A Monthly Legal Newsletter from

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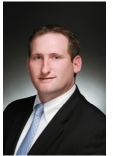

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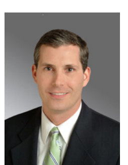
By: **Patrick Connelly** - Chicago, Illinois



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Litigation Update:
Supreme Court Decision Refines Approach To Determining Civil Rights Fee Awards In Mixed Frivolous and Non-Frivilous Claim Cases

By: Terrence Guolee - Chicago office

In *Fox v. Vice*, the United States Supreme Court, in a thirteen-page unanimous opinion authored by Justice Kagan on June 6, 2011, held that when a civil rights lawsuit under Section 1983 includes both frivolous and non-frivolous claims, a court may award reasonable attorney's fees to a defendant for costs that it would not have incurred but for the frivolous claims.

The case began in 2005, when petitioner Ricky Fox challenged the incumbent police chief in Vinton, Louisiana, Billy Ray Vice. Despite use of what Fox describes as "dirty tricks" in the campaign for police chief, Fox won the election. Also, Vice was later convicted of criminal extortion for his conduct in the campaign. Following the campaign, Fox filed a lawsuit in state court against Vice, alleging both state-law claims such as defamation and a federal civil rights claims.

Following removal of the case to federal court and discovery, Vice filed a motion for summary judgment on Fox's federal claims. By this point, even Fox agreed the civil rights claims were not valid. The district court dismissed the civil rights claims with prejudice and remanded the case to state court. In so doing, it noted that the work done by Vice's attorneys could be used to defend him against the remaining claims.

Vice then filed a motion seeking attorney's fees under 42 U.S.C. § 1988. The district court granted the motion and awarded Vice fees for all of the work that his attorneys had done in the case, even though Fox's state-law claims remained ongoing in state court. The Fifth Circuit affirmed, agreeing with the district court on appeal that the litigation had focused on the frivolous federal claims.

However, on review before the United States Supreme Court, the Court vacated the Fifth Circuit's decision and remanded the case to the district court for further proceedings. In so doing, the Court restated the understanding that prevailing defendants can recover attorney's fees in civil rights cases when a plaintiff's claim is frivolous, reasoning that fee awards are consistent with protecting defendants "from burdensome litigation having no legal or factual basis." The Court noted that this was the purpose of Section 1988.

The Court then turned to the much more difficult question: When a case involves a mix of frivolous and non-frivolous claims, how should courts allocate attorney's fees for work that helps defend against both sets of claims? The Court rejected, without much discussion, Fox's argument that a defendant who prevails on a federal civil rights claim that is deemed frivolous can never receive fees if the claim is intertwined with non-frivolous claims. The Court also rejected Vice's argument that fees should be awarded for work that is "fairly attributable" to the frivolous claims, describing it as "an empty and amorphous test" that is "in truth no standard at all."

Bream Receives JPH Humanitarian of the Year Award

Congratulations to Q&H shareholder **Jim Bream** who received the Humanitarian of the Year award from the Jackson Park Hospital on June 4, 2011. This award is given to an individual who devotes his time and efforts to the health care mission of Jackson Park Hospital and the communities it serves. This is a well deserved honor. Well done Jim!

Instead, the Court applied a "but for" test:

> Section 1988 permits the defendant to receive only the portion of his fees that he would not have paid but for the frivolous claim.

Stated differently:

"[i]f the defendant would have incurred [fees] anyway, to defend against non-frivolous claims" - e.g. a deposition addressing both frivolous and *non*-frivolous claims, which the attorney would have taken even if the frivolous claims were not included – "then a court has no basis for transferring the expense to the plaintiff."

Such a test, the Court explained, is appropriate when "the defendant has never shouldered the burden that Congress, in enacting §1988, wanted to relieve."

Having stated the "but for" proximate cause test, the Court then clarified that prevailing defendants may, in some circumstances, recover fees arising from work relating to both frivolous and non-frivolous claims.

