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In the interest of ecology, we have moved to an electronic monthly newsletter. Each of the articles below can be accessed in full at <http://www.querrey.com/newsletter-35.html>



B.Y.O.B. Brings Liability

By: Patrick Wall – Chicago, Illinois

Chicago associate Patrick Wall discusses a recent ruling finding that a gentleman's club could be subject to liability for a fatal collision which occurred after an intoxicated patron was ordered to leave the premises.

The New ADA Amendments: Increased Coverage Means Increased Obligations For Employers

By: Brandon Lemley – Chicago, Illinois

Chicago associate Brandon Lemley examines some critical definition changes to the Americans with Disabilities Act, effective January 1, 2009.

The Far-Reaching Consequences of the Illinois Supreme Court's Decision that Good-Faith Settling Tortfeasors are not to be Included on the Verdict Form

By: Christopher Harney – Chicago, Illinois

The Illinois Supreme Court recently ruled that good-faith settling tortfeasors are not to be included in the jury instruction verdict form. Chicago associate Christopher Harney explains.

Constitutional Law Update: The Need to Plead Negative Affect to a Fundamental Constitutional Right

By: Richard Turiello – Joliet, Illinois

Joliet associate Richard Turiello discusses a recent case which addressed the question of whether a plaintiff in a civil rights action against a city must allege that the conduct adversely impacts or affects a fundamental constitutional right.

Inconsistent Verdict? First District Upholds Verdict Without Award For Loss of Normal Life or Disability

By: Alexis Widlak – Chicago, Illinois

Chicago associate Alexis Widlak writes on a recent decision where the jury's decision to not award loss of normal life or disability was found to not be against the manifest weight of the evidence.

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B.Y.O.B. Brings Liability

By: Patrick S. Wall – Querrey & Harrow, Ltd. – Chicago, Illinois

The Second District, in *Simmons, et al v. Homatas*, No. 2-08-0138, 2008 Ill. App. LEXIS 1200 (2nd Dist. Dec. 3, 2008), recently found that an entertainment venue could be subject to liability for negligence by acting in concert with its patrons, who brought their own alcohol to the venue and were negligent in their own right by driving while visibly intoxicated. Additionally, ejecting visibly intoxicated patrons and placing them on public roadways in such a state is clearly sufficient to make the venue liable for the legal cause of a wrongful death which was clearly foreseeable. This decision could lead to frightening ramifications for those hosting holiday or other parties in the New Year.

A brief background in the facts will provide context. Defendant On Stage Productions operated Diamonds Gentleman Club in unincorporated DuPage County. On Stage did not have a liquor license for the premises, pursuant to county laws. Instead, On Stage encouraged its patrons to bring their own alcohol and On Stage would provide tangential products, such as glasses, ice, soft drinks, etc. Patrons were forbidden from bringing their own tangential products, for “financial” reasons, so claimed the Plaintiff.

On January 4, 2006, Defendant John Homatas (“Homatas”), along with a friend, John Chiariello (“Chiariello”), a plaintiff, went to Diamonds. As required, Diamonds’ valet parked Homatas’ car, and the men proceeded inside the venue with two fifths of alcohol. Within two hours, according to the court, both parties were visibly intoxicated. Homatas soon became ill and both parties were ejected from the venue and their car was retrieved. Next, employees put Homatas in the driver’s seat, Chiariello in the passenger seat of the car and ordered them to leave the premises. Unfortunately, fifteen minutes later, while driving 80 miles per hour, Homatas collided head on with the vehicle driven by April Simmons, 8-½ months pregnant. April was killed, along with her unborn daughter and Chiariello.

Soon after, both the Chiariello and Simmons families filed complaints, alleging common law

negligence and Dram Shop violations against On Stage. On Stage moved to dismiss the claims. The Dram Shop violations were dismissed, as On Stage did not sell alcohol, but the trial court found that a common law negligence claim could proceed. The trial court found that On Stage owed a duty to Chiariello, the passenger, because he was a business invitee of Diamonds, meaning Diamonds owed extra care to ensure his safety. As to the Simmons family, the court found that a duty existed because On Stage’s affirmative conduct created an unreasonable risk of harm. The court certified two questions of duty for an interlocutory appeal.

The appellate court combined the two issues into one central question: did On Stage owe a duty to prevent unreasonable risk of harm to both the Simmons’ and Chiariello? On its own volition, the appellate court proceeded to analyze that issue under the *Restatement (Second) of Torts*, §876, which states in pertinent part,

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

- (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.

Comment D to §876 holds that:

Advice or encouragement to act operates as a moral support to a tortfeasor, and if the act encouraged is known to be tortious it has the same effect upon the liability of the advisor as participation or physical assistance.” *Restatement (Second) of Torts*, §876, *Comment D*.

