



A Monthly Legal Newsletter from
Querrey & Harrow

Nov/Dec 2011

Editor: *Terrence Guolee*



Liability Update: Winter Worries: Is Shoveling Snow Necessary?

By: Thomas J. Condon, Jr. - Chicago, Illinois



Municipal Law Update: New Open Meetings Act Training Required Effective January 1, 2012

By: Brian Begley - Joliet, Illinois



Litigation Update: The Availability of Evidence Does Not Change the Need for Disclosure

By: Patrick Wall - Chicago, Illinois

Recent Case Successes

- Sulayman and Coffey Win in State Court Medical Malpractice Claim
- Sharifi and Guolee Win in Federal Court Civil Rights Trial
- Lemley and O'Grady Win in Seventh Circuit

News/Community Involvement

- Querrey & Harrow Welcomes New Associates Christine Fallara and Emily Widmer

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

We recommend that each article be read in its entirety. Readers should not act upon this information without seeking professional counsel. The articles in this publication may not be reprinted without the express permission of Querrey & Harrow, Ltd.

This publication may be considered attorney advertising in some jurisdictions.

This information disclosed in this newsletter are matters of public record. Prior results do not guarantee similar outcomes.

Liability Update: Winter Worries: Is Shoveling Snow Necessary?

By: Thomas J. Condon, Jr. - Chicago office

In the Midwest, most people cringe at the thought of the frigid bone chilling cold and the snow that is synonymous with winter. However, more than the weather itself, people dread one of its associated activities: snow removal. Many have questioned whether it is necessary for them to clear their sidewalks of the snow, for reasons other than being a good neighbor. Could they be liable for someone falling and being injured on their un-shoveled walk? The answer to the question is: it depends.

Many municipalities have ordinances that require snow removal, so if you live in one of those municipalities, the answer is "yes, you must shovel to avoid a fine." But that does not mean, however, that you would be liable for someone falling on the un-shoveled walk. The only way for one to be liable for someone's injury due to an un-shoveled walk is if they have a legal obligation, either by contract or voluntary assumption, to clear the snow or ice. Thus for the great majority, there is no obligation.

The Second District Appellate Court recently addressed the question of liability arising from the failure to remove snow in *Claimstone v. Professional Property Management, LLC.*, 2011 Ill. App 2d 101115. The court affirmed a grant of summary judgment dismissing the plaintiff's claim for recovery of payments made to its employee, Lynn Brome, pursuant to a workers' compensation claim for injuries sustained while on un-shoveled stairs. The suit was filed against the owner of the building, a tenant, Janis Pumfrey, and the property management company, Professional Property Management,

LLC., claiming that they were negligent in failing to clear the snow which caused plaintiff to fall. The defendants' argued that they had no duty to remove the snow and the court agreed.

The facts are simple and uncontested. On December 14, 2002, the first snowfall of the year occurred and produced a volume of snow that Brome described as a "blizzard". Although the parking lot had been plowed, the walkways and stairs had not been cleared. In spite of the snow, Brome, a housekeeper for the defendant, used the rear exterior stairs to the gain entrance to the second floor of the building where Pumfrey's apartment was located. After performing her required duties, Brome attempted to leave. She noticed that the snow was still on the stairs. She was fearful of falling. In fact, she was so nervous that she threw a bag of trash that she was carrying over the railing instead of carrying it down. She grabbed hold of the handrail and began her descent, but as she reached the second or the third stair she slipped causing her body to buckle and crash into the railing, sustaining injuries.

The court, following the precedent of *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill.2d 213 (1996), laid out the requirements for the plaintiff to support their negligence action. They must prove a duty owed to it by the defendant, a breach of that duty, and an injury proximately caused by a breach to support a claim of negligence. The relationship between the parties will determine whether or not there is a legal obligation, i.e. duty, imposed upon one for the benefit of another.

Sulayman and Coffey Win in State Court Medical Malpractice Claim



Congratulations to Chicago office shareholder **Fuad Sulayman** and associate **Kevin Coffey** who recently won a trial in a wrongful death medical malpractice action in Cook County. The case was a wrongful death action with 2 survival counts. Fuad and Kevin represented a general surgeon who was the last remaining defendant in the case. The plaintiffs asked for \$5 million from the client.

