



Illinois Trial Lawyers Association

JUSTICE FOR ALL



April 2012
Volume 2, Number 5

From the Illinois Supreme Court

Supreme court to allow juror questions

“The Illinois Supreme Court approved a rule that allows jurors to pose questions to witnesses in civil trials. The rule permits judges to determine whether a jury will be allowed to ask questions of a witness once attorneys finish their questioning. If allowed by the judge, jurors may submit their questions in writing. The judge will meet with the attorneys outside the jury’s presence, allowing them to contest any questions. The judge will rule on any objections and determine if the questions will be allowed, modified or excluded. Supreme Court Rule 243 will take effect July 1, Chief Justice Thomas L. Kilbride said in a statement. Though no high court rule previously forbid the practice, today’s announcement marks the first official authorization that civil trial judges may accept juror questions. The Illinois Supreme Court Rules Committee spent several months discussing and developing the measure before submitting it to the justices, and heard testimony from lawyers and judges on its possible impact at a hearing in Chicago last year.” (*Chicago Daily Law Bulletin* – April 3, 2012)



Supreme Court Rule 243

http://www.state.il.us/court/SupremeCourt/Rules/Amend/2012/040312_Rule_Amendments.pdf

New Rule 718 – Provision of Legal Services Following Determination of Major Disaster

http://www.state.il.us/court/SupremeCourt/Rules/Amend/2012/040412_Rule_Amendments.pdf

Rule 803 - Hearsay Exceptions; Availability of Declarant Immaterial

http://www.state.il.us/court/SupremeCourt/Evidence/Amend/2012/042612_Rule803.pdf

Supreme Court Rule 138 is renumbered as **Supreme Court Rule 15**, **Supreme Court Rule 651** is amended, a divisional heading preceding **Supreme Court Rules 570 to 579** is adopted, and effective July 1, 2012, **Supreme Court Rules 402 and 431** are amended.

http://www.state.il.us/court/SupremeCourt/Rules/Amend/2012/042612_Rule_Amendments.pdf

Mark your calendars

40th Annual Convention & Golf Outing
Annual Membership Meeting
Installation Banquet and Dinner/Dance
Friday, June 8
Oak Brook Hills Marriott Resort, Oak Brook

Southern Illinois Golf Outing
Thursday, June 21
Clinton Hill Golf Course, Swansea



TORT BRIEFS

States can't be sued over sick leave

"The U.S. Supreme Court ruled that states cannot be sued under the Family and Medical Leave Act for refusing to give an employee time off to recover from an illness. One justice said the decision 'dilutes the force' of the law that allows millions of working Americans time off to care for sick family member or to have children. The high court refused to let Daniel Coleman sue the Maryland State Court of Appeals for damages for firing him after he asked for sick leave, blaming Congress for not equating family care and self-care when lawmakers wrote the Family and Medical Leave Act. Justice Anthony Kennedy, who wrote the controlling opinion, said Congress did not investigate self-care the way it did family care when it passed the FMLA, leaving little 'widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave... Documented discrimination against women in the general workplace is a persistent unfortunate reality, and we must assume, a still prevalent wrong. An explicit purpose of the Congress in adopting the FMLA was to improve workplace conditions for women. But states may not be subject to suits for damages based on violations of a comprehensive statute unless Congress has identified a specific pattern of constitutional violations by state employers.'" Four justices dissented, including Justice Ruth Bader Ginsburg who said "The court's judgment dilutes the force of the Act and that is regrettable, but at least the damage is contained. The self-care provision remains valid Commerce Clause legislation and therefore applies, undi-

luted, in the private sector... And the Department of Labor has authority to sue a state employer for violating the self-care provision, and to gain monetary relief for adversely-affected employees." (*St. Louis Post-Dispatch* – March 20, 2012)

