

VERDICT FORM

Allocation Of Fault Under Section 2-1117 And Inclusion Of Settling Parties On Verdict Form

In *Skaggs v. Senior Services of Central Illinois, Inc.*, 2005 WL 245758 (4th Dist., January 27, 2005), the plaintiff, Anna Skaggs, hired defendant Help at Home to take her to vote at a building occupied by defendant Senior Services. Help at Home's employee drove the plaintiff to the building and parked the van near a depression in the parking lot. When the plaintiff finished voting and attempted to get back into the van, she fell and broke both of her ankles. The plaintiff sued Senior Services and Help at Home for negligence.

Before the plaintiff's complaint was filed, Help at Home filed a petition for bankruptcy. The bankruptcy court later granted Senior Services' petition for contribution against Help at Home. In the circuit court, Senior Services also filed a counterclaim for contribution against Help at Home.

The plaintiff and Help at Home later negotiated a settlement, which provided that any money actually received by the plaintiff would be allowed as a credit against liability that might be imposed upon Senior Services. A motion was then filed requesting the circuit court find the proposed settlement to be in good faith in accordance with the Contribution Act (740 ILCS 100/0.01 through 5) and bar any claim for contribution or any other claim against Help at Home. Over Senior Services' objection, the circuit court found the settlement to be in good faith. Senior Services appealed the ruling.

After analyzing the Contribution Act, the appellate court stated that the real issue in this case is the possibility that by their settlement, Help at Home and the plaintiff destroyed Senior Services' right to have the trier of fact consider Help at Home's percentage of fault when determining Senior Services' liability under section 2-1117 of the Code of Civil Procedure. (735 ILCS 5/1-1117). Section 2-1117 provides that in

cases such as these: "all defendants found liable are jointly and severally liable for the plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third-party defendant except the plaintiff's employer, shall be severally liable for all other damages." (735 ILCS 5/1-1117); *Skaggs*, 2005 WL 245758 at *5.

The appellate court indicated that under the current language, there are two possible interpretations of section 2-1117. The first interpretation is that section 2-1117 does not allow for a settling defendant dismissed from the case to be considered in apportioning liability. A trial court may consider the settling defendant as no longer a "defendant sued by the plaintiff." A second interpretation may be that the settling defendant had actually been sued, and the fact that the defendant settled does not prevent inclusion for purposes of section 2-1117. *Skaggs*, 2005 WL 245758 at *5.

The appellate court went on to say that if a settling defendant may not be included under section 2-1117, a plaintiff could sue two defendants, one who is primarily at fault but indigent and one who is minimally at fault but wealthy. By settling with the indigent defendant, the plaintiff could circumvent the application of section 2-1117, leaving the wealthy defendant, even though minimally liable, jointly liable for all damages because the settling defendant's portion of fault can no longer be considered. Such an arrangement would constitute bad faith and collusion as the parties to the settlement would be acting to deprive the non-settling party of its statutory right to several liability for non-medical expenses. However, if the non-settling defendant is more than 25% at fault, there would be no problem with an otherwise "good-faith" settlement. *Id.*

Considering these issues, the appellate court determined that it would be premature to approve the settlement without an interpretation of section 2-1117, because it is not clear whether Senior Services is more than

25% at fault. If Senior Services is more than 25% at fault, then the settlement would appear to be in "good faith" regardless of the court's interpretation of section 2-1117 as the plaintiff and Help at Home would not be destroying Senior Services' rights under section 2-1117. However, if Senior Services is less than 25% at fault, Senior Services' rights under section 2-1117 would be jeopardized if there was a chance Help at Home's percentage of fault might not be considered for determining section 2-1117 liability. *Id.* at *6.

In making its decision, the appellate court looked to the Supreme Court of Illinois' recognition, prior to the latest revision, that "the clear legislative intent behind section 2-1117 is that minimally responsible defendants should not have to pay entire damage awards." See, *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill.2d 64, 783 N.E.2d 1024 (2002). The revision to section 2-1117 prevents a plaintiff's employer from being considered in the apportioning of fault, but the legislative intent remains the same with respect to minimally responsible defendants. The appellate court believed that forcing a minimally responsible defendant to shoulder the non-medical expenses only because the more culpable defendant settled would allow plaintiffs to circumvent the purpose of the statute. *Skaggs*, 2005 WL 245758 at *6.

