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TRIAL BRIEFS

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

Jurisdiction of Illinois courts based on Internet content without *Zippo*

By George S. Bellas and A. Patrick Andes

Introduction

As it was 20 years ago, personal jurisdiction of Illinois courts may be imposed by way of "specific jurisdiction" based on the "minimum contacts" test that the United States Supreme Court fashioned in *International Shoe Co. v. State of Washington*.[1] This test still requires a showing that the defendant had sufficient "minimum contacts" with the forum state, out of which the plaintiff's action arose or is related, such that imposing personal jurisdiction over the defendant would not offend "traditional notions of fair play and substantial justice."[2] As a result of the *International Shoe* ruling, state courts are able to use their long-arm statutes to assert personal jurisdiction over parties so long doing so would withstand scrutiny under the equitable principles embodied in the Due Process clause of the Fourteenth Amendment.[3]

The Illinois long-arm statute brings a non-resident defendant under Illinois personal jurisdiction in a number of circumstances, including where the defendant: 1) has transacted business or committed a tort in Illinois;[4] or 2) is a corporation doing business in Illinois.[5] The statute also contains a "catch-all" provision permitting the courts' exercise of personal jurisdiction on any basis permitted by the Illinois Constitution and

Continued on page 2

The Nursing Home Care Act: Recoverable attorney fees and loss of society damages

By Stephen C. Buser, Columbia and Grafton

A. Introduction

The First District Appellate Court recently decided the case of *Watson v. South Shore Nursing and Rehabilitation Center, LLC,* 2012 IL App (1st) 103730, 2012 WL 470158, 2012 Ill. App. LEXIS 94 (1st Dist. 2012), which is important to lawyers suing and defending nursing homes. *Watson* is instructive on two issues that are often front and center in nursing home litigation: 1) recoverable attorney fees under the Illinois Nursing Home Care Act and 2) recovery for loss of society.

William Sloan was a resident at a nursing home operated by South Shore Nursing and Rehabilitation Center, LLC (South Shore) and Care Centers, Inc. (Care Centers). On July 24, 2004, while left unsupervised, Sloan attempted to smoke a cigarette and caught on fire. He suffered third degree burns over 30% of his body, leading to an infection that caused his death on June 10, 2006, at age 86.

Sloan's daughter, Ernestine Watson, as administrator of his estate, filed suit against South Shore and Care Centers, claiming her father's death was as a result of their negligence in leaving him unsupervised with smoking materials. Her suit included actions for both survival and wrongful death damages based on violation of the Illinois

Continued on page 6

INSIDE

***(Notice to librarians:** The following issues were published in Volume 57 of this newsletter during the fiscal year ending June 30, 2012: August, No. 1; September, No. 2; October, No. 3; November, No. 4; December, No. 5; January, No. 6; February, No. 7; March, No. 8; April, No. 9; May, No. 10; June, No. 11).*

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Jurisdiction of Illinois courts based on Internet content without *Zippo*

Continued from page 1

the Constitution of the United States.[6]

The difference between this test in practice twenty years ago and today is that, twenty years ago, courts typically would assert personal jurisdiction only where the defendant was physically present in or had visited Illinois, had entered into transactions or contracts with Illinois residents, or had made a concerted mass effort to *target* Illinois residents for business. This test was not easy to meet. But, in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, the United States District Court for the Western District of Pennsylvania in 1997 fashioned a"sliding scale" test specifically designed to address cases involving business conducted over the Internet.[7] Under this "sliding scale" test, a party may subject itself to personal jurisdiction in a forum state simply by operating an interactive Web site that reaches resident consumers.[8]

In recent years, however, courts have returned to the more traditional analysis to determine whether personal jurisdiction exists in Internet-related cases. The United States Supreme Court *Calder v. Jones* case in 1984 crafted the "effects" test, which would become the blueprint for contemporary Internet jurisdiction analysis in much of the United States and in Illinois, specifically.[9] Despite being a pre-Internet case, *Calder* emphasized the effects of defendants' intentional conduct in Florida on the plaintiff in California.[10] An interesting early case out of the Central District of Illinois, *Bunn-O-Matic v. Bunn Coffee Service, Inc.,* decided shortly after *Zippo* but without citing to it, seems to invoke both the *Zippo* "sliding scale" test and the *Calder* "effects" test.[11] There, the court reasoned that defendant's maintenance of a Web site which Illinois residents could access was insufficient to establish personal jurisdiction because the Web site was "passive" in that consumers could obtain information about defendant but could not place orders on the Web site.[12] However, the court determined that it had personal jurisdiction over the defendant under the Illinois long-arm statute because plaintiff, an Illinois corporation doing business in Illinois, suffered the alleged injury mainly in Illinois.[13]

