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## **MUNICIPAL LAW UPDATE: VICTORY SUPREME - Q&H ATTORNEYS PREVAIL BEFORE THE ILLINOIS SUPREME COURT**

On February 20, 2009, the Illinois Supreme Court released its decision in the case of *Lacey v. Village of Palatine, et al.*, No. 106359 (Ill. February 20, 2009). The defendant municipalities and individual police detectives were alleged to have breached their statutory duties under the Illinois Domestic Violence Act of 1986, 750 ILCS 60/305 (2004), in conjunction with their investigation of a solicitation for murder-for-hire plot conceived by the plaintiff's decedent's ex-boyfriend. An informant alerted police detectives to the plot in October 2004. After a thorough investigation, including notifying the plaintiff's decedent about the plot, the police detectives determined that probable cause did not exist to arrest the ex-boyfriend and closed their investigation. Plaintiff's decedent, who had been the recipient of an order of protection in effect during the relevant time period, was tragically killed two months later, in December 2004. Plaintiff later sued the defendant municipalities and individual police detectives asserting claims under the Domestic Violence Act for failing to prevent her decedent's alleged murder.

The trial court had previously dismissed plaintiff's claims, determining that the police detectives were not acting pursuant to the Domestic Violence Act during their investigation of the ex-boyfriend's criminal conduct and that the absolute immunity provided by Sections 4-102 and 4-107 of the Local Governmental and Governmental Employees Tort Immunity Act applied to insulate them from any liability for plaintiff's decedent's alleged wrongful death. On appeal, the Illinois First District Appellate Court reversed the trial court, finding that a question of fact existed as to whether the defendant municipalities and individual police detectives were "enforcing" the Domestic Violence Act during the relevant time period. After that adverse ruling, Querrey & Harrow successfully postured the case for further appeal to the Illinois Supreme Court. Oral argument was held before the Illinois Supreme Court on November 19, 2008.

To understand the import of the Illinois Supreme Court's decision, some background on the Illinois Domestic Violence Act is necessary. Section 304 of the Domestic Violence Act mandates that when a law enforcement officer "has reason to believe that a person has been abused, neglected or exploited . . . the officer shall immediately use all reasonable means to prevent further abuse, neglect or exploitation," including, among other things, arresting the perpetrator where appropriate, seizing any weapons the perpetrator used to commit the abuse, neglect or exploitation, accompanying a victim to his or her place of residence and providing a victim with information and procedures on relief available. 750 ILCS 60/304 (2004). Further, Section 305 of the Act provides for limited law enforcement officer liability. That is, Section 305 makes plain that law enforcement officers can only be held liable for willful and wanton violations of the Act (i.e., not adhering to the aforementioned duties) while "rendering emergency assistance or otherwise enforcing the Act." 750 ILCS 60/305 (2004).

Importantly, the supreme court has now, for the first time, spoken about what it means to "otherwise enforce" the Illinois Domestic Violence Act. The supreme court determined that the defendant municipalities and individual police detectives were not doing so in our case. Notably, the supreme court rejected plaintiff's argument that the Illinois Domestic Violence Act imposes upon law enforcement a generalized, open-ended and perpetual duty to protect all victims of domestic violence. The supreme court also clarified that the Illinois Domestic Violence Act is not implicated merely because law enforcement officers are dealing and/or interacting with a person who is the recipient of a protective order. Indeed, the supreme court acknowledged the insurmountable burden that would be placed on law enforcement officers if it determined to the contrary, noting that a police department's duty is to preserve the well being of the public at large, rather than specific individuals.

Finally, the supreme court noted that the language of Section 304 of the Domestic Violence Act supports that an officer must be in some proximity to a domestic violence victim in order for the duties under the Act to be triggered. Again, Section 304 of the Act requires that when law enforcement officers have reason to believe a person has been abused, neglected or exploited, they shall “immediately” take reasonable steps to prevent further abuse. The supreme court held that each of the duties enumerated in Section 304 of the Act assumes that an officer would have direct, in-person contact with the domestic violence victim. Importantly, no such contact was present in this case, as police detectives had closed their investigation two months before plaintiff’s decedent’s death. Additionally, plaintiff made no allegations in her complaint to the effect that her decedent contacted law enforcement officials reporting any violations of the order of protection by the ex-boyfriend in that two-month time period.

The Illinois Supreme Court’s ruling has obvious implications for law enforcement officials in their interactions with domestic violence victims. Arguably, the decision could be viewed as both clarifying and narrowing the circumstances under which the Act’s duties are triggered. Chicago office shareholder **Jennifer Medenwald**, chair of Querrey & Harrow’s appellate practice group, prepared the briefs and argued the case before the Illinois Supreme Court. Additionally, shareholder **Brandon Lemley** is to be commended for his work in preparing the petition for leave to appeal to the supreme court and the briefs at the trial court level. Shareholder **Paul Rettberg** was the lead attorney on the case in the trial court. As of this writing, no petition for rehearing has been filed with the Illinois Supreme Court. The deadline for any such petition is March 13, 2009.

## CASE SUCCESSES

### Querrey & Harrow Prevails in Federal Civil Rights Claim

Q&H attorneys **Dan Gallagher**, **Paul O’Grady** and **Dominick Lanzito** recently obtained summary judgment on behalf of the Village of Romeoville, defeating all of the plaintiff’s claims in the case titled *Dawn Garner Smith v. Officer Augustine, et. al.*, 07-C-0081. This suit arose out of a collision between an Amtrak train and an unoccupied automobile in Romeoville, Illinois. During the course of the police officers’ accident investigation, a dispute arose between the plaintiff, the conductor of the train, and the police, regarding whether the police were allowed to board the Amtrak train to check for injured passengers. According to plaintiff, she claimed that she cooperated with the police and did not refuse access. Defendants asserted that plaintiff denied the police and paramedics access to the train and they properly arrested and charged plaintiff with Obstructing a Peace Officer.

Plaintiff filed suit alleging that the individual officers falsely arrested her, used excessive force during the course of the arrest (including state law battery and assault), and maliciously prosecuted her. Plaintiff also brought claims against the Village of Romeoville under *Monell* alleging that the Village of Romeoville did not properly train its officers in the following areas: use of force, critical incidents involving trains, and train policy and procedures. There were also state law claims against the Village of Romeoville based upon *respondeat superior*.