Based on this analysis, the appellate court determined that only by interpreting section 2-1117 to include settling defendants can section 2-1117 reinforce the policies of the Contribution Act. Including settling defendants in apportioning liability does not discourage settlements, but it certainly better promotes equitable apportionment of damages according to relative fault. The plain language of the statute includes "defendants sued by the plaintiff." 735 ILCS 5/2-1117. Even though a defendant settles with a plaintiff and is dismissed from the case, that defendant does not lose its status as a defendant sued by the plaintiff. Therefore, the appellate court held that section 2-1117 requires the trier of fact to consider the percentage of fault of settling defendants. In this case, because section 2-1117 allowed

the trier of fact to consider Help at Home's percentage of fault, the appellate court ruled that the trial court did not abuse its discretion in finding a good-faith settlement. *Id.*

ARBITRATION HEARINGS

Effect Of Failure To Comply With Rule 237 Production Request At Arbitration Hearing

In *Government Employees Insurance Co. v. Smith*, 2005 WL 292233 (1st Dist., January 11, 2005), the plaintiff, Geico, filed a subrogation action against the defendant, David Smith, for property damage related to a traffic accident with Rosalyn Walton, a Geico insured. During the discovery phase of the case, the defendant served two Rule 237 production requests on Geico. The first request demanded that Geico produce the claim adjuster at arbitration. The second request demanded that Geico produce the claim adjuster and John Ciullo, Geico estimator, at arbitration.

The mandatory arbitration hearing took place and Geico did not produce anyone at the hearing. The arbitrators unanimously ruled in favor of Geico but indicated in the award that Geico had acted in bad faith at the hearing for failing to produce a Rule 237 witness that the defendant requested be produced.

Geico and the defendant rejected the arbitration award. The defendant then filed a motion to bar Geico from producing evidence at trial on the grounds that Geico failed to produce its employee to testify at the arbitration hearing pursuant to the Rule 237 notice to produce and because the arbitrators found Geico to have participated in bad faith at the arbitration hearing. Geico responded that it was not under a duty to produce Ciullo pursuant to the Rule 237 notice because Ciullo was not an employee of Geico, but rather, was an employee of the repair shop. The trial judge granted the defendant's motion to bar Geico from presenting evidence at trial. The defendant then filed a motion for summary judgment, which was granted, and Geico appealed.

The issue on appeal was whether the trial court's sanction, which barred Geico from presenting evidence at trial due to Geico's failure to comply with Rule 237, was an abuse of discretion, where the defendant requested that Geico produce its "claims adjuster" and Geico failed to do so. The granting of the summary judgment motion was also an issue on appeal. The appellate court determined that the sanction imposed by the trial court was pursuant to Rule 237. *Government Employees Insurance Co.*, 2005 WL 292233 at *5.

Illinois Supreme Court Rule 237(b) states in pertinent part: "The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate."

Illinois Supreme Court Rule 90(g) provides that Rule 237 is equally applicable to arbitration hearings and trials. See, *Government Employees Insurance Co. v. Campbell*, 335 Ill.App.3d 930, 933, 781 N.E.2d 639 (1st Dist. 2002). Illinois Supreme Court Rule 91(b) provides that parties to an arbitration must participate in the proceedings in good faith and in a meaningful manner. See, *State Farm Mutual Insurance Co. v. Santiago*, 344 Ill.App.3d 1010, 1013, 801 N.E.2d 142 (1st Dist. 2003). Finally, Illinois Supreme Court Rule 219(c) states that failure to comply with a Rule 237(b) notice may include an order barring the offending party from presenting any evidence or witnesses. See, *Santiago*, 344 Ill.App.3d at 1013.

The appellate court noted that sanctions for failing to comply with a Rule 237 notice are to be imposed when failure to comply is determined to be unreasonable. A circuit court's decision barring a party from presenting evidence at trial and imposing sanctions is subject to an abuse of discretion standard of review and an abuse of discretion occurs when the court's ruling is arbitrary or exceeds the bounds of reason. *Government Employees Insurance Co.*, 2005 WL 292233 at *6; citing *Santiago*, 344 Ill.App.3d at 1013, and *Campbell*, 335 Ill.App.3d at 933.

In this case, the defendant's Rule 237 supplemental notice to produce requested that Geico produce two individuals, Geico's claims adjuster and Ciullo. Geico failed to produce either individual and failed to specifically notify the defendant that Ciullo was not an employee of Geico. The arbitrators found Geico to be acting in bad faith because of the absence of Ciullo but the appellate court indicated that since Ciullo was not an employee of Geico, that was not a proper basis for a bad faith finding. However, Geico's failure to produce the Geico claims adjuster at the hearing was in violation of Rule 237, even if the arbitrators did not make that explicit finding.

