NOT SO INSTANT REPLAY: ILLINOIS APPELLATE/SUPREME COURT UPDATE

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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I. *YARBROUGH V. NORTHWESTERN MEMORIAL HOSPITAL*, NO. 121367

A. Issue — Apparent Agency

The appellate court answered the following question certified for review:

Can a hospital be held vicariously liable under the doctrine of apparent agency set forth in *Gilbert v. Sycamore Municipal Hospital* and its progeny, for the acts of the employees of an unrelated, independent clinic that is not a party to the present litigation?

B. Background

Plaintiff went to Erie Family Health Center, a not-for-profit clinic and was advised that, if she obtained prenatal care from Erie, she would deliver at Northwestern Memorial Hospital (Northwestern). Erie gave her a flyer describing tours and classes available at Northwestern. Yarbrough believed that if she received prenatal care from Erie, she would be receiving treatment from Northwestern health care workers.

When she was eight weeks pregnant, she experienced vaginal bleeding. She was treated at Illinois Masonic Medical Center, which notified Erie that they had diagnosed her with having a bicornuate uterus. Yarbrough received an ultrasound at Erie on December 2, 2005, and was told that she did not have a bicornuate uterus. She continued receiving prenatal care at Erie, but she received no other follow-up regarding a uterine abnormality. Yarbrough gave birth at 26 weeks and, as a result of the premature delivery, she alleged that her child suffered numerous medical complications. Yarbrough filed suit alleging that health care providers at Erie were the apparent agents of Northwestern and rendered negligent prenatal care leading to pre-term delivery. Erie was not a party to the litigation.

Northwestern moved for summary judgment, arguing that it had no control over Erie or its employees, did not provide financial support, and did not otherwise hold Erie out as its agent. The trial court certified the question for immediate appeal as to whether Northwestern could be found liable under an apparent agency theory for conduct of employees of a clinic that was not a party to the litigation.

C. Result

The Illinois Supreme Court's decision in *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511 (1993), holds that a hospital may be vicariously liable for negligent medical treatment rendered in the hospital by an independent contractor if:

(1) the hospital acted in a manner that would leave a reasonable person to conclude that the individual alleged to be negligent was an employee of the hospital;

(2) where the acts of the agent create the appearance of authority (the "holding out" factors); and

(3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence (the "reliance" factor).

In this case, the appellate court found nothing in the *Gilbert* decision that limited claims to negligent treatment occurring inside the four walls of the hospital. The court noted that Northwestern publicized its relationship with Erie on its website, annual reports, and press releases. Moreover, its website provided a link to Erie's website and represented that Erie was one of "Our Health Partners." The court noted that it made no difference whether Yarbrough actually observed these indicia of "holding out" on the websites, stating that whether a patient actually observes a hospital's advertisements "is not relevant to the objective inquiry into the "holding out" factor under *Gilbert*."

As to the "reliance" factor, the court held that a question of fact arose as to whether there was reasonable reliance because Yarbrough's decision to go to Erie was not based on a desire to receive treatment from a specific doctor. Rather, it was due to her expressed preference for a particular hospital, Northwestern, which she believed to be a very good hospital.

In its petition for leave to appeal filed in the Illinois Supreme Court, the hospital argued that the appellate court greatly expanded the scope of the apparent agency doctrine by creating liability for all acts of any physician with hospital privileges. The hospital further argued that the appellate court misapplied the "holding out" and "reasonable reliance" tests.

II. *ROZSAVOLGYI V. THE CITY OF AURORA*, NO. 121048

A. Issue — Tort Immunity Act

The Appellate Court certified the following question as a certificate of importance under Supreme Court Rule 316:

Does the Tort Immunity Act apply to a civil action under the Human Rights Act where the plaintiff seeks damages, reasonable attorney fees, and costs? If so, should the appellate court modify, reject, or overrule its prior holdings that the Tort Immunity Act applies only to tort actions and does not bar actions for constitutional violations.

