ILLINOIS STATE BAR ASSOCIATION

BENCH & BAR

The newsletter of the Illinois State Bar Association's Bench & Bar Section

New rule will allow jurors to submit questions to witnesses in civil trials

By Joseph Tybor and Hon. Alfred M. Swanson, Jr.

Effective July 1, 2012, Illinois will join more than half the states and the Federal Courts in allowing jurors to submit questions to witnesses in civil trials. The new rule is Rule 243.

The proposal first went to the Supreme Court's Rules Committee in August 2010. At a Rule Committee hearing, the proposal received support from of the Chief Judge of the Northern District of Illinois, the Illinois State Bar Association, the Chicago Bar Association and others.

Chief Justice Thomas Kilbride noted that scrutiny and support. "Based on the comments of those who have used or seen the procedure at trials, such a rule enhances juror engagement, juror comprehension and attention to the proceeding and gives jurors a better appreciation for our system of justice. The rule is written so that its implementation rests with the discretion of the trial judge and with safeguards so that the testimony it elicits complies with the rules of evidence."

Rules Committee Chair John B. Simon believes the scrutiny given the proposal before its adoption will benefit not only jurors, but lawyers, judges and the entire system of justice. "After receiving positive written comments and hearing the favorable views of the organized bar, practitioners and judges during the public hearing, I expect that judges and trial lawyers will welcome the adoption of the new rule," Mr. Simon

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Recent Supreme Court Rule changes

By Justice Lloyd A. Karmeier, Supreme Court of Illinois

The past year has been a particularly busy one in terms of court administration. The Illinois Supreme Court has adopted a number of significant administrative and rule changes designed to improve the efficiency of the courts, reduce costs, and make the work of the judicial branch more accessible to the public. It has also approved important measures related to criminal and juvenile delinquency cases, the prosecution of ordinance violations, and the practice of law. Here are some highlights.

Publication of Opinions. The "advance sheet" is going the way of legal-size paper. In 2011, the Court discontinued the practice of publishing decisions in printed reporters. Instead, all opinions are being made available online, at no charge, through the Court's Web site, <http://state.il.us/court>. As before, decisions can still also be obtained through commercial services such Lexis and Westlaw. In addition, effective January 1, 2011, the Court authorized publication of Rule 23 orders. Although Rule 23 orders still have no precedential effect except under the limited circumstances set forth in Rule 23(e)(1), access to those orders no longer requires a trip to the courthouse to see the case file. They are now available to anyone, anywhere with internet access. Moreover, because the opinions and Rule 23 orders are published in pdf format, they can be downloaded and read using a broad range of devices, including iPads and other tablets.

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said. "The parameters set forth in the rule are designed to maintain neutrality while at the same time engaging the interest of jurors in focusing on and following the testimony, and giving trial counsel the ability to elicit evidence responsive to the questions raised."

Chief Judge James Holderman of the Northern District of Illinois told a Rules Committee hearing that he has been using written questions by jurors for more than five years. He said the process has always run smoothly and it seems that fewer questions come out of the jury room when jurors are deliberating.

The procedure will work this way: At the conclusion of questioning of a witness by attorneys, the trial judge will determine whether the jury will be afforded the opportunity to question the witness. If questions are deemed appropriate by the trial judge, jurors will be asked to submit any question they have for the witness in writing. No discussion regarding the questions is allowed between jurors. The bailiff will collect any questions and present them to the judge who will mark them as exhibits and make them part of the record.

The judge will read the questions to all the attorneys outside the presence of the jury, and give counsel an opportunity to object to the question. The trial judge will rule on any objections and the jury questions will either be admitted, modified or excluded.

The trial judge will ask each question that is permitted and will instruct the witness to answer only the question presented. The judge will then provide all counsel with an opportunity to ask follow-up questions limited to the scope of the new testimony.

The Rules Committee recommended the trial judge give jurors a preliminary instruction, explaining the procedure to them; and after testimony in the entire trial is completed give the jury another, final instruction. It is anticipated that proposed jury instructions will be reviewed and published by the Supreme Court Committee on Jury Instructions in Civil Cases. ■

Joseph Tybor is Director of Communications for the Illinois Supreme Court and a member of the Bench and Bar Section Council.

Recent Supreme Court Rule changes

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When the Court implemented foregoing changes, it overhauled the format used for case citations. The familiar references to "Ill. App.3d" and "Ill.2d" are gone. Effective July 1, 2011, all decisions by Illinois courts of review are assigned what is called a "public domain designator" based on the court which issued the decision, the docket number of the case, and the year in which the decision was entered. In addition, each paragraph of each decision is now numbered, and the numbered paragraphs, rather than the old page numbers, are to be used when citing specific parts of a decision. The details may be found in Supreme Court Rule 6, as amended effective July 1, 2011, and the accompanying Commentary.

Electronic Filing. The federal courts and a growing number of state jurisdictions have adopted systems for electronic filing of court documents. Illinois took its first steps in that direction in 2003, when DuPage County received approval to serve as a pilot site for e-filing in the circuit courts. Will County followed in 2007 as did Cook County. The Third Judicial Circuit in Madison County became the fourth approved pilot site in 2008 and was second, only to Du Page County in actually getting its program up and running. St Clair County followed with approval for chancery cases in 2010. Additional applications are in process from DeKalb, Lake, McHenry and Sangamon Counties, and St. Clair County is working hard to obtain approval to extend e-filing to L and AR cases.

When the Court initially approved the policy for electronic filing in the circuit courts, it expressly stated that the policy did not apply to the Supreme and Appellate Courts. That is now changing. As part of an e-business initiative announced by Chief Justice Kilbride, the Court recently adopted a pilot project for

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electronic filing of documents. Initially, the pilot project will be limited to documents filed in cases on the Court's general docket when filed by the Office of Attorney General, Office of the State's Attorney Appellate Prosecutor or Office of State Appellate Defender when those offices represent adverse parties in the case. Eventually, it will be expanded to other cases before us and to cases filed in the appellate court.

As a prelude to electronic filing in the appellate court, the Supreme Court has already approved pilot projects to permit records from certain counties to be transmitted electronically to the appellate courts in their respective districts. The first such project was approved last August to allow electronic transmission of records from DuPage and Ogle Counties to the Second District. Since then, our court has authorized additional pilot programs for Adams County in the Fourth District, Rock Island County in the Third District, and most recently, Clinton County in the Fifth District. Putting records in electronic form and allowing them to be filed that way will not only save shipping and labor costs in handling the records, it will substantially improve our ability to search the transcripts and exhibits and locate and retrieve relevant information and, for the first time, will enable multiple users to view the record at the same time regardless of their physical location.

