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Recent Decisions

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Fourth District Appellate Court Holds 2-1117 Applies to Employers

Unzicker v. Kraft Food Ingredients Corporation, 325 Ill. App. 3d 587, 758 N.E.2d 474, 259 Ill. Dec. 351 (4th Dist. 2001)

Marlin Unzicker was injured on July 20, 1991 while working at a Kraft Food facility in Champaign, Illinois. He and another employee of Nogle & Black were standing on a man-lift welding flanges to a pipe. A third co-worker, Mike Law, was using a Kraft forklift to deliver equipment to Unzicker. As Law was being elevated in the forklift, the forklift struck the man-lift, tipping it over and causing Unzicker to fall.

On October 7, 1992, Unzicker filed suit against Kraft, alleging negligence and violations of the Structural Work Act (740 ILCS 150/0.01 *et seq.*). Kraft filed a third party complaint against Nogle & Black. At the trial, the jury found Unzicker's total damages to be $879,400, including non-medical damages of $788,000. The jury apportioned 1% of the fault to Kraft and 99% to Nogle & Black. Judgment was entered in accordance with Section 2-1117 of the Code of Civil Procedure, which provides only several liability for the defendants whose fault is less than 25% of the total fault, including the fault of any third party defendants who could have been sued by the plaintiff.

On appeal, Unzicker argued that Section 2-1117 did not apply to third party defendant employers such as Nogle & Black, as held by the Fifth District Appellate Court in *Lilly v. Marcal Rope & Rigging, Inc.*, 289 Ill. App. 3d 1105, 682 N.E.2d 481, 224 Ill. Dec. 920 (1997), *app. den.* 175 Ill. 2d 529. The Fourth District Appellate Court, however, refused to follow *Lilly*, finding its reasoning an overly technical interpretation of Section 2-1117 which was at odds with the clear legislative intent that a minimally culpable defendant should not be required to pay an entire judgment and that responsibility for damages should be proportional to fault. In Section 2-1117, according to the *Unzicker* court, the legislature intended to list all those whose fault might have played a role in causing the injury: the plaintiff, those sued, and those who could have been sued. The court rhetorically asked: What sense would it make, in applying Section 2-1117, to ignore the tortfeasor 99% at fault?

In reaching the decision, the court relied heavily on *Doyle v. Rhodes*, 101 Ill. 2d 1, 461 N.E.2d 382, 77 Ill. Dec. 759 (1984), which held that, despite the exclusivity provision in the Workers' Compensation Act (820 ILCS 305/5(a)), employers are subject to the Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 *et seq.*). As *Doyle* explains, employers can be sued by their own employees. The exclusivity provision of the Workers' Compensation Act is in the nature of an affirmative defense, which is waived if it is not asserted. As such, an employer is a party who could have been sued as contemplated by Section 2-1117. Accordingly, the trial court correctly determined that Kraft, whose fault was found to be only 1% of the total of those potentially at fault, was only severally liable for 1% of the damages.

Also of note is the court's determination that Section 2-1117 is not an affirmative defense. Rather, 2-1117 operates as a matter of law to allocate damages according to the jury verdict. No facts or other

affirmative matters are required to apply its provisions, so long as the defendant has joined any necessary third party defendants and the jury has determined the percentages of fault.

Two-Year Limitations Period Applies to Wrongful Death Case Arising from Construction Accident

Beetle v. Wal-Mart Associates, Inc., Docket No. 2-00-1195, 2001 WL 1671409 (2d Dist., December 21, 2001)

The plaintiff's husband was employed as a roofer by Area Construction. On September 24, 1996, while working on a Wal-Mart project, he fell from the structural steel framework of the building, was injured and died the following day. On April 27, 1999, the plaintiff filed a complaint against the defendants pursuant to the Wrongful Death Act (740 ILCS 180/1 *et seq*.).

The defendants moved to dismiss the complaint pursuant to Section 2-619(a)(5) of the Code of Civil Procedure, asserting it was untimely because the plaintiff did not commence the action within two years after her husband's death as required by Section 2 of the Wrongful Death Act (740 ILCS 180/2). In response, the plaintiff claimed that the four-year limitations period for construction-related actions, found in Section 13-214(a) of the Code of Civil Procedure, applied because it is more specific than the Wrongful Death Act's two-year limitations period. The trial court granted the motion to dismiss and dismissed the plaintiff's complaint with prejudice.

The Second District Appellate Court affirmed. Illinois courts interpreting the Wrongful Death Act have long found that a wrongful death action will lie only where the deceased had a claim that was not time-barred on or before his death. Section 2 of the Act provides that every action shall be commenced within two years after the death of such person. Since the precipitating injury in a wrongful death action is the death, Section 2 of the Act provides a plaintiff with a two-year statute of limitations that begins to run on the date of the decedent's death. The requirement that a plaintiff file his or her action within two years is a condition precedent to the filing of a wrongful death action.