The court affirmed that there is no common law duty to remove natural accumulation of snow or ice, citing *Galivan v. Lincolnshire Inn*, 147 Ill. App.3d 228 (1996), and *Graham v. City of Chicago*, 346 Ill. 638 (1931). However, the plaintiff argued that there are exceptions to the general rule that the court was required to evaluate. The first argument was that the defendants had a contractual duty which had arisen from obligating itself in the contract to remove snow and ice and, therefore, they may be held liable to a third party for the failure to perform under the contract. The second argument presented by the plaintiff was that their defendants voluntarily assumed a duty by the previous removal of the snow.

Here the building owner had contracted with a property management company for snow removal. The contract provided that the company would, “keep sidewalks free of ice and/or and take bids on snow removal of driveways/parking areas... overnight snowfall and walks must be cleaned by 7:15 a.m. ...” The court determined that there was no duty established by the contract for the removal of snow and/or from the staircase. They reasoned that the terms of the contract are unambiguous and that “sidewalks” and “all walks” do not encompass staircases.

The court further considered the plaintiff’s additional argument that the defendants had voluntarily created a duty by clearing the staircase in the past. Citing *Bourgonje v. Machev*, 362 Ill. App. 3d 989 (2006), the court identified that a person who voluntarily agrees to perform a service for the protection of another or their property must perform the service in such a manner is not to increase the risk of harm to another person who relies on the undertaking. One who is negligent in undertaking is liable for the foreseeable consequences of another who

suffers harm if they rely on the undertaking. The theory is derived from §323 and §324(a) of the Restatement Second of Torts, which provides:

One who undertakes gratuitously or for consideration, to render services to another which he should recognize is necessary for the protection of a third person or his things as subject to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm; or (b) he has undertaken to perform a duty owned by the other to the third person; or (c) the harm is suffered because of reliance to the other or third person upon the undertaking.

Restatement (Second Torts §324(a), 1965). The voluntary undertaking theory applies to both nonfeasance (the failure to perform) and misfeasance (the negligence performance.)

In this case, the plaintiff alleged that Brome relied upon the property management’s previous acts of removing the snow. In dismissing her argument, the court relied upon a decision in *Chisolm v. Stephens*, 47 Ill. App.3d 999 (1997), in which it was determined that liability could be established for nonfeasance of a gratuitous undertaking where there was reasonable reliance on the performance. The court further explained that reasonable reliance may occur where there is a deceptive appearance that performance had been made or a representation of performance had been communicated and the reliance is justified only if the person is unaware of the actual circumstances and not equally capable of determining such facts.

Sharifi and Guolee Win in Federal Court Civil Rights Trial



Chicago office shareholder **Terrence Guolee** and associate **Ghazal Sharifi** obtained a not liable verdict for a Chicago Police officer in a trial in the Federal District Court for the Northern District of Illinois. In the case, Terrence and Ghazal represented an officer alleged to have hit and choked a minor arrested for damage to property.

The court held that there was no reliance on the defendants' previous snow removal as Brome was aware of the snow. In fact, she noticed the snow on the stairs when she arrived and traveled through it. Additionally, she was aware of it when exited the apartment, so much so that she took precautions.

Hence, unless you have a contract to remove snow, generally, you will not be liable and thus, you need not worry about helping your

neighbor. That is, unless you fail to do a good job.

* * *



Thomas J. Condon, Jr. concentrates his practice in auto and premises liability. Tom also has experience in the areas of commercial, construction, liquor liability and municipal litigation. He has successfully tried multiple cases to verdict.

If you have any questions regarding this article, please contact Tom via tcondon@querrey.com or 312-540-7606.

Querrey & Harrow Welcomes New Associates Christine Fallara and Emily Widmer



In November **Christine Fallara** and **Emily Widmer**, who both clerked with Querrey & Harrow, were officially sworn in as attorneys in Illinois.

Christine Fallara is an associate in Querrey & Harrow's Chicago office and concentrates her practice in general litigation. Ms. Fallara has worked with Querrey & Harrow since 2007, having served as a paralegal and then a law clerk prior to assuming her role as an associate.

