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Where Are We? Where are We Going? And What Does the Prudent Defense Counsel Do Now? Status of Immunity for Healthcare Workers and Institutions for Negligence Claims that Arose During the COVID-19 Pandemic

In 2020, the unimaginable occurred. The outbreak of a novel virus, COVID-19, led to the all-out war fought inside of hospitals, long term care facilities, and other healthcare institutions by doctors, respiratory therapists, nurses, CNAs, and other care providers. Interviews, statements, and articles have tried to capture what these practitioners experienced providing care to waves of patients battling a previously unseen disease with a high degree of morbidity and mortality. Regardless of what healthcare setting they practice in, each have described the overwhelming nature of battling COVID-19 and caring for patients in that setting.

On April 1, 2020, after only a few weeks of COVID-19 cases in Illinois hospitals, Governor Pritzker recognized the unprecedented nature of the challenges posed by a novel disease and the rising wave of infections. In turn, Governor Pritzker issued Executive Order 2020-19 declaring that "in a short period of time, COVID-19 has rapidly spread throughout Illinois, necessitating updated and more stringent guidance from federal, state, and local public health officials" and that "eliminating obstacles or barriers to the provision of supplies and health care services is necessary to ensure the Illinois healthcare system has adequate capacity to provide care to all who need it." Executive Order 2020-19 also recognized that less than a month before, on March 9, 2020, he had declared all counties in Illinois a disaster area in response to the spread of COVID-19 and that it was of critical importance to "ensur[e] the State of Illinois has adequate bed capacity, supplies, and providers to treat patients afflicted with COVID-19, as well as patients afflicted with other maladies." Exec Order No. 2020-19 (2020).

The Executive Order directed healthcare providers, facilities, and volunteers to render assistance to the State's response to the COVID-19 disaster. Rendering assistance involved different actions depending upon whether a healthcare provider, facility, or volunteer was involved.

For a Health Care Facility, rendering assistance must include "cancelling or postponing elective surgeries and procedures, as defined in DPH's COVID-19 – Elective Surgical Procedure Guidance, if elective surgeries or procedures are performed at the Health Care Facility." Additional ways for a Health Care Facility to render assistance can include "measures such as increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19." Ill. Exec Order No. 2020-19. However, this is not an exhaustive list.

For Health Care Professionals, however, the requirement for rendering assistance is different. Executive Order 2020-19 provides that rendering assistance is synonymous with "providing health care services at a Health Care Facility in response to the COVID-19 outbreak" or by "working under the direction of IEMA" or Department of Public Health in response to the proclamation of disaster in response to COVID-19. *Id.*

For the third category of individuals covered by Executive Order 2020-19, the "Health Care Volunteer," rendering assistance takes the form of "providing services, assistance, or support at a Health Care Facility" in response to COVID-

19 outbreak but must be "authorized to do so" or by "working under the direction of IEMA" or Department of Public Health in response to the proclamation of disaster in response to COVID-19.

Subsequently, on May 13, 2020, Governor Pritzker issued Executive Order 2020-37 which renewed the request for assistance from Health Care Facilities, Health Care Providers, and volunteers to "render assistance" to the State's efforts to address the pandemic. The difference between Executive Order 19 and 37 is the examples of rendering assistance. In EO 2020-37 examples of rendering assistance for health care facilities included measures such as:

- increasing the number of beds;
- preserving and properly employing personal protective equipment;
- conducting widespread testing; and
- taking necessary steps to provide medical care to patients with COVID-19 and prevent further transmission of COVID-19.

If the healthcare facility is a hospital, Executive Order 2020-37 includes additional considerations:

- If the hospital performs elective surgeries or procedures, those surgeries and procedures must also include compliance with IDPH's current guidance on conducting elective surgeries and procedures; and
- Accepting a transfer of a COVID-19 patient from another Hospital or State-operated entities that lack capacity or capability to provide treatment.

For healthcare facilities, EO 2020-37 must also include:

- Widespread testing of residents and widespread and regular testing of staff for COVID-19 consistent with IDPH guidelines; and
- Accepting COVID-19 patients upon transfer or discharge from a Hospital or other Health Care Facility.

