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FOR THE Record

Loss Of Chance Doctrine Gets A Big Boost

The loss of chance doctrine in medical malpractice cases was strengthened by the Illinois Supreme Court in *Holton v. Memorial Hospital*, No. 79957, April 17, when it held that plaintiffs do not have to prove that they would have enjoyed a greater than 50% chance of recovery or survival absent the alleged malpractice. All they need do, the court held, is show to a "reasonable degree of medical certainty" that the malpractice increased the risk of harm or lost chance of recovery. But the defendant got a new trial on the ground of prejudicial trial conduct on the part of the trial judge and the plaintiff's attorney.

The loss of chance concept, the court explained, refers to the harm resulting to a patient when negligent medical treatment is alleged to have damaged or decreased a patient's chance of survival or recovery, or to have subjected the patient to an increased risk or harm.

This case rested on a misdiagnose of the patient's condition. Several physicians settled out, leaving a hospital as the sole defendant. Its fault was grounded on the fact that nurses did not give prompt information to physicians so that action could have been taken to alleviate the patient's condition. The jury returned a multimillion-dollar verdict for the plaintiff, and the Appellate Court affirmed. 274 Ill.App.3d 868. The hospital appealed, challenging jury instructions, and arguing that the lost chance doctrine does not lessen the plaintiff's burden of proving proximate cause and that the plaintiff failed to establish that any of its acts or omissions proximately caused the injuries.

Settling differences among the Appellate Courts, the Supreme Court liberalized the standard of causation proof in loss of chance cases, specifically rejecting the 50% measuring stick. "To hold otherwise," Justice McMorrow wrote for the court, "would free health care providers from legal responsibility for even the grossest acts of negligence, as long as the patient upon whom the malpractice was performed already suffered an illness or injury that could be quantified by experts as affording the patient less than a 50% chance of recovering his or her health."

With one exception, the court turned down the defendant's arguments on the jury instructions.

The new trial was awarded on the ground that the trial judge plaintiff's attorney improperly accused the defense of encouraging false testimony and that plaintiff's attorney engaged in other overzealous and prejudicial conduct. Two members of the court — Justices Nickels and Harrison — dissented on this point, finding ample ground for the trial judge's and plaintiff's attorney's comments.

Justice Heiple agreed with the award of a new trial, but he strongly criticized the majority opinion as doing violence to the concept of proximate cause. In any event, he wrote, it was unnecessary to introduce loss of chance into this case, since it could have gone to the jury on the evidence that the hospital's nurses did not inform the plaintiff's doctors of her worsening condition.

Carbondale Landlord Wins One From SIU

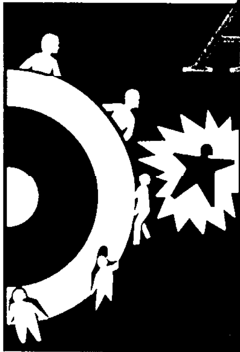
Using the Freedom of Information Act, a Carbondale landlord has pried from Southern Illinois University the right to receive the names and addresses of prospective SIU freshmen. Both the Appellate Court (279 Ill.App.3d 553) and the Illinois Supreme Court sided with the landlord in *Lieber v. Board of Trustees of Southern Illinois University*, No. 81220, May 1.

Stan Lieber owned an off-campus apartment building approved by the university for freshman students. Until 1992, when the occupancy rates in university student housing dropped, SIU had furnished Lieber names and addresses of prospective freshmen so he could pitch his apartments to them. Then the university closed the well. But it continued to supply such information to the *Southern Illinoisan*, a local newspaper, and to other organizations and individuals.

Lieber sought the information under the Freedom of Information Act, but the

BULLETPROOF *Affidavits*

By G. Grant Dixon III



YOU ARE CALMLY SITTING AT your desk one hot summer afternoon when in struts the partner: "Prepare a response to this motion for summary judgment. Call our expert and get an affidavit from him to respond to the motion. It's due tomorrow." A chill shivers down your spine. Now what? What should the affidavit say? What form must it be in? Are there any magic words or phrases? To make your affidavit bulletproof, you need to know the answers to these questions.

Valid Affidavits

All affidavits have certain requirements that must be met before they can be accepted. Every affidavit must be signed and notarized. The person signing must be sworn under oath that the statements made in the affidavit are true and correct. And the affiant must have personal knowledge of the truth of the statements made in the document.

An affidavit is a factual document. Consequently, the basis for the statements must be listed in the affidavit. The affidavit cannot just list an opinion; it must state the facts to support the opinion. This also means an affidavit cannot be based on hearsay statements of others that lack the appropriate foundation. The best recollection of the affiant is usually not enough — the statements should be based on his or her specific personal knowledge to be sufficient. Once the foundational requirements are met, nearly any evidence that can be submitted by live testimony can be submitted by use of an affidavit.

This leaves the following short list of requirements for a valid affidavit:

(1) All necessary facts are in the text (and all facts needed to support any opinions made);

(2) Stated facts are within the personal knowledge of the affiant;

(3) Affidavit is signed by the person with that knowledge;

(4) Signatory is signed while under oath; and

(5) Affidavit is notarized.

Following these rules to the letter makes your affidavit almost impervious to attack.

Once an affidavit is admitted, the effect is that the statements must be accepted as true. These averments override all allegations in the pleadings (to the extent they are not also subscribed to by affidavit). Another effect of admission of the affidavit is that any exhibits mentioned and attested to in the body of the text become verified and admissible, too.