However, the assistance must be more than benign, and must actively facilitate another’s tortious conduct according to the Court.

Here, Plaintiff alleged that On Stage required Homatas to valet his car and induced him to

inged alcohol to a point which induced vomiting. Furthermore, On Stage placed an intoxicated Homatas behind the wheel of his car and ordered him to drive away onto the public roadways.

In rebuttal, On Stage vigorously argued that the consumption of alcohol was the *legal* cause of the death of the decedents. In attempting to shield its liability, On Stage argued the old maxim that it is a person's decision to consume alcohol that proximately causes an injury, not the provision of alcohol to that person. Factually, On Stage conceded that but for their placing of Homatas behind the wheel, the accident would never have occurred. However, On Stage argued the accident was not a likely result of its conduct of ejecting Homatas.

Essentially, On Stage argued it merely provided a condition in which an injury occurred, rather than actually causing the injury. The appellate court disagreed, saying it was "foreseeable, if not virtually assured, that Homatas would collide with another car as he drove along the public roadways," and On Stage's affirmative conduct rose to a level which was more than simply creating a "condition." It was clear that the result was both objectively reasonable and the natural and probable result of On Stage's conduct.

On Stage further argued it cannot control venue patrons after they leave, and to impose liability on venues such as Diamonds would open a Pandora's Box of litigation. The appellate court demurred, indicating that it was On Stage's substantial assistance and encouragement of Homatas' conduct which provided a basis for liability and its decision would not create the slippery slope On Stage argued would exist.

Lastly, On Stage argued it was not present at the time Homatas' negligent conduct occurred, and therefore, could not be found liable for the conduct. The court found differently stating that nothing in law required defendants be present at the time and place of the negligent conduct. Again, it made crystal clear that On Stage's arguments were futile since it was not a passive bystander merely acquiescing to Homatas'

conduct, but assisted and encouraged tortious behavior which resulted in four deaths. The case was remanded for further proceedings.

The appellate court held that On Stage could be subject to liability for the collision that killed the decedents, since On Stage clearly knew that Homatas was intoxicated and would engage in negligent conduct. The court went on to analogize other Illinois cases which found liability under §876 as well. In the end, the court found that Defendant On Stage affirmatively encouraged a driver to become intoxicated, actively placed that driver behind the wheel of a car and required the intoxicated driver to operate on the roadways and therefore §876 liabilities could attach.

This decision is interesting for a few important reasons. First, it appears to show a departure from the belief that all alcohol related claims fall under the purview of the Dram Shop Act. Second, it finds that in-concert liability may be a viable theory of liability in the future for other venues subject to regulations similar to Diamonds. In a broad sense, this case highlights the power of an appellate court to decide an issue wholly different from the issues presented for review by the parties. Lastly, it appears possible that an extension of this decision could affect homeowners who host or assist in hosting a social function at their home.

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Patrick Wall, an associate in our Chicago office, concentrates his practice in automobile and premises liability litigation. He also assists with large-scale commercial litigation in the construction, commercial, real estate, employment, intellectual property, and environmental practice areas. If you have questions regarding this article, please contact Pat via pwall@querrey.com, or via 312-540-7598.

The New ADA Amendments: Increased Coverage Means Increased Obligations For Employers

By: Brandon Lemley – Querrey & Harrow, Ltd. – Chicago, Illinois

For years, the “ace in the hole” in defending a disability discrimination case has been whether an employee is “disabled” under the Americans with Disabilities Act (ADA). In the past, Supreme Court decisions made it extremely difficult for plaintiffs to prove coverage under the ADA. However, all this changes on January 1, 2009. The Americans with Disabilities Act Amendments Act of 2008 will statutorily overturn the Supreme Court precedent, immediately increasing the number of people covered by the ADA, and potentially increasing the number of suits.

To be entitled to coverage under the ADA, a plaintiff must be “disabled.” The Supreme Court held, however, that employees who have impairments that can be corrected or mitigated (through medication, medical supplies, prosthetics or assistive devices, for example), are not “disabled” and not entitled to bring an ADA lawsuit.

Disability advocates have long complained that these decisions force the disabled to walk a legal tightrope: to be “disabled,” their physical or mental impairment must be so severe that it

cannot be controlled or mitigated, but not so severe that they cannot perform their job.

The ADA amendments primarily concern expanding the scope of who is “disabled” under the ADA in favor of “broad coverage of individuals . . . to the maximum extent permitted.” The ADA’s definition of “disability” remains the same: one is disabled if he or she has (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such impairment; or (3) is regarded as having such an impairment. What changes, however, is that corrective or mitigating measures (other than ordinary eyeglasses) can no longer be considered in determining whether someone is disabled.