Cameras in the Courtroom. The Supreme Court has recorded its oral arguments for many years and has also implemented a system for videotaping those arguments. Until recently, the tapes and video were available only for internal court use. Now, however, videos of all oral arguments are freely available to the public on the court's web page. The archive contains videos dating back to early 2008. The quality of the video is high (though not HD high) and our technical people post the videos online very quickly. Our system also offers the option of downloading only the audio of the arguments in podcast form.

The new system is a boon to practitioners who are following a case or who want to get a sense of the Court and court procedure before arguing their own cases. It is valuable to law students who are trying to develop oral advocacy skills. It helps the public understand what we do and how we do it, and it's also surprisingly useful to the court itself when preparing dispositions. We no longer have to rely on our notes or recollection. If there is a question as to the position a party took during the argument, we can simply pull it up online and replay it.

An area of greater interest to the public at large has been the court's recent announcement of its intention to permit extended media coverage of circuit court proceedings on an experimental basis. The court entered an order approving the project this past January, and the first court proceedings where the new policy was put into effect were held in Rock Island at the beginning of February. The court chose Rock Island because the 14th Judicial Circuit, where Rock Island is located, is in a television market that includes parts of Iowa, where television coverage of court sessions has been allowed for years and the local media is familiar with the special constraints that pertain to covering court cases.

It is important to note that media access under the new protocol is not unrestricted. Provision has been made for witnesses or parties to object to extended coverage. In prosecutions for sexual abuse, extended media coverage of the victim's testimony will not be permitted unless the testifying victim consents. Testimony by victims of other forcible felonies as well as by police informants, undercover police officers and relocated witnesses is also subject to special protections. In juvenile, dissolution, adoption, child custody, evidence suppression, or trade secret cases, or where Illinois law requires a proceeding to be held in private, extended media coverage is prohibited**.** Also prohibited is coverage of jury selection.

When the policy was formally announced it came as a surprise to a number of chief judges, but we have since tried to reassure everyone that the new program is in no sense mandatory. To the contrary, as already indicated, it is only being tested on a trial basis, and only where a circuit has itself asked for and received approval. Moreover, and this is very important, the decision as to whether a media request for extended coverage will be granted in a particular case lies within the exclusive discretion of the judge presiding over the case. If the judge says no, it is no. The decision by a judge to deny, limit or terminate extended media coverage is absolute and cannot be appealed.

So far, it appears that the idea is being received favorably. Requests for approval of extended media coverage have been submitted by a number of additional counties in the past few months. Requests by Kankakee and Madison Counties and the 15th Judicial Circuit have already been approved, and applications from Cook County and the Tenth Circuit are under review.

Protecting Personal Information. As court documents become more accessible, there has been increased awareness of the need to shield confidential personal information from routine disclosure to the public at large. One step the Court has taken to address the issue is adoption of the new Supreme Court Rule 138. That new rule, which is a judicial counterpart to the Identity Protection Act, 5 ILCS 179/ 1 *et seq*. (West 2012), bars parties from including Social Security numbers in court documents unless required by law or ordered by the court to do so. Where inclusion of Social Security numbers is necessary and permissible, the documents themselves can only include the last four digits of the number and the filing must be accompanied by a separate form, marked confidential, identifying the full number. Under the rule, the information containing the full number must be kept in a location separate from the court file.

The new Rule 138 took effect Jan. 1 of this year. Please note, however, that it will soon be migrating to a different part of the rule book. Article III, the section where it is now located, deals with civil proceedings. Because it is the Court's intention that the rule apply to criminal as well as civil matters, it will soon be placed in Article I of the Supreme Court Rules, the general rules section, and renumbered as Rule 15.

Criminal Discovery Rules Extended to Delinquency Cases. Effective December 9, 2011, the Supreme Court amended Rule 411 to provide that the discovery rules applicable to serious criminal cases now apply to juvenile delinquency cases as well. The amendment also changed the description of the type of criminal cases subject to the discovery rules from offenses for which the accused "might be imprisoned in the penitentiary" to felonies. In addition, because the legislature has now abolished the death penalty, the amendment eliminated reference to applicability of the discovery rules to the sentencing phase of capital cases.

Posting of Bond. Rule 553(a), which specifies by whom and where bail may be taken, has now been expanded to provide that bail may now be taken at weigh stations or portable scale units established to enforce truck violations, in addition to police stations, sheriff's offices, county and municipal buildings and other specified locations. In addition, Rule 553(e) has been changed to provide that, except for citations written by local law enforcement officers in Cook

County, sworn law enforcement officers may accept cash to cover the bond in cases where the bond does not exceed $200 and the defendant is not required to be fingerprinted.

Prosecution of Ordinance Violations. New rules 570 through 579 have been adopted to govern the prosecution of ordinance violations "not punishable by a jail term and other than traffic and conservation offenses." The new rules also apply to parking offenses. The rules provide, among other things, that such prosecutions are subject to the Code of Civil Procedure, with limited exception; provide for the right to be represented by an attorney (though no right to appointed counsel) and the right to trial by jury; and specify that the prosecution must prove the ordinance violation by a preponderance of the evidence. The new rules also provide that in addition to fines, the court may impose other penalties or conditions authorized by ordinance and that, following judgment, either party may appeal.

Unauthorized Practice of Law. Rules 751 and 752 have been amended to permit the ARDC to investigate allegations of unauthorized practice of law by disbarred lawyers and by persons, entities or associations not authorized to practice law by the Supreme Court, and, where warranted, to prosecute unauthorized practice cases. Under new Rule 779, such proceedings may be brought by the Administrator of ARDC as a civil and/or contempt action in circuit court. Where the unauthorized practice is being carried out by a suspended Illinois lawyer or by a lawyer licensed to practice in another jurisdiction, the conventional disciplinary process will be followed.

Bar Application Fees Raised. Finally, the cost to take the Illinois bar exam has gone up. Under Jan. 2012 amendments to Rule 706, it now costs $400 (up from $250) to take the exam if you sign up before the first deadline (Sept. 1 for the Feb. exam, Feb. 15 for the July exam) and $600 (up from $500) if you don't get your application in until the second deadline (Nov. 1 for the Feb. exam and April 1 for the July exam). For the third and final deadline, the fee remains unchanged at $1,000. Fees to retake the bar exam have also increased, a development which may take on increased significance if and when a pending proposal to raise the passing score on the bar exam takes effect. But more on that in a future article. ■

Justice Stevens and the virtue of being indifferent to popularity

By Judge Michael Hyman

In his newly published memoir, *Five Chiefs,* Justice John Paul Stevens mentions the CBA once, but on a topic of considerable contention—that the judicial election and retention process subjects judges to popularity contests which can, consciously or unconsciously, negatively affect their decision-making.

