ILLINOIS DEFENSE COUNSEL

SURVEY OF LAW 2020

ILLINOIS DEFENSE COUNSEL

ILLINOIS DEFENSE COUNSEL SURVEY OF LAW 2020

CONTENTS

SURVEY OF CASES

2020 Survey of Law is published by the Illinois Defense Counsel, Springfield, Illinois. It is published annually as a service to its members. Subscription for non-members is $100. Subscription price for members is included in membership dues. Requests for subscriptions or back issues should be sent to the Illinois Defense Counsel at **admin@idc.law**. All materials have been edited and are the property of the Association, unless otherwise noted. **Statements or expression of opinions in this publication are those of the contributors and not necessarily those of the Association or Editors.**

P.O. Box 588 • Rochester, IL 62563-0588
800-232-0169 • 217-498-2649 • www.idc.law

2020 – 2021 OFFICERS

PRESIDENT **NICOLE D. MILOS**
AAIS, Chicago

PRESIDENT-ELECT **LAURA K. BEASLEY**
Baker Sterchi Cowden & Rice, LLC
Belleville

FIRST VICE PRESIDENT **TERRY A. FOX**
Flaherty & Youngerman, P.C.
Chicago

SECOND VICE PRESIDENT **TRACY E. STEVENSON**
Law Office of Tracy E. Stevenson, P.C.
Chicago

SECRETARY/TREASURER **DENISE BAKER-SEAL**
Brown & James, P.C.
Belleville

PAST PRESIDENTS

Royce Glenn Rowe • James Baylor • Jack E. Horsley
John J. Schmidt Thomas F. Bridgman • William J. Voelker, Jr.
Bert M. Thompson • John F. Skeffington • John G. Langhenry, Jr.
Lee W. Ensel • L. Bow Pritchet • John F. White
R. Lawrence Storms • John P. Ewart • Richard C. Valentine
Richard H. Hoffman • Ellis E. Fuqua • John E. Guy • Leo M. Tarpey
Willis R. Tribler • Alfred B. LaBarre • Patrick E. Maloney
Robert V. Dewey, Jr. • Lawrence R. Smith
R. Michael Henderson • Paul L. Price • Stephen L. Corn
Rudolf G. Schade, Jr. • Lyndon C. Molzahn • Daniel R. Formeller
Gordon R. Broom • Clifford P. Mallon • Anthony J. Tunney
Douglas J. Pomatto • Jack T. Riley, Jr. • Peter W. Brandt
Charles H. Cole • Gregory C. Ray • Jennifer Jerit Johnson
Stephen J. Heine • Glen E. Amundsen • Steven M. Puiszis
Jeffrey S. Hebrank • Gregory L. Cochran • Rick Hammond
Kenneth F. Werts • Anne M. Oldenburg • R. Howard Jump
Aleen Tiffany • David H. Levitt • Troy A. Bozarth
R. Mark Mifflin • Michael L. Resis • Bradley C. Nahrstadt
William K. McVisk

2020 – 2021 DIRECTORS

C. WM. BUSSE, JR.
Busse & Busse, P.C., Chicago

ADAM C. CARTER
Esp Kreuzer Cores LLP, Wheaton

JAMES P. DuCHATEAU
HeplerBroom LLC, Chicago

DONALD PATRICK ECKLER
Pretzel & Stouffer, Chartered, Chicago

JOHN EGGUM
Foran Glennon Palandech Ponzi & Rudloff, PC, Chicago

STEVE GROSSI
Bruce Farrel Dorn & Associates, Chicago

JOHN P. HEIL, JR.
Heyl, Royster, Voelker & Allen, P.C., Peoria

DAVID A. HERMAN
Giffin, Winning, Cohen & Bodewes, P.C., Springfield

JESSICA S. HOLLIDAY
Baker Sterchi Cowden & Rice, LLC, Belleville

ERICA S. LONGFIELD
Swanson, Martin & Bell, LLP, Chicago

MARK J. McCLENATHAN
Heyl, Royster, Voelker & Allen, P.C., Rockford

GREGORY W. ODOM
Baker Sterchi Cowden & Rice, LLC, Belleville

UNTRESS QUINN, SR.
Armstrong Teasdale LLP, St. Louis

KIMBERLY A. ROSS
FordHarrison, Chicago

BRITTA SAHLSTROM
SmithAmundsen LLC, Chicago

PATRICK W. STUFFLEBEAM
Tressler LLP, Edwardsville

JOHN F. WATSON
Craig & Craig, LLC, Mattoon

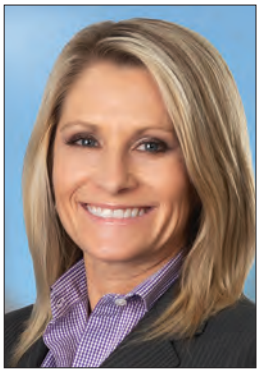
HOLLY WHITLOCK-GLAVE
HeplerBroom LLC, Crystal Lake

