ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL

SURVEY OF LAW 2018

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SURVEY 2018 OF LAW

CONTENTS

SURVEY OF CASES

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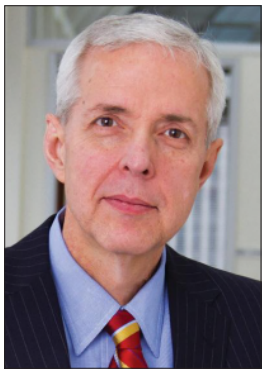

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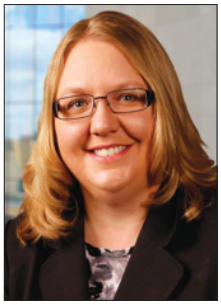

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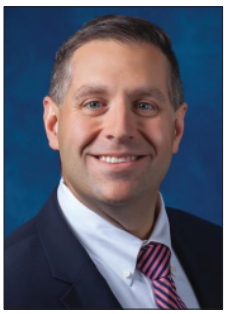

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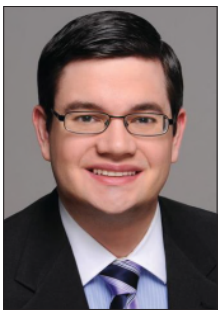

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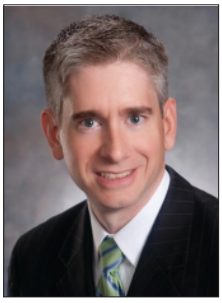

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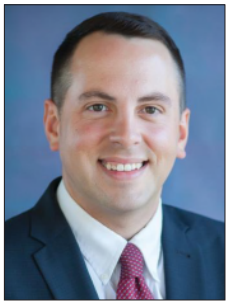

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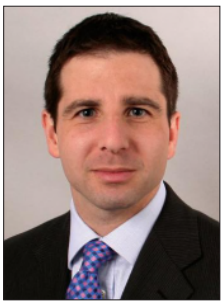

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The Illinois Association of Defense Trial Counsel is composed of an exceptional community of defense attorneys, dedicated to improving the judicial system and the practice of law. Among our core values: provide "programs and opportunities for professional development to assist members in better serving their clients." For more than a quarter of a century, one of the premiere ways we addressed that core value, and provided our members with the high quality information they needed to develop intellectually and professionally, was to publish the *IDC Quarterly*. Several years ago, the leadership of the IDC concluded that we could and should supplement the *Quarterly* and do even more as an organization to educate our members, our clients, and the judiciary. As a result, the *IDC Survey of Law* was born.

Every year since 2011, the IDC has published its *Survey of Law*. The content, written by members of the IDC Construction, Employment Law, Insurance Law, Local Government and Tort Law Committees, is a compilation of recent decisions designed to keep our members and other important decision makers abreast of changes in the law. This, our eighth annual edition, is no exception. Inside these pages you will find summaries of all of the important cases from 2018 that defense counsel—and their clients—should know about.

My deepest thanks to the Editor-in-Chief, Tara Kuchar, the Managing Editor, Denise Baker-Seal, along with the members of the *Survey of Law* Editorial Board, Laura Beasley, Terry Fox, Don O'Meara, Jr., Michael Resis, Kimberly Ross, and John Watson, as well as all of the authors, for all of their hard work in breathing life into this invaluable resource. On behalf of the officers, Board of Directors and membership of the IDC, thank you for a job well done!

Letter from the **Editors**

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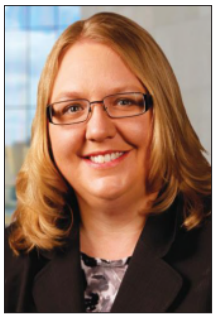

The IDC is committed to being the voice of the Illinois defense bar. As part of its pledge, the IDC strives to provide programs and opportunities for professional development to assist members in better serving their clients. This commitment includes providing its members with legal education and keeping its members updated on legal developments. Year after year, the *IDC Survey of Law* endeavors to aid members in their daily practice of law with these goals in mind.

The *2018 IDC Survey of Law* continues the IDC's rich tradition by highlighting some of the significant legal developments in Illinois. This year's publication includes articles on a range of topics, including construction law, employment law, insurance law, local government and tort law, which assists our members in keeping abreast of the current law in Illinois. The IDC is also proud to expand the *Survey's* content this year by including a new section on ethics. The IDC hopes that the *Survey* will not only increase its members' knowledge of the law, but also support its members in providing outstanding legal services to their clients.

It is an honor to work on such a valuable publication, and it is a privilege to work with the contributors to the *IDC Survey of Law*, for without them, this publication would not be possible. We express our sincerest gratitude to the Editorial Board, authors, and Executive Director, Sandra J. Wulf, for their efforts in making the *Survey* a premier publication for the Illinois defense bar.

Survey of Civil Practice Law Cases

An Open and Obvious Snow Pile Was Not Subject to the Deliberate Encounter Exception

The plaintiff in *Winters v. MIMG LII Arbors at Eastland, LLC* fell and broke his ankle while traversing a large pile of snow on a sidewalk at his apartment complex. He sued the complex owner and the snow removal service alleging each was negligent. The plaintiff later testified that, at the time of his injury, he was walking from his apartment to a nearby building to do his laundry. The plaintiff saw that the pile of snow fully blocked the sidewalk ahead of him, and realized that he had multiple alternative paths to the complex's laundry facility that would not have greatly increased the length of his journey. He nevertheless decided to walk over the pile, slipped, and was injured.

The defendants filed motions for summary judgment arguing, *inter alia*, that they owed no duty to the plaintiff because the snow pile was an "open and obvious" condition. In response, the plaintiff maintained that the "deliberate encounter exception" applied to rebut application of the open and obvious condition doctrine. The trial court granted summary judgment to the defendants, and the plaintiff appealed.

The appellate court noted that a condition on land is open and obvious when a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved. The deliberate encounter exception applies when the landowner has reason to know that an invitee or licensee will proceed to encounter the known or obvious danger because a reasonable person in plaintiff's position would do so. Its application typically involves some form of economic compulsion to the plaintiff.

The court found no question of material fact regarding the big snow pile: it was open and obvious as a matter of law. It further found the deliberate encounter exception inapplicable because, although the plaintiff knew he had other available paths to the laundry facility, he chose to negotiate the slippery pile of snow. There existed no economic compulsion in this instance—he had no money-driven reason to hurry; likewise, he failed to show that a reasonable person in his position would have found "greater utility" in walking over the pile instead of utilizing an alternative route.

Winters v. MIMG LII Arbors at Eastland, LLC, 2018 IL App (4th) 170669.

Relation-back Doctrine Did Not Allow for the Addition of a New Plaintiff

In *Hage v. Kossier*, a 13-vehicle pileup in Ogle County resulted in a personal injury lawsuit filed by a plaintiff against multiple defendants. Subsequently, after a second plaintiff filed an action bringing clams for the same accident, the plaintiff in this action sought leave to file an amended complaint adding the second plaintiff and further adding a new count on behalf of the second plaintiff. Whereas, the first plaintiff alleged that she was injured inside one of the vehicles involved in the crash, the proposed new count alleged that the second plaintiff was separately injured while standing on the road as a pedestrian. The motion to amend was brought after the two-year limitations period for personal injury actions. Protracted motion practice ensued, and the trial court ultimately granted a defendant driver's motion to dismiss the new count. The court found that the new count created a *de facto* second case that did not relate back to the original, timely action.

On appeal, the plaintiffs argued that the new count satisfied the relation-back doctrine because the original pleading was timely and the newly-described circumstances grew out of the same nucleus of operative facts. The appellate court disagreed. It found that the negligence alleged in the new count arose from different alleged acts and, thus, different occurrences. The court noted that the mechanism of the injuries were entirely separate, the injuries took place a separate times, and the new claim actually conflicted with the timely filed ones. Under the circumstances, the court concluded that nothing within the timely-filed complaint placed the relevant defendant on notice that she might have to defend against the allegations contained in the new count. In the absence of such notice, there was no basis for relation-back.

Hage v. Kossier, 2018 IL App (2d) 170901.

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Mandatory Arbitration Agreement Enforceable by a Successor Entity

In *Kero v. Palacios*, the appellate court considered a challenge to the enforceability a written agreement to arbitrate negligence claims made against a rehabilitation facility. The plaintiff was a patient at the facility. Upon his admission, the plaintiff signed a "Health Care Arbitration Agreement" stating that all claims of negligence must be submitted to binding arbitration. The contracting "facility" listed on the agreement was identified as "Imperial Grove Pavilion," along with, *inter alia*, its parents, affiliates, subsidiary companies, successors, and assigns. A second entity name, "Symphony of Lincoln Park," was handwritten into two sections of the agreement. The facility formally changed its name from "Imperial Grove Pavilion" to "Symphony of Lincoln Park" during the plaintiff's stay there. He subsequently bought a personal injury suit against the facility alleging negligence and intentional misconduct. The intentional misconduct counts were stricken by the court.

The facility moved to dismiss and compel arbitration of the negligence counts. It argued that the agreement was valid and enforceable, and that Symphony was a party to it through its then operative name of "Imperial Grove Pavilion." Symphony also provided affidavits of two employees who averred that the plaintiff was of sound mind and voluntarily executed the agreement, and explained how Symphony was a licensee of Imperial Grove Pavilion prior to the plaintiff's admission and then changed its operating name to Symphony of Lincoln Park during his stay there. In response, the plaintiff argued that the arbitration agreement was unenforceable because (1) the evidence presented failed to show that the entity referred to as "Symphony" was a party to the agreement; and (2) he executed the agreement under duress. The trial court rejected the plaintiff's arguments and granted Symphony's motion to dismiss and compel arbitration.

The appellate court decisively affirmed the trial court's ruling. It found that the affidavits presented by Symphony were legally sufficient and, along with the plaintiff's admission packet, demonstrated that Symphony was a party to the arbitration contract. It was, at the least, a successor and affiliate of Imperial Grove. The court further noted that, since Symphony was identified by handwriting in the agreement, there was no effort to hide the name from the plaintiff. The court rejected the plaintiff's claim of duress as rebutted by the record. The plaintiff did not allege that he was forced to sign the agreement or that he would have refused to sign it under different circumstances. Furthermore, the agreement itself stated, in all capital letters directly above the plaintiff's signature, that a patient "cannot be required to sign this agreement in order to receive treatment."

Kero v. Palacios, 2018 ILL App (1st) 172427.

Employer Could Not Avoid Punitive Damages for Willful and Wanton Conduct Through Admission of *Respondeat Superior* Liability

Neuhengen v. Global Experience Specialists, Inc. involved a personal injury action against a forklift driver and his employer. The plaintiff alleged that, while working at a trade show at McCormick Place in Chicago, he was injured by a forklift driven by an employee of Global Experience Specialists, Inc. (GES). The plaintiff filed suit alleging negligence and willful and wanton conduct against the driver and GES.

Before trial, the driver admitted to negligence; furthermore, GES admitted to *respondeat superior* liability, both for the driver's negligence and, if applicable, his willful and wanton conduct. GES unsuccessfully moved to dismiss certain claims in light of its admission, including a count alleging willful and wonton conduct by GES based on its hiring of and failure to train the driver. At trial, the evidence demonstrated that GES never tested, evaluated, or required that the driver be certified to operate the forklift involved in the accident in violation of OSHA rules. GES admitted that, during the relevant time period, it had no formalized procedures in place for checking for certifications. The jury ultimately found for the plaintiff and awarded him more than $12 million in compensatory damages for the driver's negligence and $3,000,000 in punitive damages for willful and wanton conduct by GES. Through special interrogatories, the jury found that GES's—but not the driver's—conduct was willful and wanton. The defendants' post-trial motions included a request for judgment notwithstanding the verdict on the $3,000,000 punitive damages award against GES. The trial court granted the JNOV, finding that GES's conduct "could never be" the proximate cause of the plaintiff's injuries.

On appeal, the defendants argued it was deprived of a fair trial by the trial court's failure to dismiss the count alleging willful and wanton conduct by GES after GES admitted to *respondeat superior* liability for the driver's willful and wanton conduct. The plaintiff cross-appealed, arguing that the court erred in granting the JNOV. The appellate court acknowledged that, generally, allegations of an employer's negligence should be dismissed as duplicative when an employer admits to an agency relationship; however, after reviewing opinions from a number of jurisdictions, it further held that the general rule should not apply when a plaintiff pleads an independent, viable punitive damages claim alleging willful and wanton conduct as to hiring, training, or entrustment of dangerous equipment to employees. The court found support for this view in the Restatement (Second) of Agency, which discusses the imposition of punitive damages against a principal for the acts of an agent if the agent is unfit for the task at hand

and the principal is reckless in hiring him. The court further addressed public policy, and opined that a rule mandating that all willful and wanton claims against an employer must fall upon its admission of *respondeat superior* liability would allow it to avoid responsibility for its own conduct.

With respect to the trial court's JNOV finding, the appellate court found error. It held that the trial record contained sufficient evidence of proximate causation linking GES's failure to establish or maintain safety and hiring procedures to justify the jury's verdict. It reinstated the verdict and the $3,000,000 punitive damages award. It also denied the defendants' request for a remittitur of the compensatory damages.

Neuhengen v. Global Experience Specialists, Inc., 2018 IL App (1st) 160322.

Landlord Lacked Standing to Sue Tenant for Rent Accruing Before He Owned Property

In *1002 E. 87th Street LLC v. Midway Broadcasting Corporation*, the appellate court, considered whether a landlord to a commercial property possessed standing to sue its tenant for rents owed to the proceeding landlord. The trial court dismissed the action and awarded attorneys' fees to the defendant—as prevailing party per the lease. The landlord appealed.

The appellate court stated the general rule that a new landlord does not have a right to recover rent due from before it acquired the property. The previous landlord retains the right to those earlier rents. On appeal, the plaintiff landlord presented a number of arguments as to why it, uniquely, possessed a right to overdue rents accruing prior to its purchase of the property.

First, it claimed that a nonwaiver clause in the lease provided it with standing. The clause stated that, "[n]o failure of landlord to exercise any power . . . or to insist upon strict compliance . . . and no custom or practice of the parties . . . shall constitute a waiver of Landlord's right to demand exact compliance with the terms . . . ." The court found the clause immaterial to the question of whether a new landowner can enforce a tenant's obligation to a previous owner. It did not create a right for the new owner to demand compliance with obligations owed to the previous owner.

The plaintiff further argued that counterclaims filed by the tenant admitted to standing, and that the "mend the hold" doctrine barred it from changing strategies and arguing against the plaintiff's standing. The "mend the hold" doctrine is an equitable principle that generally precludes a party from pleading its reason for nonperformance under a contract and then, in the midst of litigation, opportunistically switching it to another reason. This argument was also rejected by the court, which concluded that there was no evidence that the tenant "tried on" one defense, then switched to another. There was no bad faith, and the doctrine did not apply.

The court distinguished this matter from a debt assignment from the old landlord to the new one. There was no evidence that the old landlord intended to assign its debts to the new one. Notwithstanding the lack of apparent intent, established Illinois case law establishes that rent in arrears is not assignable. The overdue rent would not pass to the new landlord. The trial court's ruling, including the imposition of attorneys' fees to the defendant, was affirmed in all respects.

1002 E. 87th Street LLC v. Midway Broadcasting Corp., 2018 IL App (1st) 171691.

Rule 137 Petition for Sanctions Ineffective as to Plaintiff and Untimely as to His Attorneys

In *Short v. Pye*, the plaintiff filed five unverified complaints against a series of defendants, alleging that the defendants induced him to sell his interest in a company for substantially less than it was worth. The complaints were withdrawn or dismissed without prejudice until the trial court dismissed the fourth amended complaint with prejudice. The defendants then timely filed an Illinois Supreme Court Rule 137 petition for sanctions against the plaintiff, arguing that he lacked a good faith basis for his claims. Notably, the motion did not target any of the three sets of attorneys who variously represented the plaintiff. More than a year later, the defendants filed an amended petition for sanctions naming the plaintiff's attorneys as respondents. The trial court found that the amended petition naming new respondents amounted to a separate petition, which it found clearly untimely in light of the Rule 137 30-day deadline. An evidentiary hearing was held as to the original petition, and the plaintiff was the sole testifying witness. His unrebutted testimony generally established that he provided his attorneys with documentation and other information, but that he relied upon their expertise to determine which allegations and causes of action were to be included in the complaints. Through a written order, the court denied the Rule 137 petition against the plaintiff.

The appellate court agreed that the defendants' attempt to "amend" their Rule 137 motion was ineffective in light of the rationale behind the 30-day time limit set by the rule. The defendants contended that they were unaware that the attorneys should have been targeted until the plaintiff "pointed the finger at his former counsel." As a result, they claimed, joining the attorneys could have resulted in Rule 137 sanction against them. This argument, in the

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court's view, was "incredible" because it could be no surprise for a party facing potential sanctions to blame his attorneys. The court thus affirmed the trial court's determination that the defendants' Rule 137 petition against the plaintiff's attorneys was untimely.

With respect to the petition for sanctions against the plaintiff himself, the court found that the trial court did not abuse its discretion in denying the motion. The purpose of the rule, the court cautioned, is to prevent the filing of false or frivolous lawsuits—not to punish litigants and their attorneys for zealous but ultimately unsuccessful litigation. Although the evidentiary hearing demonstrated that the plaintiff was somewhat active in presenting documents and other information to his attorneys, the evidence did not show that he was responsible for deciding which facts to assert, that he drafted the complaints, or that he did anything beyond participate in the attorney-client relationship.

Short v. Pye, 2018 IL App (2d) 160405.

Construction Negligence Statute of Limitations

M&S Industrial Company v. Allahverdi involved application of the four-year construction negligence statute of limitations, 735 ILCS 5/13-214(a). During a wind storm, a portion of the defendant's roof was uplifted and crashed down on nearby power lines, resulting in an electrical surge that damaged the plaintiff's property. In its original complaint, filed nearly five years after the incident, the plaintiff alleged that its damages resulted from defendant's employees negligently leaving open an overhead dock door during the storm. Later, the plaintiff amended its complaint to include allegations that the defendant improperly installed and maintained the roof of its building, such that the roof was unable to withstand upward wind forces caused by the open door. As amended, the complaint included allegations that the defendant breached a duty of ordinary care by "failing to secure the roof to the main structure of the building; and/or . . . allowing the roof . . . to be installed and maintained in such dangerous condition."

The defendant moved to dismiss the complaint pursuant to 735 ILCS 5/2-619(a)(5), alleging that the plaintiff's claims were barred by section 13-214(a). The trial court granted the motion, finding that the complaint amounted to a construction negligence action that was filed beyond the four-year statute of limitations. The plaintiff timely appealed.

The appellate court, affirmed the trial court's ruling. It analyzed section 13-214(a) in detail, which provides:

> (a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission.

The court observed that section 13-214(a) has been repeatedly found to "protect activity rather than status," such that a landowner is only protected by it if it engages in one or more of the enumerated activities. Lax maintenance long after construction of a property is not protected by the four-year limitations period.

Here, the plaintiff alleged improper installation *and* maintenance of the roof. However, the court observed that the plaintiff's expert focused on the initial construction of the roof—a project in which the defendant was personally involved. The expert opined that, although the open dock door was "the precipitating event" for the incident, its cause was negligence in failing to properly attach and maintain the roof in violation of building codes. Noteworthy to the court, the complaint contained no details of alleged maintenance to the roof after its flawed installation. As a consequence, it found that the plaintiff's allegations of a failure to "maintain" the roof were merely "different permutations of the same fundamental claim: that [the defendant] initially improperly constructed the roof." The four-year construction limitations period of section 13-214(a) thus applied.

The plaintiff further argued that, even if section 13-214(a) was applicable, it did not know that the damage to its property was caused by negligent construction until, almost six years later, its expert offered that conclusion. The court rejected this effort to employ the "discovery rule" to push back the limitations period. It reiterated that knowledge of specific negligent conduct is not necessary to trigger a statute of limitations. Rather, once a party knows or should reasonably know of an injury and that it was wrongfully caused, the burden is on that party to inquire further as to the existence of a cause of action. The court concluded that, once the plaintiff discovered that its damages were caused by the defendant's roof blowing off of its structure, the limitations period was triggered and the plaintiff was obliged to investigate further. The court noted that the plaintiff was certainly in a position to do so, and clearly blamed the defendant for its damages because it filed its original complaint seven months *before* it claimed to have realized that its damages were wrongly caused.

M&S Indus. Co. v. Allahverdi, 2018 IL App (1st) 172028.

Rescission and Adequate Remedies at Law

In *Horwitz v. Sonnenschein Nath & Rosenthal*, a law firm equity partner entered into a "special partnership agreement" with his firm in which he surrendered his equity stake in exchange for a new compensation package. After six years of alleged breaches of the agreement by the firm, the plaintiff filed suit against the defendant firm seeking rescission of the agreement and damages for breach of contract and unjust enrichment. The defendant demanded a jury trial on the breach of contract claim. The chancery judge assigned that count to the Cook County Law Division where it was tried before a jury that awarded the plaintiff $125,000 in damages, which was the difference between what the plaintiff should have received under the special partnership agreement and what he actually received. Thereafter, the case was transferred back to the Cook County Chancery Division.

In the chancery court, the plaintiff argued that the breach of contract damages awarded at trial constituted an "adequate remedy at law," thus negating the plaintiff's right to equitable remedies. The motion was denied, with the court holding that rescission was a separate legal claim based on different elements. In the court's view, the plaintiff at least had a right to attempt to demonstrate that he should have been restored to his equity interest in the firm. After a bench trial on the rescission claim, the chancery judge ruled that the plaintiff had waited too long—six years into the agreement—to ask for rescission of the agreement. The court also found that the plaintiff's claims for damages were too speculative.

Both parties appealed. The plaintiff argued that the circuit court erred in denying the rescission claim at trial; conversely, the defendant argued that the claim should have dismissed by the chancery judge because the monetary award in the breach of contract action was an adequate remedy at law.

The appellate court affirmed the lower court's decision, but for different reasons. It observed that equitable relief is inappropriate if a plaintiff has an adequate remedy at law. Thus, the absence of an adequate remedy at law is a precondition to any form of equitable relief. The appellate court noted that the chancery court did not take issue with this principle; rather, it simply ruled that the plaintiff's remedy for breach of contract was not adequate.

The question of whether a legal remedy is "adequate" entails two discrete inquiries. First, the court must consider whether the legal remedy is capable of making the plaintiff "whole." Secondly, the legal remedy must be "clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." In many cases, the question is presented too early to know whether the legal remedy will satisfy these requirements. In this case, according to the court, there were no such vagaries. Here, it was clearly not difficult to put a dollar value on the plaintiff's damages for breach of contract. It actually happened when a jury awarded him the difference between what the defendant should have paid him under the contract and what it actually paid him.

The court went on to note that the plaintiff did not appeal the judgment, nor did he seek a new trial or an additur. Although the plaintiff could have recovered a greater sum by having the contract rescinded, thereby returning him to his pre-contract status as an equity partner, the completeness of a legal remedy cannot depend on whether the plaintiff is happy. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 129 Ill. App. 3d 1011, 1022 (1st Dist. 1984). An adequate legal remedy should not be confused with a maximum remedy. Equitable principles do not intervene to give a plaintiff the best possible outcome or merely to add another weapon to a plaintiff's arsenal. They enter the picture if—and only if—the legal remedy cannot make a plaintiff whole.

Horwitz v. Sonnenschein Nath & Rosenthal, 2018 IL App (1st) 161909.

Res Judicata Not Applicable When There is No Final Judgment in the Initial Case

In *Ward v. Decatur Memorial Hospital*, the appellate court found that the plaintiff's voluntary dismissal of his medical malpractice complaint and subsequent refiling was not barred by *res judicata*. The plaintiff filed four complaints and, weeks before trial, requested leave to file a fourth amended complaint. The trial court denied his request, finding the new proposed complaint to be significantly different from the operative third amended complaint. Plaintiff voluntarily dismissed his case, which had not been adjudicated. When he re-filed his case, his new complaint was almost identical to the fourth amended complaint that the trial court had previously refused to allow. The defendant filed a summary judgment motion based on the ground of *res judicata*, and the trial court ultimately granted the motion. The appellate court found that the seminal *res judicata* case, *Hudson v. City of Chicago*, 228 Ill. 2d 462 (2008), was distinguishable from the case before it. Specifically, in *Hudson* the trial court never gave permission to file an amended complaint after dismissing a count of the complaint with prejudice. While in this matter, the trial court continuously allowed plaintiff to amend his complaint, up to and including the third amended complaint that was never adjudicated at the time of the voluntary dismissal. The appellate court found a dismissal order that grants leave to amend is not final. Without a final judgment on the merits, there can be no *res judicata*. Accordingly, the appellate court found the trial

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court erred in granting summary judgment, and remanded the case for further proceedings.

Ward v. Decatur Mem. Hosp., 2018 IL App (4th) 170573.

Sole Proximate Cause Defense Can Be Argued Even if Pointing to More than One Nonparty

In *Douglas v. Arlington Park Racecourse*, the plaintiff, a professional jockey, was paralyzed from a fall he suffered during a horserace at the defendant, Arlington Park Racecourse. He sued the racetrack, the racetrack owner, and both the manufacturer and distributor of the synthetic turf used on the racetrack. The plaintiff settled with the manufacturer and distributor, and went to trial against the racetrack and its owner, arguing that their negligent maintenance of the track caused his injury. In their defense, the racetrack and its owner identified *two* nonparty actors who they argued were the sole proximate cause of his injuries. They argued that another jockey racing that day caused the plaintiff's fall when the jockey's horse clipped the plaintiff's horse. They also argued the track manufacturer failed to inform the defendants on the proper maintenance of the track. The jury was given the sole proximate cause jury instruction and found in favor of the defendants. In post-trial motions, the plaintiff argued that the sole proximate cause instruction was improperly given because the defendants identified *two* nonparty actors. The trial court agreed and granted a new trial.

The appellate court reversed finding that it was permissible for the court to use the sole proximate cause defense and jury instruction when they point the blame at more than one nonparty tortfeasor. The court reasoned that as long as the defendant's contribution to the plaintiff's injury is 0%, it is immaterial whether 100% of the blame falls on one specific nonparty or on multiple nonparties. The issue, as resolved by the appellate court, is not how many parties are to blame, but that the defendant is not one of them.

Douglas v. Arlington Park Racecourse, LLC, 2018 IL App (1st) 162962.

Supreme Court Broadly Reads Language of Product Liability Distributor Statute

In *Cassidy v. China Vitamins LLC*, a product liability case, the Illinois Supreme Court revisited 735 ILCS 6/5-621, which is known as the "Distributor Statute," and how to determine if a product manufacturer is "unable to satisfy" a judgment against it in order to reinstate a distributor as a defendant. The plaintiff alleged he was injured by an imported bulk container of vitamins. He sued a New Jersey-based company, China Vitamins, LLC. It, in turn, identified Taihua Group, a Chinese company, as the manufacturer of the storage container, and the plaintiff added Taihua Group as a defendant. Defendant China Vitamins sought dismissal pursuant to the735 ILCS 6/5-621. The trial court granted the motion and also entered a default order against defendant Taihua. Following the entry of a multi-million default judgment against Taihua, the plaintiff moved to reinstate China Vitamins as a defendant to collect the judgment because he had been unable to discovery Taihua's assets. While the trial court denied the motion, the appellate court reversed, finding that the plaintiff did not have to prove Taihua was bankrupt or no longer in existence to reinstate China Vitamins. The supreme court affirmed.

The Distributor Statute instructs that a dismissed non-manufacturer defendant, can be reinstated in specific situations, including if the manufacturer defendant is unable to satisfy judgment. China Vitamins argued that the wording meant that the manufacturer was no longer operating, but the majority disagreed. The court refused to read the language narrowly and citied public policy favoring full compensation to plaintiffs injured by defective products, particularly based on the difference in the parties' respective culpability. The Illinois Supreme Court rejected the "bankrupt or nonexistent" standard for reinstatement under section 2-621(b)(4), overruling *Chraca v. U.S. Battery Manufacturing Co.*, 2014 IL App (1st) 132325, in the process. The supreme court continued that it interpreted the statute to permit the trial court to rely on a broader range of factors to determine if a particular manufacturer is "unable to satisfy" the judgment against it. The case was remanded for the trial court to determine whether the manufacturer is unable to satisfy the judgment.

Cassidy v. China Vitamins LLC, 2018 IL 122873.

Kotecki Waiver Does Not Waive Construction Subcontractor's Statutory Lien Right

In *Cooley v. Power Construction Company, LLC*, the plaintiff construction worker was injured while unloading a 600-pound window that was to be installed. He filed a worker's compensation claim and received benefits. He also filed a negligence suit against the general contractor, who then filed a third-party claim against the plaintiff's subcontractor employer. Upon a motion by the direct defendants, the trial court found that the plaintiff's employer had contractually waived its *Kotecki* cap, which limits its liability exposure pursuant to *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155 (1991). In addition, the trial court found that the plaintiff's employer

had waived its worker's compensation lien as it related to plaintiff's personal injury lawsuit. The appellate court found that an employer is entitled to a lien on any recovery its injured employee might get from a third party that caused or contributed to the injury pursuant to 820 ILCS 305/5(b), the Workers' Compensation Act. The appellate court further found the lien and the limited liability under *Kotecki* are separate concepts and the subcontract did not contain any language to demonstrate that the subcontractor waived its right to its lien on any recovery obtained by plaintiff. Accordingly, the appellate court found the *Kotecki* cap was waived, but the lien right was not.

Cooley v. Power Constr. Co., LLC, 2018 IL App (1st) 171292.

Substitution of Judge as of Right Party Held in Contempt but Not Shackled to Judge

In *Chavis v. Woodworker's Shop, Inc.,* the appellate court held that a trial court's finding of a party in contempt at an initial hearing does not constitute a ruling on a "substantial issue" in the case and therefore, does not deprive the party of its right to substitute the judge as a matter of right pursuant to 735 ILCS 5/2-1001(a)(2).

The plaintiffs filed a small claims complaint against defendant Woodworker's Shop, Inc. (Woodworker's), pleading $9,085.13 in damages for the improper installation of their wood floor. Appearing *pro se* at the initial hearing*,* one of the plaintiffs questioned the judge about discovery and the admissibility of evidence. The judge told him to talk to an attorney. Soon thereafter, the plaintiff soon made an inappropriate statement to the judge, who found him in contempt and ordered him into custody. The plaintiff later apologized, and he was released. At the conclusion of that day's hearing, a trial date was scheduled, but no substantive issues were addressed.

The plaintiffs filed a motion seeking a substitution of judge. The chief judge heard and denied the motion, ruling that the trial judge's contempt finding was a "substantial" ruling which precluded a substitution of judge without cause as a matter of right. The cause proceeded to trial, and the original judge finding in favor of the plaintiffs but only awarding $100 in damages, plus costs, for a total amount of $191. *(Author's note—the reported decision incorrectly states the judgment as $100 plus costs for a sum of $191. The court judgment on file is $899.62 plus $191 in costs for a total amount of $1,090.62)*

The plaintiffs appealed, arguing that: 1) the judge erroneously denied their motion for substitution of judge as of right because there had been no ruling on any substantial issue in the case; 2) the trial judge misapplied Illinois Supreme Court Rule 286 in her adjudication of the small claims proceedings; and (3) the limited finding of was against the manifest weight of the evidence.

The first argument was dispositive. The appellate court found that the chief judge's denial of the plaintiffs' motion for substitution was in error. Pursuant to section 2-1001(a)(2)(i) of the Code of Civil Procedure, a civil litigant is entitled to one substitution of judge without cause as a matter of right. The motion must be granted if presented before trial and before the judge has ruled on any substantial issue in the case. Trial courts lack discretion to deny such a motion. In this case, according to the appellate court, the contempt proceedings had nothing to do with the merits of the underlying case. The plaintiff's inappropriate behavior was akin to criminal behavior that was addressed through a finding of criminal contempt. Therefore, no ruling was made on a "substantial issue" in the case, and the plaintiffs' motion for substitution of judge as of right was improperly denied.

Chavis v. Woodworker's Shop, Inc., 2018 IL App (3d) 170729.

Conclusory Statements Without Facts Dooms Counterclaim

The expression "the best defense is a good offense" only works if you have the facts to support a counterclaim. In *BMO Harris Bank, N.A. v. Porter*, the appellate court affirmed the circuit court's order granting the plaintiff bank's motion to dismiss the defendants' third amended counterclaim, with prejudice, due to the absence of facts sufficient to support its conclusory allegations.

The defendants obtained a mortgage and line of credit with the plaintiff in 2001, which became due and payable upon maturity in 2011. When the loan was not paid in full, the plaintiff filed a foreclosure action against the defendants. The defendants filed an answer and affirmative defenses and, later, a counterclaim alleging breach of implied-in-fact and implied-in-law contract. The plaintiff moved to dismiss the original counterclaim, as well as the first, second and third amended counterclaims. For their third amended counterclaim, the defendants alleged breach of an extension of their credit agreement and breach of an implied-in-fact contract, basically claiming that they were not in default because the term of the loan was extended by agreement from 10 to 20 years.

The circuit court granted plaintiff's motion to dismiss, with prejudice, finding that there was no dispute that "money was owed on the subject loan," there was "no allegation of sufficient consideration raised to support the claim for an oral contract," and there was "no binding contract even taking all facts alleged as true." The defendants appealed seeking review of the trial court's order striking their third amended counterclaim.

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The appellate court first admonished the defendants for not heeding applicable Illinois Supreme Court Rules on briefing requirements and, more importantly, not including transcripts from any of the oral arguments in the record on appeal. In the absence of such a record, the appellate court was duty bound to "presume that the trial court's judgment was in conformity with the law and with sufficient factual basis" and resolve any doubts arising from the incompleteness of the record against the plaintiff.

