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A Monthly Legal Newsletter from
Querrey & Harrow

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New Changes To The Chicago Residential Landlord Tenant Ordinance Ease Burden On Landlords

By: Ari Scharg – Chicago office

In recent years, the Chicago Residential Landlord Tenant Ordinance (“RLTO”) has proven to be a painful thorn in the side of landlords and an ‘ace in the hole’ for tenants. Although originally intended to bring balance to the once lopsided landlord-tenant relationship, the RLTO is now used more often to sue landlords for trivial missteps rather than punish real violators such as those that fail to provide safe, sanitary, and clean rental units. Fortunately, the RLTO will be modified effective August 28, 2010 to ease its rigid standards and harsh penalties. Chicago landlords must become familiar with the modifications to fully enjoy the new benefits and protections.

The modifications are meant to level the field by reducing the windfalls afforded to tenants and their attorneys at their landlord’s expense. For example, the RLTO requires landlords to return the interest earned on the tenant’s security deposit at the end of every 12-month rental period. Chicago Municipal Code 5-12-080(c). Even though the amount owed to tenants in security deposit interest is minimal (the current City of Chicago interest rate is 0.073%), the penalties for incorrectly calculating the interest payment are stiff - the landlord may be liable for twice the amount of the security deposit plus

court costs and attorneys fees. This can be devastating to otherwise compliant and responsible landlords when their security deposit interest payment is off by a few dollars, or even pennies, especially given the current Chicago real estate market.

To partially alleviate this harsh penalty, the modifications contain a 14-day ‘cure period’ for miscalculation of security deposit interest. Now, landlords will not be liable for the miscalculation of interest under the RLTO unless: (1) the tenant gives written notice to the landlord that the amount of interest was deficient; and (2) the landlord fails to either pay the correct amount of interest plus \$50.00 or provides the tenant with a written response explaining the interest calculation within 14 days. Chicago Municipal Code 5-12-080(f)(2). If the tenant disagrees with the landlord’s written response, the tenant may then file a lawsuit against the landlord and seek the same penalty as before (twice the security deposit plus costs plus attorneys fees). This modification provides an opportunity for landlords to recognize their miscalculation early and pay a relatively nominal penalty of \$50.00.

Q&H Defeats Section 1983 and Title VII Employment Claims



Chicago shareholders **Paul O'Grady, David Flynn, Dominick Lanzito** and **Ari Scharg** recently obtained summary judgment on behalf of the Will County Sheriff's Office and four Sheriff's Office employees that were sued individually. The plaintiff filed the lawsuit in the Northern District of Illinois Federal District Court under Section 1983 and Title VII.

In the case, the plaintiff, a Deputy Sheriff, claimed gender discrimination, retaliation, and violation of her First Amendment right to free speech after she was placed on paid administrative leave while being investigated by the Sheriff's Office for misconduct. Defendants successfully defeated the claims by arguing that there was no evidence that the plaintiff was treated differently from other 'similarly situated' male employees and that the plaintiff's speech was not constitutionally protected. In addition to granting summary judgment, the court agreed with the defendants' position that placement on paid administrative leave does not constitute an 'adverse employment action.' The court's language on this issue will be useful persuasive authority in many future employment cases.

Like the security deposit interest return provisions, landlords may also be held disproportionately liable for mixing, or “commingling,” a tenant’s security deposit with the landlord’s personal assets. Even though many landlords are not aware of the prohibition against commingling funds, and, indeed, gain no monetary advantage from doing so, they will still be held liable under the RLTO if they hold the security deposit in the same bank account as their own. Again, this outdated tenant safeguard wreaks havoc on Chicago landlords that unknowingly violate the RLTO by prudently preserving tenant security deposits in their personal account.

The modifications also eases this prohibition against “commingling.” Now, landlord and tenant funds may be commingled in the landlord’s personal bank account if that account contains “excess interest” at all times during the tenancy. Chicago Municipal Code 5-12-080(a)(4). The modified RLTO defines “excess interest” as “the amount of money in excess of the total amount of security deposits deposited into the account plus any interest due thereon.” In other words, the landlord must not allow its personal bank account to drop below the amount of the security deposit plus the interest owed to the tenant. This modification will result in a significant decrease in abusive litigation against landlords that were unaware of the antiquated

“commingling” rule and eradicate yet another massive tenant windfall.

