# Survey of Toxic Tort Law Cases

## Dissolved Corporation Allowed to be Sued After Expiration of Five-Year Corporate Survival Period

In *Jose Barajas v. BCN Technical Serv.*, plaintiff Barajas sued various corporate entities, including Rockford Systems, LLC, after his hand was severely injured while operating a press with a safety apparatus that was purportedly repaired, built, and/or maintained by Rockford Systems, LLC. The injury took place in 2017 and the case was timely filed in 2019. In 2014, Rockford Systems, Inc. sold its assets to Rockford Systems, LLC. Rockford Systems, Inc. then changed its name to RMS Liquidating, Inc. In November of 2014, RMS Liquidating, Inc., and an associated entity, RMS of Illinois, Inc., voluntarily dissolved. In 2019 the circuit court granted Rockford Systems, LLC's motion to dismiss under a successor liability argument. In 2020, plaintiff amended his complaint to add dissolved corporations Rockford Systems, Inc., RMS Liquidating, Inc. and RMS of Illinois, Inc. (collectively, Rockford Systems). Rockford Systems moved to dismiss, arguing in part that it could not be sued more than five years after its November 20, 2014, dissolution due to the 5-year survival period set forth in 805 ILCS 5/12.80. The court denied the motion to dismiss but certified a question for the Third District to answer on interlocutory appeal. The question was:

"Under 735 ILCS 5/2-616(d), can an amended pleading adding a dissolved corporation more than five years after its dissolution relate back to the five-year post dissolution limitations period set forth in 805 ILCS 5/12.80?" In other words, does the expiration of section 12.80's five-year limitations period render a dissolved corporation beyond the reach of section 2-616(d)'s relation-back rule.

The court assessed the language of the relation back statute and the language of the corporate survival period in tandem. Section 2-616(d) of the relation back statute states in pertinent part: "A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought. . ." The court noted that the clear and unambiguous language of section 2-616(d) applies to all statutory and contractual limitations periods and that section 12.80's five-year post dissolution period was no exception. In further support of its opinion the court noted that the legislature chose not to include limitation period language in either statute and that it would have done so if it intended to create such an exception.

The court disagreed with Rockford Systems' argument that the five-year extension to a corporation's life granted by section 12.80 establishes a fixed endpoint where the corporation ceases to exist and can no longer be sued. The court opined that a fixed endpoint is not a barrier to section 2-616(d)'s relation back rule and that it plainly allows for relation back to a date before the fixed endpoint of a dissolved corporation's life. In other words, section 2-616(d)'s application does not prolong section 12.80's five-year limitation period, nor does it shift a corporation's fixed endpoint; it merely allows relation back to a date within section 12.80's limitations period.

Ultimately, the court answered the certified question in the affirmative finding that where all conditions of section 2-616(d) are met, a dissolved corporation not originally a named defendant may be added as a defendant notwithstanding the expiration of section 12.80's five-year post dissolution period.

*Barajas v. BCN Tech. Services, Inc.*, 2023 IL App (3d) 220178.

## Plaintiff Avoids Application of Judicial Estoppel Despite Failure to Disclose Existence of Civil Suit in Separate Bankruptcy Proceeding

In *Duniver v. Clark Material Handling Co.*, the plaintiff filed a workers' compensation claim and a personal injury lawsuit arising from a workplace accident. Three weeks after filing the civil suit, the plaintiff filed for Chapter 13 bankruptcy. In his bankruptcy petition, despite multiple questions concerning the existence of lawsuits, claims, or court actions, the plaintiff failed to disclose the existence of his civil suit. Rather, the plaintiff only identified his workers' compensation claim and disclosed the name of the law firm representing him in his civil suit. When asked under oath by the bankruptcy trustee if the plaintiff was "suing anyone," the plaintiff answered "[n]o."

In the civil suit, the defendants filed a motion for summary judgment, arguing that the plaintiff should be estopped from pursuing the suit because he had failed to disclose its existence in his sworn bankruptcy petition. In response, the plaintiff argued that he relied on his bankruptcy counsel to determine the information to include in his bankruptcy petition. According to the plaintiff, his bankruptcy attorney failed to advise him that he had a duty to disclose pending lawsuits or injury claims. The plaintiff further noted that he instructed his attorney to correct the bankruptcy plan upon learning that his civil suit should have been included in the bankruptcy petition.

