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Bench & Bar

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Illinois Supreme Court Clarifies Legal Standard in Asbestos Civil Conspiracy Litigation

BY JEFFREY GORDON

The Illinois Supreme Court's recent ruling in *John Jones v. Pneumo Abex LLC et al.*[1] clarified that there is no practical difference between the standard at summary judgment and that directing a verdict. Plaintiffs John and Deborah Jones filed suit against numerous companies to recover damages they suffered after Mr. Jones developed lung cancer from purported exposure to asbestos. Plaintiffs also advanced a civil conspiracy claim against Owens-Illinois, Inc. ("Owens-Illinois"), Pneumo Abex LLC ("Pneumo

Continued on next page

The Case for Civility: My Perspective

BY ROBERT FIORETTI

As a young Chicago lawyer who enjoyed the practice of law, I was once assigned a case representing a defendant in DuPage County. After several phone calls to the plaintiff's attorney, I realized I would have to go to Wheaton to present a routine motion. I arrived on the day to present the motion and was watching attorneys looking at the call sheet to determine where they were on the call. The individual in front of me with his younger female associate was pointing to the sheet and said, "We are number five on the call." I realized I, too, was number five on the call, and went to shake his hand. In an abrupt, loud, gruff voice, he said "I'M not shaking his hand, you're on the other side."

Our case was called, the motion was presented, the relief was granted, the order signed, and we began to leave the courtroom. The judge stopped us and said, "Gentlemen, come back up here." As

Correction

In the November newsletter, Chief Justice Burke's high school was incorrectly shown as Marist. She attended Maria High School on the south side of Chicago.

The article has been corrected.

We regret the error.■

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CONTINUED FROM PAGE 1

Abex"), and other companies, alleging that they: (1) knew that asbestos was hazardous; and (2) conspired to misrepresent its dangers by falsely asserting that exposure to asbestos was safe.

Owens-Illinois and Pneumo Abex separately moved for summary judgment. Both companies argued that the Supreme Court had already decided this exact issue decades ago as to Owens-Illinois in *McClure v. Owens Corning Fiberglas Corp.*,[2] and that the fourth district had reached the same conclusion more recently in *Rodarmel v. Pneumo Abex, L.L.C.*,[3] *Menssen v. Pneumo Abex Corp.*,[4] and *Gillenwater v. Honeywell International, Inc.*[5] The circuit court agreed and allowed both motions; it reasoned that the parties had acknowledged that the evidence was the same as in *Rodarmel* for Pneumo Abex and *Gillenwater* for Owens-Illinois, even though both cases involved motions for judgment notwithstanding the verdict. The circuit court assessed minor factual differences between the summary judgment records and past cases involving the same allegations against the same companies and held that summary judgment was proper because the evidence overwhelmingly favored Owens-Illinois and Pneumo Abex.

The appellate court reversed and remanded for further proceedings. It held that summary judgment was improper because "there are no definitive answers to the disputed questions of fact presented by plaintiffs."[6] The appellate court reasoned that prior civil conspiracy cases with the same underlying facts—*McClure*, *Rodarmel*, *Menssen*, *Gillenwater*—were distinguishable because they were decided on motions for judgment notwithstanding the verdict, not motions for summary judgment.

The supreme court disagreed, found that the appellate court committed reversible error, and remanded for further proceedings. It noted that, since *McClure*, courts have frequently reviewed the same record and have entered judgment as a matter of law in the companies' favor after the cases proceeded to trial and resulted in verdicts for plaintiffs—the companies cannot be held liable for civil conspiracy. The supreme court reasoned that courts must review the evidence as a whole, and not focus on subtle aspects of the comprehensive record. And this review requires application of the same clear and convincing standard to civil conspiracy claims at the summary judgment stage as the judgment notwithstanding the verdict stage when plaintiffs are attempting to prove their case through circumstantial evidence. The identical standard applies in either instance: Whether all the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict could stand. The *Jones* decision cements that rationale.

As the supreme court noted, these asbestos civil conspiracy cases "[do] not present the typical summary judgment scenario, where the issues in dispute have yet to face the scrutiny of a trier of fact and the objective is to determine whether a genuine issue of material fact exists."[7] To the contrary, the underlying facts of the purported civil conspiracy in *Jones* are decades-old, well documented, and have been "thoroughly explored" and "aggressively tested."[8] "In such cases, there is no practical difference between the standard for summary judgment and that governing directed verdicts."[9] "If all relevant evidence is already before the court and upon such evidence there would be nothing left to go to a jury so that the court would be required to direct a verdict, denying summary judgment to permit further proceedings to take place would serve no purpose."[10]

That there were minor factual variations in the summary judgment record is a distinction without a difference. "Even if some issue of fact is presented by the summary judgment motion, if what is