The modifications described above are only two of many changes to the RLTO. It is imperative that Chicago landlords immediately master all of the modified provisions to take full advantage of the new protections they afford. Please contact the author of this article if you would like to receive a complete list and explanation of the RLTO modifications.

* * *

*Chicago office associate **Ari Scharg** is a member of the firm's litigation practice group and focuses his practice in the areas of commercial, real estate, employment and tort defense. Mr. Scharg is very active in community groups, as well as in legal industry associations. He serves as a volunteer for Immerman Angels, acts as Outreach Chair of the Young Adult Division of American Committee for Shaare Zedek Medical Center in Jerusalem, and serves on the civil rights committee of the Anti-Defamation League. He is also a member of the Board of Directors of the Chicago Legal Clinic.*

To contact Ari regarding RLTO issues or this article, please e-mail via ascharg@querrey.com or call at 312-540-7514.

Taylor Obtains Excellent Results In Multiple Auto Accident Cases



Q&H suburban success continues in Lake County. Associate **Jill Taylor** recently received a favorable jury verdict for a T-bone style automobile accident. Plaintiff claimed that the defendant ran a red light and impacted with the passenger side of her vehicle as she proceeded straight. The defendant testified that she had the green light. No independent witnesses could offer supporting testimony to either side.

Plaintiff claimed a soft tissue neck and back strain as a result, with chiropractic care. Plaintiff testified that she has had ongoing daily pain since this accident in 2003, although her medical treatment submitted also ended in 2003. The jury assessed the plaintiff with 50% negligence and awarded only \$7,500 in medical bills, reduced then to \$3,725. The jury failed to award anything for pain and suffering, or loss of a normal life. Jill also recently received a not guilty decision at arbitration and a judgment in the defendant's favor at a bench trial for property damage - both cases for automobile accidents involving left turning defendants.

Constitutional Law Update – Speaking to Remain Silent

By: Jillian Taylor – Wheaton office

On June 1, 2010, the United States Supreme Court handed down a significant ruling in *Berghuis v. Thompkins*, No. 08-1470 (June 1, 2010). The 5-4 ruling involved a reinterpretation of the protections afforded to a suspect under the 1966 case of *Miranda v. Arizona*. This time, Justice Kennedy authored the majority opinion and made it clear that there must be an unambiguous invocation or waiver of a suspect's right to remain silent.

Berghuis v. Thompkins was a murder case based on a drive-by shooting in Southfield, Michigan in 2000. Van Chester Thompkins, Jr. was ultimately arrested in Ohio about a year later and questioned for three full hours by Southfield detectives who had traveled to Ohio. At the beginning of the interrogation, Detective Helgert read Thompkins his rights under *Miranda*. At no point did Thompkins say that he wished to remain silent, that he did not want to talk to the police or that he wanted an attorney. Although he was mostly silent during the three hour interrogation, Thompkins would occasionally nod or say "yeah", "no" or "I don't know".

At about 2 hours and 45 minutes into the interrogation, Detective Helgert asked Thompkins if he believed in God. Thompkins' eyes "welled up" as he made eye contact with Helgert and he responded "yes". Helgert then asked "Do you pray to God?", to which Thompkins responded "yes". Helgert then asked

Thompkins, "Do you pray to God to forgive you for shooting that boy down?". Thompkins again answered "yes" and finally looked away.

Although Thompkins refused to sign a confession, he was convicted on this "one word" confession. The Sixth Circuit overturned the conviction, holding that his persistent silence throughout the interrogation showed that he did not want to waive his right to remain silent.

The Supreme Court specifically looked at 1) how is the right to remain silent invoked, and 2) what constitutes a waiver of the right to remain silent.

Invoking the Right to Remain Silent

The Court focused on Thompkin's actions in determining whether he had actually invoked his right to remain silent. Throughout the interrogation, Thompkins had remained "largely" silent. However, Justice Kennedy cited back to the 1994 Supreme Court case of *Davis v. United States*, which held that a suspect must unambiguously state that he would like an attorney when his *Miranda* rights are read. Justice Kennedy noted that these rights should not be treated any differently. Otherwise, it could complicate things and result in officers playing a guessing game. The decision came down to the fact that "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police."

