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26 pages in 2 sections

Consultant's job wasn't what was promised

COMMERCIAL LITIGATION, PAGE 4

TRIAL NOTEBOOK

STEVEN P. GARMISA
Hoey & Farina

Tender offer derails class, ends lawsuit

Alderson v. Weinstein

Two years ago the U.S. Supreme Court ruled that an unaccepted tender from a defendant doesn't make a lawsuit moot — because "an unaccepted settlement offer, like any unaccepted contract offer, is a legal nullity with no operative effect," *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) — but the Illinois Supreme Court hasn't reconsidered its 2011 decision, in *Barber v. American Airlines*, 241 Ill. 2d 450, that an unaccepted tender can kill a case.

In a new case, *Barber* administered a coup de gracê to the class action Richard and Ann Alderson pursued against the Lake County court clerk.

The Aldersons alleged the court clerk's office demanded a $50 fee — as authorized by the Clerks of Courts Act for a petition seeking relief from a "final judgment" — when they promptly requested reinstatement of a lawsuit (referred to as "the arbitration case") that was dismissed for want of prosecution. But because the "DWP" wasn't a final order, they shouldn't have been charged the $50 fee.

Their class-action complaint — which named the Lake County court clerk, Erin C. Weinstein, as a representative of all of the other court clerks in Illinois — asked for a writ of mandamus commanding refunds (Count 1) plus an accounting (Count 2).

Before the Aldersons' requested class certification, Weinstein sent a check for $50 to the lawyer who represented them in the arbitration case, plus $291 to their new attorney for the filing fee in the class action. But their prior lawyer allegedly cashed the $50 check without authorization.

Based on (1) the first attorney's conduct, (2) *Barber* and (2) an affidavit from Weinstein pledging her office would no longer collect the improper fee, Circuit Judge Margaret J. Mullen moved to dismiss the class action as moot.

Affirming dismissal of the class action, the Illinois Appellate Court explained that "this is a simple case" under *Barber*, because "the Aldersons have essentially received all that they are entitled to and then some."

And "even if Illinois were to adopt the *Campbell-Ewald* approach, any distinction between accepted and rejected offers would likely matter little in this case" — because "their attorney in the arbitration case (i.e., their agent) cashed Weinstein's $50 refund check." *Alderson v. Weinstein*, 2018 IL App (2d) 170498 (July 13, 2018).

Here are highlights of Justice Susan Fayette Hutchinson's opinion (with omissions not noted and formatting modified for clarity):

At present, Illinois law draws no distinction between an accepted offer of tender and an unaccepted offer of tender. For example, in *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481 (1984), where a class of teachers sued the school board that had dismissed them, the court held that the named plaintiffs' claims were mooted when they accepted the school board's offer of re-employment. However, in *Barber v. American Airlines Inc.*, 241 Ill. 2d 450 (2011), the court held that the defendant airline's offer to refund the $40 checked-baggage fee (i.e., the consumer plaintiff's only alleged damages) mooted the plaintiff's claims, even where the offer was rejected by the plaintiff's counsel.

So, for the purpose of evaluating

NOTEBOOK, *Page 4*

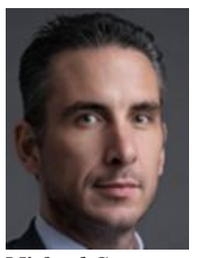
IN THE NEWS

BY SARAH MANSUR

Robert P. Walsh, partner at Clifford Law Offices, spoke on liens at the Illinois Trial Lawyers Association Update and Review Seminar on Friday at the Westin Chicago River North, 320 N. Dearborn St. *Photo by Bill Richert*

Thomas J. Posey

Daniel L. Farris



Michael G. DiDomenico

Alan J. Toback

IN THE LAW FIRMS

Reed Smith LLP added **Thomas J. Posey** as a partner in the labor and employment practice group.

Posey represents companies from a wide array of industries in all aspects of labor law and employment issues, including serving as a chief labor negotiator.

