

Illinois Litigation Update

Criminal Convictions Deemed Decisive

A criminal conviction can now effectively be used by an insurance company in deciding whether an insurer has a duty to defend the convicted insured. American Family Mut. Ins. Co. v. Savickas, 193 Ill.2d 378, 739 N.E.2d 445 (2000).

In the American Family case, Savickas had shot and killed Thomas. Savickas was convicted of first degree murder. Thomas' estate sued Savickas, alleging in part intentional conduct and alleging in part that Savickas had "negligently" shot Thomas. Savickas tendered his defense to American Family. American Family paid for the defense and also filed a declaratory judgment action, seeking a determination that it had no duty to defend or indemnify. Relying on the "expected or intended" bodily injury exclusion, the insurer filed proof of Savickas' conviction and sought summary judgment.

The Illinois Supreme Court held that summary judgment was properly entered for American Family. Importantly, the Court overruled that part of Thornton v. Paul, 74 Ill.2d 132, 384 N.E.2d 335 (1978), that held that a conviction is not conclusive proof of the facts upon which it was based, but rather only prima facie evidence. Now, the conviction acts as estoppel, if a number of factors are met:

1. The issue decided in the criminal case must be identical to the issue in the civil case.
2. There must have been a final judgment on the merits in the criminal case.
3. The party against whom estoppel is asserted must have been a party or in privity with a party to the prior case.
4. No unfairness will result to the party sought to be estopped.




Lloyd E. Williams, Jr., C. Barry Montgomery
and Peter C. John

Editor's Welcome

Welcome to the new Williams Montgomery & John Illinois Litigation Update. Past readers of the Williams & Montgomery Tort Law Update will notice that the newsletter name has changed.

This reflects the addition of name partner Peter C. John and our commitment to expand our traditional tort law reporting to include commercial litigation trends. As always, we are reporting every quarter on the very latest litigation trends and noteworthy court decisions in Illinois. We hope you enjoy our new newsletter.

Brigid E. Kennedy, Managing Editor



Defective Gun Safe Held Not To Be The Legal Cause of Suicide

In the case of Kleen v. Homak Manufacturing Company, et al., 2001 Ill.App. LEXIS 206 (1st Dist. March 30, 2001), the Illinois Appellate Court was asked to decide whether an act of suicide, under the facts alleged in the plaintiff's complaint, constituted an independent intervening act which broke the chain of causation. The court answered that question in the affirmative and reversed the trial court's order denying the defendants' motion to dismiss.

In Kleen, the plaintiff alleged that the defendant, Homak Manufacturing Company, sold and distributed a safe that was to be used for the storage of firearms and ammunition. The plaintiff further alleged that one of the other defendants, Gander Mountain, Inc., was engaged in the altering, labeling, selling and distribution of firearm safes.

Plaintiff purchased a Homak gun safe from Gander Mountain and stored his firearm and ammunition inside it. Tragically, plaintiff's adult son broke into the locked gun safe with a screwdriver, removed the gun and committed suicide. The plaintiff sued Homak and Gander under the theories of negligence and strict liability, alleging that the gun safe that they manufactured and sold was defective in that it contained a weak lock which could be easily broken.

The defendants filed motions to dismiss the plaintiff's complaint, arguing that the plaintiff's complaint failed to state a

cause of action because the plaintiff's son's suicide constituted an intervening cause breaking the chain of causation from the defendants to the plaintiff's son. The trial court denied the defendants' motions to dismiss, but certified the issue for appeal under Illinois Supreme Court Rule 308.

The appellate court began its opinion by noting that under both strict liability and negligence, a proximate cause is one that produces an injury through a natural and continuous sequence of

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events unbroken by any effective intervening cause. According to the court, the key question the court needed to resolve was whether it was reasonably foreseeable that creating an allegedly defective lock on a gun safe would result in a person breaking into the gun safe with a screwdriver, removing the gun stored inside, and then using that gun to kill himself. The court answered this question in the negative, stating:

"We find that David's suicide was not foreseeable to Homak or Gander. David's decision to kill himself, albeit tragic, was entirely of his own making ... As a competent adult, we must assume that David knew that a gun was inside the safe and clearly understood the dangers posed by the weapon. He purposely obtained the gun and intentionally took his own life. Homak and Gander did not cause David to

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No Social Host Liability for Underage Drinking

In the case of Wakulich v. Mraz, 2001 Ill.App. LEXIS 215 (1st Dist. March 30, 2001), the Illinois Appellate Court was asked to decide whether a social host can be held liable for the death of a minor houseguest pursuant to a common law cause of action for alcohol liability.