Stevens speaks his mind on this phenomenon in the course of describing a case that reverberated with political overtones, decided shortly after he joined the Seventh Circuit Court of Appeals. The Wisconsin Supreme Court had denied an application for *habeas corpus* filed by a civil rights activist priest, but a federal district judge granted the writ. The Seventh Circuit, sitting *en banc,* by a four-to-three margin, reversed the district court. Stevens wrote a dissent, which he "thought [ ] put an end to any possibility that I might be considered for appointment to the Supreme Court." Obviously he misread the impact of the dissent on his career, but the dissent did have a significant impact nonetheless—on the U.S. Supreme Court. In an opinion by Chief Justice Burger, a unanimous Supreme Court, persuaded by Stevens's dissent, reversed the Seventh Circuit.

In his memoir, Stevens suggests that the difference between the rulings of Wisconsin highest court and the nation's highest court could be explained by Wisconsin judges facing the voters while U.S. Supreme Court justices receive life tenure. (He does not attempt to explain how his view can be reconciled with the *en banc* decision by judges with life tenure.) Life tenure, says Stevens, frees federal judges from considering public opinion in deciding controversial matters of law. "The critical difference" between the other branches of government and judicial work, according to Stevens, is that majority vote decides issues of policy "[b]ut in litigation, judges have an overriding duty to be impartial and to be indifferent to popularity." This fundamental principle, Stevens writes, was embodied in admonitions for judges by Chief Justice of the King's Bench Matthew Hale (1609-1676). Hale exhorted judges not to let anything deter them from following the rules of justice. He recognized the threat to judicial decision-making posed by "popular or court applause" or by "what men will say or think."

Stevens recalls quoting Hale in 1974 before a CBA luncheon honoring past Chicago Bar presidents. At that time, Judge (not Justice) Stevens expressed his opposition to having state judges chosen by popular vote. Stevens considers the flow of money into judicial races and campaigning by judicial candidates to be "unseemly." But, he says, he is more worried "by the potential impact on the work of the judge of allowing popularity to be treated as an appropriate criterion for determining his or her fitness for office." Many years ago, I heard an Illinois appellate justice tell a federal district court judge almost the same thing, while bemoaning the "messiness" of running for retention.

Avoiding popularity

Although the burden of avoiding popularity rests with every judge, Stevens feels the public can place confidence in the independence of federal judges due to the fact that they do not run for election. Stevens has a point, especially after *Caperton v. Massey* and *Citizens United v. Fed. Election Comm'n* (in which Stevens wrote a 90 page dissent). Popularity, as Stevens describes it, will always be a danger. To ensure public confidence in impartial justice, I agree with Justice Stevens that judges who face the electorate must remain ever vigilant of the impact of popularity.

Throughout his nearly 40 years as a judge, John Paul Stevens adhered to judicial neutrality by following the principle he expressed at the CBA luncheon almost 38 years ago, "it is the business of judges to be indifferent to popularity." And in so doing, he became one of the most popular justices of our era.

Judge Hyman is a member of the Bench & Bar Section Council. He is also Editor in Chief of the CBA Record where this article first appeared in the January 2012 issue. ■

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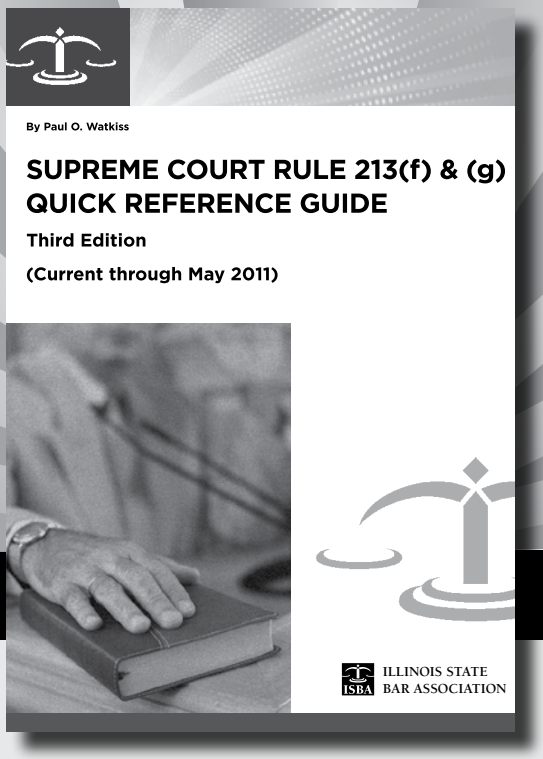

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Mentoring matters

By Judge Debra B. Walker, Circuit Court of Cook County, and Commissioner for the Illinois Supreme Court Commission on Professionalism

As a member of the Illinois Supreme Court Commission on Professionalism (f/k/a/ Committee on Civility) since its inception in 2001, I am so proud to witness the launch of our statewide Lawyer Mentoring Program. The official launch of the Chicago program took place at a special event on October 25, 2011 hosted by Winston & Strawn, one of many law firm sponsoring organizations. This followed special events throughout the state including those held in Carbondale, Edwardsville, Springfield, Peoria, and Wheaton.

At the October 25th launch, several Chicago legal luminaries spoke about mentoring. The Honorable Mary Jane Theis, Justice of the Illinois Supreme Court, said that although she was not part of any formal mentoring program, she had nothing but praise for her informal mentor of many years, former Chief Justice Thomas Fitzgerald. Paula Hudson Holderman, the second vice president of the ISBA and Winston & Strawn Chief Attorney Development Officer, announced that our Lawyer-to-Lawyer Mentoring Program Guide will serve as the model for the Winston & Strawn mentoring projects in all of its offices nationwide. She also praised the Illinois Supreme Court for amending the Supreme Court Rules to allow CLE Professional Responsibility credit for participation in the mentoring program. Cook County State's Attorney Anita Alvarez stated that this would be the first formal mentoring program for her office, and she also thanked the Illinois Supreme Court for making it easier for her attorneys at 26th and California to participate in the program, while earning their CLE credits.

Gordon Nash, the chair of the Commission on Professionalism and a former Chicago Bar Association president, spoke of the town hall meetings hosted by the Commission several years ago. He said that all of the successful attorneys in attendance at those town hall meetings commented on their mentors and the importance of mentoring on their legal careers. Dean John Corkery of the John Marshall Law School (and a fellow Commissioner) stated that the best way for anyone to teach is through modeling, not just by lecturing in the abstract or with reading lists. Current Chicago Bar Association President Bob Clifford praised Phil Corboy as his mentor, credited Corboy for helping launch his career, and said that Corboy taught him to be a gentleman and to show courtesy to his opposing counsel. Clifford stated, "Osmosis works!"

