



TRIAL BRIEFS

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

Where does a corporation "do business"?

By Laura L. Milnichuk and William J. Perry of Litchfield Cavo LLP

In *Hertz Corporation v. Friend*, 130 S.Ct. 1181 (2010), the United States Supreme Court adopted the "nerve center" approach to determine a corporation's principal place of business for the purposes of diversity jurisdiction. *Id.* at 1185-86, 1192. The High Court held that a "principal place of business" is "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities." *Id.* at 1186.

Plaintiffs Melinda Friend ("Friend") and John Nhieu ("Nhieu") sued Hertz Corporation on behalf of a putative class of California citizens who

allegedly suffered violations of California's wage and hour laws at the hands of defendant Hertz Corporation ("Hertz"). *Id.* Friend and Nhieu sued Hertz in California state court. *Id.* Hertz filed a petition for removal to federal court pursuant to 28 U.S.C. § 1441(a), claiming that Hertz was not a citizen of California. *Id.* According to Hertz, with plaintiffs and defendant as citizens of different states, diversity of citizenship for jurisdictional purposes would be satisfied pursuant to 28 U.S.C. §§ 1332(a)(1), (c)(1). *Id.*¹

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Illinois Supreme Court declares caps on non-economic damages in medical malpractice cases unconstitutional

By Hon. Richard P. Goldenhersh

Our Illinois Supreme Court, in an opinion written by Chief Justice Fitzgerald, and concurred in by Justices Freeman, Kilbride and Burke, declared caps on non-economic damages in medical malpractice cases (735 ILCS 5/2-1706.5 (West 2008), unconstitutional. The majority, relying on *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), ruled that the caps violated the separation of powers clause of the Illinois Constitution (Ill. Const. 1970, art. II, §1) and, based on the Public Act's (Act) inseparability provision, declared the entire Act invalid (Public Act 94-677). Justice Karmeier concurred in part and dissented in part, and was joined by Justice Garman. Justice Thomas did not participate in the decision.

Abigaile Lebron was delivered by Caesarean section at Gottlieb Memorial Hospital and was attended by defendants, Roberto Levi-D'Ancona, M.D., and Florence Martinoz, R.N. Abigaile's mother, Frances Lebron, filed suit contending that Abigaile had sustained numerous and permanent injuries, including "severe brain injury, cerebral palsy, cognitive mental impairment, inability to be fed normally such that she must be fed by a gastronomy tube, and inability to develop normal neurological function." (*Lebron*, slip op. at 2.) In her multi-count complaint, Lebron included a count for declaratory judgment, contending that various sections of the Act were unconstitution-

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Where does a corporation “do business”?

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In support of its proposition, Hertz provided a declaration from an employee relations manager. *Id.* This declaration showed that Hertz had facilities in 44 states, and that its California facilities accounted for 273 of the company's 1,606 total locations. *Id.* Further, the declaration stated that 2,300 of Hertz's 11,230 full-time employees worked in the California facilities. *Id.* Per the declaration, the Hertz facilities in California generated approximately \$811 million of the company's \$4.371 billion in annual revenue and about \$3.8 million of the \$21 million annual rentals. *Id.* Finally, the declaration specified that Hertz's “leadership” and “corporate headquarters” are located in Park Ridge, New Jersey and that “its core executive and administrative functions” were carried out in New Jersey and Oklahoma City. *Id.*

In remanding the case to California state court, the district court utilized the Ninth Circuit Court of Appeals' approach to determining a corporation's principal place of business: the general business activities test. *Id.* This approach instructed courts to determine a corporation's amount of business activity on a state by state basis. *Id.* If one state's amount was “significantly larger” or “substantially predominated” over other states, then that state would act as the corporation's principal place of business. *Id.* If a predominant state was lacking, then the corporation's principal place of business would be the corporation's “nerve center,” or “the place where a majority of its [the corporation's] executive and administrative functions are performed.” *Id.*

