



Patton & Ryan LLC
Attorneys at Law

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Issue 16

PATTON'S GENERAL TORT NEWS Summer/Fall 2009

A Word From John W. Patton, Jr.

The staff at Patton & Ryan wish you well.

Please call me at your convenience if we can assist you in any way. - John

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PATTON & RYAN STEP IN AT LAST MINUTE AND ACHIEVE FAVORABLE SETTLEMENT IN PRODUCT LIABILITY CASE

Thomas Knabe v. RPM International, Inc.

No.: 2003 L 012069

After an aerosol paint can exploded and seriously scarred the Knabes both physically and mentally, they sued the manufacturer. Shortly before trial, plaintiffs were still demanding \$10 million while defendant denied liability. The parties tried to mediate but could not bridge the multimillion dollar gap, so the defense brought in Patton and Ryan to try the case.

Only a few weeks before trial, Patton & Ryan was dropped into a products liability case resulting from the explosion of a can of aerosol spray paint. The Plaintiffs in the case had been demanding nearly \$10 million and mediation had not been successful. On October 9, 2001, Laura Knabe and her two small children went into their basement to get Halloween decorations. Suddenly, a spray can fell off a shelf, ruptured and spun wildly while spraying paint vapors everywhere. A nearby pilot for the water heater ignited a fireball that severely burned Alexandra, age 7, and Nicholas, age 3. Laura with her son in her arms ran outside suffering burns in the process. Meanwhile, Alexandra saved her sleeping two month old sister upstairs and earned the Girl Scout Lifesaving Medal.

Alexandra suffered 3rd degree burns causing significant permanent scarring on her left calf, thigh and hip. She was admitted to two different hospitals and underwent extensive treatment including numerous skin grafts and debridements. Future plastic surgery is required to reduce the scarring near her ankle. She is embarrassed by her condition and has received psychological treatment. Nicholas suffered burns to his face and both arms. He also underwent extensive and aggressive treatment. He has permanent scarring on both arms and a discoloration on his face. Laura Knabe suffered minor burns but was prevented from returning to work due to her injuries and the increased caretaking responsibilities caring for her children.

At an early date, plaintiffs thought about their case and aggressively preserved damages evidence. They promptly retained counsel who began collecting evidence. Plaintiff's counsel and experts were on the scene and in the hospitals, immediately taking pictures. Not only did they photograph the burns but also the debridement and surgical treatment. This captured heart wrenching footage of agony and the children's intensely painful ordeal.

Plaintiffs' expert conducted numerous tests to show how easy the cans were to puncture. Tapes of this testing also showed how the fumes could ignite and essentially gave plaintiffs a reenactment. Numerous dropC tests of the aerosol cans revealed how falls from even low heights could puncture a can. When the defense called upon Patton & Ryan there was no evidence to challenge plaintiffs' video proof of defendant's cans' vulnerability to punctures from such benign falls. The defense expert even had to admit that a falling can could rupture. While he believed a fall did not cause the subject explosion, he had no test or other proof to support much less confirm his opinion. The defense was in a bind.

Patton & Ryan quickly recognized the glaring, and sharp contrast between the weakly supported defense expert and the extensive workup behind plaintiffs' theories. The trial team, led by John Patton and Michael Vranicar, began aggressively challenging the Plaintiff on multiple fronts. By leveraging technology, Patton & Ryan was able to conduct depositions in three states over a relatively short time period while controlling costs at an acceptable level.

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KNABE v RPM, Inc.

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Although trial was only weeks away, the defense was able to re-depose Plaintiff's experts and conduct additional discovery. Armed with investigation and research, they vigorously attacked plaintiffs' expert's opinions and qualifications. Testimony in different cases and consultation with other experts provided fertile ground for new lines of cross examination.

New research into the effect on plaintiffs' lives, uncovered evidence that Alexandra continues to play soccer and excel at school despite her claimed emotional trauma. She graduated from middle school with honorable mention and had been on the student council. In high school she is a varsity starter in girl's soccer.

New interviews with witnesses uncovered helpful information about claims of similar incidents. Contacting former employees for the first time produced cooperative witnesses with valuable testimony. Further, we were able to thwart all efforts by plaintiffs to turn the witnesses against us.

