ILLINOIS STATE BAR ASSOCIATION

JUNE 2024 VOL 70 NO. 8

Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Ethical Practices in the Email Age Washington State Judge Bans AI Enhanced Video Evidence

BY DAVID W. INLANDER & RONALD D. MENNA, JR.

On March 29, 2024, a Washington state trial judge entered an order barring a criminal defendant's use of AI enhanced video.[1] The defense attempted to introduce cellphone video evidence of the crime which was enhanced by AI. Prosecutors in the case said there appeared to be no legal precedent allowing the technology in a U.S. criminal court.[2] During the two-day

Continued on next page

Somebody's Watching Me: Balancing the Absolute Litigation Privilege With Protection From Abusive Surveillance

BY SHAWN WOOD & JAKE MAGINN

In civil litigation, where truth is often elusive and evidence paramount, the clandestine art of surveillance remains an effective tool. The benefits of surveillance are clear, especially to those who seek to prove that a plaintiff is exaggerating an injury or that a client's former spouse is hiding assets or engaged in other activities relevant to a legal proceeding. Less clear is the impact of surveillance on the surveilled and the rights and remedies available to

Continued on page 3

Ethical Practices in the Email Age Washington State Judge Bans AI Enhanced Video Evidence

CONTINUED FROM PAGE 1

evidentiary *Frye*[3] hearing, the defendant's videographer stated that he was not a forensic video technician and was not forensically trained. He also testified that that he used an AI video editing tool – Topaz Labs AI – to enhance a low-resolution iPhone video of the incident at issue, did not know what videos the AI-enhancement tools were trained on, did not know whether the models employ generative AI in their algorithms, agreed that such algorithms are opaque and proprietary, and was unaware whether any peer group testing had been made evaluating AI tools' reliability for video enhancement purposes. The state's expert witness testified that the AI software created sixteen times the number of pixels, using an algorithm and enhancement method unknown and unreviewable by any forensic video expert. The defense did not offer any articles, publications, secondary sources, or any state or federal appellate decisions which examined, or approved, the introduction of AI-enhanced videos in a criminal or civil trial.[4]

The judge found that: "The use of artificial intelligence (AI) tools to enhance video introduced in a criminal trial is a novel technique" and it "uses opaque methods to represent what the AI model 'thinks' should be shown." He also found that the state's expert demonstrated that the AI method created false image detail (which is not acceptable in the forensic video community as it has the effect of changing the meaning of portions of the video), and that the enhancement removed information from the original video and added information that was not in the original video. The judge then held that "admission of this AI-enhanced evidence would lead to a confusion of the issues and a muddling of eyewitness testimony, and could lead to a time-consuming trial within a trial about the non-peer-reviewable process used by the AI model, such that any relevance is outweighed by the danger of unfair prejudice under ER 403."He concluded that the AI-enhanced video "is not crucial to the charges" as the state intends to call multiple eyewitnesses and will offer the source video at trial.[5]

The ruling comes as AI and its uses – including the proliferation of deepfakes on social media and in political campaigns – quickly evolve, and as state and federal lawmakers grapple with the potential dangers posed by the technology.[6] For example, on March 28, 2024, the United States Office of Management and Budget issued a government-wide policy to mitigate risks of AI.[7] On April 1, 2024, the U.S. Federal Trade Commission's rule banning the impersonation of government, and businesses went into effect.[8] The FTC is seeking to expand this rule by also banning the impersonation of individuals.[9]

Suggested Best Practices: AI is still in its infancy, and the technology is outpacing the ability of governments and Courts to control it. One of the companies that has developed AI-enhancing software, Amped, said in a recent post that AI is not currently reliable enough to use for image enhancement in a legal setting. The company pointed to the technology's opaque results and potentially biased outcomes.[10] University of Washington Law Professor Ryan Calo, who specializes in law and technology, stated that "You can't use a process like this and feel comfortable that what's being represented is what actually happened," and that AI should be treated like a visual aid as opposed to being used like eye-witness testimony.[11]

