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26 pages in 2 sections

The plaintiff refiles the case. What now?

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TRIAL NOTEBOOK

STEVEN P.
GARMISA
Bacon & Paris

Lost 'profits' real item for single owner

Atkins v. Robbins,
Salomon & Patt

The million-dollar question in a medical corporation's malpractice case against a law firm that allegedly caused the loss of a lucrative business relationship was whether the plaintiff — which, on paper, looked like it never made any profit, because it followed the standard practice for Subchapter S corporations of handing out substantial bonuses to the sole owner at the end of the year to avoid double taxation — could claim any pecuniary losses.

Edward Atkins M.D.S.C. (referred to as the corporation) alleged it lost a lucrative contract to provide anesthesia services to a surgeon in Chicago because its longtime lawyer failed to include noncompetition provisions in the employment agreements of two doctors who quit and poached the business opportunity.

A Cook County judge granted the defendant's request for judgment as a matter of law. Despite the sizable sums Atkins, the sole shareholder, received as compensation, the judge concluded that the corporation had no income and was not entitled to damages for lost profits.

Reviewing competing cases from other jurisdictions, the Illinois Appellate Court reversed. "Professional corporations should be allowed to operate themselves in a tax-efficient manner and still be able to pursue claims for lost profits based on alleged torts, breaches of contract and other civil wrongs," Atkins v. Robbins, Salomon & Patt, 2018 IL App (1st) 161961 (Feb. 22, 2018).

Here are highlights of Justice Eileen O'Neill Burke's opinion (with omissions not noted in the text). We turn to the critical issue on appeal, whether as a matter of law a corporation with no taxable income could ever prove damages for lost profits.

Although both parties recognize that lost profits are at issue, neither has provided us with a definition or formula to ascertain them. Nevertheless, we observe that the calculation of damages for lost profits is based on "net profit." *Stirling v. Prairie Material*, 285 Ill. App. 3d 914 (1996).

"Net profit," however, does not appear to have a consistent formulation.

For instance, our [Supreme] Court once described "net profit" as "what shall remain, as clear gain of any business venture, after deducting the capital invested in the business, the expenditures incurred in its conduct and the losses sustained in its prosecution." *Nelson v. Sangamon County Mining Co.*, 186 Ill. 397 (1925).

Our appellate courts have defined the term as generally "determined by comparing the difference by computing

NOTEBOOK, Page 4

IN THE NEWS

BY SARAH MANSUR



The Appellate Lawyers Association hosted a luncheon on Friday, "Assessing the United States Supreme Court's Momentous Term," featuring *Nate legal writer* and *Amicus* podcast host Dahlia Lithwick. The event was held at the Union League Club. Photo provided by the Appellate Lawyers Association/Jasmin Shah

IN THE LAW FIRMS

O'Keefe Lyons & Hynes LLC and McCracken, Walsh, Corliss & de la Vina have merged under the name O'Keefe Lyons & Hynes LLC.

The combined firm will consist of 11 attorneys and a staff of 24.

Areas of practice include challenging excessive property tax assessments, tax-related litigation, exemptions and strategic planning related to property taxation among other areas.

After 15 years at Kirkland & Ellis LLP, Christopher J. Eabrook has founded national litigation practice Eabrook Law LLC to provide litigation services.

Eabrook Law concentrates in all types of commercial litigation, including breach of contract, class action, disputes arising out of corporate transactions, environmental counseling and litigation, mass tort and toxic tort and insurance litigation.

To learn more about the firm, visit eabrooklaw.com.

Saul Ewing Arnstein & Lehr LLP partner Nancy DePodesta presented "The Foreign Corrupt Practices Act Survival Guide: What To Do When You Discover a Problem" at the Association of Corporate Counsel's New to In-House Committee meeting in April.

Her presentation offered items for in-house attorneys and compliance officers who might be confronting Foreign Corrupt Practices Act issues.

DePodesta focuses her practice on white-collar criminal defense matters, including securities, tax, health care and bankruptcy fraud allegations as well as internal investigations.

IN THE NEWS, Page 2

Trial dismissal created 'one free rape rule,' panel finds

BY DAVID THOMAS
Law Bulletin staff writer

An appeals panel on Wednesday reversed the dismissal of a suit against a Skokie hotel by a guest who was allegedly raped by a hotel employee.

Karla Gress alleges that Holiday Inn Chicago North Shore security guard Alhagie Singhathe drugged her at the hotel bar and raped her in her room in October 2013.

The hotel successfully moved to be dismissed, arguing it had no way to foresee the alleged attack.

Reversing, the 1st District held that such a defense would give hotels the equivalent of a "one free rape rule."

Circuit Judge Kathy M. Plunigau

dismissed with prejudice all the claims against the hotel defendants in January 2017, agreeing with the defendants that they had no duty to foresee such an attack.

But the 1st District Appellate Court found there was a special duty of care owed by defendants Lakhani Hospitality Inc., owner of the hotel, and hotel operations director Sheila Gilani. It also found the type of harm Gress alleged was foreseeable.

"All of the preceding causes of rape, battery, assault and murder clearly have many factual variables, but the facts of this case tell an all-too-familiar tale where a vulnerable woman is raped and the assault is enabled by the failure of a responsible party to protect the victim,"

Justice Terrence J. Levin wrote.

