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Bench & Bar

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Personal injury plaintiff cannot rely solely on expert opinion to create a question of fact on proximate causation

BY STEPHANIE JONES

A personal injury plaintiff cannot create a genuine issue of material fact as to the proximate cause of her injuries based on an assumption, even if she has expert opinions supporting her theory. *Allen v. Cam Girls, LLC d/b/a Jazzercise Glenview, et al.*, 2017 IL App (1st) 163340 (Dec. 26, 2017). In *Allen*, the Illinois Appellate Court upheld a Cook County trial court's decision that summary judgment was appropriate in a case where the plaintiff could only guess or assume what caused her to slip and fall in a parking lot. The judgment was affirmed despite expert opinion testimony that the defendant's conduct would have created the condition that the plaintiff assumed caused her injury. The plaintiff's failure to establish a causal link beyond

Continued on next page

Dealing with pro se litigants: A judge's dilemma

BY RAYMOND J. MCKOSKI

In the Chair's Column of the December 2017 issue of the Bench and Bar Newsletter, Deane Brown provided a thought-provoking account of the "spirited discussion" among members of the Bench and Bar Section Council concerning the challenges facing lawyers and judges when dealing with unrepresented litigants. Deane's article brought to mind the sometimes conflicting duties of a judge to decide cases on the merits while maintaining an appearance of impartiality. The conflict arises most often when

Continued on page 3

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Personal injury plaintiff cannot rely solely on expert opinion

CONTINUED FROM PAGE 1

mere speculation doomed her claim. *Allen*, 2017 IL App (1st) 163340 at ¶52. The First District reiterated that "liability cannot be based on mere speculation," and without "'positive and affirmative proof of causation, plaintiff cannot sustain the burden of establishing the existence of a genuine issue of material fact.'" *Id*. at ¶47, ¶43; *citing Strutz v. Vicere*, 389 Ill. App. 3d 676, 679 (2009)(*quoting Kellman v. Twin Orchard Country Club,* 202 Ill. App. 3d 968, 974 (1990)).

Plaintiff Robin Allen alleged that she was injured when she slipped and fell in the parking lot outside her Jazzercise class. *Allen*, 2017 IL App (1st) 163340 at ¶1. Ms. Allen sued the property owner, the snow removal company, and her Jazzercise studio to recover for injuries sustained as a result of that fall. Multiple witnesses confirmed that there was snow and ice in the parking lot at the time. *Allen*, 2017 IL App (1st) 163340 at ¶¶9 - 19. Weather reports also confirmed the likelihood of multiple layers of snow and ice in the parking lot. *Id*. At the time of plaintiff's fall, the lot had been plowed in a manner that left trails, depressions, and uneven snow deposits. *Id*. One witness testified that she parked along the street to avoid the perils of the parking lot. *Id*. It was also undisputed that the parking lot was not salted in advance of plaintiff's fall. *Id*.

At her deposition, however, Allen stated unequivocally that she did not see ice in the location of her fall:

> Q. But you can't say with any degree of certainty if it was a patch of ice that you slipped on, correct?
>
> A. I did not see any ice, but I did see snow.
>
> Q. Since you didn't see any ice, would you agree that any statement that you would have tripped on ice would be a guess on your part?
>
> A. It would be a guess on my part.

Allen, 2017 IL App (1st) 163340 at ¶42. To support her claim, Allen secured testimony from two different expert witnesses that the defendant "created a hazardous condition in the parking lot" and, to a reasonable degree of engineering certainty, the defendant's "maintenance of the parking lot would have created icy conditions that led to the plaintiff falling." *Id*. at ¶¶22 - 23. Despite the expert testimony the court confirmed the grant of summary judgment to the defense. The lynchpin of the court's decision was plaintiff's unequivocal admission that she was speculating about what condition actually caused her fall.

The court was clear that guesswork and speculation is insufficient to create an issue of fact for the jury. "Although her experts opined that ZL's snow clearing procedures would have created an unnatural accumulation of ice in the Jazzercise parking lot, Allen did not see whether she fell on ice, so she cannot establish a causal link between the alleged unnatural ice and her fall beyond mere speculation." 2017 IL App (1st) 163340 at ¶52.

While the parties disagreed about what the applicable duty was in the case, the court found that discussion irrelevant given that Allen could not meet her burden on the issue of proximate causation. *Id*. The plaintiff's failure to "establish a causal nexus between the alleged unnatural accumulation of ice in the parking lot and her fall" entitled the defendants to judgment as a matter of law. *Id*. at ¶50.