Using the first approach, the district court found that a “plurality of each of the relevant business activities” of Hertz was in California and that the difference between the amount of activities in California and the next closest state was “significant.” *Id.* at 1187. Accordingly, the district court found Hertz's principal place of business to be in California, eliminating diversity jurisdiction. *Id.*

The district court's decision was appealed to the Ninth Circuit, with that Court of Appeals affirming the decision. *Id.* Hertz filed a petition for certiorari, acknowledging the difference amongst the Circuits in their approaches to determining corporate citizen-

ship. *Id.*² One approach is the “nerve center” test that has been applied by several lower courts including the Seventh Circuit Court of Appeals in *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1287 (7th Cir. 1986); also see, *Scot Typewriter CO. v. Underwood Corp.*, 170 F.Supp. 862, 865 (S.D.N.Y. 1959).

The High Court's analysis begins by presenting a detailed discussion of the relevant history of the principal place of business standard and the difficulties in its application. *Id.* at 1187-88.³ After reviewing the various standards, the Court adopted and expanded the “nerve center” approach in *Wisconsin Knife* and *Scot* to conclude that:

“principal place of business” [as used in the diversity statute] is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's “nerve center.” And, in practice, it should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, i.e. the “nerve center,” and not simply an office where the corporation holds board meetings. *Id.* at 1192.

In concluding this was the best approach, the Court made three considerations. First, the language of 28 U.S.C. § 1332(c)(1), i.e. “a corporation is a citizen of a State where it has its principal place of business,” refers to the “main, prominent, or leading” singular place within a State. *Id.* at 1193. The Court further explained that a corporation's “nerve center” is “its main headquarters,” or a single place. *Id.* “The public often (though not always) considers it a corporation's main place of business.” *Id.* When the nerve center test is compared to the general business activities test that was used by the Ninth Circuit, the Court noted the error in application of the latter, as that test focuses on the state itself, rather than a place *within* a state. *Id.* (emphasis added).

Second, the Court reasoned that “administrative simplicity is a major virtue in a juris-

dictional statute.” *Id.* Accordingly, courts will benefit from “straightforward rules under which they can readily assure themselves of their power to hear a case.” *Id.* Moreover, the “predictability” that stems from straightforward jurisdictional rules benefits corporations when making business decisions and plaintiffs when deciding where to file a lawsuit. *Id.* As the Court metaphorically explained, a “nerve center” connotes a “corporate brain” that suggests a single location. *Id.* at 1193-94. In contrast, the general business activities test lends itself to a lack of a single, principal location. In other words, that test acknowledges several different plants or locations. *Id.* at 1194.

Third, past legislative history indicates a desire for simplicity in determining “principal place of business” for purposes of diversity. Accordingly, the Judicial Conference specifically rejected looking to the place where a corporation generated more than half of its gross income to the phrase “principal place of business.” The Court concluded that the “nerve center” approach allowed for this simplicity whereas using a corporation's “general business activities” approach as the benchmark did not. *Id.*

In conclusion, the Court recognized that there will be difficult applications of the nerve center test given the telecommunications era and the Internet. *Id.* Nevertheless, it commented that the nerve center test “points courts in a single direction, towards the center of overall direction, control, and coordination.” *Id.* While anomalies will arise, the Court agreed to accept them “in view of the necessity of having a clearer rule.” *Id.* With this approach at hand and the unchallenged declaration by Hertz pointing to a principal place of business in New Jersey, the Court vacated the Ninth Circuit's opinion and remanded the case to the district court for further proceedings consistent with its opinion. *Id.* ■

1. A corporation's citizenship is determined by the state where it is incorporated and its principal place of business. *Id.* at 1190.

