TRIAL NOTEBOOK

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New lawsuit saves claims for the class

Mabry v. Glenwood

Clarifying an important timing issue for cases where (1) apparently tardy plaintiffs sue after a proposed class action is snuffed out and (2) the new litigants — who would have been members of the would-be class — respond to a statute of limitations defense by invoking the class-action tolling rule, the Illinois Appellate Court reversed an order that dismissed negligence claims that 32 intervenors filed against the village of Glenwood.

The Local Governmental Tort Immunity Act sets a one-year deadline for property damage claims against municipalities. Four plaintiffs (Daniel and Denise Mabry plus David and Danette Cooper) sued as class representatives on April 16, 2007, contending they suffered property damage on April 16, 2006, because Glenwood's negligence allegedly caused sewer backups after a torrential rainfall.

The Mabrys and the Coopers abandoned the class-action allegations when they filed an amended complaint on March 28, 2013. But the revised pleading added 32 intervening plaintiffs who claim they also suffered property damage on April 16, 2006.

Based on the one-year statute of limitations, a Cook County judge granted the village's motion to dismiss the new claims.

Reversing, the 1st District concluded that (a) the one-year deadline for individual claims by members of the alleged class stopped running when the Mabry-Cooper complaint was filed; (b) the countdown didn't resume until the

Clarence Ditlow, executive director of the Center for Auto Safety, displays a General Motors ignition switch similar to those linked to 13 deaths and dozens of crashes of GM small cars, like the Chevrolet Cobalt, during an April 1, 2014, news conference on Capitol Hill in Washington. A civil trial starting Jan. 11 in New York City will test the legal boundaries of hundreds of claims remaining against General Motors over faulty ignition switches. *AP Photo/J. Scott Applewhite*

GM switch trial a template?

First civil action may provide framework for future court cases, provide other judges some precedent

BY LARRY NEUMEISTER
Associated Press writer

NEW YORK — A civil trial set to start this month in New York City will test the legal boundaries of hundreds of claims remaining against General Motors Co. stemming from faulty ignition switches.

The case involves an Oklahoma man who blames a defective ignition switch for preventing his air bags from deploying during a crash.

It's the first trial to result from hundreds of lawsuits filed against GM after the auto giant revealed in 2014 that faulty ignition switches

but did not recall them until February 2014. The company paid nearly $600 million to settle 399 claims made to a fund it established. Those claims covered 124 deaths and 275 injuries, though GM's fund rejected more than 90 percent of the 4,343 claims it received, according to figures the company released in December.

In recent weeks, U.S. District Judge Jesse M. Furman, the presiding judge in the case, has ruled that calling admittedly defective vehicles was "arguably dangerous conduct as it involved a hidden defect that caused a risk of serious injury or death."

The judge also ruled that the "New GM," as it is repeatedly referred to in court papers, cannot dismiss the claims of Robert S. Scheuer — the plaintiff in the trial set to start Jan. 11 — merely because he failed to keep his 2003 Saturn Ion after his front air bags

es consolidated in New York City.

"For years and years, GM — including to some of my clients — would say: 'Look, this accident is your fault. Take $75,000 even though your family is dead,'" he said in a telephone interview from his Texas office.

Hilliard said the litigants watching the case closely include "many traumatized folks who got pushed around by GM while the cover-up was active."

General Motors has told U.S. regulators in a recent quarterly report that it still faces 217 wrongful death and injury lawsuits in the

$4.7M verdict upheld by 1st District panel

Hospital can't evade agency relationship with ER physician

BY LAURAANN WOOD
Law Bulletin staff writer

A south suburban hospital cannot escape liability in a $4.7 million judgment by labeling a doctor involved as an independent contractor, a state appeals panel ruled Thursday.

The hospital pointed to a release form signed by the patient's son while she was in a respiratory coma acknowledging the contractor relationship. But the 1st District Appellate Court's ruling on Thursday rejected the hospital's notion and affirmed the wrongful-death jury verdict in plaintiff Ted Fragogiannis' case on behalf of his mother's estate.