Mentoring also has played a major role in my professional life. As a brand new lawyer, I was privileged to be mentored by a phenomenal male trial attorney at my law firm. Mark A. Miller was a very smart, articulate, talented trial lawyer. He won something like eight jury trials in a row in one year. He was courteous to everyone. His opponents always liked him. He worked hard, but he also enjoyed life and many great Chicago restaurants. When I would approach him with questions for which there were no clear cut answers, he often encouraged me to take a novel approach and to go for my goal with whatever I had. That has been exceptional advice for me throughout my 21 year legal career and in my first three years on the bench.

I was also very fortunate as a young attorney when a co-defendant's counsel, Harlene Matyas, took me under her wing. There were very few female senior attorneys at my first law firm employer. Ms. Matyas was kind enough to get to know me personally and give me many pointers on the profession and on balancing work and family commitments. She continues to be an inspiration for me to this day.

After I had been practicing law for a few years, I made a point of mentoring less-experienced attorneys, both men and women, sometimes in formal mentoring programs and other times in an informal way. It is important to "pass it on." I told a few of the lawyers for whom I have served as a mentor that I was writing this article and asked them to share a bit about what mentoring has meant to them in their career. Here is a sampling:

- Karie Valentino is a partner at the Chicago law firm of Anderson Rasor & Partners LLP, a 40 under 40 award winner, and an officer of the Women's Bar Association of Illinois. Ms. Valentino writes, "A mentor is charged with the responsibility of fostering a professional relationship with a mentee to provide instruction and guidance. However, mentoring is more than just a professional relationship; it is also a personal relationship that provides growth and development. This relationship is unique because it is dynamic and constantly evolving. As a young attorney, a woman can face multiple challenges. A mentor provides the guidance for a mentee to reach her full potential and excel in her field. The mentee quickly learns that whatever the challenge, it can be overcome. The mentor imparts the skills the mentee needs to prevail in her particular field and grow, not only as an attorney, but as an individual, a mother, a sister and a friend."
- Jamie Bracewell practices law in O'Fallon, IL at the Law Offices of Staci M. Yandle and is on the ISBA Board of Governors. Ms. Bracewell writes: "Mentoring provides an invaluable experience to other lawyers. I am truly grateful to the attorneys who took their time to advise me and encourage me to get involved with organizations. The people who have mentored me may never know how many times I replay the words they told me in my head when I am facing a situation. I think it is important for people to give their time to help others. The mentors in my life still help me to this day. I am eternally grateful to them."
- Aaron Boeder is a new associate with the Waukegan-based law firm, Salvi Schostok & Pritchard PC. Mr. Boeder writes: "My earliest mentor as a young law student was (now Judge) Debra Walker. I first met Judge Walker when she was still an attorney in private practice. Judge Walker inspired me with her competence, wisdom, and caring nature. She taught me the most important career (and life) lesson I learned: surround yourself with, and learn from, hardworking and ethical people. Through direct or indirect means, Judge Walker guided me towards every important position I had during school. At each position, I gained new mentors, such as Chief Judge James Holderman, who reinforced the paramount importance of an attorney's strong work ethic, impeccable honesty, and high standards for work product. To this day, I continue to reach out to these great mentors on a regular basis to get guidance on my career and life in general. The only way I could ever pay it back is to help others in a similar

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manner, and I strive to do so in the future."

Obviously, mentoring matters! A good mentor can literally save a legal career, many times over. The Illinois Supreme Court Commission on Professionalism, led by our multi-talented Executive Director, Jayne Reardon, has published an exceptional Mentoring Guide for use in our Lawyer-to-Lawyer Mentoring Program. As of the official launch on October 25th, we had 39 collaborators, including law firms, governmental units, law schools and legal organizations. The program has built-in flexibility for individual organizations, but it has a structure that will work throughout the state. As Ms. Reardon stated: "Illinois is poised to lead the country on professionalism issues. The Commission will support you throughout your process. On our website, you may have your own mentoring page. You can share with each other good ideas and even share mentors and mentees if you don't have an equal number."

Interestingly, the November 22, 2011 issue of the Chicago Daily Law Bulletin reported on a recent survey that found "[t]he majority of law firms in the U.S. and Canada . . . . said they plan to increase reliance on electronic ways of training associates. But associates said they prefer mentoring and on-the-job training." Given that CLE credit is now available for mentoring programs for both the mentor and the mentee, there is no better time to launch an official mentoring program at your firm, your alma mater, or your bar association. The Illinois Supreme Court Commission on Professionalism will make it extra easy for you. Please call Jayne Reardon at the Commission today (312.363.6210) and let her know that your organization will sponsor a Lawyer-to-Lawyer Mentoring Program. Your colleagues and associates will be eternally grateful. ■

Discovery of those online: Using Supreme Court Rule 224 to ascertain the identity of anonymous online posters

By Patrick Kinnally

With the continued promotion of web logs (blogs) and other Internet venues for posting unedited commentary, an increase in the number of negative statements not only about public figures but private ones, grows. Private citizens are fighting back. ("Venting Online: Consumers Can Land in Court," *N.Y. Times,* Vol. CLIX, No. 55058, June 1, 2010.

This is so even in light of the Illinois Citizen Participation Act (735 ILCS 110/1 *et seq.*), a broad and ambiguous law ("SLAPPED in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act," Sobczak, 28 N.Ill U.L.Rev. 559 (2008)). This legislation appears to have been designed to promote public speech about government and protect those who speak out from being sued over the content of what they utter. Perhaps such a law may have force for criticism in public venues but it was never intended to promote defamation. (See, Berman and Thompson, "Illinois Anti-SLAPP Statue: A Potentially Powerful New Weapon for Media Defendants," Communications Lawyer, Vol. 26. No. 2 (2009)). Yet many of these postings are anonymous. And some are blatantly defamatory and not aimed at government or public figures, but private ones.

How do you find out who these people posting critical commentary are? A recent case from the Third District Appellate Court, *Maxon v. Ottawa Publishing Co.*, 402 Ill.App.3d 704, 929 N.E.2d 666 (3rd Dist. 2010), provides a method.

The *Ottawa Daily Times* (Ottawa), a local daily newspaper, had a blog which permitted anyone to post comments in the "Comments" section after each article published on its Web site. These were unedited. In order to post a comment, the person commenting had to register by utilizing a screen name, which could be a pseudonym, obtain a password for the screen name, and provide Ottawa with an e-mail address. Ottawa did not obtain the commenter's name, address or telephone number. Its only method identifying the anonymous commenter was an e-mail address. It did not determine whether the e-mail account was active after the registration occurred.

