ILLINOIS DEFENSE COUNSEL QUARTERLY

IDC Monograph

LaDonna L. Boeckman
HeplerBroom LLC, Chicago

Sagar P. Thakkar
Rock Fusco & Connelly, LLC, Chicago

Whitney L. Burkett
Segal McCambridge, Chicago

Amendments to Illinois Wrongful Death Act to Include Exemplary Damages: Are You Ready for the Change?

I. Purpose of the Monograph

Since August 11, 2023, personal injury attorneys in Illinois have had an avenue open to them to request an additional form of damages—punitive or exemplary damages—in lawsuits brought pursuant to the Illinois Wrongful Death Act.[1] The purpose of this Monograph is to provide background and context for the change, identify issues for consideration[2], and provide guidance for the defense practitioner defending willful and wanton claims and punitive damages requests under the modified Wrongful Death Act. This Monograph will focus on those areas of law that have a robust history of addressing willful and wanton claims to provide examples and guidance. In essence, we hope that this Monograph will allow defense practitioners to be well prepared so that "you have more to give" out on the field.

II. Changes to Wrongful Death Act

As we all recall from torts classes, at common law, a person's cause of action died with the decedent. The Illinois Wrongful Death Act and Probate Act,[3] enacted in 1975 and based on the Wrongful Death Act enacted by the General Assembly in 1853, provides the next of kin of a decedent the ability to sue for the loss of a loved one. In *Mattyasovszky v. West Towns Bus Co.,* the Illinois Appellate Court for the Second District, and then the Illinois Supreme Court evaluated whether punitive damages were recoverable in a lawsuit filed by the family of a 12-year-old who was killed after he exited a bus, attempted to re-board, became caught in the door, and was ultimately crushed under the wheels of the vehicle.[4] At trial, the jury returned a verdict that included both pecuniary and punitive damages.[5] On appeal, the defendant bus company argued, in part, that the award of punitive damages was improper, citing both *Murphy v. Martin Oil Co.*[6] and *Baird v. Chicago, B & Q R.R. Co.*[7]. On appeal, the appellate court examined exemplary damages under two Illinois statutes, the Survival Act and the Wrongful Death Act.[8] Ultimately, the appellate court agreed, finding that the Wrongful Death Act did not allow for the recovery of punitive damages.[9] The Illinois Supreme Court evaluated and agreed that punitive damages were not available.[10]

During the subsequent decades, Illinois courts consistently upheld that the plain language of the Wrongful Death Act does not provide for the recovery of punitive damages.[11] The courts reinforced that absent modification of the statutory language of the Wrongful Death Act, punitive damages were not available.[12]

In August 2023, House Bill 219[13] was signed into law by Governor JB Pritzker. The bill, part of a reconciliation act, amended Illinois statutes 740 ILCS 180/1, 180/2 [Wrongful Death Act] and 755 ILCS 5/27-6 [Survival Act]. The changes made to the Illinois Wrongful Death Act by House Bill 291 include the following:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages <u>including punitive damages when applicable</u>, in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, <u>including punitive damages when applicable</u>, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.[14]

The amended language goes on to include some exceptions to the recovery of punitive damages.[15] Exemplary damages are still not recoverable in matters involving legal or medical malpractice,[16] nor "in an action against the State or unit of local government or an employee of a unit of local government in his or her official capacity."[17]

This change to the Wrongful Death Act drastically transforms the damages analysis of claims brought as a new stream of damages is now available to plaintiffs. With these changes, one must evaluate how or what actions or defenses are available to the defense counsel practitioner.

A. Exclusions and Continued Immunities

As Illinois law has consistently held, certain types of Wrongful Death lawsuits are excluded from the changes made by HB 219. Specifically, Wrongful Death Act claims arising out of medical malpractice and brought against hospitals, physicians, nurses, and other healthcare providers are specifically excluded. This is consistent with other Illinois law.[18] Similarly, legal malpractice actions brought against legal practitioners to recover wrongfully prosecuted Wrongful Death lawsuits are exempt.[19] This is consistent with the Illinois Supreme Court's holdings regarding legal malpractice that the "injury in a legal malpractice action is not a personal injury, nor is it the attorney's negligent act itself. Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission."[20]

Finally, the legal theory of sovereign immunity continues to be recognized as a bar to recovery despite the changes to the Wrongful Death Act. This is consistent with the Illinois Local Governmental and Governmental Employees Tort Immunity Act, which provides a liability shield for "actions against the State or unit of local government or an employee of a unit of local government in his or her official capacity."[21] Beyond this, immunity provisions set forward by law continue to apply. Illinois Local Governmental and Governmental Employees Tort Immunity Act,[22] provides immunity for actions taken by State and local governments and their employees; an entire area of law involving the application of this immunity in the context of public schools also exists. Similarly, the Emergency Medical Services (EMS) Systems Act[23] provides immunity for medical care provided prior to arrival at a hospital.

III. Attacking Willful and Wanton Claims at the Pleading Stage

The first weapon in the defense counsel's arsenal is an attack on the willful and wanton pleadings brought pursuant to 735 ILCS 5/2-615, a motion with respect to pleadings.[24] Section 2-615 provides the basis to point out defects in a plaintiff's complaint, or to demonstrate that a complaint fails to provide sufficient specificity that supports a claim of willful and wanton conduct. This is key when addressing willful and wanton claims in a complaint.