He was previously with Faegre Baker Daniels LLP.

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Daniel L. Farris, a partner at Fox Rothschild LLP and chair of the technology practice, presented a Healthcare Apps and Legal Issues seminar Tuesday at the firm's office in New York.

The panel discussed how technology has transformed the health-care industry and the way services are delivered, in addition to numerous legal issues health-care apps present, such as privacy concerns.

Farris counsels clients on a wide range of issues, including fiber optic networking, cloud computing, mobile app development, information management, privacy and data security.

• • • • •

Newton C. Marshall, a member at Karbal, Cohen, Economou, Silk & Dunne LLC, will speak on "Defending the Professional at Trial" at the 2018 DRI Professional Liability Seminar on Nov. 30 in New York.

The seminar will discuss myriad issues currently impacting licensed professionals, such as attorneys, accountants, architects, engineers and real estate brokers.

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Gambling bill
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"Can arbitrators refuse to approve a settlement[?]"

LAWYERS' FORUM, PAGE 4

Judge tosses lawsuit over police killing

Man shot 13 times in back in 2014; suit not filed within two years

BY DAVID THOMAS
Law Bulletin staff writer

Manish S. Shah

A federal judge on Wednesday threw out a civil rights lawsuit filed by the estate of a man who was killed when he was shot 13 times in the back by Chicago police officers.

U.S. District Judge Manish S. Shah tossed the lawsuit Esperanza Davila and others filed against the city of Chicago and the two officers who killed her boyfriend.

Davila accused Patrick Kelly and Antonio Corral of killing Hector Hernandez without provocation — according to her amended complaint, other officers already had their Tasers drawn on Hernandez when Kelly and Corral opened fire. The April 7, 2014, shooting occurred in Davila's kitchen in front of their 2-year-old son.

Kelly is a central figure in another police misconduct lawsuit — in October 2017, a federal jury awarded Brian LaPorta $44.7 million after finding that Kelly shot his friend in the back of the head either "intentionally or with reckless indifference."

Shah dismissed the lawsuit because it wasn't filed within two years of Hernandez's death, rejecting the arguments the plaintiffs raised for why the timing of the lawsuit should have been tolled. They first filed suit on Nov. 10, 2017, more than three years after Hernandez's death.

The plaintiffs argued the two-year time limit they had to sue the defendants was tolled because the city refused to disclose Kelly's and Corral's names in response to a Freedom of Information Act request they filed.

The plaintiffs also argued that their attorneys from Romanucci & Blandin LLC and the Law Office of Jeffrey Granich had pursued discovery in other lawsuits involving Kelly and the Hernandez lawsuit was never disclosed by the city.

But in a 14-page ruling, Shah said these two actions — the FOIA request and discovery in other cases — were not enough to show the plaintiffs exercised "due diligence" to discover the identities of Kelly and Corral prior to suing them. If the plaintiffs had shown due diligence, the statute of limitations would have been tolled.

"Plaintiffs here were not so diligent. Discovery by plaintiffs'

LIMITATIONS, *Page 6*

Lawyers sanctioned in kitty litter copycat case

Purina team waited until day of depo to produce 1,700 pages

BY PATRICIA MANSON
Law Bulletin staff writer

Lawyers who represent a company accused of infringing on a patent for kitty litter must pay the price for engaging in gamesmanship, a federal judge held.

In a written opinion this week, U.S. Magistrate Judge Sidney I. Schenkier sanctioned both Nestle Purina PetCare Co. and its lawyers for trying to gain an unfair advantage during discovery proceedings in a lawsuit brought against Purina by Oil-Dri Corporation of America.

Purina's lawyers withheld nearly 1,700 pages of documents — which included 1,424 pages that had not previously been produced — until the day a witness was deposed in the case, Schenkier wrote.

He wrote the lawyers then failed to provide Oil-Dri with copies of all the documents until seven days after the deposition.

"Purina's behavior warrants sanctions to remedy any prejudice to Oil-Dri and to deter Purina from further like behavior," Schenkier wrote.