B. Background

Plaintiff, Patricia Rozsavolgyi, had a medical history of unipolar depression, anxiety, panic attacks, and partial hearing loss. Her employer of 20 years, the City of Aurora (the City), terminated her employment after she made a statement to a coworker in which she used the word "idiots." She sued the City, alleging violations of the Illinois Human Rights Act, including refusal to accommodate, disparate treatment, retaliation, and hostile work environment.

Prior rulings from this appellate court held that the Tort Immunity Act applies only to tort actions and does not bar actions for constitutional violations. The Illinois Supreme Court has impliedly rejected those holdings, but the appellate court chose not to follow that precedent.

The City argued that, in this case, the Tort Immunity Act applied because plaintiff's Human Rights Act claims were not claims under the Illinois Constitution. The City urged the appellate court to reject its previous holdings that the Tort Immunity Act applies only to tort actions.

C. Result

The appellate court noted that plaintiff's sought not only monetary damages, but also equitable remedies such as reinstatement with full seniority. The appellate court held that the Tort Immunity Act applies to plaintiff's claims under the Human Rights Act and the City could assert immunity with respect to plaintiff's request for damages. However, the court held that the City could not assert immunity as to plaintiff's claims for equitable relief.

III. *CORBETT V. CITY OF HIGHLAND PARK*, NO. 121536

A. Issue — Tort Immunity Act

The issue is whether a bicycle path qualifies as a "riding trail" such that a local public entity is immune from liability for injuries caused by a condition of that path under Section 3-107(b) of the Tort Immunity Act. 745 ILCS 10/3-107(b).

B. Background

Section 3-107(b) of the Tort Immunity Act provides that local public entities cannot be held liable for an injury caused by a condition of any "hiking, riding, fishing or hunting trail." This section provides absolute immunity, even as to willful and wanton conduct. 745 ILCS 10/3-107(b).

Plaintiff suffered an injury while riding on a paved biking trail. Although bordered by a narrow band of greenery, the trail was surrounded by industrial development, residential areas, and railroad tracks. Notably, the area where the injury occurred was known as "the bunny trail." She sued Lake County and the City of Highland Park alleging that both were liable for defects in the path that caused her injuries. The trial court granted summary judgment in favor of defendants

concluding that the bike path constituted a "riding trail" for purposes of the Tort Immunity Act. Plaintiff appealed. (Lake County chose not to participate in the appeal).

C. Result

The appellate court reversed, holding that the section of the paved bike path where the injury occurred was located in a semi-urban area, and thus did not qualify as a trail. The court held that a path must be located within a forest or mountainous region to be considered a "trail" for purposes of the Act. The appellate court explained:

> Although the presence of some development in the area of a path does not *per se* mean that the path is not a "trail," the presence of industrial and residential development *all around* a path negates any conclusion that it is located within a "natural and scenic wooded area [citation] or that it is "surrounded by wooded or undeveloped land" [citation].

Corbett v. City of Highland Park, 2016 IL App (2d) 160035, ¶ 30. The court concluded that, the "frequent appearance of bunnies on the trail does not, in our judgment, call the foregoing analysis into question." *Corbett*, ¶ 31.

The appellate court relied on a decision of the Fifth District Appellate Court where the court explained that:

> Included in section 3-107(b) are unimproved hiking, riding, fishing, or hunting trails in undeveloped recreational areas that remain in their natural condition. Absolute immunity is extended for injuries sustained on these types of property because of the burden in both time and money if the local governmental entity were required to maintain these types of property in a safe condition. Furthermore, requiring such maintenance would defeat the very purpose of these types of recreational areas, that is, the enjoyment of activities in a truly natural setting.

Goodwin v. Carbondale Park Dist., 268 Ill. App. 3d 489, 493 (5th Dist. 1994).

IV. *COHEN V. CHICAGO PARK DISTRICT*, NO. 121800

A. Issue — Tort Immunity Act

Section 10/3-107(a) of the Tort Immunity Act provides:

> Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or

village street (2) county, state or federal highway or (3) a township or other road district highway.

