

Illinois Litigation Update

Hospital Patient's Claim for Breach of Warranty Denied by The Supreme Court

In the case of Brandt v. Boston Scientific Corp., 204 Ill. 2d 640, 792 N.E. 2d 296 (Ill. 2003), the Illinois Supreme Court was asked to decide whether a patient could sue a hospital for breach of the implied warranty of merchant-ability in connection with a device that the hospital sold to the patient and surgically implanted in her to treat incontinence. Joining the majority of out-of-state jurisdictions, the Supreme Court held that in a case like this where the transaction is primarily for medical services, the plaintiff could not proceed with a claim for breach of the implied warranty of merchantability.

In late December of 1998, the plaintiff, Brenda Brandt, was admitted to the Sarah Bush Lincoln Health Center to receive treatment for urinary incontinence. Part of her treatment involved the surgical implantation of a pubovaginal sling. In January of 1999, the manufacturer of the sling, Boston Scientific Corporation, issued a voluntary recall of the product because the product was causing medical complications in 7 percent of patients. Brandt was one of those patients and she suffered serious complications as a result of the implantation of the sling. In response to these complications, the sling was later surgically removed.

The plaintiff filed a four-count complaint against Boston Scientific Corporation and the Health Center. The claims against Boston Scientific Corporation included claims for negligence and strict product liability. The claim against the Health Center alleged a breach of the implied warranty of merchantability found in Article II of the Uniform Commercial Code.

The Health Center filed a motion to dismiss the claim against it on the

grounds that it was not a merchant of medical devices and the transaction between the plaintiff and the Health Center was predominantly for services instead of goods. The trial court granted the Health Center's motion to dismiss. The dismissal was affirmed on appeal. The plaintiff then appealed to the Supreme Court.

The Supreme Court began its opinion by noting that in order to succeed on a claim of breach of the implied warranty of merchantability, a plaintiff must allege and prove: (1) a sale of goods (2) by a merchant of those goods and (3) the goods were not of merchantable quality. Article II of the UCC applies to

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“transactions in goods.” Where there is a mixed contract for goods and services, there is a “transaction in goods” only if the contract is predominantly for goods and incidentally for services. This analysis is known as the “predominant purpose” test.

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FALL 2003



Health Care Practitioner Affidavit Not Necessary In Nursing Home Malpractice Cases

In a case of first impression, the Illinois Supreme Court has ruled that a certificate of merit and supporting report are not required when a plaintiff asserts a private right of action under the Nursing Home Care Reform Act, 210 ILCS 45/1-101, *et seq.* Eads v. Heritage Enterprises, Inc., 787 N.E.2d 771 (Ill. 2003).

The plaintiff, Betty Lou Eads, brought an action in the Circuit Court of Sangamon County to recover damages for personal injuries she sustained in a fall at Memorial ContinuCare, an extended-term nursing facility located in Springfield, Illinois. The plaintiff sought to impose liability on the defendants for her injuries pursuant to the Nursing Home Care Reform Act.

The defendants moved to dismiss the plaintiff's cause of action under Section 2-619 of the Illinois Code of Civil Procedure. As grounds for their motion, the defendants argued that the plaintiff should be precluded from proceeding with her claim because she did not attach to her complaint the certificate of merit and supporting report required by Section 2-622 of the Code of Civil Procedure. Section 2-622 requires that in all actions based on "medical, hospital or other healing art malpractice," a plaintiff's attorney must file an affidavit, attached to the

complaint, declaring that he has consulted with a health-care professional who has determined, by written report, that "there is a reasonable and meritorious cause for the filing of such action." A copy of the written report, which clearly identifies the plaintiff and the reasons for the reviewing health professional's determination, must be attached to the affidavit.

**The only defendants
liable for damages,
costs and attorneys'
fees under the Act
are owners and
licensees of the
nursing home.**

Since the plaintiff did not attach a certificate of merit and supporting report to her complaint, the circuit court dismissed the plaintiff's complaint and later certified it for immediate appeal. The appellate court reversed, holding that actions brought under the Nursing Home Care Reform Act are not subject to the mandates of Section 2-622. Following this finding, the defendants petitioned the Supreme Court for leave to appeal from the appellate court's judgment.