The Limits

Everything has its limits, and affidavits are no exception. Affidavits are not pleadings and cannot take the place of pleadings. They cannot state what the intent of others was at any particular time or place. They cannot be based on "information and belief" of the affiant; only hard facts will do. A laundry list of opinions without factual basis is a red-flagged affidavit waiting for a motion to strike.

G. Grant Dixon III is an associate at Corboy & Demetrio. This article is adapted from materials he prepared for a YLS seminar.

In theory, affidavits cannot be used to muddle an already clear record. Affidavits cannot contradict what a judge knows to be true. This probably also means an affidavit can be disregarded by the court if it seems illogical, improbable or unreliable. Affidavits normally cannot be used in the criminal context.

Affidavits cannot express opinions on matters of law. An example of an attempt to use such an affidavit is the recent case of *Steuri v. Prudential Insurance Co. of America*, 668 N.E. 2d 1066 (1st Dist. 1996). In response to a summary judgment motion, an employee of a defendant signed an affidavit stating the general contractor maintained control over the job site for the purposes of the Structural Work Act. Not only did the employee not have this personal knowledge, this statement was a conclusury legal opinion at the heart of the motion to be resolved. Therefore, the affidavit was improper.

An example of the "personal knowledge of affiant" requirement is *Holub v. Holy Family Society*, 164 Ill App. 3d 970, 518 N.E. 2d 419, 115 Il. Dec. 894 (1st Dist. 1987). There, an expert signed an affidavit that said the plaintiff relied on assurances of a defendant in making health care decisions. The affidavit was discarded by the court because the expert had no way of knowing this.

Another example of this personal knowledge requirement is *Riley v. Jones Brothers Construction Co.*, 198 Ill. App. 3d 822, 556 N.E. 2d 602, 144 Ill. Dec. 924 (1st Dist. 1990). An attorney filed an affidavit stating a courthouse clerk advised the lawyer's clerk that the amended complaint need not have the "FILED" stamp on it to be legally filed, provided the amended complaint appeared in the computerized docket system. The lawyer attested that way in his affidavit to explain why there was no "FILED" stamp on the amended complaint and argued that it was in fact filed. The court held that the statements were not within the personal knowledge of the signatory and therefore improper (nor was there an explanation why there was not an affidavit from the person with whom the alleged conversation took place).

A contrary result was obtained in *Parks v. McWhorter*, 144 Ill. App. 3d 270, 494 N.E. 2d 234, 98 Ill. Dec. 307 (5th Dist. 1986). There, an attorney signed an affidavit swearing that his client knew certain facts and information. Though obviously invalid, this affidavit without more, did not constitute reversible error, the court held.

One attorney even tried to have an affidavit admitted after the affiant died. The court ruled affidavits cannot be admitted posthumously. Having the affiant sign even one hour before death probably is not sufficient.

Rule 191(b)

When material facts needed to respond to a motion are not obtainable, a Rule 191(b) affidavit might be needed. These special affidavits require the party to state that material facts are known only to those persons who the lawyer is unable to contact or persons who are hostile to that party's lawyer. A list of the names of the people is required as well as a list of the anticipated opinions. The court then decides whether to grant an extension to obtain the relevant opinions from the listed witnesses.

Perhaps as important as what constitutes an affidavit is what is not an affidavit. A pleading is not an affidavit. The reason seems to be that a pleading is rarely detailed enough to give the kind of information needed in most affidavits. Many other types of sworn documents from both the United States and other countries are not intended to be (and are not) affidavits. The *Jurat*, a clause at the end of most affidavits, is not an affidavit but simply evidence that the affiant was properly sworn. Normally, swearing to the validity of documents is not enough to constitute an affidavit.

Because an affidavit is prepared and signed out of Illinois does not, by itself, make it improper. As long as the same requirements are met, the affidavit will probably be upheld as valid. Courts tend to examine the technicalities of signature and oath far more closely when presented with a foreign affidavit.

Moving To Strike

Knowing the requirements and limit of the affidavits, what can be done if an affidavit is discovered that does not meet these requirements? First, file a motion to strike the offending affidavit. Failing to object means the averments are accepted as true.

You can base your motion to strike on any of several grounds. Important questions include:

- Are the statements made by the affiant within his or her personal knowledge?
- Are the opinions given simply a legal opinion on an issue that is ultimately reserved for the judge to decide?
- Are there sufficient facts to support any opinion given?
- Does the affidavit meet the requirements of the Rule they are using?
- Are there personal opinions contained in the affidavit? If so, are they supported by the affiant?
- Does the affidavit address the issues of the motion?

Whether to exclude an affidavit is within the discretion of the trial court. Technical deficiencies will not serve as a basis to strike an otherwise valid affidavit. Substance rules over form — if the affidavit gets the information out in some form the court will likely accept it. Nor will mere surplus render ineffective an otherwise complete and sufficient affidavit. Even if the motion to strike is effective, the respondent will probably be granted leave to amend. But a lack of diligence may result in a refusal to allow the amendment.

Making your affidavits bulletproof is easy. All that is required is knowing what a proper affidavit says and cannot say. Though it won't stop the attacks, it will make those challenges less likely to succeed. It also means you can make better, more effective challenges to those deficient affidavits we all see. You'll be happy, and (more importantly) your boss and client will be happy, too. ■