Ultimately, the circuit court granted the defendants' motion for summary judgment, finding that the plaintiff "blatantly deceived" the bankruptcy trustee and that judicial estoppel applied. The First District Appellate Court reversed the circuit court, finding that judicial estoppel did not apply. The appellate court reasoned that the plaintiff received no benefit from failing to disclose the civil suit in his bankruptcy proceedings and the evidence failed to show an intent to deceive or mislead. *Duniver v. Clark Material Handling Co.*, 2021 IL App (1st) 200818. The Illinois Supreme Court granted the defendants' joint petition for leave to appeal.

Before evaluating whether estoppel applied, the court determined the appropriate standard of review. In doing so, the court noted the potentially conflicting standards at issue. Specifically, an abuse of discretion standard applies when a circuit court exercises its discretion in the application of judicial estoppel, while a *de novo* standard applies to an appeal from the grant of a motion for summary judgment. Relying on its prior opinion in *Seymour v. Collins*, 2015 IL 118432 (2015), the court explained that a *de novo* standard applies when the circuit court's application of judicial estoppel results in the termination of the litigation, and that result is brought about via a motion for summary judgment.

The Illinois Supreme Court next reiterated that judicial estoppel applies when a party takes factually inconsistent positions in separate proceedings. The party's inconsistent positions, however, must have resulted from an intent to deceive or mislead, rather than inadvertence or mistake.

Turning to the merits, the court found that the circuit court erred in granting the defendants' motion for summary judgment because reasonable people could have drawn different inferences on whether the plaintiff's omissions and misstatements in the bankruptcy proceedings revealed inadvertence or an intent to deceive. Emphasizing the *de novo* standard of review, the court explained that the record had to be strictly construed against the defendants. The court noted that in his bankruptcy petition, the plaintiff had disclosed his workers' compensation claim, which arose from the same accident giving rise to the civil suit he failed to disclose. Additionally, in one portion of the bankruptcy petition, the plaintiff disclosed the name of the law firm representing him in his civil suit. Thus, the court concluded that reasonable people could conclude that the plaintiff's actions in the bankruptcy matter resulted from confusion and inadvertence, rather than an intent to deceive.

*Duniver v. Clark Material Handling Co.*, 2023 IL 128141.

## Seventh Circuit holds that a Product Manufacturer May Have a Heightened Duty to Warn for Products Manufactured by Another Company

In *Johnson v. Edward Orton, Jr, Ceramic Foundation*, plaintiff alleged that her deceased husband contracted and died from mesothelioma caused by exposure to asbestos contained in vermiculite packaging material used by Orton, a manufacturer of pyrometric cones used in the manufacturing of ceramic products. Orton shipped its pyrometric cones to customers in cardboard boxes filled with mineral vermiculite packaging material purchased from W.R. Grace and J.P. Austin between 1963 and 1983. In 1981, Orton received a Material Safety Data Sheet ("MSDS") from W.R. Grace stating that the vermiculite in the packaging materials originated from a mine in Libby, Montana. The MSDS further stated that the packaging material contained less than .1% by weight asbestos. Decedent was a ceramics artist and teacher who opened boxes of the ceramic cones which were filled with the vermiculite packaging material.

After the case was removed from Cook County to federal court, the district court granted summary judgment to Orton, holding that Orton did not owe a duty to decedent. Plaintiff appealed the case to the Seventh Circuit.

To state a claim for negligence under Illinois law, a plaintiff "must allege facts that establish the existence of a duty of care owed by a defendant to the plaintiff, a breach of that duty, and an injury caused by that breach." Citing *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 305 Ill. Dec. 897 (2006). In determining whether a duty exists, Illinois law focuses on whether a plaintiff and defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. Citing *Simpkins v. CSX Transp., Inc.*, 358 Ill. Dec. 613, (2012).

The facts in the records support the conclusion that Orton lacked actual knowledge that the W. R. Grace vermiculite packaging was contaminated with asbestos prior to receiving the MSDS in 1981. The Seventh Circuit focused on whether Orton should have known about the contamination and associates hazards prior to 1981. The court first examined the Illinois standard applicable to Orton. Illinois law holds manufacturers "to the degree of knowledge and skill of

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experts," citing *Anderson v. Hyster Co.*, 74 Ill.2d 364, 24 Ill. Dec. 549 (1979), and therefore had a duty "to keep abreast of scientific developments touching upon the manufacturer's products." *See Proctor v. Davis*, 291 Ill. App.3d 265, 682 N.E.2d 1203 (1997). The district court viewed Orton as being akin to a supplier of the vermiculite packaging, but the appellate court viewed Orton as a supplier because the vermiculite packaging accompanied the product manufactured by Orton, even though Orton undeniably did not manufacture the vermiculite material.