The Illinois Supreme Court previously noted: "A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care."[25] In *Burke v. 12 Rothschild's Liquor Mart*, the Illinois Supreme Court, citing to statute, noted that willful and wanton conduct is a "course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."[26] Similarly, the Illinois Appellate Court noted that "[t]o sufficiently plead willful and wanton conduct, a plaintiff must allege not only duty, breach, and proximate cause, but also that the defendant engaged in a course of action that showed a deliberate intention to harm or an utter indifference to or conscious disregard for the plaintiff's welfare."[27] "Inadvertence, incompetence, or unskillfulness does not constitute willful and wanton conduct."[28]

In the vast majority of complaints that are filed attempting to plead willful and wanton claims, the plaintiff's tactic is the same: to mirror the negligence allegations and insert the descriptors "willfully and wantonly" or "intentionally" or "with conscious disregard." This is insufficient to plead a claim for willful and wanton conduct. "The bare characterization of certain acts as willful and wanton misconduct is not sufficient to withstand a motion to dismiss because such misconduct must be manifested by facts alleged in the complaint."[29]

In *Callaghan v. Village of Clarendon Hills*, a pedestrian sued the Village of Clarendon Hills and Clarendon Hills Park District after she slipped and fell on ice walking on a sidewalk.[30] The governmental defendants filed motions to dismiss pursuant to 735 ILCS 5/2-615 arguing that the plaintiff's cause of action of willful and wanton conduct should be dismissed because the plaintiff "made conclusory allegations unsupported by facts."[31] The Second District Appellate Court's analysis of Callaghan's complaint allegations were that the willful and wanton allegations were "essentially the same" as the allegations against the Park District.[32] Callaghan argued to the Appellate Court that her complaint alleged facts "supporting an inference of defendants' willful and wanton conduct, specifically that they actively created an unnatural 'massive pile' of ice and snow, knowing that there was a high probability of harm to pedestrians" in the area.[33] The Appellate Court disagreed with the plaintiff's contention, noting that the Village entities removed the snow likely for the "safety and convenience of pedestrians such as plaintiff" rather than with an "intent to deliberately harm her."[34]

Similarly, in *Brooks v. McLean County Unit Dist. No. 5*, the family of Donnie Hampton, a student who died performing a game with other students called "body shots" involving "the students voluntarily hit[ting] each other with their fists while in a school bathroom" and filed suit against the school district for willful and wanton actions.[35] The lawsuit filed against the school district alleged willful and wanton conduct for failure to supervise the students and prevent them from playing the game.[36] A combined Motion to Dismiss was filed arguing in part that the complaint failed to plead sufficient facts to demonstrate willful and wanton conduct.[37]

Under the definition of willful and wanton proscribed by the Illinois Tort Immunity Act, a plaintiff must prove "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."[38] The Court found that though the complaint included allegations about how the "body shot" game was played and alleged that the school was aware of the game being played, these were insufficient to establish willful and wanton conduct on the part of the school district.

The prudent defense practitioner at the outset of the lawsuit should evaluate the complaint and determine whether adequate facts have been pled to establish willful and wanton conduct. If not, a motion to dismiss pursuant to 735 ILCS 5/2-615 should be considered. Though most courts, even if the motion is granted, will provide a plaintiff with the opportunity to file an amended complaint, tenacious pursuit of strict compliance with pleading requirements can result in dismissals and will definitely sharpen and focus the issues that the lawsuit presents.

IV. Attacking Willful and Wanton Claims through a Motion for Summary Judgment

The next opportunity to obtain results, should a plaintiff be able to withstand a defendant's motion to dismiss the complaint, is through a motion for summary judgment. At the close of discovery, a plaintiff must have amassed sufficient evidence to support each one of the elements of their claim for damages. A party is entitled to summary judgment when the pleading, depositions, admissions, and affidavits establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[39] To prove a claim for willful and wanton conduct which has resulted in the death of an individual, a plaintiff must plead and prove the basic elements of a negligence claim that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury; in addition, a plaintiff must establish either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare.[40] There must be a noticeable and "qualitative difference" established through the facts uncovered through discovery "between willful and wanton misconduct and ordinary negligence; willful and wanton misconduct should shock the conscience."[41] When the evidence does not support the existence of a "shock to the conscience," summary judgment should be considered.

Whether conduct is willful and wanton is normally reserved for the trier of fact.[42] However, as in a negligence matter, the question of whether an action or conduct may be resolved by the trial court on a motion for summary judgment where there is "no genuine issue of material fact" and all evidence is viewed "in the light most favorable to the nonmovants so overwhelmingly favors the movant that no contrary determination based on that evidence could ever stand."[43] However, when faced with summary judgment, a plaintiff must "present a factual basis that would arguably entitle the party to a judgment."[44]

Claims for willful and wanton actions have a tendency to be very fact specific. Given this intense focus on facts, rather than a fight over whether a duty applies or what the duty is, a robust and carefully crafted and supported statement of facts can serve a practitioner well when moving for summary judgment on this type of action.

Take for example a willful and wanton claim for injuries to a cyclist who was injured when biking through a parking lot and running into an unmarked stainless-steel wire used to separate parking spaces in the Public Storage lot.[45] The bicyclist was trespassing, so the claims included one for willful and wanton conduct. The appellate court, in upholding the grant of summary judgment for willful and wanton conduct wrote:

> The issue in a willful and wanton misconduct claim, unlike in a negligence claim, is not whether an injury is foreseeable, but rather, whether defendants "had notice which would alert a reasonable [person] that substantial danger was involved, and that the defendant failed to take reasonable precautions under the circumstances." Here there is no evidence that defendants knew that the wire hanging in the parking lot posed a danger to a bicyclist or to anyone else.[46]

Similarly, summary judgment can be successful when the plaintiff has found no evidence supporting their claim of willful and wanton conduct—just negligence. "If the plaintiff has failed to produce any evidence of [willful and wanton] conduct, then the court should find as a matter of law that the defendant's conduct was not willful and wanton.[47] A plaintiff cannot just rely upon the bare allegations of the pleading, but instead must bring forward facts which a court can assess as establishing willful and wanton action. Failure to do this should result in a grant of summary judgment to the movant.