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Evan Bruno
Edward M. Casmere

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

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contained in the pleadings and affidavits would have constituted all of the evidence before the court and upon such evidence there would be nothing left to go to a jury, and the court would be required to direct a verdict, then a summary judgment should be entered."[11]

The *Jones* ruling reaffirms and extends the pragmatic approach to deciding conspiracy cases articulated in *McClure* decades ago. If a defendant can prevail on a motion for judgment notwithstanding the verdict (assuming a jury rules in the plaintiff's favor), it can prevail on summary judgment; there is no triable issue. To hold otherwise would be, as the Illinois Supreme Court said, "nonsensical."[12] ■

1. 2019 IL 123895.
2. 188 Ill. 2d 102 (1999).
3. 2011 IL App (4th) 100463.
4. 2012 IL App (4th) 100904.
5. 2013 IL App (4th) 120929.
6. 2018 IL App (5th) 160239, ¶ 23.
7. *Jones*, 2019 IL 123895, ¶ 24.
8. *Id*.
9. *Id*. at ¶ 25.
10. *Id*. at ¶ 28.
11. *Id*. at ¶ 25. (internal quotation marks omitted).
12. *Id*. at ¶ 28.

The Case for Civility: My Perspective

CONTINUED FROM PAGE 1

we approached the bench, the judge was looking at me, and being a young lawyer, I thought maybe I wrote the order incorrectly. The judge began by saying, "Gentlemen, I noticed that Mr. Fioretti is from Chicago, which is in Cook County. And the rules of DuPage County are different than in Cook County. And as such, Mr. Fioretti should know the rules of this courthouse. So, if Mr. Fioretti violates a rule of the supreme court or of DuPage County or of this courtroom, I want you, opposing counsel, to call me immediately."

At that point, I thought, "This is not going to go well for my client and myself," and I can see that the other attorney having a very big grin on his face, nodding in agreement with chest puffed up. The judge went on, "And I will tell you why you can call me directly if Mr. Fioretti violates a rule of the supreme court, or a rule of DuPage County or a rule of this courtroom. Because I taught Mr. Fioretti everything he knows about civil procedure and civil practice. And after hearing the laughs from the other attorneys and feeling much better about the case the other attorney chased after me as asked, "Why didn't you tell me you knew the judge?" To which I replied, "You wouldn't even shake my hand."

Civility is an attitude that lawyers must treat individuals, witnesses and opponents with dignity and respect. What do we learn from that courtroom experience?

1. Communication is the foundation for civility and setting the tone for respect.
2. Mentoring is key to civility.
3. Control of the courtroom.

Lawyers are expected to be zealous advocates for their clients, yet maintaining a reputation for integrity and civility in the profession. Civility can manifest itself in returning phone calls, shaking a person's hand, or how you treat your opponent or witnesses inside and outside the courtroom.

While that happened many years ago, the focus today has shifted to immediate results and winning at all costs. Telephone calls have given way to emails and texting no matter what time of day.

The second lesson from that situation is mentoring. Would you want to be a young attorney working in the office with this individual? Mentoring of young lawyers has diminished. We have those that have been mentored in civility and those whose exposure has been to unprofessional and discourteous conduct. Abuse and antagonistic behavior reflect poorly upon the individual attorney and demeans our profession. We must remember that behaviors affect outcomes of cases. Mentoring for future trial lawyers is a necessity in our profession. We are expected to fight the good fight, our reputation and the profession are more important than the case. Setting the example is important for this noble profession.

On the third point, control of the courtroom, in that example given, I believe many attorneys and the judge knew the opposing counsel. But it was clear the judge disclosed the fact that he knew me, and he wanted to set the tone for civility in the courtroom. The Code of Judicial Ethics requires that judges be patient, dignified, and courteous to all in their courtroom. Watching many judges, they do not all appreciate being in a position of setting the tone of civility, but they always must.

And accordingly, it is just not appreciated being called upon to bring civility to the attorneys in a court case. During the ISBA conference on Civility and Professionalism 2019: Properly Handling Emerging Issues with Confidence, retired judge, the Honorable Stephen R. Pacey laid out four rules governing the practice for counselors, advisors and advocates. One, follow the golden rule. Two, do the right thing. Three, what would your parents think? And four, we know it when we see it.

As I heard those four rules, I was reminded that we are in a service business. The economics of the practice of law have changed a lot in the last 25 years. We are in a noble profession, but a service profession. And our clients really don't want to be our product. In our profession, it takes years to build a reputation of honesty, professionalism and civility, but it takes only minutes to lose them. Together, we must be activists for civility in our profession. We must mentor the young, and the old, in ways that elevate our profession. I am reminded of a quote from a play that I was in in high school. And yes, Shakespeare had many things to say about lawyers in his many years of writing. But one that struck me the most was, "And do as adversaries do in law, strive mightily but eat and drink as friends."■

In Recognition of Illinois Supreme Court Chief Justice Anne Burke

BY NEIL HARTIGAN

For the last 60 years I've been involved in public life, I've known many talented people who've made important contributions, but only a few are exceptional people. One of those is Illinois Supreme Court Chief Justice Anne Burke, who as an elected justice of the Supreme Court of Illinois has just been chosen by her fellow justices as the new chief justice. She's the perfect choice.