Allen is consistent with the long line of Illinois jurisprudence holding that a personal injury plaintiff bears the burden of proof on proximate causation, and speculation, conjecture, and guesswork are not sufficient to raise genuine issues of material fact on that element. *Allen* also reminds Illinois litigants that a plaintiff cannot rely solely on expert opinion testimony to carry their burden on proximate causation. Put simply, if a plaintiff "cannot establish a causal link . . . beyond mere speculation," the case cannot proceed to trial under Illinois law. *Allen*, 2017 IL App (1st) 163340 at ¶52. ■

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Dealing with pro se litigants: A judge's dilemma

CONTINUED FROM PAGE 1

only one party is represented by counsel. The dilemma faced by federal district court judge Jack Weinstein in *Floyd v. Cosi,* 78 F. Supp. 3d 558 (E.D.N.Y. 2015), illustrates the problem. Acting pro se, Floyd sued his former employer for racial discrimination under Title VII of the Civil Rights Act. The defendant's lawyer filed a motion to dismiss (later converted to a motion for summary judgement) claiming that Floyd's cause of action was time-barred. On its face, the complaint indicated that the action was time-barred because the discriminatory acts alleged occurred more than 300 days before Floyd had filed a complaint with the Equal Employment Opportunity Commission (EEOC). Of course, defense counsel and the judge were conversant with the "continuing violation doctrine" which permits plaintiffs to challenge all discriminatory conduct that is part of the same course of action even if some of the conduct occurred more than 300 days before the filing of the EEOC complaint. Not surprisingly, Floyd was unaware of the continuing violation exception and the fact that it might save his lawsuit.

Judge Weinstein debated whether to intervene on behalf of the plaintiff. On one hand, the judge could ask Floyd a few questions to see if the continuing violation doctrine applied. On the other hand, the judge could maintain a hands-off approach because pro se litigants are bound by the same rules as lawyers. If he intervened, the judge might ensure that the case was decided on the merits and that justice was done. But intervention on the plaintiff's behalf might appear to compromise the judge's impartiality because he would be helping one litigant to the disadvantage of another litigant. If the judge decided not to intervene and rely solely on what the parties presented, the appearance of impartiality would be preserved but at the potential sacrifice a correct disposition of the motion.

So, what did Judge Weinstein do? Believing that he was "required" to intervene, the judge asked Floyd leading questions about the timing of the alleged acts of discrimination. The plaintiff's answers convinced the judge to deny defendant's motion. It seems safe to say that Judge Weinstein's questions led to a correct decision on the motion. But did his participation in the production of evidence helpful to the plaintiff create the perception of partiality?

Judge Weinstein appreciated the dilemma. He recognized that his intervention on behalf of an unrepresented plaintiff, even if necessary to do justice, created an appearance of favoritism. As a result, Judge Weinstein recused himself from further participation in the case. The case was transferred to another judge who would inevitably face the same predicament as Judge Weinstein, this time in the context of supervising discovery and conducting the trial.

How should an Illinois judge deal with the situation that confronted Judge Weinstein? Unlike the code of conduct governing federal judges, the Illinois Code of Judicial Conduct contains a provision explaining a judge's duty in pro se matters. Canon 3(A)(4) of the Illinois judicial code permits judges to "make reasonable efforts, consistent with the law and court rules, to facilitate the ability of self-represented litigants to be fairly heard." Does this provision help Illinois judges decide whether to intervene in a proceeding in which only one party has an attorney? I will leave the resolution of that question to the next meeting of the Bench and Bar Section Council.

And so what happened to Judge Weinstein's case after it was transferred to a new judge? As some of you more seasoned lawyers and judges might guess—it settled. ■

Returning to the fray after discharge

BY MICHAEL G. CORTINA

> "Once more unto the breach, dear friends, once more."
>
> - *Henry V*, Act III, Scene I

The "return to the fray" doctrine is a little-known theory that could result in harsh consequences for debtors that receive a discharge in bankruptcy, but choose to continue litigating post-discharge against creditors or other entities. It is important for attorneys to know about and understand this concept so that they can properly advise their clients, but judges also need to be cognizant of the doctrine to be sure that any such litigation is properly before them.

"Return to the fray" is a fairly simple concept, but is best explained using an example:

> Debtor owns a home, but falls behind on mortgage payments and finds himself in foreclosure where Lender seeks the property, damages, and contractually-authorized attorneys' fees. Debtor claims that Lender engaged in some sort of misdeed in dealings with Debtor, so Debtor counterclaims against Lender for breach of contract (the same contract that allows Lender to recover its attorneys' fees). Before the foreclosure case is concluded, however, Debtor seeks bankruptcy relief under Chapter 7 of the United States Bankruptcy Code and eventually receives a discharge. After the discharge, Debtor continues to litigate his counterclaim against Lender. By continuing to litigate against Lender after receiving a discharge, Debtor has voluntarily returned to the fray of litigation.