JENNIFER A. WINKING
Scholz, Loos, Palmer, Siebers & Duesterhaus, Quincy

EXECUTIVE DIRECTOR
Sandra J. Wulf, CAE, IOM

2020-2021 OFFICERS AND DIRECTORS

President
NICOLE D. MILOS
AAIS
Chicago



President-Elect
LAURA K. BEASLEY
Baker Sterchi Cowden & Rice, LLC
Belleville

First Vice President
TERRY A. FOX
Flaherty & Youngerman, P.C.
Chicago

Second Vice President
TRACY E. STEVENSON
Law Office of Tracy E. Stevenson, P.C.
Chicago

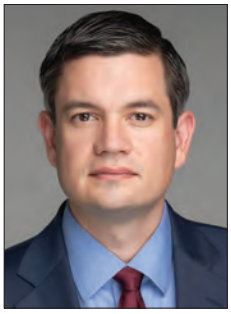
Secretary/Treasurer
DENISE BAKER-SEAL
Brown & James, P.C.
Belleville

C. WM. BUSSE, JR.
Busse & Busse, P.C.
Chicago

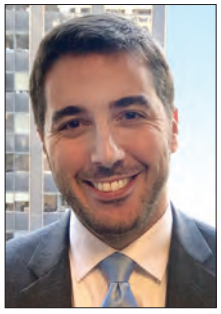
ADAM C. CARTER
Esp Kruezer Cores LLP
Wheaton

JAMES P. DuCHATEAU
HeplerBroom LLC
Chicago

DONALD PATRICK ECKLER
Pretzel & Stouffer, Chartered
Chicago



JOHN EGGUM
Foran Glennon Palandech Ponzi & Rudloff, P.C.
Chicago



STEVE GROSSI
Bruce Farrel Dorn & Associates
Chicago

JOHN P. HEIL, JR.
Heyl, Royster, Voelker & Allen, P.C.
Peoria

DAVID A. HERMAN
Giffin, Winning, Cohen & Bodewes, P.C.
Springfield

JESSICA S. HOLLIDAY
Baker Sterchi Cowden & Rice, LLC
Belleville

UNTRESS QUINN, SR.
Armstrong Teasdale LLP
St. Louis

JOHN F. WATSON
Craig & Craig, LLC
Mattoon

ERICA S. LONGFIELD
Swanson, Martin & Bell, LLP
Chicago

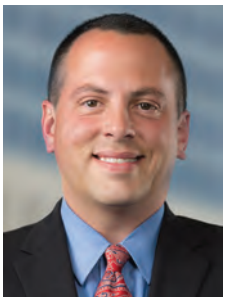
KIMBERLY A. ROSS
FordHarrison
Chicago

HOLLY WHITLOCK-GLAVE
HeplerBroom LLC
Crystal Lake

MARK J. McCLENATHAN
Heyl, Royster, Voelker & Allen, P.C.
Chicago

BRITTA SAHLSTROM
SmithAmundsen LLC
Chicago

JENNIFER A. WINKING
Scholz, Loos, Palmer, Siebers & Duesterhaus LLP
Quincy



GREGORY W. ODOM
Baker Sterchi Cowden & Rice, LLC
Belleville

PATRICK W. STUFFLEBEAM
Tressler LLP
Edwardsville

SANDRA J. WULF, CAE, IOM
IDC Executive Director
Rochester

President's Message

Nicole D. Milos
AAIS, Chicago

The IDC's *Survey of Law* is an outstanding publication, written by IDC members for the legal community. The breadth of knowledge contained herein demonstrates that IDC members are exceptional advocates for the civil defense bar. The *Survey* is an invaluable tool for the legal community.

The *Survey* has been published every year since 2011. However, 2020 was a year like no other; a year dominated by a pandemic that caused social distancing, remote working, e-learning, and virtual communities. The COVID pandemic presented unexpected challenges that impacted all aspects of our personal and professional lives. Despite these challenges, IDC continued to demonstrate value to its members through education, engagement, and advocacy. Notwithstanding the events of the past year and the isolation caused by the pandemic, lawyers were forced to find new ways to expand their knowledge while remaining engaged with the legal community. 2020 forced all of us to learn new methods to engage, connect, teach, and learn. Although cases were argued and rulings issued in an electronic, socially distant manner, the significance of the decisions issued over the past year are no less important.

IDC's *Survey of Law* will always hold a special place in my heart. In 2011, I worked with a wonderful group within IDC to develop this publication. Thereafter, I served as Managing Editor through 2016. I know, first-hand, the challenges and long hours that go into the development, writing, editing, soliciting, and design of this publication. It is for that reason that I am forever grateful to IDC Committee Chairs, Vice Chairs, Committee authors and editors, and front-line editors, specifically Steve Grossi, Laura Beasley, Georgia Joyce and Kimberly Ross for all of their hard work and contributions. I am especially proud and extend my deepest gratitude to the Editor-in-Chief, Catherine Cooke; co-Managing Editors, Jessica Holliday and Denise-Baker Seal. All of these people exemplify the brilliant legal skills of the defense lawyers that make up IDC. Finally, I want to recognize the law firms and sponsors who support IDC and this publication.

