August 2012 Vol. 58, No. 2

ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Does your claim allege educational malpractice?

By Justice James Fitzgerald Smith and Julia Illman Maness

Does an injured person have a cognizable claim for negligence against a former teacher for an injury occurring after instruction that the injured person claims can be traced to poor teaching? Probably not, according to a recent Illinois Appellate Court decision, *Waugh v. Morgan Stanley and Co., Inc.*, 2012 Il App (1st) 102653, 359 Ill. Dec. 219, 966 N.E.2d 540 (1st Dist. 2012) (*"Waugh*).

A claim for negligence against teachers and educational institutions for the quality of education received sounds in the tort of educational malpractice. This tort, also described as educational negligence, is not cognizable in Illinois. Educational malpractice claims are those which raise " 'questions about the reasonableness of an educator's conduct in providing educational services' or which require 'an analysis of the quality of education.' " *Id.* at ¶ 28, 966 N.E.2d 549, citing *Dallas Airmotive, Inc. v. FlightSafety International, Inc.*, 277 S.W.3d 696, 700 (Mo. Ct. App. 2009); *Florvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 552 (Minn. Ct. App. 2011). The *Dallas Airmotive* court provided the following examples of negligence claims that sound in educational malpractice:

> If a negligence claim raises questions concerning the reasonableness of the educator's conduct in providing educational services, then the claim is one of educational malpractice. *Christensen v. S. Normal Sch.*, 790 So.2d 252, 255 (Ala. 2001). Similarly, if the claim requires an 'analysis of the quality of education received and in making that analysis the fact-finder must consider

Continued on page 2

Supreme court clarifies fraudulent misrepresentation pleading requirements

By Sara Siegall, Chapman Spingola, LLP, Chicago

On May 24, 2011, the Illinois Supreme Court (i) reaffirmed that a litigant who files an amended pleading must reallege or incorporate previously dismissed claims to preserve the right to appeal the dismissal of those claims; and (ii) clarified that, under Illinois law, a claim for fraudulent misrepresentation will not lie between two parties with a "purely personal" relationship, even if the defendant's misrepresentations caused the plaintiff to suffer economic loss.[1]

In *Bonhomme v. St. James*, plaintiff brought an array of tort claims arising from medical, psychological, and economic damages she suffered as a result of defendant lulling her into a long-term, online romantic relationship with a fictional character whom defendant eventually induced plaintiff to believe had died of liver cancer. After plaintiff's original claims were dismissed for failure to state a valid cause of action, she filed an amended pleading alleging only one count of fraudulent misrepresentation. The Illinois Supreme Court ultimately held that claims not reincorporated into her amended pleading had been abandoned for purposes of appeal. Further, the court held that plaintiff's fraudulent misrepresentation claim could not lie because the parties'

Continued on page 6

INSIDE

IF YOU'RE GETTING THIS NEWSLETTER BY POSTAL MAIL AND WOULD PREFER ELECTRONIC DELIVERY, JUST SEND AN E-MAIL TO ANN BOUCHER AT ABOUCHER@ISBA.ORG

Does your claim allege educational malpractice?

Continued from page 1

> principles of duty, standards of care, and the reasonableness of the defendant's conduct,' then the claim is one of educational malpractice. *Id.* If the duty alleged to have been breached is the duty to educate effectively, the claim is one of educational malpractice. *Vogel v. Maimonides Academy of Western Connecticut, Inc*., 754 A.2d 824, 828 (Conn. App. Ct. 2000). A claim that educational services provided were inadequate, substandard, or ineffective constitutes a claim of educational malpractice. *Lawrence v. Lorain County Cmty. Coll*., 127 Ohio App.3d 546 [Ohio Ct. App. 1998]; *Alsides*, 592 N.W.2d 473. Where the court is asked to evaluate the course of instruction or the soundness of the method of teaching that has been adopted by an educational institution, the claim is one of educational malpractice. *Andre v. Pace Univ*., 170 Misc. 2d 893 (N.Y. App. Div. 1996).
>
> *Dallas Airmotive*, 277 S.W.3d 700.

Recently, in *Waugh,* the Illinois Appellate Court, First District, Fourth Division, considered a claim in which the appellant alleged, in relevant part, that a flight instructor negligently trained an airplane pilot and, due to this negligent instruction, the pilot thereafter crashed the aircraft. The plaintiff made multiple allegations of ineffective training by multiple parties in the circuit court.