However, the vast majority of cases involving a grant of summary judgment in the context of willful and wanton claims arise where statutory immunity applies, whether municipal immunity under the Local Governmental Tort Immunity Act, or another statutory immunity. These cases provide additional suggestions and strategies for attacking willful and wanton allegations.

A recent seminal case discussing the Local Government Tort Immunity Act was *Barr v. Cunningham.*[48] In *Barr*, the Illinois Supreme Court reminded the Illinois legal community that the question of willful and wanton conduct is **not** always a question of fact for a jury. The court also found that, absent an activity generally associated with serious injury, a plaintiff must at least show some prior injuries that occurred during the activity to establish willful and wanton conduct on the part of the defendants.

Evan Barr, a high school student at James B. Conant High School, sustained an eye injury while playing floor hockey in physical education class.[49] The ball that was being used bounced off another player's stick and hit Barr in the eye.[50] Barr sued the P.E. teacher, Laurel Cunningham, and the school district, alleging that Cunningham's failure to require the students to wear safety goggles amounted to willful and wanton conduct under the Tort Immunity Act.[51] At trial, the defendants moved for directed verdict, which was granted, with the court finding that the defendants were immune under the Tort Immunity Act, and that there was no evidence presented of "any willful and wanton conduct by defendants."[52] The directed verdict motion was granted. The appellate court reversed the trial court's directed verdict, and the Illinois Supreme Court reversed the appellate court's ruling, reinstating the directed verdict.

The Illinois Supreme Court noted that **"[i]f there is insufficient evidence to sustain an allegation of willful and wanton conduct, the issue should not go to the jury for its consideration**."[53] First, the Court found the fact that safety goggles were available and stored with the hockey equipment did not present a substantial question as to whether Cunningham was willful and wanton.[54] The Court pointed out that Cunningham imposed and enforced various safety rules, and that she did not believe a serious eye injury could occur using the safety ball and plastic sticks. This, according to the Court, did not exhibit a conscious disregard for safety; to the contrary, the evidence showed a conscious consideration of student safety.[55]

Before utilizing as authority a case involving the application of an immunity provision, caution is necessary because the statute may utilize its own definition of what constitutes willful and wanton. For example, the Tort Immunity Act defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."[56] Whether the actions of a local public entity or public employee constitute willful and wanton conduct often depend on the facts and circumstances of a given case. Courts have held that willful and wanton conduct can drastically range, depending on the misconduct. Under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton misconduct may be only degrees less than intentional wrongdoing.[57] The courts have been clear, however, that willful and wanton conduct is something more than mere negligence. In determining willful and wanton conduct, courts look at the mental state of the individual committing the misconduct. Willful and wanton misconduct "includes a range of mental states from actual or deliberate intent to cause harm, to utter indifference for the safety or property of others, to conscious disregard for the safety of others or their property."[58]

A. Local Governmental and Governmental Employees Tort Immunity Act

Illinois courts have generally found willful and wanton conduct cases involving a public entity or public employee ignoring dangers of a hazardous activity, failing to remediate an obvious danger, or inaction after knowledge of impeding danger. In comparison, Illinois courts have found an absence of willful and wanton conduct in cases involving more mundane activities or where there is no obvious or impending danger.

Barr[59] serves as a reminder to local public entities and their attorneys to actively pursue dismissal, summary judgment, and/or directed verdicts where there is no allegation or evidence of prior injuries and the activity is not one generally associated with serious injuries.

In such a situation, a strong argument exists that the local public entity did not have the requisite "knowledge of impending danger" to establish willful and wanton conduct. A determination of the absence of willful and wanton conduct can—and should—be made by the trial court as a matter of law in such circumstances. Indeed, an expeditious dispositive resolution to an action in which Plaintiff has merely pleaded acts amounting to negligence, but couched those acts as willful and wanton conduct, furthers the underlying intent and purpose of the Act—to prevent the dissipation of public funds from their intended purpose on damage claims.

In *Banks v. City of Rockford*,[60] the surviving family members of an individual killed during a traffic stop filed suit against the involved police officer and city.[61] The amended complaint alleged that the officer and the city and employer were willful and wanton in the traffic stop. The key factual evidence surrounded the issue of whether or not the record contained evidence that the officer acted with conscious disregard or utter indifference for the safety of the decedent. Again, this case turned on the facts that the plaintiff was able to establish. The appellate court noted that the plaintiff failed "to identify any facts allowing an inference Officer Cox climbed in the truck."[62] The court further noted that "it is just as likely Officer Cox shot the decedent in an attempt to save himself as it is he shot the decedent to stop him from fleeing. Even assuming Officer Cox intentionally shot the decedent, it is pure speculation as to why he did so."[63] Given the "limited circumstantial evidence" the court concluded that the *Banks* matter was "not a case where both parties presented material facts on willful and wanton conduct and the trier of fact has a conflict to resolve."[64] As such, summary judgment was appropriate.

B. Emergency Medical Services Systems Act

When invoking the immunity provided by the EMS Act, defendants are often in a position to argue that the evidence uncovered does not rise to the level of willful and wanton misconduct. The cases discussed below provide arguments successful in establishing that the undisputed material facts do not support a claim for willful and wanton negligence.