The court added that there is a reasonable interpretation of the statutes that avoids an inconsistency and gives effect to both statutes. Because the plaintiff's cause of action is based on the Wrongful Death Act, the only limitations period applicable to her claim is the two-year statute of limitations found in the Act. Thus, the plaintiff had two years from the date of her husband's death to file a wrongful death action provided that the plaintiff's decedent had a claim that was not time-barred at his death. For purposes of determining whether the plaintiff's decedent had a claim that was time-barred at the time of his death, the court used the limitations period found in Section 13-214(a), which applies to construction-related claims. In other words, Section 13-214(a) of the Code applied to the plaintiff's decedent to the extent that he could have filed an action against the defendants during his lifetime. Plaintiff's decedent died shortly after he sustained his injuries and, accordingly, he clearly had a claim that was not time-barred on the date of his death. However, since the plaintiff did not commence her wrongful death action within two years after her husband's death, that action was time-barred.

The court acknowledged that there are several cases in which courts have applied the Construction Statute of Repose to wrongful death actions. However, in none of those cases was the reviewing court asked to decide whether the Construction Statute of Repose governed over the Wrongful Death Act's two-year statute of limitations.

Alternatively, the plaintiff claimed that she filed her complaint within two years of the time she discovered that the defendants' negligent conduct could or might have caused decedent's death. She argued that, even if the two-year statute of limitations applied, the discovery rule preserved her cause of action. The court also rejected this argument, noting that where an individual's injuries are caused

by a sudden traumatic event, the cause of action accrues and the statute of limitations begins to run at the time of the injury. Without question, the plaintiff's decedent was injured in a sudden traumatic event and, therefore, the discovery rule did not apply.

First District Adopts New Rule for Admissibility of Employee Statements

Pavlik v. Wal-Mart Stores, Inc., 323 Ill. App. 3d 1060, 753 N.E.2d 1007, 257 Ill. Dec. 381 (1st Dist.)

The plaintiff filed a premises liability action, seeking damages for injuries she suffered when she slipped and fell on a liquid substance while shopping at the defendant's store. The plaintiff claimed that after she fell she observed a puddle of hair conditioner on the floor along with a conditioner bottle, but admitted that she had no idea how the conditioner came to be on the floor or how long it had been there prior to her accident.

However, she also testified that one of the defendant's employees, someone "like a store clerk," stated that the puddle of conditioner should have been cleaned up before. The plaintiff's father, who was with the plaintiff at the time of the occurrence, offered similar testimony.

Summary judgment was entered in favor of *Wal-Mart*. The trial court ruled that the post-occurrence statements of the defendant's employee constituted inadmissible hearsay and, therefore, could not be used to create a genuine issue of material fact defeating summary judgment.

The First District Appellate Court reversed and remanded. The court held that the trial court erred in finding that the post-occurrence statement was inadmissible hearsay. In so holding, the court opined that the "scope of employment" analysis for determining whether an employee statement constituted an admission by her principal or employer is the better-reasoned approach than the "traditional agency" analysis.

Under the traditional agency approach, the proponent of the statement must establish that (1) the declarant was an agent or employee, (2) the statement was made about a matter over which she had actual or apparent authority, and (3) she spoke by virtue of her authority as such agent or employee. In applying this analysis, many courts found damaging statements to be outside the scope of authority, even in cases involving relatively high-level employees, since employees are seldom hired to make damaging statements.

The modern trend in Illinois case law rejects the traditional agency approach in favor of the scope of employment analysis espoused by Rule 801(d)(2)(D) of the Federal Rules of Evidence. The federal rule provides that statements by an employee concerning a matter within the scope of her employment constitute admissions by her employer if the statements are made during the existence of the employment relationship.

Under the scope of employment approach, the proponent of the evidence need not establish that the employer specifically authorized the statement. The court found that, because the statements were made by the defendant's employee during the employment relationship about a matter within the scope of the employment, they fell within the party admission exception to the hearsay rule. With those statements in the case, a question of fact existed regarding notice of the spill, precluding summary judgment for the defense.

Loss of Consortium Claim Must be Tried with Underlying Action

Zuniga v. Dwyer, 323 Ill. App. 3d 508, 752 N.E.2d 491, 256 Ill. Dec. 611 (1st Dist. 2001).

Moises and Anna Zuniga filed a joint complaint asserting the defendants committed medical malpractice by misdiagnosing and mistreating Anna's Crohn's disease. One count of the complaint sought loss of consortium for Moises. The plaintiffs voluntarily dismissed the loss of consortium claim and the case proceeded to trial on the remaining counts. The jury returned a verdict for Anna in the amount of $378,000. Thereafter, Anna signed a release and satisfaction of judgment.

Moises then filed a cause of action against the defendants in which he again alleged his loss of consortium claim. The defendants filed a Section 2-619 motion to dismiss, arguing that the complaint was in violation of the Mandatory Joinder Rule, which requires that a loss of consortium action and underlying action be joined together at the time of filing. The trial court granted the motion to dismiss and the appellate court affirmed.