The Supreme Court affirmed the appellate court. In holding that plaintiffs who assert private rights of action under the Nursing Home Care Reform Act are not required to comply with the mandates of Section 2-622, the Illinois Supreme Court noted that while claims

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In applying the predominant purpose test to the facts of this case, the court found that the plaintiff's transaction

with the Health Center was a mixed contract because the hospital provided both medical services, such as an operating room, and goods, such as the sling, to facilitate treatment of the plaintiff's medical condition. In analyzing the bill for services which the health center presented to the plaintiff, the court noted that a majority of the charges, 51.4 percent, were for services rather than goods. In addition, in considering the predominant nature of the transaction as a whole, the court found that the plaintiff went to the health center for medical treatment for her urinary incontinence, rather than merely to buy a sling as one buys goods from a store. Although treatment for her condition involved implantation of the sling, the sling was only potentially useful after its surgical implantation. According to the court, the services

provided before, during and after the surgery to implant the sling were the primary purpose of the transaction between the plaintiff and the Health Center and the purchase of the sling was merely incidental to the treatment.

In holding that the transaction between the plaintiff and the Health Center was predominantly a transaction for services, therefore barring the application of Article II of the Uniform Commercial Code, the Illinois Supreme Court joined a majority of foreign jurisdictions which hold that a hospital's provision of a defective surgical device is primarily a transaction for services rather than goods such that no implied warranty of merchantability claim is available.

Affidavit Not Necessary In Nursing Home Malpractice Cases

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under the Nursing Home Care Reform Act may sometimes involve a resident's medical care, they do not directly implicate the individual health-care providers. According to the court, a failure to provide adequate medical care that "results in physical or mental injury to a resident, or in the deterioration of a resident's physical or mental condition" constitutes neglect and is prohibited by the Act. The only defendants liable for damages, costs and attorneys fees under the Act, however, are the owners and licensees of the nursing home. Nothing in the Nursing Home Care Reform Act requires owners or licensees to be medical professionals themselves, and nothing in the Act authorizes nursing home residents to recover damages for medical malpractice from the individuals who actually provided the

care. Suits against those individuals must be asserted independently of the Nursing Home Care Reform Act.

According to the court, the justification for Section 2-622 is therefore absent when a resident brings a statutory claim against the nursing home's owner or licensee under the Nursing Home Care Reform Act. Such cases pose no threat to the viability of the medical profession nor do they present a danger of compromise in the ability of medical professionals to provide care to patients. They serve only to ensure that nursing home owners and licensees are held accountable for violations of their legal obligations, as the General Assembly intended when it passed the Nursing Home Care Reform Act into law.



Fraudulent Misrepresentation Claims Are Limited To The Financial/ Commercial Setting

For the first time, an Illinois court has decided whether a fraudulent misrepresentation claim can be asserted in a noncommercial, nonfinancial setting. In Neurosurgery and Spine Surgery, S.C. v. Goldman, 790 N.E. 2d 925 (Ill. App. 2d Dist. 2003), the court held that it cannot.

In Neurosurgery, a doctor (Rabin) and his practice (Neurosurgery) sued a former patient of the practice (Goldman) asserting defamation claims. Goldman had allegedly falsely reported that Rabin forced his way into Goldman's hospital room while she was undressed and that similar incidents had occurred at other hospitals.

Goldman filed a third-party complaint against a Neurosurgery nurse (Skaletsky). The third-party complaint alleged (in part) fraudulent misrepresentation. Goldman asserted that Skaletsky had told Goldman of the information that Goldman had repeated regarding Rabin's conduct at other hospitals, on which Goldman had relied. The trial court dismissed the count and the Appellate Court affirmed the dismissal.

The Appellate Court traced the history of the tort of fraudulent misrepresentation. It discussed that fraudulent misrepresentation has been limited to cases involving business or financial transactions. It has also been limited to cases where the plaintiff suffers pecuniary harm. There was no need to extend the tort beyond that context because "the general milieu of negligent and intentional wrongs" has created other adequate remedies in the non-commercial, nonfinancial context.

Losing Defendants Finally Catch a Break Regarding Litigation Costs

In the case of Vicencio v. Lincoln-Way Builders, Inc., 789 N.E.2d 290 (Ill. 2003), the Illinois Supreme Court was asked to decide whether a prevailing plaintiff may tax as costs the professional fee charged by a non-party treating physician for giving an evidence deposition in the case. The court answered in the negative.