Supreme Court rejects R.J. Reynolds request for review

"The U.S. Supreme Court won't review a \$28.3 million verdict against R.J. Reynolds Tobacco Co., declining to consider legal questions that may affect thousands of similar cases by smokers and their families. The Court left intact the verdict in a case filed in the wake of a 2006 Florida Supreme Court decision that lets plaintiffs in cigarette-liability suits use factual findings by a jury in an earlier case to prove their claims... In its 2006 ruling, Florida's highest court decertified a statewide class action and threw out a \$145 billion punitive damage verdict against the industry. At the same time, the court endorsed many jury findings in the case, including that the companies were negligent, conspired to hide information about the dangers of smoking and sold defective products. The ruling is known as the Engle decision." In the current case, R.J. Reynolds "asked the Supreme Court to review a case in which a Pensacola jury in 2009 awarded \$3.3 million in compensatory damages and \$25 million in punitive damages to Mathilde Martin, whose husband, Benny, died of lung cancer at age 66 after smoking Camel and Lucky Strike cigarettes for most of his life." (*Business Week* – March 26, 2012)

Court approves J&J's \$158M settlement with Texas over false marketing of Risperidone

"Johnson & Johnson and the state of Texas won court approval of the company's agreement to pay \$158 million to settle claims that the drug-maker fraudulently marketed its [Risperdal] anti-psychotic drug." (*Bloomberg News* – March 28, 2012) Johnson & Johnson and its subsidiaries had been charged with illegally promoting Risperdal for use by pediatric Medicaid patients, even though the FDA had not approved Risperdal for use by children, and downplaying the drug's serious side effects. (*Philadelphia Inquirer* – March 28, 2012)



SCOTUS rules against mental anguish awards for Privacy Act violations

The Supreme Court ruled that "a private pilot whose H.I.V.-positive status was improperly shared between government agencies cannot collect damages for the emotional distress he suffered when he was punished for hiding his medical condition from the Federal Aviation Administration. In a case that pitted competing interests of public safety, personal privacy and the broad immunity of the government from liability lawsuits, the court's more conservative majority found that Congress had not allowed compensation for mental anguish when violations of the Privacy Act of 1974 inflicted no actual damage, like a loss of income." (*New York Times* – March 29, 2012)

iPhone 4 owners offered \$15 to settle antenna problems

To settle claims raised in 18 lawsuits that were consolidated into a massive



TORT BRIEFS *continued*

class-action covering 25 million iPhone4 users, Apple is offering \$15 to purchasers by February 17, 2012. Soon after the iPhone 4 was released, “some users began complaining that holding the handset in a certain way caused cell reception to drop dramatically, to the point of losing reception completely.” Apple responded by asserting that the problem was industrywide, rather than specific to the iPhone or its antenna, and by offering users free cases, or “bumpers.” Users who have not claimed a free case can file online by August 28. (*ZDNet* – March 29, 2012)

Medtronic agrees to settle class-action lawsuit for \$85 million

Medtronic “said that it has agreed to settle a federal securities class action lawsuit that alleged the company misled investors regarding its Infuse bone-growth device. The settlement is for \$85 million, and Medtronic denied in a statement ‘that it made any misrepresentations or omissions or that it otherwise engaged in any wrongdoing.’” The class action lawsuit “alleged that, between November 2006 and November 2008, the company misled investors about the profitability of its Infuse device, which stimulates bone growth” and it also “claimed that sales of the bone graft were more dependent on applications not approved by the Food and Drug Administration than Medtronic disclosed and that the omissions inflated the company’s stock price.” (*Minneapolis Star Tribune* – April 1, 2012)

Groupon to settle class-action lawsuit for \$8.5 million

Groupon Inc. “agreed to pay \$8.5 million to settle a class-action lawsuit alleging the expiration dates on its coupons are illegal. Customers who bought Groupon vouchers before Dec. 1, 2011 can either redeem these past their expiration date or, if they are unable to do so, obtain a refund from the \$8.5 million fund, according to the proposed settlement filed March 29 in federal court in San Diego.” Residents of some states can seek refunds only for vouchers sold after Aug. 22, 2010, however. The company also agreed for three years not to sell more than 10 percent of its daily deals with expiration dates less than 30 days from their issuance. (*Bloomberg News* – April 2, 2012)