All defendants filed summary judgment motions at the conclusion of discovery. Federal District Court Judge Leinenweber granted both motions in their entirety. The court found that the incidents leading up to the incident between plaintiff and defendants, including plaintiff’s conduct with the police and other first responders, provided probable cause to arrest and prosecute plaintiff, thus defeating plaintiff’s claims. The court also found that the use of handcuffs involved *de minimus* force and did not rise to the level of a constitutional violation.

## Insurance Law Update: Sad Facts Result In Inconsistent Ruling On Number Of Occurrences By Illinois Supreme Court

By: Michele Oshman – Chicago, Illinois

A coverage dispute arising from the drowning deaths of two teenage boys resulted in a number of occurrence ruling by the Illinois Supreme Court which, while claiming to be governed by prior case law, strays from the court's prior reflections on the issue. In *Addison Ins. Co. v. Fay*, Case No. 105752, 2009 Ill. LEXIS 176 (Ill. Jan. 23, 2009), the court looked at the sad facts of the underlying case to determine whether the injuries constituted a single occurrence or multiple occurrences, and thus whether the single \$1,000,000 per occurrence limit of liability or the \$2,000,000 aggregate limit was implicated. The court ultimately decided that, because little was known about the timing or circumstances of the boys' deaths, there were two occurrences under the terms of the Addison insurance policy.

The opinion includes a recitation of the underlying facts. The two boys were last seen on April 30, 1997 leaving one's home, and that teen's mother believed the boys were going fishing. When they did not return home that night, a search ensued. The boys' bodies were found four days later, on May 3, 1997, in an excavation pit on land owned by Addison's insured. The clay and sand pit was saturated with water, creating a "quick" condition. The opinion explained that a "quick" condition occurs when a cushion of water prevents the soil from supporting a load, which can result in the load sinking and becoming trapped. Quicksand is a commonly referenced type of soil exhibiting the condition.

The boys' bodies were at the edge of a pool of water in the pit, trapped in wet clay and sand, facing in different directions but physically touching. Two autopsies showed that the immediate cause of one's death was hypothermia and the other's death was caused by drowning secondary to hypothermia. Neither autopsy could show with any certainty the time of death of either boy, nor how closely in time they had died. Witnesses for both the estates of

the boys and the insured-landowner conceded that the boys' actions after they left home were unknown. Investigators concluded that the boys had been returning home to get out of a storm the evening they disappeared, had used the property where their bodies were found as a shortcut and had gotten trapped. The investigation also indicated that one tried to jump across the water and became trapped in the excavation pit, and that the other boy tried to help his friend but had become trapped himself. The investigators could not conclude how much time had elapsed between the two entrapments and whether the second boy had been present when the first boy became trapped.

The boys' parents sued the landowner. Addison, as the landowner's insurer, agreed to settle the case for an amount equal to the policy limits, but a dispute ensued about the number of occurrences, meaning whether the single \$1,000,000 per occurrence limit of liability or the \$2,000,000 aggregate limit applied. The trial court found that there were two occurrences, but the appellate court reversed based on *Nicor, Inc. v. Associated Electric & Gas Ins. Services, Inc.*, 223 Ill. 2d 407 (Ill. 2006), and a New Jersey appellate court decision with similar facts called *Doria v. Insurance Co. of N. America*, 210 N.J. Super. 67, 509 A.2d 220 (N.J. App. 1986).

The Illinois Supreme Court began its analysis on further appeal by determining the standard of review it would apply to the findings of fact by the trial court. The court noted that the trial court had heard no live testimony and, therefore, was not in a superior position to observe the witnesses while testifying to judge their credibility or to determine the weight to give their respective testimony. The court therefore found that it was not bound by the trial court's findings and could review the record *de novo*. 2009 Ill. LEXIS 176, at \*\*8-9.

The Illinois Supreme Court then looked at which party bore the burden on the issue of number of

occurrences. Insurer Addison argued that the claimants must establish the number of occurrences to establish coverage. The supreme court cited the tenet that once an insured demonstrates coverage, the burden falls on the insurer to prove that a limitation of coverage applies. The court then noted that insurer Addison brought the declaratory judgment action to determine the number of occurrences only after the claimants had established that the claims fell within the policy's coverage and the value of the loss. The court found that Addison was trying to limit coverage under the policy and held that the insurer bore the burden of proving that the two deaths constitute a single occurrence. *Id.* at \*11.

The analysis then turned to whether the underlying incident involved a single occurrence or multiple occurrences. The Illinois Supreme Court remarked that there was no dispute regarding the meaning of "occurrence," defined as "an accident, including continuous or repeated exposure to the same general harmful conditions." However, because the policy was silent on when an injury would be treated as a separate occurrence, the court found that it must construe the policy by applying the facts of the case.

The Illinois Supreme Court started its analysis by discussing the *Nicor* decision, relied on by the appellate court. The underlying claims in that case involved property damage which occurred when insured *Nicor* undertook a program to replace regulators in its customers' homes containing mercury. In this process, some regulators were tipped or broken, resulting in contamination of some of the homes with mercury. Coverage litigation ensued and one of the issues was whether the claims involved a single or multiple occurrences. In its analysis on the issue in that case, the Illinois Supreme Court discussed the "cause" theory, meaning what caused the underlying damage or claims, and the "effect" theory, meaning the effect caused by the underlying damage. The court ultimately held that Illinois law determines the number of occurrences by looking at the cause or causes of the damage. *Nicor*, 223 Ill. 2d at 418-19.

It would seem that following the "cause" theory, there would be one occurrence in the case at bar, *i.e.*, the boys' deaths caused by the landowner's negligent act of failing to properly secure and control his property. However, the Illinois Supreme Court continued its analysis by a "further refinement of the cause theory in its application to a variety of facts." 2009 Ill. LEXIS 176, at \*14; citing *Nicor*, 223 Ill. 2d at 420-21. The court distinguished *Nicor* from the case at bar because *Nicor* discussed affirmative acts of negligence, meaning the individual technician's replacement of the old regulators, rather than an ongoing negligent omission. 2009 Ill. LEXIS 176, at \*14. The court acknowledged that the landowner committed no intervening negligent act between the injuries of both boys, but reasoned that focusing on the sole negligent omission of the landowner would result in one occurrence even if the injuries occurred days or weeks apart, which was an unreasonable policy interpretation. *Id.* at \*16-17.

