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*Editors: Terrence Guolee
and Jillian Taylor*



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CHICAGO

175 W. Jackson Boulevard
Chicago, IL 60604
Tel: 312.540.7000
Toll Free: 800.678.2756

JOLIET, IL

3180 Theodore Street
Joliet, IL 60435
Tel: 815.726.1600

MERRILLVILLE, IN

233 East 84th Drive
Merrillville, IN 46410
Tel: 219.738.1820

OAK LAWN, IL

4550 W. 103rd Street
Oak Lawn, IL 60653
Tel: 708.424.0200

PEORIA, IL

416 Main Street
Peoria, IL 61602
Tel: 309.676.7777

WAUKEGAN, IL

415 W. Washington Street
Waukegan, IL 60085
Tel: 847.249.4400

WHEATON, IL

300 S. County Farm Road
Wheaton, IL 60187
Tel: 630.653.2600

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Can Employers Be Held Liable for Alleged Harassment or Discrimination by its Employees? A Brief Study on the *Vance v. Ball State University* case.

By: Melissa D. Sobota - Chicago office

Typically, harassment and discrimination claims arise when it is alleged that management or a superior harassed or discriminated against an employee. That said, the question also arises on whether employers can be held liable when the harassment or discrimination was done by an employee. The short answer is “yes”, employers can be held liable for harassment or discrimination by its employees. However, there are actions an employer can take to help protect itself from liability once it learns (or should learn) about alleged harassment or discrimination by its employees. Below is a brief synopsis of the 7th Circuit’s recent findings in the *Vance v. Ball State University* (No. 08-3568 7th Cir. June 3, 2011).

On June 3, 2011, the 7th Circuit issued a decision in *Vance* affirming the district court’s dismissal of Maetta Vance’s (“Vance”) complaint of discrimination against Ball State University (“University”). The district court previously granted the University’s Motion for Summary Judgment.

Vance began working for the University in 1989 as a substitute server in the Banquet and Catering Department of University Dining Services. She was promoted to a part-time catering assistant in 1991 and in January of 2007, she applied and was selected for the full-time catering assistant. Prior to her promotion in January of 2007, Vance had gained experience as a baker for the University, which she enjoyed. When she was promoted to the full-time position in 2007, she was given a pay raise and significant increase in benefits, but her duties changed to consist of preparing food for dinners for formal events, boxed lunches for causal engagements, and sides and salads for the catering department’s clients. Vance was not happy with the change in duties and responsibilities.

In 2001, one of Vance’s coworkers, Sandra Davis, hit Vance on the back of the head without

provocation. Vance verbally complained to her supervisors, but did not pursue the matter because Vance soon transferred to another department.

In 2005, Davis returned to Vance’s department and the two had an altercation in the elevator. A few days after the altercation, Vance heard from a fellow employee that another coworker, Connie McVicker, used a racial epithet in reference to Vance and the African-American students. McVicker also claimed that her family had ties to the Ku Klux Klan.

On September 26, 2005, Vance verbally complained to her supervisors and on October 17, 2005, Vance called the University Compliance Department and requested a complaint form and verbally complained about McVicker’s statements. The University immediately began an investigation into Vance’s complaint about McVicker’s statements. The investigation corroborated Vance’s account of what McVicker said. The Employee Relations Assistant Director sent an e-mail to the Director of Employee Relations stating that the University needed to make a strong statement that the University will not tolerate that kind of language or resulting actions in the workplace.

The University generally used a four-step progressive discipline process to handle employee discipline, which began with a verbal warning for the first instance of misconduct, followed by a written warning and then escalating consequences for further misconduct. Following this, on November 11, 2005, the University issued McVicker a written warning for her misconduct. The University escalated the level of discipline above the first level of a verbal warning due to the severity of the misconduct.

That same day, Vance complained to the University that McVicker called her a derogatory name again; however, the University

was unable to substantiate this allegation. Therefore, the University did not issue McVicker additional discipline. In November of 2007, Vance and Davis each made complaints about each other to the University. Instead of disciplining both employees, the University determined that the best course of action was to counsel both employees about respect in the workplace and the best path to follow.

