Hurley McKenna & Mertz
Attorneys at Law

HIGHLIGHTS

Updates on the firm, the profession, and legal issues

FALL 2007

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- *Medical negligence*
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- *Automobile accidents*
- *Aviation accidents*
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Illinois Appellate Court affirms Hurley McKenna & Mertz record negligent credentialing verdict against hospital

The Illinois Appellate Court has affirmed the largest known verdict for a plaintiff in an institutional negligence case ever obtained in Illinois. The case is also the first reported case in Illinois dealing with a hospital's liability for the negligent credentialing of a physician, podiatrist, or other health-care provider. **Christopher T. Hurley** and **Mark R. McKenna** obtained the $7,775,668 verdict in August of 2004 for their client, a longtime critical-care nurse who went to Silver Cross Hospital in Joliet, Illinois, for removal of a bunion on her left foot. Dr. Paul Kirchner, a podiatrist with surgical privileges at the hospital, performed the procedure in spite of the fact that the patient had a diabetic ulcer present at the site of the bunion. Diabetic ulcers are a known source of infections, and podiatric standards generally require that an elective surgery such as a bunionectomy be delayed until the ulcer is completely healed. Hurley and McKenna presented testimony that the podiatrist made an incision near the diabetic ulcer and placed a screw in the patient's left foot. As a result, the bones in the patient's left foot at the site of the screw became severely infected, to the extent that the patient was forced to undergo the amputation of a portion of her left foot. The patient has been unable to return to work as a nurse since the surgery.

Hurley and McKenna convinced the court that a hospital, for the first time, should specifically be liable for *negligently credentialing* a health-care provider.

During the case, Hurley and McKenna presented evidence to the jury that Silver Cross Hospital granted hospital privileges to Dr. Kirchner in 1992, contrary to the hospital's own bylaws, which required all podiatrists seeking surgical privileges at the hospital to have completed either a 12-month podiatric surgical residency program, or be board-certified by the American Board of Podiatric Surgery. Dr. Kirchner met neither of these requirements in 1992, when he initially began performing procedures at the hospital, or in 1998, when he performed surgery on the patient. During that time period, Dr. Kirchner reapplied several times for continuation of his surgical privileges at Silver Cross Hospital, and each time the hospital's Board of Trustees granted the privileges in violation of its own rules and bylaws.

Over 40 years ago, the Illinois Supreme Court recognized that a hospital has a duty to use reasonable care in the administration and management of the institution. Hurley and McKenna convinced the trial court and the Illinois Appellate Court that a hospital, for the first time, should specifically be liable for *negligently credentialing* a physician, podiatrist, or other health-care provider if the hospital

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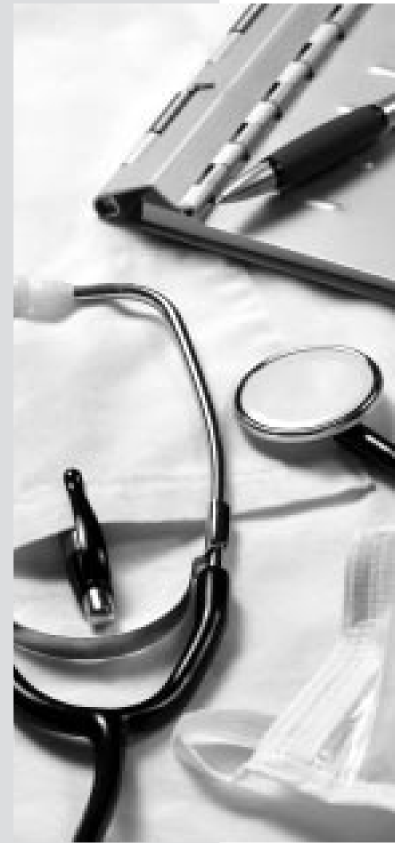
Appellate Court refuses to "second-guess" jury verdict in favor of Hurley McKenna & Mertz client



The Illinois Appellate Court recently affirmed a jury verdict obtained by **Mark R. McKenna** in favor of a victim of obstetrical malpractice. At trial, Mr. McKenna presented evidence that in the summer of 1999, the plaintiff, a 27-year-old woman with a positive home pregnancy test, made repeated visits to her obstetrician/gynecologist, reporting severe pain, cramping, and bleeding. The defendant obstetrician informed the plaintiff that she had a normal pregnancy in spite of the symptoms. Ultimately, the plaintiff experienced a ruptured ectopic pregnancy, which required emergency surgery. If the ectopic pregnancy had been properly diagnosed and treated by the defendant, the plaintiff could have avoided the rupture with the use of medication or a less invasive surgery. After the surgery, the plaintiff underwent several years of infertility treatments and eventually gave birth to triplets. In October of 2005, Mr. McKenna obtained a jury verdict of $750,000 for the plaintiff's past pain and suffering and her medical expenses.