The newly aggressive defense brought plaintiffs back to the table for successful negotiations on behalf of our clients. While the resulting settlement is confidential, it was very favorable to our client. Plaintiffs even relented and gave in to our request for settlement confidentiality. ●

READY: SUPREME COURT SAYS SETTLING DEFENDANTS DO NOT GO ON VERDICT FORM

The legacy of the *Ready* decision continues to shape Illinois law, particularly in light of recent decisions handed down by the Illinois Appellate and Supreme Courts. If you have kept up with our prior newsletters, you have undoubtedly read about the ongoing battle over what is essentially a simple question—who are “defendants sued by the plaintiff”? Despite the simplicity of this question, Illinois Courts have struggled and issued contradictory opinions when answering this question.

At issue is whether defendants who settled before trial should be placed on the verdict form for apportionment of fault. As discussed in our prior newsletter, a determination of who is on the verdict form can drastically impact a jury's allocation of fault among several defendants. This issue becomes particularly important when one defendant believes its liability exposure hovers around 25%. Pursuant to the Contribution Act, (735 ILCS § 5/2-1117) a defendant found under 25% liable is only severally liable for plaintiff's medical costs—and not the much more costly and often over-inflated “pain and suffering” and “loss of a normal life” damages.

How the jury allocates fault, however, is directly impacted by the number of defendants at trial and the amount of evidence against those defendants that is deemed admissible. Since the jury's allocation of fault must add up to 100% on the verdict form, it becomes obvious that allocation of fault among ten defendants is preferable to allocation between two defendants. And while a case may start out with ten named defendants, it may not arrive at trial with that same number. Inevitably, some parties will be dismissed and some will settle with the plaintiff. But the parties that do proceed to trial will certainly seek contribution for the fault of their co-defendants pursuant to the Contribution Act. And, pursuant to the Contribution Act, that will include all “defendants sued by the plaintiff.” This, of course, brings us full circle. Who precisely is a “defendant sued by the plaintiff?”

For quite some time, the answer to this question has depended on who you've asked. According to the Fifth District of the Illinois Appellate Court, it meant “sued at the time of trial.” This meant that all settling defendants stayed off the verdict form. *Blake v. Hi-Ho Restaurants*, 273 Ill. App. 3d 372 (5th Dist., 1995). Not only were they off the verdict form, but any evidence of their culpability was excluded from trial. However, if you asked the Fourth District, they would say just the opposite—that settling defendants remain on the verdict form. *Skaggs v. Senior Services of Illinois*, 355 Ill. App. 3d 1120 (2005).

In 2006, Patton & Ryan dealt with this precise issue in the case of *Ready v. United-Goedecke Services, Inc.* At trial, the circuit court refused to place settling defendants on the verdict form and refused defendant's jury instruction on sole proximate cause. On appeal, the First District overruled the circuit court and held that settled defendants should be placed on the verdict form. They wrote:

Here, we agree with United . . . that a remaining defendant's culpability should be assessed relative to the culpability of all defendants, including settling defendants. Only in this manner can the intent of section 2-1117, that minimally culpable defendants be held minimally responsible, be achieved.

This holding was appealed to the Illinois Supreme Court, and in late 2008, its opinion was filed. The court began by noting that:

We find no clear indication of a legislative preference for either of the parties' asserted meanings over the other. Accordingly, based on a careful examination of the language of section 2-1117, we conclude that the statute is ambiguous with regard to whether it includes within its scope settling tortfeasors such as BMW and Midwest.

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This holding immediately overturned the First District, which found the statute unambiguous in defendant's favor. *Ready v. United/Goedecke Services, Inc.*, 367 Ill.App.3d 272 (1st Dist., 2006). The basis of this holding was the Supreme Court's conclusion that neither a dictionary definition nor legislative intent could be found determinative. Accordingly, the Court began to "look to tools of interpretation to ascertain the meaning of [the] provision." In doing so, the Court looked past what the legislature actually said, and instead, relied upon the legislature's silence.

The Court began by noting that in 1995, the Fifth District Appellate Court interpreted the language of 2-1117 to mean that settling defendants stayed off the verdict form. Then, in 2003, the Illinois Legislature amended 2-1117, but in doing so, did not address the Blake holding. Although this amendment was later struck down as unconstitutional under *Best v. Taylor Machine Works*, the legislature's silence with regard to Blake was determinative in the Court's view. "[W]here the legislature chooses not to amend a statute after a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent."