He directed that the witness be deposed again by Nov. 16.

And he ordered Purina and its lawyers to pay the reasonable expenses and attorney fees Oil-Dri incurs in conducting the reconvened deposition.

Purina is represented by attorneys who include David A. Roodman and Nick E. Williamson of the St. Louis office of Bryan Cave Leighton Paisner LLP.

In a written statement, Purina spokeswoman Wendy Vlieks said the company and Bryan Cave "respect the court's decision."

"While we are disappointed the court did not deny the entire motion, we believe the court's order provides an appropriate solution for both parties," Vlieks said.

Oil-Dri's attorneys include Michael P. Mazza of Michael P. Mazza LLC in Glen Ellyn.

Mazza declined to comment because the case is pending.

Oil-Dri is based is Chicago. Purina is a St. Louis-based subsidiary of Nestle.

In February 2015, Oil-Dri filed a suit in federal court in Chicago accusing Purina of infringing an Oil-Dri patent on litter.

Three years later, Purina served a subpoena on Jerry Glynn to sit for a deposition and to produce certain documents.

Glynn, who is not a party to the suit, previously worked as a salesman for a Boulder, Colo., company named Western Aggregates.

Glynn is listed as a co-inventor of Western Aggregates' U.S. Patent Number 5,458,091.

The Western Aggregates patent is one of the bases for Purina's contention that the Oil-Dri patent it is accused of infringing is invalid.

In March, Glynn was at a former Western Aggregates facility in Colorado when he discovered two boxes of documents related to the patent he co-invented.

About that time, Glynn retained Bryan Cave to represent him at the deposition.

Mazza was not aware that Bryan Cave represented Glynn or that Glynn had documents responsive to the subpoena until Glynn gave his deposition on April 16.

When Mazza asked Roodman at the deposition why he had not made copies of the documents for Oil-Dri's attorneys beforehand, Roodman replied that he had not had time.

Roodman gave Mazza marked copies of the exhibits he used to question Glynn as he used them.

SANCTIONS, *Page 6*

4th Amendment suit over teens' car can proceed

BY ANDREW MALONEY
Law Bulletin staff writer

A federal judge has declined to toss claims that a police search in the south suburbs violated the Fourth Amendment.

U.S. Judge Manish S. Shah this week denied summary judgment for the village of Orland Hills after two minors claimed they were subjected to an unconstitutional stop.

Shah's ruling involved the village's request to drop the suit. The case was allowed to continue.

The officers claimed the 15- and 17-year-old teens drew their attention when they parked their Volkswagen in what police described as "a high-crime area" at night and made "furtive" movements in the vehicle. They claimed later they saw cannabis residue near the car but didn't photograph or collect the alleged evidence because there were only trace amounts.

The minors claimed they were waiting for a friend who would lend them a basketball. The youths said the friend lived in the area.

In a 19-page decision Monday, Shah wrote that, besides the fact the police officers believed they were parked in a high-crime area, there wasn't much evidence to bolster their claims they had reasonable suspicion to ultimately confront the boys and search their vehicle.

"If they had more, they struggle to point to it," he wrote, noting that the "furtive movement" claim — that the officers saw one of the boys motion as if he was sticking something in his sweatpants — was disputed, and a nonsuspicious inference could be drawn from it.

"A jury could conclude that an officer who did not see a suspicious gesture had no constitutional reason to detain two young men waiting in a running car in a high-crime area. There are many noncriminal things that can be waited for in a running car. One is a basketball," Shah added.

"Defendants point to no authority that justifies detention and investigation of every person sitting in a running car in this apartment complex parking lot, without some added suspicious activity," he wrote.

The events transpired on Feb. 3, 2017, around 6 p.m. The minors, identified as A.A. and D.M. in the complaint, parked among 50 or so other vehicles at an apartment complex, leaving the lights and engine running. The car got the attention of two officers, identified only as Scully and Miller in the opinion, driving an unmarked Crown Victoria down the street.