For example, when the frivolous claims prompt the removal of the case to federal court, thereby increasing the costs of the litigation, or when a defendant can demonstrate "that a frivolous claim involved a specialized area that reasonably caused him to hire more expensive counsel for the entire case," fees for work on the "non-frivilous" claims can be awarded. Likewise, the Court gave district courts significant discretion to achieve what it described as "the essential goal in shifting fees" ... "to do rough justice." By this, meaning that the appellate courts should not demand district courts apply precise mathematical accountings of the fees in issuing fee awards.

The Court then turned to the application of its new standard to the case before it. It noted the likelihood that – as the district court suggested – Vice would have incurred many of the same legal fees even if Fox had not pressed the frivolous claims. Because the district court's decision, the Court emphasized, "failed to take proper account of this overlap between the frivolous and non-frivolous claims," the Court sent the case back to the lower court for further proceedings. Given the Court's opinion, it seems likely that Fox – although not the "prevailing defendant" – will fare significantly better when the fee award is recalculated.

* * *

***Terrence Guolee**, a shareholder in our Chicago office, has successfully represented defendants, plaintiffs and carriers in dozens of complex, multimillion dollar claims covering a wide area of facts and law, in both state and federal court. As part of his practice, Terrence represents municipalities, insurance carriers, claims administrators and companies in cases involving attorney fee disputes and federal court fee petition matters.*

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Guolee Hosts 10th Annual Camp for Adoptive Families

Congrats to Chicago office shareholder **Terrence Guolee** for his 10th year as a host of the Midwest I-Child Heritage Camp in Green Lake, Wisconsin (http://www.mwihc.org). Every summer the camp serves dozens of families from throughout the Midwest and elsewhere who have adopted from India and neighboring countries, as well as domestically.

Real Estate Update: Court Expands Reach of Debt Collection Act

By: John M. Brom - Chicago office

The recent 7th Circuit decision in *Carter v. AMC, LLC*, No. 10-3184 (7th Cir. 2011), determines when management agents for landlords and real estate property owners are considered to be debt collectors under the Fair Debt Collection Practices Act (FDCPA) and therefore, subject to its requirements.

Management agents for landlords and real estate property owners can potentially be considered a debt collector under the FDCPA and therefore, subject to its requirements. The FDCPA distinguishes between "debt collectors" (who are covered by the Act) and "creditors" (who generally are not covered by the Act). The term "debt collector" is defined as:

> any person ... in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

A "creditor," on the other hand, is broadly defined as one who "offers or extends credit creating a debt or to whom a debt is owed." A creditor who is collecting or attempting to collect his own debt is excluded from the definition of "debt collector" with one exception: the term "debt collector" includes "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."

Management agents are debt collectors subject to the FDCPA when they attempt to collect a debt from a tenant who was in default prior to the management agent being hired by the landlord or owner. Management agents are not debt collectors under the FDCPA when they attempt to collect a debt from a tenant who defaulted after the management agent was hired by the landlord or owner. *Carter v. AMC, LLC*, No. 10-3184 (7th Cir. 2011).

* * *

***John Brom**, a shareholder in our Chicago office and Chairperson of our Creditors' Remedies Practice Group, has over 15 years of experience in the areas of Bankruptcy litigation, representation of business entities and corporations, corporate and LLC formation, partnership formation, licensing and regulatory compliance, commercial litigation, contract negotiation and drafting and real estate issues.*

If you have questions regarding the impact of this decision, please contact John via jbrom@querrey.com, or via 312-540-7146.

Q&H Applauds Its Most Successful Misericordia Campaign

For the sixth year running, Querrey & Harrow surpassed its fundraising goal for Misericordia! This year our volunteers collected $9,723.96, the most ever. Even better news is that Misericordia met its goal of raising $1.2 million dollars over this year's Candy Days.