Bunn-O-Matic presages the Seventh Circuit's relaxed and inconsistent approach in its application of the "effects" test and its rejection of the "sliding scale" test. Recent cases have produced interesting results. In an influential 2010 case, *State of Illinois v. Hemi Group LLC,* the Seventh Circuit affirmed the district court's ruling that it had personal jurisdiction over a Mexican cigarette company because the company "created several commercial, interactive Web sites" through which it sold cigarettes to Illinois consumers, and held itself out as doing business in every state except New York.[14] In determining that the cigarette company was subject to personal jurisdiction in Illinois, the court conducted the minimum contacts analysis "without resorting to the sliding scale approach first developed in *Zippo*."[15] In a 2011 case, *BE2 LLC v. Ivanov*, the Seventh Circuit found that Illinois did not have personal jurisdiction over a defendant operating an online dating service, where the only evidence in the record of defendant's contact with Illinois was that twenty individuals with Illinois addresses had set up dating profiles on the sight.[16]

The Transition from *Calder* to *Zippo* and back

Calder and *Keeton*

In 1984, the United States Supreme Court, in *Calder*, held that the *National Enquirer* and its distributor were subject to personal jurisdiction in California, where actress Shirley Jones lived, for a libelous article written by the *Enquirer* alleging that Jones was an alcoholic in spite of the fact that the article had been written and edited in Florida.[17] That holding was based on the *Enquirer*'s having satisfied the *International Shoe* criteria for minimum contacts in the state of California.[18] Central to the Court's ruling was that the *Enquirer* enjoyed a circulation of some 600,000 issues per week in California out of a national weekly circulation of 5,000,000, that the editors knew this, knew that Jones lived in California, and knew that the article would damage her career there.[19] The Court reasoned that the *Calder* "effects" test is satisfied where (i) the plaintiff resides in and feels the brunt of the *effects* of the defendant's out-of-state conduct in the forum state; and (ii) the defendant acted with intent to harm the plaintiff in that state.[20] These elements are arguably more applicable in the context of a defamation case, as *Calder* was, than in other actions that do not involve allegations of malicious conduct.

Simultaneously with deciding *Calder*, the Court also issued another ruling in a similar case, *Keeton v. Hustler Magazine, Inc.*.[21] There, the Court held that defendant Hustler Magazine was subject to personal jurisdiction in the state of New Hampshire in a suit brought by New York resident Kathy Keeton over a defamatory article the magazine had published, even though the New Hampshire sales comprised an exceedingly small proportion of Hustler's nationwide sales and neither Keeton nor Hustler was a New Hampshire resident.[22] Moreover, the Court ruled in Keeton's favor even though (i) the sole reason she had filed her action in New Hampshire was because it was the only state in which the statute of limitations had not yet run; and (ii) the portion of total damages she suffered in New Hampshire was minute.[23] Critical to the Court's reasoning was that Hustler was not a reporter but a publication, and therefore merited a finding of sufficient "presence" in New Hampshire for due process purposes.[24]

Zippo and the Dawn of Internet Jurisdiction

As intellectual property disputes involving trademarks and domain names began to arise with increasing frequency, the Internet became a litigated terrain in which courts applied a wide array of analytical tests and often reached inconsistent outcomes. In *Zippo*, the plaintiff was a manufacturer of "zippo" tobacco lighters, and sued an Internet news service for an array of intellectual property claims arising from defendant's use of Internet domain names containing "zippo," such as "zipponews.com."[25] To determine whether the news service was subject to personal jurisdiction in Pennsylvania, the *Zippo* Court surveyed the landscape of Internet cases involving personal jurisdiction.

One case, *Inset Systems, Inc. v. Instruction Set*, 937 F.Supp. 161 (D.Conn. 1996), embodied "the outer limits of the exercise of personal jurisdiction based on the Internet[,]" bringing the out-of-state defendant under the jurisdiction of Connecticut based on the Web site's "availability" to approximately ten thousand Connecticut residents as well as providing a toll-free number which the Court concluded was purposefully "doing

business" based on the number's continuous availability.[26] The Web site in *Inset Systems* was essentially passive. On the other end of the spectrum, the *Zippo* Court cited *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996), which reached the opposite conclusion regarding a similarly "passive" type of Web site, refusing to exercise jurisdiction because the Web site was not "interactive" in that potential patrons of the club had to call or go to a ticket outlet and get tickets in order to attend a show at the club.[27]

