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30 pages in 2 sections

Disability insurance and offsetting a P.I. award

LAWYERS' FORUM, PAGE 4

TRIAL NOTEBOOK

Steven P. Garmisa
Hoey & Farina

Facebook ID too faulty for a conviction

People v. Kent

Shortly after someone gunned down Donmarquis Jackson in the driveway of a Rockford residence, "Lorenzo Luckii Santos" posted a message on his Facebook page that said "its my way or the highway ... leave em dead n his driveway."

Prosecutors wanted to use a screenshot of this post during Lorenzo Kent Jr.'s trial on charges he murdered Jackson. Trying to authenticate this document under Illinois Rule of Evidence 901, prosecutors relied on testimony from detective Dwayne Beets, plus evidence that Jackson was murdered in a driveway; Kent had a toxic relationship with Jackson; Kent reportedly used the nickname "Lucky"; and the picture associated with the profile for "Lorenzo Luckii Santos" resembled Kent.

As part of his investigation, Beets used the name "Daquan Rogers" to create a Facebook profile. Using this identity he found the post from "Lorenzo Luckii Santos." Later that day, someone deleted the message.

The trial judge ruled that the screenshot was admissible, and the verdict was guilty. Sentenced to 55 years in prison, Kent appealed.

Looking to out-of-state authority for guidance because there was no Illinois precedent "addressing the admissibility of a Facebook post allegedly attributable to a criminal defendant," the Illinois Appellate Court reversed.

"The state simply offered no evidence that any of the information on the Facebook post was known or available only to defendant or, at the very least, to a small group of people including defendant. Worse yet, others who were familiar with defendant might have been motivated to create the post to falsely attribute an incriminating statement to defendant." *People v. Kent*, 2017 IL App (2d) 140917 (June 27, 2017).

Here are highlights of Justice Michael J. Burke's opinion (with omissions not noted in the text):

The parties have not cited, and our research has not uncovered, any Illinois case addressing the admissibility of a Facebook post allegedly attributable to a criminal defendant.

While lower federal court decisions are not binding upon state courts, we may look to them as persuasive authority. Having looked to such decisions, we conclude that *United States v. Vayner*, 769 F.3d 125 (2d Cir. 2014), best represents a line of cases that is on point and persuasive.

In *Vayner*, the defendant was convicted of the transfer of a false identification document, based on his creation of a forged birth certificate for Vladyslav Timku, a Ukrainian citizen residing in Brooklyn. The birth certificate would falsely reflect that Timku was the father of an infant daughter, whose tender age would entitle him to a deferment from compulsory military service in Ukraine.

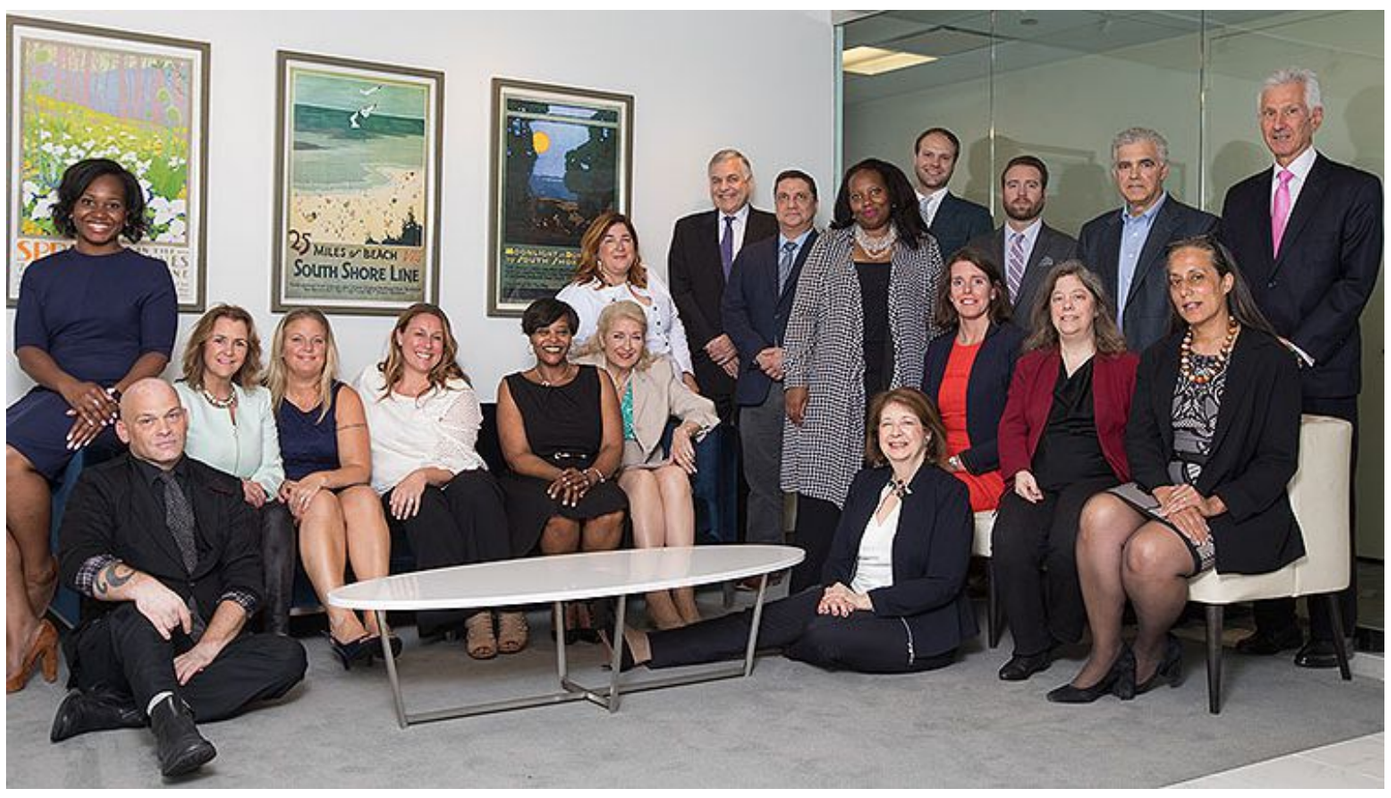
The district court admitted into evidence a printed copy of a web page, which the government claimed was the defendant's profile page from VK.com, a Russian social networking site akin to Facebook.

The defendant argued on appeal that the page had not been properly authenticated under Rule 901 of the Federal Rules of Evidence, which is similar to Illinois Rule of Evidence 901.

NOTEBOOK, *Page 5*

IN THE NEWS

BY CHRISTINE M. PUSATERI



The lawyers at Scharf Banks Marmor LLC and guests gathered July 27 at the firm's 333 W. Wacker Drive office to celebrate its fifth anniversary over craft cocktails and appetizers. The women-owned firm opened in June 2012 with 10 attorneys, nine from the New York firm Schoeman, Updike & Kaufman LLP. In a statement, partner Stephanie A. Scharf (bottom right, seated on floor) said the years have flown. "We all like each other and like the way we work together. Our clients have been tremendously supportive and we are grateful every day for their appreciation and confidence in us." *Photo provided by Scharf Banks Marmor LLC*

Colleen Mary Hurley

Robert C. Rakers

Eric J. Skwiat

Shannon E. Buckley

IN THE LAW FIRMS

Lavelle Law Ltd. added attorney **Colleen Mary Hurley** to the firm.
Hurley will be a part of the family law practice group.
She was previously with Wakenight & Associates P.C. of Oak Park.

• • • • •

Swanson, Martin & Bell LLP added lateral attorneys **Robert C. Rakers** and **Eric J. Skwiat** and newly sworn-in attorney **Shannon E. Buckley** as associates.
Rakers joins the Edwardsville office.
He practices on asbestos litigation, toxic tort litigation, product liability and general trial practice.
He was previously with Heyl Royster Voelker & Allen P.C.
Skwiat practices on intellectual property litigation and transactional services and commercial litigation and business disputes.
He was previously with Pasky Gruber LLC.
Buckley practices in commercial litigation and business disputes and medical negligence and health care.

• • • • •

Valentine Austriaco & Bueschel P.C., a law firm formed last year by attorneys **Susan Valentine**, **Aurora A. Austriaco** and **Lydia Bueschel P.C.**, has established its practice in commercial litigation and real estate matters.

IN THE NEWS, *Page 2*

TURN INSIDE

LAWYERS' FORUM

Data security and giving sound advice

PAGE 5

"Thus, we presume that this omission was a legislative oversight."

LAWYERS' FORUM, PAGE 4

Baker taps Corrado as Chicago MP

During rise at firm, corporate lawyer spent years part-time

BY DAVID THOMAS
Law Bulletin staff writer

Baker McKenzie LLP named a new managing partner for its Chicago office last week, handing the reins to Regine W. Corrado for a three-year term.

Corrado, a partner in the firm's corporate and securities group, succeeds Michael S. Smith, who remains as the leader of Baker McKenzie's North American real estate group.

A firm spokeswoman said Baker McKenzie has about 250 attorneys in Chicago.