We are especially grateful to Sean Murphy and the management of 175 W. Jackson (our Chicago office building) for allowing us to set up a fundraising home base in the main lobby. This year was extra special because we welcomed follow building tenants Carnow Conibear and Richard Bennett Custom Tailors to our volunteer team. Likewise, lobby restaurants Sopraffina and Potbelly graciously accepted donations in lieu of tips for Misericordia.

Querrey & Harrow salutes all of its fabulous attorneys and staff that worked hard to make a difference in the lives of the 600 children and adults who call Misericordia home.

Municipal Law Update: Illinois Supreme Court Does Away With the "General" Willful and Wanton Theory

By: Patrick Connelly - Chicago office

One of the most important protections that municipalities and their employees have is the Illinois Tort Immunity Act ("the Act") (745 ILCS 10/1-101 et seq). A recent Illinois Supreme Court decision has clarified a widely held misconception that willful and wanton conduct is an exception to all the blanket immunities espoused in the Act. In *Ries v. City of Chicago*, No. 109541, the court held that the general willful and wanton exceptions found in Section 2-202 of the Act cannot be read into other Sections of the Act that do not contain them.

In *Reis*, plaintiffs, Christopher Reis and Michael Martinez were injured when Demario Lowe stole a police vehilcle, ran a red light, and crashed into their vehicle. Lowe was placed into the squad car by Chicago Police Officer Sergio Oliva after Oliva learned Lowe was attempting to flee the scene of an accident. Officer Oliva did not handcuff Lowe and left the keys in the ignition. The case ultimately went to jury against the City only, and the jury entered a verdict in excess of $4,000,000 for plaintiffs. The Illinois appellate court reversed the verdict and determined, among other things, that the City was entitled to a judgment notwithstanding the verdict as it was immune from liability pursuant to section 4-106(b) of the Act, which immunizes local public entities and their employees from liability for injuries inflicted by escaping petitioners.

The court initially considered plaintiffs' argument that that since Lowe, the driver of the vehicle, was not actually a prisoner there could be no immunity under Section 4-106(b). That section provides that "Neither a local public entity nor a public employee is liable for:…(b) Any injury inflicted by an escaped or escaping prisoner." 745 ILCS 10/4-106(b). Moreover, the court recognized that the Act does not require a formal arrest or imprisonment, but rather defines "prisoner" "as a person held in custody." 745 ILCS 10/4-101. As all civil rights attorneys know, the definition of 'custody' is fluent and must be determined on a case by case basis. Here, the court found that Lowe qualified as prisoner under the Act the moment Officer Oliva placed Lowe into the back of a squad car, as a reasonable person in such a situation would not feel free to leave at that point.

Although the court noted that both Sections 2-202 (willful and wanton exception) and 4-106(b) (blanket immunity for escaping prisoners) could apply based on the facts of this case, it ultimately found that Section 4-106(b) was controlling as it was the more specifically applicable immunity. In so finding, the court cited to *Murray v. Chicago Youth Center*, 224 Ill.2d 213, 233-34 (2007) for the proposition that a statute that is particular and relates to only one subject will prevail over one that applies to cases generally. Here, Section 4-106(b) dealt specifically with immunity for injuries inflicted by escaping prisoners while Section 2-202 is a general section applying to immunity for acts or omissions in the execution or enforcement of any law. Accordingly, the court applied the more specific Section 4-106(b) which contains no exception for willful and wanton conduct.

In June, Chicago office Of Counsel **Leonard Rubin** once again chaired the Practising Law Institute's annual seminar on Understanding Copyright Law in the Data Era. Len led the all-day sessions on the applicability of copyright law to emerging Internet problems, as well as attempts to forecast problems relating to protection of artistic property in the electronic environment.