The Seventh Circuit reversed the district court's judgment and remanded the case for further proceedings. The Seventh Circuit held that there is a genuine issue of material fact as to whether Orton had constructive knowledge that the vermiculite packaging material was possibly contaminated with asbestos prior to receiving the MSDS sheet in 1981. Further, the Seventh Circuit held that the district court improperly granted summary judgment to Orton on the issue of duty to plaintiff after receiving the MSDS in 1981. After receiving the MSDS sheet in 1981, Orton had actual knowledge that the packaging material from W.R. Grace was potentially contaminated with asbestos. As such, there was a genuine issue of triable fact existed regarding Orton's use of the vermiculite packaging after its receipt of the MSDS.

*Johnson v. Edward Orton, Jr., Ceramic Foundation*, 71 F.4th 601 (2023).

## Illinois Appellate Court Finds Battery Manufacturer Subject to Specific Jurisdiction

In *Kothawala v. Whole Leaf, LLC*, the plaintiff alleged injury after an e-cigarette containing one of the defendant's batteries—an 18650 battery—exploded in his pocket while in Illinois. The defendant was a South Korean corporation with no physical presence in Illinois. The defendant moved to dismiss for lack of personal jurisdiction. According to the defendant, it did not design or manufacture 18650 batteries in Illinois. Additionally, the defendant did not sell the 18650 batteries to individual consumers and did not authorize any manufacturer, wholesaler, distributor, or other entity to sell the batteries to consumers as standalone, removable batteries. Instead, the defendant sold the batteries to businesses for incorporation into larger battery packs. The defendant alleged that it only sold the batteries to companies that agreed to use the batteries in an "approved way," and that the use of the batteries for e-cigarettes was "forbidden."

In a jurisdictional affidavit, the defendant disclosed three Illinois customers. The first customer used the defendant's batteries in vacuums and "other applications." The second customer used the batteries in forklifts. The third customer was a distributor. The defendant did not know to whom the distributor sold the defendant's batteries. Between 2016 and 2018, the defendant sold approximately 2 million 18650 batteries to companies in Illinois.

According to the court, purposeful availment means *some act* by which a defendant purposefully avails itself of the privilege of conducting activities within the forum state. The court reasoned that "some act" does not require that the act have any direct or indirect connection to the lawsuit at issue. Thus, to satisfy purposeful availment, the plaintiff needed only to show that the defendant purposefully directed its activities at residents of Illinois.

The circuit court denied the defendant's motion to dismiss, concluding that it had specific jurisdiction. On appeal, the defendant first argued that the plaintiff could not establish that the defendant purposefully availed itself of the benefits of doing business in Illinois, a requirement under the Due Process Clause. According to the defendant, it never purposefully availed itself of the consumer battery market in Illinois, as it never intended its 18650 batteries to be sold individually to consumers like the plaintiff. Thus, because the 18650 battery at issue ended up in the plaintiff's e-cigarette by "unforeseeable happenstance," the defendant argued that the plaintiff could not establish purposeful availment.

The First District Appellate Court found the defendant's view "too narrow." According to the court, purposeful availment means *some act* by which a defendant purposefully avails itself of the privilege of conducting activities within the forum state. The court reasoned that "some act" does not require that the act have any direct or indirect connection to the lawsuit at issue. Thus, to satisfy purposeful availment, the plaintiff needed only to show that the defendant purposefully directed its activities at residents of Illinois. The court determined that the description of purposeful availment applied to the defendant "in full force." The defendant had established commercial relationships in Illinois and availed itself of the privilege of doing business in Illinois. The court explained that at the purposeful availment stage, the law is unconcerned with a causal or even indirect relationship between the facts of the case and the defendant's forum state activity.

The court next addressed the second prong of the specific jurisdiction analysis: whether the plaintiff's lawsuit arose out of or related to the defendant's in-forum activities. The defendant argued that its sales of the 18650 batteries to customers in Illinois had nothing to do with the plaintiff's injury because the defendant sold the batteries to "sophisticated customers," while the plaintiff sustained injury from using an 18650 battery as a standalone, removable consumer battery in an e-cigarette. The court equated the defendant's argument with the "causation-only" standard rejected by the United States Supreme Court in *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021), because it only addressed the "arise out of" portion of the analysis and ignored the "relate to" portion. Even without a direct linear relationship between the sale of the battery into Illinois and how and where that battery allegedly malfunctioned in Illinois, the court indicated it had to consider whether the relationship among the defendant, the forum, and the litigation was close enough to support specific jurisdiction. According to the court, in *Ford*, the Supreme Court considered the "paradigm example" of specific jurisdiction to be when a company serves a market for a product in the forum state and the product malfunctions there.