The teens filed suit in federal court on Feb. 28, 2017.

They pulled into the parking lot behind the Volkswagen and, claiming one of the occupants made a gesture toward his waistband, pulled up behind the car and boxed it in so the pair couldn't leave. They got out of their car and approached the Volkswagen with flashlights illuminated.

They would both testify they saw "shake," small bits of marijuana, in the driver's lap and on the floorboards of the car, but didn't collect evidence of it, with one officer claiming it was too little to file charges and there was no reason to think either occupant was under the influence or carrying more.

Both teens showed the officers identification and were submitted to pat-downs. Miller then searched the car for several minutes with the driver at one point offering to help him open up the center console.

However, there was conflicting testimony about whether consent to the search was actually given. Both boys testified the driver said he did not consent to a search with Miller saying he didn't need the boys' permission.

The passenger additionally testified that he suggested the officers could "go ahead and search the car all you want." Scully testified the consent discussion didn't occur. Miller was not asked the same question during deposition.

Shah noted in the opinion this week that increasingly invasive searches must be justified by increasing levels of suspicion. Police don't really need suspicion to ask bystanders questions or peer inside of cars parked in public places. That's essentially what they were doing as they parked near the teens' Volkswagen, he wrote.

However, once they boxed the vehicle in, the teens were "seized" and basically conducting a *Terry* stop. Such a maneuver requires "reasonable" suspicion, or, "specific, articulable facts" giving rise to that suspicion.

SEARCH, *Page 6*

IN THE NEWS CONTINUED FROM PAGE ONE

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Lake Toback DiDomenico partners **Michael G. DiDomenico** and **Alan J. Toback** were presenters at the American Academy of Matrimonial Lawyers Illinois chapter's 2018 Columbus Day seminar in Oak Brook on Oct. 8. The event was sponsored by the Illinois Institute of Continuing Legal Education.

DiDomenico presented a case law update and Toback moderated a panel discussion, titled Lawyer Assisted Mediation — It Does Work ... Just Not Always.

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CALENDAR FOR MORE EVENTS, VISIT CHICAGOLAWBULLETIN.COM

OCTOBER 19

A Tribute to Bob Ojeda
CBA Barristers Big Band
6 p.m.
Harold Washington Library Center, Cindy Pritzker Auditorium, 400 S. State St., Chicago

OCTOBER 25

Pro Bono & Community Service Fair
CBA Young Lawyers Section
12 a.m., Skadden Arps, 155 N. Wacker Drive, Chicago
312-554-8356

OCTOBER 26

Oktoberfest
CBA Barristers Big Band
5:30 p.m.
Chicago Bar Association, 321 S. Plymouth Court, Chicago
$50
312-554-2057 tdrees@chicagobar.org

NOVEMBER 1

Annual Dinner
Lawyers' Assistance Program
5:30 p.m.
Union League Club of Chicago, 65 W. Jackson Boulevard, Chicago

NOVEMBER 2

Workers' Compensation Seminar
Illinois Trial Lawyers Association
8 a.m.
Hilton Oak Brook Hills Resort, 3500 Midwest Road, Oak Brook
800-252-8501

NOVEMBER 8

Jewish Judges Association Award and Installation Dinner
Jewish Judges Association of Illinois
5:30 p.m.
Hyatt Regency Chicago, 151 E. Wacker Drive, Chicago
312-593-8953 bobgordon9@aol.com

NOVEMBER 17

CBF Fall Benefit
Chicago Bar Foundation
6:30 p.m., Museum of Science and Industry, 5700 S. Lake Shore Drive, Chicago

NOVEMBER 29

The Bar Show: 'Big Little Laws'
Chicago Bar Association
12 a.m.
DePaul's Merle Reskin Theatre, 60 E. Balbo Drive, Chicago

DECEMBER 10

Medical Malpractice Seminar
Illinois Trial Lawyers Association
7:30 a.m.
JW Marriott Chicago, 151 W. Adams St., Chicago
800-252-8501

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