ILLINOIS DEFENSE COUNSEL
SURVEY OF LAW 2023

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SURVEY OF CASES

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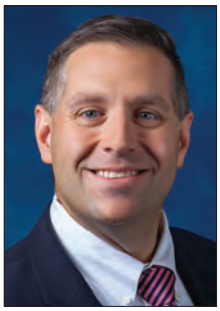

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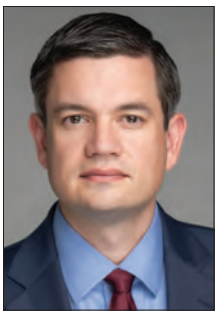

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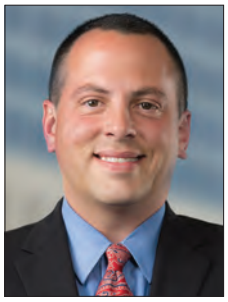

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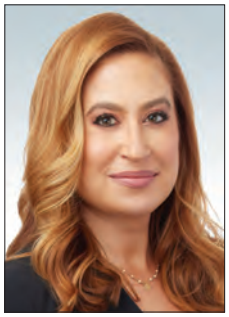

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President's Message

Tracy E. Stevenson
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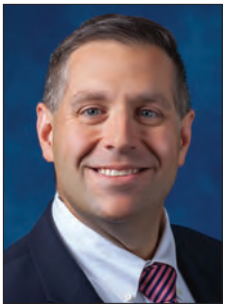
IDC's dependable analysis of the law has always been a prominent goal for the organization. In 2018, the IDC Board of Directors updated its strategic plan to focus on advocacy, education and engagement. In part, our Academies perform the educational pillar for those newly admitted to the bar. But, even before the amendment to our strategic plan, the IDC published the *Survey of Law*.

Since 2011, IDC Committees have submitted case summaries, cumulatively analyzing developments in the law that affect Illinois defense attorneys. The *Survey* ensures that the Defense Bar, IDC's membership, judges and the public are kept abreast of the legal developments from the past year. The insights offered within the *Survey of Law* give a bird's eye view of the latest legal trends. Our *Survey* editors organize the Committee summaries by category and topic for ease of review in specialized practice areas. However, reading the *Survey* from cover to cover never fails to educate! The demanding work of our *Survey of Law* Editorial Board are again applauded this year. It is a joy to see the IDC Membership come together as authors, editors and champions of the law in creating, yet another, wonderful tool to strengthen the IDC's focus on advocacy, education and engagement. Enjoy the knowledge.

Most truly yours,
Tracy Stevenson
2023-2024 IDC President

Letter from the Editors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Continuing a long tradition of IDC's devotion to legal education through its publications, we are pleased to issue the 2023 *Survey of Law.* The *Survey of Law* is a compilation of case summaries, highlighting significant developments in Illinois law over the past year. This year's summaries focus on Civil Practice, Tort Law, Insurance Law, Labor and Employment Law, Construction Law, Workers' Compensation, Trucking & Transportation Law, Ethics Law and Toxic Tort Law. The *Survey of Law* is a team effort of committee members, editors, publisher and our Executive Director.

We'd like to thank everyone who assisted in preparing the *Survey of Law* this year, including all IDC committees' chairs, Sandra Wulf, Tanya Kasiyan, and our front-line editors: Chelsea Caldwell of *HeplerBroom, LLC.*, John Watson of *Craig & Craig, LLC.*, Adam Carter of *Esp Kreuzer Cores LLP,* Tara Kuchar of *HeplerBroom, LLC.*, Kimberly Ross of *FordHarrison,* Michael Resis of *Amundsen Davis,* Erica S. Longfield of *Allstate,* John Heil, Jr. of *Heyl, Royster, Voelker & Allen, P.C.,* and Laura Beasley of *Baker Sterchi Cowden & Rice LLC.* Their commitment and dedication to IDC has made the *Survey of Law* an invaluable tool for the practice of law.

Survey of Civil Practice Cases

First District Court of Appeals Revives Portions of the Acceptance Doctrine

In 2011, the City of Chicago (City) undertook a water restoration project to replace underground water mains and to install sidewalks and ramps that complied with the Americans with Disabilities Act. The City hired CTR Joint Venture (CTR) as the project engineer and Sanchez Constructions Services (Sanchez) as the project contractor. Sanchez then subcontracted the sidewalk and ramp work to Reliable Construction and Equipment Company (Reliable), which verbally subcontracted the cement work to Precision Cement Company, Inc. (Precision). After a portion of the water main work was completed at one intersection, the sidewalk had an elevated section. Nevertheless, City and CTR inspected the work and approved it as compliant with the contract terms, the City's specifications, and ADA requirements.

Several years later, Lisa Bitsky (Plaintiff) was injured when her husband tripped and fell into her while walking on the elevated sidewalk near that intersection. The plaintiff sued the City and CTR alleging construction negligence claims and later added Sanchez, Reliable, Precision and Precision's owner to her suit.

The plaintiff eventually settled with the City and CTR but her claims against Reliable, Sanchez, and the Precision defendants remained. After extensive discovery, the remaining defendants filed motions for summary judgment. They raised the following arguments: (i) each followed the plans and specifications provided by the City and CTR when installing the sidewalk and owed no legal duty to the plaintiff, (ii) the plaintiff failed to show proximate cause between her injuries and their work, (iii) that the elevated sidewalk was an open and obvious condition, and (iv) that they had no notice of the alleged dangerous condition created by the raised sidewalk.

The circuit court decided the issue on the grounds that the subcontractors were following the specifications provided by the client and general contractor. The plaintiff appealed, arguing that the court improperly relied on the "acceptance doctrine" which the plaintiff claimed had been abandoned by Illinois law. Under the "acceptance doctrine" where a contractor performs work and the owner accepts such work, the contractor cannot be liable to a third party in tort for the work.

The Illinois Appellate Court First District found that the defendants presented uncontroverted evidence of having followed the City's and CTR's plans, specifications, and instructions. It held that the subcontractors could not, as a matter of law, be negligent for the construction because the subcontractors followed the contractor's specifications and instructions. Furthermore, nothing in the record suggested that the plans the City and CTR provided to the remaining defendants were obviously dangerous. Although the plaintiff asserted that the elevated sidewalk was unreasonably dangerous, she did not argue that the plans and specifications were so obviously dangerous that no competent contractor would follow them. As such, the First District upheld the trial court's ruling.

Bitsky v. City of Chicago, 2023 IL App (1st) 22066.

Discovery Depositions Improperly Read as Evidence, But No Prejudice for a New Trial

In *Browning v. Advocate*, 2023 IL App (1st) 221430, the plaintiff obtained a $49 million verdict in a case in which he claimed injuries caused by the failure to timely diagnose and treat a bowel perforation following the removal of his gall bladder.

The appellate court held that the trial court erred in allowing the deposition testimony of certain doctors to be read as evidence because the doctors were agents of the defendant hospital. However, the court also found that a new trial was not warranted because the hospital could not show that it was sufficiently prejudiced because of its delayed ability to examine and rehabilitate those witnesses live at the trial.

The appellate court was sharply split, with a dissent from Justice Lavin. For his part, Justice Lavin pointed out that allowing discovery depositions to be used in this fashion effectively turned them into evidence depositions, where because some of the doctors did not have representation at their depositions because of *Petrillo*.

This is an important and disturbing ruling because while it acknowledges that discovery depositions were improperly used at trial it also held that any resulting delay was not inherently prejudicial.

Browning v. Advocate, 2023 IL App (1st) 221430.

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Court Finds that Transportation Broker is not Liable as a Matter of Law in Truck Collision

In *Cornejo v. Dakota Lines*, 2023 IL App (1st) 220633, the plaintiff sued a trucking company, its truck driver, and the shipping broker seeking damages for injuries her son suffered after he was struck by an 18-wheeler truck while standing by his family's car on shoulder of the road. The jury returned an $18 million verdict for the plaintiff against the driver, the trucking company, and the broker. The plaintiff argued that the driver was an agent of both the trucking company and of the shipping broker. The jury, in response to a special interrogatory, found that the trucking company was the agent of the broker. The broker had objected to this special interrogatory and moved for a directed verdict at close of plaintiff's case, which it renewed at the close of all of the evidence. The trial court denied both motions.

Thereafter, the broker appealed the denial of its motion for a directed verdict. The appellate court noted that the cardinal consideration on the issue of agency is whether the alleged agent retains the right to control the manner of doing the work. Other factors include "(1) the question of hiring, (2) the right to discharge, (3) the manner of direction of the servant, (4) the right to terminate the relationship, and (5) the character of supervision of the work done." *Cornejo*, 2023 IL App (1st) 220633 ¶ 27. The First District Court of Appeals found that the trial court should have granted the broker's motion for directed verdict because the evidence showed that neither the driver nor the trucking company were the broker's agents. The court noted that the broker did not pay the trucking company's drivers, it did not hire or train them, it did not control their routes, and did not provide them drivers with any of the tools or equipment to perform their jobs and did not own the trucks. Rather, the trucking company and the broker adhered to the terms of their contract that specified that the trucking company was an independent contractor and that they did not have an exclusive relationship. As such, the appellate court concluded based on the evidence the verdict could not stand.

Cornejo v. Dakota Lines, 2023 IL App (1st) 220633.

Prejudgment Interest Survives Scrutiny in Illinois Appellate Court and Illinois Supreme Court Denies Review

The Illinois Appellate Court First and Fourth Districts held that challenges to the prejudgment interest statute failed on numerous grounds in *Cotton v. Coccaro*, 2023 IL App (1st) 220788 and in *First Midwest Bank v. Rossi*, 2023 IL App (4th) 220643. A panel of the First District and a panel of the Fourth District held that the imposition of prejudgment interest did not disparate the right to a jury trial, did not violate the due process rights of civil defendants because it did not apply retroactively or constitute a double recovery, and was not special legislation. The courts also found through the application of the "enrolled bill doctrine" that the Illinois Constitution's three readings rule, which requires each bill to be read in each chamber of the General Assembly by title on three separate days, was also not violated.

It is in this last area where the courts diverged in tone. The "enrolled bill doctrine" holds that once the Speaker of the House and the President of the Senate certify that a bill has been passed in conformity with constitutional requirements that is dispositive as to compliance with the Illinois Constitution. *First Midwest Bank*, 2023 IL App (4th) 220643, ¶ 221. In *Cotton*, the First District held that that the "enrolled bill doctrine" is embedded in the 1970 Constitution. In *First Midwest Bank,* the Fourth District expressed concern "over the legislature's continued blatant flouting of constitutional provisions ratified by the people of the State of Illinois in 1970 when they voted to adopt the new constitution." *Id.* at ¶ 224. The Fourth District held, however, that it did not have the authority to disregard the "enrolled bill doctrine." The Speaker and the President had certified the prejudgment interest bill even though the original bill that passed the Senate was a bill concerning electronic wills and remote witnesses that was then gutted and replaced in the House with what became the prejudgment interest statute, which was only returned to the Senate for concurrence.

The Illinois Supreme Court denied a petition for leave to appeal in *Cotton* and, as of this writing, the petition in *Rossi* is still pending.

Cotton v. Coccaro, 2023 IL App (1st) 220788.
First Midwest Bank v. Rossi, 2023 IL App (1st) 220643.

United States Supreme Court Clarifies Requirements of Fed. R. Civ. P. 50

In *Dupree v. Younger,* 598 U.S. 729 (2023), the plaintiff claimed that he was attacked while he was in a Maryland prison because of the actions of the prison guards. He filed a § 1983 action against the State of Maryland and its representatives. The defendant moved for summary judgment on the basis that the plaintiff had not exhausted his administrative remedies. The court denied the motion and the jury ultimately returned a verdict in the plaintiff's favor. The defendant did not file a post-trial motion pursuant to Rule 50 of the Federal

Rules of Civil Procedure but then filed an appeal arguing that the plaintiff failed to exhaust administrative remedies.

The Supreme Court of the United States found that a post-trial motion under Rule 50 is not required to preserve appellate review of a purely legal issue that was resolved at summary judgment. While the Supreme Court, in *Ortiz v. Jordan,* 562 U.S. 180 (2011), previously held that an order denying summary judgment on sufficiency-of-the-evidence grounds is not appealable after trial; it found the same was simply not true for purely legal questions. That is because rulings on sufficiency-of-the-evidence motions are based on the record that then exists, but more evidence may be uncovered as the litigation and/or trial continues. Thus, there is value in having the district court reexamine such motions post-trial with a full view of the record. The Supreme Court found that the reviewing court does not benefit from having a district court reexamine a purely legal pretrial ruling after trial, because nothing at trial will have given the district court any reason to question its prior analysis. As such, rulings on purely legal issues merge into the final judgment and may be subject to review.

Dupree v. Younger, 598 U.S. 729 (2023).

First District Court of Appeals Considers Standing and Application of the *Moorman* Doctrine in Data Breach Lawsuit

In *Flores v. Aon Corporation*, 2023 IL App (1st) 230140, the plaintiffs filed a class action complaint against the defendant, a global professional services company providing cybersecurity services, following a data breach. The complaint alleged that the plaintiffs provided their personal information, including names, social security numbers, dates of birth, e-mail addresses, and benefit-enrollment information to the defendant. The defendant then notified plaintiff that a third-party had been accessing its systems for over one year and therefore had access to the plaintiffs' personal information. The plaintiffs alleged that they suffered the following injuries because of the data breach: (1) damage to and diminution of the value of their personal information; (2) lost time and inconvenience dealing with consequences of the breach; (3) anxiety for the loss of their privacy; and (4) substantially increased risk of fraud and identity theft by unauthorized third parties. Three of the four named plaintiffs alleged that they received increased spam and targeted marketing because of the breach and two of the four named plaintiffs alleged they were charged for items or services they did not purchase. The defendant moved to dismiss the complaint for lack of standing and for failure to state a claim. The trial court granted the motion and dismissed the complaint.

The Illinois Appellate Court First District, reversed in part and affirmed in part. As to standing, the appellate court held that the plaintiffs sufficiently alleged an injury in fact. The court distinguished the case from that in *Maglio v. Advocate Health & Hospitals Corp*., 40 N.E.3d 746 (2d 2015), the only other Illinois decision addressing standing in a data breach suit. The court reasoned that, unlike in *Maglio*, the plaintiffs had alleged they faced imminent, impending, or substantial risk of harm due to the data breach. Specifically, the plaintiffs alleged that the data breach resulted in identity theft and fraud in the form of fraudulent charges and increased spam and targeted marketing.

In addition to considering whether plaintiffs' complaint stated a claim under numerous theories of recovery, the appellate court considered whether plaintiffs' common law tort claims were barred by the *Moorman* doctrine. The court held that the *Moorman* doctrine did not bar these claims because the plaintiffs did not allege an express contract between the parties that would create a duty to safeguard their personal information. Rather, the plaintiffs' claims were based on the defendant's common law duty to safeguard the information.

Flores v. Aon Corporation, 2023 IL App (1st) 230140.

Discovery Violation that was Found to be Unintentional is Insufficient to Reinstate Case Pursuant to Section 2-1401

In *Fredman v. OSF Healthcare System,* the Illinois Appellate Court Fourth District had to determine whether an unintentional failure to disclose documents in discovery was sufficient to allege fraudulent concealment in a petition to vacate a dismissal pursuant to 735 ILCS 5/2-1401. In *Fredman,* the plaintiff filed a medical malpractice suit and voluntarily dismissed it in May 2017. Over two years later, in July 2019, the plaintiff petitioned to vacate the voluntary dismissal order pursuant Section 2-1401 based on alleged fraud during the discovery process.

The allegation of fraud in discovery related to the defendant's claim of privilege over a particular report, the "Peminic report", during discovery. The plaintiff moved to compel production of the report, which was identified on the defendant's privilege log. Before the court ruled, the defendant produced a one-page document. The plaintiff subsequently voluntarily dismissed the case. Incredibly, the same attorneys for the parties were simultaneously litigating another medical malpractice case in another jurisdiction. In the December 2018 trial of that unrelated case, the defense counsel displayed a Pemenic report, which had not been previously produced and that

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had more than one page. In July 2019, plaintiff's counsel in *Fredman* filed the petition to vacate, alleging that defense counsel fraudulently altered the report that was produced in *Fredman* and failed to produce the entire report. The defendant moved to dismiss pursuant to 735 ILCS 5/2-619.1 and the trial court denied the petition to reinstate and the motion to dismiss without holding an evidentiary hearing. On an initial appeal, the appellate court found that the plaintiff's petition was sufficient to state a claim and remanded the case for an evidentiary hearing.

During the evidentiary hearing, it was revealed that "Peminic" was a brand of computer database and that additional entries had been made in the Peminic database but that those additional entries had not been produced by defendant. The trial court granted plaintiff's section 2-1401 petition, finding that fraudulent concealment tolled the deadline for the filing of the petition. The trial court did not, however, make an explicit finding that the defendant or its attorneys committed an intentional discovery violation. Rather, the trial court found that there was an unintentional discovery violation that did not rise to the level of a Supreme Court Rule 137 violation. The trial court further found that even unintentional discovery violations implicated the doctrine of fraudulent concealment, thereby extending the deadline for a section 2-1401 petition. The trial court also denied the defendant's section 2-619 motion to dismiss.

On appeal the Fourth District focused only on the standard to determine fraudulent concealment. The court found that it was well-settled law that the petitioner must prove by clear and convincing evidence that the other party intentionally misstated or concealed a material fact and that the petitioner had detrimentally relied on that statement or conduct. The appellate court therefore found that the trial court applied an incorrect standard on the petition to vacate. The petition was filed over two years after entry of the dismissal order, so the plaintiff had the added burden of proving fraudulent concealment. Because the trial court made a factual finding there was no intentional concealment, the plaintiff could not meet that burden and the petition to reinstate had to be dismissed.

Fredman v. OSF Healthcare System, 2023 IL App (4th) 220960-U.

Mere Finding in a Dismissal Order that Judgment is "Final and Appealable" Insufficient to Establish Appellate Jurisdiction

In *Gateway Auto, Inc. v. Commercial Pallet, Inc. et. al.,* the plaintiff ran an auto repair shop on property ("Lot B") that it leased from one of the defendants, Hagan. The lease gave the plaintiff a right of first refusal to purchase Lot B. The plaintiff made significant improvements to Lot B so that it could be used as an auto repair shop. Another defendant, 1308 Randolph LLC ("Randolph"), owned an adjacent property (Lot A). Defendant Randolph, through its agent, Buck, solicited Hagan to sell Lot B despite the right of first refusal.

The plaintiff sued defendants Randolph, Hagan, Buck and Commercial Pallet. The third amended complaint also included a count for tortious interference with prospective business relations and included Hagan. Defendant Hagan did not file a response and the plaintiff did not advance the case against Hagan. The defendant, Buck, was never served and the plaintiff did not seem to have been given leave to name Buck as a defendant. Defendant, Commercial Pallet, had been voluntarily dismissed but was again named as a defendant in the third amended complaint.

Defendant Hagan filed a counterclaim against the plaintiff and a third-party claim against the plaintiff's president, related to their failure to pay rent and taxes as required by the lease. The plaintiff and its president responded to the counterclaim, but the record did not reflect any further action on this counterclaim.

Defendant Randolph also filed a counterclaim against the plaintiff and a third-party complaint against the plaintiff's president alleging that they violated various terms of the lease. The plaintiff and its president answered the counterclaim with three affirmative defenses. Defendant Randolph thereafter filed a motion to strike the affirmative defenses, but again there appeared to be no further action with respect to this counterclaim.

Defendant Randolph's motion to dismiss the third amended complaint was granted and it was dismissed with prejudice. The plaintiff's motion to reconsider the motion to dismiss was likewise denied. The order denying the plaintiff's motion to reconsider stated, "This is a final and appealable order."

The plaintiff then appealed. Defendant Randolph argued that the appellate court lacked jurisdiction because its counterclaims and third-party complaints had not been adjudicated and the trial court had made no express finding that there was no just reason to delay appeal of the rulings on the motion to dismiss.

The plaintiff argued that the trial court's order granting Defendant Randolph's motion to dismiss was a final judgment because it dismissed with prejudice the claims in the third amended complaint against Defendant Randolph. It also argued that the court's statement that the ruling was, "a final and appealable order" was sufficient to render both orders appealable under Rule 304(a).

The appellate court dismissed the appeal for lack of jurisdiction finding that the record must include some indication that the trial court's intended to invoke Rule 304. A declaration that an order is

"final and appealable" without reference to the justness of delay or immediate appealability evinces no application of the discretion the rule contemplates. The appellate court agreed that the order dismissing the third-party complaint was a final order but not that it was appealable because other claims remained pending, and the status of other claims was simply unclear. Therefore, the non-appealability of the dismissal order was not remedied by the trial court's language in its order denying the motion for reconsideration, because it did not reference immediate appealability, the justness of the delay, or Rule 304(a) itself.

Gateway Auto, Inc. v. Commercial Pallet, Inc., 2023 IL App (1st) 230185.

E-filing Error Leads to Case Being Barred by Statute of Limitations

In *Kilpatrick v. Baxter,* 2023 IL App (2d) 23088, the plaintiff filed a complaint against the defendant alleging that she was injured after she slipped and fell at a facility maintained by the defendant on September 13, 2020. The complaint was file stamped in Lake County on September 15, 2022, via the Odyssey (Odyssey) portal. The defendant moved to dismiss the complaint under 735 ILCS 5/2-619(a)(5) arguing that the plaintiff failed to file her complaint within the applicable two-year statute of limitations period. *Id.* § 13-202.

In her response, the plaintiff alleged that she had originally submitted her complaint on September 13, 2022, at 1:06 p.m., using the Odyssey portal but that it had been rejected. Plaintiff's counsel stated that he then realized that he had inadvertently included his law firm's number rather than the attorney registration number issued by the Illinois Attorney Registration and Disciplinary Commission (ARDC). Plaintiff's counsel claimed he fixed the submission to include his ARDC number and resubmitted the corrected complaint via the Odyssey portal on September 15, 2022, at which point the complaint was accepted and filed.

The plaintiff's response to the defendant's motion to dismiss also requested relief under Illinois Supreme Court Rule 9(d)(2) arguing that there was good cause for the untimely submission because she had *attempted* to file the complaint within the applicable limitations period and the rejection was due to an error that was tantamount to a scrivener's error. The plaintiff argued that the complaint should be corrected *nunc pro tunc* to show that it was filed on September 13, 2022. The circuit court did not find good cause for the late filing and granted the motion to dismiss. The plaintiff appealed.

The appellate court first found that the attachments to the brief were not part of the record and could not be considered by the court before turning to the merits. The plaintiff contended that the circuit court erred in finding that she failed to show good cause pursuant to Rule 9(d)(2) because it did not assess the totality of the circumstances in accordance with *Davis v. Village of Maywood*, 2020 IL App (1st) 191011.

The appellate court acknowledged that Rule 9(d)(2) provides relief for certain untimely filings. Ill. S. Ct. R. 9(d)(2) (eff. Feb. 4, 2022). Rule 9(d) provides flexibility to litigants and the courts to address problems with e-filing "upon good cause shown." See *Davis*, 2020 IL App (1st) 191011, ¶ 18. The broad language of Rule 9(d)(2) indicates that a court must consider the totality of the circumstances in assessing good cause. *Id.* ¶ 21.

The appellate court considered how long the filing system had been in place and found that period of time distinguished this situation from prior cases where the court granted parties good cause. The appellate court concluded that the plaintiff failed to timely file her complaint, and, in requesting relief under Rule 9(d)(2) provided little, if any, substantive evidence to the circuit court that would demonstrate good cause. Accordingly, the appellate court found that the circuit court did not abuse its discretion in finding that the plaintiff was unable to demonstrate good cause for the late filing.

Kilpatrick v. Baxter, 2023 IL App (2d) 23088.

Plaintiff May Seek to Appoint Special Representative Where Defendant's Death is Unknown to Plaintiff Before Expiration of the Statute of Limitations and No Estate Opened

In *Lichter v. Carroll*, plaintiff was injured in a motor vehicle accident. Defendant died prior to plaintiff filing suit and without plaintiff's knowledge. An estate was never opened for the defendant. Plaintiff filed suit within the two-year statute of limitations against the defendant. Plaintiff then filed a motion to appoint a special representative of defendant's estate after the statute of limitations had expired. The trial court granted the motion, and the plaintiff filed an amended complaint naming the special representative. Defendant filed a motion to dismiss, arguing the claim was untimely because plaintiff was required to move to appoint a personal representative, rather than a special representative, of defendant's estate under 735 ILCS 13-209(c) and failed to do so. The trial court granted defendant's motion and dismissed plaintiff's case with prejudice. On appeal, the Illinois Appellate Court, First District, reversed and remanded. The Illinois Supreme Court affirmed. The issue on

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appeal was the applicability of subsection (b)(2) and (c) of 735 ILCS 13-209, known as the "Death of Party" statute. Subsection (b)(2) provides the appropriate procedure for appointment of a special representative of a deceased defendant while subsection (c) provides the appropriate procedure for appointment of a personal representative. Defendant argued that subsection (c) was the only applicable subsection because plaintiff did not learn of defendant's death until after the statute of limitations had expired. The Illinois Supreme Court held that both subsection (c) and subsection (b)(2) are available to a plaintiff who learns of a defendant's death after expiration of the limitations period, and plaintiff was not required to seek appointment of a personal representative.

Additionally, the Illinois Supreme Court held that the time limit in subsection (c) applies to a plaintiff who learns of the defendant's death after the limitations period has expired and chooses to proceed under subsection (b)(2). Therefore, a plaintiff who moves to appoint a special representative under subsection (b)(2) must do so within two years "of the time limited for the commencement of the original action." Because plaintiff followed the correct procedure in appointing a special representative for defendant in the case, her action was not time-barred.

Lichter v. Carroll, 2023 IL 128468.

The *Frye* "Standard" is Alive and Well in Illinois

At the oral argument of this matter in which the plaintiff claimed that his non-Hodgkins lymphoma was caused by his exposure to glyphosate and diesel fumes, Justice Nathaniel Howse asked:

> Everybody knows diesel fumes cause cancer. Everybody knows Roundup causes cancer. I mean it's all in the news. It's all through the atmosphere. And there's laws passed to reduce diesel fumes and diesel smoke because it's known to EPA in other countries, not just the USA—says that these fumes cause cancer. Now given that, and Justice [Mary Ann] McMorrow issued a decision I believe which says we aren't limited to the record. We can take notice of what's out there. Given that, isn't it plausible that an article which, given that everyone knows diesel causes cancer, isn't it plausible for him to rely on an article—says that association as opposed to method?

Reflecting that view, the Illinois Appellate Court, First District, reversed the circuit court's grant of summary judgment to the defendant holding that it was error to strike the testimony of the plaintiff's expert industrial hygienist and medical expert and with their testimony there was a question of fact. The court affirmed the position that an Illinois circuit court has no role as gatekeeper of the methodology that an expert employs, and in situations where an expert relies on peer reviewed literature, the *Frye* standard does not apply.

Accordingly, plaintiff's medical expert was allowed to opine that a study that concluded there was an "association" between the chemicals and cancer, was sufficient to claim a causal link between the two. As to the industrial hygienist, he was able to testify to the extent of the plaintiff's exposures without any contemporaneous tests and based solely on his interviews with the plaintiff.

Molitor v. BNSF, 2022 IL App (1st) 211486.

Corrupt File Saves Section 1401 Petition

In *National Experiential, LLC v. 601 W Companies LLC. et. al.,* National Experiential, LLC ("National") was hired by Nike to perform a light show for the National Basketball Association's All-Star Weekend. Under its contract with Nike, National was to project images from machines in Millennium Park to the sides of two buildings, one of which was jointly owned by defendants 601 W. Companies, LLC ("601") and Brickell 13 Chicago. National paid 601 for the use of the side of its building. Shortly before the show, the City of Chicago shut down the production because, despite prior assurance by the city' agent to the contrary, National had to obtain certain permits from the city, which National failed to obtain. National sought a refund from the defendants. When they refused, National sued for recission and unjust enrichment on April 21, 2021. National served the summons and complaint on the defendants' registered agent. Unfortunately, the registered agent's emails related to the case were inadvertently transferred to a corrupted folder which could not be accessed later. Consequently, the registered agent failed to forward the suit papers and the defendants failed to appear.

Approximately two months after service, the plaintiff obtained a default judgment and later filed a citation to discover assets. Both the registered agent and the defendants' building management company were served with the citation and the suit papers on November 23, 2021. The management company immediately forwarded the suit and the citation to the defendants and their counsel. It was then that they discovered the problem with the previous filings and the corrupted folder. In December, the defendants filed a petition to vacate the default judgment, pursuant to 735 ILCS 5/2-1401(a) (West 2020). The trial court granted the petition, concluding that the defendants

had a meritorious defense to the original rescission claim, and that the breakdown in the notification process was an excusable mistake. The plaintiff appealed.

In a Rule 23 opinion affirming the grant of the 1401 petition, the appellate court noted that to obtain relief under section 2-1401, a petition must set forth specific factual allegations supporting three elements: (1) the existence of a meritorious defense or claim in the original action; (2), due diligence in presenting that claim to the Circuit Court in the original action; and (3) due diligence in filing the section—2-1401 petition for relief.

The defendants argued that the plaintiffs did not exercise due diligence in ensuring that they had all necessary permits. The court noted that the meritorious defense issue here was a factual issue and not a purely legal one, and therefore, the court was not in a position to conclusively resolve the factual dispute. However, the appellate court reasoned that at the pleading stage of a 2-1401 petition, the court's role is simply to determine whether there is a real controversy on a factual question and not to actually decide the factual question. As there was evidence that the plaintiff had been assured by the city that no permits were required, there was an actual question of fact, and the appellate court held that a meritorious defense existed.

Regarding the defendants' due diligence in presenting their claim, the court stated that due diligence requires the petitioner to have a reasonable excuse for failing to act within the appropriate time. Here, the defendants had an established process by which its registered agent would accept service, often via e-mail, and would then notify the defendants. The record revealed that this system worked without incident for six years, was reasonable, and did not indicate any intention to disregard the process of court. Nor was there any evidence that the registered agent, or the defendants, acted negligently or were otherwise indifferent. Once the computer error was discovered, the defendants filed their petition only16 days after receiving the citation to discover assets. Furthermore, the breakdown in service was not attributable to the defendants' mistake or negligence. The defendants had no way of knowing that registered agent's computer error had caused a breakdown in the normal service process.

Nat'l Experiential, LLC v. 601 W Companies LLC, 2023 IL App (1st) 220716-U.

Arbitration Agreement for Nursing Home Patient Unenforceable

Parker v. Symphony of Evanston Healthcare, LLC, 2023 IL App (1st) 220391, addressed whether an arbitration agreement with a nursing home signed by a patient's daughter and health care power of attorney was enforceable against the patient. In reversing the trial judge's ruling, the First District Appellate Court answered that it was not.

The plaintiff in *Parker*, as independent administrator of a decedent's estate, filed an action against Symphony of Evanston Healthcare, LLC and Maestro Consulting Services, LLC alleging statutory violations of the Nursing Home Care Act and negligence claims pursuant to the Survival Act and Wrongful Death Act. Symphony, a long-term care facility, moved to dismiss and compel arbitration of the survival claims pursuant to 735 ILCS 5/2-619(a)(1), arguing that the decedent's daughter executed an arbitration agreement that barred the suit. The trial court granted the motion, and the plaintiff filed an interlocutory appeal.

On appeal, the court found that the decedent was admitted to Symphony in September 2017. Approximately one month later, decedent's daughter, armed with a power of attorney for health care, executed a 13-page admissions agreement on behalf of her mother. The daughter also signed a second document—a "Health Care Arbitration Agreement"—that same day. The admissions agreement expressly stated that the arbitration agreement is "incorporated into this document as though stated and contained herein." The separately paginated arbitration agreement contained language stating that signing it was not required to receive treatment. Symphony's business manager testified that 85% of residents or their representatives refuse to sign the arbitration agreement. The parties agreed that the daughter was authorized to admit her mother to Symphony pursuant to the health care power of attorney. The power of attorney, according to the plaintiff, did not provide the daughter with authority to bind her mother to the arbitration agreement because the arbitration agreement was not a condition precedent to admission to the facility. Conversely, Symphony characterized the arbitration agreement as "integral to and part and parcel of the residency contract."

Both parties relied on *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 141160. In *Fiala*, the plaintiff's daughter—also a healthcare power of attorney—executed a contract to admit the plaintiff to the defendant assisted living facility. *Id.* ¶ 1. The contract contained a "Binding Arbitration Provision" among its terms. *Id.* ¶ 8. Acceptance of the arbitration requirement was a prerequisite for admission into the facility. *Id.* ¶ 39. The daughter later filed a

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lawsuit against the facility, and the trial court denied the defendant's motion to dismiss and compel arbitration. *Id.* ¶¶ 12-13. The Second District reversed on appeal, finding that if an arbitration provision is *required for admission* to a care facility, then it becomes integral to "the health-care decision" to admit the patient to the facility. *Id.* ¶ 45. The court cautioned that "optional or otherwise not necessary" arbitration provisions do not authorize an agent acting pursuant to a healthcare power of attorney to bind the patient to arbitration. *Id.* ¶ 44. In light of *Fiala*, the *Parker* court found that the arbitration agreement in this case was freestanding and optional. It was separately paginated and signed and, significantly, stated that it was not required to receive treatment. This was reinforced, in the court's view, by the fact that 85% of those presented with the arbitration agreement refuse to sign it. Because it was not required for admission to the facility, the court found it was not "reasonably necessary" for the daughter to sign it to secure medical care for her mother. Thus, the daughter's healthcare power of attorney did not provide her with the authority to bind her mother to arbitration. The court concluded that the arbitration agreement was unenforceable and remanded the case for further proceedings.

Parker v. Symphony of Evanston Healthcare, LLC, 2023 IL App (1st) 220391.

Fifth District Court of Appeals Holds a Pump House Constituted an "Other Office" Establishing Residency of Corporation for Venue Purposes

Plaintiff filed suit in St. Clair County against two corporate defendants, both energy manufacturers, for retaliatory discharge after making a workers' compensation claim. Defendants filed a motion to transfer based on improper venue, or, in the alternative, on the doctrine of *forum non conveniens*. Defendants sought transfer to Washington County, arguing they were headquartered and maintained their operations and offices in Washington County and that the incidents alleged in the complaint occurred in Washington County. Defendants also argued that the public and private interest factors under the doctrine of *forum non conveniens* favored transfer to Washington County.

Defendants operated a water pump facility in St. Clair County that pumped water from the Kaskaskia River to the defendants' facility in Washington County. The pump house consisted of a "small, closet-like building with pipes and a pump." *Stefanisin v. Prairie State Energy Campus Mgmt., Inc.*, 2023 IL App (5th) 220687, ¶ 4. The facility was not manned with any personnel. Defendants sent maintenance workers to the pump house almost daily to make sure the pumps were working properly. Plaintiff argued that defendants were a resident of St. Clair County because the pump house was an "other office" under 735 ILCS 5/2-102. The trial court denied defendants' motion.

The Illinois Appellate Court, Fifth Circuit, affirmed the trial court's decision. The appellate court agreed with plaintiff and found that the pump house constituted an "other office" in St. Clair County. The appellate court reasoned that the defendants sent employees to the pump house daily for maintenance and that the water generated from the pump was vital to its energy production. Additionally, even though plaintiff was not a resident of St. Clair County and his injury and subsequent termination did not occur in St. Clair County, the appellate court nonetheless held that the trial court did not abuse its discretion in finding the public and private factors did not weigh in favor of transferring the case to Washington County under the doctrine of *forum non conveniens*.

Stefanisin v. Prairie State Energy Campus Management, Inc., 2023 IL App (5th) 220687.

First District Appellate Court Clarifies Requirement of Expert Testimony on Proximate Cause in Dental Negligence Case

In this dental negligence case, the patient filed suit against an oral surgeon alleging a failure to respond to the patient's calls, provide follow up care, thus abandoning her. The trial court entered summary judgment in favor of the defendant on the sole basis that plaintiff failed to present expert testimony on the element of proximate cause. The First District Appellate Court affirmed in part and reversed in part. The Appellate Court found the plaintiff's lack of an expert testimony establishing proximate cause was not a *per se* bar to her entire case. Rather, some of the plaintiff's claimed damages required expert testimony, and some did not. The Court noted that expert testimony is usually required in medical negligence cases because the proof consists of specialized medical knowledge beyond the ken of an average juror. However, no expert is required in a medical negligence case where the defendant's conduct is so grossly negligent or the treatment so common that a layman could readily appraise it. This exception applies in very simple cases. The *Thompson* Court applied the same logic to the element of proximate cause, finding that it can be obvious to the lay juror that certain conditions, such as pain and suffering, are caused by a breach of the standard of care. The Court further explained that in the instant case, negligent tooth removal causing an infection might need expert testimony to

establish the damage caused, no expert testimony was needed to explain that the condition hurt. Plaintiff's testimony as to the severity and duration of her pain was sufficient. The administration of pain medication 18 hours earlier to begin pain relief did not require specialized knowledge for a juror to evaluate. However, plaintiff's claims regarding the effect of an 18-hour delay in treatment of her cellulitis, necessitating additional medical care, did require expert testimony to establish proximate cause. Lastly, the court discussed patient abandonment claims and confirmed that there is no requirement in such claims that a physician "knowingly" abandon or refuse treatment for such claims to proceed under medical negligence.

Thompson v. LaSpisa, 2023 IL App (1st) 211448.

Court Finds that Contract Language Controls in Summary Judgment Dispute Over Subrogation Claim

Plaintiff Zurich American Insurance Company (Zurich) issued a builder's risk insurance policy to insure a building during construction. Defendant Infrastructure Engineering Inc. (Infrastructure) was a subcontractor on the project who was hired to install a system for collecting rainwater. A rainstorm occurred during the building process resulting in significant damage to the building. Plaintiff paid out on the claim to the general contractor. Plaintiff, as subrogee of the general contractor and of the building owner, a community college, sued defendant alleging defendant caused the damage. Defendant moved for summary judgment on the grounds that Plaintiff was not entitled to sue for the building owner. The trial court agreed and granted summary judgment. The general contractor purchased the insurance policy and named the college as an additional insured. Infrastructure argued in Motion for Summary Judgment that Zurich could not establish the necessary elements to its subrogation claim: (1) a third party is primarily liable for the loss, (2) the insurer is secondarily liable for the loss and (3) that the insurer paid the insured under that policy thereby extinguishing the debt of the third party. The trial court granted summary judgment and found that Zurich had not shown it was subrogated to the college's right of recovery. The trial court found that the college suffered no loss, and thus plaintiff could not meet the third requirement. Plaintiff appealed. After finding that Zurich did not forfeit its argument that contractual subrogation applied, the First District Court of Appeals turned to the merits of the parties arguments. The court concluded that the requirements set forth in the contract control the parties' right to subrogation, not the prerequisites relied upon by the trial court. The prerequisites are required when relying upon common-law subrogation. In this case there was contractual right to subrogation and the contractual language controlled. The court then examined the language of the contract, including the definition of insured, and found that the contract gave Zurich the right to pursue the subrogation claim. Based on this analysis, the appellate court reversed the trial court's granting of summary judgment.

Zurich American Insurance Company v. Infrastructure Engineering Inc., 2023 IL App (1st) 230147.

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Survey of Construction Law Cases

First District Affirms Plaintiff's Obligation to Identify Specific Defect to Avoid Summary Judgment on Premises Liability/Trip and Fall Case

In *Aalbers v. LaSalle Hotel Properties,* the Illinois Appellate Court First District affirmed and reinforced the obligation of "slip and fall" plaintiffs to provide evidence of an identifiable defect to survive summary judgment. In *Aalbers,* the plaintiff was injured after she tripped and fell shortly after exiting an elevator in a recently renovated hotel lobby. She filed suit against the hotel owner, as well as the construction manager and general contractor involved in the renovation. The owner filed a third-party action against the flooring contractor involved in the renovation. The defendants and third-party defendant moved for summary judgment on the basis that the plaintiff failed to offer evidence of an identifiable defect that caused her to fall.

The evidence before the trial court on summary judgment was plaintiff's testimony that the lobby floor was tiled, but the area in front of the elevators was carpeted. According to the plaintiff, she tripped on "a piece of something" "like a ledge" in the area where the carpet met the tile. However, the plaintiff admitted she was not looking down at the time of her fall and did not know exactly where she fell. She could not identify anything specific, including any defect, that caused her fall. Post-occurrence inspections did not identify any defect either. Relying heavily on *Kimbrough v. Jewel Cos., Inc.,* 92 Ill. App. 3d 813 (1st Dist. 1981), the trial court granted summary judgment in favor of the defendants and the third-party defendant because the plaintiff could not identify what caused her fall and was unable to connect any of the defendants to the occurrence.

On appeal, the plaintiff argued that the trial court misapplied *Kimbrough*. In affirming summary judgment, the *Aalbers* court emphasized the sound logic of the *Kimbrough* decision and reinforced the notion that, in order to survive summary judgment, a plaintiff must present some factual or evidentiary basis to support her claim. A plaintiff cannot meet this burden in a trip and fall/premises liability case if she cannot point to an identifiable defect that caused her fall.

Aalbers v. LaSalle Hotel Properties, 2022 IL App (1st) 210494.

Subcontractor Has Right to File Suit under Mechanics Lien Act on Lien Made by its Subcontractor

In *American Steel Fabricators, Inc. v. K&K Ironworks, LLC,* the Illinois Appellate Court First District held that a subcontractor had authority under § 34 of the Mechanics Lien Act (Act) to file suit based on a lien made by the subcontractor's subcontractor. 770 ILCS 60/34. The appellate court held that the subcontractor, American Steel Fabricators, Inc., fit the statutory definition of a lienor under § 34 of the Act and had the ability to commence suit.

In November 2019, American Steel, a structural steel erection company, entered into a contract with the general contractor, Maris Construction, LLC, to perform structural steel work. American Steel subsequently entered into a sub-subcontract with K&K Ironworks, LLC for additional work on the project where American Steel would provide the raw materials and K&K would install the steel. As the construction progressed, a dispute arose between American Steel and K&K regarding whether K&K was performing its contractual obligations. American Steel alleged that K&K had fallen significantly behind in the construction schedule while K&K contested that it had substantially completed all work and was owed money. K&K ultimately stopped work on the project, claiming that American Steel still owed it approximately $1,000,000.

Thereafter, K&K recorded a mechanics lien against title to the premises, claiming money owed to it by American Steel or Maris. An attorney representing American Steel sent a demand letter to K&K asking K&K to foreclose on its mechanics lien. K&K did not respond to the letter or foreclose on its mechanics lien. The attorney for American Steel then sent another demand letter to K&K asking it to release K&K's lien pursuant to §35 of the Mechanics Lien Act. After K&K did not release the mechanics lien, American Steel filed a complaint seeking to clear title on the property pursuant to § 35 of the Act. Shortly thereafter, K&K successfully moved to dismiss American Steel's complaint by arguing that American Steel was attempting to enforce rights it did not possess under Illinois law.

The appellate court analyzed the Act's construction and definitions and ruled for American Steel. Section 34 authorizes a suit by "the owner, lienor, a recorder under § 3-5010.8 of the Counties

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Code, or any person interested in the real estate . . . ." *Id.* at § 34. The court noted that the Act's definitions of contractor and subcontractor both explicitly contained language recognizing lienholder rights. *Id.* at §§ 1(a) and 21(a). K&K argued that no lien exists—and thus no lienor—until the party with a right to assert a lien is actually owed something. It further argued that as American Steel never alleged that any monies were owed to it, its complaint to clear title did not demonstrate that it was a lienor at the time it sent its § 34 demand. The Court rejected this argument because no one receiving a § 34 notice would be able to determine if the notice was valid unless the person receiving the notice was also privy to the financial records of the entity sending the notice. K&K also attempted to make additional arguments regarding qualifications of a lienor by attempting to create a distinction between an "inchoate Mechanics lien" and a "fully developed lien." The court rejected this argument by noting that the word lien was used in the statute without any qualifiers.

Am. Steel Fabricators, Inc. v. K&K Ironworks, LLC, 2022 IL App (1st) 220181.

Duty of Care Based on Section 414 Retained Control and Section 343 Premises Liability

In *Ellis v. ICC Group Inc. d//b/a Illinois Constructors Corporation et.al*, 2022 IL App (1st) 211581-U, the plaintiff, an electrician, was injured while working on a project to modify a dam located in a Cook County forest preserve. ICC Group Inc. was the general contractor. The plaintiff worked for an electrical subcontractor, Lyons & Pinner. The work was divided into two stages, with the construction of a gate for the west half of the dam being installed first, followed by a gate for the east half of the dam. A new approximately eight feet wide concrete platform was built and the dam gate was then installed on top of that platform. The gate was a curved steel structure, approximately five feet in height. The plaintiff and another Lyons electrician, McLaughlin, accessed the platform by a ramp that ran from a road above to the platform's north side. Once there, the plaintiff could not find a method to access the platform's south side. In order to do so, he tied two ladders together using mule tape and used them to climb across the gate to the south side of the platform. After completing his work, the plaintiff attempted to return to the north side of the platform by climbing the ladders to cross the gate. As he was doing so, he lost his balance and fell onto a concrete ledge and into the water below, sustaining serious injuries.