The allegations included that the instructor failed to "properly teach, train, and instruct" the pilot how to "competently and safely operate the aircraft so as to ensure a safe landing; engage in and execute safe approach and landing maneuvers; maintain proper control over the aircraft so as to maintain its flight path" and to "engage in and execute proper emergency maneuvers." This instruction, according to the complaint, was negligent and ultimately led to the crash that killed all four occupants of the aircraft.

The circuit court dismissed those claims that asserted certain defendants, a flight instructor and flight training schools, failed to properly train the pilot in how to fly and land the aircraft. The parties appealed, arguing that the trial court improperly dismissed the claims because the claims were not, in fact, claims for educational malpractice.

In a 2-1 decision, the appellate court found that the circuit court properly characterized the claims as sounding in educational malpractice and, because claims for educational malpractice are not cognizable in Illinois, properly dismissed the claims. Writing for the majority, Justice James Fitzgerald Smith explained that the dismissed claims sounded in the tort of educational malpractice because

> [t]he nature of the appellants' claims that were dismissed by the trial court focuses on the reasonableness of defendants' conduct in providing training, that is, education, to [the pilot], and would require a jury at trial to analyze the quality and methods of the education provided to [the pilot], as well as an evaluation of the course of instruction and the soundness of the teaching methods.
>
> *Waugh*, ¶33, 966 N.E.2d 550.

The court went on to hold, as a matter of first impression, that the tort of educational malpractice is not cognizable in the state of Illinois. It noted that most jurisdictions that have considered the issue of educational malpractice have found the tort non-cognizable:

> Those courts that have refused to recognize claims of educational malpractice have done so based on various public policy grounds, including: (1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will 'embroil the courts into overseeing the day-to-day operations of schools.' (Internal quotation marks omitted.) *Alsides*, 592 N.W.2d 472.
>
> *Waugh*, ¶37, 966 N.E.2d 552.

It also noted that the *Dallas Airmotive* court found these same public policy concerns persuasive when dismissing claims based on educational malpractice against flight training schools and flight instructors. The *Dallas Airmotive* court, it noted, differentiated an injury caused by an instructor during the course of instruction and an injury arising after the completion of the course of instruction. The first may be a cognizable tort sounding in ordinary negligence, as an instructor clearly has a duty to use "reasonable care so as not to cause physical injury to a trainee during the course of instruction or supervision." *Dallas Airmotive*, 277 S.W.3d 700.

By way of example, the court noted that "a woodworking shop instructor has a duty 'to exercise reasonable care not only to instruct and warn students in the safe and proper operation of the machines provided for their use but also to furnish and have available such appliances, if any, as would be reasonably necessary for the safe and proper use of the machines.' " *Dallas Airmotive*, 277 S.W.3d 700 - 01 (quoting *Kirchner v. Yale University*, 192 A.2d 641 (Conn. 1963)). The second, however, may sound in educational malpractice if it pertains to the quality of instruction and attacks the quality of instruction. *Dallas Airmotive*, 277 S.W.3d 701.

Because appellants' claims sounded in the tort of educational malpractice, a tort which is non-cognizable in the state of Illinois, the Illinois Appellate Court affirmed the judgment of the circuit court, noting:

> In essence, plaintiffs argue that the negligent performance of a former student [ ] caused an accident involving third parties and that the former student's negligence was itself caused by the poor quality of the education or training that the instructor or instructional institution [ ] provided to the student. These are claims of educational malpractice and are barred, therefore, as a matter of law.
>
> *Waugh*, ¶43, 966 N.E.2d 554. ■

Supreme court clarifies fraudulent misrepresentation pleading requirements

Continued from page 1

relationship was not commercial, but rather purely personal in nature, and therefore defendants' misrepresentations were not the sort of deceit that the tort of fraudulent misrepresentation was intended to remedy.

I. Relevant Facts and Procedural History in the Trial Court.

Plaintiff alleged the following facts in her complaint: Plaintiff, Paula Bonhomme, is a California resident who frequented an online chat room for the fans of the HBO television series *Deadwood*.[2] There, in April 2005, she struck up an online friendship with defendant, Illinois resident Janna St. James. Shortly thereafter, in July 2005, defendant registered with the website again, posing as a man, "Jesse St. James." Beginning in July 2005, defendant corresponded with plaintiff via e-mail and through the *Deadwood* chat room both as herself and as "Jesse." Defendant informed plaintiff that she knew "Jesse" and many others in his life. Ultimately, defendant created approximately 20 fictional friends and family members of "Jesse," who communicated with plaintiff from distinct e-mail accounts and physical addresses all over the world.

