



McKENNA LAW UPDATE & NEWS

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ILLINOIS SUPREME COURT RULES PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE NURSING HOME CARE ACT FOR A DECEASED RESIDENT

In a decision that has not yet been officially released, the Illinois Supreme Court in *Vincent v. Alden-Park Strathmoor, Inc.*, (Docket No. 110406) ruled that a claim for punitive damages based on allegations of wilful and wanton violations of the Nursing Home Care Act does not survive the death of the nursing home resident on whose behalf the action was brought.

Marjorie Vincent died in December, 2006, at Alden. Her estate filed a three count complaint. Count III, which was brought pursuant to the Survival Act, alleged Alden wilfully and wantonly violated provisions of the Nursing Home Care Act (NHCA) and reserved the right to bring a motion to add punitive damages. The court granted Alden's motion to dismiss which asserted that under the NHCA, punitive damages do not survive the death of the person whose injuries are the basis for an action under the Survival Act and the appellate court affirmed that decision.

The Illinois Supreme Court noted that common law punitive damages are available for wilful and wanton violations of the NHCA and causes of action based on the NHCA survive the death of the nursing home resident. However, it does not follow that punitive damages are recoverable when the resident has died. The Court also noted the

basic principle that the right to seek punitive damages does not survive the death of the injured party.

The Court held that for a punitive damage claim to survive the injured person's death, the award of such damages must be expressly authorized by the statute on which the action is predicated and cited the Public Utility Act as an example where punitive damages did not abate upon the injured party's death. Since the Nursing Home Care Act does not provide for statutory punitive damages, the right to recover those damages was lost once the resident died.

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PLAINTIFF'S USE OF FICTITIOUS NAME RESULTS IN DISMISSAL OF CASE

In *Santiago v. EW Bliss, et al*, No. 08 L 5175, December 21, 2010, (1ST District) the Plaintiff intentionally filed a complaint using a fictitious name, without leave of court to use the fictitious name pursuant to section 2-401(e) of the Code of Civil Procedure, 735 ILCS 5/2-401(e) (West 2010). Following the expiration of the statute of limitations, the Plaintiff filed an amended complaint with the correct plaintiff's name.

The Defendants moved to dismiss the complaint with prejudice as a sanction, or alternatively, on the basis that the amended

complaint was barred by the statute of limitations. The circuit court denied Defendants' motion to dismiss, but observed *sua sponte* that Illinois courts had not considered this issue before and that there was no controlling precedent for the circuit court to consult for guidance.

The circuit court certified the following question for appeal: When an injured plaintiff intentionally files a complaint using a fictitious name, without leave of court to use the fictitious name pursuant to section 2-401 of the Code of Civil Procedure, then subsequent to the expiration of the statute of limitations, files an amended complaint with the correct plaintiff's name, should the court dismiss the cause with prejudice on the motion of a defendant as a sanction or because the limitations period has expired and the amended complaint does not relate back to the initial filing? The Appellate Court answered both parts of the question in the affirmative and remanded the cause to the circuit court for further proceedings.

The Appellate Court held that, in the factual circumstances presented in this case, the circuit court may, in its sound discretion, dismiss the complaint with prejudice as a sanction. The Court determined that the actions taken by this Plaintiff constituted an offense against the integrity of the judicial system. It further reasoned that the availability of this type of sanction was necessary to deter similar offenses against the court in the future. The Appellate Court also stated that the circuit court should look at additional relevant factors when making its decision including which rules of the court the plaintiff violated, whether the defendant has been prejudiced, and whether a lesser sanction is sufficient.

The Court also held that Plaintiff's complaint must be dismissed as time-barred. An

amended pleading may not be filed after the statute of limitations runs unless the new pleading relates back to the original pleading. Plaintiff filed his second amended complaint after the statute of limitations had run, believing that it related back to the timely filed original complaint.

The Appellate Court disagreed. The Court reasoned that Plaintiff's original complaint was a nullity because the improper use of a fictitious name resulted in a suit which was not brought in the name of a natural person, a corporation or a partnership, as required under Illinois law. Therefore, the second amended complaint was the Plaintiff's original pleading, and was filed after the expiration of the applicable statute of limitations. The Court was not persuaded by the Plaintiff's argument that the doctrine of misnomer applied in this case. The misnomer doctrine is not available where a plaintiff intentionally files a complaint in the wrong name.

Santiago addresses an unsettled question of law in Illinois and also provides defendants with a blueprint to obtain dismissal with prejudice when a plaintiff improperly files a complaint under a fictitious name.