In evaluating the defendant's sales to Illinois customers, the court indicated that it did not need to decide if the defendant's sales to the two industrial customers in Illinois were sufficiently related to the plaintiff's suit. Rather, the court believed that the defendant's sales to the Illinois distributor for resale supported a finding of specific jurisdiction. The court explained that Illinois was one of only two states in which the defendant sold the 18650 batteries for resale. Additionally, the defendant admitted that it did not know to whom and for what purpose the Illinois distributor resold the defendant's 18650 batteries. The court further noted that the defendant's insistence that it never intended for the 18650 batteries to be resold for consumer purposes, much less for use in e-cigarettes, and that there was no evidence that the specific battery in the plaintiff's e-cigarette came from the Illinois distributor would be "highly relevant," but on the issue of liability, not specific jurisdiction.

Ultimately, the court indicated that it was left with the following facts: 1) the defendant sold millions of 18650 batteries in Illinois, including to a distributor for resale; 2) one of the batteries found its way into the plaintiff's e-cigarette, which was purchased in Illinois; and 3) the plaintiff was an Illinois resident who used the e-cigarette in Illinois and was injured when the e-cigarette exploded in Illinois. Under those circumstances and given that a finding of relatedness requires something short of but-for causation under *Ford*, the court found it "difficult to see how anyone could plausibly argue that the plaintiff's claims [were] *not* at least 'related to' [the defendant's] activities in this state." Consequently, the court affirmed the circuit court's denial of the defendant's motion to dismiss.

*Kothawala v. Whole Leaf, LLC*, 2023 IL App (1st) 210972.

## Forum Improper Even When Case Filed in County of Defendant's Principal Place of Business

In *Larson v. Illinois Central School Bus, LLC*, the plaintiffs' personal injury lawsuit was brought against a bus company in state court in Will County, Illinois, where it was headquartered. Plaintiff alleged that, while being transported by the defendant's employee, their minor child's wheelchair was improperly secured causing him to hit his head and suffer injuries. There was no dispute that plaintiff was injured in Denton County, Texas and there was no dispute that Illinois Central School Bus had its principal place of business in Will County, Illinois.

Defendant moved to dismiss based on the doctrine of *forum non convieniens*, arguing that (1) plaintiffs resided in Texas with their other children; (2) employee witnesses were located in Texas; (3) post-occurrence witnesses were located in Texas; and (4) medical providers were located in Texas and Virginia. Plaintiffs, on the other hand, counterargued that the material witnesses were located in Will County as the directors who made the training decisions were in Will County. While hesitant, the trial court leaned towards the Plaintiffs and denied the motion.

The trial court's decision was overruled as the Appellate Court for the Third District found that the balancing test favored dismissal of the case. The appellate court noted that "[f]*orum non conveniens* is a doctrine that is founded in considerations of fundamental fairness and sensible and effective judicial administration." The court must consider all of the relevant factors, without emphasizing one factor, within the context of the unique facts of the case. The appellate court carefully analyzed plaintiffs' choice of forum; the private interest factors, including the convenience of the parties, ease of access to evidence, availability of compulsory process, cost to obtain attendance of willing witnesses, possibility of viewing the premises, and practical considerations; and the public interest factors, including administrative difficulties, unfairness of imposing jury duty and interest in having local controversies decided locally.

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When conducting the balancing test, the Court emphasized that *forum non conveniens* is a flexible doctrine requiring evaluation of the total circumstances rather than consideration of any single factor, such the principal place of defendant's business. Moreover, the court noted that the proper determination is whether the balance of factors strongly favors dismissal as opposed to keeping the case in Will County. Aside from the plaintiffs' choice of forum, each factor either favored dismissal or was neutral.

*Larson v. Illinois Central School Bus, LLC*, 2023 IL App (3d) 220360.

## SCOTUS Holds State Law Requiring Foreign Corporations to Consent to Jurisdiction Does Not Violate Due Process

The United States Supreme Court recently held in *Mallory v. Norfolk Southern Railway Co*., 600 U.S. 122 (2023), that Pennsylvania's statute requiring foreign corporations to submit to general jurisdiction as a condition of doing business in the state does not violate the Due Process Clause. The ruling is limited to statutes that explicitly require submission to jurisdiction as a condition of registering for foreign corporations.

The plaintiff, a Virginia resident who had worked for defendant Norfolk Southern in Ohio and Virginia, brought a FELA occupational disease claim in Pennsylvania, where Norfolk Southern was registered to do business. Norfolk Southern moved for dismissal based on lack of personal jurisdiction, while the plaintiff argued Norfolk Southern had submitted to Pennsylvania's jurisdiction by registering as a foreign corporation.