The plaintiff filed a three-count complaint against ICC. Count I pled general negligence and alleged that ICC had a duty to exercise reasonable care in ensuring that the project site was a safe workplace and that it breached that duty by allowing workers to use unsecured ladders to cross the gate. Count II pled a claim under section 414 of the Restatement (Second) of Torts, alleging negligence by failing to exercise control over jobsite activities. Count III pled a claim under premises liability.

ICC filed a motion for summary judgment arguing that the evidence was insufficient to show that it had "retained control" over the work done by the Lyons electricians sufficient to impose a duty under Section 414. ICC argued that its subcontract with Lyons showed that Lyons had full control over the means and methods of its own work, and there was no evidence of ICC's employees retaining control over the safety or the details of the subcontractors' work. It also argued that the evidence did not support a claim for premises liability because the undisputed evidence showed that ICC was not the possessor of the premises, that the incident did not involve a condition of the land, that it did not have notice of any unsafe condition, and that the plaintiff's ladder set-up was itself an open and obvious danger. ICC further argued that there was no evidence to satisfy the element of proximate cause.

In granting ICC's motion for summary judgment, the trial court found that ICC did not owe a duty of care to the plaintiff under either a "retained control" theory or a premises liability theory of negligence. It found that ICC had no actual or constructive notice of any dangerous condition and that there were no facts supporting an inference that ICC retained the degree of control, supervision, or monitoring of the jobsite comparable to cases in which a duty under section 414 had been imposed. The court further found no proximate cause between any alleged negligence and the plaintiff's injuries and that the dam gate was a "condition" rather than the "cause" of the injury, and that the cause was the plaintiff's own conduct. Furthermore, the court found no evidence of foreseeability to satisfy the "legal cause" aspect of the proximate cause analysis.

In reversing the grant of summary judgment, the appellate court found that ICC owed a duty to the plaintiff as a possessor of land under a theory of premises liability but that it did not sufficiently retain control of Lyons' work to impose duty under section 414.

As to the plaintiff's section 343 theory that ICC had a duty as a "possessor" of the land, the court found that the evidence showed that ICC was a possessor of the dam platform where the injury occurred. ICC was hired as a general contractor to install a cofferdam upon which it erected a concrete platform and installed the dam gate. By doing this and acting as general contractor over-

seeing the completion of work, ICC effectively created the site where the plaintiff's injury occurred and exercised control over it during construction.

The court rejected ICC's argument that it owed no duty to the plaintiff under section 343 because the plaintiff's injury was not caused by a "condition on the land" but the plaintiff's own conduct. The court reasoned that this argument was effectively a proximate causation or comparative fault, and not one addressing its duty of care.

The court further found sufficient circumstantial evidence to create a question of fact concerning ICC's actual or constructive notice that tradesmen were using ladders to cross to the south side of the platform. In addition to other evidence, McLaughlin testified that following the gate's installation, he observed workers from various trades crossing the gate by hopping over it or by using a ladder to climb over it.

The court did reject the plaintiff's argument that ICC retained control over the manner in which Lyons performed its work. There was nothing in the contract provisions that demonstrated that ICC retained control over Lyons' work or that it was not free to do the work in its own way.

Ellis v. ICC Group, Inc., 2022 IL App (1st) 211581-U.

Proximate Cause and Cause in Fact in a Blind Construction Accident

In *Huston v. P. J. Hoerr, Inc. v. SNS Construction Services, Inc.*, Jeremy Huston, the plaintiff's decedent, was working on a scaffold installing drywall for his employer, SNS Construction Services, Inc. He was working with his foreman, Jason Ariana. The scaffold, which was on wheels, was fully erected. The two men took turns cutting pieces of drywall and then handing the drywall to the other man on the scaffold. Ariana left the room to tend to other work, leaving Huston alone in the room. Approximately 20 minutes later, Ariana heard Huston yell and heard a crashing sound. Ariana ran back into the room and found Huston and the scaffold on the floor. Huston died without ever regaining consciousness.

A two-count complaint was filed by Huston's estate under the Wrongful Death Act. (740 ILCS 180/1, 2 (2016)). Count I was brought under sections 1 and 2 of the Act and alleged that the general contractor, P.J. Hoerr, Inc. (PJH), was negligent in its control, supervision, coordination, and inspection of the construction site, including the scaffold used by Huston. The complaint alleged that the scaffold tipped over and caused Huston to fall to the ground and strike his head, resulting in death. Count II alleged that due to his injuries, Huston was prevented from attending to his usual duties and affairs and incurred monetary damages.

PJH filed an answer and a third-party complaint for contribution against SNS alleging that SNS was the entity that committed the negligent acts or omissions alleged in plaintiff's complaint. PJH and SNS filed motions for summary judgment on plaintiff's complaint and PJH's third-party complaint for contribution, respectively. The circuit court found that plaintiff could not prove the proximate cause of the accident and granted summary judgment for PJH. The court also dismissed PJH' s third-party complaint as moot. The trial court found there was no genuine issue of material fact that could be presented to a jury and further concluded that the court could not find any way that proximate cause could ever be shown against PJH or SNS.

On appeal, plaintiff argued that the circuit court erred when it (1) granted summary judgment in favor of PJH, and (2) found that PJH did not retain control over the construction site.

In a Supreme Court Rule 23 opinion affirming the grant of summary judgment, the Third District Appellate Court reviewed PJH's contract with the site owner, PJH's subcontract with SNS, and eight deposition transcripts of workmen who were on the site. The court noted that the question of proximate cause has two distinct elements: cause in fact and legal cause. Cause in fact refers to whether the defendant's conduct is a material factor in bringing about the plaintiff's injury such that it would not have occurred in the absence of the defendant's conduct. Legal cause implicates the question of foreseeability. Proximate cause typically presents a question of fact. However, courts may determine a proximate cause issue as a matter of law if the evidence proves the plaintiff would never be entitled to a recovery. Proximate cause cannot be based on speculation, surmise or conjecture. While "circumstantial evidence can be sufficient to establish proximate cause if reasonable inferences may be drawn from that evidence," such circumstantial evidence must be of such a nature and so related as to make the conclusion more probable as opposed to merely possible.

The plaintiff argued that the evidence showed that debris was placed in the room where Huston was working at the direction of PJH. This created an uneven floor surface and an unsafe work condition that was left unmitigated by PJH and prevented Huston from using a lift which would have prevented his fall. Plaintiff argued that it is reasonable to infer from the circumstantial evidence that PJH proximately caused Huston's fatal injuries after debris became entangled in the scaffold's wheels, causing it to tip over.

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The court disagreed, finding that this circumstantial evidence was insufficient to survive summary judgment. The court found that "[s]peculation and conjecture are insufficient to establish proximate cause unless the circumstances are so related that the argued-for interpretation of an incident is the only probable one."

Huston v. P. J. Hoerr, Inc., 2022 IL App (3d) 200541-U.

Subcontractor Borrowing Employer under Section 5(a) of the Workers' Compensation Act

Leman v. Volmut involved a personal injury negligence action resulting from an automobile accident. The plaintiff, a union carpenter, sued various defendants, including Intren, LLC. Intren was a contractor engaged in a project in the area of the accident. The plaintiff worked directly for Intren, but was paid by another entity, Pinto Construction. Pursuant to a Master Services Agreement (MSA), Pinto was to provide carpentry services to Intren on the project. Per the MSA, Pinto provided all personnel, labor, tools, and equipment necessary to perform its work for Intren. The MSA further specified that Pinto was solely responsible for implementing the means, methods, and operative details of its carpentry work. Pinto acknowledged in the MSA that its employees were independent contractors and not Intren employees. The facts revealed that the plaintiff worked exclusively for Intren for seven years, with Intren assigning him to projects, supervising his work, and providing him with applicable safety training.

Intren filed a motion for summary judgment in the circuit court, arguing that it was the plaintiff's "borrowing employer" and thus entitled to the protection of the exclusive remedy provision of Section 5(a) of the Illinois Workers' Compensation Act (820 ILCS 305/5(a)). The trial court granted the motion, and the plaintiff appealed. The Illinois Appellate Court First District analyzed the MSA and agreed that a borrowed employment relationship existed between the plaintiff (an employee) and Intren (the plaintiff's *de facto* employer) as a matter of law despite the fact that the MSA characterized the plaintiff as an independent contractor. The appellate court found that Intren clearly possessed the right to direct and control the manner in which the plaintiff performed his work, and that it exercised that right throughout the relevant time period. The court further concluded that the plaintiff acquiesced to employment with Intren and that, at a minimum, an implied contract of employment existed between them. Because no other inferences could be drawn from the undisputed facts in the record, the appellate court affirmed the circuit court's summary judgment order.

Leman v. Volmut, 2023 IL App (1st) 221792.

Appeal by Subcontractor against Illinois State Toll Highway Authority Dismissed for Lack of Subject Matter Jurisdiction: Toll Highway Authority was Within its Discretion to Revoke Subcontractor's Approval

Omega Demolition Corporation filed suit against the Illinois State Toll Highway Authority (ISTHA) after Omega was unable to work on tollway projects after ISTHA revoked Omega's A15 subcontractor approval. In an amended complaint, Omega alleged that its due process rights were violated as the revocation was without notice or hearing. ISTHA moved to dismiss under 735 ILCS 5/2-615 and 2-619 and the trial court granted the motion to dismiss, with prejudice, under section 2-615 for failure to state a claim.

The facts revealed that ISTHA requires every subcontractor to complete an A15 subcontractor approval form before it can work on any tollway project. Omega's A15 form was approved but, following a fatal accident involving one of Omega's employees, ISTHA revoked the approval and Omega was suspended from work on any tollway project.

Among its arguments on appeal, Omega asserted that an A15 approval is not unlike a government license and, therefore, Omega was entitled to the same due process prior to its revocation, as is afforded to any other government licensee.

The appellate court affirmed the trial court's dismissal of the action, but for a very different reason. It analyzed and agreed with ISTHA's 2-619 motion. That motion, brought pursuant to section 2-619(a)(9) but regarded by the court as employing 2-619(a)(1), asserted that Section 32 of the Tollway Highway Act grants ISTHA discretionary powers not subject to judicial review in the absence of bad faith, fraud, corruption, manifest oppression, or a clear abuse of discretion. At no time did Omega allege that any of the exceptions applied. Instead, it argued that revocation of A15 approval did not constitute one of ISTHA's discretionary powers. The appellate court disagreed and found that ISTHA acted within its statutory authority. It vacated the trial court's order and dismissed the appeal for lack of subject matter jurisdiction.

Omega Demolition Corp. v. Illinois State Toll Highway Auth., 2022 IL App (1st) 210158.

Department of Insurance has Authority to Resolve Dispute between Insured and Insurer Regarding Payment of Additional Premiums on Workers' Compensation Policy

The Illinois Supreme Court, reversing the decision of the appellate court, held that the Department of Insurance (DOI) possessed authority under Section 462 of the Illinois Insurance Code to determine whether Prate Roofing and Installations, LLC owed additional premiums on its workers' compensation policy to its insurer, Liberty Mutual Insurance Corporation, arising out of Prate's subcontractors' failure to maintain workers' compensation insurance.

Prate, a roofing and construction installations contractor, obtained workers' compensation coverage from Liberty through the Illinois Assigned Risk Plan, which provides coverage through a risk pool administered by the National Council on Compensation Insurance. After Prate renewed its policy in October 2014, Liberty audited Prate's records and found that one of its subcontractors, ARW Roofing, LLC, did not have workers' compensation insurance. Liberty therefore assessed Prate an additional premium of $127,305 because Liberty was exposed to more liability than it bargained for.

Prate appealed but the Illinois Workers' Compensation Appels Board declined to rule and advised Prate to refile its dispute with the DOI. Prate appealed to the DOI under section 462 of the Illinois Insurance Code. 215 ILCS 5/462. The DOI agreed with Liberty on all issues. The circuit court affirmed the DOI's decision. The appellate court, however, vacated the decision, relying on *CAT Express, Inc. v. Muriel*, 2019 IL App (1st) 181851, which held that the Workers' Compensation Commission lacked jurisdiction over an employment status dispute between an insurer and its insured.

On appeal to the supreme court, Liberty argued that the appellate court erred in relying on *CAT Express* and that the DOI had the authority to resolve this dispute under section 462. The supreme court construed section 462 pursuant to principles of statutory interpretation and held that the plain language of section 462 gives the DOI the express authority to resolve a dispute involving the manner in which Illinois Assigned Risk Plan rule 2-H is applied in connection with the insurance provided to an insured.

Prate Roofing & Installations, LLC v. Liberty Mut. Ins. Corp., 2022 IL 127140.

Settlements Following Mechanics Liens Do Not Violate Prohibition on Confessions of Judgment

In *Sopris Concrete, LLC v. Meeks*, the Illinois Appellate Court Second District, upheld the trial court's decision that a settlement agreement negotiated following the recording of a mechanics lien was valid and did not violate the ban on confessions of judgment as set forth in § 2-1301(c) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1301(c).

Between November 15, 2016 and March 21, 2017, the plaintiff contractor performed masonry work at the defendant's property. Subsequently, the plaintiff recorded a mechanics lien, claiming that the defendant owed it approximately $17,300. Approximately two years later, the parties entered into a settlement agreement that contained a confession of judgment clause. In the settlement agreement, the defendant agreed to pay the plaintiff $7,750 before May 20, 2019. In exchange, the plaintiff agreed to release the mechanics lien. In August 2020, the plaintiff filed suit, alleging that the defendant made only partial payments of the $7,750 owed.

In considering the plaintiff's argument that the settlement agreement was a consumer transaction in violation of the ban of confessions of judgment, the appellate court initially noted that only two Illinois appellate cases have considered whether a transaction was a consumer transaction for purposes of the statute. Neither case addressed the specific issue at hand, that is, whether a settlement agreement was considered a consumer transaction when the settlement resolved a mechanics lien arising out of a consumer transaction.

In making its determination, the appellate court considered the statutory language, legislative history, and rulings from other jurisdictions. Section 2-1301(c) of the Code of Civil Procedure bans confessions of judgment and defines a consumer transaction as "a sale, lease, assignment, loan, or other disposition of an item of goods, consumer service, or an intangible to an individual for purposes that are primarily personal, family, or household." The court held that the settlement agreement did not satisfy any of those definitions and, thus, the statute did not apply. Its conclusion is consistent with the legislative history, as state representatives were concerned with disparities and sophistication and bargaining power in consumer transactions. The appellate court noted that the defendant in this case did not purchase a faulty product. Additionally, there was no disparity in bargaining power between the parties: the defendant received favorable treatment under the settlement agreement because the plaintiff agreed to accept approximately sixty percent of what it was owed. The court also observed that courts in New Mexico and

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Texas ruled that settlement agreements do not constitute consumer transactions in similar circumstances.

The appellate court rejected the defendant's argument that multiple instruments may constitute a single contract such that the settlement agreement merged into the original consumer transaction. Instead, it pointed to specific language in the settlement agreement stating that it superseded all prior agreements and did not merge into them. It likewise rejected the defendant's contention that the settlement agreement was unenforceable for lack of consideration because the mechanics lien was facially defective and not properly perfected. The appellate court stated that a promise to forego legal action is valid consideration when made in good faith, even if the claim is ultimately shown to be invalid. In this case, the defendant did not argue that the plaintiff acted in bad faith in pursuing its mechanics lien or entering into the settlement agreement. Although there were purported technical defects with the mechanics lien, the promise to forego perfection of such lien was valid consideration. It followed that the settlement agreement was valid.

Sopris Concrete, LLC v. Meeks, 2022 IL App (2d) 210331.

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Survey of Ethics Law Cases

First District, in a Case of First Impression, Finds that Attorneys are not Entitled to *Quantum Meruit* Award Equal to Contingency Fee in a Client Agreement that, in Violation of Rule 1.5 (e) of the Illinois Rules of Professional Conduct, Failed to Specify how a Fee would be Split

In *Andrew W. Levenfeld and Associates, Ltd. v. O'Brien,* clients asked an attorney to represent them in an estate dispute. The attorney, who had a background in chancery litigation, agreed to represent clients only with the help of another attorney who had background in estate administration issues. These attorneys negotiated a contingency representation agreement with the client that stated in relevant part:

> "Clients agree to pay minimum attorneys fees calculable at an hourly rate of $300 per hour for [First Attorney's] or [Second Attorney's] time, $250 per hour for associate attorney time, and $85 per hour for paralegal or paraprofessional time.
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> * * *
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> The total fees to be charged shall be either 15% of the first $10,000,000 and 10% of any additional value of the assets recovered for the clients, or the amount of charges made for time expended, whichever is greater
> "Clients agree to pay minimum attorneys fees calculable at an hourly rate of $300 per hour for [Levenfeld's] or [Schlegel's] time, $250 per hour for associate attorney time, and $85 per hour for paralegal or paraprofessional time.
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> * * *
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> The total fees to be charged shall be either 15% of the first $10,000,000 and 10% of any additional value of the assets recovered for the clients, or the amount of charges made for time expended, whichever is greater
> 'Clients agree to pay minimum attorneys fees calculable at an hourly rate of $300 per hour for [First Attorney's] or [Second Attorney's] time, $250 per hour for associate attorney time, and $85 per hour for paralegal or paraprofessional time.
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> * * *
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> The total fees to be charged shall be either 15% of the first $10,000,000 and 10% of any additional value of the assets recovered for the clients, or the amount of charges made for time expended, whichever is greater.'

Although the attorneys had a verbal agreement on how they would split the fee among themselves, the client agreement did not state how they would split the fee.

After several offers and counteroffers, the opposing party responded with an offer of $16.25 million. The attorneys recommended responding with a demand for $16.75 million, the clients did not authorize the demand, terminated the representation, and with the assistance of new counsel, whom they paid a flat fee of $500,000, eventually settled the case for $16.85 million.

After the original attorneys sued to recover attorney fees relying on a theory of *quantum meruit,* clients moved for summary judgment arguing, among other things, that attorneys could not collect attorney fees because the attorney-client agreement violated Rule 1.5(e) of the Illinois Rules of Professional Conduct since the attorneys failed to specify in the agreement how they would divide the expected contingency fee.

> Rule 1.5(e) provides:
> A division of a fee between lawyers who are not in the same firm may be made only if:
> (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> (3) the total fee is reasonable.

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Ill. R. Prof'l Conduct 1.5(e) (eff. Jan. 1, 2010). The trial court denied the motion for summary judgment finding that the violation of Rule 1.5(e) was not egregious and did not prejudice the clients. The trial court ruled that the attorneys were entitled to an award in *quantum meruit* for $1,692,390.60. The court calculated the award by using the formula in the contingency fee client agreement which stated "15% of the first $10,000,000 and 10% of any additional value of the assets recovered for the clients . . . ." The court then added expenses and subtracted the $500,000 fee paid to the subsequent attorneys.

On appeal by the clients, the Illinois Appellate Court First District found the trial court erred by awarding a *quantum meruit* award amount equal to a negotiated contingency fee in a contract that violated Rule 1.5(e). The First District reasoned that strict compliance with Rule 1.5 is mandatory and that the contingency fee agreement in this case was unenforceable because it violated Rule 1.5(e).

The First District nevertheless noted that the attorneys presented a detailed accounting of their representation of the clients over the course of nineteen months, and how the eventual settlement was an upgrade from the clients' initial position and substantially close to the offer the attorneys recommended. The First District concluded that attorneys submitted sufficient evidence to show that their efforts benefitted the client. The First District remanded the case to the trial court to determine an appropriate attorney fee based on the reasonable value of attorneys' services without relying on the formula in a contingency fee provision that violated Rule 1.5(e) of the Illinois Rules of Professional Conduct.

Andrew W. Levenfeld and Associates, Ltd. v. O'Brien, 2023 IL App (1st) 211638.

First District Decides Representation of the Client at Trial by an Attorney Who Failed to Comply with his MCLE Requirements Did Not Violate the Client's Constitutional Right to Effective Assistance of Counsel

In *People v. Pickett*, the client retained an attorney to represent him in a first-degree murder trial. Due to pandemic related delays, the bench trial lasted from March 9, 2020, to May 21, 2021. After the trial court found the defendant guilty, information became available that on March 5, 2020, the Attorney Registration and Disciplinary Commission removed this attorney from its master roll of attorneys authorized to practice law because the attorney failed to comply with MCLE requirements. The ARDC did not readmit the attorney to active status until October 8, 2021, after completion of the MCLE requirements.

The client, through his new attorney, filed a motion for a new trial arguing that his trial counsel's loss of active attorney status deprived the client of his Sixth Amendment right to effective assistance of counsel. The trial court denied the motion.

The defendant appealed his conviction to the Illinois Appellate Court First District followed. In analyzing this appeal, the First District noted that the client did not allege that the attorney's performance was deficient, and that the trial court described the attorney as more than an effective advocate for the client. The appellate court then went on to reject the client's argument that he suffered a *per se* violation of his Sixth Amendment right arguing that prejudice must be presumed because he was represented by an individual suspended from the practice of law for reasons "'relating to [a] lack of legal ability or moral character.'"

The appellate court reasoned that the attorney's suspension was not due to "lack of legal ability or moral character" and the attorney's failure to complete MCLE amounted to a technical defect. The First District believed that the failure to comply with MCLE does not mean that an attorney is incapable of providing quality representation to clients. The appellate court noted that under Illinois Supreme Court Rule 796(a), MCLE noncompliance could merely consist of failure to report compliance by submitting the required certificate.

The First District further noted that attorneys could earn CLE credits in courses that are unrelated to their practice areas and the attorney in question could have satisfied his MCLE requirement in part by taking such courses as "War Crimes in the Star Wars Universe" or "The Curious Lawyer: Sex, Videotapes, and Lies," which the appellate court thought would not have made this attorney more effective at this particular trial.

The First District concluded that admission to the bar is the proper indicator of an attorney's fitness to practice law—not completion of MCLE requirements. It rejected the client's appeal and affirmed the trial court's denial of the motion for a new trial.

People v. Pickett, 2023 IL App (1st) 221304.

The Supreme Court of Illinois Reverses Finding by the Appellate Court of Judicial Bias in Favor of Police Testimony

In *People v. Conway*, a police officer testified that while he was working as a surveillance officer with the narcotics team, he observed the defendant fire seven shots into a moving vehicle. The officer

testified that during the shooting he was parked in an unmarked car, the defendant was approximately 150 feet away from him, it was daylight, he could see the defendant's front and side, and observed him wearing a blue hoodie. The officer testified that he then observed the defendant go into a house. After back up arrived, the officers found the defendant inside the house with a blue hoodie at his feet. The police discovered the gun used in the shooting inside the house. Further forensic tests discovered gun residue on the hoodie, but not on the defendant's hands.

After closing arguments, the trial court stated that the case turned on the police officer's identification of the defendant as the shooter in the blue hoodie. The trial court noted the shooting occurred in broad daylight, and there was no obstruction in officer's line of view of the shooter. The court acknowledged that the officer was 150 feet away. The court continued:

> 'The officer, who is a trained police officer, is not a civilian, testified that he was in a position to immediately react when the shots were fired and saw the shots being fired, the shooter moving towards the street, firing and also after seven gunshots, apparently lean in and lean out of a Pontiac. So it's not just the several seconds that boom, boom of the gun where the offender then flees into the house.
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> I do find that the officer did have a unique opportunity to view the shooter in this matter. I do find that the officer's testimony with regard to the identity of the shooter was in fact clear, credible, and convincing. I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning [than] with a police officer. That is not a general statement. That is specifically to this officer. I believe his testimony is clear, credible, and convincing with regard to this.'

The trial court then found the defendant guilty beyond a reasonable doubt of being an armed habitual criminal (the defendant had two prior criminal convictions). The Illinois Appellate Court First District, however, reversed and remanded the case for a new trial because it believed that the trial court found the police officer more credible solely because of his status as a police officer and therefore demonstrated a pronounced bias in favor of police testimony.

On the appeal by the State, the Illinois Supreme Court reversed the appellate court's judgment reversing the trial court on the grounds of judicial bias in favor of police testimony, and remanded the matter back to the appellate court for consideration of the remaining issues in the appeal that were not previously reviewed by the First District. The Illinois Supreme Court believed that the trial court was merely commenting on the credibility of the police officer's testimony, which was very different from showing bias. It went on to reason that the trial court observed that the police officer was on a surveillance operation and, because of this, was in a position to be alert and focused on the shooting when it happened—and so he had heightened attention on the situation and the shooter. The Illinois Supreme Court concluded that the trial court's determination that eyewitness identification by a particular police officer is credible is not the same as considering all police officers to be better eyewitnesses. It found that the trial court's comments reflected a deliberation of the proper factors in its credibility determination rather than a pro-police bias.

People v. Conway, 2023 IL 127670.

Third District Finds Judge Exhibited Judicial Bias during Sentencing of Criminal Defendant and Failed to Meet the Standard of the Illinois Code of Judicial Conduct

In *People v. Montgomery*, the defendant in an allegedly intoxicated state assaulted a 70-year-old man who had dementia in a convenience store. The police body cameras recorded the subsequent arrest of the defendant. The body cameras showed the handcuffed defendant baselessly claiming police brutality and demanding that the officers give the defendant's cell phone to the defendant's wife. The defendant pled guilty to aggravated battery and the trial court sentenced him to nine years and four months in prison. The trial judge commented that he would have sentenced the defendant to fourteen years in prison, but the maximum sentence allowed was ten years, and he had to reduce the sentence because the defendant pled guilty.

During the sentencing hearing, the judge interrupted the defendant's allocution to express his surprise that the clerk of the store where the assault took place did not shoot the defendant and declaring "I would have killed you. I would not have waited for the police." The judge then went on to mimic the defendant's expletive-laden rant to the police which the officers' body cameras recorded where the defendant demanded that police give the defendant's phone to the defendant's wife. The court referred to the defendant's wife as

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"your girlfriend or wife or whatever you call her." It also cautioned that, if the defendant "yap[s] off to somebody" while in prison about how he was mistreated, "I'd like to be the person right behind you to look over your shoulder at the person you're talking to and say watch the video." The court also stated that his only criticism of the arrest of the defendant was "a kind police officer." In referring to the actions of the police officers during the arrest, the judge stated: "I'm stunned that they didn't tase you when you didn't comply and dared them over and over."

On appeal, the Illinois Appellate Court Third District found that the inescapable conclusion from a review of the record is that the sentencing hearing was affected by judicial bias. The Third District noted that it neither condoned the defendant's conduct nor minimized the circumstances of the crime. It further referred to the Illinois Code of Judicial Conduct of 2010 requiring judges to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." Ill. S. Ct. R. 63(A)(3) (repealed on July 1, 2022, and recodified with the Illinois Code of Judicial Conduct of 2023, effective January 1, 2023).

The Third District stated that the sentencing judge failed to meet this standard and failed to hide his animosity towards the defendant. The Third District outlined that the sentencing judge did so in the six instances when he (1) mimicked defendant's demands to the arresting officer, (2) referred dismissively to defendant's wife, (3) envisaged a hypothetical prison scenario where it would personally discredit defendant's claims of mistreatment, (4) criticized the arresting officer's patience in dealing with defendant, (5) suggested the officer should have tased defendant upon noncompliance, and (6), the most disconcerting of all for the appellate court, stated he would have killed defendant if he were in the store clerk's shoes. The Third District concluded that if remarks of this nature do not traverse the bounds of due process and amount to what is necessary to demonstrate judicial bias, then the standard is meaningless. It went on to remand the case for a new sentencing hearing before a different judge.

People v. Montgomery, 2023 IL App (3d) 200389.

First District Rejects Client's Argument that Trial Counsel was Ineffective because of Alleged Failure to Disclose a Potential Conflict of Interest of Simultaneously Representing Codefendant's Counsel in an Unrelated ARDC Matter

In *People v. Harris*, the defendant appealed his first-degree murder conviction arguing ineffective assistance of counsel based upon the alleged failure by his trial attorney to disclose a potential conflict of interest. The trial attorney simultaneously represented the codefendant's trial attorney in an unrelated ARDC matter during the defendant's trial. The attorney did not reveal this potential conflict to the client until a hearing after the trial.

This codefendant was charged with driving the getaway car and evading the police after the shooting and was captured and arrested by the police with the defendant after a police chase. The defendant contended that, because of the conflict of interest, his trial counsel failed to zealously pursue this codefendant as an exculpatory witness on the defendant's behalf to testify that he was with the defendant all day and never saw him with a gun, and that police coerced "everything." The defendant argued on appeal that his trial attorney's failure to aggressively pursue codefendant's waiver of the right against self-incrimination could have been because of counsel's financial relationship with codefendant's counsel, and not wanting to overwhelm codefendant's counsel possibly affecting codefendant's counsel in his ARDC case, or possibly advising codefendant's counsel on how to best represent his clients.

It was not clear to the Illinois Appellate Court First District whether the defendant was alleging a *per se* conflict of interest or an actual conflict of interest. The First District first decided that this was not a *per se* conflict of interest because the defendant's trial counsel did not have a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; did not contemporaneously represent a prosecution witness; and was not a former prosecutor who had been personally involved with the prosecution of the defendant.

The First District then also concluded that the defendant failed to show an actual conflict of interest that adversely affected his trial counsel's performance. The appellate court believed that defendant's allegations of a "potential" conflict amounted only to speculative allegations and conclusory statements insufficient to establish an actual conflict of interest. It further reasoned that, under the facts of this case, the defendant failed to overcome the preemption that his trial attorney's decision not to pursue codefendant as a witness was trial strategy.

The First District therefore affirmed the defendant's conviction. The appellate court did, however, on other grounds, remand the case for a new sentencing hearing.

People v. Harris, 2023 IL App (1st) 210754.

Fourth District Finds that Judge Exhibited Judicial Bias against Defendant during Sentencing Hearing

In *People v. Fisher*, the defendant was convicted of aggravated sexual abuse. He had sexual relations with a minor that resulted in the birth of a child that was allegedly the sixteenth child born to the defendant. During the sentencing hearing, the court made a number of sarcastic comments about the defendant. For instance, when commenting on the defendant being disrespectful toward a correctional officer because he would not follow the instructions of closing his cell door, the judge sarcastically stated 'Ooh, such an obligation.'" The court then appeared to hold defendant's decision to pursue a jury trial against the defendant.

When reading aloud from the defendant's sexual evaluation that the defendant believed that he had sixteen children but was uncertain, the judge interjected, "Oh boy." The court commented, "Watch this," before asking the defendant about whether he had ever met some of his children. Instead of considering the defendant's limited intellectual ability as a mitigating sentencing factor, the court noted that talking to the defendant was "kind of like talking to a dictionary that doesn't use the alphabet." The Illinois Appellate Court Fourth District believed that, at best, this comment mocked the defendant; at worst, it established that the court held the defendant's limited intellectual ability against him.

The sentencing judge then told the defendant that he was "bad for the Earth" and asked, "What is the Earth doing, sir, with the nine children and the seven children and these other children that you aren't parenting at all? And now you want out to make some more." Before announcing its sentence, the court repeated that the defendant was "bad for the Earth" and described the defendant as a "child making machine" who was "smothering the Earth." The court asserted that it was "alarmed at the number of children that the defendant produced" and referred to the defendant as a "stellar producer."

When told that the sex offender evaluator recommended probation for the defendant, the court criticized the sex offender evaluation and the experts who authored it, exclaiming that they were "off their rocker" and that "[s]omebody needs to review them." The court commented that the conclusions of the author of the sex offender evaluation were "somewhere between the planet Zircon and the planet yet undiscovered." The Fourth District concluded that the court should have expressed its disagreement with the opinions in the sex offender evaluation in a more dignified, dispassionate, and restrained manner.

The appellate court held that, by repeatedly belittling and demeaning the defendant, the court utterly failed to adhere to the high standards expected of judges which require the court to be dignified and to treat litigants fairly. The Fourth District found that, due to the court's bombardment of sarcastic and disparaging remarks against the defendant, the defendant did not receive anything approaching a fair sentencing hearing.

The appellate court also believed that the record suggested that the court sentenced the defendant, at least in part, to prevent him from fathering more children. The Fourth District noted it did not condone the defendant's conduct or trivialize the circumstances of the crime. Nevertheless, it also called the trial court's conduct "inexcusable". The appellate court held that, by repeatedly belittling and demeaning the defendant, the court utterly failed to adhere to the high standards expected of judges which require the court to be dignified and to treat litigants fairly. The Fourth District found that, due to the court's bombardment of sarcastic and disparaging remarks against the defendant, the defendant did not receive anything approaching a fair sentencing hearing. The Fourth District vacated the sentence and remanded the case for resentencing before a different judge.

People v. Fisher, 2023 IL App (4th) 220717.

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Fourth District Finds that the Court's Statements during the Defendant's Sentencing Hearing did not Indicate Judicial Bias

In *People v. Breshears*, the defendant appealed his conviction for criminal assault for having a sexual relationship with a minor arguing, among other things, that the court's comments during his sentencing demonstrated judicial bias. During the sentencing, the victim gave an emotional victim statement expressing her dismay that, according to her, the defendant had more rights and protections than she did, and that the justice system does not care how the victims are affected. Apparently, some of defendant's supporters showed disrespect towards the victim as she spoke. Based upon the agreement of the parties, the court imposed the minimum statutory sentence on the defendant.

Prior to pronouncing the sentence, the court addressed the victim personally. The court observed it was "unfortunate" that our laws protect accused criminals, not victims. The court described the country's founders as "throwaways," "ne'er-do-wells," and "criminals from England that they didn't want." Referring to the U.S. Constitution, the court then said, "It doesn't make it right, but at the end of the day that's the document we all live by."

The court then shared that in the past she was a victim of domestic violence when she was growing up. She also stated that she frequently gets called "bitch and that, on the morning of the sentencing she was called a "super effing bitch." The court further stated "Because we teach our girls to put up with it and do what everybody—every man wants. . . . I love my current husband, but I told him that after him, I'm done."

The defendant argued that the court's comments about the founding fathers and the U.S. Constitution demonstrated the court's disdain for criminal defendants. The Illinois Appellate Court Fourth District stated that although the court should have phrased this statement validating the victim's feeling differently, it disagreed that the comments showed judicial bias against criminal defendants in general, let alone this specific defendant.

The defendant further argued that the court's use of her personal experiences of growing up in a home with domestic violence and brushing off people calling her names demonstrated improper "willingness to rely on personal experiences as somehow being relevant to this case." The appellate court stated that it believed that the court's use of profanity was unnecessary and demeaning to the atmosphere of a courtroom and the administration of justice. Nevertheless, it believed that the court merely attempted to relate to and encourage the victim by mentioning the adversity the court herself had overcome. The Fourth District noted that the judge never claimed to have personal experience that was relevant to the case, and the at hand case did not involve domestic violence.

The defendant also contended that the court's comments about her own marriage revealed "negative viewpoints about men." The Fourth District could not understand why the court referenced her own marriage; however, it did not believe that these comments showed that the court could not be impartial in criminal cases involving men.

The Fourth District also emphasized that at the end of the sentencing hearing, the defendant received the minimum statutory sentence. The appellate court found the trial court's comments, while at times inartful, confusing, and indecorous, were obviously well intentioned. Accordingly, the appellate court affirmed the trial court's judgment.

People v. Breshears, 2023 IL App (4th) 220947.

Second District Overturns Trial Court's Denial of Defendant's Motion to Withdraw Guilty Plea Due to Defense Counsel's Conflict of Interest

In *People v. Salamie*, the defendant was indicted on two counts of domestic battery and one count of interfering with the reporting of domestic violence. Ultimately, the defendant's counsel represented to the court that the defendant had agreed to plead guilty to one count of felony domestic battery, with the State dismissing the other two charges. A condition of defendant's plea agreement was that, if she successfully completed the mental health court's treatment program, her felony conviction would be vacated and a misdemeanor domestic battery conviction would be entered. If she were unsuccessfully discharged from the mental health court program, she would be sentenced to two years' imprisonment.

The defendant was not able to receive the mental health treatment that would have been applicable to her because the metal health court failed to secure it in a timely fashion. As a result, and without the defendant receiving any mental health treatment, the mental health court discharged the defendant form the mental health court program "neutrally" meaning "she did not do anything wrong." The defendant then entered into an agreed sentence whereby she would be on six months' conditional discharge for felony domestic battery.

The defendant's counsel then filed a motion to withdraw the defendant's guilty plea arguing in part that the defendant received advice from him that upon her neutral discharge she had three options: (1) withdraw her plea, (2) renegotiate her plea, or (3) stand on

her guilty plea and receive an open sentence. The defense counsel further argued that this information was incorrect, in that the third option was not a legally viable one. He also argued that it was this third possibility that coerced the defendant into accepting the State's offer that entailed a felony conviction without the possibility of receiving a reduction to a misdemeanor.

On appeal of the trial court's denying the motion to withdraw guilty plea, the defendant raised, among other grounds, that Illinois Supreme Court Rule 604(d) requires that counsel be free from conflict, and a conflict arose here when counsel implicitly raised his own ineffectiveness in defendant's motion to withdraw her guilty plea.

The Illinois Appellate Court Second District expressed no opinion on whether the advice that the defense counsel provided was actually incorrect, or whether the defendant relied on that advice. It however, found that the defense counsel had an actual conflict of interest during his argument of the defendant's motion to withdraw the guilty plea. The appellate court found that the record demonstrated that the conflict of interest affected his performance of arguing zealously on behalf of the client.

The Second District found that, in presenting the motion to withdraw the guilty plea, defense counsel was reluctant to cast blame on himself, or anyone else. The appellate court believed that in the motion defense counsel deemphasized his role as counsel, using passive language such as the client "being misinformed" about her options, instead of directly asserting that he had provided her with the deficient advice. The Second District also emphasized that during the hearing on the motion to withdraw the guilty plea, counsel argued "I think she made that decision based on—I don't want to say bad advice, but on some faulty potential, I guess I would say." The Second District also noted that defense counsel failed to include in the motion to withdraw the guilty plea the e-mail discussion he had with defendant, during which defendant allegedly agreed to accept the prosecution's offer of conditional discharge, although these e-mails were the basis for his argument to withdraw the plea.

The Second District concluded that because this conflict adversely affected defense counsel, he did not sufficiently zealously argue that he provided the defendant bad advice, and that the defendant relied on that bad advice. The appellate court therefore vacated the trial court's denial of the motion to withdraw guilty plea and directed the trial court to appoint conflict-free counsel for the defendant on remand.

People v. Salamie, 2023 IL App (2d) 220312.

Second District Finds that Defense Counsel was Ineffective for Failing to Object to the Late Disclosure of an Expert Opinion by the Prosecution

In *People v. Currie*, the defendant appealed his conviction for predatory criminal sexual assault of his niece and nephew. The defendant denied the charges at trial, and there were contradictions in the testimony of his niece and nephew. During the trial, the State's expert witness testified to opinions explaining why there are delayed reports in child sexual abuse cases, why children are reluctant to talk about sexual abuse, and why children make inconsistent claims about sexual abuse. The defense counsel did not object to this testimony.

In his motion for a new trial, the defendant argued that the State failed to disclose that this expert would provide these opinions. The defendant further argued in his motion that because the State failed to disclose this information his trial counsel did not have the opportunity to retain an expert to review and prepare a response. The trial court found that the State's failure to disclose that it would seek to introduce this testimony constituted a discovery violation. The trial court, however, denied the defendant's motion for a new trial. In denying the motion, the trial court mentioned that the lack of an objection by trial counsel at the time of this expert's testimony "weighed heavily" in its decision.

On appeal, the Illinois Appellate Court Second District noted that the defendant's trial counsel explained that she did not object at trial to this expert's opinions because the State's line of questioning surprised her. The appellate court reasoned that failing to object due to "surprise" is not a reasonable trial strategy. It, therefore, found that the defendant's trial counsel's representation fell below an objective standard of reasonableness.

The Second District believed that, had the defendant's trial counsel timely objected, she could have requested a continuance in order to better prepare her cross-examination of the expert and to better prepare her closing argument to respond to the expert's testimony. It noted that the trial court's comments suggest that it would have granted counsel's request for a continuance had one been requested.

The Second District held that the defendant's trial counsel's deficient performance prejudiced the defendant and so deprived him of the effective assistance of counsel. The appellate court, therefore, vacated the defendant's conviction and remanded the case for a new trial.

People v. Currie, 2023 IL App (2d) 220114.

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Seventh Circuit Finds that Defense Attorney did not have a Conflict of Interest in not Calling to the Stand during Trial a Witness who Accused that Attorney of Pressuring Him to Change his Testimony

In *United States v. Wright*, the defendant was on trial for conspiring to distribute and possess with intent to distribute methamphetamine. In its opening statement the government previewed testimony of a man who allegedly was a middleman and purchased methamphetamine from the defendant. The defendant's attorney also mentioned this man in his opening statement calling him a government witness and stating that this witness would testify that he never saw defendant with large amounts of methamphetamine. The defense attorney did not plan on calling this man as a witness for the defense, just cross-examining him.

The morning of the second day of trial, the government alerted the court that while prepping the witness the night before the witness told the government attorneys that during a meeting a few months earlier the defense attorney insinuated that the witness lied to the grand jury and encouraged him to change his testimony. The government referenced the potentially exculpatory testimony but did not explain whether the witness had changed those aspects of his testimony. The government stated that it no longer planned to call him as a witness.

The government informed the court of a potential conflict, *i.e.*, if defense called the witness, and he testified to being pressured to change his testimony, the defense attorney would have to take the stand to impeach him. Consequently, it was possible that the defense attorney's decision not to call the witness could be motivated by self-interest and in conflict with the defendant's best interest.

The defense attorney denied the allegations that the witness made against him. The defense attorney represented that since the government was not calling the witness, he had no idea what the witness would testify. Further, if the witness was going to accuse him of pressuring him to change testimony, he would not call him. Finally, if the witness would testify to such matters, he could not imagine why the defendant would want this witness to take the stand. The defense attorney believed that these points of argument vitiated any conflict.

The court asked the defense counsel to confer with his client, after which, the defendant confirmed to the court that she understood the possibility that her defense attorney was personally motivated not to call the witness, but she understood and agreed with the defense attorney's strategy not to call the witness.

After the defendant's conviction, she appealed on several grounds, including that her attorney's actual conflict of interest violated her Constitutional Sixth Amendment right to conflict-free counsel. The Seventh Circuit found that there was no actual conflict of interest in this case. It noted that neither the government nor the defense attorney believed there was an actual conflict of interest. The appellate court stressed that the government argued to the trial court only that the situation "could potentially create a conflict" under certain, contingent circumstances, and the defense attorney agreed that there was no conflict of interest.

The Seventh Circuit reasoned that while the decision to not call the witness might have been to the defense attorney's benefit, the defense attorney believed it was also in the defendant's best interest. The Seventh Circuit also noted that the trial court appeared to agree with this, in that the trial court remarked to the defendant in discussing the situation "'[W]e're not really sure what [this witness] might testify to.'" The Seventh Circuit believed that the government, the defense counsel, and the trial court all understood the risks inherent in calling a witness who changed his story the night before testifying. The appellate court believed that this made the witness in question an extremely risky witness even if he could provide potentially helpful testimony to the defense.

The Seventh Circuit further found that the risks associated with calling this witness also prevented the defendant from proving that failing to call this witness had an adverse effect on her defense. The Seventh Circuit rejected the defendant's appeal, including the conflict of interest argument, and affirmed her conviction.

United States v. Wright, 85 F.4th 851 (7th Cir. 2023).

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Survey of Insurance Law Cases

Illinois Supreme Court Holds That "Property Damage" Under CGL Policy May Include Damage to Construction Work Performed by Insured

In *Acuity v. M/I Homes of Chicago, LLC*, the Illinois Supreme Court held that "property damage" that results from inadvertent faulty construction work constitutes an "occurrence" under a CGL policy. The court further rejected a line of appellate decision and held that "property damage" to something other than the construction project itself was unnecessary to establish "property damage" caused by an "occurrence." The court concluded that such a premise was erroneous and "not grounded in the language of the initial grant of coverage" in the policy.

The underlying lawsuit was brought by a homeowners' association against the developer. The association alleged that the developer constructed and sold the townhomes with substantial exterior defects. None of the alleged defective work was completed by the developer—all work was completed by subcontractors and a designer. These construction defects, according to the underlying complaint, "caused physical injury" to the townhomes after construction was completed "from repeated exposure to substantially the same general harmful conditions." The association claimed that the "property damage" was an accident that was neither expected nor intended from the developer's standpoint, and that the subcontractors' work caused "damage to other portions" of the townhomes.

