


Illinois Litigation Update



Party Admission Fees Do Not Lead to Liability

Does requiring a guest to pay for admission to a party create a business invitor/invitee relationship, such that the person hosting the party can be liable for the criminal acts of third parties who injure the guest? According to the Illinois Appellate Court, the answer to this question is no.

The case of *Elizondo v. Ramirez*, 2001 Ill.App. LEXIS 569 (2nd Dist. July 17, 2001), involves a party which was held in the ground-floor apartment of a house owned by the defendants, Rigoberto and Manuela Ramirez. Mr. & Mrs. Ramirez allowed their 15-year-old daughter, Judith, to host a party in the apartment. Only teenagers were invited to the party. A sign on the front entrance to the party stated, "\$3.00 at door, no gang colors." A person stood at the front door collecting the entry fee while Judith greeted the entering guests. There was a keg of beer at the party and some beer in the refrigerator.

The plaintiff's decedent, Rodolfo Garcia, arrived at the party late in the evening. Rodolfo was a member of the Latin Kings street gang. When he arrived, several members of the Sureno 13s, a rival gang, were already present. Both Rodolfo and the members of the Sureno 13s were wearing gang colors. Sometime after Rodolfo arrived at the party, someone from inside the apartment rushed out to the porch and struck Rodolfo in the face. A fight ensued and a second individual then exited the apartment and shot Rodolfo in the right side. Rodolfo died a short time after being taken to the hospital.

The plaintiff filed a wrongful death and survival action alleging that the defendants were negligent prior to and at the time of Rodolfo's death. The defendants moved for summary judgment. The trial court granted the

motion, noting that no special relationship existed between the defendants and Rodolfo such that they owed him a duty to protect him from the criminal acts of third parties. The plaintiff then appealed.

" To establish the relationship of business invitor/invitee sufficient to impose a duty to guard against the criminal acts of third parties, the premises involved must be a business open to the general public."

The appellate court began its opinion by noting that the rule is well established in Illinois that, generally, no duty exists on the part of the owner or occupier of land to protect entrants from the criminal acts of third parties. An exception to the rule exists where there is a special relationship between the landowner and the injured person. The Illinois courts have recognized four special relationships sufficient to impose a duty upon a landowner to guard against third-party criminal attacks: (1) innkeeper and guest; (2) common carrier and passenger; (3) one who voluntarily takes custody of another in a manner that limits the person's ordinary opportunities for protection; and (4) business invitor and invitee. It was this

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Lawyer Bashing— by Another Lawyer —is Absolutely Privileged

In the case of Malevitis v. Friedman, 2001 Ill.App. LEXIS 525 (1st Dist. June 29, 2001), the plaintiff, John L. Malevitis, filed an action to recover damages from the defendants, Albert Brooks Friedman and Albert Brooks Friedman, Ltd., for alleged defamation and false light invasion of privacy. The alleged defamatory statements were made during the pendency of a breach of contract action that had been filed on behalf of Albert Brooks Friedman, Ltd., a professional corporation, against attorneys John L. Malevitis and James Stamos.

The breach of contract claim arose after Friedman's client, Sally Ruecking, discharged Friedman and hired Stamos and Malevitis to represent her in a personal injury matter. After receiving an award in *quantum meruit*, Friedman sought to recover additional attorney's fees under an alleged fee-division agreement negotiated with Stamos. The trial court granted plaintiff's motion to dismiss the breach of contract claim and the appellate court affirmed that dismissal. Thereafter, Friedman filed a petition for rehearing in the appellate court, and a petition for leave to appeal to the supreme court.

In his petition for rehearing and petition for leave to appeal, Friedman alleged that Malevitis knew that he had stolen the file from Friedman, that Malevitis had chased an existing case because of a personal relationship with Friedman's client, and that Malevitis was a perfidious and dishonest lawyer. After reading the statements, Malevitis filed a cause of action against Friedman alleging that the statements he made constituted defamation *per se* because they were not relevant to any issue in the case and imputed to Malevitis dishonesty and unethical conduct in his profession and also alleging that the



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statements tended to cast Malevitis in a false light by stating that he was unethical and dishonest in his profession.