The plaintiff in Vicencio prevailed in a negligence action against the defendant. The plaintiff then filed a motion for costs. The trial court awarded the plaintiff \$5,381.80 in costs, including the professional fee of the plaintiff's treating physician, Dr. Preston Wolin, and the costs associated with the videotaping of Dr. Wolin's evidence deposition. The appellate court affirmed the trial court's entry of costs against the defendant and the defendant then appealed.

On appeal, the Supreme Court noted that evidence depositions by physicians

need not meet the conditions imposed on depositions by others to be admissible at trial. According to Illinois Supreme Court Rule 212, the evidence deposition of a physician or surgeon may be introduced in evidence at trial on the motion of either party regardless of the availability of the deponent. In essence, the rule permits physicians to give evidence depositions for their own convenience and the convenience of the parties, notwithstanding the strong preference for live testimony at the time of trial.

In the court's view, since the defendant could not have been taxed Dr. Wolin's professional fee if the doctor had testified live at trial, there is no justification in Rule 212 for the award of the doctor's fee for his evidence deposition. In short, the court held that a trial court is neither required by

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Legislative Updates

Joint and Several Liability

A Democratic General Assembly, combined with a Democratic Governor, have passed and approved a number of legislative enactments that directly affect the defense of litigation in Illinois. Chief among the most recent enactments is a change in Section 2-1117 of the Illinois Code of Civil Procedure. The amendment to Section 2-1117 now prohibits the court from including the plaintiff's employer in the calculation to determine apportionment of fault under the Joint & Several Liability Statute. This legislative enactment is a direct result of the Illinois Supreme Court opinion of Unzicker v. Kraft Food Ingredients Corp., 783 N.E.2d 1024 (Ill. 2002), in which the court held that the plaintiff's employer is a "third-party defendant who could have been sued" and can be included in the determination of percentages of fault under Section 2-1117.

Health Care Liens

Senate Bill 274 creates the Health Care Services Lien Act to overrule the decision in Burrell v. Southern Truss, 679 N.E.2d 1230 (Ill. 1997). Senate Bill 274 clarifies that in personal injury litigation the eight different health care provider lien statutes must be read together so that the injured plaintiff cannot have his or her entire recovery consumed by these statutory liens. It creates two classes of lienholders for health care liens: (1) health care professionals and (2) health care providers. Professionals are individuals such as doctors while providers are entities such as hospitals.

This Act prohibits the total amount of the liens against a settlement or award from exceeding 40% of the amount secured by or on behalf of the injured person. All lienholders share proportionate amounts within this 40%, but in no event may a lienholder receive more than one-third of the settlement or award.

Limitations – Medical Negligence

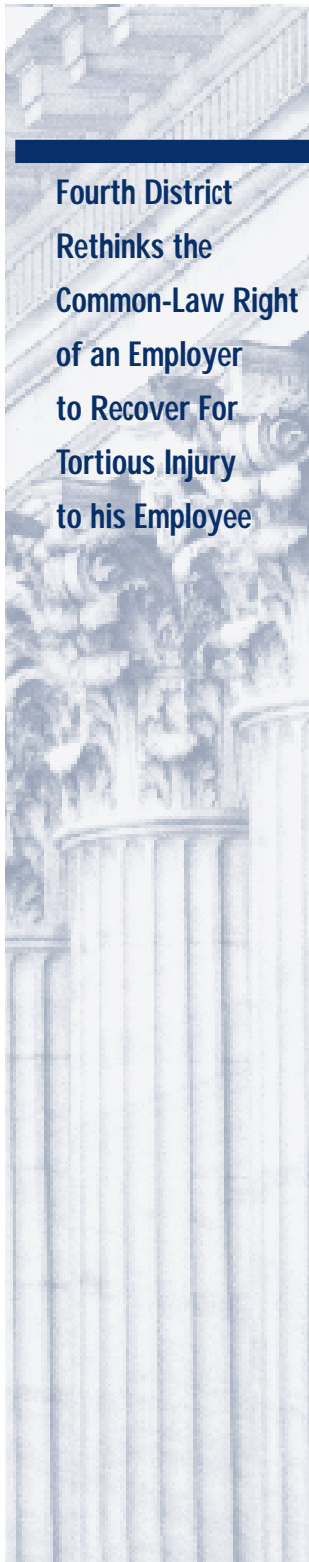
Senate Bill 616, which modifies Tosado v. Miller, 188 Ill.2d 186, 720 N.E. 2d 1075 (Ill. 1999), clarifies two conflicting statutes so that actions for medical negligence have a two-year statute of limitation regardless of whether the treatment was by a unit of local government or any other health care entity.