Our own Illinois First District Appellate Court has held that when it comes scientific evidence "special care must be taken by the trial court in ruling upon the admissibility." This is because "Juries tend to equate science with truth and may place substantial weight on any evidence labeled scientific."[12] Like Washington, Illinois uses the *Frye* test for admitting evidence of a "new or novel scientific methodology or principle."[13] Until a consensus on its reliability and general acceptance by forensic videographers has

Trial Briefs

This is the newsletter of the ISBA's Section on Civil Practice & Procedure. Section newsletters are free to section members and published at least four times per year. Section membership dues are $35 per year. To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR
Hannah Reed Lamore
Shawn Wood

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

occurred, practitioners and Courts should be wary of using or allowing AI-enhanced evidence at trial.■

David W. Inlander is managing partner of Fischel | Kahn, Chicago, where he concentrates in family law and high-end matrimonial mediation. He is a past chair of the ISBA Bench and Bar Section Council.

Ronald D. Menna, Jr. is a principal at Fischel | Kahn, Chicago, where he concentrates in commercial litigation, civil appeals, guardianships, association representation, and corporate law. He is a past chair of the ISBA Civil Practice and Procedure Section Council and chair of the Allerton 2019 and 2023 Conferences.

1. *State v. Puloka*, No. 21-1-04851-2 KNT (Sup Ct. King County, Wash., March 29, 2024), available at *https://www.scribd.com/document/719556303/21-1-04851-2-Finding-of-Facts-and-Conclusion* (*last visited April 11, 2024*).
2. *https://www.nbcnews.com/news/us-news/washington-state-judge-blocks-use-ai-enhanced-video-evidence-rcna141932* (*last visited April 11, 2024*); *https://thehill.com/regulation/court-battles/4571309-washington-judge-bans-use-of-ai-enhanced-video-as-trial-evidence/* (*last visited April 11, 2024*).
3. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
4. *Puloka*, *supra* note 1.
5. *Puloka*, *supra* note 1. Washington Evidence Rule 403 (Exclusion of relevant evidence on grounds of prejudice. Confusion, or waste of time.) (eff. Ap. 2, 1979), *https://www.courts.wa.gov/court_rules/pdf/ER/GA_ER_04_03_00.pdf* (*last visited April 11, 2024*).
6. *https://www.nbcnews.com/news/us-news/washington-state-judge-blocks-use-ai-enhanced-video-evidence-rcna141932* (*last visited April 11, 2024*); *https://thehill.com/regulation/court-battles/4571309-washington-judge-bans-use-of-ai-enhanced-video-as-trial-evidence/* (*last visited April 11, 2024*).
7. *https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf* (*last visited April 11, 2024*).
8. 16 CFR Part 461; 89 FR 15017-31; *https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-impersonation-rule-goes-effect-today* (*last visited April 11, 2024*).
9. 89 FR 15072-83; *https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-proposes-new-protections-combat-ai-impersonation-individuals* (*last visited April 11, 2024*). The comment period ends April 30, 2024.
10. *https://blog.ampedsoftware.com/2024/02/28/introducing-deepplate-ampeds-investigative-tool-for-ai-powered-license-plate-reading* ("We maintain that using AI for image enhancement, such as improving the quality of license plates or facial images, is not currently reliable for legal evidence. The reason is that the explainability of the AI's results is limited. Additionally, there is a risk that the outcomes may be biased by the data used when training the AI model.") (*last visited April 11, 2024*).
11. *https://www.king5.com/article/news/local/judge-blocks-ai-enhanced-video-triple-homicide-trial/281-dab25d7e-a037-4a2c-bac4-3acd7318ce80* (*last visited April 11, 2024*).
12. *Torres v. Midwest Dev. Co.*, 383 Ill.App.3d 20, 26 (1st Dist. 2008).
13. Illinois Rule of Evidence 702 (eff. Jan. 1, 2011), Comment citing *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63 (2002).