The court then turned to the Plaintiffs' argument that Section 2-202's willful and wanton exception applied generally to the immunities otherwise granted to officers and municipalities in the Act. The Plaintiffs' argument for a general willful and wanton exception was based on the holding in *Doe v. Calumet City*, 161 Ill.2d 237 (1994), which did in fact find that willful and wanton misconduct is an exception to the immunities granted in the Act. However, the court was unmoved by the Plaintiffs' reliance on *Doe* and instead focused on the line of cases since *Doe* which have specifically held that where a tort immunity provision does not contain an exception for willful and wanton misconduct, then no such exception exists. See *In re Chicago Flood Litigation*, 176 Ill.2d 179 (1997); *Village of Bloomingdale v. CDG Enterprises*, 196 Ill.2d 484 (2001); *Harinek v. 161 North Clark Street Ltd Partnership*, 181 Ill.2d 335, (1998); *DeSmet v. County of Rock Island*, 219 Ill. 2d 497 (2006).

After mentioning the relevant case law essentially overturning *Doe* since *Chicago Flood*, the court did the obvious and found that *Doe* was no longer good law and, in doing so, made it abundantly clear that the willful and wanton exception may not be read into those immunities where no such exception is mentioned. Thus, the court affirmed the ruling of the appellate court granting a judgment notwithstanding the verdict for the City.

The *Reis* decision is an important one for Illinois municipalities as it has finally done away with the theory that willful and wanton conduct serves as a general exception to all the immunities granted in the Illinois Tort Immunity Act. In the future, Illinois municipalities will no longer have to litigate the factually intense issue of willful and wanton conduct if it can assert an immunity which does not specifically provide for the willful and wanton exception.

* * *

***Patrick Connelly**, an associate in our Chicago office, concentrates his practice in municipal defense and general litigation. He has successfully defended a number of §1983 lawsuits for municipalities, including the Cook County Sheriff's Office and the City of Aurora. In addition to defending §1983 suits, Mr. Connelly provides counsel to our municipal clients on the issues they encounter daily, including tax issues, ordinance adoption, and allocation of federal funding.*

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International Municipal Lawyers Association Annual Conference
Chicago Hilton Hotel - September 11-14, 2011

Chicago office shareholders **Dan Gallagher**, **Terrence Guolee**, **Larry Kowalczyk** and **Paul O'Grady** will each be presenters at the International Municipal Lawyers Association's annual conference, September 11-14, 2011 in Chicago, Illinois.

Click here to register for this excellent conference on legal issues facing municipal entities throughout the United States and Canada.

http://www.imla.org/index.php?option=com_content&task=view&id=137&Itemid=353

Medical Malpractice Update: Petrillo - Medical Clinic Employees Whose Care Is Not At Issue May Not Communicate *Ex Parte* With Counsel For Medical Clinic

By: Shannon E. Holbrook – Chicago office

In *Aylward v. Settecase*, 2011 WL 1679845 (1st Dist. April 29, 2011), the First District Appellate Court addressed the issue of whether legal counsel for a defendant medical clinic could communicate *ex parte* with employees of the clinic who were not named as defendants in the plaintiff's lawsuit.

In the case, the plaintiff filed a medical malpractice action against his primary care physician, Dr. Settecase, and Dr. Settecase's employer, Midwest Physician Group, Ltd. (MPG), alleging that the defendants failed to timely diagnose his lung cancer from 2005 to 2007. Prior to the plaintiff's lawsuit, the plaintiff received care and treatment from several physicians and other employees of MPG who were not named as defendants in the plaintiff's action. In his original complaint, the plaintiff broadly alleged that MPG provided medical care to the plaintiff "through its agents, servants, and/or employees." The plaintiff also attached to his original complaint a report of a reviewing physician pursuant to 735 ILCS 5/2-622, which criticized only Dr. Settecase for his alleged failure to order an appropriate imaging study to diagnose the plaintiff's lung cancer.

