Appellate Alert

National Appellate Practice Group 2009 in Review

Making new law

*Green v. Rogers*, 917 N.E.2d 450 (Ill. 2009) (*Melissa A. Murphy-Petros*).

In *Green*, *Melissa A. Murphy-Petros* convinced the Illinois Supreme Court to make new law with respect to pleading causes of action for defamation *per se*. As a matter of first impression, the Supreme Court held that such claims must be pled with the same specificity and particularity as that required in pleading fraud claims.

When the plaintiff’s request for a volunteer coaching position with the Little League was denied, he sued the president of the local Little League board for defamation *per se*, alleging “on information and belief” that his coaching request was denied because the defendant had told other Board members that he “abused players, coaches, and umpires” and “exhibited a long pattern of misconduct with children.” The trial court granted our motion to dismiss, brought on the grounds that the plaintiff’s allegations were insufficiently specific. The appellate court reversed and reinstated the complaint. We sought review by the Illinois Supreme Court, which the Court denied, although it granted our request for alternative relief pursuant to its inherent supervisory authority and ordered the appellate court to reconsider. The appellate court did so and reached the same result, so we again sought – and this time received – Supreme Court review.

Our principal argument before the Supreme Court was that defamation *per se* cases must be pled with specificity and particularity because the plaintiff is not required to prove damages. The appellate courts were previously split on this issue. In *Green*, the plaintiff made his allegations only “on information and belief” and offered no specifics in his complaint to back them up. The Supreme Court agreed with us and held – as a matter of first impression in Illinois – that allegations of defamation *per se* cannot be sustained unless they are pled with specificity and particularity akin to that required in fraud actions. *Daniel E. Tranen* handled *Green* in the trial court and appellate court (round one); Melissa handled the matter in the appellate court (round two) and in the Supreme Court (rounds one and two).


In *Union Carbide*, the Texas Appellate Court held as a matter of first impression that the plaintiff’s claims for a work-related injury against his employer’s successor-in-interest were barred pursuant to the exclusivity provision of the Workers Compensation Act, where those claims were based upon the predecessor employer’s negligence as opposed to the successor’s post-merger negligence. We not only made new law in *Union Carbide*, but we also achieved a stunning victory for our client – the reversal of a $7.5 million jury verdict against it and entry of a “take nothing judgment.”

In Dickie, the Illinois Appellate Court addressed the scope of the stream-of-commerce test for asserting personal jurisdiction over a foreign corporation in a product-liability action. This is an issue on which the five districts of the Illinois Appellate Court are currently divided, and which will undoubtedly reach the Illinois Supreme Court at some point. One group of courts holds that Illinois has personal jurisdiction over a foreign product manufacturer or designer where its product is placed into the United States’ “national” stream of commerce; another group holds that there can be personal jurisdiction in Illinois only where there is some evidence showing that the foreign entity affirmatively directed its product into Illinois.

Dickie is another step in the right direction for the defense bar. In Dickie, we persuaded the First District Appellate Court to hold that there was no personal jurisdiction over our client, a Taiwanese manufacturer of bicycle pedals, because there was no evidence showing that it directed its pedals specifically into Illinois. In so doing, the court implicitly overruled its prior precedent to the contrary, Saia v. Scripto-Tokai Corp., 851 N.E.2d 693 (Ill. App. 2006), reh’g denied (Ill. App. 2006), pet for leave to appeal denied, 861 N.E.2d 664 (Ill. 2006), pet. for writ of cert. denied, Tokai Corp. v. Saia, et al., 127 S. Ct. 2252 (U.S. 2007), a matter in which Melissa represented defendant Tokai Corporation. Dickie was handled in the trial court by Curt J. Schlom and John C. Hunter.


Another issue percolating in the Illinois appellate courts is the question of whether a vehicle manufacturer or designer has a duty to manufacture or design vehicles with which it is safe to collide. In 1973, the Illinois Supreme Court held that no such duty exists. In 1996, Illinois adopted several federal highway transportation regulations by reference. Since that time, plaintiffs injured in rear and side under-ride collisions with semi-trailer trucks have invoked these regulations as evidence of a duty to manufacture and design trucks and trailers with which it is safe to collide. Sadigh was one such case.