The effect of a voluntary return to the fray is what must be understood. It is well-known that a discharge in bankruptcy discharges all claims and debts that arose before the date of the order for relief (i.e. the filing of the petition under Chapter 7 of the United States Bankruptcy Code). 11 U.S.C 727(b). A "claim" is a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. 11 U.S.C. 101(5)(A). For Lender's post-petition attorneys' fees in the example above to be discharged, a court would need to find that the claim for attorneys' fees was a contingent claim under 11 U.S.C. 101(5)(A) and therefore discharged.

In the example, Debtor's contract with Lender was entered into before the order for relief, but Debtor, instead of walking away from the liability, voluntarily continued the state court action against Lender for his counterclaim of breach of contract. To complete the story in the example, Lender defended against the counterclaim and eventually prevailed at trial. Lender then sought attorneys' fees for fees incurred only *after* the order for relief was entered.

A similar scenario was seen in *Siegel v. Federal Home Loan Mortgage Corporation*, 143 F.3d 525 (9th Cir. 1998). Siegel attempted to claim that FHLMC's (a/k/a "Freddie Mac") claim for fees against him was discharged because the mortgage contract that contained the fee-shifting clause was entered into pre-petition, and therefore was a contingent claim that was discharged upon the successful completion of his petition in bankruptcy. While the court agreed with Siegel that any doubts regarding the dischargeability of a claim should be resolved in favor of finding that a contingent claim existed, it also found that even though the future is always contingent, that does not mean that a bankrupt is discharged regarding everything he might do in the future.

The *Siegel* court held that if actual liability was dependent on what *others* might do, then it would be a contingent liability that was discharged; however, because the liability was contingent on what Siegel decided to do, the contractual liability was not a "claim" that was discharged. The court noted that Siegel "had been freed from the untoward effects of contracts he had entered into. Freddie Mac could not pursue him further, nor could anyone else. He, however, chose to return to the fray and to use the contract as a weapon. It is perfectly just, and within the purposes of bankruptcy, to allow the same weapon to be used against him." *Siegel* at 533.

The last line of the conclusion in *Siegel* succinctly sums-up the case when it states "… any right to avoid the attorney's fees provision of his contract fell short of protecting him when he voluntarily undertook this post-bankruptcy action against Freddie Mac." *Siegel* at 534.

Other holdings in other cases have been similar to *Siegel*. See, e.g., *In re Ybarra,* 424 F.3d 1018 (9th Cir. 2005)("by voluntarily continuing to pursue litigation post-petition that had been initiated pre-petition, a debtor may be held personally liable for attorney fees and costs that result from that litigation"); *In re Clarkson,* 377 B.R. 283 (W.D. Washington – Tacoma 2007)("the Debtor's post-petition actions in pressing the State Court Lawsuit are sufficient to find that the post-petition fees and costs at issue were not discharged in their bankruptcy"); *In* re *Hadden*, 57 B.R. 187 (W.D. Wisconsin 1986)("If the debtor chooses to enjoy his fresh start by pursuing pre-petition claims which have been exempted, he must do so at the risk of incurring post-petition costs involved in his acts").

Despite not being widely known, attorneys and judges alike can benefit from

understanding this doctrine. Attorneys can counsel their debtor clients about possible post-petition liability, and they can also advise their creditor clients about the potential of pursuing discharged debtors for post-petition matters. The judiciary can benefit by understanding the nuances associated with discharges in bankruptcy and how a discharge does not necessarily mean that debtors can never have liability on pre-petition contracts.

Regardless of authority to the contrary noted herein, no one should ever assume that post-petition actions by debtors are not subject to discharge. The point of Chapter 7 of the United States Bankruptcy Code is to provide debtors an opportunity for a fresh start, freed from the yoke of debt, and this opportunity is maintained in a stalwart fashion by bankruptcy courts. Violations of the discharge injunction are often met with swift and harsh penalties by bankruptcy courts, including actual damages, attorneys' fees, and sometimes punitive damages. Pursuing a discharged debtor should never be taken lightly. Further, the "return to the fray" doctrine is not universally accepted, and while one court may view a debtor's post-petition action to be outside of the protections of the discharge injunction, others may not. See, e.g., *In re Residential Capital v. PHH Mortgage*, 558 B.R. 77 (S.D.N.Y. 2016)("There is … no basis for reading an exception for "voluntarily ... returning to the fray" into the Bankruptcy Code"). Any possible claim against a discharged debtor that may have been involved in the debtor's bankruptcy should be brought to the attention of the bankruptcy court so that a ruling can be made on whether the debtor is liable for returning to the fray, or not. A motion to modify the discharge injunction could be filed, and the bankruptcy court could grant it, deny it, or deny it as being moot. Failure to seek any guidance from the bankruptcy court before proceeding against a discharged debtor is simply ill-advised.

