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A Monthly Legal Newsletter from

Querrey & Harrow

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IP Update: The Seventh Circuit Court Of Appeals And The Definition Of Sculpture

By: E. Leonard Rubin – Chicago office

Most people have a general idea of what constitutes a sculpture. The work may have different synonymical names – the Calder work known as "Flamingo" that sits in the plaza in front of the Chicago Loop Post Office might be called by some a "stabile" because it is a stationary mobile, but it is definitely a sculpture. But what about an artistic planting – that is, the use of a defined space to design and plant certain selected flowers so they appear in a preconceived pattern? Can that be considered a sculpture, and whether it is or not, do we care?

The United States Court of Appeals for the Seventh Circuit has just given us the answers to both parts of the preceding question. Taken in reverse order, here are the answers.

Why do we care? Because there is a provision in the U.S. Copyright Act, 17 U.S.C. Sec. 101 *et seq.*, that specifically gives to artists and sculptors certain rights that are not enjoyed by other creators of copyrightable works, such as writers and composers, and we may wish to assist in enforcing those rights.

Known as VARA, the Visual Artists Rights Act, this portion of the Copyright Act grants to visual artists and sculptors what some European countries know as "moral rights," but in a more limited manner. Moral rights is a concept that separates an author's economic interest in the author's creations from the aesthetic interest. A part of VARA allows the "author" of a work of visual art:

> (3)(A) to prevent any intentional distortion , mutilation or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification is a violation of that right …

As has been noted, this right applies to artists and sculptors. Chapman Kelley, a nationally recognized artist known for his paintings of landscapes and flowers, some in an elliptical shape, was granted permission from the Chicago Park District to plant his idea of a well-defined wildflower display within two giant ellipses in the north end of Grant Park in downtown Chicago, and he carried out his plan. After a number of years of display of the flower arrangements, the Park District notified Kelley that it needed portions of the space for other purposes, and it substantially changed the display by reducing it in both size and shape.

Kelley sued for, among other wrongs, a violation of VARA, claiming that the Park District's reconfiguration was an intentional "distortion, mutilation or other modification" of his work; his work was a sculpture and he therefore has VARA rights as a sculptor. The Park District argued that the plantings were not sculptures, and therefore, Kelley has no rights under VARA. The trial court found that Kelley's work was probably a sculpture because it was three-dimensional, but in any event not copyrightable because it lacked sufficient originality, and also that according to a First Circuit decision, site-specific works are categorically excluded from protection under VARA.

Kelley appealed to the Seventh Circuit. The reason some of us might care is that, depending on the Seventh Circuit's answer, perhaps an artistic planting of wildflowers can be considered as a sculpture and therefore protected by VARA, which could open the doors to all sorts of lawsuits in connection with changes in private gardens, museum displays and other outdoor exhibitions.

Judge Sykes of the Seventh Circuit, writing for a panel that included Judges Manion and Tinder, dissected VARA and its history, including a thorough discussion of the idea of moral rights. The decision acknowledges that U.S. law

historically has never included the moral rights concept; that a restricted version of it was included in the U.S. Copyright Act for the sole purpose of allowing the United States to become a signatory to the Berne Union Copyright Convention, and it is to be applied literally. He discussed the concept that those rights are distinguishable and therefore severable from an author's economic rights because they involve rights of a spiritual, personal and integrity-based nature. Importantly, these rights exist even after an artist no longer owns the work or any economic interest in it, and therefore has surrendered his or her economic rights. The panel's conclusion is that whatever else it may be, Kelley's creation is not a "sculpture" as that term is referred to in the Act, and therefore does not qualify for protection under VARA.

The decision explains that while the Copyright Act's broad general coverage extends to "pictorial, graphic and sculptural works," thus suggesting flexibility and breadth in application, VARA is more confining; it refers to the specific nouns "painting" and "sculpture." So to qualify for moral rights protection under VARA, Kelley's works cannot just be "pictorial" or "sculptural" in some aspect or effect; it must actually be a *painting* or a *sculpture*. "Not metaphorically or by analogy," says the opinion, "but *really*." (Emphasis in original.)

