



McKENNA LAW UPDATE & NEWS

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WRONGFUL DEATH VIA SUICIDE CLAIM DISMISSED

In *Turcios v. The Debruler Company*, 2015 IL 117962, the Illinois Supreme Court affirmed the trial court's finding that "wrongful death via suicide" is not cognizable in Illinois. In June 2011, Nelsyn Caceras allegedly committed suicide in the apartment he rented with his wife Maria Turcios. Six months later, Turcios filed a complaint against Defendant, The Debruler Company, seeking damages for intentional infliction of emotional distress, wrongful eviction, and breach of contract. Plaintiffs' Complaint was amended by adding counts seeking damages under Illinois' Wrongful Death Act and Survival Act.

Caceras and Turcios entered into a written lease with defendant for an apartment running from May 1, 2011 to April 30, 2012. Ten days into the lease, Caceras received a letter from Defendant purporting to be an official notice of eviction. The notice informed Caceras that construction on the apartment building would begin on June 10. Over the next month, Caceras was given multiple written reminders about the upcoming construction, and the need to vacate the apartment. Caceras was also offered free rent for the period covering June 1-9, and relocation to another unit with free rent for the remainder of June. The couple also received multiple telephone calls from Defendant pressuring them to vacate

the apartment. Caceras and Turcios sought legal advice and were told that their lease was valid, and that their landlord could not unilaterally terminate the lease.

Demolition of the apartment building began shortly after June 10, with Caceras and his family still occupying the apartment. On June 14, Caceras informed his wife that he could not tolerate the situation any longer, but did not know what to do. Caceras committed suicide in the apartment the following day.

In response to Plaintiffs' Complaint, Defendant filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure. As to the Wrongful Death Act and Survival Act claims, Defendant argued that a plaintiff may not recover for a decedent's suicide following a defendant's alleged tortious conduct because suicide is an independent intervening act that the tortfeasor cannot be expected to foresee. Plaintiffs argued in response that the court should follow the trend in other jurisdictions to permit such claims to proceed where the plaintiff can demonstrate that the defendant's intentionally tortious conduct caused severe emotional distress that was a substantial factor in bringing about the suicide.

The trial court granted Defendant's motion to dismiss as to the Wrongful Death Act and Survival Act claims. The

Appellate Court vacated the trial court's order, holding that where a plaintiff can satisfy the elements of the tort of intentional infliction of emotional distress, and the emotional distress is a substantial factor in causing a decedent's suicide, such causes of action are cognizable in Illinois.

The Illinois Supreme Court reversed the Appellate Court's decision on appeal. In doing so, the Court relied upon its decision in *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33 (1994). That case involved claims for breach of fiduciary duty and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Plaintiffs in that case alleged that defendant intentionally misrepresented the nature of a service fee charged in connection with the sale of high-risk foreign options. Plaintiffs sought to recover their full investment losses, along with the service fee. The Court rejected the plaintiffs' argument in *Heinold*, holding that "but for" causation is insufficient to establish an intentional tortfeasor's liability for injury to the plaintiff. To establish liability, the injury must have been foreseeable, and not merely a remote consequence of the defendant's conduct.

In *Turcios*, the Illinois Supreme Court agreed with the Defendant's argument that the holding in *Heinold* applied not just to cases alleging fraud, but to intentional torts generally. Consequently, the Court held that, "Where a plaintiff seeks to recover damages for wrongful death based on the decedent's suicide allegedly brought about through the intentional infliction of

emotional distress, the plaintiff must do more than plead facts which, if proven, would establish that the defendant's conduct was a cause in fact of the suicide. The plaintiff must plead facts which, if proven, would overcome application of the general rule that suicide is deemed unforeseeable as a matter of law. In other words, a plaintiff must plead facts demonstrating that the suicide was foreseeable, *i.e.*, that it was a likely result of the defendant's conduct."

In this case, the Court determined that the Defendant's decision to terminate the lease, and the actions taken by it to remove Plaintiffs from the apartment, did not rise to that level. Therefore, the Court ruled that the Plaintiffs failed to plead sufficient facts to demonstrate that Caceras' suicide was reasonably foreseeable based on the Defendant's conduct in evicting Caceras and his family from the apartment, and the circuit court's judgment was affirmed.