Friedman subsequently filed a motion to dismiss the complaint, arguing that the statements were made in the context of a judicial proceeding and were therefore subject to an absolute privilege. The trial court agreed and granted Friedman's motion.

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Dissolved Corporation Allowed to Recover Following Reinstatement

In a recent case of first impression, the Illinois Appellate Court has held that reinstatement of an administratively dissolved corporation will serve to retroactively validate a judgment that arose out of a cause of action that accrued during the period of dissolution and which was entered during the period of dissolution. Henderson-Smith & Associates, Inc. v. Nahamani Family Service Center, Inc., 2001 Ill.App. LEXIS 395 (1st Dist. May 29, 2001).

On January 3, 1997, the parties entered into a contract for the plaintiff to provide accounting services for the defendant corporation. Subsequently, the plaintiff failed to pay its franchise taxes and, as a result, the Secretary of State administratively dissolved the plaintiff company effective June 1, 1998. Following the administrative dissolution, the plaintiff continued to provide accounting services for the defendant pursuant to the contract. However, the defendant never rendered payment for those services. As a result, the plaintiff filed suit in the Circuit Court of Cook County, seeking payment of the money owed under the contract. At the conclusion of a bench trial, judgment was entered in favor of the plaintiff and against the defendant.

Once the judgment was entered, the plaintiff attempted to execute the judgment by issuing a citation to discover assets. As a result of the citation to discover assets, the defendant's bank account was frozen. The defendant then filed an emergency motion to quash the citation to discover assets. That motion was granted and the judge ordered that a hearing should be held to determine whether the plaintiff

should be assessed Rule 137 sanctions for availing itself of the court's supplementary proceedings when it did not have legal authority to do so having previously been administratively dissolved.

Prior to the Rule 137 hearing, the plaintiff paid its franchise taxes and its corporate status was reinstated by the Secretary of State. Subsequent to the reinstatement, the trial judge entered an order denying the defendant's motion for a new trial. The defendant then appealed, arguing that the trial judge erred in allowing the plaintiff to proceed to trial and obtain a judgment

corporation is reinstated. Following the relation back provision, the appellate court deemed the plaintiff's corporate existence to have continued without interruption from the date of the issuance of the certificate of dissolution and, therefore, the plaintiff's reinstatement retroactively validated the judgment against the defendant in its favor.

The relation back provision of the Business Corporation Act retroactively validates a corporation's status once the corporation is reinstated.

despite its administrative dissolution.

The appellate court noted that there is a paucity of case law in Illinois addressing whether or not a corporation can validly sue for breach of contract even though the cause of action accrued after the corporation had been dissolved. In order to answer this question, the court reviewed case law from a number of jurisdictions, including Florida and Missouri. After reviewing all the case law, the court held that involuntary dissolution for failure to pay fees does not bar a corporation from suing on a claim that arose after dissolution, but before reinstatement.

Following this pronouncement, the court went on to hold that the relation back provision of the Business Corporation Act retroactively validates a corporation's status once the

Lawyer Bashing...

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On appeal, the appellate court affirmed the decision of the trial court, finding that Friedman's statements about Malevitis in his petition for rehearing and petition for leave to appeal to the supreme court were absolutely privileged and, therefore, could not be the subject of a civil suit. According to the court, although it did not condone the lack of civility displayed by the "intemperate statements describing counsel as a 'perfidious' and 'dishonest' lawyer", the court believed that the remedy for such conduct was more appropriately sought in the form of sanctions, and not a civil suit for defamation.