Plaintiff and "Jesse" began an online romantic relationship that lasted until July 2006. During this time, they exchanged e-mails, photos, handwritten letters and gifts and spoke frequently on the telephone. In late 2005, "Jesse" invited plaintiff to visit him in Colorado, and plaintiff purchased a plane ticket. However, "Jesse" then cancelled their plans and defendant soon after informed plaintiff that "Jesse" had attempted suicide. In April 2006, plaintiff and "Jesse" agreed to live together in Colorado. A few months later, after plaintiff had spent time and money preparing for the move, "Jesse's" fictional sister "Alice" informed plaintiff that Jesse had died of cancer. "Jesse's" fictional friends and family members sent plaintiff condolence letters. Defendant then communicated with plaintiff daily for seven months and took a trip with her to Colorado to visit "Jesse's" favorite places. On this trip, defendant presented plaintiff with a love letter that Jesse had written to plaintiff setting out his "dying wishes."

Plaintiff discovered defendant's charade in February 2007 when defendant visited plaintiff at her home in California. During that trip, some of plaintiff's actual friends uncovered defendant's deceit and elicited her confession on videotape.

Throughout plaintiff's relationship, in response to learning of "Jesse's" attempted suicide and later his death, plaintiff fell into a deep depression, was unable to perform at work, and contracted a recurring infection common to those with weak immune systems. Plaintiff's discovery in February 2007 that "Jesse" was fictional and that defendant had been deceiving her all along only further contributed to plaintiff's poor psychological condition.

Plaintiff's physical and psychological issues caused plaintiff to lose earnings and to incur thousands of dollars in therapy bills. Additionally, over the course of her relationship with "Jesse," plaintiff was induced to spend thousands of dollars on gifts, travel, moving preparations, and alterations to her home.

Based on these facts, plaintiff filed a Second Amended Complaint containing claims against defendant for negligent and intentional infliction of emotional distress, various forms of defamation, fraudulent misrepresentation, and false light. Pursuant to Section 2-615 of the Illinois Code of Civil Procedure, the trial court dismissed with prejudice each claim except the claim for fraudulent misrepresentation, which the court dismissed without prejudice.

Plaintiff then filed a motion to reconsider and a motion requesting either (i) a finding pursuant to Illinois Supreme Court Rule 304(a) that the dismissal of her claims were ripe for appeal or, alternatively, (ii) an order certifying four questions of law for appeal pursuant to Illinois Supreme Court Rule 308. Simultaneously, plaintiff filed a notice of appeal with respect to the court's dismissal of her Second Amended Complaint.

The trial court denied each of plaintiff's motions. Plaintiff then withdrew her notice of appeal with respect to the dismissal of her Second Amended Complaint and filed a Third Amended Complaint, containing only one count for fraudulent misrepresentation. Plaintiff's Third Amended Complaint made no mention of the claims that the trial court

TRIAL BRIEFS

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call 217-525-1760

OFFICE
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

CO-EDITORS
Robert T. Park
Patrick M. Kinnally
Michele M. Jochner
Sara Siegall

MANAGING EDITOR/ PRODUCTION
Katie Underwood
kunderwood@isba.org

had previously dismissed with prejudice. The trial court then dismissed the Third Amended Complaint with prejudice pursuant to Section 2-615, and plaintiff appealed that ruling.

II. The Illinois Appellate Court Ruled that Plaintiff Abandoned All Claims in Her Second Amended Complaint, But Held that the Trial Court had Erred in Dismissing the Fraudulent Misrepresentation Claim.

On appeal to the Illinois Appellate Court, plaintiff challenged the trial court's dismissal of both her Second Amended Complaint and her Third Amended Complaint. The appellate court first ruled, *sua sponte*, that plaintiff had abandoned the claims in her Second Amended Complaint for purposes of appeal because they had not been realleged or incorporated into her Third Amended Complaint. The appellate court noted that, to preserve a dismissed claim for appeal, a litigant must either "challenge the ruling in the appellate court or reallege or incorporate the dismissed counts in a subsequent pleading."[3] Accordingly, the appellate court ruled that plaintiff's "only viable contention" was that the trial court had erred in dismissing the fraudulent misrepresentation claim alleged in her Third Amended Complaint.[4]

The appellate court next considered whether the Third Amended Complaint stated a valid cause of action for fraudulent misrepresentation against defendant. The elements of fraudulent misrepresentation are (i) that the defendant made a false statement of material fact; (ii) with knowledge or belief of the falsity; (iii) intending to induce the plaintiff to act; (iv) plaintiff did act in justifiable reliance upon the false statement; and (v) plaintiff suffered damages as a result.[5] In addition, because the tort of fraudulent misrepresentation is derived from the common law action of deceit, it generally had been limited to cases "involving business or financial transactions between parties."[6]