In Sadigh, the plaintiff’s decedent was killed when the vehicle in which she was riding slid underneath our client’s semi-trailer during a snow storm on I-94 in northern Indiana. The appellate court affirmed the dismissal of the complaint on the ground that the federal regulations did not trump the Illinois Supreme Court’s 1973 holding that there is no duty under Illinois common law to manufacture or design a vehicle with which it is safe to collide. The question presented in Sadigh is one that has provoked debate among Illinois commentators and reviewing courts, including the U.S. Court of Appeals for the Seventh Circuit, and we expect the plaintiff to seek review by the Illinois Supreme Court. Sadigh was handled in the trial court by Curt J. Schlom and Craig M. Derrig.


In this case of first impression, we obtained dismissal of a negligent misrepresentation claim heard in New York’s Appellate Division, First Department. Our client, an engineering firm, designed the heating and air conditioning system of a 32-story condominium building. The purchasers of a $4 million condominium unit in the building alleged that the specifications of the HVAC system as set forth in the offering plan misstated the specifications.
The developer of the condominium included in its offering plan information about our client, as well as information from its engineering report. The Appellate Division held that this did not give rise to an actionable claim of negligent misrepresentation in favor of the purchasers of the condominium unit, who claimed that the HVAC in the apartment was inadequate. In a split three-to-two decision, the court held that because the purchasers had no direct contact with the engineering firm, they could not sue for negligent misrepresentation. Because of the split, the plaintiff has a right to appeal to the New York Court of Appeals. 


In *Brooks*, we represented the appellant general contractor before the New York Court of Appeals, the state’s highest court. The plaintiff sued the general contractor for injuries he sustained from a fall while employed by the company’s subcontractor. The accident happened during the renovation and restoration of a highway overpass. The general contractor filed a third-party action against the subcontractor for partial contractual indemnification – that is, indemnification for the subcontractor’s negligence only. Summary judgment was granted to the plaintiff on liability pursuant to Labor Law §240(1). The matter then proceeded to a bifurcated jury trial. At the close of all evidence in the liability phase, the trial court granted the subcontractor’s motion for a directed verdict on the contractual indemnification claim. The Appellate Division, Second Department affirmed, reasoning that claims for partial contractual indemnification are barred by New York General Obligations Law § 5-322.1. The plaintiff and the general contractor ultimately settled the main action for $3 million.

The Court of Appeals reversed the dismissal of the general contractor’s third-party action against the subcontractor and remanded for a new trial on the apportionment of liability. The court agreed with us, as a matter of first impression, that New York General Obligations Law allows a partially negligent general contractor to enforce a partial contractual indemnification provision against its subcontractor for that portion of damages attributable to the negligence of the subcontractor. *Brooks* was briefed by Rich and Melissa, and argued by Melissa.


In this case of first impression, the Appellate Division, Third Department held that unclean hands by an insured’s insurance company could bar efforts by its insured to obtain indemnification from a third-party defendant. Nurse Jane Szary was employed by Ob/Gyn Associates, which was sued by the family of a patient who allegedly died due to the negligence of Nurse Szary. Nurse Szary was a third-party defendant. At trial, it was found that Nurse Szary was the solely negligent tortfeasor, and the plaintiff was awarded about $2 million. Because Nurse Szary was found to have been the active tortfeasor, Ob/Gyn was awarded judgment against her. We appealed, arguing, among other things, that Ob/Gyn’s insurer and attorney (who was following the insurer’s directions) essentially conspired with the plaintiff’s counsel to place all the blame on Nurse Szary, so that there would be a complete pass through. The Appellate Division agreed that the insurer acted in bad faith, and dismissed the claim for indemnification.

In this case of first impression, the Appellate Division, Second Department held that a hospital cannot be held liable for negligently failing to follow a “Do Not Resuscitate” order. It was claimed by the family of a patient that they had given a DNR order, instructing the hospital not to resuscitate him. However, contrary to the DNR order, the hospital negligently resuscitated him twice, causing him pain and suffering, including the additional days of suffering attendant to the additional days of life, until he expired. Analogizing the case to the “wrongful life” line of cases, the Appellate Division agreed with us that there could be no claim for “wrongful living” i.e., wrongfully causing someone to live an extra few days, even if the patient needlessly suffers thereby.


The plaintiff alleged that she sustained emotional distress as a result of an IVF clinic’s negligence with regard to clerical errors that prevented an embryo transfer. The court held that she could not recover for emotional injuries. Under New York law, there may not be (save for exceptional cases) recovery for purely emotional injuries; there must also be a physical injury. The court stated that the plaintiff’s preparation for the surgery, and her attendant pain and discomfort, could not be deemed a physical injury that would provide the predicate for recovery for emotional injury.