Schoumacher Listed As "Best" Lawyer For Construction Law



Bruce Schoumacher has been selected for inclusion in the 2011 edition of *The Best Lawyers in America* in the specialty of Construction Law. Bruce is the Group Co-Chair of the Construction Practice Group and also practices in several other areas, including professional liability, product liability, commercial litigation, and antitrust. He works with a variety of professionals, including architects, engineers, contractors and manufacturers. He has recently been recognized by his peers and named as a Leading Lawyer in the area of construction law. He has also earned an AV rating from Martindale-Hubbell.

Besides construction litigation, Bruce works regularly with owners, contractors and design professionals drafting and negotiating construction contracts and professional services agreements. He recently drafted standard form agreements for an industrial equipment manufacturer, including sales terms, purchase terms, equipment test and rental agreements and sales representative agreements. He has extensive experience drafting international and domestic commercial contracts, design agreements, sales representative contracts, repair agency agreements, distributor agreements and fabrication agreements.

Justice Sotomayor authored a strong dissent in this case and criticized the majority for alluding to some “magic words” that the police would not likely advise a suspect what “words” he needed to use to invoke his rights.

Waiver of Right to Remain Silent

The Court concluded during its analysis that police officers only need to ensure that a suspect has been advised of his rights and that he understands them. There is no requirement of obtaining a waiver of these rights. Therefore, it appears as though an interrogation can go on for an infinite period of time, until a confession is obtained or a suspect clearly invokes his right to remain silent or obtain an attorney. In this case, the majority held that Thompkins had waived his right by “engaging in a course of conduct” which began when he answered “yes” to Detective Helgert’s question about believing in God. Justice Sotomayor wrote in the dissent that this holding “ran counter” to the Court’s standing precedence on the burden that prosecutors face when proving that a suspect has waived his right to remain silent.

Following this ruling, it is clear that police procedure has been drastically changed. But the implementation will take time, as the current and past training of officers now has a new approach. There will also undoubtedly be additional cases clarifying certain aspects of the decision, such as those “magic words” or how long an interrogation can go on for in terms of waiving the right to remain silent. But for now, it is clear that you must speak up, in order to remain silent.

* * *

Jillian Taylor, an associate in our Wheaton office, concentrates her practice in vehicle and premises liability. She has tried more than 10 cases to jury verdict and has participated in over 30 arbitrations. In addition, she has drafted and been successful in multiple motions for summary judgment for the firm's major clients. In her third year of law school, Jillian served as Primary Editor of the Journal of Public Law and Policy. She also was an active member of Phi Alpha Delta Law Fraternity, serving as president of the organization. If you have questions regarding this article, please contact Jill via jtaylor@querrey.com.

Burden Listed as Featured John Marshall Alumni



Ernie Burden, a shareholder in our Chicago office, will be one of the featured alumni included in the 2010-11 John Marshall Law School Annual Report of the Dean. Ernie's quote focuses on the opportunities provided by the Law School and its well rounded program which prepares law students to practice, rather than just teaching legal concepts.

Ernie concentrates his practice in civil litigation. His areas of practice also include contract disputes, construction, product liability, food contamination and fraud investigation. Ernie has successfully completed 28 jury trials and has participated in binding arbitrations on various matters. He is also experienced in insurance law, including special investigations, coverage, and reinsurance.

Ernie's trial experience includes cases involving catastrophic injuries. Ernie has also worked in conjunction with the United States' California Office of Civil Rights Monitoring. He has worked to ensure fair housing and equal lending opportunities for the citizens of Illinois and Iowa. He has also worked to ensure fair public accommodations for the citizens of Illinois and Wisconsin. Ernie is also a member of Querrey & Harrow's Diversity Committee.

Indiana Update: Workers' Compensation Liens Need Only Be Repaid If Obligation to Repay is Shown

By: Teresa Mysliwy - Merrillville office

In the recent case of *Travelers Indemnity Co. of America v. Jerry Jarrells*, 927 N.E.2d 374, the Indiana Supreme Court held that an injured employee need not repay anything to his employer's workers' compensation carrier although he received a judgment against a third party tortfeasor in an amount sufficient to cover the lien. The court did hold that in the future, the plaintiff's award should include the workers' compensation lien, but only to the extent that the evidence established an obligation to repay.