The Illinois Supreme Court then examined the New Jersey appellate decision discussed by the Second District Appellate Court, *Doria v. Insurance Co. of N. America*, 210 N.J. Super. 67, 509 A.2d 220 (N.J. App. 1986). That case involved two brothers injured when they gained access to a swimming pool and the court noted that it had strikingly similar facts to the case under consideration. The court there applied a "time and space test," which states that "if cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event," then there is one occurrence. *Doria*, 210 N.J. Super. at 74, 509 A.2d at 224. The Illinois Supreme Court found that the appellate court had properly adopted the "time and space test," 2009 Ill. LEXIS 176, at \*120, but the Court's analysis did not end there.

The Illinois Supreme Court went on to reject the appellate court's opinion that the facts showed only a single occurrence. The court reviewed the facts *de novo*, and stated that the court could infer that the boys did not become trapped simultaneously and that the second boy became trapped trying to free the first boy from the sand. However, the investigators could not determine

how closely in time the boys became trapped or how closely in time they each died. The court therefore found that Addison did not meet its burden to show multiple occurrences and held that the underlying injuries involved two occurrences. *Id.* at \*22.

The Illinois Supreme Court's effort to find two occurrences for these very sympathetic claimants is almost uncomfortable to read. One way to make sense of the various decisions nationwide concerning the issue of number of occurrences is to check whether the ruling increased the coverage for the insured. This analysis, albeit cynical, is sometimes the only way to make sense of a particular decision. The *Nicor* case was one of the few decisions resulting in reduced or no coverage for the insured, which was admittedly a large utility. The *Addison v. Fay* case returns to a more familiar pattern for number of occurrences cases, and found additional coverage for the families of the deceased boys.

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## CASE SUCCESSES

### Querrey & Harrow Prevails in Serious Brain Injury Trial

Q&H shareholder **Tom Burke** recently obtained a not guilty verdict at trial for his client, the Village of Libertyville, in the Lake County, Illinois circuit court. In the case, the plaintiff was a 38-year-old pharmacist who was riding her son's bicycle on a Village sidewalk and fell from the bicycle, striking her head on the sidewalk and sustaining severe brain damage, blindness and total disability.

The plaintiffs claimed that the accident was caused by plaintiff striking a utility sign planted too close to the sidewalk. The plaintiffs presented evidence of \$2.4 million in past and future wage losses, over \$6 million in past and future medical expenses, and asked the jury for almost \$30 million.

The jury found in favor of the Village, accepting Tom's arguments that plaintiff did not hit the sign, but rather her fall was caused by plaintiff becoming entangled in the bicycle, which was far too small for her to safely operate. Tom also argued that even if the plaintiff struck the sign, the Village was not negligent because it did not own the sign, did not install it and the sign was not installed on Village property. Finally, Tom argued that the plaintiff was contributorily negligent for operating a bicycle that was too small for her to ride safely, at night, without a headlight, without a helmet, and riding too close to the border of the sidewalk.

The plaintiffs presented a total of seven expert witnesses. The jury deliberated for less than two hours before returning its not guilty verdict, clearing the Village of any wrongdoing.

## **Municipal Law Update: Sheriff's Handling Of Discipline After Employees' Fight Over Parking Spot Does Not Implicate First Amendment**

By: Jason Callicoa – Chicago, Illinois

The Seventh Circuit Court of Appeals recently reversed a \$240,000 jury verdict in favor of a Cook County Sheriff's Department employee who sued her employer after receiving discipline she felt was unfair following an altercation she had in the parking lot with a co-worker over a parking space.

In *Houskins v. Sheahan*, 549 F.3d 480 (7th Cir. 2008), plaintiff Virgean Houskins sued Cook County Sheriff Michael Sheahan in his official capacity, along with Cook County (collectively "the Sheriff"), claiming that she was disciplined in retaliation for reporting the parking lot fight. She also claimed the Sheriff had a widespread custom or policy of retaliating against employees of the Cook County Department of Corrections ("CCDOC") who exercised their right to free speech. Following a trial in the U.S. District Court for the Northern District of Illinois, a jury returned a verdict against the Sheriff (and a verdict against the plaintiff's co-worker, whom she sued for state law assault and battery).

The case arose from an incident on September 17, 2001, when Plaintiff pulled into the parking lot at the Cook County jail. The parking lot was full, and while plaintiff waited on a space, she saw a co-worker, Donald Keith, drive past her. Keith ended up taking the space Plaintiff was waiting on. Plaintiff got out of her car and approached Keith, and a verbal argument ensued. Keith ended the argument by striking the plaintiff in the face.

Plaintiff filed an Internal Affairs complaint against Keith as a result of the altercation, as required by the CCDOC General Orders. The day after the incident, Keith was de-deputized, or stripped of his duties as a correctional officer, as a result of the complaint Houskins filed against him. Ultimately, Keith was suspended for one day as a result of the incident. Also, the plaintiff herself received a written reprimand for using profanity during the argument, which

violated a General Order of the Sheriff's Department.

Plaintiff then filed her lawsuit in U.S. District Court, alleging that the reprimand she received was actually retaliation for complaining about the incident to her co-workers in the Sheriff's Department. She claimed her First Amendment rights were violated and claimed the Sheriff was responsible for causing the violation with a custom and practice of retaliating against employees who report misconduct. The Sheriff moved for summary judgment, arguing that plaintiff's speech was not constitutionally protected because she was a public employee speaking only about the disciplinary process at the jail. The Sheriff claimed that because this is not a matter of public concern, the employer's reaction to the public employee's speech cannot support a claim for a First Amendment violation (citing *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983)).

The lower court denied the motion for summary judgment, and the Sheriff did not raise the public concern issue in the final pre-trial order. As a result, the lower court would not allow the Sheriff to include it at trial in opening or closing statements, or to request a jury instruction on the issue.

After the jury found in plaintiff's favor against the Sheriff, the Seventh Circuit reversed. (The jury also found in plaintiff's favor on her assault and battery claims against Keith, but the Seventh Circuit upheld that verdict.) On appeal before the Seventh Circuit, the Sheriff again argued that the topic of plaintiff's complaints regarding the incident was not a matter of public concern. As a result, the Sheriff's reaction to those complaints could not support a lawsuit for infringing plaintiff's First Amendment rights. The Seventh Circuit found it was not necessary for the Sheriff to include this matter in the final pre-trial order in order to preserve the issue for appeal.