The amendments also expand the definition of “major life activities,” to include walking, standing, lifting, speaking, hearing, breathing, learning, reading, concentrating, thinking, communicating and working, as well as the operation of major bodily functions such as those pertaining to one’s digestive, respiratory, circulatory, neurological, reproductive and

NEWS & COMMUNITY INVOLVEMENT

Chicago associate **R. Scott Rochelle** was recently named to the Cook County Bar Association Minority Law Student Job Fair Committee.

Chicago associate **Kevin Casey** appeared as Santa Claus at the 9th Annual Kevin Dowling “Christmas is for Kids Toy Drive” held on December 6, 2008 in Merrionette Park. The toys collected were delivered to numerous children’s hospitals throughout the Chicagoland area. Mr. Casey is a regular volunteer with the Kevin Dowling Scholarship Foundation which was started in 1997 and offers scholarships to area elementary and high school students with learning disabilities.

In November, former managing shareholder **Dennis Marks** was formally installed by Cardinal Francis George to a 3 year term on the Board of Advisors of Catholic Charities. Dennis is also the General Chairman of Archdiocesan Leadership Day which will be held on February 7, 2009 at Maria High School in Chicago. It is anticipated that there will be 1300 - 1500 attendees with 100 workshops given in English, Spanish and Polish. Querrey & Harrow’s **Sandy Wasinski** is a subcommittee Chair and a number of Querrey & Harrow employees will serve as volunteers on her subcommittee on the day of the event.

immune systems. It also defines “substantially limits” more broadly to mean “materially alters.”

So what will the ADA amendments mean for employers?

Because the definition of “disabled” will be broader, more employees and job applicants will be eligible for protection under the ADA. Accordingly, employers will be required to be more vigilant in determining whether an individual is protected under the ADA. Additionally, because more employees will be disabled, employers will be expected to make more workplace accommodations - or face the possibility of increased litigation. The broader definition of “disabled” also takes away one of the employer’s strongest arguments in defending against a disability discrimination lawsuit. Rather than turning on whether an employee is disabled, ADA litigation will likely shift focus to more complex issues, like whether the employer offered a reasonable accommodation or what the essential functions of a job entail. The complexity of such issues may result in more trials, and likely more plaintiffs’ verdicts.

To avoid litigation, employers must review their procedures for addressing employees’ accommodation requests, and update their personnel manuals to better protect themselves against the broader coverage of the ADA amendments. Given the increased protection of the ADA, it is more important than ever that employers actively document the interactive process, revise medical certification forms, and make certain that job descriptions explicitly spell out the essential functions of every job.

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Chicago associate Brandon Lemley concentrates his practice in insurance coverage, appeals, and municipal liability. He previously served as a Federal Judicial Law Clerk to Magistrate Judge Roger B. Cosbey of the U.S. District Court for the Northern District of Indiana. While in law school, Mr. Lemley was a Lead Articles Editor for The John Marshall Law Review. Mr. Lemley also serves as an Adjunct Professor at the John Marshall Law School, teaching legal writing and appellate advocacy. If you have questions regarding this article, please contact Brandon via 312-540-7548, or via blemley@querrey.com.

The Far-Reaching Consequences of the Illinois Supreme Court’s Decision that Good-Faith Settling Tortfeasors are not to be Included on the Verdict Form

By: Christopher Harney – Querrey & Harrow, Ltd. – Chicago, Illinois

In *Ready v. United/Goedecke Servs., Inc. et al.*, 2008 Ill. LEXIS 1439 (Ill. Nov. 25, 2008), the Illinois Supreme Court, in a plurality opinion, held section 2-1117 of the Illinois Code of Civil Procedure does not require good-faith settling tortfeasors who have been dismissed from the lawsuit to be included on the verdict form.

In *Ready*, Michael Ready, a maintenance mechanic, died in a pipe-refitting project at his workplace, Midwest Generation, LLC power plant. The general contractor of the project, BMW Constructors, Inc. (BMW), had subcontracted with United/Goedecke Services, Inc. (United), to perform the scaffolding work, including the lifting of scaffolding materials. Terry, as special administrator of Ready’s estate filed suit against Midwest, United, and BMW. The plaintiff reached good-faith settlements with BMW and Midwest, and United did not object to the settlements.

Prior to the commencement of trial, the trial court ruled in the plaintiff’s favor on multiple motions in limine, and as a result, United was not allowed to present evidence at trial regarding the conduct of the settling defendants. Additionally, the trial court denied United’s motion to include BMW and Midwest on the verdict form so that the jury could consider their allocations of fault if they found against United. The jury found United 65% liable and awarded damages totaling \$14.23 million, \$8.137 million of which United was responsible to pay after the judgment against United was offset by the previous settlements of BMW and Midwest.