Somebody's Watching Me: Balancing the Absolute Litigation Privilege With Protection From Abusive Surveillance

CONTINUED FROM PAGE 1

those who fall victim to overly aggressive or disruptive evidence-gathering tactics in civil litigation.

In Illinois, at least, we are one step closer to understanding what remedies are *not* available. In *Goodman v. Goodman*, 2023 IL App (2d) 220086, the Second District Appellate Court held that the absolute litigation privilege barred a claim for intentional infliction of emotional distress arising from extensive surveillance of the plaintiff in a divorce proceeding.[1]

The Surveillance at Issue in Goodman

In *Goodman*, the court was asked to balance conflicting policy considerations relating to the use and alleged misuse of surveillance methods in connection with a divorce proceeding. Stacy Goodman filed a petition for dissolution of marriage from her husband Dru Goodman in November 2013.[2] Stacy alleged that, while she resided in the marital home, Dru "maintained constant, 24-hour surveillance" of Stacy using cameras placed throughout the interior and exterior of the residence. Stacy alleged that she had also suspected that Dru had hired a private investigator to follow her soon after she filed for divorce, and discovery subsequently revealed that had spent more than $1.2 million to surveil Stacy, sometimes for up to 18 hours per day.[3]

The surveillance continued until 2017, at which point Stacy sought an order of protection against Dru under the Illinois Domestic Violence Act of 1986 (the "Act").[4] In her petition, Stacy stated that the surveillance made her paranoid and disrupted her sleep.[5] The private investigator engaged by Drew (or on his behalf) testified that he was engaged to conduct surveillance to determine, among other things, whether Stacy was cohabitating with her boyfriend. After hearing from both sides, the court granted Stacy's request and entered the order, finding that Dru's surveillance was "obsess[ive]" and "not necessary to accomplish any purpose."[6] The appellate court affirmed the trial court's ruling.[7]

Upon the expiration of the order of protection, the trial court granted Stacy's motion to extend the order after Dru testified that, if his counsel so advised, he would recommence the surveillance if the order was lifted.[8] On appeal, the appellate court reversed the extension, finding that Stacy had failed to present evidence of good cause for the extension.[9] The court noted that it would be unfair to bar a party from gathering evidence that courts regularly review in divorce proceedings, particularly evidence of co-habitation that would cut off Stacy's right to spousal support payments.[10]

Application of the Absolute Litigation Privilege

After the divorce proceedings concluded, Stacy filed a separate action against Dru stemming from the surveillance. Her Complaint in this separate action included a claim for intentional infliction of emotional distress and three claims under the Illinois Domestic Violence Act of 1986.[11] The trial court initially denied Dru's argument, asserted in a motion to dismiss, that the absolute litigation privilege barred Stacy's intentional infliction of emotional distress claim.[12] The court subsequently granted summary judgment in Dru's favor, however, concluding that the absolute litigation privilege barred the emotional distress claim as a matter of law.[13]

On appeal, the Second District Appellate Court upheld the trial court's decision. The court reasoned that the absolute litigation privilege extends beyond defamatory communications. The court further held that it applies to a bar claim for intentional

infliction of emotional distress stemming for litigation-related surveillance, even when the conduct occurs before the litigation commenced.[14]

In addressing its prior affirmation of the trial court's finding in the divorce proceedings that the surveillance was "obsessive" and "not necessary to accomplish a purpose," the court held that the privilege applies regardless of motives or reasonableness.[15] The court further held that the ultimate question in ascertaining whether the privilege applies is whether the conduct at issue has some logical nexus to the subject of the litigation.[16] In this case, the court found that it did and affirmed summary judgment in Dru's favor on Stacy's emotional distress claim.