The plaintiff in Wakulich filed a complaint alleging that the plaintiff's minor daughter, Elizabeth Wakulich, attended a party at the home of the defendants, Dennis, Michael and Brian Mraz. On the evening of the decedent's death, Michael and Brian provided the decedent with a quart of an alcoholic beverage known as Goldschlager and induced her to drink it through goading, the application of great social pressure, and by offering money.

When the decedent lost consciousness, Michael and Brian placed her in a downstairs family room, where they observed her vomiting profusely and making "gurgling" sounds. Both boys later checked on the decedent, at which time they removed her vomit-saturated blouse and placed a pillow under her head to prevent aspiration. Early the next morning, Dennis Mraz ordered his sons to remove the decedent from the home. They took her to a friend's house, and later to a hospital, where she was pronounced dead.

The plaintiff's complaint brought claims against the three defendants pursuant to the Wrongful Death Act and the Survival Act. The plaintiff alleged that the defendants were negligent in inducing the decedent into drinking to excess and that all three of the defendants were negligent in failing to act to protect the decedent after voluntarily undertaking her care after she lost consciousness.



The defendants moved to dismiss, arguing that liability under the Dram Shop Act does not extend to social hosts or those not engaged in the liquor business. In addition, the defendants argued that they did not owe a legal duty to seek medical assistance for the decedent and that as a result the counts of the complaint based on voluntary undertaking should also be dismissed.

The trial court agreed with the defendants' arguments and dismissed the plaintiff's cause of action. The plaintiff then appealed.

On appeal, the appellate court recognized that in the case of Charles v. Seigfried, 165 Ill.2d 482, 651 N.E.2d 154 (1995), the Illinois Supreme Court held that the entire field of alcohol-related liability has been preempted by the Illinois General Assembly through its passage and continual amendment of the Illinois Dram Shop Act. According to the appellate court, the Illinois Supreme Court further held that that legislative preemption extended to social hosts who provide alcoholic beverages to another person, regardless of whether that person is an adult, underage, or a minor.

Based on the Charles court's repeated statements regarding preemption of the entire field of alcohol-related liability

and repeated findings that any form of social host liability that was to be created must come from the legislature, the appellate court held that the trial court was correct in dismissing those counts of the plaintiff's complaint based on a common law cause of action for alcohol liability.

In regard to the plaintiff's allegations of voluntary undertaking, the appellate court held that the trial court erred in dismissing those counts of the plaintiff's complaint which alleged a voluntary undertaking. According to the court, the plaintiff alleged that Michael and Brian Mroz voluntarily undertook affirmative steps to care for the decedent. According to the court, these actions clearly demonstrated an undertaking concerning the decedent's well-being and it would be left to a jury to decide whether the defendants failed to exercise due care in the performance of their voluntary undertaking.

Liability for Little League Brawl



The case of Hills v. Bridgeview Little League Association, 195 Ill. 2d 210, 745 N.E. 2d 1116 (2000) centers around a violent beating administered by one set of little league coaches to an opposing little league coach. The plaintiff, John Hills, acted as a little league coach for a Lemont little league team. In July of 1990, Hills' Lemont team was engaged in a

little league baseball tournament with a little league team from Bridgeview, Illinois. In the course of the game, two of the coaches from the Bridgeview little league team, George Loy, Sr. and George Loy, Jr., apparently took exception to the coaching being done by John Hills. At the end of the sixth inning, both Loys took turns pummeling Hills with their fists and a baseball bat.

Following the attack, John Hills and his wife filed a lawsuit in the Circuit Court of Cook County against the Loys, the City of Bridgeview and the City of Justice (which sponsored the little league tournament). As ultimately amended, the plaintiffs' complaint alleged a theory of direct negligence against Bridgeview. Specifically, the plaintiffs alleged that Bridgeview was negligent in failing to supervise and control its coaches and manager.

The case was reached for trial in June of 1995 and at that time an order of default

was entered against the Loys for failure to answer or otherwise plead. The jury returned a verdict against Bridgeview and the City of Justice in the amount of \$757,710. The appellate court affirmed.

Following that decision, both Bridgeview and Justice appealed to the Illinois Supreme Court. The Illinois Supreme Court reversed the decision of the appellate court.

The supreme court noted that rather than attempting to recover under a theory of *respondeat superior* the plaintiffs claimed that Bridgeview was "directly" negligent in failing to supervise and control the assistant coaches. In order to establish this claim of direct negligence, the plaintiffs were required to establish that Bridgeview had an affirmative duty to control the Loys and that the duty was breached.