Born and raised in Germany, Corrado joked how her French first name and Italian last name — courtesy of her husband — hide her heritage at first glance. She advises multinational companies on the inner workings of cross-border transactions, especially before and after an acquisition.

"I help out clients with carve-outs and divestitures, and then on the other side, post-acquisition integration with other internal restructurings, always working very, very closely with various departments within our clients," she said.

Corrado said she has a large number of clients in the health-care, food and agriculture industries.

Corrado earned her law degree at the University of Hamburg in Germany, then obtained her LLM at the University of the Pacific McGeorge School of Law in 1990. A year later, she joined Baker McKenzie.

Regine W. Corrado

Notably, Corrado worked part-time for the firm from 1995 to 2001 so she could raise her children.

She became a partner in 2002 and a national partner in 2007.

Corrado told the Daily Law Bulletin she believes her experience in working a flexible schedule will help her in her role as managing partner.

The following Q&A interview has been edited for clarity and brevity.

Law Bulletin: What do you like the most about your practice?

Corrado: My practice allows me to work with very exciting companies and solve their problems around the world. What I like the most about working with our foreign offices is to fit what our clients like to do within the culture and the business environment outside of the United States.

CORRADO, *Page 6*

Catholic church seeks abuse case sanctions

Archdiocese files motion questioning truthfulness of plaintiff's sex charges

BY LAURAANN WOOD
Law Bulletin staff writer

The Archdiocese of Chicago is asking a Cook County judge for sanctions against a man it alleges filed a lawsuit based on false allegations of sexual abuse by defrocked priest Daniel McCormack.

The archdiocese's motion, presented this morning to Cook County Circuit Judge Kathy M. Flanagan, alleges that, although plaintiff John J. Doe voluntarily dismissed his suit in June with plans to refile, his "entire case is based on a lie."

The motion alleges the plaintiff discussed his desire to sue the church while in prison during phone conversations with his cousin as well as a girlfriend he had at the time.

His cousin had previously settled a lawsuit against the archdiocese.

Citing a transcript of a recorded January 2014 phone call between Doe and his girlfriend, the archdiocese alleges Doe discussed his cousin's settlement with her and stated, "I'm just ready to get out man so I can get my little slice of the pie ... "

And in mid-June 2014, the motion alleges, Doe's cousin indicated during a phone call that he was considering helping Doe contact lawyers who could help him "bring a case." The motion alleges part of Doe's response included the sentiment, "... As long as m*****f***** ain't got to touch me for real, I don't give a f***."

The archdiocese alleges Doe has tried to conceal his conversations through litigation and has falsely indicated in other case filings McCormack previously made physical contact with him.

The motion is asking for sanctions in the form of costs associated with defending Doe's claim, along with any other relief seen fit, assessed against Doe himself since it appears he also misled his lawyers on the matter.

During a hearing this morning, Flanagan granted Hurley, McKenna & Mertz P.C. partner Michael T. Mertz's motion to withdraw his firm as counsel in Doe's case. She continued the case to Aug. 30, where either Doe is expected to resume litigation with a new lawyer or the parties will continue to move forward on deciding the motion.

After the hearing, Patricia C. Bobb, owner of Patricia C. Bobb & Associates who represents the archdiocese, said she's currently unsure of the exact dollar amount sought against Doe. But regardless of that number, she said, it filed the motion because "we have to send the message that these false claims ... really do a disservice to real victims in a case."

"As lawyers and officers of the court, we have an obligation to bring it to the court's attention when someone files a false claim and tries to perpetrate a fraud on the court for money," she said after the hearing.

Bobb said while she's unsure of how many similar types of motions the archdiocese has filed in its other abuse cases, the motion filed against Doe is its first to cite a plaintiff's own words as an evidential basis to request sanctions.

After the hearing, Mertz issued a statement defending his firm's work on the case. He also expressed confidence that his now-former client may have avenues to defend against the motion.

"My firm's withdrawal from the John J. Doe matter is not a reflection of our view of the merits of the case or of the merits of the archdiocese's motion for sanctions against John J. Doe. There are many reasons clients and attorneys

ARCHDIOCESE, *Page 6*

Panel upholds fired Evanston employee's ADA award

BY PATRICIA MANSON
Law Bulletin staff writer

Jurors heard enough evidence to conclude that the city of Evanston violated federal law by firing a worker who had suffered a traumatic brain injury, an appeals court ruled.

The 7th U.S. Circuit Court of Appeals on Monday upheld the a judgment in favor of Biagio Stragapede in a lawsuit he filed against the city under the Americans with Disabilities Act.

The jury awarded Stragapede $225,000 in damages. After concluding Stragapede also was entitled to back pay, U.S. District Judge Edmond E. Chang entered a $354,070 judgment in his favor.

The 7th Circuit conceded there was conflicting testimony from medical professionals and Stragapede's co-workers about his ability to carry out his duties as a water services worker.

But the evidence in Stragapede's favor supports the jury's finding that he was able to perform the essential functions of his job, the court wrote.

That evidence, it wrote, included the testimony from Stragapede's direct supervisor, Tim Bartus.

Bartus testified he had watched Stragapede in the field and that he was capable of installing water meters correctly, the court wrote.

Bartus, the court wrote, also testified he had performed spot checks on Stragapede's work which involved locating and marking obscured water mains and sewers and found it was accurate.

The court noted another supervisor testified Stragapede could not complete meter installations and other required tasks.

But that supervisor had never observed Stragapede performing his duties, the court wrote.

"The jury was charged with sorting through these conflicting reports and deciding how much weight, if any, each deserved," Judge Diane S. Sykes wrote for the court panel.

The jury, she wrote, also was charged with weighing conflicting evidence from Dr. Zoran Grujic, a neurologist who examined Stragapede in April 2010.

Grujic cleared Stragapede to return to work at that time, the panel wrote.

But in a July 2010 letter, it wrote, Grujic concluded certain incidents were related to Stragapede's brain injury.

In one incident, Stragapede was unable to install a meter within two hours. In other incidents, he tripped on a set of stairs, drove through an intersection while looking down at his lap and twice went to the wrong location.

Grujic followed up his letter with another in September 2010 saying the incidents showed Stragapede could not do his job.

The panel noted Grujic conceded his conclusion was based entirely on information provided by the city.

In light of that testimony, the panel wrote, it was "not irrational" for the jury to discount Grujic's conclusion.

"It's the jury's job to weigh conflicting evidence, make credibility determinations and evaluate the trial record based on its collective common sense," Sykes wrote.

Richard Lee Stavins of Robbins, Salomon & Patt Ltd. argued the case before the 7th Circuit on behalf of Stragapede.

"Truth, justice and the American way have been served," Stavins said.

Corporation Counsel W. Grant Farrar, who argued the case on behalf of the city of Evanston, could not be reached for comment.

Stragapede was an Evanston city employee for 14 years before he was fired in 2010.

The city placed him on a temporary leave of absence in September 2009 after he suffered a brain injury.

Stragapede returned to work in June 2010 after Grujic examined him and after he completed a three-day work trial.

To accommodate Stragapede, the city allowed him to use a map, tape recorder and pen and paper on the job and to go off-task to consult with his supervisors.

The city put Stragapede back on leave about three weeks after he returned to work and fired him two months after that.

Stragapede sued the city in federal court in Chicago. The jury returned its verdict in March 2015 and Chang entered judgment in favor of Stragapede five months later.

In its opinion, the 7th Circuit panel rejected the argument that the city was justified in firing Stragapede because he constituted a direct threat to the safety of others.

Reasonable jurors could accept Stragapede's explanation that he was looking down when he drove through the intersection because he was trying to grab a clipboard that had fallen off the seat, the panel wrote.

It wrote Stragapede also testified the light was green and no pedestrians were present at the time of the incident.

"The jury also might reasonably have concluded that the two directional mishaps were not a safety issue at all," Sykes wrote.

"Lastly, as we've noted, the jury was free to discount Dr. Grujic's July and September opinions, which relied entirely on the [c]ity's characterization of Stragapede's performance."

Joining the opinion were Chief Judge Diane P. Wood and Judge Frank H. Easterbrook. *Biagio Stragapede v. City of Evanston, Illinois*, No. 16-1344.

pmanson@lawbulletinmedia.com

IN THE NEWS CONTINUED FROM PAGE ONE

Operating from newly remodeled and expanded offices at 105 W. Adams St., the firm also recently became certified as a women-owned business by the Women's Business Enterprise National Council and was admitted for membership in the National Association of Minority and Women Owned Law Firms.

Prior to launching the firm, Valentine and Bueschel worked together at another firm on a range of commercial litigation matters.

Austriaco joined them from her own firm, concentrating in commercial litigation, title insurance litigation and real estate-related matters.


Susan Valentine


Aurora A. Austriaco


Lydia Bueschel

IN PRINT

In recognition of the growing importance of privacy and data protection law and compliance, the International Association of Defense Counsel has dedicated the Summer 2017 edition of its Defense Counsel Journal to the exploration of privacy issues.

The summer issue is the first half of the association's Privacy Project V publication.

The second half will be published in the Fall 2017 issue.