The Seventh Circuit Court looked for guidance on this issue to the decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which was decided after plaintiff's trial in the lower court. The Seventh Circuit agreed with the Sheriff, based on *Garcetti*, which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

The Seventh Circuit found that plaintiff was clearly expected to report the incident under the General Orders, and therefore she was speaking as part of her official duties as an employee of the Sheriff, and not as a citizen. Her complaints to her co-workers dealt with her own personal dissatisfaction with the investigation of the parking lot incident, and were likewise not on a matter of public concern. As a result, the court found she did not enjoy First Amendment protection of the speech at issue. The court also found that the Sheriff could not be liable based on a custom or practice that causes a constitutional violation, because there was no violation of plaintiff's constitutional rights to begin with.

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## **Employment Law Update: Changes In Job Duties (But Not of Title or Salary) Does Not Constitute Demotion In Illinois**

By: Stacey McGlynn Atkins – Chicago, Illinois

On February 9, 2009, the Seventh Circuit Court of Appeals discussed the issue of property interest in employment in Illinois. In *Akande v. Grounds, et al.*, No. 07-3800, a clinical case worker for the Illinois Department of Corrections alleged that he was "effectively removed" from his position without cause. The district court held that plaintiff had failed to present evidence from which a reasonable jury could conclude that he was deprived of a protected interest, and concluding that the defendants were entitled to qualified immunity, thereby absolving them of any liability. The Seventh Circuit agreed and affirmed the lower court decision.

Plaintiff Akande was promoted to the position of clinical casework supervisor with the IDOC. This position was subject to the Illinois

Personnel Code, 20 ILCS 415/1 *et seq.*, which provides that employees cannot be terminated or demoted without cause. Part of plaintiff's duties included making recommendations to the warden to resolve disciplinary tickets against inmates. Following disciplinary hearings, clinical casework supervisors, such as the plaintiff, were expected to enter the reports into the correctional facility's Disciplinary Tracking System ("DTS").

In the fall of 2003, plaintiff's co-worker was promoted, leaving plaintiff as the only clinical casework supervisor for the facility. Shortly thereafter, defendant Grounds was appointed Warden of the facility. Grounds was informed that plaintiff was underperforming, the major criticism being that plaintiff was not inputting the mentioned reports into DTS. Despite at least

two orders from Grounds that plaintiff enter the reports into DTS at the end of each day, plaintiff “delegated” the task to corrections counselors, claiming that the task took up a majority of his day.

Plaintiff was then referred to discipline for his refusal to abide by the Warden’s directives. In his defense, plaintiff claimed that he was entitled to delegate the task, notwithstanding the Warden’s orders. Three separate hearing officers rejected this defense, and plaintiff was subjected to discipline. In response, plaintiff filed six separate grievances, claiming he was unfairly subjected to discipline. These complaints were subsequently settled.

In January 2004, plaintiff was informed by Grounds that he would no longer have the responsibility for supervising correctional counselors; however, plaintiff would remain in his current position, receiving the same pay, and retaining most of his regular duties. Thereafter, Grounds presented plaintiff with a memorandum outlining the responsibilities expected of him. Plaintiff was asked to sign the memo, but refused. That same day, plaintiff went on extended disability leave; he never returned to his job at the facility.

On appeal, the threshold question was whether there had been an unconstitutional deprivation of plaintiff’s right to life, liberty, or property. The basis of plaintiff’s Section 1983 claim was that he had been effectively demoted from his position. Recognizing that property interests are not created by the United States Constitution, the court deferred to applicable Illinois law. It was undisputed that plaintiff had a property interest in his employment (created by Illinois statute as discussed above); however, plaintiff failed to demonstrate any deprivation of that right.

In Illinois, “demotion” is defined as “assignment of an employee to a vacant position in a class having a lower maximum permissible salary or rate than the case from which the demotion was made for reasons of inability to perform the work of the class from which the demotion was made.” 80 Ill. Admin. Code §302.470(a). Taking

the plaintiff’s allegations as true, the undisputed evidence revealed that plaintiff was not assigned to a vacant position with a lower salary, nor was he terminated or told to leave his employment. Rather, his job duties were altered and he remained in the same position with the same pay, retaining most of his original duties.

Based on this, the court held that the alterations to plaintiff’s position did not amount to a “demotion” under Illinois law. Because plaintiff was unable to show that he was subjected to a constitutional deprivation, the defendants were entitled to qualified immunity. The doctrine of qualified immunity shields governmental officials from liability for civil damages where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

In defending claims similar to that of the *Akande* plaintiff, it is important to heed to Illinois law and statutory provisions. Employers must be cognizant of the applicable state laws which define actionable property interests.

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## Indiana Insurance Update: Indiana Courts Address Issues of Emotional Injury Coverage

By: Stacy Vasilak – Merrillville, Indiana

Often times, people claim that they have emotional injuries as a result of an accident. The question then arises whether these damages are covered under a policy of insurance. In 2008, the Indiana Supreme Court considered recovery of emotional distress damages under an insurance policy in two opinions which were both decided on February 28, 2008.

In *State Farm Mut'l Automobile Ins. Co. v. Jakupko, et al*, 881 N.E.2d 654 (Ind. 2008), the Jakupko family (Richard and Patricia and their children, Nicholas and Matthew) was involved in an accident. Richard was severely injured, including quadriplegia and a brain injury. In addition to their bodily injuries, Patricia, Nicholas and Matthew each suffered emotional distress as a result of being in the accident. Johnson, the driver of the other vehicle, was underinsured. Richard Jakupko maintained underinsured motorist coverage with State Farm in the amount of \$100,000 per person and \$300,000 per accident. State Farm paid \$100,000 to Richard and then refused to pay any additional monies towards the claims of emotional distress raised by Patricia, Nicholas and Matthew, arguing that because their claims for emotional distress were caused by Richard's injuries, those claims were included in the "each person" limit for Richard's claim which had already been paid.

First, the supreme court determined that emotional distress was a "sickness" under the policy. The policy defined "bodily injury" as "bodily injury to a person and sickness, disease or death which results from it. *Id.* at 657 n.1. Indiana code requires coverage for "bodily injury, sickness or disease". Therefore, the court determined that State Farm's definition meant the same thing.

The court then reviewed prior Indiana decisions which held that bodily injury was not limited to physical injury and that the inclusion of sickness in the definition would necessarily include mental anguish because lay persons would not

believe mental anguish was not included in "sickness". *Id.* The court further determined that because Patricia, Nicholas and Matthew were physically involved in the accident and received actual physical injuries, they could legally recover damages for emotional distress under Indiana law.

In this respect, under Indiana law, in order to recover for negligent infliction of emotional distress, a person must sustain a direct impact (modified impact rule) in an accident and, as a result thereof, sustain an emotional trauma or have a direct involvement in the accident (i.e. witnessed the accident or came upon the scene soon after the accident) and be closely related (i.e. spouse, parent, child, grandparent, sibling) to the physically injured party (bystander rule). *Smith v. Toney, et al*, 862 N.E.2d 656 (Ind. 2007).