On December 22, 2005, Vance filed a charge with the EEOC alleging race, gender and age discrimination. In 2006, Vance continued to make complaints about Davis and McVicker, which the University investigated but found no basis for discipline. On May 10, 2006, Vance filed a complaint alleging that her supervisor was forcing her to work through her breaks. The University investigated this allegation as well, but did not find a factual basis for Vance's allegations. In August of 2006, Vance filed a second complaint with the EEOC alleging that the University retaliated against her. Vance then filed the lawsuit on October 3, 2006.

While Vance's case was pending in the district court, she applied for and was promoted to the position of a full-time catering assistant. Vance complained that after her promotion she was reassigned to menial tasks such as cutting vegetables, washing fruit and refilling trays in retaliation for engaging in protected activities.

The 7th Circuit reviewed the merits of Vance's hostile work environment and retaliation claims (which were the two issues Vance appealed to

the 7th Circuit) under the *de novo* standard of review. Title VII prohibits employers from discriminating against a person with respect to compensation, terms, conditions or privileges of employment based on the person's race. However, in order to prove liability under Title VII for a hostile work environment, Vance was required to prove: "(1) that her work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; (3) that the conduct was either severe or pervasive; and (4) that there is a basis for employer liability."

Employer liability under Title VII depends on whether the alleged harassment was perpetrated by supervisors or co-workers. Employers are strictly liable for harassment perpetrated by supervisors, but they can assert an affirmative defense when the harassment does not result in a tangible employment action. In order for an employer to be held liable if co-workers are the cause of the alleged harassment, the plaintiff must show that the employer had "been negligent either in discovering or remedying the harassment."

The 7th Circuit held that Vance failed to set forth sufficient grounds to establish employer liability for violation of Title VII based on the conduct of Vance's supervisors because Vance failed to present any facts to establish that her supervisor's conduct was motivated by or had anything to do with her race.

Querrey & Harrow Sponsors and Presents at International Municipal Lawyers Association Conference



Querrey & Harrow welcomed hundreds of municipal lawyers from throughout the United States and Canada as a sponsor of the International Municipal Lawyers Association Conference at the Chicago Hilton this September. Chicago office shareholder **Terrence Guolee** spoke before the conference on the defense of attorney fee and cost petitions in Section 1983 civil rights cases. Shareholders **Dan Gallagher**, **Larry Kowalczyk** and **Paul O'Grady** also submitted papers to the group on CRIPA investigations and Federal Rule of Civil Procedure 68 offers of judgment.

The 7th Circuit then turned its attention to whether the University could be held liable for the alleged conduct of Vance's coworkers. In order for the University to be liable, Vance was required to establish that the University was negligent "in failing to 'take reasonable steps to discover and remedy the harassment'." *Quoting, Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 953 (7th Cir. 2005). However, once an employer becomes aware of the alleged harassment, it can avoid liability if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from occurring in the future.

The court held that the University was not liable for its employee's alleged harassment because it satisfied its obligations by promptly investigating each of Vance's complaints and taking disciplinary action where appropriate. The court noted that had the University simply accepted an employee's simple denial of the alleged harassment or not calibrated its responses depending on the situation, the court would have been inclined to send the case to the jury.

Finally, the 7th Circuit turned its attention to Vance's retaliation claim. In order to establish a prima facie case of retaliation, the plaintiff may use the direct or indirect method of proof. Under the indirect method of proof (which Vance used), the plaintiff is required to show that: "(1) she engaged in a statutorily protected activity; (2) she performed her job according to the employer's expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than a similarly situated employee." In order to prove retaliation based on a change in working conditions, the plaintiff is required to show that a reasonable employee would have found the challenged action materially adverse. Since Vance failed to establish that she was treated less favorably than similarly situated employees, she failed to show that she suffered a materially adverse employment action. Furthermore, since Vance failed to allege more than a dislike for her new assignment, or a preference for her old one, she

failed to establish that the University took an adverse action against her. Therefore, the court affirmed the district court's dismissal of Vance's complaint.

The important thing for all employers to keep in mind in order to try to avoid being held liable for alleged harassment by its employees, it should immediately begin an investigation into any alleged harassment or discrimination and take corrective action as necessary. However, the employer cannot avoid liability by simply conducting a cursory investigation based on the alleged harasser's denial of the alleged misconduct; rather, the employer should conduct and document an in-depth, good faith investigation to try to learn what actually happened and take the appropriate corrective action.