During the course of discovery, counsel for MPG sought permission from the plaintiff's counsel to discuss the plaintiff's care and treatment, outside of a deposition, with various members of its staff who were involved in the plaintiff's medical treatment at MPG, but who were not named as defendants in the plaintiff's complaint. The plaintiff objected. While the motion was pending, the plaintiff filed an amended complaint in which he removed the allegations that other agents, servants, and/or employees were involved in the plaintiff's treatment and alleged that the plaintiff's care and treatment was provided by Dr. Settecase. The trial court ultimately denied MPG's motion and the issue was certified for an interlocutory appeal.

On appeal, MPG argued that its counsel should be allowed to communicate *ex parte* with nonparty employees of MPG, even though those employees' actions are not currently alleged to have been negligent, since the plaintiff could later amend his complaint to assert claims of negligence based on the actions of those employees pursuant to the liberalized standard for amending a complaint as articulated by the Illinois Supreme Court in *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343 (2008). The plaintiff argued that the risk of MPG facing new claims for vicarious liability for other employees in the future and the potential prejudice resulting from the inability to communicate with its own employees were purely hypothetical based on the plaintiff's current allegations.

In reaching its decision, the appellate court discussed the history of the doctrine governing a defendant's *ex parte* communications with a plaintiff's treating physician, beginning with the seminal 1986 case, *Petrillo v. Syntex Laboratories, Inc.*, which held that the defense counsel was prohibited from *ex parte* communications with the plaintiff's treating physician where the physician's conduct was not the basis of the defendant's liability. The court further noted the evolution of the case law following *Petrillo*, in which the courts have expressly permitted *ex parte* communications between counsel for institutional healthcare defendants and their healthcare employees through whom the institution may be vicariously liable.

The appellate court then upheld the trial court's denial of MPG's motion, holding that the current allegations related only to the defendant physician's conduct and that the relaxed standard for amending pleadings adopted by *Porter* did not justify abandoning the established precedents of *Petrillo* and its progeny, particularly since the prejudice that a subsequent

amended complaint might cause the defendant was purely hypothetical at the time MPG filed its motion. The court further reasoned that the trial judge has the discretion to deny a plaintiff's motion to amend the complaint to add new allegations if the request to amend is made too close to trial, such that there were safeguards in place to prevent the potential unfair prejudice or surprise raised by MPG.

While the court in *Aylward* upheld established precedent designed to protect the sanctity of the physician-patient relationship, it should be noted that the case involved a medical clinic and did not address the right of counsel for a hospital defendant to engage in certain *ex parte* communications with its employees and agents. Communications between legal counsel for a hospital and the hospital's employees and agents are governed by the Hospital Licensing Act, 210 ILCS 85/6.17. The Act provides that the hospital's medical staff members and the hospital's agents and employees may communicate, at any time and in any fashion, with legal counsel for the hospital concerning the provisions of the Act and any care or treatment that they provided or assisted in providing to any patient within the scope of their employment or affiliation with the hospital.

The Act contains a separate provision regarding the hospital's counsel's communications with members of the hospital's medical staff after a complaint for medical negligence is served. After a medical malpractice complaint is filed, the Act provides that members of the hospital's medical staff who are actual, or alleged, employees or agents of the hospital may continue to communicate with the hospital's legal counsel concerning the claim alleged in the complaint without the consent of the patient or the necessity of formal discovery. Thus, had MPG been a hospital facility licensed pursuant to the Hospital Licensing Act, its counsel could have permissibly communicated with its own employees or agents, including its physician employees, outside of formal discovery regardless of whether the employees' actions served as a basis for the hospital's liability in the litigation.