Pre-petition litigation involving debtors often continue once a bankruptcy discharge has been granted. Courts and counsel alike should know and understand that a debtor may have liability for returning to the fray, and debtors and creditors need to be advised so that they can make informed decisions on whether to go once more unto the breach. ■

Mandatory e-filing is just around the corner—A good cause exemption exists for those who need it

BY JUSTICE MARY KAY ROCHFORD

Attorneys and litigants filing documents with the Illinois Supreme Court and Appellate Courts, in civil cases, have been required to do so electronically since July 1, 2017. The requirement for e-filing in civil cases became applicable to circuit courts across the State on January 1, 2018, pursuant to Illinois Supreme Court M.R. 18368 (eff. Jan. 22, 2016). Most court users will transition from conventional to electronic filing ("e-filing") with few problems and minimal disruptions. However, mandatory e-filing will prove challenging for many self-represented litigants ("SRLs"), who do not have the resources, technology, or ability necessary to navigate e-filing. The requirement may prevent them from having full access to our courts.

Illinois Supreme Court Rule 9(c) (eff. Dec. 13, 2017), exempts certain documents from e-filing and includes a good cause exemption in subsection (4). On December 13, 2017, the Illinois Supreme Court amended Rule 9(c)(4), to define the nature of "good cause" and detail the procedures for obtaining such an exemption.

Rule 9(c)(4) now reads:

> "Documents filed in a specific case, upon good cause shown by certification. Good cause exists where a self-represented litigant is not able to e-file documents for the following reasons: no computer or Internet access in the home and travel represents a hardship; a disability, as defined by the Americans with Disabilities Act of 1990, that prevents e-filing; or a language barrier or low literacy (difficulty reading, writing or speaking in English). Good cause also exists if the pleading is of a sensitive nature, such as a petition for an order of protection or civil no contact/stalking order.
>
> A Certification for Exemption from E-filing shall be filed with the court—in person or by mail—and include a certification under 1-109 of the Code of Civil Procedure. The court shall provide and parties shall be required to use a standardized form expressly titled 'Certification for Exemption from E-filing'

adopted by the Illinois Supreme Court Commission on Access to Justice.

> Judges retain discretion to determine whether, under particular circumstances, good cause exists without the filing of a certificate and the court shall enter an order to that effect. Judges retain discretion to determine whether good cause is shown. If the court determines that good cause is not shown, the court shall enter an order to that effect stating the specific reasons for the determination and ordering the litigant to e-file thereafter."

The standardized certification to which the amended rule refers may be found on the Illinois Courts' website. The certification lists the Rule's different bases for good cause. A SRL (or attorney in cases of a sensitive nature only) may select the applicable box on the certification form for establishing good cause, sign under penalty of perjury pursuant to 735 ILCS 5/9-101 (West 2014), and submit it to the Clerk along with any pleadings to be filed. The Clerk must accept the certification and, upon its filing, the good cause exemption will automatically apply without the need for court approval of the exemption.

Additionally, under Rule 9(c)(4), judges have discretion to *sua sponte* order that a litigant be exempted from e-filing without a certification. Where there is good cause, a judge may order that a party is exempt from e-filing, which would allow that party to file physical documents with the clerk. This authority will be especially useful in high-volume courtrooms, where a defendant is directed to appear for the first time in person on a certain date, and wishes to file documents.

Finally, under Rule 9(c)(4), judges also retain discretion to assess the continued existence of good cause. Where the good cause basis for the exemption no longer applies, a judge may order a litigant to e-file thereafter. This authority will serve to prevent any possible abuse.

The number if Illinois residents appearing in court without an attorney has soared. The trend is not isolated to any one circuit, county, or case type. The rise is driven, in great part, by financial hardship. Many Illinois residents lack regular access to a computer and the internet. Smart phones or tablet devices cannot provide the access needed. Additionally, more than 22% of Illinois residents speak a language, other than English, in their homes.