Hicks v. City of O'Fallon[65] involved a single-vehicle (ambulance) accident. The two plaintiffs were being transported by the ambulance and were injured in the accident.[66] The injured plaintiffs filed a lawsuit, including claims for willful and wanton negligence. The court noted that "there was no dispute that Sill [the paramedic] was a public employee in the midst of an emergency call within the meaning of the Tort Immunity Act."[67] Further, the testimony was that the paramedics were "driving with the flow of traffic"[68] And that the "testimony demonstrated that it had rained for several days before the accident," but "the record is devoid of evidence that Sill was aware of puddles of water on the roadway that presented a substantial danger."[69] Based on the totality of the evidence available, the court found that there was no evidence of willful and wanton conduct on the part of the paramedics.[70]

Additionally, consider *Gary v City of Calumet City*,[71] which arose out of Calumet City Fire Department paramedics responding to a 911 call when a 31-year-old woman suffered a severe asthma attack. Under the Emergency Medical Services System Act, Calumet City was immune from civil liability when providing pre-hospital medical care, except for care that rose to the level of willful and wanton misconduct.[72] The estate of the patient alleged that the paramedics' care was willful and wanton for delaying intubation and because on the first intubation attempt, the ET tube was placed in the esophagus, rather than the trachea, which was not discovered and corrected timely.[73] The City moved for summary judgment on the willful and wanton claims arguing that the evidence showed that the patient (1) "was intubated at the earliest possible time," (2) "even assuming arguendo that the intubation was performed incorrectly, the paramedics' error would not constitute willful and wanton conduct in light of the difficult and chaotic emergency circumstances," and (3) that "the paramedics used reliable methods to assess and monitor the intubation."[74] The trial court granting the motion for summary judgment noted that the factual circumstances of the *Gary* care fits " precisely the type of case that falls within the EMS Act."[75]

In *Bowden v. Cary Fire Protection Dist.,*[76] William Bowden suffered an asthma attack which triggered a respiratory arrest.[77] As part of the pre-hospital care, the paramedics ordered that CPR activities be stopped.[78] The EMTs administered high flow oxygen via face mask and was then bagged. While en route to the hospital, the patient suffered a respiratory arrest, which then turned into a cardiopulmonary arrest.[79] In response to orders from medical control, the paramedics attempted to intubate the patient without success and caused vomiting.[80] The paramedics continued on to the hospital. Bowden was admitted, placed on life support, and was maintained on life support until his death about a week later.[81]

The Cary Fire Department moved for summary judgment on the willful and wanton counts, arguing that the care they provided may have been negligent, but was not willful and wanton.[82] In reviewing the grant of summary judgment, the appellate court noted:

> We also do not believe that the EMTs displayed a conscious disregard for the decedent's safety because they did not immediately contact the hospital when they arrived at the scene to get permission to intubate and administer asthma medications. Nor do we believe that the EMTs were willful and wanton merely because they were unsuccessful in their attempt to intubate the decedent in the ambulance. The evidence herein demonstrates that the EMTs' conduct was in conformity with the written SOPs governing the treatment of asthma patients and that the EMTs did not attempt any life support service beyond their level of training.[83]

Interestingly, the appellate court concluded that even though the facts and outcome of the events giving rise to the lawsuit were tragic, "it is inappropriate to examine the case in hindsight and second-guess every action taken by the EMTs in rendering emergency treatment to the decedent. Lacking any evidence that the EMTs' conduct was willful and wanton, we conclude that the trial court properly entered summary judgment on behalf of CFD."[84]

V. Detailed, Comprehensive, and Targeted Discovery Aids in Defending Willful and Wanton Allegations

As we know, the plaintiffs' bar is routinely using willful and wanton allegations to shift the burden of proof to defendants to both increase the value of cases and overcome various statutory limitations on recovery. The lessons to master in this new world where a plaintiff can include willful and wanton allegations with the goal of attaining punitive damages are three-fold: 1) know the specifics of the case; 2) prepare a plan; and 3) choose your witnesses wisely.

A. Detailed: Know the Specifics of the Case

As a defense practitioner defending claims that your client's willful and wanton negligence caused the death of an individual, you must invest the time to know the factual ins and outs of the event giving rise to the death and how the client fits into the scenario. A prudent defense practitioner will want to determine at the outset where one can obtain and produce evidence supporting each of the defense requirements and undermining the plaintiff's burden. In particular, the defense attorney will examine whether there is a relationship or role that the client has that might give rise to an immunity provision. When an immunity statute is identified, meticulously evaluate the statute that gives rise to it and consider what the plaintiff must plead to either avoid the immunity or make certain that your client qualifies for the immunity. In essence, a well prepared defense practitioner needs to know the basic requirements of the statute and what evidence has been used by courts to establish inclusion.

As has been noted above, it depends upon the definition of willful and wanton that is at issue what type of "intent" it may be necessary to establish. This "intent" should be taken into account in the investigation and analysis of your available evidence and response to written discovery. Consideration of "intent" is also key to the types of questions that you ask the plaintiff's witnesses and how you prepare your own witnesses to provide deposition testimony, and, if necessary, to testify at trial.

As part of discovery, the shrewd defense practitioner will have reviewed and become aware of all of the details of the documentary evidence prior to any preparation sessions with witnesses. Doing so will allow you to identify and build a comprehensive repository of the evidence that will be used by plaintiff to try to establish that the client was willful and wanton. By understanding the nuances of the documents and how they fit into the bigger picture, the defense practitioner will be better prepared to guide how individual pieces are framed in the universe of the case. As an integral part of the document review, defense counsel should also identify which documents they may want to use with which witness under the client's control. This allows time for the witness to become comfortable with the facts, history, and ramifications of the document before testifying at deposition. Similarly, the witness can understand how that document could be weaponized by plaintiff's counsel and have a strategy to deflect a frontal attack at deposition.