After a thorough analysis of case law in Indiana and the federal courts, the supreme court held that to allow State Farm to limit recovery to Patricia, Nicholas and Matthew for their injuries in the accident would be contrary to the statute which requires "coverage . . . for the protection of persons insured under the policy who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness or disease." Ind. Code § 27-7-5-2(a)(1). Because the three were physically involved in the accident, they were legally entitled to recover damages. To rule otherwise would contravene the requirements of Indiana Code § 27-7-5-2.

Conversely, in *State Farm Mut'l Automobile Ins. Co. v. DLB*, 881 N.E.2d 665 (Ind. 2008), DLB was with his cousin riding bikes when his cousin was struck and killed by an automobile driven by State Farm insured, Wallace. Wallace's limits were \$100,000 per person and \$300,000 per accident. DLB was not physically injured, but did suffer from post-traumatic stress disorder as a result of witnessing his cousin's fatal injuries. State Farm paid out \$100,000 to the cousin's

parents, but denied a claim for emotional distress made by DLB. The supreme court focused on the fact that DLB did not suffer any direct impact in the accident and, therefore, could not recover under Wallace's insurance policy. Without a direct impact, force or harm to his body, DLB was not entitled to recover for his emotional distress.

The lesson from these cases is that equally important as the facts surrounding each individual case is the language of the insurance policy. Since an insurance policy is a contract, its clear and unambiguous language (assuming it is not contrary to statute) will control as to whether recovery is allowed. If there is any ambiguity whatsoever, Indiana courts will construe the language in the light most beneficial to the insured and rule in their favor. If the case involved recovery by a third party, Indiana courts are not as likely to be as liberal in their interpretation and will not hesitate to deny claims.

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## COMMUNITY INVOLVEMENT

### Querrey & Harrow Sponsors Charity Run/Walk

Q & H is again a leading sponsor of the Lew Blond Memorial 5k Run/Walk, scheduled for Saturday, May 30, 2009 at Maple School in Northbrook, Illinois. Chicago office shareholder **Jim Bream** is a lead organizer of the run each year.

Over 700 people attended the eighth annual run last year. The event was organized seven years ago to memorialize Lew Blond, a beloved Maple School teacher, who passed away from ALS in February 2000. The race raises money for several charitable purposes: The Les Turner ALS Foundation, scholarships for graduating seniors at Glenbrook North and South High Schools, and school projects funded by the District 30 Education Foundation.



Funds raised from the 2008 Lew Blond Memorial 5K Run/Walk, 1 Mile Run will allow the District to purchase and install "white boards" for the classrooms at Maple, Wescott and Willowbrook Schools! This state-of-the-art technology will enhance the already significant resources that promote student development through enrichment activities, as well as continue to encourage staff creativity and excellence. Sign up now for the race at <http://www.signmeup.com/63692>.

Q&H Shareholder Jim Bream (with Laura Bream & Therese Blond)

## Medical Malpractice Update: First District Upholds Summary Judgment for Defendant Physician

By: Anton Marqui – Chicago, Illinois

The Illinois First District Appellate Court recently examined the physician-patient relationship in upholding summary judgment for the defendants in *Siwa v. Koch et al.*, 2009 Ill.App.LEXIS 55 (1<sup>st</sup> Dist. Feb. 10, 2009).

The decedent, Victor Siwa, was employed by West Suburban Hospital as a clinical coordinator in the CT area. In the summer of 2000, West Suburban installed new software on a CT scanner to provide cardiac scanning. Mr. Siwa volunteered to undergo a scan as part of the testing and training. On June 16, 2000, Dr. Donald Koch, a staff radiologist, administered the scan and interpreted the results. Dr. Koch determined that Mr. Siwa had an abnormally high coronary artery calcification placing him at risk for heart attack.

Dr. Koch did not prepare a written medical report as would be customary for a regular patient, but did speak to Mr. Siwa on two occasions; the day Dr. Koch saw the results and again five days later. During each conversation, Dr. Koch urged Mr. Siwa to make an appointment to see a cardiologist, the second time stating “God damn it, Victor, your score is high enough you need to see a cardiologist now.” Mr. Siwa apparently scheduled an appointment but then suffered a fatal heart attack while playing basketball before seeing a cardiologist. *Siwa* at \*2-5. Plaintiff alleged Dr. Koch, Village Radiology and West Suburban Hospital failed to adequately warn or provide adequate follow up, resulting in Victor Siwa’s death.

In reviewing the case, the court noted that a physician-patient relationship cannot be established where a patient does not seek that physician’s medical advice and the physician does not knowingly accept that person as a patient. *Citing, Reynolds v. Decatur Memorial Hospital*, 277 Ill.App.3d 80, 85 (4<sup>th</sup> Dist. 1996). Thus, it was clear to the *Siwa* court that Victor Siwa was not Dr. Koch’s “patient” since Dr. Koch did not know Mr. Siwa was a volunteer

until after the scan and Mr. Siwa did not seek out Dr. Koch for medical advice. Thus, it held no duty was owed.

However, plaintiff attempted to argue a duty based on a special relationship, relying on *Bovara v. St. Francis Hospital*, 298 Ill.App.3d 1025 (1st Dist. 1998); *Lenahan v. University of Chicago*, 348 Ill.App.3d 155 (1st Dist. 2004); and *Davis v. Weiskopf*, 108 Ill.App.3d 505 (2nd Dist. 1982). Based on the cases cited by plaintiff, the *Siwa* court identified a couple of factors as determinative of a special physician-patient relationship: the physician’s advice was sought out by the decedent’s physicians and direct or indirect treatment of the malady or condition. The facts here simply did not support a finding of a physician-patient relationship, special or otherwise. Dr. Koch never advised Mr. Siwa’s physicians and was not directly or indirectly involved in treatment; he merely chose to warn. No duty was owed and summary judgment was entered. *Siwa* at \*6-10.