On appeal, Moises contended that the trial court erred when it ruled that the loss of consortium action had to be tried with the underlying action since it had granted his motion to voluntarily dismiss the loss of consortium claim pursuant to Section 2-1009. The court acknowledged that Section 2-1009(a) gives the plaintiffs an unfettered right to voluntarily dismiss their claims without prejudice. However, Section 2-1009 does not automatically immunize a plaintiff against the bar of *res judicata* or any other legitimate defenses a defendant may assert in response to the re-filing of voluntarily dismissed counts. To allow Section 2-1009 to immunize the plaintiffs against the defendants' defenses would impair judicial economy and defeat the public policy underlying *res judicata*.

Moreover, under the case of *Brown v. Metzger,* 104 Ill. 2d 30, 470 N.E.2d 302, 83 Ill. Dec. 344 (1984), whenever possible, a spouse's loss of consortium claim should be joined with the impaired spouse's cause of action. Unless the deprived spouse can prove facts demonstrating why joinder with the impaired spouse's claim was not possible, a loss of consortium claim must be dismissed. Joinder is mandatory because joining related claims will reduce litigation expenses for the parties, conserve judicial time and resources, and contribute to the reduction of court congestion.

The appellate court noted that no prior Illinois case discussed the specific issue the court was addressing. However, the court was compelled to affirm because ruling otherwise would permit a deviation from the course the Illinois Supreme Court has set regarding the management of loss of consortium actions.

Although *Brown* requires joint filing and does not explicitly state that both actions must be tried together, the court believes such a requirement is presumed. Mandatory joinder is needed to eliminate the double recovery problems associated with loss of consortium claims, to reduce litigation expenses, to conserve judicial time and resources and to reduce court congestion. Limiting the joinder rule would erode the policy considerations inherent in Section 13-203 of the Code of Civil Procedure, which requires loss of consortium actions to be commenced within the same period of time as actions for damages for injury to the spouse, and amount to an unwarranted departure from the Supreme Court's guidance.

Defendant Owed No Duty to Protect Child from Conveyer Belt

Luu v. Kim, 323 Ill. App. 3d 946, 752 NE 2d 547, 256 Ill. Dec. 667 (1st Dist. 2001)*, app. den.* 196 Ill. 2d 544.

Minor-plaintiff Billy Luu suffered injuries after becoming entangled in a conveyer belt at the P-K Mall in the Pilsen Park Shopping Center. Plaintiff's father brought suit against P-K Mall, Pilsen Shopping Center and Buschman Conveyers, the manufacturer, to recover for those injuries.

Billy's father, Donald Luu, rented space in the mall for his business. On the day of the occurrence, Donald gave Billy money to play video games located in the southeast corner of the mall. Adjacent to the game room was a doorway and stairwell leading to the second floor storage area. The conveyer belt was in the room but could not be seen from the top of the stairs. Donald was aware of the conveyor belt but never operated the belt in Billy's presence.

P-K Mall Management was responsible for the maintenance and upkeep of the storage area where the conveyer belt was located. Management was aware that vendors would use a wire or other device to hold the storage room door open and observed graffiti on the walls of the storage room, but did not know who put it there. Management was also aware that vendors would sometimes bring their children with them to the mall.

The trial court granted the defendants' motions for summary judgment, and the appellate court affirmed. As a general rule under *Kahn v. James Burton Co.,* 5 Ill. 2d 614, 126 N.E.2d 836 (1955) and subsequent cases, children have no greater rights to go on the land of others than adults. Their minority alone does not impose a duty upon the occupier or controller of premises to prepare for their safety, except where four conditions are present: (1) the owner or occupier of the land knew or should have known that children habitually frequent the property; (2) a defective structure or dangerous condition was present on the property; (3) the defective structure or dangerous condition was likely to injure children because their age and immaturity renders them incapable of appreciating the risk involved; and (4) the expense and inconvenience of remedying the defective structure or dangerous condition are slight when compared to the risk to children.

The *Luu* court held that the plaintiff failed to meet the first criteria of the *Kahn* doctrine cited above. The plaintiff failed to articulate any facts indicating the defendants knew or should have known that children frequented the second floor storage room of the mall or operated the conveyer belt. The mere fact that graffiti was present in the area and that vendors' children would sometimes accompany them to the storage room where the conveyer belt was located, was not enough for the plaintiff to meet the foreseeability element of the *Kahn* doctrine.

With respect to the action against the conveyor manufacturer, the court noted that the fact an injury occurred does not itself prove a product is defective. Rather, the plaintiff must show that his injuries derived from a distinct defect which subjects those exposed to the product to an unreasonable risk of harm. While the plaintiff submitted an affidavit generally asserting that certain components of the conveyer belt were defective, he completely failed to identify which parts of the belt were unreasonably dangerous. Without such specific evidence, the manufacturer will not be held responsible, and summary judgment was appropriate.

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