Also critical to the Court's finding in *Zippo* was its analysis of a Sixth Circuit case, *CompuServe, Inc. v. Patterson,* 89 F.3d 1257 (6th Cir. 1996). There, the Sixth Circuit held that a Texas defendant had purposefully conducted business in Ohio by uploading thirty-two master software files to CompuServe's Ohio Internet server and entering into *a* contract with *an* Ohio resident. The *Zippo* court reasoned that, similarly, Zippo Dot Com had purposefully conducted business in Pennsylvania because it contracted with 3,000 individuals and seven Internet service providers located in that state.[28] Citing a key rationale in the *Burger King* ruling, the *Zippo* court concluded: "[t]raditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper [citations]. Different results should not be reached simply because business is conducted over the Internet."[29]

Zippo rapidly became the seminal case on which courts relied in ruling on specific personal jurisdiction in Internet-based disputes nationwide. The *Zippo* "sliding scale" test based on passivity, interactivity, or purposefully doing business, was the prevailing standard employed by courts in nearly every jurisdiction. However, as time has gone on and more and more Web sites offer features that are essentially "interactive" with users on the Web site—regardless of whether such features reflect the Web site owner's purposeful transacting of business—the effectiveness and accuracy of the "sliding scale" test has been eroded. Definitions of the very terms "interactivity" and "passivity" have varied considerably. Few people, for example, would consider a Web site where users may post comments as "passive," yet the Eighth Circuit found just that in 2010, holding that the defendant owners of a Web site with a message board where people could post complaints were not subject to personal jurisdiction in Missouri.[30] The court came to this conclusion in spite of the fact that the defendant Web site owner actually advertised the Web site as "interactive."[31]

Back to *Calder*

Due to the inconsistencies resulting from courts' application of the *Zippo* "sliding scale" test, many courts have returned to more traditional tests in resolving specific personal jurisdiction issues in e-commerce and cyberspace disputes. Bucking the general trend, the Seventh Circuit, in particular, never truly embraced the "sliding scale" test because it was hesitant "to fashion a special jurisdictional test for Internet-based cases."[32] The Seventh Circuit's rejection of the "sliding scale" test has precipitated some interesting recent results. A survey of the more significant rulings out of the Illinois federal court within the past two years follows below.

***Tamburo v. Dworkin,* 601 F.3d 693 (7th Cir. 2010)**

The Seventh Circuit ruled that out-of-state defendants from Colorado, Michigan, Ohio, and Canada with "sporadic" Illinois contacts were subject to personal jurisdiction in Illinois based upon their concerted efforts through blast e-mails and Web site postings to defame and interfere with the business of an Illinois-based software company.[33] The Court also found, however, that an Australian corporate defendant was not subject to personal jurisdiction in Illinois because the complaint alleged only that this defendant "facilitated the posting" of other individuals' messages, with no specific details as to (i) how many messages; (ii) the content of the messages; or (iii) whether the defendant knew that plaintiff did business in Illinois.[34]

In holding that Illinois had personal jurisdiction over the four individual defendants, the court reasoned that the defendants' efforts to induce the plaintiff's customers and Internet readers to boycott the plaintiff satisfied the "express aiming" element of the *Calder* test.[35] Relying on two earlier Seventh Circuit cases employing the *Calder* test, *Janmark, Inc. v. Reidy* and *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, the *Tamburo* court concluded that "inducing the customers of an Illinois firm to drop their orders can be a tort in Illinois, and [. . .] whether or not it is a tort in Illinois, it is actionable in Illinois."[36] The *Tamburo* court also relied upon the *Indianapolis Colts* ruling that cable-television broadcasts of Baltimore Colts games constituted electronic "entry" into Indiana for jurisdictional purposes.[37]

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Similar to television broadcasts, the court reasoned that use of Web postings to "defame an Illinois-based businessman and exhort readers to boycott his products [could] be conceptualized as an electronic 'entry' into Illinois for jurisdictional purposes."[38]

***State of Illinois v. Hemi Group LLC,* 622 F.3d 754 (7th Cir. 2010).**

The Seventh Circuit held that New Mexico defendant Hemi Group, LLC, an on-line cigarette company, was subject to specific jurisdiction in Illinois where its sole alleged sales to Illinois residents were to an undercover Illinois revenue agent.[39] Of great significance to the Court's rationale in rejecting Hemi's argument that it did not do business with Illinois residents was a disclaimer on Hemi's Web site stating that it would ship to any state in the country except New York.[40] The Court stated that this not only constituted an express decision to do business in Illinois, but also demonstrated Hemi's knowledge (i) that transacting business over state lines could subject it to jurisdiction in those states; and (ii) of how to protect itself from being haled into court in a particular state.[41]

The court also was not persuaded by Hemi's argument that the "minimum contacts" element was not met because purchases from its Web site were "unilateral actions by the customers." In rejecting that argument, the court cited to Hemi's numerous deliberate acts for the purpose of holding itself out to do business in every state except New York, including the creation of many commercial, interactive Web sites through which customers could purchase cigarettes, and shipping online orders to purchasers wherever they lived.[42] This case is notable because it demonstrates how a legal disclaimer can operate to diminish rather than reinforce the protections accorded an out-of-state defendant based upon the presumption that the defendant intended to do business in every state not specifically disclaimed.