Despite finding no duty of care, the court also discussed the lack of causation. Plaintiff offered factual allegations that Mr. Siwa’s death was foreseeable. Reviewing this argument, the court noted that foreseeability is not to be construed so as to find a defendant liable for every injury that could possibly occur. *Citing, Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill.2d 507 (Ill. 1987). While Dr. Koch was clearly concerned about Mr. Siwa’s scan results and strongly urged and repeated the need to see a cardiologist, it was not reasonably foreseeable that an otherwise healthy 40 year-old man would die of a heart attack while playing basketball. Further, there was no evidence that seeing a cardiologist would have prevented the death. Ultimately, it was Mr. Siwa’s choice to delay obtaining a consultation. The court held that the facts would never allow plaintiff to establish proximate cause. *Siwa* at \*10-11.

Lastly, plaintiff attempted to bar certain testimony of two West Suburban employees

regarding conversations between Dr. Koch and Mr. Siwa, based on the Dead Man's Act, 735 ILCS 5/8-201. It was first noted that plaintiff forfeited the argument by not objecting before entry of the summary judgment order, highlighting the importance of maintaining the record. Despite the forfeiture, the court went on to state that the Dead Man's Act only bars testimony by adverse parties or those directly interested in the outcome of the action. The two West Suburban employees had no interest in the outcome, were not defendants, and had ceased employment with the hospital. Thus, the Dead Man's Act was not violated. *Siwa* at \*12.

While Dr. Koch expressed strong concern for Mr. Siwa's health and took active steps toward informing Mr. Siwa of his condition and providing medical advice, the court would not extend a duty. The court's holding evidences unwillingness to expand the physician-patient relationship.

\* \* \*

*Anton Marqui, an associate in our Chicago office and a member of the firm's medical malpractice practice group, concentrates his practice in medical malpractice and transportation liability. Mr. Marqui also has previous experience in the areas of insurance coverage, construction injury, and premises liability. If you have questions regarding this article, contact Anton via [amarqui@querrey.com](mailto:amarqui@querrey.com), or via 312-540-7584.*

## COMMUNITY INVOLVEMENT

On February 27, 2009 Chicago shareholder **Beverly Berneman** moderated the Trademark and Copyright Law program at John Marshall Law School's 53rd Annual Intellectual Property Law Conference. The topics included:

- The Google Book Project: Litigation and Settlement;
- It Isn't Easy Being Green: "Green" Trademark Issues;
- Litigating Fair Use Cases; and
- Open Source Software - -Traditional Copyright in Innovative Models.

\* \* \*

On March 4, 2009, Chicago associate **Ari Scharg** served as a Judge at the Dean Fred F. Herzog Moot Court Competition.

\* \* \*

Chicago shareholder **Bruce Schoumacher's** chapter on mechanics lien law appears in the recently published book *Construction Law*, published by the American Bar Association. The text is designed for use in law school courses on construction law.

## Medical Malpractice/Litigation Update: The Empty Chair Defense: Nonexistent Defendants and Proximate Cause

By: Chloé G. Woodard – Chicago, Illinois

In the recent cases of *Tabé v. Ausman* and *Bosco v. Janowitz*, the Illinois Appellate Court provided clear guidance on the rules pertaining to arguing that the proximate cause of a plaintiff's injury was solely in the act of another, not a party to the suit.

In *Tabé v. Ausman et al.*, No. 1-07-0703 (1st Dist. Feb. 9, 2009), Judge O'Brien reversed and remanded, finding that the trial court erred when it granted the plaintiff a new trial after the jury returned a medical malpractice verdict in favor of the defendants. On June 23, 2000, the defendants performed a laminectomy procedure on the plaintiff. The laminectomy involved placing a fat graft into the plaintiff's spinal area to alleviate his chronic back pain. The procedure failed to provide the desired result and left the plaintiff with both motor and sensory deficits. After the procedure in 2000, the plaintiff began to experience numbness in his feet, back pain, diminished strength in his left leg, and improper bladder function. Subsequently, the plaintiff sued the three surgeons who performed the procedure.

The trial primarily focused on the plaintiff's claims that the defendant doctors negligently failed to perform a timely decompression procedure to preserve the plaintiff's spinal nerves and avoid further negative results. The jury trial lasted a total of nine days during which there was extensive medical testimony from eight different physicians. The defendants themselves, three experts on behalf of the plaintiff, and one expert on behalf of the defendants provided testimony.

Defendant, Dr. Ausman, testified that an MRI was ordered to rule out nerve compression as the cause of the plaintiff's symptoms and admitted that "if the plaintiff's pain was being caused by nerve compression, then decompression surgery was necessary." Dr. Ausman, admitted that he did not specialize in reading MRI films and that he often consulted with a radiologist or neuroradiologist to review the MRI films, as he

did in this instance. The neuroradiologist's MRI report, which the defendants reviewed in deciding the plaintiff's postoperative care, noted that the fat graft used in the surgery encroached on the spinal canal, but the MRI report did not indicate that the graft was compressing the plaintiff's spinal nerves.

All three defendant doctors conferred with the neuroradiologist regarding his opinion before they concluded that there was no nerve compression and therefore no reason to justify further surgeries, such as a decompression procedure. Two of the plaintiff's experts agreed that it was within the standard of care for neurosurgeons to rely on the findings of a neuroradiologist and take such findings into account in creating a treatment plan, with one even admitting that the neuroradiologist who reviewed the plaintiff's MRI films made no mention of nerve compression. At the close of the evidence, the defendants persuaded the circuit court to give the long form of Illinois Pattern Jury Instructions (IPI), Civil, No. 12.04 (sole proximate cause instruction), over plaintiff's objection. The long form includes the second paragraph and reads as follows:

More than one person may be to blame for causing an injury. If you decide that the defendants were negligent and that their negligence was the proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.

However, if you decide that the sole proximate cause of the injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.

IPI Civil No. 12.04 (2006).

The defense presented two different grounds supporting a finding of no liability: (1) that the fat graft was not compressing the plaintiff's nerves and, therefore, they were not negligent in failing to perform a decompression surgery, and (2) that if the MRI films showed compression, as the plaintiff's experts testified, then the neuroradiologist's omission of that fact in the report was the sole proximate cause of the plaintiff's injuries.

After just a few hours of deliberation, the jury returned a general verdict in favor of the defendants. Soon after, the plaintiff filed a post-trial motion asserting that the circuit court erred in giving the long form of IPI Civil No. 12.04 because there was no evidence to support the unnamed neuroradiologist as the sole proximate cause of the plaintiff's injury. The circuit court agreed and granted the plaintiff's request for a new trial finding that it erred in tendering the long form of IPI Civil 12.04 to the jury and that its error misled the jury resulting in prejudice to the plaintiff. However, within the court's written order, there was no explanation on how the jury was "misled" by the instruction or the manner in which the plaintiff was "prejudiced" by the instruction. The defendants filed a petition for leave to appeal, which was granted.