In her role as a paralegal and law clerk, Ms. Fallara assisted the bankruptcy team with debtor and creditor rights, mortgage foreclosures, evictions, collections and real estate closings.

Ms. Fallara has volunteered on multiple campaigns including a governor and United States President as well as interning during undergrad on Capitol Hill for former Illinois Congressman Jerry Weller and in the Chairman's Office of the RNC.

Emily Widmer will concentrate her practice in general litigation, including products liability, premises liability, and insurance coverage. During law school, Emily was a member of Chicago-Kent's Moot Court Honor Society and appellate advocacy program. She competed in two national competitions, and also coached a moot court team.

At Chicago-Kent, Emily was chosen as one of the "best advocates" in her Intensive Trial Advocacy course and was the recipient of Chicago-Kent's Alumni Labor and Employment Law Scholarship, in addition to a Chicago-Kent merit scholarship. Emily also served on the editorial staff of Chicago-Kent's Seventh Circuit Review Law Journal. Prior to joining Querrey & Harrow in 2009, Emily was a law clerk for a boutique Chicago law firm specializing in real estate and property law.

Before attending law school, Emily worked at a Chicago-based public affairs and strategic communications firm where she primarily worked on energy and environmental initiatives as well as public issue campaigns.

Municipal Law Update: New Open Meetings Act Training Required Effective January 1, 2012

By: Brian Begley - Joliet, Illinois Office

Presently, the Open Meetings Act (5 ILCS 120/1.05) requires public entities to designate one or more employees, officers or members to receive training on compliance with the Open Meetings Act and to submit a list of designated employees, officers or members to the public access counselor to successfully complete an annual training program. Any subsequent designations by the public entity of additional employees, officers or members to receive this training must successfully complete the training curriculum within 30 days after designation.

The Illinois General Assembly has recently passed Public Act 097-0504 which has expanded the electronic training requirements to each elected or appointed member of a public body. Effective January 1, 2012 any elected or appointed member of a public body who is a member on January 1, 2012 will be required to complete electronic open meetings act training within 1 year, on or before January 1, 2013. All subsequent elected and appointed members shall be required to complete electronic training within 90 days after such member is sworn in or assumes the duties of their elected or appointed position. Upon successful completion of the electronic training, each member will receive a certificate which must be filed and retained by the public body.

Specifically, the training section of the Open Meetings Act will require that,

...each elected or appointed member of a public body subject to this Act who is such a member on [January 1, 2012] must successfully complete the electronic training curriculum ... one year after the effective date of this amendatory Act.” 5 ILCS 120/1.05(6)

Each elected or appointed member of a public body subject to this Act who becomes such a member after [January 1, 2012] ... shall successfully complete

the electronic training curriculum ... not later than the 90th day after the date the member: takes the oath of office, if the member is required to take an oath of office to assume the person's duties as a member of the public body; or otherwise assumes responsibilities as a member of the public body, if the member is not required to take an oath of office to assume the person's duties as a member of the governmental body.

The failure of one or more members of a public body to complete the training required by this Section does not affect the validity of an action taken by the public body.

The newly adopted training requirements of the Open Meetings Act is not limited to elected/appointed municipal officials only, but will also be required of all public bodies as defined in the Act, i.e. park district, township and school board officials.

While violation of any component of the current Open Meetings Act is considered a class C misdemeanor, section 4 of the Open Meetings Act has been amended to specifically exclude any violations of the additional training requirements under the same classification since the intent of the training requirements is to curb future inadvertent violations of the Act.

* * *



Brian Begley 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. Brian also served in the Civil Actions Bureau, representing Cook County in complex building and zoning matters.

If you have any questions regarding this article, please contact Brian via bbegley@querrey.com or 815-726-8153.

Litigation Update: The Availability of Evidence Does Not Change the Need for Disclosure

By: Patrick Wall – Chicago office

Recently, in *Scales v. Benne*, the First District reviewed whether the exclusion of photographs not disclosed by plaintiff, but which were publicly available, was an abuse of discretion. The Circuit Court “emphatically rejected the plaintiff’s contention,” as did the Illinois Appellate Court. 2011 IL App. (1st 102253).

