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Court lowers bar for plaintiffs to establish willful and wanton conduct

by Laura A. Weizeorick

The bar to establish willful and wanton behavior has just been lowered. A recent decision by the Second District, in *re Estate of Jeffrey Stewart v. Oswego Community School District No. 308*, 2016 IL App (2d) 151117, held that a high school teacher's failure to recognize the life-threatening nature of an asthma attack and follow school district policy to call 9-1-1 amounted to willful and wanton behavior.

Eighteen-year-old Jeffrey Stewart collapsed during a high school English class and began shaking convulsively on the floor. His teacher thought he was having a seizure and immediately ran to his side and directed two students to run to get the nurse. The teacher found Stewart was breathing and turned him on his side to prevent him from choking. He remained by Stewart's side to keep him alert until help arrived. The teacher did not use the phone in the classroom to call the nurse's office or 911.

Approximately seven minutes after Steward collapsed, the school nurse arrived in the classroom. She knelt beside Stewart and found he was exhibiting agonal breathing and had no pulse. She immediately started CPR. She instructed the teacher to call the nurse's office to have them call 911 and to call for a defibrillator. The teacher then called the nurse's office and spoke to the district's health service coordinator who placed the call to 911. The 911 call was made seven to twenty minutes after the collapse. CPR was continued until the paramedics arrived and took over. Stewart did not regain consciousness. According to the autopsy report, the cause of death was asthma.

Stewart's mother sued the school district, claiming that the teacher acted willfully and wantonly in response to Stewart's collapse and that the district acted willfully and wantonly with regard to training the teacher. She also pointed to the school district's own policy which required that someone immediately call 911 when a student is facing life and death circumstances.

The school district claimed absolute immunity under the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.*), for policy determinations made with discretion and limited immunity under both the Act and Section 24-24 of the Illinois School Code against negligent conduct.

The trial court found absolute immunity under the Act was not available as a matter of law as the teacher did not make any policy determinations. The case went to trial on the question of whether the teacher was merely negligent and thus immune from liability under the Act and the

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Restaurant's rude theme creates a higher duty of care

by Steve DiNolfo and Ryan Morton

When a customer injures another customer at a rowdy restaurant, the atmosphere promoted by the restaurant might increase the owner's duty owed to patrons, according to a recent ruling by an Illinois appellate court.

In *Libolt v. Weiner Circle, Inc.*, 2016 IL App (1st) 150118, a plaintiff accused the restaurant of negligence by creating an environment where customers could get injured. The restaurant argued there was no way for the plaintiff to prove the restaurant's actions caused her injuries. The appellate court, however, held that the atmosphere promoted by the eatery elevated its duty to protect customers.

Leah Libolt was a late-night customer at Weiner Circle in Chicago. The restaurant is known for intentionally acting rudely to customers, who eat at the hot dog stand partly because of that atmosphere or "schtick." Witnesses described the scene at 2 a.m. as loud and rowdy. One intoxicated man in particular was having a verbal fight with some of the restaurant's employees. Libolt testified that the situation escalated, as the employees threatened him aggressively. Another customer shoved the man, who ran into Libolt, knocking her to the ground. She broke her wrist and elbow, leading to multiple surgeries and months of physical therapy.

Libolt sued Weiner Circle, alleging the restaurant acted negligently in several ways, such as not forcing the man to

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Credit history cannot be used when hiring some sales associates

by W. Anthony Andrews and Ryan Morton

An Illinois appellate court recently held that retail employers cannot consider a job applicant's credit history when hiring some sales associates.

In *Ohle v. Neiman Marcus Group*, 2016 IL App (1st) 141994, the prospective employee argued the store violated the Employee Credit Privacy Act (820 ILCS 70/1) by using her credit history against her. Neiman Marcus responded by saying store clerks are exempt from the Act because they handle large amounts of cash and credit card information. The appellate court, however, decided the legislature did not intend to include clerks as an exception.

According to the undisputed facts of the case, after a job interview, Neiman Marcus told the applicant, Catherine Ohle, that she could expect an offer. However, when the store ran a background check, it learned Ohle had several accounts in collections, as well as several civil judgments against her. The store informed her that she did not get the job, because she failed her credit check. She subsequently sued Neiman Marcus for allegedly violating the Act, alleging discrimination based on her credit history.