The insurer for one of the subcontractors sought a declaration that it owed no duty to defend or indemnify the developer, which was an additional insured under the subcontractor's policy. The insurer argued that the developer was responsible for all the townhomes and that any allegation of damage necessarily related to defective construction and not to any damage of property beyond the townhomes themselves. Therefore, argued the insurer, there was no covered "property damage" caused by an "occurrence" under the policy.

The circuit court agreed, granting the insurer summary judgment. On appeal, the Illinois Appellate Court, First District, noted that a requirement of damage to "other property" is not explicitly present in the policy, but instead arises from a line of cases interpreting CGL policies. The court questioned the rationale for the continued existence of this requirement absent policy language to the contrary. While the court set forth reasons to eliminate the "other property" requirement, it declined to do so. Instead, it held that a subcontractor's work should be viewed as a discrete project, and thus damage to other portions of the larger construction project meets the damage to "other property" requirement. The appellate court held that the underlying complaint alleged that defective subcontractor work damaged portions of the townhomes other than the work of those subcontractors. Interpreting the complaint liberally in favor of the developer as an additional insured, the court concluded that damage to "other property" was alleged, triggering a duty to defend.

The Illinois Supreme Court affirmed the appellate court in part and reversed in part, and remanded for further proceedings on the applicability of certain exclusions. First, the court noted that there was nothing in the CGL policy's initial grant of coverage that suggested that the association's claims were not covered. Rather, a CGL policy is "a very broad liability policy whereby the insurer assumes a wide scope of risks." The policy provided coverage for "property damage" caused by "an occurrence." "Property damage" was defined in the policy as "physical injury to tangible property, including all resulting loss of use." The court noted that physical injury is sustained where the property is "altered in appearance, shape, color or in other material dimension." The court concluded that the association was seeking recovery for water damage to the interior of units, which was a physical injury to tangible property. Accordingly, the underlying complaint alleged "property damage."

The court then addressed whether the alleged damage was caused by an "occurrence," which was defined in the policy as meaning "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Accident" was not defined in the policy, so the court looked to how "accident" has been defined in Illinois case law and in dictionaries. Based upon these definitions, the court held that "the term 'accident' . . . reasonably encompasses the unintended and unexpected harm caused by the negligent conduct." Here, because neither the harm nor the cause of the harm was "intended, anticipated, or expected," the complained of conduct constituted an "accident," and therefore there was an "occurrence" under the CGL policy. In addressing the insurer's argument that a CGL policy is not intended "to insure the cost to repair or replace defective work," it noted that certain exclusions in the policy would be meaningless if "all construction

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defects that result in property damage to the completed project" were always excluded.

Finally, and most notably, the Illinois Supreme Court rejected the premise that there can be no "property damage" caused by an "occurrence" unless the underlying complaint alleges damage to some property other than the construction project itself. This premise, concluded the court, "is not grounded in the language of the initial grant of coverage in the insuring agreement," and to the extent appellate cases "have relied upon considerations outside the scope of the insuring agreement's express language," the court held that those cases "should no longer be relied upon."

Without deciding whether the insurer owed a duty to defend, the court reversed the circuit court's entry of summary judgment in the insurer's favor. The court noted that on remand, the trial court should consider whether certain "business risk" exclusions for damage to that "particular part of any property that must be restored, repaired or replaced because your work was incorrectly performed on it" and damage to your work applied to bar coverage. The court also pointed out these exclusions contained exceptions that could be relevant to determining whether the insurer owed a duty to defend.

Acuity v. M/I Homes of Chicago, LLC, 2023 IL 129087.

D&O Excess Liability Insurance Policy Covered Settlement of Claim under the False Claims Act to Recover Payments Made in Violation of the Anti-Kickback Statute

In *Astellas US Holding, Inc. v. Fed. Ins. Co.*, the U.S. Department of Justice began to investigate Astellas, a pharmaceutical company, for potential health care offenses arising out of its contributions to "patient assistance plans," which cover the costs of treatment with an expensive new cancer drug. It issued a Civil Investigative Demand relating to possible violations of the Anti-Kickback Statute and the False Claims Act. The government sought approximately $164 million for Medicare losses attributable to contributions made by Astellas, which settled with the federal government for $100 million. Astellas turned to its liability insurers to cover the $100 million settlement payment. One of its insurers denied coverage under its directors' and officers' excess liability policy, which had a $10 million policy limit. Astellas filed suit for breach of the insurance contract. The insurer argued that the settlement payment both compensated the government for its losses and disgorged at least some of the fraudulent gains. Because the settlement payment constituted at least a "subset" of the gains, the insurer argued that this "overlap" between Astellas's gains and the government's losses rendered the $100 million settlement payment wholly restitutionary, so that not even $10 million of the settlement would be insurable. The district court granted summary judgment in favor of Astellas, finding that Illinois law and public policy did not prohibit insurance coverage for at least $10 million of the settlement payment.

The Seventh Circuit Court of Appeals affirmed, holding that Astellas was entitled to coverage for settlement of the False Claims Act claim. The Seventh Circuit recognized that in cases where the insured enters into a settlement that disposes of both covered and non-covered claims, the insurer's duty to indemnify encompasses the entire settlement if the covered claims were the "primary focus" of the litigation. In this case, the Seventh Circuit noted that no claims ever became the "primary focus" of the litigation, because there were only potential claims that the government investigated and then settled without a lawsuit. Further, the Seventh Circuit held that the insurer would have to show that the $10 million Astellas sought to recover under the insurance policy applied to an uninsurable portion of the settlement payment. Even in cases where settlement payments unquestionably included some restitution, Illinois courts give the benefit of the doubt to the insureds. Accordingly, the Seventh Circuit agreed with the district court that the settlement payment, rather than restitutionary, was a covered "loss" under the policy.

Astellas US Holding, Inc. v. Fed. Ins. Co., 66 F.4th 1055 (7th Cir. 2023).

Department of Insurance has Sole Authority to Enforce Rules for the Adjustment of Claims

Plaintiff was a passenger in a taxicab when it was involved in an accident with an uninsured motorist. The cab company's insurance policy covered certain damages resulting from the accident with the uninsured motorist, including damages sustained by cab passengers. After an Illinois court found that the policy covered plaintiff's claim up to the $350,000 policy limit, plaintiff sent a letter to the insurer and requested payment of the limit. Thereafter, plaintiff filed suit in federal court seeking specific performance and the insurer's adjustment of her claim within fourteen days. The insurer filed a motion to dismiss and argued that the correct way for plaintiff to pursue her claim was through arbitration and the Illinois Department of Insurance. At the hearing, plaintiff's attorney confirmed that the source of the insurer's obligation to adjust the claim in a timely fashion stemmed from the Illinois Insurance Code. The district court granted the insurer's motion to

dismiss on the basis that plaintiff failed to cite any language in the insurance contract that created an obligation to adjust her claim or to do so within a certain timeframe. Instead, the district court held that plaintiff relied upon certain sections of the Illinois Insurance Code that did not provide a private right of action.

The Seventh Circuit Court of Appeals affirmed, holding that without an alleged contractual provision obligating the insurer to adjust her claim, the Illinois Department of Insurance has the sole authority to enforce the insurance rules contained in the Illinois Administrative Code, and the proper remedy for a party who alleges a violation is to submit a complaint to the department.

Bernacchi v. First Chicago Ins. Co., 52 F.4th 324 (7th Cir. 2022).

Catch-All Provision in Violation-of-Law Exclusion Did Not Exclude Coverage for BIPA Lawsuits

In *Citizens Ins. Co. of Am. v. Wynndalco Enterprises, LLC*, the Seventh Circuit Court of Appeals affirmed the district court's entry of judgment on the pleadings, holding that a catch-all provision in a policy's Distribution of Material in Violation of Statutes exclusion was facially ambiguous and required construing the policy in favor of coverage for the insured.

The insured was named in two underlying class actions brought for alleged violations of the Biometric Information Privacy Act ("BIPA"). BIPA has been broadly characterized as codifying "an individual's right of privacy in and control over his or her biometric identifiers and biometric information." The insured sought coverage from its insurer under a liability policy that provided coverage for, among other things, "personal and advertising injury." The policy defined "personal and advertising injury," in part, as "injury, including consequential 'bodily injury,' arising out of one or more of the following offenses . . . [o]ral or written publication, in any manner, of material that violates a person's right of privacy." Although the insurer did not dispute that the insured's alleged conduct fell within the policy's definition of "personal and advertising injury," it asserted that the claims were barred by the catch-all provision in the policy's Distribution of Material in Violation of Statutes exclusion. The catch-all provision barred coverage for violations of "[a]ny other laws, statutes, ordinances, or regulations, that address, prohibit or limit the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information." The district court held that the provision was facially ambiguous and not enforceable, because a literal reading of the provision would exclude coverage not only for BIPA claims, but also for "a number of other statutory causes of action that the policy in the first instance purported to cover, including slander, libel, trademark and copyright."

After conducting its analysis, the Seventh Circuit concluded "[o]n a plain-text reading, the catch-all provision has an extremely broad sweep—so broad, in fact, that the exclusion on its face would eliminate coverage for a number of statutory injuries expressly included in the definition of 'personal and advertising injur[ies]' that the policy purports to cover." Consequently, the clash between competing policy provisions gave rise to an ambiguity, requiring the policy be construed in favor of coverage.

Citizens Ins. Co. of America v. Wynndalco Enterprises, LLC, 70 F.4th 987 (7th Cir. 2023).

Note: The Illinois Appellate Court, First Judicial District, recently disagreed with this decision in *National Fire Ins. Co. of Hartford v. Visual Pak Co., Inc*., 2023 IL App (1st) 221160. There, the court upheld a slightly differently worded violation-of-law exclusion, holding that the insurers owed no duty to defend an underlying BIPA suit. As of the time of publication of the Annual Survey, the decision is not final.

Hotel's Operation of a Cooling Water Intake/Discharge System Without a Valid Permit in Violation of Statutory and Regulatory Environmental Requirements Was Not an "Occurrence" Under a CGL Policy

In *Cont'l Cas. Co. v. 401 N. Wabash Venture, LLC*, the Illinois Appellate Court, First District, addressed the "occurrence" requirement under commercial general liability policies. There, the State of Illinois and several environmental groups sued a hotel operator concerning its allegedly improper operation of a water intake/discharge system, which withdrew water from the Chicago River for the hotel's HVAC system and discharged heated effluent. The crux of the complaints was the hotel's alleged failure to have the necessary permits required under state and federal statutes for the operation of the cooling water intake/discharge system.

Several insurers had issued the hotel commercial general liability policies that defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." One of the insurers filed a declaratory judgment action against the hotel and its other insurers, seeking a declaration

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that it had no duty to defend or indemnify the hotel in connection with the underlying complaints. The hotel's insurers then sought judgment on the pleadings arguing, among other things, that there was no "occurrence," because the intentional operation of the water intake/discharge system could not be an accident under the policies. The hotel opposed the motions, arguing that the insurers ignored the underlying complaints' allegations of harm to fish and other wildlife, and that there was no indication that the hotel intentionally caused the harm. The circuit court granted the motions, finding there was no "occurrence" under the policies and that the policies' pollution exclusion barred coverage in any event.

The appellate court affirmed, rejecting the hotel's argument that the relevant inquiry for an "occurrence" was whether the hotel expected or intended its operation of the intake/discharge system to harm fish and other wildlife. The insurers maintained the relevant inquiry was the hotel's intentional operation of the intake/discharge system without a valid permit. The court held that the proper focus was the hotel's operation of the intake/discharge system generally—"not the ultimate results of that operation" that allegedly harmed fish and other wildlife.

In so holding, the court explained that even if the intake/discharge system's impact to fish and other wildlife was relevant in determining whether there was an "occurrence," there was no "occurrence" because "[t]he natural and ordinary consequences of an act do not constitute an accident." The hotel was required to submit historical and current studies regarding the intake/discharge system's impact to fish and other wildlife for its permit. Thus, the hotel knew that any alleged harm to fish and other wildlife resulting from operating the intake/discharge system was the "natural and ordinary consequence" of its use. Consequently, even if the alleged harm to fish and other wildlife should be considered, there was no "occurrence" under the policies.

Cont'l Cas. Co. v. 401 N. Wabash Venture, LLC, 2023 IL App (1st) 221625.

Breach of Contract Action Against Insurer Not Precluded Where Prior Voluntary Dismissal Reserved Right to Proceed in Subsequent Action

In *Creation Supply, Inc. v. Selective Ins. Co. of the Southeast,* the Seventh Circuit Court of Appeals addressed (after a long and winding procedural history) whether the doctrines of claim and issue preclusion barred a federal lawsuit that had been expressly reserved by an Illinois state court. The insured, a producer of markers, initially sued its insurer in 2012 in Illinois state court, alleging that the carrier breached its duty to defend an underlying suit brought by one of its competitors for trademark violations. The underlying suit settled in 2013 and prevented the insured from selling one of its primary lines of markers. The Illinois state court granted the insured partial summary judgment, finding that the insurer breached its duty to defend and awarded incidental relief. On appeal, the appellate court limited the incidental relief to attorney's fees the insured incurred before settlement of the underlying trademark litigation.

In 2014, the insured filed a separate suit in federal court, alleging breach of contract and asserting a claim against the insurer for vexatious and unreasonable conduct under section 155 of the Illinois Insurance Code. In 2016, the insured voluntarily dismissed its state court action without its insurer's objection. In dismissing that action, the state court expressly reserved the insured's right to bring a breach of contract action in federal court. The federal court granted the insured partial summary judgment on the issue of insurance coverage, found for the insured in a bench trial on the section 155 claim, and awarded $3 million in damages on the section 155 claim alone. On appeal, the Seventh Circuit Court of Appeals reversed and remanded with instructions to decide the remaining issue of contract damages.

The district court on remand denied the insured's motion to seek punitive damages and dismissed the breach of contract claim as precluded by the prior state court action, despite the state court's express reservation of the insured's right to refile the claim in federal court.

With respect to claim preclusion, the Seventh Circuit held in the second appeal that the Illinois state court's express reservation of the insured's right to refile a breach of contract claim in federal court was sufficient grounds to allow the federal court lawsuit to proceed. The Seventh Circuit relied on an exception to claim preclusion contained in the Restatement (Second) of Judgments that permits an action otherwise barred by claim preclusion if "[t]he court in the first action expressly reserved the plaintiff's right to maintain the second action." With respect to issue preclusion, the insurer argued that the insured was barred from bringing any other action in any forum based on the insurer's breach of its duty to defend. The Seventh Circuit was quick to note that issue preclusion does not prevent "multiple rounds" of litigation—it only narrows the scope of disputed issues. The court also noted that the incidental relief that the insured obtained from the Illinois state court was narrower and different from the consequential damages or other unrecovered fees the insured sought to recover stemming from the breach of contract claim. The Seventh Circuit affirmed the denial of the insured's motion to amend and once again remanded for a determination of the insured's breach of contract damages.

Creation Supply, Inc. v. Selective Ins. Co. of the Southeast, 51 F.4th 759 (7th Cir. 2022).

Absent Demonstrable Prejudice, Insurer Could Not Rely Upon Insured's 23-Month Delay in Giving Notice of Claim to Decline Uninsured Motorist Coverage

In *Direct Auto Ins. Co. v. O'Neal*, the Illinois Appellate Court, First District, held that an insured's 23-month delay in giving notice did not prejudice the insurer, and therefore the insurer could not avoid uninsured motorist coverage for an accident.

There, the insured made the claim under her automobile policy. Although the insured's attorney sent a letter informing the insurer of the accident within six months, the address was old and the insurer did not receive actual notice until 23 months later, just days after the insured demanded and filed for arbitration. The insurer filed a declaratory judgment action and relied on a 30-day written notice provision in the policy. In a bench trial, the trial court found that the insured substantially complied with this notice provision and that the insurer suffered no prejudice from the delay.

The First District affirmed, holding that while a notice provision can be a valid prerequisite to coverage, to justify the insurer's nonperformance, the delay must materially breach the policy. To constitute a material breach, the delay must prejudice the insurer or be unjustifiably late. The court held that there was no demonstrable prejudice because the insurer had not conducted any investigation prior to filing its declaratory action. The insurer could not therefore show how the delay precluded a meaningful investigation. Similarly, by not conducting any investigation, the insurer could not know what it would have done differently had it received timely notice. Finally, the court held that the delay was not unjustified, because the insured's attorney had sent notice to the insurer, albeit to an old address listed in the policy six months after the accident.

Direct Auto Ins. Co. v. O'Neal, 2022 IL App (1st) 211568.

Insurer Entitled to Declaratory Judgment When Insured Stipulated to Criminal Battery and Exclusion for "Expected or Intended" Injury Applied to Eliminate Liability Coverage

In *Erie Ins. Co. v. Gibbs*, the insurer filed a declaratory judgment action for a determination that it owed no duty to defend a negligence action brought against its insured, who had pushed and injured a hospital employee while he was attempting to leave his hospital room. Before the altercation took place, the police had taken the insured to the hospital when he had a blood alcohol concentration of 0.282 following a domestic dispute. After stipulating to the facts alleged by the prosecution, the insured was found guilty of two counts of misdemeanor battery arising from his conduct as a patient at the hospital.

The underlying negligence action alleged that the insured failed to "drink in a reasonable manner," "urinate in a reasonable manner," "urinate in a reasonable location," and to "reasonably respond to plaintiff's attempts to help him." The insurer's declaratory judgment action alleged that: (1) the facts did not constitute an "occurrence" under the home insurance policy; (2) the exclusion for bodily injury "expected or intended" by the insured applied; and (3) the exclusion for physical abuse applied. The insured filed a motion to stay to prevent a ruling on the coverage action until the underlying suit was resolved. The circuit court denied the insured's motion to stay and granted summary judgment in the insurer's favor. The circuit court found that the insured acted intentionally, and therefore the coverage for the complained-of conduct at the hospital was excluded under the policies.

On appeal, the Illinois Appellate Court, Third District, affirmed. It held that the coverage action would not have a preclusive effect on the negligence action. A criminal conviction can collaterally estop the retrial of any issue in a subsequent civil trial that was actually litigated in the criminal trial. Here, the court concluded that the insured had stipulated to the State's facts, including that he intentionally pushed the hospital employee, and his misdemeanor battery convictions were conclusive evidence that his conduct was intentional and excluded from coverage under the policy.

Erie Ins. Co. v. Gibbs, 2023 IL App (3rd) 220143.

Auto Exclusion Eliminated Coverage for Accident Under CGL Policy Where Truck Driver was Both an Executive and Employee of Insured Corporation

In *Erie Ins. Exchange v. Aral Constr. Corp.*, the circuit court granted summary judgment in favor of the CGL insurer based on the auto exclusion in the policy. There, the occupant of a parked vehicle alleged in the underlying negligence action that she was injured and her auto was damaged when a truck struck the door of the parked car she was exiting and knocked her unconscious. The CGL policy insured a construction company. The driver of the truck was both

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the sole officer and sole employee of the company. The truck was personally owned by the driver, who insured it with another carrier through a policy with a $25,000 liability limit, and while he used the truck for construction projects, the truck lacked any markings that would lead one to believe it was a company vehicle. The CGL policy provided that "'executive officers' and 'directors'" were insureds but only with respect to their duties as officers and directors. Employees of the company were also insureds, but only for acts within the scope of their employment. On cross-motions for summary judgment, the circuit court held that as the truck was owned and operated by the driver, he was an employee of the company, and the auto exclusion barred coverage under the CGL policy.

The Illinois Appellate Court, First District, affirmed. The court rejected the underlying plaintiff's argument that the driver of the truck was not acting as an employee but as the company's executive at the time of the accident. The underlying plaintiff further argued that because operating the truck did not relate to executive officer duties, the truck driver was not an "insured" and therefore the auto exclusion was inapplicable. The court concluded that the underlying plaintiff's interpretation was unreasonable and unsupported by legal authority. Rather, a plain reading of the policy made clear that both employees and executives were "insureds" under the CGL policy, and the auto exclusion expressly eliminated coverage arising from the use of any auto by "any insured." The fact that the employee was also an executive did not eliminate the driver's "insured" status as an employee. To find otherwise would lead to an absurd result, particularly in instances of providing coverage to sole proprietorships.

Erie Ins. Exchange v. Aral Constr. Corp., 2022 IL App (1st) 210628.

Complete Defense Rule Inapplicable to Title Insurance Claims

In *Findlay v. Chicago Title Ins. Co.*, the Illinois Appellate Court, First District, held that title insurance claims are exempt from the complete defense rule. The complete defense rule (*i.e.*, the "in for one, in for all rule") generally requires an insurer to defend all claims in a complaint even where only one or some of the claims are potentially covered. In *Findlay*, plaintiffs purchased a beach-front lot on Lake Michigan. In the underlying action, they were sued by neighboring property owners who sought a declaration that an implied ingress-egress easement ran across plaintiffs' property and plaintiffs counterclaimed. All parties had title insurance with Chicago Title, and Chicago Title hired counsel for all parties involved. As to plaintiffs, Chicago Title agreed to defend and indemnify only some of the claims. At plaintiffs' request, Chicago Title replaced the defense attorney it had initially retained with new counsel, plaintiffs retained counsel of their own in addition to the defense attorneys provided by Chicago Title, and plaintiffs eventually secured a declaration that no implied easement existed across their property.

Plaintiffs then brought suit *pro se* against Chicago Title, claiming, among other things, that Chicago Title created a conflict of interest and breached the insurance contract by failing to defend on all counts in the underlying litigation. The trial court entered summary judgment in favor of Chicago Title and plaintiffs appealed.

The First District affirmed. In assessing the applicability of the complete defense rule to title insurance claims, the court noted that the rule generally stems from the broad defense language contained in general liability policies. According to the court, one justification for the rule is that "dividing representation between covered and noncovered claims is impractical." The court examined cases from other jurisdictions and noted that an increasing number of jurisdictions hold that the rationale for the complete defense rule does not apply to title insurance. Indeed, title insurance, unlike other forms of insurance, "only indemnifies and covers losses from defects in title, lien property, encumbrances, and other similar risks," generally requires only a one-time premium, and is "retrospective rather than prospective." Additionally, the court concluded that title insurance claims tend to be discrete and easily bifurcated from related claims. Accordingly, and adopting the analyses from Seventh Circuit Court of Appeals cases, the court held that "the complete defense rule does not apply in the context of title insurance."

Findlay v. Chicago Title Ins. Co., 2022 IL App (1st) 210889.

Uninured Motorist Policy Provision Conditioning Insured's Right to Recover on Occupancy of Insured Automobile is Unenforceable

In *Galarza v. Direct Auto Ins. Co.*, the Illinois Supreme Court held that a policy provision that limited uninsured motorist coverage to occupants of an insured vehicle at the time of an accident violated public policy and was invalid. There, a 14-year-old boy was involved in a hit-and-run accident while riding his bicycle. The uninsured motorist insurer denied coverage in the declaratory judgment action, arguing that while the claimant qualified as an "insured," the coverage was limited to insureds who are occupying an "insured automobile" at the time of the accident. The claimant countered that conditioning coverage on occupancy of a vehicle precluded coverage for pedestrians and cyclists in violation of section 143a of the

Illinois Insurance Code. On cross-motions, the trial court entered summary judgment in the insurer's favor.

The Illinois Appellate Court, First District, relied on section 143a and concluded that uninsured motorist coverage is mandated for "the protection of persons insured" under an automobile liability policy. In the appellate court's opinion, the insurer impermissibly attempted to condition this statutorily required coverage on the insured's occupancy of an insured vehicle. To do so undercut the very purpose of the uninsured motorist statute—placing the insured in substantially the same position as if the uninsured motorist had insurance coverage. While the court noted that "an insured seeking to invalidate an insurance policy provision as against public policy bears a heavy burden, such burden has been satisfied in the instant case." The Illinois Supreme Court allowed the insurer's petition for leave to appeal.

The Illinois Supreme Court agreed with the appellate court's analysis, holding the limitation included in the policy violated section 143a of the Insurance Code and was unenforceable as a matter of public policy. The court noted that it had previously determined that uninsured motorist coverage "must extend to all who are insured under the policy's liability provisions," and that an insurer may not "either directly or indirectly, deny uninsured-motorist coverage to that person." The court reiterated that the public policy behind uninsured motorist coverage "is to place the insured in the same position as if the at-fault party carried the requisite liability insurance." For that reason, the court concluded that whether the injured person occupied an insured vehicle was not the proper inquiry. Instead, the appropriate inquiry under section 143a was whether the injury arose out of the "ownership, maintenance, or use of a motor vehicle, including the uninsured vehicle." Section 143a requires that liability policies include coverage for "any person" injured arising out the use of the "ownership, maintenance, or use of a motor vehicle," and the person's status as an occupant of a vehicle is irrelevant.

Galarza v. Direct Auto Ins. Co., 2023 IL 129031.

Original Complaint Constituted Reportable Claim Under Claims-Made Policies Even Though Only Relief Sought was Declaratory in Nature

In *Hanover Ins. Co. v. R.W. Dunteman Co.*, a D&O insurer insured two family-owned construction businesses under consecutive "claims made" insurance policies. The policies required the insured to timely report any claim during the same policy period in which the claim was first made. There, an estate filed suit for a declaratory judgment against one of the insured companies in 2017, but included allegations concerning the actions of various family members as officers, directors and shareholders. The estate thereafter amended the complaint twice, broadened the allegations of wrongdoing, and added the family members and the other construction business as defendants in 2018. It was only at that point in the next policy period that the D&O insurer was first notified of the suit. The insurer denied coverage, citing the insureds' failure to timely notify it of the claim during the same policy period in which it was first made in 2017. After denying coverage, the insurer filed a declaratory judgment action in federal court and the insureds counterclaimed for a declaration of coverage. On cross-motions for judgment on the pleadings, the district court entered judgment in favor of the insurer.

The Seventh Circuit Court of Appeals affirmed, holding the estate's original complaint constituted a reportable claim under the 2017 policy, even though the relief sought was declaratory in nature. The reporting obligation did not depend on the specific remedies sought in the underlying suit. The broadened allegations of wrongdoing by family members as officers, directors and shareholders did not create a new claim first made during the 2018 policy period. The insureds' notice to the insurer was untimely and the insurer was justified in denying coverage.

Hanover Ins. Co. v. R.W. Dunteman Co., 51 F.4th 779 (7th Cir. 2022).

"Other Insurance" Provision Made Carrier Excess and Insurer Was Not Required to Contribute to Insured's Defense Costs

In *Indem. Ins. Co. of N. Am. v. Westfield Ins. Co.*, a swine farm being sued for public nuisance notified its insurers of the action against it. One of the insurers, Indemnity Insurance Company of North America, advised the insured that it may not provide coverage due to an exclusion in the policy. Indemnity also notified the insured that it would seek a declaratory judgment reflecting the same. At this time, the insured had two separate policies with Indemnity. Indemnity's communications with the insured only referenced one of the insurance policies, despite the insured having filed claims under each policy.

The insured withdrew its tender of defense to Indemnity, and the insured's other two insurers agreed to split the defense costs of the insured. Later, new case law emerged holding that the exclusion relied upon by Indemnity in denying coverage was inapplicable to odor claims like the one asserted in the underlying action here. The insured again requested that Indemnity participate in its defense.

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In response, Indemnity filed another declaratory judgment action in federal court seeking a declaration that it had no duty to defend its insured and that its insurance coverage was in excess to other insurance. After cross claims and counter suits were filed between the three insurers, the district court consolidated the cases and the three carriers each sought summary judgment. The district court denied Indemnity's motion and granted in part and denied in part the motions of the other two insurance carriers.

The Seventh Circuit Court of Appeals reversed, holding that Indemity's "other insurance" provision relieved it of any duty to defend the insured. The court further held that Indemnity was "not estopped from asserting this defense because it promptly responded to [its insured's] tender of defense with reservation of rights letters and a declaratory judgment action."

Indem. Ins. Co. of N. Am. v. Westfield Ins. Co., 58 F.4th 276 (7th Cir. 2023).

Anti-Stacking Clause Prevents Stacking of Liability Limits That are Listed Multiple Times on Declarations

In *Kuhn v. Owners Ins. Co.*, a bus driver injured in an accident with a semitruck filed a declaratory judgment action against the trucking company's liability insurer, seeking a finding that the policy limits could be stacked because the $1 million limit of liability was listed separately for each of the seven vehicles insured under the policy. The policy provided that the insurer would "pay damages . . . for bodily injury up to the Limit of Insurance shown in the Declarations," and the plaintiff argued there was $7 million in liability coverage because the $1 million limit was listed seven times in the declarations. The insurer argued that the declarations were unambiguous, showed a "Combined Liability" limit of $1 million for each accident, and that its anti-stacking clause prevented stacking. Such clause provided that "[t]he Limit of Insurance for this coverage may not be added to the limits for the same or similar coverage applying to other autos insured by this policy to determine the amount of coverage available for any one accident . . . regardless of the number of . . . covered autos." In its 73-page order, the trial court found the policy ambiguous and held that stacking was permitted because the limit of insurance was listed multiple times.

The Illinois Appellate Court, Fourth District, reversed, holding that the policy plainly provided coverage of only "$1 million each accident," and even if there was some ambiguity, the policy's anti-stacking clause cleared up any possible confusion. The court recognized that the Illinois Supreme Court has stated that while "it would not be difficult to find an ambiguity arising from the declarations page that lists the liability limits separately for each coverage vehicle," it also noted there is no *per se* rule of ambiguity "anytime the limits are noted more than once in the declarations." "Rather, the question [of stacking] should be decided on a case-by-case basis."

The appellate court thereafter examined the liability policy at issue before reaching its conclusion that it was not subject to stacking. Specifically, the term "Limit of Insurance" appeared in the declarations only once and listed the "Combined Liability" limit of "$1 million each accident" immediately after that term. The court then reasoned that because the coverages varied for each of the seven vehicles that were insured, it was reasonable for the insurer to itemize each of the vehicles separately. It also found that no reasonable insured would believe that such itemization allowed stacking, particularly given that the seven itemized premiums for liability coverage equaled the total premium shown in the declarations for liability insurance coverage. Finally, even if there was some ambiguity, the court noted that the policy contained the above anti-stacking clause, and that provision was unambiguous and barred stacking where there were multiple insured vehicles.

In short, the appellate court agreed with the insurer that the trial court had engaged in a "tortured and strained reading of the Policy to find an ambiguity" rather than applying the "Policy's clear anti-stacking provision." The court therefore reversed the trial court's decision and instructed the trial court to enter judgment in favor of the insurer declaring that the limit of insurance under the policy was "$1 million per accident."

The Illinois Supreme Court thereafter accepted the plaintiff's petition for leave to appeal on September 27, 2023.

Kuhn v. Owners Ins. Co., 2023 IL App (4th) 220827.

Environmental Pollution Exclusions Did Not Bar Coverage for Residents' Claims Against City for Contaminated Drinking Water

The residents of the City of Sycamore filed a putative class action against the city alleging that the city failed to maintain its water mains (by avoiding replacing the water mains for decades) and that in doing so provided residents with unsafe drinking water and damaging the equipment that used water in their homes. The city tendered the claims to its insurance company, and the insurer denied coverage and filed an action for declaratory judgment. The insurer argued that the failure to maintain the water system did not

constitute an "occurrence" for the purpose of coverage and further argued that the damages were due to pollution and lead, and therefore subject to the policies' pollution and lead exclusions. The trial court determined that the exclusions applied, found for the insurer, and the city appealed.

On appeal, the city argued that the pollution exclusion did not apply to the facts of the case because this was not a "traditional environmental pollution." The "total pollution exclusion" provided that the policies do not apply to "bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time. The Illinois Appellate Court Second District, in assessing this language, reviewed both precedent and historical events leading to the adoption of the pollution exclusion, and found that the exclusion was intended to only protect insurers from "potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*." In this regard, a key factor to consider is whether the alleged material "is confined within the insured's premises or, instead, escapes into the land, atmosphere, or any watercourse or body of water."

The Second District concluded that the alleged iron, lead, and bacteria the city distributed to its citizens was not a "traditional environment pollution." Rather, the underlying complaint alleged that the city did not repair its water mains for decades, and that the mains sat in highly corrosive soils, causing them to disintegrate and causing the unsafe water to be distributed to residents of the city. This was not a case of a released or escaped pollutant into the ground that later caused the water to be contaminated, but rather the water did not become contaminated until it was within the city's pipes. Therefore, the "total pollution" and "pollution" exclusions of the policies were not applicable.

The court further found the arguments that the "lead" exclusion applied and that "there was never an occurrence" similarly unavailing because the "allegations do not suggest that all the plaintiffs' problems arose from exposure to lead," and because there was no evidence that the city intended or expected the result. Accordingly, the appellate court reversed and remanded the case for additional proceedings.

LM Ins. Corp. v. City of Sycamore, 2023 IL App (2d) 220234.

No Coverage for Damage to Building Indirectly Caused by "Governmental Action" in Demolishing Neighboring Building

In *McCann Plumbing, Heating & Cooling, Inc. v. Pekin Ins. Co.*, a matter of first impression, the Illinois Appellate Court Third District examined an insurer's denial of coverage for damage to an insured's building resulting from the demolition of an unrelated building, based upon the insurance policy's governmental action exclusion.

The insured purchased a building to run its business and its insurance policy with Pekin Insurance Company "provided insurance coverage for 'direct physical loss of or damage to' the covered property." Thereafter, the village declared an unrelated building to the south of the insured's building to be unsafe and ordered its demolition. The insured's building was inadvertently damaged in the process. The insured sought coverage from Pekin, which denied coverage, citing the insurance policy's "governmental action exclusion." The trial court agreed with Pekin, holding that the exclusion applied and granting Pekin judgment on the pleadings.

On appeal, the insured argued that the exclusion should not apply because the village "did not order" destruction or damage to the insured's building. Specifically, the insured argued that "because the Village neither issued a demolition order for their commercial building nor had the authority to cause damage to it pursuant to its demolition order concerning the adjacent property, the governmental action exclusion is inapplicable." The appellate court noted that the questions before it were "whether this damage was caused 'directly or indirectly' from the destruction and whether that damage falls within the purview of the governmental action exclusion under the parties' commercial lines insurance policy."

The court looked to the language of the exclusion, that Pekin "will not pay for loss or damage caused directly or indirectly by. . . [s]eizure or destruction of property by order of governmental authority." The language "caused directly or indirectly," held the court, "provides context to the limitations . . . of the predicate." The language "destruction of property by order of governmental authority," the court concluded, meant that "it is necessary that the destruction of property be carried out through an order of governmental authority." Reading this language together, the court held that the insured's "property damage is a loss that grew out of and was therefore 'caused. . . indirectly' [by] the destruction of property" and it "falls under the governmental action exclusion because the damage stems from the Village's demolition order." In short, "[c]onsidered in its entirety, the plain, ordinary, and popular meaning of the policy supports [the]

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reading that the damage incurred was an indirect result caused by the destruction of the adjacent property." Because a plain reading of the clauses together leads to the conclusion that the exclusion applied, the Third District affirmed the trial court.

McCann Plumbing, Heating & Cooling, Inc. v. Pekin Ins. Co., 2023 IL App (3rd) 190722.

Failure to Disclose Change in Health Between Time of Application and Delivery of Policy is a Material Misrepresentation Entitling Life Insurer to Rescind Policy

In *Meier v. Pac. Life Ins. Co.*, the United States Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of the insurer, holding an insured's failure to disclose his terminal cancer diagnosis amounted to a material misrepresentation for purposes of 215 ILCS 5/514, entitling the insurer to rescind the policy. In July 2018, Ron Meier submitted his application for a life insurance policy with Pacific Life. The policy was delivered to Meier in September 2018. However, between the time the application was submitted and the time the policy was delivered, Meier learned he had stage IV lung cancer. Despite a provision in the application requiring Meier to inform Pacific Life "in writing of any changes" in his health, Meier failed to do so. About a year after the policy was issued, Meier passed away and his wife filed a claim with Pacific Life under the life insurance policy. Pacific Life rejected the claim and rescinded the policy after learning the timeline of Meier's diagnosis and his failure to disclose it.

In reviewing the district court's grant of summary judgment for Pacific Life, the Seventh Circuit first evaluated whether Meier's failure to disclose his diagnosis (1) was a misrepresentation and, if so, (2) whether it was material. The Seventh Circuit found the language in the application obligating Meier to notify Pacific Life "in writing of any changes" to his health was unambiguous and placed a clear duty on him, such that his omission amounted to a misrepresentation. The Seventh Circuit also had no trouble finding Meier's omission of his cancer diagnosis material. The Seventh Circuit stated that, "[a] terminal cancer diagnosis substantially increases the chances of a person's death such that a life insurance company would either reject that application or, at the very least, reconsider its premiums." The district court also correctly determined that Meier's verbal disclosure to the person from whom the policy was purchased was not disclosure to Pacific Life because that person was a broker (not an agent of Pacific Life). Accordingly, the Seventh Circuit affirmed summary judgment in favor of Pacific Life.

Meier v. Pac. Life Ins. Co., 63 F.4th 595 (7th Cir. 2023).

Court's Ruling That Insureds Breached Cooperation Clause Prevented Insureds from Seeking Defense from Insurer in Similar Subsequent Case

In *Nationwide Mut. Ins. Co. v. Srachta*, the Appellate Court of Illinois, Third District, affirmed summary judgment for Nationwide in its declaratory judgment action. The coverage dispute arises out of litigation between a homeowner's association (Association), its board of directors, and residents of the Association. Nationwide insured the Association under a businessowners' policy and agreed to defend the Association and its directors, without any reservation of rights, in a counterclaim filed by Association residents for alleged breaches of the Common Interest Community Association Act 765 ILCS 160. Due to a conflict between a director and the Association, Nationwide agreed to retain two separate attorneys, but the Association declined Nationwide's offer of defense. Nationwide intervened in the suit and was able to settle a few of the claims. Because the Association's personal counsel and the Association's directors continuously interfered with Nationwide's attorney's attempts to resolve the remaining claims, Nationwide moved for summary judgment, arguing it had no duty to defend the Association and directors due to their breach of the policy's cooperation clause. The trial court granted Nationwide's motion for summary judgment, relieving Nationwide of its duties under the policy.

Association residents then filed a separate derivative suit against the Association and its directors for breaching their fiduciary duties by, among other things, refusing Nationwide's defense and violating Nationwide's cooperation clause. Upon receiving a request for defense from its insureds, Nationwide filed the declaratory judgment action at issue here. In the declaratory judgment action, the trial court granted judgment on the pleadings in favor of Nationwide based on *res judicata* and collateral estoppel. In particular, the court ruled that the Association and directors were barred from seeking a defense in the derivative suit because of the ruling entered in the prior case that they breached the cooperation clause in the Nationwide policy. The appellate court affirmed judgment for Nationwide, holding that the matter was ripe, and the issues and identity of the parties in the prior suit and the derivative suit were such that relitigation was prevented by both *res judicata* and collateral estoppel.

Nationwide Mutual Ins. Co. v. Srachta, 2023 IL App (3rd) 220089.

Decision by Illinois Department of Insurance That Contractor Owed Additional Workers' Compensation Insurance Premiums Reversed

In *Prate Roofing and Installations, LLC v. Liberty Mut. Ins. Corp*., Prate obtained workers' compensation coverage from Liberty. Prate and Liberty disputed whether Prate owed Liberty additional workers' compensation insurance premiums, because certain subcontractors hired by Prate did not have individual coverage. The Illinois Department of Insurance (DOI) entered an order finding that Prate owed additional workers' compensation premiums to Liberty in the amount of $127,305. The circuit court affirmed the decision of the DOI in favor of Liberty and against Prate. After a series of appeals, Prate contended in this appeal that the DOI erred in finding that ARW LLC had its own employees who worked on Prate jobs to justify Liberty's charging an additional premium.

The Illinois Court of Appeals, First District, found that the uncontradicted affidavits submitted by Prate indicated that ARW LLC in fact had no employees and that Liberty had submitted no evidence to support its conclusion that ARC LLC had employees that were subject to workers' compensation coverage. After reviewing the documentary evidence as a whole, the appellate court concluded that the DOI's decision was against the manifest weight of the evidence and reversed the factual findings of the DOI.

Prate Roofing and Installations, LLC v. Liberty Mut. Ins. Corp., 2022 IL App (1st) 191842-B.

Court Rejects Underlying Plaintiff's Attorney's "Clever" Pleading in Attempt to Trigger Insurance Coverage for Criminal Act of Doctor

In August 2020, Nancy Corelis filed a complaint against Dr. Karuparthy and Integrative Pain Centers of America, alleging Karuparthy injected a "medical substance" that rendered her immobile, and subsequently physically and sexually assaulted her. Corelis alleged that Integrative Pain Centers was vicariously liable. Professional Solutions, the carrier for Integrative Pain Centers, sought a declaratory judgment that it had no duty to defend the underlying action, because Karuparthy pleaded guilty to two criminal charges. In the declaratory judgment action, the trial court concluded that Professional Solutions had a duty to defend the underlying complaint, granted the Corelis'motion to dismiss, and denied Professional Solutions' motion for judgment on the pleadings. More specifically, in the coverage action the trial court determined that the criminal conviction was only *prima facie* evidence of intent.

The Illinois Appellate Court Fourth District reversed the trial court and held that Professional Solutions had no duty to defend the underlying complaint. In so finding, the court refused to permit the plaintiffs to manufacture coverage "through clever lawyering, careful wording, and sophisticated pleading, all calculated to neatly comply with black-letter law and legal rules in a purely abstract, hyper-technical sense while ignoring reality and common sense." In fact, the court found that the underlying negligence counts amounted to "little more than a groundless attempt to bring [Corelis'] claims within the policy's coverage." In other words, Corelis sought recovery for injuries resulting from a single course of conduct – Karuparthy's sexual misconduct under the guise of medical treatment. Any argument to the contrary "defie[d] common sense." Moreover, consistent with established Illinois law, the court found that Karuparthy's sexual misconduct related to Corelis was not "medical treatment," and the fact that Karuparthy used a "medical substance" to incapacitate Corelis did not convert an intentional tort into medical malpractice.

In addition, the court found that the "criminal conduct" exclusion applied, and it took judicial notice of the charges. The court noted that the criminal convictions to which Karuparthy pleaded guilty arose out of the same allegations contained in the underlying complaint. Moreover, the court determined that the guilty pleas were inconsistent with negligence.

Prof'l Solutions Ins. Co. v. Karuparthy, 2023 IL App (4th) 220409.

Coverage Owed Under Insurance Policy's Media Liability Provision for Defense of Biometric Information Privacy Act Class Action

In *Remprex, LLC v. Certain Underwriters at Lloyd's London*, the Illinois Appellate Court First District examined whether insurance defense coverage existed for claims brought against the insured for alleged violations of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq*. (BIPA). This coverage case arose from two separate BIPA class action lawsuits involving Remprex. Remprex filed a breach of contract action against Certain Underwriters at Lloyd's London for Underwriters' refusal to provide Remprex with defense coverage in the class-action suits.

Notably, Remprex was not a party to one of the class actions. That lawsuit was filed against BNSF. While the complaint refer-

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enced BNSF and its "authorized vendors" (Remprex fell within that category), and BNSF's answer identified Remprex as an authorized vendor, Remprex was never a named party. The fact that Remprex was subpoenaed for records in the suit and that it engaged in information-gathering activities related to the suit (without prior consent from Underwriters) similarly did not amount to a "claim" against Remprex under the insurance policy. The First District therefore held Remprex was not entitled to defense coverage relating to the BNSF lawsuit.

Remprex was, however, a party to the other lawsuit. Remprex argued that Underwriters owed Remprex a defense to that suit under the media liability provision of the policy and the policy's data and network liability coverage. The First District held that Remprex was entitled to defense coverage under the policy's media liability provision, which expressly provided coverage for "violation of the rights of privacy of any individual" while "creating, displaying, broadcasting, disseminating or releasing Media Material to the public." Under the policy, "Media Material" included "any information," and the parties did not dispute that the underlying lawsuit alleged Remprex created media material (here, biometric data—fingerprints).

Based upon this broad policy language, the appellate court concluded that Remprex's alleged unlawful collection and storage of fingerprints may potentially fall within coverage under the policy for violation of one's privacy rights "during the course of creating media material." Accordingly, Underwriters owed Remprex a defense to that suit under the media liability provision. The court rejected Remprex's argument that coverage was also owed to it under the policy's data and network liability coverage, noting that such coverage "appears to apply primarily to third-party breaches of the insured's computer systems," which was not alleged in the underlying suit.

Remprex, LLC v. Certain Underwriters at Lloyd's London, 2023 IL App (1st) 211097.