* * *



Melissa Sobota, an associate in our Chicago office, concentrates her practice in labor and employment law. She previously worked with the Corporation Counsel of the City of Chicago in the Labor Division and has handled Union grievances, litigation and arbitrations involving contract disputes, discipline and medical and benefits plans. Ms. Sobota handles Union certification petitions, severance petitions and litigates unfair labor practice charges before the Illinois Labor Relations Board. She also handles contract negotiations and disputes involving medical and insurance benefit plans.

Ms. Sobota has experience handling matters before the Equal Employment Opportunities Commission, Illinois Department of Human Relations, the City of Chicago Commission on Human Relations, the Illinois Department of Labor, the Illinois Human Rights Commission, and the Illinois Labor Relations Board, as well as in state court.

If you have any questions regarding this article, please contact Melissa at msobota@querrey.com, or via 312-540-7596.

Clarification of Responses to Requests to Admit Regarding the Reasonableness and Necessity of Medical Expenses

By: Aaron De Angelis – Joliet office

Illinois attorneys are acutely aware of Supreme Court Rule 216. Rule 216 provides an effective means for establishing material facts or genuineness of documents in a case without the necessity of formal proof at trial.

Supreme Court Rule 216 allows a party to serve 30 written requests (unless otherwise agreed or court ordered for good cause shown) on the other side to admit the truth of any specified relevant facts or genuineness of documents set forth in the requests. The truth of each fact or the genuineness of each document stated in the requests are deemed admitted unless the responding party, within 28 days from the date of service, either: (1) admits to the request; (2) serves a sworn statement that specifically denies the matters of which the admission is requested; (3) serves a sworn statement that specifies the reasons why the request cannot truthfully be admitted or denied; or (4) serves a written objection stating the grounds of objection. Absent a proper denial or a valid objection, the request will be treated as an admission at trial.

In personal injury cases, a common issue of contention between a plaintiff and a defendant is whether a plaintiff's medical treatment is reasonable and necessary as a result of the subject accident and whether the cost for the

treatment is fair and customary. Over the past decade, plaintiff's attorneys have increasingly used requests to admit on these issues to ease their burden at trial. Assuming these facts are admitted by the defendant or deemed admitted by the court, plaintiff's attorneys do not have to call a medical expert to testify at trial on these issues.

Initially, when confronted with requests to admit regarding the reasonableness and necessity of treatment or the fairness of medical bills, defense attorneys would generally object that such requests were improper because they called for an opinion or conclusion, rather than a fact. However, several Illinois appellate courts over the years have specifically ruled that:

the amount of medical expenses a plaintiff incurred as a result of an event, the necessity and reasonableness of medical services, and the fair reasonable cost of medical services rendered are all proper subjects for requests to admit.

Troyan v. Reyes, 367 Ill.App.3d 729, 739 (3rd Dist. 2006); see also *Szczeblewski, et al. v. Gossett*, 342 Ill.App.3d 344 (2003); *Hubeny v. Chairse*, 305 Ill.App.3d 1038 (2nd Dist. 1999).

COMMUNITY INVOLVEMENT

Sobota Runs for Susan G. Komen Breast Cancer Research



Chicago office associate **Melissa Sobota** recently completed the Race for the Cure 10K run. Melissa's running team raised over \$2,000 for breast cancer research for the Susan G. Komen Foundation.

Guolee Walks for ALS Walk 4 Life



Chicago office shareholder **Terrence Guolee** took a more leisurely route to fundraising, joining with the "Chris' Convoy" team for the 2 mile ALS Walk 4 Life Charity Walk in Lincoln Park in Chicago. The team raised over \$3,000 for research for a cure for ALS.

As a way around having to simply admit or deny the reasonableness and necessity of treatment or the fairness of medical bills, many defense attorneys simply began responding with boilerplate refusals to admit or deny. However, these types of responses have been deemed inadequate and will likely result in the requests being admitted. According to the decision in *Szczeblewski*, a party must make a reasonable effort to secure answers to requests to admit from persons and documents within the responding party's reasonable control. 342 Ill.App.3d at 349.

Recently, the First District Appellate Court's decision in *Oelze v. Score Sports Venture, LLC*, 927 N.E.2d 137 (Ill. App. 1st Dist. 2010), further interpreted Supreme Court Rule 216, as well as the holding in *Szczeblewski*. In *Oelze*, the plaintiff requested that the defendant admit that she incurred particular medical expenses as a result of the accident, that the expenses were for reasonable and necessary treatments, and that the charges were reasonable. The plaintiff also submitted all of her medical records to the defendant, a summary of the bills and a copy of each bill.