***uBid, Inc. v. The GoDaddy Group, Inc.*, 623 F.3d 421 (7th Cir. 2010)**

The Seventh Circuit ruled that the well-known out-of-state domain registration Web site GoDaddy.com, against which Chicago-based plaintiff, uBid, Inc., brought suit for intentionally registering dozens of domain names confusingly similar to plaintiff's, was subject to personal jurisdiction in Illinois as a consequence of its deliberate exploitation and mass commercial success in Illinois.[43] The Court relied on the reasoning that the United States Supreme Court used in *Keeton* to overturn the district court's ruling that GoDaddy was not subject to personal jurisdiction in Illinois because its contacts with Illinois were initiated by Illinois residents.[44] The Court adopted *Keeton's* rationale that, because Hustler had produced "a national publication aimed at a nationwide audience," it would not be unfair for Hustler "to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed."[45]

Further, the *Keeton* Court opined that the plaintiff's claim for libel arose "out of the very activity" the magazine was conducting in the state, a close enough relationship to warrant New Hampshire's assertion of personal jurisdiction over the magazine.[46] Similarly, the *uBid* court held that GoDaddy had deliberately and extensively exploited the Illinois market, citing the company's massive ad campaign, including ads which aired in Illinois during the last six Super Bowl telecasts and billboards in the home stadiums of the Chicago Cubs, White Sox, Bulls, and Blackhawks.[47]

Finally, the Court reasoned that the relationship between GoDaddy's Illinois contacts and its alleged wrongful conduct was sufficiently close to satisfy the "arising out of" prong of the *International Shoe* test.[48] Specifically, the Court found that GoDaddy had (i) advertised to hundreds of thousands of Illinois residents; (ii) made hundreds of thousands of sales there by offering "free parking" of domain names; and (iii) "used and trafficked in the free parked pages with a bad-faith intent to profit from uBid's marks."[49] The Court explained that the necessity of a geographical nexus or proximity was largely useless in cases such as this one where the harm "can fairly be characterized as occurring anywhere the Internet is accessible[,]" regardless of where the customer registering the domain name resides.[50]

***be2 LLC v. Ivanov,* 642 F.3d 555 (7th Cir. 2011).**

The Seventh Circuit reversed the district court's order denying New Jersey *pro se* defendant Ivanov's postjudgment motion to dismiss for lack of personal jurisdiction, finding that although Ivanov's dating Web site was fully interactive and had a domain address and Web site design that were confusingly similar to the address and Web site design of plaintiff be2.com, no evidence showed that Ivanov had *deliberately targeted* Illinois residents.[51] Under the *Zippo* sliding scale test, Ivanov would have been subject to personal jurisdiction in Illinois. However, because the Seventh Circuit never adopted the *Zippo* "sliding scale" test, the court used the "effects" test of *Calder* and *Keaton* instead. Under that test, the Court found that Ivanov, unlike *Hustler* and GoDaddy, had not extensively and deliberately exploited or targeted the Illinois market.[52] Quoting *Hemi,* the court stated: "[c]ourts should be careful in resolving questions about personal jurisdiction involving online contacts to ensure that a defendant is not haled into court simply because the defendant owns or operates a Web site that is accessible in the forum state, even if that Web site is 'interactive.'"[53]

Conclusion

Illinois courts, unique from other jurisdictions, have refused to formally adopt the *Zippo* "sliding scale" test from the start, and their reliance on the more traditional "effects" test of *Calder* and *Keeton* in lieu of a test crafted specifically for Internet-related cases has yielded an intriguing and sometimes unpredictable body of jurisprudence. On the one hand, cases such as *Hemi* stand for the premise that a legal disclaimer as to doing business in one or more jurisdictions may well operate as a constructive targeting of consumers in every other jurisdiction, especially when such disclaimers betray an exposure to previous litigation on this issue.

On the other hand, *Tamburo* and *Ivanov* both demonstrate that where the actual quantitative and qualitative evidence fail to establish a defendant's "express aiming" towards the forum state or "purposeful availment" of the forum state's benefits—as with the Australian defendant in *Tamburo* and with the New Jersey defendant in *Ivanov*—the Seventh Circuit is reluctant to impose personal jurisdiction under the Illinois long-arm statute, even if the Web site in question is "highly interactive."