Insurance Broker Owed no Duty to Additional Insured on Property Insurance Policy

Santa Rosa Mall, LLC v. Aon Risk Servs. Cent., Inc., arose out of a commercial lease dispute between Santa Rosa Mall, LLC and Sears Holding Corporation. After Hurricane Maria hit Puerto Rico in September 2017, Santa Rosa tried to collect property insurance proceeds under its lease agreement with a Puerto Rican subsidiary of Sears. At first, the insurance proceeds were deposited in a special account in Santa Rosa's name, but Sears later elected to self-insure the property under a different section of the lease that had no requirement to deposit insurance proceeds in a separate account.

During repairs, Sears filed for Chapter 11 bankruptcy protection and resolved claims with the insurance companies that insured the shopping mall property. As a result, Santa Rosa was forced to use its own funds ($20 million) to complete the repairs.

Santa Rosa filed suit against Aon Risk Services Central Inc., alleging professional negligence and tortious interference with contract. Santa Rosa claimed that Aon, as the insurance broker for Sears, was aware of Sears's obligations under the lease agreement and advised Sears during the period in question on matters of risk management, claims resolution, and compliance with the insurance requirements in leases. Aon moved for dismissal for failure to state a claim and the circuit court granted the motion. Santa Rosa appealed, and the Illinois Appellate Court First District affirmed.

On appeal, Santa Rosa argued that Aon owed a duty of care to Santa Rosa because Santa Rosa was an additional insured under the Sears policy. While the appellate court tended to agree that Santa Rosa was an additional insured on the Sears policy, it held that Santa Rosa's status as an additional insured did not give rise to a duty owed by Sears's broker, Aon, to Santa Rosa. The court observed that Sears was Aon's client, not Santa Rosa. Aon may have had a duty to procure property coverage for Sears, but Aon was not a party to the insurance contracts between Sears and its insurers. The court further recognized persuasive foreign authority supporting the general rule that a broker owes no post-procurement duties to an additional insured.

Santa Rosa further contended that Aon owed a duty to Santa Rosa as a foreseeable third party, and such a duty is not dependent on contract, privity of interest or the proximity of relationship. The appellate court rejected this argument, because Santa Rosa's claim was not based on Aon's failure to procure adequate insurance for Sears. Rather, "the entirety of the complaint is about what Aon failed to do to alert Santa Rosa or to convince Sears to pay Santa Rosa after claims were made under the policy."

The appellate court then addressed Santa Rosa's claim that Aon committed tortious interference with contract by allegedly directing or encouraging Sears to breach its obligations under the lease. Finding that the complaint was devoid of factual allegations that Aon induced Sears to breach the lease, the court held that the complaint's conclusory allegations of inducement were insufficiently pled under Illinois' fact-pleading standards to survive dismissal.

Santa Rosa Mall, LLC v. Aon Risk Servs. Cent., Inc., 2023 IL App (1st) 221352.

Illinois Supreme Court Holds Tenants Were Not Insureds and Were Not Entitled to Defense or Indemnity Relating to Fire

In *Sheckler v. Auto-Owners Ins. Co.*, the Illinois Supreme Court held that an insurer's duty to defend or indemnify against a third-party contribution claim did not extend to the tenants of an insured property when the tenants were not identified insureds under the policy.

Monroe and Dorothy Sheckler rented a residential property in Pekin, Illinois. Pursuant to the lease, the Shecklers' landlord was required to "maintain fire and other hazard insurance on the premises only," and the Shecklers were responsible for insuring their personal possessions. The landlord had insurance from Auto-Owners, which included first-party dwelling coverage and third-party landlord liability coverage. The first party dwelling coverage encompassed, "coverage for fire damage to the premises," and the third-party landlord liability coverage included claims brought by third-parties that the insured "becomes legally obligated to pay as damages because of or arising out of bodily injury or property damage." The latter coverage contained an exclusion for "property damage to property occupied or used by an insured or rented to or in the care of, any insured."

In August of 2015, the Shecklers advised their landlord that the gas oven and stove in the unit was not working. The landlord contacted a repairperson, who, after inspecting the appliance, left the property to obtain a repair part. After the repairperson left, the Shecklers smelled gas, attempted to mask the gas smell with Febreze, and then turned on the stove. This resulted in a fire and significant property damage.

The landlord submitted a claim under the dwelling coverage provision of his insurance policy, and Auto-Owners paid damages for fire loss and loss of rental income. Auto-Owners then filed a subrogation action against the repairperson, alleging that his repairs proximately caused the damages. The repairperson filed a third-party complaint for contribution against the Shecklers.

The Shecklers tendered their defense of the contribution claim to Auto-Owners, which Auto-Owners declined, arguing that the Shecklers were not insureds under the policy. The trial court agreed with Auto-Owners and entered summary judgment in its favor. The appellate court reversed, and the Illinois Supreme Court allowed Auto-Owners leave to appeal.

The Illinois Supreme Court looked to the insurance policy language to determine whether the Shecklers were co-insureds for purposes of Auto-Owners' duty to defend or indemnify. The court noted that the "Shecklers are not identified as persons insured under the policy, and they do not fall under either definition of 'insured.'" The court additionally recognized that "the policy provisions make clear that only insureds are covered under the policy."

The policy's dwelling coverage provided coverage for fire damage to the covered premises and did not include a duty to defend or indemnify an insured against a third-party liability claim. And while the landlord liability coverage provided a duty to defend and coverage for claims brought by third parties, that provision only applied to insureds. Moreover, concluded the court, even an insured would not be covered under this provision where the third-party landlord liability coverage excludes "property damage to property occupied or used by an insured or rented to or in the care of, any insured," like it did here.

Because the Shecklers were not insureds under the policy, they were not entitled to the coverage and protection afforded by the policy. The Illinois Supreme Court held that Auto-Owners did not owe a duty to defend or indemnify the Shecklers against the third-party contribution claim.

Sheckler v. Auto-Owners Ins. Co., 2022 IL 128012.

Insurer's Payment to Public Adjuster Satisfied Insurer's Policy Obligations, Despite Public Adjuster Misappropriating Those Funds

In *Thirteen Inv. Co., Inc. v. Foremost Ins. Co. Grand Rapids Mich.*, the issue was whether an insurer's payment of a fire loss directly to the insured's public adjuster satisfied the insurer's policy obligations under Illinois law.

Thirteen Investment Company, Inc. sustained a fire loss, which was covered by an insurance policy issued by Foremost Insurance Company. Thirteen retained Paramount Restoration Group, Inc. as its public adjuster and general contractor for the repairs. In its agreement with Paramount, Thirteen directed any insurance companies to include Paramount on all payments on the claim.

Paramount adjusted the claim, and Foremost delivered two settlement checks to Paramount that were made payable to Thirteen, its mortgagee, and Paramount. Thereafter, Paramount endorsed the names of the co-payees, cashed the checks, and kept all proceeds. Thirteen ultimately fired Paramount as its general contractor. Thirteen then sued Foremost, seeking a declaration that Foremost breached the insurance policy by not paying the claim. The district court found in favor of Foremost, and Thirteen appealed.

On appeal, Thirteen made three arguments: (1) Foremost waived payment as an affirmative defense by failing to plead it in

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its answer; (2) Foremost's policy obligation under Illinois law was not discharged by delivering checks to Paramount; and (3) Foremost failed to make claim payments in installments after Foremost had inspected repair work performed.

With respect to Thirteen's first argument, the Court of Appeals for the Seventh Circuit held that Foremost was not required to plead payment separately as an affirmative defense, because Foremost's denials to the complaint allegations of breach for failure to pay were sufficient to preserve the defense. Regarding Thirteen's second contention, the court noted that the Illinois Supreme Court had not yet addressed whether "a contract obligor's delivery of a check to a joint co-payee, who then unilaterally cashes the check, discharge[s] the obligor's performance in the amount of the check." Forced to predict how the Illinois Supreme Court would decide this issue, the court looked to Illinois appellate court cases. The court also considered the Illinois Insurance Code—more specifically, those provisions governing public adjusters.

After considering Illinois case law and statutory provisions, the court found that while Foremost agreed to provide coverage and payment for negotiated claims, it did not agree to take responsibility for the actions of the public adjuster or to ensure that the bank performed proper due diligence before paying the draft. The court noted that under Illinois law, the public adjuster should bear consequences for its own violation of statutory standards. Further, the court observed the oddity of an insurer bearing a drawee bank's possible negligence in disbursing funds without ascertaining proper endorsement by joint co-payees.

As for Thirteen's third and final argument, the court found no facts or terms contained in the insurance policy to support a claim that Foremost breached a different agreement by not paying in installments.

Thirteen Inv. Co., Inc. v. Foremost Ins. Co. Grand Rapids Mich., 67 F.4th 389 (7th Cir. 2023).

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Survey of Labor and Employment Law Cases

Illinois Paid Leave for All Workers Act

On January 10, 2023, the Illinois Legislature passed the "Paid Leave for All Workers Act," (PLAW Act) effectively guaranteeing that as of January 1, 2024, with a few exceptions, "an employee who works in Illinois" will be eligible to earn "up to a minimum 40 hours of paid leave" in a 12-month period. The new law allows employees to take time provided or earned under the Act for "**any reason**."

As discussed below, in some cases this law may not require employers to provide additional leave beyond what they already provide. Even where no additional leave is required, some employers—*including some employers based outside of Illinois*—may need to follow accrual and carry-over rules in the PLAW Act. Indeed, there are several aspects of this law that are potentially subject to differing interpretations and/or appear to be inconsistent with other laws. For now, until the Illinois Department of Labor issues final regulations or other guidance, employers should review current leave policies, assess the need for any changes to those policies in time to provide notices as required under state laws.

Does this law apply to my company?

Under the definition of "employer"—which borrows heavily from the Illinois Wage Payment and Collection Act's definition—most companies that have employees who work in the State of Illinois will be subject to the requirements of the PLAW Act. Under the PLAW Act, "'Employer' has the same application and meaning as provided in Sections 1 and 2 of the [Wage Payment and Collection Act]," with some exceptions. In practical effect, after accounting for these Wage Payment and Collection Act sections and the PLAW Act's carve outs, the PLAW Act applies to all individuals and public and private entities that employ at least one employee in the state of Illinois, except:

- Federal government employers;
- School districts organized under the Illinois School Code; and
- Park districts organized under the Illinois Park District Code.

(There is a proposed amendment currently pending to also exempt fire protection districts.) Importantly, the PLAW Act also exempts from its requirements employers covered by a "municipal or county ordinance that is in effect on the effective date of this act that requires employers to give any form of paid leave to their employees, including paid sick leave or paid leave." Thus, employers that are already providing paid sick leave to employees under the Chicago or Cook County paid sick leave ordinances are not required to provide an additional 40 hours of paid time off and that employers in municipalities that have opted out of the Cook County ordinance will need to begin providing paid time off under the new state law. Note that Chicago has already amended its ordinance to require up to 5 days of paid leave that can be used for any reason, and up to 5 days of paid sick leave, earned at a faster rate (1 hour for every 35 hours worked), with even more generous carryover and other applications.

Does this apply to my company's employees?

As much as one might think that answering the first question—whether the new law applies to one's company—would also answer this question, it's not quite that simple.

The PLAW Act also uses the Wage Payment and Collection Act's definition of "employee" as a starting point for defining workers entitled to leave. Sections 1 and 2 of the Wage Payment and Collection Act, define the term "employee" to mean:

- "[A]ny individual permitted to work by an employer in an occupation"; and
- "Employees in this State, including employees of units of local government and school districts, but excepting employees of the State or Federal governments."

The Wage Payment and Collection Act—and by extension, the PLAW Act—explicitly excludes from coverage individuals who meet the definition of an independent contractor under Illinois law. Additionally, the PLAW Act modifies the Wage Payment and Collection Act's broad definition of employees in several notable ways:

- Notwithstanding anything to the contrary in the Wage Payment and Collection Act, domestic workers are included as "employees" under the PLAW Act;
- Individuals who meet the definition of "employee" under the federal Railroad Unemployment Insurance Act or the Railway Labor Act are not "employees" under the PLAW Act;
- "College or university" students who work part time and on a temporary basis for the college at which they are enrolled are not "employees" of that college under the PLAW Act; and
- Individuals who work for an "institution of higher learning" for less than two consecutive calendar quarters and who do not have an expectation that they will be rehired by the same institution are not covered by the definition of "employee" under the PLAW Act.

While the PLAW Act utilizes the Wage Payment and Collection Act's definitions of employer and employee, it is unclear to what extent the Wage Payment and Collection Act's regulations, which further delineate those terms, may apply to PLAW Act claims as well. The PLAW Act specifies that it applies to "an employee who works in Illinois," which implies that the law not only applies to in-state employees, but also to employees based outside of Illinois who perform at least 40 hours of work in Illinois in the yearly period. Further, Wage Payment and Collection Act regulations provide that the Department can assert jurisdiction, among other bases, over a claim "if the work is performed outside the State of Illinois, [and] the employer [is] located in Illinois." If the regulations apply, one could conclude that the PLAW Act applies not only to employees working in Illinois (whether working for an Illinois-based company or not), but also to employees *working outside of Illinois* for an Illinois-based employer. Hopefully, once the Illinois Department of Labor passes Regulations, the Regulations will define clearly whether the law mandates paid leave solely for Illinois-based employees; but for now, Illinois employers may want to prepare for the possibility that leave under the PLAW Act will have to be provided to employees located outside of Illinois. Likewise, employers based outside of Illinois but whose employees perform work in Illinois will also need to track their employees' hours worked in Illinois and provide the appropriate amount of paid leave.

Are bargaining unit employees covered under this law?

The PLAW Act provides that its requirements may be waived in a "bona fide collective bargaining agreement" if the waiver is "set forth explicitly in such agreement in clear and unambiguous terms." Notably, however, the new law will not change or affect any collective bargaining agreement that is in effect on January 1, 2024. In other words, under the language as written, employers with a unionized workforce will arguably still be required to implement leave requirements—including the accrual or grant, usage, and recordkeeping rules discussed below—even where those may be inconsistent with the terms of a collective bargaining agreement that is in place and may not be set to expire for several years.

The above said, the PLAW Act will not apply to employees covered by collective bargaining agreements with state agency employers, employers within the construction industry, or employers who provide services "nationally *and* internationally" of delivery, pickup, and transportation of documents, parcels, and freight. (It is unclear whether the "and" was intended to require the employer to engage in both national and international services to be exempt, or if one or the other is sufficient.)

How much paid time off must be provided and when must an employer provide it?

As mentioned above, covered employees are entitled to earn and use a minimum of 40 hours of paid time off during a 12-month period. The paid leave under the PLAW Act accrues at the rate of 1 hour for every 40 hours worked up to a maximum of 40 hours, unless the employer chooses to provide more. Exempt employees are presumed to work 40 hours in each work week unless their regular work week is less than 40 hours.

Employees begin accruing leave at the beginning of employment or the effective date of the PLAW Act, whichever is later. However, an employer may elect to provide the full 40 hours of leave at the beginning of the applicable 12-month period as a block grant. Regardless of whether the time accrues as the employee works or is granted at the outset of the applicable period, employees are eligible to begin taking leave 90 days following the commencement of their employment or 90 days after the law is effective, whichever is later.

The employer may designate the consecutive 12-month period, which must be communicated to employees in writing at the time of hire. Thus, the employer can designate a calendar or fiscal year period, or a period based on an anniversary of employment. If an employer makes changes to the designated 12-month period, the employer must provide documentation to the employee that includes the balance of hours work, paid leave accrued and taken, and the remaining leave balance.

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How can the paid time off provided under this law be used?

PLAW leave can be used for any reason. Employees can request to take paid leave either orally, in writing, or in accordance with an employer's reasonable paid leave policy; but employees need not provide, and employers may not require, documentation or certification regarding the reason for taking time off under the PLAW Act. The law provides that a reasonable policy may include a requirement that an employee provide seven calendar days' notice if the leave is foreseeable, or, if not foreseeable, as much notice as is practicable after employee is aware of a need for leave. Given that the employer cannot require the employee to provide a reason for the leave, however, it will be impossible for employers to enforce the notice requirement if the employee does not voluntarily provide a reason. Employers may set a "reasonable" minimum time increment for use, which is defined as not exceeding two hours per day. Employers are not allowed to require the employee to find coverage from another employee to take paid leave.

If the employer provides other paid leave besides the paid time off under the PLAW Act and accounts for the leave separately from the mandated leave, the employee may choose the "bank" of leave from which they wish to take time off. Because of the rules on the payout of unused time off and carryover, as well as the potential for abuse if the employee is not required to provide a reason for use of the leave, as discussed in further detail below, employers may want to consider tracking and otherwise administering the 40 hours of paid time off separately from other paid leave, including paid time off that may be used for any purpose that is in excess of 40 hours.

Must an employer allow unused leave to be carried over from year to year?

Employers who provide the minimum number of hours of paid leave to an employee on the first day of employment or the first day of the consecutive 12-month period (i.e. who frontload the time in a block grant) are not required to carry over paid leave when the new year begins and can require the employee to forfeit the unused time. If employees accrue benefit time as they work, however, employees may carry over unused time. Even though the Act requires carryover of time if employees earn as they work, the Act does not require the employer to allow the employee to use more than 40 hours in the designated 12-month period. Although the law is silent on the maximum amount of accrual of paid leave in the 12-month period, the law allows for the limitation on usage to 40 hours per year.

Do employers have to pay out unused paid time off when an employee leaves?

Additionally, employers will not be required to pay out any leave time that accrues or is granted but not used when an employee is separated from their employment unless the time received or earned under the PLAW Act is placed in a paid time off bank or employee vacation account. In other words, if an employer that provides other types of leave or more leave than the minimum required under the PLAW Act aggregates all paid leave into a single bank of paid time off, all of the unused leave in that bank will have to be paid out upon the employee's termination. On the other hand, if the employer keeps PLAW-required leave separate from other leave (including general paid time off in excess of 40 hours), the employer will not have to pay out any unused PLAW-required leave. Thus, leave required under this new Illinois law is essentially treated the same as a separate bank of "paid sick leave" has been treated under the Wage Payment and Collection Act.

If an employee's employment is terminated for any reason and the employee has unused paid leave under the new law and is rehired within 12 months, the employer must reinstate the prior unused paid leave and allow it to be immediately used at the beginning of re-employment. If the employee is promoted, transferred, or moved to a new division or location but is still employed by the same employer, the employee must retain any previously accrued time.

Are there any recordkeeping or notice requirements?

Employers are required to preserve records documenting hours worked, leave accrued and taken, and the remaining leave time balance for three years and must allow the Department of Labor access to the records.

Employers must also post a summary of the Act's requirements in a conspicuous place where notices are customarily posted. Employers will also be required to provide a written notice summarizing the requirements of the PLAW Act and information about how to file a charge with the Illinois Department of Labor. The notice will have to be given to employees upon commencement of employment or 90 days after the PLAW Act becomes effective, whichever is sooner, and may be provided as a standalone document or included in an employee handbook.

What happens if an employer does not comply?

The IDOL has responsibility for administering and enforcing the PLAW Act. Employees who believe their employer has violated

the PLAW Act will be able to file a complaint with the IDOL. The limitations period for such a filing is three years from the date of the alleged violation. If, after an investigation, the IDOL finds cause to believe that the law has been violated, the matter will be referred to an Administrative Law Judge for a formal hearing.

Employers who fail to abide by the PLAW Act—including the law's recordkeeping requirements—may be liable to affected employees for up to $1000 in civil penalties as well as damages in the form of any actual underpayment, compensatory damages, equitable relief as may be appropriate, reasonable attorneys' fees, witness fees, and other costs of maintaining an action against the employer. Violations will also subject employers to a penalty of $2,500 for each separate violation of the Act to be paid into a "Paid Leave for All Workers Fund," that will be used for purposes of enforcing the PLAW Act.

Further, other than clear and unambiguous waivers in a collective bargaining agreement, individual employees may not waive their rights under the PLAW Act, and any agreement by an employee purporting to waive such rights will be considered void. The law also includes a nonretaliation provision that makes it unlawful for an employer to threaten to take or to take adverse action against an employee for exercising rights under the PLAW Act.

Cook County Paid Leave Ordinance

On December 14, 2023, the Cook County Board of Commissioners passed the Cook County Paid Leave Ordinance, which replaces the Earned Sick Leave Ordinance. The new Paid Leave Ordinance (the "Ordinance") became effective only 17 days later, on December 31, 2023, giving Cook County employers virtually no time to update their policies. Enforcement will begin on February 1, 2024. With a few exceptions, the Ordinance mirrors the requirements of the Illinois Paid Leave for All Workers Act.

Chicago Paid Leave and Paid Sick and Safe Leave Ordinance

In response to the State of Illinois enacting the Paid Leave for All Workers Act ("PLAW Act"), which requires 40 hours of paid leave to be provided to employees that can be used for any reason, but exempts Chicago and Cook County because they already had paid sick leave ordinances, the City of Chicago enacted, on November 9, 2023, a new Chicago Paid Leave and Paid Sick and Safe Leave Ordinance (the "Ordinance" or "CPLO"). This Ordinance went through many iterations over a short period of time and was passed with very little notice or time for objection or oversight. As a result, on December 13, 2023, the Chicago City Council voted to delay implementation of the ordinance to July 1, 2024, presumably to have time to enact rules for implementation, to give employers a chance to update their policies, and possibly (hopefully) time to make some adjustments to the ordinance to clear up some questions that will be discussed below. Until then, the existing paid sick leave ordinance will be in effect, requiring employers to provide up to 40 hours of paid sick leave.

Covered Employees

The CPLO requires employers to provide "Covered Employees" with various types of paid leave, which will be discussed below. The term "Covered Employees" under the CPLO includes any employee who, within any 120-day period, performs at least 80 hours of work for an employer while physically present within the geographic boundaries of the City. Thus, Covered Employees include those who spend any time for which they are compensated while working in or traveling in the City. This would include employees who make deliveries and sales calls or perform other travel related to their jobs while in Chicago. It would not include uncompensated commuting time in the City. Thus, the CPLO also applies to companies that are not physically located in Chicago, but who have employees who perform at least 80 hours of work in Chicago within any 120-day period.

In a glaring example of inconsistency, the Ordinance makes many references to the concept of a Covered Employee ceasing to meet the definition of a Covered Employee as a result of transferal outside of the geographic boundaries of the City. This was in the original version of the Ordinance, before the definition of a Covered Employee was changed. The amendment to the ordinance provides that once an employee meets the definition of a Covered Employee, the employee remains a Covered Employee for the rest of the time the employee works for the employer. It is therefore unclear whether the multitude of references to an employee no longer being a Covered Employee will also be removed from future versions of the Ordinance.

"Covered Employees" also include all "domestic workers," regardless of whether they work as employees, independent contractors, sole proprietors, or partnerships. Domestic workers are defined as those whose primary duties include housekeeping, house cleaning, home management, nanny services, caregiving, personal care or home health services for elderly and infirm individuals, laundering, cooking and companion services, chauffeuring, and other household services to members of households.

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Paid Leave and Employer Size

The types of paid leave under the CPLO include paid leave that can be used for any reason ("Paid Leave"), and paid sick leave, which can only be used for sick leave reasons ("Paid Sick Leave"). Paid Sick Leave can be used for what have become the "customary" reasons, including for the employee's or employee's family's preventative or medical care, if the employee or employee's family member (with a very broad definition) is a victim of a crime of violence, business closure due to public health emergency, etc. The size of the employer is significant when it comes to payout of accrued Paid Leave upon termination, which will be discussed below. Employers with covered employees in Chicago are broken down into Small, Medium, and everyone else. A Small Employer is one who has 50 or fewer Covered Employees. A "Medium Employer" is one who has between 51 and 100 Covered Employees. Though not defined as a "large" employer, every other employer would be those with more than 100 Covered Employees. Perhaps a saving grace to smaller employers, particularly those outside of Chicago who happen to have employees who perform work in Chicago, is that the definition refers to the number of Covered Employees, not just total employees. Thus, an employer outside of Chicago who has 50 or fewer employees who perform work in Chicago may be a Small Employer for purposes of Chicago paid leave, even if they are otherwise a large employer. As will be discussed, however, employers will need to track the time and location of the work of all employees, not just Covered Employees, to ensure that a non-covered employee does not become a Covered Employee.

Earning Paid Leave and Paid Sick Leave

Employers are required to provide Paid Leave and Paid Sick Leave to all Covered Employees in amounts discussed below. If an employer's policy already provides paid leave in a manner and amount that meets the minimum requirements, the employer need not provide any additional leave under the Ordinance. Starting on July 1, 2024, or on the first day of a Covered Employee's employment, paid leave under the ordinance must begin to accrue. For every 35 hours worked, the Covered Employee will accrue 1 hour of Paid Leave and 1 hour of Paid Sick Leave. The total leave that can be accrued is capped at 40 hours of Paid Leave and 40 hours of Paid Sick Leave in a 12-month period (unless the employer chooses a higher amount). If an employer is already providing more than the minimum required leave, the employer will be allowed to provide the leave on a monthly basis rather than accruing hour by hour. Overtime-exempt employees are presumed to work 40 hours per week unless their normal workweek is shorter, in which case paid time off shall accrue based on the normal work week. Payment for paid leave must be compensated at the same rate and with the same benefits that the Covered Employee regularly earns during hours worked and must be calculated by dividing the total wages (not including overtime or premium pay, tips, or commissions) earned in the prior 90 days by the number of hours worked. (Commission-only employees must receive pay based on base wage or the applicable minimum wage, whichever is greater.)

Use of Paid Leave and Paid Sick Leave

Employers must allow Covered Employees to begin using accrued Paid Sick Leave no later than the 30th day of employment and must allow the use of Paid Leave no later than the 90th day of employment. Employees may choose whether to use Paid Sick Leave or Paid Leave. Employers may set a reasonable minimum increment for use of either form of paid leave, but no more than 4-hour increments for Paid Leave and no more than 2 hours for Paid Sick Leave.

Carryover v. Frontloading

Employers may choose whether to frontload paid leave or allow for carryover to the next 12-month accrual period.

Carryover: If the employer chooses the carryover method, at the end of each 12-month accrual period, Covered Employees will be allowed to carry over to the following 12-month period up to 16 hours of Paid Leave and 80 hours of Paid Sick Leave. Employers do not need to pay out any unused leave that did not carry over. If the employer denied the employee the use of leave in a manner that prohibited the employee from meaningfully having access to such paid time off, then the employer must allow carryover of the additional amount that the employee did not have reasonable time to use.

Frontloading: If the employer chooses the frontloading method, the employer will need to immediately grant Covered Employees 40 hours of Paid Leave or 40 hours of Paid Sick Leave or both on the first day of employment (or the first day of the 12-month accrual period). The Ordinance states that if the employer frontloads Paid Leave, the employer is not required to allow carryover of Paid Leave to the next year. The Ordinance does not specify that an employer may avoid carryover of Paid Sick Leave that has been frontloaded. However, proposed rules for the Ordinance state that if an employer grants 40 hours of Paid Leave no later than 90 days after the start of employment and yearly thereafter, and 40 hours of Paid Sick Leave no later than 30 days after starting employment, then the employer does not need to follow the requirements for accrual or carryover.

Hopefully, the City Council will fix this omission in the text of the Ordinance.

Conspicuously absent from both the Ordinance and proposed rules is any discussion of a cap on accrual of Paid Sick Leave banks, or a cap on use of either type of paid leave. Since carryover of Paid Leave is limited to 16 hours, presumably an employee can use up to 56 hours of Paid Leave in a year, the 16 carried over and the 40 earned the next year. With the carryover of up to 80 hours of Paid Sick Leave, however, this could potentially mean an employee has 120 hours of Paid Sick Leave to use, 80 of which then can keep carrying over to the next year if unused. If the City does not place a cap on use like the State did under the PLAW Act (capping use at 40 hours in a year), then it will be to employers' benefit to use the frontloading method to avoid the accrual of very large amounts of paid leave with no limit on taking it. Otherwise, employees may have as much as 4.4 weeks of available leave in a year (176 hours) to use. It will be particularly important to limit the amount of leave available to use under the Ordinance given the very significant potential for abuse, as discussed below.

Notice of Taking Leave

Employers may require Covered Employees to provide up to 7 days (but not more) of notice of the need to take paid time off if the need is reasonably foreseeable. If the need is not reasonably foreseeable, employers may require the employee to give notice as soon as is practicable on the day the employee intends to take paid off, by notifying the employer by phone, email, or "other means." An employer may not require a Covered Employee to obtain preapproval from the employer prior to using the paid time off. Importantly, the employer is prohibited from using its absence-control policy to count paid time off as an absence that triggers discipline, discharge, demotion, suspension, or any other adverse activity. Further, the employer may not require the employee to provide a reason for or proof of the need for the leave. The only exception is that for use of Paid Sick Leave, if the absence is for more than three consecutive workdays, the employer may require certification that the use of the Paid Sick Leave was for proper sick leave reasons. This means that the employee can essentially take a few hours of leave off nearly every day, without notice or warning, and cannot be disciplined for it, and will not have to explain why they took the time. It begs the question of how an employer will know if the employee misused the sick leave or was off for more than three days for a sick leave reason if the employee does not need to provide a reason for the leave. Without the ability to ask for a reason, require notice, or impose any absence-control policies, employers will likely experience significant abuse of the system.

Payout on Termination or When No Longer Covered Employee

Paid Leave: Upon termination from employment (unless stated otherwise in a Collective Bargaining Agreement), or when an employee ceases to be a Covered Employee (which may no longer be relevant since the amendment to the Ordinance), Small Employers (50 or fewer employees) do not need to pay out any unused Paid Leave. Medium Employers (51-100 employees) are required to pay out 16 hours of unused Paid Leave until July 1, 2025, and thereafter, will be required to pay out all unused Paid Leave. Employers with over 100 employees will be required to pay out all unused Paid Leave upon termination of employment (and upon request of an employee who has not received a job assignment for the prior 60 days but who is still an employee). Although vague and not well defined, it appears that if an employer has an unlimited paid leave policy, upon termination from employment, or when an employee ceases to be a Covered Employee, the employer must pay the monetary equivalent of 40 hours of paid time off minus the hours of paid time off used by the Covered Employee in the last 12-month period before the date of separation as part of the final compensation.

Paid Sick Leave: Employers do not need to pay out unused Paid Sick Leave on termination.

Notices and Recordkeeping

Employers are required to post a notice of the Ordinance in the same place as they post (or distribute) other labor and employment laws. Notices regarding the paid leave ordinance, as well as all other employer notices, must be provided in the employee's primary language. Employers must also provide each Covered Employee, each time wages are paid, a written notification of an updated amount of Paid Leave and Paid Sick Leave that has accrued and has been used (though employers who credit employees paid leave on a monthly basis because they provide more than the minimum amount of leave may provide the updated notice of available leave on a monthly basis). Employers must keep records regarding paid leave for 5 years. A failure to do so will create a "presumption, rebuttable by clear and convincing evidence," that the employer violated the Ordinance. Employers must track the hours worked (and location if work is performed inside and outside of Chicago) of all employees, not just Covered Employees.

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Enforcement

Employees may bring claims to the City Department of Business Affairs and Consumer Protection. The Ordinance does not provide a statute of limitations but the proposed rules state that complaints must be brought within 3 years. Damages are three times the full amount of any leave denied or lost due to the violation, as well as fines ranging between $1,000 and $3,000 for each separate offense. Posting violations and failure to provide the regular accounting of leave accrual and availability will be $500 for the first violation and $1,000 for any subsequent violation. Each day that a violation continues will constitute a separate and distinct offense. Employees will also have the right to file suit in court, but for the Paid Leave provisions, not until July 1, 2025. Damages in a private cause of action will be up to three times the full amount of any leave denied or lost by reason of the violation plus interest, along with costs and reasonable attorney's fees. The Ordinance is silent on a statute of limitations for a private cause of action.

Amendments to Equal Pay Act: HB3733

EEO-1 Reports No Longer Allowed for Equal Pay Act Registration Certification

Under HB 3733, Employers who are required to seek equal pay registration certificates (i.e. employers with 100 or more employees in Illinois) will be required to submit a list of all employees during the past calendar year, separated by gender, race, and ethnicity as reported in the employer's most recently filed EEO-1 report, along with other required formation (such as county where the employee works, dates of employment, etc.). Employers will no longer be able to choose between providing that list or simply producing their most recently filed EEO-1 reports. Thus, employers will want to immediately take steps to compile and continually add to employee lists containing the required information so that it is readily available when the time comes to register.

Employers Must Publish Pay Scale in All Job Postings under Equal Pay Act

Under HB3129, the Illinois Equal Pay Act (IEPA) was amended to provide that, effective January 1, 2025, all employers with 15 or more employees and with employees employed in Illinois, must include the "pay scale and benefits" for a position in any specific job posting. Importantly, it is unclear in HB3129 whether the employer must have 15 or more employees in Illinois, or 15 or more employees anywhere, for the amendment to apply. The amendment specifies, however, that it only applies to positions that will either 1) be physically performed, at least in part, in Illinois, or 2) that will be performed outside of Illinois but the employee reports to a supervisor, office, or other work site in Illinois. "Pay scale and benefits" means the wage or salary, or the wage or salary range, and a general description of benefits and other compensation, including but not limited to bonuses, stock options, or other incentives the employer reasonably expects in good faith to offer for the position.

From a practical standpoint, the amendment provides that inclusion of a hyperlink to a publicly viewable webpage that includes the pay scale and benefits information satisfies the requirement. Alternatively, if the employer's website has an easily accessible and publicly available place where the information is posted and the posting directs people to that location on its website, this will also satisfy the posting requirement. If an employer engages a third party to announce, post, publish, or otherwise make known a job posting, the employer must provide the pay scale and benefits information to that third party and the third-party must include the information. The third party will be held liable for the failure to include the information unless it can show the employer did not provide it.

Importantly, the amendment does not prohibit the employer from asking the applicant about his or her wage or salary expectations for the position for which the applicant is applying.

The amendment to the IEPA also provides that an employer shall announce, post, or otherwise make known all opportunities for promotion to all current employees no later than 14 days after the employer makes an external job posting for the position. If the employer does not post the job in a manner available to the applicant, then the employer (or employment agency) must disclose to the applicant the pay scale and benefits to be offered for the position prior to any offer or discussion of compensation, and if the applicant requests. The amendment applies to any job postings made after the effective date of the amendment.

Alleged violations of the job posting requirements will be investigated, upon receipt of a complaint, by the Illinois Department of Labor. Complaints must be raised within one year after the date of the violation. Penalties for a job posting or batch of postings that are active at the time the Department issues a notice of violation for violating the posting requirement, are as follows. A first offense following a cure period of 14 days to remedy the violation will result in a fine up to $500 (at the Department's discretion). A second offense, following a cure period of seven days to remedy the violation, will result in a fine up to $2,500 (also at the Department's discretion). A third offense will receive no cure period and will result in a fine up to $10,000 (at the Department's discretion). If a company receives a

violation after having had a third offense, penalties shall be automatic without a cure period for five years. For violations that are not active at the time the Department issues its notice of violation, the penalty for a first offense is up to $250 (with discretion), and the remaining offenses have the same penalty as if the posting was still active.

Illinois Human Rights Act Now Gives IDHR Right to Intervene in Litigation

HB3135 provides that if a complainant files a complaint with the Illinois Human Rights Commission (IHRC) or in circuit court, the complainant is required to provide the chief legal counsel of the Illinois Department of Human Rights (IDHR) with notice within 21 days of filing the complaint. The amendment will give the IDHR the right to petition the IHRC to intervene in any action filed by the complainant at the IHRC, whether the complainant requests it or not. The IDHR may intervene if the IHRC determines that: 1) the IDHR has an interest different from one or more of the parties; 2) the expertise of the IDHR makes it better suited to articulate a particular point of view; or 3) the representation of the IDHR's interest by existing parties is or may be inadequate and the IDHR will or may be bound by an order or judgment in the action. Thus, this is a very low bar for the IDHR to meet in order to be able to intervene.

In addition, HB3135 provides that if a complainant has filed suit in state or federal court, the Illinois Attorney General may seek to intervene in the lawsuit on behalf of the IDHR (after the IDHR certifies that the case is of general public importance).

Transportation Benefits Program Act to Require Pre-Tax Deductions for Certain Public Transit

With HB2068, the Illinois Legislature created the Transportation Benefits Program Act (TBPA). It becomes effective January 1, 2024. The TBPA provides that "covered employers" must provide a pre-tax commuter benefit to "covered employees" which must allow employees to use pre-tax dollars to purchase a transit pass on "public transit" via a payroll deduction, such that the costs for such purchases may be excluded from the employee's taxable wages and compensation up the maximum amount permitted by federal law.

The TBPA defines a "covered employer" as one with 50 or more covered employees, if the employer is located in a specified geographic area. The geographic area includes all of Cook County, and within one mile of fixed-route transit service in a litany of townships in surrounding counties (listed out in the bill), presumably based on which locations have or are near train or bus stations. (We note that the original version would have applied to employers of all sizes, and also allow the deduction to be used for parking at or near the business or a commuter parking area.) The TBPA defines a "covered employee" as a person who performs at least 35 hours of work per week for compensation on a full-time basis. The benefit must become available no later than the first regular pay period after 120 days of employment. Under the Act, "public transit" is either the Chicago Transit Authority or the Regional Transportation Authority.

The TBPA further provides that nothing in the Act shall be deemed to interfere with, impede, or diminish the right of employees to bargain collectively with their employers, or affect the validity of or change the terms of bona fide CBAs in force on the effective date of the Act. After the effective date, requirements of the Act may be waived in a bona fide CBA if the waiver is set forth explicitly in the agreement in clear and unambiguous terms.

Civil Rights Remedies Restoration Act: Automatic and Minimum Penalties for Emotional Distress Under Virtually All Anti-Discrimination Laws for Employers Receiving Federal Funding

With HB2248, the Illinois Legislature has created the Civil Rights Remedies Restoration Act (CRRRA). The Legislature justified the passage in response to and to counteract the effect of the 2022 U.S. Supreme Court decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S.Ct. 1562 (2022). The Supreme Court in *Cummings* held that awarding damages for emotional distress in cases involving the Rehabilitation Act of 1973 and the Affordable Care Act violates the Spending Clause statutes at issue. The Illinois Legislature believed that the *Cummings* decision will likely also impair the availability of emotional distress damages under other federal civil rights statutes. The Legislature clearly believed that emotional distress must be allowed in every civil rights statute in order to make those victims of discrimination whole.

As a result, the CRRRA provides that any violation of the Rehabilitation Act or the Affordable Care Act, as well as Title II of the Americans With Disabilities Act of 1990 (ADA), the Age Discrimination in Employment Act (ADEA), Title IX of the Education Amendments Act of 1975, Title VI of the Civil Rights Act of 1964, and any other federal statute prohibiting discrimination under a program or activity receiving federal financial assistance, constitutes a violation of the CRRRA. In the event of a violation of the CRRRA, the successful plaintiff is entitled to all economic and non-economic damages (and attorney's fees and costs) determined

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by the finder of fact, and in no case shall that amount be less than $4000. Enforcement of this law can occur in any Illinois court.

Personnel Records Review Act—Records to be Emailed upon Request

HB3733, which as discussed above, included some changes to the Equal Pay Act, also provided some minor amendments to the Illinois Personnel Record Review Act (IPRRA). The amendment provides that if an employee requests his or her personnel records to be provided by email, the employer must do so. Likewise, the employer must provide paper copies and mail the records (at the employee's expense), if requested.

Illinois Laws to be Posted Online or Emailed to Remote Workers

HB3733 also includes amendments to several Illinois employment laws that will require employers with employees who do not regularly report to a workplace, such as remote workers or workers who travel for work, to either post all of the required information under the Illinois Minimum Wage Law, the Illinois Wage Payment and Collection Act, and the Child Labor Law, to the employer's website or intranet, or email a copy of the laws to said workers.

Illinois Gender Violence Act to Specifically Apply to Employers

The Illinois Legislature amended the Illinois Gender Violence Act (GVA) under HB1363. The GVA allows a person who has been the victim of gender-related violence to sue the person who committed the act of violence and seek various damages. HB1363 amended the GVA to apply it now specifically to employers under certain (broad) circumstances. HB1363 went through multiple iterations, including amendments that could not be grammatically parsed to determine exactly when the amendments would possibly apply. Importantly, the amendments provide a huge new door for dilatory plaintiffs to walk right through to raise certain claims of sexual harassment long after well-established federal and state deadlines.

The GVA amendment provides the following, which we are quoting exactly because there is no other way to parse the language:

> Section 11. (a) An employer is only liable for gender-related violence committed in the workplace by an employee or agent of the employer when the interaction giving rise to the gender-related violence *arises out of and in the course of employment* with the employer. Liability only extends to gender-related violence that occurs: (i) while the employee was directly performing the employee's job duties *and the gender related violence was the proximate cause of the injury*; or (ii) while the agent of the employer was directly involved in the performance of the contracted work *and the gender related violence was the proximate cause of the injur*y. Proximate cause exists when the actions of the employee or the agent of the employer were a substantial factor in causing the injury.
> An employer is liable if the employer has acted in a manner inconsistent with how a reasonable person would act under similar circumstances.
>
> (b) An employer is liable for gender-related violence if the employer:
>
> (1) failed to supervise, train, or monitor the employee who engaged in the gender-related violence. An employer providing training pursuant to Section 2-109 of the Illinois Human Rights Act shall have an affirmative defense that adequate training was provided to the employee; or
>
> (2) failed to investigate complaints or reports directly provided to a supervisor, manager, owner, or another person designated by the employer of similar conduct by an employee or agent of the employer and the employer

HB1363 went through multiple iterations, including amendments that could not be grammatically parsed to determine exactly when the amendments would possibly apply. Importantly, the amendments provide a huge new door for dilatory plaintiffs to walk right through to raise certain claims of sexual harassment long after well-established federal and state deadlines.

failed to take remedial measures in response to the complaints or reports.

Based on the definition, it would appear that this law is written to apply when the victim of the gender-related violence was performing his or her job duties at the time of the conduct, perhaps to contrast it with being outside of the work environment in a purely social environment with a co-worker, or even while on a meal break from work. It is difficult to imagine, however, what it means for the interaction giving rise to the gender-related violence to "arise[ ] out of and in the course of employment," since it is impossible to conceive of a job in which gender-related violence is an expected aspect of employment, i.e. a job in which gender-related violence "arises out of" the employment. The Legislature could have simply stated that an employer may be liable if the gender-related violence occurs while the employee is at work and performing his or her job duties and left it there, if that is what it meant. Employers should probably assume this to be how the law will be interpreted, but be aware that a potential argument can be made in the future regarding the strict interpretation of the language in the law.

"Gender-related violence" is defined as a "form of sex discrimination" and includes: 1) one or more acts of violence or physical aggression satisfying the elements of battery under the laws of Illinois that are committed, at least in part, on the basis of a person's sex, whether or not the acts have resulted in criminal charges, prosecution, or conviction; 2) a physical intrusion or physical invasion of a sexual nature under the coercive conditions satisfying the elements of battery under the laws of Illinois, whether or not the act or acts resulted in criminal charges, prosecution, or conviction; and 3) a threat of an act described in (1) or (2) above, causing a realistic apprehension that the originator of the threat will commit the act.

Thus, based on this definition of "gender-related-violence," an employer can potentially be held liable for any sexual harassment that in any manner involves touching, or even the threat of touching. Based on the definition of what it means to perpetrate an act of gender-related violence, an employer may also be exposed to liability for the conduct of any employee or agent who personally encourages or assists in the act of gender-related violence, such as helping cover up an incident, or a group of employees standing around laughing and encouraging the conduct. (Some states refer to this concept as "aiding and abetting" sexual harassment.)

Importantly, the statute of limitations for an alleged victim of gender-related violence to sue the employer under the GVA is four (4) years (or two (2) years after a victim turns 18 if the victim is a minor at the time). (The original version would have given employees a seven (7) year statute of limitations.) Still, this is a major addition to sexual harassment laws under which employees may raise claims, and a lengthy expansion to statutes of limitations that employers have been subject to for decades. Currently, claims under Title VII and the Illinois Human Rights Act (IHRA) must be raised within 300 days. Claims under Illinois common law for negligence (hiring, retention, supervision), or assault and battery, must be brought within two (2) years. This GVA amendment will give employees who miss those deadlines four (4) years, which will have a potentially unfair effect on employers. Much can happen in four years, including employees (i.e. witnesses) leaving, memories fading, evidence (such as surveillance or electronic information) being destroyed or written over, documents being destroyed through usual document retention processes, and companies going out of business or changing hands. All of this can occur with the employer having had no knowledge of any of the allegations and being deprived of the ability to investigate and/or defend itself.

