A Review of Illinois Statutory Immunities for Health Care Providers: A Discussion of the Case Law And Application of the Defense

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The April 1, 2020 Executive Order entered by Illinois Governor J.B. Pritzker confirmed that health care facilities, providers, and volunteers will be immune from civil liability for any injury or death alleged to have been caused by any act or omission occurring while said facility/provider/volunteer was engaged in providing health care services in response to the COVID-19 outbreak. The Order references the Illinois Emergency Management Agency Act (IEMA Act), the Emergency Medical Services (EMS) Systems Act, and the Good Samaritan Act as the legal authority upon which such immunity is conferred. As the COVID-19 death toll rises and the frontline providers continue to battle on, many may wonder exactly how the immunities are asserted and whether they will indeed afford protection. The instant publication will provide a case law review of the statutory immunities referenced in Pritzker's Executive Order 2020-19 in the context of their application and assertion as a defense.

Provider Immunity Does Not Prevent the Filing of a Lawsuit

Governor Pritzker's Executive Order 2020-19 directs that health care providers, facilities, and volunteers shall be immune from civil liability for any injury or death occurring in the course of rendering health care services in response to the COVID-19 outbreak. The statutory **immunities referenced in the Order are not a bar to suit, but rather, provide immunity from liability** absent *willful or wanton* misconduct.

The Immunities are Affirmative Defenses

The relevant statutes referenced in Executive Order 2020-19 are: 20 ILCS 3305/15 (IEMA Act); 20 ILCS 3305/21 (IEMA Act); 210 ILCS 50/3.150 (EMS Act); and 745 ILCS 49 (Good Samaritan Act).

Immunity under the **Good Samaritan Act is an affirmative defense**. In the case of *Carroll* v. *Community Health Care Clinic, Inc.*, the plaintiff filed a medical malpractice action against defendant health care clinic. 81 N.E.3d 122, 127, 414

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Ill.Dec. 856 (4th Dist. 2017). The defendant filed a motion to dismiss under section 2-619 of the Illinois Code of Civil Procedure, asserting that it was immune from liability under the Good Samaritan Act. The court discussed that the asserted immunity was an affirmative defense, citing to the following as legal authority:

The existence and preclusive effect of immunity is one such affirmative matter. See Smith v. Waukegan Park District, 231 Ill. 2d 111, 115, 324 Ill.Dec. 446, 896 N.E.2d 232, 235 (2008) (addressing immunity under the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 et seq. (West 2002)). "The defendant bears the initial burden of proof of the affirmative matter and, if satisfied, the burden shifts to the plaintiff to show that 'the defense is unfounded or requires the resolution of an essential element of material fact before it is proven.'" Mondschein v. Power Construction Co., 404 Ill. App. 3d 601, 606, 344 Ill.Dec. 344, 936 N.E.2d 1101, 1106 (2010) (quoting Kedzie & 103rd Currency Exchange, Inc. v. Hodge, 156 Ill. 2d 112, 116, 189 Ill.Dec. 31, 619 N.E.2d 732, 735 (1993)).

[emphasis added] *Carroll*, 81 N.E.3d at 127. While the case law cited by the court in *Carroll* relates to the Local Governmental and Governmental Employees Tort Immunity Act, the Court's application of such case law in evaluating the Good Samaritan defense makes clear that it is indeed an affirmative defense.

Immunity under the **EMS Act** is also treated as **an affirmative defense**. An Order entered by Cook County, Law Division, Judge Moira Johnson in *Weems* v. *Cook County Hospital* on January 3, 2013, granted the defendant "**leave to assert EMS Act Immunity as an affirmative defense**." 2013 WL 12289915 (Ill.Cir.Ct.) (Trial Order, Jan. 3, 2013.) An opinion by another Cook County, Law Division Judge also references the immunity under the EMS Act as an affirmative defense in her ruling on a Section 2-615 motion to dismiss. In *Brown* v. *Jackson Park Hosp. Foundation*, Judge Drella C. Savage opined that, "because Defendant UCMC argues that it is immune from ordinary negligence pursuant to the Emergency Medical System Services Act ("EMS Act"), this motion would probably be better suited as a 2-619 motion." 2012 WL 13027837, at *10. Judge Savage's **reference to the propriety of a Section 2-619 motion provides further support that immunity under the EMS Act will be treated as an affirmative defense** (i.e., as an "other affirmative matter per Section 2-619(a)(9)).