Pennsylvania's Supreme Court held that Pennsylvania's foreign corporation registration statute explicitly mandating that foreign corporations must submit to general jurisdiction as a condition of doing business in the state, violated the Due Process Clause. The court recognized that *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co*., 243 U.S. 93 (1917), held such statutory provisions to be constitutional but found that it was "implicitly overruled" by intervening Supreme Court decisions.

The U. S. Supreme Court overruled the Pennsylvania court and upheld *Pennsylvania Fire*. The Supreme Court reiterated lower courts must follow directly applicable precedent, and that overruling Supreme Court decisions is the exclusive prerogative of the Court itself. The Court went on to hold that, contrary to arguments of Norfolk Southern and the dissent, *International Shoe v. Washington*, 326 U.S. 310 (1945), and its progeny, which set forth the analysis of "specific jurisdiction" and "general jurisdiction" whereby a state can exercise jurisdiction if the cause of action arose in the state or if the defendant is "at home" in the state, did not overrule *Pennsylvania Fire Ins. Co.,* but exist alongside it. Whereas *Pennsylvania Fire Ins. Co.* considered the constitutionality of statutory requirements that foreign corporations submit to jurisdiction as a condition of operating within a state, *International Shoe* examined whether a state court could exercise jurisdiction over a defendant that had not otherwise consented.

The Court held that Pennsylvania's statute did not violate Norfolk Southern's right to due process and Norfolk Southern had waived its objection to personal jurisdiction by registering to do business in Pennsylvania. While the majority opinion made much of the extent of Norfolk Southern's operations in Pennsylvania in refuting its arguments, the deciding factor in the Court's analysis was the Pennsylvania foreign corporation registration statute's explicit requirement for foreign corporations to submit to general jurisdiction in Pennsylvania as a condition of doing business there. Without analyzing any other States' laws, the majority acknowledged that "few States continue to employ consent statutes like Pennsylvania's." *Mallory*, 600 U.S., 140 n.7. Therefore, *Mallory* is narrowly applicable; it does not hold that a corporation submits to general jurisdiction in a given State by virtue of registering as a foreign corporation; only that laws explicitly requiring consent to jurisdiction by foreign corporations are constitutional.

*Mallory v. Norfolk Southern Railway Co*., 600 U.S. 122 (2023).

## Trial Court Improperly Barred Industrial Hygiene and Medical Causation Experts Under *Frye*.

The First District in *Molitor v. BNSF Railway Company*, held the trial court erred in barring a plaintiff's expert witnesses on industrial hygiene and medical causation (and in subsequently granting summary judgment on that basis) in a FELA matter arising out of a B-cell lymphoma diagnosis. In so doing, the First District clarified application of the *Frye* test in the context of matters involving occupational exposures to allegedly carcinogenic substances.

David Molitor, the plaintiff, disclosed two controlled expert witnesses to testify against his former employer, BNSF Railway, in his lawsuit claiming he contracted B-cell lymphoma due to his inhalation of carcinogenic emissions from idled locomotives and exposure to the herbicide Roundup. Plaintiff retained Hernando R. Perez, Ph.D., an industrial hygienist, and Ernest P. Chiodo, M.D., an internal medicine physician. The trial court barred Dr. Perez from testifying at trial, finding his opinions "lacked the necessary foundation for the court to determine whether they were based upon a methodology or principle that was generally accepted by the scientific community." Specifically, the trial court noted Dr. Perez relied upon his own conversation with plaintiff in formulating his opinions concerning the allegedly harmful exposures but did not visit any of plaintiff's worksites. As to Dr. Chiodo, the trial court barred him from testifying that diesel and Roundup exposure caused plaintiff's diagnosis because the published studies Dr. Chiodo relied upon in formulating his opinions noted only a positive association between exposure to those substances and B-Cell Lymphoma, rather than causation.

The First District reversed, holding the trial court improperly applied the *Frye* standard. It noted first, that "general acceptance" under *Frye* does not concern ultimate conclusions of experts and focuses instead on methodology. Second, it noted general acceptance does not mean universal acceptance. A proponent of expert testimony need not establish a methodology is accepted by "consensus, or even a majority of experts" so long as the methodology is not of "experimental or dubious validity." Third, the trial judge is not a "gatekeeper" under *Frye*, and the trial judge may only apply the *Frye* test if the methodology of the expert offered in support of his or her conclusions is "new" or "novel." Finally, trial judges may not apply "*Frye*-plus-reliability"— a standard rejected by the Illinois Supreme Court in *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63 (2002). Citing *Donaldson*, the First District stated, "questions concerning the underlying data upon which the expert relied go to the weight of the evidence, not its admissibility."