2. This article will not address the jurisdictional objection posed pursuant to 28 U.S.C. § 1453(c).

3. Please see Sections III and IV of the opinion, pages 1187-1192 for greater detail.

Illinois Supreme Court declares caps on non-economic damages in medical malpractice cases unconstitutional

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al. The challenge to caps on non-economic damages set forth in section 2-1706.5 of the Act was the focus. Plaintiffs argued, citing *Best*, that the limitation on damages violated the separation of powers clause in that the General Assembly was supplanting the judiciary's authority to determine whether a remittitur was appropriate in any given case and, in effect, established a legislative remittitur. The circuit court of Cook County determined that plaintiff's arguments were correct and granted their motion for partial summary judgment and, as noted above, invalidated the Act in its entirety. The majority opinion, after determining that the standard of review was *de novo*, examined the two facets of the circuit court's opinion. The circuit court had ruled that section 2-1706.5 was unconstitutional, both facially and as applied to the plaintiffs. The majority opinion, concurred in by the dissenters, reversed the circuit court's determination that the section was invalid as applied, and proceeded to review the question of facial invalidity.

The circuit court held that section 2-1706.5 violated the separation of powers clause based on the Supreme Court's ruling in *Best*. After a detailed examination of *Best*, and noting that the *Best* court also ruled that the \$500,000 limitation on non-economic damages was arbitrary and violated the special legislation clause of the Illinois Constitution (Ill. Const. 1970, art. IV, §17), the court proceeded to consider the separation of powers argument. The majority noted that in *Best* the purpose of the separation of powers clause as a barrier "is to ensure that the whole power of two or more branches of government shall not reside in the same hands" (*Best*, 179 Ill. 2d at 410), and also noted that "the legislature is prohibited from enacting laws that unduly infringe upon the inherent power of judges" (*Best* 179 Ill. 2d at 411).

The *Best* court also conducted a review of the doctrine of remittitur. The Court noted that the *Best* court held that while the legislature has power to act upon certain damages as in damages recoverable in statutory causes of action, the general limitation on damages, in the section at issue in *Best* violated the separation of powers clause, as it

"unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law." *Best*, 179 Ill. 2d at 413-14.)

The subsequent discussion of *dicta* is instructive to the lower courts and to practitioners. The defendants in *Lebron* contended that the separation of powers analysis in *Best* was *dicta* as it was not necessary to the disposition of *Best*. To bolster their arguments, the defendants noted the specially concurring opinion of Justice Blandic (179 Ill. 2d at 471) and the concurring in part and dissenting in part opinion by Justice Miller (179 Ill. 2d at 481). The majority determined that while the separation of powers analysis in *Best* was not essential to the decision, its pronouncements on separation of powers in *Best* were not mere *dicta*. While noting that the *Best* majority's conclusion on separation of powers was expressed as a holding, the pronouncement was also characterized as judicial *dictum* since the point, separation of powers, had been argued by counsel and had been ruled on by the Court. Accordingly, as judicial *dictum*, it was entitled to much great weight and should be followed.

After agreeing with defendants' argument that a distinction between *Best* and *Lebron* was that *Lebron* was a broad based statute while section 2-1706.5 was specifically addressed to medical malpractice cases, the question before the court, separation of powers, was still the same. The majority also noted the Attorney General's argument that the damages cap was rationally related to the Act's purpose of addressing economic and social costs involved in malpractice insurance, but concluded that the ultimate question was whether the statute violated the separation of powers by encroaching on the judiciary's sphere of authority. The majority gave similar treatment to defendants' argument that the General Assembly has the authority to change the common law. The majority agreed that such authority exists, but also concluded it must be exercised within the bounds of the Illinois Constitution. As stated by the court, "The crux of our analysis is whether the statute unduly infringes upon the inherent power of the judiciary.

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**** Here, the legislature's attempt in section 2-1706.5 to limit common law damages in medical malpractice actions runs afoul of the separation of powers clause." (*Lebron*, slip op. at 19-20.) The majority similarly considered and rejected the argument that its holding ran afoul of and contrary to precedents of the court. After noting decisions in other State courts as to the unconstitutionality of similar provisions, the Court indicated that such cases may provide guidance if precedent is lacking in Illinois but are not determinative of the disposition of questions involving the Illinois Constitution. The Court then held that the limitation on non-economic damages in medical malpractice actions under section 2-1706.5 violated the separation of powers clause and, accordingly, was invalid. It also noted that since the Act contained an inseverability provision, the Act would be held invalid and void in its entirety.