The current issue is available for free and without a subscription via the association's website, iadclaw.org.

IN THE BAR GROUPS

The Kane County Bar Association's monthly Ask A Lawyer day will be Aug. 12 from 9 a.m. to noon.

The public can call (630) 762–1900 for a free consultation with a volunteer attorney.

Topics include real estate, landlord-tenant, criminal, estates and wills, divorce, child custody, collections, bankruptcy and traffic matters.

pusateri@lawbulletinmedia.com

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AUGUST 4

RPTE New Leader Orientation
American Bar Association
10 a.m., Hilton Rosemont O'Hare, 5550 N. River Road, Rosemont
312-988-5000

eDiscovery Processes and Procedures: The "Know-How" with the "How-to"
American Bar Association
10 a.m., Online
312-988-5000

Golf Outing
Workers' Compensation Lawyers Association
10 a.m., Pheasant Run Resort, 4051 E. Main St., St. Charles

AUGUST 8

Resolving Commercial Property Disputes: A Primer for Real Estate Attorneys
American Bar Association
12 p.m., Online
312-988-5000

Tax Traps for the Unwary in Annuity Planning
American Bar Association
12 p.m., Via telephone
312-988-5000

Board of Directors meeting
Kane County Bar Association
5 p.m., KCBA, 555 S. Randall Road, Suite 205, St. Charles
630-762-1915 director@kanecountybar.org

AUGUST 9

Practical Cybersecurity Tips for Lawyers at Warp Speed
Asian American Bar Association of Chicago and Asian American Bar Association Law Foundation
12 p.m., Online
312-988-5000

Estate Probate and Elder Law Committee meeting
Kane County Bar Association
12 p.m., KCBA, 555 S. Randall Road, Suite 205, St. Charles
630-762-1915 director@kanecountybar.org

AUGUST 10

The New Medicare Appeals Rule: What Appellants Need to Know
American Bar Association
11 a.m., Online
312-988-5000

Annual Golf Outing
Northwest Suburban Bar Association
11:30 a.m., Makray Memorial Golf Club, 1010 S. Northwest Highway, Barrington
847-221-2601 jbarth@nwsba.org

2017 Shindy
Lawyers for the Creative Arts
7 p.m., Chop Shop - 1st Ward, 2033 W. North Ave., Chicago
$75 a person
312-649-4111

AUGUST 11

Annual Minority Job Fair
Cook County Bar Association
9 a.m., Embassy Suites, 511 N. Columbus drive, Chicago
312-630-1157

Tax Law Committee meeting
Kane County Bar Association
12 p.m., KCBA, 555 S. Randall Road, Suite 205, St. Charles
630-762-1915 director@kanecountybar.org

AUGUST 12

Ask A Lawyer Day
Kane County Bar Association
9 a.m.,
630-762-1900

AUGUST 14

Golf Outing
Peoria County Bar Association
12 p.m., Mount Hawley Country Club, 7724 N. Knoxville Ave., Peoria

AUGUST 15

ERISA Basics Session Two: For Employers ERISA Plans- Working with Employers on Reporting and Compliance Requirements
American Bar Association
12 p.m., Online
312-988-5000

Navigating IP Protection in eSports
Lawyers for the Creative Arts
2 p.m., 2112, 4245 N. Knox Ave., Chicago
$15 a person
312-649-4111

Lawyers Networking Reception
Jewish United Fund of Metropolitan Chicago
5:30 p.m., Neal Gerber & Eisenberg LLP, 2 N. La Salle St., Suite 2200, , Chicago
312-357-4888 younglawyers@juf.org

AUGUST 16

Estate and Probate Collegium
Kane County Bar Association
8 a.m., KCBA, 555 S. Randall Road, Suite 205, St. Charles
630-762-1915 director@kanecountybar.org

Social Hour
South Suburban Bar Association
5 p.m., Flossmoor Station, 1035 Sterling Ave., Flossmoor
708-633-9700

AUGUST 17

Local Government Committee meeting
Kane County Bar Association
12 p.m., KCBA, 555 S. Randall Road, Suite 205, St. Charles
630-762-1915 director@kanecountybar.org

Flying Through Government Thunder Clouds: Navigating Cloud Procurements, Cybersecurity and Regulatory Issues in the Public
American Bar Association
12 p.m., Online
312-988-5000

New Developments in Military Pension Division: Yesterday, Today and Tomorrow
American Bar Association
12 p.m., Online
312-988-5000

Board of Managers meeting
Kane County Bar Association
4:30 p.m., KCBA, 555 S. Randall Road, Suite 205, St. Charles
630-762-1915 director@kanecountybar.org

AUGUST 21

Burning Down the House: The Myths Around Youth Homelessness in America
American Bar Association
12 p.m., Online
312-988-5000

AUGUST 22

Dividing the Assets: What Attorneys Should Know about Marital Settlement and Separation Agreements
American Bar Association
12 p.m., Online
312-988-5000

Landslide Webinar Series: Tips and Tactics for Protecting Life Sciences Innovations inthe Current Legal Climate
American Bar Association
12 p.m., Online
312-988-5000

Bar Briefs Editorial Board meeting
Kane County Bar Association
12 p.m., KCBA, 555 S. Randall Road, Suite 205, St. Charles
630-762-1915 director@kanecountybar.org

AUGUST 23

Navigating Title Insurance and Survey Issues in Purchase and Sale Agreements
American Bar Association
12 p.m., Via telephone
312-988-5000

So Your Client Wants to Buy a Business: What Every Transaction Lawyer Should Know
American Bar Association
12 p.m., Online
312-988-5000

AUGUST 24

Lawyer Ethics: E-Communications, Social Media and the Internet session two
American Bar Association
12 p.m., Online
312-988-5000

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Gap in 2011 change to trailer/home tax favors husband, wife

Law honors existing taxation as real estate vs. personal property; one home fit neither

BY ANDREW MALONEY
Law Bulletin staff writer

SPRINGFIELD — For years, the state taxed mobile and manufactured homes as real estate property as if they were built on a permanent foundation.

But a policy change in 2011 and an advantageous "grandfather clause" have allowed one couple to slip through the cracks, according to a state appeals court decision.

The Mount Vernon-based 5th District Appellate Court ruled this week that a couple should not be taxed at a higher rate under the new law even though they didn't properly register a home they built months before the change kicked in.

Under the new law, the type of home foundation no longer determines whether a mobile or manufactured home is taxed as property. What matters is whether the home is outside a designated mobile-home park. If so, it is taxed as real property. If not, it is taxed as personal property.

The new law contains a so-called "grandfather" provision, allowing homes that were previously taxed at lower, personal property rates to continue being assessed as such, until they are sold or moved to a location outside a mobile home.

Harlan and Phyllis Jones built a manufactured home in May or June in 2010 on property they had purchased. It did not rest on a permanent foundation.

However, the Joneses did not comply with a requirement to register the home with the Franklin County tax assessor within 30 days, and the property was assessed as a vacant lot that year.

Beginning in 2011, the home was assessed as real estate. When the Joneses challenged that assessment, the Property Tax Appeal Board upheld it, noting the Joneses failed to comply with the registration requirement.

> *"We note that a relatively small number of homes are likely to fit into this category. Thus, we presume that this omission was a legislative oversight."*

The decision was upheld by then-2nd Judicial Circuit Judge David K. Overstreet.

On appeal under the Administrative Review Law, the panel reviewed the final decision of the appeal board, not Overstreet's.

Three statutes — the Mobile Home Local Services Tax Act, the Manufactured Home Installation Act and the Property Tax Code — all generally add up to say similar things: Homes that were taxed as personal property before the "permanent foundation" distinction was eliminated should continue being taxed as such. Homes that were taxed as real estate prior to the change should continue to be taxed as real estate.

The Joneses argued to the appellate court that under the statutes' "plain and ordinary meaning," mobile and manufactured homes should continue to be taxed in the same fashion they were before the law changed in 2011.

The Property Tax Appeal Board and the Franklin County Board of Review argued the "privilege tax" for homeowners paying the lower rates is only available to people who had actually paid the tax before the law changed.

But Justice Melissa A. Chapman wrote on Tuesday on behalf of a unanimous panel that the Joneses essentially slipped through the cracks of the legal language, saying the legislation "failed to address mobile homes and manufactured homes that, like the petitioners' home, were not installed on or after the effective date of the new legislation and were not assessed and taxed in 2010."

"We note that a relatively small number of homes are likely to fit into this category. Thus, we presume that this omission was a legislative oversight," she added.

Chapman wrote that the Illinois Department of Revenue did give guidance for such situations, saying that if homes were built before the new law went into effect but weren't assessed in 2010, they should be treated like "mobile or manufactured home[s] of similar construction" for taxes.

Chapman pointed to testimony that suggested that, while the home was placed on site in May or June and tax assessments aren't usually complete until July, "it was not realistic to expect a reasonable homeowner to register the home at any earlier time considering it was likely not occupied until July, when water service began," she wrote.

The panel also noted that the Mobile Home Tax Act does not say that a failure to register prevents property from being assessed. And while a failure to register a home with an assessor is a violation, it's only a Class A misdemeanor, Chapman noted.