Florida appellate court rejects \$79.2 million tobacco award

A three-judge appellate panel “rejected a North Florida jury’s call for R.J. Reynolds Tobacco Co. to pay \$79.2 million to the daughter of a dead smoker -- overturning what could have been the largest verdict in a barrage of lawsuits against cigarette makers. The



1st District Court of Appeal sent the case back to Levy County circuit court to determine a reduced amount of damages in the 1996 lung-cancer death of James Cayce Horner.” In the case, “one of thousands stemming from a 2006 Florida Supreme Court decision that

established critical findings about the health dangers of smoking and past misrepresentation by the tobacco industry,’ the Tallahassee-based panel found compensatory damages excessive, and so also overturned punitive damages based on the amount of compensatory damages.” (*Jacksonville Daily Record* – April 10, 2012)

Court rules Pfizer is not protected from asbestos claims

“Pfizer Inc..isn’t entitled to protection from some asbestos claims related to its non-operating bankrupt Quigley Co. unit, according to a federal appeals court ruling. Pfizer bought Quigley in 1968, and the company stopped most operations in 1992, filing for bankruptcy in 2004. Pfizer has said it never made or sold any Quigley products, and some claimants hadn’t released Pfizer from alleged ‘derivative liability.’” A judge “that found Quigley’s bankruptcy barred certain lawsuits against Pfizer” but “a May 2011 decision in district court reversed the order, and Pfizer had appealed that ruling.” (*Bloomberg News* – April 11, 2012)

At the summer meeting of the American Association for Justice, ITLA Past President Laird Ozmon will be elected AAJ Parliamentarian in an uncontested election.

The meeting will be held July 28-31 in Chicago. Go to www.justice.org for registration information.

Congratulations Laird.



ILLINOIS NEWS

Don't get sick in Chicago

According to a new report by Commonwealth Fund, "the city of Chicago is a health care market marked by high costs and poor care." Chicago ranked 215th of the 306 nationwide health care markets. Results of the findings include:

- 92.2 percent of Chicago patients hospitalized for pneumonia received recommended care below the national median of 96.9 percent;
- Nearly 25 percent of all Medicare patients in Chicago are readmitted to the hospital within 30 days, well above the nation median of 17.7 percent;
- Medicare payments average \$10,334 per patient, nearly 30 percent more than the national average;
- Commercial health insurance payments average \$3,700 per patient, nearly 12 percent more than the national average of \$3,314.

"Chicago's rankings are 'reflective of high costs, high rates of uninsured, very high rates of potentially preventable hospital admissions and low rates of preventative care such as screening for breast and colon cancer,' said Cathy Schoen, a co-author of the report."

In other results, "Chicago's performance on such measures as hospital staff's ability to manage patients' pain and issuing appropriate instructions on home recovery after discharge, offers a dismal picture.

- More than 42 percent of the city's patients did not receive satisfactory pain management and medicine side-effect information, compared with the 36.8 percent median;
- 8 percent of surgical patients did not receive appropriate care to prevent complications, compared with the 3.8 percent national median.

"These are all symptomatic of a care system that has access barriers to timely and effective primary care, care in the community and is under-investing in public health," Ms. Schoen said." (*Crain's Chicago Business* – April 3, 2012)

OSHA fines Steeleville, IL company
 "Federal workplace safety officials are levying a \$231,000 fine against a company that operates a southern Illinois pasta plant for violations linked to an explosion that injured two workers last October. The U.S. Department of Labor's Occupational Safety and Health Administration...says the fine stems from six safety violations at Gilster-Mary Lee Corp's plant in Steeleville. Two workers at the plant were doing equipment maintenance ...when a welding spark caused an operational dust collector to explode, severely burning those workers. Officials at Gilster-Mary Lee Corp. say the company doesn't agree with all of OSHA's findings but will continue to provide a safe workplace while looking for improvements. (*St. Louis Post-Dispatch* – April 11, 2012)

Expert Testimony Exchange

ITLA has over 8,750 deposition transcripts accessible to ITLA members.