Davis v. CornerStone Telephone Company, 61 A.D.3d 1315 (3d Dep’t 2009) (Peter A. Lauricella and Benjamin F. Neidl).

Wilson Elser’s client, CornerStone Telephone Company, is a local exchange carrier based in Troy, New York, with customers throughout upstate New York and in Western Massachusetts. The plaintiff, Larry Davis, is a technology entrepreneur who was formerly a partner of some of CornerStone’s principals in a now-defunct consulting business. Davis claimed that he had invested $100,000 in the consulting business in 2001. He also claimed that the consulting business, in effect, had transformed into CornerStone Telephone Company – i.e., that the two businesses were alter egos. Davis contended that he was, therefore, a de facto equity holder in the telephone company, and entitled to a sizeable share of its profits to date. His 155-page complaint pled 27 causes of action, including breach of contract, breach of fiduciary duty, fraud, and theft of corporate opportunities. Peter and Ben secured a pre-answer dismissal, based on the statute of limitations, documentary evidence, and a failure to state a cause of action, and the plaintiff appealed.

The Appellate Division, Third Department affirmed the dismissal of 26 out of the 27 causes of action. The Appellate Division modified the Supreme Court’s decision by restoring only one, minor cause of action for “unjust enrichment.” However, the restored “unjust enrichment” claim does not entitle Davis to an equity stake in the telephone company. Instead, his damages will be limited to reimbursement for some minor “benefits” that Davis allegedly provided to the principals of CornerStone for a few months in 2001 (such as discounted office space).
Achieving strategic advantages for our clients


The plaintiff instituted suit in federal court alleging a violation of the Jones Act and common-law negligence. Our clients (originally represented by another law firm) were brought into the case about a year later, and discovery was expedited. Predecessor counsel was found by the district court to have failed to timely comply with the discovery orders, and to have otherwise responded haphazardly and disingenuously, resulting in the dismissal of the answer and cross claims. Wilson Elser was thereafter substituted in as counsel. We appealed to the Second Circuit. During the appellate phase, our clients settled with the plaintiff for $2.5 million, but structured the settlement so as to preserve our clients’ right of post-settlement contribution against the co-defendants, which is permitted under the Jones Act.

The Second Circuit reversed the district court’s order, and reinstated the cross-claims against the co-defendants, thus permitting our clients to seek contribution. The Second Circuit held that before our clients’ answer was stricken, the district court should have considered imposing sanctions upon predecessor counsel. The case was remanded for a determination on whether sanctions would be warranted, and also whether our clients’ motion to implead further parties should be granted.


In *Certain Underwriters*, *Josh M. Kantrow* defeated a Fortune 500 corporation’s claim for coverage for an $11 million underlying verdict which had already been upheld by the Delaware Supreme Court and an additional $2 million in defense costs. The Appellate Division agreed that the underlying case was not covered by the $25 million fiduciary liability policy at issue, despite the fact that the underlying complaint arguably asserted a covered claim, because the basis of the underlying ruling against the insured related solely to breach of contract.

*Keaney v. City of New York*, 881 N.Y.S.2d 143 (N.Y. App. 2d Dep’t 2009) (*Mathew P. Ross* and *Debra A. Adler*).

The plaintiff suffered a broken right shoulder as a result of the defendant’s alleged negligence. The fracture healed and the plaintiff’s medical treatment at time of trial was limited to use of painkillers three to four times per week. The plaintiff’s expert testified that the plaintiff might benefit from arthroscopic surgery, but surgery had not yet been performed. The jury awarded the plaintiff $1.6 million for pain and suffering. On appeal, we obtained a reduction of that award to $500,000.


In this case, the plaintiff suffered the loss of her eye as a result of the defendants’ alleged negligence. The jury awarded $2.4 million. On appeal, we obtained a reduction of the award to $1.2 million.
Victories across the country

Our 2009 victories also include the opinions listed below:


*A.S.A. Produce Co., Inc. v. Everest Nat. Ins. Co.*, 318 Fed. Appx. 589 (9th Cir. 2009) (where there is a genuine dispute over coverage between insurer and insured, there is no bad faith) (Robert Cooper and D. Victoria Labrie).


*Farrell v. City of New York*, 889 N.Y.S.2d 103 (N.Y. App. 2d Dep’t 2009) (appellate court granted summary judgment to the defendants; the defendants did not make special use of public street abutting their premises) (Richard E. Lerner and Patrick J. Lawless).

