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Citations in motions for summary judgment

LIFE IN THE WORKPLACE, PAGE 4

STEVEN P. GARMISA
Hoey & Farina

Justices offer some lessons on mistrials

Burkhamer v. Krumske

Based on blatantly out-of-bounds questions during direct examination of Kevin Burkhamer — the plaintiff in an admitted-liability auto case — about whether the defendant, Mel Richard Krumske, ever called to apologize for causing the collision, Krumske's attorney promptly objected and requested a mistrial.

Despite sustaining the objection and acknowledging at sidebar that an instruction to disregard might be an inadequate remedy for the unfair prejudice likely caused by the improper questioning, the judge postponed ruling on the request for a mistrial.

At the end of the trial on damages, the verdict for Burkhamer was $175,000.

The jury was discharged. And before judgment was entered, Krumske's attorney reminded the judge about the lingering motion for a mistrial.

Concluding the verdict might have been "inflated by passion," the judge said she was granting "the motion for a new trial," although Krumske never filed a posttrial motion.

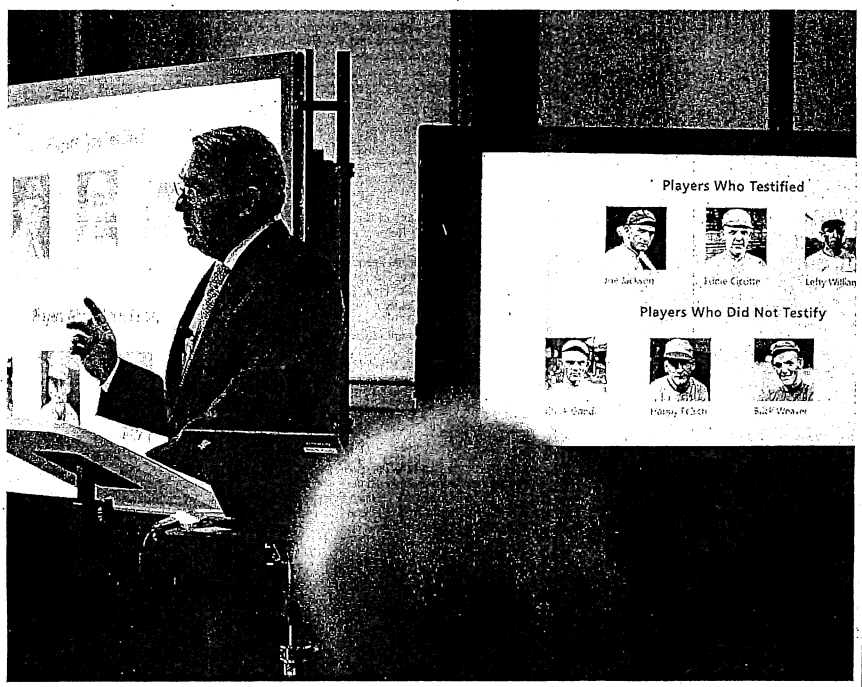
The Illinois Appellate Court permitted an immediate appeal by Burkhamer under Supreme Court Rule 306.

Providing important procedural lessons about postponed rulings, posttrial motions and the distinctions between mistrials and new trials, the 1st District reversed.

Krumske "waived his right to a mistrial by waiting until after the jury returned its verdict to seek a ruling on his motion for mistrial" — and he "waived his right to a new trial by failing to file a posttrial motion." *Burkhamer v. Krumske*, 2015 IL App (1st) 131863 (June 12, 2015).

Here are highlights of Justice Shelvin L. Hall's opinion (with omissions not noted in the text):

A mistrial is defined as "either a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings, or



Bartlit, Beck, Herman, Palenchar & Scott LLP partner Philip S. Beck defends eight former White Sox players accused of throwing the 1919 World Series during a mock retrial of the Black Sox Scandal on Tuesday afternoon at his firm's office. While the jury received the same instructions as its 1921 counterparts did, Tuesday's simulation used modern technology to present the case. *Michael R. Schmidt*

A big White Sox win on Tuesday night

Modern-style mock trial over 1919 Black Sox Scandal reaches same outcome as 1921 jury

BY LAURAANN WOOD
Law Bulletin staff writer

As the Chicago Cubs finished off the National League Division Series a few miles to the north, eight former White Sox players got their own win Tuesday when they scored their second not-guilty verdict in 94 years during a simulated retrial in the Black Sox Scandal.