Claimants Bounce Back From Open and Obvious Ruling Regarding Trampoline Liability

The Fifth District of the Appellate Court has held that the dangers of bouncing on a trampoline may not be “open and obvious.” Sollami v. Eaton, 319 Ill. App.3d 612, 747 N.E.2d 375 (5th Dist. 2001). This is contrary to the holding of the Fourth District in Ford v. Nairn, 307 Ill. App. 3d 296, 717 N.E.2d 525 (4th Dist. 1999). In Ford, the Appellate Court held that a reasonable teenager would appreciate the open and obvious danger of jumping on a recreational trampoline and therefore the defendant had no duty to warn about those dangers.



In Sollami, 15-year-old Kathleen Sollami went to the Eaton residence and jumped on the Eaton’s backyard trampoline with her friends. While performing a trick maneuver, she hurt her knee when she came down on the trampoline mat. She sued Eaton under a theory of premises liability. She also sued the manufacturer (ICON Health and Fitness, Inc. d/b/a Jumpking, Inc.) for strict product liability.

Both defendants filed motions for summary judgment. They argued that a reasonable 15-year-old would appreciate the open and obvious danger of jumping on a trampoline, that Kathleen was capable of recognizing any associated dangers, and that there was

no duty to warn of a known danger. The trial court agreed that the danger was open and obvious and that neither defendant had a duty to warn of the danger. It relied on the Ford case (also involving a Jumpking trampoline), which it found factually indistinguishable. The court granted summary judgment for the defendants.

On appeal, the appellate court reversed. It held that warnings are required where the defendant, who possesses superior knowledge about the hazard and the risks of encountering that hazard, knows or should know that harm might occur if no warning is given. The court disagreed that Ford controlled.

The fifth district focused on particular facts in the record. The trampoline came with various warning labels and a user’s manual. The manual stated that the trampoline should only be used under the strict supervision of qualified instructors. The manual included an “Instruction Program” and “Model

Lessons.” The court also focused on portions of the user’s manual directing that the user should obtain instructions on basic, fundamental skills of *jumping and landing* in order to use the product safely.

The court noted that those sections of the manual were not mentioned in the Ford case. The court concluded that those sections of the manual were either not provided to or not considered by the court in the fourth district.

The court reasoned that although certain recognized hazards associated with trampoline jumping may be considered open and obvious, it doubted that recreational users appreciated the hazards posed by the “thrust capacity”

of the trampoline mat or appreciated that the risk is reduced when the user gets “fundamental landing techniques” instruction. Jumpking therefore had a duty to warn purchasers and users of the hazards and risk of harm that they might encounter while using the product. Interestingly, the court focused on statements made in the user’s manual in determining that the manufacturer had knowledge superior to that of a user.

As to Mr. Eaton, the court held that he had access to the warnings and instructions for use contained in the user’s manual, but that there were fact questions as to whether his knowledge of the possible hazard was superior to Kathleen’s.

Justice Welch dissented. He believed that the Ford analysis of the open and obvious damages rule was correct and applicable.

Illinois now has different rulings on the question of whether the dangers of trampoline jumping are open and obvious. Depending on the reader’s perspective, these rulings are diametrically opposed. The Illinois Supreme Court has accepted review of Sollami. Look to future Williams Montgomery & John Illinois Litigation Updates to see how our supreme court decides this conflict.

Party Admission Fees ... *Continued from page 1*

fourth special relationship that the plaintiff argued was applicable to the case at bar.

According to the plaintiff, the decedent was required to pay a \$3.00 fee to enter the party. The payment of the fee entitled the decedent to drink beer and to enjoy the music provided by the disc jockey. In addition, by paying the fee, the decedent, a minor, was free to drink beer without intervention by the police. According to the plaintiff’s assertion, between 50 and 70 individuals attended the party, and the defendants therefore made between \$150 and \$210 on the party.

The court, in rejecting the plaintiff’s argument that charging a fee to partygoers is sufficient to establish an invitor-invitee relationship, specifically noted that there is scant authority in the State of Illinois regarding this particular proposition. As a result, the court was forced to review cases from Missouri and Michigan in order to resolve the dispute.