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1. 326 U.S. 310, 316 (1945)
2. *Id.*
3. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985)
4. *See* 735 ILCS 5/2-209(a)(1-2)
5. *See* 735 ILCS 5/2-209(b)(3)

6. *See* 735 ILCS 5/2-209(c)
7. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)
8. *Id.*
9. *Calder v. Jones*, 465 U.S. 783, 787 (1984)
10. *Id.* at 788-89
11. *Bunn-O-Matic Corp. v. Bunn Coffee Serv., Inc.*, No. 97-3259, 1998 U.S. Dist. LEXIS 8128 (C.D. Ill. 1998)
12. *Id.* at *5-6
13. *Id.* at *6
14. *State of Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 758 (7th Cir. 2010)
15. *Id.*
16. *be2, LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011)
17. *See Calder*, 465 U.S. 785 -86, 789-90.
18. *Id.* at 788-89
19. *Id.* at 785, 789-90
20. *Id.* at 788-89
21. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)
22. *Id.* at 772-73, 775
23. *Id.* at 773
24. *Id.* at 781
25. *Zippo Manufacturing*, 925 F. Supp. 1120
26. *Id.* at 1125. The Court ignored the simple fact that *any* Web site on the www is available "continuously" and also ignored the lack of evidence demonstrating that Connecticut residents had in fact called the toll-free number.
27. *Id.*
28. *Id.* at 1126
29. *Id.* at 1124 (citations omitted)
30. *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010)
31. *Id.*
32. *See Hemi Group*, 622 F.3d 758 (citing *Tamburo v. Dworkin,* 601 F.3d 693, 703 n. 7 (7th Cir. 2010)) (collecting cases for the precept quoted above).
33. *Tamburo*, 601 F.3d 697
34. *Id.* at 708
35. *Id.,* at 704-06
36. *Id.* at 705, (quoting *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1203 (7th Cir. 1997)). In *Janmark,* although the injury was in Illinois, the plaintiff was targeted specifically by a California company which induced a New Jersey client of Janmark's to break its contract. *Id.* at 706.
37. *Id.* at 706 (citing *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership,* 34 F.3d 410, 412 (7th Cir. 1994))
38. *Tamburo*, 601 F.3d 706
39. *Hemi Group*, 622 F.3d 755, 757-58
40. *Id.* at 757-58
41. *Id.* at 758
42. *Id.*
43. *uBid, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 423 (7th Cir. 2010)
44. *Id.,* at 427
45. *Id.* at 427 (quoting *Keeton*, 465 U.S. 781)
46. *uBid*, 623 F.3d 427
47. *Id.* at 424
48. *Id.* at 430-32
49. *Id.* at 431
50. *Id.*
51. *Ivanov*, 642 F.3d 556, 559
52. *Id.* at 558-59
53. *Id.* (quoting *Hemi Group*, 622 F.3d 760)

The Nursing Home Care Act: Recoverable attorney fees and loss of society damages

Continued from page 1

Nursing Home Care Act and common law negligence. A jury found against the defendants, awarding damages of $1,650,547.86 for Sloan's medical expenses, pain and suffering, disfigurement, and loss of a normal life, but nothing for loss of society.

The plaintiff petitioned the court under the Nursing Home Care Act for attorney fees of $568,187.50, but the trial court awarded only $322,110. The First District Appellate Court affirmed the $322,110 attorney fee award but granted the plaintiff a new trial on the issue of damages for loss of society.

The complaint sought relief in four counts: (1) common law negligence for failing to properly monitor Sloan and failing to secure all smoking materials from him; (2) violations of the Nursing Home Care Act, in that the defendants neglected Sloan by failing to provide him adequate supervision and oversight; (3) a survival action, alleging the defendants' conduct caused Sloan to suffer personal injury including pain and suffering, mental anguish, fright, disfigurement, emotional distress and humiliation; and (4) a wrongful death action, alleging that Sloan left five surviving daughters who had lost their father's support and society.

Prior to trial, the parties stipulated that Sloan attempted to light a cigarette, causing him to suffer first, second and third degree burns to his head, face, chest, neck and arms, resulting in an infection that proximately caused his death. They also stipulated that he incurred $1,200,547.86 in medical bills for treatment for his injuries.

The daughters testified that they often visited their father while he was in the nursing home from when he was admitted in 2002 and to his death on January 10, 2006. One daughter lived out of state but visited her father three to five times per year and had telephone conversations with him "all of the time." The other daughters visited their father weekly and sometimes brought him home on weekends. One daughter testified that after her father suffered burns from the cigarette incident at the nursing home, he never again talked to her or smiled but would follow her with his eyes. The other daughters testified that before the accident they celebrated birthdays and holidays with him. As a result of his burns, Sloan was confined to a hospital for the last 23 months of his life.

The plaintiff called two South Shore employees to testify on her behalf. One was an LPN who testified that the family visited Sloan frequently and were concerned about his welfare. A director of nursing testified that the family was very close and that the daughters often visited their father.