The court then addressed the substantive question of whether the defendants sufficiently pleaded facts to establish a "contract implied in fact," which required pleading an offer, its acceptance and sufficient consideration, just like in an express (oral or written) contract. The court noted that the only difference between an express and an implied contract is that an implied contract can be inferred from the facts and conduct of the parties.

Unfortunately for the defendants, the appellate court found that the third amended counterclaim was "replete with conclusory statements without sufficient facts to support them" as to all three elements—offer, acceptance and consideration—and that it also failed to sufficiently plead a meeting of the minds. Moreover, the court observed that the defendants attempted to create supporting facts by relying on only certain portions of the original loan documents while ignoring others "in dereliction of basic contract law."

Although the defendants were not required to set forth evidence in the counterclaim, they were not allowed to simply set forth conclusions without including some facts supporting those conclusions.

BMO Harris Bank, N.A. v. Porter, 2018 IL App (1st) 171308.

Contribution Allowed Among Vicariously Liable Co-Defendants

In *Sperl v. Henry*, the Illinois Supreme Court held that two vicariously liable co-defendants had a right of contribution against each other where their common liability arose from the negligent conduct of the same agent. At trial, the jury rendered a nearly $24 million verdict against a semi-truck driver and her two corporate principals, jointly and severally. One of the principals, CHR, paid the damages in full and sought contribution from the other principal, Dragonfly. The trial court entered judgment on CHR's contribution claim and ordered Dragonfly to pay one-half of the damages.

Dragonfly appealed, arguing that because the principal co-defendants were only found to be vicariously liable (and technically "not at fault in fact"), that they were blameless, and that the Contribution Act did not apply. The Contribution Act only applies, argued Dragonfly, when there is a basis for comparing the fault of joint tortfeasors. The appellate court agreed and found that because Dragonfly and CHR were both "blameless" for purposes of contribution, that there was no basis upon which to compare fault.

The Illinois Supreme Court reversed the appellate court decision for three reasons. First, section 2(a) of the Contribution Act does not expressly exclude vicariously liable defendants from the scope of the Act. Second, while the Act uses the term "tortfeasor", that term is defined for purposes of the Contribution Act as a person "subject to liability in tort." This definition only requires that the parties to a contribution action "be potentially capable of being held liable to the plaintiff…" And third, contrary to Dragonfly's contention that fault could not be apportioned between it and CHR because they were both blameless principals, the court saw no reason why their relative culpability could not be compared. "Their relative culpability is equal given their identical positions. Accordingly, under section 3 of the [Contribution] Act, the *pro rata* share of the common liability for both CHR and Dragonfly is 50%."

Sperl v. Henry, 2018 IL 123132.

Res Judicata Applied Where Plaintiff Sought to Intervene in Employer's Action Against Third Party Tortfeasor Following Dismissal of Her Complaint

In *A&R Janitorial v. Pepper Construction Company*, the Illinois Supreme Court affirmed the judgment of the trial court where it dismissed a plaintiff's complaint on *res judicata* grounds. In this case, the plaintiff was injured at work and sought workers' compensation benefits, but failed to bring a timely personal injury action against a third-party tortfeasor, Pepper Construction Company ("Pepper"). One week before the statute of limitations expired, the plaintiff's employer filed a subrogation action against Pepper. The plaintiff filed her lawsuit against Pepper long after the statute of limitations had passed and the court dismissed her complaint with prejudice.

Shortly after dismissal, the plaintiff filed a petition seeking leave to intervene in her employer's action against Pepper. In response, Pepper argued that the plaintiff's petition was barred on *res judicata* grounds. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." Separate causes of action may be considered the same cause of action for *res judicata* purposes where they arise out of a "single group of operative facts."

Here, the court found that *res judicata* applied. First, the dismissal with prejudice was an adjudication on the merits, thus satisfying the initial requirement for *res judicata*. The court also found that second element, identity of a cause of action, present.

The claims in the plaintiff's complaint and her petition to intervene arose out of a single group of operative facts: her workplace injury. Lastly, the fact that the plaintiff was the same party seeking to hold Pepper liable for her injuries in both actions satisfied the third element—identity of the parties.

The plaintiff did not dispute that all three elements of *res judicata* were met. Rather, she argued that it would be inequitable to apply the doctrine in this case because her employer had no interest in protecting her right to recovery for noneconomic damages. The court held that whether or not she had an interest in her employer's action was of no relevance to the *res judicata* analysis.

A&R Janitorial v. Pepper Constr. Co., 2018 IL 123220.

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Survey of Construction Law Cases

Contractor Freedom: Restatement 414 Requires Control Over Means and Ends

In *Puente v. Lopez*, the appellate court addressed an appeal from summary judgment that sought damages for injuries suffered while plaintiff was working for a subcontractor on a construction project. The work involved the expansion and renovation of a warehouse roof. On appeal, the plaintiff argued that the general contractor had retained sufficient control over the project in accordance with section 414 of the Restatement (Second) of Torts.

The court explained the general rule that one who hires an independent contractor is not liable for harm caused by the independent contractor's acts or omissions because the hiring entity has no control over the details and methods of the independent contractor's work and, therefore, is not in a good position to prevent negligent performance. However, section 414 provides that the hiring entity may be found directly liable for the acts or omissions of an independent contractor when the general contractor "retains the control of any part of the work…for others whose safety the employer owes a duty to exercise reasonable care."

In order for the general contractor to owe a duty to the subcontractor, there must be such a retention of a right of supervision that *the contractor is not entirely free to do the work in his or her own way*. Neither a general right to enforce safety, nor the mere existence of a safety program, safety manual, or safety director, is sufficient to amount to retained control under section 414. The court expounded that even when the employer retains the right to inspect work, order changes to the plans, and ensure that safety precautions are observed and the work is done safely, he will not be held liable unless the evidence shows that he retained control over the *incidental aspects* of the independent contractor's work, meaning that the employer controlled *both the ends and means of the work*.

In *Peunte*, the subcontract required the general contractor to "supervise and direct" the project and to be "solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the Contract." However, the *Puente* court demonstrated how Illinois courts have continuously found identical contract language to simply provide the employer's *general* right of supervision of the project, but not the requisite retention of control to impose a duty on the employer toward the injured plaintiff.

The plaintiff in *Puente* relied on two cases to support its claim, *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577 (1st Dist. 2008), and *Diaz v. Legal Architects, Inc.*, 397 Ill. App. 3d 13 (1st Dist. 2009). In *Grillo*, there was evidence that the employer's supervisor "actively supervised" the subcontractors and that, before the plaintiff's injury, the supervisor had told him to stop what he was doing and start something else, thereby indicating that the plaintiff was not free to do the work in his own manner. Likewise, in *Diaz*, the employer's superintendent stopped the subcontractor's excavation work on two occasions. On the contrary, in *Puente*, the on-site foreman for the subcontractor testified that the general contractor had no involvement in telling the subcontractor how to do its work. The subcontractor was free to do the work in the way it desired in order to accomplish what it had contracted to do.

Plaintiff's final argument was that the general contractor exhibited control of the subcontractor's work post-accident, when the general contractor stopped work on the site and directed the subcontractor to take corrective safety measures. However, the court reasoned that remedial measures requiring a contractor to comply with OSHA regulations does not create a duty of care to a plaintiff injured at the work site. Accordingly, the court concluded that there was insufficient evidence, as a matter of law, to establish a duty to plaintiff under section 414 and affirmed the circuit court's granting of summary judgment.

Puente v. Lopez, 2018 IL App (1st) 170283-U.

Burden of Proof in Action Seeking Declaration that Coverage is Not Owed to Additional Insured

In *Hastings Mutual Insurance Company v. Blinderman Construction Company, Inc.,* the appellate court reversed the circuit court's order granting insurer's motion for summary judgment in a case in which the insurer claimed it did not owe coverage to its additional insured, the general contractor. An employee of a subcontractor was injured on a jobsite. The subcontractor was contractually required to list the general contractor as an additional insured under its general liability policy. The insurance policy contained an exclusion for insurance afforded to additional insureds excluding coverage for actions when, "liability aris[es] out of the sole negligence of the additional insured or by those acting on behalf of the

additional insured." The appellate court held that despite the underlying complaint solely alleging negligence of the general contractor and failing to mention any actions of the subcontractor that may have contributed to the incident, the insurer may potentially owe coverage to the general contractor reversing and remanding the matter. Next, the court held that allegations of the underlying complaint must be read with the understanding that the employer may be the negligent actor even where the complaint does not include allegations against the employer because of the state's workers' compensation laws. As such, the insurer must prove that the employer's conduct did not contribute to the cause of the plaintiff's injury. The appellate court held that the insurer had the burden of proving that the subcontractor's conduct did not in any way contribute to causing the injury sustained by the plaintiff and failed to meet this burden. Based on the failure to meet its burden, the court reversed and remanded the entry of summary judgment for the insurer.

Hastings Mut. Ins. Co. v. Blinderman Constr. Co., Inc., 2017 IL App (1st) 162234.

Plaintiff's Activities Not Relevant to Determine Statute of Limitations

In *Staine v. T. Steele Construction, Inc*., the appellate court dismissed an interlocutory appeal arising out of the circuit court's certification of questions pertaining to whether the plaintiff's actions qualified as construction-related for purposes of determining the applicable statute of limitations. The plaintiff was injured at a worksite when he tripped over exposed conduit in a walkway where he was working as a computer software installer. The plaintiff took the position that the four-year limitations period for construction-related accidents applied (735 ILCS 5/13–214), while all three defendants asserted that the two-year statute of limitations for personal injuries (735 ILCS 5/13–202) applied and barred all of the plaintiff's causes of action. As a preliminary matter, the appellate court held that the defendant corporation qualified as a "person" within the meaning of 735 ILCS 5/13–214. Next, the appellate court held that the classification of the plaintiff's actions was immaterial to which limitations period applied, as the relevant question relates to defendants' activities, not the plaintiff's. As such, the appellate court found that the certified questions bore little relevance to the issue of which statute of limitations governs the case and the answers to the questions would not materially advance the termination of the litigation. The appellate court dismissed the appeal finding it lacked jurisdiction to consider the interlocutory appeal.

Staine v. T. Steele Constr., Inc., 2017 IL App (1st) 162724-U.

First District Clarifies the Evidence of "Retained Control" to Trigger a Vicarious Liability in Construction Negligence Claims

In *Meza v. F.H. Paschen*, the appellate court affirmed the trial court's grant of a summary judgment order in favor of the general contractor because the general contractor did not retain control over the subcontractor's work and, thus, under Section 414 of Restatement, owed no duty to the subcontractor's employee. The defendant, a subcontractor, entered into a contract with a general contractor, on a construction project. The plaintiff—an employee of a subcontractor—sustained fatal injuries while working on the construction project.

The plaintiff filed a construction negligence claim against his employer and the general contractor, alleging that the employer had a duty to exercise reasonable care in its supervision, operation, and control of the construction site. The defendant moved for summary judgment, pursuant to section 414 of the Restatement (Second) of Torts, which was denied. However, later, the defendant's motion to reconsider was granted, and the plaintiff appealed.

In *Carney v. Union Pacific Railroad Co.,* the Illinois Supreme Court addressed an employer's liability for injury to an independent subcontractor at a worksite based on negligence principles. *Carney v. Union Pacific Railroad Co.*, 2016 IL 118984. The supreme court specifically clarified the issue of the existence of a duty on the part of one who hires a subcontractor in the context of a construction liability. *Id.*

On appeal, the plaintiff acknowledged *Carney* but argued that his facts were distinguishable and, therefore, the defendant had a duty. However, the appellate court confirmed that the *Carney* analysis applies to the issue of a defendant's retained control over the work of the plaintiff. The court opined that the best indicators to find the defendant's retained control sufficient to trigger a vicarious liability are whether the written agreement between the parties includes provisions for the defendant's retained control over the plaintiff's work and whether there was any conduct at variance with the written contract. The court also noted that, even if the general contract holds the defendant responsible for safety of work, the analysis gives more weight to the subcontract than the general contract because the subcontract delegates such duty to subcontractor. The court explained that neither general safety provisions in the general contract nor the general contractor's safety orientation constituted retained control over the plaintiff *per se*. The court further explained that the defendant's constructive notice is irrelevant to the analysis if the court already determined that the general contractor did not retain control over the subcontractor's work.

In summary, the appellate court analyzed the evidence of the retained control and affirmed the trial court's grant of summary

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judgment to the defendant based on the Restatement (Second) of Torts 414.

Meza v. F.H. Paschen, 2017 IL App (1st) 161569.

Common Issues of Ultimate Fact Under the *Peppers* Doctrine

In *Arch Insurance Co. v. Barton Malow Co.*, the appellate court, in an unpublished opinion, confirmed the trial court's denial of a motion to stay an insurance coverage declaratory judgment action, holding the *Peppers* doctrine did not apply because there were no issues of ultimate fact common to both the declaratory action and the underlying lawsuit. Under the *Peppers* doctrine (named for the Illinois Supreme Court's decision in *Maryland Casualty Co. v. Peppers*), it is generally inappropriate for a court considering a declaratory judgment action to decide issues of ultimate fact that could bind the parties to the underlying litigation. If common issues of ultimate fact exist, the trial court should stay the declaratory judgment action until the underlying litigation is resolved. In this case, the court held there were no factual determinations to be made in the declaratory action that would have any preclusive effect on the underlying litigation. Specifically, the court found the determination of which contract governs whether a party is an additional insured under an insurance policy is not the same as determining which contract applies for purposes of determining a party's safety obligations in the underlying lawsuit. Similarly, the court found that determining whether complaint allegations trigger a duty to defend an additional insured under an insurance policy is not the same as determining whether a party is at fault in the underlying lawsuit. Because no common issues of ultimate fact existed, the trial court properly denied the motion to stay.

Arch Insurance Co. v. Barton Malow Co., 2018 IL App (1st) 172868-U.

Construction Law: Importance of Contesting Rule 191(a) Affidavits of Damages

Commercial litigators often contest the sufficiency of affidavits pertaining to damages submitted by plaintiffs under Illinois Supreme Court Rule 191 at the summary judgment stage. When defendants fail to vigorously contest these affidavits, plaintiffs can prove their damages with relative ease because courts "must accept an affidavit as true if it is uncontradicted by counter-affidavit or other evidentiary materials." *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1st Dist. 1999). In *Herlihy v. Collins Construction, Inc*., 2017 IL App (1st) 161142-U, the appellate court highlighted the consequences of the defendant's failure to contest the sufficiency of a plaintiff's Rule 191 affidavit of damages.

In *Herlihy*, the plaintiffs contracted with the defendant for excavation of the crawl space and construction of a basement in their home. During the course of the project, the foundation of the neighbor's house slid into the excavated portion of the plaintiffs' home and caused extensive damages. The plaintiffs thereafter sued the defendant for negligence and breach of contract. Eventually, the circuit court granted the plaintiffs' motion for partial summary judgment, and ordered plaintiffs to submit an affidavit of damages and ordered the defendant to submit a counter-affidavit in response.

The plaintiffs averred in their affidavit that they incurred significant costs and expenses because of the defendant's negligence and breach. In particular, the plaintiffs alleged that they incurred damages for permits, architectural and engineering services, and a developer for "plotting, excavation design, structural calculations, site visits, and foundation drawings." *Id.* The plaintiffs also submitted detailed invoices for those services. Despite the court's prior instructions, the defendant did not file a counter-affidavit or offer any other rebuttal evidence. At the subsequent hearing, over the defendant's objections as to the sufficiency of the plaintiffs' affidavit, the circuit court entered a judgment of $206,348.06 against the defendant.

The defendant appealed the circuit court's judgment arguing that the plaintiffs' damages affidavit contained insufficient factual support because it merely listed amounts due and attributed these amounts to "damages to the property." Thus, the defendant argued the affidavit was insufficient to satisfy the requirements of Rule 191. The court first found that the defendant properly preserved the sufficiency issue by making a timely objection during the hearing. The court found that the defendant's objection was "sufficiently specific to preserve its argument." Therefore, the sole remaining issue for the court was to analyze whether the plaintiffs' affidavit was sufficient to support the amount of the circuit court's judgment.

In support of his insufficiency argument, the defendant relied on *Steiner Electric Co. v. NuLine Technologies, Inc*., 364 Ill. App. 3d 876 (1st Dist. 2006). The *Herlihy* court rejected the defendant's arguments. Instead, the court found that the facts of the case before it were distinguishable from *Steiner*. Unlike the defendant in *Steiner*, the plaintiffs averred in their affidavit (1) that they had personal knowledge of the facts asserted therein, (2) that they owned the home that was damaged, (3) that during the course of a construction project by Collins at their home, they sustained damage to their property, and (4) that as a result of the damage they incurred significant costs and expenses the amounts of which were documented by admissible evidence in the form of attached invoices. *Id.* at ¶ 20. The court

also noted that while the defendant had objected to the sufficiency of the affidavit, he had failed to contradict the amounts claimed by filing a counter-affidavit or presenting any evidence of his own. *Id.* at ¶ 21. The court reiterated the rule that it must an affidavit of as true absent contradiction by counter-affidavit or other evidentiary materials. Accordingly, despite the *de novo* standard of review for Rule 191 challenges, the court affirmed the circuit court's judgment against the defendant in its full amount.

Herlihy v. Collins Constr., Inc., 2017 IL App (1st) 161142-U.

Testimony of Shared Responsibility for Jobsite Safety Does Not Support the Admission of a Subsequent Remedial Measure

In *Kinstner v. Harbour Contractors, Inc.*, the appellate court affirmed a defense verdict finding that the trial court did not err by excluding evidence relative to a general contractor's subsequent remedial measure.

The plaintiff filed a single-count negligence action against the defendant following a slip and fall on a municipal construction site. The defendant served as the project's general contractor. Garth/Larmco (Larmco) operated as the project's masonry subcontractor and employed the plaintiff. Before trial, the defendant filed a motion *in limine* to bar testimony that it placed stone in the area where the plaintiff fell after the accident. The defendant did not dispute its jobsite ownership and control and the trial court granted the motion.

At trial, the defendant advised the jury during its opening statement that it maintained overall control of the construction site, including the location where the plaintiff was working. During his case in chief, the plaintiff alleged that he operated a forklift to hoist materials on the project. On the date in question, his right foot hit an exterior ground rut and resulted in the fall. The plaintiff claimed forklift use on the jobsite caused the ground rut. The plaintiff also presented testimony from the defendant and his employer that established a ground rut could be eliminated from the jobsite by filling it with stone. The plaintiff also presented evidence that doing so was a feasible alternative to make a jobsite safe. The defendant presented evidence that Larmco agreed to share reasonability for safety on the jobsite and Larmco had the authority to stop work if it saw an unsafe condition. The trial court returned a verdict in the defendant's favor.

On appeal, the plaintiff argued that the defendant disputed jobsite ownership and control when it elicited testimony that there was shared responsibility for safety. The plaintiff argued that he should have been allowed to present evidence that the defendant placed stone in a ground rut following the accident to show the defendant's control on the project. On review, the appellate court rejected the plaintiff's argument. The appellate court found that the defendant's trial evidence did not dispute that it maintained jobsite ownership and control. Rather, the court found the defendant'strial evidence simply established that Larmco also possessed a degree of control on the project. Trial testimony suggesting that all entities at a jobsite share a degree of control for safety does not automatically alter a general contractor's ownership and control on a project. Thus, because jobsite ownership and control was not at issue, the defendant's subsequent remedial measure was inadmissible and the trial court's judgment was affirmed.

Kinstner v. Harbour Contractors, Inc., 2017 IL App (1st) 162919-U.

A *Kotecki* Cap Waiver is Not the Same as a Worker's Compensation Lien Waiver

In *Cooley v. Power Construction Company*, 2018 IL App (1st) 171292, the plaintiff was injured on a construction site. After making a worker's compensation claim against his employer, the plaintiff sued the general contractor, who then filed a third-party complaint for contribution against the employer. The employer filed an affirmative defense based on *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991), arguing that its contribution liability was limited by the amount of workers compensation benefits paid. The general contractor moved to strike the employer's *Kotecki* defense, arguing that the employer waived the *Kotecki* cap by agreeing to indemnify the general contractor. The trial court granted the motion to strike the *Kotecki* defense, finding that the indemnity provision waived the cap. However, the trial court found that the employer had waived its workers compensation lien as well, even though the general contractor's motion to strike did not make any argument in that regard. After the trial court denied a motion to reconsider with respect to the lien waiver, the employer appealed.

The appellate court initially found that the employer's waiver of the *Kotecki* cap was entirely consistent with retention of its lien, especially at the pleadings stage. The appellate court explained that, while the employer agreed to unlimited contribution liability, the "true offender" was not yet known, such that the employer could still recover on its lien if the plaintiff proved that the general contractor's negligence caused his injuries. The appellate court then found that the language in the subject contract did not amount to a waiver of the lien (even if it did amount to a waiver of the *Kotecki* cap). The appellate court explained that a lien waiver will not be found "absent unmistakable settlement language to that effect." The indemnifica-

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tion provision lacked any specific reference to the lien. The court further found that, although the indemnity provision mentioned the Workers Compensation Act in the context of waiving the *Kotecki* cap, the mere mention of the Act was not sufficiently explicit to constitute a waiver of the lien as well. Finally, the appellate court found that the employer's agreement that its indemnity obligations shall not be diminished by "any limitations of liability or recovery under worker's compensation laws" was not a waiver of the lien because the lien is not a limitation of liability.

Cooley v. Power Constr. Co., 2018 IL App (1st) 171292.

First District Explains that Plaintiffs Cannot Allege a Duty to Inspect and Maintain to Avoid the Four-Year Limitations Period for Construction Claims

In *M&S Industrial Co., Inc., v. Fred Allahverdi,* a windstorm lifted the roof of the defendant's auto dealership and repair shop, causing the roof to make contact with nearby power lines that then caused a power surge to the plaintiff's manufacturing facility, damaging equipment in the plaintiff's facility. The plaintiff sued the defendant, alleging that the defendant left a garage door open during the storm, which allowed wind to enter the building and lift the roof. The plaintiff's complaint alleged that the defendant was negligent because he knew that the roof was not adequately secured to the rest of the building when it was installed, and that leaving the door open exposed the improperly secured roof to the wind.

The plaintiff's complaint was filed approximately five years after the subject occurrence. The defendant moved to dismiss, arguing *inter alia* that the plaintiff's claim was barred by the four-year limitations period in 735 ILCS 5/13-214(a). The plaintiff argued that 13-214 did not apply, because the complaint alleged a failure to maintain, rather than a construction negligence claim. The plaintiff also argued that, even if 13-214 applied, the suit was timely pursuant to the discovery rule, because the plaintiff did not learn of the defects in the defendant's building until the plaintiff's engineer inspected the building during discovery several months after the plaintiff filed suit. The trial court granted the defendant's motion, finding that the complaint alleged a construction negligence claim subject to 13-214(a)'s four-year limitations period, and the discovery rule did not apply because the storm that caused the damage was a sudden, traumatic event, such that the claim accrued on the date of the storm.

The appellate court affirmed the trial court's analysis. The appellate court cited with approval *O'Brien v. City of Chicago,* 285 Ill. App. 3d 864 (1st Dist. 1996) and *CITGO Petroleum Corp. v. McDermott Int'l, Inc.*, 368 Ill. App. 3d 603 (1st Dist. 2006), which found that when the plaintiff's claimed is based on a defect that arose during the initial construction, the plaintiff cannot avoid 13-214(a)'s four-year limitations period by arguing that the claim is based on an ongoing duty to inspect and maintain. The appellate court distinguished two prior decisions involving power suppliers, *Ryan v. Commonwealth Edison Co.*, 381 Ill. App. 3d 877 (1st Dist. 2008) and *MBA Enterprises, Inc. v. Northern Illinois Gas Co.*, 307 Ill. App. 3d 285 (3rd Dist. 1999). The appellate court explained that the four-year limitations period did not apply to the power suppliers in *Ryan* and *MBA Enterprises* because the claims arose out of defects in their supply systems, and power suppliers have a unique ongoing duty to inspect and maintain their equipment.

The appellate court also found that the discovery rule did not apply. The court noted that the plaintiff learned the day after the storm that the damage was caused by the defendant's roof lifting into power lines. While the plaintiff argued that it did not know the precise cause of the damage until its inspection years later, the court explained that the plaintiff had sufficient knowledge immediately after the storm to know that the damage was caused by the roof, such that the plaintiff should have investigated further. The court distinguished the subject facts from cases where minor issues arose over time, and the true cause of the problem was not identified until an inspection after the problem persisted. The court explained that the damage in this case was caused by a sudden traumatic event, thereby causing the claim to accrue immediately, rather than a "hidden, insidious, or chronic" problem that would trigger the discovery rule.

M&S Indus. Co., Inc., v. Fred Allahverdi, 2018 IL App (1st) 172028.

Escrow Agent Had No Duty to Inspect Property Before Fund Disbursal

In *231 W. Scott, LLC v. Lakeside Bank*, the appellate court reversed a trial court's judgment in favor of a plaintiff building owner, who sought damages resulting from an alleged breach of an escrow agent's fiduciary duties. The escrow agent disbursed funds to a general contractor without first inspecting the work to identify any project inadequacies. The question on appeal concerned whether the scope of the agent's fiduciary duty included an obligation to verify the completion and quality of the general contractor's work. The court first reaffirmed long-standing Illinois law holding that an escrowee's fiduciary duty is strictly limited to the escrow instructions. The plaintiff contended that additional duties, other than those specified in the escrow instructions, required the defendant to perform duties not required by the escrow agreement's terms. In examining the subject escrow agreement, the court found that the terms *right* and *may* were permissive rather than mandatory. The court determined that

an interpretation of the escrow agreement, requiring the performance of such inspection services, was inconsistent with the escrow agreement's disclaimer that the defendant had any responsibility for 1) the project being completed according to plans and specifications or 2) losses caused by errors in certifications of the work. Ultimately, the appellate court reversed the trial court's judgment order finding that the defendant could not be held to responsibilities above and beyond those established in the escrow agreement.

231 W. Scott, LLC v. Lakeside Bank, 2017 IL App (1st) 161131.

Summary Judgment Affirmed in Favor of General Contractor for Construction Negligence and Premises Liability Claims Against Plaintiff Who Fell Off a Roof

In *Cruz v. Power Constr. Co., LLC,* 2018 IL App (1st) 171170-U, the appellate court rejected the plaintiff's theories of construction negligence under section 414 of the Restatement (Second) of Torts, and premises liability pursuant to section 343 of the Restatement (Second) of Torts that were brought against the defendant, a general contractor. The plaintiff was a roofer for Combined Roofing and wasinjured at a job site when he fell 7 to 12 feet off a roof. *Cruz,* 2018 IL App (1st) 171170-U, ¶ 8. The plaintiff claimed that the defendant retained control over the job site and refused to allow him to use scaffolding or a stepladder. *Id.* at ¶ 9. The employer's project manager testified that the plaintiff should not have been standing on a narrow ledge and that it was up to Combined Roofing and the plaintiff to determine how to work safely and provide experienced workers. *Id.* at ¶ 10-11.

In Illinois, the general rule is that one is not vicariously liable for tortious acts or omissions committed by an independent contractor. *Id.* at ¶ 30. However, when sufficient control is exercised over the contractor the rule no longer applies and liability under section 414 of the Restatement (Second) of Torts is evaluated. Because the employer of an independent contractor is usually not liable for the contractor's negligence, the employer's liability must be based upon its own negligence. *Id.* at ¶ 31. The issue was whether the defendant, as the general contractor, retained sufficient control over its subcontractors such that direct liability may be decided as a matter of law. *Id.* at ¶ 33. The court found that the written contract is the best indicator of whether a defendant retained control sufficient to trigger liability. However, if an agreement does not provide evidence of control, it may be demonstrated by evidence of the defendant's conduct.

Here, the defendant contractually agreed to supervise and direct the work using the defendant's best professional skill and attention. *Cruz v. Power Constr. Co., LLC,* 2018 IL App (1st) 171170-U, ¶ 34. The defendant had agreed to be solely responsible for all construction means, techniques, sequences, and procedures for all portions of the work. As such, the court found that these types of contractual terms were those reserved to companies that employed subcontractors, and were not evidence that the defendant retained control over the manner of the work performed by subcontractors. *Cruz,* 2018 IL App (1st) 171170-U, ¶ 35. The court held there was nothing in the contractual terms showing that the defendant retained supervisory control such that its subcontractors were not entirely free to work in their own way. While the defendant had the right to start, stop, and inspect the progress of the work, its subcontractors had control over the means and methods of the work performance. *Id.* at ¶ 39.

The court agreed that the defendant's rights to enforce safety were insufficient to impose liability against it. Instead, the court held that the mere existence of a safety program, safety manual, or safety director is insufficient to trigger liability unless there is evidence the general contractor retained control over the incidental aspects of the independent contractor's work. *Id.* at ¶ 41.

Next, the plaintiff attempted to argue that the defendant's conduct at the job site showed it retained control over the work of its subcontractors. *Id.* at ¶ 44. This was because: (a) the defendant scheduled and sequenced the construction work and the work of its subcontractors; (b) the defendant's staff walked the job site daily; (c) it conducted safety inspections; and (d) it required employees of the subcontractors to attend initial safety meetings. The defendant also had ordered the plaintiff's employer not to use scaffolds or ladders. The court ruled this evidence was insufficient to show that the defendant controlled the work of its subcontractors since the plaintiff's instructions were given to him by his employer, and it was his employer he went to for any job site questions, tools, and equipment. *Id.* at ¶ 49.

The court found in favor of the defendant on plaintiff's premises liability claims. *Id.* at ¶ 59 There was no evidence that the defendant was aware of a dangerous condition, or that it knew about a dangerous condition that caused an unreasonable risk of harm to plaintiff.

Cruz v. Power Constr. Co., LLC, 2018 IL App (1st) 171170-U.

Insurer Has No Duty to Defend When Broad Exclusion Provision in the Policy Excludes Coverage to Any Employee of the Insured

In *Vivify v. Nautilus*, the appellate court addressed an appeal from summary judgment granted in favor of an insurer that refused to defend its insured against an action filed by a subcontractor's employee.

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A subcontractor of the plaintiff, employed by Victoria Metal, fell from a second story scaffold, and sued the plaintiff (the general contractor) for negligent supervision. The plaintiff and Victoria had a subcontractor's agreement that required Victoria to indemnify the plaintiff against claims of bodily injury resulting from Victoria Metal's work under the subcontract and required Victoria to procure insurance on the plaintiff's behalf as an additional insured. The plaintiff tendered its defense to Nautilus, the defendant in the instant case, and it declined to defend the plaintiff, based on the employee exclusion in the at issue insurance policy. Thereafter, the plaintiff filed an action seeking a declaration that the defendant had a duty to defend it against the Victoria Metal employee's bodily injury litigation.

The insurance policy at issue contained a broad provision that was a specific endorsement to the policy titled "Exclusion-Injury to Employees, Contractors, Volunteers and Other Workers" which specifically excluded coverage for any bodily injury sustained by an employee of an insured entity's subcontractors. Given the plain meaning of the policy, and because the employee that brought suit was an employee of the plaintiff's subcontractor, the trial court found that the defendant was not required to defend the plaintiff under the broad exclusion endorsement of the policy.

On appeal, the plaintiff argued that the court misinterpreted the insurance policy by failing to give effect the "separation of insureds" clause and erred in not considering the terms of the subcontract between the plaintiff and its subcontractor in its decision.

The appellate court stated that under certain circumstances, it may look to other evidence when the policy language is ambiguous to determine whether the underlying case potentially could come within the policy coverage, however the court did not find the policy at issue to be ambiguous. Further, the court commented that the defendant was not a party to the subcontract, and therefore questioned how the subcontract has any bearing on the defendant's intent in entering in to the insurance policy.

Further, the plaintiff argued that it was entitled to coverage based on the policy's "separation of insureds" provision, otherwise known as a severability clause, which would preclude application of a coverage exclusion. The court recognized that several cases have precluded a similar coverage exclusion, where an exclusion for bodily injury to any employee of the insured arising out of and in the course of his employment by the insured, did not permit an insurer to deny one insured coverage where that insured was sued by the employee of another insured. However, the court stated, "none of those cases had policy language containing the broad exclusionary language at issue here."

For those reasons, the appellate court upheld the trial's court decision to deny insurance coverage to the plaintiff.

Vivify Constr. v. Nautilus Ins. Co., 2017 IL App (1st) 170192.

Section 5(b) Complaints—A Chance to Circumvent the Statute of Limitations

Section 5(b) of the Illinois Workers' Compensation Act (Act) allows the employer to file suit in the injured workers' name within three (3) months of the statute of limitations to recover from a third-party tortfeasor. *A & R Janitorial v. Pepper Construction Co*. suggests that an injured worker can, in some circumstances, hijack an employer's 5(b) action if she fails to sue on time.

Teresa Mroczko sustained personal injuries at work when a desk fell on her. Contractors were moving the desk as part of a carpet replacement renovation. More than two years after her accident—and after the statute of limitations expired—Teresa filed suit against the contractors.

Luckily, for Teresa, her employer had timely exercised its rights under Section 5(b) of the Act. That section of the Act allows an employer who has paid workers' compensation benefits to file suit "in his own name or in the name of the employee… against such other person for the recovery of damages…." 820 ILCS 305/5(b). An employer's claim under Section 5(b) is not limited to the amount it paid (or will pay) to the injured worker. While an employer may obtain excess recovery, it must tender those sums to the injured worker.

After the circuit court dismissed Teresa's case with prejudice, she moved to intervene in her employer's suit. By that point, her employer was only seeking indemnification for its workers' compensation exposure. Her employer argued that *res judicata* barred the petition to intervene; Teresa's suit had been adjudicated on the merits. The circuit court agreed.

After the dismissal, the employer amended its complaint to seek recovery for non-economic damages. Teresa then moved to disqualify her employer's attorney arguing an apparent conflict of interest. "I don't represent Teresa. I never represented her," counsel maintained. The circuit court held that there was no conflict, that counsel would not be disqualified, and that any sums over the workers' compensation exposure would be paid to Teresa.