A brief review of the facts will assist in the understanding. This was a disputed liability case involving a vehicle/pedestrian collision at North and Clybourn in Chicago, Illinois. The plaintiff claimed he was crossing the street in the crosswalk when he was struck by the defendant’s car. The defendant claimed the plaintiff was some distance from the crosswalk when plaintiff walked into the side of defendant’s car. The sole witness testified consistent with the defendant’s version of the accident. The jury found for defendant. Plaintiff filed a post-trial motion, which was denied.

More specifically, prior to trial, the defendant filed a Supreme Court Rule 214 Request to Produce to the plaintiff asking to produce all photographs, slides, etc. which were related to the accident. Plaintiff’s response did not include the photographs.

At trial, plaintiff argued he had only obtained the photos immediately before the day of trial. Plaintiff then called the defendant at trial and tendered the photographs at the pre-trial conference held immediately prior to the plaintiff’s cross examination of defendant. Three photographs; two pictures of the intersection and one photo of the make and model of the defendant’s vehicles, were produced, all from three publicly available websites, i.e., Autotrader.com, Google.com and Netquest.com. Defendant’s counsel objected as the photographs had not previously been produced. Plaintiff’s counsel admitted he did not tender the photographs to the defendant.

Plaintiff further argued that he did not have to

disclose the photographs for use on cross examination when the defendant is an adverse witness. The trial court emphatically disagreed and barred the use of the photographs.

Outside of the presence of the jury, the plaintiff’s counsel made an offer of proof that even the defendant himself had gone to Mapquest.com to do research on the intersection and further that the defendant admitted that the pictures of the car were physically accurate. The trial court admitted the photographs for the purposes of the offer of proof, but did not allow them at trial.

After losing, plaintiff moved for a new trial, arguing that the court erred in barring the use of the photographs. Plaintiff claimed since he only intended to use the photos on cross examination, they were not subject to previous disclosure. The trial court disagreed, stating that the decision whether to produce them does not depend on how they are used. The trial court referenced Illinois Supreme Court Rule 201 which requires “full disclosure of any matter relevant whether it relates to a claim or defense.” The trial court found the photographs were subject to disclosure in whatever way counsel intended to use them and that the defendant had properly asked for the photographs, and they were not produced. The trial court held that since the rule makes no distinction as to when the photographs are to be used, plaintiff’s argument of when he intended to use them was not sufficient to avoid any proper discovery request. The trial court, rejecting the plaintiff’s argument, quoted:

What plaintiff has done herein is an attempted end-run around Rule 214. He has waited until the very eve of trial to secure photographs that he could have secured at any time earlier via Google and Mapquest, and then asserted he could not produce the photographs because he did not have them until the eve of trial.

The trial court found “nothing could be further from the truth” with regard to plaintiff’s arguments. Lastly, plaintiff argued that he was prejudiced by the exclusion of the photographs. However, the trial court found that the plaintiff had not shown any specific prejudice to his case. The plaintiff then appealed.

On appeal, plaintiff first argued Illinois Supreme Court Rule 213 provides an exception to disclosure to Illinois Supreme Court Rule 214, which discusses the disclosure of documents. Plaintiff argued “[its’] appeal presents an opportunity to clarify the seeming “inconsistency” between Rule 213 regarding the testimony of witnesses and discovery and Rule 214 which covers the request of documents, especially where a party is called and cross examined as an adverse witness,” as happened in this case. Plaintiff argued Rule 213(g) did not require disclosure of the photographs. Rule 213(g) states “without making disclosure under this Rule, however, a cross examining party can elicit information including opinions from the witness.”

The appellate court said its reading “found nothing in the rule which would support the plaintiff’s contention” and further found that the rule only discusses information, including opinions and the documents in this case were not mere information - especially those documents which plaintiff planned to use substantively. The court disagreed with plaintiff’s first argument.