Neiman Marcus admitted that it ran a credit check on Ohle, as well as other job applicants. However, in its defense, the store asserted that sales associates are exempt from the Act, because they have access to confidential information when customers fill out credit card applications. Additionally, sales clerks have unsupervised access to large sums of cash and merchandise. Therefore, the store argued, checking a sales clerk's credit history is a "bona fide occupational requirement," making it exempt from the Act.

The trial court granted Neiman Marcus's motion for summary judgment, ruling that the exemption did apply. The plaintiff appealed, and the First District Appellate Court reversed the trial court's decision. The appellate court determined the legislature did not intend to include sales clerks in the Act's exemptions.

The Act prohibits employers from using someone's credit history when making employment decisions. The Act includes a list of situations, though, where credit information could be used in hiring.

The Illinois General Assembly passed the Employee Credit Privacy Act (820 ILCS 70/1 *et seq.*) in 2011, which the governor then signed. The Act prohibits employers from using someone's credit history when making employment decisions. The Act includes a list of situations, though, where credit information could be used in hiring. One of those exemptions is if "the position involves access to private or confidential information…." (820 ILCS 70/10(a)(5)).

Credit card applications contain private information of customers, including Social Security numbers. Sales associates handle those forms by taking them from customers and placing them in cash registers. However, the court determined such minimal handling of confidential information does not equate to "access" under the Act. Unlike store managers, sales associates cannot access the private information after the forms are entered into the system. Associates do not have authority to handle that information in any substantial way.

Additionally, the court examined the Act's legislative history and determined the Act was designed to protect low-level employees like sales associates. Legislators specifically asked on the Senate floor whether cashiers were exempted from the bill because they handle credit cards and cash registers, and the bill sponsor responded that exempting those clerks was not the intent. The sponsoring senator also clarified that "unsupervised access to cash," as stated elsewhere in the bill, required more than simply access to the cash register.

Neiman Marcus also attempted to cite other exemptions to justify its credit check on Ohle. The court rejected those alternative arguments, though, because each exemption focused on actual access and control of money or merchandise. Sales associates do not exercise enough control over these areas to warrant credit checks. The court determined Neiman Marcus did discriminate against the plaintiff by not hiring her based on her credit history.

Employers should use caution when running credit checks, even for positions involving "access to private or confidential information." Members of our firm welcome calls for consultation on this issue. ■

Willful and wanton conduct

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Illinois School Code or whether he acted willfully and wantonly, and immunity did not apply. The jury found the teacher guilty of willful and wanton conduct and returned a verdict of $2.5 million in favor of Stewart's estate. The District appealed.

On appeal, the District argued that even if the teacher's response to Stewart's collapse was misguided, the teacher had acted with care and did not meet the heightened definition for willful and wanton conduct set forth under the Act. According to the statute, "willful and wanton conduct" means "a course of action which shows actual or deliberate intention to cause harm" or "an utter indifference to or conscious disregard for the safety of others." Because the teacher immediately sent for a nurse, ran to Stewart, turned him on his side, and remained with him until help arrived, the District maintained that the teacher did not show the kind of "utter indifference or conscious disregard" for Stewart that amounted to willful and wanton conduct.

The court first examined the standard for willful and wanton conduct. Despite a body of precedent to the contrary, it dismissed the notion that the Act requires a heightened standard for willful and wanton conduct. Instead, it relied on the Illinois Supreme Court decision in *Harris v. Thompson*, 2012 IL 112525, to find that the statutory definition is entirely consistent with common law precedent.

It then used a totality of the circumstances analysis to determine if the teacher's conduct was willful and wanton, highlighting the following three factors: (1) whether the conduct was a deviation from standard operating procedures or a policy violation; (2) whether there was an unjustifiably lengthy response time; or (3) whether the conduct was an unjustifiably inadequate response to a known danger.

First, the court found the teacher violated clear school district policy by failing to call 911 under life and death circumstances. The court acknowledged that the teacher was not a medical professional but stated that most people would view a young person's collapse and struggle for breath and consciousness as a medical emergency. Further, it found the teacher's testimony, that he repeatedly asked Stewart to "stay with him" and that he did not need to instruct fellow students to "run" for the nurse as they understood the urgency of the situation, to be acknowledgement that Stewart was fighting for his life.