The defendant appealed and argued that the jury's award of $680,000 out of the $750,000 verdict for past pain and suffering damages was so large as to have been the result of unfair passion and prejudice, was "shocking" to the judicial conscience, and should have been stricken. The Illinois Appellate Court disagreed, reviewed the evidence, and ultimately "decline[d] to second-guess the jury's determination."

Illinois Appellate Court affirms $3.2 million medical malpractice verdict obtained by Hurley McKenna & Mertz

Appellate Court also rules plaintiff entitled to additional compensation for medical bills

Hurley McKenna & Mertz recently won a case in the Illinois Appellate Court, First District. This was a medical malpractice case brought on behalf of an elderly woman who was given too much of a dangerous antibiotic because of a nursing error at Little Company of Mary Hospital. This antibiotic—gentamicin—is known to cause kidney failure when given over long periods of time. **Christopher T. Hurley** and **Mark R. McKenna** tried the case to a jury in September 2005, and obtained a $3.2 million jury verdict for the loss of the plaintiff's kidney function. The Illinois Appellate Court upheld that verdict and further ruled that the trial judge should have allowed the plaintiff's expert to testify that the plaintiff's past and future medical expenses were customary, reasonable, and necessary.

The trial court had ruled that the plaintiff's expert, a board-certified nephrologist and medical school professor, did not have enough experience as a medical office billing person to testify about the plaintiff's bills. The appellate court disagreed, holding that the expert nephrologist's experience was greater than that of the average juror, and could have aided the jury in awarding the plaintiff damages for past and future medical expenses. The appellate court has ruled that the case should proceed for a new trial only on the issue of past and future medical expenses for the plaintiff, who will require dialysis for the rest of her life.

The issue of expert testimony regarding medical bills has become important in Illinois. Recent Illinois Supreme Court and Appellate Court cases have suggested that when insurers or a government entity such as Medicare or Medicaid has paid only a negotiated, reduced portion of a plaintiff's medical bills, as is customary in a medical malpractice or personal injury case, the plaintiff must present expert testimony that the total bills are customary, reasonable, and necessary.

Read the Illinois Appellate Court's opinion at our Web site, **www.hurley-law.com**.

Electrical burn case

Mr. Mertz settled a case for $800,000 for a client, Witkor Smolik, who suffered a severe electrical burn while installing siding on a new home. Sunland Construction, the general contractor for the project, built the home within only a few feet of a 12,000-volt power line. ComEd discovered that the home was being constructed within a dangerous proximity to the power line and issued warnings to Sunland, and to Mr. Smolik's employer. As a result of ComEd's warnings, the Village of Bensenville revoked the building permit for the home. Despite these warnings, Sunland sent Mr. Smolik to install vinyl siding on the home, but did not tell him that the permit had been revoked, that the warnings had been issued, or that the power line carried 12,000 volts of electricity.

A piece of aluminum J-channel Mr. Smolik was holding either came into contact with the power line or caused electricity to arc from the power line. The electrical shock that resulted caused Mr. Smolik to fall from his ladder and caused a full-thickness electrical burn over the anterior aspect of Mr. Smolik's left lower leg, including the tibia, which required two skin-grafting procedures. Mr. Smolik developed an open wound with exposure of the tibia, requiring debridement of the bone and closure with a muscle flap.

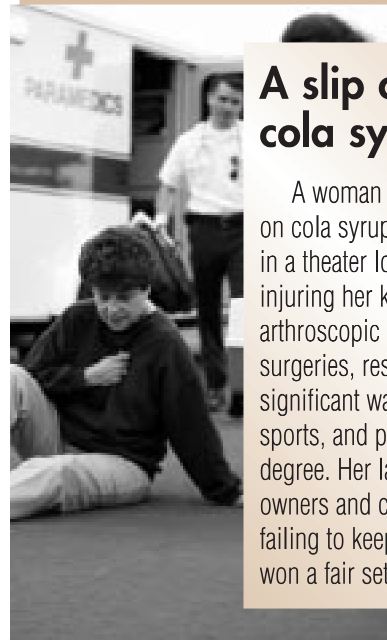
Sunland Construction paid $675,000 of the settlement, and ComEd paid $125,000 of the settlement.