Once the defendant made the motion to bar all evidence from Geico, the burden was placed on Geico to demonstrate why its noncompliance with the defendant's Rule 237 notice to produce was "reasonable or the

result of extenuating circumstances." *Campbell*, 335 Ill.App.3d at 933. The appellate court noted that Geico produced no evidence with regard to its noncompliance in producing the claims adjuster either before the trial court or the appellate court. *Government Employees Insurance Co.*, 2005 WL 292233 at *7-8.

The appellate court ruled that Geico had an obligation to produce the claim's adjuster at the arbitration hearing pursuant to the Rule 237 notice to produce by the defendant. Therefore, there was no abuse of discretion in the trial court's order barring Geico from presenting testimony or evidence at trial. In addition, there was no error in the trial court's granting of summary judgment in favor of the defendant. The trial court's rulings were affirmed. *Id.* at *8.

PROXIMATE CAUSE

Summary Judgment Appropriate Where Proximate Cause Is Based On Speculation

In *Mann v. Producer's Chemical Company*, 2005 WL 396584 (1st Dist., February 15, 2005), the decedent, Brooks Mann, was killed when he was hit by a car while crossing a street. The decedent and another high school student, Audrey Fox, were walking home from school when Fox crossed Route 59 and stopped to sit on a wall on the other side of the street. Fox then saw the decedent cross Route 59 in front of a stopped truck. As soon as the decedent stepped past the truck, a speeding vehicle driven by defendant, Romaus Mesa, which drove around the stopped truck through a yellow-marked no-drive zone, struck and killed him. The decedent's estate sued Mesa, the truck driver (Bartow) and the owner of the truck (PCC).

Fox testified that while the decedent was crossing in front of the truck, Bartow waved him across. Bartow testified that the decedent started running across the street when he noticed the arrow turn green. Bartow also stated that he never made eye contact with the decedent and never waved him across but he did reach for his air horn cord over his left shoulder when he saw the decedent was about to be hit by Mesa's vehicle. No other witnesses to the accident testified that they saw the truck driver wave to the decedent other than Fox. *Mann*, 2005 WL 396584 at *1-2.

After all of the witnesses to the accident were deposed, PPC and Bartow filed a motion for summary judgment. The trial court granted the motion based on the pleadings and depositions and found that the plaintiff could not prove proximate cause because the decedent continued to

cross the street without doing anything different from what he had been doing before he supposedly saw Bartow wave at him. The trial court also found that it would be pure speculation to find that the decedent was looking at Bartow and that he relied on Bartow's gesture. Since case law states that speculation is not enough, the trial court granted the motion for summary judgment. The plaintiff appealed the ruling. *Id.* at *2.

The plaintiff argued that the trial court erred in entering summary judgment in favor of PCC and Bartow because the trial court improperly resolved, as a matter of law, the "factual" question of whether the decedent relied on Bartow's signal in crossing the street. PCC and Bartow responded that summary judgment was appropriate because: (1) Bartow owed no duty of care to the decedent; (2) the plaintiff failed to create a genuine issue of material fact as to whether Bartow breached a duty of care; and (3) the plaintiff failed, as a matter of law, to prove the alleged negligence of Bartow was a proximate cause of the accident. *Id.* at *3.

The appellate court noted that in a negligence action, the plaintiff is required to prove: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; and (3) the breach was the proximate cause of the plaintiff's injury. *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill.App.3d 789, 795, 721 N.E.2d 614 (2nd Dist. 1999). The issue of proximate cause is usually a question of fact for a jury. *Wojtowicz v. Cervantes*, 284 Ill.App.3d 524, 531, 672 N.E.2d 357 (1st Dist. 1996). However, a plaintiff must demonstrate proximate cause. Otherwise, he has failed to establish a *prima facie* case and a directed verdict is proper. And, where the pleadings, depositions, and other evidence before the court show that at trial a verdict would have to be directed, entry of summary judgment is proper. *Mann*, 2005 WL 396584 at *3, citing *Kennedy v. Joseph T. Ryerson & Sons, Inc.*, 182 Ill.App.3d 914, 918, 538 N.E.2d 748 (1st Dist. 1989).

Proximate cause has two components: cause in fact (a matter of reasonable certainty) and legal cause (a question of foreseeability). *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 257-58, 720 N.E.2d 1068 (1999). Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage. A defendant's conduct is a cause in fact of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury. A defendant's conduct is a material element and a substantial factor in bringing about an injury if, absent that conduct, the injury would not have occurred.

Mann, 2005 WL 396584 at *3, citing *First Springfield*, 188 Ill.2d at 258.

In this case, the plaintiff relies on Section 324A of the Restatement (Second) of Torts, which states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if:

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement (Second) of Torts, Sect. 324A (1965).

