

# REED ARMSTRONG QUARTERLY

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# IMMUNITY

## **The Doctrine of Sovereign Immunity Does Not Apply When the State's Agents Violate Statutory or Constitutional Law, or Act in Excess of Their Authority since Illegal Acts of a State's Agents Are Not Regarded as Acts of the State**

*Leetaru v. Board of Trustees of University of Illinois*, 2015 IL 117485 (opinion subject to revision or withdrawal)

The plaintiff, a doctoral student, filed an action for injunctive relief against the defendants, the Board of Trustees of University of Illinois and a vice-chancellor, alleging that an ongoing investigation into his alleged misconduct as a graduate student violated several provisions of the university's Policies and Procedures, as well as the Bylaws of the Graduate College Handbook. Specifically, the plaintiff alleged that the defendants deviated from the prescribed procedures in certain delineated ways, and he sought preliminary and permanent injunctions to prevent the defendants from proceeding further with the investigation. The defendants moved to dismiss on the basis that they were protected by the State Lawsuit Immunity Act, and that exclusive jurisdiction for the claim lay in the Court of Claims. The circuit court dismissed the action, and the appellate court affirmed.

The Supreme Court reversed the lower courts. The court observed that the Section 2-619 motion to dismiss acknowledged, for purposes of the motion, that the plaintiff's complaint was legally sufficient. Thus, the court was only tasked with deciding whether jurisdiction lay with the circuit court. In holding that the action could proceed in circuit court, the Supreme Court noted that formal identification of the parties is not determinative of whether an action is actually against the State; rather, substance

rules over form. Nevertheless, the doctrine of sovereign immunity does not apply when the State's agents violate statutory or constitutional law, or act in excess of their authority. Illegal acts of a State's agents are not regarded as acts of the State it-

... actions to enjoin the State or its agents from exceeding their authority and violating a plaintiff's legal interests do not contravene sovereign immunity....

self, and when such is the case, a lawsuit may be maintained in circuit court against those agents. Additionally, the Illinois courts have held that actions to enjoin the State or its

agents from exceeding their authority and violating a plaintiff's legal interests do not contravene sovereign immunity; the precedent applies not only to State agents' violations of statutes and the constitution, but to violations of administrative rules and regulations as well. Because the plaintiff in this case had alleged that agents of the State had exceeded their authority, his lawsuit was properly of the type that could proceed in circuit court. Finally, the Supreme Court rejected the defendants' argument that the requested injunction would interfere with a governmental function; the action did not seek redress for a past wrong, but sought only to enjoin future, allegedly unauthorized conduct. Thus, the type of claim brought by the plaintiff did not threaten the State's sovereign immunity and could proceed.

## **Municipality Did Not Owe a Duty of Reasonable Care to Pedestrian Who Attempted to Cross a Street outside the Crosswalk.**

*Peters v. Riggs*, 2015 IL App (4th) 140043

Plaintiff was hit by a car as she crossed a city Street in Quincy, Illinois. Plaintiff filed suit against the driver who hit her, the City of Quincy and Ameren Illinois. Plaintiff based her claim against the City of Quincy and Ameren Illinois on the nonfunctioning streetlights in the location of the accident alleging they created an unreasonably unsafe condition. The defendant motorist sought contribution from the City of

Quincy and Ameren for not maintaining the streetlights. The City of Quincy and Ameren Illinois filed a motions to dismiss both plaintiff's and defendant motorist's claims which were granted. The rulings were affirmed on appeal.

The City's motion was granted on the basis that it owed plaintiff no duty relying on section 3-102(a) of the Tort Immunity Act, which provides as follows:

... a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used.

Since pedestrians are not intended users of streets, a municipality does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside the crosswalk and the court affirmed the

trial court's dismissal of plaintiff's claims against the City.

As for Ameren Illinois, the court likewise held it "owed no duty to [plaintiff] for failing to provide illumination on a city street where [plaintiff] was not an intended user of the city street" citing cases so holding where utility companies had installed, maintained or inspected street



lights for a municipality. Although Ameren owned the streetlights, the duties owed by landowners and occupiers did not apply because Ameren was not sued as the owner of the premises upon which a dangerous condition was permitted, but rather as failing to maintain the streetlights.