Further support for the proposition that immunity under the EMS Act is an affirmative defense can be found in the *Collins* v. *Superior Air-Ground Ambulance Service, Inc.* Appellate Court opinion. 338 Ill.App.3d 812, 828, 789 N.E.2d 394, 273 Ill.Dec. 494 (1st Dist. 2003). In *Collins*, the court discussed that, "Superior is raising the affirmative defense that the immunity provision in section 3.150(a) of the EMS Act shields it from liability." The court went on to opine that Superior raised this affirmative defense using the improper procedural vehicle—explaining that Superior's Section 2-615 motion was not appropriate, where the affirmative defense of immunity required the proof of many facts outside the pleadings. *Id*.

Like the court in *Brown,* the court in *Collins* suggested that **a Section 2-619 motion would have been the appropriate vehicle to raise such an affirmative defense**. [**To note, the text cited from Collins v. Superior Air-Ground Ambulance Service, Inc., is contained in a portion of the Opinion that is unpublished under Supreme Court Rule 23, however the remainder of the Opinion is published*.]

This author has not identified any Illinois case law discussing the assertion of immunity under Sections 15 and 21 of the IEMA Act. However, **looking at the application of the EMS Act and Good Samaritan Act provides us with persuasive authority that the immunity granted by the IEMA Act would be applied in the same way, i.e., as an affirmative defense.** In addition to the EMS Act and Good Samaritan Act, other Illinois statutes also treat civil immunity as an affirmative defense. For example, statutory immunity for an official performing discretionary functions and acting within the scope of her duties under the Illinois Tort Immunity Act is an affirmative defense. 745 ILCS 10/2-202; *Niebur* v. *Town of Cicero*, 212 F. Supp. 2d 790 (N.D. Ill. 2002). Another contextual reference can be seen in the Appellate Court's opinion in *Morris* v. *City of Chicago*, holding that the assertion of **statutory immunity under the Tort Immunity Act is an affirmative defense** that should be raised in a defendants' answer (however failure to timely do so does not necessarily constitute waiver where assertion was made before final judgment and results in no prejudice to the plaintiff). 130 Ill.App.3d 740 (1st Dist. 1985). Given the above, the immunity under the **IEMA Act will arguably constitute an affirmative defense**.

It should be noted that by virtue of being an affirmative defense, the defendant will have the burden of proof to establish that the alleged conduct is covered by the immunity asserted. (*See*
IPI B21.03).

Raising the Immunity Defense via Dispositive Motions

As the case law cited above reveals, defendants in Cook County have asserted immunity by way of filing a **motion to dismiss**.

- In the case of *Carroll* v. *Community Health Care Clinic, Inc*., 2017 IL App (4th) 150847, 81 N.E.3d 122, 414 Ill.Dec. 856, discussed above, defendant's Section 2-619 motion to dismiss was granted on the basis that the Good Samaritan Act provided immunity from liability.

- In *Brown* v. *Jackson Park Hosp. Foundation*, 2012 WL 13027837, discussed above, the court granted defendant University of Chicago Medical Center's ("UCMC") Section 2-615 motion to dismiss. The Court held that because the UCMC team provided emergency transport services, the EMS Act applied and thus plaintiff's claims must be dismissed with prejudice given the Act's immunity provision. However, the Court also commented that, "***certainly, however, Plaintiff may amend the complaint to allege willful and wanton conduct as the EMS Act specifically provides an exception for such tortious***

conduct."