The Illinois Appellate Court first considered the defendants' arguments that the jury's general verdict in their favor is beyond review based on the two-issue rule in the absence of special interrogatories, which would have disclosed the basis for the jury's verdict. As described in *Strino v. Premier Healthcare Associates*, 365 Ill.App.3d 895, 904 (1st Dist. 2006), the two-issue rule was found to apply to errors in instructions. In the case at hand, the court agreed that if the jury determined that the defendant doctors did not deviate from the standard of care, then any error in giving the long-form proximate cause instruction "would have had no effect on the verdict." See *Strino*, 365 Ill.App.3d at 904-05.

In accord with IPI Civil 12.04, the jury was to first consider whether the defendants were negligent, then determine if the defendant doctors deviated from the standard of care, and

lastly consider the issue of proximate cause. Before granting the plaintiff a new trial, the Illinois Appellate Court suggested that the circuit court should have considered whether the jury's verdict could be explained by a finding of no negligence against the defendant doctors, and if there was no negligence, then instructing on sole proximate cause did not matter. As the supreme court made clear in *McDonnell v. McPartlin*, "[t]he second paragraph of IPI, Civil, No. 12.04 properly reflects the defendant's right to attempt to negate a single element of the plaintiff's medical negligence claim, i.e. the element of proximate cause." 192 Ill.2d 505, 521- 522 (Ill. 2000).

Ultimately, it was found that the circuit court erred in granting the plaintiff a new trial on the sole proximate cause instruction. However, the court cautioned that in following *Strino*, due to the absence of special interrogatories answering whether the plaintiff proved negligence based on the MRI films disclosing a nerve compression, this could not be determined from the general verdict, thus neither could the issue of whether the sole proximate cause instruction made any difference. This leaves that issue open for future determination.

Nonetheless, the appellate court went on to reach the same conclusion with regards to the defendants' second argument that the plaintiff was not found to have been prejudiced by the giving of the sole proximate cause instruction. "As a general rule, a new trial should be granted for improper jury instruction only where the opposing party has suffered serious prejudice from the offending instruction." *Thompson v. MCA Distribution*, 257 Ill.App.3d 988, 991 (1st Dist. 1994). The defendant asserted the "some evidence" standard as set out in *Leonardi v. Loyola University of Chicago*, 168 Ill.2d 83 (Ill. 1995), and contended further that the circuit court, in reversing its initial assessment of the evidence went beyond what is permissible under the *Leonardi* standard. The appellate court noted that the some evidence standard was recognition of the existence of a "factual question," which must be left to the jury to resolve. In reversing its initial assessment, the defendant doctors contended the circuit court had permissibly

removed the factual question determination from the jury.

The Illinois Appellate Court declined to review the record as to the evidence to support the defendant doctor's proposition. However, it followed its own path and based on a review of Illinois case law, determined that plaintiff was not prejudiced by instructing the jury on the sole proximate cause defense, and absent a showing of serious prejudice to the plaintiff, it was an abuse of discretion for the circuit court to grant a new trial based on an erroneous jury instruction. *Thompson*, 257 Ill.App.3d at 991.

The appellate court reasoned that to warrant a new trial it is the plaintiff's burden to demonstrate that the sole proximate cause instruction caused him prejudice. On review, the court's concern is "not with examining the evidentiary foundation for the instruction as much as the impact the instruction may have on the jury's deliberations." The second paragraph of IPI Civil 12.04 comes into play only where the defendant doctors may have been negligent but the negligence did not proximately cause any injury to the plaintiff. Following *McDonald*, and *Leonardi*, the appellate court reasoned that a defendant raising the sole proximate cause defense seeks to defeat a plaintiff's claim of negligence by establishing proximate cause solely in the act of another not a party to the suit.

This defense is commonly referred to as the "empty chair defense." *McDonald*, 192 Ill.2d at 516, quoting *Leonardi*, 168 Ill.2d at 92. "However, [t]he sole proximate cause defense merely focuses the attention of the properly instructed jury \*\*\* on the plaintiff's duty to prove the defendant's conduct was the proximate cause of plaintiff's injuries." *McDonald*, 192 Ill.2d at 520-21, quoting *Leonardi*, 168 Ill.2d at 94.

The appellate court was ultimately unconvinced that the giving of the second paragraph of IPI Civil 12.04 caused the plaintiff any prejudice by merely focusing the jury's attention on the plaintiff's duty to prove that defendant's conduct was a proximate cause of the injuries he claimed. The Illinois Appellate Court was "at a

loss to identify any prejudice to the plaintiff by giving the sole proximate cause instruction, and no satisfactory reason was given by the plaintiff as to how the second paragraph misled the jury."

Finally, the plaintiff made a last ditch effort to persuade the appellate court by arguing that the prejudice he suffered was based upon the improper argument by the defendant doctors during closing argument. However, the appellate court quickly dismissed this argument, finding that because no objection was made, the claim was forfeited.

Ultimately, the Illinois Appellate Court found that the circuit court abused its discretion in awarding the plaintiff a new trial based solely on the giving of the sole proximate cause instruction. While it may have been error for defense counsel in closing argument to put before the jury the possibility that the conduct of some third person was the sole proximate cause of the plaintiff's injuries, the Illinois Appellate Court found no prejudice to the plaintiff by focusing the jury's attention on the plaintiff's duty to prove that the defendant's conduct was a proximate cause of the injuries he claimed.

Just one day following the *Taber* decision, the Illinois Appellate Court again considered the issue of admitting evidence of other physicians' negligence and in instructing the jury with the long form of the IPI Civil Nos. 12.04 and 12.05 (2000). In *Bosco v. Janowitz, et al.*, No. 1-07-0617 (1st Dist. Feb. 10, 2009), the plaintiff Peter Bosco battled a series of long, complicated gastrointestinal illnesses beginning in March of 1993. From that point forward until October 1999, the plaintiff visited a series of gastroenterologists for which his symptoms were treated with medication. However, on October 25, 1999, the plaintiff was readmitted to the emergency room for severe abdominal pain.

At that time, Dr. Brasco performed a colonoscopy and diagnosed an obstruction of the colon. Unknown to Dr. Brasco, he had perforated the plaintiff's colon during the procedure for which he was then rushed into emergency surgery. His emergency surgery was performed by Dr. Aki. During this surgery, the

presence of stage 2 cancer was found and 3/4 of the plaintiff's colon was removed. Dr. Aki informed the plaintiff's wife that he had removed all of the cancer during the surgery.