On appeal, the the appellate court reversed, holding that *res judicata* did not bar the intervention petition. Distinguishing *Sankey Brothers, Inc. v. Guilliams*, 152 Ill. App. 3d 393 (1st Dist. 1987), the court noted that the employer sought recovery above its indemnification right. The Act gave Teresa an interest in the excess recovery and the suit. Since the employer was not a party to the prior action, there was no identity of parties, and *res judicata* did not apply.

The injured worker had a right to intervene "when the representation of [her] interest by existing parties is or may be inadequate and [she] will or may be bound by an order or judgment in the action." *735 ILCS 5/2-408(a).* In ruling on a petition to intervene as of right, the trial court's discretion is limited to determining the (1)

timeliness of the petition, (2) inadequacy of representation and (3) sufficiency of interest.

The court held that the trial court "failed to determine" whether those threshold requirements had been met. Because her employer would be incentivized to settle for an amount equal or less than the value of the workers' compensation claim, her interests could not be adequately represented. Counsel's statement that he "never represented [Teresa]" was "incongruent" with the assertion of an incentive to pursue maximum damages. As such, the trial court failed to determine whether or not Teresa's interests were adequately protected. The district court remanded back to the trial court to make that determination.

For practical purposes, *A & R* means that an employee may, at times, circumvent the statute of limitations if the employer does not carefully prepare its 5(b) action. By seeking recovery for pain and suffering, in addition to seeking indemnification, an employer runs the risk of having its 5(b) suit hijacked by a plaintiff who failed to timely file his complaint.

A & R Janitorial v. Pepper Constr. Co., 2017 IL App (1st) 170385.

You Cannot Have Your Cake and Eat It Too!

In *Anekom, Inc. v. Estate of Demith,* 2018 IL App (3d) 160554, the appellate court found that an owner could not defeat the mechanics lien claims of two subcontractors, because its judgment against the general contractor included as damages the amount of the lien claims of the subcontractors. There, the trustee of an estate hired a general contractor to demolish a residence and replace it with a new house. The general contractor agreed to complete the work within 180 days. The general contractor hired two subcontractors to perform certain portions of the work. The estate subsequently terminated its contract with the general contractor claiming that the general contractor was not performing its work in accordance with the schedule.

The general contractor filed suit against the estate for (1) breach of contract, (2) to foreclose on its mechanics lien and (3) in *quantum meruit*. The estate filed a counterclaim against the general contractor for breach of contract. The trial court eventually dismissed the general contractor's complaint for failure to appear.

The two subcontractors filed counterclaims, which included counts foreclosing on their mechanics lien claims against the property. The estate then obtained a default judgment against the general contractor, which included as damages the amounts of the subcontractors' lien claims. Next, both subcontractors filed motions for summary judgment on their lien claims, which were granted by the trial court. The estate appealed the rulings in favor of the subcontractors.

On appeal, the court found that the estate was precluded from defending the subcontractors' mechanics lien claims, because of the election of remedies doctrine. The court noted that the estate's default judgment against the general contractor included all its damages, including the amount of the subcontractors' lien claims. The court reasoned that the estate's position was inconsistent. The court stated that the estate could not obtain a judgment against the general contractor, which included the amount of the subcontractors' lien claims, and then turn around alleging that the subcontractors' mechanics lien claims were invalid.

The estate contended that even though the judgment contained the lien claims that there was no chance of double recovery by it since it was unlikely that it would ever be able collect on the judgment. The court rejected the estate's argument, because the estate offered no evidence that it had attempted to collect on the judgment. The court also found that the estate was barred from defending the subcontractor lien claims under the doctrine of judicial estoppel.

Anekom, Inc. v. Estate of Demith, 2018 IL App (3d) 160554.

Court Finds Severity of Risk Defines Material Breach of Construction Contract

In *LB Steel, Inc. v. Carlo Steel Corp.,* 2018 IL App (1st) 153501, the chance that a construction defect could result in a catastrophic accident dictated the findings of the appellate court on several major issues. In that case, a general contractor entered into a contract with the City of Chicago to erect a steel canopy over terminals at O'Hare International Airport. The general contractor entered into a contract with a subcontractor to provide the steel canopy. The subcontractor retained a steel fabricator to manufacture the canopy and 35 steel support columns.

During construction, the City discovered cracks in some of the welds for the canopy, including welds in the support columns furnished by the fabricator. Although many welds were defective, only a relatively few required remediation, because they were crucial "for the safety of the entire canopy." One expert stated that the critical defective welds amount to only 1,000 feet of weld for 39 miles of welding done by the fabricator.

Multiple suits and counterclaims were filed by the City, general contractor, subcontractor and fabricator for breach of contract, fraud, foreclosure on mechanics lien claims, recovery on a construction bond and in *quantum meruit*. All these claims were consolidated in *LB Steel*.

The fabricator argued it did not materially breach the contract and that therefore, the city should not have withheld payment to the

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general contractor, the general contractor should not have withheld payment to the subcontractor and the subcontractor should not have withheld payment to the fabricator. The appellate court, however, stated that even though only a small amount of the welds had to be repaired that those were critical welds and had to be remediated for safety reasons. Accordingly, the appellate court found that because the fabricator materially breached the contract first, the other parties were excused from breach of their contracts.

The fabricator then claimed that it should be paid from the contractor's surety bond. In response, the appellate court noted that the surety's liability was determined by the liability of the principal and hence the fabricator was not entitled to payment under the bond, because the general contractor was not liable for breach of its contract with the subcontractor.

Next, the fabricator stated that even if it breached the contact, it was entitled to payment pursuant to the theory of substantial performance because the defective welds were only a relatively small part of performance. Again, the appellate turned down the fabricator's argument, because of the severity of the risk, if any of the defective welds had failed.

The fabricator also contended that it should be awarded damages in *quantum meruit*. Despite the existence of a written contract, the appellate court agreed and reversed the finding of the trial court. However, the appellate court remanded this issue to the trial court to determine whether the *quantum meruit* award should be set off against the amount of the judgment entered against the fabricator In favor of the general contractor and subcontractor.

Finally, the fabricator contended that the judgment of general contractor entered against it should be reduced by the amount of payment made to the general contractor under a professional liability insurance policy. The appellate court denied the fabricator's argument, because the policy excluded coverage for claims arising from faulty workmanship in construction or manufacturing.

LB Steel, Inc. v. Carlo Steel Corp., 2018 IL App (1st) 153501.

"Use" Does Not Equate with "Construction" Under Interpretation of Zoning Ordinance

In *Terra Creek LLC v. City of Rockford,* the appellate court analyzed a city zoning ordinance to evaluate whether "use" equates with "construction" to determine whether a special-use permit lapsed. There, the land developer filed suit against the defendant, maintaining that a previously approved special-use permit lapsed because no new construction occurred within the subject development for more than two years.

The defendant's zoning ordinance provided in part that, if the use of the property as authorized by the special-use permit is discontinued for a period of 24 consecutive months, then the special-use permit shall lapse. The subject special-use permit included single and multi-family homes, restaurants, stores and offices. At the time the complaint was filed, at least one home within the development was continuously used for residential purposes.

The circuit court granted the defendant's motion for summary judgment, finding that the permit was still valid because "use" does not equate to "construction" and because at least one home within the development was continuously used for residential purposes, consistent with the special use permit.

The appellate court affirmed and held that "use" does not equate to "construction." Giving the language its plain meaning, the court first noted that the word "construction" does not appear anywhere in the ordinance. Moreover, following the rationale of the circuit court, the appellate court held that "use" refers to the activity conducted, or function that occurs, on the property; construction is limited to an accommodation for that use or activity. Because there was evidence of a continuous use of the property for residential purposes, the special-use permit remained in effect.

Terra Creek, LLC v. City of Rockford, 2017 IL App (2d) 161105-U.

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Leading Lawyers, a Law Bulletin Publishing Company, as an Emerging Lawyer in the practice areas of commercial litigation and general personal injury defense. Emerging Lawyers names the top 2% of lawyers in Illinois who are under the age of 40 or have practiced less than 10 years.

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Survey of Employment Law Cases

Circuit Court Has No Subject Matter Jurisdiction Over Claim That Union Breached Duty of Fair Representation

In *Knox v. Chicago Transit Authority*, the plaintiff appealed the dismissal of his complaint against the defendant-employer, which sought reinstatement of his employment and back pay and benefits. Before filing the complaint, the plaintiff's grievance was submitted to arbitration pursuant to a collective bargaining agreement between the defendant-employer and the plaintiff's union. The arbitrator determined that the plaintiff was entitled to reinstatement, but not back pay or benefits due to the nature of the plaintiff's offense. The plaintiff filed a complaint in the circuit court, alleging that the denial of back pay and benefits violated the collective bargaining agreement. The defendant-employer argued that the plaintiff's complaint should be dismissed because the plaintiff lacked standing to seek judicial review of the arbitration award. The plaintiff claimed that he had standing because the union breached its duty of fair representation by not bringing up the issue of back pay and benefits at the arbitration. The defendant-employer filed a third party complaint against the union. Thereafter, the union filed a motion to dismiss, which argued that the circuit court lacked subject matter jurisdiction because a claim for the breach of duty of fair representation can only be brought before the Labor Relations Board. The circuit court agreed and dismissed the plaintiff's complaint for lack of subject matter jurisdiction. The appellate court affirmed the lower court's ruling, and held that the circuit court lacked subject matter jurisdiction, as the Labor Relations Board had exclusive jurisdiction over claims for breach of the union's duty of fair representation.

Knox v. Chi. Transit Auth., 2018 IL App (1st) 162265.

Higher Education Loan Act Supports Claim for Retaliatory Discharge

The plaintiff, a former college director of medical programs, filed a complaint against the defendant-employer alleging claims for retaliatory discharge, wrongful termination, and violations of the Illinois Whistleblower Act. The plaintiff alleged that the defendant-employer terminated him due to his complaints regarding a professor who was unqualified to teach a health science class at the college. The circuit court dismissed the plaintiff's retaliatory discharge and Whistleblower Act claims, and the plaintiff appealed. The appellate court affirmed the circuit court's dismissal of the Whistleblower Act claim, but reversed the dismissal of the retaliatory discharge claim. The appellate court cited the Higher Education Loan Act as support for the plaintiff's claim. The court reasoned that "[i]t is axiomatic that in order to accomplish the mission of educating young men and women, defendant must staff its classes with competent individuals who actually possess the knowledge listed in the course syllabus." *Roberts v. Bd. of Trustees Community Coll. Dist. No. 508*, 2018 IL App (1st) 170067, ¶ 32. The court believed that the passage of the Higher Education Loan Act evidenced the fact that the government supported the goals of higher education, which constituted a clear mandate of public policy.

Roberts v. Bd. of Trustees Cmty. Coll. Dist. No. 508, 2018 IL App (1st) 170067.

Summary Judgment Reversed on Pilot's ADA and FMLA Claims Against Airline

The plaintiff, a former airline pilot, filed a complaint against his employer for alleged violations of the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). The plaintiff informed the defendant that he was diagnosed with diabetes mellitus and that he would need to take leave under FMLA to determine his reaction to his medication and to undergo an FAA mandated medical examination. The plaintiff was allowed to take FMLA leave, but was terminated after he exhausted his leave of absence and communication problems resulted in the plaintiff failing to recertify his leave or return to work. The plaintiff also refused to submit to an independent medical examination in addition to the FAA requirements. Notably, within 24 hours after receiving an email from the plaintiff stating that he was grounded due to the FAA requirements, the employer sent an internal email with instructions to terminate the plaintiff once he returned from leave.

The employer moved for summary judgment on the plaintiff's claims. The employer argued that the plaintiff's condition did not constitute a disability under the ADA because the plaintiff's diabetes was well-controlled and government regulations prevented him

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from flying. The court disagreed and held that a rational trier of fact could find that the plaintiff's diabetes was a disability within the meaning of the ADA because it substantially limited the function of the plaintiff's endocrine system. The employer further argued it terminated the plaintiff because he failed to return to work after his leave expired, but the court believed that a rational trier of fact could find otherwise due to the email sent by the employer regarding terminating the plaintiff once he returned from leave.

The court also denied summary judgment on the plaintiff's FMLA claims. In relevant part, the employer claimed that there were no FMLA violations because the plaintiff informed the employer that he would be unable to fly at the expiration of the 12-week FMLA period and that the defendant was not required to keep the plaintiff employed if he was unable to perform his job duties after the expiration of his FMLA leave. While the court agreed with this proposition, it held that the plaintiff's claims should survive because the events for which the plaintiff complained occurred during the plaintiff's FMLA leave.

Cloutier v. GoJet Airlines, LLC, 311 F. Supp. 3d 928 (N.D. Ill. 2018).

Alleged Workplace Harassment Did Not Amount to More Than Petty Slights

In *Parks v. Speedy Title & Appraisal Review Services*, the plaintiff alleged that while employed by the defendant, her supervisors harassed her in multiple ways, including disciplining her for errors that were not her fault, giving her more difficult work than her co-workers, speaking to her in a disrespectful manner, and unjustifiably denying pay raises. The plaintiff filed suit against her former employer, alleging that this behavior created a hostile work environment that caused her to resign. The plaintiff's claims included, in pertinent part, race and gender discrimination, wrongful termination, and retaliation.

The defendant moved to dismiss the complaint arguing that the plaintiff's claims for race and gender discrimination should be dismissed because the plaintiff failed to sufficiently allege she suffered an adverse employment action. The court agreed, holding that the behavior for which the plaintiff complained only constituted "ordinary workplace grievances" and "petty slights." *Parks v. Speedy Title & Appraisal Review Services*, 318 F. Supp. 3d 1053, 1062 (N.D. Ill. 2018). Similarly, the court dismissed the plaintiff's wrongful/constructive termination claim and the plaintiff's retaliation claim because she did not sufficiently allege that her workplace was intolerable or that the behavior arose above "minor annoyances." Accordingly, the district court granted the motion, dismissing the plaintiff's claims without prejudice.

Parks v. Speedy Title & Appraisal Review Services, 318 F. Supp. 3d 1053 (N.D. Ill. 2018).

Employers Must Pay Commissions on a Monthly Basis

In *Sutula-Johnson v. Office Depot, Inc.*, the plaintiff filed a two-count complaint against her former employer alleging that changes to her compensation (percentages earned for commissions on selling furniture) constituted a breach of contract and violated the Illinois Wage Payment and Collection Act (IWPCA). The employer had amended the employee compensation plan so that commissions were termed "incentive payments" and reduced the commission percentage of each sale. The employer did not consider incentive payments "earned" until the date they were actually paid to the employee and only issued these payments each calendar quarter.

Summary judgment was granted to the employer in the district court. On appeal, the Court of Appeals, Seventh Circuit affirmed summary judgment for the employer on the breach of contract claims, holding that changes to the plaintiff's compensation did not create new contractual rights. With respect to the IWPCA claims, the Seventh Circuit noted there was an absence of Illinois cases distinguishing commissions and bonuses under the IWPCA or in any other context. Accordingly, the court determined that an employer violated the IWPCA by failing: (1) to pay the plaintiff commissions on a monthly basis; and (2) to pay her commissions on sales invoiced before she resigned. The court rejected the employer's argument that the incentive payments were "bonuses" since they were tied to their annual sales targets, and concluded that the incentive payments were best understood as "commissions" under the IWPCA. Based on the record on appeal and plain language of the employer's plan, the incentive payments were clearly used to compensate its employees for sales made on its behalf and calculated using a set percentage for each sale. On average, the "incentive payments" consisted of up to two-thirds of an average employee's total compensation. Furthermore, employees could take a draw against future incentive payments. The court held that these were all hallmarks of commissions, not bonuses.

The court was equally critical of the employer's arbitrary decision that incentive payments were only "earned" once paid. If allowed to stand, the court determined that an employer would effectively nullify the IWPCA's requirement that employees be paid on a timely basis. The court held that this delay, as well as forfeitures on earned commissions upon resignation, violated the IWPCA. Accordingly, summary judgment was reversed on the plaintiff's IWPCA claims.

Sutula-Johnson v. Office Depot, Inc., 893 F.3d 967 (7th Cir. 2018).

Employers Granted Summary Judgment in 37-Count Employment Discrimination Case

In *Keen v. Teva Sales & Marketing, et al.*, the plaintiff alleged she was discriminated and retaliated against because of her disability and gender in violation of the Americans with Disabilities Act (ADA), the Illinois Human Rights Act, and Title VII of the Civil Rights Act. In *Keen,* the plaintiff was involved in an automobile accident and took five lengthy leaves of absence from 2011 through April 2016. The plaintiff alleged that the defendants passed her over for a promotion and denied her excess insurance coverage during that time because of her gender and disability. The plaintiff filed several gender and disability discrimination charges with the EEOC from 2013 to 2016. In April 2016, the plaintiff received a termination letter from the defendants after failing to make a single sales call for an entire year. In their motion, the defendants argued that the plaintiff failed to provide them with any definite return date and would only periodically provide updates on her health.

In granting the defendants' summary judgment, the court noted that the ADA is an antidiscrimination statute—not an entitlement to medical leave. An employee whose disability prevents him or her from returning to work regularly and who is not capable of performing the essential functions of their job is not a qualified individual for ADA purposes. Accordingly, the court held that the plaintiff failed to produce any evidence that she was able to perform the essential functions of her job at the time of her termination, and therefore was not a "qualified individual" under the ADA. Furthermore, the court stated that even if the plaintiff was a "qualified individual," there was still no evidence that she was fired due to her disability and not because of the defendants' enforcement of its leave of absence and workers' compensation policies.

On the gender claims, the plaintiff failed to present evidence that other similarly situated male employees received preferential treatment or that she suffered any disparate treatment.

Keen v. Teva Sales & Mktg., Inc., 303 F. Supp. 3d 690 (N.D. Ill. 2018).

Employee's Case for Reverse Employment Discrimination and Harassment and Violations of the Whistleblower Act Survives Pleading Stage

In *Weller v. Paramedic Services of Illinois, Inc.*, the district court granted in part and denied in part the defendants' motion to dismiss the multicount complaint of a male firefighter and paramedic who sued his former employer and a village to whom the employer provided paramedic and fire services. The court denied in part the employer's motion to dismiss, allowing the plaintiff's claims of gender discrimination and retaliation under Title VII and the Illinois Human Rights Act (IHRA), defamation, Illinois Whistleblower Act (IWA), and retaliatory discharge to proceed. First, the court held that the plaintiff stated gender discrimination claims under Title VII and the IHRA based on alleged sex stereotyping when the plaintiff pleaded that he was discriminated against because he refused to participate in his male coworkers' harassment of their female colleague. Next, the court denied the motion to dismiss the plaintiff's gender-based retaliation claims under Title VII and the IHRA based on his opposition to his coworkers' treatment of his female coworker, reaffirming that a retaliation claim can be based on a complaint about any conduct that violates the statutes. Third, the court rejected the employer's argument that the IWA claim failed because the plaintiff only reported the alleged misconduct to his employer and not a government or law enforcement agency, holding that the report to the village was a report to a government agency and allowed the IWA claim to proceed. Finally, the court denied the employer's motion to dismiss the plaintiff's common law retaliatory discharge claim because the plaintiff had alleged that he was terminated as a result of bringing his coworker's illegal drug use to the attention of his employer.

In addition, although the court granted the employer's motion to dismiss the intentional infliction of emotional distress (IIED) claim because an employer cannot be held vicariously liable for tortious conduct of its employees that is within the scope of the employment, the dismissal was without prejudice and the plaintiff was given leave to file an amended complaint attempting to plead IIED claims against the individuals responsible for his emotional distress. The court also granted the village's motion to dismiss the plaintiff's tortious interference with contract claim without prejudice, holding that: (1) the claim was not yet ripe pursuant to the collective bargaining agreement because the union's grievance process had not yet concluded; and (2) the plaintiff did not state a claim because the village's only allegedly wrongful act—falsely accusing him of sexual harassing behavior—occurred after the termination and could not have caused the termination.

Weller v. Paramedic Services of Ill., Inc., 297 F. Supp. 3d 836 (N.D. Ill. 2018).

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Employer Allowed to Refuse Employment to Individuals Receiving Annuity from Retirement System

In *Dayton v. Oakton Community Coll.*, the Court of Appeals, Seventh Circuit affirmed the trial court's grant of summary judgment in favor of the defendant in three consolidated class actions arising out of the employer's decision not to employ any person receiving an annuity from the retirement system that served eligible public community college employees. The Seventh Circuit affirmed the district court's grant of summary judgment on the age discrimination claims, holding that although all annuitants must be over the age of 55 by law, the decision to terminate the employment of persons based solely on their participation in the retirement system was not unlawful disparate treatment because: (1) the plaintiffs failed to produce any similarly situated persons who were treated more favorably; (2) the college's decision was not based on the age of the employee but instead was based on a determination that its costs of compliance with a recent statutory change and the risk of penalties associated with erroneous recordkeeping were too high to allow it to continue employing annuitants; and (3) the challenged employment action was "based on reasonable factors other than age." Because the employees did not adduce sufficient evidence that a reasonable factfinder could conclude that the defendant violated the Age Discrimination in Employment Act, the employer was also entitled to summary judgment on a Section 1983 claim. Likewise, the appeals court affirmed the district court's grant of summary judgment on the state constitutional claim. Although the Illinois Constitution prohibits the impairment of any public pension contract, the Seventh Circuit affirmed the trial court's reasoning that these protections do not guarantee an annuitant's continued employment. Finally, the Seventh Circuit affirmed the trial court's grant of summary judgment on the retaliatory discharge claims, holding that the plaintiffs had not shown that: (1) the decision to terminate annuitants' employment would be considered to violate a clear mandate of Illinois public policy; and (2) there was any evidence from which a reasonable factfinder could conclude that their discharge was in retaliation for their participation in the pension plan

Dayton v. Oakton Cmty. Coll., 907 F.3d 460 (7th Cir. 2018).

Personality Conflicts are Not Enough to Sustain Discrimination and Retaliation Claims

The plaintiff in *Skiba v. Illinois Central Railroad Company* alleged that his former employer unlawfully discriminated against him on the basis of his age and national origin and retaliated against him for complaining about his supervisor. In that case, the plaintiff was hired as an entry-level management trainee at 55 years old. The plaintiff was later promoted, serving in multiple management-level positions. The plaintiff alleged that, when he was 58 years old, his supervisor became verbally abusive towards him, and as such, the plaintiff requested reassignment to a different department. At the same time, his supervisor informed the human resources department that the plaintiff was under-performing. After the plaintiff's request for reassignment was denied, he filed a charge of discrimination with the Equal Employment Opportunities Commission.

The district court granted summary judgment on behalf of the employer and the Court of Appeals, Seventh Circuit affirmed. The Seventh Circuit noted that the plaintiff failed to establish that he engaged in any statutorily-protected activity to support a retaliation claim, as complaining about discrimination or harassment generally without indicating a connection to a protected class is not enough. Moreover, the court determined that the issue was a mere conflict of personalities and despite the supervisor berating, badgering, and disrespecting his subordinates, such actions did not amount to actionable harassment or discrimination. In addition, the Seventh Circuit noted that comments describing the plaintiff as "low energy" and that other individuals would be "a little faster" were not attributed to the plaintiff's age. Furthermore, because the plaintiff could not show that any younger employee was similarly situated or given preferential treatment, his age discrimination claim failed.

The court also held that the plaintiff failed to provide sufficient evidence to support a discrimination claim based on national origin. The plaintiff's claim was based on the fact that he was American and his supervisors were Canadian. However, the plaintiff failed again to demonstrate that a particular protected characteristic was a motivating factor for any employment decisions. Therefore, the plaintiff's national origin claim failed.

Skiba v. Ill. Cent. R.R. Co., 884 F.3d 708 (7th Cir. 2018).

Grievance Alleging Race and Sexual Harassment Not Considered Protected Activity

In *Emerson v. Dart*, a Cook County correctional officer filed a Section 1983 action against Cook County and individual employees alleging that they retaliated against her for filing personnel grievances. The plaintiff had previously filed two formal personnel grievances alleging race and sexual harassment, which were both denied. The plaintiff alleged that after filing the grievances, her supervisor continued to reassign her shifts, made malicious comments against

her, and failed to assist her while supervising a group of inmates. The plaintiff took a leave of absence and then filed suit.

During discovery, the plaintiff posted a message to a Facebook group of more than 1,600 employees of the Cook County Department of Corrections. The message was an intimidating message that named the job descriptions of County employees who would testify and suggested that other employees not come forward in defense of the County.

The County asked for sanctions for witness tampering, which the court granted. The district court also granted the County's motion for summary judgment, concluding that the plaintiff's first grievance did not constitute protected activity, and that the plaintiff could not show that her supervisors were aware of the second grievance to establish a retaliatory motive. On appeal, the Seventh Circuit affirmed the sanctions award and the ruling on the retaliation claim.

Emerson v. Dart, 900 F.3d 469 (7th Cir. 2018).

Trial Court Errors Lead to Reversal and Second Trial

In *Robinson v. Perales*, two plaintiffs (a police officer and a watch commander) filed suit against their employer and individual defendants for employment discrimination. In that case, the plaintiff-officer, who described himself as biracial, reported directly to a lieutenant. On two occasions, the lieutenant used a racial slur (the N-word) when speaking to the plaintiff-officer. After the second time the lieutenant used the N-word, the lieutenant was suspended. Thereafter, the lieutenant subjected the plaintiff-officer to a high level of scrutiny, followed him on duty, and directed other employees, including the plaintiff-watch commander, to go against the plaintiff-officer. The plaintiff-watch commander refused. After his refusal, the plaintiff-watch commander received unwarranted notices of infractions and was assigned to a different shift by his division commander, who had discussed the decision with the lieutenant.

The court granted summary judgment in favor of the defendants on all claims except for the plaintiff-officer's claim against the lieutenant and the employer for retaliation. That claim went to jury trial which resulted in a verdict against the lieutenant and in favor of the employee but only an award of $1 in favor of the plaintiff-officer. On appeal, the Court of Appeals, Seventh Circuit found that the district court erred in dismissing the plaintiff-officer's claim of hostile work environment based on his race. The appellate court disagreed with the district court's belief that a few instances of the racial slur were not significant enough to demonstrate that the conduct at issue was severe or pervasive. Rather, the court found that the lieutenant's use of the slur on two separate occasions in connection with his heightened scrutiny of the plaintiff-officer and his call to others to take action against the plaintiff-officer were sufficient to create a triable issue for a jury on whether the harassment was severe or pervasive enough to constitute a hostile work environment.

The Seventh Circuit also reversed summary judgment in favor of the defendants on the plaintiff-watch commander's claim of retaliation. The district court based its decision on the fact that the decision maker was not aware of the plaintiff-watch commander's protected activity. The Seventh Circuit noted that decision maker did, however, consult with the lieutenant before deciding to demote the plaintiff-watch commander. Thus, under the "cat's paw" theory, a jury could determine that the lieutenant caused the decision maker to demote the plaintiff-watch commander with a retaliatory motive. Accordingly, court found that the plaintiff-watch commander presented adequate evidence that the lieutenant either made the decision to demote the plaintiff-watch commander or influenced the person who did so.

Robinson v. Perales, 894 F.3d 818 (7th Cir. 2018)

Female Probation Officer Strikes Out on Hostile Work Environment Claim Alleging that Two Coworkers Threatened Her Life

In *Flanagan v. Office of Chief Judge of Circuit Court of Cook County*, the plaintiff successfully sued her employer for retaliation. While the employer's appeal was pending, the plaintiff claimed that one night at the office, her colleague overhead an employee say, "I want to bring some bodily harm to [the plaintiff]," and the employee instructed another employee to "figure out a way to get [the plaintiff] alone and away from her partner," to which the other individual responded, "I'm going to do it." Later, the plaintiff maintained that one of the employees radioed her to an area. After the plaintiff went to the area, the door was locked behind her. The plaintiff overhead the employee say, "Do it when she gets out the door." In addition, an employee allegedly made a comment that "[he] could hit [her] and nobody would give a f***." However, nothing happened to the plaintiff during the encounter. In affirming summary judgment to the employer, the Court of Appeals, Seventh Circuit found that a jury could not find that the plaintiff was subjected to a hostile work environment because the alleged threat was too oblique to be considered severe since it was not clear to whom the plan was directed or what the plan was. Because the plaintiff walked away unharmed, there were questions as to whether the plaintiff was ever actually in danger. The court also noted that the employee's comment that "[he] could hit [her] and nobody would give a f***," was best characterized as

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an "empty threat" rather than "a seriously contemplated declaration of an intent to do harm."

Flanagan v. Office of Chief Judge of Circuit Court of Cook Cnty., 893 F.3d 372 (7th Cir. 2018).

Lack of Legroom Not a Disability Under the ADA

In *Koty v. DuPage County*, the Court of Appeals, Seventh Circuit affirmed the ruling of the district court in favor of the defendant-employer. In *Koty,* the plaintiff was working as a sheriff's deputy and he requested a squad car with more legroom. The request was denied. As a result, the plaintiff sued his employer alleging that his employer: (1) failed to provide him with reasonable accommodations pursuant to the Americans with Disabilities Act (ADA); and (2) retaliated against him for filing an EEOC charge. The district court granted the defendant-employer's motion for summary judgment on his ADA accommodation claim and retaliation claim. On appeal, the Seventh Circuit held that the plaintiff's inability to drive one model of a vehicle was not a disability under the ADA, and thus, affirmed the district court's ruling on the plaintiff's ADA accommodation claim. With respect to the plaintiff's retaliation claim, the Seventh Circuit held that the plaintiff failed to demonstrate that he suffered an adverse action and also failed to show that the Department's reasons for its actions were a pretext for retaliation.

Koty v. DuPage Cnty., 900 F.3d 315 (7th Cir. 2018).

Employee Fails to Show Material Adverse Actions

In *Freelain v. Village of Oak Park*, the Court of Appeals, Seventh Circuit affirmed the district court's grant of summary judgment in favor of the defendant-employer. In that case, the plaintiff, a police officer, reported that another police officer was harassing him. The plaintiff claimed that he began experiencing health issues as a result of the work-related harassment and subsequently took significant time off work. In addition, the plaintiff requested and received additional leave under the Family Medical Leave Act (FMLA).

The plaintiff sued his employer, alleging that the employer retaliated against him in violation of the FMLA and the Americans with Disabilities Act (ADA). The plaintiff alleged that the following were materially adverse actions taken by the employer in retaliation: (1) misclassified his sick leave; (2) required him to undergo a psychological evaluation before returning to work; and (3) waited three months before approving his request to engage in outside employment.

In affirming the lower court's grant of summary judgment, the Seventh Circuit first held that the misclassification of leave time caused the plaintiff no harm as he was eventually made whole when the employer restored his sick leave and gave him compensation for unpaid time he spent on leave. Second, the court held that requiring a police officer to undergo a psychological evaluation prior to returning to duty was reasonable given his line of work. Third, the court found that the delay in approving the plaintiff's outside employment request was not retaliatory because the employer's decisions were discretionary in nature.

Freelain v. Vill. of Oak Park, 888 F.3d 895 (7th Cir. 2018).

"Independent Contractor" Has Possible FLSA Claim

In *Simpkins v. DuPage Housing Authority*, the Court of Appeals, Seventh Circuit addressed the question of summary judgment under the Fair Labor Standards Act (FLSA) on the issue of employee versus independent contractor. The plaintiff began working for the defendant in November 2009 pursuant to an independent contractor agreement with an expected completion date of June 2011. In 2012, a new independent contractor agreement was entered into between the parties. The plaintiff was contracted to provide general maintenance at a single location for the defendant. The agreement did not include a completion date. The plaintiff worked full-time and exclusively for the defendant and received tax forms (1099s) until 2015 when his relationship with the defendant ended. The plaintiff filed a lawsuit, claiming that the defendant failed to pay overtime under the FLSA and violated the Family and Medical Leave Act (FMLA). The lower court concluded that the plaintiff was an independent contractor and entered summary judgment in favor of the defendant. The plaintiff conceded that the dismissal of the FMLA claims was appropriate and appealed the FLSA claims. The Seventh Circuit reviewed numerous factual issues relating to the question of employment versus independent contractor with respect to the FLSA claim. It concluded that there were material issues of fact as to the nature of the contract and the relationship between the plaintiff and the defendant that needed to be resolved by a fact finder. The Seventh Circuit reversed the summary judgment decision on the FLSA claim and remanded the case to the lower court.

Simpkins v. DuPage Hous. Auth., 893 F.3d 962 (7th Cir. 2018).

When It's Too Late: An Employee's Attempt to Manufacture Discrimination and Retaliation Claims After the Decision to Terminate

In *Guzman v. Brown County*, the Court of Appeals, Seventh Circuit affirmed the District Court, Eastern District of Wisconsin's dismissal of the plaintiff's Family Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) claims on a motion for summary judgment. The plaintiff was a 911 dispatcher and was fired after numerous attendance/tardiness issues. At the meeting for her termination, the plaintiff presented a doctor's note to the employer that indicated that she "most probably" had sleep apnea. The plaintiff then requested FMLA leave. It was disputed whether she provided the note and/or requested FMLA leave before or after termination, but it was undisputed that the decision maker had no knowledge of the purported sleep apnea before deciding to terminate the plaintiff. Several reasons existed for the dismissal of the plaintiff's FMLA interference claim, one of which was the fact that the employer lacked notice of the plaintiff's alleged intention to take leave. The Seventh Circuit held that "six incidents of oversleeping, spread over eighteen months, do not constitute the sort of stark and abrupt change which is capable of providing constructive notice of a serious health condition." *Guzman v. Brown Cnty.*, 884 F.3d 633, 641 (7th Cir. 2018). The fact that the decision-maker did not have knowledge of the alleged condition was also detrimental to the plaintiff's FMLA interference claim, as well as to her FMLA retaliation claim and her ADA/Rehabilitation Act disability discrimination and retaliation claims. The fact that the plaintiff's tardiness may have been a side effect of her undiagnosed sleep apnea could not save her disability discrimination claim. Additionally, acts taken by the employer with respect to the plaintiff *after* her termination could not serve as an adverse employment decision for the plaintiff's retaliation claims. The court dismissed the plaintiff's failure to accommodate claim, because there was no evidence that the employer had notice of the alleged disability prior to the decision to terminate. The Seventh Circuit reiterated that "[a]fter the fact requests for accommodation do not excuse past misconduct." *Id.* at 642.