Medical and Hospital Records

House Bill 1038 makes two changes to the law regarding medical and hospital records. It requires that a health care practitioner or health care facility send these records to a patient or the patient's representative within 30 days of receipt of a written request. If the practitioner or facility needs more time to do this, they may take another 30 days to comply if they send the requesting party a written explanation of the delay and the date by which the requested information will be provided. The records must be provided within 60 days.

It also requires that health care practitioners or health care facilities provide at least 30 days' notice of the closure of the practice or facility. The notice must include an explanation of how copies of the records may be accessed by patients. The notice may be given by publication in a newspaper of general circulation where the practice or facility is located.





Fourth District Rethinks the Common-Law Right of an Employer to Recover For Tortious Injury to his Employee

Under the modern employer-employee relationship, an employer no longer has a common-law right to recover from third parties for loss of services due to an employee's injury, according to the Illinois Appellate Court. Castle v. Williams, 788 N.E.2d 421 (Ill. App. 4th Dist. 2003).

In *Castle*, an employee was injured, resulting in the loss of his services as chief operating officer. The employer sued the tortfeasor. The court dismissed the employer's complaint, finding that the tortfeasor did not owe a duty to the employer.

The Appellate Court affirmed. It held that it had to "reevaluate" the "common-law concepts in the light of present-day realities." The court found that the common-law right was rooted in concepts of feudalism, where the servant was considered a member of the master's household. Today, however, the employer-employee relationship is rooted in contract terms. The court found that the common-law right was outdated and cited three major reasons to not impose a duty to the employer to prevent the employee's injury.

First, it held that the employer's injury is not reasonably foreseeable because it is too remote and indirect from the negligent act. Secondly, imposing a duty on the tortfeasor would be an unreasonable burden because the tortfeasor has no knowledge of the contract and no control over the employer's business. Third, because the "majority of people" are employed, allowing employers such recoveries could result in a proliferation of claims, including fraudulent claims.

The court noted that the issue of whether the common-law rule still applies in Illinois was a question of first impression for Illinois courts.

Standard Changes In regard to "Good Faith Settlements"

In the case of Johnson v. United Airlines, 784 N.E.2d 812 (Ill. 2003), the Illinois Supreme Court recognized the long-standing principle that the "good faith" of a settlement is the only limitation that the Joint Tortfeasor Contribution Act places on the right to settle and that it is the good faith nature of a settlement that extinguishes the contribution liability of the settling tortfeasor. In a matter of first impression, the court held that a non-settling tortfeasor is required to show by a preponderance of the evidence, rather than by "clear and convincing" evidence, that a proposed settlement was not made in good faith in order to preserve the right to seek contribution from a settling tortfeasor.

Insurance Coverage Update

In a case of first impression in Illinois, the Illinois Appellate Court held that a Named Driver Exclusion in an automobile liability insurance policy does not violate Illinois public policy. St. Paul Fire and Marine Ins. Co. v. Smith, 787 N.E. 2d 852 (Ill. App. 1st Dist. 2003). The court acknowledged that the Illinois Vehicle Code requires that all vehicles be insured through a liability insurance policy and that auto policies insure any person using the auto with the insured's permission. However, the Appellate Court held that section 7-602 of the Code provides a "limited exception for named driver exclusions to the mandatory insurance laws."

Emergency Responder Walking on Highway Held Not to Be “Pedestrian”

When is a pedestrian not a pedestrian? When the “pedestrian” is a police officer or emergency responder responding to an emergency. That was essentially the conclusion reached, in a case of first impression, in Lewis v. Haavig, 788 N.E.2d 758 (Ill. App. 3d Dist. 2003).

In Lewis, a police officer was investigating an automobile accident. Wearing dark clothes with no reflective material and without using other officers to warn oncoming vehicles, the police officer walked in the passing lane of the highway. Defendant Haavig, driving an oncoming car, struck and killed Sergeant Lewis. Lewis’ estate sued Haavig.

Haavig asserted comparative negligence as a defense. He tendered two jury instructions that recited the law in Illinois, pursuant to 625 ILCS 5/11-1003(a) and 625 ILCS 5/11-1007(b), that respectively require pedestrians in areas other than crosswalks and sidewalks to yield the right-of-way to vehicles and to walk on the shoulder far from the edge of the roadway.