Sisters of St. Francis Health Services Inc. appealed the verdict, alleging the hospital could not be found liable in Fragogiannis' mother's death because he signed the form that recognized doctor Perry Marshall was an independent contractor.

However, the panel ruled the hospital should be liable because the plaintiff's mother, Georgia Tagalos — who was in respiratory distress at the time her son signed the form — sought care from the hospital itself and had no way to choose her physician.

"What the court is recognizing is that there are many instances where hospitals will market themselves by talking about how great their doctors are, and then when the doctors fail to meet the standard of care, the hospitals distance themselves from this relationship," said Christopher T. Hurley, a partner at Hurley, McKenna & Mertz P.C. who represented Fragogiannis. "The doctrine of apparent agency basically establishes a way for the jury to say, 'No that's not OK. You're responsible for this doctor's behavior because you made it look like he's your employee.' "

Tagalos, a long-time asthma sufferer, began wheezing and gasping for air in July 2006 while she and Fragogiannis headed home from a friend's house in Bourbonnais.

Tagalos was transported by ambulance to St. James Hospital in Olympia Fields after attempts to improve her condition with two different rescue inhalers failed.

Tagalos could not speak but was responsive upon her arrival, and a nurse began caring for her while Marshall, the emergency room's attending physician, headed to the respiratory emergency.

Upon his arrival, Marshall indicated to a resident that Tagalos might require intubation, and Tagalos became unresponsive while the resident prepared for the procedure 11 minutes after she arrived to the ER.

Tagalos vomited when the resident attempted the intubation, so Marshall requested an anesthesiologist's help to establish her airway. She vomited again during a second intubation attempt, and several subsequent attempts also failed.

Marshall then ordered an airway

HOSPITAL, *Page 6*

Panel reverses $157K in fees in converter box suit

BY DAVID THOMAS
Law Bulletin staff writer

deprived on an opportunity to test

Panel: Consent forms are important, but they aren't dispositive

HOSPITAL, *FROM PAGE 1*

be established through surgical procedure, which was completed about 25 minutes after she arrived to the hospital.

By that time, however, Tagalos' brain suffered a complete deprivation of oxygen, and she had effectively become brain dead by the time the procedure was performed. She was taken off of life support and died three days later.

Fragogiannis sued Marshall and the hospital in 2006 alleging the parties were negligent for taking nearly 25 minutes to establish an airway for Tagalos despite arriving to the hospital with a respiratory emergency. He argued he could recover damages from Marshall for his alleged negligence either individually or as the hospital's apparent agent.

The defendants denied the allegations and instead contended they complied with the standard of care in such situations.

A jury awarded Fragogiannis $4.7 million after a week of trial before Circuit Judge Lorna E. Propes.

On appeal, St. James Hospital contended it shouldn't be held liable for Marshall's actions because he was not an agent but rather an independent contractor — which Fragogiannis recognized by signing a consent form for his mother.

Apparent agency is a question of fact left for a jury to determine. And in a 16-page opinion authored by Justice John B. Simon, the panel held Fragogiannis' jury correctly found Marshall to be St. James Hospital's apparent agent.

While consent forms are an important factor in determining whether a hospital held a physician out as its agent, the panel held, it is not a dispositive piece of evidence and has no bearing on Tagalos' case.

"Tagalos did not sign the form and never knew of its existence," Simon wrote. "In fact, Tagalos was already brain dead, hypoxic, by the time her son signed the document. By the time the form was signed, the negligent acts had already occurred."

The panel also noted that no evidence was offered to prove Fragogiannis could have legally bound his mother to the document with his signature.

John B. Simon

"Suffice to say that a third party signing a consent form after the negligence has occurred and after the patient is brain dead would not inform any unsuspecting patient that the four doctors that treated the individual were independent contractors," Simon wrote.

Hurley said the panel's opinion is a good and important one because it limits a hospital's ability to escape liability when its apparent agents are negligent.

He said it's common for patients not to completely read a consent form that slips in an independent-contractor provision at the bottom for the sake of receiving care.