The plaintiff filed post-trial motions for the recovery of attorney fees under the Nursing Home Care Act and for a new trial based on the jury's failure to award compensation for loss of society.

B. Attorney Fees

The plaintiff signed a contingency fee contract, agreeing to pay one-third of any gross recovery for attorney fees. Since the judgment awarded by the jury was $1,650,547.86, she claimed attorney fees of one third of $1,650,547.86 or $550,182.62, plus costs of suit.

The trial court held a hearing on the plaintiff's attorney fee petition and decided that the contingent fee contract was not a reasonable basis on which to grant attorney fees. The plaintiff's attorney submitted an attorney fee bill of $543,187.50 based on time spent on the case and their hourly rate. They also claimed $25,000 in attorney fees for post-trial services resulting in total fees of $568,187.50.

The defendants challenged the amount

of the attorney fees on the basis of duplicate billings and inaccuracies, contending $309,610 was a reasonable fee. The trial court ruled the plaintiff was entitled to attorney fees of $309,610 plus $12,500, representing one-half of attorney fees for post-trial work and her costs of suit.

The First District affirmed the trial court's reduction of attorney fees. It said the starting point for calculation of attorney fees is the "lode star" approach, which is the number of hours expended on the litigation times a reasonable hourly rate. The court indicated this figure can be adjusted up or down based upon a range of factors including though not limited to, the difficulty of the issues involved, the skill required to perform the legal, and whether the plaintiff failed to prevail on unrelated claims. The court relied on *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), and *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App.3d 231, 671 N.E.2d 768, 219 Ill.Dec. 601 (1996).

South Shore attacked both the number of hours and the hourly rates claimed by the plaintiff as excessive and unreasonable. The First District decided that the trial court's reduction of plaintiff's attorney fees was not so unreasonable as to constitute an abuse of discretion. Further, the court held the trial court had no obligation to award plaintiff attorney fees based on her one-third contingent fee contract.

C. Loss of Society

The trial court ruled that the jury's decision to award zero damages for loss of society was not against the manifest weight of the evidence. The First District agreed with the plaintiff, however, finding that the jury improperly ignored a proven element of damage, the loss of society, since there was uncontroverted testimony by Sloan's daughters and the South Shore employees that the daughters were deprived of his society by his death. The appellate court traced the evolution of loss of society damages allowed under the Illinois Wrongful Death Act, 740 ILCS 180/2 (West 2008), as expounded in the cases of *Elliot v. Willis*, 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982), and *Bullard v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984). The court noted that the presumption that Sloan's next of kin had a reasonable expectation of the continuation of his life was never rebutted, and there was no evidence that the daughters were estranged from the deceased.

Also, the court stated that there was no evidence to support a jury finding that Sloan died of unrelated causes. In such a case, even absent the defendant's wrongful conduct, there would be no continuation of life to allow a recovery for loss of society. The court ruled that the unrebutted testimony permitted no reasonable inference other than that, if Sloan had lived beyond June 10, 2006, his daughters would have continued to enjoy his love, companionship and affection.

South Shore contended that the focus of the daughters' testimony was on their childhood memories of their father and their grief resulting from his death, neither of which form a basis of compensation for loss of society. The court acknowledged that the daughters' testimony included these subjects, but found they also offered unrebutted testimony of their continuing relationship with their father while he was a resident at South Shore and of the love, companionship and affection they shared with him until he died.

D. Conclusion

Watson's lesson includes the importance for lawyers representing plaintiffs seeking recovery of attorney fees from a nursing home not to rely only on a contingency fee contract, but to be prepared to prove their attorney fees based on the "lode star" method based on the number of hours they expended. *Watson* is also instructive of when loss of society damages will be allowed in nursing home litigation where the deceased resident may or may not have the type of relationship with family members that will support a loss of society award. ■

Can we e-file a notice of appeal

By John B. Kincaid, Mirabella Kincaid Frederick & Mirabella PC, Wheaton

On April 16, 2012, the Second District in *VC&M, LTD v. Andrews*, 2012 Ill.App. (2d) 110523 (hereinafter "*Andrews*"), held that an e-filed notice of appeal from DuPage County was ineffective to confer jurisdiction upon the Appellate Court.

Historically, the Illinois Supreme Cort in its Order Number M.R.18368 approved the 18th Judicial Circuit as a site for implementation of an electronic filing project on October 28, 2004, effective January 2, 2007. The Rule provides that in certain types of cases (law, arbitration, chancery, miscellaneous remedies and dissolution of marriage), e-filing is permitted and encouraged. There is no prohibition against e-filing a notice of appeal in M.R. 18368. The Court permits the filing of a Petition for Leave to Appeal to the Supreme Court electronically (Paragraph 3, Electronic Filing User Manual). In addition, Supreme Court Rule 303 does not prohibit e-filing a notice of appeal in e-filed cases.

