McKenna Storer

McKENNA LAW UPDATE & NEWS

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GOV. PAT QUINN SIGNS WORKERS' COMPENSATION REFORM LAW

On June 28, 2011, Gov. Pat Quinn signed into law an overhaul of the state's workers' compensation system. Some of the provisions include cutting the fee schedule from 180% to 150% over the amount paid by Medicare for workers' compensation procedures, appointing new arbitrators who would serve for shorter terms, capping the wage differential for permanent injuries instead of allowing payments for life, and allowing employers to prove intoxication as the cause of an injury.

Some of the provisions take effect immediately and others won't come into play until later in the year. Eventually the new provisions should have an effect on the liens that have to be addressed in related tort cases.

VEGAN'S MENTAL ANGUISH MAY WARRANT PUNITIVE DAMAGES

In a very strange First Amendment case, a prisoner brought a claim against the prison system for knowingly serving him food "infused" with animal proteins. The plaintiff alleged that he suffered physical injury and severe mental anguish by the thought of being compelled to consume meat and animal byproducts. In the case of *Boyd v. Wright,* 2011 WL 1790347 (C.D.Ill., 2011), the plaintiff alleged that his religion required him to eat a vegan diet and he sought compensatory and punitive damages.

The Plaintiff presented affidavit evidence through a "vegan diet cook" at the Hill Correctional Institution. The cook stated that he was ordered almost daily by the dietary supervisor to prepare food for the vegan trays that was infused with animal byproducts such as mashed potatoes that contained milk solids and wheat bread that contained whey and soy bits that were mixed with ground turkey meat. The cook further stated that the supervisors ordered the cook to serve half portions to the vegans, to cook the vegan meals in dirty pots and pans that contained dried-on meat and grease, and to never serve the vegans fresh vegetables.

The cook stated that when he asked the supervisors why the vegan food was prepared in this way, the supervisors responded that they "wanted to get a lot of the vegans to stop receiving vegan trays because there were too many vegans on the diet list." Another inmate alleged that the supervisor told him that "the conditions of the vegan diet would remain poor until the inmates who are on the vegan diet stop writing grievances on the diet."

The plaintiff complained that the diet caused him stomach upsets, muscle atrophy and to lose weight. In the Court's opinion, the plaintiff's vague complaints of periodic diarrhea, fatigue, and muscle cramping were too *de minimis* to constitute evidence of physical injury.

The District Court, however, did not decide the issue of whether punitive damages would be available. Under Section 1983, punitive damages may be awarded "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."

Even though the District Court determined that the claim for violation of rights was "plausible," the District Court reserved ruling on punitive damages. Instead, the District Court Judge strongly recommended mediation to resolve the case. Thus, the District Court left open the issue of whether intentionally feeding meat products to a vegan could warrant punitive damages.

This strange case may have some application to civil actions in food alteration cases or where a customer claims he advised a food provider that he was a vegan. However, for now, there are no definitive answers on whether punitive damages would be awarded on such claims.

For further information on this case, contact **Kristin Tauras** at 312.558.3923 or ktauras @mckenna-law.com.

ILLINOIS SUPREME COURT FINDS ERROR IN JURY INSTRUCTION ON PROFESSIONAL NEGLIGENCE

In *Studt v. Sherman Health Systems*, (Docket No. 108182, June 16, 2011), the Illinois Supreme Court held that jury instruction 105.01 (2006) does not accurately state Illinois law on the standard for professional negligence. In the *Studt* case, the plaintiff was seen in the emergency room for abdominal pain but was sent home by the doctors. Two days later her doctor admitted her to the hospital for a surgical consult where her ruptured and gangrenous appendix was removed. She required multiple hospitalizations and surgeries for recurrent infections.

The plaintiff sued the Hospital for professional and institutional negligence and at trial the jury returned a general verdict against the Hospital. The Hospital appealed claiming that instruction 105.01 was an incorrect statement of Illinois law but the Appellate Court upheld the verdict.

In 2006 the wording for jury instruction 105.01 was changed from the standard of care of a "*reasonably well-qualified*" professional to a "*reasonably careful*" professional. The Illinois Supreme Court noted that the skill a professional must exercise is "that special form of competence which is not part of the ordinary equipment of the reasonable man, but is the result of acquired learning and aptitude developed by special training and experience".

The Court held that the changed instruction was incomplete because it contained no reference to the professional's knowledge, skill and care (or ability). In addition, expert testimony is required to establish the standard of care in most professional negligence situations but the 2006 version did not limit the jury's consideration to expert testimony. It would have allowed the jury to consider rules, regulations and bylaws. The Court rejected the Hospital's contention that the instruction also gave confusing directions on whether jurors could use their own personal knowledge in determining the standard of care.

Even though the Court agreed the jury instruction was deficient, it upheld the jury's verdict against the Hospital because it found that only experts had testified on the standard of care at the trial and the jury instructions as a whole did not warrant

reversal. Until a new version of 105.01 is officially released, jury instructions should be carefully reviewed to be sure they are consistent with the Court's opinion in this case.