As for the contribution claims, they were not viable absent some bases of liability to the original plaintiff. Because the City of Quincy and Ameren owed no duty to the Plaintiff, the defendant motorist's contribution claims failed as well.

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## IN-CONCERT LIABILITY

### **Complaint Alleging Boat Passenger Affirmatively Encouraged Her Boyfriend to Drive Boat at Excess Speeds and Provided Driver with Money for Cocaine and Alcohol Stated Cause of Action for Wrongful Death of Child Who Fell off Inner Tube and Was Struck and Killed by Boat.**

*Borcia v. Hatyina*, 2015 IL App (2d) 140559

The plaintiffs filed this personal injury and wrongful death action after the death of their child. In this case, the plaintiffs' child was being towed behind a pontoon boat, on an inflatable tube when the child fell off the tube and was struck and killed by a boat. The defendant driver was significantly impaired by cocaine and alcohol when he struck the child. The plaintiffs' also sued the driver's girlfriend alleging in-concert liability, by affirmatively encouraging her boyfriend to drive the boat at excess speeds and providing the driver with money for cocaine and alcohol. Plaintiffs' also brought a cause of action for negligent infliction of emotional distress on behalf of their daughter who was on the inner tube near her sibling who was struck and killed by the

defendants' boat. The defendant girlfriend filed a motion to dismiss the in-concert liability count and the negligent infliction of emotion distress count. The trial court granted the motion to dismiss finding that the plaintiff had alleged insufficient facts to establish substantial assistance or encouragement for establishing a duty by defendant driver's girlfriend to attach under section 876 of the RESTATEMENT (SECOND) OF TORTS. The plaintiffs appealed the dismissal.

On appeal the court looked to section 876 of the RESTATEMENT (SECOND) OF TORTS which provides in pertinent part: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (b) knows that the other's con-

**"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." RESTATEMENT (SECOND) OF TORTS, § 876.**

duct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." The Appellate Court held that the plaintiffs presented allegations with proper inferences sufficient to survive a motion to dismiss. The plaintiff's



## PROXIMATE CAUSE

### Supreme Court Affirms the General Rule That Suicide Is Generally Considered an Unforeseeable Intervening Act as a Matter of Law Even for Intentional Torts.

*Turcios v. The DeBruler Company*, 2015 IL 117962 (opinion subject to revision or withdrawal)

complaint alleged that: (1) the defendants were in defendant driver's boat; (2) defendants went on a boat ride, and defendant driver operated the boat; (3) defendant girlfriend encouraged driver's continued conduct of operating the boat at an unsafe speed in his significantly impaired state; (4) and the defendants were consuming alcoholic beverages and cocaine. Based on these allegations the court inferred that: (1) no others were on the boat with Defendants; (2) there were other individuals on the lake using the lake for their enjoyment; (3) given the driver's degree of intoxication and impairment, the driver was operating the boat in an unsafe manner for the Defendants and others on the lake; (4) defendant girlfriend's encouragement served as an affirmative act, leading the driver to continue operating the boat in an unsafe manner. Based on these inferences, the court overruled the trial court's ruling dismissing the count based on in-concert liability.

As to the count based on negligent infliction of emotional distress, the court also reversed holding reasonable inferences from the allegations were sufficient to establish "that she suffered a direct impact that caused emotional distress [citation] or that she was a bystander in a zone of physical danger that caused her to fear for her own safety and that she suffered physical injury or illness as a result of her emotional distress [citation]."

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The plaintiffs in this case filed several counts against the management company of their former apartment complex, including wrongful death and survival counts. Shortly after the plaintiff Turcios and her husband moved into an apartment in the complex, they were presented with a 30 day



notice to quit, and were advised that demolition of the building would begin shortly. Ms. Turcios and her husband were also offered a free unit for one month, and were offered \$2,000 to vacate their apartment. They declined to leave, and demolition began around their unit. Plaintiff's husband committed suicide, allegedly due to intentional infliction of emotional distress. The circuit court dismissed the wrongful death and survival counts, on the basis that these causes of action

could not be brought as a result of suicide. The appellate court reversed, and the defendant appealed.