Balancing Competing Policy Considerations

The appellate court's decision reveals the challenges inherent when a party with an "absolute privilege" to engage in a particular type of conduct tests the boundaries of reasonable behavior and forces the question of how far is too far. In *Goodman*, the appellate court itself had previously affirmed the grant of Stacy's order of protection in the divorce proceedings after the trial court found that Dru had engaged in "an obsessive pattern of surveillance" that was "not necessary to accomplish a purpose."[17] Given this backdrop, the question in Stacy's subsequent lawsuit of whether the surveillance was reasonable, necessary, or logically connected to the divorce proceedings might have been viewed as a materially disputed issue of fact better left to a jury. It also raised concerns regarding overly aggressive conduct toward an intimate partner, concerns that the Illinois Domestic Violence Act was intended to address. [18]

The court avoided venturing into the issue of "how far is too far" and adhered strictly to precedent in addressing each of the discrete arguments raised by the claimant. When Stacy argued that the privilege should not apply because it was initiated before the divorce proceedings had been filed, the court relied on precedent holding that "the privilege applies to conduct before, during and after litigation."[19] When Stacy argued that Dru had admitted that the initial purpose of the litigation was not to establish co-habitation, the court relied on precedent holding that "the privilege applies even where the conduct is not confined to the specific issues in the litigation."[20] While this approach may seem overly formulaic or less than satisfying, Illinois courts certainly have found other claims to be barred by the absolute litigation privilege,[21] including negligent infliction of emotional distress, breach of contract, and invasion of privacy.[22] The court's decision thus remains in keeping with Illinois precedent holding that, without such protection, "[t]he absolute litigation privilege would be meaningless"[23] and deviation from the notion that the absolute litigation privilege is, in fact, "absolute" creates a serious risk of turning every instance of litigation surveillance into a separate tort action.■

Shawn Wood is a partner in the Chicago office of Seyfarth Shaw LLP and serves as the national chair of its Commercial Litigation Practice Group. Jake Maginn is an associate in the litigation practice group at Seyfarth Shaw LLP and previously served as a guardian ad litem with the Loyola University Chicago School of Law Community Law Center, advocating for children involved in guardianship disputes.

1. *Goodman v. Goodman*, 2023 IL App (2d) 220086, appeal denied, ¶ 31 (Ill. 2023). The absolute litigation privilege is an affirmative defense that permits attorneys to "publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding . . . if it has some relation to the proceeding." Restatement (Second) of Torts § 586 (1977). As highlighted by *Goodman*, the privilege has been applied in other contexts, but only "if Illinois policy would be furthered by doing so." *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 27.
2. *Goodman*, 2023 IL App (2d) 220086, ¶ 5.
3. *Id.* at ¶¶ 6-7.
4. 750 ILCS 60/101 *et seq.*; *Goodman*, 2023 IL App (2d) 220086, ¶ 5.
5. *Goodman*, 2023 IL App (2d) 220086, ¶ 11.
6. *Id.* at ¶ 12.
7. *In re Marriage of Goodman*, 2019 IL App (2d) 170621-U, ¶ 167.
8. *Goodman*, 2023 IL App (2d) 220086, ¶ 14.
9. *In re Marriage of Goodman*, 2020 IL App (2d) 200289-U, ¶ 56.
10. *Id.* at ¶ 47.
11. *Goodman*, 2023 IL App (2d) 220086, ¶ 16.
12. *Id.* at ¶ 17.
13. *Id.* at ¶ 21.
14. *Id.* at ¶¶ 27-28.
15. *Id.* at ¶¶ 30-31.
16. *Id.* at ¶ 31.
17. *In re Marriage of Goodman*, 2019 IL App (2d) 170621-U, ¶¶ 160, 167.
18. The Department of Justice has outlined "technological abuse" as a form of domestic violence that uses technology, including cameras, to "harm, threaten, control, stalk, harass, impersonate, exploit, extort, or monitor another person."https://www.justice.gov/ovw/domestic\violence#:~:text=Domestic%20violence%20is%20a%20pattern,control%20over%20another%20intimate%20partner(last accessed February 24, 2024).
19. *Goodman*, 2023 IL App (2d) 220086, ¶ 28, *citing Bedin v. Northwestern Memorial Hospital*, 2021 IL App. (1st) 190723, ¶ 29.
20. *Id.* at ¶ 29, *citing Malevitis v. Friedman*, 323 Ill. App. 3d 1129, 1131 (2001).
21. Other states have similarly expanded the application of the litigation privilege to apply to other tort claims. *See, e.g., Wise v. Thrifty Payless, Inc.,* 83 Cal.App.4th 1296, 1303 (2000) ("the privilege, when applicable, is absolute and precludes all tort theories of recovery except malicious prosecution."); *Baglini v. Lauletta,* 338 N.J. Super. 282, 297 (App. Div. 2001) (The one tort excepted from the reach of the litigation privilege is malicious prosecution, or malicious use of process."); *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 235 (Colo. 1995) ("an attorney is not liable to a non-client absent a finding of fraud or malicious conduct by the attorney."); and *Feenix Payment Sys., LLC v. Blum*, CVN21C05099EMDCCLD, 2022 WL 215026, at *6 (Del. Super. Ct. Jan. 25, 2022) ("Statements falling under the absolute litigation privilege are privileged regardless of the tort theory by which the plaintiff seeks to impose liability.")
22. See *Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677, ¶¶ 14-18.
23. *Id.* at ¶ 17 (internal citations omitted).