The cases relied upon by the court from Missouri and Michigan all hold that the imposition of a small fee to people attending a party does not alter the relationship between the host and the guests. As a result, the appellate court

concluded that the collection of a small fee, by someone who, absent the fee, would otherwise clearly not be a business invitor, is insufficient to establish the special relationship of business invitor and invitee that would allow the imposition of liability for the criminal acts of third parties.

According to the court, “to establish the relationship of business invitor-invitee sufficient to impose a duty to guard against the criminal acts of third parties, the premises involved must be a business open to the general public.” Since the defendants’ home was not held open to the general public as a business, the court held that the defendants did not owe a duty to the decedent to protect him from the criminal acts of a third party.

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:

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Settling Defendants Not Entitled to a Good Faith Finding

In the case of Dubina v. Mesirow Realty Development, Inc., 2001 Ill. LEXIS 1034 (July 26, 2001), the Illinois Supreme Court was asked to decide whether the settlement of a tort action for property damage can meet the good-faith requirement of the Joint Tortfeasor Contribution Act when the plaintiffs, as a condition of their settlement agreement, assign their causes of action to a group of the settling defendants.

The dispute which gave rise to the appeal centered around a fire in April of 1989 which destroyed a building that housed several Chicago art galleries. The fire occurred while the building was undergoing extensive renovation. Numerous works of highly valuable art were destroyed when the building burned down.

In the wake of the fire, the owners of the art galleries who leased space in the building, the artists who exhibited work in the galleries, and their insurers, brought a total of 35 separate actions containing the damage claims of 112 separate plaintiffs to recover for property loss. Most of the actions named as defendants the owners and managers of the building, the general contractors hired to do the renovation work, and their subcontractors.

Prior to trial, all of the plaintiffs settled with all of the defendants except two: Litgen Concrete Cutting & Coring Company, Inc. and Gelick Foran Associates, Inc. The settling defendants entered into 29 separate agreements with the plaintiffs. Each agreement required the plaintiffs to assign their claims against Litgen and Gelick Foran to certain of the settling defendants. Under the terms of the agreements, the settling defendants agreed to pay the plaintiffs a particular amount in settlement and a separate but equal amount in exchange for the assignment of plaintiffs' cause of action against Litgen and Gelick Foran. The total

amount paid for settlement was approximately \$4.5 million. An equal amount was paid for the assignments.

Over the course of a series of hearings in June and July of 1994, the Circuit Court of Cook County found that each of the 29 settlement agreements had been made in good faith within the meaning of Section 2 (c) of the Joint Tortfeasor Contribution Act. The court entered orders dismissing the plaintiffs' claims against the settling defendants and dismissing all of the defendants' contribution claims against one another, including the contribution claims asserted by Litgen and Gelick Foran.

The settling defendants subsequently substituted their attorneys for the plaintiffs' attorneys and moved for a voluntary dismissal of the plaintiffs' claims against Litgen and Gelick Foran. The settling defendants then re-filed the plaintiffs' claims by assignment against Litgen only in the Circuit Court of Cook County (Gelick Foran had previously obtained summary judgment in its favor).

On appeal, the Illinois Supreme Court held that the settlement agreement at issue defeated the Joint Tortfeasor Contribution Act's purpose of equitably distributing among all joint tortfeasors the burden of compensating an injured plaintiff since, in receiving the assignment of the plaintiffs' causes of action, the settling defendants stood to recoup \$4.5 million of their settlement payment (the portion paid for the assignment), as well as any damages exceeding \$9 million. In addition, the Court held that the settlement agreements and assignments violated the Act because they allowed the settling defendants to accomplish indirectly that which they could not do directly—recover contribution from Litgen.