"Holding that the petitioners' home must be assessed and taxed at a higher rate than would otherwise be applicable on an ongoing basis would be an arbitrarily harsh penalty for a minor infraction," the panel concluded.

The ruling reversed the judgment of the circuit court and set aside the decision of the Franklin County Property Tax Appeal Board. Justices Judy L. Cates and John B. Barberis Jr. concurred in the 18-page opinion.

B. David Garavalia, a sole practitioner in Benton who represented the Joneses, could not be reached for comment today.

A spokeswoman for the state attorney general's office, which represented the property tax board, could not immediately comment on the decision.

The case is *Harlan W. Jones, et al., v. State of Illinois Property Tax Appeal Board, et al.*, 2017 IL App (5th) 160199.

amaloney@lawbulletinmedia.com

CASE SUMMARIES

FIND MORE SUMMARIES ON PAGE 6

Fourth Amendment — excessive force, DNA question

Where a U.S. District Court found DNA evidence was irrelevant to determination of two officers' states of mind at time of shooting, no abuse of discretion occurred.

Octavia Mitchell v. City of Chicago, et al.

No. 14-2957

Writing for the court: Judge Ann Claire Williams

Concurring: Judge Ilana Diamond Rovner and U.S. District Judge William M. Conley, Western District of Wisconsin

Released: July 5, 2017

The 7th U.S. Circuit Court of Appeals affirmed a decision by U.S. District Judge Sharon Johnson Coleman.

On the evening of April 24, 2010, two Chicago police officers attached to a mobile strike force, were on patrol in a marked squad car. Two other officers were in a second marked squad car behind them following in a "wolf pack" formation.

The officers spotted a white Buick without a front license plate, traveling north on State Street. The officers decided to stop the car for the simple traffic violation and activated their flashing lights. They followed the car onto a neighborhood street and it slowed and stopped. Izael Jackson, a passenger, got out.

According to the officers' testimony, Jackson immediately began firing a weapon in the direction of the squad cars. One officer returned fire through the windshield of his patrol car, while a second officer radioed for backup.

At this point, the car sped away, leaving Jackson behind. While looking over his shoulder and shooting in the direction of the police cars, Jackson began running away. As Jackson fled, one of the officers fired two or three shots at him. The third officer raised his rifle and began to fire at Jackson's back as well. Jackson fell to the ground.

The officers approached and the fourth officer kicked the gun, later determined to be a Glock Model 19 9-millimeter semi-automatic handgun, out of Jackson's hand and handcuffed him. Paramedics were called and Jackson was transported to Stroger Hospital, where he died the next morning.

Following Jackson's death, his mother, Olivia Mitchell, filed a civil suit bringing claims of excessive force under the Fourth Amendment and the state's wrongful-death statute against the city and the officers. Mitchell alleged that the shooting death of her son was unjustified because Jackson never had a gun and never shot at the officers.

A jury trial was held and Mitchell presented two eyewitnesses, Taza Williams and her mother, Sandra Williams. Taza testified that she watched the shooting from her mother's home and saw four or five police officers chasing Jackson before shooting him.

She also stated that it was dark but that it looked like Jackson did not have a gun. Sandra, who was also watching, testified that she clearly saw Jackson run away from the police officers with his hands in the air. She said Jackson did not have a gun.

The city highlighted inconsistencies in the testimony of Taza and Sandra and presented evidence that undermined their credibility. The city also offered expert testimony that showed gunshot residue was found on Jackson's hand.

Expert testimony also revealed that 16 expended shell casings found at the scene came from the Glock Model 19, corroborating the officers' testimony that the gun shots came from an area were Jackson was.

At the close of evidence, a directed verdict was entered for two of the officers, the two who did not fire at Jackson. After short deliberations, the jury returned a verdict in favor of the city for the other two officers. Mitchell moved for a new trial but the district court denied the motion. Mitchell appealed.

On appeal, Mitchell first challenged the district court's decision to quash her subpoena to the Illinois State Police. The panel noted that Mitchell's subpoena was untimely, occurring after the district court set a close-of-fact discovery four months before. The panel further stated that Mitchell had failed to provide good cause for her delay in seeking the subpoena. The panel determined that the district court was within its discretion to quash the subpoena.

Next, Mitchell challenged the court's ruling on a motion in limine filed by the city to bar Mitchell from making arguments or questioning witnesses regarding the lack of testing of DNA swabs from Jackson's alleged gun by the Illinois State Police forensic services laboratory.

The city argued that such evidence would be irrelevant and unfairly prejudicial because the city and the officers had nothing to do with testing DNA and there was no reason to believe DNA evidence would have helped Mitchell's case.

The panel found no abuse of discretion in the district court's ruling. The panel stated that the DNA evidence would be irrelevant to the question of whether the officers were reasonably fearful of Jackson at the time of the shooting.

The panel, therefore, affirmed the district court's decision.

LAWYERS' FORUM

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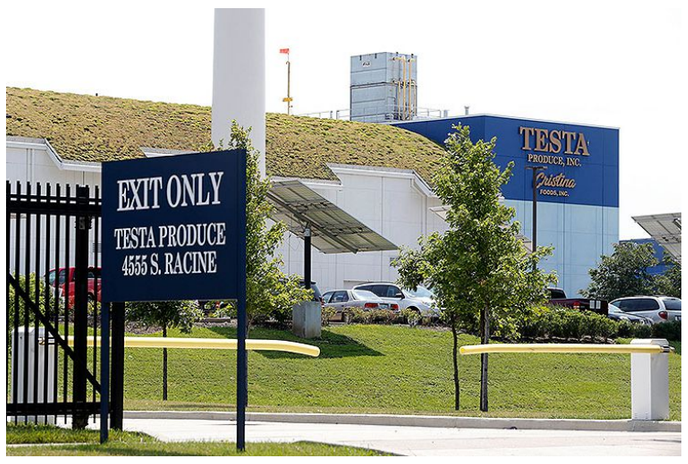
Older people die on the job at higher rate

BY MARIA INES ZAMUDIO AND MICHELLE MINKOFF
Associated Press writers



The Testa Produce Inc. plant on the South Side of Chicago last month. Older people are dying on the job at a higher rate than workers overall, even as the rate of workplace fatalities decreases, according to an Associated Press analysis of federal statistics. In 2015, about 35 percent of the fatal workplace accidents involved a worker 55 and older, or 1,681 of the 4,836 fatalities reported nationally. William White, 56, was one of them. White fell 25 feet while working at Testa. He later died of his injuries. *AP Photo/Charles Rex Arbogast*

Older people are dying on the job at a higher rate than workers overall, even as the rate of workplace fatalities decreases, according to an Associated Press analysis of federal statistics.

It's a trend that's particularly alarming as baby boomers reject the traditional retirement age of 65 and keep working. The U.S. government estimates that by 2024, older workers will account for 25 percent of the labor market.

Getting old — and the physical changes associated with it — "could potentially make a workplace injury into a much more serious injury or a potentially fatal injury," said Ken Scott, an epidemiologist with the Denver Public Health Department.

Gerontologists say those changes include gradually worsening vision and hearing impairment, reduced response time, balance issues and chronic medical or muscle or bone problems such as arthritis.

In 2015, about 35 percent of the fatal workplace accidents involved a worker 55 and older — or 1,681 of the 4,836 fatalities reported nationally.

William White, 56, was one of them. White fell 25 feet while working at Testa Produce Inc. on Chicago's South Side. He later died of his injuries.

"I thought it wouldn't happen to him," his son, William White Jr., said in an interview. "Accidents happen. He just made the wrong move."

The AP analysis showed that the workplace fatality rate for all workers — and for those 55 and older — decreased by 22 percent between 2006 and 2015. But the rate of fatal accidents among older workers during that time period was 50 percent to 65 percent higher than for all workers, depending on the year.

The number of deaths among all workers dropped from 5,480 in 2005 to 4,836 in 2015. By contrast, on-the-job fatalities among older workers increased slightly, from 1,562 to 1,681, the analysis shows.

During that time period, the number of older people in the workplace increased by 37 percent. That compares with a 6 percent rise in the population of workers overall.

Ruth Finkelstein, co-director of Columbia University's Aging Center, cautions against stereotyping. She said older people have a range of physical and mental abilities and that it's dangerous to lump all people in an age group together because it could lead to discrimination.

She said she's not sure that older workers need much more protection than younger workers, but agreed there is a need for all workers to have more protection. "We are not paying enough attention to occupational safety in this country," she said.

The AP analysis is based on data from the Bureau of Labor Statistics' Census for Fatal Occupational Injuries and from one-year estimates from the American Community Survey, which looks at the

DYING, *Page 6*

Offset statutes put brakes to insurer's effort to half disability benefits

WORKPLACE ISSUES

MARK D. DEBOFSKY

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All group disability insurance policies coordinate benefits with other sources of disability income to preclude potential double recoveries. Social Security disability benefits and workers' compensation benefits are universally identified as offsets against long-term disability insurance payments.