Nevertheless, the appellate court noted that both the Illinois Supreme Court and courts in other states had acknowledged that, in certain limited circumstances, a litigant might bring a claim of fraudulent misrepresentation to recover pecuniary harm even if the harm stems from a relationship that is "outside the commercial context."[7] In support of this assertion, the appellate court pointed to the Illinois Supreme Court case, *Doe v. Dilling*.[8] There, plaintiff brought a fraudulent misrepresentation claim against her fiancé's parents for misrepresenting that her fiancé was suffering from Lyme disease and heavy metal poisoning when, in truth, he was suffering from AIDS. The court held that these facts could not support a claim for fraudulent misrepresentation.[9] While one infected with a disease may have a duty to disclose his own condition to those who may become exposed, the court found that this duty should not be extended to third parties.[10]

Despite its unwillingness to extend the tort of fraudulent misrepresentation to the facts alleged there, the Supreme Court in *Doe* cited with approval cases from other jurisdictions in which courts had upheld fraud claims based upon a defendant's covert transmission of a sexually transmitted disease.[11] The court also noted two Illinois appellate court cases that held that adoptive parents could bring fraudulent misrepresentation claims against adoption agencies that induced them to adopt children based on intentional misrepresentations of the adopted children's medical and psychological backgrounds.[12] Thus, though the court recognized that the tort of fraudulent misrepresentation "has on occasion been extended" to non-commercial settings, it ruled that such an extension was inappropriate under the facts in *Doe*.[13]

The appellate court reached the opposite conclusion as to the facts alleged in *Bonhomme*.[14] The appellate court noted that, while plaintiff and defendant's relationship was not commercial, plaintiff had alleged specific economic losses, such as sums spent on gifts and travel.[15] Such damages, reasoned the court, were not "purely personal" and therefore plaintiff should be able to recover those damages based upon a tort theory of fraudulent misrepresentation.[16]

III. The Illinois Supreme Court Affirmed the Appellate Court's Refusal to Review the Dismissal of Plaintiff's Second Amended Complaint But Reversed the Ruling that Plaintiff had Stated a Claim for Fraudulent Misrepresentation.

In its May 24, 2012 opinion, the Illinois Supreme Court held that the appellate court had misinterpreted *Doe* when it extended the tort of fraudulent misrepresentation to the factual circumstances in *Bonhomme*.[17] The court stated that "the crucial question" in determining whether the parties' relationship had transcended beyond the "purely personal" so that it may support a claim for fraudulent misrepresentation, is whether the relationship had "some commercial, transactional or regulatory component."[18] Such a transactional component existed in the adoption cases because, though the adoption of a child is personal, the defendant agencies were in the "highly regulated" "business of facilitating adoptions."[19]

In contrast, the court characterized the relationship between plaintiff and defendant in *Bonhomme* as a "long distance personal relationship" with all the signposts of an "ordinary human relationship" such as "conversation, intimacy, trust, mutual beneficence, emotional support, and even grief."[20] The court acknowledged that the parties' personal relationship was "built wholly on one party's relentless deceit."[21] While it held that Illinois law did not allow plaintiff to recover based on a theory of fraudulent misrepresentation, the court noted that plaintiff could have had viable claims against defendant based on other tort theories that did not require allegations of a commercial component to the parties' relationship.[22]

Such claims were no longer available to plaintiff; however, because the court also affirmed the appellate court's ruling that plaintiff had abandoned the claims in her Second Amended Complaint.[23] The court flatly rejected plaintiff's argument that her filing of a Motion for Reconsideration and/or Motion for Rule 304(a) Finding or Rule 308 Certification had been sufficient to preserve the claims in her Second Amended Complaint.[24] Rather, the court stated that the "law could not be clearer" that when a litigant files an amended pleading that does not reference or incorporate previously dismissed counts, those counts are abandoned and are not subject to appellate review.[25]

Further, the court explained that this rule is not as harsh or as unnecessarily formulaic as it may seem at first blush. First, conforming to the rule is far from burdensome, as a simple footnote in an amended pleading will suffice to avoid abandonment of the claims.[26] Second, strict compliance with this rule is necessary to "notif[y] the defendant of the alleged causes of action and theories of recovery" and prevent litigants and judges from having to "speculate as to which legal theories or claims a party intends to advance[.]"[27]

Thus, the Illinois Supreme Court (i) affirmed the appellate court's ruling that plaintiff had abandoned all claims against defendant except for the fraudulent misrepresentation claim alleged in her Third

Amended Complaint, and (ii) reversed the appellate court's holding that the alleged facts could support a claim for fraudulent misrepresentation.