According to the court, pursuant to Section 317 of the Restatement (Second) of Torts, the plaintiffs were required to show that Bridgeview knew or had reason to know of the need to control the Loys, that it knew or had reason to know that it had the ability to control them, and that it negligently failed to act on that information. According to the court, based on the facts of this particular case, the volunteer relationship between Bridgeview and the Loys lacked sufficient elements of control to bring that relationship within the purview of Section 317 of the Restatement (Second) of Torts. As a result, the supreme court concluded that Bridgeview had no affirmative duty to control the assistant coaches or to intervene to curtail the criminal attack. As a result, the court held that the trial judge erred in denying Bridgeview's motion for judgment notwithstanding the verdict.

In so holding, the court began its analysis by noting that there existed a split in the appellate court regarding the definition of the special relationship

that may impose upon landowners a duty to protect lawful entrants from the criminal attacks of third-parties. One line of appellate decisions held that the special relationship arises when the possessor of land holds the premises open to the public for entry for business purposes.

A second line of decisions imposed liability on landowners only if the possessor of the land received a benefit from the lawful entrant. After analyzing both positions, the supreme court held that a special relationship imposing a duty upon a landowner to protect lawful entrants from the criminal attacks of third-parties exists whenever the land is held open for business purposes, abrogating the case of Hill v. Charlie Club, Inc., 279 Ill.App.3d 754, 665 N.E.2d 321 (1st Dist. 1996).

The court further held that since the playing field upon which the attack occurred was not a business open to the general public, no special relationship existed between Justice and John Hills that would give rise to an affirmative

A special relationship imposing a duty on a landholder to protect lawful entrants from third-party attacks exists where land is held open for business purposes.

duty on the part of Justice to protect Hills from the criminal attack initiated by the Loys.

Defective Gun Safe ...

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make that decision, nor could they reasonably have anticipated that decision as a likely consequence of their conduct. Thus, [the plaintiff] has not adequately alleged legal cause.”

After addressing the issue of legal cause, the court turned to a discussion of the second distinct requirement for proximate cause: cause in fact. According to the court, a defendant’s conduct is a cause in fact of the plaintiff’s injury only if that conduct is a material element and a substantial factor in bringing about the injury.

In this case, the appellate court believed that the allegedly defective product manufactured by the defendants was only a passive condition which allowed the decedent’s injury to occur. In this case, the product at issue was a gun safe, not the gun actually used by the decedent to kill himself.

The allegedly defective gun safe did not injure the decedent in any way, but merely provided a condition allowing the decedent slightly easier access to the gun. In the view of the court, it was the decedent’s intentional, voluntary, and independent act of removing the gun and shooting himself that was the sole proximate cause of his injury and death. Based on the foregoing, the appellate court found that the plaintiff could never establish proximate cause and, accordingly, reversed the order denying the defendants’ motion to dismiss.

Anti-Assignment Clauses Enforced

An insurer may enforce an anti-assignment provision in a structured settlement agreement. In Re: Dennis Shaffer v. Liberty Life Assur. Co. of Boston, 2001 Ill.App. LEXIS 139 (1st Dist. 2001). Now that the First District has so decided, it means that every district of the Illinois Appellate Court has enforced anti-assignment provisions and prevented claimants from assigning their future payments.

Firm Notes

The firm congratulates **Peter C. John** on recently being elected President of the International Academy of Trial Lawyers.

Membership in the Academy is limited to 500 national and 100 international trial attorneys. **Lloyd Williams** and **C. Barry Montgomery** are also Fellows of the Academy, marking the firm as having the greatest number of attorneys in the organization of any Chicago law firm. The Academy, founded in 1954, is engaged in programs to cultivate the science of jurisprudence, promote reforms in the law, facilitate the admission of justice and elevate the standards of integrity, honor and courtesy in the legal profession.

Mardi Milia has been admitted to the Michigan Bar and **Jennifer Ross** has been admitted to the Indiana Bar.

Brad Nahrstadt and **Matt Kuehl** have had an article accepted for publication in the Illinois Bar Journal. The article discusses the contact sports exception to the general rule of negligence. It will be published in the November or December 2001 issue of the Journal.

Richard Hodyl gave a speech entitled "New Issues and Developments in Insurance Coverage Litigation" at a dinner meeting of the Illinois Society of Chartered Property and Casualty Underwriters.

C. Barry Montgomery presented a speech entitled "Serious Injuries" at the Kane County Bar Association Seminar on Damages — How to Maximize — How to Minimize.

Richard Hodyl presented a speech entitled "Recent Developments in NAII Amicus Litigation" to the National Association of Independent Insurers Claims Executive Meeting.

Thomas Pontikis gave a speech on Post-Sale Duty to Warn at the University of Wisconsin at Madison's course on the Role of Warnings and Instructions.

Copies of the articles contained in this issue of the Illinois Litigation Update and articles from the Tort Law Update can be found on the firm's Website: www.willmont.com.

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