

Trial Briefs

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

Meet the New Section Council Chair: Deanna Litzenburg

BY SHAWN WOOD



The ISBA Civil Practice and Procedure Section Council welcomes Deanna Litzenburg as its new chair. Deanna is a shareholder with Mathis, Marifian and Richter, Ltd. in Belleville whose commercial litigation, employment and civil defense practice extends throughout Illinois. *Trial Briefs* caught up with Deanna to talk about the experience she brings to the role of section council chair and her goals for the

Continued on next page

Meet the New Section Council Chair: Deanna Litzenburg

1

Personal Jurisdiction Remains a Fact-Intensive Inquiry

1

Can Punitive Damages Become Compensatory Damages?

4

Personal Jurisdiction Remains a Fact-Intensive Inquiry

BY GEORGE BELLAS & KASEY HUGHES

The U.S. Supreme Court has created another level of uncertainty with a ruling that changes the landscape for establishing personal jurisdiction. *Mallory v. Norfolk Southern R. Co.*, 600 U.S. ___ (2023), held that a company can be sued in any state in which it is registered to do business if that state requires consent to

general jurisdiction as a prerequisite to registration.

Previously, absent specific jurisdiction, companies could only generally be sued in their place of incorporation and/or where their principal place of business was located. However, certain states

Continued on page 3

Meet the New Section Council Chair: Deanna Litzenburg

CONTINUED FROM PAGE 1

coming year.

Let's start with your background. Your practice extends from commercial litigation to defending employers and health care professionals, to serving as a mediator and arbitrator, correct?

That's correct. It's a variety of civil practice. I started out originally at a firm in St. Louis doing exclusively worker's compensation defense and decided I didn't want to be so narrowly focused and so I came over here to the firm 22 years ago and expanded. I still do worker's comp. defense as a small piece of my practice but I have greatly expanded so, a lot of commercial litigation, trust and estate litigation, banking. So yeah, it's a wide variety of practice.

Does your practice bring you to courts throughout the state of Illinois?

They do. During this year's ISBA Allerton Conference, I spoke with a number of lawyers who only practice in Cook County. I started thinking that day – how many different counties that I'm in, as my practice extends to Madison and St. Clair, which are the third and twentieth Illinois judicial circuits, and then I have cases the 4th, 2nd, and 24th, and then I also go up north. I've got some in Cook County, some in Kendall County, so yeah, I'm kind of around the state right now.

When did you first become active with the Illinois State Bar Association?

I've always been a member, but I did not become active until I attended an Allerton Conference, probably four Allertons ago, at the invite of former third circuit judge, Illinois Judges Association president, and long-time Civil Practice and Procedure Section Council member, Barbara Crowder. Judge Crowder invited me to attend, and I loved Allerton. I then kept submitting myself as a nominee for the Section Council and have been involved ever since. I sincerely thank Barbara Crowder for inviting me and encouraging me.

What have you enjoyed most about serving on the Civil Practice and Procedure Section Council?

Above all, I've enjoyed getting to know lawyers throughout the state and have learned so much from the other members. The discussions we have at our meetings about recent precedent and changes to the Illinois Supreme Court rules are amazing. I love both the in-person and online debates and alerts, as they really do keep you up to date. In fact, there was one that came up recently where I circulated it within my office and it reached a few of our attorneys who were in mediation. Learning about changes in the law in real time changed the tone of the negotiations and was instrumental to a successful outcome.

What are some of your goals for the Section Council during your year as chair?

I think Emily Masalski did a terrific job over the last year in finding ways to broaden our participation and get new lawyers involved. Hopefully, we can continue to build on that success in the coming year. We have a lot of terrific lawyers on our Section Council. I would love to foster a spirit of inclusion to ensure all of the members feel they have a voice and opportunity to contribute and participate. It's okay to disagree among respected colleagues. Perspectives are important. Along these same lines, we will also be working to encourage more of our young lawyers to take a more active role, to stay connected, to confirm what interests them, and to ensure the work we are doing continues to evolve and remain relevant to all of our members.

And of course (shameless plug), striving for 100 percent participation by section council members in terms of article submissions for Trial Briefs, correct?