745 ILCS 10/3-107. The issue in this case is whether the Chicago Park District can assert immunity for a bicyclist's injuries that occurred on Chicago's Lakefront Trail.

B. Background

Plaintiff injured his shoulder after riding over a defect in the Lakefront Trail and falling off his bike. He claimed that the Park District had prior knowledge of the defect and that its failure to immediately correct it constituted willful and wanton conduct. The Park District moved for summary judgment arguing that it was absolutely immune under the Tort Immunity Act because the Lakefront Trail was an "access road" to fishing, hunting, recreational, and scenic areas, as contemplated under Section 3-107(a) of the Act. The trial court agreed, finding the Park District immune and, in the alternative, there was no material issue of fact suggesting that the Park District engaged in willful and wanton conduct.

C. Result

The appellate court reversed, finding that Section 3-107(a) of the Tort Immunity Act is ambiguous and, as a result, the court could consider the statute alongside sub-section (b) which addresses "trails" as opposed to "roads." The court explained:

"That section 3-107(b) has been limited to trails in undeveloped areas supports a determination that section 3-107(a) was likewise intended only to apply to access roads to undeveloped and primitive areas." *Cohen v. Chicago Park Dist.*, 2016 IL App (1st) 152889, ¶ 40.

Accordingly, since the Lakefront Trail was located in a developed area, the Tort Immunity Act did not apply. The court also found that a question of fact existed as to whether the Park District acted willfully and wantonly because it took about a month to fix the defect in the pavement after learning of it. The defect consisted of a four foot long crack in the pavement, three inches wide, and two to three inches deep.

V. *COCHRAN V. SECURITAS SECURITY SERVICES USA, INC.*, NO. 121200

A. Issue — Negligent Interference with Possession of a Corpse

This case addresses the issue of whether a cause of action exists for negligent interference with the possession of a corpse in the absence of willful and wanton conduct.

B. Background

The decedent, Walter Andrew, was transported to Memorial Medical Center for an autopsy. Later, representatives of the funeral home arrived at Memorial's morgue to obtain the remains

of a different person named William Carroll. Memorial mistakenly delivered Walter Andrew's remains to the funeral home, and the body was later cremated.

Plaintiffs filed suit against the Memorial, the funeral home, and Securitas Security Services, a company that contracted with Memorial to provide certain security services. Memorial and the funeral home settled.

Plaintiff alleged that Securitas' employees failed to place an I.D. tag on the decedent's body when it was received at the hospital, and also failed to place an I.D. tag on the case used to transport the body. The trial court granted the defendant's motion to dismiss, finding that plaintiff failed to allege sufficient facts to establish a duty on the part of the defendants.

C. Result

Illinois common law recognizes a right by a decedent's next of kin to possession of a decedent's body to make appropriate disposition thereof, whether by burial or otherwise. However, it has long been the law in Illinois that there is no right to maintain an action for mere negligence in dealing with a body. However, over time, the law has evolved across the country to allow such actions even in the absence of willful and wanton conduct.

The appellate court reversed the trial court's order dismissing the case, holding that, although courts have traditionally been reluctant to allow negligence actions where only emotional distress damages are claimed, the more modern view supports recognition of an ordinary negligence cause of action arising out of next of kin's right to possession of a decedent's remains. The court concluded that a cause of action exists for negligent interference with the right to possession of a decedent's body by the next of kin, without circumstances of aggravation. The appellate court's ruling stands in direct contradiction to three appellate court decisions, each of which required a showing of willful and wanton conduct.

VI. *LAWLER V. THE UNIVERSITY OF CHICAGO MEDICAL CENTER*, NO. 120745

A. Issue — Medical Malpractice Statute of Repose

This case addresses the issue of whether a medical malpractice claim brought under the Wrongful Death Act relates back to an existing claim, or is barred by the statute of repose.

B. Background

Plaintiff filed a timely medical malpractice claim alleging that her physician misdiagnosed her macular pathology, which in turn led to defendants' failure to recognize central nervous system lymphoma. Plaintiff died after the expiration of the four-year statute of repose. Her daughter substituted herself as party plaintiff and sought to amend the complaint to state claims under the Wrongful Death and Survival Acts.