Amendments to the Day and Temporary Labor Services Act Impact Staffing Agencies

The Day and Temporary Labor Services Act ("IDTLSA") was amended this year, with changes originally effective August 4, 2023 (with certain portions postponed to April 1, 2024), which place additional requirements on staffing agencies and their clients. The changes also increase penalties for violations and allow temporary workers and interested third parties to sue staffing agencies and/or clients. The IDTSLA applies to all staffing agencies and clients located in Illinois or that conduct business in Illinois.

Under the changes to the IDTLSA, temporary worker pay and training obligations are changed. A temporary worker assigned to a client for 90 calendar days after April 1, 2024, must receive at least the same pay rate and equivalent benefits as the client's lowest paid employee with similar role and tenure. The Act provides that "actual cost of benefits" may be paid in lieu of benefits. If there is no employee with a similar role, the staffing agency must compensate at least as much as the client's lowest paid employee with the closest tenure. Further, effective August 4, 2023, before the temporary worker goes to a worksite, the staffing agency must provide training and notice regarding hazards at the worksite and the client's safety/health practices, as well as providing the contact information for the IDOL and the identity of the client representative to whom temp worker can report safety concerns. Additionally, the staffing agency must provide notice of any labor trouble at that worksite before the temporary worker reports to

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the worksite. Finally, a temporary worker is permitted to refuse assignments without repercussions.

In addition to these new benefits for the temporary workers, the IDTLSA's amendments place new requirements on clients, including that if requested, the client must provide a staffing agency with the information about job duties, pay and benefits of comparative employees the agency needs to comply with the law. The client must also provide the staffing agency with information about safety and health practices, hazards at worksite, and the client's efforts to eliminate hazards and protect workers. Clients must provide its temporary workers with specific training regarding hazards and must verify that the staffing agency's training includes all known hazards. Finally, the client must provide the staffing agency with information about any labor disputes at worksite. The amendments give no guidance as to the method of reporting.

Recordkeeping requirements of both staffing agencies and clients are also changed with the amendments to the IDTLSA. For three years, staffing agencies must maintain safety training records, compensation information from their clients, and signed verifications that assigned temporary workers received the required notices and training. Further, for three years, clients must maintain records regarding hazards, efforts to remove hazards, and employee pay/benefits. Liability primary falls on the staffing agency for failure to pay accurately, but a client may face potential liability for failing to provide necessary information.

Penalties for violating the IDTLSA increase, to $100 - $18,000 for initial violations, and $250 - $7,500 for repeat violations. In assessing penalties, the IDOL will consider the seriousness of any violation, economic harm to the temp worker, the history of previous violations, the amount necessary to deter a future violation, and efforts made by the staffing agency and/or client to correct the violation. Enforcement may be sought by temporary workers and interested third parties, such as state agencies and unions.

Proposed Changes to E-Verify Use Put on Hold

SB1515 proposed to amend the Right to Privacy in the Workplace Act and was to impose new restrictions and requirements on employers who use the federal E-Verify system (or any employment eligibility verification systems) to ensure employees are legally able to work in the United States. The original version of the law proposed to prohibit the use of E-Verify altogether, unless the employer is required to use it (such as if it is a federal contractor). It was later amended to only place additional requirements on employers in the event of a verification discrepancy. The legislation passed both branches of the Legislature, but Governor Pritzker vetoed the law, apparently believing it did not protect employees enough. Both legislative chambers have once again proposed to ban the use of E-Verify except when required and that legislation is making its way through the process. As of publication, there have been no changes to the use of E-Verify.

Lion Elastomers and United Steelworkers — The NLRB Limits Employers' Ability to Terminate Problem Employees

In its May 2023 decision in the collective cases of *Lion Elastomers and United Steelworkers*, (Case Nos. 16-CA-190681, 16-CA-203509 and 16-CA-225153), the National Labor Relations Board (NLRB) effectively hamstrung employers from terminating employees who have outbursts of temper at the workplace. The decision mandates that where the employee's outburst is related to protected activity under Section 7 of the National Labor Relations Act (NLRA), the employer may not be able to move to terminate the employee.

Context is key, the majority held, stating, "Conduct occurring during the course of protected activity must be evaluated as part of that activity—not as if it occurred separately from it and in the ordinary workplace context." The majority went on to assert that employees must be able to "robustly" exercise their Section 7 rights.

In the case, the employer issued the employee a Last Chance Agreement after it found that the employee repeatedly engaged in abusive, disrespectful, and dishonest behavior, including his use of "inflammatory and insulting language." The employee had previously been warned to conduct himself in a "civil and professional manner." The employee refused to sign the Last Chance Agreement, and later had a heated exchange with his supervisor in a safety meeting, for which he was terminated.

While the NLRA has long prohibited employers from retaliating against employees who exercise their Section 7 rights, allowing employees such leniency and requiring employers to second-guess whether the conduct may have been related to protected activity in the heat of the moment may lead to employees abusing their managers and coworkers, under the protective umbrella of Section 7.

While this decision could be construed to stifle management's ability to manage the workplace and protect the mental, emotional, and even physical safety of its employees, it is ultimately up to the courts—not the NLRB—to determine the limits of Section 7 protections. In fact, the United States Supreme Court will decide in its current term whether the deference given to agencies such as the NLRB needs to be changed—an encouraging opportunity

for SCOTUS, given that many federal courts have refused to implement regulations passed by agencies such as the NLRB and the EEOC.

The EEOC Issues Guidance on AI in the Application Process

In May 2023, the Equal Employment Opportunity Commission (EEOC) released its long-awaited technical assistance document on the use of software, algorithms, and artificial intelligence (AI) in employment selection procedures, providing guidance for employers who wish to use AI within the limits of Title VII of the Civil Rights Act of 1964. The EEOC opined that AI can be used to program different algorithms and software for purposes of streamlining employment decisions. For example, the EEOC highlights the use of resume scanners that prioritize applications using certain keywords or virtual screeners that review pre-defined requirements. However, the agency recognized that AI, when programmed with a problematic set of human-defined objectives and selection criteria, may disparately impact a particular legally protected class, which would run afoul of Title VII. Accordingly, the EEOC's guidance suggests that the use of algorithmic decision-making tools must be monitored closely to ensure that the application of these technologies creates a neutral result, unless the employer can show that such use is "job related" and "consistent with business necessity." The guidance also warned that employers cannot shift liability by shielding themselves under another entity's created technology. Therefore, employers must proactively inquire of vendors to ensure that a tool intended to increase efficiency does not instead create potential disparate impact liability under Title VII.

Stericycle, Inc. & Teamsters Loc. 628— The New Standard for Employer Policies under NLRA

The National Labor Relations Board (NLRB), held in *Stericycle, Inc. & Teamsters Loc. 628*, 372 NLRB No. 113 (Aug. 2, 2023), that general prohibitions of employee activity in workplace rules that have a tendency to chill concerted activity without a narrowly defined purpose would violate the National Labor Relation Act (NLRA).

The current board rejected the standard under *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), finding the standard allowed employers to implement broad rules that could restrict employees from exercising their rights under Section 7 of the National Labor Relations Act. In *Boeing*, the Board established three categories to evaluate facially neutral workplace policies, rules or handbooks. When evaluating the employer's policies, the Board would consider (1) the nature and extent of the potential impact on NLRA rights, and (2) the legitimate justification associated with the rule. After the Board's evaluation, it would categorize the rules as follows: Category 1: rules that were lawful to maintain; Category 2: rules that warrant individualized scrutiny in each case; and Category 3: rules that were unlawful. The Board's determination of a Category 1 rule; employees shall work harmoniously and conduct themselves in a positive manner. It was determined that rules similar to this were common sense and it was reasonably expected that every employer would want to maintain workplace harmony. Category 1 rules, when reasonably interpreted, would not have a tendency to interfere with rights under the NLRA. Category 2 and 3 rules were those that could have an adverse impact on rights under the NLRA.

The Board in Stericyle found policies should not automatically be grouped into categories. The Board determined every employer policy should be evaluated to ensure it was narrowly tailored to further business interests and not unnecessarily burden employee rights. Employer policies should be evaluated to determine if a reasonable employee would take pause when considering the employer policy and engaging in activity protected under section 7 of the NLRA.

The new standard under *Stericycle* requires NLRB general counsel to prove that a challenged employer policy has a reasonable tendency to chill employees from exercising their right under section 7 of the NLRA. If the employee could reasonably interpret the rule to have coercive meaning, counsel will carry its burden and the rule is presumptively unlawful. The employer can rebut the presumption by proving a legitimate business interest for the rule. If the employer proves its defense the rule will be found lawful.

The Stericyle standard is immediately enforceable and retroactive. The Board determined the standard would be applied retroactively where it would not cause manifest injustice. Manifest injuries will be determined by considering the parties reliance on pre-existing law, the effect of retroactivity to accomplish the purpose of the NLRA and any other injustice arising from retroactive application.

Stericycle, Inc. & Teamsters Loc. 628, 372 NLRB No. 113 (Aug. 2, 2023).

Tims v. Black Horse Carriers— Five-Year Limitations Period Applies to All BIPA Claims

In *Tims v. Black Horse Carriers*, (2023 IL 127801), the Illinois Supreme Court handed down a pivotal decision on February

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2, 2023, which finally brought clarity to a long-standing issue affecting hundreds of BIPA class actions that have been stayed in federal and state courts in Illinois. Pursuant to the Court's opinion, the five-year, catchall statute of limitations period applies uniformly to claims brought under all provisions of the Illinois Biometric Information Privacy Act (BIPA). Consequently, Illinois businesses facing BIPA suits have seen an expansion of the size of putative classes and potential liabilities as the trial courts lifted many of the stays in cases that had been dormant pending this decision.

Prior to the Court's long-awaited ruling, the First District Appellate Court previously determined that the five-year limitations period applied to claims brought under §§15(a), 15(b), and 15(e) of BIPA. These sections expressly require private entities to obtain informed consent before collecting biometrics and to make their retention policies for such data publicly available. The First District also held, based on the Court's holding in *Sekura v. West Bend Mutual Insurance Co.*, that Illinois' one-year limitations period for traditional privacy claims applied only to §§15(c) and 15(d) of BIPA, prohibiting entities from profiting from or disclosing the sale of biometrics.

The Illinois Supreme Court in *Tims*, however, "acknowledge[d] that the one-year statute of limitations period could be applied to subsections (c) and (d)," but concluded "it would be best to apply the five-year catchall limitations period codified in section 13-205 of the Code." The Court held that doing so effectuates the legislative purpose of BIPA to secure "the public welfare, security, and safety of the public" by regulating biometrics. The Court opined further that applying the five-year catchall period will "ensure certainty, predictability, and uniformity as to when the limitations period expires" in each of the five subsections of BIPA. The decision in *Tims* has had far-reaching implications on the potential exposures to businesses facing BIPA litigation. Entities should immediately review their existing storage and deletion policies for anything that is even arguably biometric data and ensure they have secured written, informed consent to collect their employees' biometrics.

Tims v. Black Horse Carriers, Inc., 2023 IL 127801.

Cothron v. White Castle Systems, Inc.— BIPA Claims Accrue with Each Separate Violation

On February 17, 2023, the Illinois Supreme Court issued a significant opinion in *Cothron v. White Castle Systems, Inc*., (2023 IL 128004) holding that a separate claim accrues under Section 15(b) and 15(d) of the Illinois Biometric Information Privacy Act (BIPA) each time a private entity collects or discloses a biometric identifier or information. While Castle argued, unsuccessfully, that claims under these sections can only accrue once upon the first collection and first disclosure of the biometric data. In opposition, the plaintiff argued such claims accrue every time a private entity collects or disseminates biometrics without prior, informed consent.

Based on the plain language of the statute, the Court sided with the plaintiff and followed the underlying federal district court's ruling that "[a] party violates Section 15(b) when it collects, captures, or otherwise obtains a person's biometric information without prior informed consent," be it the first time and each subsequent time an entity collects biometric information. Additionally, the Court held a private entity violates Section 15(d) each time it discloses or otherwise disseminates a person's biometric data to a third party.

Despite White Castle's argument that imposing liability for hundreds or thousands of statutory violations—in which no harm occurred—"could potentially result in punitive and astronomical damages awards," the Court cited its reasoning from *Rosenbach v. Six Flags* and *McDonald v. Symphony Bronzeville* that "the legislature intended to subject private entities who fail to follow [BIPA's] requirements to substantial potential liability." Fortunately, the Court also recognized that it "appears that the General Assembly chose to make damages discretionary rather than mandatory under [BIPA]." The three dissenting justices argued the majority decision is in error because there is only one loss of control or privacy when the information is first obtained or disclosed by a third-party. Thus, "imposing punitive, crippling liability on businesses could not have been a goal of the Act," leads to "absurd results," and incentivizes plaintiffs to delay bringing claims to boost their damages.

The majority concluded with a call to the General Assembly to "respectfully suggest" that lawmakers "make clear its intent regarding the assessment of damages under the Act." Until then, trial courts are left to fashion damages awards, if any, that (1) fairly compensates class members and (2) deters future violations, without destroying businesses.

Cothron v. White Castle Sys., Inc., 2023 IL 128004, *as modified on denial of reh'g* (July 18, 2023).

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Survey of Tort Law and Workers' Compensation Cases

$40 Million Verdict Vacated by Second District

In *Bland v. Q-West*, the Illinois Appellate Court, Second District vacated a verdict for a plaintiff who suffered a spinal cord injury that left him a quadriplegic and remanded the case for a new trial. The plaintiff was injured as he was being forcibly removed from a bar.

The appellate court held that the circuit court erred when it refused to allow the defendant to amend its affirmative defense to include a claim of self-defense. The circuit made this decision 10 minutes after it had allowed the plaintiff to amend the complaint. Flowing from this first error, the reviewing court further found error in the failure of the circuit court to instruct the jury on that defense.

Finally, the court found the circuit court erred when it did not allow the defense to cross examine the plaintiff's expert with a Rule 213(f)(3) expert witness disclosure that the conduct of the EMTs and ER staff "caused and contributed" to the plaintiff's paralysis and that is was error not to allow a sole proximate cause instruction in IPI 12.04.

The court also articulated additional errors that did not form the basis for reversal, including that plaintiff's counsel should not have been allowed to (a) use a dummy human body made from materials purchased from Home Depot during closing or (b) argue about the defendant's internal rules forming a legal duty.

Bland v. Q-West, Inc., 2023 IL App (2d) 210683.

Improper Use of Alleged Agents' Deposition Testimony Read to the Jury Insufficient to Establish Prejudice at Trial

Following a laparoscopic cholecystectomy, a patient's recovery was complicated by a bowel perforation that went undiagnosed for a period of time, resulting in ischemia and the necrosis of the patient's small bowel. This in turn required removal of the damaged bowel and a subsequent bowel transplant. During the hospitalization, the patient was treated by a number of physicians. The lawsuit proceeded against the hospital, surgeon, and another physician for medical negligence. Plaintiffs amended their complaint to add treaters and their employers and alleged that the physicians were agents or apparent agents when treating the plaintiff. The hospital filed an answer admitting that four of the physicians were apparent agents and denying apparent agency as to the remaining physicians.

During discovery, plaintiff issued deposition riders to the defendants seeking to depose individuals with knowledge about the relationship between a defendant and a managed care organization that was not a party to the lawsuit. The hospital refused to comply, and a discovery sanction was ultimately entered pursuant to Supreme Court Rule 219 barring the hospital from "maintaining any defense or argument" concerning the apparent agency of non-employee doctors.

At trial, the plaintiff moved in limine to read portions of 10 treater physician depositions in their case in chief. Defendants objected to the use of the testimony of seven physicians whom it argued were not agents, arguing that the use of the discovery deposition testimony violated Illinois Rule of Evidence 801(d)(2)(D) (allowing a party's agent or servant out of court statement when the statement concerns "a matter within the scope of the agency or employment, made during the existence of the relationship"). Specifically, the hospital argued that any agency relationship only existed while the physicians were providing care to the plaintiff and "ceased by the time the deposition" such that the deposition could not constitute statement of an agent.

The First District Appellate Court undertook an analysis of the use of depositions at trial and exception to the hearsay rule against the use of out of court statements. First, with respect to admissibility under Rule 801(d)(2)(C), which specifically defines statements offered against a party made by a person "authorized by the party to make a statement concerning the subject" as not hearsay, the trial court agreed that the fact the doctors were authorized to document in the patient's chart and communicate about patient's care did not mean that the doctors were authorized to speak on behalf of the hospital. The appellate court also evaluated whether the depositions were admissible due to the physicians being in privity with the hospital, as outlined in Rule 801(d)(2)(F), which the court rejected. The court found that the discovery depositions of the treating physicians that the hospital did not admit agency with were improperly allowed to be read to the jury as a statement against a party.

Despite this finding, the appellate court found no harm in the admission. Defendants argued that they were prejudiced because they

were not allowed to cross examine the witness immediately after the statements were read to the jury. The appellate court found that the defendants could have asked to treat the physicians as adverse witnesses and attempt to impeach statement from their deposition testimony. Further, the fact there was a delay before an opportunity for cross examination was the product of the order of proof at trial, which did not manifest prejudice.

A dissent authored by Justice Lavin addressed the discovery sanction issued by the trial court, despite neither party appealing the issue because the issues on appeal "predominantly concern that order" and how the thin evidence that supported the entry of the sanction order "altered the course" of what happened at trial. The dissent outlined the unfair prejudice to the defendants as a result of the trial court's decision to allow the plaintiffs to read "cherry picked" portions of the discovery deposition to the jury when the witnesses were available to testify live at trial.

Browning v. Advocate Health & Hosp. Corp., 2023 IL App (1st) 221430.

No Duty of Care Owed Under Open and Obvious Danger Doctrine

The United States Court of Appeals for the Seventh Circuit affirmed the grant of summary judgement for defendant Sherwin-Williams where defendant owed no duty to plaintiff under the open an obvious doctrine.

Plaintiff, a truck driver, brought suit against defendant, alleging the company failed to exercise ordinary care by leaving empty pallets in the work area and providing an unsafe "walkie" (a hand-operated forklift). Plaintiff was delivering products to defendant's paint supply store. After plaintiff finished unloading his truck at defendant's store, plaintiff backed the walkie down the store's ramp toward pallets near the dumpster, but miscalculated how long it would take to stop the walkie. He failed to stop before he got to the pallets, trapping his foot and breaking his ankle.

Defendant moved for summary judgment arguing (1) it owed no duty because the pallets were an open and obvious condition that plaintiff could have avoided and (2) plaintiff failed to provide evidence that the walkie was unsafe.

First, court found that the defendant did not owe plaintiff a duty of care under the open and obvious danger doctrine, where plaintiff could have avoided such danger by moving the walkie away from the pallets. This doctrine "considers whether a reasonable person with the plaintiff's knowledge of the situation would appreciate the risk and know to avoid the hazard." If so, the risk of harm is slight and plaintiff is expected to avoid the hazard on their own. Plaintiff conceded the pallets were an open and obvious condition but argued the deliberate encounter exception applied. Under this exception, defendant would have reason to expect plaintiff to encounter the pallets because the advantages of doing so outweigh the apparent risk. The court rejected plaintiff's argument, concluding that plaintiff could have done the job without encountering the danger by reversing away from the pallets. Additionally, the placement of the pallets by the dumpster was the "natural" place for their disposal, and to "micromanage" their placement would impose an unreasonable consequence on landowners unsupported by Illinois law. Accordingly, defendant did not owe plaintiff a duty of care, so the claims related to the discarded pallets fail.

The court also held that the district court did not err in excluding plaintiff's expert's opinion regarding the allegedly unsafe condition of the walkie, concluding it was neither "based on sufficient facts or data" nor "the product of reliable principles and methods." As such, plaintiff could not prove that the walkie was unsafe.

Burns v. Sherwin-Williams Co., 78 F.4th 364 (7th Cir. 2023).

Illinois Supreme Court Finds Arbitration Clause in Resident Long-Term Care Admission Contract Terminated on Death of Resident Due to General Contract Provision

Defendant Oakbrook Healthcare Centre, Ltd. appealed a decision from the First District that affirmed a trial court's decision to deny a motion to compel arbitration under a nursing facility contract. The Supreme Court of Illinois affirmed the judgment of the trial court finding that arbitration was not an available option for alleged negligent conduct that occurred prior to the resident's death.

Plaintiff filed an action based on alleged negligent care provided to a resident of a nursing facility, injuries suffered as a result, and the resident's subsequent death. Plaintiff sued based on the Nursing Home Care Act, common-law negligence, wrongful death action, *res ipsa* negligence, and survival action. Oakbrook filed a motion to compel arbitration of these claims based on the resident's admission contract ("Admission Contract") to the facility.

"Section E" of the Admission Contract provided a dispute resolution provision whereby the parties agreed to binding arbitration for all civil claims should they not be able to resolve their dispute through mediation. "Section F" of the Admission Contract, titled "Term and Termination," stated that the Admission Contract would terminate immediately upon the resident's death.

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Relying on the Illinois Supreme Court's opinion in *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, Oakbrook argued that the negligence and Nursing Home Care Act claims brought under the Survival Act should be arbitrated under the Admission Contract's arbitration clause, and the termination-on-death clause in the term provision does not change the result because the claims accrued prior to the resident's death. Plaintiff argued that Oakbrook had no contract to enforce because the entire contract, including the arbitration clause, did not survive the resident's death.

The supreme court analyzed its opinion in *Carter* and the appellate court decision in *Mason v. St. Vincent's Home, Inc.,* 2022 IL App (4th) 210458, and overruled *Mason*, to the extent it held that all claims brought pursuant to the Survival Act but after the decedent's death are subject to arbitration despite a termination-on-death clause. In doing so, the supreme court looked toward its well-established rules of contract interpretation.

Oakbrook further argued that the language in the arbitration clause, "all civil claims arising in any way out of this Agreement," demonstrated that the parties did not intend to terminate the arbitration clause upon the resident's death, and the dispute resolution provision remained enforceable. However, the supreme court found that a plain language reading of the contract showed that the parties contracted to use arbitration only up until the point of the resident's death because, by the express terms of the Admission Contract, the contract ceased to exist once the resident died.

The supreme court cited the appellate court's decision in this matter, stating that the drafters of the contract could have limited the interpretation of the termination on death provision by carving out an exception to preserve the arbitration clause (e.g., "this Contract, other than the arbitration agreement in Section E, shall terminate upon the resident's death"). However, no such provision existed in this case.

For these reasons, the supreme court concluded that the Admission Contract terminated on the resident's death, and affirmed the judgment of the appellate court, which affirmed the judgment of the trial court denying Oakbrook's motion to compel arbitration.

Clanton v. Oakbrook Healthcare Ctr., Ltd., 2023 IL 129067.

Second District Appellate Court Performs Close Scrutiny of Elements of Employment and Overturns Radiology Group's Agency Summary Judgment Decision

A patient sued multiple healthcare providers and healthcare institutions for failure to timely diagnose her ascending aortic dissection, including failure of a radiologist to comply with the standard of care by not identifying changes in the aorta that could indicate an aortic dissection. The defendant radiology group filed a motion for summary judgment asserting that the radiologist was neither an employee nor agent of the group, citing the testimony of the radiologist, the Radiology Services Agreement between the group and hospital, and the Engagement Agreement between the radiologist and group. The circuit court found that there was no genuine issue of material fact that the radiologist was neither an employee nor agent of the group and granted the group's motion for summary judgment finding the radiologist was an independent contractor.

The Appellate Court Second District reversed, finding that there was a question of fact regarding the relationship between the radiologist and group after an extensive analysis of the factors in determining whether an employer-employee relationship exists, including (a) the right to control the manner of work; (b) the nature of work performed in relation to the business of the purported employer; (c) the skill involved in the work contemplated; (d) the method of payment; (e) the right to discharge; (f) the party providing tools, materials, or equipment for work; and (g) the party deducting or paying for insurance, social security, and taxes.

The appellate court noted that the agreement between the group and hospital and the group and radiologist, rather than demonstrating the independence of the practitioner, indicated that he was controlled by the group. Specifically, as part of the Engagement Agreement, the radiologist granted the group the right to send a letter resigning his privileges to the hospital should his affiliation with the group terminate. In so doing, the appellate court noted the doctor "relinquished any rights to a hearing, review, or due process to which he might otherwise be entitled through medical staff bylaws, hospital bylaws, and state and federal law." The radiologist was only allowed to practice at the hospital through the group, indicating a retained "right to control the manner in which" the radiologist practiced.

The group pointed to the fact that the radiologist was free to choose what shifts he wanted. The appellate court observed that the evidence indicated that once the radiologist accepted a shift, the radiologist was obligated to work or find coverage, in contrast with an independent contractor who performs work as they please. Additionally, while working, the radiologist was in the radiology reading room and was required to stay within the vicinity of the hospital if an emergency occurred, which the appellate court found to be unlike an independent contractor who would be allowed to come and go as they please. Similarly, the fact that the radiologist was required to complete STAT radiology reads and complete reads on all imaging that arrived during his shift was inconsistent with an independent contractor.

Ultimately, the appellate court noted that the uncontested facts demonstrated elements of both an employer-employee relationship and an independent contractor position existed which prohibited the entry of summary judgment.

Conrads v. Rush-Copley Med. Ctr., 2023 IL App (2d) 220455.

Prejudgment Interest in Wrongful Death and Personal Injury Cases Held Constitutional

Plaintiff brought a medical negligence claim against radiologist and service corporation for failure to diagnose her with cancer from imaging. At trial, the jury found in favor of Plaintiff, awarding damages over $6,000,000. Plaintiff filed a renewed motion for prejudgment interest, posttrial. The trial court granted Plaintiff's renewed motion and modified the plaintiff's judgment to include over $100,000 in prejudgment interest. Defendants appealed, arguing that the amendment mandating prejudgment interest in personal injury and wrongful death cases violates the Illinois Constitution.

Defendants presented several constitutional challenges to the amendment including: (1) the amendment violates the right to jury trial; (2) the amendment violates due process; (3) the amendment violates the constitutional bar on special legislation; (4) the legislature failed to meet constitutional procedural requirements; and (5) retroactive application of the amendment is unconstitutional. The appellate court found Defendants' constitutional challenges unpersuasive.

In considering whether the amendment violates the right to trial by jury, the Court found prejudgment interest is not an element of tort law, but rather a statutory additur. Prejudgment interest applies only when legislatively defined conditions apply and does not affect a jury's damage calculation. Furthermore, the Court found that the amendment does not penalize a defendant who elects for trial by jury.

Reviewing Defendants claim that the amendment violates due process, the Court used the rational basis test to determine the constitutionality of the amendment. The Court found the legislature has legitimate interests in the amendment. Interests include encouraging prompt settlement of wrongful death and personal injury cases, and compensating plaintiffs for the delay in being made whole.

Defendants contended that the amendment penalizes defendants for delays in litigation. The Court found prejudgment interest is neither bonus nor penalty, but rather a preservation of an award's economic value. Furthermore, Defendants argued that prejudgment interest is duplicative of the jury's award. The Court found that while the amendment may be illogical in conjunction with jury instructions which adjust future damages to present value, illogical is not unconstitutional.

In considering the prohibition on special legislation, the appellate court employed the rational basis test. The Court found that the legislature has legitimate interests in the prejudgment interest amendment. Personal injury and wrongful death cases make up a majority of the cases on Illinois dockets. As such, the Court held the legislature can reasonably focus reform efforts on these cases.

Defendants contended that the amendment unfairly prejudices a defendant joined more than one year after a plaintiff's filing. The Court found the Defendants have no standing for this argument; however, the Court suggested a reasonable court could find a one-year grace period for such a defendant.

Defendants contended that the amendment violates the separation of powers, specifically contending that the amendment deprives the judicial branch of its role as arbitrator of factual damages at issue. The Court found that the legislature decides the legal consequences of the jury's findings. Therefore, the amendment respects separation of powers.

The Court dismissed Defendants' procedural requirement argument finding that, under the enrolled bill doctrine, procedural requirements for passage preclude judicial review under applicable specific conditions.

Referencing Defendants' retroactive argument, the Court held that the amendment may not be applied retroactively to Defendants since Defendants have no vested rights in a particular remedy, and the legislature intended for the amendment to apply retroactively.

In conclusion, the appellate court held that the amendment providing for prejudgment interest in wrongful death and personal injury cases is constitutional.

Cotton v. Coccaro, 2023 IL App (1st) 220788.

Consent Form Signed by the Decedent's Wife was Insufficient for Hospital to Defeat Apparent Agency Claim

The Second District's decision in *Fese v. Presence Central* has a significant impact on defending against apparent agency claims and relying on a hospital's disclaimer to obtain summary judgment against plaintiffs. In *Fese*, the plaintiff brought survival and wrongful death actions on behalf of her husband in connection with her husband's death following admission to an emergency room. The plaintiff alleged medical negligence against a physician and against the hospital on an agency theory with the physician. The plaintiff also brought a claim for recovery under the Family Expense Act.

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The physician was an independent contractor of the hospital but also served as a medical director of the emergency department. In the emergency room, the patient and his wife were given a consent form that unambiguously disclaimed any agency relationship with the physician. The patient's wife signed the form and acknowledgement of the disclaimer. The Kane County Circuit Court granted the defendant hospital's motion for summary judgment, finding that the plaintiff could not prove vicarious liability upon theories of apparent agency or implied authority. The circuit court held that the consent form signed by the wife precluded the apparent agency claim, and that the physician's status as a medical director at the hospital was legally insufficient to raise a question of fact regarding implied authority.

The Second District Appellate Court affirmed in part and reversed in part, holding that questions of fact remained regarding apparent agency, precluding summary judgment in favor of the hospital. First, the Second District held that the consent form was unenforceable against the patient's estate because of a lack of evidence as to whether the wife had the patient's authority to sign on his behalf. The court found the language in the consent form sufficient to disclaim agency. But there was insufficient evidence of what the patient knew or should have known about the physician's employment status. Therefore, the form was insufficient to dismiss the survival and wrongful death actions brought on the patient's behalf. In contrast, the plaintiff's claim under the Family Expense Act was brought in the wife's individual capacity, and since she signed the consent form, she had actual notice of the doctor's independent contractor status. Thus, the plaintiff's family-expense claim was appropriately dismissed.

The Second District affirmed the circuit court's finding that the plaintiff lacked evidence to prove an actual agency relationship between the hospital and the physician based on a theory of implied authority. Observing the standard for proving implied authority, the court looked to whether the evidence was sufficient to show that the hospital had a right to control the physician's exercise of medical judgment. The plaintiff cited evidence of the physician's medical directorship at the hospital and the hospital's bylaws. Focusing on the hospital's service agreement with the physician's practice group, the Second District determined that the hospital did not maintain sufficient control over the physician's work as a treatment provider to support a theory of implied agency, as a matter of law. Pursuant to the physician-services agreement, decisions regarding physician staffing and termination were retained by the practice group, not the hospital. The practice group, not the hospital, compensated the physician for his work at the hospital. In addition, the court explained that the physician's administrative duties as a medical director were distinct from his duties and medical judgment regarding patient care.

Fese v. Presence Cent. & Suburban Hosp. Network, 2023 IL App (2d) 220273.

Summary Judgment for the Hospital on Apparent Agency Affirmed Based on the Patient's Treatment History with the Physician but Reversed as to Implied Authority Based on the Hospital's Rules Showing Right to Control the Physician's Medical Decision Making

The plaintiffs—the bank administrator of the child's estate and the child's mother—filed a medical negligence action against a hospital and physician related to an allegedly delayed cesarean section. The plaintiffs claimed that the hospital was vicariously liable for the physician's alleged negligence because the physician was the apparent agent of the hospital, or an actual agent of the hospital based on a theory of implied authority. The circuit court granted the hospital's motion for summary judgment, finding that the plaintiffs failed to present sufficient evidence to establish that the physician was the apparent or actual (implied) agent of the hospital. The plaintiffs appealed to the Third District Appellate Court.

The Third District affirmed the circuit court's ruling against the plaintiffs' apparent agency theory but reversed the circuit court's decision as to plaintiffs' implied agency theory. In support of summary judgment, the hospital argued that the plaintiffs could not prove all the elements of apparent agency, citing the consent-to-surgery form the mother signed and the fact that the mother had been a prior patient of the physician at issue. The plaintiffs argued that the evidence was sufficient to create a genuine issue of fact because the evidence showed that: (1) the hospital had held itself out as a provider of complete medical care in its emergency room; (2) the hospital failed to inform the mother that the physician was an independent contractor because the consent form she signed was too ambiguous as to who among the staff physicians were independent contractors; (3) the mother relied on the hospital to provide the physician for the care she required; and (4) the hospital's Internet postings and advertising raised a question of fact as to whether the hospital held the physician out as its agent.

As to apparent agency, the Third District agreed with the plaintiffs that the consent form was too ambiguous to put the mother on notice of the physician's independent contractor status. The form's language was insufficient to defeat apparent agency because it only

informed the mother that "most" of the physicians at the hospital were independent contractors and that the physician at issue "may be" an independent contractor. But the court agreed with the hospital that the mother's history of treatment with the physician was sufficient to put her on notice of the physician's independent status. The evidence showed that the mother had been the physician's patient during the entire course of her prior pregnancy and the latter part of her current pregnancy. During both periods, the mother attended appointments at the physician's private office, which was not part of the hospital. Considering the mother's treatment history, the plaintiffs' other evidence regarding the hospital's Internet advertising was insufficient to raise a question of fact on apparent agency. Thus, as a matter of law, summary judgment for the hospital was proper as to the plaintiffs' apparent agency claim.

The Third District, however, held that the "determination of whether [the physician] was the implied agent of the hospital is a question of fact for the trier of fact to decide in this particular case." The court stated the rule: to maintain an actual agency claim premised on a theory of implied authority between the hospital and physician, there must be enough evidence to show the hospital had the right to control the physician's exercise of medical judgment. The court concluded that the record showed that the hospital maintained the right to control several aspects of the physician's ob-gyn practice. For instance, the timing of and manner in which the physician was to administer certain treatment interventions, including the timing of performing the C-section at issue, "were dictated in detail by the hospital." Moreover, the court distinguished between hospital policies of "an administrative nature," and policies that "involve healthcare decisions" relevant to the physician's exercise of medical judgment as an ob-gyn. For example, the hospital's policies prevented the physician from performing certain ob-gyn procedures and abortions at the hospital; according to the court, these policies involved healthcare decisions that tended to show the hospital's right to control the physician's exercise of medical judgment.

Finally, the court noted the hospital's independent-contractor agreement, which gave the hospital the right to discharge the physician from on-call work if the physician provided services that contravened the hospital's "ethical directives." For these reasons, the Third District concluded that the "unique facts of this case and the specific rules that the hospital had put in place that directly pertained to [the physician's] medical decision-making ability as an ob-gyn" precluded summary judgment in favor of the hospital on the plaintiffs' implied agency claim.

First Midwest Bank v. Ottawa Reg'l Hosp. & Healthcare Ctr., 2023 IL App (3d) 220008.

Prejudgment Interest Statute Is Unconstitutional but Was Upheld by Fourth District Due to the Enrolled Bill Doctrine

In *First Midwest Bank v. Rossi*, the plaintiff claimed medical negligence against a surgeon in connection with complications from a gastric bypass surgery, leading to the patient's death. Following trial, the jury returned a verdict for the plaintiff, totaling $7,745,400. Upon post-trial motions, the trial court granted the plaintiff's motion for prejudgment interest.

On appeal, the defendant contested the award of prejudgment interest, arguing that the prejudgment-interest statute, 735 ILCS 5/2-1303(c), is unconstitutional. First, the Fourth District concluded that the statute is constitutional in that it did not violate the defendant's constitutional right to a jury trial or due process. Based on its review of the legislative history, however, the Fourth District concluded that the statute was enacted in violation of the Illinois Constitution's three-reading rule (Ill. Const. 1970, art. IV, § 8(d)), which requires that a "bill shall be read by title on three different days in each house," and that the "bill and each amendment thereto shall be reproduced and placed on the desk of each member before final passage." In violation of this rule, the prejudgment-interest bill was not read out by title. Instead, the Illinois Senate and House read it out only as "Senate Bill 72" or some variation of the same. Moreover, the bill was not read out three times in the Illinois Senate following substantial amendments in the House.

The Fourth District rejected the argument that the bill's numerical designation and title are the same for purposes of constitutional compliance. The court characterized this argument for the General Assembly's use of a "mere" numerical designation as "a mockery" of the constitutional "requirement that the bill be read by its title on three different days." The Fourth District explained that pursuant to well-established precedent from the Illinois Supreme Court, the title of the bill is an important legislative consideration in determining the bill's scope. The three-reading rule was intended to ensure that the legislature is fully aware of the contents of bills before voting and allows lawmakers to debate the legislation. "Equally relevant to the three-reading rule is the opportunity for the public to view and read a bill prior to its passage, thereby allowing the public an opportunity to communicate either their concern or support for proposed legislation with their elected representatives and senators. Taken together, two foundations of the bedrock of democracy are decimated by failing to require the lawmakers to adhere to the constitutional principle." For these reasons, The Fourth District concluded that the General Assembly's violation

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of the three-reading rule rendered the prejudgment-interest statute unconstitutional.

Nonetheless, despite its conclusion that the statute is unconstitutional, the Fourth District held that it was bound by the supreme court's "enrolled bill doctrine." Pursuant to the doctrine, certification by the President of the Senate and the Speaker of the House that the constitution's procedural requirements were met in passing the bill: (1) provides conclusive evidence of compliance; and (2) protects the bill from judicial review based on concerns for the separation of powers. Despite the violation of the three-reading rule, the necessary certifications were made regarding the prejudgment-interest statute's enactment, thus triggering the enrolled bill doctrine. Bound by the doctrine, the Fourth District held that it could not set the prejudgment interest statute aside based on its unconstitutional enactment.

The Fourth District called upon the supreme court to revisit and reject the enrolled bill doctrine. To convey its concerns about the doctrine, the court quoted from Justice Heiple's partial dissent in *People v. Dunigan*, 165 Ill. 2d 235, 256–58 (1995), observing that literal adherence to the "'so-called enrolled-bill doctrine means that a bill need never be read or presented in either house, need never receive a majority vote, and need never even be voted on. Two people, the Speaker of the House and the President of the Senate need merely sign and certify a bill and, unless vetoed by the Governor … the bill becomes *ipso facto* the law of Illinois.'"

First Midwest Bank v. Rossi, 2023 IL App (4th) 220643.

A Chance to Replead in Police Shooting Case

The family of man who was shot in the back of the head by an Illinois State Trooper will get another chance to replead. That is the result of *Green v. State*, 2023 IL App (1st) 220245.

Applying the three factors from *Healy v. Vaupel*, 133 Ill. 2d. 295 (1990), the appellate court agreed with the circuit court that the plaintiff failed to plead facts to avoid having to proceed in the Court of Claims. The court found: (1) there are no allegations that the employee of the state acted beyond the scope of his or her authority through wrongful acts, (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of state employment, and (3) the complained-of actions involve matters ordinarily within that employee's normal and official functions of the state. As a consequence, the court held that sovereign immunity precluded subject matter jurisdiction in circuit court and that the only remedy under the second amended complaint had to be sought in the Court of Claims.

However, the reviewing court reversed the circuit court's denial of leave to amend and to file a third amended complaint to allow the plaintiff to plead additional facts to try to show that the troopers were not acting with the course and scope of their duties as state officials. The court found that the allegation that murder had been committed was insufficient; rather, more facts needed to be pled to establish whether the shooting occurred without lawful justification.

Green v. State, 2023 IL App (1st) 220245.

COVID-19 Executive Order May Provide Immunity to Healthcare Facilities for Ordinary Negligence Claims

On April 1, 2020, pursuant to the Illinois Emergency Management Agency Act (20 ILCS 3305/1 *et seq.*) ("the Act"), Governor J.B. Pritzker issued Executive Order No. 2020-19, which provided the first directives, in a series, to address the COVID-19 outbreak. Shortly thereafter, and within 30 days, Governor Pritzker reissued Executive Order No. 2020-19 as Executive Order No. 2020-33 (hereinafter "Executive Order"). While Governor Pritzker reissued his same executive order several times during the pandemic, this suit only concerned the first two orders, which invoked the Governor's authority under Section 21(c) of the Act to extend governmental tort immunity (under 745 ILCS 10/1-101 *et seq.*) to nursing homes and healthcare facilities that "render[ed] assistance or advice at the request of the State" during the disaster declaration.

Specifically, after invocation of the Executive Order, several wrongful-death lawsuits were filed against a nursing home where many residents had passed away from COVID-19 complications during the beginning of the pandemic. The suits were consolidated as the plaintiffs all similarly alleged that that the nursing home negligently and willfully failed to control the spread of COVID-19 into the facility which resulted in the residents' deaths. The nursing home filed motions to dismiss the negligence claims arguing immunity from ordinary negligence under the Executive Orders. The trial court initially denied said motions to dismiss, but thereafter, the nursing home filed a motion to reconsider, and the trial court vacated the denial. The nursing home then submitted the following question for certification: "Does [Executive Order] provide blanket immunity for ordinary negligence to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic." The trial court certified the question for review, and the Second District Appellate Court granted leave to appeal.

The appellate court first noted that the certified question, as presented, misstated the relevant issues in the case. However, it

further held that it was not limited to the language of the question as certified and could answer the certified question, as reframed. The court then reviewed its modified certified question and answered in the affirmative. Specifically, the modified certified question was reframed as follows: "Does Executive Order No. 2020-19, which triggered the immunity provided in 20 ILCS 3305/21(c), grant immunity for ordinary negligence claims as to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic?"

Under the modified question, and after finding no ambiguity in section 21(c) of the Illinois Emergency Management Agency Act, the appellate court determined that the nursing home here would have immunity from negligence claims arising during the Governor's disaster declaration "*if and only if* it can show it was 'render[ing] assistance' to the State during this time." Further, that "rendering assistance" is a fact-bound question not easily disposed of through preliminary pleadings and would be more situated for the trial court to decide, in that it could better evaluate the quantum of evidence necessary to determine whether a given defendant qualified for the statutory immunity at issue. Thus, while the modified certified question was answered in the affirmative, the matter was also remanded to the circuit court in order to better evaluate whether the nursing home being sued "rendered assistance" to the State under which it would qualify for the tort immunity it was attempting to enforce.

James v. Geneva Nursing and Rehab. Ctr., LLC, 2023 IL App (2d) 220180, appeal allowed.

Text Messages and Torts: A Closer Look at Intentional Infliction of Emotional Distress

In *Kornick v. Goodman*, the plaintiff brought a claim against the defendant for intrusion upon seclusion. The defendant filed a five-count counterclaim, one being a counterclaim for intentional infliction of emotional distress. The trial court granted the plaintiff's motion to voluntarily dismiss his intrusion upon seclusion claim, leaving the defendant's emotional distress claim as the sole pending matter. The defendant alleged that he sustained severe emotional distress after viewing vile and vulgar text messages that the plaintiff had sent to the defendant's 13-year-old son, who had features of autism spectrum disorder. The trial court granted summary judgment in favor of the plaintiff. The defendant appealed.

The elements of the tort of intentional infliction of emotional distress provide that a party must allege facts to establish that (1) the defendant's conduct was extreme and outrageous, (2) the defendant either intended that his conduct should inflict severe emotional distress or knew that there was a high probability that his conduct would cause severe emotional distress, and (3) the defendant's conduct caused severe emotional distress.

On appeal, the first element was not at issue. As to the intent element, the appellate court noted that in some instances, a plaintiff may maintain a cause of action for intentional infliction of emotional distress even if the alleged outrageous conduct was not directed specifically at the plaintiff. The court reasoned that a plaintiff need not be in the presence of the conduct when it occurs to assert that it caused the plaintiff emotional distress. The court explained that relaxing the presence requirements for the intent element was appropriate because the case involved the dissemination of vile and disturbing text messages that had the potential to last forever, which thereby prolonged the period in which the plaintiff could experience emotional distress.

The appellee argued that there is no genuine issue of fact about whether he intended or was reckless about the likelihood that his text messages to the plaintiff's son would cause the plaintiff severe emotional distress. The court reasoned that the party's intent when acting is a question of fact and that summary judgment should not be used when a party's intent is a central issue. The court explained that the appellee's assertion that he did not intend for the appellant to see any text messages raises a question of fact for the jury to resolve as to whether his actions were intentional or so reckless as to warrant the imposition of liability. The court ruled that questions of fact remained as to whether the appellee should have known that the appellant would ultimately see vile and disturbing text messages sent to the appellant's son and, therefore, reversed the trial court's order of summary judgment.

Kornick v. Goodman, 2023 IL App (2d) 220197.