For Dr. Perez, the First District held the trial court improperly applied a *Frye* standard in assessing his opinions as deficient. Dr. Perez's reliance on the information he received from plaintiff by interview was considered proper for purposes of admissibility, as well as his reliance upon documents from the case, peer-reviewed publications, and information published on government websites. The First District further noted that while the trial court did not assess the methodology of Dr. Perez, his historical exposure assessment method was nonetheless well established in the field of industrial hygiene. As to Dr. Chiodo, the First District noted the defendant did not counter his conclusions with an expert affidavit or similar document showing the causal link between diesel exposures and herbicides to be new or novel. And Illinois law does not require "definitive medical or scientific agreement on the existence of a causal relationship before a jury may hear the evidence on the issue." The First District reversed and remanded to the trial court consistent with its holding.

Following *Molitor*, Illinois continues to set itself apart by not factoring reliability into the admissibility analysis as do courts in *Daubert* jurisdictions.

*Molitor v. BNSF Railway Company*, 2022 IL App (1st) 211486.

## Seventh Circuit Determines that Interest of Justice Does Not Require District Court to Transfer Case Rather than Dismiss for Lack of Personal Jurisdiction Where Plaintiff Allowed Time for Refiling to Expire

In *North v. Ubiquity, Inc.*, 72 F.4th 221 (7th Cir. 2023), the Seventh Circuit held that when a district court lacks personal jurisdiction, it must transfer the case to the appropriate forum rather than dismiss it when required by the interests of justice.

The plaintiff, an Arizona resident acting on behalf of his Illinois-based firm, and the defendant, a California corporation, negotiated and executed a contract in Arizona. Performance was to be "in or from Arizona." The plaintiff brought a breach of contract claim in Arizona state court in 2014. While the Arizona case was pending, the plaintiff filed an identical breach of contract claim in the United States District Court for the Northern District of Illinois in 2016. That case was dismissed for lack of personal jurisdiction in July 2017. The plaintiff appealed, arguing the district court erred both in its personal jurisdiction ruling, and in dismissing the case instead of transferring it to the Central District of California, which had general jurisdiction over the defendant. The plaintiff then obtained a stay pending the outcome of the Arizona litigation, which remained in effect until January 2023.

The Seventh Circuit affirmed the district court's personal jurisdiction ruling. Citing *International Shoe v. Washington*, 326 U.S. 310 (1945) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 907 (1979), it held there was no general jurisdiction in Illinois because the defendant was not incorporated in Illinois and did not have its primary place of business there. Likewise, there was no specific jurisdiction because the contract was executed in and was to be performed in Arizona. Citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), it ruled the plaintiff needed to show more than just that one party to the contract was an Illinois firm.

The court then considered whether 28 U.S.C. §1631 required the district court to transfer the case instead of dismissing it. The court held that by its plain language, §1631 applies to dismissals for personal jurisdiction and subject matter jurisdiction. 28 U.S.C. §1631 (Where "there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action. . . to any other court. . . in which the action. . . could have been brought at the time it was filed or noticed"). The court was persuaded by the Third Circuit's interpretation that §1631 imposes a limited independent

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obligation on district courts to consider whether to transfer a case to an appropriate jurisdiction rather than dismissing it for lack of jurisdiction when it would be in the interests of justice, whether a transfer is requested or not. *De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124 (3rd Cir. 2020) ("[A] district court that lacks personal jurisdiction must at least consider a transfer" under §1631).

However, the interests of justice did not require the district court to transfer the plaintiff's case. The statute of limitations would have permitted the plaintiff to re-file his case in California within seven months after it was dismissed by the district court. Instead, the plaintiff obtained a stay which remained in place for more than five years before pursuing his appeal. Considering these facts, the interests of justice did not require the district court to consider a transfer.

Finally, the court considered and rejected the plaintiff's second argument that §1404(a) also provided grounds to transfer his case, since like §1631, that statute provides for transfer "in the interest of justice." The court found that for the same reason the interests of justice did not require transfer under §1631, they did not do so under §1404(a).

*North v. Ubiquity, Inc.,* 72 F.4th 221 (7th Cir. 2023).