Guzman v. Brown Cnty., 884 F.3d 633 (7th Cir. 2018).

Medical Resident Who Fails Required Exam for Licensure is Not a "Qualified Individual" and Does Not Satisfy the "Essential Functions" of the Job

In *Rodrigo v. Carle Foundation Hospital*, the Court of Appeals, Seventh Circuit affirmed the District Court, Central District of Illinois' dismissal of the plaintiff's Americans with Disabilities Act (ADA) claims on a motion for summary judgment. In affirming dismissal of the plaintiff's discrimination and accommodation claims, the court held that a medical resident who failed to pass an exam that was required for licensure in Illinois was not a "qualified individual" under the ADA and could not meet an "essential function" of the residency program at the defendant hospital. *Rodrigo v. Carle Found. Hosp.*, 879 F.3d 236, 242-43 (7th Cir. 2018). The exam in question was the third part of the United States Medical Licensing Examination (USMLE). The hospital required a resident to pass the Step 3 exam within two attempts. The Seventh Circuit determined that the requirement was legitimate, particularly in light of the fact that the licensing state (Illinois) had a limitation on the number of attempts an individual had at USMLE exams before disqualification from licensure. Thus, when the plaintiff failed the Step 3 exam on his third attempt (and became disqualified from licensure in Illinois since he had previously failed other USMLE exams), he was terminated. In addition to his ADA discrimination and accommodation claims, the plaintiff also attempted to assert a retaliation claim for the hospital's failure to waive its requirement with respect to the Step 3 exam. In the Seventh Circuit's view, the plaintiff was trying to "make an end-run around the 'qualified individual' requirement by simply reframing a discrimination or accommodation claim as one for retaliation." *Id.* at 243. It held that the plaintiff could not make such a collateral attack on the legitimacy of the hospital's requirement.

Rodrigo v. Carle Found. Hosp., 879 F.3d 236 (7th Cir. 2018).

Court Applies Ministerial Exception to Music Minister

In *Sterlinski v. The Catholic Bishop of Chicago*, the plaintiff, a church organist, alleged national origin discrimination and retaliation under Title VII of the Civil Rights Act, as well as age discrimination and retaliation under the Age Discrimination in Employment Act (ADEA), after he was demoted and terminated from his Director of Music position at his local parish. The church moved to dismiss the claims based on the "ministerial exception" under the First Amend-

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ment (which prohibits ministers from suing a religious institution for various forms of discrimination). The court granted the motion on the claims relating to the demotion, but allowed discovery to proceed on the claims relating to the termination. After conducting discovery on the termination issue, the church moved for summary judgment. The church argued that the plaintiff was a "minister" and that the First Amendment protected the church's employment decision because of the church's protection of freedom of religion.

The court analyzed whether the plaintiff's job qualified as a minister and whether the duties he performed as the church's organist were ministerial in nature. This included an in-depth analysis of the role and importance of music, and particularly instrumentalists, to Catholic worship during mass. There was discussion about the fact that music at a service is not simply sung, but rather that it is "sung prayer, or it is prayer that is *supported and directed by instrumental music being played*." [emphasis in the original]. The court also looked at the importance of the organ, itself, given its size, and sound and ability to play sounds of different emotions. The court rejected the plaintiff's arguments that he was not a minister because he could not pick the music and claimed he merely "robotically played notes" from the sheet music.

Sterlinski v. The Catholic Bishop of Chi., 319 F. Supp. 3d 940 (N.D. Ill. 2018).

"Janitor" Exception Applied in Non-Compete Case

In *Medix Staffing Solutions, Inc. v. Dumrauf*, the District Court, Northern District of Illinois considered the enforceability of a restrictive covenant in an employment setting that that stated that an "employee shall not…for two years…engage in any other employment or business…[with another] business, engaged in the manufacture or sale of sorbitol [etc.]…" Thus, the restriction essentially sought to enjoin the employee from working in "any capacity" at another company in the same industry.

The former employee argued that the restriction was so broad that it would have barred him from even working as a janitor at a competitor company. Although the court described the example given as "a bit far-fetched," it nonetheless found that the statement (about the janitor scenario) was not "an inaccurate statement of [the covenant's] prohibitions." The court further held that the restrictions "clearly" would prevent the former employee from taking any number of plausible roles at another industry player no matter how far removed from actual competition with the former employer and was therefore unenforceable.

Medix Staffing Solutions, Inc. v. Dumrauf, 17 C 6648, 2018 U.S. Dist. LEXIS 64813 (N.D. Ill. April 17, 2018).

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Survey of Ethics Law Cases

Second District Holds that a Judge Cannot Rescind His Own Recusal Due to Conflict of Interest

In *In re Marriage of Peridotite*, the appellate court recognized and adopted the facts agreed by the parties, as follows: 1) the judge in the underlying marriage dissolution case announced in court that he was recusing himself because his nephew was an employee of the firm representing one of the parties; 2) when the judge announced his recusal, counsel for that party asked him to reconsider; 3) several days later, the judge announced in court that after a consultation with the chief judge he decided to rescind the recusal.

The appellate court held that once the judge recused himself he lost all authority to decide substantive matters, including whether he should have recused himself at all. The court recognized that the applicable ethical rule was subsection (C)(1) of Illinois Supreme Court Rule 63 requiring a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. The court specifically concentrated on subsection (C)(1)(e)(ii), involving a situation where a person within the third degree of relationship to the judge (such as the judge's nephew) is acting as a lawyer in the proceeding.

The appellate court noted that Supreme Court Rule 63(D) specified that a judge disqualified by the terms or Rule 63(C) could still participate in the proceeding if the record of the proceeding incorporated an agreement by the parties waiving the disqualification. The court, however, found that there was nothing in the record to suggest such a waiver by the parties in this case.

The appellate court reasoned that personal nature of the recusal decision precluded independent review of a refusal to recuse. It noted that Rule 63 does not even require a judge to disclose a basis for the recusal, unless the judge chooses to offer the parties the option to waive the conflict. The court stressed that, while appearances can be assessed by others, the subjective component cannot. When a judge recuses himself, but then changes his mind, he might leave himself open to a charge that he is, at best, uncertain about his ability to remain impartial. Using this analysis, the court concluded that a bright-line rule not permitting exceptions for disqualified judge to make substantive rulings is the best policy.

In re Marriage of Perradotti, 2018 IL App (2d) 180247.

Fifth District Finds that Guardian *Ad Litem* was Not Entitled to Quasi-Judicial Immunity and was Under Duty to Serve the Best Interests of the Client Minor

In *Nichols v. Fahrenkamp*, the plaintiff, when she was a minor, received a settlement for injuries sustained in a motor vehicle accident. Because she was a minor, her mother was appointed as a guardian of plaintiff's person and estate. The court appointed an attorney as the guardian *ad litem*. Subsequently, the plaintiff brought a lawsuit against her mother alleging that the mother spent funds from the settlement amount solely for the mother's benefit (and not for the benefit of the plaintiff). The judge entered a judgment for the plaintiff against her mother but limited the amount of the recovery due to the fact that there was a guardian *ad litem*. The plaintiff then filed the lawsuit against the attorney who acted as guardian *ad litem* and his law firm. The circuit court granted summary judgment for the guardian *ad litem* and his law firm relying on the premise that a private attorney appointed as guardian *ad litem* has quasi-judicial immunity for his or her omissions "so long as the guardian *ad litem* follows the directions of the court and is within the scope of the appointment."

The appellate court disagreed with granting of the quasi-judicial immunity and reversed the grant of the summary judgment. It reasoned that the grant of immunity would mean that guardian *ad litem* had no independent duty to plaintiff, and the appointment of a guardian *ad litem* was nothing more than an empty gesture. The appellate court found that guardian *ad litem* was under duty to serve the best interests of the plaintiff. It specifically found that guardian *ad litem* owed a duty to plaintiff to render advice and to protect plaintiff's assets and interests arising out of the underlying personal injury settlement and to act as an advocate on behalf of plaintiff. The court noted that granting guardian *ad litem* quasi-judicial immunity would mean that plaintiff would not be allowed to pursue any remedy for guardian *ad litem's* alleged failure to exercise that degree of care and judgment that reasonable and prudent men exercise in these circumstances to protect the assets of a minor.

The appellate court further reasoned that defendants in this case were in a situation different from guardians *ad litem* appointed in dissolution of marriage and child custody proceedings who have absolute immunity. The rationale for giving that absolute immunity is giving child representatives in marriage and child custody pro-

ceedings an opportunity to fulfill their obligations without worry of harassment or intimidation from dissatisfied parents. The court felt that that rational was inapplicable in this case where the situation was more akin to a fiduciary relationship between a guardian and ward as a matter of law. It stressed that it was not concluding that all guardian *ad litems* have no immunity.

Nichols v. Fahrenkamp, 2018 IL App (5th) 160316.

Firm Prosecuting Its Own Claim Using Its Own Lawyers is Not Entitled to an Award of Attorney Fees

In *State ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, the underlying case involved a *qui tam* action by the law firm against a Minnesota corporation based on that corporation's alleged failure to pay Illinois state taxes on the purchases made by the law firm and its president. The president and other attorneys from the law firm conducted the depositions in the case. During the two-day bench trial, the law firm's president served as a lead counsel and testified as a witness. Two other lawyers from the law firm also acted in dual roles during the trial both representing the law firm and acting as witnesses on its behalf. An outside law firm also appeared as counsel of record for this law firm, but its involvement was extremely limited.

During the bench trial, the law firm prevailed on some of its claims against the Minnesota corporation. In addition to the 30 percent of the proceeds for its bringing the *qui* tam action, the law firm requested attorney fees, costs, and expenses. The circuit court approved some of the attorney fees, costs, and expenses requested by the firm. The appellate court affirmed award of the damages, but reversed the award of attorney fees, costs, and expenses other than those incurred by the outside counsel the law firm hired to assist it. The appellate court found that the law firm was not entitled to recover attorney fees for any of the work performed by the law firm's own lawyers on any of the claims.

The Illinois Supreme Court affirmed. The Illinois Supreme Court reasoned that, in this case, there was nothing that could fairly be characterized as an attorney-client relationship from which an obligation to pay an attorney fee might arise. The interest of the law firm as the client and the attorney in this litigation were identical, and their contributions to the case were indistinguishable. When the law firm made a legal decision, it was not counseling a client; it was talking to itself. The Illinois Supreme Court specifically noted, however, that it was not reaching the general question of whether an entity could ever claim statutory attorney fees for work performed by its own in-house attorneys.

State ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc., 2018 IL 122487.

Fifth District Considers Whether Attorney's Having to Argue in a Posttrial Motion His Own Ineffectiveness at Trial Amounted to a Conflict of Interest

In *People v. Garcia*, the jury convicted defendant of residential burglary. Prior to the trial, the defendant's attorney filed a motion *in limine*, requesting the trial court to bar the state from presenting in its case-in-chief evidence of other crimes involving defendant. The court granted the motion. At trial, the state presented two videotaped interviews of the defendant that were played to the jury in their entirety without any objection form the defense attorney. These interviews included evidence of other crimes involving the defendant.

At the hearing on post-trial motion, defense counsel and the court had conflicting recollections of the events leading up to the admission of these videotaped interviews. The defense counsel stated that he did not object to the videos because he "was certain that it was probably redacted." The court, however, believed that defense counsel reviewed the video and had no objection to its playing as part of his trial strategy. The court asked defense counsel that if he had some factual issues for the court to take into consideration on the motion, counsel would need to present evidence on that because the court was not going to accept counsel's unsworn argument as to the facts that are not before the court. The prosecutor stated that defense counsel had the video for 200 days before trial and that the argument made by defense counsel was incompetence of counsel. The defense counsel then argued only that the admission of the tape was plain error, declined to put on any evidence of the circumstances leading up to the admission of videotaped interviews, and emphasized that he was not casting blame on anyone.

On defendant's appeal of his conviction and sentence, the defendant argued that his trial counsel had either a *per se* or actual conflict of interest in arguing the posttrial motion. The appellate court noted that, in the context of criminal proceedings, the Illinois Supreme Court has identified three situations causing a *per se* conflict: (i) defense counsel has a prior or contemporaneous relationship with the victim, the prosecution, or another entity assisting the prosecution; (ii) defense counsel contemporaneously represents a prosecution witness; and (iii) defense counsel was a former prosecutor who had been personally involved in the defendant's prosecution. The Illinois Appellate Court Fifth District declined to expand the Illinois Supreme Court's definition of a *per se* conflict under the circum-

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[The Fifth District] stated that, under *Strickland v. Washington*, 466 U.S. 668 (1984), for the posttrial motion to prevail, defense counsel had to show that his performance was deficient and that the deficient performance so prejudiced the defendant that he was denied a fair trial. However, the court found that defendant's attorney did not make any effort to show either prong of the *Strickland* standard, and that the record established that his failure to do so was attributable to the conflict of interest inherent in having to argue his own ineffectiveness.

stances in this case, stressing that this is also a situation where the defendant did not request a new attorney.

The Fifth District, however, did find that defense counsel had an actual conflict of interest. It stated that, under *Strickland v. Washington*, 466 U.S. 668 (1984), for the posttrial motion to prevail, defense counsel had to show that his performance was deficient and that the deficient performance so prejudiced the defendant that he was denied a fair trial. However, the court found that defendant's attorney did not make any effort to show either prong of the *Strickland* standard, and that the record established that his failure to do so was attributable to the conflict of interest inherent in having to argue his own ineffectiveness. The Fifth District found that the defense counsel's loyalty was divided between defendant's interests and counsel's own self-interests. It vacated the denial of the defendant's posttrial motion and remanded the case for the appointment of conflict-free counsel, who may file a new posttrial motion and may raise whatever issues he or she deems meritorious in a new posttrial motion hearing.

People v. Garcia, 2018 IL App (5th) 150363.

Third District Considered Whether an Attorney Violated an Ethical Duty Owed to His Client and Whether the Lapse Triggered the Exclusionary Rule

The state charged the defendant, Christian Shepard, with sex offenses and attorney Anthony Tomkiewicz met with the defendant at the Will County jail to discuss legal representation. During these meetings, the defendant neither paid a retainer nor signed a client agreement, but rather told Tomkiewicz his father would pay the retainer.

Tomkiewicz also represented another inmate in Will County jail. Less than two weeks after the state charged the defendant, an inmate informed detectives the defendant solicited him to kill four witnesses in the sex offense case. Detectives asked the second inmate to wear a wire to gather more evidence against the defendant, but before agreeing to cooperate, the inmate asked to speak with his attorney, Tomkiewicz. Tomkiewicz disclosed he had met with the defendant regarding the sex offense case, but indicated he would not represent the defendant and informed the defendant's father he would not accept a retainer.

Tomkiewicz met with the second inmate the same day and filed an appearance in his case. The inmate wore a wire and recorded a conversation wherein the defendant hired the inmate to kill witnesses. Subsequently, the state charged the defendant with solicitation of murder for hire in addition to the sex offenses.

The defendant filed a motion to dismiss or in the alternative to suppress evidence, specifically the recording, citing Illinois Rule of Professional Conduct Rule 1.8. The defendant argued Tomkiewicz violated the rule which prohibits attorneys from disclosing communications from prospective clients, even if no attorney-client relationship ensues. Rule 1.8, effective January 1, 2010, also prohibits attorneys from representing "a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." The defendant further argued this violation of Rule 1.8 justified excluding the recording in the murder-for-hire case under the exclusionary rule. The court suppressed the recording, but the Illinois Appellate Court Third District reversed on appeal stating the defendant never proved Tomkiewicz received confidential information that was significantly harmful to the prospective client.

On remand, the defendant filed a motion to suppress claiming he and Tomkiewicz established an attorney-client relationship, and that Tomkiewicz representation of the inmate constituted a conflict of interest. In his motion, the defendant claimed that he had subjective expectations of confidentiality and that he told Tomkiewicz the police coerced his confession. Tomkiewicz believed the attorney-

client relationship was formed only after the defendant paid the retainer fee and signed the client agreement. The trial court found Tomkiewicz and the defendant formed an attorney-client relationship and the attorney violated Rules 1.7 (conflict of interest among current clients) and 1.9 (materially adverse conflict of interests with former clients) by representing the inmate.

Reviewing the trial court's factual findings for manifest error and its legal conclusions de novo, the appellate court determined Tomkiewicz did not commit an ethical violation and the recording was not properly suppressed under the exclusionary rule.

The court noted that the attorney-client relationship requires no formal written agreement, nor any payment; however, the attorney-client relationship is voluntary and requires both parties consent. Here, Tomkiewicz indicated his agreement to represent the defendant was contingent on paying the retainer fee and signing the client agreement. Neither, the defendant nor Tomkiewicz discussed the facts of the case nor any specific defense strategy.

Turning next to the exclusionary rule, the court noted it "would be the first reviewing court in the free world to find that defense counsel's ethical violation triggers the exclusionary rule." The court noted Tomkiewicz did not act as the state's agent and meetings between Tomkiewicz and the defendant had nothing to do with the solicitation of the inmate for murder or his decision to aid the police. Rather, Tomkiewicz, as would any defense attorney, merely allowed the inmate to voluntarily cooperate with the state. The defendant suffered no prejudice as a result of Tomkiewicz' involvement. Tomkiewicz did not disclose any of the defendant's privileged communications. Rather the defendant, when soliciting murder for hire, volunteered privileged information and documents to the inmate. The court opined it was not holding that a lawyer's actions could never trigger the exclusionary rule, but rather that state misconduct is necessary to do so.

People v. Shepherd, 2018 IL App (3d) 160724.

Third District Considered the Requirements for Standing to Raise a Violation of Rule 1.7 of the Illinois Rules of Professional Conduct

A mother and father had a tumultuous relationship and did not live together, although the father maintained contact with his two biological children. After the mother died, the father demanded the children be turned over to him. Before the mother's death, she and her children resided with the children's maternal grandparents. Because the father was a defendant in a criminal matter, he executed a standard form "Appointment of a Short-term Guardian" appointing his sister under the Probate Act of 1975. 755 ILCS 5/11-5.4. His sister filed a petition for appointment and included in a supporting affidavit that she was pursuing guardianship in accordance with the father's express designation, and the guardianship would terminate on the date the father indicated he was willing and able to carry out day-to-day parenting responsibilities. His sister also indicated the guardianship was being sought as a result of the maternal grandparent's refusal to comply with the father's wishes. Natalie Cappetta represented the father's sister in this court proceeding.

During several court proceedings regarding custody and guardianship of the children, Ms. Cappetta and other members of her firm represented the father. During guardianship proceedings, the maternal grandparents filed a motion to disqualify Ms. Cappetta, and two other attorneys, alleging they violated Illinois Rule of Professional Conduct 1.7, which concerns concurrent conflict of interests by representing both the father and his sister. The grandparents argued the parties were in conflict with each other because the father sought custody of his children and his sister sought guardianship. Following a brief hearing, the court found the attorneys were in violation of Rule 1.7 and granted the grandparent's motion to disqualify. The court denied a motion to reconsider

On appeal, the court noted attorney disqualification is a drastic measure because it destroys an established attorney-client relationship and prevents a party from retaining their choice of counsel. The appellate court applied the abuse of discretion standard to review the trial court's decision to disqualify counsel, but applied de novo review to the trial court's interpretation of Rule 1.7.

First, the court considered whether the maternal grandparents had standing to bring the motion disqualify. In order to have standing to challenge opposing counsel's ability to represent a client, a party must show the representation adversely affects the challenger's interests. The maternal grandparents argued their interests were impacted because it permitted the father and his sister to pursue contradictory theories. Namely, the father could argue he was able to take custody of the children and the sister could argue he was unable to care for them, giving rise to her claim to custody as guardian. The court found the grandparent's argument failed because 1) the father and his sister did not take inconsistent positions, and 2) to the extent the father and his sister presented alternative pleadings, the maternal grandparents failed to establish prejudice. The court noted the record and pleadings demonstrated the father and his sister pursued the same objective—securing custody of the children for Anthony. The statutory guardianship form evidenced the father's belief he was entitled to custody of the children and was authorized to designate his sister as their short-term guardian. The guardianship was short-term and limited in time. Further, the maternal grandparents failed to present evidence they were prejudiced by the common representation. As

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such, the appellate court found the grandparents lacked standing to bring the motion to disqualify.

Opining further, the court considered whether the grandparents waived their objection to the conflict. The court noted a party waives its objection to an alleged conflict of interest if it fails to assert the conflict promptly and motions to disqualify should be made with reasonable promptness after the conflict is discovered. The appellate court found that the maternal grandparents conduct constituted waiver as they knew of the alleged conflict for three months, and filed their motion to disqualify only after the father prevailed on the grandparent's guardianship motion.

The court next addressed the alleged conflict itself since the court had authority to disqualify counsel on its own motion. Disqualification under Rule 1.7 is appropriate if the father and his sister were "directly adverse" or their representation would be materially limited. For the reasons discussed above, the court found the father and his sister were not directly adverse. Similarly, the court noted the record showed no evidence the parties' interests would diverge or that counsel's independent professional judgment was limited or compromised. As such, the court held the trial counsel abused its discretion by granting the maternal grandparents' motion to disqualify.

In re Estate of M.L, 2018 IL App (3d) 170712.

Third District Upholds the Dismissal Due to Unauthorized Practice of Law of the Complaint Filed by a Nonlawyer on Behalf of Herself and Others

In *Kimbrell v. State Bank of Speer*, the *pro se* plaintiff filed a complaint on behalf of herself, her husband, and her mother. In another case, the court previously ordered this plaintiff not to draft any pleading, motion, complaint or written document of any type in the name or for the use or benefit of any third party including, but not limited to, her husband and mother. After a hearing on defendant's motion to dismiss, the trial court dismissed the complaint in this case for failure to state a claim and allowed 28 days to file an amended complaint. The *pro se* plaintiff filed a first amended complaint that, again, listed herself, her husband, and her mother in the caption. Defendant again filed a motion to dismiss, and, after a hearing, the court dismissed the first amended complaint without prejudice. The court warned the plaintiff that if she filed another amended complaint without substantial improvement in the pleading, the court would dismiss it with prejudice.

After the *pro se* plaintiff filed a second amended that stated it was on behalf of the plaintiff, her husband, and her mother, defendant filed a motion to dismiss arguing, among other things, that the second amended complaint was a nullity that should be dismissed because plaintiff engaged in unauthorized practice of law by filing it on behalf of herself, her husband, and her mother. The trial court dismissed the second amended complaint with prejudice. The trial court noted that it was clear from the language of the second amended complaint that the plaintiff was representing her husband and mother. It also noted that, even aside from the unauthorized practice of law issue, the second amended complaint was incomprehensible.

On appeal, the appellate court reasoned that the unauthorized practice of law rules are intended to safeguard the public from individuals unqualified to practice law and to ensure the integrity of our legal system. It noted that, under Illinois Supreme Court decisions, the nullity rule should not be applied automatically. Rather it should be invoked only where it fulfills the purposes of protecting the public and the integrity of the court system from the actions of the unlicensed and where no alternative remedy is possible.

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that it was improper. The court in a prior case has ordered her not to do it. Her participation on behalf of her husband and mother was far from minimal, she filed a complaint, a first amended complaint, and a second amended complaint, filed other motions, and made arguments before the trial court. The trial court gave the plaintiff three opportunities to file a coherent complaint and it found the second amended complaint at issue was "incomprehensible." The court decided that, under these circumstances, the trial court did not abuse its discretion in finding no alternative to dismissal of the second amended complaint. The court held that, given that *pro se* plaintiff was not a licensed attorney, her representation of her mother and husband in this case rendered the proceedings null and void.

Kimbrell v. State Bank of Speer, 2018 IL App (3d) 170498.

First District Finds that Attorney Hired by the Administrator of the Estate Owed a Duty of Care to the Estate, Not Just the Administrator

In *Estate of Hudson by Caruso v. Tibble,* a decedent died intestate with only two heirs, his wife and his son from a prior marriage. After the opening of the probate case, the wife became the administrator for the multimillion dollar estate. The wife subsequently retained counsel, for which the appearance stated that they were appearing as attorneys for the wife, and were "Attorney for: Administrator." Decedent's son and Decedent's brother filed petitions to remove the wife as the administrator of the estate alleging, among other things, dissipating the estate's assets, mismanagement, waste, and conversion. Eventually, the wife resigned as administrator of the estate and another administrator of the estate was appointed. The decedent's son then filed an action against the defendants. The new administrator of the estate did the same on behalf of the estate. The complaint contained the allegations of legal malpractice and breach of fiduciary duty.

Defendants filed a motion for summary judgment claiming that their client was the wife and her administration of the estate, and not the successor administration that filed the lawsuit. They argued that the attorney-client relationship did not exist between them and the estate, they never owed a duty to the estate, just the wife as the administrator of the estate who retained them. They produced a copy of the engagement agreement that only listed the wife as the client. The trial court decided that defendants only owned the fiduciary to the administrator of the estate who hired them (the wife). It granted defendants' motion for summary judgment.

On appeal, the appellate court reversed. It found that defendants had a duty to the estate and a question of fact existed whether they breached that duty. The appellate court reasoned that Illinois case law has consistently recognized that an attorney hired by the estate representative to administer a decedent's estate owes the estate a duty. The court stated that it seemed axiomatic that when an attorney is retained by an administrator for the purpose of administering the estate, its client is in actuality the administrator and the estate due to the symbiotic nature of their concurrent existence. The court believed that the administrator only acts to serve the estate, and the estate cannot act but through the name of the administrator.

Estate of Hudson by Caruso v. Tibble, 2018 IL App (1st) 162469.

Third District Finds that Attorney Who Prepared Trust Did Not Owe Duty to a Third- Party Beneficiary Who was Not a Co-Trustee

In *Johnson v. Stojan Law Office, P.C.*, a mother retained a law firm to draft a living trust that named her three children as successor co-trustees in the event of her death, incompetency, disability, or other inability to act. The trust provided the mother with the right to amend or modify its terms without the consent of any trustee or beneficiary. It also granted her the right to remove any trustee and appoint successor trustees with written notice to be removed or appointed. The mother then developed Alzheimer's disease. After her ailment, she visited the attorney that drafted her trust, and amended the trust to remove two of her children as successor co-trustees and named them as secondary co-trustees. A doctor testified that the mother was competent to make significant decisions at the time she made this change to the trust. These two children then began to question disbursements from the trust and, after their mother's death, filed a lawsuit for legal malpractice against the law firm. After the court dismissed one of the children from the case, the law firm moved for summary judgment arguing that it did not owe a duty to the remaining child. The trial court granted the motion.

The appellate court affirmed. It rejected the plaintiff's contention that the law firm owed him a duty as both a co-trustee and a beneficiary of the trust. The court found that the law firm never owed a duty to this plaintiff because he never became a co-trustee. The plaintiff failed to raise a genuine issue of material fact that his mother lacked capacity when she removed him as successor co-trustee. The court similarly dismissed the plaintiff's contention that the law firm owed him a duty as a third-party. The court reasoned that, while normally an attorney is liable to his client and not third parties, there could be liability when the purpose and intent of the

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attorney-client relationship was to benefit or influence the non-client as third party. It found, however, that in this case the purpose of the creation of the trust was to provide financial support for the mother and the possibility that plaintiff could benefit from the trust was insufficient to create a duty by the law firm to the plaintiff.

Johnson v. Stojan Law Office, P.C., 2018 IL App (3d) 170003.

First District Finds that Two Attorneys Committed Fraud on the Court and Directs the Clerk to Forward Copy of the Order to ARDC

Clark v. Gannett Co., Inc. involved a successful class action for the violation of the Telephone Consumer Protection Act. After the parties agreed to a settlement—and the judge approved it—the class counsel moved for an award of attorneys' fees, expenses, and an incentive award for the class representative. There was a sole objector to the settlement. The objector was a California resident who was solicited by a disbarred California counsel, and then referred the matter to a Texas attorney. The Texas attorney in turn asked Illinois attorney to act as local counsel. On the last day for filing objections, this Illinois counsel signed and filed an objection prepared by the Texas counsel. The objection included a statement that the Texas counsel and his law firm represented the objector as his general counsel in objecting to the settlement. The statement also stated that the Texas counsel did not presently intend on making an appearance for himself or his law firm. At no time did this Texas counsel file an appearance or sign a pleading. The objection asserted that the attorneys' fees were excessive, that class members have received insufficient information in the class notice regarding the settlement terms, and that the amount of the settlement was insufficient. After the judge overruled all of these objections and approved the settlement, the class counsel moved for sanctions under Rule 137 against the objector's counsel in Texas and in Illinois.

Prior to the hearing, objector's Illinois counsel moved *in limine* to bar any testimony or evidence regarding other class action cases in which he served as objector's counsel, or in which sanctions were sought against him. The court granted this motion. The trial court found that the objection was not filed for an improper purpose and declined to grant Rule 137 sanctions. The class counsel appealed.

The appellate court noted that class counsel accused the objector counsel of a practice in other cases of frivolously objecting, appealing the denial of the objection, settling out of court, and then withdrawing as soon as class counsel agreed to a nominal amount in "attorneys' fees." The court found that the objector's counsel repeated this practice in 14 other cases since 2009. It found that, under these circumstances, the trial court erred in granting the motion *in limine* excluding this evidence.

The court agreed that by not signing any pleadings or appearing in court, Texas counsel succeeded in circumventing Rule 137. The appellate court found, however, that Texas counsel violated Rule 5.1(c) and Rule 8.4(a) of Illinois Rules of Professional Conduct because he was supervising the work of the Illinois counsel (Rule 5.1(c)) and knowingly assisted or induced Illinois counsel to violate the Rules of Professional Conduct (Rule 8.4(a)). The appellate court found that Illinois counsel admitted to signing documents prepared by the Texas counsel without reviewing them, or taking an active part in the case, also violated the Illinois Rules of Professional Conduct. The court decided that Illinois counsel failed to adequately investigate the basis for the objections to the proposed settlement before filing, and did not use his own judgment. The court also found that, for his part, the Texas counsel did not adequately supervise Illinois counsel's action.

The court further found that Illinois and Texas counsel have both engaged in a fraud on the court. It reversed the trial court decision, remanded the case, and directed the appellate court to forward a copy of its order to the Illinois Attorney Registration and Disciplinary Commission to determine whether disciplinary action should be taken against both the Illinois and Texas counsel.

Clark v. Gannett Co., Inc., 2018 IL App (1st) 172041.

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Survey of Insurance Law Cases

Intended or Expected Bodily Injury Exclusion Did Not Relieve Homeowners Insurer of Duty to Defend Daycare Center and Owner

In *Allstate Indemnity Company v. Contreras,* the insured owned and operated a home daycare center where the insured's husband had sexually abused two children. The mother of the two children brought the underlying action against the insured and the daycare center, alleging that they had negligently failed to supervise and protect the children who had been left in their care. After the insured sought a defense under her homeowner's policy, her insurer filed a declaratory judgment action, claiming that an exclusion barred liability coverage. The exclusion stated that the policy did not cover "any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." The policy also had a "joint obligations" clause, which stated that the "terms of [the] policy impose joint obligations on persons defined as an insured person" and that "the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person." According to the homeowner's insurer, because the bodily injuries alleged in the underlying complaint were intended or expected by the insured's spouse and because the spouse qualified as an "insured" under the policy, the insurer had no duty to defend the insured and the daycare center under the exclusion and the "joint obligations" clause. The trial court agreed and granted summary judgment to the insurer.

On appeal, the appellate court reversed and remanded, holding that the exclusion and the "joint obligations" clause together did not relieve the insurer of the duty to defend the daycare center and the owner. Even though the exclusion applied to "any insured person" and the policy imposed joint obligations on the insureds, the husband's intent to injure the children did not preclude a defense for the owner and daycare center when the underlying complaint did not allege that they had participated in the husband's criminal conduct. The "joint obligations" language was not part of the exclusion and could be reasonably construed to refer to general obligations to pay premiums and take certain actions before and after a loss. Moreover, the allegations against the owner and the daycare center had to be independently evaluated from the husband's conduct. Because the complaint alleged a negligent failure to supervise and protect against the insured and daycare center, the insurer had not met its burden to demonstrate that it owed no duty to defend.

Allstate Indem. Co. v. Contreras, 2018 IL App (2d) 170964.

Statute of Limitations Accrued Upon Policy Purchase, Not When Insurer Denied Coverage

In *American Family Mutual Insurance Company v. Krop*, the Illinois Supreme Court held that the insureds' negligence claims against their insurer and agent were barred by the two-year statute of limitations in 735 ILCS 5/13-214.4, when the failure to procure the requested coverage was clear from the face of the policy. There, the insureds requested a policy that was equal to the coverages provided by the previous carrier. Unlike their old policy, however, the new policy did not provide coverage for certain "personal injury" offenses, including defamation, invasion of privacy and intentional infliction of emotional distress. The new policy was issued and delivered to the insureds in March 2012. More than two years later in 2014, after the insureds were sued for defamation, invasion of privacy and intentional infliction of emotional distress, they sought a defense under their new homeowner's policy. Their new insurer denied the claim and initiated a declaratory judgment action. Thereafter, the insureds filed a counterclaim against the insurer and a third-party complaint against the insurer's captive agent, alleging that the captive agent negligently failed to provide a policy with coverage equal to their old policy. The insurer and the captive agent moved to dismiss the counterclaim and third party complaint, arguing that the two-year statute of limitations set forth in 735 ILCS 5/13-214.4 for claims against an insurance producer had expired. The trial court granted the motion to dismiss and the appellate court reversed. The supreme court reversed the appellate court and affirmed the trial court's dismissal of the claims.