From this decision and its limitations on what constitutes a work of sculpture, we can settle doubts about the applications of VARA. The decision also touches on the requirement of "originality" in copyright law, and concludes that basically, what appears to a viewer in a creation such as Kelley's is a product of nature and not authored. The sprouting of flowers from seeds, the spread of plantings, are part of gardens that are planted and cultivated, not authored. "A garden's constituent elements are alive and inherently changeable, not fixed." Even though an "author" might determine the initial arrangement of plants in a garden, this is not the type of authorship required for copyright.

The bottom line of this carefully-worded and expansive decision is that a planned set of plantings is not even copyrightable, much less capable of classification as a sculpture and therefore protectable under VARA. The Chicago Park District, in this case at least, emerges victorious.

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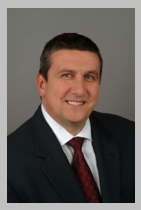
E. Leonard Rubin *is Counsel with the law firm of Querrey & Harrow, Ltd., a firm that represents individuals and business clients worldwide. Len, who concentrates his practice in intellectual property, and specifically copyright, trademark, defamation, trade secret and entertainment law, resigned his position a number of years ago as Vice President, General Counsel and Corporate Secretary for Playboy Enterprises, Inc., where he had been for 13 years, to return to private practice. He has extensive experience handling negotiations, legal problems, internet implications and litigation in the copyright, communications, publishing, computer, music, television, theatrical and motion picture areas, among others.*

If you have any questions regarding this article or Q&H's Intellectual Property practice, please contact Len via lrubin@querrey.com or 312-540-7676.

Jendryk Wins Auto Appraisal Clause Breach of Contract Trial



Jim Jendryk recently won a not guilty verdict for his client auto carrier in a breach of contract claim involving issues surrounding invocation of the appraisal clause in an auto insurance contract, following an auto accident caused by an uninsured driver. In the case, the plaintiff claimed consequential damages of over $400,000 based upon insurance premiums paid, debt paid on the bank loan and loss of use of her vehicle for 67 months after it was repossessed by the bank.

Seventh Circuit Finds No Violation of Arrestee's Rights in Use of Hobble

By: Jason Callicoat - Chicago office

The Seventh Circuit Appellate Court recently ruled in favor of several police officers who had been sued for allegedly failing to provide medical care to a schizophrenic arrestee when he stopped breathing. The Court also ruled in favor of the officers' employer, the City of Springfield, which had been sued for allegedly failing to train the officers to use the hobble that allegedly caused the arrestee to stop breathing. The arrestee was transported to the hospital for treatment, but he did not survive.

In *Sallenger v. City of Springfield, Ill.*, 2010 WL 5128850 (7th Cir. 2010), Plaintiff asserted that the officers violated the decedent's Fourth Amendment rights by failing to provide medical care, and that pursuant to the holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the City was liable for causing the violation by failing to train the officers.

The officers had responded to a call that Andrew Sallenger was having a psychotic episode. A family member reported that he was running around the house naked in an agitated and uncontrollable state. The family also reported the officers would need a lot of backup because Sallenger was very strong (he was a large man, standing 6 feet tall and weighing 262 pounds). Three police officers responded, and after a violent struggle, managed to put Sallenger in handcuffs. They also placed him in a hobble, which is a cord that is looped around a suspect's lower legs and then connected to a strap that is attached to handcuffs. Within minutes of being hobbled, Sallenger stopped breathing. When the officers realized this, they removed the hobble, started CPR, and called for paramedics.

At the time of the incident, the City permitted officers to use hobbles in cases in which a suspect in custody is displaying or has indicated signs of a hostile and combative nature. But the City did not specifically train its officers in how to use them. The hobble used on Sallenger was not issued by the City; rather, one of the responding officers purchased it from a retail website. The officer testified he had read the instructions that came with the hobble and had seen other officers use them. Another officer on the scene testified that he was aware that restraining a suspect in a hobble could cause positional asphyxiation if the suspect was not turned on his side.