Where We Began

The Executive Order sets forth provisions of the Illinois Emergency Management Agency Act, 20 ILCS 3305/15 (hereinafter IEMA Act), a statute enacted by the Illinois legislature in 1988, years before the COVID-19 emergency, which provides the Governor with emergency powers in times of crisis. The same statute provides the Governor with the authority to "make, amend, and rescind all lawful necessary orders, rules, and regulations" to carry out the provisions of the IEMA Act. *See* 20 ILCS 3305/6(c)(1); Exec. Order 2020-19. Executive Order 2020-19 grounds the immunity provided therein with the identical provisions found in the IEMA Act:

> Neither the State, any political subdivision of the State, nor, except in cases of gross negligence or willful misconduct, the Governor, the Director, the Principal Executive Officer of a political subdivision, or the agents, employees, or representatives of any them, engaged in any emergency management response or recovery activities while complying with or attempting to comply with this Act or any rule or regulation promulgated pursuant to this Act is liable for the death of or any injury to persons, or damage to property, as a result of such activity.

20 ILCS 3305/15 & Ill. Exec. Order 2020-19

> And furthermore:
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> Any private person, firm or corporation and employees and agents of such person, firm or corporation in the performance of a contract with, and under the direction of, the State, or any political subdivision of the State under the provisions of this Act shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of willful misconduct.

20 ILCS 3305/21(b) & Ill. Exec. Order 2020-19.

In addition to drawing from the immunity provisions of the IEMA Act, the Executive Order also cites to those provisions of the Good Samaritan Act, 745 ILCS 49/1, and the Emergency Medical Services System Act, 210 ICLS 50/3.150, to further bolster the immunity provided to individuals and entities who are responding to a crisis. Ill. Exec. Order 2020-19.

Executive Order 2020-19 affords immunity from liability for all allegations *other than claims of willful and wanton or gross negligence* for those people or entities who meet the criteria set out in the Executive Order:

> During the pendency of the Gubernatorial Disaster Proclamation, [Health Care Facilities, Health Care Professionals, any Health Care Volunteers] shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by such [Health Care Facilities, Health Care Professionals, any Health Care Volunteers].

Application of Immunity

Many personal injury attorneys began filing lawsuits alleging claims for injury and death as a result of COVID-19 as early as May 2020. Since then, hundreds of lawsuits for death and injury as a result of COVID-19 have been filed. However, these are not the only lawsuits against which the immunity can be asserted. As a result, most personal injury attorneys have filed lawsuits asserting both negligence and willful and wanton claims.

For those of us who have spent the last three years defending these lawsuits, we have consistently filed Motions for Involuntary Dismissal pursuant to 735 ILCS 5/2-619(a)(9), asserting that the claim asserted is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." As the question of whether or not a Health Care Facility, Health Care Professional, or Health Care Volunteer was rendering assistance lies squarely within the knowledge of that person/entity, discovery from any plaintiff will not assist in the determination. Typically, the motion for involuntary dismissal is supported by an affidavit crafted with representatives of the Health Care Facility, Health Care Professional, or Health Care Volunteer to identify and attest to the specific ways in which assistance was rendered to the State of Illinois consistent with the provisions of the Executive Order.

Under Illinois law, the movant who files a motion for involuntary dismissal "has the burden of proof on the motion and the concomitant burden of going forward." *Reynolds v. Jimmy John's Enterprises, LLC,* 2013 IL App. (4th) 12039 at ¶ 37. Once the defendant meets the initial burden, as when an affidavit is filed supporting the ways in which a Healthcare Institution or Healthcare Provider was rendering assistance to the state, "the burden then shifts to the plaintiff,

who must establish that the affirmative matter asserted either is unfounded or requires the resolution of an essential element of material fact before it is proven." *Reynolds v. Jimmy John's Enterprises, LLC,* 2013 IL App. (4th) 12039 at ¶ 37.

It was at this junction that most trial courts evaluated the motions to dismiss and concluded that a question of fact existed regarding whether the defendant was rendering assistance. However, this is a premature conclusion. In fact, Illinois law is clear: "By presenting adequate affidavits supporting the asserted defense, the defendant satisfies the initial burden of going forward on the motion and that the burden immediately shifts to the plaintiff to submit "counter-evidentiary materials refusing the movant's affirmative defense." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). Illinois law is also clear that when "supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted." *Zedella v. Gibson*, 166 Ill. 2d 181, 195 (1995). A plaintiff must file a counter affidavit to respond. A plaintiff's failure to do so will result in the facts of an affidavit are deemed admitted. *Piser v. State Farm Mut. Auto. Ins. Co.*, 405 Ill. App. 3d 341, 353 (1st Dist. 2010). Since any evidence regarding the number of beds available in a facility, actions taken to preserve and protect the availability of PPE, and whether or not elective surgeries and procedures were cancelled or postponed will only be in the hands of the Health Care Facility, it should be difficult for a plaintiff to obtain and file a counter affidavit.

