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Tort Trends

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Illinois Supreme Court Rule 219 and Exclusion of Witnesses

BY MARK BENFIELD & KATHRYN JOHNSON-MONFORT

Illinois Supreme Court Rule 219(c) provides that the court "may enter . . . orders as are just" when a party "unreasonably fails to comply with any provision of part E of article II of the rules of this court or fails to comply with any order entered under these rules." The Rule contemplates several forms of relief, including "that a witness be barred from testifying." Ill. S. Ct. R. 219(c)(iv). "The factors a trial court is to use in determining whether exclusion of a witness is an appropriate sanction are: (1) surprise to the adverse party; (2) the prejudicial effect of the witness' testimony; (3) the nature

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The Often-Overlooked Power of 'In-Concert Liability' in Personal Injury Cases

BY THOMAS M. CONNELLY

Illinois law regarding in-concert liability is not well developed, but it remains a powerful theory of liability in complex personal injury cases. The classic example used by many courts across the country to describe in-concert liability is the drag race scenario where liability attaches to both drag racing drivers A and B although only A injures bystander C.[1] Other courts have also described the theory as deriving from the criminal concept of aiding and abetting.[2] In other words, an individual who acts in concert with a tortfeasor in causing a plaintiff's injury is held jointly and severally liable for that injury because the individual becomes legally responsible for the actions of the tort-feasor.[3]

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The Often-Overlooked Power of 'In-Concert Liability' in Personal Injury Cases

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Despite the shortage of case law concerning in-concert liability, Illinois courts have clearly adopted the theory by relying on section 876 of the Restatement (Second) of Torts to provide an accurate definition of such liability.[4]

Section 876 defines in-concert liability as follows:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[5]

Although the Restatement's definition provides three separate paths to proving in-concert liability, the most useful tool in holding additional parties liable is subsection (b) of section 876, the "substantial assistance or encouragement" prong. Subsection (b) "imposes liability on those persons who act in concert with another tortfeasor, giving substantial assistance or encouragement to another's tortious conduct."[6] Notably, this theory of liability does not even require a plaintiff to prove the third-party acted negligently—liability arises solely from rendering substantial assistance to the tortfeasor.[7]

Perhaps the most authoritative case in Illinois regarding "substantial assistance" in-concert liability is *Simmons v. Homatas*.[8] In *Simmons*, the plaintiffs suffered fatal injuries in a car crash. Immediately before the crash, the defendant driver had been at a strip club that did not serve alcohol but allowed patrons to bring their own. After the defendant became visibly intoxicated, club employees kicked him out of the club, had the valet bring him his car, and ordered him to leave. Only 15 minutes after leaving the club, the defendant driver caused the fatal crash killing the plaintiffs. Because the club did not sell nor provide the defendant driver with alcohol, they were not liable under the dramshop act. However, plaintiffs proceeded with a common law action against the club based on in-concert liability.

The Illinois Supreme Court held that the defendant strip club did owe a duty to the deceased plaintiffs under the theory of in-concert liability, and further held that plaintiffs properly stated a cause of action under subsection (b) of section 876 in their complaints by alleging that the club knew the defendant driver's conduct constituted a breach and that the club provided substantial assistance or encouragement in committing that breach of duty.[9] More specifically, the plaintiffs alleged in their complaints that the club knew or should have known that the defendant driver was intoxicated and, despite its knowledge of the driver's intoxication, directed him to leave the premises of the club in his vehicle.[10]

Once a plaintiff properly pleads a cause of action for in-concert liability, the question of whether a defendant has substantially assisted or encouraged another person in his tortious conduct becomes a question of fact for the jury.[11] The factors used to determine whether a defendant provided substantial assistance are: (1) the nature of the act encouraged, (2) the amount of the assistance given by the defendant, (3) his presence or absence at the time of the tort, (4) his relation to the other, and (5) his state of mind.[12]

Despite the "substantial assistance" theory of in-concert liability being often overlooked, it is a powerful cause of action to hold a party liable even when he or she is not negligent. Although case law is not well-developed on this issue, there is plenty of authority to provide guidance on pursuing and defending in-concert liability claims. So, it is an important concept to understand for both plaintiffs and defendants.■

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1. 1 Products Liability § 3.06 (2024) (citing *Morton v. Abbott Lab.*, 538 F. Supp. 593, 596 (M.D. Fla. 1982) (although this case rejected the application of in-concert liability in this particular case, the court explained that the "classic example of such liability is the drag race: A and B are illegally racing when A injures C. A and B are jointly and severally liable because their concerted tortious conduct caused C's injuries")).
2. *Id.* (citing *Shackil v. Lederle Labs.*, 116 N.J. 155, 561 A.2d 511, 515 (1989)).
3. *Woods v. Cole*, 181 Ill. 2d 512, 519 (1998).
4. *Borcia v. Hatyina*, 2015 IL App (2d) 140559; *Simmons v. Homatas*, 236 Ill. 2d 459 (2010); *Kohn v. Laidlaw Transit, Inc.*, 347 Ill. App. 3d 746 (5th Dist. 2004); *Fortae v. Holland*, 334 Ill. App. 3d 705 (1st Dist. 2002); *Umble v. Sandy McKie & Sons, Inc.*, 294 Ill. App. 3d 449 (2nd Dist.1998).
5. Restat. 2d of Torts, § 876.
6. *Simmons v. Homatas*, 236 Ill. 2d 459, 476 (2010).
7. *Fortae v. Holland*, 334 Ill. App. 3d 705 (1st Dist. 2002).
8. 236 Ill. 2d 459 (2010).
9. *Simmons*, 236 Ill. 2d at 478.
10. *Id.*
11. *Id.* at 477-78.
12. *Id.* at 477.