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DEFAMATORY STATEMENTS ON THE INTERNET MAY NOT REMAIN ANONYMOUS AND MAY BE ACTIONABLE

The Illinois Supreme Court's recent decision in *Hadley v. Doe*, 2015 IL 118000, 2015 Ill. LEXIS 750 discusses the application of Illinois Supreme Court Rule 224 to obtain the identity of an anonymous internet commentator who made allegedly defamatory remarks about a candidate to the county board. This case highlights the importance of reviewing the rules and procedural requirements when filing a complaint

when the identity of the defendant needs to be determined. This case also highlights that activities on the internet are not private and comments on the internet should not be written with reckless abandon.

An online newspaper article was written about plaintiff, a candidate for the county board. An anonymous internet subscriber, Fuboy posted the following in the comment section following the article: "Hadley is a Sandusky waiting to be exposed. Check out the view he has of Empire [Elementary School] from his front door." Fuboy also commented: "Anybody know the take of Hadley's suicide attempt? It is kinda 'It's a Wonderful life' with Pottersville winning out. We can just be happy that Stephenson County is fortunate enough to have this guy want to be of 'service' again."

The plaintiff filed a defamation lawsuit. After the suit was filed, the plaintiff issued a subpoena to Comcast, the internet service provider, to disclose Fuboy's identity. The circuit court entered an order directing Comcast to comply with the subpoena and provide the information requested, with the condition that Comcast would have to notify the subscriber and the subscriber would have 21 days to contest the subpoena.

At a hearing on a motion to quash the subpoena to Comcast, the court informed the parties that Illinois Supreme Court Rule 224 – Discovery Before Suit to Identify Responsible Persons and Entities - would be the better procedure to obtain Fuboy's identity. Plaintiff did so and the court ultimately directed Comcast to provide the identification and last known address of the subscriber. The appellate

court affirmed and the case was appealed to the Illinois Supreme Court.

Fuboy argued that plaintiff was not entitled to relief under Rule 224 because the Rule contemplates filing a separate action prior to the commencement of any lawsuit. Fuboy argued the statute of limitations had run because the plaintiff commenced a new lawsuit seeking relief under Rule 224 and thereby plaintiff abandoned his original complaint.

The Court found that the language in Rule 224 that a petitioner "may file an independent action" contemplates a separate action. The Supreme Court also noted that the plaintiff was instructed by the court to pursue Rule 224. Moreover, there is no language in Rule 224 that would require the dismissal of the original complaint. The Rule is silent as to how to proceed when the court erroneously instructs a plaintiff to proceed under Rule 224 after the suit has been filed. The Court found that dismissing the complaint would be too harsh of a sanction. However, the Supreme Court cautioned that the result in this case should not be regarded as approval for invoking Rule 224 after a lawsuit has been filed.

The Supreme Court did agree that for a determination of whether a petitioner has satisfied Rule 224's necessity requirement, the court must evaluate a defamation complaint to determine whether it will withstand a §2-615 motion to dismiss. Under the §2-615 standard, the determination is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, state sufficient facts to establish a cause of action upon which relief may be granted.

To state a cause of action for defamation, it must be shown that the defendant made a false statement about the plaintiff and the defendant made an unprivileged publication of that statement to a third party and the publication caused damages. A statement is defamatory per se if its harm is obvious and apparent on its face. Even if a statement can be classified as being defamatory per se, it will not be actionable if it is reasonably capable of an innocent construction or if it is an expression of opinion.

In this case the court found that Fuboy's statement imputed the commission of a crime to the plaintiff and was defamatory per se. Because the complaint plead sufficient facts to establish a cause of action for defamation sufficient to withstand a §2-615 motion to dismiss, the circuit court properly concluded that necessity was established under Rule 224.

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CALCULATION OF HEALTH CARE LIENS

In *McVey v. M.L.K. Enterprises, LLC*, the Illinois Supreme Court held that under section 10 of the Health Care Services Lien Act, attorney fees and costs should not be deducted from a plaintiff's total recovery before calculating the amount to be awarded for payment of a health care lien. In this case that resulted in the plaintiff receiving only \$2,750 out of a \$7,500 settlement, but the Court held there was no language in section 10 that allowed for any deduction.

McKENNA NEWS

Greg Cochran has been included in the list of Leading Lawyers for 2015 for Class Action/Mass Tort Defendant Law and Toxic Torts Defense Law. Greg has previously received this honor from 2012 – 2014.

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