

## Illinois Litigation Update

### Provisions of the Illinois Hospital Licensing Act Held Constitutional

In Burger v. Lutheran General Hospital, 2001 Ill. LEXIS 1423 (October 18, 2001), the Illinois Supreme Court was asked to decide whether certain provisions of Section 6.17 of the Illinois Hospital Licensing Act violate the Illinois Constitution.

The plaintiff, Doris Burger, went to the Lutheran General Hospital emergency room with a leg injury. Within a few hours, after examination and treatment, she was released. The next evening, Burger was admitted to the hospital for intravenous antibiotic therapy. Three days later her leg was amputated at the knee.

Burger filed a medical malpractice complaint against four doctors, Lutheran General Hospital, and the hospital's parent corporation. She alleged that emergency room care and care during her admission was negligent.

Discovery in the plaintiff's case was ongoing at the time that Public Act 91-526 became effective. This public act amended section 6.17 of the Hospital Licensing Act, governs protection of, and confidential access to, a hospital patient's medical records and information.

The amended sections at issue in the appeal provided as follows:

\*\*\* (d) No member of a hospital's medical staff and no agent or employee of a hospital shall disclose the nature or details of services provided to patients, except that the information may be disclosed to the patient, persons authorized by the patient, the party making treatment decisions, if the patient is incapable of making decisions regarding the health services provided, those parties directly involved with providing treatment to the patient or processing the payment for that

treatment, those parties responsible for peer review, utilization review, quality assurance, risk management or defense of claims brought against the hospital arising out of the care, and those parties required to be notified under the Abused and Neglected Child Reporting Act, the Illinois Sexually Transmissible Disease Control Act, or where otherwise authorized or required by law.

(e) The hospital's medical staff members and the hospital's agents and employees may communicate, at any time and in any fashion, with legal counsel for the hospital concerning the patient medical record privacy and retention requirements of this section and any care or treatment they provided or assisted in providing to any patient within the scope of their employment or affiliation with the hospital.

\*\*\* (h) Any person who, in good faith, acts in accordance with the terms of this section shall not be subject to any type of civil or criminal liability or discipline for unprofessional conduct for those actions.

After the Act was amended, Burger filed an emergency motion to bar *ex parte* communications between the hospital's counsel and those members of its medical staff who provided health care to her but who were not named as defendants. The motion also requested that the circuit court declare subsections (d), (e) and (h) of Section 6.17 of the Hospital Licensing Act unconstitutional.

The circuit court determined that certain portions of the Act violated the doctrine of separation of powers and that other portions constituted an unreasonable

CONTINUED ON PAGE 5

WINTER 2001

## Federal Boat Safety Act Preempts Propeller Guard Claims



In *Sprietsma v. Mercury Marine*, 2001 Ill. LEXIS 1039 (August 16, 2001), the Illinois Supreme Court held that the Federal Boat Safety Act of 1971 (FBSA) preempts state common law causes of action based on a manufacturer's failure to install propeller guards on boat engines.

Jean's husband, Rex, filed a wrongful death action against, among others, Mercury Marine, seeking to recover damages for the decedent's pain and suffering along with the pecuniary loss suffered by himself and his son. Mercury Marine filed a motion to dismiss on the grounds that the Sprietsmas' claims were expressly preempted by the language of the FBSA's preemption clause and were also impliedly preempted. The circuit court granted Mercury Marine's motion to dismiss, finding the claims to be impliedly preempted. The appellate court affirmed, holding that the common law claims for failure to install propeller guards were expressly preempted. The Illinois Supreme Court then granted the plaintiff's petition for leave to appeal.

In July 1995, the plaintiff's decedent, Jeanne Sprietsma, fell from a motorboat and was struck by the motor's propeller blades. As a result, she suffered serious injuries that resulted in her death. The boat was equipped with a 115 horsepower outboard motor which did not contain a propeller guard. The motor was designed, manufactured and sold by Mercury Marine.

