ILLINOIS CASELAW UPDATE—MARCH 28, 2008[1]

Hospitals & Physicians

Defense Verdict for Hospital Reinstated; "Missing Witness" Issue

On March 24, 2008, the First District Appellate Court reinstated a Cook County verdict in favor of MacNeal Memorial Hospital and its physician in a case regarding the allegedly negligent insertion of a chest tube in a pneumonia patient.

The case was tried before the Hon. Judge John B. Grogan. Plaintiff argued on appeal that Judge Grogan abused his discretion in refusing to give a "missing witness" instruction as to defendant's expert witness, Dr. Jesse Hall, whom it was alleged had given an opinion years before trial that the defendant physician had deviated from the standard of care.

In opening statements, plaintiff's counsel stated to the jury that Dr. Hall would concede that the standard of care had been breached by the defendant physician. After plaintiff rested her case, the defense did not call Dr. Hall, ostensibly on the basis of his travel and surgery schedule. Plaintiff then unsuccessfully sought to re-open her case to call Dr. Hall or, in the alternative, obtain a 5.01 "missing witness" instruction.

Judge Grogan refused both of plaintiff's requests. The verdict was rendered for defendant. Judge Grogan did order a new trial for unstated reasons. The appellate court, in an opinion written by Justice Robert Cahill, reinstated the verdict on the following bases: (1) Dr. Hall was a witness equally available to both sides, such that plaintiff could have subpoenaed him for deposition and/or trial; (2) plaintiff's counsel injected error into the proceedings by revealing the nature of Dr. Hall's alleged testimony in opening statements, and where a party had injected error into the proceedings, it was 'manifestly unfair' for that party to be granted a new trial. *Lisowski v. MacNeal Memorial Hospital Association, et al., 1-07-0076*

Defense Verdict for Physician Upheld; "Dueling Experts" and Use of Article on Cross-Examination

The 7th U.S. Circuit Court of Appeals recently affirmed a defense verdict in favor of a surgeon in the Southern District of Illinois. At issue in the case were injuries sustained by plaintiff after the defendant removed her gallbladder as a treatment for recurrent epigastric pain. Plaintiff alleged that defendant was negligent in having mistaken plaintiff's common bile duct for the cystic duct. Plaintiff's expert testified that the standard of care requires that the cystic duct be identified with "absolute certainty" before a transection; defendant's expert testified that there is no method of identification that is free from potential risks. The defense expert further testified that the surgeon complied with the standard of care by using the accepted procedures to assure herself that it was the cystic duct that she was about to resect.

The jury returned a defense verdict. On appeal, plaintiff argued the verdict was against the "manifest weight of the evidence." The appellate court rejected this argument; finding that a jury—after hearing all expert testimony—could have reasonable concluded that the defendant was not negligent. Also rejected was plaintiff's claim that the trial court erred in allowing the defense attorney to cross-examine plaintiff's expert with an article authored by a non-testifying expert in the field. The appellate court found that this cross-examination was in no

way improper, as the attorney asked only a few questions about the article and essentially the same information came out in the defendant's expert's testimony. *Wipk v. Kowalski, 06-3844*

Evidence

Plaintiff's Verdict Reversed; Trial Court Erred in Refusing to Admit Evidence of Intoxication

The First District Appellate Court recently reversed the trial court and remanded for a new trial an automobile negligence case in which plaintiff received damages in excess of $25,000,000. The case was tried before Hon. Judge Richard J. Elrod. At issue was whether or not evidence of plaintiff's legal intoxication (.95, where legal limit was .09) should have been admitted as evidence on the issue of defendant's contributory negligence. Plaintiff argued that the evidence was "irrelevant" because the defense expert who cited it could not conclude that plaintiff suffered impairment. Plaintiff succeeded in obtaining a pretrial order barring defense counsel from introducing evidence of the intoxication at trial.

In remanding the case, Justice Cahill, writing for the court, held that evidence of plaintiff's intoxication is relevant to the extent that it affects the care plaintiff takes for his own safety and is therefore admissible as a circumstance to be weighed by the trier of fact in its determination of the issue of due care. *Petraski v. Thedos, 1-06-2915*

APRIL 11, 2008

Third-Party Practice

The First District Appellate Court, in an opinion written by Justice Shelvin Hall, reversed a Cook County jury verdict and held that the trial court erred in directing a verdict in favor of a third-party defendant subcontractor on a construction site. Plaintiff alleged that the defendant owner/general contractor was negligent and caused his injuries when he fell on a wooden "sill plate" that was mounted on a structural steel beam to take measurements. Plaintiff testified that he was never told that he could not walk on the sill plate. He was trained not to walk on a brace burt never told he could not place the weight of his foot on a brace and that it was not unusual to place a foot on a brace.

The defendant filed a third-party action against the subcontractor, seeking contribution. At the close of evidence during the trial, third-party defendant moved for directed verdict on basis that none of the witnesses testified that it did anything wrong. Trial court granted the motion, and the jury returned a verdict against the defendant in excess of $442,000. On appeal, the defendant argued that, if plaintiff's act of walking on the sill plates was a dangerous one, then the subcontractor responsible for the plates was negligent, having breached its duty to plaintiff by allowing him to walk on the sills. Noting that there was evidence, introduced by the defendant, that the third-party defendant subcontractor was responsible for the means and methods of performing work at the site, and for providing a safe workplace for plaintiff, the appellate court held that the trial court erred in directing the verdict and remanded the case for a new trial.

Construction; Statute of Reponse

On March 28, 2008, the First District Appellate Court, in an opinion written by Justice Joseph Gordon, held that an electrician's lawsuit against Com Ed was not time-barred by the 10-year construction statute of repose where the negligence that purportedly caused the injury did not stem from construction, but rather from maintenance of the equipment at issue. Therefore, the First District reversed a summary judgment entered by the trial court judge, Hon. Bill Taylor, in favor of Com Ed.

"The theory of recovery predicated upon Com Ed's alleged failure to discovery and repair defects in its power system setup must be given its due as an activity that is not protected by the statute of repose," wrote

Justice Gordon, noting that plaintiff had alleged that Com Ed had failed to maintain the resistor leading to the circuit breaker on the 20+ year old power system. *Daniel Ryan v. Com Ed, 1-06-3309*

Indemnification

On January 25, 2008, the Illinois Supreme Court affirmed a trial court's holding that an equipment interchange agreement executed between a trucking company and a shipper which stated that the trucking company would indemnify the shipper "for any and all claims arising out of, in connection with, or resulting from the possession, use, operation or returning of the equipment during all periods when the equipment shall be out of possession of (shipper)" required the indemnitor (trucking company) to indemnify the indemnitee (shipper) for liability resulting from indemnitee's negligence. In so doing, the court upheld and reiterated the principles of Westinghouse Electric v. LaSalle Monroe Bldg, Corp., 395 Ill. 429 (1946). *Buenz v. Frontline Transportation Co. 2008 WL 217169 (1/25/08)*