The defendant responded that having "made reasonable inquiry and the information known or readily available within the Defendant's control [being] insufficient to admit or deny" she could not admit or deny, lifting generalized language straight out of the opinion in *Szczeblewski*. The defendant also asserted that she could not admit or deny the request because she was not a physician or nurse or otherwise trained in medical billing and practice rates or treatments described in the plaintiff's bills.

The plaintiff moved to deem the responses admitted, asserting that they were boilerplate and did not set forth a good faith detailed reason why the requests could not be admitted. The trial court denied the motion.

The First District reversed, agreeing with the plaintiff that the responses were boilerplate and lacked sufficient detail as to why the responses

could not be answered. The court relied on *Szczeblewski* in holding that Rule 216 imposes a good-faith obligation to secure answers to requests to admit from persons within the responding person's reasonable control, "including from the party's attorney and insurance company investigators and representatives."

The court observed that the defendant made a "formulaic assertion" quoting the language of *Szczeblewski* but lacking any detail of the extent of the "reasonable inquiry" it asserts that it made or why the "information known and readily obtainable" by it was insufficient to enable it to admit or deny the requests. The court ruled that defendant's failure to provide detail resulted in the admission of the requested facts.

The decision in *Oelze* clearly requires that defense attorneys will have to either admit or deny requests to admit or explain in detail why they are not able to do so. However, defense attorneys should not fear the "neither admit, nor deny" response. Simply, they must prepare to defend such a response in order to ensure that litigation occurs on the merits.

* * *



Aaron De Angelis, an associate in our Joliet, Illinois office, concentrates his practice in civil litigation, including auto, premises, and commercial litigation, as well as individual services, including estate planning and real estate.

Prior to joining Querrey & Harrow, Mr. De Angelis worked as an associate at another local law firm where his practice included representing individuals and businesses in a variety of matters. In his litigation practice, Mr. De Angelis has handled major commercial foreclosure litigation, as well as breach of contract matters. He also has represented clients in auto and premises liability claims.

If you have questions regarding this article, please contact Aaron at adeangelis@querrey.com, or 630-653-2600.

Insurance Update: Policy Language Controls in Determining General Contractor's Additional Insured Status Under Second-Tier Subcontractor's CGL Policy

By: Peter Graham - Chicago office

A recent case is a reminder that, in Illinois, a contractor that relies on a certificate of insurance from its subcontractor as evidence that it is an additional insured on the subcontractor's insurance policy, does so at its own peril. The recent decision in *Westfield Ins. Co. v. FCL Builders, Inc.*, 407 Ill.App.3d 730 (1st Dist. 2011), involved a general contractor (FCL) who subcontracted steel fabrication and erection to a subcontractor (Suburban). Suburban, in turn, subcontracted the steel erection to a sub-subcontractor (JAK).

The contract between FCL and Suburban required Suburban to procure a stated amount of commercial general liability (CGL) insurance, and that the CGL policy must cover both FCL and Suburban. In addition, the contract required that any subcontractor of Suburban must carry the same level of CGL insurance naming FCL as an additional insured. Suburban passed this responsibility on to JAK via a contract that specifically incorporated a previously executed master agreement between the two parties. The master agreement included a provision requiring JAK to carry the same level of insurance coverage that Suburban was required to provide to FCL. Accordingly, JAK purchased a CGL policy that included as an additional insured "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy."

Approximately one month after the job began, JAK's employee fell off a steel beam and was injured. The injured employee subsequently sued FCL and Suburban. FCL sought defense and indemnification from Westfield. Westfield refused on the grounds that FCL was not an additional insured under JAK's policy. Westfield filed suit seeking a declaratory judgment that it was not responsible to defend and indemnify FCL in the lawsuit.

The parties filed cross motions for summary judgment. In support of its motion, FCL argued that:

1. it met the written agreement provision of the policy since the contract between JAK and Suburban obligated JAK to include FCL as an additional insured on JAK's CGL policy;
2. it received a certificate of insurance that listed FCL as an additional insured on JAK's policy; and
3. deposition testimony showed that JAK understood it was required to add FCL on the policy.