Littman Obtains Dismissal of Case Through Use of Investigator

Chicago shareholder **Roger Littman's** recent decision to obtain surveillance of a purportedly blind plaintiff resulted in the voluntary dismissal of a lawsuit brought against one of Roger's physician clients. In the case, the plaintiff had been hospitalized with a rare medical condition known as Pseudotumor Cerebrii, in which cerebro-spinal fluid builds up within the cranium and causes severe headaches and, in some cases, loss of vision. Plaintiff sued the neurosurgeon, the internist and the neuro-ophthalmologist caring for him at one of the area's top hospitals. Subsequent treaters opined that the vision loss was near complete, permanent and related to the care of the defendants. Indeed, reports of neuro-ophthalmologists in Illinois and in Wisconsin confirmed severe loss of vision on objective and subjective testing.

Following a female defendant's report that she believed the plaintiff was looking at her during a deposition, an investigator was hired and taped the plaintiff riding the CTA to a tavern; crossing 6 lanes of of a major roadway without assistance and with his cane folded up; and then being able to secure his own and a friend bottles of beer from behind the bar, opening them and pouring just in time for the first pitch of the White Sox home opener.

Prior to obtaining the voluntary dismissal, Roger defeated multiple motions from plaintiff's attorneys seeking to bar the videotape evidence and expert opinions were obtained documenting that plaintiff was malingering and just plain faking his blindness.

Sallenger's Estate asserted the officers did not respond appropriately after they realized he was not breathing. Springfield Police Lieutenant Mark Bridges arrived on the scene within minutes of the hobbling, and the other three officers testified that it was at this point-just after Bridges arrived-that they realized Sallenger was not breathing. All four officers on the scene testified that they immediately removed the hobble, began CPR, and summoned an ambulance. Testimony from one of Sallenger's family members at the scene supported this.

The Estate contended, however, that there was a seven-minute lag between the time the officers realized Sallenger was unconscious and the time they began to administer medical aid. As support, the Estate relied on a transcript from the recording of the calls made on the police radio during the course of this incident. The transcript reflected that at 2:15 a.m. a radio call was made from an unidentified officer who said, "white male, late 30's [sic], unconscious, unresponsive." It also reflects a radio call from Lieutenant Bridges reporting, "I'm out at the scene." This call is logged at 2:22 a.m. The Estate inferred from the timing of these radio calls that the officers on the scene realized Sallenger was unconscious at 2:15 a.m.-seven minutes before Lieutenant Bridges arrived-but did nothing.

Lieutenant Bridges testified, however, that it would be wrong to equate the logged time of his radio call to the actual moment he arrived at the scene. Events were chaotic and moving rapidly, and when he arrived, his attention was focused on assisting the officers at the scene; the time of his radio call reflected only the point in time at which he paused to call in his arrival to the dispatcher.

Under the Fourth Amendment's objective reasonableness standard, four criteria are examined to determine whether officers responded reasonably to a detainee's need for medical care: (1) the officer's notice of the detainee's need for medical attention; (2) the seriousness of the need; (3) the nature or scope of the required treatment; and (4) any countervailing police interests, e.g., the need to prevent the destruction of evidence, or other similar law-enforcement interest. The Estate argued the record supported an inference that there was a seven-minute gap between the time the officers realized Sallenger was not breathing and the time they provided medical care, and that this was unreasonable given the seriousness of the medical need.

Querrey & Harrow Elects Kevin Casey and Michele Oshman as Shareholders

Querrey & Harrow is pleased to announce that **Kevin M. Casey** and **Michele T. Oshman** were elected in January as shareholders of the firm.

Kevin M. Casey concentrates his practice in general litigation. Currently, Mr. Casey handles claims involving premises liability, workers' compensation, and construction litigation. Mr. Casey also has extensive experience in handling matters involving civil rights, equine liability and municipal law/community matters. Mr. Casey is a member of Chicago Bar Association and Illinois State Bar Association.

Michele T. Oshman concentrates her practice in the areas of insurance coverage, appeals, and complex defense litigation. She has represented the interests of insurance companies in state and federal courts throughout the country. Ms. Oshman is a member of the Defense Research Institute and The Armadillo Club.