Mr. Jarrells was seriously injured in 2002 when a concrete wall, which was not properly braced, fell on him. His employer was a subcontractor at the construction site. Travelers, the workers' compensation carrier, paid disability benefits of \$21,025.91 and medical payments of \$45,109.76, for a total of \$66,135.67. Jarrells then sued the general contractor and another subcontractor for his injuries, notifying Travelers of the suit. Travelers elected not to intervene in the action, but notified Jarrells' attorney of the lien. At the jury trial, Jarrells testified that he was aware that if he recovered in the lawsuit, he might be required to reimburse Travelers for the workers' compensation payments that he had received.

The jury subsequently awarded Jarrells \$508,750, which was 55% of the total award they arrived at, deducting for the fault of Mr. Jarrells and his own employer. Travelers demanded reimbursement of \$22,495.75, which accounted for the attorney fees and comparative fault assessment. Jarrells' response was that Travelers should get nothing because the jury had already reduced the award by the amount of workers' compensation benefits. Travelers then intervened in the action so that the court could determine the amount of its lien to be protected.

The Indiana Collateral Source statute provides that evidence of workers' compensation benefits paid is permitted to show the amount of money that the plaintiff is required to repay. I.C. 34-44-1-2(2). The stated purpose of the statute is to

enable accurate assessment of the prevailing party's pecuniary loss and to provide that the prevailing party not recover more than once for its losses. The statute expressly allows evidence of proof of payments to plaintiff from some sources, and also directs a trier of fact to "consider" the payments admitted into evidence.

The court found that the only reasonable interpretation of these provisions is that the jury should include the amount of any collateral source payments that the plaintiff is required to repay in its award. But if there's no evidence of an obligation to repay, the jury shouldn't include the amount of those payments in its award.

In this case, the jury was specifically instructed to "consider" the payments for workers' compensation in its award. It was also told that Jarrells could not recover more than once for his losses. The parties' dispute centered around whether the jury deducted the amount of the workers' compensation benefits from the total damages in arriving at the original \$925,000 figure, or if it assessed damages based on the assumption that Jarrells would repay Travelers from the judgment proceeds. The court agreed that both interpretations were equally plausible, and stated that this instruction should not be used in future trials. However, no one objected to its use here, and if Travelers had intervened, participated in the trial and objected to this instruction, it would warrant a new trial. But because Travelers did not intervene and appear, it took the trial as it found it, and was therefore entitled to no reimbursement of its lien because there was no actual evidence presented to the jury regarding the actual amount Jarrells would be required to repay.

* * *



Teresa Mysliwy, an associate in our Merrillville, Indiana office, concentrates her practice in subrogation, litigation, and collections. To contact Teresa regarding this article or your Indiana legal needs, please e-mail via tmysliwy@querrey.com, or call via (219) 738-1820.

Natural Accumulation Rule Prevails Over Increased Common Carrier Duty - CTA Has No Duty to Remove Snow and Ice from Platforms

By: Brian Begley - Joliet office

The Illinois Supreme Court in *Marianna Krywin v. The Chicago Transit Authority* (“CTA”), 2010, WL 2780319, handed down an opinion on July 15, 2010 ruling that the CTA had no duty to remove snow and ice caused by natural accumulation or to warn of such accumulations.

Plaintiff, Marianna Krywin, filed a two-count complaint in the Circuit Court of Cook County against the Chicago Transit Authority following an injury she sustained on January 13, 2005 while exiting a train onto the southbound platform at Sheridan Road in Chicago. Specifically, plaintiff alleged that as she exited the train, she slipped on snow and water located on the platform and fell, injuring her left leg. Count I, grounded in negligence, alleged that the CTA had a duty to exercise ordinary care in the operation, supervision and maintenance of the area of ingress and egress where the plaintiff fell and that the CTA breached that duty. Count II of plaintiff’s complaint alleged that the CTA held a duty to exercise a highest degree of care in the operation and maintenance of its trains and stations and was guilty of willful and wanton conduct in failing to comply with that duty.

At the close of plaintiff’s evidence, the trial court granted the CTA’s motion for directed verdict in part finding that the CTA did not have a duty to remove natural accumulations of snow or ice or a duty to warn of such accumulations as the ice on the platforms was a result of a natural accumulation. At the close of evidence, the trial court instructed the jury that in selecting a place for the plaintiff to alight from the train, it was the duty of the CTA “exercise the highest degree of care consistent with the mode of conveyance used and practical operation of its business as a common carrier by train”. The jury returned a verdict in favor of the plaintiff in the amount of \$372,141.00.