"They just sign them because they want to get healthcare and they want to get treated," he said. "So here's a case where the woman who died was in a coma when they had her son sign one of those forms, and the hospital wanted that form to be a basis for the court to find them not liable. And the court said, 'No way.' "

Mark R. McKenna, a partner at Hurley McKenna & Mertz, also represented Fragogiannis.

Dina L. Torrisi, a partner at Hughes, Socol, Piers, Resnick & Dym Ltd who represented the hospital, declined to comment.

Robert E. Elworth, a partner at HeplerBroom LLC who represented the hospital, could not be reached for comment.

Justices Daniel J. Pierce and Michael B. Hyman concurred in the opinion, *Ted Fragogiannis v. Sisters of St. Francis Health Services, Inc.*, 2015 IL App (1st) 142706.

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Panel affirms $3.10 judgment over sales tax but vacates attorney fees

APPEAL, *FROM PAGE 1*

provided insufficient evidence to back up the billing records submitted as part of the request for attorney fees.

Sears argued that because the original time sheets Zimmerman used to record the company's work were destroyed, the itemized billing statement was inadmissible as evidence.

The panel held that when computer-stored records are submitted as evidence, the original documents must be kept in order to give the opposing side the ability to scrutinize those records.

As a result, Donnelly's approval of the billing statement as-is was an error of law, the panel found. Without the statement, "there is no evidence in the record from which a reasonable fee could be calculated," Hoffmann wrote.

Thomas A. Zimmerman Jr., the sole shareholder of Zimmerman Law Offices, expressed confidence in an interview that his client would be awarded the fees despite the destruction of the original time sheets.

"We'll produce the entire file. I can use the itemized invoice to refresh my recollection as to the amount of time spent performing a particular task," Zimmerman said. "We'll be able to prove it up."

Aliano was also represented by Eleonora P. Khazanova and Matthew C. De Re of Zimmerman Law Offices.

Sears was represented by Francis A. Citera, Jane B. McCullough and Paul A. Del Aguila of Greenberg, Traurig LLP. They did not return a request for comment.

Justices Mary K. Rochford and Mathias W. Delort concurred in the judgment and the opinion.

The case is *Mario Aliano v. Sears, Roebuck and Co.*, 2015 IL App (1st) 143367.

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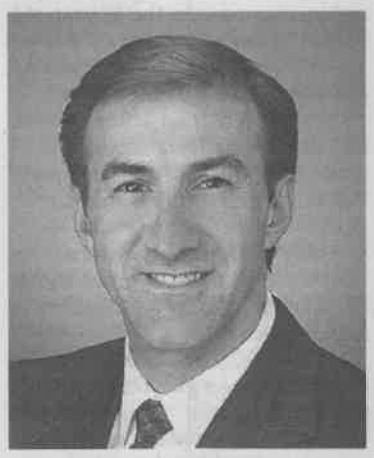

Thomas A. Zimmerman Jr.

Judge refuses GM request to exclude evidence for punitive damages

IGNITION, *FROM PAGE 1*

Scheuer trial would "help form the basis for settlement of similar claims."

"It's our belief that the air bags weren't designed to deploy in the accident that he had," Cain said.

In September, GM announced it had reached a $575 million deal with Hilliard to settle 1,385 death and injury cases and to resolve a 2014 class-action lawsuit filed by shareholders claiming GM's actions reduced the value of their stock.

The announcement came as the U.S. attorney's office in Manhattan revealed GM had settled a criminal investigation, agreeing to pay $900 million to the government to avoid prosecution on wire fraud charges.

The company has initiated companywide safety reforms and in 2014 issued a record 84 recalls covering more than 30 million vehicles, including 27 million in the U.S.

Pharmaceutical companies getting more savvy with R&D projects

DRUGS, *FROM PAGE 3*

decade, currently averaging about 14 years.

The figure was about 11 years in the late 1990s. The increased development time has been driven by the growing complexity of drug trials and demands for more data from health insurers.

A separate report from Deloitte suggests the largest pharma companies could learn from the R&D strategy of their midsize competitors, who tend to focus on a particular family of diseases or conditions.

These smaller companies tend to have lower R&D costs and higher sales per product, according to Deloitte.