The appellate court indicated that under a voluntary undertaking theory, to establish proximate cause of the injury, the cause-in-fact component requires a showing that a plaintiff relied on the defendant's conduct. Restatement (Second) of Torts, Sect. 324A (1965). As applied to this case, Section 324A(c) required the plaintiff to show the decedent relied on Bartow's wave in continuing to cross the street without checking for other traffic at the point he was struck by Mesa's vehicle. The court stated that the showing of reliance by the decedent is necessary to establish that Bartow's act of waving the decedent through the intersection "is a material element and a substantial factor in bringing about an injury if, absent that conduct, the injury would not have occurred." *Mann*, 2005 WL 396584 at *4, citing *First Springfield*, 188 Ill.2d at 258.

The trial court found the plaintiff's evidence to be mere speculation. The appellate court advised that it is well settled that liability cannot be predicated upon surmise or conjecture as to the cause of an injury, but liability can be established where there is a reasonable certainty that the defendant's actions caused the injury. *Wiegman*, 308 Ill.App.3d at 795; *Wojtowicz*, 284 Ill.App.3d at 531. While this can be established from circumstantial evidence, a fact is not "established by circumstantial evidence unless the circumstances are of such a nature and so related to each other that it is the only probable, not merely possible, conclusion that can be drawn therefrom." *Mann*, 2005 WL 396584 at *5, citing

Wiegman, 308 Ill.App.3d at 796.

Based on the case law, the appellate court determined that if the existence or nonexistence of reliance by the decedent on Bartow's wave were equally probable, then the plaintiff is unable to establish that there is a "reasonable certainty that the defendant's acts caused the injury" and, therefore, failed to establish proximate cause. *Wiegman*, 308 Ill.App.3d at 795. There was no direct evidence on the question of reliance because the decedent never regained consciousness after the accident. As for circumstantial evidence, the only witness who testified that Bartow waived was Fox and she admitted that the decedent continued along his same path and did not do anything different after the wave. *Mann*, 2005 WL 396584 at *6-7.

Based on the evidence presented, the appellate court held that where non-reliance by the decedent on the alleged wave was just as probable as reliance by the decedent on the wave, the conclusion that there was reliance on the alleged wave is a matter of speculation, surmise and conjecture and a trier of fact cannot make such a conclusion. Therefore, the appellate court ruled that summary judgment for defendants PCC and Bartow was appropriate.

DUTY OF CARE

Allegations Of BOCA Violations Barred Section 2-615 Dismissal

In *Marshall v. Burger King*, 2005 WL 545386 (2nd Dist., March 4, 2005), the decedent, Detroy Marshall, III, was killed when a car driven by defendant, Pamela Fritz, crashed through the wall of a Burger King restaurant and struck him. The accident happened when Fritz when trying to leave Burger King and she backed her car into a lamppost in the parking lot. Driving forward from the lamppost, she lost control of her vehicle, drove up on the sidewalk, became airborne and crashed through the largely windowed wall of the restaurant.

The decedent's estate filed suit against defendants Burger King and its franchise owner, Davekiz, Inc., for their failure to exercise due care in the design and construction of the restaurant by not installing protective barriers around the building. The plaintiff claimed that these failures were the proximate cause of the decedent's injuries. The property owner defendants filed a motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure. They argued they had no duty under the law to protect their patrons from the threat of runaway cars crashing into the restaurant. The trial court granted the

motion and the plaintiff appealed.

The issue on appeal was whether the trial court erred in holding that the defendants had no duty to take any of the precautions cited by the plaintiff in the complaint. The elements of a common-law action for negligence are: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately resulting from the breach. *Trevino v. Flash Cab Co.*, 272 Ill.App.3d 1022, 1027, 651 N.E.2d 723 (1st Dist. 1995). Whether a duty exists depends upon whether the parties stand in such a relationship to one another that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff. *Marshall*, 2005 WL 545386 at *2, citing *Ellison v. Village of Northbrook*, 272 Ill.App.3d 559, 566, 650 N.E.2d 1059 (1st Dist. 1995).

The plaintiff's complaint stated a cause of action against the defendants for negligence. The plaintiff alleged specific ways in which the defendants failed to guard against the possibility of cars penetrating the restaurant and injuring patrons. The appellate court held that based on the allegations in the complaint, it could not say as a matter of law, that such precautions were beyond the duty of reasonable care owed by a premises owner in the defendants' situation. The appellate court cited to and relied on two Illinois cases that have recognized the duty of premises owners to protect invitees from the dangers of runaway vehicles despite the relevancy of such incidents. See, *Ray v. Cock Robin, Inc.*, 57 Ill.2d 19, 23, 310 N.E.2d 9 (1974) and *Marquardt v. Cemocky*, 18 Ill.App.2d 135, 137-38, 151 N.E.2d 109 (2nd Dist. 1958).