The court found the record did not support any inference of a seven-minute gap. The court noted all the witnesses testified consistently, even the main witness for the Estate, that as soon as the officers realized Sallenger was not breathing, they removed the hobble and began administering medical care. The logged time of Lieutenant Bridges' call was insufficient to undermine this, given his explanation that events on the scene were chaotic, and it would be wrong to equate the time of his call with the exact moment he arrived. Accordingly, the Appellate Court upheld the lower court's summary judgment ruling in favor of the officers on the Fourth Amendment medical care claim.

The Estate's *Monell* claim was based on the City allowing the officers to use the hobble without training them on how to do so. The court noted that a municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee. According to the court, the two alleged constitutional violations that might have formed the basis for *Monell* liability were (1) the claim that the officers used excessive force against Sallenger, resulting primarily from their alleged misuse of the hobble; and (2) the claim that the officers inadequately responded to his medical needs during the arrest.

However, the court noted that all officers were cleared of any constitutional wrongdoing on an excessive-force claim following jury trials, and the Estate did not challenge these verdicts on appeal. The court further found that the medical-care claim against the officers could not provide an alternative basis for *Monell* liability, as the officers' conduct did not violate the Fourth Amendment. Finding no underlying constitutional violation, the Appellate Court upheld the lower court's grant of summary judgment in favor of the City.

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***Jason Callicoat**, an associate in our Chicago office, concentrates his practice in municipal liability and construction law, defending municipalities in civil rights litigation and defending construction companies in injury cases and breach of contract litigation. He also handles mechanics liens and contract suits on behalf of construction companies that have not been paid for work they performed.*

Jason edits the environmental construction newsletter "Green Space Today," and is a regular contributor to the newsletter "Construction Law Quarterly." He has previous litigation experience in the areas of construction injury, insurance coverage, and workers' compensation.

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Congratulations to Querrey & Harrow's "Super Lawyers" and "Rising Stars"

Four Querrey & Harrow shareholders were selected for inclusion as "Super Lawyers" for 2011. Congrats go to: **Daniel F. Gallagher** - Personal Injury Defense: General; **Robert P. Huebsch** - Personal Injury Defense: Medical Malpractice; **Roger Littman** - Personal Injury Defense: Medical Malpractice; and **Bruce Schoumacher** - Construction/Surety.

Chicago shareholders **Cynthia Garcia** and **Jennifer Medenwald Turiello** along with Chicago associate **Stacey Atkins,** have been selected for inclusion on the Illinois Rising Stars 2011 list, a division of Illinois Super Lawyers. They are among less than 2.5 percent of Illinois attorneys to receive the honor each year.

Premises Liability Update:
Open and Obvious Danger Rule Defeats Store Patron's Claim

By: Jonathan E. Irwin – Chicago office

The open and obvious doctrine is commonly used as a defense in premises liability cases. This doctrine is an exception to the general rule that a duty to exercise reasonable care is owed by a premises owner to protect its invitees from a dangerous condition on the land which presents an unreasonable risk of harm. In the recent case of *Kleiber v. Freeport Farm & Fleet, Inc.*, 2010 WL 5020371, the Third District Appellate Court upheld a trial court's granting of summary judgment against a patron who brought suit against a store for injuries she sustained when she fell and broke her leg on the store's property based on the open and obvious danger rule.

The plaintiff and her husband went shopping at the Farm & Fleet Store to purchase bags of top soil. To obtain the bags of top soil, the plaintiff walked across an empty wooden pallet that was lying on the ground located outside the front of the store. The plaintiff picked up a bag of top soil and had turned back to go across the pallet to her vehicle when her foot went through one of the slats in the pallet causing her to fall and sustain injury to her leg. The plaintiff subsequently filed a one count complaint against the store based upon premises liability.

At her deposition, the plaintiff testified that the top soil that they were going to purchase was located outside the front of the store on pallets. The plaintiff and her husband pulled their truck directly in front of the store to load the top soil into the truck. The plaintiff did not speak to a store employee before trying to load the top soil and did not request any assistance in loading the top soil. There was an empty pallet on the ground in front of the pallet containing the top soil. The plaintiff testified that she walked directly to the bags of top soil over the empty pallet. The plaintiff also admitted that there was nothing on the left side of the empty pallet in front of the full pallet of top soil which prevented her from accessing the back pallet from the side.