According to the Illinois Supreme Court, contract actions and torts arising out of contractual relationships accrue at the time of the breach of the contract, not when a party sustains injury. Furthermore, negligence actions related to insurance policies, such as negligent procurement, are treated as torts arising out of contractual relationships. Here, the alleged breach took place and the insureds'

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negligent procurement claim accrued when the policy was issued with the wrong coverage, not when the insurer denied the claim. Because the insureds did not initiate their action against the captive agent and insurance carrier until over three years later, their claim was barred by the two-year statute of limitations. In reaching their decision, the supreme court rejected the insureds' argument that the discovery rule should apply to extend the statute of limitations. Insureds have a duty to read their policies and know whether their coverage conforms to their expectations when they receive the policy. The supreme court left open the possibility that a narrow set of cases may exist where the insured could not possibly be expected to learn the extent of coverage simply by reading the policy, which could justify the application of the discovery rule. However, in this case, the Illinois Supreme Court found that no circumstances justified such an exception.

Am. Fam. Mut. Ins. Co. v. Krop, 2018 IL 122556.

Two Policies Did Not Stack when Insured was Killed by Uninsured Motorist

In *Busch v. Country Financial Insurance Company*, an insured was covered under two auto policies issued by the same insurer. Each provided uninsured motor vehicle coverage: one in the amount of $100,000 and the other in the amount of $250,000. Each policy had an anti-stacking provision that limited liability to the highest limit under any one policy in the event that the insurer issued more than one policy. Each policy also had an "other insurance" provision that required the insurer to pay its "proportionate share" of the loss if other uninsured motorist coverage applied to the loss. After the insured was struck and killed by a hit-and-run driver, her mother sought the limits of both policies. The insured's mother argued that the "other insurance" provision applied when the same carrier issued multiple policies, and that a conflict existed between the antistacking provision and "other insurance" provision, thereby creating an ambiguity that had to be construed against the insurer. The trial court agreed and stacked the policies.

The appellate court reversed. When both provisions were read together, it was clear that the antistacking provision applied where the insured was covered under two or more policies issued by the same insurer while the "other insurance" provision applied only when a policy was issued by a different insurer. Any other reading of the two provisions would be unreasonable. If the "other insurance" provision applied to multiple policies issued by the same company, there would be no need for the provision to refer to the "proportionate share" of loss because the insurer's proportionate share would always be 100%. Similarly, reading the "other insurance" provision as applying to multiple policies issued by the same company would render the antistacking language meaningless. Because the "other insurance" provision did not apply when only one insurer issued multiple policies, there was no conflict between the "other insurance" and the antistacking provisions, no ambiguity existed, and the uninsured motorist limits did not stack.

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Busch v. Country Fin. Ins. Co., 2018 IL App (5th) 140621.

Subsurface Water Exclusion Precluded Coverage for Above-Ground Water Damage

In *Central Illinois Compounding, Inc. v. Pharmacists Mutual Insurance Company*, the insured operated a pharmacy in a leased space that flooded when an underground water service line ruptured during a telephone company's boring operations. All of the flooding and water damage to the premises occurred above ground. When the insured sought coverage, the insurer denied the claim based on a policy exclusion for damage caused by subsurface water. In the ensuing coverage litigation, the parties disputed the meaning of the exclusion. According to the insured, the exclusion applied only to subsurface water, which causes belowground damage. The insurer maintained, however, that the exclusion applied whenever the water originated below the surface—irrespective of whether the ensuing damage was above or below ground. The trial court agreed with the insurer and granted summary judgment in its favor. The appellate court affirmed, finding that the subsurface water exclusion precluded coverage for the aboveground water damage. The court reasoned that a contextual reading of the entire exclusion demonstrated that the exclusion applied whether subsurface water caused damage below

or above ground. The court noted, for example, that the exclusion explicitly referenced damage caused by subsurface water that flows, leaks, or seeps through or into doors, windows, floors, and septic tanks, and these structures may be above or below ground.

Cent. Ill. Compounding, Inc. v. Pharmacists Mut. Ins. Co., 2018 IL App (3d) 170809.

Stacking of Underinsured Motorist Coverage Limits of Multi-Vehicle Policy Allowed

In *Cherry v. Elephant Insurance Company*, the appellate court permitted the stacking of underinsured motorist coverage limits for four vehicles insured under one policy. The insureds were injured in an accident with an underinsured motorist and sought to stack the four coverage limits. When the carrier took the position that coverage was limited to a single coverage limit, the insureds filed a declaratory judgment action. The trial court granted summary judgment to the insurer, finding that the limits did not stack. On appeal, the court reversed, finding that the policy was ambiguous and allowed for stacking of the four coverage limits. Examining prior case law in detail, the court considered the general rule in Illinois allowing for stacking of underinsured motorist coverage when the limits are listed separately in the policy declarations for each vehicle insured under the policy. However, the court noted that no *per se* rule requires the stacking of limits simply because the limits are listed separately for each vehicle in the policy declarations. The carrier argued that the policy's antistacking provision cured any potential ambiguity stemming from listing the limits multiple times in the declarations. That antistacking provision prohibited the "stacking or combining of coverages" for more than one auto under the policy. Disagreeing with the carrier, the court found that antistacking provision did not prohibit the stacking of underinsured motorist coverage *limits*. Rather, the court found that the provision prohibited the combining of different *coverages* under the policy. Because the policy declarations listed the underinsured motorist coverage limits and premium separately for each vehicle and did not otherwise prohibit the stacking of limits, the court found it ambiguous and allowed for stacking.

Cherry v. Elephant Ins. Co., 2018 IL App (5th) 170072.

Misrepresentation in Policy Application Not Material for Purposes of Rescinding Policy

Direct Auto Insurance Company v. Koziol concerned rescission of an automobile insurance policy based on a material misrepresentation in the insured's insurance application. The insured submitted a claim for physical damage coverage for damage to his vehicle following an accident with a utility pole. While investigating the claim, the carrier discovered that the insured had failed to disclose on his insurance application that a different vehicle owned by his parents was kept at the insured's house. The carrier argued that the policy should be rescinded based on the policy's "fraud and misrepresentation" provision, stating that the policy would be null and void based on any material misrepresentations in the insurance application. The carrier also cited section154 of the Illinois Insurance Code, governing misrepresentations and false warranties. The court applied a two-prong test under section 154 for determining if the policy should be rescinded. To satisfy the first prong, the statement first must be false. To satisfy the second, the statement must have been made with an actual intent to deceive or the statement must materially affect the acceptance of the risk or hazard assumed by the insurer. The carrier argued that the misrepresentation was material because it would have charged a higher premium for the policy had the other vehicle been disclosed. The court disagreed, however, finding that an increase in premium, standing alone, without any actual evidence of an increased risk to the insurer, is insufficient to justify rescission of an automobile insurance policy under section154 of the Code.

Direct Auto Ins. Co. v. Koziol, 2018 IL App (1st) 171931.

Fire Policy's "Vandalism and Malicious Mischief" Exclusion Violated Standard Fire Policy

In *Ervin v. Travelers Personal Insurance Company*, the District Court, Northern District of Illinois, applying Illinois law, declined to apply a "vandalism and malicious mischief" exclusion to bar coverage for a fire loss to the insured's building. The exclusion at issue barred coverage for "[v]andalism and malicious mischief, and any ensuing loss caused by any intentional and wrongful act committed in the course of the vandalism or malicious mischief, if the dwelling has been vacant for more than 30 consecutive days immediately before the loss." The insured did not dispute that the exclusion on its face applied; however, she argued that it could not be enforced as written because it would impermissibly provide less

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coverage than that required by the Illinois Standard Fire Policy. The district court agreed and granted summary judgment. Noting that all fire insurance policies written in Illinois must conform to the requirements of the Standard Policy, the court explained that Illinois courts have found that the Standard Policy requires a prospective, 60-day vacancy period that begins to run at the policy's inception. In other words, the premises must be vacant for at least 60 days from the time the policy is issued, regardless of how long the premises actually were vacant. The fire occurred just over one month after the policy took effect. The district court determined the exclusion violated the 60-day vacancy period required by the Standard Policy, meaning it was unenforceable. The insurer argued in response that any conflict between the policy and the Standard Policy could be resolved by expanding the 30-day period in the policy to 60 days, in which case the exclusion still would apply. The insurer further argued that because the policy provided greater coverage than the Standard Policy in certain circumstances, the policy could provide *less* coverage than the Standard Policy in other circumstances. The district court disagreed, finding instead that the Standard Policy sets forth the minimum coverage required by fire insurance policies.

Ervin v. Travelers Pers. Ins. Co., 317 F.Supp.3d 1014 (N.D.Ill. Apr. 5, 2018).

Tenant Entitled to Additional Insured Coverage for Parking Lot Shooting

Dominick's Finer Foods v. Indiana Insurance Company concerned additional insured coverage for a tenant under a general liability policy issued to the owner of the property. The claim arose out of a shooting in the parking lot in a shopping center where the supermarket leased space. The supermarket tendered the underlying personal injury lawsuit for defense and indemnity to the landowner's insurer pursuant to an additional insured endorsement in the policy naming the supermarket as an additional insured. There was no dispute that the insurance also covered the parking lot where the shooting occurred; however, the insurer declined coverage and the supermarket filed a declaratory judgment action and asserted a claim for bad faith. The trial court granted summary judgment to the insurer. On appeal, the appellate court held that the insurer owed a duty to defend the supermarket as an additional insured. The court considered the theories of liability asserted against the supermarket in the complaint pending at the time of tender, which included premises liability and a voluntary undertaking to protect patrons and invitees by hiring security companies to patrol the parking lot. Examining each theory of liability, the court found the allegations against the supermarket could be deemed to assert a claim for "liability arising out of" the premises, within the meaning of the additional insured endorsement. The court interpreted this language broadly to contemplate liability that has "its origin in," is "growing out of," is "flowing from" or is "connected with" or "incidental to" the premises. Under this broad language, the court concluded the allegations were sufficient to trigger coverage under the policy. However, the insurer did not act in bad faith in declining coverage based on a *bona fide* coverage dispute.

Dominick's Finer Foods v. Indiana Ins. Co., 2018 IL App (1st) 161864.

Inability to Perform Important Job Duty Does Not Satisfy Requirements for Total Disability

In *Fiorentini v. Paul Revere Life Insurance Company,* the insured brought an action alleging that the disability insurer improperly discontinued total disability benefits under an occupational disability insurance policy. Following cancer treatment, the insurer paid total disability benefits to the insured for five years, after which it notified the insured that he no longer met the total disability requirements of the policy because he had been cancer-free for five years and was working regularly again. The insured claimed that even though he could perform three important duties of his occupation—consulting with clients, programming, and administrative duties—he was not able to perform sales. The appellate court did not agree, holding that although the insured's capacity to perform as president of his company had been diminished by his inability to perform one of his important duties, he was able to continue his occupation.

Fiorentini v. Paul Revere Life Ins. Co., 893 F.3d 476 (7th Cir. 2018).

Trigger Date for Coverage is Commencement of Malicious Prosecution, Not Date of Exoneration

In *First Mercury Insurance Company v. Ciolino,* a liability insurer brought an action for declaratory judgment seeking a determination that its insured, a private investigator, was not covered for a claim of malicious prosecution made by a murder suspect exonerated during the policy period. The conduct that led to the wrongful conviction took place in the late 1990s, but the insured was not exonerated until 2014. The insurer maintained there was no coverage because the underlying complaint did not assert a claim for "personal injury" caused by an offense committed during the 2006-2015 annual policy periods.

The insured maintained that under Illinois law, a claim for malicious prosecution does not accrue until the termination of the proceeding in favor of the plaintiff. There was no dispute that the insurer's policy was in force when the plaintiff in the underlying lawsuit was exonerated in 2014, but not in force during the earlier period when the underlying plaintiff was allegedly framed by the insured or at the time of his guilty plea or conviction in the late 1990s. The trial court granted summary judgment in the insurer's favor. The appellate court affirmed, holding that the trigger date for coverage was not the date of exoneration, but rather date the alleged malicious prosecution commenced. The appellate court rejected the insured's argument that the use of the term "offense" indicated the parties' intent that coverage would only be triggered upon fulfilment of all elements of a tort claim under Illinois law. Instead, a straightforward reading of the term indicates that coverage depends upon whether the insured committed the "personal injury" offense during the policy period. Based on this reasoning, the appellate court affirmed the entry of summary judgment in the insurer's favor because the offense of malicious prosecution commenced in the late 1990s.

First Mercury Ins. Co. v. Ciolino, 2018 IL App (1st) 171532.

Verdict by Six-Person Jury for Bad-Faith Refusal to Settle Reversed Because Six-Person Jury was Unconstitutional

In *Hana v. Illinois State Medical Inter-Insurance Exchange Mutual Insurance Company (ISMIE),* the appellate court reversed the judgment entered on a jury verdict and remanded the case for a new trial. There, the underlying plaintiffs/judgment creditors, as assignees of the insureds, brought an action against a medical malpractice liability insurer to recover for bad faith and breach of fiduciary duty based upon a failure to settle within policy limits. The plaintiffs brought a medical malpractice suit against the insureds to recover for allegedly deficient prenatal care. The insurer accepted the defense of the underlying lawsuit without reservation. The plaintiffs settled with certain defendants and proceeded to jury trial against the doctors and their clinic, resulting in a verdict that exhausted the limits of the policy and left the doctors personally liable for the $1.35 million balance. In exchange for a covenant not to enforce the excess judgment against the doctors, the plaintiffs were assigned whatever rights the doctors might have with respect to a bad faith claim for the insurer's failure to settle within the policy limits. The plaintiffs then filed suit seeking $1.35 million in compensatory damages for the insurer's alleged bad faith refusal to settle and $10 million in punitive damages for its alleged willful and wanton breach of fiduciary duty, together with attorneys' fees and penalties under section 155 of the Illinois Insurance Code. The plaintiffs also filed a jury demand for a six-person jury over the insurer's objection. The six-person jury found in favor of the plaintiffs on all counts and awarded the damages sought.

The appellate court reversed and remanded for a new trial due to the denial of the insurer's constitutional right to a 12-person jury, citing *Kakos v. Butler,* 2016 IL 120377, in which the Illinois Supreme Court found that the size of the jury—12 people—was an essential element of the right of trial by jury and that the statutory the amendment reducing the size of juries in civil trials violated the Illinois Constitution on its face and therefore void at inception. As to issues likely to arise on remand, the court held that evidence of the plaintiffs' offer to settle with the liability insurer for the entire $1.35 million excess verdict was inadmissible on remand to show the insurer's continuing bad faith because evidence of settlement negotiations is generally inadmissible. The court also held that a claim based on the insurer's bad-faith failure to settle does not require proof of a reasonable opportunity to settle within policy limits, as misstated in the pattern instruction; rather, the duty to settle arises when a claim has been made and there is a reasonable probability of recovery in excess of the policy limits.

Hana v. Ill. State Med. Inter-Ins. Exch. Mut. Ins. Co., 2018 IL App (1st) 162166.

"Limited Other States Insurance" Endorsement Did Not Provide Coverag for Illinois Employee Under Iowa Policy

In *Hartford Underwriters Insurance Company v. Worldwide Transportation Shipping Co.,* the insurer brought a declaratory judgment action for a determination that it owed no duty to defend or indemnify its insured, or pay benefits to the estate of the insured's employee, under an Iowa workers' compensation policy, for an accident that took place in Illinois. The insured, through its broker, submitted an application for insurance to the National Council on Compensation Insurance, Administrator of the Iowa Workers' Compensation Insurance Policy, for a policy providing coverage in Iowa only. Thereafter, the employee was injured while at work in Illinois and subsequently died from his injuries. The employee was a Illinois resident and the estate filed a claim for workers' compensation in Illinois. The parties only disputed whether the insured was covered by Part Three, the Residual Market Limited Other States Insurance Endorsement ("LOSI"). The LOSI endorsement contained three conditions that had to be met to extend insurance coverage for benefits required by the workers' compensation law of any state not listed in the policy. The district court found that the

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second condition required for the LOSI endorsement to apply was not satisfied because by virtue of the nature of it operations in Illinois, the insured was required by Illinois law to have obtained separate workers' compensation insurance coverage. Under Illinois law, the employer had to either self-insure or insure its workers' compensation liability with a carrier authorized to do such insurance business in Illinois. The insurer was not authorized to provide insurance in Illinois. In addition, the district court found that the insured did not satisfy the third LOSI provision, which required the employee's work in Illinois to have been "temporary." It was undisputed that the employee performed 100% of his work in Illinois. Because the insured could not obtain coverage under the LOSI provision of the policy and no other provision of the policy applied, the district court held that the insurer had no duty to defend, indemnify, or pay any insurance benefits to the employee's estate. The district court also granted the insurer's motion for summary judgment on the insured's affirmative defenses of waiver and estoppel, finding that the insurer never made any payments related to the employee's claim other than for investigation, and that the insurer's conduct never suggested that the insured was afforded coverage for hiring an Illinois resident for Illinois work.

Hartford Underwriters Ins. Co. v. Worldwide Transp. Shipping Co., 313 F.Supp.3d 919 (N.D. Ill. 2018).

Insurer's Liability for Failure to Defend Under a Reservation of Rights or Seek a Declaratory Judgment was Capped by $25,000 Policy Limit

In *Hyland v. Liberty Mutual Fire Insurance Company.,* a passenger who was injured when the car in which she was riding struck two parked vehicles, brought an action against the auto insurer for the car owner, seeking to recover a $4.6 million default judgment previously entered against the driver. The facts showed that the 16-year old driver was not driving lawfully after 11:00 p.m. curfew and was later convicted of aggravated reckless driving. Neither the driver nor her parents had auto insurance, but the owner of the auto had a policy that covered anyone driving with permission. The driver claimed that the owner's daughter gave her permission, which the daughter denied. When the passenger sued the driver, the insurer believed its insured and refused to defend the suit. Following the entry of the $4.6 million default judgment, the driver assigned whatever claim she had under the policy to the plaintiff. In the subsequently filed action, the district court held that the insurer was liable for the entire judgment, even though the policy had only $25,000 limits, because the insurer had failed to defend or seek a declaration of its rights. The appellate court vacated and remanded, holding that the insurer was liable for only $25,000 representing the policy limit, along with post-judgment interest accruing from the date of judgment in the underlying action until paid. The plaintiff argued that the entire judgment was recoverable because the damages were proximately caused by the insurer's failure to defend. The court rejected the plaintiff's argument, finding that it would not be possible to show that the insurer acted in bad faith when the driver never asked for a defense and the complaint omitted the fact that owner's daughter gave the driver permission. Moreover, the failure to defend did not proximately cause the plaintiff's damages because the driver's liability was clear and the plaintiff did not claim that she was awarded more than the amount to which she was entitled because of the default judgment.

Hyland v. Liberty Mut. Fire Ins. Co., 885 F.3d 482 (7th Cir. 2018).

No Obligation Owed to City Under "Loss of Use" Provision for Suit Alleging that Administrative Fees for Release of Impounded Vehicles Violated Due Process Rights

In *Illinois Municipal League Risk Management Association v. City of Collinsville,* the association filed a complaint for declaratory judgment seeking a determination that it had no obligation to defend or indemnify the city in the underlying class action, which related to the enforcement of a local ordinance requiring an individual whose vehicle had been towed and impounded in connection with certain criminal offenses to pay a $500 administrative fee to the city prior to obtaining the release of an impounded vehicle. In the underlying class action, the plaintiffs argued that the ordinance violated their due process rights because the fee was not related to the cost of services provided and served no rational purpose. The plaintiffs sought class certification and asked the trial court to award the return of all monies received by the city. In the declaratory judgment action, the association filed a motion for summary judgment in which it argued that the city was not entitled to coverage for the plaintiffs' claims because the claims did not fit within the coverage grants issued by the association to the city. The appellate court agreed, holding that the plaintiffs' claims for $500 per person were for a permanent deprivation of funds and did not allege a "loss of use" of their money on a temporary basis, as defined by the "loss of use" prong of the property damage provision in the association's coverage grants to the city.

Illinois Mun. League Risk Mgmt. Ass'n v. City of Collinsville, 2018 IL App (4th) 170015.

Insurer Estopped from Asserting Policy Defenses by Virtue of Settlement Conduct

In *Rogers Cartage Company v. The Travelers Indemnity Company*, the insured filed suit seeking a determination that its insurer was liable for its $7.5 million settlement of claims brought in federal court for contribution to costs of environmental clean-up at two superfund sites. The trial court granted summary judgment to the insured on finding that the insurer breached its duties to defend and failure to settle, the pollution exclusion did not apply, the settlement was reasonable, and the insurer's refusal to settle was vexatious and unreasonable under section 155 of the Insurance Code.

The appellate court affirmed, holding that the insurer had breached its duties to defend and settle in good faith. Although it had agreed to defend under a reservation of rights, the insurer rejected all settlement demands within policy limits and sent a letter to the insured stating that it controlled the defense and threatening to deny coverage if the insured continued to negotiate. The pollution exclusion was inapplicable when the insured did not expect or intend the toxic wastewater to enter the groundwater. The settlement, which the parties reached without the insurer's consent, was reasonable and binding on the insurer when the cleanup costs could have exceeded $30 million, future remediation costs were estimated to be over $21 million, underground remediation was already $40 million and additional costs were expected. The test was whether the insured's decision to settle on the terms at issue were consistent with the conduct of a prudent uninsured entity under the totality of the circumstances, and what a reasonably prudent person in the insured's positon would have settled for on the merits of the claim. Even though the $7.5 million settlement involved a covenant not to execute against the insured and was for several million dollars more than an alternative "cash" settlement that had been under consideration, the settlement was reasonable and non-collusive. The court relied on the fact that the federal court had approved the settlement, there was no evidence of fraud or collusion, the insured did not conceal essential details of settlement discussions from the insurer and the insurer had rejected a prior $3.75 million settlement demand. The court also upheld the damages awarded under section 155, including $2.6 million in attorneys' fees, because the insurer had sent the insured a threatening letter rejecting settlement and advising that the insured was at risk of breaching the cooperation clause of the policies if it continued to negotiate, and the insurer had filed its own coverage action in a county other than where the insured was located.

Rogers Cartage Co. v. Travelers Indem. Co., 2018 IL App (5th) 160098.

Professional Services Exclusion for Professional Services Performed by "Any" Insured Did Not Preclude a Duty to Defend an Additional Insured Which Provided No Professional Services

In *Sentinel Insurance Company v. Walsh Construction Company*, the District Court, Northern District of Illinois determined that an insurer's decision that it had no duty to defend a general contractor claiming additional insured status was erroneous, thereby estopping the insurer from asserting policy defenses. In the underlying wrongful death action, the general contractor claimed that it was an additional insured and tendered its defense to the insurer for an engineering firm that acted as a subcontractor on the construction project. As is often the case, the construction contract required the engineering firm to provide the contractor with primary and non-contributory coverage as an additional insured. The underlying complaint included allegations that the general contractor had failed to supervise and provide adequate oversight with regard to the work of the engineering firm, which caused a steel post to fall on the decedent. The engineering firm's insurer denied that it had a duty to defend, however, because the policy had professional services exclusion that barred coverage for professional services performed by "any" insured. In determining that Walsh was entitled to a defense, the district court focused on the separation-of-insureds provision, under which the policy applies separately to each insured against whom a suit is brought. The court ultimately rejected the insurer's contention that the use of the word "any" in the exclusion

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was meaningful in a situation where the additional insured had not provided professional services. Additionally, the court found that the declaratory judgment action was not filed within a reasonable time because it was commenced more than a year after the tender of the claim, and therefore the insurer was estopped from asserting other coverage defenses. As a result, the insurer was also precluded from arguing that its policy provided only excess insurance based on the "other insurance" clause.

Sentinel Ins. Co., v. Walsh Constr. Co., 298 F. Supp. 3d 1165 (N.D. Ill 2018).

Uninsured Motorist Insurer Cannot Moot Attempt to Obtain Post-Judgment Interest on Arbitration Award by Paying Principal Amount of Award

In *Shackelford v. Allstate Fire & Casualty Insurance Company*, the appellate court reversed a trial court order that dismissed an insured's attempt to confirm an uninsured motorist arbitration award, finding that the insured had, in fact, stated a claim for confirmation of the award. The insurer and the plaintiff had arbitrated an uninsured motorist coverage dispute, and the arbitrator entered an award for $16,000 in the plaintiff's favor (subject to all applicable setoffs and liens to be resolved by the parties and their attorneys). The insurer did not immediately pay the award. When the insured filed suit to enter judgment on the award, plus interest, the insurer tendered $14,000 and took the position that it had satisfied all potential liability. The appellate court disagreed, holding that the insurer could not moot the complaint by paying the award, since the statute that provided for entry of a judgment on an arbitration award did not have an exception for satisfied awards. Additionally, the court found that under the judgment interest statute, post-judgment interest accrued on the $16,000 award at the statutory rate of nine percent. The arbitrator's reference to setoffs did not make the award so indefinite that it could not accrue interest. The case was remanded for determination of the interest award amount.

Shackelford v. Allstate Fire & Cas. Ins. Co., 2017 IL App (1st) 162607.

Estoppel Doctrine Does Not Apply to Denial of Claim Reported After Expiration of Claims-Made Policy

In *Southwest Disabilities Services & Support v. ProAssurance Specialty Insurance Company*, the appellate court was called upon to evaluate whether Illinois estoppel doctrine required an insurer to file a declaratory judgment action when denying coverage due to the claim being made outside the claims-made policy period. The case arose out of an injury at a community integrated living arrangement for developmentally disabled adults. During the policy period, one of the residents at the insured's facility choked on a piece of food, and subsequently brought a suit for his injuries. The suit was filed approximately 18 months after the incident, and the insured immediately gave notice to its insurer. The insurer denied coverage on grounds that the policy had been cancelled 10 months before notice was given, for non-payment of premium (and the policy would have been expired by its terms had it not been cancelled). The insurer filed no declaratory judgment action and the insured then brought suit, invoking the rule that an insurer taking the position that a complaint potentially alleging coverage is not covered may not simply refuse to defend—the insurer must either defend under a reservation of rights or seek a declaratory judgment that there is no coverage, or otherwise be estopped. The trial court granted the insurer judgment on the pleadings, finding that the insurer had no duty to defend. The appellate court affirmed, holding that the estoppel doctrine did not apply to a claim first reported after expiration of the policy period. The court explained that claims-made and occurrence-based policies insure different risks. In an occurrence policy, the risk is the occurrence itself. In a claims-made policy, the risk is the claim brought by a third party against the insurer. Because the risk is dif-

The court explained that claims-made and occurrence-based policies insure different risks. In an occurrence policy, the risk is the occurrence itself. In a claims-made policy, the risk is the claim brought by a third party against the insurer. Because the risk is different, notice is assessed differently.

ferent, notice is assessed differently. With a claims-made policy, notice within the policy period is one of the specific requirements of the insuring agreement. If notice is not reported within the policy period, the policy is not triggered because the claim does not fall within the coverage of the policy. The insurer was not relying on the insured's breach of notice condition; rather, it was relying on the insured to fulfill its reporting duties to trigger coverage. Here, the estoppel doctrine could not apply and the trial court accordingly entered judgment on the pleadings because coverage was never potentially triggered.

Southwest Disabilities Servs. & Support v. ProAssurance Specialty Ins. Co., 2018 IL App (1st) 171670.

21-Month Delay Was Not Reasonable, No Matter How Minor Vehicle Accident Appeared at the Time

In *State Auto Property and Casualty Insurance Company v. Brumit Services*, the United States Court of Appeals for the Seventh Circuit evaluated the insured's argument that notice of an auto accident 21 months after it occurred was reasonable because the accident appeared to be minor to the insured. There, while backing out of a parking space at a gas station, the insured struck a 68-year-old pedestrian with the truck's tailgate, causing her to fall and suffered scrape wounds on her elbow and knee. The insured was unaware of the accident until a bystander alerted him as he was driving away. He then came back to the scene, called for an ambulance, and provided the police officer at the scene with a statement. The insured thought the incident so minor that he was not required to report it to his insurer. Nearly two years later, the pedestrian filed suit, claiming significant injuries. The insured gave notice of the claim to his insurer, which brought a declaratory judgment action contending that the insured had breached the policy's notice requirements. The district court granted summary judgment to the insured, finding that the 21-month delay was reasonable as a matter of law. The Seventh Circuit reversed, holding that the 21-month delay was unreasonable. Notice must be given in a reasonable time, and Illinois courts evaluate five factors: (1) the specific language of the policy's notice provision; (2) the insured's sophistication in commerce and insurance matters; (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer. The court found that each of the factors favored the insurer. Two points were highlighted. First, the court found that in any auto accident in which a person is knocked to the ground by a truck, a reasonable driver would understand that a claim or suit might be filed. In addition, the court determined that it would be inappropriate to apply an unduly high standard in assessing the insured's sophistication. The fact that the insured ran a very small business (it was operated from his home and he had two employees) did not support the argument that he was unsophisticated. The court refused to apply a standard where only large corporations, attorneys, and insurance agents would qualify as "sophisticated" insureds, leaving insurers to wonder whether notice provisions would be enforced against the vast majority of Illinois residents. As notice was unreasonably late considering the relevant factors, no coverage was available for the insured's claim.

State Auto Prop. & Cas. Ins. Co. v. Brumit Servs., 877 F.3d 355 (7th Cir. 2017).

Mortgagee's Rights Protected Even Though Policyholder Did Not Own Home and Was Not a Party to the Mortgage

In *State Farm Fire & Casualty Company v. Dubrovsky*, the homeowner's insurer brought a declaratory judgment action against the policyholder, who was the homeowner's father, and the mortgagee, contending that it owed no coverage under the policy with respect to fire and vandalism claims. There, the father purchased a homeowner's policy for the property but did not live in the house (which was a condition of the policy), and did not set forth in the insurance application that he was purchasing the policy on a house in which he had no interest. Facts pertaining to ownership came to light when the policyholder's son made two claims. The insurer ultimately denied the claims, cancelled the policy, and took the position that the policy was void from inception because the father never had an insurable interest in the property. The insurer took the position that the mortgagee likewise could not recover on grounds the policy was void and the policyholder lacked an insurable interest. The trial court granted summary judgment to the mortgagee. The appellate court affirmed, holding that the policyholder's possible lack of an insurable interest as a non-owner did not provide a basis for the insurer to deny coverage to the mortgagee under the policy's standard mortgage clause. Under a standard or union mortgage clause, the insurance policy is interpreted as a separate and distinct contract with the mortgage company, such that conduct of the insured/mortgagor is not imputed to the mortgagee/lender. Even if the policy were void at inception or if the policyholder had no insurable interest in the property, the mortgagee could still pursue recovery under the policy. As long as the mortgagee had an insurable interest (a condition that was satisfied so long as the mortgagee was owed

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money secured by a mortgage on the property), it rights under the policy were intact and could not be affected.

State Farm Fire & Cas. Co. v. Dubrovsky, 2018 IL App (1st) 170282.

Order Debarring Party from Rejecting Award Upheld as Sanction for Not Appearing in Response to Rule 237 Notice

In *State Farm v. Trujillo*, the appellate court affirmed the trial court's order granting the plaintiff's motion under Illinois Supreme Court Rule 90(g) to bar the defendant from rejecting the arbitration award entered in the plaintiff's favor. The appellate court held that the trial court did not abuse its discretion when it granted the motion to bar because the plaintiff had properly served a Rule 237 notice to appear on the defendant, the defendant failed to appear at the arbitration, and under Rule 90(g) a sanction for failure to comply with a Rule 237 notice can include debarring a party from rejecting an award. The appellate court noted that the defendant failed to provide any evidence that his noncompliance with the proper Rule 237 notice was reasonable or the result of extenuating circumstances. The appellate court further noted that while attendance by defense counsel preserves the right to reject an award and defense counsel did attend the arbitration in this case, counsel's attendance did not preclude the trial court from debarring the party from rejecting the award. The appellate court also held that the trial court did not abuse its discretion in denying the defendant's motion to reconsider because the debarring order was entered pursuant to Rule 90(g) and the basis of the motion to reconsider was that the defendant participated in the arbitration good faith under Rule 91(b).

State Farm Mut. Auto. Ins. Co. v. Trujillo, 2018 IL App (1st) 172927.

Extension of Insurance Policy Limitation Period to File Suit Must Be in Writing

In *Sweis v. Founders Insurance Company*, the insured sued her insurer to recover underinsured motorist benefits more than one year after settling with the liability insurer. The trial court granted the insurer summary judgment on grounds that the suit was barred by the one-year limitation period in her policy. The appellate court affirmed, holding that the one-year contractual limitation period began to run when the plaintiff settled with the at-fault motorist and the contractual limitation did not violate public policy. The plaintiff further argued on appeal that the insurer should be estopped from relying on the limitations period because the plaintiff detrimentally relied on the adjustor's representations, causing her to not timely file suit. The court found no basis to apply equitable estoppel. The court stated that even if the adjustor made misrepresentations, the plaintiff failed to provide any evidence the representations occurred prior to the expiration of the policy's limitation period. The undisputed evidence showed that nothing prevented the plaintiff from timely filing suit or obtaining written agreement to extend the limitations period before expiration of the limitation period. The court held that the one-year contractual limitations period was not against public policy because parties have the ability to agree in contract to a shortened limitations period, and the limitations period for underinsured motorist disputes only begins to run after final payment is made on behalf of the underinsured motorist.

Sweis v. Founders Ins. Co., 2017 IL App (1st) 163157.