E-filing presents an opportunity to increase access and efficiency for the majority of court users. However, the ability to use new technologies is not universal. The amendment to Rule 9(c)(4) signifies the desire of the Illinois Supreme Court to avoid the inadvertent creation of new barriers to our courts through e-filing. The exemption will allow SRLs to file documents in person or by mail. The exemption does not undermine the Illinois Supreme Court's strong and laudable efforts to modernize and improve the efficiency of Illinois courts. It does, however, offer a failsafe for the most vulnerable Illinois residents who might otherwise struggle to access the courts and aligns Illinois practice with that of the rest of the country. In adopting the amended rule, the Court furthered its goals of establishing a modern, cost-effective, and efficient case management system, while protecting the needs of the most vulnerable litigants who would struggle to adapt. ■

Recent appointments and retirements

1. Pursuant to its Constitutional authority, the Supreme Court has appointed the following to be Circuit Judge:
   - Hon. Jeffrey S. MacKay, 18th Circuit, December 1, 2017

2. The Circuit Judges have appointed the following to be Associate Judge:
   - Debra D. Schafer, 17th Circuit, December 11, 2017
   - Anna M. Benjamin, 6th Circuit, December 12, 1017

3. The following Judges have retired:
   - Hon. Valarie Turner, Cook County Circuit, 2nd Subcircuit, December 1, 2017
   - Hon. Thomas Appleton, 4th District Appellate Court, December 6, 2017
   - Hon. Laurence J. Dunford, Cook County Circuit, December 6, 2017
   - Hon. Fernando L. Engelsma, Associate Judge, 17th Circuit, December 8, 2017
   - Hon. Brian L. McPheters, Associate Judge, 6th Circuit, December 11, 2017
   - Hon. Michael T. Caldwell, 22nd Circuit, December 31, 2017
   - Hon. Margarita Kulys Hoffman, Cook County Circuit, 13th Subcircuit, December 31, 2017
   - Hon. Margaret J. Mullen, 19th Circuit, December 31, 2017
   - Hon. Nancy S. Waites, Associate Judge, 19th Circuit, December 31, 2017

4. The following Judge is deceased:
   - Hon. John Schmidt, Circuit Judge 7th Circuit, assigned to the Appellate Court, 4th District, December 19, 2017 ■

ABA considers modifying model rules on attorney advertising

BY EDWARD CASMERE

The rules controlling how lawyers communicate with the public may be in for an overhaul. On December 12, 2017, the American Bar Association's Standing Committee on Ethics and Professional Responsibility released a draft of proposed changes to the ABA's Model Rules of Professional Conduct. The proposed changes affect the rules covering communications and solicitations by lawyers (Model Rules 7.1 to 7.5). Any proposed changes in the ABA's Model Rules may have potential wide-ranging impact since the rules of professional conduct in many states, including Illinois, closely track the ABA's Model Rules.

The proposed changes would add a new provision to Model Rule 1.0: Terminology, and make substantive changes to Rule 7.1: Communications Concerning a Lawyer's Services, Rule 7.2: Advertising, Rule 7.3: Solicitation of Clients, Rule 7.4: Communication of Fields of Practice and Specialization, and Rule 7.5: Firm Names and Letterheads. The proposal is the result of a request made by the Association of Professional Responsibility Lawyers (APRL) to the ABA in 2016. APRL's request came after years of study by one of its own committees.

The memorandum submitted in support of the proposed amendments by the ABA's Standing Committee on Ethics and Professional Responsibility (SCEPR), states that the proposed amendments seek to re-establish the rules as models by:

> (i) encouraging more national uniformity; (ii) simplifying the rules that are actually enforced by state regulators; (iii) maintaining the prohibition against engaging in false or misleading communications; and (iv) accommodating developments in the legal profession, technology, and competition (from inside and outside the profession). To protect consumers, the amendments free regulators from the onerous and complicated provisions now in place, and focus attention on harmful conduct.

See SCEPR's Memorandum in Support of Working Draft of Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising at p. 4.

According to SCEPR's summary of its recommended changes, the proposed amendments will, among other things: "[s]treamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies;" combine and consolidate some of the rules; and "[e]liminate the labeling requirement for targeted mailings, but prohibit such mailings that are misleading, involve coercion, duress or harassment, or where the target of the solicitation has made known to the lawyer a desire not to be solicited." *Id*. at 5.

A public forum on the proposed changes will be held during the ABA's Midyear Meeting in Vancouver, BC on Friday, February 2, 2018, at 2:00 p.m. SCEPR is accepting written comments through March 1, 2018 (comments can be sent to modelruleamend@americanbar.org). The Working Draft is available online at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility.html. ■

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