Bonhomme serves as an important reminder that practitioners should take care to preserve adverse rulings for appeal, and that the failure to take small, simple steps may lead to big and unfortunate consequences. This case also demonstrates the value of pleading all legal claims and theories that one believes, in good faith, the facts can support. This is especially true where uncertainty exists about the pleading requirements for one or more theories alleged in a complaint. ■

---

1. *Bonhomme v. St. James*, 2012 IL 112393, 970 N.E.2d 1 (2012).
2. The facts alleged in Plaintiff's complaint are described in detail in the Illinois Appellate Court's March 10, 2011 opinion. *Bonhomme v. St. James,* 407 Ill.App.3d 1080, 1081-82, 945 N.E.2d 1181 (2d Dist. 2011).
3. *Id.* at 1083 (citing *Ottawa Savings Bank v. JDI Loans, Inc.*, 374 Ill.App.3d 394, 399, 871 N.E.2d 236 (2d Dist. 2007)).
4. *Id.*
5. *Id.* at 1084.
6. *Id.*
7. *Id.* at 1085.
8. 228 Ill. 2d 324, 351, 888 N.E.2d 24 (2008).
9. *Id.* at 343.
10. *Id.* at 349.
11. *Id.* (citing *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988) (holding that defendant that engaged in romantic relationship with plaintiff without disclosing that he had genital herpes could be liable to plaintiff for fraud); *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Cal. Ct. App. 1984) (same); *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. 1988) (same)).
12. *Dilling*, 228 Ill.2d 347 (citing *Roe v. Catholic Charities of the Diocese of Springfield, Ill.*, 225 Ill. App. 3d 519, 588 N.E.2d 354 (5th Dist. 1992); *Roe v. Jewish Children's Bureau of Chi.*, 339 Ill.App.3d 119, 790 N.E.2d 882 (1st Dist. 2003)).
13. *Id.* at 349-50.
14. 407 Ill.App.3d 1085.
15. *Id.*
16. *Id.*
17. 2012 IL 112393 at ¶ 38.
18. *Id.*
19. *Id.* at ¶ 37.
20. *Id.* at ¶ 38.
21. *Id.*
22. *Id.* at ¶ 38, n.2.
23. *Id.* at ¶ 19.
24. *Id.* at ¶ 20.
25. *Id.* at ¶ 19.
26. *Id.* at ¶ 26, n.1.
27. *Id.* at ¶ 28.

Lessons of *Tunca v. Painter*

By Judge Russell W. Hartigan and Nick J. Moeller

The law is filled with technicalities. It is made up of requirements often complex and numerous where one misstep can save or destroy a case. These requirements range from the issue-specific components of a particular cause of action to the near universal condition of timeliness of notice. The First District of the Appellate Court of Illinois provides an example of how these details can both extinguish and protect in *Tunca v. Painter.*[1]

In June 2006, plaintiff Dr. Josh Tunca operated on a patient. Hours later the patient developed a blood clot in her femoral artery. The next day, Dr. Painter performed surgery to correct the problem.

A year later, Dr. Tunca filed his initial complaint alleging in its first count, labeled "Slander *Per Se* by Dr. Painter," that Dr. Painter told hospital administrators that Dr. Tunca had inadvertently cut the artery during surgery. It alleged that Dr. Painter later stated, in a company of medical professionals that Dr. Tunca had negligently and inadvertently severed the artery.

The complaint's second count, "Slander *Per Se* by Dr. Conway," alleged that Dr. Conway, the chairman of the hospital's quality review committee, stated that Dr. Tunca should expect a letter from the committee regarding his severing of the artery while in the presence of other professionals. The third count, labeled "Violation of the Medical Studies Act," reincorporated the conduct of counts I and II asserting that Dr. Conway had violated the Illinois Medical Studies Act.[2]

In February of 2008, the trial court dismissed all three counts.

Dr. Tunca then amended his complaint. The first count of the amended complaint was identical to the first count of his initial complaint except Dr. Tunca added that Dr. Painter had told other doctors that Dr. Tunca had inadvertently and negligently cut the artery. He added a new count alleging that Dr. Painter's violated the Medical Studies Act. Count III of the amended complaint, "Slander *per se* by Dr. Conway," repeated the allegations of the initial complaint. The "Violation of the Medical Studies Act by Dr. Conway" was repeated as count IV.

In October 2008, the trial court dismissed all counts of the amended complaint with prejudice, except for the count alleging Dr. Painter's violation of the Medical Studies Act.