The exact opposite is also a key to a sound willful and wanton discovery plan. Identification of documents to use with plaintiff's witnesses and eliciting testimony helpful to the defense can be achieved through the plaintiff's witnesses.

Despite the focus on thematic issues and strategic use of documentary evidence, the individual case facts should never be far from view. These facts are the individual pieces of the story that is being told on behalf of the client. The facts will be part of the potential frame work to establish that there is no genuine issue of material fact that there was no willful and wanton action. Possibly the facts will serve as the framework for asserting the application of a legal immunity. The same facts could be key in preventing a plaintiff's motion to amend the complaint to add punitive damages. In other words, the facts are the prepared defense attorney's stock and trade.

B. Comprehensive: Prepare a Plan

Part and parcel of knowing the facts, documents, and nuances of the witnesses, the prudent defense practitioner will have a comprehensive preparation plan based on those facts for the discovery of the case. This must include:

- Develop a general topic list for the case identifying those topics on which each witness should be prepared to testify;
- Create a matrix of each witness's name, their location/position/role at the time of the incident, and brief summary of their involvement in any investigation of the case prior to the filing of the lawsuit. This becomes a "cast of characters" for the lawsuit;
- Evaluate and organize a reference guide of the client's most important documents that will likely be used against the defense witnesses;
- Evaluate and organize a reference guide of the adverse party's most important documents that will likely be used against the defense witnesses;
- Analyze outside documents that will be efficacious in supporting your theory, themes and witnesses or will serve as a basis for opinions that your witnesses may offer (e.g., legislative guidance, policies and procedures, or a CDL study guide).

A comprehensive plan also requires astute defense practitioners to include the reasons for the extensive preparation with the individual witnesses. Doing so allows witnesses to see counsel as part of the team, rather than an interruption to their day or job. Counsel ready to attack claims for willful and wanton conduct will talk with each individual witness about the topics on which they will be speaking, the strategic value of those topics, and the specifics that each witness will bring to help support the overall theme and picture being painted.

C. Targeted: Choose Your Witnesses Wisely

Witnesses who are nervous or desperate to perform well or want to defend the company/practice should be expected. Part of the attorney's job is to both make them comfortable and make them understand that they are learning a new skill that you are asking them to put into play as opposed to playing the hero or saving the day. Cases are rarely won in a single deposition, but they certainly can be lost in one.

During the initial individual meetings with the witnesses, you need to take a critical look at and for signs of emotionality in each person and evaluate how to best identify and help to manage those issues. Each witness will be different and will no doubt be nervous. Everyone is affected by their feelings, whether about this case, their experience in a prior case, about the process, or the individual plaintiff. Part of your role as the preparing counsel is to help your witness with strategies to address their concerns, anxieties, and coping mechanisms for their own fear in addition to strategies to plan their responses to questions from opposing counsel.

Fostering trust with your witnesses is key. During follow up preparation sessions, defense counsel should be transparent in providing feedback regarding those specific issues that their responses are improving, which issues should be focused on/repeated, and what issues are outside of their wheelhouse or where they should recognize that they have no expertise and should steer away from offering testimony. Failing to be honest or hiding these things from witnesses causes distrust and concern that the witness might "disappoint coach" which can undercut their overall effectiveness as a witness.

In some matters you will need to designate a corporate witness. Use the preparation sessions to evaluate which individuals are learning the process and strategy early. They will demonstrate critical thinking about hypothetical questions. These witnesses will also understand that a plaintiff attorney may load a question with assumptions that may not exist. The savvy corporate witness will know how to acknowledge and contend with those problematic questions. Similarly, they will be able to craft short answers without those answers coming off as terse or evasive.

VI. Attacking Plaintiff's Request for Punitive Damages

Nothing in the changes to the Wrongful Death Act brought about by the implementation of HB 219 modified the requirements of 735 ILCS 5/2-604.1, which sets forth the actions that must be taken by a plaintiff seeking punitive damages in order to plead said damages.[85] Specifically, 735 ILCS 5/2-604.1 requires that a plaintiff seeking to include a claim for punitive damages, file a pretrial motion" and establish at a hearing before the court "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages."[86] A plaintiff has a window for filing such a motion, and it must be filed no later than 30 days after the close of discovery.[87]

Plaintiffs may argue that they are not required to comply with the provisions of 735 ILCS 5/2-604.1 because the amendments to the Wrongful Death Act specifically permit the recovery of punitive damages. Essentially, the changes to the statute themselves constitute statutory authority for punitive damages without the need for the court to make its own determination.

The counter to this argument, however, is that Illinois law recognizes willful and wanton claims as a heightened or aggravated form of negligence.[88] Specifically, in *Fiala v. Bickford Senior Living Group, LLC,*[89] the Illinois appellate court agreed that in a lawsuit for medical battery, the provisions of section 5/2-604 do not apply because medical battery is an intentional tort, not a claim of negligence.[90] The *Fiala* court noted that the "operative language" of section 2-604.1 is "[i]n actions . . . based on negligence . . . no complaint shall be filed containing a prayer for relief seeking punitive damages."[91] Given the genesis of willful and wanton claims as a varietal of negligence, the appellate court's reasoning in *Fiala* provides a firm argument, combined with statutory construction, that a plaintiff must in fact obtain approval from a court before proceeding with a request for punitive damages brought under the modified Wrongful Death Act.

VII. Coverage Considerations When Defending Willful and Wanton Claims

The intent of this Monograph is not to dispense recommendations with respect to insurance coverage when willful and wanton claims are involved. However, when counseling a client and defending against claims of willful and wanton actions, the question of whether or not there is insurance coverage is ever present.