In her deposition, the plaintiff went on to acknowledge that what caused her to fall was that her foot went into the space of the pallet causing her to loose her balance and that if she had been looking at where she was walking, she would not have chosen to step into the space of the pallet. The plaintiff further testified that as she approached the top soil from over the empty pallet, she was aware that there were spaces between the boards on the pallet.

Littman Defeats Claim Alleging Failure to Diagnose Melanoma

Roger Littman obtained vindication for an internist sued for failing to diagnose melanoma arising from a spot beneath a toenail. Following treating plaintiff for a month for this condition with antibiotics, Roger's defendant doctor referred the plaintiff to a podiatrist, who was also sued. Plaintiff claimed that the persistence of the lesion over several appointments should have resulted in a biopsy or referral to a dermatologist. Instead, after the referral took place, the internist thought the problem was taken care of and left the patient's feet in the podiatrist's hands.

Facing an expert he had used in a prior trial, Roger researched experts used by his opponent and responded by hiring an expert that plaintiff counsel's office had used several times. Instead of the $12.8 million requested by plaintiff, the jury awarded a verdict in favor of all defendants.

Following her deposition, the store filed a summary judgment motion asserting that the plaintiff could not show that any defective condition of the wooden pallet caused her injury. The store further argued that it owed no duty to plaintiff since the danger of stepping into an open slat of the wooden pallet was an open and obvious condition. On appeal, the plaintiff did not dispute that the pallet in question presented an open and obvious danger, but argued that the trial court erred in granting summary judgment because the evidence presented a genuine issue of material fact as to whether the distraction or deliberate-encounter exception to the open and obvious danger rule applied in the present case.

Additionally, the plaintiff argued, for the first time on appeal, that the granting of the summary judgment motion was premature. However, the court held that this argument was forfeited by the plaintiff because she had failed to request a continuance of the summary judgment hearing and had failed to file a Supreme Court Rule 191(b) affidavit attesting that she needed to conduct additional discovery in order to respond to the summary judgment motion in the trial court.

On appeal, the court noted that for the plaintiff to prevail on her negligence claim against the store, she must prove that the store owed a duty of care to the plaintiff. In making a determination as to whether such a duty is owed, the court stated that the following factors should be considered:

1) the reasonable foreseeability of injury to another;

2) the reasonable likelihood of injury;

3) the magnitude of the burden that guarding against injury places on the defendant; and

4) the consequences of placing that burden on the defendant.

As to the first factor, the court noted that whether the injury is reasonably foreseeable is determined pursuant to Section 343 of the Restatement (Second) of Torts which sets forth the general rule on the duty of care owed by possessors of land to invitees. Section 343 of the Restatement provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> a. knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees; and
>
> b. should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
>
> c. fails to exercise reasonable care to protect them against the danger."

The court noted that there are two limited exceptions to the open and obvious danger rule which may apply under certain circumstances when the possessor of land has reason to anticipate or expect that an injury will occur to an invitee, despite the open and obvious nature of the danger. The first exception is the distraction exception where the open and obvious rule will not apply if the possessor of land has reason to anticipate or expect that his invitees' attention will be distracted such that the invitee will fail to discover the open and obvious danger or will forget about the danger or will fail to protect herself from the danger. The second exception in which the open and obvious danger rule will not apply is where the possessor of land has reason to anticipate or expect that the invitee will proceed to encounter an open and obvious danger because, to a reasonable person in the invitee's position, the advantages of doing so outweigh the apparent risk.

As to the distraction exception, the court noted that the store had no reason to expect that the plaintiff would be distracted, that she would fail to see the holes in the pallet and would forget about the holes in the pallet, or would fail to protect herself from the danger posed by the holes in the pallet. The court in reaching this

determination found that the plaintiff herself testified that she saw the pallet and the holes in the pallet, that she recognized the size of the pallet, and how high the pallet was off the ground. The court concluded that the plaintiff's own testimony established that she was not distracted and was simply not looking where she was going such that the distraction exception to the open and obvious danger rule did not apply.