According to the supreme court, Congress enacted the FBSA "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." In 1988, the Coast Guard specifically considered whether to require manufacturers to install propeller guards on their boat motors. The Coast Guard directed the National Boating Safety Advisory Council to review the available data on prevention of propeller-strike accidents and to assess the feasibility and potential safety advantages and disadvantages of propeller guards. The advisory council appointed a propeller guard subcommittee to review and analyze the data and to consider whether the Coast

### in this issue

- ◆ Hospital Licensing pg 1
- ◆ Boat Safety pg 2
- ◆ Auto Business Exclusion pg 3
- ◆ Trigger of Coverage pg 3
- ◆ Can We Go Home Yet? pg 4
- ◆ Tender Years Doctrine pg 7

CONTINUED ON PAGE 6

## Automobile Business Exclusion Found Void

The supreme court recently decided that an automobile business exclusion in an automobile liability insurance policy violated Illinois public policy. State Farm Mutual Automobile Ins. Co. v. Smith, 2001 Ill. LEXIS 1073 (Ill. 2001).

In Smith, Barnes drove his vehicle to Harrah's Casino. Ruby Smith was his passenger. He left his vehicle with a valet service. When leaving Harrah's, Fisher, a valet driver employed by Harrah's, retrieved the car. Smith alleged that as she was entering the passenger door, the car rolled backwards, striking her and knocking her down. She sued Barnes, Fisher and Harrah's for negligence.

Barnes' vehicle was insured by State Farm. Fisher and Harrah's tendered their defense to State Farm who refused the tender. State Farm then filed an action for declaratory judgment arguing that it had no duty to defend or indemnify Fisher or Harrah's because of an automobile business exclusion in the policy.

The trial court held that the automobile business exclusion applied and granted summary judgment for State Farm. On appeal, the appellate court found that this exclusion violated the public policy of Illinois as stated in Section 7-317(b)(2) of the Illinois Vehicle Code and as decided by the Supreme Court in State Farm Mutual Automobile Ins. Co. v. Universal Underwriters Group, 182 Ill. 2d 240, 695 N.E.2d 848 (1998). Universal Underwriters had held that a liability insurance policy issued to the owner of an automobile must cover the named insured and any other person using the vehicle with the named insured's permission. State Farm sought leave to appeal from the Illinois Supreme Court. The Illinois Supreme Court affirmed the judgment of the appellate court, thus finding that the

exclusion was void.

The automobile business exclusion provided that there was no coverage "while any vehicle insured under this section is: . . . B. Being repaired, serviced or used by any person employed or engaged in any way in a car business. . . ." Section 7-601(a) of the Mandatory Insurance Act in the Illinois Vehicle Code requires that vehicles be insured through a liability insurance policy. Section 7-317(b)(2) of The Vehicle Code requires that motor vehicle liability policies also insure not only the named insured but any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured. The supreme court concluded that those two sections of the Vehicle Code together require that a liability insurance policy issued to an auto owner must cover the named insured and any other person using the car with the named insured's permission.

The Illinois Supreme Court agreed with Fisher and Harrah's that the automobile business exclusion violated Illinois' requirement that a vehicle owner's liability insurance policy cover any person using the vehicle with the express or implied permission of the owner. When the automobile owner gives his vehicle to a person engaged in an automobile business, the owner is also giving that person the express or implied permission to use the vehicle. The exclusion for persons engaged in the automobile business necessarily means that persons using the vehicle with the insured's express or implied permission are excluded from coverage. That violates Section 7-317(b)(2).

The Court quoted, approvingly, from the appellate court in this case that had held that the purpose of mandatory automobile liability insurance is not only to protect the owner against

liability, but also to protect the public by securing payment of their damages. The Court refused to establish a public policy contrary to the public policy that the Illinois legislature had determined was appropriate for the State of Illinois. The holding was also consistent with the majority of other jurisdictions considering the precise issue.

Despite the Court's blow to the insurance industry, it also pointed out that it was not deciding issues beyond the specific issue in this case. The Court disagreed that its interpretation meant that it was prohibiting virtually every possible exclusion that an insurer may include in its policy. The court stressed that it was deciding only the issue of the automobile business exclusion and was expressing no opinion as to any other exclusion. Since the automobile business exclusion was State Farm's only argued basis for summary judgment, the court remanded the cause to the circuit court for entry of summary judgment in favor of Fisher and Harrah's.

The Court's decision to limit its analysis to only the specific exclusion at hand likely means that there will be many future challenges, on an exclusion by exclusion basis, to other exclusions in auto policies on public policy grounds.

