other party 30 days prior to the December 1 renewal date.

Effective March 8, 2008, plaintiff voluntarily dissolved as a corporation after filing Articles of Dissolution with the Illinois Secretary of State. Nine months after plaintiff's dissolution, the maintenance agreement's December 1, 2008 renewal date passed without either party providing 30 days' written notice of termination. Subsequently, in or about June 2009, defendant terminated the maintenance agreement with plaintiff.

Plaintiff sued defendant claiming defendant breached the contract when it terminated the maintenance agreement in June 2009. Defendant moved to dismiss, challenging plaintiff's standing and capacity to sue. The trial court found plaintiff lacked standing to maintain the action and dismissed the complaint. Plaintiff appealed.

The appellate court first noted that although the trial court decided the case on the issue of standing, the case actually presented an issue of capacity. Legal capacity generally refers to the status of a party, e.g., incompetent, infant, or unincorporated association. In contrast, the doctrine of standing requires that a party, either in an individual or representative capacity, have a real interest in the action brought and in its outcome. Although the trial court dismissed because of a lack of standing, the appellate court can affirm the trial court's decision on any basis appearing in the record.

Plaintiff argued that because the obligations under the maintenance agreement existed pre-dissolution, it could still bring its lawsuit despite the fact that the cause of action accrued post-dissolution. Relying on a recent Illinois Supreme Court decision, *Pielet v. Pielet*, 2012 IL 112064, the appellate court rejected that argument. Section 12.80 of the Business Corporation Act reads:

> The dissolution of a corporation . . . shall not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the date of such dissolution.

805 ILCS 5/12.80 (West 2010). The *Pielet* court interpreted that language to require that the cause of action actually accrue prior to dissolution. The court affirmed the trial court's dismissal of plaintiff's complaint.

A Plus Janitorial Company, Inc. v. Group Fox, Inc., 2013 IL App (1st) 120245.

Rule 304(a) Dismissal of Defendants not Rendered Moot by Leave given to remaining Defendants to file third Party Actions Against Dismissed Defendants

In *Zamora v. Montiel, et al.*, plaintiff's negligence complaint was dismissed against some, but not all, defendants and the trial court included Illinois Supreme Court Rule 304(a) language that there was no just reason for delaying either enforcement or appeal of the dismissal. Plaintiff filed a motion to reconsider. Shortly thereafter, the trial court granted the remaining defendants leave to file a third-party complaint against the recently-dismissed defendants. Then, the trial court denied plaintiff's motion to reconsider, and thereafter, the remaining defendants filed their third-party complaint. Plaintiff did not file a notice of appeal at that time.

Two years later, the third-party complaint was dismissed and plaintiff requested the trial court make a new Rule 304(a) finding with respect to the original dismissal order, and the trial court did so. Plaintiff then filed a notice of appeal of the original dismissal of the defendants, which was by then two years old. The Appellate Court for the Second District of Illinois dismissed the appeal for lack of jurisdiction. Thereafter, the plaintiff requested that the trial court "renew" its original Rule 304(a) finding, which was denied. Ultimately, after the entire case was dismissed, plaintiff again filed a notice of appeal seeking reversal of the initial dismissal.

The appellate court had to decide if the trial court's ruling allowing leave for the remaining defendants to file a third-party complaint against the newly-dismissed defendants also required the trial court to make a new Rule 304(a) finding in relation to the dismissal of plaintiff's action against those defendants. Plaintiff argued that when the trial court granted leave to file the third-party complaint, the previous Rule 304(a) finding was rendered ineffective. However, because of the timing of the filing of the third-party complaint, no new claim was added until after the judgment in favor of the defendants became final and appealable and the period for appeal had run. The appellate court declined "to equate obtaining leave to file a claim with actually filing that claim." They found that the better rule was the simpler rule: merely obtaining leave to file a claim does not trigger the need for a new Rule 304(a) finding. Moreover, the appellate court noted the plain language of Rule 304(a) contemplates that additional claims will actually be pending.

The granting of leave to file a third-party complaint against newly-dismissed defendants did not render ineffective the Rule 304(a) language in the order dismissing those defendants. Therefore, the plaintiff's appeal was dismissed, as plaintiff failed to file a notice of appeal within 30 days of the trial court's resolution of the motion to reconsider the original dismissal order, and the subsequent third-party actions were irrelevant to the requirement that plaintiff appeal within the timeframe dictated by the rule.