While we appreciate all those who send in transcripts, PLEASE remember to complete the Expert Testimony Exchange form with each transcript you submit. This provides us information that can be shared with other members when inquiring about a transcript. The form is available under the Member Resources tab of the website.



Call 800-252-8501 or email Audra at audra@iltla.com to find out if we have a valuable transcript for your next case.

Illinois MCLE Reporting Requirements

For Illinois attorneys with last names A-M

whose 2-year reporting period is 7/1/2010 - 6/30/2012, the CLE requirement is **24 general CLE credits, plus 6 hours of professional responsibility credit,** for a total of 30 credits.

For Illinois attorneys with last names N-Z

whose 2-year reporting period is 7/1/2011 - 6/30/2013, the CLE requirement is **24 general CLE credits, plus 6 hours of professional responsibility credit,** for a total of 30 credits.



NATIONAL NEWS

Screening panels in medical liability cases under scrutiny

The New Hampshire Supreme Court is hearing a case that could restrict the use of screening panels by medical societies during liability cases, as justices consider whether a law requiring judges to inform juries about panel findings is superseding courts' authority. The case involves a woman who visited the emergency department at the Southern New Hampshire Medical Center in 2006 for back pain. She was diagnosed with intractable pain by an emergency physician and admitted to the hospital, but her condition was later reviewed by a neurosurgeon who diagnosed her with meningitis; she later died. The woman's family filed suit, claiming that her death was caused by delayed diagnosis and late treatment. The case was reviewed in 2010 by a medical screening panel, but the family pushed for the court to deem the panel law unconstitutional and exclude the panel's findings from evidence at trial; the motion was granted by a trial court. Medical screening panels are in place in at least 16 states, and medical societies in Maine, Vermont, and other states are concerned about how the court's ruling will affect existing or planned panels in other jurisdictions. (*American Medical News* – March 26, 2012)

Trial bar, Chamber, senior groups support SMART Act

To address what it calls “an obscure and complex part of the Medicare law,” a loose coalition of “K Street types that includes trial lawyers, the U.S. Chamber of Commerce and advocates for seniors wants to breathe life into a congressional effort to pass legislation that would streamline the Medicare secondary-payer process.” It added that backers of “SMART Act,” as the Strengthening Medicare and Repaying Taxpayers Act is known for short, “agree that when an insurer other than Medicare -- think auto insurance or liability -- is responsible for

medical bills, they should pay them.” The measure, introduced in both chambers, would help Medicare recoup at least \$1.1 billion per decade from primary payers when it is the secondary payer. However, despite bipartisan support, “it's still not clear they have the momentum to get something enacted this year.” (*Politico* – March 27, 2012)

Texas judge upholds 2003 law's cap on non-economic damage awards

“A 2003 Texas law that caps pain and suffering awards in health care lawsuits is constitutional, a federal judge ruled on Tuesday.” In a one-page decision, judge Rodney Gilstrap for Eastern District in Marshall dismissed the two remaining counts in a lawsuit originally filed in 2008 that claimed the state's statutory cap on non-economic damages, enacted as part of its Medical Malpractice and Tort Reform Act of 2003, unconstitutionally bars access to the courts and takes private property. According to the Austin-based Texas Alliance for Patient Access, a coalition that defending the cap, the law limiting non-economic damages to between \$250,000 and \$750,000, depending upon the defendants, makes Texas one of 27 states restricting awards for non-economic damages. (*Business Insurance* – March 29, 2012)