The court further found that the deliberate-encounter exception did not apply because the plaintiff admitted at her deposition that she did not go into the store to seek assistance and there was no evidence that the plaintiff had no other option available to her to obtain the bags of top soil. Additionally, the court noted that the deliberate-encounter exception generally applies to employment situations where the plaintiff makes a deliberate choice, due to an economic reason, to encounter the hazard, such as a job requirement.

After concluding that the plaintiff's injury was not reasonably foreseeable, the court turned its consideration to the remaining three factors in the duty analysis. As to the likelihood of the injury, the court found that the likelihood of an injury is generally considered to be slight when a condition is open and obvious because it is assumed that a person encountering the condition will appreciate and avoid the risks it presents.

As to the magnitude of and the consequences of placing the burden upon the store, the court noted that the store would bear a great burden if a duty with regard to the pallet were placed upon it. The court held that it would be unreasonable to impose upon the store a duty which required the store to have an employee stationed outside the store to specifically monitor the pallets in question and to immediately remove any pallets that started to run low or became empty to avoid the risks that a person might try to cross a low or empty pallet. The court found this burden to be unreasonable particularly where the plaintiff never sought assistance from anyone in the store despite having recognized the open and obvious danger.

As the *Kleiber* case demonstrates, the open and obvious defense remains an effective tool to use to defeat a trip-and-fall claim which occurs on a landowner's property. To help ensure that this defense is successful, it is important to ask questions at the plaintiff's deposition which directly address the two exceptions to this defense. While the deposition testimony cited in the *Kleiber* case was found to be sufficient to defeat the plaintiff's claim, it does not appear that the plaintiff was specifically questioned as to whether she was paying attention to what she was doing, and whether she was in any way distracted or forgetful in what she was doing at the time of the accident. Asking these additional questions at a trip-and-fall deposition will further aid the court when ruling on a summary judgment motion which is based on the open and obvious doctrine.

* * *

***Jonathan Irwin**, an associate in our Chicago office, handles class action/mass tort litigation in both state and federal courts on a national basis. He is an experienced trial lawyer and has defended over 90 cases to jury verdict. He has maintained an excellent track record, having obtained either defense verdicts or verdicts below the plaintiff's demand in more than 80% of the cases he has tried.*

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Littman Prevails in Whiteside County Medical Malpractice Trial

A jury in Whiteside County took only three hours to find in favor of **Roger Littman's** ER physician after a 2½ week trial involving claims of failed diagnosis and treatment for uncontrolled hypertension and fatal bleeding of the brain. This, despite evidence the decedent appeared before Roger's client showing signs of highly elevated blood pressure, neck pain, swollen lymph nodes and severe headaches.

Indiana Real Estate Law: Reliance on Sales Disclosure Forms

By: Stacy Vasilak - Merrillville, Indiana office

The law in Indiana since 1881 has been that a "purchaser has no right to rely on the representations of a vendor as to the quality of the property, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities." *Cagney v. Cuson*, 77 Ind. 494, 497 (1881). Indiana courts have followed this rule since that time. As recently as 2009, the Indiana Court of Appeals has held that a purchaser of a home could not sue the seller of the home for fraudulent misrepresentations even if those representations operated as an inducement to purchase the property. See *Dickerson v. Strand*, 904 N.E.2d 711 (Ind. Ct. App. 2009). In *Strand*, the seller completed the sales disclosure form required under Indiana law. On that form, they represented that there were no structural problems with the home. After purchase, the buyers discovered extensive structural damage due to termites. The buyers sued the sellers. The majority affirmed summary judgment for the buyers citing to the *Cagney* case.

Since that time, the Indiana Court of Appeals has issued three separate opinions holding that, with the passage of Ind. Code §32-21-5-7 in 1993, the common law rule that a buyer cannot rely on the seller's representation regarding the absence of defects in those items specifically included in Ind. Code §32-21-5-7(1) has been abrogated. See *Vanderwier v. Baker*, 937 N.E.2d 396 (Ind. Ct. App. 2010); *Hizer v Holt*, 937 N.E.2d 1 (Ind. Ct. App. 2010); and *Wise v. Hays, et al*, (Ind. Ct. App. 2011). A seller can now be held liable for any misrepresentation on the sales disclosure form if the seller had actual knowledge of that misrepresentation at the time the form was completed.