The Maxons in 2008 were seeking a zoning change so they could use their house as a bed and breakfast facility. Local zoning officials were considering the matter. Ottawa posted on its blog a statement which said, "Ottawa: Commissioners favor B & B additions and changes." Comments were received on the blog by anonymous posters, basically accusing the Maxons of bribing public officials to get the ordinance changed in their favor, a serious charge.

Supreme Court Rule 224 provides that a person may file an independent action seeking discovery before a suit is filed to determine the identity of one who may be responsible in damages. A similar but slightly different version of that procedure appears in our Code of Civil Procedure, 735 ILCS 5-2/402. The purpose of the petition, which must be verified, is a narrow one: discovery of the identity of a potential defendant. Nothing more. (See, *Gaynor v. Burlington Northern and Santa Fe Railway*, 322 Ill.App.3d 288, 294, 750 N.E.2d 307 (5th Dist. 2001)). This is not a fishing expedition.

The Maxons thought they fit that definition and filed a Rule 224 petition, claiming they had been defamed by the anonymous postings and requested the Ottawa provide them with the identities of the commenters. Ottawa filed a section 2-615 (735 ILCS 5/2-615) motion to dismiss, which the trial court granted.

Relying on what is called the *Dendrite-Cahill* test (*Dendrite International, Inc. v. Doe No. 3,* 342 N.J.Super. 134, 775 A.2d 756 (2001) ("*Dendrite*") and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) ("*Cahill*")), the trial judge found the Maxons failed to state a claim for defamation and, since no recovery in damages could be made, dismissed the petition.

Under *Dendrite-Cahill*, the court is required to balance the First Amendment interests of those posting commentary anonymously with the reputational interests of the private citizen. And, where the private citizen cannot state a claim for defamation (*e.g.*, *Solaia Technology LLC. v. Speciality Publishing,*

Inc., 221 Ill. 2d 588 (2006)) or some other tort, then, according to the trial court in *Maxon*, the First Amendment interests predominated.

Applying a *de novo* review, the appellate court in *Maxon* reversed the trial judge's ruling and remanded the case for disclosure of the Internet poster. In so doing, the court refused to adopt the *Dendrite-Cahill* analysis, reasoning that sufficient examination for safeguarding both the interests of the poster and the Maxons can be addressed through motion practice. The appellate court rejected *Dendrite-Cahill's* holding that disclosure of the anonymous poster can only be required where the party who is the object of the posting, "undertakes efforts to provide notice to the anonymous commentator; and shows that his/her defamation claim against the poster would be sufficient to survive a hypothetical motion for summary judgment."

In doing so, the appellate court observed that the heightened scrutiny *Dendrite-Cahill* requires was more than satisfied by its Supreme Court Rule 224 analysis. The court stated that Ottawa attempted to give some notice to all defendants, and that a trial court has the discretion to permit additional notice.

Next, the *Maxon* court concluded that, under Supreme Court Rule 224, the petition must be verified and state with specificity the facts necessary to plead a cause of action for defamation. Finally, the Court concluded that, once the trial court determined that a petitioner, like the Maxons, had pled a *prima facie* case for defamation, then the defendant commentator has no First Amendment rights to protect. The court found there was no constitutional right to defame (see, *Cahill* at 950), and also concluded that the anonymity of Internet commenters does not enjoy a special degree of constitutional protection from claims of defamation by private individuals.

Justice Schmidt dissented. In his view, the anonymity of Internet posters was a paramount First Amendment concern. His focus was on the anonymous nature of the poster, which he opined required special protection. Justice Schmidt observed that anonymity on the Internet allows for a diverse exchange of ideas that would not be there otherwise. Also, he endorsed the *Dendrite-Cahill* test and said the Maxons failed to state a claim for defamation because no reasonable person would ever interpret the postings to be a statement of fact.

Another district of the appellate court, although arguably utilizing *Maxon*'s analysis in connection with Supreme Court Rule 224, came up with a different result in the world of anonymous online commentary. *Stone v. Paddock Publications*, (2011 IL App (1st) 93386, 2011 WL 5838672 (1st Dist. 2011) ("*Stone*")).

Lisa Stone, as mother and next friend of her son, Jed, filed an unverified petition for discovery against Paddock Publications, d/b/a the Daily Herald. In it, she claimed an anonymous online posting by Hipcheck16 allegedly defamed Jed. The posting related an election in which Ms. Stone was a candidate for trustee in the Village of Buffalo Grove. The trial court ordered the Internet service provider, a non-party who was responding to a subpoena, to turn over to the plaintiff "the identity of Hipcheck16." A John Doe who appeared obtained a stay of the trial court's order, which the appellate court reversed.

The *Stone* opinion agreed with *Maxon*'s analysis and held that a petition for discovery must be verified, allege with particularity the basis for the defamation claims, seek the identity of the defendant for the claim, not the substance for such a cause of action, and requires a hearing where the trial court determines that the verified petition states a cause of action for defamation. (*Stone*, ¶ 17).

The *Stone* court, however, indicated that, unless a Supreme Court Rule 224 petition meets such requirements, it is the trial court's responsibility to dismiss the petition after the hearing which determines the factual sufficiency of the defamation claim. The court based its conclusion on the fact that if the verified petition does not establish sufficient facts to assert a cause of action, then the purpose of the petition, namely to engage in necessary discovery, is not warranted. Illinois Supreme Court Rule 224(a)(1)(i)(a). It analogized its analysis to a motion to dismiss for legal sufficiency (735 ILCS 5/2-615), at least in the defamation context. The Court, citing *Maxon*, concluded the plaintiff is required to plead facts to establish the alleged defamatory statements are constitutionally protected free speech. (¶ 21).

Justice Salone specially concurred in the result, but disagreed with the majority on the applicable burden of proof. "Petitioner need only establish probable cause to establish the requisite reason the proposed discovery is necessary. …" (¶ 47). "The majority's *prima facie* standard narrows the possibility of redress for meritorious claims without justification …. Unlike the majority, I find no justification, either in the language of Rule 224 or applicable case law, for requiring a higher standard of proof for potential plaintiffs, who are unaware of the identity of a single potential defendant, than plaintiffs who purport to know the identity of a single defendant." (¶ 48).