Zamora v. Montiel, 2013 IL App (2d) 130579.

Two Year Statute of Limitations Applies to All Professional Services Claims Against Attorneys

The case of *800 South Wells Commercial, LLC v. Horwood Marcus and Berk* involved a question of whether the two-year statute of limitations for claims against attorneys arising from acts or omissions in performance of professional services applied to actions outside of legal malpractice claims brought against an attorney by a client.

The plaintiff filed a complaint against one set of defendants and those defendants' attorneys. The allegation against the attorneys was that they aided and abetted their clients/co-defendants' breach of fiduciary duty owed to plaintiff with regard to the foreclosure and subsequent sale of a commercial space and parking garage in Chicago. Plaintiff alleged that the non-law firm defendants breached their fiduciary duties by diverting the option to acquire the parking garage from plaintiff, and that the law firm defendant aided and abetted those defendants in doing so. Plaintiff filed suit against all parties in the alleged scheme. The law firm filed a motion to dismiss based on the two-year statute of limitations provided in 735 ILCS 5/13-214.3(b) for actions "against an attorney arising out of an act or omission in the performance of professional services." Plaintiff argued that the statute of limitations did not apply because the claim did not arise out of the law firm's performance of legal services for the plaintiff. The trial court found that the statute of limitations did apply and dismissed plaintiff's action against the law firm. The Appellate Court for the First District of Illinois looked to the plain language of the statute and found that there was no language restricting the statute's application to legal malpractice claims or claims brought only by an attorney's client. Rather, the plain language directs that the two-year statute applies to all claims against an attorney arising out of acts or omissions in the performance of professional services. Since the cause of action was based on the law firm's performance of professional services, (albeit not on behalf of the plaintiff), and the complaint was filed more than two years after plaintiff learned of its injury, the appellate court affirmed the trial court's dismissal of the action.

800 South Wells Commercial, LLC v. Horwood Marcus and Berk Chartered, 2013 IL App (1st) 123660.

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Foreign Manufacturer Has Sufficient Jurisdictional Contacts Where Unrelated Sales Were Made to A Company with an Office in Illinois

In *Russell v. SNFA*, the Supreme Court of Illinois determined that a French manufacturer of a custom tail-rotor bearing for a helicopter involved in a crash had the requisite minimum contacts with Illinois for purposes of specific personal jurisdiction under the Long Arm Statute, and further found that it was reasonable for the French manufacturer to litigate the matter in Illinois.

The case stems from a fatal helicopter crash in Illinois. The plaintiff estate of decedent Michael Russell, the pilot of the helicopter, filed suit against a number of entities. The helicopter was manufactured in Italy by an Italian company. At one point, the helicopter was owned by a Louisiana-based company who replaced the tail-rotor bearings on two separate instances. The bearings were purchased from a Pennsylvania-based company, and were manufactured in France by defendant SNFA. The Louisiana-based company then sold the helicopter to plaintiff's employer. The suit was filed against the Italian manufacturer, the Louisiana-based company that replaced the bearings, the Pennsylvania-based company that sold the bearings, and SNFA. SNFA filed a motion to dismiss for lack of in personam jurisdiction. Discovery was conducted on the motion to determine SNFA's sales, marketing, and distribution activities. It was found that SNFA manufactures bearings for use in airplanes and helicopters, and has customers in the U.S. It did not have offices, assets, property, or employees in Illinois, and was not licensed to do business in Illinois. However, SNFA divulged that it sold bearings (different than the ones at issue) to a company that had an office in Illinois, that it had an employee who had traveled to Illinois for meetings about its products, and that it had a purchasing agreement with the Illinois-based client.

The trial court granted SNFA's motion to dismiss. The appellate court reversed, directing the trial court to reconsider in light of the United States Supreme Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *J. McIntyre Machinery v. Nicastro*. The trial court again dismissed SNFA and the appellate court again reversed, noting that its ruling was consistent with the United States Supreme Court's observation in *McIntyre* that "distribution by an American distributor in the states could be sufficient to establish jurisdiction, given the right set of facts."