Disasters brought \$370 billion in losses last year

“Natural catastrophes and other disasters produced \$370 billion in economic losses in 2011, the highest figure on record, according to new data released by global reinsurer Swiss Re. The global insurance industry suffered \$116 billion in losses, the second-highest figure on record, including a record \$49 billion in insured earthquake losses and \$12 billion for the Thailand floods, the largest ever for a single flood event.” (*Out of The Storm News* – March 28, 2012)

Claims for damages due to mold receive boost

A recent decision by a key appellate court in Manhattan ruled in favor of legal claims for health damages caused by mold, claiming that the scientific evidence of the harm caused by mold was strong enough to support the claims. Some condo and co-op lawyers worry that the decision could lead to a wave of new personal-injury lawsuits for mold injuries. (*Wall Street Journal* – April 2, 2012)

Texas paper urges increase in cap on government liability

The *San Antonio Express-News* editorialized in favor of raising the current \$250,000 per individual cap on the damages available for injuries caused by public employees under the Texas Tort Claims Act. Citing the case of a man who suffered brain damage and other serious injuries when hit by a speeding police officer driving on a non-emergency call without siren or lights, the editorial notes that his damages of medical bills alone were over \$325,000. It also notes that the “current \$250,000 cap has been on the books since 1987. To keep up with inflation, the cap would need to be more than \$500,000 to have the same purchasing power in 2012.” (*San Antonio Express-News* – April 6, 2012)

Boston transit system seeks \$100k cap on injury awards

“Plaintiffs suing the MBTA after getting injured in bus and trolley crashes, slips and falls, escalator mishaps and other accidents could soon see their damage awards capped at \$100,000 if a bill before the state Legislature is passed. The T is seeking to limit personal injury awards to the same \$100,000 cap imposed on similar judgments against all other state agencies, cities and towns - a move the cash-strapped transit agency says will save it an estimated \$4 million a year.” (*Boston Herald* – April 8, 2012)



NATIONAL NEWS

Robotic drug dispensers may be contaminated with bacteria

“So-called robotic drug dispensers can be contaminated with dangerous bacteria,” according to a study published in the journal *Infection Control and Hospital Epidemiology*. “During routine screening, staffers at Wake Forest Baptist Medical Center in North Carolina discovered *Bacillus cereus* bacteria in drug samples dispensed by a robot used to prepare intravenous medications in a sterile environment.” The researchers said that “their findings highlight the importance of routine screening of medication prepared by robotic dispensers, which are becoming increasingly common in hospitals.” (*Health Day* – April 6, 2012)

Seven Massachusetts hospitals plan to take new approach to malpractice claims

“Seven Massachusetts hospitals plan to offer patients harmed by medical errors a prompt apology and financial settlements before they resort to lawsuits, part of a major new initiative to improve the state’s cumbersome medical malpractice system.” (*Boston Globe* – April 18, 2012) “The program, called Disclosure, Apology and Offer, targets ‘defensive medicine’ -- a term describing often unnecessary or excessive tests and procedures ordered by doctors wary of being sued by their patients. Many experts consider defensive medicine to be among the top drivers of soaring health care costs nationwide...The Massachusetts Medical Society, which represents nearly 24,000 physicians, planned to announce the initiative on Wednesday and hopes it will promote a less confrontational atmosphere between patients and doctors when medical mistakes occur and speed resolution of disputes.” (*AP* – April 18, 2012) The program “won’t entirely prevent litigation, the proponents said. Patients who have received bad medical care can still sue.” However, “advocates say this approach has the potential to transform the medical system, where doctors now sometimes order excessive tests to protect themselves.” (*Boston Herald* – April 18, 2012)