The role of the chief justice is a multifaceted one. She will lead the court in deciding the law on the most and important questions confronting our state. The judicial record and reputation are important. Fortunately, Justice Burke's 30-year record of judicial experience is outstanding.

She has served for 12 years on the Supreme Court, 11 years on the Appellate Court, 7 years on the court of claims, where she was the first woman judge to sit on that court. She was appointed by former Illinois Gov. James R. Thompson and re-appointed by former Illinois Gov. Jim Edgar.

Before serving on the Illinois Appellate Court, Gov. Edgar appointed Chief Justice Burke to provide in-depth leadership in reshaping and improving the Illinois juvenile justice system. Subsequently, the governor appointed her as special counsel for child welfare services.

In all of her judicial responsibilities, Chief Justice Burke enjoys a reputation for her commitment to the rule of law. A legal scholar, she has earned the respect and trust of her fellow justices for her integrity, ethics, cooperative spirit, hard work and courage in the support of her principles.

She has won elections to the Appellate and Supreme Courts, where she has received the votes of 2 million Illinoisans as well as the endorsements of the press and the "highest quality rating" from over 30 bar associations. Her campaigns were chaired by many of the most respected members of the bar, including Sen. Dawn Clarke Netsch, Newton Minow and Abner Mikva.

Every judge and lawyer in the state, including myself, would be delighted if their lifetime resumés resembled that of Chief Justice Burke. She has received doctorate honoris causa from 13 universities and law schools. She was appointed as the first chairperson of the very distinguished National Review Board for the Protection of Children and Young People by the National Conference of Catholic Bishops.

The board investigated accusations as well as the cause and effects of the clerical sexual abuse in the Roman Catholic Church. Their report pulled no punches; it contained guidelines and policies for effectively responding to the scandal across the United States for priests and bishops. The report was a very tough one and Chief Justice Burke was criticized by some senior church officials, but she and her board were right in pursuing and exposing the truth.

Her accomplishments go on and on. Her awards are in the hundreds, a small sample of which are: The Learned Hand Award from the Federal Bar Association, Abraham Lincoln Award from the Illinois State Bar Association, the John Paul Stevens Award from the Chicago Bar Association, and the Thurgood Marshall Award. Every disability, educational and social service groups have given her the most important awards, as have the 14 major ethnic groups. She was also recognized in Chicago Magazine's "47 Smartest Chicagoans of All Time," and Crain's "Most Influential Women." She also received the Living Proof Pilot Award from Rush Neurobehavioral Center. Her record goes on and on.

But oftentimes the public knows the name of a public official but not much more. Who are they? What are they really about? What are their values? The best way to answer that question is to remember that she's the person who created the Special Olympics. How did she do it? What happened between then and her appointment to a judgeship years later by former Gov. Thompson?

Anne McGlone grew up on the southwest side of Chicago. She didn't come from money or power. Her parents were Irish immigrants who worked hard to give their four children a good home, filled with love. They couldn't give them much in the way of worldly goods, but they gave them more important things—a good set of values to live by. Anne went to Maria High School, where she excelled in sports as well as she did in the Chicago Park District competitions. In school, however, she was a "C" student. She had trouble reading what was written on the blackboard. It was a blur. She read backwards, from right to left and wrote her name the same way. It was later, as a freshman at George Williams College, that she was diagnosed as having perceptual handicap—better known as dyslexia, which is a neurological learning disability. It is not something you can grow out of. It has persisted during Chief Justice Burke's lifetime. There is a need for accommodation since it doesn't diminish, it simply changes.

George Williams College was good for Anne. She majored in physical education and worked as a camp counselor. Unfortunately, the college moved to a far western suburb, which she couldn't attend without a car, which she couldn't afford. Fortunately, when one door closes, Anne knew how to find and open another one. She was a "Park Kid," so she took and passed a civil service exam and earned a job as a recreation leader in the Chicago Park District. She was assigned to West Pullman Park and put in charge of an experimental program teaching physical education to

mentally disabled children and young adults. It was a perfect match. As an athlete herself, she knew the thrill of competition and the joy of winning. She recognized the positive impact sports had on her students. Participation could make all of the children winners. Her insight came from her heart and her life experiences with dyslexia. She saw her kids as champions, as special athletes. They had the same dreams, goals of achievement, they loved to compete, they loved to win, they loved to be told "good job". Her program was a success and drew the attention of William McFetridge, the president of the Chicago Park District Board. She asked that the program be expanded to ten more parks for better competition and it was approved.