Appellate Court Remands for New Trial Due to Circuit Court Error in Excluding Impeachment Evidence

Plaintiff brought a personal injury negligence action against Defendant for injuries sustained when Plaintiff was attempting to cross a public roadway on a motorized scooter and was struck by Defendant's motor vehicle. Defendant admitted negligence, and a jury trial on damages followed. The jury awarded Plaintiff damages in excess of $800,000. Defendant filed a post-trial motion for a new trial arguing that the circuit court erred when it excluded impeachment evidence and testimony of one of plaintiff's medical experts. The circuit court excluded impeachment evidence of this medical expert regarding bias, prior disciplinary actions, communications

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with counsel, and his previous work as a medical expert. The Plaintiff conceded that circuit court erred in excluding this evidence. The appellate court agreed with the Plaintiff and Defendant, ruling that the exclusion of evidence was erroneous.

Regarding the circuit's court exclusion of impeachment evidence, the appellate court reviewed the decision applying an abuse of discretion test. An abuse of discretion occurs in circumstances in which the trial court based a decision on an incorrect application of the law. The appellate court determined that the trial court excluded the evidence on a believed distinction under Illinois Supreme Court Rule 213 between treating physicians and controlled expert witnesses. Specifically, the circuit court held that a treating physician is subject to a narrower scope of cross examination due to the status as a treating physician. The appellate court held the circuit court incorrectly interpreted Supreme Court Rule 213. The distinction between a controlled expert and treating physician relates only to disclosure method and does not affect the substance of an expert's testimony. Additionally, Illinois law guarantees an opposing party's cross examination to demonstrate any bias, motive, question of accuracy, recollection, and credibility of expert witnesses. The Appellate Court therefore found the circuit court abused its discretion.

Abuse of discretion will only result in reversal if the ruling has substantially prejudiced the Defendant. The Appellate Court found the exclusion of the impeachment evidence substantially prejudiced Defendant. As a result of the ruling, Defendant was not able to present evidence regarding the medical expert's bias, prior disciplinary actions, communications with counsel, and his previous work as a medical expert. This evidence could have impacted the jury's perception of the medical expert's credibility and impartiality. Furthermore, this medical expert was Plaintiff's only medical expert to offer medical testimony regarding the permanent nature of the injury, relate compensatory injuries to the accident, and to connect other injuries to the accident. Plaintiff relied heavily on this expert's testimony in arguments for past and future pain. As a result of the Plaintiff's reliance on this medical expert, the failure of the court to not allow a full cross substantially prejudiced Defendant. Therefore, the circuit court's abuse of discretion substantially prejudiced Defendant. Consequently, the appellate court reversed the circuit court and remanded the matter for a new trial.

Moore v. Mandell, 2023 IL App (5th) 220289.

Google Earth Photos Not Sufficient to Prove City's Constructive Notice of Sidewalk Defect

The Appellate Court of Illinois Third District held that there was no evidence that the city had actual or constructive notice of the defect in the sidewalk where the plaintiff pedestrian fell, upholding the circuit court's grant of summary judgment for the city.

Plaintiff fell while walking on a pedestrian bridge in City of Naperville. She filed a two-count complaint against the City, asserting causes of action for negligence and premises liability. She alleged her fall was caused by a longstanding "sidewalk defect" and that the City failed to (1) warn pedestrians of the defect, (2) provide adequate lighting to illuminate the defect, and (3) repair the defect. Plaintiff argued that the circuit court erred in granting summary judgment because (1) the City had actual and/or constructive notice of the alleged defect in the sidewalks and (2) the defect was not *de minimis*.

Plaintiff asserted defendant had actual notice based on a "Sidewalk Closed" sign on the street next to the sidewalk, shown in a Google Earth photo from October 2016. She also claims the City had constructive notice, based on Google Earth photos showing a visible gap between the concrete and brick beginning in 2012. However, the Google Earth photos were inadmissible because plaintiff provided no foundation or authentication. Even if they were admissible, they do not establish the City had actual knowledge because there is no evidence that the City placed the sign there or that the sign placed because of a defect in the sidewalk. Absent this evidence or any evidence that anyone had previously complained about the condition of the sidewalk, plaintiff failed to establish the City had actual notice of the dangerous condition. There was also no admissible evidence offered about how long the dangerously defective condition existed, so plaintiff failed to establish it had been so long that the City should have been aware of it.

Finally, Illinois follows the *de minimis* rule in assessing injury claims arising from deviations in elevation in adjoining municipal sidewalk slabs; slight defects are *de minimis* and not actionable as a matter of law. A sidewalk defect is considered *de minimis* "if a reasonably prudent person would not foresee some danger to persons walking on it." However, this issue was not reached by the court here since the City lacked actual or constructive notice of the defect in the sidewalk.

Ory v. City of Naperville, 2023 IL App (3d) 220105.

Appellate Court Reverses and Finds Arbitration Agreement Unenforceable as to Plaintiff's Survival Act Claims

In *Parker v. Symphony*, the plaintiff, as administrator of the estate of the decedent, filed a lawsuit against a long-term care facility alleging violations of the Nursing Home Care Act and common-law negligence pursuant to the Survival Act and Wrongful Death Act. Prior to her admission to the long-term care facility, the decedent executed an Illinois short-form power of attorney for health care under 755 ILCS 45/4-10(b), designating her daughter as her agent.

Around one month after her admission to the facility, the decedent's daughter executed an admission contract on behalf of the decedent, detailing the rights and obligations of each party during her residency, which provided that "[t]he Resident and facility have entered into a separate Health Care Arbitration Agreement in connection with this Contract and expressly affirm and state that said Health Care Arbitration Agreement be incorporated into this document as though stated and contained herein." On that same date, the daughter signed a separately paginated "Health Care Arbitration Agreement" which mandated arbitration for any injury claims brought pursuant to the Survival Act. The arbitration agreement was not a condition to rendering health care services by any party, and the agreement was not a requirement for admission of any resident to the facility.

The long-term care facility moved to dismiss and compel arbitration related to the Survival Act claims, arguing that the decedent's daughter had signed a binding arbitration agreement, as the decedent's agent pursuant to the health care power of attorney. The trial court agreed with the with the long-term care facility, dismissed the action, compelled arbitration of the Survival Act claim, and stayed the Wrongful Death claim. The plaintiff filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1), arguing that the daughter lacked authority to bind the decedent to the arbitration agreement and that said agreement was procedurally and substantively unconscionable.

The appellate court indicated that while valid arbitration agreements can mandate arbitration, an arbitration agreement may be invalidated by a state law defense of general applicability, such as fraud, duress or unconscionability, just like any other contract. The appellate court, relying on *Fiala v. Bickford Senior Living Grp., LLC*, 2015 IL App (2d) 141160, held that where an arbitration agreement, such as the one at issue, is optional and freestanding, signing the arbitration agreement was not an act "reasonably necessary to implement the exercise of" the daughter's health care power of attorney. Because the decedent had only signed a health care power of attorney and the arbitration agreement was a separate and optional contract offered upon admission to the long-term care facility, the daughter's power of attorney was not triggered at the time to give her authority to sign such a contract. Since the arbitration agreement was unenforceable, the appellate court reversed the trial court's order compelling arbitration and remanded the action to the circuit court for further proceedings without addressing whether the agreement was unconscionable.

Parker v. Symphony of Evanston Healthcare, LLC, 2023 IL App (1st) 220391.

Navigating Damages: Loss of Consortium and Material Services Post-Remarriage

In *Passafiume v. Jurak*, the plaintiff, acting as an independent administrator of the deceased estate, filed a complaint against the defendant alleging medical malpractice and sought recovery under the Wrongful Death Act. During the trial, an expert economist opined that the value of the plaintiff's loss of financial support was $912,881. A jury found the defendant negligent in the plaintiff's management of the deceased blood clot and awarded $2,121,914.32 in damages, which was reduced to $1,697,531.48. The defendant appealed, challenging the damages award.

On appeal, the defendant argued that the trial court erred by allowing the jury to consider damages for the loss of material services beyond the date of the plaintiff's remarriage. The appellate court indicated that financial support and material services have historically been recoverable under a statutory wrongful death action. The court determined that when a plaintiff chooses to seek damages for loss of consortium within a statutory wrongful death action, the loss of financial support and loss of material services are preserved and remain subject to the Supreme Court's holding that remarriage must not affect the jury's determination of damages. However, the remaining elements of a loss of consortium claim, including society, guidance, companionship, felicity, and sexual relations, remain subject to the *Carter* rule of termination upon remarriage.

The appellate court affirmed the trial court's judgment. The appellate court rejected the defendant's argument that damages for loss of material services must end upon remarriage. The court reasoned that the plaintiff did not bring a consortium action in addition to a wrongful death action but sought damages for consortium within a wrongful death action. As a result, the court ruled that the plaintiff preserved the loss of financial support and loss of material services and explained that remarriage must not affect the jury's determination of damages.

Passafiume v. Jurak, 2023 IL App (3d) 220232.

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Paws, Claws, and Legal Cause: Analyzing the Animal Control Act

In *Scollard v. Williams*, the plaintiff filed a two-count complaint based on injuries the plaintiff sustained while interacting with and attempting to help an injured dog that had gotten loose from the defendant's backyard. Count one was an Animal Control Act claim. Count two was a negligence claim. The trial court granted the defendant's motion for summary judgment on both counts. Regarding the Animal Control Act, the trial court concluded that the plaintiff had voluntarily assumed the risk of injury when she sought to help a wounded animal she had never met. Regarding the negligence claim, the trial court held that the defendant owed the plaintiff no duty because there was no evidence that the dog had demonstrated any vicious propensities before biting the plaintiff. The plaintiff appealed the trial court's decision on the Animal Control Act count.

On appeal, the plaintiff argued that the implied assumption of risk doctrine did not apply under the Animal Control Act. To succeed on a claim under the Animal Control Act, a plaintiff must prove (1) an injury caused by an animal owned by the defendant, (2) lack of provocation, (3) peaceable conduct by the plaintiff, and (4) the presence of the plaintiff in a place where the plaintiff had a legal right to be.

The parties presented four issues. First, whether the defendant was an "owner" under the Act when the bite occurred. Second, whether the plaintiff was an "owner" of the dog when the bite occurred. Third, whether and to what extent the assumption of risk doctrine applies to the facts of the case. Finally, whether there was a genuine issue of material fact about whether the dog was provoked when it bit the plaintiff.

The appellate court explained that the defendant did not voluntarily relinquish control of the dog to another individual or entity who had been expected to control the dog responsibly. The plaintiff and other interested individuals interacted with the dog to reunite the dog and the defendant. Therefore, the defendant was an "owner" under the Act and not entitled to summary judgment on the basis that the defendant was not an "owner" at the time of the bite.

The appellate court then utilized the "assumption of risk" analysis and "owner" analysis to address the two interrelated issues that focused on the plaintiff's relationship with the dog at the time of the bite. The court ruled that the plaintiff would not lose the protections of the Act under either the assumption of risk or owner analysis. The court indicated that petting and generally accompanying a lost animal while authorities contact the owner are not actions akin to that of an owner. The court also indicated that under the assumption of risk doctrine, there were still issues for the trier of fact because of the conflicting evidence about the plaintiff's interaction with the dog. Therefore, the court ruled that because there was a genuine issue of material fact on provocation and whether the plaintiff's relationship with either the defendant or the dog objectively excluded the plaintiff from the class of protected persons under the Act, the appellate court reversed and remanded the circuit court's judgment.

Scollard v. Williams, 2023 IL App (1st) 220464.

Standard of Care Held to be a Genuine Issue of Material Fact with Respect to Physician-Patient Relationship

The First District Appellate Court, reversing the circuit court, determined that a material issue of fact existed as to whether a supervising physician owed the decedent a duty of care, based on a physician-patient relationship, when the supervising physician never treated, consulted with, or evaluated the decedent in person.

By way of background, the decedent presented herself to the emergency room complaining of a sore throat and difficulty breathing. She signed consent paperwork upon admission that indicated her admission and discharge would be arranged by an attending physician. She was seen by a nurse practitioner who diagnosed her condition and recommended that she be discharged with follow-up instructions to see her primary care physician. After her discharge, less than one and one-half hours later, the decedent called 911, but she could not speak. The dispatcher sent paramedics to her house and found the decedent unresponsive. Emergency personnel took her to the hospital where life-saving measures were started, but she ultimately passed away. Thereafter, the plaintiff filed a multi-count complaint against several defendants, including the emergency room supervising physician.

The appellate court discussed the physician-patient relationship and the analysis used to determine when such a relationship exists. The court determined that the physician-patient relationship exists when the physician takes some affirmative action to participate in the care, evaluation, diagnosis or treatment of the specific patient. Here, the supervising physician, while he never saw the decedent in person, was the supervising physician for the nurse practitioner. Said nurse practitioner examined the decedent, diagnosed the decedent, prescribed her medication, and discharged her from the emergency room with instructions to follow-up with her primary care physician. The supervising physician reviewed the decedent's medical chart, determined that such planned course of treatment and action was "reasonably appropriate," and ordered no further testing. He also signed off on the discharge plan and testified that

a patient could not be discharged unless the supervising physician approved such discharge. Considering all facts presented and the case law at issue, the court stated that the supervising physician's medical evaluation in fact impacted the decedent's diagnosis and treatment, and thus, a genuine issue of material fact existed as to whether the doctor owed a duty of care. Further, because of this, it was an error to grant summary judgment on such a basis. As such, the circuit court's decision was reversed and remanded for further proceedings on the complaint.

Slanger v. Advanced Urgent Care, Ltd., 2022 IL App (1st) 211579.

Medical Malpractice Claim Can Stand for Baby Born with Substantial Birth Defects

The plaintiff will have another opportunity to make a claim against mental health doctors and the facility where they worked in a case in which a disabled mother, who had a prior brain injury, did not abstain or manage her birth control and gave birth to a child with substantial birth defects allegedly caused by her prescription medication, Depakote.

The defendants argued that the minor's transferred negligence claim could not stand because the mother's medical malpractice claim was previously dismissed in a separate action against the facility. Further, defendants argued that the negligent supervision claim failed as a matter of law because the mother signed a waiver, and her unprotected sex was a superseding cause.

The plaintiff relied on the holding in in *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348 (1977), in which the Illinois Supreme Court recognized transferred negligence and stated: "As medical science progressed, the courts took notice that a fetus is a separate human entity prior to birth. It is by now commonly accepted that at conception the egg and sperm unite to jointly provide the genetic material requisite for human life. Thus, various courts have gradually come to recognize that the embryo, from the moment of conception, is a separate organism that can be compensated for negligently inflicted prenatal harm."

The Illinois Appellate Court, Fifth District affirmed in part and reversed in part as follows: (1) the circuit court properly dismissed the Indiana defendants as there was no personal jurisdiction over them; (2) the circuit court erred in granting summary judgment to the Illinois medical defendants on the transferred negligence claim on a wrongful birth claim for the birth defect to the plaintiff's child; and (3) the circuit court erred in granting summary judgment to the facility defendants on the negligent supervision claims based upon the application of the exculpatory clause because the court could not decide as a matter of law whether a birth defect resulting from unprotected sex was foreseeable when the waiver was executed. The court also held that there was a question of fact on causation as to whether the mother was adequately informed of and understood the risks of unprotected sex when she was Depakote.

Solomon v. Ctr. for Comprehensive Serv., Inc., 2023 IL App (5th) 210391.

Arbitration Agreement Held Procedurally and Substantively Unconscionable

Decedent's descendant sued defendant nursing home under the Nursing Home Care Act, the Wrongful Death Act, and the Survival Act alleging that the decedent suffered and died due to nursing home's negligent care and treatment. Nursing home filed a motion to dismiss and compel arbitration in compliance with the arbitration agreement signed by decedent. The trial court denied nursing home's motion, finding that the arbitration agreement was unenforceable as a matter of law as procedurally and substantively unconscionable. Nursing home appealed arguing that the trial court erred in finding the arbitration agreement unenforceable. The appellate court affirmed the ruling of the trial court.

A contract may be unenforceable as procedurally unconscionable, substantively unconscionable, or both. Finding the agreement both procedurally and substantively unconscionable, the appellate court affirmed the circuit court's denial of defendant's motion to dismiss and compel arbitration.

Procedural unconscionability exists when a court determines, in consideration of all the circumstances, that the plaintiff lacked bargaining power and that disputed terms were so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he/she was agreeing to them. The appellate court found several factors indicating procedural unconscionability. Decedent had numerous health issues and several hospitalizations prior to his death. Defendant nursing home presented decedent with the 120-page agreement after decedent was re-admitted to the nursing home from a long hospital visit. As to decedent's power of attorney, a descendant testified that decedent was confused, could not sign his name and had difficulty reading, comprehending, and speaking. Defendant could not recall how decedent's signature appeared on the agreement. Additionally, the agreement provided, in part, that the agreement was an integral part of the resident's underlying admission and/or continued residency. Defendant did not recall informing decedent that the agreement was optional. In consideration

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of all these factors, the court found the arbitration agreement was procedurally unconscionable.

Substantive unconscionability exists when the contract terms are so one sided that they oppress an innocent party and where obligations and rights imposed create a significant cost-price disparity. The agreement mutually limited the parties' recovery to $250,000. The appellate court found this more severely affected decedent because defendant was unlikely to incur damages near $250,000 from decedent. Additionally, under the agreement, decedent waived his right to attorney fees while defendant retained its right to attorney fees. The appellate court found these factors created a severe cost disparity between the parties and therefore found the agreement substantively unconscionable.

Turner v. Concord Nursing and Rehab. Ctr., 2023 IL App (1st) 221721.

Video Surveillance Evidence of Proximate Cause in Slip-and-Fall Case Supports Reversal of Summary Judgment

The Appellate Court of Illinois First District reversed the grant of summary judgment in a slip-and-fall case, finding sufficient evidence to support an inference that the absence of a handrail proximately caused plaintiff's injury.

Plaintiff went to defendant's nail salon for a manicure and pedicure, and while stepping out of the pedicure chair, which was on a raised platform and connected to a tub, she fell and broke her leg. The incident was captured by a security camera. Plaintiff alleged defendant was negligent by causing the steps and floor to become slippery, failing to assist her in descending from the elevated chair, and failing to warn her of the slippery steps and floor. Defendant brought a *Celotex* motion based on supposed absence of evidence on plaintiff's inability to identify where or on what she slipped, and the circuit court granted defendant's motion for summary judgment.

In her appeal, plaintiff argued that the trial court erred in granting summary judgment because there was evidence that (1) defendant violated a safety ordinance requiring handrails and (2) defendant failed to install slip-resistant flooring around the pedicure station. Defendant maintained the trial court did not err because plaintiff failed to establish proximate cause.

The court reversed the grant of summary judgment, finding that the video surveillance "readily belies many of the defense's arguments in favor of summary judgment." Specifically, the video showed the "location, circumstance, and biomechanics" of plaintiff's fall. Plaintiff's expert relied on this to opine that the pedicure station was unreasonably dangerous because it lacked a handrail in violation of a local ordinance. A violation of an ordinance meant to protect human life is *prima facie* evidence of negligence.

Plaintiff testified that when she first began to slip, the salon technician put her hand out and plaintiff tried to grab the salon technician's hand. This testimony, along with the video, is direct evidence to support the inference that the lack of a handrail proximately caused plaintiff's injury. The slip-and-fall cases that defendant relies on, where plaintiff was "unsure" of what they slipped on, are distinguished from this case because they were not recorded and there were no witnesses, leaving the plaintiffs without proximate cause. Here, the entire event was recorded on the security camera and there were witnesses in the salon at the time. The court found there was more than enough evidence to survive a motion for summary judgment.

The circuit court's entry of summary judgment denied plaintiff the opportunity to secure testimony from eyewitnesses, which could have further clarified how plaintiff fell and whether the salon floor was contaminated. The *Celotex* motion granted by the trial court was improper because a *Celotex* motion should only be entertained after the respondent has had adequate time to complete discovery.

Williamson v. Evans Nails & Spa Corp., 2023 IL App (1st) 220084.

WORKERS' COMPENSATION

Kenneth F. Werts, *Craig & Craig, LLC*
R. Mark Cosimini, *Rusin & Maciorowski, Ltd.*

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Municipal Employee's Injury in Public Parking Lot was Compensable Under Facts of Case

A municipal employee who slipped and fell on ice and snow in a parking lot owned by the municipality could recover benefits under the Illinois Workers' Compensation Act. The employer-provided parking lot exception to the general premises rule applied

even though the general public could use the parking lot, where the evidence showed that the municipality had granted the employee and other workers the privilege of parking in the spaces in excess of a time limitation applicable to the general public. Thus, the injury was a compensable injury arising out of and in the course of employment, because a municipal employer's premises in the workers' compensation context included places where the employee reasonably might be while on duty, and included places incidental thereto, such as the employer-provided parking area. However, not all municipal property was included.

West Springs Police Dep't v. Illinois Workers' Comp. Comm'n, 2023 IL App (1st) 211574WC.

Employee's Slip and Fall Injury as She Prepared to Leave Office to Attend Mandatory Conference Arose Out of Employment

The appellate court held the Commission's decision finding that the claimant's injury arose out of and in the course of her employment when she slipped and fell on ice in the parking lot of her employer was not against the manifest weight of the evidence. Claimant performed administrative and secretarial duties as directed by a school principal. Sometime prior to the date of the accident, claimant was notified via e-mail that she was to attend a mandatory meeting at the district office at 10:00 a.m. on November 24, 2014. On the day of the meeting, school was not in session, but parent-teacher conferences were scheduled to begin around 1:00 p.m. The district office was in a separate building, three to four minutes away by car. Between the time claimant clocked in for work at 7:39 a.m. at the elementary school and the time she left for the meeting, she testified that she was getting ready for the parent-teacher conferences. As claimant prepared to travel to the meeting, she slipped on wet snow in the school parking lot, sustaining injuries. The employer argued that her injuries did not arise out of and were not sustained in the course of the employment. It said the claimant had been instructed not to go to the school first, but to report to the meeting at 10:00 a.m. The appellate court disagreed, noting that there was no evidence introduced that the claimant had been directed not to come to her school at her usual times, but rather to report for the meeting hours later at 10:00 a.m. Claimant testified that she reported to her school at the ordinary time, that she helped prepare for teacher/parent conferences and that she intended to return to the school after the mandatory meeting. Based upon its analysis, the appellate court indicated the Commission's decision that claimant's accident and resulting injuries arose out of and in the course of her employment was not against the manifest weight of the evidence.

Flossmoor Sch. Dist.#161 v. Illinois Workers' Comp. Comm'n, 2023 IL App (1st) 211603WC-U.

An Idiopathic Fall May Be Compensable if the Employment Significantly Contributed to the Injury by Placing the Employee in a Position Increasing the Dangerous Effects of the Fall

Claimant, a teacher, sought benefits for injuries she sustained to her knees, lower back, head, left elbow, and right pointer finger from falling down a flight of stairs at her place of employment on January 19, 2011. At a hearing, she testified that her duties required that she walk up and down multiple flights of stairs at work. Claimant also testified that the stairs were slanted and lacked metal or treading material. She stated that at the end of the day, when she fell, she felt her foot slip. All she could remember was "clinging as best" as she could. She stated that after she fell down approximately 22 stairs, she regained consciousness at the bottom of the stairs and discovered that her coat was wet. Discharge notes from St. Bernard Hospital stated that claimant experienced a syncopal episode that caused her to fall, but claimant denied the accuracy of the notes. A coworker confirmed that the steps were wet from snow that day. The arbitrator, finding claimant's testimony lacked credibility, concluded that claimant did not slip and fall on wet, dilapidated stairs. Rather, the arbitrator concluded that claimant fell down the stairs after she experienced a syncopal episode. Although the Commission did not dispute the arbitrator's finding that claimant sustained a fall due to a syncopal episode, it determined that claimant presented evidence to support a reasonable inference that the fall stemmed from a risk related to her employment. Specifically, the Commission found that the stairs in the big building were not average stairs but made of cement, worn, uneven, and lacked treading. Additionally, because claimant was required to traverse stairs that were 25 steps in height to clock in and out of work every day, the Commission concluded that claimant's employment contributed to her injuries by placing her in a position where the stairs increased her risk of injury from the fall. Employer sought timely judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's decision.

The appellate court affirmed. It noted that an idiopathic fall may be compensable if the employment significantly contributed to the

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injury by placing the employee in a position increasing the dangerous effects of the fall. The court said it disagreed with the Commission's reasoning that the stairs were dilapidated, but it still believed ample evidence existed that the wet stairs caused claimant's fall. Here, the record reflected that claimant consistently testified that she slipped and fell on wet stairs. Specifically, she testified that the stairs were wet after the parent patrol entered the big building from outside, tracked-in snow and ice on their shoes, and then traversed the same flight of stairs that claimant subsequently fell down. Claimant's colleague confirmed claimant's testimony that the floor and stairs leading to the second floor were wet as a result of the outside wintery conditions. Moreover, stressed the appellate court, it was undisputed that in order to receive compensation, employer required claimant to traverse a flight of stairs at least two times a day to clock in and out of work, and it was immediately following this employer-required task that claimant fell down the stairs. The court said that while it disagreed with the Commission's rationale, it ultimately found that the Commission properly concluded that claimant's injuries arose out of her employment.

Chicago Bd. of Educ. v. Illinois Workers' Comp. Comm'n, 2023 IL App (1st) 220341WC-U.

Slip and Fall in Parking Lot Not Compensable Where Employer Did Not Own or Control Lot

Where the employer did not own the parking lot in which claimant fell, sustaining injuries, did not control nor contribute to the maintenance of the parking lot, and where it appeared that the lot was not part of the employer's premises, the claimant's fall did not arise out of and in the course of her employment. Affirming the Commission's decision, the court stressed that the employer neither instructed her where to park nor provided her with a parking pass. Instead, claimant testified that the employer told her she could park wherever she wanted. Based on the facts, the court could not conclude that claimant's injury arose out of and in the course of her employment with employer.

Hoots v. Illinois Workers' Comp. Comm'n, 2022 IL App (4th) 220041WC-U.

CAUSAL CONNECTION

Claimant Fails to Show Causal Connection Between Current Medical Condition and Earlier Workplace Accident

On July 10, 2006, claimant suffered a work-related accident that resulted in a torn left rotator cuff and long head of the biceps tendon. In November 2006, he underwent surgery to repair the tears. An arbitrator awarded him PPD as to his left arm to the extent of 50 percent loss of use, which was later reduced to 40 percent by the Commission. The claimant returned to work full duty on May 31, 2007. On January 17, 2012, claimant slipped and fell on ice on the employer's premises. In April 2013, an arbitrator found that the claimant suffered multiple contusions and strains as a result of the work accident and awarded him medical expenses, temporary total disability, and PPD benefits of 5 percent loss of the person as a whole. On March 16, 2015, the claimant filed a petition for review under sections 8(a) and 19(h) of the Act, seeking an increase in PPD benefits and the payment of medical treatment for his left shoulder and cervical spine conditions. The Commission ultimately found that the claimant failed to establish that his left shoulder and cervical spine conditions for which he received treatment from 2015 through 2017 were related to the 2012 accident. The Commission noted that the claimant returned to work full duty on April 30, 2012, and sought no medical treatment for his left shoulder or cervical spine from that time until he returned to his physicians in 2015. As to the claim regarding claimant's cervical spine, the Commission further found that no medical testimony was presented explaining how a left shoulder strain/contusion suffered in 2012 could have resulted in the conditions described. As to the cervical spine condition, the Commission found that there was no causation opinion presented. Therefore, the Commission denied the claimant's petition with regard to both the left shoulder and cervical spine conditions and found the claimant was not entitled to an increase in the permanency awarded for that accident. The claimant sought review before the circuit court of Cook County, which confirmed the Commission's decision.

The appellate court said the record demonstrated that, despite any injury the claimant sustained as a result of the 2012 accident, he returned to work full duty and sought no treatment related to his current conditions until he presented to his doctor nearly three years later. Further, the Commission noted that the claimant was diagnosed with simple strains/contusions related to the 2012 accident. Although physician's notes later reflected that the claimant's condition was related to the 2012 accident, this conclusion was not helpful because the physician did not explain the reason for chang-

ing his assessment that the claimant's condition was related to the 2012 accident instead of the 2006 surgery. Nor did the doctor explain how a left shoulder contusion/sprain in 2012 could have resulted in a left shoulder axillary neuropathy diagnosis three years later. Finally the doctor did not explain how a left shoulder contusion/sprain in 2012 could have resulted in multiple procedures five years later. As noted by the Commission, there was no medical testimony supporting the contention that the claimant's left shoulder contusion/strain could have resulted in the claimant's condition of ill-being. Regarding the claimant's cervical spine condition, there again was no causation opinion relating it to the 2012 accident, as explained by the Commission. The court stressed that it was the claimant's burden to demonstrate, by a preponderance of the evidence, such causal relationship. Here, with the lack of medical evidence supporting causation, he failed to satisfy this burden. The decision of the circuit court was affirmed.

Tortoriello v. Illinois Workers' Comp. Comm'n, 2022 IL App (1st) 220153WC-U.

Commission's Finding as to Causation Affirmed Where Conflict in Medical Opinions was Resolved Against Claimant

Here, the arbitrator concluded that claimant failed to prove by a preponderance of the evidence that he suffers from an occupational disease arising out of and occurring in the course of his employment. The arbitrator also found that claimant failed to prove by a preponderance of the evidence that he suffered a timely disablement under section 1(f) of the Act (820 ILCS 310/1(f) (West 2016)). The arbitrator noted that to prove disablement under the Act, a claimant must show that he or she suffered an impairment in the function of the body or the event of becoming disabled from earning full wages as a coal miner as the result of an occupational disease. The arbitrator found that claimant failed to meet either prong. A majority of the Commission affirmed and adopted the decision of the arbitrator. Commissioner Parker dissented. Claimant appealed. The appellate court affirmed, finding first that the Commission's decision that claimant failed to prove that he suffered from an occupational disease arising out of and occurring in the course of his employment with respondent was not contrary to the manifest weight of the evidence where the record contained a conflict in the opinions of the medical experts and resolving that conflict was primarily a matter for the Commission. Additionally, the Commission's finding that claimant failed to prove by a preponderance of the evidence that he suffered a timely disablement pursuant to section 1(f) of the Workers' Occupational Diseases Act was not against the manifest weight of the evidence. The court stressed that claimant did not cease working at the mine because of a diagnosis of coal workers' pneumoconiosis (CWP), he was laid off and declined a recall. After that, the mine shut down.

Field v. Illinois Workers' Comp. Comm'n, 2022 IL App (5th) 210301WC-U.

It is the Job of the Commission, Not the Appellate Court, to Weigh the Evidence as to Causation

The appellate court affirmed the Commission's finding that claimant sustained an accident arising out of and occurring in the course of his employment and its finding that claimant's current condition of ill-being was causally related to his employment. Neither finding on the part of the Commission was against the manifest weight of the evidence where the resolution of those issues required the trier of fact—the Commission—to weigh the evidence, draw reasonable inferences therefrom, and resolve conflicts in the medical opinions. The court stressed that the employer essentially asked the appellate court to reweigh the evidence. It could not and would not do so.

Holland Trucking v. Illinois Workers' Comp. Comm'n, 2023 IL App (5th) 220404WC-U.

Firefighter Need Not Show His Job was *Conclusive* Factor in Development of Cancer, Only that it was *A* Causative Factor

Here, an arbitrator found that claimant was a firefighter for about 16 years on September 6, 2013, and he had kidney cancer that resulted in a disability. The arbitrator found that pursuant to 820 ILCS 310/1(d) (2012), the claimant's kidney cancer shall be rebuttably presumed to arise out of and in the course of his employment and be causally connected to the hazards or exposures of the employment. The arbitrator noted the differing opinions of two physicians, noting additionally that one of them opined that the type of cancer the claimant had was rare and had a completely different etiology compared to more common types of kidney cancer. Neither physician, however, directly answered the question of causation. Based upon the foregoing, the arbitrator concluded that the City failed to overcome the rebuttable presumption. The Commission

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agreed with the arbitrator's ultimate determination but differed in analysis. Instead, the Commission found that the City successfully rebutted the presumption by submitting evidence of an alternative cause of the claimant's kidney cancer in form of its expert's opinion. However, the Commission found that the claimant still proved by a preponderance of the evidence that he suffered an occupational disease based on his own expert's testimony and the record as a whole. The Commission otherwise affirmed and adopted the arbitrator's decision. The circuit court confirmed the Commission's decision.

The appellate court stressed that the Commission need not reiterate or bolster the arbitrator's findings when adopting the arbitrator's decision. The court noted that both experts were provided with the medical records pertaining to the specific form of kidney cancer that the claimant was diagnosed with and made no distinction between different forms of kidney cancer. It was not until the City's physician responded to the claimant's doctor's report that he provided that chromophobe renal cell carcinoma was a relatively rare form of kidney cancer that has a "completely different etiology" when compared to common types of kidney cancer. If the claimant's form of kidney cancer was rare, it is unsurprising that the experts would review studies that examined kidney cancer generally. Again, this was a factor for the Commission to consider when weighing the evidence.

The court said the biggest issue with the City's expert's report was that he sought to find an absolute causation explanation where none was required. For instance, he stated that none of the studies he reviewed conclusively demonstrated that firefighters have an elevated risk of kidney cancer and there is no definitive association between firefighters and the development of kidney cancer. The court stressed, however, the claimant did not have to show that firefighting was the sole or principal causative factor in the development of his kidney cancer—he need only show that it was *a* causative factor. The court found that the Commission's finding that the claimant's kidney cancer arose out of and in the course of his employment was not against the manifest weight of the evidence.

City of Springfield v. Illinois Workers' Comp. Comm'n, 2022 IL App (4th) 210604WC-U.

EMPLOYMENT STATUS

"Volunteer" Pilot For Skydiving Business to Gain Flight Hours for Airline Transit Certificate Was Not an Employee Entitled to Workers' Compensation Benefits

The Commission's determination that a pilot, who sustained injuries in a crash while landing, was not an employee of the owner of the plane, a skydiving business, was not against the manifest weight of the evidence where the claimant testified that she had agreed to fly for skydiving business without payment or monetary compensation so that she could accumulate flight hours that she needed in order to obtain an airline transit certificate, which would authorize her to fly jets. She admitted that she was volunteering to do something which gave her an "incidental benefit." The recording of flight hours in her flight log book was solely her responsibility and choice, not something required, supervised, or verified by the business. The claimant never received any tax document from the business indicating that she had received any type of benefit from it. Citing *Pearson v. Industrial Comm'n*, 318 Ill. App. 3d 932, 935 (2001), the court said there could be no employer/employee relationship, and therefore, no liability under the Act, absent a contract for hire, express or implied.

Larson v. Illinois Workers' Comp. Comm'n, 2023 IL App (4th) 220522WC-U.

Written Agreement was to be Considered in Determining Employer/Employee Relationship; It's Wording, However, was Not Fully Dispositive

The appellate court affirmed an Order of the circuit court confirming the Commission's decision where the Commission found the existence of an employer/employee relationship based upon the fact that the employer controlled the manner in which claimant performed the work, dictated claimant's schedule, supervised claimant at the job site, provided transportation and equipment, and hired claimant and others to perform maintenance duties consistent with the nature of their business. The Commission's decision was not against the manifest weight of the evidence. Quoting *Larson's Workers' Compensation Law*, the appellate court stressed that although a contractual agreement is a factor to consider, it does not, as a matter of law, determine an individual's employment status.

Routine Maint. v. Illinois Workers' Comp. Comm'n, 2022 IL App (1st) 211433WC-U.

Newspaper Photographer Establishes Employer/Employee Relationship

At a hearing, claimant testified that The Final Call, Inc., a/k/a FCN Publishing (FCN) is the publishing arm of the Nation of Islam and publishes the Final Call newspaper, audio tapes, videos, and CDs. He stated that he had worked for FCN for about 10 years prior to the events giving rise to his claim. According to the claimant, his job title when he was hired by FCN was staff photographer. In the August 10, 2009, issue of the Final Call newspaper, the claimant was identified in the list of staff positions for the newspaper as staff photographer under the name of Kenneth Muhammad. Claimant admitted that, during his time with FCN, he also did freelance photography for other publications such as the Chicago Crusader and the Chicago Defender. He stated that he used the cameras owned by FCN for his freelance work. According to the claimant, FCN's editors were aware of his freelance activities. He denied, however, that he ever worked out of the office of any other publication. The claimant did admit that he had taken photographs of events when he had not informed FCN. He also admitted that he offered photographs which FCN decided not to use to other publications. Claimant was paid $650 every two weeks. No taxes or Social Security was deducted from the biweekly checks he received. He also admitted that he had not filed any income tax returns for the years that he worked for FCN, including for 2009. On January 7, 2009, he sustained injuries when he fell inside a bus that he was taking to cover a news story. He testified that he often used public transportation to travel to the locations of stories. The arbitrator found that an employee/employer relationship existed, and that claimant's injuries were sustained in the course and scope of his employment.

The Commission issued a unanimous decision affirming and adopting the arbitrator's decision and ordered FCN to reimburse the Injured Workers Benefit Fund for any compensation that the Fund paid to the claimant pursuant to the award. The circuit court confirmed the Commission's decision. The matter moved first down and then up the appellate chain on a procedural issue. Ultimately, the appellate court held that claimant's uncontradicted testimony was more than sufficient to support the Commission's determination that an employer/employee relationship existed between FCN and the claimant on January 7, 2009, the date of his injury. Obtaining photographs of newsworthy events was a part of FCN's newspaper business. Further, FCN provided the cameras that the claimant used. Although no taxes were taken out of the claimant's checks, FCN paid him the same amount biweekly without regard to the number of hours he worked or the number of pictures that he took for FCN. The fact that the claimant also did freelance work for other publications did not, in the court's judgment, compel a contrary conclusion. The issue before the Commission was the relationship between the claimant and FCN, not the relationship between the claimant and any other entity. That issue was one of fact. The Commission had weighed the evidence and found an employment relationship. The judgment of the circuit court was accordingly affirmed.

The Final Call v. Illinois Workers' Comp. Comm'n, 2022 IL App (1st) 211137WC-U.

AVERAGE WEEKLY WAGE

Claimant's Average Weekly Wage Determined by the Weeks and Parts Thereof Worked During the Less than 52 Weeks Worked

Claimant worked 32 hours in the three weeks prior to his injury. A majority of the hours were paid at his regular time rate of $47.35 an hour. Claimant was paid double time ($94.70) for eight of those hours. The Arbitrator calculated the claimant's average weekly wage to be $505.47 ($47.35 x 32). The matter was reviewed by the Commission and they reversed, finding the average weekly wage to be $1,894.00. They arrived at that figure by multiplying his regular rate of $47.35 by the 24 hours he worked a week at regular time ($1,136.40) dividing that amount by 3 ($378.80) and then multiplying that number by 5 ($1,894.00). The employer sought judicial review. The circuit court of Cook County confirmed. The employer sought appeal to appellate court. The appellate court reversed holding that the correct average weekly wage calculation should be $505.47 based upon his earnings during the weeks and parts thereof claimant worked at his regular time rate as it was determined his overtime paid was actually a bonus as he did not work "overtime" as that term is defined. The calculation used to arrive at an average weekly wage was arrived at by dividing his regular time earnings for the 32 hours total he worked by 3, the number of weeks he worked.

Employco USA, Inc. v. Illinois Workers' Comp Comm'n, 2023 IL App (1st) 220906WC-U.

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MEDICAL CARE

Section 8(a) Does Not Give Commission Power to Attach Conditions to its Finding of Whether Future Medical Care is Necessary and Reasonable

In April 1994, Montgomery was driving a forklift for the employer when his forklift was bumped by another forklift. He sustained injuries in his right hand and arm. The pain in his arm would not go away. In May 1994, he filed a workers' compensation claim relating to the injury. According to his application for adjustment of the claim, the parts of his body affected were his neck, shoulder, and arms. The "Nature of Injury" was described as "[right] arm in sling." In December 1996, the parties entered into a workers' compensation lump-sum settlement agreement, which the Commission approved in January 1997. According to the agreement, the affected parts of Montgomery's body were the "[n]eck, shoulder[,] and right arm." The nature of the injury was "[r]ight upper extremity sympathetic dystrophy" and "lower right extremity migration." While acknowledging that causation remained in dispute, the agreement obligated the employer to pay petitioner a lump sum of $86,000. In return, Montgomery waived all rights under the Act except his right to future medical treatment under section 8(a).

In 2011, Montgomery filed a section 8(a) petition against the employer, alleging wrongful denial of medical treatment. He afterward moved for penalties and attorney fees pursuant to sections 16 and 19(k) (id. §§ 16, 19(k)), accusing the employer of an unreasonable and vexatious refusal to pay medical expenses. Montgomery also sought approval of a life care plan prepared by an expert in the preparation of such plans. The life care plan went through a couple of revisions. The employer disputed the reasonableness and necessity of the medical and incidental expenses.

In May 2018, oral arguments were made on the section 8(a) petition. Subsequently, the Commission issued a decision in which it identified the primary issue in the case as "the appropriate treatment course based on [Montgomery's] complicated diagnosis and progression" of his CRPS. (CRPS is the current term for what formerly was called reflex sympathetic dystrophy (RSD).) The Commission directed that the "care and treatment" of Montgomery's CRPS was to be managed by one central treating physician to oversee the care plan and direct all tangential modalities of treatment and medications. The central treating physician was to make bi-annual reports of Montgomery's medical progress. The Commission also found that the central treater could not be Montgomery's current physician. The Commission also ordered that the central treating physician—besides being a physician other than Montgomery's current doctor—had to be affiliated with a major medical institution. The Commission determined that the proposed life care plan was premature and should not be considered until a medical care plan, administered by a central treating physician, was implemented pursuant to its order.

Both parties sought judicial review of the Commission's decision in the circuit court of Will County, which, in 2019, confirmed the Commission's decision, finding it was not against the manifest weight of the evidence. Both parties then appealed. In 2020, the appellate court found that the Commission's decision was interlocutory and that the circuit court lacked jurisdiction to review it. Specifically, the court then held that the Commission's June 26, 2018, Decision and Order on § 8(a) Petition merely recited the employer's statutory duty to pay reasonable and necessary medical and incidental expenses, without specifying which of Montgomery's claimed expenses that the employer had to pay pursuant to that statutory duty.

Following remand, the Commission issued its final decision on December 23, 2020, in which it announced that the parties had reached a settlement under which the employer's payment to petitioner of $44,000 would be "the full extent of [the employer's] liability for the unpaid balances and other expenses claimed by Montgomery." The Commission noted in its decision that much of Montgomery's treatment had been paid by either Medicare or Medicaid. In addition to paying Montgomery $44,000, the employer was to hold him harmless and pay the Medicare or Medicaid lien if asserted. The Commission adopted and incorporated into its final decision "all other facts findings and conclusions in the Order & Decision on 8(a) Petition of June 26, 2018."

After the Commission's decision on remand, Montgomery again sought review in the circuit court. On December 7, 2021, the circuit court confirmed the Commission's decisions of June 26, 2018, and December 23, 2020, finding neither decision to be against the manifest weight of the evidence. Montgomery's present appeal is from the circuit court's judgment of December 7, 2021.

As to the Commission's rejection of the life care plan, the court observed that the Commission has only the powers bestowed by the Act. The court could find no provision empowering the Commission to attach conditions to its finding of whether future medical care was necessary and reasonable. The Commission did not have the power to choose among physicians and to regulate the manner in which medical treatment was carried out. Section 8(a) could not be plausibly interpreted as giving the Commission such powers. The court agreed with Montgomery that the Act contemplated decisions by the Commission based on treatment provided or to be provided, not on who provides it. The Commission lacked statutory authority to order the designation of a central treating physician or to disqualify

Montgomery's treating physician from that role in favor of another physician. By commanding the designation of a central treating physician, other than Montgomery's doctor and to require that the central treating physician be affiliated with Cleveland Clinic or with an accredited, university-based medical center, the Commission exceeded its statutory authority.

Montgomery v. Illinois Workers' Comp. Comm'n, 2022 IL App (3d) 210604WC.

Court Acknowledged Evidence as to Need for Surgery Supported More than One Inference; it Would Not Disturb Commission's Decision

Claimant sought benefits for injuries that she sustained to her right arm and shoulder on June 29, 2012, while working for the employer. The parties stipulated that the claimant suffered a work-related accident on that date, but disputed the amount of temporary total disability (TTD) benefits owed to the claimant, whether the claimant's current condition of ill-being was causally related to the accident, and whether the claimant was entitled to prospective medical care in the form of a surgical procedure recommended by her treating physician. After conducting a hearing, the arbitrator awarded the claimant TTD benefits from July 2, 2012, until the date she began working part time for another employer, and maintenance benefits from that date through January 12, 2015. The arbitrator found that the claimant had reached MMI on January 18, 2015, and that the claimant had failed to prove that her condition of ill-being after that date was causally connected to her work accident. The arbitrator therefore denied prospective medical care and related expenses incurred after that date.

