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Lost earnings and lost earnings potential: Can a small business owner recover?

BY PATRICK M. KINNALLY

For small business owners who are self-employed the measure of damages in a civil tort action can be complicated. That seems antithetical to the American virtue of self-determination and to a group whom comprise the largest employer in the United States. Many, small entrepreneurs loan the corporate entities they choose for their business models substantial sums of money. They do not take salaries but let the retained earnings accumulate in corporations they create. Can such an owner recover when it is reasonably certain that a loss of earnings as well as potential earning capacity will result? The answer, according to the Fourth District Appellate Court, is that is for a fact finder to decide.

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Contempt, social media, and the First Amendment in the *Marriage of Weddigen*

BY ASHLEY D. DIFILIPPO

The 4th District Appellate Court recently addressed the issues of contempt, freedom of speech, and the intersection of Facebook in everyday court. In, *In re the Marriage Weddigen*, 2015 IL App (4th) 150044,[1] the court discusses what constitutes civil contempt, whether a purge order is constitutional, and how the first amendment affects a person's activity on social media. This case not only provides an overview of criminal versus civil contempt, which is a good refresher for the civil practitioner, but it also addresses a prevalent issue: showing how social media, and one's presence on social media, is intruding into the courtroom, and is becoming a powerful

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Keiser-Long v. Owens, 2015 IL App (4th) 140612. (*Keiser*).

In 2008, Plaintiff, Carol Keiser-Long (Carol) was involved in a car wreck with Kirk Owens, (Kirk) defendant. At the time of the accident, Kirk was intoxicated and pleaded guilty to driving under the influence of alcohol. The facts established he ran a stop sign. In her amended complaint, in two counts, Carol alleged Kirk's conduct was negligent and willful and wanton. She sought recovery for "lost earning capacity and lost earning potential."

The cause was tried before a jury. Kirk admitted liability as to negligence. They jury only considered willful and wanton conduct and the amount of damages.

During the trial Carol testified she was self-employed. She was the only shareholder of two corporations C-Bar Cattle Company (C-Bar) and C-Arc Enterprises, a consulting corporation. C-Bar was a cattle broker entity, buying and selling cattle for profit. The revenue of C-Bar was deposited in its corporation accounts. Carol never received a salary or bonus from C-Bar. She provided shareholder loans to C-Bar routinely. No person other than Carol worked for C-Bar. C-Bar and C-Arc were ordinary corporations, not pass through subchapter- S corporations.

Carol testified that due to the accident she was unable to make decisions in her business due to pain. She could not visit cattle feed lots and auctions in the Midwest, which was necessary to her business.

Her testimony was corroborated by Larry O'Hern. He testified that prior to 2008 plaintiff owned 3000-4000 head of cattle every year. But after the accident they ceased doing business together. O'Hern testified that 2009-2010 were profitable years in the cattle business. He opined that Carol's typical annual inventory of 3000-4000 head of cattle in those years would have earned her approximately $200,000 per year.

Plaintiff's accountant, Roger Colmark, testified Carol did not take a salary from C-Bar because it would deplete the retained earnings of the corporation, which she owned as its only shareholder. In his opinion, these earnings belonged to Carol, individually. Carol's evidence, if believed, warranted an award that she missed the opportunity to earn money in her cattle business after the accident.

Kirk moved for a directed verdict when the jury retired. He argued that Carol presented evidence only on losses sustained by C-Bar and C-Arc, not her personally. Because Carol had never taken a salary, Kirk argued, she had never suffered a recoverable loss. Relying on (*Sezonov v. Wagner* 274 Ill. App 3d 511 (1995) (*Sezonov*). The trial court granted this motion. The Appellate Court reversed.

In *Sezonov* the plaintiffs were the sole shareholders of a corporation which owned a pet store. They were poised to open a second store, when one of the shareholders was injured in a car accident. One Plaintiff sought to recover lost net profits of $21,000 due to the delay in the opening of the second store. The 2nd District Appellate Court held the plaintiff could only recover the money which he personally would have received from the corporation, namely, the earnings or wages lost.

The Fourth District in *Keiser*, refused to follow *Sezonov*. It found *Sezonov* involved a claim for lost earnings, not a claim for lost earning capacity. It concluded the fact Carol did not take a salary from C-Bar was of no consequence to a loss of potential earnings. Also, the Court stated that a loss of earnings capacity was:

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> earnings which are derived from the combination of capital and labor should not be considered in determining the diminution of earning capacity. However, it has also been held that a jury may properly consider the profits which have been derived from the plaintiff's management of, or activity in a business, as distinguished from profits derived from invested capital.