United argued on appeal to the First District Appellate Court that if a jury could have considered the faults of BMW and Midwest, then there is a chance that United would have fallen below the 25% mark, making them severally liable under section 2-1117 and responsible for no more than \$5.473 million, as opposed to the \$8.137 million United ultimately paid.

Section 2-1117 establishes that all defendants are jointly and severally liable for the plaintiff's past and future medical and medically related expenses. Additionally, a defendant whose fault is 25% or greater is jointly and severally liable for all other damages; whereas, a defendant whose fault is less than 25% is only severally liable. According to section 2-1117, the faults considered in these calculations are those of the "plaintiff, the defendants sued by the plaintiff, and any third party defendants who could have been sued by the plaintiff." Section 2-1117. (emphasis added).

The appellate court held in favor of United and ruled BMW and Midwest should have been on the verdict form. The case was appealed to the Illinois Supreme Court to determine if good-faith settling tortfeasors are "defendants sued by the plaintiff," according to Section 2-1117. If the court determined Section 2-1117 contemplated good-faith settling tortfeasors, then BMW and Midwest would be included on the verdict form for purposes of fault apportionment, and the jury would hear evidence related to the culpability of these settled defendants.

The supreme court found the term "defendants sued by the plaintiff" in Section 2-1117 ambiguous; therefore, the court turned to an analysis of legislative intent to determine the scope of the term. The court relied on the fact that the Illinois legislature amended section 2-1117 in 2003, but this amendment did not address the 5th District's 1995 decision in *Blake v. Hy Ho Restaurant, Inc.*, 273 Ill. App. 3d 372 (1995), that defendants who settled were not to be included in the apportionment of fault under section 2-1117. Thus, the court believed the legislature's failure to amend section 2-1117

amounted to an acquiescence of the *Blake* holding. In conclusion, the Illinois Supreme Court held that good-faith settling tortfeasors are not "defendants sued by the plaintiff" and therefore should not be listed on the verdict form.

This decision has far-reaching practical implications, many of which were addressed by Justice Garman in his dissent, which was joined by Justice Karmeier. As Justice Garman pointed out, this decision:

invites future plaintiffs to reject reasonable settlement offers from minimally responsible defendants with 'deep pockets' in an effort to keep such defendants in the case until judgment.

Plaintiff's will likely "pick off" any defendants with "shallow pockets" by settling with these defendants in order to disallow the jury from hearing any evidence regarding these defendants' apportionment of fault. As a result, the jury may find an otherwise minimally responsible defendant more liable when it does not hear evidence of the fault of the settled defendants.

Further, Justice Garman questioned what will happen if the plaintiff settles during trial or while the jury is deliberating, since evidence of the guilt of these defendants was likely to have been introduced prior to settling. It seems unlikely the courts will require the trial to start over or declare a mistrial, and seems more likely the courts will attempt to rectify this problem through jury instructions. Nevertheless, courts must address this issue in the future.

In light of this decision, a defendant in United's position should aggressively challenge any motions in limine which attempt to limit the evidence introduced regarding the fault of any co-defendants who may potentially settle or who may have already settled. Also, defendants must ardently attack a settlement between a plaintiff and a largely responsible co-defendant with "shallow pockets" as not being in "good faith," in hopes of keeping these co-defendants in the

case and on the verdict form. However, as established law in Illinois makes opposing settlements extremely difficult, this option carries very little in the way of protection for targeted defendants.

Additionally, a defendant would be well advised to consider the likelihood that a plaintiff may attempt to target its deep pockets, when contemplating an early settlement demand. When analyzing a settlement demand, such a defendant should factor in the assets of co-defendants and/or their liability insurance limits to predict if the plaintiff might attempt to settle with these defendants. More importantly, a minimally responsible defendant with “deep pockets” should analyze its apportionment of fault compared to that of the plaintiff only, with the assumption that the plaintiff will “pick off” the other responsible defendants with “shallow pockets.”

This forward-looking settlement analysis may prove vital to a defendant hovering below the 25% liability mark prior to any settlements, and thus, originally severally liable. A defendant presuming to be found severally liable when the faults of all defendants are considered is likely to believe a settlement demand by the plaintiff representing 25%-40% liability to be unreasonable. However, such a settlement may be advisable when one contemplates that the

jury could find the defendant over 40% liable if the plaintiff strategically settles with other liable defendants.

* * *

Christopher Harney, admitted to the bar on November 6, 2008, is a new associate in Querrey & Harrow's Chicago office. Chris previously clerked for Querrey & Harrow during law school and concentrates his practice in general litigation and currently assists in a variety of matters, including: auto liability cases, premises slip and fall claims, and drafting commercial contract provisions. We welcome Chris to our practice.