But what Anne McGlone really wanted was a city-wide competition for all the special athletes in Chicago. She had a vision it should be. The greatest event in sports was the Olympics, so she married that name to her special athletes and proposed a Special Olympics. I was the attorney general for the park district when I saw a young 21-year-old girl named Anne McGlone come into the Chicago Park District and in two years create and convince the Chicago Park District to authorize her to conduct the first Special Olympics in history. It was literally a miracle. The bureaucracy of the park district had never researched, funded, and implemented a major city-wide program in only two years. The odds were 1,000-1 against her. She didn't care. She was a fighter who never, ever would quit on her special kids.

Naturally she wanted an iconic setting for the Olympics, so she asked for and got Soldier Field, which was the site of some of America's greatest sporting events.

Next, she made the Special Olympics a nationwide event. On July 18, 1968, 2,000 proud special Olympians, from 26 states, led by marching bands with banners flying high to designate each group, entered Soldier Field and competed in 200 separate events.

History was made on that field that day, and now 50 years later the Special Olympics are held in 192 countries, where thousands and thousands of Special Olympians will compete.

With the creation of the Special Olympics, Anne has altered the public perception and created a greater awareness and inclusion of children and adults with disabilities.

It was a busy Summer for Anne. In May she had married a young Chicago policeman and became Mrs. Edward Burke. Ed subsequently passed the bar exam and they started a family. For the next three years she raised her family. By then they had three children and at Ed's urging, Anne entered DePaul University School of New Learning to finish college and become a certified teacher. For five years she taught school and raised their three children.

Next, Ed and Anne decided that she would become a much stronger and more effective for the disabled if she became a lawyer. She entered Kent Law School and went "underground" for three years to deal with the very difficult law school curriculum. Due to her dyslexia, she was an auditory learner.

By now Ed was Ald. Edward Burke, and he also became Mr. Mom to help Anne deal with law school. Three years with four children, she became a lawyer at 40 years of age. She had her choice of a number of major downtown law firms. Instead she opened a small neighborhood law office. Her practice was diverse, both civil and criminal. There were many family law cases. She worked with abused and neglected children, the most vulnerable in our society. Many were threatened or impoverished, and all sorts of families were at risk. She continued her advocacy for the disabled during the 11 years of her neighborhood practice until she came to the attention of former Gov. Thompson, who appointed her to her first judgeship. Now 30 years later, she's the chief justice of the Supreme Court.

Chief Justice Anne Burke is a good, decent, and humble person who has had to fight for everything she's accomplished, sometimes against overwhelming odds, but she never quits. She doesn't use the positions she's held for self-aggrandizement; rather, she uses the power and resources to fight for the people who are powerless and others in need. To her this is the great privilege of her life. Everything else has followed from that.

She's a born leader. People like and trust her and her values. But as nice as she can be, she's as tough as nails if somebody is trying to hurt her special children. Avery Brundage, the pompous chairman of the Olympic committee, found out the hard way when he tried to prevent the Special Olympics from being held. He lost and the children won! She's proud of her record of accomplishments, but the things she's the proudest of are her family—her husband of 52 years, their five children, and nine grandchildren. These are the things that give her purpose. When she looks in the mirror, she sees a wife, a mother, and a grandmother; a woman who does the dishes and cooks the meals.

The next time somebody says that one person can't make a difference, tell them about a young girl with dyslexia who grew up on the southwest side of Chicago. She's now Chief Justice Anne McGlone Burke of the Supreme Court of Illinois—who's an exceptional human being.

Thanks, and congratulations Madame Chief Justice!■

Recent Appointments and Retirements

1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:

- Richard D. Felice, 18th Circuit, November 4, 2019

2. The circuit judges have appointed the following to be associate judges:

- Derek Asbury, 10th Circuit, November 1, 2019
- Julio Valdez, 16th Circuit, December 9, 2019

3. The following judges have retired:

- Hon. Michael J. Fusz, Associate Judge, 19th Circuit, November 30, 2019
- Hon. Peter W. Ostling, Associate Judge, 18th Circuit, November 30, 2019
- Hon. Linda Abrahamson, Associate Judge, 16th Circuit, December 16, 2019
- Hon. Richard A. Stevens, Associate Judge, Cook County Circuit, December 20, 2019
- Hon. James N. Karahalios, Associate Judge, Cook County Circuit, December 30, 2019
- Hon. Walter D. Braud, 14th Circuit, December 31, 2019

4. Pursuant to its constitutional authority, the supreme court has recalled the following judge and assigned him to the appellate court:

- Hon. Milton S. Wharton, 5th District, November 1, 2019 ■

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