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Robinson v. Greeley & Hanson (2d.Dist. 1983) 114 Ill. App. 3d 720 (*Robinson*).

Keiser clearly states that because C-Bar's profits were derived from Carol's management and operation of C-Bar's

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business; and, that the diminution of C-Bar's profits was a jury determination as to Carol's lost earning capacity.

In this context the following jury instruction is appropriate:

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> If you decide for the plaintiffs on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate them for any of the following elements of damage proved by the evidence to have resulted form the wrongful conduct of defendant
>
> (1) the value of earnings lost and reasonably certain to be lost in the future;
>
> (2) emotional pain, suffering embarrassment, humiliation and distress;
>
> (3) punitive damages

***

(*Kritzen v. Flender Corp* (2d Dist 1992) 226 Ill. App. 3d 541 (*Kritzen*).

In *Keiser*, the court concluded that damages which obviously occur from the tort alleged are recoverable, as long as the amount sought is reasonably certain to resuit. (*Robinson*). In the context of lost earning capacity this calculation is the difference between what plaintiff was capable of earning before the injury and that which she was incapable of earning after the injury. The issue to be resolved is the loss of the ability to earn, not merely actual earnings lost. It could be both.

Citing the Restatement (second) of Torts. Sec 924) the *Keiser* court observed:

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> When the injured person was not receiving salary, but owned and was operating a business that was deprived of his services by the injury, his damages are the value of his services in the business during the period. If his services , rather than the capital invested or the services of others, were the predominant factor in producing the profits, evidence of the diminution of profits from the business will be received as bearing on the loss of earning capacity.

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Carol proved these facts, that is: she managed C-Bar's business; maximized its earnings from her labor and skill, and that the business was not profitable without her efforts. Also, she established, through O'Hern, that her opportunity to earn profits was lost due to the fact of her injury. The court found the fact that C-Bar's retained earnings were a benefit that inured to Carol to be significant since she owned them individually. Finally, the *Keiser* court rejected Kirk's argument that Carol could not recover a loss of earning potential because she failed to adduce any evidence of a *personal* financial loss. Because of Carol's day-to-day involvement in C-Bar's operation, she was its alter ego and any resulting loss to C-Bar was a loss to her. In other words, the issue a trier of fact is to decide is not just lost earnings but the loss of the ability to earn. If the latter is reasonably certain to occur, it is a proper element of recoverable damages. A plaintiff's injury by the tortious act of a defendant entitles her to recover those damages which flow from that act (*Kritzen*)

Our Supreme Court has never opined on the issue which *Keiser* and *Sezonov* disagree. Maybe it will one day. Lost earnings capacity is not easily defined and its proof can be problematic in terms of certainty as well as quality. But in *Keiser*, the plaintiff provided more than enough evidence to make that a jury determination. To me, that seems like a correct outcome. It recognizes that a small business owner, regardless, of the form of his/her business model, can be made whole in our civil tort system. ■

player that judges are considering.

Brenda Weddigen and James Weddigen, Petitioner and Respondent respectively, originally came before the court in post- dissolution proceedings when the petitioner filed a petition asking the trial court to hold the respondent in direct civil contempt. The petitioner, Brenda Weddigen, alleged that the Respondent had intentionally and secretly recorded a hearing conducted three days earlier in violation of Illinois Supreme Court Rule 63(A)(8). This allegation was made based on Respondent's own comments which he posted on a Facebook page, stating he recorded the prior hearing, and encouraged others to do the same. On the Facebook page of the Illinois Fathers Non-Profit Organization, Respondent stated the following:

> On March 20, 2014, the Illinois Supreme Court declared the Illinois Eavesdropping Act of 1961 to be UNCOSTITUTIONAL. (*State of Illinois v. Melongo*, 2014 IL 114852). I recorded my hearing today and I encourage all of you to do so as well… This is going to raise a lot of issues with the court, but they should have thought of that before they turned the court system into a revenue center for the country.

In addition to the preceding statement, the Respondent posted instructions on how to get a cellular telephone through court security in order to record the hearing.

In responding to the petition to hold him in direct civil contempt, Respondent stated that he had not in fact recorded the hearing, but had instead "made a false claim on Facebook." He went on to argue that there is nothing illegal in making false claims, as long as those claims are not made while testifying under oath. Instead, he was encouraging others to invoke their first and fourteenth amendment rights.

At a hearing on the petition for contempt, the trial court stated it accepted the Respondent's statement that he did not actually recorded the hearing, but the court found Respondent in indirect

civil contempt of court for posting the comments on Facebook, encouraging others to record proceedings, and giving instructions on how to accomplish it. The court stated that the contempt it was concerned about was Respondent's actions of going on a website and telling others to record proceedings in the courtroom. The court then went on to order the Respondent to make a public statement on Facebook, apologizing for his previous remarks.