However, less than one month later, on September 7, 2000, Dr. Aki again performed surgery on the plaintiff to remove the remaining one quarter of his colon. At that time it was discovered that the plaintiff's colon cancer had spread to his abdomen. The metastatic cancer eventually spread to the plaintiff's spleen, liver, pelvis and neck. The plaintiff died on May 17, 2002.

On September 6, 2002, the plaintiff's wife, individually and as executor of the estate, filed a medical malpractice lawsuit against Dr. Brasco, Northwest Community Hospital, Dr. Janowitz, Westmont Family Practice, S.C., and Dr. Orbeta. Prior to the trial in this matter, Dr. Brasco and Northwest Community Hospital settled with the plaintiff, and were dismissed with prejudice from the lawsuit.

At trial, a gastroenterologist, testified on behalf of the plaintiff stating that because Bosco's colon had the presence of both polyps and ulcerative colitis, both indicative of cancer development, Dr. Orbeta should have taken biopsies of the entire colon, and that Dr. Orbeta and Dr. Janowitz breached the standard of care by failing to create a colon cancer detection plan, failing to communicate the plan to the decedent and failing to execute a colon cancer detection plan. He opined that these omissions caused and contributed to the development of metastatic colon cancer and ultimately the decedent's death. The plaintiff also presented Dr. Sullivan, a specialist in internal medicine, who testified that "even when a primary care physician refers a patient to a specialist, the primary care physician is still responsible for coordinating the patient's care." Dr. Sullivan opined that Dr. Janowitz breached the standard of care by not creating a colon cancer detection plan by failing to communicate the plan to the decedent and by failing to execute such detection plan. He went on to say that these omissions caused and contributed to the

development and spread of the decedent's colon cancer which ultimately lead to his death.

The defendant doctors took issue with what the proper standard of care was for primary care physicians during the time period at issue. There was testimony that the standard of care for a primary care physician between 1993 and 1999 did not require the physician to advise the patient of all risks and complications relating to his disease when the patient's condition was being treated by a specialist. Ultimately, the defendants argued that once the decedent was referred to a specialist and was subsequently diagnosed, that specialists became the primary treater for the decedent's ulcerative colitis. Applying this further, the defendant doctors presented expert testimony which provided that "the standard of care did not require either doctor to begin a colon cancer detection plan until 8 to 10 years after the first bout of severe episode of pancolitis, which in this case would not have been until 2001."

On October 16, 2006, the jury rendered a unanimous verdict in favor of the defendants. Subsequently, on January 16, 2007, the plaintiff filed a post trial motion requesting the trial court grant her a judgment notwithstanding the verdict or a new trial on all issues. The trial court denied this motion holding that the jury's decision was fully supported by the evidence. On March 6, 2007, plaintiff filed a notice of appeal before the Illinois Appellate Court. The Illinois Appellate Court determined three issues, the last of which being "whether the trial court properly gave the wrong-form instruction to the jury concerning the sole proximate cause issue."

Before the Illinois Appellate Court, the plaintiff argued that she was entitled to a new trial because the jury was irrevocably tainted when the trial court denied her motion *in limine* and her request to give a specific version of the jury instructions that did not include the sole proximate cause language. But the plaintiff was ultimately penalized for failure to include the plaintiff's motion *in limine* within the records submitted to the appellate court. As such, they deferred to the trial court's reasoning for

denying the plaintiff's motion *in limine* and assumed that the trial court's ruling was correct.

In reviewing the instruction issue, the court held that the long form of IPI Civil No. 12.04 is appropriately given to the jury where there is admitted evidence that the sole proximate cause of the resulting injury could have been the negligent conduct of a dismissed defendant. Citing, *Petre v. Kucich*, 356 Ill.App.3d 57, 66 (1st Dist. 2005). Additionally, the long form of the IPI, Civil, No. 12.05 is proper when "[a] defendant has the right not only to rebut the evidence tending to show that [the] defendant's acts are negligent in the proximate cause of claimed injuries, but also has the right to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of {the} plaintiff's injuries." Citing, *Mack v. Anderson*, 371 Ill.App.3d 36, 57 (1st Dist. 2006), quoting *Leonardi*, 168 Ill.2d at 101.

In this instance, the defendants argued that the evidence presented to the jury was sufficient to allow the trial court to give the long-form instructions, which included the proximate cause language complained of by the plaintiff, because the jury heard evidence that allowed it to conclude that the conduct of Dr. Brasco was the sole proximate cause of the decedent's metastatic cancer and death. In fact, the plaintiff's own expert testified that Dr. Brasco's perforation of the colon caused the metastatic spread of the cancer and that the failure of Dr. Aki to remove the entire colon soon after decedent's partial colectomy, increased the risk that the cancer would recur.

The jury also heard testimony from Dr. Sullivan, who testified that had the surgery been done in a timely fashion and the cancer taken out prior to its spread, the decedent likely would have enjoyed an average life expectancy. Ultimately, the Illinois Appellate Court held that the trial court did not abuse its discretion in instructing the jury with the long forms of IPI Civil Nos. 12.04 and 12.05, in light of the fact that the jury could have concluded from the evidence that Dr. Brasco's conduct was the sole proximate cause

of the decedent's metastatic cancer and eventual death.

Notably, the Illinois Appellate Court did not address the plaintiff's arguments that the trial court misapplied *Ready v. United/Goedecke Services*, 367 Ill.App.3d 272 (1st Dist. 2006), *aff'd. in part, & rev'd. in part* No. 103474 (Nov. 25, 2008), which found that settling defendants should not be included on a verdict form because apportionment rules are inapplicable where, as here, the defendants were found completely not liable. Thus, it appears that the *Bosco v. Janowitz* and *Tabé v. Ausman* decisions provide that the inability to include settling or non-existing defendants on the verdict form, as held by *Ready*, does not necessarily preclude a defendant from arguing and using IPI 12.04 and 12.05 to argue that the settling defendant was the sole proximate cause of the injuries to the plaintiff.

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*Chloé Woodard, an associate in our Chicago office, concentrates her practice in medical malpractice and litigation. Chloé is active in the Women's Bar Association of Illinois, serving on the Budget Committee, Judicial Reception Committee, and the Annual Dinner Committee. She is also an active member of the Chicago Bar Association, where she participates in the Richards Career Academy Mentoring Program. Chloé is also a member of Phi Alpha Delta Legal Fraternity Story Chapter.*

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