Where We Are: The *James* Decision

One early decision on the question of application of immunity under Executive Order 2020-19 is *James v. Geneva Nursing & Rehabilitation Center, LLC*, 2023 IL App (2d) 220180, where a motion for involuntary dismissal was filed to dismiss the negligence claims contained in the plaintiffs' complaints supported by an affidavit of the nursing home administrator setting out actions taken by the facility consistent with rendering assistance. After briefing, the Kane County Circuit Court denied the motion to dismiss, finding that a question of fact existed regarding whether the facility had rendered assistance. The trial court granted a request for certified question pursuant to Supreme Court Rule 308. The certified question submitted was: whether Executive order No. 2020-19 provides "blanket immunity for ordinary negligence [claims] to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic." *James v. Geneva Nursing & Rehabilitation Center, LLC*, 2023 IL App (2d) 220180 at ¶ 2.

The Second District revised the certified question, noting that blanket immunity is not available under the provisions of the IEMA Act and Executive Order because it excludes willful and wanton actions on the face of the order. *See id.* at ¶ 37. However, the Second Circuit Appellate Court went on to evaluate the breadth of immunity provided under Executive Order 2020-19 and the IEMA Act.

The *James* decision makes clear that the immunity provided is a product of the IEMA Act as announced by the Executive Order. "Executive Order No. 2020-19 invoked the Governor's authority under section 21(c) of the Act [Illinois Emergency Management Agency Act, 20 ILCs 3305/1 et seq (West 2020)] to extend ordinary governmental tort immunity" to Health Care Facilities and Health Care providers "during the Governor's disaster declaration. *Id.* at ¶ 7. The Appellate Court noted that immunity "would derive from the Illinois Emergency Management Act, not the executive order invoking that Act" because all the Executive Order did was "invoke the Governor's authority to declare a public health emergency, triggering a preexisting, potential statutory immunity for health care facilities under the Act." *Id.* at ¶ 17.

The Second District Appellate Court rejected any challenge to the constitutionality of Executive Order 2020-19, once again noting that because the immunity derives from the provision of the IEMA and was not "inconsistent with the

relevant portion of the Act." *Id.* at ¶18. It should be noted that the IEMA has been in existence and invoked previously without question of constitutionality.

The Appellate Court next addressed the relevant grant of immunity within Executive Order 2020-19 contained within Section 3:

> [D]uring the pendency of the Gubernatorial Disaster Proclamation, Health Care Facilities . . . shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Facility, which injury or death occurred at a time when a Health Care Facility was engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak.

EO 20-19 Section 3.

The plaintiffs in *James* made many arguments that the Executive Order (and therefore the source of the Governor's power, the IEMA) does not provide immunity, either because there must be "real assistance" to the State for immunity to apply. (James Response brief at 10-11). Essentially, the *James* Plaintiffs argued for either a threshold finding of "enough" assistance rendered to the State or evidence of a causal link between the assistance rendered to the State with the injury to the plaintiff or plaintiff's decedent.

The Appellate Court rejected this line of argument. "We need not parse the executive order's language too closely—particularly its use of the phrase 'at a time'—as the parties have." *James*, at ¶19. The Appellate Court found no ambiguity in section 21(c) of the IEMA. "The statutory authority is clear that, except for willful misconduct, any 'private person, firm or corporation' who renders assistance or advice at the request of the State *** *during* [a] *** disaster [ ] shall not be civilly liable for causing the death of, or injury to, *any person*." *Id.* at 20 (emphasis in the original).

Having found that EO 2020-19 exists as an expression of the immunity available through the IEMA, and that there are no questions of constitutionality, the Appellate Court went on to note that what rendering assistance means "is apt to be a fact-found question not easily disposed of through preliminary pleadings and process." *Id.* at ¶ 22.

Asserting Immunity

For those of us who spend our legal careers defending medical providers and healthcare institutions, the idea of an immunity available for any of the care that we defend is a *rara avis* situation—reminiscent of the lyrics of Alice Coopers' classic. "I'm always chasing rainbows waiting to find the little bluebird in vain." However, consistent with the decision in *James*, for the period of time that Governor Pritzker issued a proclamation declaring that an emergency exists, immunity should be available. *See* IEMA §21(c) ("Any private person, firm or corporation and employees . . . who renders assistance or advice at the request of the State . . . shall not be liable for causing the death or, or injury to, any person . . . except in the event of willful misconduct."); and EO 20-19 ("During the pendency of the Gubernatorial Disaster Proclamation, [Health Care Facilities, Health Care Professionals, any Health Care Volunteers] shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by such [Health Care Facilities, Health Care Professionals, any Health Care Volunteers]"). Governor Pritzker issued the first emergency proclamation on March 9, 2020, and continued to renew the proclamation until expiration on May 11, 2023. Arguably, if a Healthcare Facility or Healthcare Provider rendered assistance to the State of Illinois in the ways outlined in the Executive Order, they should be entitled to immunity for allegations of negligence.