Absolutely. Everybody needs to participate in the submission of two articles per year for *Trial Briefs* and also to assist with our Continuing Legal Education

Trial Briefs

This is the newsletter of the ISBA's Section on Civil Practice & Procedure. Section newsletters are free to section members and published at least four times per year. Section membership dues are \$30 per year. To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR

Hannah Reed Lamore
Shawn Wood

PUBLICATIONS MANAGER

Sara Anderson

✉ sanderson@isba.org

CIVIL PRACTICE & PROCEDURE SECTION COUNCIL

Deanna L. Litzenburg, Chair
Michelle J. Rozovics, Vice-Chair
Carlos A. Vera, Secretary
Emily N. Masalski, Ex-Officio
Heather A. Begley
George S. Bellas
Hon. Joel L. Chupack
Caroline Mazurek Cozzi
Hon. Eugene G. Doherty
Derek Dominguez
Harry L. Dubnick
Glenn R. Gaffney
David J. Handley
Robert Handley
Hon. Russell W. Hartigan
Khalid J. Hasan
John J. Holevas
Nicholas Jacob Kamenjarin
Blake James Kolesa
Hannah Reed Lamore, Newsletter Co-Editor
Andrew J. Mazzuca
Hon. Timothy J. McJoynt
Hon. Brian R. McKillip, Ret.
Ronald D. Menna
Gregory Edward Moredock
Thomas M. Olson, Jr.
Prof. Jeffrey A. Parness
Cathy A. Pilkington
Bradley N. Pollock
William J. Quinlan
Mark A. Rouleau
Scott B. Sievers
Joseph A. Souligne
Erika M. Washington
David A. Weder
P. Shawn Wood, Newsletter Co-Editor
Mark L. Karno, Board Liaison
Alonzo Alexander, Staff Liaison

DISCLAIMER: This newsletter is for subscribers' personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

programs, because we have a lot of pressure this year in connection with our CLE. Our Section Council, for whatever reason, has fallen off with respect to CLE planning, perhaps due in part to the pandemic. It remains a priority to get back on track to produce quality CLE content for our members.

What advice do you have for new members of the section council or attorneys new to the ISBA overall?

Just jump in. Find new ways to get involved. Your voice and contributions

matter, so don't be afraid to sign up and speak up. It can be intimidating walking into a room of judges and lawyers who have been practicing for 40+ years but, they are welcoming. We all want you to be there, and we want you to be involved.■

Shawn Wood is a partner in the Chicago office of Seyfarth Shaw LLP and serves as the national chair of the firm's commercial litigation practice group.

Personal Jurisdiction Remains a Fact-Intensive Inquiry

CONTINUED FROM PAGE 1

require consent to general jurisdiction as a condition of registration. *Mallory* involved a Pennsylvania law treating registration to do business “as a foreign corporation” as a “sufficient basis” for “general personal jurisdiction” over that corporation.

In *Mallory*, Norfolk Southern Railway employed plaintiff for nearly 20 years in both Ohio and Virginia. After plaintiff contracted cancer, he alleged the railroad was responsible, claiming his work exposed him to carcinogens causing his illness. Plaintiff sued defendant in Pennsylvania state court under a federal scheme that allows railroad workers to pursue their employers in court for work-related injuries. The defendant, however, objected on personal jurisdiction grounds, claiming the Fourteenth Amendment's Due Process clause did not permit it to be sued in Pennsylvania.

Plaintiff responded with the winning argument: as long as Northern Southern had registered to do business in Pennsylvania, it agreed to appear in Pennsylvania courts to answer a claim.

Finding for the plaintiff, SCOTUS's majority based its ruling on the 1917 decision in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 37 S. Ct. 344 (1917). In *Pennsylvania Fire*, the Missouri state courts could exercise personal jurisdiction over a Pennsylvania insurance company in a lawsuit brought by an Arizona mining company over a fire insurance claim

for the mining company's Colorado gold smelter that was destroyed by lightning. Missouri courts were permitted to exercise jurisdiction over the Pennsylvania insurer because it had registered to do business in Missouri under a state statute that required out-of-state companies to appoint an official to accept service of process in Missouri.