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Breach of the Covenant of Good Faith and Fair Dealing in a Contract Does Not Give Rise to a Separate Cause of Action in Tort

Can the contractual covenant of good faith and fair dealing serve as an independent source of duties giving rise to a cause of action in tort? According to the Illinois Supreme Court, absent very special limited circumstances, the answer is no. Voyles v. Sandia Mortgage Corporation, 2001 Ill. LEXIS 486 (May 24, 2001).

In the Voyles case, the plaintiff homeowner was awarded damages in DuPage County Circuit Court against the defendant mortgage company for negligence in issuing false and inaccurate credit reports. On appeal, the appellate court found that the mortgage company acted intentionally in raising the homeowner's monthly payments without reason and thereafter refusing to accept the proffered payments. Subsequently, the appellate court entered judgment for the homeowner on the homeowner's breach of the duty of good faith and fair dealing claim, tortious interference with prospective economic advantage claim, and defamation claim. The mortgage company then appealed.

On appeal, the Supreme Court recognized that prior to the decision of the appellate court in this case, the

appellate court panels which had squarely addressed the question had consistently refused to recognize an independent tort for a breach of the implied duty of good faith and fair dealing in a contract. One very narrow exception exists to this rule: a separate action in tort is available when an insurer breaches its duty to settle an action brought against the insured by a third party.

According to the Supreme Court, the plaintiff homeowner had recourse to both her specified remedies under the parties' contract and traditional tort remedies which she in fact sought to employ but failed to prove (i.e., tortious interference with prospective business advantage and defamation).

As a result, according to the court, a "cause of action for violation of a duty in good faith and fair dealing would, as a practical matter, add little to this or any plaintiff's remedial repertoire." Since the court did not see a need to expand the reach of the limited cause of action acknowledged in duty-to-settle cases, the judgment in favor of the plaintiff on her breach of the duty of good faith and fair dealing claim was reversed.

Settling Defendants ... *Continued from previous page*

The plaintiffs, by assigning their causes of action to the settling defendants, allowed the settling defendants, in the guise of plaintiffs, to indirectly recover contribution from Litgen and, since the Act prohibits a settling tortfeasor from recovering contribution from any

tortfeasor whose liability is not extinguished by the settlement, the settlement agreements and assignments were found to be collusive.

Firm Notes

Williams Montgomery & John is pleased to announce that **Patrick J. Head** and **Joseph L. Kish** have joined the firm as partners.

Patrick Head, former General Counsel of FMC Corporation, Montgomery Ward & Co. and former Regional Counsel of Sears Roebuck & Co., and **Bill Shank**, a litigation partner and the former General Counsel of Walgreen Co. and Chemetron Corporation, will combine their experience in the management and disposition of thousands of cases in virtually every field of the law by serving as a General Counsel unit within the firm.

Joseph L. Kish, previously a partner with Severson & Werson of San Francisco, is a graduate of the University of Michigan and DePaul University College of Law (1988) and has concentrated his practice in civil litigation involving complex business and insurance matters, as well as professional and products liability, and white collar criminal defense.

Hanson L. Williams has joined us as an associate. Prior to joining our firm, Hanson worked as an associate at Anderson Bennett & Partners and Cassidy, Schade & Gloor. Hanson also was an Assistant State's Attorney for Cook County. He graduated from Colgate University and the University of Denver College of Law (1994).

The firm welcomes two new associates, **Adam C. Carter** and **Margaret C. Grzadziel**, both graduating from the University of Illinois College of Law.

Thomas H. Neuckranz served as a panelist at The Jerome Mirza Professional Trial Lawyers College of Advocacy training program in the principles and techniques of personal injury litigation at The University of Illinois College of Law, July 11-14, 2001.

Lloyd E. Williams, Jr. and **Bradley C. Nahrstadt** have had an article published in *Business Law Today*, the magazine of the ABA Section of Business Law. The article, which discusses the handling of class actions and multi-district litigation, appears in the September/October issue.

Peter C. John participated in the CBA's seminar entitled "Anatomy of a Civil Trial" on September 13th. Peter's topic was Effective Direct and Cross examination.

For additional information,
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