The prudent practitioner should assert immunity under the IEMA and Executive Orders as an affirmative defense while filing an answer to the complaint. The affirmative defense need not set out specific actions taken to render assistance, but a statement positively asserting each of the declared definitions of what rendering assistance was, considering the time frame of the alleged care at issue.

With respect to the timing of filing a motion, some courts may take the language in *James* literally, that a motion for summary judgment or partial summary judgment should be the vehicle to assert immunity. *See James*, 2023 IL App (2d) at ¶ 22. However, a motion for involuntary dismissal pursuant to 735 ILCS 5/2-619(a)(9) supported by an affidavit affords the opportunity for discovery. This addresses the Appellate Court's concern regarding the need for a "fact-bound" analysis in evaluating the application of immunity.

Plaintiffs' Current Response

The typical arguments raised by personal injury attorneys in responding to a claim of immunity (other than to argue that EO 20-19 does not provide immunity) is to attack on the issue of causal connection. If the *James* decision is the controlling decision, the language of the IEMA controls, which does not include any causation requirement, and any assertion for the need of causality should be dismissed.

Litigants should be aware of a decision issued by Judge Angelo Kappas of the DuPage County Court in *Ware v. Butterfield Health Care, Inc.*, No. 2021 L 001185 (18th Jud. Cir.). Judge Kappas issued an opinion on a motion to dismiss one week before the *James* decision was released. The decision in *Ware* compared the language of the Executive Order 2020-19 with that of 2020-37 in addressing causation. The language in Executive Order 2020-37 "clearly incorporates a causal connection requirement in that it states that hospitals are immune 'from civil liability for any injury or death *relating to* the diagnosis, transmission, or treatment of COVID-19." *Ware* at 12. The *Ware* Court went on to deduce: "By looking at EO 2020-37, it is clear that Governor Pritzker knew how to use precise language to incorporate a causal connection requirement, indicating that, if he wanted such a requirement in EO 2020-19, he would have explicitly added one to the plain language." *Id.*

Similarly, many personal injury attorneys attempt to minimize the efforts of the healthcare industry in responding to the COVID-19 pandemic. Arguments such as the Healthcare Facility "keeping a face mask or two in a closet constituting preserving PPE" or that accepting residents from the hospital setting into the facility was nothing more than "business as usual" all speak to the argument that there is a threshold before immunity applies. This argument also fails because there is no language in either the IEMA or Executive Order establishing what threshold assistance is required prior to immunity being available.

Current Status

As of the drafting of this article, the plaintiffs in *James* have filed a petition for leave to appeal to the Illinois Supreme Court, which has not been decided. *See James v. Geneva Nursing & Rehab Center, LLC*. (No. 130042) (filed Sept. 21, 2023). As such, at this time *James* is the controlling decision. Practitioners defending healthcare providers and institutions should use the IEMA as jumping off point for asserting immunity for negligence allegations.

Nothing within the Executive Orders or IEMA limits the application of immunity to only COVID-19 claims. There is also no question that the impact of COVID-19 addressed many aspects of the delivery of healthcare, including the

availability of beds, increase in the demands placed upon nursing staff, and so on. All of which should be covered by the immunity provision.

In addition to filing an affirmative defense asserting immunity pursuant to the IEMA and Executive Orders, a prudent practitioner should issue written discovery to confirm the plaintiff's lack of knowledge of those issues that form the basis of rendering assistance—number of beds available, policies on extended PPE usage, knowledge of steps to purchase and acquire PPE, inservices to inform staff and providers about COVID-19 and the current information and precautions, and when necessary steps to cancel elective surgeries and/or conduct COVID-19 testing. Armed with discovery answers that establish the plaintiff's lack of knowledge on issues that would contradict the affidavit of a knowledgeable representative of a Healthcare Facility or Practitioner in support of either a motion for involuntary dismissal or motion for summary/partial summary judgment, the prudent practitioner will set opposing counsel on their heels.

About the Author

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