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LOSS OF BUSINESS INCOME PROVISION NOT AMBIGUOUS WHEN READ IN CONTEXT WITH THE ENTIRE POLICY

In its decision in *CIMCO Communications, Inc. v. National Fire Insurance Company of Hartford*, __ N.E.2d __, 2011 WL 488746 (1st Dist, 2011), the Court emphasized that in construing an insurance contract it "must assume that every provision was intended to

serve a purpose. Thus, an insurance policy must be considered as a whole; all of the provisions, rather than an isolated part, should be examined to determine whether an ambiguity exists.”

This matter involved an insurance coverage dispute wherein an insured, CIMCO Communications, Inc. (“CIMCO”), sought coverage under a business income provision of a policy issued by National Fire Insurance Company of Hartford (“National Fire”), arising out of a flood and the resulting property damage to CIMCO’s facility. National Fire willingly provided coverage to CIMCO for its claimed losses for a three-month period from the date of the flood until the date its equipment was repaired. However, National Fire refused to pay for any claimed losses beyond the three-month period. It argued that CIMCO was not entitled to recover losses incurred beyond the three-month “period of restoration” under the business income provision of the policy.

The business income provision of the National Fire Policy at issue states as follows:

“We will pay for actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ during the ‘period of restoration.’ * * * We will only pay for loss of Business Income that occurs within 12 consecutive months after the date of direct physical loss or damage.”

CIMCO contended that the above-cited business income provision provided it with coverage for “any and all losses *during* a 12-month period following the date of physical damage, provided that the losses are caused by a necessary suspension of operations during the period of restoration.” National Fire, however, argued that recovery under said business income provision was limited to losses sustained due to necessary suspension of operations during a period of restoration that lasted *no longer than* 12

consecutive months. (Emphasis added) The competing interpretations amounted to a difference of 9 months of claimed losses.

Although the Court noted that on the surface both interpretations appeared to be reasonable based on the language of the business income provision alone, after examining the entire policy it rejected CIMCO’s interpretation. The policy also contained an “extended” business income provision which would have been rendered meaningless if the Court accepted CIMCO’s interpretation.

The Court held that because CIMCO’s interpretation was inconsistent with the policy as a whole, it could not find that interpretation to be reasonable. It went on to state that “[a] policy provision is not rendered ambiguous simply because the parties disagree as to its meaning. Rather, an ambiguity will be found where the policy language is susceptible to more than one reasonable interpretation.” Since CIMCO’s interpretation was not reasonable, there was no ambiguity.

This ruling shows that the court is not willing to accept the insured’s attempt to create an ambiguity for coverage when the clear and plain language of the policy limits coverage for such business income losses.

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TRIALS AND CASE DISPOSITIONS

After a week of trial, it only took the jury 15 minutes to find in favor of **Julie Ramson's** client in a recent medical malpractice trial. The plaintiff claimed that Julie's client had ignored or failed to properly followup on PVCs on the plaintiff's decedent's EKG. Julie was able to show that the PVCs were an isolated occurrence and that the death was due to an entirely unrelated cause. **Dawn Ehrenberg** assisted with the trial.

Sumi Yang obtained a verdict for her client in an arbitration hearing. She represented a motor vehicle driver who was sued for contributory negligence. Sumi successfully argued before the panel of arbitrators that her client was not in any way responsible for the accident. The arbitrators found the other driver 100% responsible for the accident and awarded the three plaintiffs approximately \$18,000.00 in damages, solely against the other driver.

McKENNA NEWS

We are pleased to announce that **Greg Cochran** and **Margaret Foster** have been named by Illinois *Super Lawyers* magazine as two of the top attorneys in Illinois for 2011. Each year, the research team at *Super Lawyers*, a service of Thomson Reuters, undertakes a rigorous multi-phase selection process that includes a statewide

survey of lawyers, independent evaluation of candidates by the attorney-led research staff, a peer review of candidates by practice area, and a good-standing and disciplinary check. Only five percent of the lawyers in the state are named by *Super Lawyers*. Please join us in congratulating Margaret and Greg on this distinction.

McKenna attorneys recognized by Illinois *Super Lawyers* magazine in previous years include **Julie Ramson** and **Tom Lucas**, along with **Greg** and **Margaret**.

Bob Pisani is a co-author of a Monograph titled "Federal Preemption Defenses in Product Liability Suits: A Continuing Evolution" which has just been published in the Illinois Association of Trial Defense Counsel's IDC Quarterly, Vol. 21, No. 1 (2011). This monograph discusses the federal preemption defense and how this defense has evolved over the last 15 years, particularly as it relates to product liability suits. For your convenience, a copy of this Monograph is enclosed. It is also available on our website. If you have any questions about the Monograph, contact Bob at 312.558.3959 or rpisani@mckenna-law.com.

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