A more controversial offset, though, are payments that result from personal-injury claims which compensate claimants for categories of damages that have nothing to do with disability, such as pain and suffering.

A recent ruling from the 2nd U.S. Circuit Court of Appeals, *Arnone v. Aetna Life Insurance Co.*, 2017 WL 2675293 (2nd Cir. June 22, 2017), looked at whether a disability insurer could properly offset an insured's personal-injury recovery and decided that Section 5-335 of the New York General Obligations Law precluded the claimed offset.

Section 5-335 provides that personal-injury settlements "shall be conclusively presumed" not to include "any compensation for the cost of health-care services, loss of earnings or other economic loss[es]" that "have been or are obligated to be paid or reimbursed by an insurer."

The court held that the New York statute survived an Employee Retirement Income Security Act pre-emption challenge and precluded Aetna's efforts to reduce Savatore Arnone's disability benefits.

Arnone, a New York resident, recovered $850,000 on account of severe injuries he suffered in an accident. Although the settlement was not itemized and did not delineate how much was paid for each element in the personal injury case, Aetna, which was paying disability benefits to Arnone, asserted that under the explicit terms of the disability insurance policy, it could assume that 50 percent of the settlement was for disability and reduced benefits accordingly. Arnone successfully challenged that reduction.

Although the policy explicitly allowed Aetna to offset 50 percent of the personal-injury recovery, the court found that Section 5-335 barred Aetna's actions as a matter of law. The court rejected Aetna's assertion that Section 5-335 was pre-empted by ERISA by finding the law fell within the exemption to ERISA's broad preemption applicable to laws regulating insurance.

The court also overruled a choice of law argument — although the policy specified it was to be interpreted in accordance with the laws of the state of Connecticut, the court held that Arnone, a New York resident, was entitled to the protection of that state's laws.

Aetna's final attack on the applicability of Section 5-335 was its claim that Arnone failed to timely raise that provision as a bar to the offset.

The court dismissed that argument as well, finding that Arnone was entitled to raise the issue explaining:

"We are not worried, for example, that absent a forfeiture rule for someone in Arnone's position, the claims administration process will be undermined. Arnone has not strategically saved his best argument for last or otherwise ambushed Aetna. Even though Arnone did not expressly flag the statute during Aetna's claims process, he certainly made to Aetna in substance the same argument that he now makes in court: [H]e repeatedly informed Aetna that the settlement amounts it sought to offset were for 'pain and suffering' and 'not for disability,' J.A. 182, 308, and that 'no wage replacement was included,' J.A. 182.

"In citing Section 5-335 later, Arnone supplemented a consistently held position with legal authority, which seems to us to be permissible in this context."

The court also found meritless Aetna's claim of surprise, ruling that Aetna was a "well-established and sophisticated insurer that operates nationwide" and would therefore be aware of anti-subrogation laws. The court noted that Aetna "is not entitled to insulate itself from the application of relevant state law by hoping that during the claims process its insureds — generally less knowledgeable and with fewer resources — fail to invoke by number a state law with which Aetna should already be quite familiar." Hence, the court applied Section 5-335 to bar the offset.

This fascinating ruling will no doubt be cited in other jurisdictions that have statutorily adopted anti-subrogation laws that recognize the collateral source rule and which are comparable to Section 5-335.

... the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist ..."

In Illinois, though, it does not appear that *Arnone* will have any impact. Illinois applies the collateral source rule, a doctrine that *Wills v. Foster*, 229 Ill.2d 393, 399 (Ill. 2008), described as follows: "Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor."

The basis for such a rule "is that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons."

However, the Illinois Code of Civil Procedure contains an interesting provision that would apply in some instances to the circumstances that existed in *Arnone*. Under Section 2-1205, medical-malpractice judgments may be reduced by "50 percent of the benefits provided for lost wages or private or governmental disability income programs, which have been paid, or which have become payable to the injured person by any other person, corporation, insurance company or fund in relation to a particular injury."

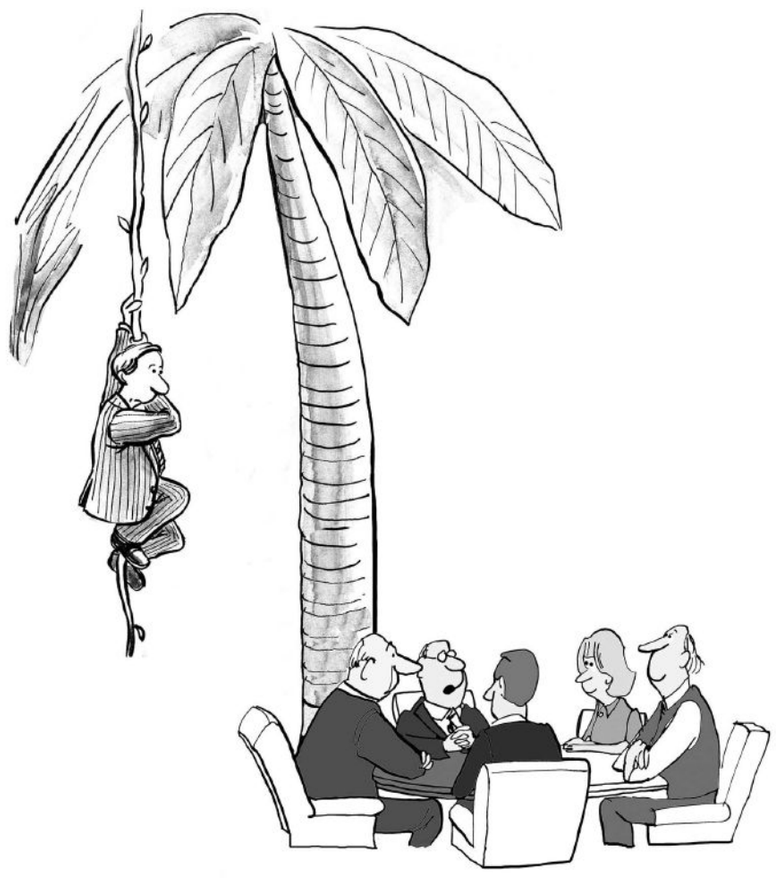
An exception exists, however, where "there is a right of recoupment through subrogation, trust agreement, lien or otherwise."

Thus, the New York and Illinois statutes are somewhat the opposite of one another — in New York, a disability insurer is precluded from asserting a right of recoupment with respect to a personal-injury recovery. If *Arnone* had been a resident of Illinois, though, and had his claim been for medical malpractice, his recovery could have been reduced by the disability insurance he received if the Aetna policy did not contain any offset language.

New York also has a "reverse offset" statute applicable to Social Security and workers' compensation. In most jurisdictions, Social Security benefits are reduced by the receipt of workers' compensation benefits that exceed 80 percent of a worker's average current earnings.

However, in New York, the workers' compensation benefits are reduced by the Social Security benefits received by the injured worker. Go figure.

HABEAS WHATSIS



"Contrary to what you may believe, new clients do not grow on trees."

THIS DAY IN LEGAL HISTORY

BY KAREN CONTI

Karen Conti is owner of ContiLaw LLC. She is a regular legal commentator on the local Fox affiliate, CNN and truTV. She appears every Sunday from 8 to 9 p.m. on WGN-AM 720 to discuss current legal events and to answer listeners' questions.

1776

The Declaration of Independence was signed. Many believe it was signed on July 4. However, that was the date that Congress approved the document's final text. It was signed 29 days later.

1991

Grammy–winning singer Rick James was arrested along with his 21–year-old girlfriend for imprisoning and torturing a woman with a hot cocaine pipe over three days at James' Hollywood Hills home. He was convicted and served a two-year sentence at California's Folsom State Prison.

Online purchasing platform runs afoul of data breach laws, gets reprimand

E-commerce company Aptos Inc is facing legal action on two fronts as a result of not only its alleged failure to comply with state data security and breach notification laws, but also for giving bad advice about those laws to its clients in the wake of a data breach that compromised personal information of some of its clients' online retail customers.

The attorneys general of Illinois and 14 other states have put Aptos Inc. on notice that they believe that the company is giving its retail clients incorrect information about the consumer notification obligations in those states, following a data breach last year.

At the same time, a proposed class action accuses Aptos of failing to protect customers' personal information, including credit and debit card data, to disclose the extent of the breach and to timely notify affected clients.

Both actions stem from Aptos' discovery last year that hackers installed malware on its servers, exposing 40 of its clients, including Tempur Sealy International Inc. and Liberty Hardware Manufacturing Corp., to possible identity theft.

In a June 5 letter, the attorneys generals of Illinois, Arkansas, Colorado, Connecticut, Iowa, Kentucky, Maryland, Minnesota, Mississippi, New York, North Carolina, Oregon, Pennsylvania, Virginia and Washington notified the Atlanta-based Aptos' general counsel that the company gave clients incorrect information concerning the states' data breach notification laws.

According to the letter, Aptos told the 40 online retailers affected by a data security breach it reported on March 1 that the retailers did not have to notify consumers of the breach in cases where a credit or debit card's CVV number — the three- or four-digit security number — was not compromised.