In 1919, the White Sox faced the Cincinnati Reds in the World Series with arguably two of the best pitchers in baseball. Beating the Reds seemed an easy task, but those eight players — dubbed the "Black Sox" — took probability into their own hands.

They let gamblers get into their minds and into their pockets. Allegedly, they fixed the games and threw the World Series.

But during a time when betting on games ran rampant and no law specifically prohibited such acts, were the players technically engaging in illegal activity?

Jurors deliberated that question in a 1921 trial held at the old Cook County Criminal Court Building at 54 W. Hubbard St.

In the same building — since renamed Courthouse Place — the mock jurors on Tuesday reached the same conclusion under the exact same instructions. But this time around, they had extra help from 21st century technology to shape their decision.

The mock trial was a part of Chicago Ideas Week, an annual event that brings industry leaders to town to collaborate on new business and cultural concepts.

Although Tuesday's trial brought jurors back in time instead of trying the case under today's laws, Adam L. Hoeflich — a partner at Bartlit, Beck, Herman, Palenchar & Scott LLP — said the event fit that description because it showed how the use of technology would have shaped how the players' case was tried.

"When you're talking about the legal practice, that's part of what we tried to do was show people how we would use best practices in technology today to take a different view of something that happened a century ago," said Hoeflich, who played the mock-prosecutor.

While listening to the case, mock jurors watched as Hoeflich quickly flipped through original grand jury investigation excerpts. They followed along smoothly as he and fellow partner Philip S. Beck, who played the role of the players' defense attorney, supported their arguments by magnifying and highlighting more statistics than the standard batting average and on-base percentage to support their arguments.

And with video as a visual aid, Hoeflich demonstrated the difference between a baseball player giving his all and one who might only be playing at 95 percent — a difference that he argued would be unrecognizable to fans observing the game from ballpark stands.

And while the mock jury's experience was largely digital, trying a case was much more tactile in the early 20th century.

"People would hand out transcripts to jurors. They would have things that were blacked out," Hoeflich said. "If we actually were in today's world and had all of the film from the games, we'd be looking at actually how fast did (Sox pitcher Eddie) Cicotte throw the ball, and people would be using that. We'd be showing how Cicotte

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Lawyer behind MH370 filings faces sanctions

Panel calls for a 60-day suspension over Kelly's discovery petitions

BY JAMIE LOO
Law Bulletin staff writer

A Chicago attorney who filed a Rule 224 petition after the disappearance of Malaysia Airlines Flight 370 in March 2014 is accused of filing a frivolous petition and is now facing sanctions.

An Illinois Attorney Registration & Disciplinary Commission Hearing Board is recommending a 60-day suspension for Monica R. Kelly of Ribbeck Law Chartered for allegedly filing a Rule 224 petition without proper basis in the law, despite prior warnings from a Cook County judge to refrain from such pleadings in similar fatal airline cases.

Kelly, 48, is registered with the ARDC under the name Monica E. Ribbeck. She has been a lawyer in Illinois since 1994.

A Rule 224 petition is used to open limited discovery for the sole purpose of identifying parties that may be responsible for damages and named as defendants in a later complaint.

On March 8, 2014, Flight 370 went missing en route to Beijing, China, after leaving Kuala Lumpur, Malaysia, with 227 passengers and 12 crew members. Malaysia's minister of aviation made a statement on March 24, 2014, that the Boeing 777 aircraft had crashed into the ocean with no survivors — but no official determination of the cause of the crash had been made yet.

Last month, French authorities confirmed barnacle-covered debris that washed ashore on Reunion Island in July came from the Malaysian jet. But no cause of the crash has been identified.

On March 25, 2014, Kelly's law firm filed a Rule 224 petition against Boeing and Malaysia Airlines on behalf of the estate of Chandra Siregar, who was a passenger on board the plane.