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## Supreme Court Decides Trigger of Coverage Issue

In Traveler's Ins. Co. v. Eljer Mfg., Inc., 2001 Ill. LEXIS 1070 (Ill. 2001), the Court decided when indemnity coverage for "property damage" under excess comprehensive general liability insurance policies is triggered. The Court held that, under Illinois law, coverage for claims by individuals alleging property damage

CONTINUED ON PAGE 6

## **Can We Go Home Yet? It's a Matter of School Policy**

The Illinois Supreme Court has had another chance to examine the immunity question under Section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act ("The Act"). Harrison v. Hardin County Community Unit School District No. 1, 2001 Illinois LEXIS 1429 (Ill. 2001). In Harrison, the Court determined that a high school principal's decision as to what time students could leave school due to bad weather conditions was a policy-making, discretionary decision, and, therefore, the School District was entitled to immunity for the ramifications of that decision.



In Harrison, high school student Joshua Davis asked his principal if he could leave school early because of deteriorating weather conditions. The principal advised Davis that all students would be dismissed early at a certain time after lunch.

Later that day, the principal dismissed school early and Joshua drove home from school with his girlfriend. He passed his own driveway and continued toward his girlfriend's house. En route, he was in a car accident. He admitted that he could have taken the bus to school. He further acknowledged that

the accident would not have occurred had he not been taking his girlfriend home and that his girlfriend could have ridden home on the bus.

The evidence showed that a procedure was in place at the high school where students could call home and ask their parents if they could leave school early. However, the principal had discretion to deny the student's request if school were to be dismissed within a short period of time.

The court reasoned that the principal's decision in this case required considerations of the circumstances surrounding Joshua's request. The principal had to balance the competing interests of the student's desire to leave early with the precedent it would set for other students who wanted to leave early. He also had to make a judgment as to how best to perform his duties as principal and find the most optimal solution. Therefore, he made a discretionary policy decision when he refused Joshua's request for early dismissal.

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**The principal made a discretionary policy decision when he refused Joshua's request for early dismissal.**

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The court disagreed with the plaintiff's argument that the principal could not have been determining policy because the decision only impacted an individual student. The court noted that Section 2-201 does not require that the decision achieve a "common public benefit" to fall within the Act's immunity protections.

**CONTINUED ON PAGE 5**

## **Hospital Licensing Act Held Constitutional** *Continued from page 1*

invasion of the plaintiff's constitutional privacy interests.

Following the circuit court's decision, a direct appeal was taken to the Illinois Supreme Court. In summarizing the plaintiff's separation of powers argument, the Supreme Court noted that the plaintiff argued that subsections (d) and (e) violate Supreme Court Rule 201 because they contain no limitation on the scope of information that can be elicited *ex parte* from the patient's doctor during discovery, thereby allowing medical care entirely unrelated to the issues raised in a lawsuit to be fully revealed; foreclose the court from deciding discovery issues relating to *ex parte* contacts between defense counsel and hospital health care providers who are not specifically named as defendants in the plaintiff's medical malpractice action; and improperly permit *ex parte* communications between defense attorneys and the plaintiff's treating physicians long before any lawsuit is filed by the plaintiff for medical negligence.

In rejecting these arguments, the Court specifically recognized that the plaintiff and the circuit court improperly ignored the important non-litigation aspects of subsections (d) and (e) of Section 6.17 of the Act. According to the Court, subsections (d) and (e) do not regulate discovery. Instead, the Act provides standards and regulations intended to safeguard the public's health and welfare. As the Court noted, in light of the highly regulated environment in which hospitals operate, it is reasonable and logical that hospital risk managers and hospital counsel interact on a regular basis with hospital employees, agents and staff concerning a wide array of issues which may require prompt legal guidance and which are not related to litigation. Because the limited intra-hospital discussions cannot be characterized as disclosures to an opposing litigant or to a third-party not

affiliated with the hospital, and do not necessarily take place in a litigation setting, the information shared pursuant to those subsections is not "discovery" subject to the Supreme Court rules. As a result, subsections (d) and (e) do not purport to regulate discovery and therefore do not impinge upon the power of the judiciary.