Thereafter, the CTA appealed. Addressing the primary issue on appeal, the appellate court acknowledged that, as a common carrier, the

CTA owed to its passengers the highest degree of care consistent with the practical operation of its conveyances. With that said, the appellate court was left to weigh the duty a common carrier owes to its passengers in light of the natural accumulation rule. The appellate court ultimately determined that the natural accumulation rule prevails over the common carrier’s duty to provide its passengers with a safe place to alight. In support of its decision, the appellate court noted that “imposing a duty on the CTA to inspect every platform every time a train was to discharge or take on passengers or bring the train system to a standstill

Affirming the decision of the appellate court on appeal, the Illinois Supreme Court followed the precedent established in *McElligott v. Illinois Central R.R. Co.*, 37 Ill.2d 459 (1967), and its progeny in finding that the Natural Accumulation Rule prevails over the increased duty of common carriers.

Further, plaintiff also asserted that the rationale underlying application of the Natural Accumulation Rule, that it would place an unfair burden on the municipality, was unreasonable where the evidence showed that there was no ongoing storm. However, citing *Frederick v. Professional Truck Driver Training School, Inc.*, 328 Ill.App.3d 472, 478 (2002) the Illinois Supreme Court found that there is no exception to the Natural Accumulation Rule based on the “passage of time”. Finally, the court noted that where there is no separate and independent tort of willful and wanton conduct and the defendant had no duty to remove natural accumulations of ice or snow from the platform or a duty to warn of those conditions, the court should have directed a verdict in favor of the CTA on the issue of willful and wanton conduct as well.

Accordingly, the application of the recent decision in *Krywin vs. The Chicago Transit Authority* serves to further strengthen the application of the Natural Accumulation Rule as

it applies to common carriers and specifically dismissed any "passage of time" exception to the rule or allegation of willful and wanton conduct on behalf of common carriers when the Natural Accumulation Rule is asserted.

* * *



Brian Begley, an associate in our Joliet, Illinois office, concentrates his practice in municipal and premises liability. Brian previously served as an Assistant State's Attorney in the Cook County State's Attorney's Office, where he tried numerous cases in the traffic and narcotics divisions. Mr. Begley also served in the Civil Actions Bureau, representing Cook County in complex building and zoning matters. To contact Brian regarding this article, please call Brian at 815-726-8153 or e-mail via bbegley@querrey.com.



Q&H Running Team Competes in Race Judicata Charity Run

On July 22, 2010, "Q&H Swift Justice," a team of 11 Q&H runners and walkers competed in Race Judicata, a citywide event in which many major Chicago law firms are represented. The proceeds from Race Judicata are donated to Chicago Volunteer Legal Services Foundation, an organization committed to ensuring that the law works for everyone, not just those who can afford it.

Guolee Runs 9th Annual Camp for Adopted Children and Families

This August, Chicago shareholder **Terrence Guolee**, hosted the 9th Annual Midwest I-child Heritage Camp ("MWIHC") in Green Lake, Wisconsin. MWIHC is an annual camp held each Summer for families that have adopted from India and other countries who have an interest in exposing their kids to Indian culture and meeting and socializing with other families that have adopted (or are in the adoption process). More info on the camp can be obtained at <http://www.mwihc.org>.

Q&H Has Another Successful Year Raising Money for Misericordia

Q&H is happy to report that its involvement with Misericordia's Candy Days event this Spring once-again helped Misericordia meet its fundraising goals of for the year! Since 2006, Q&H has surpassed its prior year's collections each year and we look forward to working with Misericordia in 2011. This year, dozens of attorneys and staff of the firm once-again went out to the corners of Chicago's Loop and collected \$7,887.48 for Misericordia.

Bream Supports Coprodeli USA

Jim Bream attended a fundraiser on July 22, 2010 night for Coprodeli USA. Coprodeli supports the work of Coprodeli in Peru which aids Peruvian families by providing for fundamental needs, promoting education and job training, and developing strong self-sustaining community programs. Volunteers from the U.S., Europe, Latin America, and from among the disadvantaged people of Peru provide hope and vital services to those in need.