Two Wrongs Do Not Make a Right: Illinois Adopts the 'Partial Breach' Doctrine

BY RONALD D. MENNA, JR.

A party who materially breaches a contract cannot take advantage of the terms of the contract which benefit it, nor can it recover damages from the other party to the contract.[1] From this, Illinois follows the "first-to-breach rule", which holds a material breach of a contract provision by one party *may* be grounds for releasing the other party from its contractual obligations.[2] This is because Illinois law "does not condone breach of contract, but it does not consider it tortious or wrongful. If a party desires to breach a contract, he may do so purposely as long as he is willing to put the other party in the position he would have been had the contract been fully performed. … Fault is irrelevant to breach of contract. Whether one intentionally, carelessly, or innocently breaches a contract, he or she is still considered to be in breach of that contract and the extent of the breaching party's liability is generally the same."[3] Generally, the purpose of contract damages is to place the nonbreaching party in a position that it would have been in had the contract been performed, not to provide the nonbreaching party with a windfall recovery.[4]

In *PML Development LLC v. Village of Hawthorn Woods,*[5] the Illinois Supreme explicitly adopted the misnamed "partial breach" doctrine as an exception to the first-to-breach rule.[6] It held, for the first time, that if an injured party elects to continue with a contract after a material breach by the other party, the injured party cannot later cease performance and then claim it had no duty to perform based on the other party's first material breach.[7] When faced with a material breach, the injured party may proceed in one of two ways: (a) repudiate the agreement, cease performing, and sue for damages; or (b) continue to perform, retaining its benefit of the bargain, and sue for damages.[8] If the injured party elects to continue to perform, it must continue to perform or incur liability for breach.[9] The *PML Development* Court summarized the doctrine as "when a party to a contract elects to continue performing despite the other party's material breach, the nonbreaching party remains bound to its obligation to perform."[10]

The court then went on to address a further question: if an injured party elects to continue performing a contract – despite the other party's material breach – what is the consequence of the injured party's subsequent material breach?[11] First, in such a case, the courts treat each material breach as a "partial", or better understood as a nonmaterial, breach.[12] Thus, if both parties breach, both parties are entitled to damages, but neither is entitled to total damages for breach.[13] The court should calculate each party's respective damages and then offset the ultimate judgment entered.[14]