In regard to the plaintiff's separation of powers argument concerning subsection (h), the Court found that subsection (h) simply states the self-evident proposition that if a party acts in good faith and within the parameters of Section 6.17, that party is not subject to liability or disciplinary action. The court concluded that subsection (h) facilitates the limited, permissible communications authorized in subsections (d) and (e), and therefore does not violate the separation of powers.

In regard to Burger's violation of privacy argument, the Court noted that in light of the reality of contemporary hospital operations, a hospital patient cannot reasonably expect a member of the hospital's medical staff, or the hospital's agents and employees, to refrain from discussing the medical care provided to the patient with the hospital, which is ultimately responsible for the patient's care. Despite this reduced expectation of privacy, the provisions of Section 6.17 of the Act protect a patient's justifiable expectation of privacy with respect to the release of medical information to third parties and explicitly prohibit disclosure of medical information to outsiders. Since the hospital is not a third-party with respect to its own medical information, the provisions at issue do not violate the common law doctrine, known as the Petrillo doctrine, which protects a patient's privacy by preventing confidential medical information from being divulged to third parties.

Finally, the court rejected Burger's special legislation argument, finding that the classifications set forth in the challenged portions of the Illinois Hospital Licensing Act are reasonably related to a legitimate governmental purpose and therefore do not constitute special legislation.

In summary, the Illinois Supreme Court held that subsections (d), (e) and (h) of Section 6.17 of the Illinois Hospital Licensing Act do not violate the separation of powers clause of the Illinois Constitution, do not violate a patient's right to privacy as defined by Article 1, Sections 6 and 12 of the Illinois Constitution, and do not violate the special legislation clause contained in Article 4, Section 13 of the Illinois Constitution.

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## **Can We Go Home Yet?**

*Continued from page 4*

Justices Harrison and Kilbride concurred. They did not believe that the School District was entitled to immunity. However, they thought that proximate cause was lacking. It was unforeseeable that, after professing a desire to avoid driving in inclement weather, Joshua would make the independent decision to drive past his own home and drop his girlfriend off despite the fact that bus transportation was available. Joshua's conduct was an intervening, efficient cause that broke the chain of causation.



## **Federal Boat Safety Act Preempts Propeller Guard Claims**

*Continued from page 2*

Guard should move toward a federal propeller guard requirement.

After studying the issue and conducting public hearings, the subcommittee unanimously recommended that the “Coast Guard should take no regulatory action to require propeller guards.” The subcommittee made this recommendation after finding that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades.

After noting this history, the supreme court turned to the question of whether or not the FBSA preempted the plaintiff’s common law causes of action. According to the court, Section 4306 of the FBSA preempts state laws or regulations that are not identical to the regulations promulgated under the FBSA. At first glance, this provision appears to expressly prohibit the type of action brought by the plaintiff. However, the court noted that Section 4311 of the FBSA specifically states that compliance with the standards, regulations or orders prescribed under the FBSA do not relieve a person from liability at common law or under state law. Read in conjunction with Section 4306, the court held that Section 4311 prevented the court from finding express preemption of the plaintiff’s common law causes of action.

After ruling that the FBSA did not expressly preempt the plaintiff’s common law causes of action, the court then turned to a determination of whether the FBSA impliedly preempted the plaintiff’s claims.

According to the court, the United

States Supreme Court has found implied conflict preemption where it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In this case, the Coast Guard made an affirmative decision to refrain from promulgating a propeller guard requirement. As a result, the supreme court believed that the Coast Guard’s failure to promulgate a propeller guard

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**The Coast Guard’s failure to promulgate a propeller guard requirement equates to a ruling that no such regulation is appropriate.**

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requirement equates to a ruling that no such regulation is appropriate pursuant to the express policies of the FBSA. Since a damage award would, in effect, create a propeller guard requirement, and thus frustrate the objectives of Congress in promulgating the FBSA, the Court held that the plaintiff’s common law tort claims were impliedly preempted by the FBSA.

## **Supreme Court Decides Trigger of Coverage Issue**

*Continued from page 3*

arising out of the failure of the “*QEST*” residential plumbing system was triggered when a claimant suffered physical injury to tangible property in the form of water damage due to leaks from the *QEST* system. The opinion is noteworthy for its comprehensive analysis of Illinois law regarding trigger of coverage.