The majority then dealt with issues in the partial concurrence and partial dissent of Justices Karneier and Garman, noting that the dissent argued that *Best* was wrongly decided. The Court concluded that *Best* was valid and controlling in the disposition of the instant case. The majority also dealt with the dissent's argument that the Court lacked jurisdiction, as the dissent concluded that the plaintiff lacked standing to challenge the constitutionality of the Act and that the constitutional issue was not ripe for judicial review.

Justice Karneier, joined by Justice Garman, concurred in part and dissented in part. After noting the public debate on medical costs, healthcare crisis, and medical reform as the backdrop for the General Assembly's legislative finding that the Act was necessary, it reviewed the various changes the Act made to existing law. The dissent noted the broad powers of the General Assembly to exercise regulatory power as to the public interest and welfare and to determine what measures would achieve those ends and, further, that it was not the function of the judiciary to consider the wisdom of the General Assembly's actions. The dissent cited the substantial deference given to legislative enactments, including a strong presumption of constitutionality of such acts. The dissent agreed that the constitutional question before the Court was facial. The dissenters argued that determination of the question was not necessary for resolution of the *Lebron* case and that the case had not yet presented

to the court a justiciable matter in that it was insufficiently definite and concrete as opposed to hypothetical or moot. The dissent also noted, in contrast to *Best*, that the issues before the Court were decided in the context of motions related to the parties' own pleadings, as opposed to motions to dismiss under section 615 in *Best* (735 ILCS 5/2-615 (West 2006)). After arguing that the issues raised were nonjusticiable, the dissent proceeded to explain its position that the public interest exception to nonjusticiability did not apply in this case, noting that there was no documented case in Illinois in which a plaintiff in a medical malpractice action had their non-economic damages awards reduced under the statute.

The dissent then proceeded to an attack on the *Best* case, arguing that it was wrongly decided and that even if its separation of powers ruling was judicial *dictum*, a reexamination of *Best* was not precluded. The essence of the dissent's position was that *Best's* conclusion that the damages caps operated as a remittitur, a power that the courts alone possess, was incorrect, and similarly in error was the majority's conclusion that legislatively-imposed caps on damages were comparable to judicial remittiturs.

The final argument against the majority's separation of powers conclusion was that the legislature has "constitutional power to make, amend, alter and abolish the laws of this state," which power also extends to the common law. (*Lebron*, slip. op. at 46). Accordingly, the dissent argued the cap on non-economic damages was not a violation of the separation of powers, but a proper exercise of the General Assembly's power to change the common law.

The dissent also made what was essentially a policy argument in an examination of the larger context in which the legislature acted. The dissent argued that there was not necessarily a direct correlation between the extent of physical injury and the size of the injured party's non-economic loss and, accordingly, it was not a given that the Act would penalize the most seriously injured plaintiffs. The dissent also argued that the broader intent of the General Assembly's action was to forestall large awards of non-economic damages that could impair or jeopardize the availability of medical services to the general population. In essence, the dissent argued the majority was overruling the legislative judgment of the General Assembly

and encroaching on the prerogative of the legislature.

Conclusion

Our Supreme Court's ruling in *Lebron* and its reliance upon and analysis of its prior ruling in *Best*, constitute the modern jurisprudence relating to the separation of powers dispute, an argument that is almost as old as the State itself. The lower courts and all practitioners who face questions of statutory and constitutional issues are well advised to examine *Lebron* and *Best* in detail. This article does not claim to be comprehensive as to *Lebron*, but rather has attempted to highlight those issues and arguments that are most likely to be raised concerning the scope and validity of regulatory statutes and the degree of binding authority of pronouncements of the courts of review. ■



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