Meanwhile, Westfield simply argued that the plain language of the policy it issued to JAK extended only to entities with a written agreement with JAK. The circuit court denied FCL's motion for summary judgment and granted Westfield's. FCL appealed.

Sterk Named to Posts at Kendall College and Chicago Bar Association



Chicago office associate **Kevin Sterk** was recently named an Adjunct Faculty Member at the Kendall College School of Business and will be teaching Business Contracts & Law during the fall quarter. Kevin also accepted the position of Vice-Chairman of the Chicago Bar Association's Young Lawyer Section's Diversity Committee.

On appeal, the court applied the general rule that “[i]f insurance policy terms are clear and unambiguous, they must be enforced as written unless doing so would violate public policy.” (internal citations omitted). Applying this principle, the court rejected FCL’s argument that the contract between JAK and Suburban requiring JAK to include FCL as an additional insured on its CGL policy satisfied the policy’s additional insured provision. The court stated that since the unambiguous language of the policy required a written contract between JAK and FCL, and no such contract existed, FCL’s argument must fail. In addition, the court noted that since the issue before the court was the extent of Westfield’s obligations to its insured(s), FCL was incorrect to focus its argument on JAK’s obligations to Suburban.

The court similarly rejected FCL’s second argument. The certificate of insurance issued to FCL by JAK included a disclaimer that clearly stated:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

The court noted that under Illinois law, “where the certificate refers to the policy and expressly disclaims any coverage other than that contained in the policy itself, the policy controls.” Consequently, the certificate at issue did not affect the terms of the policy and, once again, the court held that FCL was not afforded additional insured status under the terms of the policy.

Finally, the court held that the deposition testimony offered to show that JAK knew it was required to add FCL to its policy was extrinsic evidence that could not be considered unless the contract was ambiguous. Since the contract was unambiguous on its face, the court refused to consider the deposition testimony. Having rejected all three of FCL’s arguments, the appellate court affirmed the circuit court’s order granting summary judgment to Westfield.

The FCL case demonstrates that a certificate of insurance will not be sufficient to alter the unambiguous terms of an insurance policy. Consequently, a contractor should be wary of relying solely on a certificate of insurance as evidence that it is an additional insured under its lower tier subcontractor’s CGL policy.

* * *



Peter Graham, an associate in our Chicago office, concentrates his practice in construction and has experience with litigation, mechanics liens, and employment law issues. He also has experience drafting and negotiating contracts among owners, general contractors, and subcontractors. Prior to joining the Firm, Mr. Graham worked in the legal department of a general contractor, well-known for its work throughout the Midwest. Through that experience, he gained a thorough understanding of the recent challenges in the construction industry.

Mr. Graham graduated cum laude from The John Marshall Law School in 2010. In law school, he was named to the Dean's List on multiple occasions. He also served as Staff Editor for the John Marshall Law Review. If you have any questions regarding this article, please contact Peter via pgraham@querrey.com or 312-540-7684.

Schoumacher Presents on Professionalism and Ethics to Illinois Institute of Continuing Legal Education



Chicago office shareholder **Bruce Schoumacher** recently spoke on the topics of professionalism and ethics at the mechanics lien seminar presented in Chicago by the Illinois Institute of Continuing Legal Education and co-sponsored by the Society of Illinois Construction Attorneys. Bruce also recently completed a successful term as President of the Society of Illinois Construction Attorneys.

Healthcare Law Update: Scope of Discovery Prior to Filing a 2-622 Affidavit is Clarified by the First District Appellate Court

By: Jillian Taylor - Chicago office

On June 10, 2011, the First District Appellate Court handed down a critical decision on the issue of discovery as it pertains to 2-622 affidavits. The court in *Zangara v. Advocate Christ Medical Center, et al.*, Nos. 1-09-1911 and 1-09-1914, consolidated (1st Dist. 2011), held that discovery which takes place before the filing of a 2-622 affidavit is not limited to only the medical and personal records of the plaintiff, although it is subject to the limitations imposed by the discretion of the court and the Medical Studies Act.

Joseph Zangara filed suit against Advocate Christ Medical Center (Advocate) in December of 2007, as a result of contracting methicillin-resistant staphylococcus aureas (MRSA) during a hospitalization in 2005. Under Illinois statute 735 ILCS 5/2-622(a)(1), an affidavit must be included with a plaintiff's complaint which states that a health care professional has reviewed the records of the plaintiff and determined there to be a meritorious claim.