Justice Salone concluded the majority's approach places an undue burden on petitioners who have meritorious claims. (¶ 52). Comparing it to the respondents in discovery provision of the Code of Civil Procedure, 735 ILCS 5/2-402, Justice Salone concluded that if a trial court concludes there is probable cause for the action, then a respondent may be added as a party. (*Id).*

The court concluded that Stone was unable to do so because her petition and amendment failed to allege the defamatory statements. Also, the court held the words were subject to an innocent construction. *Green v. Rogers*, 234 Ill.2d 478, 495, 917 N.E.2d 450 (2009). The statements communicated by Hipcheck16 to Stone's minor son said (¶ 29):

> Seems like you're very willing to invite a man you only know from the Internet over to your house – have you done it before, or do they usually invite you to their house?

The *Stone* court concluded these allegedly libelous comments had no precise meaning either as defamation *per se* or *per quod*. (¶¶ 30-32). The majority opinion also observed (¶ 34):

> Encouraging those easily offended by online commentary to sue to find the name of their "tormenters" would surely lead to unnecessary litigation and would also have a chilling effect on the many citizens who choose to post anonymously on the countless comment boards for newspapers, magazines, Web sites and other information portals. Putting publishers and Web site hosts in the position of being a "cyber-nanny" is a noxious concept that offends our country's long history of protecting anonymous speech.

This language seems overdone where a person's reputation is implicated. A private party's reputation is a valuable asset. Once attacked by an unknown assailant, the damage is already done, since when posted on the Internet apparently the only recourse is

for the publisher to take the posting down from the site. On the other hand, the Internet provides a forum for robust discussion where an exchange of opinions can provide valuable information. Anonymity may provide some security to those who post statements that are not a violation of the law. The Third District seems to have taken a reasonable middle ground in making disclosure the right course, by enforcing a little-used Supreme Court Rule.

Part of the problem is a Federal law called the Communication Decency Act, 47 U.S.C. 230(c). This Act preempts state laws that seek to hold a provider of interactive computer service liable for content authored by a third party. 47 U.S.C. 230(e)(3). (See, *Chicago Lawyer's Committee for Civil Rights Under Law v. Craig's List, Inc.*, 519 F.3d 666, 670-671 (7th Cir. 2008)).

This Act seems in direct contravention of the Illinois constitutional privilege that accords an Illinois citizen with a right of individual dignity. (*Cf. Bartlett v. Fonorow*, 343 Ill.App.3d 1184, 1196, 799 N.E.2d 916 (2nd Dist. 2003), and *Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)). It seems odd that an interactive site can provide a forum for defamation that an Illinois constitutional guarantee protects. Providing a forum for libelous statements clearly gives that commenter a sense of legitimacy as to the content stated.

In Illinois, unlike federal constitutional jurisprudence, citizens have a right to individual dignity and, accordingly, communications that portray criminality, depravity, hatred, abuse or hostility toward another person or persons are condemned. (Illinois Constitution, Bill of Rights, Sec. 20). Accordingly, reliance on U.S. Supreme Court precedent to insure First Amendment discussion, as the *Stone* Court pronounced, seems misplaced, too. The standard of review the *Stone* court announced is not consonant with *Maxon*.

Perhaps the Illinois Supreme Court can give trial courts and practitioners some guidance as to what this individual dignity right actually denotes in a society that places a premium on instantaneous communication and commentary. ■

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Jablonski v. Ford: Is the Illinois Supreme Court crafting a new approach to duty analysis and proof in negligent-product-design cases?

By George Bellas and A. Patrick Andes

A gradual shift in how Illinois courts are deciding cases involving negligent-product-design claims appears to be evolving following the Illinois Supreme Court's recent ruling in *Jablonski et al. v. Ford Motor Co.,* 2011 IL 110096 (Ill. 2011).

Reversing a $43 million jury verdict for the plaintiffs, the court held in an opinion authored by Justice Theis that under a negligent-product-design claim the "risk-utility" test with a higher burden of proof controlled, which the plaintiffs failed to meet. The ruling seems on its surface to dispense with the more intuitive and less rigorous "consumer expectation" test, which earlier cases have folded into the risk-utility test.

In practice, however, it looks as if the Illinois Supreme Court applied language out of its 2008 *Mikolajczyk v. Ford Motor Co.* decision in which the court warned that a plaintiff who fails to rebut evidence introduced by the defendant proper to the risk-utility analysis runs the risk of an adverse ruling.

Perhaps most astonishing of all is that the *Jablonski* court reviewed the actual evidence itself, overturning the jury's and the appellate court's findings and ruling as a matter of law that the evidence failed to meet the threshold required for mere *submission* to a jury. This emerging line of Illinois cases bodes ill for plaintiffs seeking damages due to design defect and negligent product design in products liability cases.

Background

On July 7, 2003, Dora and John Jablonski were driving home on I-270 in Madison County, Illinois, and had come to a stop in traffic while passing through a construction zone. A distracted driver did not see the stopped traffic and rear-ended the Jablonski's Lincoln Town Car with her Chevrolet Lumina at a rate of speed between 56 and 65 mph. The force of the collision crushed the fuel tank and a heavy wrench lying in the trunk punctured the fuel tank, causing the Town Car to explode. As a result, John was killed and Dora suffered extensive injuries and burns, including permanent disfigurement.

Dora and her son, John Jr., proceeded with claims against Ford after reaching settlement with the driver. The plaintiffs' claims at the time of trial alleged that when the 1993 Town Car was designed and manufactured—and thereafter—Ford had a legal duty of ordinary care to ensure the car was not unreasonably dangerous and defective.

Plaintiffs alleged Ford was negligent and strictly liable in at least one of the following ways: 1) by outfitting the Town Car with a vertical, behind-the-axle ("aft-of-axle") fuel tank; 2) failing to shield the aft-of-axle tank; and 3) failing to warn consumers of the risk of fuel tank puncture by trunk contents. Additionally, plaintiffs asserted that Ford's con-

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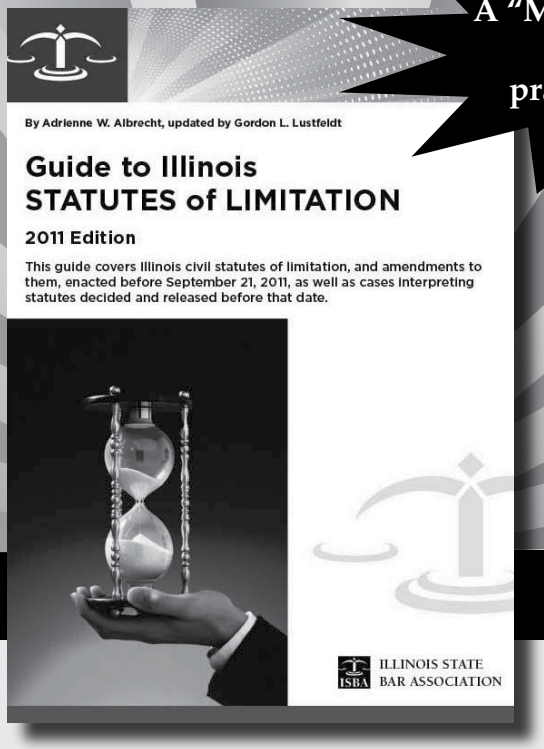

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duct was "willful and wanton," alleging Ford knew at the time of design and manufacture of the Town Car of multiple deaths and/or serious injuries in 416 accidents involving aft-of-axle vehicles prior to 1993, but none were Town Cars or other cars with a similar design. Plaintiffs further alleged Ford knew of the heightened risk of fire-related injuries in its aft-of-axle vehicles and the need for shields and kits necessary to protect drivers from such catastrophic events.