*Ferluckaj v. Goldman Sachs*, 880 N.Y.S.2d 879 (N.Y. 2009) (Court of Appeals granted summary judgment to the defendant tenant on all labor law claims; the defendant did not hire the plaintiff window washer, did not control her work, and had not yet taken possession of premises at the time of her injury) (Christine A. Bernstock).

*Frometa v. Diaz-Diaz*, unpublished, 2009 U.S. App. LEXIS 21922 (2d Cir. 2009) (affirmance of defense verdict in rear-end-collision case, wherein the plaintiff who underwent numerous surgeries after the accident, was found to have sustained no injury whatsoever as a result of the accident, the plaintiff’s contention that the defense
counsel’s comments prejudiced the jury against her were deemed insufficient grounds to reverse) (Richard E. Lerner).


*Gotay v. Breitbart*, 884 N.Y.S.2d 677 (N.Y. 2009) (Court of Appeals granted summary judgment to the defendants; legal malpractice claim was time-barred and continuous representation doctrine did not apply) (Richard E. Lerner and Patrick J. Lawless).

*Gratt v. Etour and Travel, Inc.*, 2009 U.S. App. LEXIS 21655 (2d Cir. 2009) (putative class action for alleged violations of Telephone Consumer Protection Act dismissed because the plaintiff could not establish the jurisdictional predicate for class-action certification or diversity jurisdiction) (Richard E. Lerner and Debra A. Adler).


*McMillian v. Sheraton Chicago Hotel & Towers*, 567 F.3d 839 (7th Cir. 2009) (dismissal of personal injury action affirmed; the plaintiffs failed to establish damages at or exceeding the jurisdictional requirement of $75,000 per plaintiff) (Melissa A. Murphy-Petros).


*Nevers v. Electric Mobility Corp.*, 23 So. 3d 1251 (Fla. App. 3d Dist. 2009) (jury verdict for the defendant manufacturer of a mobility scooter affirmed, based upon finding that the scooter was not defective; the plaintiff driver was severely injured when he was struck by another motorist while trying to remove the scooter he was
transporting from the roadway after it detached from his vehicle; $6 million claimed damages) (Anthony P. Strasius and Edgardo Ferreyra, Jr.).

Nicholas v. New York City Housing Authority, 885 N.Y.S.2d 82 (N.Y. App. 1st Dep’t 2009) (premises liability; summary judgment for the defendant affirmed; no actual or constructive notice of alleged defect) (Patrick J. Lawless).


Regan v. Starcraft Marine LLC, 524 F. 3d 627 (5th Cir. 2008) (third-party complaint of boat manufacturer against United States improperly dismissed under the Feres doctrine, which bars tort suits against the United States by or on behalf of service members whose injuries arise out of activity incident to military service. The allegedly injured plaintiff, an off-duty soldier, was not engaged in activity incidental to military service when he fell off a pontoon boat rented by a fellow off-duty soldier and used by both for recreational purposes in non-military waters) (Francis P. Manchisi, E. Stratton Horres Jr., and Cathlynn Cannon).

Reyes v. Sequeira, 889 N.Y.S.2d 451 (1st Dep’t 2009) (settlement agreement reached in open court held unenforceable and reinstated since it incorporated all material terms of the settlement contract) (Richard E. Lerner and Judy C. Selmeci).


Saladin v. Prudential Ins. Co. of America, 337 Fed. Appx. 78 (2d Cir. 2009) (summary judgment for the defendant affirmed; the plaintiff failed to exhaust administrative remedies) (Theresa B. Marangas, Peter A. Lauricella, and Elizabeth J. Grogan).

Schultz v. Shreedhar, 886 N.Y.S.2d 484 (N.Y. App. 2d Dep’t 2009) (hospital not vicariously liable for the alleged negligence of attending physician as he was not a hospital employee) (Richard E. Lerner and Judy C. Selmeci).

Seelig v. Burger King Corp., 888 N.Y.S.2d 123 (N.Y. App. 2d Dep’t 2009) (complaint dismissed; open and obvious condition which was not inherently dangerous) (Stuart A. Miller and Debra A. Adler).


In re Permian Tank & Mfg., Inc., 11-09-00294-CV (Tex. App., Eastland 2010) (orig. proceeding). (After the trial court refused to enforce an arbitration agreement in a case brought by a former employee, we successfully enforced the arbitration agreement through a mandamus proceeding at the appellate court.) (Lee L. Cameron Jr. and Jennafer G. Groswith).

*Prior results do not guarantee a similar outcome.