The Supreme Court reversed the appellate court and affirmed the circuit court. The Supreme Court noted that suicide is generally considered to be an intervening act that breaks the causal connection of a tortfeasor's negligent conduct; additionally, suicide is generally considered unforeseeable as a matter of law. In this case, the plaintiffs vaguely alleged that the constructive eviction and demolition constituted severe emotional distress that was a substantial factor in the suicide. Defendant argued that under *Martin v. Heinold Commodities*, the concept of foreseeability, as part of the doctrine of proximate causation, limits the liability of negligent as well as intentional tortfeasors. The Supreme Court agreed with the defendant, noting that the plaintiffs' view would lead to open-ended and limitless liability in the cases of intentional tortfeasors. The *Heinold* court noted that even intentional tortfeasors are not insurers of safety of plaintiffs, and the Supreme Court declined to overrule this view. In this case, the appellate court was mistaken to limit *Heinold* to the tort of fraud; *Heinold* is to be read as applying to intentional torts generally. Therefore, because an intentional tortfeasor's liability is limited by foreseeability as part of proximate

cause, the general rule that suicide is unforeseeable as a matter of law must be applied. Thus, the court held that when a suicide is allegedly caused by intentional infliction of emotional distress, the plaintiff is required to do more than plead facts that would establish that the defendant's conduct was merely a

cause in fact of the suicide; the plaintiff must plead facts that overcome the general rule of suicide as unforeseeable, and must demonstrate that the suicide was foreseeable. The court acknowledged that such a rare case might present itself in the future, but the case at bar was not such a case.

... plaintiff must plead facts [to] demonstrate that the suicide was foreseeable. The court acknowledged that such a rare case might present itself in the future.

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## VOLUNTARY UNDERTAKING

### Landlord and Security Contractor Assumed Duty through Voluntary Undertaking to Prevent Murder Which Was a Reasonably Foreseeable Consequence of Security Deficiencies Presented by Evidence in Opposition to Summary Judgment Motion

*McKenna v. AlliedBarton Security Services, LLC*, 2015 IL App (1<sup>st</sup>) 133414 (opinion subject to revision or withdrawal)

The plaintiffs in this matter filed wrongful death actions, survival actions, and negligence actions against multiple defendants. The case arose after a triple homicide was committed, along with additional injuries, on the 38<sup>th</sup> floor of 500 West Madison Street in Chicago. The owner/management of the building, NACA Madison, LLC,



contracted with AlliedBarton to provide security services for the

building. The contract between the two provided that NACA controlled the hiring and discipline of the AlliedBarton officers, and AlliedBarton was to “assist” the NACA security director in implementing protocols. Additionally, the protocols specified that workplace incidents that could lead to murder must be addressed, as well as that hostile individuals must be kept out of interior spaces. Finally, the protocols referred to situations in which armed individuals must be contained and prevented from harming others. The trial court granted summary judgment to NACA and AlliedBarton, finding that they owed no duty to the plaintiffs, and also finding that proximate cause could not be proven.

The First District reversed both grants of summary judgment. The appellate court observed that there is typically no duty on the part of the landowner to protect against the criminal acts of a third

the protocols specified that workplace incidents that could lead to murder must be addressed, as well as that hostile individuals must be kept out of interior spaces.

party. However, if a defendant voluntarily undertakes to protect against criminal activity, the defendant can be held liable for the actions of third parties. In this case, NACA argued that it had turned over security responsibility to AlliedBarton; however, this argument was belied by the contract between the two. Additionally, NACA had commissioned two prior studies of its building security, and both studies concluded that security was lacking;

## WRONGFUL DEATH

however, these studies were not shared with AlliedBarton.

In regard to AlliedBarton's argument that the murderous rampage was not foreseeable, the appellate court noted that the contract between NACA and AlliedBarton specifically provided that the goal was to protect the life of all persons. Additionally, there was a wealth of evidence regarding the unreasonable actions taken by AlliedBarton personnel in dealing with the murderer prior to his gaining access to the 38<sup>th</sup> floor. The allegations of negligence were supported by the facts; also, AlliedBarton assumed a duty to protect life in the contract it signed with NACA.