For further information, contact **Dawn Ehrenberg** at 312.558.3933 or dehrenberg@mckenna-law.com.

A TWIST ON THE ANIMAL CONTROL ACT

When you think of the Illinois Animal Control Act the most common scenario involves a child or a jogger being bitten by a dog. The Act protects these individuals that may not have had any way of knowing or avoiding the risk that the dog posed to them. In a recent opinion by the Fifth District Appellate Court of Illinois in *Kindel v. Tennis et al.* No. 5-10-0403 given on May 25, 2011, the court looks at a different situation involving the Animal Control Act.

In *Kindel*, the plaintiff was injured by a bull which, he alleged, was owned and controlled by Defendants while he was working for them. Plaintiff sued for injuries, alleging negligence and violation of The Animal Control Act. To prevail under the Act, a plaintiff must prove: (1) an injury caused by an animal owned by the defendant; (2) lack of provocation; (3) the peaceable conduct of the injured person; and (4) the presence of the injured person in a place where he has a legal right to be. *Smith v. Lane,* 358 Ill.App.3d 1126 (2005).

The defendants argued that it was part of the plaintiff's job to care for the bull that attacked him and that the bull was in the plaintiff's custody and care at the time of the attack. The plaintiff denied that he had custody and control of the bull.

The trial court focused on the issue of whether the plaintiff qualified as an "owner" of the bull since he was an employee. If so, the plaintiff would be barred from recovery under the Act. In ruling on the defendant's motion to dismiss the Animal Control counts of plaintiff's complaint, the trial court found that plaintiff could not argue that he had no way of knowing the bull posed a risk to him because the Act could not extend to an employee who was working with a farm animal.

Although the Appellate Court did not take a position on the merits of the plaintiff's case, they found that the trial court improperly dismissed the Animal Control Act counts, per Section 2-615 of Code of Civil Procedure. The Appellate Court found that a question of ownership, under the Animal Control Act, is normally a question of fact, to be determined by the trier of fact. In addition, there is no case law that holds that the employee of an owner of an animal is *per se* barred from recovery under the Act. The trial court decision was reversed and the case was remanded for further proceedings.

For further information, contact **Paul Steinhofer** at 312.558.3985 or psteinhofer@mckenna-law.com.

NEW CITATION FORMAT IN ILLINOIS – NOT TYPOS

Beginning this summer, new case citations in Illinois will look vastly different than they have in the past. The Illinois Supreme Court has adopted the public-domain electronic citation system for appellate opinions and is discontinuing publication of the official Illinois Reports and Illinois Appellate Reports. The contract for the official Illinois publications, currently held by West, expires July 31, 2011.

The new electronic publication rule goes into effect on July 1, 2011. For every case published in Illinois, the case will have a public-domain case designator number. For older cases, the old citation format may still be used, but for the cases decided after July 2, 2011, the format will look more like the following citations: Illinois Supreme Court: case name, 2011 IL 102345; Appellate Courts: case name, 2011 IL App (1st)

101234. And the cases will no longer have page numbers, but rather paragraph citations.

There are numerous other citation changes, but trust us to make sure that they are cited accurately, if not oddly, under the new rules. For any questions concerning this new change, please contact **Kristin Tauras** at 312.558.3923 or ktauras@mckenna-law.com.

TRIALS AND CASE DISPOSITIONS

Alexander Sweis prevailed in an arbitration in a motor vehicle accident case. The arbitrators determined that his driver caused the accident as he was poking out into the street from a bank exit when plaintiff drove by. However, the plaintiff was claiming about $5,000.00 in medical bills. Alex was able to show that the plaintiff had been involved in a previous accident 6 weeks earlier and disputed that this second accident caused any injuries to the plaintiff. The arbitrators found in favor of Alex's client on damages and awarded the plaintiff zero.

MCKENNA NEWS

Tom Hayes was recently elected to his 6th term as Arlington Heights Village Trustee and also reappointed as President Pro Tem in the Mayor's absence. Congratulations to Tom!

At the 2011 IDC Annual Meeting, **Margaret Foster** was sworn in for another term as a Director. She was also appointed IDC Diversity Liaison. **Dawn Ehrenberg** received a Meritorious Service Award for her service as Co-Chair of the Medical Liability Committee and **Robert Pisani** received a Meritorious Service Award for his service as Co-Chair of the Product Liability Committee. **Gregory Cochran** was recognized for his service as a Past President.

WELCOME!!

McKenna Storer takes pleasure in announcing that **Alexander Sweis** has joined our Insurance Defense group as an associate. Alex brings strong litigation experience in handling civil litigation matters from pre-suit negotiations through jury verdict. He has first chaired 11 jury trials and over 90 arbitrations in Cook County and the collar counties. He is a 2005 graduate of DePaul University with a B.A. in History and he received his J.D., *cum laude*, from the John Marshall Law School in 2009. Alex is admitted to the bar of Illinois and is actively involved in several bar associations.

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