The Pennsylvania law at issue provided an out-of-state corporation “may not do business in this Commonwealth until it registers with” the Department of State. 15 Pa. Const. Stat. § 411(a). In registration, a company must identify an office that it will continuously maintain in Pennsylvania. § 411(f); 412(a)(5). Most importantly, Pennsylvania law recites that “qualification as a foreign corporation” shall permit state courts to “exercise general personal jurisdiction” over a registered foreign corporation just as they can do over domestic corporations. 42 Pa. Const. Stat. § 5301(a)(2)(i).

As a Pennsylvania registered company for over two decades, the Court ruled Norfolk Southern had “both the benefits and burdens shared by domestic corporations – including amenability to suit in state court on any claim.”

However, the consent-by-registration requirement found in *Pennsylvania Fire* did not overrule *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *Pennsylvania Fire* stands for the proposition

that an out-of-state corporation can consent to jurisdiction, whereas *International Shoe* only created an additional theory of personal jurisdiction over out-of-state corporations when the corporation had not consented to a state's jurisdiction (i.e., minimum contacts).

So far, Pennsylvania is the only state to pass a law requiring all corporations doing business in the the state to consent to being sued in Pennsylvania court by anyone, for the conduct the corporation engaged in anywhere. Georgia Supreme Court has also applied a consent theory to hold that corporations choosing to do business in that state implicitly consent to a general jurisdiction there. *See* Slip. Op. at 9-10 & n.2 (Barrett, J., dissenting).

Unlike in Pennsylvania, the Illinois Business Corporation Act of 1983, 805 ILCS 5/1.01, et seq. does not have a similar personal jurisdiction consent provision at issue in *Mallory*. Illinois would have personal jurisdiction over a registered foreign corporation on all matters notwithstanding whether the minimum contacts requirement displays specific jurisdiction if it were to enact a similar provision.

The concern remains how this ruling might lead to increased amounts of forum shopping. But, in the future, defendants still can assert personal jurisdiction challenges when sued in an unfavorable forum that do not meet the ordinary standards of specific or general personal jurisdiction. Conversely,

plaintiffs in inter-corporate disputes should also be alert to the possibility that consent-by-registration may increase the number of forums available.

In his concurrence, Justice Alito set forth a road map for defendants to challenge the constitutionality of Pennsylvania's "consent-by-registration" statute through the

dormant Commerce Clause. On remand, Pennsylvania will address the grounds for challenge to the Pennsylvania statute and general jurisdiction.

Bottom line, we are still dealing with a fact-specific inquiry for determining personal jurisdiction. ■

George Bellas is the Senior Partner in the Park Ridge Law Firm of Bellas & Wachowski.

Kasey Hughes is a second year student at DePaul University Law School.

Can Punitive Damages Become Compensatory Damages?

BY ROBERT HANDLEY

In *Midwest Sanitary Service, Inc., et al. v. Sandberg Phoenix & Von Gontard, P.C., et al.*, 2022 IL 127327 (Sept. 22, 2022), Plaintiffs filed a legal malpractice case against their attorneys individually and their law firm. Plaintiffs' suit for malpractice claimed that Defendants were negligent in the trial of their case; and, as a result of their negligence, they were required to pay and did pay punitive damages in the sum of \$625,000, plus compensatory damages. The Defendants filed a motion to dismiss the punitive damages portion of the claim, arguing that Illinois' public policy, as set forth in 735 ILCS 5/2-1115, prohibits Plaintiffs in legal malpractice cases from recovering punitive damages from attorneys.

735 ILCS 5/2-1115 provides in part as follows:

"Sec. 2-1115. Punitive damages not recoverable in healing art and legal malpractice cases. In all cases, whether in tort, contract or otherwise, in which the Plaintiff seeks damages by reason of legal . . . malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed."

The circuit court denied the Defendants' attorneys motion to dismiss but certified the following question for immediate appeal pursuant Illinois Supreme Court Rule 308:

"Does Illinois' public policy on punitive damages and/or the statutory prohibition

on punitive damages found in 735 ILCS 5/2-1115 bar recovery of incurred punitive damages in a legal malpractice case where the client alleges that, but for the negligence of the attorney in the underlying case, the jury in the underlying case would have returned a verdict awarding either no punitive damages or punitive damages in a lesser sum?"