"Our analysis indicates that companies who maintain a consistent therapy area footprint are projected to deliver higher R&D returns," the company states.

Despite the difficulties of drug development, experts expect the approvals trend to continue. IMS Health predicts 225 new drugs will be approved worldwide between 2016 and 220.

Hospital maintains its liability covered by state's compensation fund

CAP, *FROM PAGE 3*

procedure on Crystal Bobbitt with inadequate staffing and failed to provide continuous ultrasound guidance during the procedure, leading to her premature birth at 33 weeks.

Juliann has cerebral palsy, leaving her unable to use her arms and legs and must be fed by a tube.

Bobbitt said her daughter loves going to school and being around people, although she can communicate only using body language.

"She's a blessing. I really can't think of her any other way," Bobbitt said. "She lights up a room with her smile."

Rutledge's in-and-out time with the court makes his tenure shortest

COTTER, *FROM PAGE 4*

resigned from the court in October 1942. The retired justice served in that post for just over a year, when he was appointed to head the newly formed War Mobilization Board.

Byrnes later became secretary of State under President Harry Truman after which he returned to South Carolina to become governor. As governor, he supported

At 17, Rutledge began to read law and then went to London to continue his studies at Middle Temple Inns of Court. From 1761 to 1774, Rutledge practiced law in Charleston. In 1774 and 1775, he, like Johnson, was a delegate to the First Continental Congress.

From 1776 to 1778, Rutledge was president of the South Carolina General Assembly; he then served as the state's first governor

On Sept. 24, 1789, President George Washington nominated Rutledge to be an associate justice to the Supreme Court. Rutledge was confirmed on Sept. 26, 1789, taking his oath on Feb. 15, 1790, to become the second high court justice. Rutledge resigned his seat on March 5, 1791, having never heard a case, in order to become the South Carolina Court of Common Pleas and Sessions' chief judge.

As a result, Rutledge issued only one opinion as chief justice. To date, Rutledge is the only one of 15 recess appointments to the high court who has been rejected by the Senate. Rutledge was so distraught by the rejection, that he went home to Charleston and attempted suicide shortly afterward. He resigned his recess appointment within days of his suicide attempt.

CASE SUM

See the full text of each case on our webs

Criminal law — drug

Where a defendant is charged with delivery of a controlled substance within 1,000 feet of a school, it is an essential element of the crime that the building be actively operating as a school at the time, and if the state fails to demonstrate such, then they have failed to demonstrate an essential element of the crime.

The 1st District Appellate Court reversed in part, affirmed in part, and remanded a case by Cook County Associate Judge Stanley Sacks.

On Aug. 31, 2011, a Chicago police officer Harold English and approached him. English asked the officer what he needed, and the officer replied that he needed "some diesel" — a street term for heroin.

English then left to go to a nearby alley. When he returned, he handed the officer two small bags containing a white powdery substance, and the officer paid English with a marked bill. A short time later, English was arrested, though the marked bill was not found on him at the time of his arrest. Seven bags of white powder were recovered nearby in an alley and tested positive for heroin.

English was charged with delivery of a controlled substance within 1,000 feet of a school and possession with intent to distribute for the bags found in the alley.

Equal protection — c

Where a civil detainee was harassed and denied treatment based on his sexual orientation, his complaint stated claims under the equal protection and due process clauses of the 14th Amendment.

The 7th U.S. Circuit Court of Appeals reversed a decision by U.S. District Judge Harold A. Baker, Central District of Illinois.

Michael Hughes is confined at the downstate treatment and detention facility in Rushville as a result of his designation as a sexually violent person for purposes of the state's Sexually Violent Persons Commitment Act. Hughes sued Michael Farris, the laundry supervisor at the facility, and Krista Wilcoxen, Rushville's rehabilitation director.

Hughes alleged that he was abused beginning in 2014 when Farris began supervising the laundry room. Hughes stated that Farris berated him with an onslaught of homophobic epithets and encouraged other residents to take reprisals against him because he was gay.

In January 2015, Farris ordered Hughes to take charge of the laundry room. Hughes hesitated,