Defendants moved to dismiss the wrongful death claim arguing that it was barred under the medical malpractice statute of repose. The trial court granted the motions to dismiss, ruling that the wrongful death claim was a new claim and that no legal precedent authorized application of the relation back doctrine.

C. Result

The appellate court reversed, finding that the wrongful death claim arose out of the same occurrence alleged in the initial complaint and that defendants had notice of both the facts and allegations. As such, defendants would not be prejudiced by wrongful death claims filed after the expiration of the statute of repose. The court explained that Section 2-616(b), which governs the relation back doctrine, applies regardless of whether the claims at issue are governed by a statute of limitations. Defendants argued in their petition for leave to appeal to the Illinois Supreme Court that the appellate court improperly evaluated the issue using principles applicable to the statute of limitations, as opposed to the statute of repose.

Craig L. Unrath

- Partner

Craig is partner at Heyl Royster and is Chair of the firm's Appellate practice group. He is also Vice Chair of the Professional Regulation/Licensure practice group. He began his career with Heyl Royster in 1994 after serving for two years as law clerk to Justice Carl A. Lund of the Illinois Appellate Court, Fourth District.

Craig has extensive experience in the Illinois Appellate Courts, Illinois Supreme Court, and the Seventh Circuit Court of Appeals. He has argued eleven cases before the Illinois Supreme Court, eight of which were the result of successful Petitions for Leave to Appeal. Craig has argued 34 cases before the Seventh Circuit Court of Appeals, and filed dozens of briefs in appeals decided without oral argument. He has also argued cases in the United States Courts of Appeals for the Eighth Circuit and Federal Circuit.

He served as President of the Illinois Appellate Lawyers Association from 2007 to 2008. He currently serves as Chair of the Amicus Committee for the Illinois Association of Defense Trial Counsel (IDC).

Significant Cases

- *Reeder v. Auto Owners Ins. Co.,* 2016 IL App (3d) 150252-U - The Third District Appellate Court affirmed a trial court's order granting summary judgment in favor of defendant in a case where plaintiffs claimed they were entitled to coverage under an insurance policy issued to the prior owner of car. The appellate court found that, following the sale of the car, the prior owners had no insurable interest in the vehicle. In addition, the court found that the omnibus clause of the policy could not be interpreted as offering coverage to the purchasers of the car.
- *Cripe v. Leiter*, 184 Ill. 2d 185 (1998) - In a case of first impression, the Illinois Supreme Court held that Consumer Fraud and Deceptive Business Practices Act did not apply to claim that attorney charged excessive fees.
- *Hobbs v. Hartford Ins. Co. of the Midwest,* 214 Ill. 2d 11 (2005) - The statement: "If a premium charge does not appear, that coverage is not provided" appearing on an insurance policy declarations sheet does not address the issue of stacking and cannot reasonably be read as contradictory to the antistacking clause in the policy. The policy must be construed as a whole.
- *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513 (1996) - Held: Although an insurer's conduct may give rise to both a breach of contract action and a separate and independent tort action mere allegations of bad faith or unreasonable and vexatious conduct, without more, do not constitute such a tort.
- *Armstrong v. Guigler,* 174 Ill. 2d 281 (1996) - Held that a claim for breach of implied fiduciary duty is independent of and only incidental to the written contract and, as a result, the residual, five year statute of limitations applied.
- *Mwesigwa v. DAP, Inc.*, 637 F.3d 884 (8th Cir. 2011) - Successfully defended appeal of order granting motion for summary judgment in products liability case. Held: The Federal Hazardous Substances Act preempts state cause of action that would impose a labeling requirement different from the requirements in the FHSA. FHSA did not require manufacturer to warn of risk of fire from accidental spill, or warn against spreading product after spill.
- *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) - Former music director and organist of religious diocese and church brought action against diocese alleging he was terminated in violation of the Age Discrimination in Employment Act (ADEA). The Court of Appeals held that director's position fell within ministerial exception to the ADEA.
- *Cookson v. Price*, 239 Ill. 2d 339 (2010) - A medical malpractice plaintiff may be granted leave to amend a complaint to correct defects resulting from a failure to comply with statute requiring a section 2-622 affidavit of merit where the complaint does not appear to be frivolous, even where the new report is substantially different than the original report.
- *General Casualty Ins. Co. v. Lacey,* 199 Ill. 2d 281 (2002) - The validity of an exhaustion clause was governed by the law in effect at the