Dr. Tunca again amended his complaint. Dr. Tunca relabeled count I as "Slander *Per Quod* by Dr. Painter" instead of *per se*, and added that the comments became widely disseminated. Dr. Tunca altered the third count relabeling it "Slander *Per Quod* by Dr. Conway." He added that Dr. Conway had also informed him, in a common hallway, that he had negligently cut the artery. He alleged that Dr. Conway's and Dr. Painter's statements had caused a 25% loss in referrals.

The court dismissed the count of slander *per quod*.

In March 2009 Dr. Tunca filed his third and final amended complaint. The first count, "Slander *Per Quod* by Dr. Painter," was repeated, adding that Dr. Tunca relied on referrals from other doctors and that he had experienced a drop of more than $861,000 in business income. Count II was repeated with no change. Count III alleging slander *per quod* by Dr. Conway was repeated from the previous complaint with the same changes as count I.

The trial court, in June 2009, dismissed the slander *per quod* counts, counts I and III. Dr. Tunca then filed a timely notice of appeal for the June 2009 orders.

On January 28, 2010, the trial court found, under Illinois Supreme Court Rule 304(a), no reason to delay an appeal of the 2008 ruling dismissing the slander *per se* counts and the court alleging Dr. Conway's violation of the Medical Studies Act.

On March 2, 2010, Dr. Tunca filed a notice of appeal of the October 2008 dismissals. On March 4, he motioned for an extension of time to file late notice of appeal, and the ap-

pellate court granted that motion on March 9. However, none of March documents were included in the record. They could only be found in the appendix of the defendants' briefs.

The appellate court did not consider the merits of the 2008 dismissal of the slander *per se* counts and the count alleging Dr. Conway's violation of the Medical Studies Act. The court explained that Illinois Supreme Court Rule 303(a) requires a filing of notice of appeal within thirty days of the final judgment or of the order disposing the last post judgment motion.[3]

The appeals deadline is jurisdictional and therefore the record must establish the timeliness of an appeal.[4] Because the notice of appeal, motion for extension, and court's order granting the extension were not in the record, the court reasoned that there was no basis for jurisdiction.[5] Even if the parties were to stipulate that the copies in the defendants' appendix could be considered, the court noted that such stipulations are insufficient for questions of jurisdiction.[6]

The court then explained the requirements of an appeal following a finding under Illinois Supreme Court Rule 304(a). Even if the court had jurisdiction over the appeal, Dr. Tunca had forfeited his right to a review of the dismissals when he did not continue the allegations of his first amended complaint and failed to seek an immediate appeal.[7]

The court explained that there are two ways to preserve counts for appellate review after a Rule 304(a) finding, which permits the appeal from a dismissal of only some counts of a complaint.[8] A plaintiff must either (1) immediately appeal before filing an amended complaint or (2) preserve or repeat the counts in subsequent complaints.[9] Without following one of these options, the court stated, a plaintiff waives their right to appeal.[10]

The court noted that Dr. Tunca did not file a notice of appeal regarding the 2008 dismissal until March 2010, a year after filing his third amended complaint and almost a year and a half after his second amended complaint was filed.[11] Therefore, he did not take advantage of the first option.[12]

Dr. Tunca never referenced the dismissed claims of *per se* defamation or Dr. Conway's violation of the Medical Studies Act after his first amended complaint.[13] The court rejected Dr. Tunca's argument that the *per* se slander claims were preserved because the facts necessary for a slander *per se* case were present in the slander *per quod* counts.[14] The court explained that plaintiffs must preserve the stated theory of recovery, not just the supporting facts behind a theory.[15] Thus, Dr. Trunca did not use the second option and waived his right to appeal the dismissal of the first amended complaint counts.[16]

The court reviewed the merits of the 2009 dismissal of the slander *per quod* counts of the third amended complaint. In its *de novo* review, the court explained that defamatory statements can be divided into two categories: *per se* and *per quod*.[17] *Per se* defamation is where the defamatory nature is obviously harmful and damages are presumed.[18] Illinois courts recognize four types of *per se* defamation: statements suggesting (1) commission of a crime; (2) infection with a loathsome, communicable disease; (3) inability or lack of integrity to perform duties of office or employment; and (4) a lack of ability or creating prejudice in a profession.[19]

Per quod defamation either is defamatory on its face without falling into one of the four *per* se defamation categories or requires extrinsic facts to explain the injurious nature of the statements.[20] The court noted that *per quod* defamation requires a showing of special damages.[21]

Defendants argued that the statements alleged were opinions protected under the First Amendment.[22] However, the court ruled that constitutional protection holds only as long as opinions cannot be "reasonably interpreted as stating actual facts."[23]