Prior to filing suit, Zangara filed a petition pursuant to Illinois Supreme Court Rule 224, requesting certain statistics and data from Advocate concerning infection control, policies and procedures for the control and treatment of infectious diseases and a list of patients who contracted MRSA within the 90 days before Mr. Zangara was admitted. Rule 224 allows for pre-litigation discovery in order to ascertain the identity of those who may be responsible for damages. Advocate failed to respond to the request and Mr. Zangara filed his lawsuit with an affidavit by his counsel pursuant to 2-622(a)(3), which stated that they were "unable to obtain a consultation with a licensed health care professional...due to the lack of compliance with requests for records..."

During litigation, a motion by Zangara was granted after continued non-compliance, compelling Advocate to respond to the requests and specifically provide a number of MRSA

cases for a period of time prior to Zangara's admission. Advocate produced an index of their policies and procedures, but objected to any requests pertaining to MRSA on the basis of privilege under the Medical Studies Act (the Act), 735 ILCS 5/8-2101. The Act states, in pertinent part, that information, documents and data "used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality" is privileged. The court performed an *in camera* review of 27 pages of documents claimed to be privileged and determined that 24 of the pages were in fact protected under the Act. Zangara was still unable to secure a 2-622 affidavit based upon the information and documents disclosed by Advocate and a motion to dismiss under 735 ILCS 5/2-619 was granted in favor of the defendants.

On appeal, the parties disputed whether or not the MRSA information was privileged under the Act and the scope of discovery allowed prior to the filing of a 2-622 affidavit. The appellate court held that discovery conducted prior to filing a 2-622 affidavit is subject to the Act, and further, that it is not only confined to the medical and personal records of the plaintiff at issue. The court also held that the MRSA information sought was not privileged under Act.

In deciding that discovery is not only confined to the plaintiff's records, the appellate court looked to the intention of 2-622 and 735 ILCS 5/8-2001(b), which allows for the examination of patient health care records. Section 2-622 was enacted for the purpose of preventing frivolous lawsuits from being filed for medical malpractice. However, Illinois courts have applied the requirements of the section so as to not deprive a plaintiff of his or her rights before any necessary discovery has been completed. When a request for an examination of medical records is made, Section 8-2001(b) applies, which states in pertinent part that:

Every private and public health care facility shall, upon the request of any patient who has been treated in such health care facility... [permit the patient, his attorney or] legally authorized representative to examine the health care facility patient care records, including but not limited to the history, bedside notes, charts, pictures and plates, kept in connection with the treatment of such patient... 735 ILCS 5/8-2001(b) (West 2008).

The defendants relied on the case of *Woodward v. Krans*, 234 Ill.App.3d 690, 700 (2d 1992), which stated that section 2-622 “allows only for discovery of the plaintiff’s medical records.” However, the appellate court found *Woodward* distinguishable because it dealt with a situation under Illinois Supreme Court Rule 201(d) where the defendants had not yet appeared. In this case, the defendants had appeared and Rule 201(d) did not apply. Instead, the appellate court noted that the defendants could have been brought in as respondents in discovery without any limitation on the scope of discovery sought and also cited a committee note for section 8-2001(b), which states that “records of a health care facility or a health care practitioner shall be made available for examination or copying to the patient or the patient’s legally authorized representative.” 95th Ill.Gen. Assem. House Bill 472, 2007 Session, House Committee Amendment No.1.

The second holding of the appellate court was that the MRSA infection rates of Advocate were not privileged under the Medical Studies Act. The court noted that the purpose of the Act is to encourage medical professionals to self-evaluate and participate in studies and programs to improve patient care and reduce morbidity and mortality. However, it is important to keep in mind that the Act is not designed as a shield and only protects documents which are generated exclusively for peer-review committees. Most importantly, documents generated in the normal course of business are not protected under the Act, even if they are later reviewed and utilized

by a peer-review committee. The court held that disclosing the number of MRSA infections for a three-month time frame did not conflict with the purpose of the Act and ensuring that medical professionals self-evaluate “in the interest of advancing quality health care.” In this case, the number of individuals who contracted MRSA while admitted to Advocate was deemed to be a “mere incident of fact” and not privileged information.