## Court Won't Buck Old Law Despite Modern Times

Despite the fact that times are changing, the appellate court has refused to recede from the rule that a child under seven is incapable of negligence. *Appelhans v. McFall*, 2001 Ill. App. LEXIS 799 (1st Dist. 2001). In *Appelhans*, the plaintiff pedestrian was hit by five-year-old defendant William McFall while he rode his bicycle. Plaintiff alleged that William rode his bicycle negligently and that his parents negligently supervised him. The trial court dismissed the complaint and the appellate court affirmed.

As to William, the defendants moved to dismiss based on the long established rule of Illinois law that a child is incapable of negligence if he is less than seven years old. The rule dates back to the turn of the 20th century when the Illinois Supreme Court adopted the 'tender years' doctrine, which states that a child is incapable of contributory negligence if he is less than seven years old. The rationale for the doctrine is the belief that a child under the age of seven is incapable of recognizing and appreciating risk and is, therefore, deemed incapable of negligence as a matter of law.

In *Appelhans*, the plaintiff argued that "profound societal changes" since the adoption of the rule merited reconsideration. Specifically, the plaintiff pointed to cable television, video games, the Internet, pre-teen gangs and violent crime. The plaintiff's theory was that in response to these modern day challenges, children must learn at a young age to exercise good judgment and may, therefore, be held to a reasonable standard of care based upon their age.

The appellate court agreed that the notion that young children cannot recognize or appreciate risk has been and continues to be undermined as society more thoroughly educates them



on safety issues. The Court also agreed that the arbitrariness of the seven-year rule supported its abandonment.

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**The court relied on principles of *stare decisis* which it believed compelled it to follow the tender years doctrine.**

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Nevertheless, the court refused to abandon the rule. The court relied on principles of *stare decisis* which it believed compelled it to follow the tender years doctrine. The court believed it should not depart from rules long recognized as the law just because the court believed that it might decide the issue differently. However, the court "invited" the Supreme Court or the legislature to revisit the viability of the tender years doctrine. The court was concerned that if it rejected the tender years doctrine, it would create a

split in appellate court authority that would render uncertain the rights of future litigants.

The court also found that the plaintiff had not adequately alleged the two elements required to prove a claim of negligent parental supervision: (1) the parents were aware of specific instances of prior conduct sufficient to put them on notice that the act complained of was likely to occur and (2) the parents had the opportunity to control the child.

It will be interesting to follow this case and see whether the plaintiff seeks review from the Illinois Supreme Court — the court that could appropriately adopt new law. We will report on any future developments.

## Firm Notes

The Firm's affiliated office, **Clarke, Silverglate, Campbell, Williams & Montgomery**, in Miami, Florida was recently rated as one of the Top Law Firms in South Florida in the 2002 Edition of the South Florida Legal Guide, a publication of Florida Media Affiliates. **Mercer K. (Bud) Clarke** was recently designated a Leading Florida Attorney in both personal injury defense and product liability law by the American Research Corporation. **Spencer H. Silverglate** of the Miami office was recently selected by his South Florida peers as a Top Lawyer - Litigation as reported in the 2002 Edition of the South Florida Legal Guide.

**Edward O. Pacer** and **Anthony A. Enrietti** gave presentations regarding worker's compensation at Turner Construction's Training Program. Topics addressed were the Americans with Disabilities Act, FMLA considerations and basic worker's compensation.

**Richard Hodyl** was a speaker on a panel discussion at the DRI Annual Meeting on October 4, 2001 in Chicago. The panel discussion involved recent Arizona and Ohio state court decisions that have narrowed the applicability of the attorney client privilege in insurance bad faith cases.

**Richard Hodyl, Jr.** and **Mark R. Misiorowski** authored an article titled "Scope of Business Interruption Policies Will Be Tested After The World Trade Center Attack" which was published in the October 2001 Mealey's Litigation Report: Insurance.

Williams Montgomery & John Ltd. would like to welcome its newest associates:

**Edward R. Moor** has rejoined the firm. Ed graduated from Indiana University (1987) and Indiana University School of Law (1990). He is admitted to practice in both Illinois and Indiana.

**Sarah M. Bailey** graduated from the University of Cincinnati (1997) and Chicago-Kent College of Law (2000). She is also admitted to practice in Michigan.

**Cameron H. Goodman** graduated from the University of Wisconsin (1997) and Chicago-Kent College of Law (2000).

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