The court explained that to determine whether a statement was fact or opinion courts weigh whether (1) the statement is readily understood; (2) the context indicates it is factual; and (3) its truth is objectively verifiable.[24] The court pointed out that each comment alleged had a factual basis.[25] Defendants were both alleged to have stated that Dr. Tunca acted negligently.[26] Both were based on a verifiable assertion that Dr. Tunca cut the artery.[27] Dr. Conway further allegedly implied that the review committee would scrutinize Dr. Tunca.[28] These statements, the court held, were factual in nature and not protected opinions.[29]

The court then explained that the defendants could not claim the innocent construction rule, which holds that *per se* defamatory statements are not actionable if reasonably capable of innocent construction, as the rule only applies to *per se* defamation.[30]

The court held the statements that Dr. Tunca negligently severed the artery "had the clear meaning that he committed professional malpractice."[31] Since allegations of professional negligence would prejudice the surgeon in his profession, the court determined the statements were defamatory on their face, and did not need extrinsic support.[32]

The court acknowledged that a *per quod* defamation claim must also allege special damages.[33] The court explained that Dr. Tunca specifically alleged the statements caused other doctors to stop referring patients to him and his business declined.[34] The court also noted that a plaintiff does not have to prove that third parties heard defamatory statements from the defendants, adopting the modern rule where a defamer is liable for reasonably foreseeable repetitions.[35] The court stated that there was little doubt that repetition by other professionals was reasonably foreseeable.[36] Therefore, the court reversed the trial court's dismissal of the slander *per quod* charge and remanded it for trial.[37]

The *Tunca* court's ruling makes clear that attorneys must preserve the court record for appeals. Jurisdictional documents especially must be preserved, as parties cannot stipulate to jurisdictional requirements. Appealing attorneys who have not preserved the record faces serious risk because they are never safe from jurisdictional challenges whether from opposing attorneys, the trial court, or courts of review.

Tunca exemplifies the strict requirements for appeals under Rule 304(a). When only a portion of a complaint is dismissed, attorneys must either appeal before amending or preserve the dismissed charges; otherwise they waive the right to appeal. Attorneys can repeat the dismissed charges in the amended complaint. Even simpler, they can add in a clause incorporating the previous complaint's counts. Preserving a case for appeal relies on diligence. Attorneys who fail to preserve the record or preserve their dismissed counts will find their appellate options closed.

The ruling in *Tunca* shows the similarities between *per se* and *per quod* defamation cases. Because *per quod* can be either defamatory on its face or require extrinsic evidence of defamatory meaning, it can act as a backup count in *per se* suits. An attorney bringing a *per se* defamatory suit would do well to also

include a *per quod* defamation claim in case the court decides the subject statements do not fall within the four *per* se categories recognized by Illinois. While an added count of *per quod* requires the additional showing of special damages, it could overcome the use of the innocent construction rule, which is only applicable in *per se* suits.

The court opinion in *Tunca v. Painter* provides an important reminder of the importance of preserving the record and dismissed counts in cases where appellate review is sought. The court's discussion also provides an excellent analysis of the components of defamation *per quod*, showcasing its requirements and potential strengths. ■

The Honorable Russell W. Hartigan is a Judge in the Fifth Municipal District of the Circuit Court of Cook County. Co-author Nick J. Moelle is a law student at the University of Illinois College of Law.

1. *Tunca v. Painter*, 2012 IL App (1st) 93384, 358 Ill. Dec. 758, 965 N.E.2d 1237 (1st Dist. 2012).
2. 735 ILCS 5/8-2101 (West 2007)
3. *Id.* at *17 (citing Ill. S. Ct. R. 303(a)).
4. *Id.* at *18 (citing Ill. S. Ct. R. 303(d)).
5. *Id.* at *20-21.
6. *Id.* at *20.
7. *Tunca*, *supra* at note 1, at *22-23.
8. *Id.* at *24.
9. *Id.*
10. *Id.*
11. *Id.* at *27-28.
12. *Id.*
13. *Id.* at *27.
14. *Id.* at *28-29.
15. *Id.* at *29-30 (citing *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713 (2010)).
16. *Id.* at *32.
17. *Id.* at *33.
18. *Id.*
19. *Id.* at *34.
20. *Id.*
21. *Id.* at *35.
22. *Id.* at*36.
23. *Id.* at *37 (citing *Bryson v. News America Publications, Inc.,* 174 Ill. 2d 77, 100 (1996).
24. *Id.*
25. *Id.* at *40.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at *41.
30. *Id.* at *42.
31. *Id.* at *46.
32. *Id.* at *47.
33. *Id.* at *48.
34. *Id.* at *49.
35. *Id.* at *62.
36. *Id.* at *63.
37. *Id.* at *65.