This case should now serve to put health care providers on notice for two important reasons. First, when requests are made pursuant to Supreme Court Rule 224 and Section 8-2001(b), the ultimate decision of scope will be determined by the trial court, albeit still governed by the limitations of the Medical Studies Act, and may very well be extended beyond just that of the plaintiff’s medical records. Secondly, the Medical Studies Act and its protection will be limited in scope so as to prevent it from being used as a mechanism to circumvent compliance with discovery requests. For information to be privileged, it must be generated for the purpose of use by a peer-review committee, and not just incidentally or secondarily utilized by one.

* * *



Jillian Taylor, an associate in our Chicago office and Co-Editor of this newsletter, concentrates her practice in medical malpractice and nursing home litigation. Prior to joining the practice group, Jill tried more than 10 cases to

jury verdict and participated in over 30 arbitrations in the area of auto and premises liability. In addition, she drafted and was successful in numerous motions for summary judgment for the firm’s major clients. In law school, Jill served as Primary Editor of the *Journal of Public Law and Policy*. She is also a member of Phi Alpha Delta Law Fraternity, and served as president of the organization for the Monroe Chapter while in law school.

If you have questions regarding this article, please contact Jillian via jtaylor@querrey.com or via 312-540-7624.

Litigation Update: The Filing of an Affirmative Defense Does Not Constitute Waiver of the Dead Man's Act Defense

By: Brad R. Schneiderman - Chicago office

The First District Appellate Court in *Argueta v. Krivickas*, 2011 WL 102166 (1st Dist. July 8, 2011), examined the ramifications of pleading an affirmative defense when asserting the Dead Man's Act.

In the *Argueta* case, the plaintiff originally filed suit against Peter Krivickas alleging the defendant was at fault for an automobile accident. Subsequent to the initial filing, Mr. Krivickas passed away. The plaintiff subsequently filed an amended complaint naming Rosa Gomez as Mr. Krivickas's special representative. Ms. Gomez included an affirmative defense in her answer, asserting that the plaintiff was negligent. Following written and oral discovery, Ms. Gomez moved for summary judgment, arguing that the Dead Man's Act prevented the plaintiff from recovery. The plaintiff argued that Ms. Gomez waived the use of the Dead Man's Act by pleading her affirmative defense and in the alternative, that his affidavit and the deposition testimony of two police officers created a genuine issue of material fact. The trial court granted Ms. Gomez's motion for summary judgment from which the plaintiff appealed.

The Dead Man's Act provides that:

In the trial of any action in which any party defends as the representative of a deceased person, no adverse party or person directly interested in the action shall be allowed to testify on his or her behalf to any conversation with the deceased or to any event which took place in the presence of the deceased.
735 ILCS 5/8-201.

The plaintiff in *Argueta* argued that Ms. Gomez's affirmative defense triggered an exception to the Act which reads:

If any person testifies on behalf of the representative to any conversation with

the deceased or to any event which took place in the presence of the deceased, any adverse party or interested person may testify concerning the same conversation or event. 735 ILCS 5/8-201(a).

The appellate court was unimpressed with the plaintiff's contention and held that an affirmative defense does not constitute testimony under the plain and ordinary language that the legislature intended when enacting the Dead Man's Act. Further, while a decedent waives protection offered under the Dead Man's Act if her representative presents evidence concerning events which occurred in the presence of the decedent, the appellate court explained that allegations in an affirmative defense do not constitute evidence. Accordingly, the defendant did not waive the Dead Man's Act in asserting her affirmative defense. As an aside, the appellate court noted that verified allegations in an affirmative defense would constitute evidence if admitted. While this did not appear to be the case in the *Argueta* matter, it is noteworthy from a practical sense.

After determining that Ms. Gomez's affirmative defense did not waive her protection under the Dead Man's Act, the appellate court next analyzed whether there was any genuine issue of material fact which would preclude it from affirming summary judgment. The majority of allegations in the plaintiff's complaint involved events which occurred in the decedent's presence. Therefore, the Dead Man's Act barred the plaintiff from testifying as to those allegations. The remaining sole allegation in the plaintiff's cause of action was with respect to the use of a traffic signal, which may or may not have been within the decedent's knowledge. The plaintiff attempted to introduce evidence from police officers who responded to the accident as their testimony regarding conversations they had with the decedent would not have been precluded under the Dead Man's Act. The police

officers, however, did not recall the decedent admitting that he drove through a red light. Therefore, the appellate court found that any testimony from the officers regarding the use of the traffic signal would be inadmissible because of the speculative nature of such testimony.