In support, plaintiffs submitted testimony of Ford engineers, independent experts, a major peer-reviewed research study on fuel-tank positioning partially funded by Ford, rear-end collision reports, and Ford internal memos showing Ford's knowledge of fire hazards associated with aft-of-axle fuel tanks and a proposed design over the rear axle that would be "high enough in the trunk to essentially preclude rupture from in-trunk articles during an accident." A critical piece of evidence disclosed that between 1997 and 2003, eleven incidents prior to the Jablonski accident involving a similar "panther" model with an aft-of-axle fuel tank, the Victoria Police Interceptor, sustained puncture of the fuel tank by trunk contents in high-speed rear-end collisions involving police officers.

Ford's primary defense was that its conduct in constructing a vertically-oriented, aft-of-axle fuel tank was reasonable because this was the best location for that type of vehicle and design, and moving it would have compromised other desirable elements. In support of this, Ford submitted evidence that it met or exceeded all relevant federal and internal safety standards with regard to fuel integrity and crash-testing and that the puncture of the fuel tank by a pipe wrench was so unique and unforeseeable that no manufacturer could have anticipated or designed against its occurrence.

Ford introduced evidence that 99.9993% of all Town Cars produced from 1992 to 2001 never had fatal rear-end collisions with fire and that the over-the-axle design was unworkable. Critical to this ruling, Ford also introduced evidence that moving the location of the gas tank would necessitate an entire redesign of the automobile, incurring new risks of equal or even greater magnitude, including tank rupture from other parts of the car as well as fuel-fed filler pipe fires. This evidence was never rebutted.

At the close of evidence, Ford renewed its motion for a directed verdict on all counts. Plaintiffs, who had brought products liability claims sounding in both strict liability and negligent design, then voluntarily dismissed their strict liability claims with prejudice, inviting a motion for mistrial by Ford, which alleged substantial evidence was presented and admitted under the guise of relevancy for purposes of strict liability. The circuit court denied the motion for mistrial and for directed verdict.

After the 11-day trial the jury returned its verdict in favor of plaintiffs for $43 million including punitive damages. On appeal the appellate court affirmed the judgment, and the Illinois Supreme Court granted Ford's petition for leave to appeal.

The Supreme Court's Analysis

Duty of Care and the Risk-Utility Test

The issue on appeal was to clarify the duty analysis in a negligent-product-design case generally and specifically to address the application of the risk-utility test in determining the duty of care. Products liability claims based in negligence, such as negligent design, derive from fundamental precepts of common law negligence. *Calles v. Scripto-Tokai Corp.,* 224 Ill.2d 247, 270 (2007). A plaintiff must establish existence of a duty, a breach of that duty, an injury proximately caused by that breach, and damages. *Heastie v. Roberts,* 226 Ill.2d 515, 556 (2007).

As set forth at the outset by the court in its review, quoting *Calles,* "the key question in a negligent-design case is whether the manufacturer exercised reasonable care in designing the product." In determining if the manufacturer's conduct was reasonable, the question becomes whether the manufacturer should have foreseen, in exercising ordinary care, that the design would be hazardous to someone. For a harm to be foreseeable, the plaintiff must prove that the manufacturer actually knew or should have known at the time of manufacture of the risk posed by the product's design. *Calles*; *Sobczak v. General Motors Corp.,* 373 Ill.App.3d 910, 923 (2007).

The court then cited § 291 of the Restatement (Second) of Torts for the longstanding notion that the determination of whether a manufacturer exercised reasonable care in its product design embraces a "balancing of the risks inherent in the product design with the utility of benefit derived from the product." This is the risk-utility test. "[T]he risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." While many and varied factors comprise the test, the two primary factors are: 1) the availability of feasible alternate designs at the time of manufacture; and 2) that the design used did not conform to industry standards, authoritative voluntary organizations, or criteria set forth in regulations.

The distinction between the risk-utility test and the more intuitive, less rigorous "consumer expectation" test also employed in the duty analysis of these cases is clear, as Theis herself cited in *Salerno v. Innovative Surveillance Tech, Inc.,* 402 Ill.App.3d 490, 497 (1st Dist. 2010) before her appointment to the Supreme Court. The consumer expectation test requires the plaintiff to establish that the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." This test merely requires that the product is more dangerous than contemplated by the consumer, whereas the risk-utility test also requires that the extent of the danger outweighs the benefits of the challenged design.

The *Jablonski* court cites *Calles* for the rule of law that risk-utility balancing "remains operative in determining whether a defendant's conduct is reasonable in a negligent-design case." The *Calles* court held that the appellate court erred in holding that the risk-utility test did not apply to negligent-product-design claims. *Jablonski,* however, seems to go a step further in not considering the consumer expectation test at all. In fact, the test is never used in the opinion for any determination of duty whatsoever. A closer reading of the opinion and a key passage in the court's 2008 *Mikolajczyk v. Ford Motor Co.* ruling, however, reveals a more subtle explanation for this omission.

Mikolajczyk and Unrebutted Defendant Evidence

The Illinois Supreme Court has already been using the risk-utility test to cannibalize the consumer expectation test in products liability litigation involving design defect in strict liability. In 2008 the court held the following regarding the relationship between the two tests in *Mikolajczyk v. Ford Motor Co.,* another case where the decedent's vehicle was struck by another car from behind, killing the driver:

> In sum, we hold that both the consumer-expectation test and the risk-utility test may be utilized in a strict liability design defect case to prove that the product is "unreasonably dangerous". . . *When both tests are employed, consumer expectation is to be treated as one factor in the multifactor risk-utility analysis* (emphasis added).