When the 18th Judicial Circuit was selected as a pilot site, the DuPage Circuit Court promulgated local rules to accommodate the new procedure. Those rules (5.01, *et seq*.) refer to the Supreme Court Order M.R. 18368 as authorizing the procedure. Either a plaintiff in his complaint or a defendant in her answer can cause a case to become "electronically" designated (Rule 5.03(b)) provided that after such designation "thereafter the file shall be processed electronically."

DuPage County Local Rule Paragraph 5.03(d), the subject of this article, provides:

> (d) All appellate and post-judgment enforcement proceeding documents shall be filed and served in the conventional manner and **not by means of e-filing**." (Emphasis added).

Local Rule 5.06(d) provides that once a case becomes an e-filing case, the Clerk of the Court shall **only** accept and approve subsequent filings through an electronic vendor or the Clerk's computer workstation with certain exceptions. The Clerk is directed to refuse any document presented to be filed in paper form and shall return the document to the filing party with directions to file electronically.

Enter the case of *VC&M, LTD v. Andrews*. The underlying suit for a real estate brokerage commission against a homeowner qualified as an e-filing case in DuPage County, but it was not initially e-filed. The plaintiff, upon losing its case on dismissal of an amended complaint, filed its first e-filing document—a motion to reconsider—within the 30-day time limit. The trial court found that the filing was a nullity since the "motion to reconsider was not filed hard copy." A tardy hard copy filing failed to extend the time within which to file a notice of appeal. The plaintiff then e-filed a notice of appeal, contrary to the express prohibition in Local Rule 5.03(d).

The Second District dismissed the plaintiff's appeal for lack of jurisdiction, holding that Local Rule 5.03(d) sealed the plaintiff's fate. Questions raised by this case include the following:

(1) Can a local rule be utilized to trump a Supreme Court rule designed to discourage paper filings and encourage electronic transmission?
(2) Is a notice of appeal really an "appellate document" under Local Rule 5.03?
(3) If the Supreme Court intended a notice of appeal to be paper-filed in all cases, why didn't it so indicate in M.R. 18368?
(4) If e-filing was to be mandatory, why is the Circuit Court directed to reject any later paper document filing, presumably including a notice of appeal? (Local Rule 5.06)

Some cases are helpful in our consideration of these issues. *Vision Point of Sale v. Haas*, 226 Ill.2d 334, 875 N.E.2d 1065, 1080 (2007), held that although circuit courts have the power to adopt their own rules, they are powerless to change substantive law or impose substantive burdens upon litigants. One could argue that this circuit court rule affects the substantive rights of litigants and should yield to the Supreme Court Rule.

Further, a notice of appeal is not an "appellate document" since a notice of appeal filed only in the Appellate Court but not in the Circuit Court is a nullity. *First Bank v. Phillips*, 379 Ill.App.3d 186, 882 N.E.2d 1265, 1267 (2nd Dist., 2008) (appeal dismissed because the court lacked jurisdiction where the notice of appeal was not filed with the clerk of the circuit court). Thus, Local Rule 5.03 may not apply to a notice of appeal. In addition, there is no demonstrated prejudice to the appellee since he was advised of the nature of the appeal with the electronically-filed notice of appeal. See *Burtell v. First Charter Services*, 76 Ill.2d 427, 394 N.E.2d 380, 383 (1979) (notice of appeal will confer jurisdiction on an appellate court if the notice, when considered as a whole, fairly and adequately sets out the judgment complained of and the relief sought so that the successful party is advised of the nature of the appeal). It is unlikely that the Supreme Court, in creating an e-filing system and promoting it aggressively as the wave of the future, intended that it be used as a weapon to cut-off appellate rights based upon a technicality.

We are advised by the Supreme Court website that the following counties, in addition to DuPage, have also been designated as e-filing counties: Cook, Madison, St. Clair and Will. St. Clair County's Local Rule 11.02 is nearly identical to DuPage's Rule 5.03(d) prohibiting the e-filing of "appellate documents." Cook County Local Rule 09-01 provides only that "post-judgment collection matters" are specifically excluded from the pilot project, but there is no mention of "appellate documents." Madison County Third Circuit Court Rule 2 provides that "all appellate and post-judgment proceedings shall be served and filed in the conventional manner and not by means of e-filing." We were unable to gain access to any local Will County rule that may prohibit e-filing certain documents.

Other counties and circuits which have been e-filing-approved may well be amending these rules as we speak since they are silent on the issue. Every appellate practitioner should be scrambling nimbly to see if their local rules prohibit the e-filing of appellate and post-judgment proceeding documents.