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

September

Friday, 9/7/12- Chicago, ISBA Chicago Regional Office—Child Custody and the Military Family. Presented by the ISBA Family Law Section and the ISBA Military Affairs Committee. 8:25-4:00 pm; Reception 4-5 (lunch and reception included)

Friday, 9/7/12- Teleseminar—Valuing Closing Held Interests and Effective Planning without Discounts. Presented by the Illinois State Bar Association. 12-1.

Monday, 9/10/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Monday, 9/10/12- Friday, 9/14/12- Chicago, ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Presented by the Illinois State Bar Association. 8:30-5:45 daily.

Wednesday, 9/12/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Thursday, 9/13/12-Saturday, 9/15/12- Itasca, Westin Hotel—8th Annual Solo and Small Firm Conference. Presented by the Illinois State Bar Association. Time TBD.

Tuesday, 9/18/12- Teleseminar—Ethics in Pre-Trial Investigations. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/20/12- Teleseminar—Tax Planning for the Entrepreneur. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/20/12- Chicago, ISBA Chicago Regional Office (DNP)—Introduction to Improvisation for Lawyers: Basic Communication Skills for Public Speaking, Teaching and Presenting. Complimentary for ISBA Law Ed Faculty. 9-11; 12-2; 2:30-4:30.

Friday, 9/21/12- Chicago, ISBA Chicago Regional Office—Introduction to Improvisation for Lawyers: Basic Communication Skills for Attorneys. Presented by the Illinois State Bar Association. 9-11; 12-2; 2:30-4:30.

Monday, 9/24/12- Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Tuesday, 9/25/12- Teleseminar—Individual Trustees-Duties and Potential Traps. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/27/12- Teleseminar—Breaking Up: Ethical Considerations When a Law Firm Dissolves. Presented by the Illinois State Bar Association. 12-1.

Friday, 9/28/12- East Peoria, Stoney Creek Inn—Deconstructing Delinquency. Presented by the ISBA Child Law Section. 8:00-4:45.

Friday, 9/28/12- Chicago, ISBA Chicago Regional Office—The Basics of the Americans with Disabilities Act. Presented by the ISBA Standing Committee on Disability Law. 9:15-12:45.

Friday, 9/28/12- Live Webcast—The Basics of the Americans with Disabilities Act. Presented by the ISBA Standing Committee on Disability Law. 9:15-12:45.

October

Tuesday, 10/2/12- Teleseminar—Compensation Issues in Nonprofits. Presented by the Illinois State Bar Association. 12-1.

Monday, 10/8/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 9-10.

Monday, 10/8/12- Chicago, ISBA Chicago Regional Office—Advanced Workers' Compensation- Fall 2012. Presented by the ISBA Workers' Compensation Law Section. 9-4.

Monday, 10/8/12- Fairview Heights, Four Points Sheraton—Advanced Workers' Compensation- Fall 2012. Presented by the ISBA Workers' Compensation Law Section. 9-4.

Tuesday, 10/9/12- Teleseminar—Franchise Agreements: A Practical Guide to Reviewing and Negotiating. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/10/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 9-10.

Wednesday, 10/10/12- Thursday, 10/11/12- Chicago, ISBA Chicago Regional Office—A Primer on Administrative Law and Rulemaking. Presented by the ISBA Administrative Law Section; co-sponsored by the ISBA Civil Practice and Procedure Section, the ISBA Real Estate Law Section and the ISBA Energy, Utilities, Transportation and Telecommunications Section. All day both days.

Friday, 10/12/12- Chicago, ISBA Chicago Regional Office—Transitions, Economics and Ethics- Ready or Not! Presented by the ISBA Senior Lawyers Section. Half Day PM program.

Friday, 10/12/12- Bloomington, Holiday Inn and Suites—Fall 2012 DUI & Traffic Law Updates. Presented by the ISBA Traffic Laws and Courts Section. 9-4.

Tuesday, 10/16/12- Teleseminar—Understanding Financial Statements for Business Lawyers, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/17/12- Teleseminar—Understanding Financial Statements for Business Lawyers, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/17/12- Chicago, ISBA Chicago Regional Office—What Every Lawyer Should Know About Intellectual Property. Presented by the ISBA Intellectual Property Law Section. All day program. ■

TRIAL BRIEFS
ILLINOIS BAR CENTER
SPRINGFIELD, ILLINOIS 62701-1779
AUGUST 2012
VOL. 58 NO. 2

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820