A frequently asked questions document that Aptos gave clients specifically addressed the question: "What is the notification obligation where CVV data was not exposed?" The FAQ stated in response that there was no obligation to notify consumers if their card's CVV number was not exposed.

"This is not correct. The CVV number does not have to be disclosed to trigger our states' notification obligations," the letter pointed out. All 15 states have similar statutes that mandate notice when personal information plus an "account number, credit or debit card number, in combination with any required security code, access code or password that would permit access to an individual's financial account" is acquired by an unauthorized third party, the letter said.

But a CVV number is not considered "any required security code" under the statutory language because a credit card owner — and therefore an identity thief as well — can use a credit card without it, said the letter. In fact, some top websites don't require a CVV code to make a purchase, such as Amazon.com, Freshdirect.com, Zappos.com, Victoriasecret.com and HSN.com, it noted.

The letter, sent by the office of New York Attorney General Eric T. Schneiderman on behalf of the states, noted that New York's statute, for example, is designed to notify affected consumers in the event of a breach so that they can protect themselves from identity theft.

So if a credit card can be used without a CVV number, then the owner of the card should be notified of a breach so he or she can protect themselves. "Any other reading would eviscerate the clear intent of the statute," the letter concluded.

Finally, the state attorneys general informed Aptos that they expect the company to take action and give affected clients the correct data breach information regarding CVV numbers.

On June 9, New York resident Michelle Provost filed a proposed class-action lawsuit against Aptos and its client Tempur Sealy in a federal court in Georgia. The complaint alleges Aptos as well as Tempur Sealy failed to notify customers about the data breach.

Provost used her debit card to make two online purchases from Tempur Sealy in April and June 2016, but didn't find out that her card's information was compromised until April 2017, when Tempur Sealy notified her in writing, according to the complaint. Upon reviewing her bank statements, Provost discovered a fraudulent charge.

The complaint alleges the defendants' deceptive trade practices violate state consumer protection and data breach notification laws and accuses the defendants of negligence, breach of implied contract and unjust enrichment.

It proposes the certification of state and nationwide classes of consumers and seeks actual and statutory damages, restitution and disgorgement. The complaint also asks for an injunction ordering the defendants to promptly notify all affected customers of future data breaches.

According to the complaint, Aptos and Tempur Sealy's actions were a compendium of what not to do with respect to notifying consumers in the event of a data breach. Aptos discovered the data breach in November 2016 and reported it to federal law enforcement agencies. At the agencies' request, Aptos delayed informing clients, including Tempur Sealy, to allow the investigation to move forward, the complaint notes. Aptos notified its clients in February 2017 but took no steps to inform consumers of the breach.

"Instead, Aptos let the online businesses affected decide if, how and when to notify their customers," the complaint states. Tempur Sealy, in turn, didn't tell customers about the breach for nearly another two months, it adds.

Further, neither Aptos nor Tempur Sealy disclosed the extent of the data breach including, how many consumers' personal information — including name, address, e-mail address, telephone number, payment card account number and expiration date — was stolen and when the records were compromised, according to the complaint.

By failing to give adequate notice of the data breach, both defendants prevented consumers around the country from taking steps to protect themselves. Provost said she never would have used her debit card at Tempur Sealy's online store if she had known about the breach.

Finally the complaint alleges the defendants also failed to comply with industry standards to protect customers' personal information. Members of the payment card industry, or PCI, established a Security Standards Council in 2006 to develop PCI Data Security Standards (PCI DSS) to improve the security of payment processing systems.

Aptos and Tempur Sealy failed to comply with the PCI DSS, which requires merchants and service providers to, among other

MCGINN, *Page 6*

PRIVACY, TECHNOLOGY AND LAW

NERISSA COYLE MCGINN

Nerissa Coyle McGinn is a Chicago-based partner at Loeb & Loeb LLP. Her practice focuses on matters involving the convergence of advertising and promotions, emerging media, technology, and privacy law as well as intellectual property law, focusing on trademark clearance and counseling. She can be reached at nmcginn@loeb.com.

"Instead, Aptos let the online businesses affected decide if, how and when to notify their customers," the complaint states.

Notebook

FROM THE FRONT PAGE

Court looks at possible trouble coming from false posts on Facebook

The [2]nd Circuit Court of Appeals held that the district court had made a reversible error in admitting the web page, "because the government presented insufficient evidence that the page was what the government claimed it to be — that is, the defendant's profile page, as opposed to a profile page on the Internet that the defendant did not create or control."

Although it was "uncontroverted that information about the defendant appeared on the VK page: his name, photograph and some details about his life that were consistent with Timku's testimony about him, there was no evidence that the defendant himself had created the page or was responsible for its contents."

The [2]nd Circuit hypothesized that, if the government sought to introduce a flyer found on the street that contained the defendant's Skype address and was purportedly written or authorized by him, "the district court surely would have required some evidence that the flyer did, in fact, emanate from the defendant. Otherwise, how could the statements in the flyer be attributed to him?"

The [2]nd Circuit rejected the notion that the mere fact that a web page with the defendant's name and photograph happened to exist on the [i]nternet at the time of the special agent's testimony permitted a reasonable conclusion that the page was created by the defendant or on his behalf.

"Lorenzo Luckii Santos" post

The connection between the Facebook post and defendant in this case is even more tenuous than the connection between the VK web page and the defendant in *Vayner*.

"The authentication of social media poses unique issues regarding what is required to make a prima facie showing that the matter is what the proponent claims." *Smith v. State*, 136 So. 3d 424 (Miss. 2014). "Creating a Facebook account is easy. Anyone at least [13] years old with a valid e-mail address could create a profile." *Smith*, ¶ 19.

"Not only can anyone create a profile and masquerade as another person, but such a risk is amplified when a person creates a real profile without the realization that third parties can 'mine' their personal data. Friends and strangers alike may have access to family photos, intimate details about one's likes and dislikes, hobbies, employer details and other personal information, and, consequently, the desire to share information with one's friends may also expose users to unknown third parties who may misuse their information." *Smith*, ¶ 19.

Thus, concern over authentication arises because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password, and, consequently, the potential for fabricating or tampering with electronically stored information on a social networking website is high and poses challenges to authenticating printouts from the website. *Smith*, ¶ 19 (citing *Griffin v. State*, 419 Md. 343 (2011)).

Here, the state offered no evidence that defendant ever accessed Facebook or even used the [i]nternet. At best, the photograph and the name on the Facebook profile are about defendant and not evidence that defendant himself had created the post or was responsible for its contents.

Moreover, the statement "its my way or the highway ... leave em dead n his driveway" was not self-authenticated by the fact that the victim was killed in his driveway. The state's reasoning that the post can be attributed to defendant because it is incriminating is circular.

Any person could have created the post if he or she knew defendant by his alleged alias, knew about the shooting and the underlying feud and had digitally mined an image of someone who looked like defendant.

As in *Vayner*, the state simply offered no evidence that any of the information on the Facebook post was known or available only to defendant or, at the very least, to a small group of people including defendant.

Worse yet, others who were familiar with defendant might have been motivated to create the post to falsely attribute an incriminating statement to defendant.

Other than the post itself, the state cites no evidence that defendant even had a Facebook profile, much less that the post was his.

The Facebook post in this case is no different from the hypothetical flyer in *Vayner*.

If a printout of the screenshot of the Facebook post had been found on the street, the trial court surely would have required some evidence that it was written or authorized by defendant. Otherwise, the statement on the printout could not be attributed to him.

The mere fact that a Facebook post on a profile with defendant's alleged alias and photograph happened to exist on the [i]nternet for a brief period after the offense does not permit a reasonable conclusion that the post was created by defendant or on his behalf.

The ease in fabricating a social media account to corroborate a story means that more than a "simple name and photograph" are required to sufficiently link the communication to the purported author under Rule 901. *Smith*, ¶ 21.

The court in *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012), surveyed cases and noted that "something more" might be necessary to adequately present a prima facie case of authentication.

For example, (1) the purported sender admits authorship, (2) the purported sender is seen composing the communication, (3) business records of an [i]nternet service provider or cellphone company show that the communication originated from the purported sender's personal computer or cellphone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cellphone, (4) the communication contains information that only the purported sender could be expected to know, (5) the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or (6) other circumstances peculiar to the particular case may suffice to establish a prima facie showing of authenticity.

These examples are intended only as a guide, and we emphasize that we express no view on what specific type and quantum of evidence would have been sufficient to authenticate the Facebook post and warrant its consideration by the jury.

However, to argue that the Facebook post was tantamount to an admission that defendant killed the victim in his driveway, Rule 901 required "some basis" on which a reasonable juror could conclude that the post was not just any [i]nternet post, but was in fact created by defendant or at his direction.

Without such a showing, the trial court abused its discretion in admitting the Facebook post and Detective Beets' testimony.

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Corrado wants to focus on fostering young female lawyers' growth

CORRADO, *FROM PAGE 1*

LB: Tell me about your time working part-time for the firm while raising your family.