On June 8, 2012, the Second District, *sua sponte*, issued a Certificate of Importance to the Illinois Supreme Court, pursuant to Supreme Court Rule 316, raising the question of whether the DuPage Circuit Court rule prohibits the electronic filing of a notice of appeal. On June 11, 2012, the Illinois Supreme Court accepted the case for review, assigning it docket number 114445. ■

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

September

Friday, 9/7/12- Chicago, ISBA Chicago Regional Office—Child Custody and the Military Family. Presented by the ISBA Family Law Section and the ISBA Military Affairs Committee. 8:25-4:00 pm; Reception 4-5 (lunch and reception included).

Friday, 9/7/12- Teleseminar—Valuing Closing Held Interests and Effective Planning without Discounts. Presented by the Illinois State Bar Association. 12-1.

Monday, 9/10/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Monday, 9/10/12- Friday, 9/14/12- Chicago, ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Presented by the Illinois State Bar Association. 8:30-5:45 daily.

Wednesday, 9/12/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Thursday, 9/13/12-Saturday, 9/15/12- Itasca, Westin Hotel—8th Annual Solo and Small Firm Conference. Presented by the Illinois State Bar Association. Time TBD.

Tuesday, 9/18/12- Teleseminar—Ethics in Pre-Trial Investigations. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/20/12- Teleseminar—Tax Planning for the Entrepreneur. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/20/12- Chicago, ISBA Chicago Regional Office (DNP)—Introduction to Improvisation for Lawyers: Basic Communication Skills for Public Speaking, Teaching and Presenting. Complimentary for ISBA Law Ed Faculty. 9-11; 12-2; 2:30-4:30

Friday, 9/21/12- Chicago, ISBA Chicago Regional Office—Introduction to Improvisation for Lawyers: Basic Communication Skills for Attorneys. Presented by the Illinois State Bar Association. 9-11; 12-2; 2:30-4:30.

Monday, 9/24/12- Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 2:30-3:30.

Tuesday, 9/25/12- Teleseminar—Individual Trustees-Duties and Potential Traps. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/27/12- Teleseminar—Breaking Up: Ethical Considerations When a Law Firm Dissolves. Presented by the Illinois State Bar Association. 12-1.

Friday, 9/28/12- East Peoria, Stoney Creek Inn—Deconstructing Delinquency. Presented by the ISBA Child Law Section. 8:00-4:45.

Friday, 9/28/12- Chicago, ISBA Chicago Regional Office—The Basics of the Americans with Disabilities Act. Presented by the ISBA Standing Committee on Disability Law. 9:15-12:45.

Friday, 9/28/12- Live Webcast—The Basics of the Americans with Disabilities Act. Presented by the ISBA Standing Committee on Disability Law. 9:15-12:45

October

Tuesday, 10/2/12- Teleseminar—Compensation Issues in Nonprofits. Presented by the Illinois State Bar Association. 12-1.

Monday, 10/8/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 9-10.

Monday, 10/8/12- Chicago, ISBA Chicago Regional Office—Advanced Workers' Compensation- Fall 2012. Presented by the ISBA Workers' Compensation Law Section. 9-4.

Monday, 10/8/12- Fairview Heights, Four Points Sheraton—Advanced Workers' Compensation- Fall 2012. Presented by the ISBA Workers' Compensation Law Section. 9-4.

Tuesday, 10/9/12- Teleseminar—Franchise Agreements: A Practical Guide to Reviewing and Negotiating. Presented by the Illinois State Bar Association. 12-1

Wednesday, 10/10/12- Webinar—Advanced Tips for Enhanced Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 9-10

Wednesday, 10/10/12- Thursday, 10/11/12- Chicago, ISBA Chicago Regional Office—A Primer on Administrative Law and Rulemaking. Presented by the ISBA Administrative Law Section; co-sponsored by the ISBA Civil Practice and Procedure Section, the ISBA Real Estate Law Section and the ISBA Energy, Utilities, Transportation and Telecommunications Section. All day both days.

Friday, 10/12/12- Chicago, ISBA Chicago Regional Office—Transitions, Economics and Ethics- Ready or Not! Presented by the ISBA Senior Lawyers Section. Half Day PM program.

Friday, 10/12/12- Bloomington, Holiday Inn and Suites—Fall 2012 DUI & Traffic Law Updates. Presented by the ISBA Traffic Laws and Courts Section. 9-4.

Tuesday, 10/16/12- Teleseminar—Understanding Financial Statements for Business Lawyers, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/17/12- Teleseminar—Understanding Financial Statements for Business Lawyers, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/17/12- Chicago, ISBA Chicago Regional Office—What Every Lawyer Should Know About Intellectual Property. Presented by the ISBA Intellectual Property Law Section. All day program. ■

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