Respondent filed a motion to reconsider, alleging he was given no notice he would be subject to contempt proceedings for posting the comment, seeing as the petition for contempt was based on the Respondent's alleged secret recording of the hearing. As such, he argued this was a due-process violation. The trial court responded by entering a written order vacating the original order, but still stating the Respondent had received proper notice, and would now be given an opportunity to explain why his social media postings should not hold him in contempt. At a hearing on the matter, the Respondent argued he did not record the earlier hearing, nor did he intend to incite lawlessness with his statement. The court then held the Respondent in contempt of court for posting the statements advocating recording hearings. The court again instructed the Respondent to purge himself of the contempt finding by posting on Facebook that he was wrong and that people cannot record family court proceedings. When the Respondent refused to do so, the court imposed a sanction of $100 per day until Respondent completed his purge as ordered.

The appellate court first addressed the issue of contempt, and whether it was appropriate in this matter. As the court stated, "all [trial] courts have the inherent power to punish contempt; such power is essential to the maintenance of their authority and the administration of judicial powers." *People v. Simac*, 161 Ill. 2d 297, 305 (1994). But different procedures are used depending on the type of contempt at issue. The court explained: civil contempt is "coercive" in nature, and seeks to compel the individual to perform a particular act. When a court has ordered an individual to perform a certain act, and the individual fails to, civil contempt is appropriate. Therefore, civil contempt proceedings have two fundamental attributes: (1) the individual "must be capable of taking the action sought to be coerced", and (2) once compliance is accomplished, no further sanctions are imposed. ¶ 20.

Criminal contempt is different from civil contempt in that its intent is to punish the wrongdoer. Criminal contempt is found when the person's conduct is said to "embarrass, hinder, or obstruct a court in its administration of justice…" Criminal contempt includes showing disrespect for the court, and is intended to vindicate the dignity and authority of the court. ¶21. In determining whether contempt proceedings are criminal or civil, the court must look at the dominant purpose for which the sanctions are imposed. Criminal sanctions are retrospective in nature, and seek to punish for past acts which cannot be undone. Civil sanctions are prospective in nature, and seek to coerce compliance in the future. ¶ 22

In this case, Petitioner sought a finding of civil contempt for respondent's conduct of secretly recording the prior hearing. The trial court, on its own, addressed the Respondent's conduct of posting comments on Facebook. The court was not seeking to coerce the Respondent into complying here, but rather to punish and sanction the Respondent for his past conduct. As this is punitive, it constitutes criminal contempt. The problem that the appellate court found occurred was that when an individual is charged with indirect criminal contempt, one is entitled to all the constitutional protections and procedurals rights available, including due notice that he is facing criminal contempt sanctions. Those rights were not afforded to the Respondent in this matter. The respondent was not given written notice of the charge, or notice that he could be held in indirect criminal contempt. The petition itself intended to coerce the Respondent from engaging in further activity, which indicates this was a civil action. Yet the sanctions imposed were for criminal contempt; and without the proper procedural safeguards in place, this action was improper. As such, the contempt finding was reversed.

The purge order by the court required the Respondent to post additional comments on the same Facebook page, apologizing, correcting, or recanting his previous comments. The court decided not to address this issue, only to say that should the parties proceed with indirect civil contempt, procedural and constitutional safeguards must be met.

In a concurring opinion though, the court specifically addressed the purge order, and how it violated the Respondent's first amendment protections. While not a majority opinion, the court in the concurring opinion found that the contempt proceedings violated the respondent's first-amendment rights. As the court said, the "worst that can be said of respondent's conduct is that he urged persons attending trial court proceedings to record them." While this may have been unwise or unwarranted, Respondent's comments urged a violation of trial court protocol, and most likely not criminal behavior. Even if it was criminal behavior, speech cannot be restricted, even in imminent danger situations, unless "the evil apprehended is relatively serious." The conduct urged here was nowhere close to inciting the level of lawlessness appropriate. The concurring opinion went as far as to call the purge order compelled speech, reminiscent of another time.

The concurring opinion reminds the trial courts, and practitioners, of the history of the first amendment, and the fact that government cannot compel or restrict speech without due process and without compelling justification. The opinion gives an overview of both United States Supreme Court decisions, as well as Illinois decisions, which show how a restriction on speech is unlawful under the constitution. The opinion first looks to *Brandenbug v. Ohio*, 395 U.S. 444, 447 (1969), where the Supreme Court held that "the government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time." *Id*. at 447.