Mississippi judge holds state’s cap on damages unconstitutional

“A state judge has declared a legislatively imposed cap on how much juries can award in non-economic damages unconstitutional. Circuit Judge Charles Webster in Coahoma County issued the ruling April 20 in a 14-page opinion. He criticized the Legislature for intruding into judicial authority.” Ruling on a motion by an attorney representing plaintiffs who received a jury verdict that included \$6 million in non-economic damages for the death of a child in an apartment complex fire, Webster ruled that a \$1 million cap on non-economic damages adopted by the state legislature in 2004 is beyond the legislature’s jurisdiction. The *AP* also noted that the constitutionality of the damages cap is at issue in a number of cases before the state supreme court, and the fifth circuit is also considering the question. (*AP* – April 24, 2012)



On April 23, 2012, ITLA Past President Todd A. Smith was presented with the Citizen Action/Illinois Senator Paul Wellstone Award.

Citizen Action/Illinois presented its Seventh Annual Senator Paul Wellstone Award to Todd A. Smith, partner at Power Rogers & Smith, P.C. Senator Wellstone was a leader of progressive effort in labor, consumer rights, and civil justice rights during the 90’s as a U.S. Senator from Minnesota. Citizen Action/Illinois serves as one of the leading consumer groups in the state with a presence on all of the issues important to Senator Wellstone.

Todd A. Smith is the immediate past President of the Illinois Trial Lawyers Association, former President of the American Association for Justice (formerly known as the Association of Trial Lawyers of America), and a former President of the Illinois State Bar Association. During his time as a leader in the trial bar he has worked at both state and federal levels to limit and avoid damage to the right to trial by jury and our civil justice system.



LEGISLATIVE RECEPTION

Tuesday, April 17, 2012



ITLA Calendar of Events

Friday, June 8

**40th Annual Convention & Golf Outing
Annual Membership Meeting
Installation Banquet and Dinner/Dance**

Oak Brook Hills Marriott Resort,
Oak Brook

Thursday, June 21

Southern Illinois Golf Outing
Clinton Hill Golf Course, Swansea

Monday, September 10

Cook County Judicial & Legislative Night Dinner
Mid-America Club, Chicago

Friday, September 28

**Seminar
Board of Managers Meeting**
Westin, St. Louis

Friday, September 28

SO IL Judicial & Legislative Night
Busch Stadium, St. Louis

Monday, October 8

Update & Review Seminar
Westin River North Chicago

Saturday, November 3

Workers' Compensation Seminar
Oak Brook Hills Marriott Resort,
Oak Brook

Friday, December 7

Board of Managers Meeting
Westin River North Chicago

Saturday, December 8

Medical Malpractice Seminar
Westin River North Chicago

Illinois Trial Lawyers Association
401 West Edwards Street
Springfield, IL 62704
800.252.8501

Return Service Requested

**PRSRTD
FIRST CLASS
U.S. Postage PAID
SPRINGFIELDIL
Permit No. 827**

Illinois Trial Lawyers Association *Professionals & Businesses for Justice*

Vendor Membership Program

Please support these vendors that support ITLA and your profession!

Legacy \$25,000

Preferred Capital Funding of Illinois
Amicus Court Reporters, Inc
Settlement Advisors

Benefactors \$15,000

McCorkle Court Reporters, Inc.
Waterville Advisors

Sponsors \$5,000

Evidence Video
EvergreenStructures / HassakisGiltner
Sullivan Reporting Company
Express Medical Records
Robson Forensic
Med-Law Connection
Life's Plan Inc. Pooled Trust
Groundwork Trial Consulting
BeaconRehab LifeCarePlan/Econ/Voc

Sponsors continued

Suisse Bancorp
U.S. Legal Support, Inc.
Oasis Legal Finance
It's Your Serve
Pohlman USA Court Reporting
Summit Pharmacy
Automated HealthCare Solutions
Midwest Litigation Services
H-WAVE
AthletiCo
Merrill Lynch
Legal Capital
Ringler Associates
IWP
ATI Physical Therapy
Kelly Ramsdale Associates
Northern Trust

Don't wait. Act now, and be a part of protecting the civil justice system.

as of April 26, 2012