Even more significantly for this case, the *Mikolajczyk* court set forth the following in response to the plaintiff's assertion that she was not required to choose the risk-utility test to prove her case:

> Plaintiff is correct that a product liability plaintiff is not required to utilize the risk-utility method of proof and does not have a "burden" of proving the existence of a feasible alternative design. She does, however, have the burden of proving that the product is unreasonably dangerous due to a design defect. *If, however, a product liability defendant introduces evidence that no feasible alternative design exists or that the design offers benefits that might outweigh its risks, the plaintiff who does not rebut such evidence with evidence of her own runs the risk that the trier of fact may resolve the issue against her*
>
> (Emphasis added).

Proceeding with the risk-utility test, the *Jablonski* court found, quite contrary to the appellate court, that plaintiffs failed to meet their burden of proof. The court found that plaintiffs failed to produce evidence that Ford's conduct in its design of the fuel system was unreasonable. Key to this conclusion was the lack of a feasible alternative design (including the over-the-axle design) and Ford's conformity with industry standards, the two primary factors in the risk-utility test for which Ford presented ample evidence in rebuttal of plaintiffs' assertions. Plaintiffs' failure to rebut Ford's evidence showing that no feasible alternate design existed is right out of the *Mikolajczyk* language cited above.

The court also states that Ford showed conformity with all federal fuel integrity standards, exceeding even its own internal 50-mph crash testing and that the aft-of-axle fuel tank location was accepted industry practice. Plaintiffs were therefore required to rebut those findings with evidence showing Ford's conduct was still unreasonable and failed to do so. And finally, Ford submitted evidence showing that the vertical, aft-of-axle fuel tank placement was the best location, and that moving it would require a redesign of the entire vehicle, subjecting it to a host of new risks of equal, or even greater, magnitude, including tank rupture from other parts of the car as well as fuel-fed filler pipe fires. This evidence clearly goes to the heart of the risk-utility test of balancing the design's harm against its benefits and was never rebutted.

As for the shielding, plaintiffs failed to present any design "proven out by crash testing." The court also found that plaintiffs failed to present evidence demonstrating that the risk was foreseeable and that the inherent risks in the design outweighed its benefits. Critical to these findings was that plaintiff's expert Mark Arndt was unable to present a single accident involving puncture of an aft-of-axle fuel tank from trunk contents in a Lincoln Town Car, only of similar vehicles used by police officers whose work made them more prone to high-speed rear-end collisions. Also key was that the research study of Derwyn Severy, heavily relied upon by plaintiffs, which opined that an "over-the-axle" location for the fuel tank would reduce risk of structural collapse and fuel tank rupture. However, not one of the vehicles tested in the study had an aft-of-axle fuel tank or was tested for trunk contents puncturing the fuel tank. The court reversed all rulings and awards, including duty to warn based on waiver and improper jury instructions.

Supreme Court's Review of Factual Evidence

This case is extraordinary in that the Illinois Supreme Court actually reviewed the factual evidence presented at trial, overturning the jury's findings and the appellate court's ruling based on insufficient evidence as a matter of law. Ford asserted it was entitled to a judgment notwithstanding the verdict because plaintiffs "failed to present sufficient evidence that [Ford] breached any recognized standard of care and, therefore, insufficient evidence to justify *submitting* any of their negligence claims to the jury." (Emphasis added). The standard of review for judgment notwithstanding the verdict requires that, after reviewing all the evidence most favorably toward the nonmovant, the evidence "so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.,* 37 Ill.2d 494, 510 (1967).

Therefore, the court explained, a motion for judgment *n.o.v.* essentially presents a question of law as to whether "a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case" exists. After reviewing all the evidence most favorably toward plaintiffs, the court concluded that plaintiffs had indeed presented insufficient evidence from which a jury could conclude that Ford breached its duty of reasonable care by way of negligent design and reversed the rulings below as a matter of law.

Conclusion

The Supreme Court's transition from *Calles* to *Jablonski* suggests that in negligent-product-design claims specifically and in products liability litigation generally, the Illinois Supreme Court may not yet be restricting duty analysis solely to the risk-utility test but has incorporated the consumer expectation test as a factor into the risk-utility test. Moreover, even if the plaintiff chooses the consumer expectation test for its method of proof, if the defendant presents evidence appropriate to the risk-utility analysis, the burden will shift to the plaintiff to rebut that evidence or risk an adverse ruling by the trier of fact. ■

George Bellas is the principal in the suburban Chicago firm of Bellas & Wachowski. George was a recipient of AAJ's Patrick Sharp Award for Consumer Education of the Risks in Defective Products. Patrick Andes is an associate in the firm.

Recent appointments and retirements

- The Illinois Supreme Court, pursuant to its constitutional authority, has appointed the following to be Circuit Judge:
  - Michael F. Otto, Cook County Circuit, February 15, 2012
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- **Ex Parte Communications*—**The panel will outline the ethical obligations of judges and lawyers to refrain from ex parte communications and discuss ways to avoid violations of the rules. Special emphasis will be placed on how ex parte communications impact judges and attorneys and what duties arise once the communication occurs.

2:15 – 3:00 p.m. Handling Dilatory Tactics in Discovery—More Secrets from the Bench*
The panelists will discuss the judge's role in enforcing ethical rules and encouraging professional civility in the context of discovery, as detailed below.

- **Discovery Problems in General Civil Cases*—**The panel will address the failure to properly respond to discovery requests in the general civil area, including the use of Supreme Court Rules 201, 219, 137, and 213 and the relationship between case management orders and the discovery process. Scenarios will be presented detailing the problems faced by attorneys and the Court by dilatory discovery answers.
- **Discovery Problems in Family Law Cases*—**This judicial panel will address the failure to properly respond to discovery requests in the family law area, including the use of Supreme Court Rules 201, 219, 137, and 213 and the use of final contribution to attorney's fees and fee shifting under 750 ILCS 5/508 and 503 to ensure discovery compliance. Scenarios will also be presented detailing the problems faced by attorneys and the Court by dilatory discovery answers.

3:00 – 3:15 p.m. Break (refreshments provided)

3:15 – 4:45 p.m. Breakout Sessions (Pre-register for Either A or B)

A. Civil Practice Update—In this segment, Judge Spears reviews significant Illinois Supreme Court and Appellate Court civil cases from 2010-present, along with important statutory and rule changes of which Illinois lawyers need to be aware.

B. Criminal Law Update—This session includes a criminal law update from the standpoint of a practitioner, covering recent cases, statutes and Supreme Court Rules from January 1, 2010 through the present. Emphasis is given to issues commonly addressed by prosecution and defense counsel in the handling of criminal cases – from arraignment, pretrial/trial and sentencing, to post-conviction proceedings.

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