RC: If you are in a transactional practice, part time is a good thing in the sense that you have less assignments, but I never had hours that were entirely regular. I always had to juggle that a little bit. At the beginning, I was able to come home fairly regularly in the early afternoons and then go back to work at night. In the later years, it was more like an early dinner and then I would do my little night shift after dinner.

LB: What is the difference between a full-time and a part-time transactional attorney? It doesn't seem like you're working any less if you had just stayed full-time.

RC: No, that is not quite correct. A full-time young associate — then and now — works really all the time. I did not work all the time. I did have time for my family and my kids, and I very much enjoyed that I was able to do that.

For example, when my younger daughter was in the Girl Scouts and I was able to be a Girl Scout leader and make it to every meeting and do what I needed to do and work late at night.

LB: And Baker McKenzie was in full support of this?

RC: Absolutely. I always appreciated — I always kind of shared my story and where I was at and what I was about, and everybody always appreciated that. I never had the need to hide myself. I was always there as a mom and with my interests that included work, foremost, as well as other things.

LB: Can you tell me about how Baker McKenzie's flexible scheduling enabled you to work part-time for six years?

RC: My partners with whom I worked, they knew I was on a part-time schedule, so when a new project came in they would ask me if I had time for that. It was either "yes, with help in this area," or "actually, now, at this time no."

There was always that transparency you need to have in order to collaboratively work with each other.

LB: Why did you decide to come back to full time?

RC: My kids were in school and my family situation was such that I had great support at home where I could focus more on work. And I set out to become a national partner, that's what I wanted to do at the time.

Q: What are your goals and hopes for your term as the firm's managing partner?

RC: What that means is I'll make sure our office runs smoothly, with everything that belongs to that. I'll be very much focused on spending a lot of time with our clients in the Chicagoland area. I very much like to listen to their stories and their issues they have around the world and see how we can help, see how I can help and bring those issues and questions to a solution by enlisting the help of the entire firm.

LB: And you're expected to maintain your individual work?

RC: I keep my clients and I would never give up my clients. That's something I couldn't do. I have grown very much attached to them.

LB: How do you plan to divide your responsibilities to your firm and your responsibilities to your clients?

RC: Whatever is on the calendar for the day. There could be a day that is entirely spending time with our clients. Other days where I'll spend a lot of time in internal meetings. It'll just depend on the day. Having worked on a flexible basis will hopefully help me juggle those two jobs as well.

LB: What kind of trends are you noticing with the Chicago legal market? And how do you plan to address them as the new managing partner?

RC: The companies that are located in Chicago ... more and more and more have become global businesses. That is a fantastic opportunity for Baker McKenzie with its 77 offices in 45 countries, and I intend to bring all of the experiences and deep knowledge of how to do business globally to our clients.

LB: Is there anything you would like to add?

RC: In the [diversity and integrity] area, my tenure as the managing partner will also be about not only helping to recruit diverse candidates among our associates and partners but also to make sure our diverse attorneys have a fruitful and interesting career with us as well as focusing on leadership positions for our younger female colleagues. That is something we as managers have to actively help bring about, and that's something I'm very interested in.

One last focus — I would like to continue the excellent work that past managing partners have done to work with the Chicago community; to help them bring about programs and use our fantastic and beautiful space upstairs wisely to bring that to our community here. ... We have a tradition of being excellent hosts, and I will continue that tradition.

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Plaintiff's attorney allowed to leave case, criticizes defense attorney

ARCHDIOCESE, *FROM PAGE 1*

cease working together, and this case is no exception," Mertz said in the statement. "John J. Doe and I believe he has defenses to the archdiocese's motion for sanctions, and the court may very well deny the motion."

He then blasted the archdiocese for alerting the media to the public proceeding in which its motion would be heard.

"The Archdiocese of Chicago's decision to involve the press in this motion — before the court has ruled or even set a briefing schedule — reveals its true intent is to use the John J. Doe case to gain an advantage over other victims of childhood sexual abuse by its clergy," his statement continues.

"For decades, the Catholic church and the Archdiocese of Chicago have failed in their solemn duty to protect children from sexual predators masquerading as priests. Calling reporters to attend a motion, where the archdiocese feels it has an advantage, is a disappointing return to business as usual for an institution that claims to live by the word of Christ. Perhaps the cardinal should be asked to explain what he hopes to gain by publicizing this matter."

Doe's initial June 2015 lawsuit against the archdiocese alleged McCormack engaged in inappropriate conduct and cultivated a "sexually and/or otherwise abusive relationship" with him through his various visits to St. Agatha's Catholic Church in June 2004.

McCormack pleaded guilty in 2007 to molesting five boys, served a five-year prison sentence and was remanded to a mental health facility is Rushville upon his release.

Doe also filed a motion in early June requesting leave to seek punitive damages against the archdiocese. However, nearly 10 days later, Circuit Judge Patricia O'Brien Sheahan entered an order voluntarily dismissing the suit with leave to refile.

The case is *John J. Doe v. The Archdiocese of Chicago, et al.*, 15 L 6189.

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Older worker fatality rate tends to be higher than general workforce

DYING, *FROM PAGE 4*

working population. It excludes cases where the cause of death was from a "natural cause," including a heart attack or stroke.

AP also examined the number and types of accidents in which older workers died between 2011, when the bureau changed the way it categorized accidents, to 2015:

• Fall-related fatalities rose 20 percent.

• Contact with objects and equipment increased 17 percent.

• Transportation accidents increased 15 percent.

• Fires and explosions decreased by 8 percent.

"We expect that there will be more older workers increasing each year and they will represent a greater share (of the fatalities) over the last couple of decades," said Scott, the epidemiologist. "This issue of elevated risk is something we should be paying close attention to."

An Associated Press-NORC Center for Public Affairs Research poll found in 2013 that 44 percent of older Americans said their job required physical effort most or almost all of the time and 36 percent said it was more difficult to complete the physical requirements of their jobs than it was when they were younger.

William White Jr. said his father had been working in the same Chicago-based warehouse for more than a decade and was a manager when he fell to his death on Sept. 24, 2015.

"My dad was the best at what he did. He's the one who taught me everything I know," the 26-year-old Chicago resident said. "He went up to get an item for the delivery driver and the next thing you know he made a wrong move and fell. The job is fast-pace and everybody is rushing."

Thomas Stiede, principal officer for Teamsters Local 703, said White knew the safety procedures and he can't understand why White didn't wear a safety harness. "He was a very conscientious employee," he said, his voice cracking with emotion.

Testa Inc. was fined $12,600 by the U.S. Occupational Safety and Health Administration for failing to provide safety training. The company declined to comment for this story.

The same year White died, the fatal accident rate in Illinois for older workers was 4.5 per 100,000 workers, 60 percent higher than the comparable rate for all workers.

In most states, the fatal accident rates for older workers were consistently higher than comparable rates for all workers.

Nevada, New Jersey and Washington had the greatest percent increase in fatal accident rates for older workers between 2006 and 2015.

The three states with the largest percent decrease were Hawaii, Oregon and Vermont.

Eight states saw their overall workplace fatality rate drop, even as the rate for older workers increased: Massachusetts, Michigan, Montana, Nevada, New York, Texas, Utah and Washington.

In two states — North Dakota and Wisconsin — the trend was reversed; older worker accident rates decreased while the accident rate overall increased.

In metropolitan areas, Las Vegas ran counter to the national trend.

In 2006, the fatal accident rate among older workers in the Las Vegas metropolitan area was lower than the rate among all workers. But by 2015, the rate of deaths among older workers more than doubled even as the rate among all workers declined.

Transportation accidents account for a large portion of fatal workplace incidents among both older workers and workers in general.

In one such incident, Ruan Qiang Hua, 58, died last Nov. 21 from injuries suffered in a forklift accident at Good View Roofing and Building Supply warehouse, according to the California Occupational Safety and Health Administration. After a bag of mortar fell from the pallet, Qiang backed up and rolled off a ramp. The forklift tipped over and Qian was crushed when he jumped off.

The agency fined the San Francisco-based company $62,320, saying it had failed to ensure that forklift operators were competent and wore seat belts.

The company is appealing the penalties, according to OSHA.

Records show that Hua was not properly trained or certified as a forklift operator. Video of the incident showed he was not wearing his seat belt. Other video from the worksite showed that other forklift operators also had not used their seat belts and that the employer failed to install a curb along the sides of the ramp to prevent the lifts from running off the ramp. The company declined to comment.

In California, the 2015 rate of fatal accidents was 3.4 per 100,000 workers for older workers, 60 percent higher than the rate for all workers.

The AP analysis showed that older workers were involved in about 1 in 4 fatal workplace accidents related to fires and explosions from 2011 to 2015.

In April 2014, Earle Robinson, 60, and other employees were doing maintenance work at Bryan Texas Utilities Power Plant, about 100 miles north of Houston, when there was a loud explosion. Workers called 911 and pleaded for help.

"He's in bad shape. He's got a lot of facial burns," according to a transcript of the 911 calls. "He's got some pretty bad burns."

Robinson was taken to a hospital in Houston and died days later. The company declined to comment for this story.