## Third District Finds Spouse Not Entitled to Damages for Loss of Material Services After Remarriage in Wrongful Death Action

In *Passafiume v. Jurak*, the appellate court addressed the issue of whether a plaintiff is entitled to damages for loss of material services, (i.e., household chores), beyond the date of plaintiff's remarriage. Acting as special administrator on behalf of his deceased wife, Lois Passafiume, Paul Passafiume filed a wrongful death action based on alleged medical malpractice against defendant Daniel Jurak. A jury awarded Paul Passafiume $2,121,914.34 in damages. Plaintiff's damages were reduced to $1,697,531.48 based on a finding that Lois Passafiume was contributorily negligent. Jurak argued that the trial court erred in allowing the jury to consider damages for the loss of material services after the date of Paul Passafiume's remarriage. Paul Passafiume remarried 15 months after his wife's death. Paul Passafiume's second marriage ended in divorce after 18 months. Plaintiff filed a motion *in limine* to limit evidence concerning the value of household services beyond the date of plaintiff's remarriage. Plaintiff contended that while his loss of consortium claim terminated with his remarriage, the loss of material services should be categorized separately from his loss of consortium claim. Instead, he postured that his loss of material service should be considered as the loss of financial support. Plaintiff's economist expert, Stan Smith, opined that the value of Mrs. Passafiume's lost household services was $998,158. Mr. Smith's opinion was based on information that Mrs. Passafiume spent two to three hours per day on household tasks such as cleaning, cooking, doing laundry, yard work, and paying bills.

The appellate court rejected defendant's argument that a spouse's claim for loss of material services must end upon remarriage. However, in this case, plaintiff filed a statutory wrongful death claim and failed to file a common law negligence claim. The appellate court further rejected defendant's argument that expert Smith's testimony concerning Lois Passafiume's household services was improper. Citing the standard set forth in the Illinois Rule of Evidence 702, which provides, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness may testify thereto in the form of an opinion or otherwise," the appellate court held that Smith's testimony was admissible. To be admissible, expert testimony must be supported by adequate foundation, showing the facts or data relied upon by the expert are of the type relied upon by experts in the field. Citing Ill. R. Evid. 703 (eff. Jan. 1, 2011); *Wilson v. Clark*, 84 Ill.2d 186, 193-96 (1981). The appellate court in Passafiume reasoned that Smith's opinions were based on objective information and statistics.

*Passafiume v. Jurak*, 2023 IL App (3d) 220232.

## Illinois Legislature and Governor Enact Public Act 103-0514 to Allow Punitive Damages in Wrongful Death Cases

On August 11, 2023, Illinois Governor J.B. Pritzker signed House Bill 219 into law—now Public Act 103-0514. This new law amended 740 ILCS 180/1, 740 ILCS 180/2, and 755 ILCS 5/27-6 to allow punitive damages to be recoverable in wrongful death and survival actions effective immediately. Illinois House Bill 219, which was introduced to the Illinois General Assembly on December 5, 2022, included several key amendments that aimed to expand the current law by allowing the survivors of wrongful death victims to seek punitive damages. House Bill 219 passed through the House on May 16, 2023, with a vote of 75 Yeas and 40 Nays. It passed through the Senate on May 18, 2023, with a vote of 37 Yeas and 19 Nays. Public Act 103-0514 became law on August 11, 2023, with the Governor's signature. It applies to all wrongful death and survival causes of action in Illinois filed on or after August 11, 2023.

Public Act 103-0514's most significant amendment to Illinois' Wrongful Death Act (740 ILCS 180) and Survival Act (755 ILCS

5/27-6) is including punitive damages as one of the types of damages recoverable. Illinois' Wrongful Death Act now states, in part:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, including punitive damages when applicable, in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, including punitive damages when applicable, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. 740 ILCS 180/1.

From this point forward, Illinois wrongful death plaintiffs and their counsel can seek punitive damages against defendants in addition to personal injury and product liability causes of action. Plaintiffs may recover punitive damages if they can prove with clear and convincing evidence that the conduct of the defendant(s) was "with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others." In Illinois, there is no cap on punitive damages.

From this point forward, Illinois wrongful death plaintiffs and their counsel can seek punitive damages against defendants in addition to personal injury and product liability causes of action. 735 ILCS 5/2-604.1. Plaintiffs may recover punitive damages if they can prove with clear and convincing evidence that the conduct of the defendant(s) was "with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others." 735 ILCS 5/2-1115.05(b). In Illinois, there is no cap on punitive damages. *See Wills v. Foster*, 229 Ill.2d 393 (2008).

These newly enacted amendments to the Wrongful Death Act and Survival Act do not apply to all claims. Public Act 103-0514 makes clear that punitive damages may not be recovered in medical malpractice and legal malpractice claims. The amended statutes explicitly state: "Punitive damages are not available in an action for healing art malpractice or legal malpractice[.]" 740 ILCS 180/1-2; 755 ILCS 5/27-6. Additionally, punitive damages may not be recovered in wrongful death and survival claims against the State of Illinois or its employees. Public Act 103-0514 explicitly states: "Punitive damages are not available . . . in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity."