The Hearing Board found that Kelly violated rules of professional conduct by making a frivolous filing with no basis in law and engaged in conduct prejudicial to the administration of justice.

Based on the evidence, which included statements Kelly made to the media and prior actions on Rule 224 petitions, the board alleged that Kelly already knew the names of potentially liable parties and used the petition as a publicity ploy.

"Respondent desired to be the first to announce publicly that she had initiated legal proceedings with respect to the Flight 370 incident and intended to prove both Malaysia Airlines and Boeing were negligent," the report said.

ARDC hearing panels act as trial courts in the disciplinary process, and their decisions can be appealed before a review board.

ARDC Deputy Administrator James J. Grogan declined to comment on the hearing board's report.

Kelly's attorney George B. Collins of Collins, Bargione and Vuckovich, said his client is out of the country on business and is aware of the hearing board's report. She has instructed him to file exceptions to an ARDC Review Board.

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Publisher tries again to sell near Wrigley Field

BY PATRICIA MANSON
Law Bulletin staff writer

A publisher that lost in a legal bid to sell its Cubs-centric magazine just outside Wrigley Field's gates is hoping to advance his case to the next round.

Left Field Media LLC has asked the 7th U.S. Circuit Court of Appeals to allow vendors to hawk Chicago Baseball magazine on the public sidewalks outside the ballpark gates until the court decides whether a federal trial judge should have enjoined enforcement of two city ordinances.

One ordinance prohibits all peddling on public sidewalks adjacent and Wednesday next week.

Left Field is represented before the 7th Circuit by sole practitioners Mark G. Weinberg and Adele D. Nicholas.

"We expect a prompt ruling given that the playoffs are ongoing and the plaintiff's rights are at immediate risk," Nicholas said.

The city is represented by Assistant Corporation Counsel Jonathon Delmar Byrer.

Law Department spokesman John Holden said the city will oppose Left Field's motion to halt the enforcement of the peddling ban on the public sidewalks adjacent to Wrigley Field.

ARDC panel: Kelly used discovery petitions to generate publicity

ARDC, *FROM PAGE 1*

Kelly based her petition on theories from Max Vermij, an aviation expert she had contacted about the airline accident. Although she acknowledged not knowing the cause of the Flight 370 incident, Kelly went ahead with the petition, alleging that Boeing and Malaysia Airlines were negligent.

The petition was assigned to Cook County Circuit Judge Kathy M. Flanagan, who regularly hears Rule 224 petitions. Flanagan had previously dismissed two Rule 224 petitions filed by Kelly in 2013 against aircraft manufacturers "on the basis that such petitions were not authorized by the rule when the identity of a potential defendant was known to the petitioner."

Shortly after the Rule 224 petition was filed, Kelly conducted news briefings in Kuala Lumpur announcing the legal action and stated that "we will prove it was a mechanical failure of the aircraft design that caused the plane to crash."

On March 28, 2014, Flanagan issued a memorandum opinion dismissing the Rule 224 petition, citing the procedural issue that once there's sufficient information to identify at least one potential defendant "then the correct procedure is to file an action at law for damages," and utilize general discovery provisions.

The order also stated that despite the court's dismissal of two other Rule 224 petitions from Kelly's law firm in other fatal airline crashes, the firm still filed the Flight 370 petition knowing there was no basis to do so. Flanagan suggested the court may impose future sanctions. Kelly did not appeal Flanagan's ruling.

According to the Hearing Board report, Kelly disagrees with Flanagan's interpretation of Rule 224 and views it as a tool to identify and eliminate liable parties before the two-year statute of limitations has run to file a lawsuit. She argued that parties such as Boeing will allegedly not cooperate in discovery willingly, which delays the process.

On the same day Flanagan denied the Rule 224 petition in the Siregar case, Kelly filed another Rule 224 petition on behalf of Lee Kim Fatt, the spouse of a Flight 370 crew member. Flanagan dismissed the petition and Kelly appealed to the 1st District Appellate Court.

Although the court reversed the dismissal solely on Flanagan's failure to hold a hearing, it acknowledged "and fully sympathize(d) with the trial court's frustration" at the repeated filings from Kelly outside the scope of Rule 224. The case was remanded back to Flanagan, but before a hearing could be conducted, Kelly voluntarily dismissed the case citing a settlement.