The Court of Appeals issued its most recent opinion in a string of opinions dated February 15, 2011. In *Wise*, the purchasers completed the sales disclosure form indicating that there were no structural problems with the building, that they had not received any notices from any governmental or quasi-governmental agencies affecting the property, and that the property was not in a flood plain. In addition, the buyers specifically asked the seller questions about the property such as where on the property the wetlands were located, whether the wetlands were usable and whether the wetlands were registered. The seller noted that the property could be developed for additional residential housing.

The purchase agreement allowed the buyers to obtain an inspection and provided that the contract could be terminated if the inspection revealed a major defect that the sellers were unwilling or unable to correct. The buyers purchased the property after inspection by a licensed home inspector. After the purchase, the buyers began to have some concerns about the residence and surrounding property.

During the investigation, the buyers obtained correspondence from the enforcement branch of the Army Corp of Engineers evidencing that the seller was violating the Clean Water Act and that the wetlands on the property might affect development. In addition, a professional engineer inspected the house and found that there were numerous code violations including noticeably cracked drywall joints in the bedroom. In addition, the engineer noted he could press on the wall and feel it move and see the drywall flex which indicated that the wall corners were not structurally bound together. It was also noted that the buyer could feel the wall move on a windy night. There were also other noticeable, long standing problems that the engineer noted.

The buyers sued the seller for fraud and negligence alleging that the seller knowingly misrepresented certain things on the sales disclosure form in addition to other allegations. The trial court dismissed the case on seller's motion.

On appeal, the Court of Appeals held that since the sales disclosure statutes specifically state

that a seller can be held liable under certain circumstances the common law rule that buyers cannot rely on representations by sellers was no longer valid. Specifically, the court held that a seller may be liable for any misrepresentation on the sales disclosure form if the seller had actual knowledge of that misrepresentation at the time the form was completed. The Court of Appeals found that there was sufficient evidence before the court to allow the matter to proceed to trial.

Therefore, sellers must be sure that they properly fill out the sales disclosures form in transactions involving residential real estate. To improperly complete the form or fail to acknowledge a defect in the property of which they have actual knowledge, could lead to the imposition of liability costing the seller not only the actual damages incurred but also attorney fees and potentially punitive damages.

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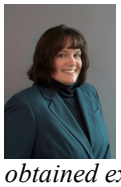

***Stacy Vasilak**, an associate in our Merrillville, Indiana office, concentrates her practice in general litigation and arbitration, with an emphasis in auto and premises liability. She previously obtained experience in first party claims, automobile liability, premises liability, products liability, construction claims, bad faith claims, and insurance coverage. She also has experience in class actions and in drafting appellate briefs for the Indiana Court of Appeals, the Indiana Supreme Court, and the Seventh Circuit Court of Appeals.*

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SEMINARS/EVENTS

Chicagoland Chamber Trade Show
Chicago, Illinois - March 16, 2011

On March 16, 2011, the firm will exhibit at the Chicagoland Chamber of Commerce Trade Show, which nearly 500 businesses attend. The show runs from 5 pm to 7 pm and we have additional tickets available through our table registration. Please contact Julie Heinzel at jheinzel@querrey.com if you wish to attend the show.

Medical Records Law in Illinois
Tinley Park, Illinois August 2, 2011

On August 2, 2011, Jamie Waynee, Shannon Holbrook, and Anton Marqui will present a one-day seminar entitled "**Medical Records Law in Illinois**" in conjunction with Lorman Education Services. This seminar is designed for medical records directors, health information directors, business managers, office managers, hospital administrators, compliance directors, nurses, social workers, release of records professionals and attorneys.

The seminar will cover the types of medical records, statutes and regulations, maintenance of the record, including ownership and retention, confidentiality and access. Registration information will be posted early this summer at lorman.com.

If you wish to be notified when registration opens, please contact Amy Kozy at akozy@querrey.com.