The Illinois Supreme Court noted that there was not general jurisdiction over SNFA, but ultimately found there was specific jurisdiction. The Illinois Supreme Court closely analyzed a number of United States Supreme Court rulings on specific personal jurisdiction. It found that SNFA manufactured the bearings specifically for the co-defendant Italian helicopter manufacturer, who in turn sold helicopters in the United States through its subsidiary distributor. It also found that SNFA benefitted from Illinois' system of laws, infrastructure, and business climate, and availed itself of Illinois' laws in all of its dealings with its Illinois client. In total, the supreme court found SNFA had the requisite minimum contacts necessary for specific personal jurisdiction.

The supreme court then moved to the reasonableness prong, and found that it was reasonable for SNFA to litigate in Illinois, despite the significant burden imposed on it. This determination was based on the fact that Illinois had an indisputable interest in resolving the litigation stemming from a fatal Illinois crash, when plaintiff's decedent was living and working in Illinois for an Illinois employer, and where the crash implicated "societal concerns of products liability and occupational safety." Thus, having found that there were requisite minimum contacts and that it was reasonable for the French company to defend itself in Illinois, the supreme court affirmed the appellate court that reversed the circuit court's dismissal order and remanded the case for further proceedings.

Russell v. SNFA, 2013 IL 113909.

615 & 619 Motions Not Appropriate to Challenge The Truth of Facts Alleged in a Complaint

In *Reynolds v. Jimmy John's Enterprises, LLC*, the court reversed the grant of the defendants' motion to dismiss brought pursuant to 735 ILCS 5/2-619.1 because the motion did not conform the requirements of the rules. The plaintiff alleged that the defendants were liable for the negligent supervision and negligent training of an employee of a Jimmy John's franchisee who caused the plaintiff injury when attempting to deliver sandwiches. The defendants filed a Section 2-619.1 motion which combined arguments brought under Sections 2-615 and 2-619(a)(9). The motion was deficient in first combining parts of the motions under both Sections 2-615 and 2-619, which violates Section 2-619.1's requirement that the motion that combines such sections have separate parts for each rule pursuant to which each part of the motion is brought. Next, the 2-615 aspect of the motion was deficient because it made factual arguments outside of the pleading. Further, the court found the motions deficient because the defendants attacked the truthfulness of the allegations, which is not permitted under either Section 2-615 or 2-619(a)(9) and contradicting factual allegations of the complaint does not constitute "affirmative matter" under Section 2-619(a)(9). The court specifically criticized the use of an expert's affidavit which the court called a "red flag" that the motion was challenging the factual allegations of the complaint. The court found that the plaintiff had alleged facts that, if true, would be sufficient to support the plaintiff's cause of action against the defendant. Finally, the court set forth the distinctions between motions brought under Section 615, 619, and 1005 and made clear than Section 2-615 and 2-619 motions are not the proper vehicle to challenge the factual allegations of the plaintiff's complaint.

Reynolds v. Jimmy John's Enterprises, LLC, et. al, 2013 IL App (4th) 120139.

In evaluating Illinois public policy, the court held that Illinois allows parties to allocate the risks between them as they see fit and that clauses similar to the one at issue in this case had been enforced by Illinois courts.

Exculpatory Provision in Gym Membership Agreement Upheld

In *Hussein v L.A. Fitness International, LLC*, the appellate court upheld the grant of dismissal pursuant to Section 2-619(a)(9) based upon the application of an exculpatory agreement in a gym membership that required the application of Minnesota law. The plaintiff was injured while using a machine at the defendant's gym. In considering the motion, the court first decided which law to apply and in coming to the conclusion that Minnesota law applied, the court considered the following factors: there is a reasonable relationship between the chosen forum and parties or transaction and it is "not dangerous, inconvenient, immoral, nor contrary to the public policy of our local government" to apply the provisions of the contract. The first question—choice of law—was not an issue for the court because the agreement was entered into in Minnesota and the plaintiff did not challenge the application of Minnesota law. The second question—appropriateness—was readily answered because the exculpatory clause in the agreement did not violate Illinois public policy and could be applied to dismiss the plaintiff's claim. In evaluating Illinois public policy, the court held that Illinois allows parties to allocate the risks between them as they see fit and that clauses similar to the one at issue in this case had been enforced by Illinois courts.

Hussein v L.A. Fitness International, LLC, 2013 IL App (1st) 121426.

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