A majority of the Commissioners modified the arbitrator's decision in part and affirmed it in part. Specifically, the Commission found that the claimant's current condition of ill-being was causally related to her June 29, 2012, work accident. However, it found that the surgery recommended by the claimant's treating physician was neither reasonable nor necessary. The Commission denied the claimant's claim for medical treatment and related expenses after January 12, 2015, (the date on which claimant had reached MMI, according to the Commission). The Commission also vacated the arbitrator's award of maintenance benefits and awarded the claimant temporary partial disability (TPD) benefits from January 2, 2013, through January 12, 2015. It affirmed and adopted the arbitrator's decision in all other respects. The circuit court confirmed the Commission's decision.

Initially, the appellate court noted that Section 8(a) of the Act requires an employer to pay for medical and surgical services and expenses which are "reasonably required to cure or relieve from the effects of the accidental injury," and that the claimant has the burden of proving that the medical services and expenses sought are reasonable and necessary.

Initially, the appellate court noted that Section 8(a) of the Act requires an employer to pay for medical and surgical services and expenses which are "reasonably required to cure or relieve from the effects of the accidental injury," and that the claimant has the burden of proving that the medical services and expenses sought are reasonable and necessary. Applying the required deferential standards, the court said it could not say that the Commission's refusal to award the arthroscopic shoulder surgery recommended by the treating physician was against the manifest weight of the evidence. Another physician opined that the thinning of the supraspinatus area of the claimant's rotator cuff, while "abnormal," did not necessitate any surgical intervention. The physician further opined that the symptoms that the claimant reported after the initial shoulder surgery were not consistent with the diagnostic studies. He concluded that the claimant was "pretty functional" and that all of the objective criteria that were utilized by her treating physicians suggested that nothing was wrong. The physician conceded that the claimant had a cervical spine problem and degenerative disc disease. However, he opined that she had successful surgery on both those areas. He stated that he was not surprised that the claimant might be "somewhat symptomatic," but he opined that "there's not enough there to add up to the severity" of the symptoms she is currently reporting. The court noted that the evidence supported more than one reasonable inference. However, the court could not disturb the Commission's decision on that basis. It stressed that it could reverse only when an opposite conclusion was clearly apparent—that is, when no rational trier of fact could have agreed with the Commission. That was not the case here.

Currey v. Illinois Workers' Comp. Comm'n, 2022 IL App (1st) 210829WC-U.

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TEMPORARY TOTAL DISABILITY

Employer Allowed No Credit for Payments Made to Injured Worker Since Payments were Made Via Worker's Accrued Leave Time

The appellate court held that the Commission's denial of a city's multiple requests for credits pursuant to 820 ILCS 305/8(j) (2014) against amounts awarded to a claimant, relating to at-work injuries which the claimant suffered while in the city's employ was appropriate because there was no dispute that the claimant was paid through the expenditure of her accrued leave time and because there was no indication that she could not have used this leave time absent an occupational injury.

City of Joliet v. Illinois Workers' Comp. Comm'n, 2023 IL App (3d) 220175WC.

SETTLEMENTS

Medical Provider Not Specifically Named in Claimant's Settlement Agreement with Employer is Not a Third-Party Beneficiary to the Contract

Plaintiff, Midwest Neurosurgeons, LLC (Midwest), filed a breach of contract action against defendant, Mary Ellen Abell, seeking to recover the costs of medical services and treatment Midwest provided to Abell's employee, Cheryl Lyell. Midwest alleged that it was a third-party beneficiary to a settlement contract entered into by Abell and Lyell, wherein Abell and Lyell agreed to settle Lyell's workers' compensation claim. Abell filed a motion to dismiss, arguing, inter alia, that the Act prohibited medical providers from maintaining private causes of action against employers for medical services provided to employees who filed claims pursuant to the Act. The circuit court granted Abell's motion and dismissed Midwest's action for failure to state a claim. Midwest appealed, arguing that the court erred because it had pled a recognized cause of action under Illinois law. The appellate court affirmed.

The appellate court noted in relevant part that the settlement contract specifically referenced the medical bills incurred by Lyell for treatment she received at Neurology of Southern Illinois, Ltd., but the contract did not specifically reference the medical bills incurred by Lyell at Midwest. As such, Midwest was not specifically identified in the contract by name as an intended beneficiary. The court stressed that in spite of language in the settlement agreement that Abell agreed to "pay, directly to the providers, the causally-related medical expenses incurred up to 9/26/12," the contractual provision providing for payment of medical expenses directly to Lyell's medical providers merely restated a provision of the Act. Despite the inclusion of the general direct payment language, the court concluded that the contract at issue was made for the direct benefit of Lyell and that any benefit to Midwest was incidental. The court's interpretation of the contract was supported by the fact that Abell specifically agreed to pay the medical expenses incurred at Neurology of Southern Illinois, Ltd. without reference to the medical expenses incurred at Midwest. Midwest failed to plead sufficient facts to show that it was an intended third-party beneficiary to the settlement contract.

Midwest Neurosurgeons, LLC v. Abell, 2022 IL App (5th) 210394-U.

WAGE-DIFFERENTIAL BENEFITS

Commission's Decision to Award PPD Benefits Under Section 8(d)2 in Lieu of an Award of Wage-differential Benefits Under Section 8(d)1 was Not Against the Manifest Weight of the Evidence

On appeal, claimant argued that the Commission erred by (1) declining to award wage-differential benefits under section 8(d)1 of the Act, (2) declining to award penalties and fees under sections 19(k), 19(l) and 16, and (3) awarding respondent section 8(j) credits. Respondent argued that the Commission's decision to award PPD benefits based on a percentage-of-a-whole under section 8(d)2, in lieu of an award of wage-differential benefits under section 8(d)1 was not against the manifest weight of the evidence.

The appellate court noted that under section 8(d) of the Act, a claimant who suffers a permanent partial disability may receive a wage-differential award or a percentage-of-the-person-as-a-whole award. To prove entitlement to a wage-differential award under section 8(d)1, a claimant must show that:

1. he is "partially incapacitated from pursuing his usual and customary line of employment" and
2. there is a "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the

time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

In contrast, a claimant is entitled to a PPD award based on a percentage-of-a-whole under three circumstances:

1. when his injuries do not prevent him from pursuing the duties of his employment but he is disabled from pursuing other occupations or is otherwise physically impaired;
2. when his "injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity;" or
3. when he suffers an "impairment of earning capacity" but he "elects to waive his right to recover under [8(d)(1)."

The court also noted that the Illinois Supreme Court had expressed a preference for wage-differential awards and "where a claimant proves that he is entitled to a wage-differential award, the Commission is without discretion to award a section 8(d)(2) award in its stead"

Gallianetti v. Indus. Comm'n of Illinois, 315 Ill. App. 3d 721 (3d Dist. 2000).

The court added that here, the Commission affirmed and adopted the arbitrator's award of PPD benefits for 20 percent loss of use of the person as a whole under section 8(d)2, finding that claimant proved he was partially incapacitated from pursuing the duties of his usual and customary line of employment but failed to prove he suffered an impairment of earning capacity. Claimant challenged the Commission's finding that he failed to prove an impairment of earning capacity, arguing both that the uncontroverted evidence established an impairment of his earning capacity and that the Commission "failed to apply the proper legal standard in failing to award wage-differential benefits." In doing so, the court stressed that claimant was attempting to avoid application of the deferential manifest-weight-of-the-evidence standard by arguing that the Commission erred as a matter of law when it declined to award wage-differential benefits. Cases cited by claimant were distinguishable. Here, the Commission agreed with the arbitrator's determination that claimant failed to prove an impairment of earning capacity.

The Commission found that claimant had permanent work restrictions of no kneeling or squatting following his January 26, 2011, knee injury, but continued working for respondent as a union carpenter earning the same wage as the other union carpenters. Claimant testified that his restrictions precluded him from performing certain work assignments when he returned to work in February 2016, but respondent accommodated his restrictions by assigning him work that required no kneeling or squatting. As the Commission correctly noted, the evidence showed that respondent was neither paying claimant to perform job duties he was unqualified to perform nor paying him a wage above what is normally paid for such services. The court said it would not disturb the Commission's decision to discount an opinion offered by claimant's vocational expert. It was the function of the Commission to decide questions of fact, judge the credibility of witnesses, determine the weight that their testimony is to be given, and resolve conflicts in the evidence.

The court said the Commission's finding that claimant failed to establish an impairment of earning capacity was a reasonable determination based on the evidence presented at the arbitration hearing. Therefore, it could not say that the Commission's decision to award PPD benefits under section 8(d)2 in lieu of an award of wage-differential benefits under section 8(d)1 was against the manifest weight of the evidence.

Haepp v. Illinois Workers' Comp. Comm'n, 2022 IL App (1st) 210634WC.

CREDIT

Credit for Previous Loss of Use Held to be Based Upon a Percentage of Disability Rather than the Number of Weeks of Disability for Which Compensation was Paid

The claimant settled a 1999 case for 20% loss of use of the right leg. At the time of the settlement, 20% of a leg corresponded with 40 weeks of permanent partial disability benefits. Subsequently, Section 8(e)12 of the Act was amended so that the complete loss of use of a leg was 215 weeks rather than 200 weeks. The claimant suffered a second accident to the right leg in 2015. Following a trial, the Arbitrator and the Commission awarded 30% loss of use to the leg. In calculating the amount payable to the claimant, the Commission awarded 64.5 weeks of PPD benefits less the 40 weeks previously awarded in the first case. On appeal, the employer argued the appropriate calculation should have been based upon the percentage of disability rather than the number of weeks of compensation previously paid to the claimant. This would result in the previous award for 20% of a leg being deducted from the current award of 30% of a leg. Based on the current status of Section 8(e)12, the remaining 10% of a leg corresponds with 21.5 weeks of benefits.

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The Appellate Court held the employer's calculation was correct. When analyzing Section 8(e)17, the credit for prior awards section of the Act, the Appellate Court noted the plain language indicates the "loss" shall be taken into consideration and deducted from any award for a subsequent injury. The court explained the "loss" is the permanent or partial loss of use of a member and not the compensation that was paid or is payable. Consequently, the Appellate Court reduced the award to allow the employer credit for the previous loss of use to the leg.

Village of Niles v. Illinois Workers' Comp. Comm'n, 2023 IL App (1st) 221617WC-U.

EVIDENCE; ADMISSIBILITY

Employer was Not Collaterally Estopped from Challenging Causation Where Actual Finding aas Not Definitively Decided in Earlier Litigation

The appellate court held the employer was not collaterally estopped from challenging causation where the actual finding asserted as its basis was not definitively decided in the earlier litigation. Moreover, the Commission's decision that claimant failed to prove his condition of ill-being was causally related to his employment was not against the manifest weight of the evidence where conflicting medical evidence existed on the issue. The appellate court affirmed in relevant part.

Lewis v. Illinois Workers' Comp. Comm'n, 2022 IL App (2d) 210779WC-U.

Commission Abused its Discretion and Committed Reversible Error by *Sua Sponte* Excluding Medical Records to Which the Employer had Stated, in the Arbitration Hearing, that it had No Objection

Cummings claimed workers' compensation benefits from Future Environmental, Inc. After an arbitration hearing, the Commission found his claim to be unproven, and accordingly, the Commission declined to award him any benefits. Cummings then sought review in the Cook County circuit court, which confirmed the Commission's decision, concluding that the decision was not against the manifest weight of the evidence. Cummings appealed on two grounds. First, he argued the Commission abused its discretion by excluding from consideration 109 pages of medical records to which the employer's attorney had stated he had no objection. Second, Cummings argued the Commission abused its discretion by sustaining the employer's irrelevancy objection to nine photographs of petitioner holding bags of asbestos he had removed from work sites.

The appellate court indicated that it disagreed with Cummings' second contention but found merit in the first. The court said that by *sua sponte* excluding the medical records from consideration, the arbitrator essentially made a foundational objection for the employer. The arbitrator thereby abused his discretion. The Commission adopted the arbitrator's recommended decision without qualification, making the arbitrator's abuse of discretion the Commission's own abuse of discretion. The court said the error was not harmless. Therefore, it reversed the circuit court's judgment and the Commission's decision and remanded the case to the Commission with directions to issue a new decision, this time taking into consideration the improperly excluded medical records.

Cummings v. Illinois Workers' Comp. Comm'n, 2022 IL App (1st) 210956WC-U.

WAIVER

Employer's Adoption of Doctor's Opinion in Fitness-for-Duty Evaluation did Not Bar Employer from Contesting Issue of Disability in Later Workers' Compensation Proceeding

The appellate court held that an employer's prior adoption of a doctor's medical opinion that the claimant was permanently disabled from working as a police officer, which opinion had been rendered for purposes of a fitness-for-duty evaluation, was not a judicial admission that barred the employer from contesting the issue of disability during subsequent workers' compensation proceeding, and the employer did not otherwise waive the issue. The court also found that the Commission's finding that the claimant failed to prove that his work accident was causally related to his current condition of ill-being was not against the manifest weight of the evidence. The Commission's denial of the claimant's claims for additional TTD benefits, maintenance benefits and additional medical expenses was not against the manifest weight of the evidence.

Dickman v. Illinois Workers' Comp. Comm'n, 2022 IL App (2d) 210709WC-U.

APPEALS

Circuit Court has No Jurisdiction to Consider Petition for Judicial Review Filed Prior to Final and Corrected Decision of the Commission

On May 19, 2021, the Commission issued a decision awarding claimant benefits. On May 24, 2021, the employer filed a motion for correction of clerical error with the Commission. On June 7, 2021, claimant filed a petition for judicial review in the circuit court of McHenry County. On July 1, 2021, the Commission issued a corrected decision. On July 14, 2021, claimant filed a notice of intent to file for review with the Commission but did not file a petition for judicial review of the corrected Commission decision with the circuit court. Instead, claimant filed a motion for leave to file an amended petition for judicial review. The employer filed an objection to claimant's motion, to which claimant filed a response. After arguments on the motion for leave to amend the petition, on November 2, 2021, the court denied the motion and dismissed the petition for judicial review for lack of subject matter jurisdiction. Claimant appealed. The appellate court affirmed.

The court explained that claimant filed his petition for judicial review on June 7, 2021, while the employer's motion for correction of clerical error, filed May 24, 2021, was pending with the Commission. The Commission determined it would make the correction sought and issued a corrected decision on July 1, 2021. Thereafter, claimant did not file a petition for judicial review. Thus, the petition seeking review of the Commission's decision by the circuit court was premature. The circuit court did not therefore have subject matter jurisdiction to entertain the action. The appellate court reasoned that because claimant did not file a petition for judicial review after receiving the corrected decision, he failed to comply with the dictates of the Act. The premature filing did not vest the circuit court with jurisdiction, nor did claimant's motion to amend the premature petition. There was no error in the circuit court's dismissal of the petition for judicial review for lack of subject matter jurisdiction.

Smith v. Illinois Workers' Comp. Comm'n, 2022 IL App (2d) 210702WC-U.

Circuit Court's Order Remanding Case to Arbitrator to Determine, *inter alia*, Vocational Rehabilitation, if Any, was Interlocutory and Not Appealable

The arbitrator awarded the claimant TTD benefits from November 14, 2018, (the date his treating physician took him off work), through July 8, 2019, (the date that the claimant could have returned to work a light-duty position offered by the employer but did not do so). The arbitrator found that the claimant's refusal to return to work for the light-duty assignment after July 8, 2019, precluded the award of further TTD or maintenance benefits after that date. Based upon these factual findings, the arbitrator concluded that the claimant was not entitled to vocational rehabilitation. The claimant appealed the arbitrator's decision to the Commission, a majority of which affirmed and adopted the arbitrator's decision with modifications. The Commission affirmed the arbitrator's decision to deny TTD benefits after the claimant refused to work a job within his restrictions. It noted that the claimant was released to work with restrictions on May 19, 2019, and had sought work with other employers beginning in June 2019. Nevertheless, he refused to work the light-duty position offered by the employer. The Commission rejected the claimant's argument that he could not work the light-duty position. It found that the claimant never intended to return to work for the employer. Based on these findings, the Commission affirmed the arbitrator's denial of maintenance benefits and vocational rehabilitation.

The circuit court reversed the Commission's decision in part. It found that the Commission's decision on TTD benefits and its denial of vocational rehabilitation and maintenance were against the manifest weight of the evidence. Although the circuit court acknowledged that an employer may deny a claimant TTD benefits when the claimant refuses to accept a job within his work restrictions, it found that, in this case, the claimant had not refused to work the light-duty job offered by the employer. The court ordered that TTD benefits should have been paid from the date the claimant was taken off work through October 14, 2019, when the claimant reached maximum medical improvement. The circuit court held that the Commission's finding that the claimant could return to work full duty was clearly against the manifest weight of the evidence. It ordered that maintenance benefits should have been paid from October 14, 2019, through the date of the arbitration hearing. At the conclusion of its written Order, the circuit court indicated that it appeared that the original Decision was under section 19(b) and, therefore, the case should be remanded back to the Arbitrator for further proceedings.

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The employer filed a notice of appeal from the circuit court's order. The appellate court said that before addressing the issues raised by the employer, it had to determine whether it had jurisdiction to decide this appeal. The employer argued in the affirmative. The court said the claimant had not argued that the court lacked jurisdiction. The court observed that an order of the circuit court which reverses a decision of the Commission and remands the matter to the Commission for further substantive proceedings is interlocutory and not appealable. Here, the circuit court remanded the matter to the arbitrator "for further proceedings for a determination of additional amounts for TTD benefits, maintenance compensation for permanent disability *and for vocational rehabilitation, if any*" (emphasis added by the appellate court). The court stressed, however, that an order providing for vocational rehabilitation is not final until the parties have agreed upon (or the Commission has determined) a rehabilitation plan outlining the rehabilitation services to be performed and the amounts due for such services, among other things. Thus, the circuit court's order is interlocutory and is not appealable.

The court added:

> We agree that the Commission's initial decision was a final order, and that the circuit court therefore had jurisdiction to review it. However, the question at issue is not whether the circuit court had jurisdiction, but whether we have jurisdiction to decide this appeal. Contrary to the employer's suggestion, the fact that the Commission's order was final and appealable when it reached the circuit court does not decide that issue. As noted above, the circuit court has ordered the arbitrator to conduct further proceedings and to make additional substantive findings on remand. That renders the circuit court's order interlocutory, and it deprives us of jurisdiction to review either the circuit court's order or the Commission's initial order [Opinion, p. 10].

Henderson v. Illinois Workers' Comp. Comm'n, 2023 IL App (5th) 220061WC-U.

Despite Claimant Being Pro Se, the Appellate Court Dismissed Appeal Due to Claimant's Failure to Comply with Rules Regarding Briefs

Following a hearing before a Workers' Compensation Commission Arbitrator, an award was rendered for benefits to claimant including prospective medical treatment. On review, the Commission reversed the portion of the Arbitrator's Order for prospective medical treatment and modified the permanent partial disability award. The Commission affirmed all other aspects of the Arbitrator's decision. The claimant filed a judicial review in the circuit court, and the circuit court confirmed the Commission's decision in all respects.

Acting pro se, Petitioner filed an appeal of the circuit court's Order to the appellate court. The claimant's brief included a Statement of Facts which only contained the facts supporting the claimant's claim of error, but it also included arguments and comments on the facts asserted. Additionally, there were no references to the record on appeal. With respect to the Argument section, the claimant asserted his previous attorney made false statements to benefit the employer, but it did not include any contentions relating to the propriety of the Commission's decision. As with the Statement of Facts, the Argument section did not contain citations to authority or to pages of the record on appeal. Furthermore, the claimant's brief did not include an appendix as required by Illinois Supreme Court Rule 342.

In its decision, the Appellate Court noted it is not a repository for an appellant to foist the burden of argument and research. Because the claimant failed to comply with Illinois Supreme Court Rules 341 and 342 mandating the contents of a brief on appeal, the Appellate Court dismissed the appeal.

Brinson v. Illinois Workers' Compensation Comm'n, 2023 Ill App (1st) 230266WC-U.

EXCLUSIVE REMEDY

Professional Softball Player's Negligence Action Against Employer for Failure to Maintain Workers' Compensation Coverage May Move Forward

Allard played for the Chicago Bandits from 2014 to 2016. The Chicago Bandits is a professional women's softball team affiliated with the National Pro Fastpitch League, operated and maintained by NPF Franchising, LLC. Allard sustained injuries during a game on June 14, 2016, in Akron, Ohio. She did not return to the game but did play the following day. Then she was placed on "concussion protocol," which prohibited Allard from attending games or practices. She remained on the protocol for approximately 10-12 days. Afterwards, Allard attempted to return to her sports routine, but her concussion symptoms immediately returned and worsened. On July 24, 2016, the Bandits terminated its contract with Allard and released her as "unable to play" based on her injury. Through

the remainder of 2016 and 2017, she went through extensive therapy at her own expense.

In summer of 2017, Allard returned to the Bandits under a new contract. By 2017, the Bandits had gone through a change in ownership: the Village of Rosemont now owned the team with Toni Calmeyn as the new general manager. When Allard began practice, her concussion symptoms returned almost immediately. She communicated these symptoms to the ownership, but the Village and Calmeyn nonetheless cleared her to continue playing. In the first game after her return, the symptoms adversely affected her performance.

On June 7, 2017, the Bandits filed a workers' compensation claim with its insurance carrier, Liberty Mutual, for Allard's concussion injury. The insurance adjuster informed the team that its policy had lapsed from September 12, 2015, through July 12, 2016. Calmeyn informed Allard that her injury was not covered because the former team owner had failed to pay insurance premiums for nearly one year. Subsequently, Allard's 2017 contract with the Bandits terminated.

On June 14, 2019, Allard filed her initial complaint, and on October 31, 2019, she filed the first amended complaint, adding a negligence claim with the Village of Rosemont as the defendant. After extensive briefing, the circuit court dismissed negligence claims against the Village and NPF Franchising, LLC with prejudice as time-barred under section 13-202 of the Code of Civil Procedure. The circuit court also dismissed claims for negligence, breach of contract, breach of fiduciary duty, promissory estoppel, breach of implied covenant of good faith and fair dealing, fraud, fraud in the inducement, fraudulent concealment, and unjust enrichment against the Bandits for lack of jurisdiction under the Workers' Compensation Act. The circuit court denied Allard's motion to reconsider. The circuit court's subsequent orders dismissed the remaining claims, and Allard timely appealed.

On appeal, Allard raised two issues:

1. Did the circuit court err in dismissing negligence claims against the Village of Rosemont and NPF Franchising, LLC as time-barred, because the discovery rule postponed the commencement of limitations period of her claims? and
2. Did the circuit court err in dismissing claims against the Chicago Bandits for lack of jurisdiction because her claims fall under exceptions to the exclusive remedy provision of the Workers' Compensation Act?

Allard argued that under the discovery rule, the limitations period starts to run when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused. The court disagreed with her framing of the question. That a plaintiff does not realize the consequences or the full extent of her injury at the moment of the injury does not postpone the accrual of her claim. Indeed, Allard alleged that within minutes after the whiplash, she began to see stars in her vision and realized that she needed medical attention. Without question, there was an injury of some magnitude, of which Allard was almost immediately aware. The court said the nature and circumstances surrounding Allard's traumatic event were such that she was thereby put on notice that actionable conduct might be involved. The court added, however, that the application of the "sudden traumatic event" rule did not bar Allard's negligence claim against NPF Franchising in its entirety. Allard's claim included allegations that NPF Franchising negligently failed to ensure that its teams maintained an active workers' compensation insurance. Here, Allard could not have known that the team's workers' compensation insurance lapsed at the time of her injury until the insurer denied the claim and that denial was communicated to her. Because the action was filed within the two-year limitations period, Allard's negligence claim against NPF Franchising was not time-barred to the extent that it alleges NPF Franchising's negligence in failing to ensure its teams' active insurance status. The appellate court added that Allard's claim against the Chicago Bandits was barred by the exclusive remedy provisions of the Illinois Workers' Compensation Act.

Allard argued that under the discovery rule, the limitations period starts to run when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused. The court disagreed with her framing of the question. That a plaintiff does not realize the consequences or the full extent of her injury at the moment of the injury does not postpone the accrual of her claim.

Allard v. NPF Franchising, LLC, 2023 IL App (1st) 220335-U.

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Mother's Civil Action Against Son's Employer Following Murder by Co-Worker was Barred by Exclusive Remedy Provisions of the Illinois Act

On September 20, 2017, plaintiff's decedent, John Price ("Price"), was working the night shift at an Arby's restaurant in Hickory Hills, Illinois. The Arby's restaurant is owned and operated by defendants Lunan Roberts, Inc. and Lunan Corporation. While Price was taking orders over the intercom system, his co-worker, Irvin Thomas, was preparing the food orders. Because they were working the late shift, Price and Thomas were the only two employees on duty, as the dining room was closed and only the drive-thru was open. Price clocked in for his shift at 9:57 pm. Thomas clocked in at 10:02 pm.

Surveillance video showed the two men working in the restaurant. Two minutes after Thomas clocked in for his shift, at 10:04 pm, Price could be seen gesturing towards Thomas. Thomas was in the process of putting a bun in an oven. The surveillance video did not include any audio. After Price gestured towards Thomas, Thomas walked away from where he was preparing food and exited the frame of the surveillance camera. Thomas returned into view of the camera carrying a large kitchen knife. Thomas proceeded to grab Price and stab him multiple times, resulting in Price's eventual death. Price suffered 27 separate stab wounds. Thomas was arrested and was later charged with murder.

Plaintiff Doreen Price, John Price's mother, filed this suit against defendants, the owners and operators of the Arby's restaurant where her son was killed. She alleged that defendants are liable for her son's death for negligent hiring, retention, and supervision of their employees, among other things. The record revealed that in 2016, a year prior to the stabbing in this case, Thomas threatened two of his elderly relatives with a 9-inch kitchen knife. Thomas also verbally threatened to kill the relatives on that occasion if they did not follow his commands. He was convicted of assault and unlawful use of a knife. Thomas's relatives secured an order of protection against him after that incident.

Thomas and Price had worked together on the night shift for about 14 months. On several occasions, Thomas and Price had disagreed. The district manager of Lunan Corporation testified in a deposition that he knew about an incident where Thomas had shoved a garbage can into Price. Defendants filed a motion to dismiss the case and later filed a motion for summary judgment. Defendants argued in both their motions that they are not liable because plaintiff's exclusive remedy for this matter was under the Workers' Compensation Act. The trial court denied the motion to dismiss in order to allow plaintiff to take discovery on facts that might relate to whether the exclusive remedy provision of the Workers' Compensation Act would bar plaintiff's claims. Following discovery, and on defendants' motion, the trial court granted summary judgment in defendants' favor.

The appellate court noted that fights between employees arising out of disputes concerning the employer's work are risks incidental to the employment, and resulting injuries are compensable under the Workers' Compensation Act and bar recovery in civil suits against the employer. However, where a physical confrontation between two employees was purely personal in nature, the resulting injuries cannot be said to have arisen out of the employment.

The court observed that in moving for summary judgment here, defendants provided evidence that Price was injured during the course of his employment and that his injury was otherwise compensable under the Workers' Compensation Act. At that point, the burden of production shifted to plaintiff to supply some evidence that her claims fell within an exception to the exclusive remedy provision of the Workers' Compensation Act. Plaintiff argued that there was no ongoing work dispute between Thomas and Price, that there was significant evidence that they had a personal relationship, and that the disagreement between the two was unrelated to work.

The court said that plaintiff's hypotheses had appeal, but she could not point to any evidence in the record to support her theories. The court stressed that there were simply no facts in the record that the murder was the result of any personal dispute between Price and Thomas. To reach the conclusion plaintiff urged the court to reach, indicated the court, it would have to engage in speculation that was not supported by record evidence. Plaintiff herself testified that she did not know of any personal disputes between Thomas and her son. During the investigation into the murder, no concrete motive for Thomas's actions was ever revealed. Plaintiff conceded in her deposition that she did not know why Thomas killed her son. While there was no evidence that the dispute was work related, there was similarly no evidence that the dispute was personal, and plaintiff had the burden of producing evidence the dispute was personal. The trial court correctly granted judgment in defendants' favor.

Price v. Lunan Roberts, Inc., 2023 IL App (1st) 220742-U.

Civil Action Against Borrowing Employer is Barred by the Exclusive Remedy Provisions of the Illinois Workers' Compensation Act

The appellate court affirmed the judgment of the circuit court of Cook County granting defendant's motion to dismiss plaintiff's

complaint for damages resulting from a workplace injury. Plaintiff failed to raise a genuine dispute of fact as to whether plaintiff was a borrowed employee of the alleged borrowing employer such that the protections afforded the borrowing employer under the Workers' Compensation Act would not apply, and plaintiff failed to raise a genuine dispute of material fact as to whether the borrowing employer's willful and wanton conduct caused plaintiff's injuries.

Cabrera v. Wiremasters, Inc., 2023 IL App (1st) 220484-U.

Exclusivity Provision of the Workers' Compensation Act Protects Borrowing Employer from Liability

This case involves injuries to the plaintiff when he was struck by a vehicle while performing his job duties. The trial court granted a Motion for Summary Judgment filed by a defendant, borrowing employer pursuant to the exclusivity provision of the Workers' Compensation Act. The appellate court addressed whether the alleged employer met the criteria to be a borrowing employer and therefor fall under the provisions and protections of the Workers' Compensation Act.

The facts revealed Plaintiff was officially an employee of Pinto Construction, but he had been working with a different company, INTREN, for several years. Because INTREN was not a signatory to the union contract, INTREN helped Plaintiff work through Pinto which was a signatory to the union contract, so he could continue working at INTREN. The evidence established that despite the plaintiff's paychecks coming from Pinto, INTREN had the right to direct and control the manner in which the plaintiff performed his work. The plaintiff worked the same hours as the other INTREN employees. The plaintiff took orders from INTREN's foremen, and Pinto never had any supervisors at the work site. Based on these factors, the appellate court held there was no genuine issue of material fact that INTREN was a borrowing employer.

Under the Workers' Compensation Act, a borrowing employer is jointly and severally liable for Workers' Compensation Benefits along with the lending employer. Here, because INTREN was a borrowing employer, INTEREN was immune from third party liability due to the exclusivity provision of the Workers' Compensation Act.

Leman v. Volmut 2023 Ill. App (1st) 221792.

RETALIATORY DISCHARGE

Former Employee Must Show that Employer Knew of Work-Relatedness of Injury to Support Retaliatory Discharge Action

Where an Illinois employee failed to indicate to his employer that his absence from work was due to an alleged work-related injury and he filed his workers' compensation claim six weeks after he had been terminated for failure to report for work, his retaliatory discharge action against his former employer was barred as a matter of law, held a state appellate court. The court acknowledged that had the alleged injury been witnessed by a representative of the employer, the result might have been different, but the court stressed that the former employee had come forward with no evidence that the employer knew of the alleged work-relatedness of the injury or that he would eventually file a workers' compensation claim.

Eckerty v. Eastern Ill. Foodbank, 2022 IL App (4th) 210537.
Methods of Insurance.

Appellate Court Finds Uncontroverted Evidence Showed that Subcontractor had No Employees and, Therefore, Did Not Need Insurance

Prate Roofing appealed an order from the circuit court of Cook County, which affirmed the final decision of the Director of Insurance in favor of defendant, Liberty Mutual Insurance Company (Liberty Mutual), and against Prate Roofing, regarding the parties' workers' compensation insurance dispute. The parties disputed whether Prate owed Liberty Mutual additional workers' compensation insurance premiums because certain subcontractors hired by Prate did not have individual coverage. Prate challenged that determination before the Department of Insurance (DOI). Based on findings of a Hearing Officer, then-Director of the DOI Jennifer Hammer entered an order agreeing with Liberty Mutual and finding that Prate owed additional workers' compensation premiums in the amount of $127,305. The circuit court affirmed the Director's decision and dismissed the claim for declaratory judgment. On appeal, Prate Roofing contended, in relevant part, that the DOI erred in finding that one of the subcontractors, ARW Roofing LLC (ARW LLC) had its own employees who worked on Prate jobs to justify Liberty Mutual charging the additional premium. The dispute had earlier gone to the Illinois

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Supreme Court on other issues and was remanded. Following that remand, the appellate court held the factual finding of the Director of Insurance that Prate Roofing had its own employees for purposes of requiring workers' compensation coverage was not proper as it was against the manifest weight of the evidence.

Prate Roofing maintained that, under the plain language of the Act, if a subcontractor only operates as a middleman that turns around and subcontracts all labor to a different subcontractor who is properly insured for workers' compensation, there is no exposure to the hiring party or its insurer. Thus, the insured status of a middleman without employees is irrelevant. Prate Roofing further contended that the undisputed facts in this case were that it hired an uninsured subcontractor, ARW LLC, and further that ARW LLC acted merely as a middleman who subsequently subcontracted all labor on Prate Roofing jobs to RTS, who was properly insured. Accordingly, the employees who actually worked on Prate jobs were protected under RTS's insurance policy. Prate Roofing also argues that it provided uncontradicted proof to the DOI that ARW LLC had no employees of its own in the form of affidavits from the owner and/or employee of the relevant subcontractors. The court said the uncontradicted affidavits submitted on behalf of Prate Roofing indicated that ARW LLC had no employees. Liberty Mutual submitted no evidence to supports its contention that ARW LLC in fact had employees subject to workers' compensation coverage. After viewing the documentary evidence presented as a whole, we conclude that the DOI's decision was against the manifest weight of the evidence.

Prate Roofing & Installations, Inc. v. Liberty Mut. Ins. Corp., 2022 IL App (1st) 191842-B.

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Survey of Toxic Tort Law Cases

Dissolved Corporation Allowed to be Sued After Expiration of Five-Year Corporate Survival Period

In *Jose Barajas v. BCN Technical Serv.*, plaintiff Barajas sued various corporate entities, including Rockford Systems, LLC, after his hand was severely injured while operating a press with a safety apparatus that was purportedly repaired, built, and/or maintained by Rockford Systems, LLC. The injury took place in 2017 and the case was timely filed in 2019. In 2014, Rockford Systems, Inc. sold its assets to Rockford Systems, LLC. Rockford Systems, Inc. then changed its name to RMS Liquidating, Inc. In November of 2014, RMS Liquidating, Inc., and an associated entity, RMS of Illinois, Inc., voluntarily dissolved. In 2019 the circuit court granted Rockford Systems, LLC's motion to dismiss under a successor liability argument. In 2020, plaintiff amended his complaint to add dissolved corporations Rockford Systems, Inc., RMS Liquidating, Inc. and RMS of Illinois, Inc. (collectively, Rockford Systems). Rockford Systems moved to dismiss, arguing in part that it could not be sued more than five years after its November 20, 2014, dissolution due to the 5-year survival period set forth in 805 ILCS 5/12.80. The court denied the motion to dismiss but certified a question for the Third District to answer on interlocutory appeal. The question was:

"Under 735 ILCS 5/2-616(d), can an amended pleading adding a dissolved corporation more than five years after its dissolution relate back to the five-year post dissolution limitations period set forth in 805 ILCS 5/12.80?" In other words, does the expiration of section 12.80's five-year limitations period render a dissolved corporation beyond the reach of section 2-616(d)'s relation-back rule.

The court assessed the language of the relation back statute and the language of the corporate survival period in tandem. Section 2-616(d) of the relation back statute states in pertinent part: "A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought. . ." The court noted that the clear and unambiguous language of section 2-616(d) applies to all statutory and contractual limitations periods and that section 12.80's five-year post dissolution period was no exception. In further support of its opinion the court noted that the legislature chose not to include limitation period language in either statute and that it would have done so if it intended to create such an exception.

The court disagreed with Rockford Systems' argument that the five-year extension to a corporation's life granted by section 12.80 establishes a fixed endpoint where the corporation ceases to exist and can no longer be sued. The court opined that a fixed endpoint is not a barrier to section 2-616(d)'s relation back rule and that it plainly allows for relation back to a date before the fixed endpoint of a dissolved corporation's life. In other words, section 2-616(d)'s application does not prolong section 12.80's five-year limitation period, nor does it shift a corporation's fixed endpoint; it merely allows relation back to a date within section 12.80's limitations period.

Ultimately, the court answered the certified question in the affirmative finding that where all conditions of section 2-616(d) are met, a dissolved corporation not originally a named defendant may be added as a defendant notwithstanding the expiration of section 12.80's five-year post dissolution period.

Barajas v. BCN Tech. Services, Inc., 2023 IL App (3d) 220178.

Plaintiff Avoids Application of Judicial Estoppel Despite Failure to Disclose Existence of Civil Suit in Separate Bankruptcy Proceeding

In *Duniver v. Clark Material Handling Co.*, the plaintiff filed a workers' compensation claim and a personal injury lawsuit arising from a workplace accident. Three weeks after filing the civil suit, the plaintiff filed for Chapter 13 bankruptcy. In his bankruptcy petition, despite multiple questions concerning the existence of lawsuits, claims, or court actions, the plaintiff failed to disclose the existence of his civil suit. Rather, the plaintiff only identified his workers' compensation claim and disclosed the name of the law firm representing him in his civil suit. When asked under oath by the bankruptcy trustee if the plaintiff was "suing anyone," the plaintiff answered "[n]o."

In the civil suit, the defendants filed a motion for summary judgment, arguing that the plaintiff should be estopped from pursuing the suit because he had failed to disclose its existence in his sworn

bankruptcy petition. In response, the plaintiff argued that he relied on his bankruptcy counsel to determine the information to include in his bankruptcy petition. According to the plaintiff, his bankruptcy attorney failed to advise him that he had a duty to disclose pending lawsuits or injury claims. The plaintiff further noted that he instructed his attorney to correct the bankruptcy plan upon learning that his civil suit should have been included in the bankruptcy petition.

Ultimately, the circuit court granted the defendants' motion for summary judgment, finding that the plaintiff "blatantly deceived" the bankruptcy trustee and that judicial estoppel applied. The First District Appellate Court reversed the circuit court, finding that judicial estoppel did not apply. The appellate court reasoned that the plaintiff received no benefit from failing to disclose the civil suit in his bankruptcy proceedings and the evidence failed to show an intent to deceive or mislead. *Duniver v. Clark Material Handling Co.*, 2021 IL App (1st) 200818. The Illinois Supreme Court granted the defendants' joint petition for leave to appeal.

Before evaluating whether estoppel applied, the court determined the appropriate standard of review. In doing so, the court noted the potentially conflicting standards at issue. Specifically, an abuse of discretion standard applies when a circuit court exercises its discretion in the application of judicial estoppel, while a *de novo* standard applies to an appeal from the grant of a motion for summary judgment. Relying on its prior opinion in *Seymour v. Collins*, 2015 IL 118432 (2015), the court explained that a *de novo* standard applies when the circuit court's application of judicial estoppel results in the termination of the litigation, and that result is brought about via a motion for summary judgment.

The Illinois Supreme Court next reiterated that judicial estoppel applies when a party takes factually inconsistent positions in separate proceedings. The party's inconsistent positions, however, must have resulted from an intent to deceive or mislead, rather than inadvertence or mistake.

Turning to the merits, the court found that the circuit court erred in granting the defendants' motion for summary judgment because reasonable people could have drawn different inferences on whether the plaintiff's omissions and misstatements in the bankruptcy proceedings revealed inadvertence or an intent to deceive. Emphasizing the *de novo* standard of review, the court explained that the record had to be strictly construed against the defendants. The court noted that in his bankruptcy petition, the plaintiff had disclosed his workers' compensation claim, which arose from the same accident giving rise to the civil suit he failed to disclose. Additionally, in one portion of the bankruptcy petition, the plaintiff disclosed the name of the law firm representing him in his civil suit. Thus, the court concluded that reasonable people could conclude that the plaintiff's actions in the bankruptcy matter resulted from confusion and inadvertence, rather than an intent to deceive.

Duniver v. Clark Material Handling Co., 2023 IL 128141.

Seventh Circuit holds that a Product Manufacturer May Have a Heightened Duty to Warn for Products Manufactured by Another Company

In *Johnson v. Edward Orton, Jr, Ceramic Foundation*, plaintiff alleged that her deceased husband contracted and died from mesothelioma caused by exposure to asbestos contained in vermiculite packaging material used by Orton, a manufacturer of pyrometric cones used in the manufacturing of ceramic products. Orton shipped its pyrometric cones to customers in cardboard boxes filled with mineral vermiculite packaging material purchased from W.R. Grace and J.P. Austin between 1963 and 1983. In 1981, Orton received a Material Safety Data Sheet ("MSDS") from W.R. Grace stating that the vermiculite in the packaging materials originated from a mine in Libby, Montana. The MSDS further stated that the packaging material contained less than .1% by weight asbestos. Decedent was a ceramics artist and teacher who opened boxes of the ceramic cones which were filled with the vermiculite packaging material.

After the case was removed from Cook County to federal court, the district court granted summary judgment to Orton, holding that Orton did not owe a duty to decedent. Plaintiff appealed the case to the Seventh Circuit.

To state a claim for negligence under Illinois law, a plaintiff "must allege facts that establish the existence of a duty of care owed by a defendant to the plaintiff, a breach of that duty, and an injury caused by that breach." Citing *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 305 Ill. Dec. 897 (2006). In determining whether a duty exists, Illinois law focuses on whether a plaintiff and defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. Citing *Simpkins v. CSX Transp., Inc.*, 358 Ill. Dec. 613, (2012).

The facts in the records support the conclusion that Orton lacked actual knowledge that the W. R. Grace vermiculite packaging was contaminated with asbestos prior to receiving the MSDS in 1981. The Seventh Circuit focused on whether Orton should have known about the contamination and associates hazards prior to 1981. The court first examined the Illinois standard applicable to Orton. Illinois law holds manufacturers "to the degree of knowledge and skill of

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experts," citing *Anderson v. Hyster Co.*, 74 Ill.2d 364, 24 Ill. Dec. 549 (1979), and therefore had a duty "to keep abreast of scientific developments touching upon the manufacturer's products." *See Proctor v. Davis*, 291 Ill. App.3d 265, 682 N.E.2d 1203 (1997). The district court viewed Orton as being akin to a supplier of the vermiculite packaging, but the appellate court viewed Orton as a supplier because the vermiculite packaging accompanied the product manufactured by Orton, even though Orton undeniably did not manufacture the vermiculite material.

The Seventh Circuit reversed the district court's judgment and remanded the case for further proceedings. The Seventh Circuit held that there is a genuine issue of material fact as to whether Orton had constructive knowledge that the vermiculite packaging material was possibly contaminated with asbestos prior to receiving the MSDS sheet in 1981. Further, the Seventh Circuit held that the district court improperly granted summary judgment to Orton on the issue of duty to plaintiff after receiving the MSDS in 1981. After receiving the MSDS sheet in 1981, Orton had actual knowledge that the packaging material from W.R. Grace was potentially contaminated with asbestos. As such, there was a genuine issue of triable fact existed regarding Orton's use of the vermiculite packaging after its receipt of the MSDS.

Johnson v. Edward Orton, Jr., Ceramic Foundation, 71 F.4th 601 (2023).

Illinois Appellate Court Finds Battery Manufacturer Subject to Specific Jurisdiction

In *Kothawala v. Whole Leaf, LLC*, the plaintiff alleged injury after an e-cigarette containing one of the defendant's batteries—an 18650 battery—exploded in his pocket while in Illinois. The defendant was a South Korean corporation with no physical presence in Illinois. The defendant moved to dismiss for lack of personal jurisdiction. According to the defendant, it did not design or manufacture 18650 batteries in Illinois. Additionally, the defendant did not sell the 18650 batteries to individual consumers and did not authorize any manufacturer, wholesaler, distributor, or other entity to sell the batteries to consumers as standalone, removable batteries. Instead, the defendant sold the batteries to businesses for incorporation into larger battery packs. The defendant alleged that it only sold the batteries to companies that agreed to use the batteries in an "approved way," and that the use of the batteries for e-cigarettes was "forbidden."

In a jurisdictional affidavit, the defendant disclosed three Illinois customers. The first customer used the defendant's batteries in vacuums and "other applications." The second customer used the batteries in forklifts. The third customer was a distributor. The defendant did not know to whom the distributor sold the defendant's batteries. Between 2016 and 2018, the defendant sold approximately 2 million 18650 batteries to companies in Illinois.

According to the court, purposeful availment means *some act* by which a defendant purposefully avails itself of the privilege of conducting activities within the forum state. The court reasoned that "some act" does not require that the act have any direct or indirect connection to the lawsuit at issue. Thus, to satisfy purposeful availment, the plaintiff needed only to show that the defendant purposefully directed its activities at residents of Illinois.

The circuit court denied the defendant's motion to dismiss, concluding that it had specific jurisdiction. On appeal, the defendant first argued that the plaintiff could not establish that the defendant purposefully availed itself of the benefits of doing business in Illinois, a requirement under the Due Process Clause. According to the defendant, it never purposefully availed itself of the consumer battery market in Illinois, as it never intended its 18650 batteries to be sold individually to consumers like the plaintiff. Thus, because the 18650 battery at issue ended up in the plaintiff's e-cigarette by "unforeseeable happenstance," the defendant argued that the plaintiff could not establish purposeful availment.