The *Aylward* case also illustrates several key defense strategies that counsel for hospitals should consider when defending a hospital in a medical malpractice action. When faced with broad allegations that the hospital acted negligently by and through a named physician defendant, but also other unidentified agents and employees, defense counsel generally should seek to strike the vague allegations of agency for failure to state a cause of action upon which relief may be granted. When faced with such a motion, the plaintiff's counsel will often agree to limit the allegations to the specifically identified healthcare provider in the complaint or will further specify the healthcare providers whose care is at issue. This result serves to limit the scope of the allegations in the action and also identifies the individuals, or class of healthcare providers, that the hospital's counsel may wish to interview. In a case where the hospital denies that the healthcare provider is its actual agent or employee, the Hospital Licensing Act also affords the hospital's counsel the opportunity to communicate with its alleged agents in order to defend against the allegations of negligence without conceding that the healthcare provider is an agent of the hospital.

In a case such as *Aylward*, counsel for an institutional client such as a medical clinic should also counsel its client to consider retaining separate counsel to represent the clinic's employees who are not permitted to discuss the case directly with the clinic's counsel in order to protect the employees' interests and to minimize any potential exposure for vicarious liability against the clinic that may arise from the employees' conduct.

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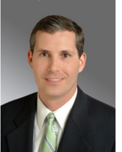

***Shannon Holbrook**, an associate in our Chicago office, concentrates his practice in health care liability where he has significant experience in the defense of medical malpractice claims against hospitals, physicians, and other health care professionals.*

Please contact Shannon via sholbrook@querrey.com, or via 312-540-7642.

Lissa Hamer Scores Two Excellent Results for Her Clients

Congrats to Wheaton, Illinois office shareholder **Lissa Hamer** on obtained two excellent results for her clients this month.

In the first case, a trial held June 14-16, 2011 in Kane County, Lissa defended a client sued by a plaintiff was claiming an operated herniated disc as a result of Lissa's client backing into his car. There were $67,000 in specials on a $100,000 insurance policy.

Two weeks before trial, Lissa learned that her client was sitting in the Kendall County jail on felony aggravated battery charges. His criminal trial was set for the same week as the civil trial and, as such, the felony judge in Kendall would not release Lissa's client on a writ. The civil trial was a "must go," so Lissa was put in the position of admitting negligence.

The plaintiff had had a pre-existing back injury that he claimed had essentially resolved by the time of the incident. However, he had not been previously diagnosed with any herniations. Plaintiff's treating physician diagnosed him with two herniated discs, put him through a course of epidural steroid injections and recommended surgery that was later performed by a neurosurgeon.

Lissa's retained medical expert expert testified live at trial and admitted that, although he did not find any objective evidence of injury and his review of the MRI's did not support a diagnosis of herniation, he would consider reasonable the plaintiff's first visit to plaintiff's treating physician and the three therapy visits right after the accident to be reasonable. Based on this, the trial court judge, of her own volition, directed liability against Lissa's client and left Lissa in a position where all she could argue was against the value of the injury claim.

Plaintiff asked for $241,000 from the jury. Lissa argued that there was no evidence of injury and that her expert was being generous by conceding the one office visit and the therapy. The jury returned a verdict for plaintiff, but awarded zero damages.

In the second case, Lissa was engaged in a binding arbitration where the defendant rear-ended the plaintiff at 55 mph on I-294 because he was distracted by the lights on a police car ahead, involved in a traffic stop (classic rubbernecking). The plaintiff banged her knee on the dash and within 6 weeks of the incident underwent arthroscopic surgery to remove a loose body that had broken loose within the knee. Thereafter, the plaintiff underwent a course of physical therapy and when the pain continued, a series of Orthovisc injections.

Lissa argued that the plaintiff had substantial pre-existing chondromalacia and the plaintiff's treatment was more likely related to those issues rather than acute trauma. That said, Lissa had to conceed that the plaintiff did not have any record of prior knee complaints. As a result, Lissa argued that if the panel found the surgery to be related, then they should limit recovery to just those charges.

The plaintiff's medicals were in excess of $40,000.00. Plaintiff asked for an award of $250,000.00. Regardless, the panel only gave plaintiff $22,500.00 for the cost of the surgery and MRI and $7,500.00 for pain and suffering for a total of $30,000.00.