time of issuance of the policy, not settlement with the liability insurer.
- *Bubb v. Springfield School Dist. 186,* 167 Ill. 2d 372 (1995) - In a case of first impression, the court interpreted language in Section 3-106 of the Tort Immunity Act, finding that statutory recreational immunity is triggered by the recreational character of the property regardless of its primary purpose.
- *Johnson v. Doughty,* 433 F.3d 1001 (7th Cir. 2006) - Denials of prisoner's requested hernia surgery did not constitute deliberate indifference to a serious medical condition.
- *Roberts v. Northland Ins. Co.,* 185 Ill. 2d 262 (1999) - In a claim against a primary and excess insurer, the court held that the insured was entitled to only one setoff for the insured's workers' compensation benefits; that the primary insurer was entitled to take the workers' compensation setoff first, after which any remainder could be taken by the excess insurer; and that public policy precluded either insurer from taking a setoff for the insured's social security disability benefits.

Publications
- "Amicus Committee Report," *Illinois Defense Counsel Quarterly* (2016)
- "Amicus Committee Report," *Illinois Defense Counsel Quarterly* (2015)
- "Final Judgments" chapter in *Civil Appeals (Illinois): State and Federal 2015*, Illinois Institute for Continuing Legal Education
- "Privileges" chapter in *Illinois Civil Trial Evidence*, Illinois Institute for Continuing Legal Education (2015)
- "The Amicus Committee Report," *Illinois Defense Counsel Quarterly* (2014)
- "Survey of Amicus Cases," Illinois Association of Defense Trial Counsel's 2013 Survey of Law (2014)
- "The Amicus Committee Report," *Illinois Defense Counsel Quarterly* (2014)
- "Privileges" chapter in *Illinois Civil Trial Evidence*, Illinois Institute for Continuing Legal Education (2009)

Public Speaking
- *"What's On the Horizon"*
  Heyl Royster's 31st Annual Claims Handling Seminar (2016)
- *"I Want to Appeal Now! A Primer on Interlocutory Appeals"*
  Heyl Royster's 30th Annual Claims Handling Seminar (2015)
- *"Proactive Defense Strategies: Why an Appellate Specialist?"*
  Heyl Royster 29th Annual Claims Handling Seminar (2014)

Professional Recognition
- Named to the Illinois *Super Lawyers* list (2008-2017). The *Super Lawyers* selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.
- Selected as a *Leading Lawyer* in Illinois. Only five percent of lawyers in the state are named as *Leading Lawyers*
- Chicago Daily Law Bulletin article on successful appeal in *Cripe v. Leiter* before the Illinois Supreme Court
- Recognized as a Top Lawyer in Illinois as published in *Crain's Chicago Business* (2010-2011)

Professional Associations
- Illinois Appellate Lawyers Association (President 2007-2008)
- Defense Research Institute (DRI)
- Illinois Association of Defense Trial Counsel (Chairman, Amicus Committee)
- Seventh Circuit Bar Association
- Eighth Circuit Bar Association
- Peoria County Bar Association
- Illinois State Bar Association
- American Bar Association

Court Admissions
- State Courts of Illinois
- United States District Court, Central, Southern and Northern Districts of Illinois
- United States Court of Appeals, Third, Seventh and Eighth Circuits
- United States Court of Appeals, Federal Circuit
- United States Supreme Court

Education
- Juris Doctor, University of Illinois, 1991
- Bachelor of Arts-Humanities, Shimer College, 1978