The First District Appellate Court found the defendant's view "too narrow." According to the court, purposeful availment means *some act* by which a defendant purposefully avails itself of the privilege of conducting activities within the forum state. The court reasoned that "some act" does not require that the act have any direct or indirect connection to the lawsuit at issue. Thus, to satisfy purposeful availment, the plaintiff needed only to show that the defendant purposefully directed its activities at residents of Illinois. The court determined that the description of purposeful availment applied to the defendant "in full force." The defendant had estab-

lished commercial relationships in Illinois and availed itself of the privilege of doing business in Illinois. The court explained that at the purposeful availment stage, the law is unconcerned with a causal or even indirect relationship between the facts of the case and the defendant's forum state activity.

The court next addressed the second prong of the specific jurisdiction analysis: whether the plaintiff's lawsuit arose out of or related to the defendant's in-forum activities. The defendant argued that its sales of the 18650 batteries to customers in Illinois had nothing to do with the plaintiff's injury because the defendant sold the batteries to "sophisticated customers," while the plaintiff sustained injury from using an 18650 battery as a standalone, removable consumer battery in an e-cigarette. The court equated the defendant's argument with the "causation-only" standard rejected by the United States Supreme Court in *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021), because it only addressed the "arise out of" portion of the analysis and ignored the "relate to" portion. Even without a direct linear relationship between the sale of the battery into Illinois and how and where that battery allegedly malfunctioned in Illinois, the court indicated it had to consider whether the relationship among the defendant, the forum, and the litigation was close enough to support specific jurisdiction. According to the court, in *Ford*, the Supreme Court considered the "paradigm example" of specific jurisdiction to be when a company serves a market for a product in the forum state and the product malfunctions there.

In evaluating the defendant's sales to Illinois customers, the court indicated that it did not need to decide if the defendant's sales to the two industrial customers in Illinois were sufficiently related to the plaintiff's suit. Rather, the court believed that the defendant's sales to the Illinois distributor for resale supported a finding of specific jurisdiction. The court explained that Illinois was one of only two states in which the defendant sold the 18650 batteries for resale. Additionally, the defendant admitted that it did not know to whom and for what purpose the Illinois distributor resold the defendant's 18650 batteries. The court further noted that the defendant's insistence that it never intended for the 18650 batteries to be resold for consumer purposes, much less for use in e-cigarettes, and that there was no evidence that the specific battery in the plaintiff's e-cigarette came from the Illinois distributor would be "highly relevant," but on the issue of liability, not specific jurisdiction.

Ultimately, the court indicated that it was left with the following facts: 1) the defendant sold millions of 18650 batteries in Illinois, including to a distributor for resale; 2) one of the batteries found its way into the plaintiff's e-cigarette, which was purchased in Illinois; and 3) the plaintiff was an Illinois resident who used the e-cigarette in Illinois and was injured when the e-cigarette exploded in Illinois. Under those circumstances and given that a finding of relatedness requires something short of but-for causation under *Ford*, the court found it "difficult to see how anyone could plausibly argue that the plaintiff's claims [were] *not* at least 'related to' [the defendant's] activities in this state." Consequently, the court affirmed the circuit court's denial of the defendant's motion to dismiss.

Kothawala v. Whole Leaf, LLC, 2023 IL App (1st) 210972.

Forum Improper Even When Case Filed in County of Defendant's Principal Place of Business

In *Larson v. Illinois Central School Bus, LLC*, the plaintiffs' personal injury lawsuit was brought against a bus company in state court in Will County, Illinois, where it was headquartered. Plaintiff alleged that, while being transported by the defendant's employee, their minor child's wheelchair was improperly secured causing him to hit his head and suffer injuries. There was no dispute that plaintiff was injured in Denton County, Texas and there was no dispute that Illinois Central School Bus had its principal place of business in Will County, Illinois.

Defendant moved to dismiss based on the doctrine of *forum non convieniens*, arguing that (1) plaintiffs resided in Texas with their other children; (2) employee witnesses were located in Texas; (3) post-occurrence witnesses were located in Texas; and (4) medical providers were located in Texas and Virginia. Plaintiffs, on the other hand, counterargued that the material witnesses were located in Will County as the directors who made the training decisions were in Will County. While hesitant, the trial court leaned towards the Plaintiffs and denied the motion.

The trial court's decision was overruled as the Appellate Court for the Third District found that the balancing test favored dismissal of the case. The appellate court noted that "[f]*orum non conveniens* is a doctrine that is founded in considerations of fundamental fairness and sensible and effective judicial administration." The court must consider all of the relevant factors, without emphasizing one factor, within the context of the unique facts of the case. The appellate court carefully analyzed plaintiffs' choice of forum; the private interest factors, including the convenience of the parties, ease of access to evidence, availability of compulsory process, cost to obtain attendance of willing witnesses, possibility of viewing the premises, and practical considerations; and the public interest factors, including administrative difficulties, unfairness of imposing jury duty and interest in having local controversies decided locally.

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When conducting the balancing test, the Court emphasized that *forum non conveniens* is a flexible doctrine requiring evaluation of the total circumstances rather than consideration of any single factor, such the principal place of defendant's business. Moreover, the court noted that the proper determination is whether the balance of factors strongly favors dismissal as opposed to keeping the case in Will County. Aside from the plaintiffs' choice of forum, each factor either favored dismissal or was neutral.

Larson v. Illinois Central School Bus, LLC, 2023 IL App (3d) 220360.

SCOTUS Holds State Law Requiring Foreign Corporations to Consent to Jurisdiction Does Not Violate Due Process

The United States Supreme Court recently held in *Mallory v. Norfolk Southern Railway Co*., 600 U.S. 122 (2023), that Pennsylvania's statute requiring foreign corporations to submit to general jurisdiction as a condition of doing business in the state does not violate the Due Process Clause. The ruling is limited to statutes that explicitly require submission to jurisdiction as a condition of registering for foreign corporations.

The plaintiff, a Virginia resident who had worked for defendant Norfolk Southern in Ohio and Virginia, brought a FELA occupational disease claim in Pennsylvania, where Norfolk Southern was registered to do business. Norfolk Southern moved for dismissal based on lack of personal jurisdiction, while the plaintiff argued Norfolk Southern had submitted to Pennsylvania's jurisdiction by registering as a foreign corporation.

Pennsylvania's Supreme Court held that Pennsylvania's foreign corporation registration statute explicitly mandating that foreign corporations must submit to general jurisdiction as a condition of doing business in the state, violated the Due Process Clause. The court recognized that *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co*., 243 U.S. 93 (1917), held such statutory provisions to be constitutional but found that it was "implicitly overruled" by intervening Supreme Court decisions.

The U. S. Supreme Court overruled the Pennsylvania court and upheld *Pennsylvania Fire*. The Supreme Court reiterated lower courts must follow directly applicable precedent, and that overruling Supreme Court decisions is the exclusive prerogative of the Court itself. The Court went on to hold that, contrary to arguments of Norfolk Southern and the dissent, *International Shoe v. Washington*, 326 U.S. 310 (1945), and its progeny, which set forth the analysis of "specific jurisdiction" and "general jurisdiction" whereby a state can exercise jurisdiction if the cause of action arose in the state or if the defendant is "at home" in the state, did not overrule *Pennsylvania Fire Ins. Co.,* but exist alongside it. Whereas *Pennsylvania Fire Ins. Co.* considered the constitutionality of statutory requirements that foreign corporations submit to jurisdiction as a condition of operating within a state, *International Shoe* examined whether a state court could exercise jurisdiction over a defendant that had not otherwise consented.

The Court held that Pennsylvania's statute did not violate Norfolk Southern's right to due process and Norfolk Southern had waived its objection to personal jurisdiction by registering to do business in Pennsylvania. While the majority opinion made much of the extent of Norfolk Southern's operations in Pennsylvania in refuting its arguments, the deciding factor in the Court's analysis was the Pennsylvania foreign corporation registration statute's explicit requirement for foreign corporations to submit to general jurisdiction in Pennsylvania as a condition of doing business there. Without analyzing any other States' laws, the majority acknowledged that "few States continue to employ consent statutes like Pennsylvania's." *Mallory*, 600 U.S., 140 n.7. Therefore, *Mallory* is narrowly applicable; it does not hold that a corporation submits to general jurisdiction in a given State by virtue of registering as a foreign corporation; only that laws explicitly requiring consent to jurisdiction by foreign corporations are constitutional.

Mallory v. Norfolk Southern Railway Co., 600 U.S. 122 (2023).

Trial Court Improperly Barred Industrial Hygiene and Medical Causation Experts Under *Frye*.

The First District in *Molitor v. BNSF Railway Company*, held the trial court erred in barring a plaintiff's expert witnesses on industrial hygiene and medical causation (and in subsequently granting summary judgment on that basis) in a FELA matter arising out of a B-cell lymphoma diagnosis. In so doing, the First District clarified application of the *Frye* test in the context of matters involving occupational exposures to allegedly carcinogenic substances.

David Molitor, the plaintiff, disclosed two controlled expert witnesses to testify against his former employer, BNSF Railway, in his lawsuit claiming he contracted B-cell lymphoma due to his inhalation of carcinogenic emissions from idled locomotives and exposure to the herbicide Roundup. Plaintiff retained Hernando R. Perez, Ph.D., an industrial hygienist, and Ernest P. Chiodo, M.D., an internal medicine physician. The trial court barred Dr. Perez from testifying at trial, finding his opinions "lacked the necessary foundation for the court to

determine whether they were based upon a methodology or principle that was generally accepted by the scientific community." Specifically, the trial court noted Dr. Perez relied upon his own conversation with plaintiff in formulating his opinions concerning the allegedly harmful exposures but did not visit any of plaintiff's worksites. As to Dr. Chiodo, the trial court barred him from testifying that diesel and Roundup exposure caused plaintiff's diagnosis because the published studies Dr. Chiodo relied upon in formulating his opinions noted only a positive association between exposure to those substances and B-Cell Lymphoma, rather than causation.

The First District reversed, holding the trial court improperly applied the *Frye* standard. It noted first, that "general acceptance" under *Frye* does not concern ultimate conclusions of experts and focuses instead on methodology. Second, it noted general acceptance does not mean universal acceptance. A proponent of expert testimony need not establish a methodology is accepted by "consensus, or even a majority of experts" so long as the methodology is not of "experimental or dubious validity." Third, the trial judge is not a "gatekeeper" under *Frye*, and the trial judge may only apply the *Frye* test if the methodology of the expert offered in support of his or her conclusions is "new" or "novel." Finally, trial judges may not apply "*Frye*-plus-reliability"— a standard rejected by the Illinois Supreme Court in *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63 (2002). Citing *Donaldson*, the First District stated, "questions concerning the underlying data upon which the expert relied go to the weight of the evidence, not its admissibility."

For Dr. Perez, the First District held the trial court improperly applied a *Frye* standard in assessing his opinions as deficient. Dr. Perez's reliance on the information he received from plaintiff by interview was considered proper for purposes of admissibility, as well as his reliance upon documents from the case, peer-reviewed publications, and information published on government websites. The First District further noted that while the trial court did not assess the methodology of Dr. Perez, his historical exposure assessment method was nonetheless well established in the field of industrial hygiene. As to Dr. Chiodo, the First District noted the defendant did not counter his conclusions with an expert affidavit or similar document showing the causal link between diesel exposures and herbicides to be new or novel. And Illinois law does not require "definitive medical or scientific agreement on the existence of a causal relationship before a jury may hear the evidence on the issue." The First District reversed and remanded to the trial court consistent with its holding.

Following *Molitor*, Illinois continues to set itself apart by not factoring reliability into the admissibility analysis as do courts in *Daubert* jurisdictions.

Molitor v. BNSF Railway Company, 2022 IL App (1st) 211486.

Seventh Circuit Determines that Interest of Justice Does Not Require District Court to Transfer Case Rather than Dismiss for Lack of Personal Jurisdiction Where Plaintiff Allowed Time for Refiling to Expire

In *North v. Ubiquity, Inc.*, 72 F.4th 221 (7th Cir. 2023), the Seventh Circuit held that when a district court lacks personal jurisdiction, it must transfer the case to the appropriate forum rather than dismiss it when required by the interests of justice.

The plaintiff, an Arizona resident acting on behalf of his Illinois-based firm, and the defendant, a California corporation, negotiated and executed a contract in Arizona. Performance was to be "in or from Arizona." The plaintiff brought a breach of contract claim in Arizona state court in 2014. While the Arizona case was pending, the plaintiff filed an identical breach of contract claim in the United States District Court for the Northern District of Illinois in 2016. That case was dismissed for lack of personal jurisdiction in July 2017. The plaintiff appealed, arguing the district court erred both in its personal jurisdiction ruling, and in dismissing the case instead of transferring it to the Central District of California, which had general jurisdiction over the defendant. The plaintiff then obtained a stay pending the outcome of the Arizona litigation, which remained in effect until January 2023.

The Seventh Circuit affirmed the district court's personal jurisdiction ruling. Citing *International Shoe v. Washington*, 326 U.S. 310 (1945) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 907 (1979), it held there was no general jurisdiction in Illinois because the defendant was not incorporated in Illinois and did not have its primary place of business there. Likewise, there was no specific jurisdiction because the contract was executed in and was to be performed in Arizona. Citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985), it ruled the plaintiff needed to show more than just that one party to the contract was an Illinois firm.

The court then considered whether 28 U.S.C. §1631 required the district court to transfer the case instead of dismissing it. The court held that by its plain language, §1631 applies to dismissals for personal jurisdiction and subject matter jurisdiction. 28 U.S.C. §1631 (Where "there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action. . . to any other court. . . in which the action. . . could have been brought at the time it was filed or noticed"). The court was persuaded by the Third Circuit's interpretation that §1631 imposes a limited independent

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obligation on district courts to consider whether to transfer a case to an appropriate jurisdiction rather than dismissing it for lack of jurisdiction when it would be in the interests of justice, whether a transfer is requested or not. *De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124 (3rd Cir. 2020) ("[A] district court that lacks personal jurisdiction must at least consider a transfer" under §1631).

However, the interests of justice did not require the district court to transfer the plaintiff's case. The statute of limitations would have permitted the plaintiff to re-file his case in California within seven months after it was dismissed by the district court. Instead, the plaintiff obtained a stay which remained in place for more than five years before pursuing his appeal. Considering these facts, the interests of justice did not require the district court to consider a transfer.

Finally, the court considered and rejected the plaintiff's second argument that §1404(a) also provided grounds to transfer his case, since like §1631, that statute provides for transfer "in the interest of justice." The court found that for the same reason the interests of justice did not require transfer under §1631, they did not do so under §1404(a).

North v. Ubiquity, Inc., 72 F.4th 221 (7th Cir. 2023).

Third District Finds Spouse Not Entitled to Damages for Loss of Material Services After Remarriage in Wrongful Death Action

In *Passafiume v. Jurak*, the appellate court addressed the issue of whether a plaintiff is entitled to damages for loss of material services, (i.e., household chores), beyond the date of plaintiff's remarriage. Acting as special administrator on behalf of his deceased wife, Lois Passafiume, Paul Passafiume filed a wrongful death action based on alleged medical malpractice against defendant Daniel Jurak. A jury awarded Paul Passafiume $2,121,914.34 in damages. Plaintiff's damages were reduced to $1,697,531.48 based on a finding that Lois Passafiume was contributorily negligent. Jurak argued that the trial court erred in allowing the jury to consider damages for the loss of material services after the date of Paul Passafiume's remarriage. Paul Passafiume remarried 15 months after his wife's death. Paul Passafiume's second marriage ended in divorce after 18 months. Plaintiff filed a motion *in limine* to limit evidence concerning the value of household services beyond the date of plaintiff's remarriage. Plaintiff contended that while his loss of consortium claim terminated with his remarriage, the loss of material services should be categorized separately from his loss of consortium claim. Instead, he postured that his loss of material service should be considered as the loss of financial support. Plaintiff's economist expert, Stan Smith, opined that the value of Mrs. Passafiume's lost household services was $998,158. Mr. Smith's opinion was based on information that Mrs. Passafiume spent two to three hours per day on household tasks such as cleaning, cooking, doing laundry, yard work, and paying bills.

The appellate court rejected defendant's argument that a spouse's claim for loss of material services must end upon remarriage. However, in this case, plaintiff filed a statutory wrongful death claim and failed to file a common law negligence claim. The appellate court further rejected defendant's argument that expert Smith's testimony concerning Lois Passafiume's household services was improper. Citing the standard set forth in the Illinois Rule of Evidence 702, which provides, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness may testify thereto in the form of an opinion or otherwise," the appellate court held that Smith's testimony was admissible. To be admissible, expert testimony must be supported by adequate foundation, showing the facts or data relied upon by the expert are of the type relied upon by experts in the field. Citing Ill. R. Evid. 703 (eff. Jan. 1, 2011); *Wilson v. Clark*, 84 Ill.2d 186, 193-96 (1981). The appellate court in Passafiume reasoned that Smith's opinions were based on objective information and statistics.

Passafiume v. Jurak, 2023 IL App (3d) 220232.

Illinois Legislature and Governor Enact Public Act 103-0514 to Allow Punitive Damages in Wrongful Death Cases

On August 11, 2023, Illinois Governor J.B. Pritzker signed House Bill 219 into law—now Public Act 103-0514. This new law amended 740 ILCS 180/1, 740 ILCS 180/2, and 755 ILCS 5/27-6 to allow punitive damages to be recoverable in wrongful death and survival actions effective immediately. Illinois House Bill 219, which was introduced to the Illinois General Assembly on December 5, 2022, included several key amendments that aimed to expand the current law by allowing the survivors of wrongful death victims to seek punitive damages. House Bill 219 passed through the House on May 16, 2023, with a vote of 75 Yeas and 40 Nays. It passed through the Senate on May 18, 2023, with a vote of 37 Yeas and 19 Nays. Public Act 103-0514 became law on August 11, 2023, with the Governor's signature. It applies to all wrongful death and survival causes of action in Illinois filed on or after August 11, 2023.

Public Act 103-0514's most significant amendment to Illinois' Wrongful Death Act (740 ILCS 180) and Survival Act (755 ILCS

5/27-6) is including punitive damages as one of the types of damages recoverable. Illinois' Wrongful Death Act now states, in part:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, including punitive damages when applicable, in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, including punitive damages when applicable, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. 740 ILCS 180/1.

From this point forward, Illinois wrongful death plaintiffs and their counsel can seek punitive damages against defendants in addition to personal injury and product liability causes of action. Plaintiffs may recover punitive damages if they can prove with clear and convincing evidence that the conduct of the defendant(s) was "with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others." In Illinois, there is no cap on punitive damages.

From this point forward, Illinois wrongful death plaintiffs and their counsel can seek punitive damages against defendants in addition to personal injury and product liability causes of action. 735 ILCS 5/2-604.1. Plaintiffs may recover punitive damages if they can prove with clear and convincing evidence that the conduct of the defendant(s) was "with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others." 735 ILCS 5/2-1115.05(b). In Illinois, there is no cap on punitive damages. *See Wills v. Foster*, 229 Ill.2d 393 (2008).

These newly enacted amendments to the Wrongful Death Act and Survival Act do not apply to all claims. Public Act 103-0514 makes clear that punitive damages may not be recovered in medical malpractice and legal malpractice claims. The amended statutes explicitly state: "Punitive damages are not available in an action for healing art malpractice or legal malpractice[.]" 740 ILCS 180/1-2; 755 ILCS 5/27-6. Additionally, punitive damages may not be recovered in wrongful death and survival claims against the State of Illinois or its employees. Public Act 103-0514 explicitly states: "Punitive damages are not available . . . in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity."

740 ILCS 180/1-2; 755 ILCS 5/27-6. Public Act 103-0514.

First District Approves Setoff of Civil Rights Settlement Amounts Against Tort Judgment Under Joint Tortfeasor Contribution Act

In a case of first impression, the Illinois Appellate Court for the First District recently upheld the trial court's ruling that under the Illinois Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 *et seq.* (West 2020)), tort defendants were entitled to judgment setoff of settlement amounts recovered by the plaintiffs related to civil rights violation claims under the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.* (West 2020)) stemming from the same claimed misconduct, injuries, and damages.

In *Saunders v. Orbitz Worldwide, LLC*, IL App (1st) 221018 (1st Dist. 2023), plaintiffs appealed the trial court's ruling, claiming that non-settling defendant Orbitz Worldwide, LLC, was not entitled to receive any judgment setoff from plaintiffs' settlement with co-defendant Havas Chicago Worldwide, LLC, because the claims against Havas were civil rights violations distinct from the tort injuries caused by Orbitz's misconduct.

The case arose from allegations that Havas, plaintiffs' employer, was working with Orbitz to develop an advertising and marketing campaign for Orbitz. Plaintiffs alleged that Havas and Orbitz subjected plaintiffs to sexual harassment and a hostile work environment, centered around Orbitz's employee Ramses Meijer's sexual harassment, assault, and rape of plaintiffs during the scope of their work together. Plaintiffs further claimed that Havas and Orbitz were aware of Meijer's misconduct, but both permitted it to continue to keep the business arrangement intact. Havas' liability

— Continued on next page

In light of this ruling, defendants should consider aggressively pursuing judgment set-offs from co-defendant settlements, regardless of the theory of recovery that liability is based on as compared between defendants, as long as there is a connection between the conduct alleged between the defendants and where the alleged conduct by the defendants both led to plaintiff's claimed injuries or damages.

was predicated on violations of the Human Rights Act, while the allegations against Orbitz were related to common law torts of negligent supervision and retention of Meijer. Following plaintiffs' confidential settlement with Havas, Orbitz first filed a third-party action against Havas for contribution. Havas successfully moved to dismiss the third-party action pursuant to a good-faith settlement finding, but Orbitz persuaded the court to allow Orbitz a judgment setoff of 30% of the total settlement amount recovered from Havas.

On appeal, plaintiffs argued that the Contribution Act did not apply to the case, not only because Havas was not a party subject to liability under tort, but also that the injuries caused by Havas' misconduct and civil rights violations were not the same injuries caused by Orbitz's tortious misconduct. The First District disagreed, finding that violation of the Human Rights Act creates the potential for liability in tort as required by the Contribution Act. The court reasoned that the Human Rights Act statute established a standard of conduct that imposes a duty on employers to address sexual harassment in the workplace, similar to the Illinois Supreme Court's definition of tort under common law negligence in *Fancil v. Q.S.E Foods, Inc.*, 60 Ill. 2d 552, 554 (1975), with that opinion noting that there must exist a "duty or an obligation requiring one to conform to a certain standard of conduct for the protection of another against an unreasonable risk." *Saunders*, at ¶ 20, citing *Fancil,* at 554. By this analysis, the *Saunders* court found that "plaintiffs requested damages for tortious conduct pursuant to a statute," and held that "violation of the Human Rights Act 'creates the potential for liability in tort and that it may be a proper predicate for a contribution claim.'" *Id.* at ¶ 27. The court declined to rule on the propriety of the trial court's setoff amount, as the trial court did not make that determination appealable under Illinois Supreme Court Rule 304(a). *Id.* at ¶ 44.

Ultimately, the court found that allowing the set-off supported the purpose of equitable apportionment of damages among joint tortfeasors, noting that plaintiffs alleged that "both Orbitz and Havas fostered a corporate culture that tolerated the sexual harassment of women," that both had knowledge of Meijer's misconduct and failed to address it, and that as a result of both companies' failures, plaintiffs suffered damages. *Id.* at ¶ 43. The court summarized by reiterating that "[w]hat matters is the culpability of the parties, not the theories of recovery on which liability is based." *Id.* at ¶ 43, citing *Doyle v. Rhodes*, 101 Ill. 2d 1, 14 (1984).

In light of this ruling, defendants should consider aggressively pursuing judgment set-offs from co-defendant settlements, regardless of the theory of recovery that liability is based on as compared between defendants, as long as there is a connection between the conduct alleged between the defendants and where the alleged conduct by the defendants both led to plaintiff's claimed injuries or damages.

Saunders v. Orbitz Worldwide, LLC, 2023 IL App (1st) 221018.

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Survey of Trucking and Transportation Law Cases

Illinois Appellate Court Reiterates No Duty to Design or Maintain a Vehicle with which it is Safe to Collide

In the unpublished case *De La Paz v. Reggie's Pallets Co., et al.*, the plaintiff, Pablo De La Paz, as Special Administrator of the Estates of Abril and Brisa De La Paz, filed a wrongful and negligence action against a myriad of defendants. The decedents' car struck the rear end of a parked semi-tractor trailer. The collision caused their car to underride the rear of the trailer resulting in their deaths.

At issue in *De La Paz* was the legal sufficiency of the plaintiff's negligence claims against the manufacturer, previous owners, and current owners of the trailer based on allegations relating to a defective rear underride protection system on the trailer the decedents struck. The plaintiff alleged the manufacturer of the trailer owed a duty to design, manufacture and sell the trailer in a reasonably safe manner; the previous owners owed a duty not to modify or alter the rear underride system, to maintain the system and to inform the purchaser of unsafe alterations or modifications in the trailer; and the current owners likewise owed a duty to maintain the trailer in a safe condition.

The manufacturer and previous owners sought dismissal of the negligence claims under Section 2-615 of the Illinois Code of Civil Procedure, arguing that, under Illinois law, there is no obligation to design or maintain a vehicle with which it is safe to collide. 735 ILCS 5/2-615. The current owners moved for summary judgment on the same grounds. Defendants cited the Illinois Supreme Court decision *Mieher v. Brown*, 54 Ill. 2d 539 (Ill. 1973) in support of their argument.

In *Mieher*, the supreme court held that while manufacturers owe a duty to design a vehicle in which it is safe to ride, public policy and social requirements did not require a similar duty to be placed on manufacturers to design a vehicle with which it is safe to collide. 54 Ill. 2d at 543 – 45. In the subsequent decision *Beattie v. Lindelof*, 262 Ill. App. 3d. 372, 379 – 80 (1st Dist. 1994), the Illinois Appellate Court First District, following *Mieher*, concluded there was no duty to maintain a vehicle with which it is safe to collide either.

The plaintiff in *De La Paz*, while acknowledging *Mieher* controlled, argued it should be overruled by the supreme court. The circuit court, following *Mieher,* dismissed the defective rear underride system claims against the manufacturer and prior owners and entered summary judgment in favor of the current owners of the trailer.

The appellate court, finding *Mieher* and its progeny directly on point, affirmed the circuit court's orders. The appellate court also affirmed the circuit court's related order staying discovery on the issue of the defective rear override system with respect to the defendants moving to dismiss under section 2-615. The appellate court found the rationale for the stay reasonable, and thus not an abuse of discretion, because the plaintiff could not state a claim based on the rear override system, rendering discovery on the issue unnecessary.

De La Paz v. Reggie's Pallets Co., 2023 IL App (1st) 221093-U.

Determining Whether a Freight Broker can be held Vicariously Liable as the Principal of a Trucking Company

In *Cornejo v. Dakota Lines Inc., Gordon Lewis, and Alliance Shippers, Inc.*, the Illinois Appellate Court First District analyzed what evidence could reasonably support the finding of an agency relationship between a shipping broker and motor carrier. The plaintiff sustained injuries in an accident involving a truck and trailer operated by Gordon Lewis, an employee of Dakota Lines, Inc., which had a contractual arrangement with shipping broker Alliance Shippers, Inc. to transport automotive parts.

The plaintiff sued Alliance under a theory of vicarious liability against Lewis contending that Lewis was an agent or employee of Alliance at the time of the accident, vicarious liability against Dakota as principal of Lewis, and direct negligence against Lewis himself. The jury found that Lewis, as Dakota's admitted agent, was negligent and that Dakota was Alliance's agent. Judgment was entered against all three. Alliance moved for judgment notwithstanding the verdict, which the trial court denied. Alliance appealed arguing that, as a matter of law, Dakota was an independent contractor and neither Lewis nor Dakota were agents of Alliance.

The appellate court reversed and entered judgment notwithstanding the verdict for Alliance. The court, in reviewing the nature of the relationship between Dakota, Alliance, and Lewis, determined the evidence failed to demonstrate the degree of control over the work performed (hauling loads) that Illinois courts have required when finding that an agency relationship exists.

The court cited to *Sperl v. C. H. Robinson Worldwide, Inc.*, 408 Ill. App. 3d 1051 (3rd Dist. 2011), as an example of facts demonstrating the high degree of control exerted by a broker over a driver to warrant a jury's finding of an agency relationship. In *Sperl,* the broker hired, paid, and dispatched the driver, directed delivery to the broker's own warehouse, and imposed strict fine-enforced schedules upon the drivers. 408 Ill. App. 3d at 1053 – 1055. The court however, found the case before it more akin to *Shoemaker v. Elmhurst-Chicago Stone Co.*, 273 Ill. App. 3d 916 (1st Dist. 1994), where the shipper had minimal contact with the carrier's drivers and did not dictate routes or driving methods but merely specified the hauling task.

The court noted the contract between Alliance and Dakota identified Dakota as independent contractor, provided that neither were the agents of the other, and stated that Dakota was solely responsible for its employees and agents. Significantly, the court determined the evidence of Alliance's control—its authority to specify pickup and delivery details, delivery timelines, and the type of container and chassis to be used by Dakota—merely pertained to ancillary aspects of transportation and did not signify substantial control over the actual performance of the work.

Dakota hired Lewis, trained him, gave him a driver's handbook, paid him, and withheld taxes from his paychecks. Lewis did not communicate with anyone employed by Alliance. Alliance did not dictate what route Lewis had to take with his load, nor did Alliance provide Lewis with any tools, equipment, or materials. Alliance did not have the power to hire or fire any Dakota drivers but could request that a driver be removed from a route. The court emphasized this distinction between control over the result of the assigned task and control over the manner in which the work was executed, ultimately determining that an agency relationship between Alliance and Dakota was not established.

Cornejo v. Dakota Lines, Inc., 2023 IL App (1st) 220633.

Seventh Circuit Reinstates Railroad Claim Under the Federal Employers' Liability Act

Jaranowski, a conductor with 22 years of service at Indiana Harbor Belt Railroad Company, sustained a serious neck injury in October 2020 while operating a railroad switch. He filed a lawsuit under the Federal Employers' Liability Act (FELA), alleging negligence and negligence per se by the railroad due to improper maintenance of the switch and violation of Federal Railroad Administration (FRA) Track Safety Standards. 49 C.F.R. Part 213. The parties first consented to the case being heard by a magistrate judge who initially granted summary judgment in favor of the railroad on the ordinary negligence claim, finding that the inspection reports and the condition of the switch prior to the incident did not indicate negligence by the railroad. The district court agreed and granted summary judgment in favor of the railroad, ultimately concluding that Jaranowski failed to present evidence the railroad had actual or constructive notice of any defect in the switch before his injury. This decision encompassed both the ordinary negligence claim and the negligence per se claim.

The Court of Appeals for the Seventh Circuit reversed the district court's decision. The appellate court agreed with the need for actual or constructive notice to establish a violation of the federal Track Safety Standards. However, it found sufficient evidence indicating that the railroad should have known about the switch's defects before Jaranowski's injury, creating a genuine dispute for trial.

More specifically, regarding evidence of defects and notice, the court observed that photographs of the switch taken after the plaintiff's injury showed debris that could interfere with the switch's operation. Despite regular inspections indicating no defects, the court reasoned that a jury could infer negligence in the railroad's inspection process. Further, Jaranowski's expert identified several potential causes of the injury related to the switch's condition, which could have been discovered through diligent inspections.

The court additionally clarified that a violation of the federal Track Safety Standards requires actual or constructive notice of defects. It held that Jaranowski presented enough evidence to suggest that the railroad should have been aware of the switch's condition, thereby potentially violating these standards. Emphasizing the standard for summary judgment, the court held that the evidence presented could allow a reasonable jury to conclude that the railroad had constructive notice of the switch's defective condition. Finally, under FELA, the court recognized that the threshold for employer negligence is significantly lower than in ordinary negligence cases,

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requiring only that the employer's negligence played any part, even the slightest, in producing the injury.

In light of the above, the appellate court reversed the district court's ruling granting summary judgment for the railroad and remanded the case for further proceedings, holding that there was a genuine dispute of material fact regarding whether the railroad company had constructive notice of the switch's defects.

Jaranowski v. Indiana Harbor Belt R.R. Co., 72 F.4th 744 (7th Cir. 2023).

Transportation Company's Headquarters in Plaintiff's Chosen Forum Not Enough to Avoid Dismissal Based on Doctrine of *Forum Non Conveniens*

In *Larson v. Illinois Central School Bus, LLC*, the minor plaintiff was injured while being transported on a school bus owned by defendant and driven by defendant's employee. The plaintiff utilized a wheelchair and alleged that an aide, also employed by defendant, improperly secured his wheelchair on the bus.

The accident occurred in Denton, Texas and the bus was located in Texas. The plaintiff filed a complaint for negligence in Will County, Illinois where defendant's principal place of business was located. The complaint alleged the defendant failed to implement policies for safely transporting minors, failed to properly train its drivers and aides, failed to properly secure plaintiff's wheelchair, failed to adequately inspect the way the wheelchair was secured, failed to correct the dangerous condition, and failed to monitor the plaintiff during transport.

The defendant filed a motion to dismiss based on the doctrine of *forum non conveniens*, arguing the lawsuit should be filed in Texas. The defendant argued that almost all of the occurrence witnesses, documentary evidence, post-accident investigation, and post-accident medical treatment occurred in Texas. The defendant also argued that its pertinent employees, including the driver, the aide, the driver's immediate supervisor, the dispatcher, and the managers that conducted a post-accident investigation were located in Texas. The plaintiff argued that the defendant's directors were the pertinent witnesses to testify about defendant's policies and procedures and were located in Will County. The trial court denied the motion.

On appeal, the Illinois Appellate Court Third District reversed the trial court's decision. The appellate court afforded the plaintiff's choice of forum less deference because the plaintiff did not reside in Will County and the accident did not occur there. The appellate court next considered the private interest factors: convenience of the parties, ease of access to evidence, availability of compulsory process, cost to obtain attendance of witnesses, and possibility of viewing the premises. The appellate court recognized that while the location of defendant's principal place of business could be considered, it was not dispositive. The court concluded the allegations in the complaint centered on the conduct of defendant's agents and employees rather than its directors, and those witnesses were located in Texas. While two of the defendant's directors were potential witnesses and resided in Illinois, they were available for trial as employees regardless of where trial took place. The court also noted that, while records can easily be accessed with recent technology, there is no substitute for live testimony and most witnesses were located in Texas. The court next considered the public interest factors: administrative difficulties, unfairness in imposing jury duty, and the interest in having local controversies decided locally. While it found that most of these factors were neutral, it concluded that Texas had an interest in having the case decided there as the allegations in the complaint were focused on actions taken in Texas and where the injury occurred. In balancing these factors against each other, the appellate court found the trial court abused its discretion in denying defendant's motion to dismiss.

Larson v. Illinois Central School Bus, LLC, 2023 IL App (3d) 220360.

Plaintiff's Unawareness that the Defendant is Deceased Prior to Filing Suit No Longer Requires a Defendant's Estate to be Opened for Plaintiff's Cause of Action to Survive Dismissal

Lichter v. Carroll, involved a personal injury arising from a motor vehicle accident where the defendant died after the date of the accident, but before suit was filed and before the statute of limitations passed. No estate was ever opened for the defendant. Plaintiff learned that defendant had died after filing her complaint. Plaintiff then appointed a "special representative" for the defendant's estate pursuant to 735 ILCS 5/2-1008(b). The motion was granted and the complaint was amended to name the special representative as defendant in the case. Over two years after the defendant's death, the special representative appeared and filed a motion to dismiss.

The defendant's motion relied on *Relf v. Shatayeva*, 2013 IL 114925. *Relf* states that to appoint a "special representative," a plaintiff must use 735 ILCS 13-209(b) which "presuppose[s] that the plaintiff is aware of the defendant's death at the time he or she commences the action." *See Id.* ¶ 27. Per the defendant's motion,

because the plaintiff was unaware of the defendant's death prior to filing suit, she was required to proceed under 735 ILCS 5/13-209(c). *See Id.* ("[a] separate set of requirements apply where, as in this case, the defendant's death is not known to the plaintiff before expiration of the limitations period and, unaware of the death, the plaintiff commences the action against the deceased defendant directly. This scenario is governed by section 13-209(c)"). Section 13-209(c) requires plaintiff to sue a "personal representative" of the defendant's estate. A "personal representative" is an individual appointed by a probate court, for whom letters of office have been issued, as opposed to a "special representative" which can be appointed for the limited purpose of acting as a legal placeholder.

The defendant argued that because over two years had passed after the death of the defendant at the time that the motion was filed, and no "personal representative" had been sued, the two-year statute of limitations contained in subsection (c)(4) barred plaintiff's claim. *See* 735 ILCS 5/13-209(c)(4) ("[I]n no event can a party commence an action under this subsection (c) unless a personal representative is appointed and an amended complaint is filed within 2 years…."). The motion was granted. Plaintiff's complaint was dismissed with prejudice. The appellate court reversed, and the Illinois Supreme Court reviewed.

The supreme court in *Lichter* held that the plaintiff could proceed under subsection (b) notwithstanding its language in *Relf*. The two subsections are not necessarily exclusive—"there is nothing in the plain language of the statute to indicate that subsection (c) imposes a requirement to the exclusion of subsection (b)(2) when it is available." Instead, "subsection (b)(2) is not limited to those situations where the plaintiff is aware of the defendant's death at the time, he or she commences the action and before the statute of limitations expires." In addition, the supreme court found that the time bar under 735 ILCS 5/13-209(c)(4) applies if the plaintiff seeks to appoint a special administrator under subsection (b)(2).

The takeaway is that a defendant's pre-suit death, unknown to the plaintiff at the time they file, no longer requires plaintiff to sue a personal representative if an estate has not already been opened. However, per *Relf*, a plaintiff must still file against a personal representative if an estate had been opened. There is now a two-year statute of limitations, starting at the expiration of the original statute of limitations, for plaintiff to file an amended complaint against the special representative.

Lichter v. Carroll, 2023 IL 128468.

Negligence Claims Brought Against Freight Broker Preempted by Federal Law

A recent decision by the Court of Appeals for the Seventh Circuit expanded the preemptive reach of the Federal Aviation Administration Authorization Act ("FAAAA"), joining a growing number of federal circuits that have found that state law common negligence claims are preempted by section 14501(c)(1) of the FAAAA. In *Ying Ye v. GlobalTranz Enterprises, Inc.*, the Seventh Circuit specifically concluded that negligent hiring claims against a freight broker are preempted by the FAAAA.

Defendant GlobalTranz was hired by a third party to arrange for the transportation of goods from Illinois to Texas. GlobalTranz hired a motor carrier, which dispatched one of its drivers to transport the goods. While enroute to the delivery location, the driver was involved in an accident with a motorcycle driven by Shawn Lin (Ying Ye's husband). Shawn Lin passed away as a result of his injuries.

Ms. Ye filed suit against the motor carrier, its driver, and GlobalTranz alleging negligent hiring and vicarious liability claims against GlobalTranz. The Seventh Circuit's decision only addressed the dismissal of the negligent hiring claim.

To support her negligent hiring claim, Ms. Ye alleged that GlobalTranz "knew or should have known" that the motor carrier was an unsafe company with a history of FMCSA violations. This claim was brought under Illinois common law negligence principles. The Seventh Circuit recognized United States Supreme Court precedent which held that state common law tort claims "fall comfortably within" the preemption provision of the FAAAA. Section 14501(c)(1) of the FAAAA provides that a state:

> [m]ay not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier. . . or any motor private carrier, broker, of freight forwarder with respect to the transportation of property.

The Seventh Circuit concluded that Ms. Ye's claim struck at the "core of GlobalTranz's broker services by challenging the adequacy of care the company took—or failed to take" in hiring the motor carrier. The Seventh Circuit reasoned that enforcing a common law negligent hiring claim against a freight broker would have a significant economic effect on freight broker services, thus subjecting it to preemption under the FAAAA.

The Seventh Circuit then examined whether the safety exception of the FAAAA prevented Illinois common law negligent hiring

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claims from being preempted. The Seventh Circuit acknowledged that state laws which regulate motor vehicle safety issues are not preempted by the FAAAA. However, the Seventh Circuit noted the FAAAA's definition of motor vehicle was narrow and did not reference freight brokers or freight broker services. Therefore, the Seventh Circuit held that the common law negligent hiring claims against freight brokers do not have a "direct link" to motor vehicle safety that would save these claims from being preempted by the FAAAA. The Seventh Circuit reasoned that the FAAAA "makes clear that Congress views motor vehicle safety regulations separately and apart from provisions imposing obligations on brokers."

Ms. Ye filed a Writ of Certiorari on November 2, 2023, making this an important case to monitor in 2024. If the Seventh Circuit's decision is upheld, this case has the potential to drastically limit the plaintiff bar's ability to bring common law negligence claims against freight brokers and other similarly situated companies.

Ye v. GlobalTranz Enters., 74 F. 4th 453 (7th Cir. 2023).

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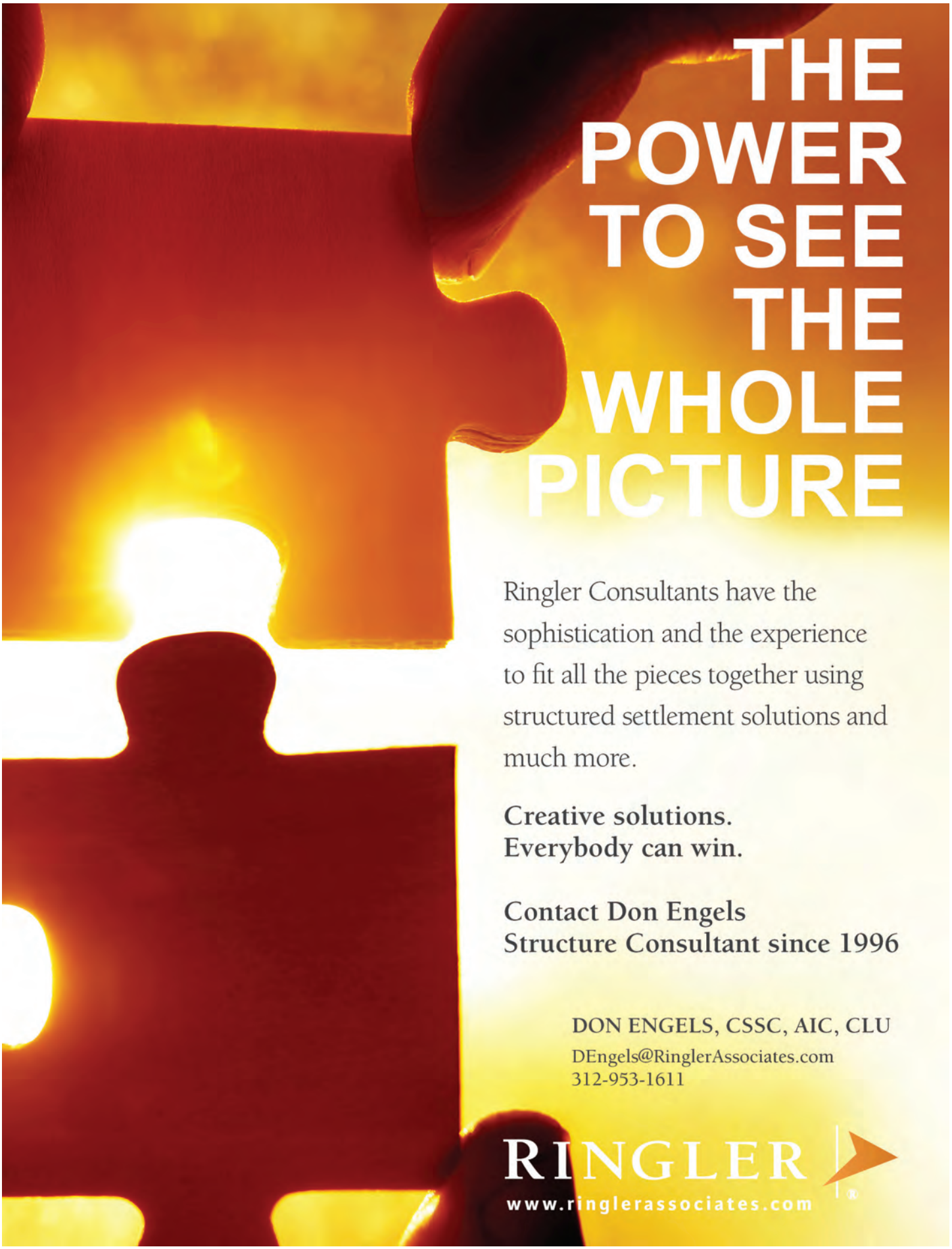
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