The Illinois Appellate Court affirmed the judgment of the circuit court and also answered the question in a negative. The Illinois Supreme Court allowed the appeal. They also allowed the Illinois Defense Counsel to file an *amicus curiae* brief.

In the underlying case, an employee of Defendant filed a complaint for a retaliatory discharge. After the trial, he was awarded \$160,000 in compensatory damages and \$625,000 in punitive damages. In their legal malpractice case, Plaintiffs claim their attorney breached their duty in the underlying action because they failed to disclose witnesses, failed to disclose voicemails, failed to object to language of the limiting instruction, failed to tender an alternative instruction and committed other errors, which they claimed resulted in the award for the compensatory and punitive damages. The Defendants' attorneys filed a 2-619 motion seeking to strike the request for punitive damages as violative of Section 2-1115 and Illinois public policy.

Initially, the court analyzed the requirements of proof in a legal malpractice action. They discussed the requirement that the Plaintiff would have to prove the "case within a case." They analyzed the proximate cause and "but for" requirements. They also discussed Plaintiff's burden of proving the damages were incurred because of the attorney's negligence. They noted that even if negligence is established, unless the Plaintiff can show the negligence proximately caused the punitive damages against Plaintiff, the case will fail.

The court next distinguished punitive or exemplary damages from compensatory damages. They looked at cases where legal malpractice was claimed because the client allegedly *lost* its recovery of punitive damages due to the alleged malpractice. In other words, they discussed whether the Plaintiff in a legal malpractice case can recover lost punitive damages that were allegedly *not recovered* because of their attorney's negligence.

Under those circumstances, they agreed with the California court which found that 1.) imposing liability for lost punitive damages against negligent attorneys would neither punish the culpable tortfeasor; nor 2.) deter others from committing similar wrongful acts. The court also added that permitting recovery of lost punitive damages as compensatory damages in the

malpractice case violates the public policy against speculative damages, as the punitive damages requires a moral determination as opposed to a factual determination based on actual damages. Also, there are different standards of proof for punitive damages versus compensatory damages. The court also discussed other policy issues concerning punitive damages.

Nonetheless, they found the case at bar distinguishable. In this case, permitting Plaintiff to recover the punitive damages it actually paid would not punish the attorney Defendants. Instead, the punitive damages became an element of the claim for compensatory damages. An award of punitive damages actually paid would make Plaintiff whole because it replaces the money Plaintiff paid in the underlying action.

Also, because the Plaintiff actually paid the punitive damages, and it is a known amount—\$625,000—there would be no

speculation in the legal malpractice case. In other words, the jury in this case would not have to make the moral determination of the amount of punitive damages. In essence, the court reasoned the punitive damages under these circumstances are compensatory to Plaintiff.

Further, because these damages were already paid, the court found that this is not a situation where the jury is considering the lost shot at punitive damages at trial. There is no proof issue as far as the different burdens of proof are concerned. The court further reasoned that there is no risk of a societal cost, i.e., possibly subjecting the Defendants to a greater liable or consumers running the risk of not being able to obtain legal services or obtain a recovery from legal malpractice, because the damages were already set.

Based on these considerations, the Illinois Supreme Court concluded that the trial and appellate courts would be affirmed and

735 ILCS 5/2-1115 does not bar recovery of punitive damages under the circumstances of this case.■

Robert Handley is a partner the law firm of BURKE & HANDLEY, P.C., 799 Roosevelt Road, Building 6, Suite 108, Glen Ellyn, Illinois 60137.

Announcing **TWENTY | 20** *by LexBlog, Inc.*

Interested in having a legal blog but don't have time for the setup and maintenance?

LexBlog can help!

ISBA members receive a blog **FREE** for the first 6 months, and then **\$39.99/month** thereafter, with no setup fees and the blog will automatically be featured on Illinois Lawyer Now.



ILLINOIS STATE
BAR ASSOCIATION

For more information, visit isba.org/lexblog