Christopher graduated Cum Laude from the University of Mississippi School of Law, following receiving a Bachelor's Degree in Psychology from the University of Chicago as a four-year recipient of the Chicago Police and Fire Scholarship. During law school, Christopher was active on the moot court team and successfully competed in a variety of appellate competitions, including placing as a Semifinalist in the State of Mississippi Appellate Advocacy Competition. If you have any questions regarding this article, or would like copies of any of the materials cited, please contact Chris via charney@querrey.com, or via 312-540-7622.

CASE SUCCESSES

Querrey & Harrow Wins Appeal in Wrongful Death Gun Case

Chicago office shareholder **Terrence Guolee** recently received an unpublished order from the First District Appellate Court denying plaintiff's Petition for Rehearing of the appellate court's prior order affirming the trial court's entry of summary judgment in a wrongful death case. In the case, Querrey & Harrow obtained dismissal of all claims made against the Sheriff of Cook County following the tragic accidental shooting of a 15-year old girl by a 17-year old who accessed the duty weapon of his uncle, a Cook County Sheriff's Lieutenant. Plaintiffs sought recovery against the Sheriff asserting that storage of the weapon was part of the officer's job duties. In affirming the summary judgment, the First District rejected the trial court's reasoning for entering summary judgment, but nevertheless held that summary judgment was appropriate as the Sheriff would be immune from claims based on *Respondeat Superior* theories pursuant to Section 2-204 of the Illinois Tort Immunity Act. Further appeal to the Illinois Supreme Court is expected.

Constitutional Law Update: The Need to Plead Negative Affect to a Fundamental Constitutional Right

By: Richard Turiello – Querrey & Harrow, Ltd. – Joliet, Illinois

The Second District Appellate Court recently addressed the question of whether a plaintiff in a civil rights action against a city must allege that the conduct adversely impacts or affects a fundamental constitutional right. In the case of *Karabetsos v Village of Lombard et al*, No. 2-08-0457 (2nd Dist., Nov. 20, 2008), the plaintiff filed suit against the Village of Lombard and several officials claiming a violation of her right to substantive due process when she was forced to agree to certain repairs to her porch by threatening her regarding a lack of a building permit. The defendants filed a motion to dismiss claiming that the plaintiff had failed to state a cause of action. The motion was denied as was a subsequent motion to reconsider. However, the court certified the following question:

When pleading a cause of action for a violation of substantive due process under the 14th Amendment to the U.S. Constitution against a public body or official, is the plaintiff required to plead both (1) arbitrary conduct which shocks the conscience and (2) a constitutionally protected interest affected or adversely

impacted thereby or is it sufficient to plead only one of the foregoing elements[?] *Id.*

The appellate court accepted the question for review and found it is necessary to plead both elements. However, the court was quick to point out that this question does not encompass all of the considerations necessary to determine if the plaintiff has successfully set forth a viable claim. The court ruled that their opinion should not be construed as holding that the two elements are sufficient to state a claim; rather that they are both necessary.

It is important to note that there is a difference when a plaintiff is challenging executive, rather than legislative action. If a plaintiff is challenging the validity of a legislative act, substantive due process requires the act be reasonably related to some legitimate government purpose. When challenging the validity of a non-legislative action, the court must examine whether the property interest being deprived is fundamental under the Constitution. Of a more important note is that a “fundamental right” is not the same as a

CASE SUCCESSES

Richard Turiello Scores Two Defense Verdicts

Joliet associate **Richard Turiello** recently obtained two great results in Will County. In a rear-end accident, plaintiff claimed injury to his cervical spine and underwent approximately one year of conservative treatment, missing eight months of work. The plaintiff's retained expert testified that the plaintiff had a 50% chance of needing surgical intervention for his neck. The defendant's retained expert testified that the plaintiff was injured but did not require surgery as a result of the accident. The plaintiff claimed roughly \$18,000 in past medical damages, \$54,000 in lost wages and between \$20,000 and \$350,000 in future medical damages and time off of work. Prior to trial an offer of \$100,000 was made by defendant and rejected by plaintiff. The plaintiff then asked the jury for an award of \$485,000. After deliberations, the jury awarded the plaintiff \$98,000.

In the second case, the plaintiff turned left in front of the defendant. Plaintiff alleged that the defendant had his right turn signal on and, at the last minute, aborted his right turn, continued straight and struck the plaintiff. The plaintiff testified that it is common practice for vehicles turning left to turn as oncoming traffic is turning right because there are two lanes available. The jury returned a verdict in favor of the defendant.

constitutional right. It has long been held that a fundamental right is a right that is implicit in the concept of ordered liberty and not necessarily spelled out in the Constitution or other documents. Fundamental rights have been defined previously by courts as personal immunities that are so ingrained in our traditions as to be ranked as fundamental. They have also been defined as rights implicit in the concept of ordered liberty.