740 ILCS 180/1-2; 755 ILCS 5/27-6. Public Act 103-0514.

## First District Approves Setoff of Civil Rights Settlement Amounts Against Tort Judgment Under Joint Tortfeasor Contribution Act

In a case of first impression, the Illinois Appellate Court for the First District recently upheld the trial court's ruling that under the Illinois Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 *et seq.* (West 2020)), tort defendants were entitled to judgment setoff of settlement amounts recovered by the plaintiffs related to civil rights violation claims under the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.* (West 2020)) stemming from the same claimed misconduct, injuries, and damages.

In *Saunders v. Orbitz Worldwide, LLC*, IL App (1st) 221018 (1st Dist. 2023), plaintiffs appealed the trial court's ruling, claiming that non-settling defendant Orbitz Worldwide, LLC, was not entitled to receive any judgment setoff from plaintiffs' settlement with co-defendant Havas Chicago Worldwide, LLC, because the claims against Havas were civil rights violations distinct from the tort injuries caused by Orbitz's misconduct.

The case arose from allegations that Havas, plaintiffs' employer, was working with Orbitz to develop an advertising and marketing campaign for Orbitz. Plaintiffs alleged that Havas and Orbitz subjected plaintiffs to sexual harassment and a hostile work environment, centered around Orbitz's employee Ramses Meijer's sexual harassment, assault, and rape of plaintiffs during the scope of their work together. Plaintiffs further claimed that Havas and Orbitz were aware of Meijer's misconduct, but both permitted it to continue to keep the business arrangement intact. Havas' liability

*— Continued on next page*

> In light of this ruling, defendants should consider aggressively pursuing judgment set-offs from co-defendant settlements, regardless of the theory of recovery that liability is based on as compared between defendants, as long as there is a connection between the conduct alleged between the defendants and where the alleged conduct by the defendants both led to plaintiff's claimed injuries or damages.

was predicated on violations of the Human Rights Act, while the allegations against Orbitz were related to common law torts of negligent supervision and retention of Meijer. Following plaintiffs' confidential settlement with Havas, Orbitz first filed a third-party action against Havas for contribution. Havas successfully moved to dismiss the third-party action pursuant to a good-faith settlement finding, but Orbitz persuaded the court to allow Orbitz a judgment setoff of 30% of the total settlement amount recovered from Havas.

On appeal, plaintiffs argued that the Contribution Act did not apply to the case, not only because Havas was not a party subject to liability under tort, but also that the injuries caused by Havas' misconduct and civil rights violations were not the same injuries caused by Orbitz's tortious misconduct. The First District disagreed, finding that violation of the Human Rights Act creates the potential for liability in tort as required by the Contribution Act. The court reasoned that the Human Rights Act statute established a standard of conduct that imposes a duty on employers to address sexual harassment in the workplace, similar to the Illinois Supreme Court's definition of tort under common law negligence in *Fancil v. Q.S.E Foods, Inc.*, 60 Ill. 2d 552, 554 (1975), with that opinion noting that there must exist a "duty or an obligation requiring one to conform to a certain standard of conduct for the protection of another against an unreasonable risk." *Saunders*, at ¶ 20, citing *Fancil*, at 554. By this analysis, the *Saunders* court found that "plaintiffs requested damages for tortious conduct pursuant to a statute," and held that "violation of the Human Rights Act 'creates the potential for liability in tort and that it may be a proper predicate for a contribution claim.'" *Id.* at ¶ 27. The court declined to rule on the propriety of the trial court's setoff amount, as the trial court did not make that determination appealable under Illinois Supreme Court Rule 304(a). *Id.* at ¶ 44.

Ultimately, the court found that allowing the set-off supported the purpose of equitable apportionment of damages among joint tortfeasors, noting that plaintiffs alleged that "both Orbitz and Havas fostered a corporate culture that tolerated the sexual harassment of women," that both had knowledge of Meijer's misconduct and failed to address it, and that as a result of both companies' failures, plaintiffs suffered damages. *Id.* at ¶ 43. The court summarized by reiterating that "[w]hat matters is the culpability of the parties, not the theories of recovery on which liability is based." *Id.* at ¶ 43, citing *Doyle v. Rhodes*, 101 Ill. 2d 1, 14 (1984).

In light of this ruling, defendants should consider aggressively pursuing judgment set-offs from co-defendant settlements, regardless of the theory of recovery that liability is based on as compared between defendants, as long as there is a connection between the conduct alleged between the defendants and where the alleged conduct by the defendants both led to plaintiff's claimed injuries or damages.

*Saunders v. Orbitz Worldwide, LLC*, 2023 IL App (1st) 221018.

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