The trial court refused to present those instructions to the jury. The jury found Sergeant Lewis 40% negligent. After trial, the judge vacated the judgment and awarded a new trial, believing he had erred in not tendering the second jury instruction (that pedestrians must walk on the shoulder far from the roadway).

On appeal, the appellate court reversed, finding the trial court erred in vacating the jury verdict. It held that “[t]he acts of individuals whose duties require them to be on the highway must be judged by a standard more liberal than in the case of an ordinary pedestrian who has no care other than his own safety.” The court therefore held that a police officer, in the course of responding to an emergency, is not held to the same standard as an ordinary pedestrian. The court further held that 625 ILCS 5/11-1003(a), the basis for one of the instructions, was not applicable because “Sergeant Lewis was not a pedestrian” but was, instead, acting as a police officer at the time of the incident.

Firm Notes Continued from page 8

Richard Hodyl taught a 13-week course beginning in June called “Legal Environment of Risk Management and Insurance” for the Insurance School of Chicago. Students in the course are insurance company claims and underwriting personnel.

Richard Hodyl spoke on June 11, 2002 before the National Association of Independent Insurers Claims Executives Committee in Des Plaines, Illinois on new case law developments affecting insurers.

Mark R. Misiorowski addressed the topic of “Transporter and Environmental Safety Regulations” at the August 21 seminar hosted by the Lake Michigan Section of the Air & Waste Management Association in Chicago.

Bradley C. Narstadt and **Christina D. Ketcham** had their article entitled “A Primer on Defending Breast Cancer Litigation” published in the spring Issue of *The Defense Law Journal*.

Losing Defendants Catch a Break

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Section 5-108 of the Code of Civil Procedure, nor permitted by other statute or court rules, to tax as costs to the losing party the professional fee charged by a non-party treating physician for attending an evidence deposition.

The Supreme Court also reversed the appellate court’s judgment affirming the taxing of the fees of the videographer and court reporter as costs since the court could not determine from the record whether Dr. Wolin’s evidence deposition was used at trial as a matter of necessity or purely as a matter of convenience.

Firm Notes

The firm is pleased to welcome **David L. Applegate** and **Theodore J. Low** as Partners. **Mr. Applegate** is an experienced commercial trial and appellate lawyer who concentrates his practice in patent, trademark, copyright, trade secret, and unfair competition litigation. He has been lead trial counsel in every case he has tried to verdict. An award-winning member of the Northern District of Illinois Trial Bar, David is a graduate of Yale University and of the University of Chicago Law School. He speaks and writes frequently on matters of interest to the legal and business communities. **Mr. Low** has practiced law since 1977, the year he graduated with honors from the University of Michigan Law School. Since then, he has practiced exclusively in litigation, with a heavy emphasis on commercial and complex matters, including antitrust, securities, contracts and bankruptcy reorganizations.

Summer E. Heil, Richard Hodyl Jr., David E. Kravitz and Edward R. Moor have been elected to partnership. **Summer Heil** concentrates her practice in commercial, product liability and transportation litigation. She also represents employers in actions pending in federal and state courts and equal employment opportunity agencies. **Richard Hodyl** concentrates his practice in insurance coverage, contracts, class actions, complex litigation and appeals. **David Kravitz** is a trial attorney involved in all aspects of litigation and trial of a wide variety of civil liability disputes. Areas of concentration include commercial litigation, civil conspiracy, products liability, construction litigation, transportation litigation, premises liability, and fire cause and origin litigation. Mr. Kravitz has litigated complex commercial cases, wrongful death actions, and catastrophic injury cases in numerous state and federal courts. **Edward R. Moor's** practice is concentrated in complex litigation. He has handled and tried cases in product liability litigation, including aviation litigation; commercial litigation, including telecommunications; toxic torts, wrongful death and personal injury cases. He represents manufacturers in state and federal courts throughout the Midwest. He has also secured major verdicts and settlements for personal injury plaintiffs in medical malpractice cases in Illinois.

The firm also welcomes new associates **Rodney C. Bashford, Thomas C. Koessl, Eric R. Lifvendahl, John E. Newton, Alex R. Thiersch, W. Scott Trench, Brigitte C. Weyls**, and **Beth B. Woods**.

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