If a plaintiff is able to show a fundamental right has been allegedly violated, the inquiry turns to whether the alleged action of the executive infringing on that right is so egregious as to shock the conscience. In *Karabetsos*, the court was not asked to determine if the plaintiff had done this but rather if it must be alleged to survive a motion to dismiss. The court also did not re-examine what is an egregious act as this is a concept that is well-defined by prior courts. The court found it is required of plaintiffs to allege both conduct that shocks the conscience, as well as the violation of a fundamental right. If a plaintiff fails to allege both, they have failed to state a cause of action. The court also ruled that their opinion should not be construed as holding that the two elements alone are enough to sustain a cause of action. The case was remanded to the trial court with instructions to proceed consistent with the court's answer to the certified question. The court's opinion gives us a clearer picture of what a plaintiff must allege in

order to sustain a cause of action against an individual for executive actions.

This opinion is important because it gives guidance as to what must be plead against an executive in order to sustain a cause of action for alleged rights violations. As the court points out, the examination into the allegations is different than into the actions of the legislature because of the different ways the two branches operate and affect citizens. The court's opinion is important because it gives attorneys and other practitioners a guide post as to what must be plead so actions can be taken accordingly. The case is currently back before the trial court for further proceedings.

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Richard Turiello, an associate in our Joliet office, concentrates his practice primarily in general liability litigation. He also handles workers compensation and premises liability matters. Mr. Turiello has tried over 50 cases to jury verdict, he has handled numerous workers compensation cases, and has participated in over 100 arbitrations. Mr. Turiello is a member of the team that represents local municipalities in connection with zoning and general issues. Mr. Turiello also handles cases for local hospitals and several large retail companies. He handles workers compensation claims for governmental entities and not-for-profit organizations. If you have questions regarding this article, please contact Rich via rturiello@querrey.com.

CASE SUCCESSES

Querrey & Harrow Successfully Settles Municipal Sewer Claim

Jennifer J. Sackett Pohlenz recently successfully resolved an enforcement case brought by a government entity in Indiana involving allegations of industrial sewer user discharge exceedences against one of our clients. The settlement not only included release of past alleged violations, but also contained a release of potential future violations that could take place until such time as certain construction involving new discharge treatment was completed.

Summary Judgment Won in Auto Case

Patrick Wall recently obtained summary judgment in favor of a defendant in a suit alleging negligent operation of a motor vehicle causing emotional damages. The plaintiff claimed that he was injured and suffered emotional damage after the defendant rear-ended him on the highway. Defendant argued that the plaintiff's claims did not procedurally meet the initial burden, nor the final burden and would be uncompensable under Illinois law. Summary judgment was granted, finding that the plaintiff's injuries did not reach a compensable level. Additionally, the plaintiff's cross-motion for summary judgment was denied.

Inconsistent Verdict? First District Upholds Verdict Without Award For Loss of Normal Life or Disability

By: Alexis Widlak – Querrey & Harrow, Ltd. – Chicago, Illinois

In *Poliszczk v. Winkler*, the First District found that the jury's decision to award medical expenses and pain and suffering, without also awarding loss of normal life or disability was not against the manifest weight of the evidence and therefore found the trial court did not abuse its discretion in denying plaintiffs' post-trial motion for a new trial based upon the arguably inconsistent award. No. 1-07-0490, 2008 Ill. App. LEXIS 1248 (1st Dist. Dec. 1, 2008). Brother and sister plaintiffs Joseph and Marie Poliszczuk filed a lawsuit against defendant Kathryn Winkler alleging personal injuries arising out of a rear-end collision. Defendant admitted negligence prior to trial and the trial proceeded on the issue of causation and damages.

On September 12, 2006, the jury returned a verdict in favor of the plaintiffs as follows: for Marie, a total of \$30,100 allocated as \$24,100 for past and future medical expenses, \$6,000 for past and future pain and suffering, \$0 for disability and \$0 for loss of normal life; and for Joseph, a total of \$9,000, allocated as \$7,000 for past and future medical expenses, \$2,000 for past and future pain and suffering, \$0 for disability and \$0 for loss of normal life. Plaintiffs filed a post-trial motion for a new trial arguing that the jury's verdicts were inadequate and "internally inconsistent." The trial court denied plaintiffs' motion for a new trial and the First District affirmed.