In reaching its recommendation, the Hearing Board found that although unrelated to the Siregar matter, the Appellate Court's opinion was significant because it sent a clear message that it sympathized with Flanagan's position that the filings were frivolous.

The Hearing Board also found that Kelly's choice not to appeal the petition dismissal in the Siregar case indicates a publicity motivation because by the time Flanagan had dismissed the petition, she had already obtained the press coverage she desired which would make an appeal unnecessary.

The board was also unconvinced by Kelly's assertion that Boeing would be uncooperative in the discovery process and felt that it was speculative and unsupported by evidence.

Kelly was censured by the Illinois Supreme Court in November 2014 for failure to withdraw as counsel of record for Mustafa Gumus, who was injured in a 2009 airplane crash in the Netherlands.

The matter is *In re Monica E. Ribbeck* No. 2014 PR 00092.

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For a conviction, jury instructions required proof of intent to fraud

RETRIAL, *FROM PAGE 1*

handled the same exact plays in other games, and I do think you would try the case very differently using today's technology."

Despite society's digital advances, the mock jury returned the same verdict as was delivered in 1921. That, Hoeflich and Beck said, came from the jury's instructions upon deliberation.

Back then, laws had not yet been passed that directly declared fraternizing with gamblers and throwing baseball games illegal — those came shortly after the Black Sox players' acquittal.

Since proving the players "agreed merely to throw the games" wasn't enough, according to the instructions, both juries were tasked to find that the players specifically conspired to defraud Sox catcher Raymond Schalk, the team's front office or the public.

Bradley Bergman, a retired banker from Chicago who sat on the mock jury, said he would have found the players who admitted to taking gamblers' money guilty for defrauding the club and the public.

"They did not go out and take physical dollars, but by changing the odds, they in fact changed the payout, which in fact changed who got paid what," he said.

Bergman said his reasoning behind a guilty verdict was centered on preserving the integrity of the sport.

"They knew they were doing something wrong. By doing something wrong, they knew that they were impacting the character of the game," he said.

Bergman said his biggest challenge came when he stacked the players' postseason statistics against grand jury evidence but then focused on the definition of intent.

"How specific does the intent have to be?" he asked. "In other words, regarding taking money from the public, did they have to actually take money from the public and from the league and the player, or was their intent to defraud enough to convict?"

Such a conflict was fairly representative of the types of issues modern-day jurors can grapple with, Beck said.

"When you're charged with something like conspiracy to defraud and there are hard questions about intent and even if you don't defraud somebody — if you agreed with others to attempt to do so — where do you draw the line on that sort of thing?" Beck said. "I thought that reaction was a typical one and an understandable one."

Beck said although he held no expectations regarding the mock jury's finding, the charge "really is what stated the outcome."

"I think it was that jury charge back in 1921 that resulted in the acquittal, and I think it was that same jury charge that 100 years later people listened to, followed the instructions and voted accordingly."

The retrial came after several months of scouring libraries and city archives to find authentic trial documents and secondary sources for proper context into what happened. Christopher R. Hagale, a Yale history major and an associate at the firm who conducted that legwork and played the judge, said he enjoyed being able do what he loved to provide attendees an enjoyable experience.

"Obviously a trial is much more complicated than this and all the procedures that would be going on, but it was a lot of fun to see people have serious interest and to ask good questions about how everything was working and to show them a part of what we do," he said.

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Magazine vendor argues free speech violated in no-peddling case

WRIGLEY, *FROM PAGE 1*

reasons for adopting the ordinance — crowd control and security — are also content neutral.

And the ordinance advances

city never told Chicago Baseball vendors before April 5 that they needed to have peddling licenses.

And none of the magazine's vendors have been ticketed for obstructing sidewalks in the 19 years

congestion — which is different from obstruction — "the correct solution is not to outlaw speech activity," the motion says.

And the motion contends the fact that the city allows other activities

free literature, the motion says.

The case is *Left Field Media LLC v. City of Chicago, et al.*, No. 15-3233.

Weinberg declined to say whether he expects Left Field to