The year Robinson died, the fatality rate among older workers in Texas was 6.1 per 100,000 workers — 43 percent higher than the accident rate for all workers.

The National Center for Productive Aging and Work is pushing for changes in the workplace to make it safer for older workers. The year-old center is part of the National Institute for Occupational Safety and Health.

"We advocate to make workplaces as age-friendly as possible," said co-director James Grosch. For example, increased lighting helps older workers whose eyesight has weakened with age.

He said the center is emphasizing productive aging, looking at "how people can be more productive, how their wisdom can be leveraged in a workplace."

Editor's note — Maria Ines Zamudio is studying aging and workforce issues as part of a 10-month fellowship at The Associated Press-NORC Center for Public Affairs Research, which joins NORC's independent research and AP journalism. The fellowship is funded by the Alfred P. Sloan Foundation.

E-commerce company misreads data security laws, gets into trouble

MCGINN, *FROM PAGE 5*

things, protect cardholder data, maintain a vulnerability management program, implement strong access control measures and regularly monitor and test networks, the complaint avers.

With countless data breaches occurring at organizations around the country over the past several years, the Federal Trade Commission issued "Data Breach Response: A Guide for Business" at the end of 2016. The guidance provides details on how to secure the organization's systems, fix the breach — and notify the parties involved, including consumers.

The FTC recommends the organization designate a point person in the organization to release information to those affected by the breach. The agency offers sample letters, websites and toll-free numbers to communicate with people whose information may have been compromised.

The FTC also recommends being as transparent as possible by clearly communicating what is known about the breach, including how it happened, what information was taken, how the stolen information was used if known, what actions are being taken to remedy the situation and how to reach the relevant contacts in the organization.

In addition, the organization should encourage individuals who discover that their information has been misused to file a complaint with the FTC via IdentityTheft.gov.

Most states have enacted legislation requiring notification of security breaches involving personal information, but some are more comprehensive than others.

Illinois amended its Personal Information Protection Act, effective Jan. 1, to require state government agencies and businesses subject to the federal Health Insurance Portability and Accountability Act (HIPAA) that experience a data security breach to notify the state attorney general's office and any affected Illinois residents.

The state attorney general's office also created a dedicated e-mail address for breach reporting: databreach@atg.state.il.us.

Under the Illinois Personal Information Protection Act, any entity that conducts business in the state, and for any purpose, handles, collects, disseminates or otherwise deals with nonpublic personal information, is required to timely disclose a data security breach of personal information concerning Illinois residents.

Organizations subject to HIPAA must provide the state attorney general's office with similar information about the breach and provide additional information including the date and types of any consumer data security breach notification that has or will be sent to consumers and the types of consumer credit monitoring and fraud prevention and detection services being offered, if any.

As Aptos is learning the hard way, regulatory enforcement and consumer class actions are a hefty consequence for failing to conscientiously comply with state data security and breach notification laws.

Every Friday, see what happens when entertainment and law mix in **Non-billable Hours** on page 4 of the Law Bulletin.

CASE SUMMARIES

ADDITIONAL CASE SUMMARY ON PAGE 3

Criminal procedure — jury waiver, all cases notice

Where the defendant is simultaneously arraigned on multiple cases and waives the right to a jury trial in one case, the court may not join the cases and try them all in a bench trial without first informing the defendant that he has not yet waived the right to a jury trial in the other cases and may still insist on one.

People v. George Gatlin

2017 IL App (1st) 143644

Writing for the court: Justice Eileen O'Neill Burke

Concurring: Justices David Ellis and Margaret Stanton McBride

Released: June 8, 2017

The 1st District Appellate Court affirmed in part and reversed and remanded in part a decision by Cook County Associate Judge Joseph Michael Claps.

On Feb. 23, 2014, George Gatlin approached Migdalia Castro and a friend of hers and attacked her friend before pushing Castro to the ground. Castro stood up and fled, telling her fiance, Chauncey Roberts, what had happened.

Roberts went and approached Gatlin, asking him why he had attacked Castro. When Gatlin didn't respond, Roberts said he would call the police and took out his cellphone. As he walked away, Gatlin struck him from behind with a belt buckle, beating him repeatedly.

As he was being beaten, Roberts dropped his cellphone, which Gatlin grabbed, yelling "who you going to call now?" as he ran away.

About three weeks later, Gatlin was charged with aggravated battery and unlawful restraint of Castro as well as robbery, aggravated battery and unlawful restraint toward Roberts.

The list of charges regarding both Castro and Roberts were read to Gatlin as he was being arraigned. Gatlin asked the court to repeat the charges relating to Roberts. After the court did so, it stated "These are charges for which you have a right to ... trial by a jury." The court determined that Gatlin was aware and informed of his rights.

In late September, Gatlin waived the right to trial by jury. The written jury waiver referenced the charges involving Roberts. Subsequent to Gatlin signing the waiver, the state moved to join the cases. The cases were joined, over Gatlin's objection, and the trial court heard them both in a bench trial.

Gatlin was found guilty of aggravated battery in both cases and not guilty on the remaining issues. He was sentenced to two concurrent terms of four years in prison. He appealed.

On appeal, Gatlin argued that the trial court failed to ensure that he properly waived his right to a jury trial regarding the charges stemming from his actions toward Castro. Although the state argued, and the appellate court agreed, that he had been properly admonished and knowingly waived his right to a jury trial for the charges relating to Roberts, as was recorded in the oral record as well as a signed jury waiver, no such record existed indicating that he waived his right to a jury trial for the charges relating to Castro.

The state moved to merge the two trials after the waiver for one had been obtained.

The appellate court agreed. The court emphasized that there was no indication that Gatlin was even aware, subsequent to waiving his right to a jury trial in one case, that he retained his right to a jury trial in the other.

The court cited precedent that silent acquiescence to a bench trial does not support a knowing-and-understanding waiver of rights to a jury trial.

The appellate court noted that violations of the right to a jury trial are plain error under the second prong of the plain-error doctrine and, therefore, reversed Gatlin's conviction for aggravated battery of Castro and remanded the case for a new trial.

Sentencing — parsimony principle, sentence change

Where a U.S. District Court judge is not required to consider the parsimony principle of 18 U.S.C. Section 3553(a) twice when calculating a defendant's sentence, the lower court order was affirmed.

United States v. Carnell King

No. 16-3572

Writing for the court: Judge David F. Hamilton

Concurring: Judges Michael S. Kanne and Diane P. Sykes

Released: June 30, 2017

The 7th U.S. Circuit Court of Appeals affirmed a decision by U.S. District Judge Robert W. Gettleman.

Carnell King obtained personal information which could be used to identify more than 100 people between the years of 2012 and 2014, including information on the director of the U.S. National Security Agency.

King used the information to create and use, or attempt to use, 185 credit and debit cards. King also prepared and submitted 62 false tax refund claims in names other than his own. Reported losses from King's crimes totaled $10,980.

King was first arrested in June 2014 and charged with access device fraud. King was not detained before trial, but one condition of his temporary release was that he not commit a federal crime. In November, King was arrested again and charged with wire fraud after attempting to use credit card accounts of various individuals less than two months after his initial arrest.

King's pretrial release was then revoked and he was detained. King eventually pleaded guilty to all five counts, including a charge of aggravated identity theft, which requires a minimum sentence of 24 months in prison consecutive to any other sentence.

The district court sentenced King to concurrent terms of 24 and 30 months in prison, which was below the applicable guidelines range. After adding the mandatory consecutive 24-month sentence, King's total sentence was 54 months. King appealed.

On appeal, King challenged his sentence. The appellate panel began by stating that the district court believed that the guidelines calculation of 46 to 57 months prior to the 24-month consecutive addition overstated King's culpability. The panel stated that the judge gave a thoughtful explanation of the sentence that considered a variety of aggravating and mitigating factors.

King, however, argued that the guideline calculation in his case violated 18 U.S.C. Section 3553(a) and its parsimony principle. The parsimony principle holds that the simplest means be used to determine a final outcome.

King argued that the guideline instruction to use a $500 minimum loss per access device was contrary to the parsimony principle. He stated that the statutory parsimony principle should allow a defendant to argue that the guideline calculation itself should be lowered before the court goes on to the Section 3553(a) analysis.

The panel found that this would require the court to consider the parsimony principle twice, once in whether to modify an otherwise correct guideline calculation itself and second in exercising its final sentencing authority under Section 3553(a).

The panel found that this argument had no apparent basis in the statute. The panel noted further that the sentencing guidelines are advisory, and that nothing in them requires the district court to adopt the calculated sentence. The panel further noted that a defendant is always free to argue that the guidelines, taken as a whole or when particular provisions are examined, recommended an unduly harsh sentence in their case.

The panel concluded that the district court's sentence was sound, and, as a result, affirmed the district court's decision.

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Spanish (helpful). 2-5 prior years as a legal secretary in a plaintiff's personal injury firm. Excellent organizational, computer, team work skills; familiar w/prep. of subpoenas, motions, docketing, medical records requests; Dictaphone / outstanding typing skills. Experience w/trial preparation / jurisdictional court filing required. Please forward your confidential resume w/ references and salary details to:
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