At trial, the jury heard testimony from plaintiff Marie, her father Charles, Marie's treating orthopedic surgeon Dr. Jack Perlmutter, plaintiff's expert witness Dr. Spiros Stamelos, and defendant's expert witness Dr. Avi Bernstein. Marie testified that she felt back and neck pain the day following the accident which radiated down her torso. She treated the pain with ice, heat and medications and the pain began to subside after a few days. For weeks following the accident she was unable to perform any physical activities such as dancing,

volleyball, sexual activity or tying her shoes or perform household chores such as cleaning the bathtub or taking out the trash. She also testified that before the accident she was a passionate dancer and planned to pursue a dance major in college followed by a professional dancing career. However, after the accident she was forced to take a two-year break from dancing, was unable to regain her pre-accident flexibility and was unable to bend backward or forward without radiating pain.

Mr. Poliszczuk testified that Marie and Joseph never had back problems before the accident, that Marie danced and participated in poms and that Joseph was an avid go-cart driver. After the accident, Marie was forced to take a one-year break from dancing and stopped doing household chores and that Joseph needed help exiting his go-cart, walked "like an old man" and eventually had to stop go-cart racing.

Both Marie and Joseph's board-certified treating orthopedic surgeon, Dr. Perlmutter, testified at trial, although only to Marie's injuries. He testified that he had treated Marie five years prior from January 24, 2001 through July 2, 2002. Marie complained of lower back pain with radiation to her front, right thigh, which worsened with physical activity. He observed that Marie walked in a slow, guarded manner and that her range of motion in her lower back was limited. He ordered a bone scan which indicated a "limbus vertebrae," a congenital condition, and prescribed physical therapy. Eventually, he ordered an MRI of Marie's lower back which revealed a bulging disc at the L2-L3 lumbar area, but did not reveal whether the bulging disc was symptomatic. Therefore, he ordered a discogram to determine whether the bulging disc was symptomatic by injecting contrast material into the vertebral discs on the spine through a needle with the purpose of reproducing pain. In Marie's case, the discogram performed at the L3-L4 level reproduced no pain whereas the discogram

performed at the L2-L3 level reproduced pain. Based on these results, along with those of the MRI and the fact that Marie was asymptomatic prior to the accident, he opined that Marie's injury was caused by the rear-end car accident. He further recommended Marie undergo a spinal fusion surgery which would cost at least \$30,000.

Plaintiffs' retained expert Dr. Spiros Stamelos, a board-certified orthopedic surgeon, testified that he examined Marie on May 26, 2006. She complained of tight hamstrings, soreness and limitation of motion in her lower back which came and went with activity and seasonal conditions. He opined that based upon the damage to plaintiffs' vehicle and the absence of prior back problems, that the collision caused Marie's spine to twist resulting in a bulging disc at the L2-L3 level causing a permanent injury. However, he did testify that the results of Marie's 2001 and 2005 MRIs indicated the possible presence the congenital condition limbus vertebra. Furthermore, he disagreed with treating physician Dr. Perlmutter's recommendation for immediate surgery.

Dr. Stamelos' testimony regarding Joseph's injuries was rather limited since he never examined Joseph and instead based his testimony and opinions upon the notes contained in Dr. Perlmutter and Joseph's primary physician's charts. Dr. Stamelos testified that Joseph sustained permanent injuries as a result of the accident that included a bulging disc at the L4-L5 level and an injured disc at the L5-S1 level.

Defense expert, Dr. Avi Bernstein, a board-certified orthopedic surgeon, opined that Marie suffered from limbus vertebra, a pre-existing congenital condition, which often appears as an abnormality on MRI scans and confused with something that could be causing pain. Marie presented to Dr. Bernstein on October 24, 2004 complaining of sharp, unpredictable pain in her lower back. Upon examination of Marie, Dr. Bernstein observed that Marie was in no acute distress, she showed no signs of pain during examination, she arose from her chair without difficulty, she exhibited no signs of pain

guarding, and tested for a full, unrestricted range of motion and flexibility. She reported no pain upon palpation of her lower back at the L2-L3 level. Furthermore, Dr. Bernstein opined that Marie was not a candidate for future medical treatment or surgery and that the car accident did not aggravate her pre-existing back condition.

Before deciding the issues on appeal, the First District acknowledged that the trial court incorrectly gave concurrent jury instructions on "disability" and "loss of normal life" as the Illinois Pattern Jury Instruction No. 30.04.01 specifically limits the instruction to one or the other. Illinois Pattern Jury Instructions, Civil (2008). However, in this case, the First District found that reversal on this basis was unnecessary because neither party objected to the concurrent objections on the record and the defendant was not prejudiced by the concurrent instructions as the jury awarded nothing for both disability and loss of normal life regardless.