Going on, the concurring opinion addressed the standard for first amendment

cases, specifying that "the likelihood, however great, that a substantive evil will result, cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be substantial; it must be serious." Citing to *Bridges v. State of California*, 314 U.S. 252 (1941). Illinois cases, the opinion continues, have held that courts and judges cannot be shielded from "wholesome exposure," and the freedom of speech should not be impaired through the exercise of the court's contempt power unless there is a "serious and imminent threat to the administration of justice." *D'Aostino v. Lynch*, 382 Ill. App. 3d 960, 971 (2008), citing to *People v. Hathaway*, 27 Ill. 2d 615, 618 (1963).

The concurring opinion found that the purge order issued by the trial court violated the respondent's first amendment rights. The only thing the Respondent urged through his comments was a violation of court protocol, not criminal behavior. There was no imminent danger, nor proof of anything that would satisfy a higher burden. As such, the concurring opinion at least, found the purge order to be without legal justification.

While the first amendment issue was not addressed in the majority opinion, it is important for practitioners to examine the concurring opinion, and see the implications it provides. Many civil practitioners are finding that their client's presence and activity on social media is becoming more and more a part of courtroom debate. The concurring opinion addressed the comments made by the Respondent, and whether or not the court can restrict or compel additional speech on social media grounds. While the concurring opinion strongly states that the court cannot, it is interesting to note that while the court cannot compel an apology on social media, any comments made by a party on a social media site are free game for the parties to examine, discuss, and use as exhibits in court. While the first amendment may protect speech (or in this matter, protect a party from compelled speech), the first amendment does not protect a party from having their statements used against him or her, in the court's determination of credibility, fitness, or other relevant considerations. Just as statements can be used against one's interest, social media posts are becoming an everyday occurrence, which practitioners must be aware of. ■

This article discusses the case of *In re Marriage of Weddigen*, 2015 IL App (4th) 150044, which was filed on October 28, 2015, in the 4th District Appellate Court. All references and quotations, unless specifically stated, are to that case and citation.

Proposed class action not mooted by defendant's tender

BY MICHAEL R. LIED

Ballard RN Center, Inc. filed a three-count class action complaint alleging that on March 3, 2010, Kohll's Pharmacy & Homecare, Inc., sent plaintiff an unsolicited fax advertisement. The complaint alleged that defendant's conduct: (1) violated the Telephone Consumer Protection Act of 1991 (Protection Act) (47 U.S.C. § 227; (2) violated the Consumer Fraud and Deceptive Business Practices Act (Fraud Act) (815 ILCS 505/2; and (3) constituted common-law conversion of plaintiff's ink or toner and paper. Each of the three counts included class allegations.

The complaint alleged that plaintiff did not have a prior business relationship with defendant and plaintiff did not authorize defendant to send fax advertisements to plaintiff. The complaint further alleged that defendant's fax advertisement did not provide the requisite "opt out notice."

Concurrent with its complaint, plaintiff also filed a motion for class certification pursuant to section 2-801 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-801 *et seq.*

On June 28, 2012, defendant filed a motion seeking summary judgment solely on count I of plaintiff's complaint that sought recovery under the Protection Act. In its motion, defendant alleged that on three separate occasions defendant tendered plaintiff an unconditional offer of payment exceeding the total recoverable Protection Act damages. Plaintiff rejected all three tenders. Defendant further alleged that plaintiff did not file a motion for class certification despite the case being open for over two years.

The circuit court denied defendant's motion for summary judgment. The court reasoned that defendant did not make its tender on count I before plaintiff filed its motion for class certification. Therefore, the claim was not moot under *Barber v. American Airlines*, 241 Ill.2d 450 (2011). *Barber* held that a class action may be dismissed as moot when the defendant tenders relief to the named plaintiff prior to the filing of a motion for class certification.

Disagreeing with defendant's argument that plaintiff's motion for class certification was merely a "shell" motion, the circuit court concluded that "*Barber* requires only that a motion for class certification be filed. It does not require that it meet any certain standard."

On April 15, 2013, the circuit court granted plaintiffs amended motion for class certification. On interlocutory appeal, the appellate court affirmed the circuit court's order certifying the class on counts II and III but reversed the court's class certification on count I. The appellate court agreed with defendant's contention that plaintiff's initial motion for class

certification, filed concurrently with its class action complaint, was a "shell" motion that was insufficient under *Barber*.