- In *Brock* v. *Anderson Road Ass'n,* 677 N.E.2d 985, 993, 222 Ill.Dec. 451, 459, 287 Ill.App.3d 16, 26–27 (2nd Dist. 1997), the defendants' motion to dismiss was upheld on appeal, finding that emergency responder defendants were immune from liability. One of the allegations by the plaintiff in this case was that the responders were ignorant of the malfunction code on the thermometer used, which indicated that the patient's temperature was beyond the thermometer's scale. The court held that this conduct did not rise to the level of willful and wanton conduct, and further pointed out that while it may have been sufficient to establish negligence, it was not sufficient to constitute willful and wanton misconduct.

The Exception to Immunity: Willful and Wanton Conduct

The *Brown* case cited above raises a crucial point in asserting immunity under the EMS Act: **statutory immunity insulates the health care provider from liability unless willful and wanton conduct is alleged**. Where willful and wanton conduct has not been alleged, a defendant may successfully move for dismissal or summary judgment. In a case where willful and wanton conduct *is* alleged, the success of a defendant's dispositive motion rests on the sufficiency of and facts supporting such allegation—which will ordinarily be a question of fact.

An act is willful or wanton if it is intentional or if it is committed under circumstances exhibiting a reckless disregard for the safety of others. *Meck* v. *Paramedic Services of Illinois*, 695 N.E.2d 1321, 1327, 231 Ill.Dec. 202, 208, 296 Ill. App.3d 720, 728 (1st Dist. 1998). **Whether specific acts amount to willful and wanton conduct is ordinarily a question of fact for the jury, and only in an exceptional case will the issue of willful and wanton misconduct be taken from the jury's consideration or be ruled on as a question of law**. *Prowell v. Loretto Hospital*, 339 Ill.App.3d 817, 791 N.E.2d 1261, 274 Ill.Dec. 850 (1st Dist. 2003).

The circumstances dictating when such a determination will be considered a question of law are not fleshed out in the case law evaluating immunity under the EMS Act. However, the Appellate Court has addressed this issue as it relates to immunity under the Illinois Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/). In *Urban* v. *Village of Lincolnshire*, the Appellate Court held that in ruling on a motion for summary judgment, **the trial court may determine that a defendant's actions do not amount to willful and wanton conduct where no other contrary conclusion may be drawn from the record presented**. 272 Ill. App. 3d 1087, 651 N.E.2d 683 (1st Dist. 1995).

Whether a defendant's conduct may be deemed as willful and wanton will depend on a fact specific inquiry. The Appellate Court in *Washington v. City of Evanston* evaluated whether the defendant's acts rose to the level of willful and

wanton so as to preclude immunity under the EMS Act. 336 Ill. App. 3d 117, 128, 782 N.E.2d 847, 855 (1st Dist. 2002). In ultimately affirming the trial court's summary judgment finding in favor of the defendant, the Appellate Court evaluated other cases involving alleged willful and wanton misconduct by emergency personnel as instructive, discussing that:

Deviations from established guidelines and instructions on how to respond to an emergency call have been found sufficient to create a question for the trier of fact to determine whether a defendant's conduct was willful and wanton. *American National Bank & Trust Co.,* 192 Ill.2d at 286, 248 Ill.Dec. 900, 735 N.E.2d at 558 (paramedics' conduct found willful and wanton where, in violation of basic training precept to always try door before leaving scene of emergency call, paramedics left scene without trying unlocked apartment door when they received no response to their knocking and asthma victim in apartment died). **However, where the providers of emergency services provided extensive care and followed SOPs, courts have found that there was no willful and wanton misconduct despite a bad outcome for the patient**. See *Brock v. Anderson Road Ass'n,* 287 Ill.App.3d 16, 222 Ill.Dec. 451, 677 N.E.2d 985 (1997) (paramedics' failure to diagnose heat-related illness due to their unfamiliarity with thermometer was not willful and wanton misconduct given the extensive care provided to decedent in conformity with SOPs); *Bowden v. Cary Fire Protection Dist.,* 304 Ill.App.3d 274 (1999)(EMTs' difficulty in providing oxygen to decedent was not willful and wanton misconduct given the extensive care provided to decedent in conformity with SOPs).