The proper standard of review regarding the appellate court's review of a trial court's denial of a post-trial motion is the "abuse of discretion" standard, *Dixon v. Union Pacific R.R. Co.*, 383 Ill.App.3d 453, 470 (2008), meaning the court has to consider whether the evidence supported the jury's verdict. Upon ruling on a post-trial motion for new trial, the trial judge has the discretion to determine whether the jury's verdict was against the manifest weight of the evidence, meaning whether the opposite conclusion is clearly evident or the jury's findings are unreasonable, arbitrary or not supported by any evidence. *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1028 (2005). This standard of review yields great deference to the trial court's decision to either deny or grant a post-trial motion, as the trial judge is in the best position to observe the demeanor, testimony and credibility of all witnesses.

Ultimately, the question of damages is a question of fact, not law, and is within the sole discretion of the jury, not the court. The Illinois Supreme Court has ruled that a trial court can only disturb a jury's award of damages if the trial court finds one or more of the following: (1) the jury ignored a proven element of damages;

(2) the jury employed passion or prejudice in arriving at the verdict; or (3) there was no relationship between the award and loss sustained. *Snover v. McGraw*, 172 Ill.2d 438, 449 (1996).

The First District re-affirmed Illinois' rejection of the reversal *per se* rule regarding inconsistent verdicts as decided in *Snover*. Prior to *Snover*, a line of Illinois cases held that inconsistent jury verdicts required reversal *per se* where the jury awarded medical expenses without an award for pain and suffering. But in *Snover*, the Illinois Supreme Court acknowledged that there are circumstances where the evidence presented supports an award of medical expenses, but does not support an award for pain and suffering. *Id.* at 448.

Regarding *Snover's* three-prong test, the plaintiffs focused on the third prong that the award bore no reasonable relationship to the loss sustained. To determine whether a reasonable relationship existed, the First District examined the jury's role in deciding damages. Given the subjective nature of determining an award for loss of normal life or disability, the jury must rely on their own common sense and life experiences, along with analyzing the credibility of the witnesses, to determine whether to award money for loss of a normal life or disability. A jury is free to disbelieve evidence when the evidence is contradicted or based upon the subjective testimony of the plaintiff. *Id.* at 449.

In this case, the court held the jury was free to draw its own conclusions regarding the credibility of the witnesses and any inconsistencies therein. For example, Marie testified she stopped dancing for two years while her father claimed she stopped for only one year. The jury was also free to analyze the credibility and substance of all medical evidence adduced at trial. Defense expert Dr. Bernstein testified that Marie suffered a pre-existing condition known as limbus vertebra, which both Dr. Stamelos and Dr. Perlmutter agreed upon, but disagreed about other issues. Dr. Bernstein testified that a limbus vertebra did not cause pain, did not warrant surgery and was not caused by trauma from the car accident. Furthermore,

Dr. Bernstein's 2004 physical examination of Marie indicated that she was in no pain and had full range of motion, flexibility and muscle strength. After hearing all the medical testimony, the jury was free to accept Dr. Bernstein's opinions over those of Dr. Perlmutter and Dr. Stamelos.

Regarding Joseph, a record of his own testimony was not included in the record on appeal. Again, the jury was free to assess the credibility of Joseph's father as he testified to Joseph's troubles getting out of his go car and his "walking like an old man." Specifically regarding loss of normal life or disability, his father could offer no testimony because Joseph had been away at college in Arizona for four years and there had been no current medical examination of him. The only testimony regarding permanency came from Dr. Stamelos, by whom Joseph was never physically examined. In fact, Dr. Stamelos' permanency opinion should have been barred, and would have been if the defendant would have raised an objection.

Overall, a court will not find a jury's award to be against the manifest weight of the evidence just because the award is less than generous. *Branum v. Slezak Construction Co., Inc.*, 289 Ill.App.3d 948, 953 (1997). In this case, the jury awarded Marie a total of \$30,100 and Joseph a total of \$9,000 and their medical bills were \$11,599.61 and \$6,933, respectively. The First District found nothing in the record to support the plaintiffs' assertion that the jury's awards were inadequate. Furthermore, the First District rejected Marie's argument that she was entitled to an additur to account for the recommended \$30,000 spinal surgery. Again, the jury was free to assess the credibility of all medical witnesses and the jury was convinced by Dr. Bernstein that the surgery was unnecessary.

This case suggests the importance of the jury's power to decide cases based upon credibility of witnesses, including the parties and their treating and expert witnesses. Therefore, it is important for defense attorneys to take the time to thoroughly research potential expert witnesses for solid credentials and trustworthy, logical

opinions as well as prepare a well-thought, planned cross-examination of the plaintiff and his or her treating physician and experts. Defense counsel must keep in mind that attacking the credibility of the plaintiff starts at the discovery deposition and that defense counsel must go into the deposition with a strategy to lock the plaintiff into certain testimony that can be used to their client's advantage at trial.

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SEMINARS

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