Next, the court explained that waiting 7 to 20 minutes to call 911 was an unjustifiable response time and that the teacher's overall actions were inadequate in response to a life-threatening danger. Although the teacher's initial actions to send for a nurse and run to Stewart's side do not constitute willful and wanton conduct, his subsequent inaction for 7 to 20 minutes after those first few minutes was out of balance with the life and death circumstances. The Second District therefore affirmed the lower court and upheld the multi-million-dollar judgment.

Stewart puts educators and all local government agencies on notice that the standard for willful and wanton conduct has been lowered. *Stewart* now requires that a 911 call be made within minutes for "medical emergencies" or "life and death situations."

In light of *Stewart*, school districts and all local governmental agencies should diligently review their policies and consider with legal counsel whether it would be prudent to include a provision for responding to medical emergencies. Further, management should ensure that all staff members are trained on the agency's policies and know how to implement them. ■

Recent Verdicts of Interest

- **Visitor falls from second floor and takes $2.5 million**

Visitor went to pick up his sister, a tenant in the defendant's 13 unit apartment. Not finding her home, he exited out the back door and fell 2 stories off the porch under construction which had no handrails. Defendant argued the plaintiff should have seen the yellow tape and exercised appropriate caution. Jury found for the plaintiff, apparently finding the illegal construction without permits was to blame but reduced plaintiff's award by 25%, awarding $2.5 million for head injury.

- **No sexual harassment found in firehouse**

Forty year-old female receptionist at the Cicero fire department claims she was frequently sexually harassed at the workplace with comments, brushing up against her, being shown provocative magazine photos and subject to sexual jokes repeatedly. Defendant denied most allegations, acknowledging one magazine photo and inadvertent contact. Jury found the defendant not guilty likely based on evidence discrediting her claims of fragile emotional state leaving her homebound when defendant proved she had taken numerous vacations, including to Mexico and South Korea.

Above are sample verdicts taken from the Cook County Verdict Reporter. Valuation of injuries and exposure to a defendant vary greatly based on the specific factors of a case. To assess the value or cost of a specific injury, contact one of our litigators.

Restaurant's rude theme

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leave the premises, not protecting customers, and encouraging employees to antagonize customers. Weiner Circle moved for summary judgment, arguing there were no facts that could support Libolt's claim. The trial court granted that motion, and Libolt appealed.

The appellate court first considered whether Weiner Circle had a heightened duty to protect its customers. If there was no legal duty, then summary judgment was appropriate. Restaurants typically do not need to guard against unforeseen dangers like customers running into each other. Libolt argued, though, that the restaurant's employees owed her an elevated duty of care because they provoked the drunk man into unruly behavior without taking steps to protect other patrons.

The court considered four factors regarding duty and agreed with the plaintiff. First, the injury was reasonably foreseeable, given the restaurant's rude gimmick and the typically intoxicated customers at that time of night. Second, it was likely that such an environment could cause an injury. Third, the restaurant could have warned customers about this danger, simply by posting signs or better training its employees. And lastly, those precautions would not have burdened the restaurant. Therefore, Weiner Circle had a special duty to protect its customers.

The restaurant is known for intentionally acting rudely to customers, who eat at the hot dog stand partly because of that atmosphere or "schtick."

The court also considered whether there were enough facts to prove the restaurant violated its elevated duty. To be found liable for negligence, a defendant's actions must have been the proximate cause of an injury. Weiner Circle had argued there were no facts available that could prove causation. Because the man was never identified, it would be impossible to determine why he bumped into Libolt, let alone whether the restaurant affected that action.

The appellate court disagreed, however, saying the material facts of the case were still in dispute. Although the man's identity is unknown, there were many facts available showing the atmosphere of the restaurant on that evening. Several witnesses also could testify about actions taken by restaurant employees, which a jury could use to establish proximate cause. The court held that "reasonable persons could draw divergent inferences" from both disputed and undisputed facts in the record, so the summary judgment should not have been granted. The case was remanded back to the trial court and is still pending.

The court clarified that not all restaurants should be subject to this elevated duty to protect customers. The court's ruling narrowly applies where a business "intentionally creates and knowingly maintains a volatile environment in which the likelihood of injury to its invitees is unreasonably high." In those situations, the business must warn and protect customers from dangers. ■

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