Second, plaintiff argued under his reading of Rule 213 and 214, there was another “inconsistency” on which documents needed to be disclosed depending on when they would first be used as evidence. The appellate court strongly disagreed with plaintiff, finding that the only “seeming inconsistency was the result of the plaintiff misreading the rule.” In support, plaintiff argued *Southern Illinois Airport Authority v. Smith*, which admitted documents in a factually similar situation, mandated admission of the documents. 267 Ill App. 3d 201 (5th Dist. 1994). In response, the appellate court there chastised plaintiff for failing to read the express limitation of the *Smith* holding which stated specifically, “if such documents were used by the cross-examiner in his case in chief or to bolster the testimony of his witnesses, we would not hesitate to rule against such nondisclosure.” The appellate court highlighted how the plaintiff here attempted to utilize the exact procedure his is own case disapproved of.

In the instant case, the court found that although the photographs were readily available to both parties, the defendant proceeded to trial with no documents disclosed by plaintiff and would have prepared differently for trial had the plaintiff disclosed those documents. Further, plaintiff’s failure to disclose those documents, as the appellate court found and as the trial court had properly found, was governed by Rule 214. In sum, the court found plaintiff’s reading of Rule 213 twisted, and inapplicable to its case.

Lemley and O’Grady Win in Seventh Circuit



Chicago office shareholder **Brandon Lemley** and **Paul O’Grady** scored a victory before the Seventh Circuit Court of Appeals on behalf of a municipality and its police chief. In the case, a multi-jurisdictional SWAT team fired “pepper balls” (essentially paint balls filled with the substance contained in pepper spray rather than paint) to rouse a suicidal, non-responsive individual reported as having access to weapons. The primary issue on appeal was whether the Chief of Police for the municipality that requested the SWAT team could face “supervisory liability” for the actions of the SWAT team, whose members were not sued. The Seventh Circuit held that there was not evidence that the police chief had any supervisory authority over the SWAT team, and to the extent he provided input on what action the SWAT team should take, it was in the role of a consultant rather than supervisor.

Lastly, the appellate court argued even accepting plaintiff's arguments, it still does not change the fact that the one witness, Mr. Allen, illustrated to the jury clear evidence of where the plaintiff was located at North and Clybourn and how the plaintiff walked into the defendant's car - not that the defendant struck plaintiff. Therefore, the photographs were "not of the sort that would have impacted the jury's verdict", and did not prejudice plaintiff. The appellate court found the proffered photographs would not have provided the jury with direct information as to where the plaintiff stood.

* * *



Patrick Wall has been an Associate with Querrey & Harrow since 2006. He concentrates his practice in the defense of auto and premises liability. He has defended national corporations,

homeowners and landowners against claims ranging in severity and complexity from soft tissue injuries to catastrophic injuries. Additionally, he is active in the defense of transportation liability. He also practices in the defense of medical malpractice and Nursing Home Care Act litigation.

If you have any questions regarding this article, please contact Pat via pwall@querrey.com or 312-540-7598.

Schoumacher Article Reprinted in ISBA and ABA Publications

Bruce Schoumacher's article "Recent Amendment Guts the Arbitration Act," published in Building Knowledge, the news letter of the Construction Law Section of the Illinois State Bar Association, has been reprinted in the August, 2011 issue of the Dispute Resolver, the newsletter of Division 1 of Forum on the Construction Industry of the American Bar Association.

SEMINARS

Construction Project Management Wheaton, Illinois - December 14, 2011

Bruce Schoumacher, Jason Calliccoat, and Peter Graham are scheduled to speak at the December 14th Construction Project Management seminar in Wheaton, Illinois. Bruce will discuss construction insurance; Jason will provide an overview of mechanics liens; and Peter will address minority contracting requirements. This seminar is designed for architects, engineers, and contractors.

For additional information and to register for this seminar, please visit www.halfmoonseminars.com.

"Handling Motor Vehicle Crashes" From the Occurrence Up To Trial - IICLE Chicago, Illinois - February 3, 2012

On February 3, 2012, Shareholders **Christopher Johnston** and **Larry Kowalczyk** will be featured speakers for the defense perspective in a seminar hosted by the Illinois Institute of Continuing Legal Education.

Chris will cover the basic requirements of uninsured and underinsured claims, avoiding conflicts of interest and bad faith claim, minimizing damages, counterclaims and contributory negligence. Larry will discuss trucking litigation, experts, investigations and black box issues, driver documentation, and independent contractor issues.

To be notified when the IICLE website begins registration for this seminar, send an email to info@querrey.com with "IICLE Feb. 3" in the subject line.