Finally, the court found that proximate cause did not become a legal question in this case. The facts at bar, insofar as numerous security deficiencies existed in the evidence, met the substantial factor test for a finding of cause-in-fact; additionally, legal cause could be sustained in that the defendants foresaw the potential need to deal with armed individuals intent on attacking workplaces within the building.

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### **Statute of Limitations for Wrongful Death and Survival Actions Runs from Date of Death notwithstanding the Discovery Rule Which Was Held Inapplicable in Such Cases**

*Moon v. Rhode*, 2015 IL App (3d) 130613 (opinion subject to revision or withdrawal)

Plaintiff filed a wrongful death and survival action three years after his mother's death. The defendant filed a motion to dismiss pursuant to 735 ILCS 2-619(a)(5), arguing that the two-year statute of limitations for both wrongful death and survival actions had expired. The trial court granted the defendant's motion stating that the plaintiff's mother's date of death was the date from which the two-year statute of limitation is measured. Plaintiff appealed.

On appeal the plaintiff argued that the discovery rule allowed him to file his complaint within two years from the time he knew or should have known of the negligent conduct. The plaintiff based his argument on two cases in which the court held that where a wrongful death claim is predicated upon a claim of medical malpractice that was not apparent to the plaintiff at the time of death, the statute of limitations applicable to medical malpractice actions governs the time for fil-

ing. However, this Court held that the two cases the plaintiff relied on were incorrectly decided. The court found that Wrongful Death Act and the Survival Act are creatures of the legislature. Thus, they are not susceptible to changes by

**The court found that Wrongful Death Act and the Survival Act are creatures of the legislature. Thus, they are not susceptible to changes by the judiciary.**

the judiciary. The Acts are simply to be interpreted. The Court looked to the plain language of the Wrongful Death Act and Survival act and held that under the Wrongful Death Act, and Survival Act, suit must be filed within 2 years of the date when plaintiff learned of the injury or death, not from the date when plaintiff learned of the negligence of a potential defendant causing the injury or death.



## FIRM NEWS

### Reed Armstrong Partner Secures Summary Judgment in Dog Bite Case

*Watson v. Main, et al*; Madison County Case No. 11-L-1416



Partner Michael C. Hobin secured summary judgment in favor of a campsite tenant who plaintiff alleged was negligent in allowing the co-defendant to be present unsupervised at the leased campsite with his dog, which led to the dog injuring the plaintiff. It was undisputed that on the day

of plaintiff's injury, the co-defendant was present at the campsite with his dog but the campsite tenant was not. Further, under the lease, the tenant agreed to abide by the ordinances and rules pertaining to the campground which required tenants to keep dogs on leashes, and the lease also stated guests of the tenants were to be accompanied by the tenants at all times. Also, there was no dispute that the tenant did not know of the dog's dangerous propensities.

Reed Armstrong argued under these undisputed facts the tenant was not liable because she did not meet the statutory definition of an owner under the Animal Control Act (510 ILCS 5/16 (West 2006)) in that she did not harbor or exercise control over the dog one way or another. Madison County Circuit Court Judge Dennis Ruth agreed, reasoning as follows.

As the Animal Control Act is inapplicable in this case, Plaintiff has alleged (the tenant) is liable under a theory of common law negligence. A common law negligence action is an alternative to an Animal Control Act cause of action. Traditionally, to recover under a common law negligence cause of action for a dog bite the Plaintiff must show that "the animal had a mischievous propensity to commit such injuries and that the owner had knowledge

of the propensity. *Beckert v. Risberg*, 33 Ill.2d 44, 46, 210 N.E.2d 207, 208 (1965).

The Court distinguished a case involving a horse where unlike this case, there was pled a cause of harm that was not the animal's innate dangerousness but rather negligent instruction.

With regard to the alleged breach of the lease provisions, plaintiff still failed to offer evidence that this resulted in the dog biting and injuring the Plaintiff. The tenant had no role in letting the dog off of the leash. Despite the breach of the ordinance and contract clause requiring supervision of guests, Judge Ruth ruled "[i]t was the actions of those present at the campsite immediately before and during the attack that led to Plaintiff's injury." The tenant did not violate "the clause requiring dogs to be leashed." Plaintiff is appealing the Circuit Court's ruling.

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