Plaintiff's Verdict Upheld When Residency and Actual Cash Value Were Undefined in the Policy

In *Thorne v. Member Select Ins. Co.*, the insured brought suit against his insurer to recover after his carrier denied his claim for fire damage to his residence. The jury awarded the plaintiff $87,000 and the district court denied the insurer's motion for judgment as a matter of law. The United States Court of Appeals for the Seventh Circuit affirmed, holding that the evidence supported the jury's determination that the house was the insured's residence; that the jury was properly instructed on the house's "actual cash value;" and that the evidence supported the verdict. The court held that under Indiana law the house was the plaintiff's residence because plaintiff owned the house, had free access to the house, and kept personal belongings there, all of which constituted the requisite subjective intent to reside

> The court rejected the insurer's argument that the policy implicitly defined "actual cash value" as replacement cost less depreciation just because the policy also settled losses by replacement cost, which was to be calculated without depreciation.

there. The insurer also argued the district court erred by interpreting the meaning of "actual cash value" under the policy and in determining whether the jury verdict was reasonable. The court noted the policy did not define "actual cash value" despite capitalizing the phrase in the policy. The court rejected the insurer's argument that the policy implicitly defined "actual cash value" as replacement cost less depreciation just because the policy also settled losses by replacement cost, which was to be calculated without depreciation. The court found the district court correctly used the broad evidence rule to interpret "actual cash value" because the Indiana Supreme Court has adopted the board evidence rule as the default interpretation when "actual cash value" is not otherwise specifically defined in the policy as "replacement cost less depreciation."

Thorne v. Member Select Ins. Co., 882 F.3d 642 (7th Cir. 2018).

Named Driver Exclusion was Unenforceable as to Passenger's Claim for Underinsured Motorist Benefits

In *Thounsavath v. State Farm Mutual Auto Insurance Company*, the Illinois Supreme Court affirmed a declaratory judgment in the plaintiff's favor in a suit seeking underinsured motorist benefits after an accident in which the plaintiff's driver was specifically named as an excluded driver by endorsement to the plaintiff's automobile policies with her insurer. The court first noted that section143a-2 of the Insurance Code provides that underinsured motorist coverage must extend to all insureds under the policy where, as here, the uninsured motorist coverage exceeds the minimum liability limit required by the Financial Responsibility Law. The court also noted that the excluded driver was not making a claim under the policies; rather, the passenger was making the claim. Although the named driver exclusion was enforceable when the excluded driver made the claim, the court held the insurer could not use the exclusion to deny underinsured motorist coverage for a passenger who had no control over the amount of liability insurance coverage that the excluded driver purchased for his vehicle. To recover, the underinsured motorist statute did not require the plaintiff to determine the limits of a driver's liability coverage before riding as a passenger in the vehicle. Once the plaintiff was an insured, her insurer could not directly or indirectly deny her underinsured motorist coverage. To apply the named driver exclusion to the plaintiff while she was riding as a passenger would have violated public policy because underinsured motorist coverage is mandated by statute.

Thounsavath v. State Farm Mut. Auto. Ins. Co., 2018 IL 122558.

Attorney-Client Privilege and Work Product Doctrine did not Apply to All Documents Between Attorney and Client

In *Towne Place Condominium Association v. Philadelphia Indemnity Insurance Company*, the magistrate judge for the District Court, Northern District of Illinois entered an order on the applicability of attorney-client privilege and work product doctrine claims made by the defendant in an insurance coverage dispute. The carrier produced a privilege log claiming numerous documents were protected by either attorney-client privilege or work product doctrine or both. The court stated that the status of the drafter was not decisive on the question of whether a document is protected by the attorney-client privilege, but rather whether the predominant purpose of the communication is to render or solicit legal advice. The court concluded that communications to or from an attorney and the client are not always protected from disclosure. The court determined that emails from defense counsel to the insurer advising that a letter was sent, a meeting scheduled, and the plaintiff's response was due, together with the attorney's summary of what took place in court, were not protected. The court also stated that the work product doctrine does not always extend to an insurer's pre-denial activities, but a reasonable anticipation of litigation is sufficient to claim work product absent a formal lawsuit. Even if prepared by an attorney, information assembled in the ordinary course of business or for non-litigation purposes may not qualify for work product protection.

Towne Place Condo. Ass'n v. Phila Indem. Ins. Co., 284 F. Supp. 3d 889 (N.D. Ill. 2018).

Insurer Allowed to Raise Additional Policy Defenses Not Enumerated in Denial

In *Tracy Holdings LLC v. West Bend Mutual Insurance Company* the insured, a hotel whose water-damage claim was denied, brought suit against its insurer, alleging breach of contract and vexatious and unreasonable delay under section 155 of the Insurance Code. The plaintiff argued that the insurer could not rely on a policy exclusion for "continuous or repeated leakage" because the exclusion was not cited in any pre-suit letters, and that the mend-the-hold and waiver doctrines precluded the insurer from raising the exclusion after suit was filed. The district court rejected the plaintiff's arguments, holding that the mend-the-hold doctrine did not apply because the insurer was not changing the basis for its coverage denial during litigation. Rather, the insurer was adding a

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defense, which was not precluded by the mend-the-hold doctrine. Further, the court held that the insurer did not waive any policy defenses because its denial letter specifically reserved the right to raise additional defenses, which it did as additional defenses among its affirmative defenses to the plaintiff's complaint. As to the merits of the exclusion, the court found that the ensuing-loss clause did not apply because the ensuing-loss clause was only mentioned in a separate section of the policy relating to negligent work, and the policy when read as a whole did not suggest that the ensuing-loss clause was incorporated into other sections of the policy. The court held that because the undisputed facts showed that years of leaks caused the water damage around the windows, the exclusion barred coverage.

Tracy Holdings LLC v. W. Bend Mut. Ins. Co., 333 F. Supp.3d 809 (N.D. Ill. 2018).

Save Your Insurance Policies or You May Regret It

Travelers Indemnity Company v. Rogers Cartage Company shows that there may some merit to being a hoarder. There, the insurer brought a declaratory judgment action against its insured, a hauler of bulk liquid chemicals, seeking a determination on the existence, terms and conditions of missing auto and general liability policies dating back to the 1960s that allegedly provided coverage for environmental contamination at two former truck-cleaning facilities. The insurer provided a defense of the underlying claims under a reservation of rights. The insured eventually settled the underlying lawsuits for $9 million and sought indemnity from its insurer. The trial court ruled in the insured's favor. The appellate court affirmed, finding that the insured had proven by the preponderance of the evidence (1) both the existence and terms of the missing general liability policies and (2) the terms of the missing automobile liability policies, the existence of which the insurer had admitted. The appellate court also held that the insurer's reservation of rights letter and the certificates of insurance were sufficient to prove the existence of the missing general liability policies. For the terms of the missing general liability policies, the court held that the terms of specimen policies, renewals of certain policies and copies of policies for periods before and after the periods of the missing policies from the 1960s were sufficient to prove the basic terms of the missing general liability policies. For terms of the missing automobile liability policies, the appellate court found that the renewals of certain policies and letters describing certain coverages of the policies sent with the missing policies were sufficient to show the terms of the missing policies.

Travelers Indem. Co. v. Rogers Cartage Co., 2017 IL App (1st) 160780.

Endorsement to Employee Exclusion Trumps Additional Insured Endorsement

In *Vivify Construction*, *LLC v. Nautilus Insurance Company*, a general contractor brought a declaratory judgment action against a subcontractor's general liability insurer, seeking a determination that the insurer owed a duty to defend an underlying action brought against it by the subcontractor's employee. There, the contract between the general contractor and subcontractor stated that the subcontractor would procure liability insurance adding the general contractor as an additional insured. The subcontractor obtained the additional insured coverage for the general contractor. The subcontractor's policy also was endorsed to delete the exclusion barring coverage for claims of the insured's employees and replaced with a broader endorsement, which excluded coverage for injury to employees of any insured or subcontractors. The subcontractor's insurer denied coverage to the general contractor for the employee claim, relying on the exclusionary endorsement barring claims of any employees of an insured's subcontractor. The trial court granted the subcontractor's insurer's motion for judgment on the pleadings. The appellate court affirmed, holding that the employee exclusion barred coverage for the general contractor, regardless of the separation-of-insureds provision and the subcontractor's obligations under its subcontract. The appellate court rejected the general contractor's argument that it could consider the subcontractor's obligations as parol evidence to interpret an insurance policy that was not ambiguous. The appellate court noted that the endorsement to the employee exclusion clearly denied coverage for bodily injury to an employee of any subcontractor of the general contractor. The appellate court also denied the general contractor coverage under the separation-of-insureds provision, distinguishing the cases cited by the general contractor on the basis that they did not involve the broad exclusionary language used in the endorsement.

Vivify Constr., LLC v. Nautilus Ins. Co., 2017 IL App (1st) 170192.

Court Finds Insured's Manufacture of Asbestos Containing Components for Conveyor Systems was Single Occurrence

In *United Conveyor Corporation v. Allstate Insurance Company*, an insured argued that each asbestos bodily injury claim made against it was a separate occurrence and that therefore the higher

aggregate limits of its insurance policies should be applied. There, the insurer issued primary comprehensive general liability policies for a period of twenty-two years to the insured. Each policy had aggregate limits higher than the occurrence limits. The insured was sued in thousands of suits by plaintiffs who claimed they were injured by products manufactured by the insured that contained asbestos. Each of the policies defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury." The insured designed and manufactured fly-ash-handling conveyor systems for coal power plants. Each system was separately designed and manufactured to the specifications of each of the insured's customers. Some of the components used in its conveyor systems contained asbestos. The insured also sold sealant products used for installation and maintenance of its conveyor systems that contained asbestos. The insurer defended the suits but subsequently advised the insured that each of the policies had been exhausted, applying the occurrence limit of liability of each policy. The insured filed suit against the insurer, contending that the asbestos claims arose from multiple occurrences. The insured filed a motion for a partial motion for summary judgment and the insurer responded with a cross-motion for summary judgment, arguing that the claims arose from a single occurrence because they resulted from the continuous manufacture and sale of conveyor systems containing asbestos components. The trial court denied the insured's motion for partial summary judgement and granted the insurer summary judgment. The appellate court affirmed, holding that the insured's liability did not arise from the design and installation of individual conveyor systems. Rather, the court noted that the single cause of its liability was that the insured manufactured system components containing asbestos. The court reasoned that the insured's liability arose from its manufacturing activities, not from its design and installation of the individual ash-handling systems.

The court reasoned that the insured's liability arose from its manufacturing activities, not from its design and installation of the individual ash-handling systems.

United Conveyor Corp. v. Allstate Ins. Co., 2017 IL App (1st) 162314.

"Damage-to-Property" Clause Barred Coverage for Grain Bin Damaged in Explosion

In *West Side Salvage, Inc. v. RSUI Indemnity Company*, the owner of a hot grain bin hired the insured to fix the bin's overheating. The bin was potentially dangerous because it had rising grain temperatures, which could result in fire and explosion. While the insured was working to reduce the temperature of the grain, the grain exploded, injuring several workers and damaging the bin. The insured had an $11 million excess liability policy with the defendant. The primary insurer tendered its $1 million policy limits, but defended the insured in the underlying case. The excess carrier reserved its rights contending the coverage for damage to the bin was excluded based on the "damage-to-property" clause of its policy and refused to settle the underlying action. At trial of the underlying action, the insured was found liable for injuries to the workers and damage to the bin. The insured and the excess carrier then settled the insured's claim that the excess carrier should have settled the personal injury claims within the limits of its policy, but the settlement did not address the property damage to the bin. The insured then sued the excess carrier for its alleged failure to settle the property damage claim within the limits of its excess liability policy. The insurer moved for summary judgment and the district court held that the "damage-to-property" exclusion did not bar coverage for damage to the bin. However, the district court found that there was no evidence that the insurer breached any duty to settle and entered judgment for the insurer. The Court of Appeals for the Seventh Circuit pointed out that if the policy did not cover the claim the insurer had no duty to settle the claim. Applying Illinois law, the court held that the exclusion barred coverage for the property damage claim. The court reasoned that the exclusion did not apply to only that particular part of the property where the insured was performing work, but also to property damage caused by the insured's poor workmanship. The court noted that general liability policies do not cover normal business risks and that the risk that grain may explode due to poor workmanship was a normal business risk. Since the court concluded that the exclusion applied and there was no coverage under the policy, the court did not need to rule on the insured's claim that the insurer acted in bad faith when it refused to settle the claim.

West Side Salvage, Inc. v. RSUI Indem. Co., 878 F.3d 219 (2017).

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Survey of Local Government Law Cases

Seventh Circuit Affirms Dismissal of Claim Challenging Ordinance Prohibiting Women From Exposing Their Breasts in Public

In *Tagami v. City of Chicago*, the plaintiff, as part of GoTopless, Inc., a nonprofit organization that advocates for a woman's right to bare her breasts in public, participated in "GoTopless Day" by walking about Chicago baring her breasts. A police officer ticketed the plaintiff for violating the City of Chicago's public-nudity ordinance, CHICAGO, ILL., CODE § 8-8-080, which provides that, "Any person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto…or any public way within the City of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, *or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering*, shall be fined not less than $100.00 nor more than $500.00 for each offense." *Tagami*, 875 F.3d at 371 (emphasis added).

The plaintiff was found guilty and ordered to pay a fine and administrative costs. Thereafter, she sued the City of Chicago, alleging that its ordinance violated the First Amendment's guarantee of freedom of speech and amounted to sex discrimination in violation of the Equal Protection Clause. The district court dismissed the claim, and the Court of Appeals, Seventh Circuit affirmed. With respect to the First Amendment claim, the court declared that the ordinance regulated conduct, not speech, and therefore, the plaintiff's conduct was not protected by the First Amendment. Nevertheless, the court still considered whether the ordinance was constitutional under the *O'Brien* intermediate standard of scrutiny test, which states that a law survives First Amendment scrutiny if (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction on alleged First Amendment freedoms is no greater than essential to further the government's interest. The court concluded that like other laws of this type, the ordinance's essential purpose—promoting traditional moral norms and public order—are both self-evident and important enough to survive scrutiny under the *O'Brien* test.

Regarding the equal protection claim, the court stated that on its face, the ordinance plainly imposed different rules for women and men because it prohibits exposure of "the breast at or below the upper edge of the areola thereof *of any female person*." However, a law that classifies on the basis of sex comports with the Equal Protection Clause when the classification serves important governmental objectives and the "discriminatory means employed are substantially related to the achievement of those objectives." Finding no meaningful difference between this and the *O'Brien* test, the court held the ordinance withstands equal-protection challenge because it "easily" survived the *O'Brien* test.

In her dissent, Judge Ilana Rovner criticized the majority's finding that the plaintiff's conduct was not speech afforded protection under the First Amendment. "Her conduct had but one purpose —to engage in a political protest challenging the City's ordinance on indecent exposure."

In her dissent, Judge Ilana Rovner criticized the majority's finding that the plaintiff's conduct was not speech afforded protection under the First Amendment. "Her conduct had but one purpose —to engage in a political protest challenging the City's ordinance on indecent exposure." *Tagami*, 875 F.3d at 381Judge Rovner also noted that "[a]ny invocation of tradition and moral values in support of a law that facially discriminates among classes of people calls for a healthy dose of skepticism on our part, as historical norms are as likely to reflect longstanding biases as they are reasonable distinctions." *Id.* at 383. In her opinion, both counts were prematurely dismissed and the plaintiff should have been permitted to develop the record in support of her claims.

Tagami v. City of Chi., 875 F.3d 375 (7th Cir. 2017).

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Appellate Court Upholds Dismissal of Detainee's *Monell* Claims

Chicago police officers misidentified Rashad Swanigan as a perpetrator of bank robberies, arrested him, and detained him for approximately 51 hours without a probable-cause hearing. *Swanigan v. City of Chicago,* 881 F.3d 577, 580 (7th Cir. 2018). He was released when the state prosecutor decided not to press charges, and police later found the true culprit. Thereafter, Swanigan sued the officers involved in his arrest and detention under 42 U.S.C. § 1983 alleging various constitutional violations. He later filed a related suit against the City raising *Monell* claims. The suits were consolidated but maintained separate case numbers and dockets; and the district judge stayed the *Monell* suit to allow the suit against the officers to proceed on its own.

In the trial court, a jury found for Swanigan and awarded him $60,000 in damages. *Swanigan,* 881 F.3d at 580. Swanigan then moved to lift the stay on his suit against the City, but the judge dismissed the suit *entirely*, ruling that Swanigan waived most of his claims and that the others were not justiciable. *Id.* The Court of Appeals, Seventh Circuit vacated and remanded with instructions to allow Swanigan to amend his complaint. With the stay lifted, Swanigan filed an amended complaint alleging constitutional injuries stemming from three police department policies: (1) a "hold" policy by which the officers kept him in custody, (2) a policy of requiring detainees to participate in police lineups, and (3) a policy regarding the contents of the closed case file that continued to label him as the bank robber. *Id.* The judge dismissed the *Monell* suit in its entirety, and the Seventh Circuit affirmed.

First, the court of appeals held that federal common law prevents Swanigan from recovering on his claims related to the "hold" policy because § 1983 plaintiffs cannot recover twice for the same injury. *Id.* at 582. The court rejected Swanigan's attempt to split his detention into three distinct stages: his arrest, the three hours at the station before the hold was issued, and the two days at the station after the hold was placed. *Id.* The jury had found that the officers lawfully arrested Swanigan, so the City could not be held liable "based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Id.* (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)). The court also determined that Swanigan had faced a single detention and was only entitled to one recovery. Moreover, the court found that Swanigan's allegations did not suggest that the city's hold policy caused the pre-hold detention, which is fatal to a *Monell* theory of liability. *Id.* The court also shut the door on Swanigan's prayer for injunctive relief because he had only alleged he might be pulled over, arrested, and subjected to a long detention again, which did not show a sufficient likelihood that he will be wronged in a similar way again.

Second, the court held Swanigan's claim for damages under the Fourteenth Amendment failed because the mistaken identifications were never admitted in a trial. *Id.* at 584 (quoting *Hensley v. Carey*, 818 F.2d 646, 649 (7th Cir. 1987)).

Third, Swanigan claimed that the policy regarding "cleared-closed case" files violated his constitutional rights because the public could access the report through a Freedom of Information Act request, or an officer in the future might use the misleading report against him. However, the court held that the potential for public stigma is not cognizable as a due-process violation because it does not deprive a person of life, liberty or property. *Id.* at 584.

Judge Hamilton authored an opinion concurring in part and dissenting in part. He dissented from the decision to affirm dismissal of Swanigan's challenge to the "cleared-closed case" policy. In his view, Swanigan had standing because there remains a substantial risk that harm will befall him because black drivers face a high risk of being pulled over and the likelihood the officers will rely on prior reports. *Id.* at 586.

Swanigan v. City of Chi., 881 F.3d 577 (7th Cir. 2018).

Firefighter's Termination for Violating Residency Requirement was Constitutional

In *Cannici v. Village of Melrose Park,* the Court of Appeals, Seventh Circuit affirmed the trial court's order granting the defendant village's motion to dismiss. In *Cannici,* the plaintiff was a firefighter for the defendant for sixteen years before he was terminated for violating the defendant's the Village terminated him because it found he violated the residency ordinance. The plaintiff lived in Melrose Park until 2008, when he bought a home in Orland Park. However, he continued to own his home in and stayed in the house alone during the week. In 2013, he rented the Melrose Park home to another family, but reserved a portion of the basement for his exclusive use, kept his belongings in the home, maintained access to the home, paid utilities and taxes for the home, and used the Melrose Park address for all professional and personal matters. However, the plaintiff slept at his Orland Park home between 2013 and 2016.

In 2016, the defendant interviewed the plaintiff to inquire about his residency. Upon review, the Board of Fire and Police Commissioners (Board) determined that the plaintiff had violated the defendant's residency ordinance and issued a written statement of charges seeking termination. At the subsequent hearing, the Board found that the plaintiff had failed to maintain residency between 2013 and 2016. The plaintiff filed a complaint in state court against the

village seeking review under the Illinois Administrative Review Act (Act) and claiming violation of his due process and equal protection rights. The defendants removed to federal court and filed a motion to dismiss, which the district court granted.

Affirming the dismissal, the Seventh Circuit held that to satisfy due process, the defendant only needed to provide the plaintiff with a meaningful post-termination remedy. Moreover, the court emphasized that the Act provides sufficient post-deprivation relief. The plaintiff did not contend that his rights under the Act had not been afforded to him, so the court found no reason to believe he has been deprived of his due process rights.

The court also held that a class-of-one theory of equal protection did not apply to the plaintiff's allegation that the village terminated his employment in an arbitrary and irrational manner. The court cited the Supreme Court's decision in *Engquist v. Or. Dep't of Argric.*, 553 U.S. 591, 598 (2008), which held "the class-of-one theory of equal protection does not apply in the public employment context." Indeed, the court stated "[t]he Supreme Court has 'never found the Equal Protection Clause implicated in the specific circumstances where, as here, government employers are alleged to have made an individualized subjective personnel decision in a seemingly arbitrary or irrational manner.'"

Cannici v. Vill. of Melrose Park, 885 F.3d 476 (2018).

Supreme Court Holds Requiring Employees to Pay "Fair Share" or "Agency" Fees Violates the First Amendment

In *Janus v. AFSCME* the United States Supreme Court issued a landmark decision holding that it is an unconstitutional infringement on a public employee's First Amendment rights to require that employee to pay "fair share" or "agency" fees. Fair share fees are supposed to combat the "free-rider" problem, where someone who does not pay union dues still gets the benefit of the union's bargaining in the form of higher wages and better working conditions. The plaintiff argued that fair share fees violate the First Amendment because they are coerced political speech, as those who pay it are tacitly supporting the union's political positions. The Supreme Court agreed with the plaintiff, holding that fair share fees "violate[ ] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." 138 S. Ct. 2448, 2460 (2019). In so holding, the Court overruled the decision in *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977).

Janus v. AFSCME, 138 S. Ct. 2448 (2018).

Illinois Supreme Court Finds Gun Ban Unconstitutional

In *People v. Chairez,* the Illinois Supreme Court found a portion of the Unlawful Use of Weapons statute (720 ILCS 5/24*, et seq*), which bans the carrying of firearms within 1,000 feet of schools, parks, public housing, and courthouses, unconstitutional. In that case, the defendant pled guilty to possessing a firearm within 1,000 feet of a public park, but later sought to vacate his conviction by arguing the statute was unconstitutional. The Illinois Supreme Court agreed, and struck down the portion of the statute that banned guns within 1,000 feet of a public park. It held that the 1,000 foot ban was a severe burden on a person's Second Amendment right to carry a firearm, and the state failed to show how the 1,000 foot ban actually reduces gun violence near public parks. The supreme court also noted the difficulty of determining whether someone was within a 1,000 foot area of a public park. The decision does not address the 1,000 foot ban as it applies to the other areas where the statute prohibits the carrying of guns (*i.e.,* schools, courthouses, public housing), nor does the opinion strike down the prohibition on carrying guns within a public park.

People v. Chairez, 2018 IL 121417 (Ill. Feb. 1, 2018).

Due Process Destruction of Evidence—Court Dismisses Without Prejudice Where Plaintiff Fails to Allege that Defendant Officers Caused Evidence to be Destroyed

In *Bolden v. City of Chicago*, the plaintiff's murder conviction was reversed, the charges against him dismissed, and he received a certificate of innocence after serving 22 years of a life sentence. He then filed suit against the City of Chicago (*Monell* claim) and Chicago police officers (due process and malicious prosecution) for their alleged fabrication and destruction of exculpatory evidence that led to his arrest, conviction, and life sentence. Both defendants sought dismissal of the claims against them. The trial court granted in part, and denied in part, the defendant officers' motion to dismiss. The trial court granted the motion to dismiss as to the due process claim as it related to destruction of a 911 recording only. The trial court denied the City's motion to dismiss.

In January of 1994, the plaintiff was playing a video game inside a restaurant when one of three men involved in a failed drug deal ran inside seeking help after being shot in the back. The plaintiff called 911 from the phone inside the restaurant and waited for police to arrive on the scene. None of the witnesses at the restaurant identified

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plaintiff, or anyone matching plaintiff's description, as the shooter. Several witnesses at the scene either provided, or indicated that they could provide, statements that corroborated the plaintiff's story that he was inside when the shots were fired and placed the 911 call. The plaintiff was eventually arrested and tried for the two murders that occurred in the parking lot and for shooting the man that he aided inside the restaurant.

Shortly after his arrest and subsequent charges, the plaintiff's legal counsel requested the production of the two firearms recovered during the initial investigation. The plaintiff's counsel further informed the defendant officers that his client placed the 911 call on the night of the murders and that there would be a recording of that call. Notwithstanding, the defendant officers destroyed the weapons after plaintiff's counsel requested their production and allegedly allowed the 911 recording to be purged. At that time, the City's policy called for the destruction of 911 recordings after 30 days unless there was a preservation request.

A plaintiff alleging the destruction of evidence needs to show that (1) the defendant destroyed potentially exculpatory evidence in bad faith or while engaged in other misconduct, and (2) a deprivation of the plaintiff's liberty. In granting the defendant officers' motion to dismiss plaintiff's due process claim—limited solely to the destruction of the 911 recording and any related due process claim for the failure to investigate it—the court held that the plaintiff failed to allege that the tape was under the officers' control or that they were responsible for its destruction. The court noted that while an affirmative act of destruction is not required, the plaintiff must somehow attribute its destruction to the defendant officers. Here, the plaintiff merely alleged that the officers caused its destruction. The court stated that such a conclusory allegation was too tenuous to infer the officers were responsible and denied this claim without prejudice.

Bolden v. City of Chi., 293 F. Supp. 3d 772 (N. D. Ill. 2017).

First Amendment Protections Do Not Extend to Speech Made Pursuant to One's Official Duties

In *Davis v. City of Chicago*, the plaintiff filed suit against the defendant city after he was allegedly fired for refusing to change his findings in police misconduct investigations. The district court dismissed the plaintiff's claims because his findings fell outside the First Amendment's protections because he spoke as a public employee and not as a private citizen. The Court of Appeals, Seventh Circuit affirmed.

In 2008, the plaintiff joined Chicago's Independent Police Review Authority (IPRA) as an investigator. In 2010, he was promoted to supervisor where he continued to collect and review evidence on police misconduct complaints and submit draft reports for approval. In 2014, Scott Ando became IPRA's Chief Administrator and hired Steven Mitchell as his First Deputy Chief Administrator. The plaintiff alleged that between 2014 and 2015, Ando and Mitchell ordered him to change his "sustained" findings of police misconduct and to revise his reports to be favorable to the accused police officers. In 2015, Ando implemented a policy requiring his review and approval of all "sustained" findings. Under this new policy, anyone who refused Ando's recommended changes was disciplined for insubordination. The plaintiff continued to refuse changes after the policy went into place and was fired in July 2015.

The plaintiff alleged that he was fired for refusing to change his "sustained" findings, which violated his First and Fourteenth Amendment rights. The plaintiff further alleged state claims for violations of the Illinois Whistleblower Act and common law retaliatory discharge. The district court dismissed his constitutional claims with prejudice and declined to exercise supplemental jurisdiction over his state law claims. The plaintiff appealed his First Amendment claim only.

The First Amendment protects a public employee's speech if the employee can demonstrate that (1) the speech was made as a private citizen, (2) the speech addressed a matter of public concern, and (3) the employee's interest in expressing that speech is not outweighed by the state's interests as an employer in promoting effective and efficient public service. In affirming the district court, the Court of Appeals, Seventh Circuit held that the plaintiff did not speak as a private citizen, and therefore the court did not need to go beyond the first step in this analysis. The court concluded that because IPRA required the plaintiff to draft and revise his reports, his refusal to do so was speech made pursuant to his official duties. Accordingly, the plaintiff spoke as a public employee and the First Amendment did not protect this speech.

Davis v. City of Chi., 889 F.3d 842 (7th Cir. 2018).

Village Avoids Retaliation Claim After Employee Takes FMLA Leave

Employers often encounter difficult situations in how to deal with employees without running afoul of anti-retaliation protections. In *Freelain v. Village of Oak Park*, the Court of Appeals, Seventh Circuit dealt with claims of retaliation prohibited by the Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA). The ADA prohibits covered employers from discriminating against individuals with disabilities. 42 U.S.C § 12112(a). Further, the FMLA grants qualified employees twelve weeks of leave during

a twelve-month period for qualifying health reasons. 29 U.S.C. § 2612(a)(1). Both the FMLA and the ADA prohibit retaliation against employees who assert their statutory rights.

In *Freelain,* the plaintiff was an Oak Park police officer who reported that a female sergeant in the department sexually harassed him by verbal overtures and, when he filed an internal complaint, shoved him into the door of his squad car while yelling, "look out! look out!" *Freelain,* 888 F.3d 895, 899 (7th Cir. 2018). He then experienced stress-related conditions, such as migraine headaches, and took significant periods of time off. The plaintiff sued the defendant village asserting it retaliated against him in violation of the FMLA and ADA.

> [W]hile employers must be sensitive to claims of retaliation when an employee makes a request for FMLA leave, the employer is not required to accede to all demands by the employee. The actions of the employer will be measured against an objective standard regarding whether the actions were truly adverse such that it would dissuade a reasonable employee from engaging in the protected activity.

The FMLA does not require employers to pay employees when they are on family or medical leave. Rather, the law permits an employer to exhaust paid leave held by employees while they use FMLA leave. The plaintiff's arguments were predominantly based on his frustration with the defendant for exhausting his paid leave account. Indeed, the plaintiff was allowed to take all of the unpaid leave he wanted or needed. His claims asserted that doing exactly what the FMLA allows—placing an employee on unpaid leave—violated the anti-retaliation provision of the FMLA and ADA.

Retaliation claims under the FMLA and ADA have three elements: (1) the employee engaged in statutorily protected activity; (2) the employer took adverse action against the employee; and (3) the protected activity caused the adverse action. The district court granted summary judgment in favor of the defendant on all claims. The Seventh Circuit affirmed the ruling and pointed out that the plaintiff failed to furnish evidence that the defendant took any materially adverse actions against him. A plaintiff must show that the defendant's action would have dissuaded a reasonable worker from engaging in protected activity. This is an objective standard, not based on the plaintiff's subjective feelings.

The court in *Freelain* held that those acts that the plaintiff identified as retaliation would not discourage a reasonable employee from exercising his rights under these statutes. The defendant's requirement that the plaintiff use his accrued paid sick leave while off on medical leave did not constitute a materially adverse act, because the FMLA allows employers to count FMLA leave against paid sick days and to not otherwise pay employees for time spent on FMLA leave. Additionally, the plaintiff was eventually made whole by restoration of his sick leave and by compensation for any unpaid time he spent on leave. Also, the defendant's requirement that plaintiff undergo psychological evaluation before he returned to duty was reasonable, because the plaintiff was in public safety position as police officer and had been off several weeks due to stress-related medical symptoms. Further, the defendant's three-month delay in approving plaintiff's request for secondary employment was not a materially adverse act where such decisions were discretionary and plaintiff failed to show that he was singled-out for delay.

The "take away" from *Freelain* is that, while employers must be sensitive to claims of retaliation when an employee makes a request for FMLA leave, the employer is not required to accede to all demands by the employee. The actions of the employer will be measured against an objective standard regarding whether the actions were truly adverse such that it would dissuade a reasonable employee from engaging in the protected activity.

Freelain v. Vill. of Oak Park, 888 F.3d 895 (7th Cir. 2018).

Appellate Court Finds ComEd Annexation Agreement Invalid

Annexation may occur in a variety of ways. Voluntary annexation occurs where a landowner files a petition to be annexed. Alternatively, a municipality may proceed with involuntary annexation where certain statutory requirements are met, such as where a property is "wholly bounded" by another municipality. In *Chicago Title Land Trust Company v. County of Will*, the court analyzed the legality of an involuntary annexation, which was contingent on the validity of a voluntary annexation.

In this case, the plaintiff filed a *quo warranto* action against the defendant, Village of Bolingbrook, alleging that the defendant entered into a "sham" voluntary annexation agreement with an adjacent

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property owner (ComEd) to create contiguous boundaries to reach his property. The Illinois Appellate Court First District found that the ComEd annexation was a sham transaction, created exclusively for allowing the defendant to reach the plaintiff's property. It noted that ComEd did not have an independent desire to have its property annexed to the Village, but rather submitted the petition for voluntary annexation at the request of the defendant. Thus, this annexation was found to be a nullity and could not be used to create contiguous boundaries with the plaintiff's property. Further, the annexation of the ComEd property was premature and ineffective, and thus a nullity, because conditions precedent to ComEd annexation agreement had not occurred or been fulfilled. Thus, the plaintiff's property was not "wholly bounded" by one or more municipalities, as required by Section 7-1-13 of Municipal Code, at the time of the passage of the ordinance attempting to involuntarily annex the plaintiff's property.

Chi. Title Land Trust Co. v. County of Will, 2018 IL App (3d) 160713.

Evidence of Prior Taser Incident Between Plaintiff and Police Officer was Relevant in Section 1983 Action

In *Burton v. City of Zion*, the plaintiff brought a section 1983 action against a municipality and two of its police officers for use of excessive force. Before trial, the defendants filed a motion *in limine* to bar evidence of an incident that took place five and a half years earlier in which one of the officers had placed plaintiff in handcuffs and used a stun gun on her while arresting her after a traffic stop. When the plaintiff filed a citizen's complaint after the earlier incident, an internal police department investigation concluded that the officer had used unnecessary force and the municipality settled with the plaintiff for an undisclosed sum of money. In the section 1983 action, the plaintiff testified that her fear of the police from the earlier encounter explained why she drove home without stopping after two squad cars attempted to pull her over for driving on a suspended driver's license. The district court granted the defendants' motion *in limine* to bar evidence of the earlier Taser incident on grounds that its probative value was substantially outweighed by the danger that the jury would consider it as evidence of the officer's propensity to use excessive force. The jury returned a verdict in the defendants' favor and the plaintiff appealed.

The Court of Appeals, Seventh Circuit reversed and remanded for further proceedings, holding that the earlier encounter was admissible for a specific purpose other than as evidence of the officer's propensity to use excessive force. The issue in a section 1983 action is whether the force used, in light of the facts and circumstances known to the police officer at the time, was objectively reasonable. The fact that the plaintiff had been subjected to excessive force previously could not be excluded as other-acts evidence that the officer had the propensity to use excessive force. Although the police officer's subjective intent and the plaintiff's state of mind were not relevant, an officer should take into account what he or she knows about the suspect's history in deciding what force to use. The earlier Taser incident was admissible to explain the plaintiff's evasive behavior in driving home. The Seventh Circuit did not order a new trial but directed the district court on remand to reweigh the probative value of the earlier incident against the potential danger of unfair prejudice, and to consider whether an appropriate limiting instruction to the jury could mitigate the risk of unfair prejudice.