Illinois has been consistent in its assertion that a policy of insurance cannot, by definition, provide indemnification for punitive damages arising out of the misdeeds of the policy holder. In *Beaver v. Country Mutual Ins. Co.*,[92] the Illinois Appellate Court for the Fifth District, citing the principle that in Illinois punitive damages are meant to punish and deter, not to form a source of compensation, found that the "line prohibiting the protection of insurance is drawn . . . not between negligent conduct and intentional conduct, but between negligent conduct and the kind of unintentional conduct for which punitive damages may be imposed."[93] However, the Second District Appellate Court recently held that an insurer has a duty to defend an additional insured based on allegations of "willful and wanton" conduct, despite the fact that the relevant endorsement provided coverage only for "negligent" acts.[94] Inclusion of coverage counsel to provide guidance may be necessary. To the extent that your client relationship is through an insurance agreement to defend, recall that the tripartite relationship can further complicate this issue. As such, caution is necessary when fulfilling the duty to represent your client.

VIII. Conclusion

As this Monograph has shown, there are many devices in a defense counsel's toolbelt to mount a defense on behalf of clients who are faced with allegations of willful and wanton conduct and ensuing punitive damages claim. On one hand, battling the willful and wanton allegations come down to focused preparation to outlast and outplay the plaintiff. But when defending against the inclusion of punitive damages, one of the most important tool is to utilize the existing Illinois case law, and particularly the long history of punitive damages serving as exemplary and punishments, rather than compensation for an injury. Said a different way, adopt the plan that Alexander Hamilton and his men describe in "Stay Alive."

Outright.
Outrun.
Outlast.
Hit'm quick, get out fast.
Chick-a-plao![95]

(Endnotes)

1 Illinois Wrongful Death Act and Probate Act, 740 ILCS 180/1.

2 As one commentator has noted, a practitioner defending a possible punitive damages claim may want to consider a constitutionality attack on a complaint alleging punitive damages as the legislative history of HB 219 demonstrates a failure to complete three readings, in violation of Illinois Constitution, Art IV, Section 8(d). Schwartz, Roy & Eckler, "Punitive damages are now permitted to be sought in Illinois wrongful death and survival actions" www.fmglaw.com/general-liability/punitive-damages-are-now-permitted-to-be-sought-in-illinois-wrongful-death-and-survival-actions/ (posted Aug. 14, 2023). Specifically, when HB 219 was passed by the legislature on May 16, 2023, and "after having gone through two readings in the House on January 12, 2023 and March 16, 2023, HB 219, which was a bill to amend the Uniform Interstate Depositions and Discovery Act, by making a technical change (a shell bill), was gutted and replace with the bill to amend the Wrongful Death Act to allow punitive damages." *Id.* Once this change was made, HB 219 was "moved out of the House and to the Senate that same day, after having been amended two more times that day in the House, and was ultimately passed by the Senate after three readings in that chamber on May 18, 2023." *Id.* Therefore the three readings constitutional requirement was not met. "Though not as egregious as some violations of the rule, this issue should be preserved given that certain Illinois courts, including two justices of the Illinois Supreme Court in *Caulkins v. Pritzker*, 2023 IL 129453, have become increasingly vocal about the problems with the enrolled bill doctrine and the failure of the General Assembly to adhere to the constitutional requirements for passage of legislation." *Id.*

3 740 ILCS 180/1.

[4] *Mattyasovszky v. West Towns Bus Co.*, 21 Ill. App. 3d 46, 48-49 (2d Dist. 1974); and decision by the Illinois Supreme Court, *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31 (1975).

[5] *Mattyasovszky v. West Towns Bus Co.*, 21 Ill. App. 3d at 48. The *Mattyasovszky* decision provides a nice history of common law and the introduction, adoption and reasons for adoption of wrongful death statutes. *Id.* at 51-53.

[6] *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423 (1974).

[7] *Baird v. Chicago, B & Q R.R.*, 11 Ill. App. 3d 268-70 (4th Dist. 1973)

[8] *Mattysovszky*, 61 Ill. 2d at 34-36 ("The objectives of an award of punitive damages are the same as those which motivate the criminal law—punishment and deterrence. Yet in a criminal case the conduct which gives rise to the imposition of punishment must be clearly defined. That is not so when the question is whether the conduct of the defendant can be characterized as either negligence **or** willful and wanton conduct. The fine that is imposed upon the defendant in a criminal case goes to the State. But in a civil case the exaction taken from the defendant, under the label of exemplary damages, becomes a windfall for the plaintiff. The maximum and minimum amounts of the fine imposed by way of punishment and deterrence in a criminal case are fixed by statute. In the civil case, however, the jury is left at large to take from the defendant and deliver to the plaintiff such amount as it sees fit.") (emphasis added).

[9] *Mattyasovszky*, 21 Ill. App. 3d at 54-55. The Second District Appellate Court noted that punitive damages "are not damages of a physical character. They are those assessed in the interest of society to punish the defendant and to warn him [or her] and others that such acts are offenses against society. No plaintiff has a vested right to punitive damages. The legislature may restrict or deny the allowance of such damages at will." *Id.* at 54.

[10] *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d at 32.

[11] *See Marston v Walgreen Co*., 389 Ill. App. 3d 337 (1st Dist. 2009) (involving claim of a pharmacist mistakenly filling a prescription with the wrong medication causing the death of a 77 year old man); *Wills v. DeKalb Area Retirement Center*, 175 Ill. App. 3d 833 (2d Dist. 1988) (finding that "punitive damages are not recoverable under the Wrongful Death Act); *Burgess v. Clairol, Inc.*, 776 F. Supp. 1278 (N.D. Ill. 1991) (evaluating Illinois law and noting that neither the Wrongful Death Act nor the Survival Act allow an estate to recover punitive damages; instead there must be some other statute authorizing an action that affords the right to recover punitive damages).