Slips and falls

Managers of shopping malls, airports, and other public places take steps to prevent falls by patrons. They maintain lighting over common areas, install handrails on stairs, and keep floors dry and free of obstacles.

As visitors, we should also take care to not trip and fall. Most of us watch where we're stepping; avoid wet spots, loose carpets, and other hazards; and walk around obstacles.

A fall can occur in the blink of an eye. If you or a loved one falls in a public place, act right away to protect your rights.



A slip on cola syrup

A woman at a concert slipped on cola syrup and fell to the floor in a theater lobby, seriously injuring her knee. She had arthroscopic and knee replacement surgeries, resulting in loss of significant wages, inability to play sports, and postponing her college degree. Her lawyer sued theater owners and concessionaires for failing to keep a clean floor and won a fair settlement.

On-the-job injury

Additional compensation

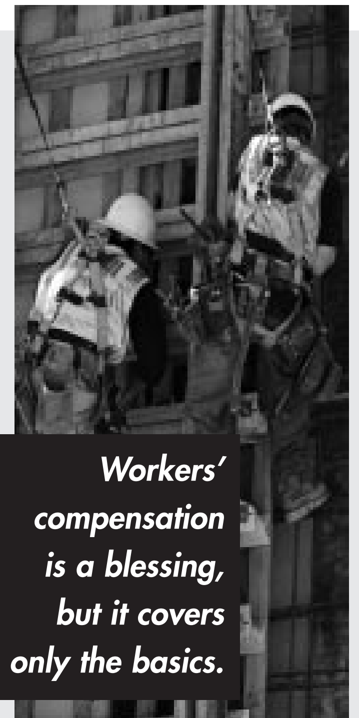
Workers hurt while at their jobs have **two** potential sources of compensation for the physical injury suffered.

First, there is workers' compensation, a state- and employer-funded benefits program that usually compensates injured workers for medical bills, lost wages, and rehabilitation. Workers' compensation is helpful, but it covers only the basics.

Second, injured workers also have the right to seek monetary damages caused by negligent third parties who may have been responsible for the injury. One third party might be a manufacturer whose defectively designed equipment lacked a guard to protect fingers from being crushed. Another third party could be a negligent driver who caused injuries to an employee driving on the job.

Workers generally have the right to seek redress from third parties who contribute to their injuries, compensation that may be unavailable from workers' compensation programs. This might cover current compensation for pain and suffering, scarring and disfigurement, loss of earning capacity, as well as anticipated needs, such as future medical bills and future lost wages.

Anyone injured on the job should seek legal counsel.



Workers' compensation is a blessing, but it covers only the basics.

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Christopher Hurley elected to the American Board of Trial Advocates (ABOTA)

Christopher T. Hurley, founding partner of **Hurley McKenna & Mertz,** was elected as a member of the American Board of Trial Advocates (ABOTA) and the Illinois Chapter of ABOTA. Membership in ABOTA is by invitation only. Prospective members must have at least five years of active experience as trial lawyers, have tried at least ten civil jury trials to conclusion, and have additional litigation experience. In addition, they must demonstrate the virtues of civility, integrity, and professionalism. Since its founding in 1958, ABOTA's primary mission has been the preservation of the civil jury trial right guaranteed by the 7th Amendment to the U.S. Constitution. Its membership includes lawyers from the plaintiff and defense bars, as well as judges from all 50 states, the District of Columbia, and Puerto Rico.

Visit our updated Web site

Please visit our updated and revamped firm Web site: **www.hurley-law.com**. Included are summaries of recent verdicts and settlements, bios of our attorneys, copies of client newsletters, information about our use of technology in the courtroom, and FAQs.

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failed to use reasonable care in granting staff privileges to that provider, and the physician or podiatrist subsequently commits malpractice that results in injury.

In this case, the jury agreed that podiatrist Dr. Kirchner was negligent in performing the initial surgery at the hospital and in failing to properly treat the foot infection, and that Silver Cross Hospital was negligent in giving hospital privileges to Dr. Kirchner to perform the surgery in the first place.

Read the Illinois Appellate Court's opinion at our Web site:

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