Burton v. City of Zion, 901 F.3d 772 (7th Cir. 2018).

Ordinance Regulating Food Trucks is Constitutional

In *LMP Services, Inc. v. City of Chicago*, a food-truck operator challenged two sections of a municipal ordinance that regulated food-trucks. The plaintiff challenged one provision for violating the due process and equal protection clauses in the Illinois Constitution, which said a food truck could not be located within 200 feet of the principle customer entrance of a street-level restaurant. Under a second provision challenged for violating the right to be free of unreasonable searches under the Illinois Constitution, a food-truck had to be equipped with a Global Positioning System (GPS) that sends real-time data to any service that has a publicly accessible application programming interface. The trial court found the two sections of the ordinance constitutional and the food-truck operator appealed.

The appellate court affirmed, applying the rational basis test to determine whether the limitation on the location of a food truck within 200 feet of the principal customer entrance of a street-level restaurant was constitutional under the due process and equal protection clauses of the Illinois Constitution. The ordinance's infringement on the right to pursue a profession was not a fundamental right for substantive due process purposes and the 200-foot limitation was neither an arbitrary nor an unreasonable means of promoting the general welfare. Unlike brick-and-mortar businesses, food-truck operators do not pay property taxes, and the 200-foot rule protected businesses that supported the municipality's property tax base. It was completely rational for the municipality to favor those businesses that paid taxes over those businesses that did not. Moreover, the GPS requirement was a valid condition for a license and as a method for maintaining records as to the licensee's location while conducting its business on public streets. The GPS requirement was not a warrantless "search" because the municipality did not physi-

> Unlike brick-and-mortar businesses, food-truck operators do not pay property taxes, and the 200-foot rule protected businesses that supported the municipality's property tax base. It was completely rational for the municipality to favor those businesses that paid taxes over those businesses that did not.

cally trespass on the food-truck's property, and without a trespass, no "search" took place.

The Illinois Supreme Court has agreed to hear the food-truck operator's appeal and the IDC will report on the Illinois Supreme Court's decision when it is filed in 2019.

LMP Services, Inc. v. City of Chi., 2017 IL App (1st) 163390.

Deliberate Indifference No Longer the Standard for Pretrial Detainees

For the past several years, the "deliberate indifference" standard was applicable for section 1983 medical claims brought by incarcerated individuals regardless of whether they had been convicted or were simply pretrial detainees. The Court of Appeals, Seventh Circuit's decision in *Miranda v. County of Lake* moved away from the status quo and required that an "objective reasonableness" standard be applied to section 1983 medical claims brought by pretrial detainees.

In *Miranda*, an inmate of the Lake County Jail went on a hunger strike that, eventually, led to her death. The administrator of her estate then sued the county and the doctors of the county jail, who were employed by a private medical provider, for deliberate indifference to a serious medical need under section 1983. The court stated that it was well settled that the deliberate indifference to a prisoner's serious medical need violates the Eighth Amendment and that the "deliberate indifference" standard requires a showing that the defendant had a "sufficiently culpable state of mind," asking whether the official actually believed there was a significant risk of harm to the plaintiff. The subjective standard was noted to be closely linked to the language of the Eighth Amendment that prevents the infliction of "cruel and unusual punishments." With this in mind, the court highlighted that pretrial detainees stand in a different position than individuals who have been convicted, in that they are entitled to the presumption of innocence and cannot be "punished" at all. Accordingly, the Fourteenth Amendment rather than the Eighth is applied to pretrial detainees.

After some analysis, and a survey of precedent from the other circuits, the Seventh Circuit determined that an "objective reasonableness" standard would be applicable to medical care section 1983 claims brought by pretrial detainees rather than the deliberate indifference standard used in the past. The opinion in *Miranda* is somewhat unclear as to *exactly* what the new standard will entail. The general interpretation is that a pretrial detainee must show that the medical treatment (or lack thereof) provided to him or her purposefully, knowingly, or recklessly by the medical provider, was objectively unreasonable in order to demonstrate that the medical care was in violation of the Fourteenth Amendment. A showing of negligence or gross negligence is still insufficient to sustain a medical care claim under the Fourteenth Amendment.

It is unclear if a plaintiff bringing a section 1983 medical care claim must show that the complained of medical condition was an objectively serious one. This has long been a threshold requirement under the deliberate indifference standard, but it was not directly addressed by the Court in *Miranda*.

Miranda v. Cnty. of Lake, 900 F.3d 335 (7th Cir. 2018).

Discretionary Immunity? Prove it.

In *Monson v. City of Danville*, the plaintiff filed a claim against the defendant city after she tripped and fell on an uneven seam on a city sidewalk. The defendant moved for summary judgment under sections 2-109 and 2-201 of the Tort Immunity Act on the ground that its employees exercised discretion in determining which portions of the sidewalk were in need of repair or replacement. The circuit court granted the defendant's motion and the appellate court affirmed. The Illinois Supreme Court reversed and remanded the decision.

The supreme court, in coming to its decision in *Monson*, read the two sections of the Tort Immunity Act together to state that a public entity is immune from liability for the discretionary acts or omissions of its employees. In the supreme court's analysis, it ruled that the provisions in section 3-102(a) of the Tort Immunity Act which set forth a general duty on the part of a local public entity to maintain its property in a reasonably safe condition under certain circumstances does not operate to override or supersede the discretionary immunities afforded to the city under sections 2-109 and 2-201 of the Act.

However, the supreme court moved on to determine that the defendant in *Monson* failed to provide evidence to show that the

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decision to replace or repair the relevant sidewalk was one of discretionary nature. The court noted that a defendant claiming immunity under section 2-201 must prove that its employee held either a position involving the determination of policy or a position involving the exercise of discretion. Additionally, the defendant must establish that the act or omission giving rise to the injuries was both a determination of policy and an exercise of discretion. Policy determinations are "those decisions which require a municipality to balance competing interests and to make a judgment as to what will be the best solution to serve those interests." *Monson,* 2018 IL 12486, ¶ 30. Discretionary decisions are those "unique to a particular office and involving the exercise of personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner that act should be performed." *Id.* The court found that the defendant failed to meet its burden, as there was no indication that the specific area of sidewalk was ever inspected, there was no evidence of the defendant's decision-making process with respect to the specific site, and there was no evidence of any policy in connection with the sidewalk.

In the end, *Monson* shows that when arguing for discretionary immunity under section 2-201, a defendant *must* provide evidence of the discretionary process with respect to the specific defect complained of and must make a connection between the discretionary process and some policy. A broad claim that a defect was part of a general overall process or evaluation will likely not be successful.

Monson v. City of Danville, 2018 IL 122486, *reh'g denied* (Sept. 24, 2018).

Illinois Passes Law Preempting Local Government Regulation of Drones

In August, the Illinois General Assembly passed a state law preempting local government regulation of drones. P.A. 100-735 declares that the regulation of drones is an "exclusive power and function of the State." The new law prohibits any unit of local government, including home rule units (except the City of Chicago), from enacting any ordinance or resolution that regulates unmanned aircraft systems. The law does not seem to prohibit units of local government from controlling or regulating drones that fly over their own government-owned property, which would be more of an "ownership" exercise of authority rather than "regulatory" exercise. However, the law does appear to prevent a local government from regulating drones through its exercise of zoning or other powers over private property. The law became effective August 3, 2018.

Public Act 100-735, 620 ILCS 5/42.1 (eff. Aug. 3, 2018).

Snow Way Around It: Court Finds Deliberate Encounter Exception Does Not Apply to Slip and Fall Case

In *Winters v. MIMG LII Arbors at Eastland, LLC*, the plaintiff was injured when he slipped and fell on a pile of snow and ice on the sidewalk at his apartment complex as he walked to a laundry facility. The Court found the pile of snow was "open and obvious" as a matter of law. A condition on the land is "open and obvious" when a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved. There are two exceptions to the open and obvious doctrine: (1) the distraction exception and (2) the deliberate encounter exception. The distraction exception applies when the possessor of land has reason to expect that his or her invitees may be distracted and will, therefore, fail to discover or protect against the open and obvious danger. This exception will apply only when evidence exists from which the court can infer that the plaintiff was actually distracted. The deliberate encounter exception applies when the possessor of land has reason to expect that his or her invitee or licensee will proceed to encounter the known or obvious danger because a reasonable person in plaintiff's position would do so. The *Winters* Court advised that the deliberate encounter exception did not apply where plaintiff knew that there were multiple ways to reach the laundry facility. Further, the Court pointed out that the plaintiff failed to show that a reasonable person in his position would have found greater utility in walking over a snow pile instead of using the alternative path.

Winters v. MIMG LII Arbors at Eastland, LLC, 2018 IL App (4th) 170669.

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Survey of Tort Law and Workers' Compensation Cases

Fifth District Finds No Causation Under Animal Control Act Where Plaintiff Fell from a Porch While Petting a Dog

Section 16 of the Animal Control Act imposes liability on an animal owner when the animal "attacks, attempts to attack, or injures" any peaceable person without provocation. 510 ILCS 5/16. But what actions by an animal are sufficient to cause an injury? According to the appellate court, a dog that moved closer to plaintiff during petting did not cause the injuries sustained when plaintiff lost her balance and fell off the edge of a porch.

In *Crosson v. Ruzich*, plaintiff was standing at the edge of an elevated porch after a social visit when she began petting the defendants' dog, Moxie. As Moxie inched toward the plaintiff, the plaintiff stepped away. Unfortunately for the plaintiff, she inadvertently stepped off of defendant's porch and fell into a rock garden near the porch. The trial court granted summary judgment for the defendants.

The appellate court explained that an "animal is the proximate cause of an injury only when the injury was caused by the conduct of the dog and not by the plaintiff's independent act." An overt act is required, but not all actions by an animal will be sufficiently overt for liability to extend. A passive or inert force—such as the expected behavior of an animal—is not the type of startling, irregular, or erratic conduct contemplated by the Animal Control Act. Since plaintiff accidentally stepped off of a porch in response to a dog's benign movement nearby, summary judgment for the animal owner was proper based upon insufficient evidence of causation.

Crosson v. Ruzich, 2018 IL App (5th) 170235.

More than One Sole Proximate Cause Does Not Preclude Defense

In *Douglas v. Arlington Park Racecourse, LLC*, the appellate court considered whether a sole proximate cause jury instruction was properly given in a case where the defendant argued that multiple non-parties were the sole proximate cause of the plaintiff's injury. The plaintiff, a professional jockey, was injured when he fell off his horse during a race. The defendants, a racecourse and racecourse owner, argued that they were not liable under a sole proximate cause defense. The defendants pointed to another jockey as the sole proximate cause of plaintiff's injury. Additionally, the defendants argued that the racetrack surface manufacturer was the sole proximate cause of the plaintiff's injury. The jury returned a verdict for the defendants and responded in a special interrogatory that the sole proximate cause of the injury was the conduct of some person other than the defendants. The trial court granted a new trial becausethe sole proximate cause issue should not have gone to the jury.

The appellate court first noted that the defendants sought to blame both the other jockey and the racetrack manufacturer throughout the trial. The court explained that the sole proximate cause doctrine "is, in fact, not an affirmative defense" because "the burden of proving proximate cause in a negligence action remains, at all times, on the plaintiff." The sole proximate cause doctrine is one avenue for a defendant to argue that plaintiff failed to prove proximate cause, and a jury instruction on the subject acts to focus the attention of the jury on plaintiff's duty to prove proximate cause. Because some evidence supported the sole proximate cause theory concerning both non-party actors, the trial court properly gave that instruction and special interrogatory to the jury. As such, there was no basis to order a new trial on those grounds, and the jury verdict for defendants was reinstated.

Douglas v. Arlington Park Racecourse, LLC, 2018 IL App (1st) 162962.

The Presence of Icicles Does Not Prove that a Faulty Gutter Caused Either an Unnatural Accumulation of Ice or Plaintiff's Fall

In *Cole v. Paper Street Group, LLC*, the plaintiff sued the owner and manager of a property after she fell on icy stairs. The plaintiff alleged that an unnatural accumulation of ice formed due to faulty gutters on the premises. The defendants moved for summary judgment because there was no evidence establishing a defect on the property that created an unnatural accumulation of ice that caused the plaintiff's fall. The trial court granted summary judgment.

The appellate court affirmed for two reasons. First, the appellate court found no evidence that faulty gutters caused an unnatural accumulation of ice. Indeed, the presence of icicles alone did not

prove a defect. For that reason, the case was factually distinguishable from cases holding a property owner liable for falls on ice due to a defective condition or negligent maintenance of the premises.

Second, the plaintiff failed to establish that the icicles were connected to the ice on the stairs where she fell. Even though the plaintiff testified that the ice was formed by dripping icicles, this testimony was insufficient to establish causation because the plaintiff also admitted that she did not know whether the ice had formed from snow melting and refreezing. As the plaintiff's causation testimony was mere speculation and another causation witness only observed ice on the steps below the location of the plaintiff's fall, there was no triable issue of fact as to whether an unnatural accumulation of ice caused the plaintiff's fall.

Cole v. Paper St. Grp., LLC, 2018 IL App (1st) 180474.

Plaintiff's Assumption Fails to Prove Proximate Cause in Slip and Fall

In *Allen v. Cam Girls, LLC*, the plaintiff sued a snow removal contractor and property owner after she fell while walking in a parking lot. She alleged the existence of an unnatural accumulation of ice, but she did not actually see what caused her to fall. Rather, she relied on her own assumption that she fell on ice in the parking lot, which was covered in matted-down snow. To oppose summary judgment, the plaintiff highlighted expert testimony that the snow clearing procedures would have created an unnatural accumulation of ice.

While the parties disputed whether a defendant who voluntarily undertook a duty to remove natural accumulations of snow could be liable absent an unnatural accumulation, the appellate court deemed the question relevant only where the defendant took no action to clear snow and ice. Where, as in this case, a defendant did take action to clear snow and ice, it could only be held liable for defective actions, such as an action that created an unnatural accumulation of ice. But where the plaintiff failed to establish that she fell on ice there was no causal link between the defendants' alleged negligence and an unnatural accumulation of ice that caused plaintiff to fall. Therefore, the appellate court affirmed summary judgment for defendants.

Allen v. Cam Girls, LLC, 2017 IL App (1st) 163340.

Legal Malpractice Claim Filed by Incidental Beneficiary of Trust Fails for Lack of Duty

In *Johnson v. Stojan Law Office, P.C.,* a legal malpractice action, the plaintiff sued a law firm alleging legal malpractice in drafting trust documents for the plaintiff's mother. The plaintiff claimed that he was owed a duty due to his status as successor co-trustee of the trust and as a beneficiary of the trust. However, the appellate court pointed out that plaintiff was actually a second successor co-trustee and never actually became a co-trustee, as the named successor was able to perform her role as a trustee. Additionally, the law firm owed plaintiff no duty because he was an incidental beneficiary of the trust where the trust was not created for his benefit. The possibility that plaintiff might benefit from the trust if assets remained after the death of the intended beneficiary was insufficient to create a legal duty owed to the plaintiff by the law firm. Instead, the law firm owed a legal duty to the plaintiff's mother, as she retained the firm to draft the trust. Thus, summary judgment for the defendant law firm was proper.

Johnson v. Stojan Law Office, P.C., 2018 IL App (3d) 170003.

Illinois Supreme Court Finds Social Host Liability Rule Inapplicable and Allows Hazing Lawsuit to Proceed

A college student died after he consumed an excessive amount of alcohol during a pledge event at a fraternity. His estate sued the national fraternity organizations, local chapter, numerous members of the fraternity, and numerous non-members who took part in the hazing activities. The trial court dismissed the plaintiff's complaint, and the appellate court affirmed the dismissal of some of the defendants, including the non-member defendants, but reversed dismissal as to other defendants, including the active fraternity members.

The Illinois Supreme Court discussed the long-followed rule that social host liability does not extend to the sale or gift of alcoholic beverages outside of the Dram Shop Act. This rule is based upon the rationale that providing alcohol is generally considered a remote, not a proximate, cause of a subsequent injury. Without overturning that rule, the supreme court held that an alcohol-related hazing event involving the "*required* consumption of alcohol in order to gain admission into a school organization in violation of Illinois's hazing statute" does not constitute the sale or gift of alcohol for purposes of social host liability. *Bogenberger v. Pi Kappa Alpha Corp.*, 2018 IL 120951, ¶ 18 (emphasis in original). Because the required consumption of alcohol is near enough to constitute a proximate cause of an individual's intoxication and resulting injury, the supreme court held that the plaintiff's claim was not precluded by the rule against social host liability.

Turning to the allegations against each defendant, the supreme court held that the national organizations were not vicariously liable for the hazing of pledges and did not owe an affirmative duty

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to prevent individual members from hazing pledges. However, the local chapter, fraternity members, and non-members all owed a duty to the pledges, because a hazing injury is reasonably foreseeable and likely to occur as a result of the required consumption of dangerous amounts of alcohol. Of note, the non-members present were considered to be an integral part of the event and conveyors of the message that pledges must drink to become a member of the fraternity. Accordingly, dismissal of the complaint was reversed as to all of the defendants except the national fraternity organizations.

Bogenberger v. Pi Kappa Alpha Corp., 2018 IL 120951.

Appellate Court Holds that Innkeeper Could Have Reasonably Foreseen Sexual Assault

In *Gress v. Lakhani Hospitality, Inc.*, the plaintiff filed a complaint alleging that a hotel employee put a narcotic substance in her drink while at the hotel restaurant and lounge, and that she was subsequently sexually assaulted by the employee who had been directed to enter the plaintiff's room by another hotel employee to repair a faulty air conditional unit. The plaintiff made the following allegations regarding the employee: he was previously arrested for solicitation, he was known to have harassed managers and searched their bags without consent, and that a different female guest complained about his creepy behavior in one instance six years earlier. The plaintiff also made the following allegations against the hotel: another employee embezzled funds, several guests reported stolen property from their rooms, hotel employees gave guests alcohol and fraternized with them in their rooms, prostitutes frequented the hotel, and a woman reported a sexual assault two months after the plaintiff was raped. The trial court dismissed the plaintiff's complaint, reasoning that the hotel could not have reasonably foreseen that a hotel security guard, who also worked as a handyman, might sexually assault an intoxicated female guest.

The appellate court observed that the innkeeper-guest relationship imposes upon the innkeeper the highest degree of care, meaning that the innkeeper has an affirmative duty to protect a guest against an unreasonable risk of physical harm. Applying that rule, the appellate court found that the hotel owed the plaintiff a duty to protect her against third-party criminal attacks and should have known that the employee could have entered the plaintiff's room without her consent and committed a crime. The court declined to require that an innkeeper be on notice of a prior sexual assault before the imposition of a duty under such circumstances. Thus, the appellate court reversed dismissal of the complaint against the hotel.

Gress v. Lakhani Hosp., Inc., 2018 IL App (1st) 170380.

Premises Liability Jury Instructions Proper Where Plaintiff Fell on Stairs

In *Garcia v. Goetz*, a lawsuit arising from a fall on a flight of stairs, the plaintiff proffered ordinary negligence jury instructions, and the defendant proffered premises liability jury instructions. The plaintiff claimed that the complaint was a negligence complaint; yet, the plaintiff's expert had testified almost entirely about premises liability elements. The appellate court explained that the majority of negligence allegations sounded in premises liability, including the alleged failure to maintain the stairs in a safe manner, failure to warn of the dangerous condition of the stairs, and violation of the building code. As the bulk of the evidence and allegations related to conditions on the land, the trial court properly refused the negligence instructions and gave only the premises liability instructions to the jury. Accordingly, the verdict for the defendants was affirmed.

Garcia v. Goetz, 2018 IL App (1st) 172204.

Sidewalk Abutting a Residence: First District Creates a Conflict in Interpretation of Sidewalk Under the Snow and Ice Removal Act

Numerous cases interpreting the Snow and Ice Removal Act, 745 ILCS 75/2, have interpreted the phrase "sidewalks abutting the property" to include both public and private sidewalks, as well as pedestrian paths on the property akin to a sidewalk. The appellate court discussed these cases at length in *Hussey v. Chase Manor Condominium Ass'n*, where the plaintiff sued a condominium association and property management company after she fell on ice located on a pathway behind her condominium building.

The appellate court strictly construed the phrase "sidewalk" to mean only a public sidewalk and held that application of the Snow and Ice Removal Act is limited only to public sidewalks bordering residential property. Based upon this new interpretation, the appellate court held that ice on the pathway within the residential property was not immunized by the Snow and Ice Removal Act.

The appellate court noted that the stated purpose of the Snow and Ice Removal Act is to encourage landowners and residents to "clean the sidewalks abutting their residences of snow and ice." 745 ILCS 75/1. Moreover, the court observed that multiple other districts of the appellate court declined to read the term "sidewalk" to mean "public sidewalk" where the plain language of the Snow and Ice Removal Act made no distinction between public and pri-

vate sidewalks. Nevertheless, the appellate court reversed summary judgment for defendants.

Hussey v. Chase Manor Condo. Ass'n, 2018 IL App (1st) 170437.

Legal Malpractice Claim of a Plaintiff Duped into Inadequate Settlement Barred by the Statute of Limitations

In *Brummel v. Grossman*, the plaintiff sued his attorneys and their firms alleging that he retained them to represent him in his workers' compensation action against his employer, Nicor Gas, and that his attorneys failed to timely obtain or develop medical evidence necessary to seek temporary total disability benefits. The plaintiff further alleged that in October 2011 his attorneys induced him into accepting an unreasonably low settlement offer from his employer. The plaintiff claimed he did not know the settlement amount was far below what he should have received in compensation until he consulted with a new attorney in 2014. At that point, the plaintiff filed a legal malpractice lawsuit.

The trial court dismissed the legal malpractice complaint with prejudice pursuant to section 2-619(a)(5) of the Code of Civil Procedure for failure to file within the two-year statute of limitations governing legal malpractice actions, 735 ILCS 5/13-214.3. The plaintiff appealed, arguing that the statute of limitations was tolled because the plaintiff filed within two years of discovering his injury and that the defendant should be estopped from raising the statute of limitations defense based on plaintiff's reliance on the defendants' misrepresentations, which delayed discovery of the injury.

The appellate court affirmed dismissal of the legal malpractice suit finding that the statute of limitations does not require that the injured party acquire actual knowledge of negligent conduct before the period runs. Rather, the statutory period will begin once an injured party has reasonable belief that the injury was caused by wrongful conduct thereby creating an obligation to inquire further on that issue. The court found that the plaintiff should have known that the settlement did not include temporary total disability benefits based on the language contained in the settlement order, as well as the dollar amount of the settlement (less than one year's worth of his previous salary), when factoring in his remaining life expectancy of 28 years. Despite the assurances plaintiff allegedly relied on when accepting the settlement, the appellate court held that all of the facts were apparent to the client at the time of the settlement to make him aware of the need for further investigation. Lastly, the appellate court found that the plaintiff could not demonstrate that the statements upon which he based his fraudulent concealment argument were calculated to lull him into delaying his filing or to prevent him from discovering his claim. As a result, the defendants were not estopped from asserting the statute of limitations defense.

Brummel v. Grossman, 2018 IL App (1st) 162540.

Domicile Determines Applicability of Interspousal Immunity in Tort Actions

In *Hand v. Hand*, a wife sued her husband for negligence arising out of an automobile accident that occurred in Indiana. Both wife and husband were Illinois residents. The trial court applied Indiana law and dismissed the complaint, based upon the Indiana doctrine of interspousal immunity. Plaintiff argued that Illinois law should apply to permit the action, as interspousal tort immunity was abolished in Illinois three decades ago.

The appellate court agreed with the plaintiff. In weighing the conflict of law factors, the domicile, residence, and place where the relationship was centered weighed strongly for Illinois. Where the location of the injury was merely fortuitous, as in this case, the domicile and place where the relationship was centered were of paramount importance. Because Illinois had a greater interest in regulating the rights of its married residents, Illinois law applied. The appellate court reversed the dismissal of the plaintiff's complaint and remanded the lawsuit for further proceedings.

Hand v. Hand, 2018 IL App (3d) 170275.

Distraction Exception Applies to Fall on Stairs

In *Henderson v. Lofts at Lake Arlington Towne Condo. Association,* a premises liability action, the plaintiff sued a condominium association and property manager for injuries sustained when he slipped and fell on the stairs. The plaintiff also sued an independent contractor for alleged negligence in applying a sealant to the stairs. Notably, the plaintiff had slipped twice previously at the same location, so the defendants moved for summary judgment based upon the open and obvious doctrine, and the trial court entered summary judgment for all defendants.

The appellate court declined to find that the plaintiff's knowledge of the slippery-when-wet condition of the stairs alleviated defendants of a duty. Instead, the court relied upon the plaintiff's testimony that he simply was not thinking about the slippery-when-wet condition at the time of the accident to hold that the distraction or forgetfulness exception to the open and obvious doctrine applied.

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With the distraction exception applicable, all four duty factors weighed in favor of finding a duty, and the appellate court reversed summary judgment for all defendants.

The trial court also granted summary judgment for the third-party defendant on a third-party contribution claim filed against the plaintiff's girlfriend, the owner of a condominium unit at the property. Because the unit owner had no control over the epoxy work and was not otherwise in a position to prevent the slippery condition of the stairs, a common element of the property, the appellate court affirmed summary judgment for the third-party defendant.

Henderson v. Lofts at Lake Arlington Towne Condo. Ass'n, 2018 IL App (1st) 162744.

Electric Pallet Jack Manufacturer Could Not Reasonably Foresee Modification of Product and Plaintiff Failed to Show Proximate Cause

In *Pommier v. Jungheinrich Lift Truck Corp*., a products liability and negligence action, the plaintiff was injured while working as a manufacturing operator when an allegedly defective electric pallet jack unexpectedly stopped while in use. Experts for both sides identified the product defect as an inverted brake cam. However, it was not known by anyone who had inverted the brake cam.

The appellate court held that the inverted brake cam constituted a "modification" of the product, as it was an unintended change to the original components that was a deviation from the manufacturer's recommended maintenance. Having reached that conclusion, the appellate court found that the defendants—wholly owned subsidiaries and distributors of the product manufacturer—could not have reasonably foreseen the modification, as they could not have reasonably foreseen that operators would disregard the operating manual prohibition against operators performing maintenance on the jack. For that reason, the appellate court affirmed summary judgment for defendants.

As an additional basis to affirm summary judgment, the appellate court explained that the plaintiff failed to establish that the alleged defect proximately caused the pallet jack to unexpectedly stop. Importantly, the plaintiff failed to present sufficient evidence related to the angle at which she positioned the tiller handle, which could have caused the jack braking system to engage without any defect. Moreover, the plaintiff's own expert testified that the inverted cam made the brake less likely to activate, which refuted his own opinion that the brake system design negligently failed to prevent an inverted cam. Accordingly, summary judgment was properly granted for the defendants on the basis of lack of proximate cause.

Pommier v. Jungheinrich Lift Truck Corp., 2018 IL App (3d) 170116.

Attorney Not Obligated to Advise Client in Individual Capacity Where Attorney Represented Client in Representative Capacity Only

In *Donkle v. Lind*, a legal malpractice action that arose from an attorney-client relationship between attorney defendants and the plaintiff represented in her capacity as trustee of her mother's trust. The plaintiff claimed that the attorney defendants were obligated to advise her regarding a claim, that was available to her in her individual capacity, against the estate. The defendants moved to dismiss because they did not represent the plaintiff in her individual capacity, and the trial court agreed.

To sustain a legal malpractice claim, a plaintiff must prove the breach of a duty of care arising from the attorney-client relationship. Where the plaintiff and the defendants had no attorney-client relationship, the plaintiff could not pursue a legal malpractice lawsuit.

To sustain a legal malpractice claim, a plaintiff must prove the breach of a duty of care arising from the attorney-client relationship. Where the plaintiff and the defendants had no attorney-client relationship, the plaintiff could not pursue a legal malpractice lawsuit. Here, the plaintiff was only a client in her representative capacity as a trustee of her mother's trust. There was no ambiguity in either the underlying lawsuit or the retainer agreement, which both listed the plaintiff in her representative capacity. The legal duty owed by the defendant attorneys to the plaintiff in her representative capacity did not extend to impose a legal duty owed to the plaintiff in her individual capacity. For that reason, the appellate court affirmed the dismissal of plaintiff's complaint.

Donkle v. Lind, 2018 IL App (1st) 171915.

Dealership's Superior Possessory Lien in BMW Without Written Security Agreement Defeats Order of Replevin

In *Malek v. Gold Coast Exotic Imports, LLC*, the plaintiff filed a replevin action against a car dealership after title in a BMW had been transferred to her in a divorce action. The dealership had received the BMW from the plaintiff's husband during the pendency of the divorce action to satisfy a debt arising from his purchase of the car. Then, the dealership refused to turn the vehicle over to the wife despite an order from the divorce court. She filed a replevin action against the dealership. Following a bench trial, the trial court issued an order of replevin in favor of the wife because the dealership never recorded its lien on the BMW. The dealership appealed, asserting it had perfected a security interest on the BMW pursuant to section 9-313(a) of the Uniform Commercial Code (UCC), 810 ILCS 5/9-313(a), in the form of a possessory lien, which preceded the plaintiff's interest in the car when the husband did not pay his balance and returned the car to the dealership.

The Illinois Appellate Court First District reversed the trial court judgment, finding the lien at issue was excepted from operation of the Illinois Vehicle Code. Under section 9-203(b) of the UCC, a security interest is created if (1) value has been given, (2) the debtor has rights in the collateral or power to transfer such rights to a secured party, and (3) the debtor and the secured party have agreed that a security interest shall attach to the collateral. The appellate court concluded that the agreement between the husband and the dealership created a valid security interest, the husband had rights in the BMW, and the husband and dealership agreed that the security interest would attach in the event he failed to satisfy his debt. Despite the typical evidence of a written security agreement, the secured party's actual possession of the collateral sufficiently operates to put third parties on notice of the secured party's interest. The appellate court held that the dealership perfected its security interest in the BMW and put the wife on notice of its interest by taking possession. The appellate court further held that the dealership was not required to raise its lien as an affirmative defense to in the replevin proceeding because the plaintiff was aware of the dealership's interest and the lien was no surprise.

Malek v. Gold Coast Exotic Imports, LLC, 2018 IL App (2d) 171459.

Unprofitable Corporation Permitted to Sue for Lost Profits

In *Edward Atkins, M.D., S.C. v. Robbins, Salomon & Patt, Ltd*., a legal malpractice case that proceeded to trial, the trial court granted defendants' motion on the issue of damages, finding that an unprofitable business could not obtain damages for lost profits. The action arose out of an alleged failure to include post-employment restrictive covenants in employment contracts entered into by plaintiff, an anesthesiology service provider. The alleged failure by the plaintiff's attorneys caused lost profits when the plaintiff's employees formed a new company that directly competed with plaintiff.

Plaintiff presented evidence that the business was managed to achieve a year-end "no profit" or loss position. By this strategy, the business sought to avoid taxes at the corporate level, which could result in double taxation. Corporate revenue was distributed at the end of the year to employees and the business owner in order to achieve the "no profit" goal. Based upon this evidence, the trial court held that a business with no profits could not recover for lost profits.

The appellate court noted that calculation of damages for lost profits is based on net profit. Although net profit is generally calculated as revenues minus expenses, that simplistic measure is not appropriate where the owner receives distributions in order to achieve a "no profit" outcome and avoid double taxation of corporate revenues. The appellate court adopted an approach to allow the plaintiff to recover lost profits for compensation paid to principals of a corporation, which serves to prevent a windfall to tortfeasors who cause damages to businesses that choose to operate in this type of tax-efficient manner. Thus, the appellate court reversed the trial court grant of a directed verdict on the issue of damages and remanded the matter for a new trial.

Edward Atkins, M.D., S.C. v. Robbins, Salomon & Patt, Ltd., 2018 IL App (1st) 161961.

Fourth District Enters Judgment Notwithstanding the Verdict for Defendant in Asbestos Matter

In *McKinney v. Hobart Brothers Co.*, the plaintiff, who had been diagnosed with mesothelioma, proceeded to trial against a welding rod manufacturer. The plaintiff alleged that the company failed to warn him of the danger presented by the asbestos-containing welding rods that he encountered for eight months in the early 1960s. The jury found for the plaintiff and awarded him damages.

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The appellate court reversed the jury verdict because the defendant owed no duty to the plaintiff and for lack of evidence that the welding rods were a substantial cause of plaintiff's mesothelioma. As to the first grounds for reversal, the appellate court observed that it was unknown to the industry in 1963 that welding rods could release asbestos fibers in the manner alleged. Because the defendant could not have known of the danger during the year of the plaintiff's exposure, the defendant could not be charged with a duty to warn the plaintiff of the danger presented.

As a second basis to enter judgment for the defendant as a matter of law, the appellate court looked to the specific testimony in the plaintiff's deposition to conclude that the plaintiff failed to show evidence that the welding rods were a substantial cause of his mesothelioma. The court pointed to the fact that the plaintiff worked for 40 years as a car mechanic servicing asbestos-containing brake lines. Additionally, the facts of the case showed that the plaintiff's asbestos exposure at the defendant's facility was akin to the amount encountered in a natural environment. Where no evidence supported the conclusion that plaintiff would not have contracted mesothelioma except for the eight months he spent with minimal exposure to asbestos through welding at the defendant's facility, the plaintiff failed to establish the substantial causation element, and judgment for the defendant notwithstanding the verdict was entered.

McKinney v. Hobart Bros. Co., 2018 IL App (4th) 170333.