"Plaintiffs deserve the opportunity to expand on their story beyond the pleading stage, and the trial court erred in dismissing the counts of plaintiffs' complaint against the owner, operator and manager of the hotel and its involved employees," he wrote.

Gress alleged she was drinking at the Bar Louie attached to the hotel. She alleged Singhathe slipped a substance into her drink there. Gress passed out in her hotel room.

Another hotel employee sent Singhathe to enter Gress' room to fix a broken air conditioner, even though the staff allegedly knew she was intoxicated. When he entered the room by himself, Singhathe allegedly raped Gress while she was

unconscious.

Police used a rape kit taken the morning after the alleged attack to match DNA with Singhathe.

Singhathe was never criminally charged, said Elizabeth R. Oleszewski, an associate at Salvi, Schotok & Pritchard PC, and one of Gress' attorneys.

Singhathe worked at the hotel for several years after the alleged rape occurred, Levin wrote.

The defendants argued they could not be held liable for Singhathe's alleged rape of Gress because there had not been a prior report of rape at the hotel.

The panel rejected the argument, as Illinois law does not require hotels to foresee the exact

PREMIERES, Page 5

Jury gives \$6.2M after amputation

Test ordered ASAP,
not STAT, leading to
record Kane verdict

BY JORDYN REILAND
Law Bulletin staff writer

Kane County jurors awarded more than \$6.2 million after an Elgin hospital amputated a man's left leg, a leg his lawyers argue could have been saved if a doctor had ordered a test "STAT" instead of "ASAP."

Arthur "Bill" Hein and his wife, Cathy, sued Dr. Kate Onyiah and her employer, Inpatient Consultants of Illinois P.C., alleging Onyiah did not recognize the urgency of the situation when she waited nearly six hours for ultrasound results to diagnose a blood clot.

The verdict, reached Tuesday, is the highest reported Kane County verdict or settlement for leg amputation, according to John L. Kirkton of the Jury Verdict Reporter, a product of Law Bulletin Media.

The last similar case with a large award was a \$4.55 million verdict in 2012 involving a pedestrian who was hit by a drunken driver, Kirkton said.

The verdict was reached after an

eight-day trial before Kane County Associate Judge Mark A. Pheasant, according to Hein's attorney Craig D. Brown of Meyers & Flowers LLC.

On July 11, 2012, Hein was scheduled for prostate cancer surgery at Sherman Hospital in Elgin. Following the procedure Hein was experiencing leg numbness and coldness — symptoms associated with acute arterial insufficiency, Brown said.

After on-call nurses attempted to diagnose Hein's symptoms, Brown said they ordered an incorrect test and alerted Onyiah to what was going on. Onyiah then examined Hein shortly after 11 a.m. but, Brown contends, she did not recognize his symptoms and the need for an "immediate" consultation by a vascular surgeon.

"If the vascular surgeon would've gotten involved sooner they would've saved his leg," Brown said.

Onyiah ordered an arterial ultrasound "ASAP" instead of "STAT," a message of greater urgency to the radiology staff, and the results did not come back for nearly six hours.

It was confirmed Hein had a blood clot and emergency surgery was scheduled for 10:15 p.m. in hopes of restoring blood flow to the leg, Brown said.

AMPUTATION, Page 5

Anesi Ozmon attorney named new firm head

BY SARAH MANSUR
Law Bulletin staff writer

Anesi Ozmon, Rodin, Novak & Kohen Ltd. announced this week that John M. Popelka was named president and managing partner.

He succeeds Mark Novak, who has served in those roles since 2006. Novak, who has been with the personal injury and workers' compensation firm for more than 40 years, will become the first chairman in the firm's 63-year history.

Popelka, 56, said the firm created the chairman role to allow Novak to spend more time mentoring young attorneys.

As managing partner, Popelka said he would like the firm to focus on the professional development of associates.

"I do plan on bringing a new perspective to the firm and that new perspective is to foster an environment that makes the professional development of attorneys, that I'll be managing, a priority," he said.

He also wants to prioritize prompt and responsive communications with clients.

"That's something that throughout my 25 years, I've had an particular emphasis on — making sure we return phone calls promptly," he said.

"It's something that I plan to particularly emphasize during the course of my career as the managing partner. It's so fundamental but it's surprising how many people



John Popelka

fumble that away," he said.

Popelka said the firm is also in the process of redesigning its compensation structure in a way that allows attorneys to get paid in an "immediate" and "ongoing basis."

A 1986 graduate of The John Marshall Law School, Popelka founded a personal-injury firm in Chicago shortly after he graduated. That firm, Capron Avgerinos & Popelka, is now Capron & Avgerinos PC.

Popelka said he decided to pursue a legal career representing individuals and workers after he lost a piece of his finger while working one summer at a paper mill.

The accident left him unable to work for the rest of the summer, he said, but he never sought compensation for the time he was out of work or his medical bills.

ANESI, Page 5

SAVE THE DATE.

Tuesday, May 15, 2018

University Club of Chicago | 7:30am - 10:00am

REGISTER: www.cvent.com/d/dgqmg1Alyssa Gawlinski agawlinski@lawbulletinmedia.com

MORNING LINEUP LIVE

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