In addition, the Court analyzed the pre-amended and post-amended versions of 2-1117 to conclude the original intent of the legislature. Again, reverting to rules of statutory construction, the Court noted that "an amendment to a statute creates a presumption that the amendment was intended to change the law." To fully appreciate this argument requires a bit of legislative history. In 1986 the legislature enacted the language of 2-1117 that is presently being examined. However, the somewhat short-lived Public Act 89-7, entitled "Tort Reform Act of 1995", made some rather sweeping amendments to Illinois law. Included in that Act was an amendment to section 2-1116 of the Code, which was titled, "Limitation on recovery in tort actions; fault." The amended section 2-1116(b) defined "Tortfeasor" as "any person, excluding the injured person, whose fault is a proximate cause of the [injury] for which recovery is sought, regardless of whether that person is the plaintiff's employer, regardless of whether that person is joined as a party to the action, and regardless of whether that person may have settled with the plaintiff."

In 2003, the case of *Best v. Taylor Machine Works*, held the 1995 Tort Reform Amendments unconstitutional in their entirety. Once this occurred, 2-1117 reverted back to its original 1986 language. Although gone, the language contained in these attempted amendments was certainly not forgotten. The Ready Court noted that the legislature was attempting to codify a statute which explicitly placed settled defendants on the verdict form. And, as the Court previously noted, "an amendment to a statute creates a presumption that the amendment was intended to change the law." However, the Ready Court apparently viewed the phrase "change the law" to mean a complete 180 degree reversal. Therefore, the Court presumed that since the Legislature was attempting to alter the law under the 1995 Tort Reform Act to include settled defendants on a verdict form, then the old 1986 law must have meant that settled defendants did not belong on the verdict form.

In addition to the above, the Court indirectly dealt with the sole proximate cause defense. It noted that the Appellate Court remanded the case for a new trial, and thus, did not address the sole proximate cause issue. As the Supreme Court was now reversing the Appellate Court, it was remanding the sole proximate cause defense issue back to the Appellate Court for determination.

On June 30, 2009, the First District Appellate Court found in favor of defendant's sole proximate cause argument, reversed the trial court and remanded the case for a new trial. The court held that "an answer which denies that an injury was the result of or caused by the defendant's conduct is sufficient to permit the defendant in support of his position to present evidence that the injury was the result of another cause." The court also stated that the sole proximate cause defense merely focuses the attention of a properly instructed jury on the plaintiff's duty to prove that the defendant's conduct was a proximate cause of the plaintiff's injury. The plaintiff promptly filed a petition for leave to appeal this appellate court decision back to the Supreme Court of Illinois.

Although the Ready saga continues, in part, the Supreme Court's decision that settling defendants do not go on the verdict form for apportionment of fault stands as the current law of Illinois. ●

EARLY MOTION PRACTICE PAYS OFF IN BRAIN DAMAGE CASE

While Patton & Ryan is often called upon by national corporate entities to defend them at trial in large-exposure matters because of our proven effectiveness before a jury, it is our aggressive motion practice that allows us to dispose of claims at early stages of the litigation process, saving our clients' time and resources. From our membership of senior partners on to our highly-skilled associates, our attorneys are focused on aggressively attacking plaintiffs' claims from the very outset of the litigation process.

Our dedication to disposing of claims through aggressive motion practice was highlighted in a recent product liability case handled by our associate, Don Carrillo, under the supervision of our senior partner, Dave Ryan. Mr. Carrillo was called on to assist in defending our manufacturing client in a product liability action where the Plaintiff alleged injuries resulting from the manufacture of an overhead trolley material moving system. Plaintiff alleged 2 counts of strict product liability and 2 counts of product liability negligence against our client. In his complaint, Plaintiff alleged that the trolley system was unreasonably dangerous and defective for its failure to have proper backup safety stops that would prevent "rollers" from falling off the end of the track. As a result of this condition, Plaintiff claimed permanent brain injuries when a roller fell on his head at a John Deere facility in Moline, Illinois.

Upon receiving this assignment, Mr. Carrillo called upon his experience in product liability litigation to assess the weaknesses in Plaintiff's complaint and also conducted a thorough investigation into the facts of the case. Mr. Carrillo concluded that Plaintiff failed to properly plead a cause of action and that Plaintiff's strict liability counts were violative of the applicable statute of repose. Consequently, a combined motion to dismiss was filed pursuant to section 2-619.1 of the Illinois Code of Civil Procedure. After oral arguments on the motion were heard, the judge dismissed Plaintiff's strict product liability counts with prejudice and also dismissed the product liability negligence counts for a second time.

Patton & Ryan is dedicated to achieving favorable results for its clients at the initial stages of litigation through efficient and aggressive motion practice. Saving our clients' resources is a top priority at our firm and we welcome your consideration as defense counsel at any stage of the litigation process. ●

OTHER NEWS SPOTLIGHT



Patton & Ryan Family and Staff Enjoy the Summer Outing at the White Sox Game

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