WORKERS' COMPENSATION

Kenneth F. Werts
R. Mark Cosimini

Slip and Fall on Wet Pavement in Employer's Parking Lot was Not Compensable

Claimant sustained injuries to her face, right shoulder, and right hip when she fell on wet pavement at the employer's premises while walking to her car on her way to lunch. An arbitrator found that the claimant had sustained accidental injuries arising out of and in the course of her employment and awarded TTD benefits, PPD benefits for 10 percent loss of the person as a whole, and medical expenses. The Commission reversed, finding that the claimant's injury "did not result from an employment-related risk or from a neutral risk to which [the claimant] was at increased exposure as a result of her employment." One commissioner dissented, concluding that the claimant was exposed to a greater risk than that faced by the general public at the time of her injury because her accident was the result of a hazardous condition (wet pavement due to rain) that the claimant regularly had to traverse in order to access her car, which was parked in a designated parking space in a lot controlled by her employer. The circuit court confirmed the Commission's ruling.

The appellate court said it was undisputed that there were no defects on the paved surface where the claimant fell at the time of her fall (*e.g.*, there were no holes, depressions, uneven surfaces, loose gravel, or puddles of rainwater). It was also undisputed that the area was free of any ice or snow. The surface was merely wet from the rain. There was no evidence that the employer required the claimant to walk in the particular area where she fell or otherwise controlled the route that she took to her car. Nor was there evidence that some aspect of the claimant's employment enhanced the risk in some way. The court noted the risk that the claimant confronted at the time of her accident was the risk of walking on wet pavement in the rain on property owned and controlled by her employer. The question presented in this case was whether an injury caused by an exposure to that risk, standing alone, was compensable under the Act. Agreeing with the Commission, the court answered in the negative. The dangers created by rainfall were dangers to which all members of the public were exposed on a regular basis. Unlike the situation where defects or particular hazardous conditions are located at a particular worksite, the risk of slick payment was not a risk distinctly associated with the employment.

Dukich v. Illinois Workers' Comp. Comm'n, 2017 IL App (2d) 160351WC.

Under Facts of the Case, Commission Erred in Failing to Analyze the Dispute as a Traveling-Employee Case

The appellate court held the Commission erred in failing to analyze case using the traveling-employee doctrine when the undisputed facts showed claimant was a traveling employee and that his injuries occurred while engaging in reasonable and foreseeable conduct. The court observed an employee is considered a "traveling employee" if his or her job duties require travel away from the employer's premises. For a traveling employee, any injury sustained when performing any act the employee is directed to perform by the employer, any act the employee has a common-law duty to perform, and any act that the employee can reasonably be expected to perform are generally compensable. That is, so long as an employee is engaging in conduct that is reasonable and foreseeable,

any injury arises out of and occurs in the course of employment. At the time of the claimant's accident, he was traveling in furtherance of his employer's needs to a location other than his usual place of employment. Hence, the Commission erred in failing to analyze this as a traveling-employee case.

Kenaga v. Illinois Workers' Comp. Comm'n, 2017 IL App (1st) 161859WC.

Nurse Failed to Show Causal Connection Between Repetitive Lifting of Patient and Shoulder Injury

The appellate court held the Commission's decision finding claimant had not proved that she sustained a compensable, work-related injury, was not against the manifest weight of the evidence. Claimant, who worked as a registered nurse for more than 25 years, contended she suffered a work-related injury to her right shoulder on January 18, 2014, while lifting a patient a number of times during her 12-hour shift. Claimant also acknowledged, however, that approximately one month before her alleged work injury, she was involved in an accident at home that affected her right shoulder. The appellate court observed that in cases involving a pre-existing condition of ill-being, recovery depended upon the employee's ability to show that a work-related accidental injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the pre-existing condition. The court added that ultimately, an accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. The appellate court said that here, in finding a non-compensable injury, the Commission first determined that both parties' medical experts largely agreed that the history and mechanism of injury described by claimant was not a reasonable or likely cause of the right shoulder condition surgically treated by claimant's treating surgeon. As noted by the Commission, prior to testifying at arbitration, claimant repeatedly and consistently described a repetitive-trauma type work injury. One of the medical experts opined claimant's right shoulder injuries were most consistent with a traumatic rotator cuff tear from a fall that was painful. He did not believe it was possible for claimant to have caused or aggravated her rotator cuff tear with the type of work activities she described to him, which involved constantly moving and repositioning a patient. With this testimony, the record was sufficient to support the Commission's decision, and an opposite conclusion was not clearly apparent.

Rechenberg v. Illinois Workers' Comp. Comm'n, 2018 IL App (2d) 170263WC.

Court Rejects Employer's Contention That an Intervening Accident Should Limit Liability If It Is a Cause of the Claimant's Condition

Claimant alleged he sustained three separate accidents. The Commission affirmed the arbitrator's finding that claimant sustained three distinct accidents, but the Commission also held the second two accidents did not constitute independent intervening accidents sufficient to break a causal relationship from the initial accident. The Commission further held the claimant's current condition of ill-being was related to the first accident. On appeal, the employer at the time of the first accident argued two lines of cases were inconsistent. The line of cases dealing with pre-existing conditions only require a subsequent accident to be *a* cause of a claimant's condition. However, with subsequent intervening accidents, liability from an initial accident is extinguished only if the intervening accident *completely severs* the causal relationship. The appellate court viewed the argument as the employer trying to limit liability in intervening cause cases if the subsequent event was only a causative factor in the claimant's condition as opposed to the sole cause of the claimant's condition. The appellate court rejected the employer's argument and commented there is no authority to support an apportionment of compensation involving multiple accidents, and Illinois law has consistently established that if an intervening accident fails to completely sever the causal connection, then the initial accident is still *a* cause of the claimant's condition. Consequently, the appellate court affirmed the commission's finding that the employer was liable for compensation based upon the initial work accident.

Par Electric v. Illinois Workers' Comp. Comm'n, 2018 IL App (3d) 170656WC.

For Concurrent Wages to Be Utilized in Computing an Injured Worker's AWW, the Employer Must Be Aware of Other "Paid" Work

In awarding claimant wage differential benefits, concurrent wages were not included in the calculations because the Commission found that claimant failed to prove his employer knew that he was compensated for service as a pastor during the relevant period.

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The fact that the employer knew claimant worked as a minister at a fairly large church, that the employer had asked claimant to say prayers at the plant, and the claimant had previously filed a claim for religious discrimination against the employer, did not establish that the employer knew that claimant was compensated for his services as a minister or pastor. Accordingly, the Commission's calculation of claimant's average weekly wage was not against the manifest weight of the evidence.

Bagwell v. Illinois Workers' Comp. Comm'n, 2017 IL App (4th) 160407WC.

Employer was Required to Pay Husband's Medical Insurance Carrier Amount It Negotiated with Medical Care Providers, Not the Amount of Those Medical Providers' Initial Bills

Where, prior to a final decision that determined claimant's injuries were compensable, claimant's husband's medical insurance carrier paid medical expenses incurred by claimant in a negotiated amount of $17,597.96 (and co-payments of $260), with a $0 balance remaining, the employer (and its workers' compensation carrier) were required to reimburse the husband's medical insurance carrier in that amount. It was not the employer's obligation to pay claimant the full, pre-negotiated invoice amounts that had been originally billed to the husband's medical insurance carrier.

Perez v. Illinois Workers' Comp. Comm'n, 2018 IL App (2d) 170086WC.

Medical Providers Could Not Recover Unpaid Bills from Workers' Compensation Insurer Under Third-Party Beneficiary Theory

Several medical providers filed suit against an employer and its workers' compensation insurer alleging that the providers had not been paid for treatment provided to Llamas, an injured employee. Liberty Mutual, the insurer, eventually made late payments of medical bills in the amount of $80,000 to the providers, but over $5,200 in bills was still outstanding. In addition, Liberty failed to pay any statutory interest on both the unpaid bills as well as the late paid bills, and the providers contended the amount of interest due as of the date of the complaint exceeded $24,000. Ultimately, the trial court dismissed with prejudice the providers' claims for breach of contract, breach of contract implied in law, breach of contract implied in fact, and violation of section 155 of the Illinois Insurance Code. The providers timely appealed. Turning first to the providers' claim for breach of contract, the appellate court said this was premised on the allegation that the providers were third-party beneficiaries of the workers' compensation policy issued by Liberty to the employer. The court noted that in an earlier decision, it had answered that question in the negative. The providers were incidental and not direct third-party beneficiaries of the insurance policy, and the direct payment obligation of 820 ILCS 305/8.2(d) did not provide a remedy or change that result. Nor had the providers stated a claim for breach of contract implied in fact.

Marque Medicos Farnsworth, LLC v. Liberty Mut. Ins. Co., 2018 IL App (1st) 163351.

Trial Court's Award of Statutory Interest to Medical Providers was Erroneous

An award of statutory interest under 820 ILCS 305/8.2(d) (2010) to the companies that provided surgical care to an employee who sustained a work-related injury was improper despite the fact that the companies had to wait several years for payment from the employer and insurer. The medical service providers were not members of the class for whose benefit the Workers' Compensation Act was enacted. Thus, the medical service providers failed to state a claim upon which relief could be granted and the trial court erred in awarding the statutory interest.

Medicos Pain & Surgical Specialists, S.C. v. Travelers Indem. Co. of Am., 2018 IL App (1st) 162591.

Claimant Was Not Entitled to Wage Differential Award Where He Admitted He Was Not Medically Restricted from Pursuing His Usual and Customary Line of Employment

The appellate court held that the claimant, by his own admissions, was not entitled to a wage differential award, because he acknowledged in his brief that he was not medically restricted from pursuing his usual and customary line of employment as a truck driver and was willing and able to return to work. The court added the evidence in the record supported the conclusion that the claimant was not partially incapacitated from pursuing his usual and customary line of employment as a result of a work-related accidental injury.

Sysco Food Serv. v. Illinois Workers' Comp. Comm'n, 2017 IL App (1st) 170435WC.

Medical Experts May Not Base Their Opinion on Conjecture or Speculation

In a workers' compensation action, a medical expert witness may not base his or her opinion on guess, conjecture, or speculation. Accordingly, the circuit court correctly determined that the decision of the Commission denying benefits to claimant after 12/13/2011, the date the Commission determined claimant had reached MMI, was contrary to the manifest weight of the evidence, where opinions of the employer's experts lacked a reasonable foundation. The appellate court indicated the evidence relied upon by the Commission was flawed, while the evidence relied upon by the arbitrator was sound. Because neither medical expert ever saw the MRI study which would have provided the objective basis for claimant's symptoms that the Commission claimed did not exist, that provided a sound reason to reject the doctors' opinions.

Scimeca v. Illinois Workers' Comp. Comm'n, 2017 IL App (2d) 161054WC.

Commission Lacked Jurisdiction to Hear Employer's Petition for Review Where Employer Failed to File Petition Within 30 Days of Corrected Decision by Arbitrator

Where an employer failed to file a petition for review to the Commission within 30 days after an arbitrator issued a corrected decision, the Commission lacked jurisdiction to consider the employer's petition for review of the original decision, which had become a nullity, and the arbitrator's corrected decision, therefore, became the decision of the Commission and was conclusive. The substantial compliance argument advanced by the employer lacked merit because referencing a non-final order entered on a different date was more than a scrivener's error. The employer failed to comply with an express statutory requirement for review, and strict compliance with the requirements for filing a petition for review of an arbitrator's decision to the Commission was necessary.

Edwards v. Illinois Workers' Comp. Comm'n, 2017 IL App (3d) 150757WC.

Nine Percent Judgment Interest Does Not Apply to Affirmance of Arbitrator's Award

Illinois' Administrative Review Law has no bearing on the provisions of the state's Worker's Compensation Act, which sets forth a specific procedure for the review of an arbitrator's workers' compensation award, interest on the award during this process, and the conversion of the award into a judgment at the conclusion of review, in the event that the employer fails to pay the award. Accordingly, the 9 percent judgment interest rate set forth in 735 ILCS 5/2-1303 does not apply to a Commission award prior to the award being reduced to judgment by a Circuit Court pursuant to section 19(g) of the Act.

Dobbs Tire & Auto v. Illinois Workers' Comp. Comm'n, 2018 IL App (5th) 160297WC.

Where Commission Ordered Claimant to Pay Attorneys' Fees out of Settlement Proceeds, He was Required to File the Requisite Bond to Appeal that Decision to the Circuit Court

Claimant filed a claim under the Workers' Compensation Act, seeking benefits for various injuries he allegedly sustained while working for the employer. Claimant also filed a common law claim related to the same accident against the employer and a third-party defendant in the Circuit Court of Cook County. The parties entered into a global settlement agreement in the civil action, which purported to settle both the claimant's workers' compensation claim and the civil action. At the time of the settlement, the claimant was pro se. The employer submitted the settlement agreement to the Commission for approval. The arbitrator approved the parties' settlement agreement and ordered the claimant to pay attorney fees to the three attorneys who had represented him at various times during the Commission proceedings. The claimant appealed the arbitrator's award of attorney fees to Commission, which unanimously affirmed the arbitrator's decision. The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County but did not post an appeal bond when filing his petition for judicial review. The claimant's former workers' compensation counsel filed a motion to quash summons and to dismiss the claimant's petition for judicial review, arguing that the claimant's failure to post an appeal bond as required by 820 ILCS 305/19(f)(2) (2016) deprived the circuit court of subject-matter jurisdiction to review the Commission's order. The circuit court granted the claimant's previous counsels' motion and

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dismissed the claimant's petition for judicial review with prejudice. The appellate court also affirmed. It noted that here, the Commission entered an award for the payment of money against the claimant. Specifically, the Commission ordered the claimant to pay $64,000 in attorney fees to his three prior workers' compensation attorneys upon receipt of the settlement proceeds from the employer's counsel. The Commission did not order the employer to pay a portion of its settlement payment to the attorneys. It ordered the claimant to pay the attorney fees.

Joiner v. Illinois Workers' Comp. Comm'n, 2017 IL App (1st) 161866WC.

Employer's Right to Workers' Compensation Lien is Absolute

Under the plain language of 820 ILCS 305/5(b) (2016), an employer's right to reimbursement of the full amount of benefits paid or to be paid to the injured or deceased worker is absolute; it may not be diminished or, as in this case, stricken by a trial court based upon allegations that the employer and/or carrier did not cooperate sufficiently in the third-party suit that produced a settlement. The appellate court indicated the estate had not cited any Illinois case that suggested that a court had the power to limit or strike an employer's lien based on conduct on the part of the employer or its insurer. Absent such a showing, it was error for the trial court to do so.

Estate of Rexroad v. Mid-West Truckers Risk Mgmt. Ass'n, 2018 IL App (5th) 170342.

Waiver of the *Kotecki* Cap Defense Does Not Result in a Waiver of the Employer's Workers' Compensation Lien

Cooley, who worked for Reflection Window, sustained injuries while unloading a 600-pound window that Reflection Window was going to install at the project. He filed a workers' compensation claim and received benefits as a result. Cooley also filed a civil action against Power Construction for negligence. Power Construction was the general contractor for the project. It had retained Elston Window as a subcontractor, and Elston Window in turn retained Reflection Window as a sub-subcontractor. Power Construction filed a third-party complaint for contribution against Reflection Window, contending that the latter was the negligent party. Reflection Window filed an answer that included, among other defenses, an assertion of the "*Kotecki* cap" as an affirmative defense. Power Construction moved to strike the *Kotecki* cap affirmative defense on the basis that Reflection Window had waived that defense under either the master agreement between Power Construction and Elston Window, the subcontract agreement between Elston Window and Reflection Window, or both (both had indemnification provisions that mentioned workers' compensation). The trial court found that Reflection Window Company had waived its *Kotecki* cap as an affirmative defense and also found that Reflection Window waived its statutory workers' compensation lien. Reflection Window appealed. Initially, the Appellate Court observed that the *Kotecki* cap could be waived. A subcontractor's agreement to indemnify the general contractor and hold it harmless for claims resulting from the performance of the subcontractor's work waives the affirmative defense that the subcontractor might have otherwise had for limited liability under the Workers' Compensation Act. The court stressed, however, that the lien and the limited liability under *Kotecki* were separate concepts. Reflection Window could have both agreed to be subject to potential unlimited liability while at the same time not given up its right to collect monies it paid for workers' compensation for Power Construction causing an injury to its employee. The existence of the lien did not mean that Power Construction could not get contribution. The lien was not a mechanism to apportion fault between Power Construction and Reflection Window. The court also stressed that, depending on how the case developed, Reflection Window could be entitled to some or all of the damage award entered in favor of plaintiff and against Power Construction for Power Construction's own pro rata share of liability as recompense for its workers' compensation expenditure. If Power Construction was found to be liable, Reflection Window would have a lien on the amount awarded to plaintiff from Power Construction up to the amount of its workers' compensation payment. The *Kotecki* waiver by Reflection Window only meant that it could not limit its liability should it be found to be liable itself. But just because there is a waiver of the *Kotecki* cap defense, it does not follow that there must have been a waiver of the workers' compensation lien.

Cooley v. Power Constr. Co., LLC, 2018 IL App (1st) 171292.

Children Born with Birth Defects Could Maintain Tort Action Against Fathers' Employer for Alleged Exposure to Toxic Chemicals

Plaintiffs, who alleged that they were born with severe birth defects that had been (a) sustained in utero and (b) caused by their fathers' exposure to toxic chemical products during their fathers' employment with the defendant, stated valid claims for negligence

and willful and wanton misconduct under both Arizona and Texas law and the claims for loss of child consortium under Arizona law were sufficiently pled to withstand a 735 ILCS 5/2-615 motion to dismiss. The appellate court indicated that, based on the language of the states' workers' compensation statutes, Arizona and Texas courts would adopt the principle that their respective exclusive remedy provisions do not bar family members who are separately and independently injured by the employer's negligence from bringing a claim.

Ledeaux v. Motorola Inc., 2018 IL App (1st) 161345.

Employee Riding to Work in Employer-Provided Van Could Not Sue Coemployee Driver in Negligence

Peng, a restaurant worker, filed a negligence suit against her coworker, Guan, and two other drivers, seeking damages for injuries she sustained in a three-car collision that occurred while Guan was driving restaurant employees to work in a van their employer provided for their commute. The trial court ultimately dismissed Peng's action as to Guan, finding that the civil action against a tortious coworker was barred by the exclusive remedy provisions of the Workers' Compensation Act. Peng countered that the rule should not apply because the commute was not part of her employment and she did not affirmatively elect the *de minimus* reimbursement for some medical expenses which her employer voluntarily paid directly to one of her medical care providers. The appellate court acknowledged that, as a general rule, an accident occurring while an employee traveled to or from work is not considered to have arisen out of or occurred in the course of employment. An exception to this rule existed, however, when the employer provided a means of transportation to or from work or affirmatively supplied an employee with something in connection with going to or coming from work. The court noted that the employer gave Guan the keys to a 15-passenger van to transport Guan and other employees to and from the restaurant, paid Guan $600 per month for driving duties, and covered the cost of fuel. The employer prohibited anyone other than Guan from driving the van. Guan also was prohibited from using the van for personal errands. Citing *Larson's Workers' Compensation Law*, the court observed that a coemployee acting in the course of his or her employment was immune from a common law negligence action. Here, Peng was traveling in an employer-controlled passenger van when she sustained her injuries. The court acknowledged that Peng was not compensated for her commute time or required to use the restaurant vanpool to get to and from the restaurant, and thus was not "on the job" in the traditional sense of that phrase. Again, citing *Larson*, the court said, however, that Peng relinquished control over the conditions of transportation when she climbed into a vehicle owned by her employer and driven by her coemployee under the employer's direction.

Peng v. Nardi, 2017 IL App (1st) 170155.

Inconsistency in Granting Extensions of Time to File 2-622 Report Warrants Reversal of Parties' Dismissals

In *Lee & Lee v. Berkshire Nursing & Rehab Ctr.,* the plaintiffs, Earnest and Mildred Lee, brought a medical negligence action against several defendant doctors and medical groups for injuries Earnest sustained while in their care; Mildred brought derivate loss of consortium claims. Citing the proximity to the statute of limitations, plaintiffs' attorney attached an affidavit pursuant to 735 ILCS 5/2-622(a)(2) alleging that he was unable to obtain the requisite physician's report and would need a 90-day extension. During this 90-day period, the plaintiffs filed several amended complaints adding new party defendants, but not adding any new allegations. The attorney's affidavit averring his inability to consult was attached to each amended complaint.

One day after the 90-day period had lapsed, two of the defendants, Juan Cobo, M.D. and Rush Oak Park Hospital, Inc., filed a motion to dismiss pursuant to section 2-619 based on the plaintiffs' failure to provide a 2-622 report within the required 90 days. The motion further noted the two-year statute of limitation had expired. The plaintiffs did not respond to the pending motion opting instead to file a motion for an extension of time. This motion claimed that the plaintiffs' counsel believed, prior to leaving his old law firm, that the necessary medical records had been sent to a medical professional for review. When he later contacted the reviewing professional, he was informed the records had never been received. Based on this, counsel requested an additional 45 days to file the report. The motion further noted several other defendants had not yet appeared and answered. The circuit court denied the motion for extension of time and granted defendants' motion to dismiss with prejudice. The plaintiffs subsequently filed a motion for reconsideration which was denied.

However, the case was only dismissed with prejudice as to the two moving defendants; it remained pending, without a 2-622 report, against all other defendants. The circuit court subsequently granted plaintiffs two additional extensions of time to file a 2-622 report as to all other defendants.

The plaintiffs appealed Dr. Cobo's and Rush Park's dismissal with prejudice. The appellate court held that the court's dismissal of

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these two defendants with prejudice while allowing, even after the 90-day period had passed, several extensions as other defendant-doctors placed form over substance and represented an abuse of discretion. The appellate court accordingly reversed the order dismissing the two defendants with prejudice and remanded the matter.

Lee & Lee v. Berkshire Nursing & Rehab Ctr., 2018 IL App (1st) 171344.

Plaintiff's Death After Case was Submitted to Jury Transforms Case into Survival Action and Precludes Recovery of Future Damages

In *Jefferson v. Mercy Hospital & Medical Center*, the plaintiff, Jeanette Jefferson, filed a medical malpractice action against the defendant alleging that due to the negligence of the defendant's nurses and doctors, a clot occluded her tracheostomy tube and caused respiratory arrest, ultimately resulting in permanent brain damage.

At trial, two days before closing arguments, the plaintiff's counsel informed the court that the plaintiff fell and sustained an injury requiring brain surgery. She was not expected to regain competency, and arrangements were being made to have a guardian appointed. The jury was not told of this fact. Following closing arguments and after the case had been submitted to the jury, but before a verdict was returned, Jeanette died. Her death was spread of record, and the plaintiff, Joi Jefferson, was appointed as special representative of the estate to receive the jury's verdict. Mercy moved for a mistrial which the trial court denied. Subsequently, the jury returned a verdict in favor of plaintiff in the amount of $22,185,598.50, of which $15,007,965.68 was allocated toward future damages.

The defendant filed a post-trial motion seeking, *inter alia*, a vacatur of the future damages award. The trial court denied this motion, and the defendant appealed. The defendant contended that upon Jeanette's death and the appointment of Joi as special administrator of the estate, the case became a survival action, which limited the potential relief the jury could award. It was undisputed that in a Survival Act claim, the decedent's representatives have a cause of action for decedent's medical expenses and pain and suffering up to the date of death. However, the plaintiff argued that because the case had already been submitted to the jury when Jeanette died, it was not a survival action. She claimed that no post-submission event should alter the judgment.

This was an issue of first impression in Illinois. Accordingly, the appellate court considered case law from outside the jurisdiction; it found that in analogous circumstances, other courts had entered judgments *nunc pro tunc* to the dates the cases had been submitted. However, the court was only able to identify cases considering this issue in bench trials, whereas here the court was considering a jury trial. The appellate court found the distinction to be an important one; in a bench trial, a case is ripe for judgment when it is submitted to the judge, while in a trial by jury, a case is not ripe for judgment until a verdict is rendered. This difference limits the ability of a court to enter a judgment *nunc pro tunc*.

Accordingly, the appellate court held that because the jury was still deliberating on the day Jeanette died, there was no judgment that actually could have been entered on the day. So, the trial court could not enter judgment *nunc pro tunc* to that date. The earliest date the judgment could have been entered was the day after Jeanette died. Accordingly, the appellate court held that the case became a survival action upon Jeanette's death and as such, the plaintiff was only entitled to compensation for injuries Jeanette suffered prior to her death.

Jefferson v. Mercy Hosp. & Med. Ctr., 2018 IL App (1st) 162219.

Technical Violation of the Golden Rule in a Closing Argument Alone Does Not Warrant New Trial

In *Nikora v. Parikh*, the plaintiff brought survival and wrongful death causes of action against Dr. Nirali Parikh, M.D. and ManorCare of Elk Grove Village IL, LLC. The case eventually proceeded to jury trial. During closing arguments, the plaintiff's counsel reviewed the medical timeline with the jurors before concluding that the defendant facility's nurses' failures to inform the defendant physician about the decedent's changes in condition and Dr. Parikh's failure to timely send the decedent to the hospital caused, or contributed to, his death.

In response, the defendant pnysician's counsel focused the jury on the timeline of the physician's knowledge. Counsel stated: "you need to evaluate this case for Dr. Parikh from a prospective analysis. Stand in her shoes on that morning when she—." The plaintiff's counsel timely objection to this statement was sustained, and the trial court instructed the jury to disregard the statement. The court prompted the defendant physician's counsel to continue, to which she asked the jury to "[t]ake yourself back to that time and evaluate from Dr. Parikh's perspective."

During her closing argument, the defendant physician's counsel also displayed a prepared projection slide with the text, "Once he agreed to go and did go to the hospital…." The plaintiff's counsel objected as a violation of a *motion in limine* ruling. The decedent had initially refused to be transferred to the hospital, but less than one minute later acquiesced. The trial court ruled that this was

more prejudicial than probative and barred any related evidence. So, the trial court sustained the objection and instructed the jury to disregard the text.

The plaintiff thereafter moved for a new trial based, in part, on the defendant physician's counsel's statement violating the long-standing golden rule that it is improper to ask the jury to place itself in the shoes of a party. The trial court agreed.

The jury ultimately rendered a verdict in favor of both defendants. The plaintiff thereafter moved for a new trial based, in part, on the defendant physician's counsel's statement violating the long-standing golden rule that it is improper to ask the jury to place itself in the shoes of a party. The trial court agreed. It found that the first statement about standing in the physician's shoes was prejudicial and noted that it was less concerned with the intent of the physician's counsel when making the statement and more concerned with the statement's prejudicial impact. The trial court held that this error, alone and in combination with the violation of a *motion in limine* ruling, warranted a new trial.

The defendant physician appealed. She argued that her counsel's comment asking the jury to place itself in her shoes was not intended to arouse the passions of, or elicit sympathy from, the jury, but rather to focus it on the critical time period. The appellate court agreed. It cautioned that improper comments must not be viewed in isolation, but within the context of the entire closing argument. Accordingly, it held that the comment could not be considered overly prejudicial when its true purpose was understood as was evidenced by the second statement about the physician's perspective. The court further held that any potential prejudice was mitigated by the trial court's instruction to the jury to disregard the comment. The appellate court held this technical violation of the golden rule alone did not warrant a new trial.

Nevertheless, the appellate court affirmed the trial court's ruling on the plaintiff's motion for a new trial, deferring to the trial court's findings of the cumulative prejudicial effects of the technical golden rule violation and *motion in limine* ruling violation.

Nikora v. Parikh, 2018 IL App (1st) 172473.

Hospital can Potentially be Liable for Patient-Turned-Gun-Violence-Perpetrator's Death

Johnnie Russell III was a patient of the defendant, Provena Hospitals, doing business as Provena Mercy Medical Center. The day after Russell was admitted, a nurse discovered that he had a gun. Shortly thereafter, during a confrontation with the Aurora Police Department, Russell was shot to death.

The plaintiff, Russell's sister and the administrator of his estate, filed a wrongful-death action in the circuit court of Kane County, Illinois against the defendant. She alleged that the defendant's agents and employees were aware of Russell's mentally defective condition and prior psychiatric history but failed to conduct a reasonable search to determine whether Russell possessed any contraband that could cause harm to himself or others.

Provena filed its answer, asserting the affirmative defense of comparative negligence and alleging that Russell came to Provena of his own accord carrying an inherently dangerous weapon which proximately caused his death. The plaintiff did not file a reply to the affirmative defense. At trial, Provena filed a motion to deem its affirmative defense admitted, on the basis that the plaintiff had not filed a reply denying it. The trial court judge granted Provena's motion. Subsequently, Provena filed a motion for judgment on the pleadings, arguing that plaintiff could now no longer establish that any of the defendant's conduct was the proximate cause of decedent's death. The trial court also granted this motion and entered judgment on the pleadings in favor of Provena. Following the denial of her motion to reconsider, plaintiff appealed. The First District reversed and remanded in 2015; it held that the plaintiff's failure to reply to the affirmative defense only admitted the non-conclusory allegations of the affirmative defense.

Upon remand, Provena filed a motion for summary judgment, arguing that there was no evidence that its acts or omissions were a proximate cause of decedent's death. The trial court judge granted the motion finding that cause-in-fact did not exist because there was no evidence that had decedent been searched, the gun would have been discovered.

The plaintiff again appealed. The appellate court held that Provena, as a hospital, was under a duty to exercise reasonable care to protect its patrons from harm. The court also held that it was reasonably foreseeable that decedent would harm himself or others based on Provena's knowledge of decedent's psychiatric history and his aggressive behavior, including threatening to kill his neighbors with his guns. Indeed, it was Provena's policy at the time to search for contraband when a patient was admitted to the behavioral health unit for precisely this reason.

— *Continued on next page*

Contrary to the trial court, the appellate court found that cause-in-fact did exist. To argue that decedent did not have a gun at the time of admission, but rather obtained it after admission, was improper speculation from the trial court. It was also contrary to the law of the case as established by the allegations of the affirmative defense previously deemed admitted.

During the appellate oral argument, Provena argued that decedent's estate was barred from any recovery based on decedent's own criminal acts. However, as Provena acknowledged, decedent was acting with a history of psychological difficulties when he engaged in his fatal confrontation. The decedent's sanity at the time of the confrontation is crucial in determining whether his actions were criminal. The appellate court emphasized that questions of sanity and mental health are questions of fact and cannot form the basis to affirm the trial court's order of summary judgment.

Accordingly, the appellate court reversed and remanded allowing plaintiff to pursue her case against Provena.

Coleman v. Provena Hosps., 2018 IL App (2d) 170313.

First District Opens the Door to Requiring Production of Insurance Policies and Related Documents

Joyce Hobson, after being hospitalized and undergoing multiple medical procedures at Advocate, experienced cardiopulmonary arrest and died. Anthony Brown, as the administrator of her estate, filed a medical malpractice action against Advocate Health and Hospitals Corporation, doing business as Advocate South Suburban Hospital and other defendants.

The plaintiff issued discovery requests seeking copies of Advocate's insurance policies. Advocate responded that there is no policy to produce because it is a self-insured entity. After multiple court orders, the plaintiff filed a motion to compel and for sanctions pursuant to Illinois Supreme Court Rule 219. The circuit court ordered Advocate to tender its full trust agreement and an unredacted copy of the endorsement for an *in camera* inspection. Advocate orally represented at hearing that it had $12.5M in coverage for the plaintiff's claim, but refused to produce the trust agreement or related documents. It asked to be held in friendly contempt and the court imposed a $100 fine.

Advocate appealed. It argued that insurance documents are relevant only in insurance coverage actions. It also argued that its trust documents are financial documents rather insurance documents, so the court abused its discretion in ordering their production.

The appellate court found that friendly contempt was the correct mechanism to test the correctness of a discovery order, which is normally not final or appealable. The appellate court held that even if the trust documents are not a standard insurance policy *per se*, Advocate's self-insured trust presumably exists—at least indirectly—for the ultimate benefit of parties such as the plaintiff, like a liability policy.

The appellate court took pains to distinguish discoverability from admissibility. It disagreed with Advocate's apparent attempt to distinguish between Illinois case law and Illinois Supreme Court Rule 213's requirement to produce information detailing potential liability limits and assets with Rule 214's requirement to produce documents evidencing those limits. The court suggested that the production of insurance-related documents was proper. Given that the trial court's order to produce the trust documents for an *in camera* review superseded its prior orders mandating their production, the appellate courtdid not address other than in dicta whether production of the insurance or trust documents was required when properly requested through discovery. Rather, the appellate courtconsidered only whether the *in camera* review was appropriate.

It found that the circuit court did not abuse its discretion in ordering an *in camera* inspection of Advocate's insurance-related documents. Absent such a firsthand review, the circuit court would have no means to assess the discoverability of the challenged materials.

Accordingly, the appellate court affirmed the trial court's order mandating production of the insurance-related documents for an *in camera* review and vacated the court's contempt order against Advocate.

Brown v. Advocate Health & Hosps. Corp., 2017 IL App (1st) 161918.

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R. Mark Cosimini is a partner with *Rusin & Maciorowski*. He has been with the firm since 1997 and is the managing partner in the firm's Champaign and Carbondale offices. His practice is focused on representing employers in Workers' Compensation cases, and he also defends liability cases throughout central Illinois. Mr. Cosimini previously served two terms on the IDC Board of Directors, and he is currently serving on the Legislative and Tort Law Committees for the IDC. He has also served on the Workers' Compensation Section Council for the ISBA. Mr. Cosimini has lectured at legal seminars and he frequently speaks with employers on issues relating to Workers' Compensation matters.

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Survey of Law

Index of 2018 Cases

CIVIL PRACTICE LAW

CONSTRUCTION LAW

— Continued on next page

EMPLOYMENT LAW

ETHICS LAW

— Continued on next page

INSURANCE LAW

— Continued on page 90

LOCAL GOVERNMENT LAW

TORT LAW & WORKERS' COMPENSATION

2018 Survey of Law Index (Continued)

Survey of Law

Index of Advertisers

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