In granting the motion to dismiss, the trial court cited to policy reasons why the defendants should not be held responsible for failing to insure that runaway vehicles could not penetrate the restaurant. The trial court determined that the precautions the plaintiff cited could compromise the aesthetic qualities of business premises. The appellate court responded that by relying on the policy reasons, the trial court was overlooking the plaintiff's allegation that the defendants departed from custom and practice in the industry, as well as violated the Building Officials and Code Administrators' (BOCA) building code, by not taking the asserted precautions. *Marshall*, 2005 WL 545386 at *3.

The appellate court determined that in alleging that the defendants' conduct was unreasonable in light of an industry code, as well as custom and usage, the plaintiff created a question of fact as to whether the defendants' failure to take precautions was

a breach of their duty of reasonable care, despite whatever cost or inconvenience would be involved in exercising that duty. *Id.* at *4.

The appellate court was also not persuaded by the principal cases cited by the defendants, *Simmons v. Aldi-Brenner Co.*, 162 Ill.App.3d 238, 515 N.E.2d 403 (3rd Dist. 1987) and *Stutz v. Kamm*, 204 Ill.App.3d 898, 562 N.E.2d 399 (4th Dist. 1990). In *Simmons*, a grocery store patron lost consciousness as she was driving into the parking lot and drove through the glass front wall of the store, killing several other patrons. The appellate court reversed the jury's verdict and ruled that a duty did not legally exist requiring the defendant to protect against the injury caused by the vehicle because it would be mere speculation to say the safety features would have prevented the accident.

In *Stutz*, a driver accidentally drove off the rear edge of a parking lot of a driver service facility and crashed into the building. The appellate court upheld the section 2-615 dismissal of the complaint because it held a duty did not legally exist that required the defendants to prevent the type of harm that occurred. In this case, the appellate court declined to follow *Simmons* and *Stutz* because it disagreed with the reasoning provided by the appellate courts in each case. *Marshall*, 2005 WL 545386 at *4-6.

Based on the appellate court's ruling that the allegations asserting BOCA violations automatically created a question of fact, the trial court's dismissal was reversed and the case was remanded. A dissenting opinion was included in which the dissenter disagreed that a duty of care existed. The dissent relied on the cases cited by the defendant, *Simmons* and *Stutz*. The dissent was also concerned that the court relied on the BOCA violation allegations, even though the plaintiff failed to identify which codes were violated and if those codes were in effect in the town at issue. *Id.* at 6-7.

STATUTE OF LIMITATIONS

Use Of Mistaken Identity To Toll Statute Of Limitations

In *Pruitt v. Pervan*, 2005 WL 396585 (1st Dist., February 15, 2005), the plaintiff, Jennifer Pruitt, fell on a stairway of a building she was visiting. She filed suit against Wolin-Levin, the property managers, for negligently maintaining the building. Approximately six months after the statute of limitations expired, the plaintiff learned during discovery that the property owners were responsible for property maintenance and not the property managers. The plaintiff

then filed a motion to amend the complaint and add the property owners as defendants and the motion was granted.

The property owners filed a motion to dismiss because the action was time barred by the statute of limitations. The plaintiff responded that the complaint related back pursuant to section 2-616(d) of the Illinois Code of Civil Procedure. The trial court granted the motion to dismiss and the plaintiff appealed.

Section 2-616(d) prevents a cause of action against a person not originally named a defendant from being time barred by the lapse of time by any statute or contract as long as three terms and conditions are met. If the conditions are met, the amended complaint adding the new defendant relates back to the date of the filing of the original pleading. Section 2-616(d) was recently amended in 2002 and it now requires that would-be defendants "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her." 735 ILCS 5/2-616(d)(2). Under this new requirement, the appellate court concluded that it must first determine whether there is a case of mistaken identity before it could determine whether the amended complaint would relate back to the original pleading. *Pruitt*, 2005 WL 396585 at *2-3.

Based on the evidence, the appellate court determined that the plaintiff did not intend to sue the property owners. The plaintiff assumed the property managers were solely responsible for property maintenance and that assumption did not change until six months after the statute of limitations expired. Therefore, the plaintiff's failure to name the defendants was not a "mistake" as is required under section 2-616(d). The plaintiff simply lacked sufficient information to understand the property owners' involvement in property maintenance. Since there was no "mistaken identity," the appellate court determined that the dismissal was proper and it was affirmed. *Pruitt*, 2005 WL 396585 at *4.

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