[12] *Marston*, 389 Ill. App. 3d at 346 ("We find that the plaintiff has presented no convincing argument to persuade us to deviate from strong Illinois public policy and established law, as repeatedly set out by our supreme court. Specifically, actions for punitive damages will not survive the death of the original plaintiff unless the legislature specifically authorizes such an action or there are strong equitable reasons for allowing the recovery of punitive damages.").

[13] H.B. 219, 2023 (Ill. 2023).

[14] 740 ILCS 180/1 (new language from House Bill 219 underlined).

[15] *See* Alberto Bernabe, Two Steps Forward, One Step Back: Illinois' New Rule on Punitive Damages in Wrongful Death Cases, 49 S. Ill. U. L. J. 1 (2024) (arguing that the exclusions of recovery of punitive damages in wrongful death actions for governmental immunity, medical and legal malpractice is "flawed and unfair"). Bernabe argues that though the inclusion of punitive damages is to punish a wrongdoer and to deter, because punitive damages are typically paid to

the plaintiff "as a practical matter, they are part of the total compensation package and thus supplement what could otherwise be an incomplete recovery." *Id.* at 4. This analysis jumps the very large legal justification for including punitive damages—that these damages are exemplary—and immediately cloaks the punitive damages as "part of the total compensation package" that "supplement[s] what could otherwise be a complete recovery. Under Illinois' long and well documented legal history, punitive damages are not "compensation." It is this type of imprecise assault on the very nature of punitive damages that all counsel must be on guard to address and prevent. Otherwise, plaintiffs will argue that punitive damages are "just another part of the compensatory package" and can further drive up potential verdicts without the compensatory number being tied to an actual injury.

[16] "Punitive damages not recoverable in healing art and legal malpractice cases. In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no unitive, exemplary, vindictive or aggravated damages shall be allowed." 735 ILCS 5/2-1115.

[17] 740 ILCS 180/1 ("Punitive damages are not available . . . in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity.").

[18] *See* 735 ILCS 5/2-1115 ("In all cases, whether in tort, contract, or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed.").

[19] *Id.*

[20] *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006).

[21] Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101.

[22] Illinois Local Governmental and Governmental Employees Tort Immunity Act 745 ILCS 10/1-101.

[23] Emergency Medical Services (EMS) Systems Act, 210 ILCS 50/3.150.

[24] *See* 735 ILCS 5/2-615.

[25] *Ziarko v. Soo Line R. Co.*, 161 Ill. 2d 267, 273 (1994) (cited with approval by *Satinoff v. Highland Park Public Library*, 2012 IL App (2d) 120558-U, ¶ 11; *Washington v. Chicago Bd of Educ.*, 204 Ill. App. 3d 1091, 1094 (1st Dist. 1990) (affirming grant of dismissal pursuant to a 2-615 motion to dismiss).

[26] *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 443 (1992) (noting that "willful and wanton conduct in the context of the award of punitive damages" approaches the "degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it").

[27] *Floyd v. Rockford Park Dist.*, 355 Ill. App. 3d 695, 699 (2d Dist. 2005).

[28] *Floyd*, 355 Ill. App. 3d at 701, 703.

[29] *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 300 (2d Dist. 2010) (involving a complaint that the alleged defendant "with a conscious indifference and reckless disregard for the safety of others willfully and wantonly committed" certain actions or omissions).

[30] *Callaghan*, 401 Ill. App. 3d 287 (2d Dist. 2010).

[31] *Id.* at 289.

[32] *Id.* at 302.

[33] *Id.*

[34] *Id. See also Ramos v. Waukegan Comm. Unit School Dist.*, 188 Ill. App. 3d 1031 (1989) (involving a child injured jumping rope on sidewalk and alleged that cracked and uneven sidewalks caused harm to the child; Court found allegations of cracked and uneven sidewalks were insufficient to make a claim for willful and wanton because no facts were pled showing why the sidewalk was unreasonably dangerous).

[35] *Brooks v. McLean County Unit Dist. No. 5*, 2014 IL App (4th) 130503, ¶ 1.

[36] *Brooks*, 2014 IL App (4th) 130503 at ¶ 6.

[37] *Id.* at ¶ 7.

[38] Illinois Tort Immunity Act, 740 ILCS 10/1-210.

[39] 735 ILCS 5/2-1005.

[40] *West Bend Mutual Insurance Company v. Community Unit School District 300*, 2021 IL App (2d) 210108.

[41] *Romito v. City of Chicago*, 2019 IL App (1st) 181152, ¶ 30.

[42] *See Urban v. Village of Lincolnshire*, 272 Ill. App. 3d 1087, 1094 (1st Dist. 1995).

[43] *Lacey v. Perrin*, 2015 IL App (2d) 141114 ¶ 39. *See also Urban v. Village of Lincolnshire*, 272 Ill. App. 3d at 1094 (a court may "hold as a matter of law that a public employee's actions did not amount to willful and wanton conduct when no other contrary conclusion can be drawn [from the record presented].").

[44] *Kurczak v. Cornwell*, 359 Ill. App. 3d 1051, 1059-60 (2d Dist. 2005).

[45] *McNally v. Public Storage, Inc.*, 405 Ill. App. 3d 1192 (1st Dist. 2011) (this is a Supreme Court Rule 23 decision).

[46] *McNally*, 405 Ill. App. 3d at 8-9. *See also Spires v. Mooney Motors, Inc.*, 229 Ill. Dec. 162 (4th Dist. 1992) (granting partial summary judgment on willful and wanton claims of employee injured on lunch break while using employer's tire changing machine).