Id at 125. The opinion in *Washington* acknowledged precedent that where a provider of emergency care deviates from standard operating procedure, such deviations have been found to create a genuine issue of material fact as to whether a defendant's conduct was willful and wanton. *Id*. In such a case, the determination of willful and wanton is a question of fact. However, it also acknowledged precedent that where emergency providers followed standard procedure and provided "extensive care", such care is not considered willful and wanton.

While there is no case law interpreting what constitutes willful and wanton conduct under the IEMA, compliance with protocols and procedures will likely be determinative in the context of COVID-19.

The success of a dispositive motion under the Good Samaritan Act largely turns on an analysis of whether the Act's particular conditions are satisfied. Section 25 of the Good Samaritan Act immunizes volunteer **physicians** from civil liability only if they: (1) "in good faith," (2) provide emergency care, (3) "without fee." 745 ILCS 49/25; *Estate of Heanue,* 355 Ill.App.3d at 650–52, 291 Ill.Dec. 537, 823 N.E.2d 1123. The meaning of the phrase "without a fee" has been the subject of much debate and will likely be the central inquiry in determining whether a defendant is entitled to immunity under the Act.

The Illinois Supreme Court held in *Home Star Bank and Financial Services* v. *Emergency Care and Health Organization* that the phrase was ambiguous. 2014 IL 115526, 6 N.E.3d 128, 144 (Ill. 2014). It reasoned that the term "fee" is broad enough to include both a patient being billed and a doctor being paid. *Id.* The Illinois Supreme Court reconciled the ambiguity by looking to the legislative intent for aid in statutory construction. In doing so, the Court ultimately determined that the promotion of volunteerism supported a **definition of "fee" that includes both a patient being billed and a doctor being compensated for his time worked**. *Id.* The *Home Star Bank* opinion affirmed reversal of the finding of summary judgment in favor of the defendants. It held that where a physician renders emergency care in the course of his duties as an emergency physician and is compensated by his employer for the hourly services he performed that day, he is not immune under the Good Samaritan Act, even where his services were not billed for by his employer. *Id*.

However, in *Carroll* v. *Community Health Care Clinic, Inc*., the same analysis was applied with a different result. 2017 IL App (4th) 150847, 81 N.E.3d 122, 414 Ill. Dec. 856. In *Carroll*, Section 30 of the Good Samaritan Act was at issue (whereas the Illinois Supreme Court in *Home Star* addressed Section 25). Section 30 immunizes volunteer providers rendering treatment at a **free medical clinic**, in good faith, who receive no fee or compensation *from that source*. 745 ILCS 49/30. The court in *Carroll* determined that because defendant doctor and APN were compensated by OSF Healthcare System, and not the medical clinic where they rendered care to the plaintiff, those defendants were not considered to have received fees or compensation from "that source" (i.e., the health care clinic). In light of the foregoing interpretation, the Appellate Court upheld the trial court's dismissal of plaintiff's claims against defendant doctor and defendant APN, holding that they were immune from liability under the Good Samaritan Act.

Application of the Good Samaritan Act to the COVID-19 crisis will likely follow a similar analysis, with a fact specific inquiry into the particular provisions of the controlling Section of the Act to dictate the result. In circumstances where, for example, retired physicians are volunteering their time to respond to the COVID-19 crisis, application of the Good Samaritan Act is likely to be unambiguous and unchallenged.

A review of existing case law lends guidance as to how the assertion of immunity as a defense under the IEMA Act, EMS Act, and Good Samaritan Act, may apply to the COVID-19 context. Executive Order 2020-19 may help eliminate some uncertainty that will undoubtedly erupt as conflicting interpretations of "willful and wanton" emerge in the COVID-19 context. By explicitly providing that the cancellation and postponement of elective procedures are covered under the immunity, such language will hopefully serve to limit challenges to provider decision-making in that regard and will aid the courts in determining, as a matter of law, that cancellation or postponement of such procedures cannot be considered willful and wanton. Nonetheless, this author anticipates that an interpretation of "willful and wanton" will be at the forefront of COVID-19

litigation and courts will be left with matters of first impression as we navigate these uncharted waters.