On appeal to the Illinois Supreme Court, plaintiff argued that the appellate court erroneously construed *Barber* to require the motion for class certification filed with its class action complaint to contain sufficient factual allegations and evidentiary materials adduced through discovery to avoid mootness when a defendant tenders relief to the named class representative. Plaintiff urged the court to reject that interpretation and, instead, adopt the procedure employed by the federal courts. Plaintiff maintained that while federal courts in Illinois also require the filing of a class certification motion with the complaint, they expressly recognized that information about the size of the class and nature of defendant's practices will have to be obtained during discovery and supplied later.

In *Barber*, the court focused on mootness principles applicable to class actions. *Barber*, at 456 (citing *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481 (1984)). Specifically, the court explained that:

> "[T]he important consideration in determining whether a named representative's claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender. [citations omitted.] Where the named representative has done so, and the motion is thus pending at the time the tender is made, the case is not moot, and the circuit court should hear and decide the motion for class certification before deciding whether the case is mooted by the tender. [Citation omitted.] The reason is that a motion for class certification, while pending, sufficiently brings the interests of the other class members before the court 'so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole.' "*Barber,* at 456-57.

The court further explained in *Barber*, however, that the situation is different when the tender is made before the filing of a motion for class certification. In that situation, the interests of the other class members are not before the court, and the case may properly be dismissed. *Barber*, 241 111. 2d at 457. Thus, dismissal of the plaintiff's class action was proper in *Barber* because there was no motion for class certification pending when the defendant refunded the contested $40 baggage fee to the plaintiff, thereby mooting her claim. *Barber*, at 457.

The court in *Barber* rejected the so-called "pick off' exception that had developed in the Illinois appellate court. The "pick off' exception lacked a valid legal basis and also contradicted applicable mootness principles when the named plaintiff in a class action is granted the requested relief. *Barber*, at 460.

Barber contained no explicit requirement for the class certification motion, other than the timing of its filing. In other words, *Barber* does not impose any sort of threshold evidentiary or factual basis for the class certification motion.

Plaintiff's motion for class certification was not a "shell" motion that lacked content. To the contrary, plaintiff's motion for class certification identified defendant, the applicable dates, and the general outline of plaintiff's class action allegations. More specifically, plaintiffs motion sought certification of three separate classes of individuals with fax numbers who received fax advertisements from defendant during a specific time period and were not provided the requisite "opt out" notice. The motion also referenced the description of the classes in plaintiff's concurrently-filed class action complaint, a pleading that provided additional factual allegations. Thus, plaintiff's motion was not a frivolous "shell" motion when it contained a general outline of plaintiff's class membership, class action allegations, and effectively communicated the fundamental nature of the putative class action.

Even assuming that plaintiff's motion for class certification was insufficient for purposes of class certification under section 2-801 of the Code. *Barber* did not hold that the motion for class certification must be meritorious. To the contrary, the focus of *Barber* was on the timing of the filing of a motion for class certification—there was no mention of the ultimate merits of that motion.

Focusing on the timing of the filing of the motion for class certification rather than on its ultimate merit is also consistent with the approach taken in the Seventh Circuit Court of Appeals.

The Seventh Circuit has also thoroughly addressed the competing interests of the defendant and the named plaintiff on the issue of a tender mooting the class action. Rejecting the class action defendant's concern that a plaintiff may have an incentive to move for class certification prematurely without the fully developed facts or discovery required to obtain certification, the court explained that:

> "If the parties have yet to fully develop the facts needed for certification, then they can also ask the district court to delay its ruling to provide time for additional discovery or investigation. In a variety of other contexts, we have allowed plaintiffs to request stays after filing suit in order to allow them to complete essential activities. [Citations omitted.] *** We remind district courts that they must engage in a 'rigorous analysis'—sometimes probing behind the pleadings—before ruling on certification. [Citation omitted.] Although discovery may in some cases be unnecessary to resolve class issues [citation omitted], in other cases a court may abuse its discretion by not allowing for appropriate discovery before deciding whether to certify a class.

This approach was entirely consistent

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with *Barber* and correctly afforded the trial court discretion to manage the development of the putative class action on a case-by-case basis.

Barber did not impose any explicit requirements on the motion for class certification, and plaintiff's motion for class certification in this case was sufficient for purposes of *Barber*. In cases when additional discovery or further development of the factual basis is necessary, those matters will be left to the discretion of the trial court.

The important consideration in determining whether a named representative's claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender. Defendant's tender of relief, partial or otherwise, after plaintiff filed its class certification motion could not render moot any part of plaintiffs pending action under *Barber*. The appellate court erred in reaching the opposite conclusion, and the court reversed that part of its decision.

Ballard RN Center, Inc. v. Kohll's Pharmacy and Homecare, Inc., 2015 IL 118644. ■