[47] *Kurczak v. Cornwell*, 359 Ill. App. 3d 1051, 1060 (2d Dist. 2005).

[48] *Barr v. Cunningham*, 2017 IL 120751.

[49] *Barr*, 2017 IL 120751 at ¶ 3.

[50] *Id.* ¶ 4.

[51] *Id.* ¶ 1.

[52] *Id.* ¶ 9.

[53] *Id.* ¶ 15.

[54] *Id.* ¶ 16.

[55] *Barr*, 2017 IL 120751 at ¶ 17.

[56] 745 ILCS 10/1-210.

[57] *Ziarko v. Soo Line R.R.*, 161 Ill. 2d 267, 275-76 (1994); continuing to be cited with approval in cases such as *Kurczak v. Cornwell*, 359 Ill. App. 3d 1051, 1060 (2d Dist. 2005) (involving claims of injury after a slip and fall on ice); *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 236 (2007).

[58] *Kurczak v. Cornwell*, 359 Ill. App. 3d at 1060 (2d Dist. 2005), and *Murray v. Chicago Youth Center*, 224 Ill. 2d at 236 (2007).

[59] *See supra*.

[60] *Banks v. City of Rockford*, 2023 IL App (4th) 221111.

[61] *Banks*, 2023 IL App (4th) 221111, at ¶ 1.

[62] *Id.* at ¶ 32.

[63] *Id.*

[64] *Id.* at ¶ 36.

[65] *Hicks v. City of O'Fallon*, 2019 IL App (5th) 180397.

[66] *Hicks*, 2019 IL App (5th) 180397, at ¶ 1.

[67] *Id.* at ¶ 45.

[68] *Id.* at ¶ 50.

[69] *Id.* at ¶ 52.

[70] *Id.* at ¶ 53.

[71] *Gary v City of Calumet City*, 2020 IL App (1st) 191812.

[72] *Gary*, 2020 IL App (1st) 191812, at ¶ 2.

[73] *Id.* at ¶ 4.

[74] *Id.* at ¶ 22.

[75] *Id.* at ¶ 24. The *Gary* case noted that there is a schism in authority regarding what constitutes a question of fact on whether a paramedic acted in a manner that was willful and wanton. *Id.* at ¶ 29. On one hand are the cases of *American National Bank & Trust Co. v. City of Chicago*, 192 Ill. 2d 274 (2000), and *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360. On the other hand, there are *Bowden v. Cary Fire Protection District*, 304 Ill. App. 3d 274 (1999) and *Fagocki v. Algonquin/Lake-In-The-Hills Fire Protection District*, 496 F.3d 623 (7th Cir. 2007). However, the disparity

that the Court in *Gary* tries to point out and rests its summary judgment analysis on is shaky as multiple of the cases that created the alleged schism were pleading motions, rather than motions for summary judgment. When making and defending arguments, an evaluation of the procedural background of the case being cited may be key in distinguishing an authority being used.

76 *Bowden v. Cary Fire Protection District*, 304 Ill. App. 3d 274 (1999).

77 *Bowden*, 304 Ill. App. 3d at 275.

78 *Id.* at 276.

79 *Id.* at 277.

80 *Id.*

81 *Id.*

82 *Id.* at 279.

83 *Bowden*, 304 Ill. App. 3d at 282.

84 *Id.* at 283-84.

85 735 ILCS 5/2-604.

86 *Id.*

87 *Id.*

88 *Papadakis v. Fitness 19 IL 116, LLC*, 2018 IL App (1st) 170388, ¶ 22 ("Willful and wanton conduct is an aggravated form of negligence.").

89 *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 150067.

90 *Fiala,* 2015 IL App (2d) 150067, at ¶ 51.

91 *Id.* at ¶ 53.

92 *Beaver v. Country Mutual Ins. Co.*, 95 Ill. App. 3d 1122 (5th Dist. 1981) (addressing whether Illinois public policy "permits insurance against liability for punitive damages that arise out of an insured's own misconduct").

93 *Beaver*, 95 Ill. App. 3d at 1125.

94 *West Bend Mutual Ins. Co. v. Community Unit Schl Dist. 300*, 2021 IL App (2d) 210208.

95 Lin-Manuel Miranda, *Stay Alive,* on Hamilton: An American Musical (Original Broadway Cast Recording) (2015).

About the Authors

LaDonna L. Boeckman is a partner at *HeplerBroom LLC* and is based in the Chicago office. Her practice is focused on the defense of medical professionals, entities that provide healthcare to patients, and long term care facilities.

Sagar P. Thakkar concentrates his practice in civil and commercial litigation matters. Sagar represents individuals and corporate clients in a broad range of civil complex commercial litigation including contract disputes, labor/employment disputes, landlord/tenant disputes, construction negligence and insurance coverage disputes, torts litigation, and construction law. Throughout his career, he has represented clients in civil litigation matters from inception through post-judgment enforcement. He earned his B.S. in political science and economics from the University of Illinois at Chicago, and his J.D. with from IIT – Chicago-Kent College of Law.

Whitney L. Burkett of *Segal McCambridge Singer & Mahoney* in Chicago concentrates her practice on defending complex personal injury and catastrophic loss cases. As a seasoned litigator, she regularly manages litigation from inception through trial, including discovery, motion practice and trial preparation. Ms. Burkett's background includes defending medical and dental negligence, construction, transportation, premises liability and products liability claims, as well as counseling clients on risk management and litigation strategy.

About the IDC

The Illinois Defense Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.IDC.law or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, admin@IDC.law.