In her special concurrence, Justice Rochford, quoting a seventh circuit case, wrote to clarify that the "partial breach" doctrine is a misnomer and "is better understood as an election of remedies."[15] There are either material or nonmaterial (minor) breaches of a contract. The remedy depends upon whether the breach is minor or material. A nonmaterial breach does not allow the injured party to terminate the contract.[16] A material breach remains material regardless of the remedy sought and cannot be "converted" into a "partial" breach by continued performance. Instead, under the doctrine, a material breach is *treated* as if it were a nonmaterial breach.[17] It is this author's opinion that Justice Rochford's preferred terminology should be adopted in future cases as it more accurately describes the law's treatment of mutual material breaches of contract when there is continued performance.■

Ronald D. Menna, Jr. is a principal at Fischel | Kahn, Chicago, where he concentrates in commercial litigation, civil appeals, guardianships, association representation, and corporate law. He is a past chair of the ISBA Civil Practice and Procedure Section Council and chair of the Allerton 2019 and 2023 Conferences.

1. *Dubey v. Pub. Storage, Inc.*, 395 Ill.App.3d 342, 361-62 (1st Dist. 2009).
2. *PML Development LLC v. Village of Hawthorn Woods*, 2023 IL 128770, ¶ 50 ("In other words, the first-to-breach rule excuses the injured party from future performance and allows the injured party to pursue its breach of contract claims. Conversely, the first breaching party cannot seek to enforce the contract against the injured party."); *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 70 (2006); *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill.App.3d 324, 346 (1st Dist.), *appeal denied*, 216 Ill.2d 737 (2005) ("Under general contract principles, only a material breach of a contract provision by one party will justify nonperformance by the other."); Restatement (Second) of Contracts § 229 (1981). The Appellate Court in *LB Steel, LLC v. Carlo Steel Corp.*, 2018 IL App (1st) 153501, ¶ 31, held: "A material breach of contract constitutes the 'failure to do an important or substantial undertaking set forth in a contract.' *Mayfair Construction Co. v. Waveland Associates Phase I Ltd. Partnership*, 249 Ill.App.3d 188, 202-03, 188 Ill.Dec. 780, 619 N.E.2d 144 (1993)."
3. *Album Graphics, Inc. v. Beatrice Foods Co.*, 87 Ill. App. 3d 338, 350 (1st Dist. 1980).
4. *Jaime v. Nomanbhoy as Tr. of Nomanbhoy 2007 Children's Tr.*, 2023 IL App (3d) 190185-U, ¶ 92, citing, *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill.App.3d 277, 296 1st Dist.), *appeal denied*, 234 Ill.2d 519 (2009).
5. *PML Development, supra* note 2.
6. *Id*., 2023 IL 128770, ¶¶ 48, 52.
7. *Id*. at 52.
8. *Id*., 2023 IL 128770, ¶ 52 ("All of this is to say that, following a material breach, the injured party reaches a fork in the road: it may either continue the contract (retain its benefits of the bargain and sue for damages) or repudiate the agreement (cease performing and sue for damages).").
9. *Dustman v. Advocate Aurora Health, Inc.*, 2021 IL App (4th) 210157, ¶ 38.
10. *PML Development, supra* note 2 at ¶ 57.
11. *Id*., 2023 IL 128770, ¶ 57. "The facts relevant to the parties' remedies are straightforward: the Village and PML each materially breached the agreement, and each party, despite the mutual breaches, persisted in performing under the agreement." *Id*., 2023 IL 128770, ¶ 76 (Rochford, J., specially concurring).
12. *Id*. at ¶ 66.
13. *Id*.
14. *Id*. at ¶ 67.
15. *Id*. at ¶¶ 76-77 (Rochford, J., specially concurring), citing *Emerald Investments v. Allmerica Financial Life Insurance & Annuity Co.*, 516 F.3d 612, 618 (7th Cir. 2008).
16. *Id*. at ¶¶ 78-79 (Rochford, J., specially concurring).
17. *Id*. at ¶ 79 (Rochford, J., specially concurring).