With respect to the plaintiff's affidavit that was filed in response to the defendant's motion for summary judgment, the Dead Man's Act still precluded the portions of the affidavit relating to the traffic signal because this knowledge may have been obtained in the presence of the decedent. Accordingly, although the appellate court found that there were portions of the plaintiff's affidavit which should have been admissible given that the events in the affidavit occurred outside the presence of the decedent, summary judgment was still proper as the plaintiff failed to establish that the decedent's negligence caused the accident.

The appellate court's holding in *Argueta* illustrates the importance of a plaintiff carefully structuring his pleadings when faced with a deceased defendant. Further, a thorough investigation of the incident is critical for a plaintiff to preserve a negligence claim. Witnesses to an occurrence and other tangible evidence are not barred under the Dead Man's Act. As the *Argueta* case has demonstrated, there are certainly situations in which a plaintiff will be barred from recovery for an otherwise

pursuable claim because the alleged at-fault party passed away.

From a defense perspective however, it is important to note that preserving your affirmative defense rights will not waive your protection under the Act. It is impossible for a defendant to know how discovery will play out during the pleadings stage. Thus, a defendant should not be dissuaded from asserting an affirmative defense out of fear of waiving his or her protection afforded under the Dead Man's Act. It is recommendable, however, that a defendant not verify an affirmative defense as admitted allegations may constitute evidence and thus, enable an adverse party to testify despite the Dead Man's Act.

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Brad Schneiderman, an associate in our Chicago office, concentrates his practice in medical malpractice and health care liability and has experience representing hospitals, physicians and other health care professionals. He has participated in all aspects of the litigation process, including a number of appeals. Brad also has experience in commercial litigation, bankruptcy, and other personal injury matters.

If you have questions regarding this article, please contact Brad via bschneiderman@querrey.com, or at 312-540-7672.

CASE SUCCESSES

Keleher Wins In Seventh Circuit as Appointed Appellate Counsel



On August 24, 2011, Querrey & Harrow shareholder **Christopher Keleher** won a reversal in the U.S. Court of Appeals for the Seventh Circuit in *Ortiz v. Webster*, No. 11-2012. Mr. Keleher was appointed by the Seventh Circuit Appellate Court to represent Arboleda Ortiz, who had sued the federal penitentiary where he was housed. Mr. Ortiz suffered from an eye condition known as pterygium and claimed the federal penitentiary was deliberately indifferent to his condition. The District Court granted the government summary judgment. Chris was then appointed for the appeal. Chris was able to persuade the Seventh Circuit that, despite the difficult burden of establishing deliberate indifference, the District Court erred. Ortiz represents a rare reversal on the issue of deliberate indifference and an important decision ensuring the federal government will be held accountable for allowing an inmate's health to deteriorate.

UPCOMING SEMINARS

Rubin to Present on Rights of Publicity and Entertainment Licensing

Practising Law Institute - Chicago, Illinois
November 3-4, 2011

Chicago office Of Counsel **Len Rubin** will be one of the featured speakers at the annual Practising Law Institute seminar titled "Understanding the Intellectual Property License", being presented on November 3 and 4, 2011. Len will be speaking on the subject of "Rights of Publicity and Entertainment Licensing", as well as participating in a "Mock Negotiation of a License Agreement".

Construction Lien Law in Illinois

Chicago, Illinois - December 1, 2011

Naperville, Illinois - December 9, 2011

On December 1, 2011, in Chicago and on December 9, 2011, in Naperville, Illinois, Querrey & Harrow attorneys will present a one-day seminar entitled "Construction Lien Law in Illinois". This Lorman Education Services seminar is designed for contractors, owners, developers, subcontractors, suppliers, architects, engineers, lenders, accountants, and allied construction professionals. Construction Practice Co-Chair **Bruce Schoumacher** will serve as Moderator for the seminar. Other speakers include **Jason Callicoa**t, **Thomas J. Condon**, **John Halstead**, **Thomas Kaufmann**, **Scott B. Krider**, **Anthony Madormo** and **Timothy Rabel**. To receive notification when the brochure for this seminar is published, please email info@querrey.com.