As President of IDC, I hope you enjoy the *2020 Survey of Law*.

Letter from the Editors

Catherine A. Cooke, Editor-in-Chief
Robbins, Salomon & Patt, Ltd., Chicago

Jessica S. Holliday, Managing Editor
Baker Sterchi Cowden & Rice, LLC, Belleville

Denise Baker-Seal, Managing Editor
Brown & James, P.C., Belleville

IDC is excited to bring you another informative *Survey of Law* edition. 2020 was anything but an ordinary year and many of us found ourselves working exclusively from home, juggling household responsibilities, children's virtual learning, Zoom court calls and depositions, and an increasingly blurred line between our work and home lives. Facing those unique challenges, many attorneys may have had less time available to catch up on the latest Illinois case law developments over the course of the year.

Fortunately, our hardworking IDC committee members have done an exceptional job of summarizing many of the most important case developments in Illinois in 2020 in the areas of civil practice, insurance, torts, toxic torts, employment, construction, and legal ethics. We hope you find the *2020 Survey of Law* to be a valuable resource to help you stay abreast of developments in the law.

The editors would like to extend our gratitude to all of the individual authors, committee chairs, and front-line editors for contributing their time and talents to this year's *Survey of Law*. This is true every year, but particularly in 2020 as we all faced many unexpected disruptions to our personal and professional lives and free time was often scarce. As always, we also thank IDC Executive Director Sandra Wulf and graphic designer Polly Danforth for their assistance and dedication to making the *Survey of Law* the high-quality publication it continues to be.

Survey of Civil Practice Law Cases

Negligent Training Claims are No Different than Any Derivative Theory of Liability Against an Employer When Agency is Admitted

In *McQueen v. Green*, 2020 IL App (1st) 190202, the appellate court reversed a jury verdict after award of punitive damages against the defendant employer but absolving its employee of liability for causing the plaintiff's injuries. The defendant employer's role in the case was only through *respondeat superior*. The appellate court ruled that the jury's verdict was inconsistent and the jury should not have ruled against the employer once it found the employee not guilty. The court also found that the jury was so poorly instructed that it contributed to these issues and prevented a fair trial. The case was remanded for a new trial.

The defendant was employed by Pan-Oceanic and was tasked with picking up a skid-steer from being repaired and bringing it back to Pan-Oceanic. The defendant was driving a truck with an attached flatbed trailer. He observed the skid-steer being loaded onto his trailer and believed it "did not look right," but after speaking with his boss who reassured him it would be safe to return, defendant began his return trip. During the trip, the defendant observed the trailer bouncing in his rearview mirror and when he applied his brakes, he lost control of his vehicle and collided with plaintiff.

Plaintiff's complaint contained three counts: (1) negligence for the underlying occurrence; (2) negligence of Pan-Oceanic for its failure to properly hire and train defendant; and (3) willful and wanton conduct against both defendant and Pan-Oceanic for reckless disregard for safety of others. There was no issue as to agency and Pan-Oceanic admitted the defendant was its employee and Pan-Oceanic would be liable for damages caused by him under *respondeat superior.*

The parties and the court held various jury instructions conferences throughout the trial and the record revealed a clear misconception as to whether or not plaintiff could proceed against Pan-Oceanic for negligent training since agency was not at issue. The misunderstanding resulted in the failure to give the correct version of IPI Civil No. 50.01 which would have clearly stated that Pan-Oceanic's liability was indistinguishably tied to its employee. The version of IPI Civil No. 50.01 given during trial omitted the sentence "*However, if you find that [agent's name] is not liable, then you must find that [principal's name] is not liable.*" The jury ultimately found the defendant not liable but found against Pan-Oceanic for willful and wanton conduct and awarded punitive damages. The trial court denied Pan-Oceanic's post-trial motion stating that the allegations of negligent training and supervision were a separate, non-derivative tort, and Pan-Oceanic failed to object to the use of IPI Civil No. 50.01 at trial.

The appellate court reasoned that, among the many instructions issues, the jury's verdict was inconsistent, which mandated a new trial. Citing its decision in *Gant v. L.U. Transport, Inc.*, 331 Ill. App. 3d 924, 928 (1st Dist. 2002), the court ruled that once Pan-Oceanic admitted liability for its agent via *respondeat superior*, the jury should not have been able to reach the conclusion that it was independently negligent. Plaintiff attempted to argue that negligent training was a separate and distinct theory of liability not within the same umbrella of negligent hiring, negligent retention, or negligent entrustment, and thus, was properly before the jury.

Although negligent training has never been explicitly addressed by Illinois case law, the appellate court found that it is implicitly stated in prior decisions, and no exception was necessary as requested by plaintiff. The appellate court declined to recognize negligent training any differently from other negligence claims that are barred when an employer admits liability under *respondent superior*.

Since the jury was not adequately instructed, it answered the special interrogatories in the affirmative that Pan-Oceanic had acted with reckless disregard for safety while the defendant was found not guilty. The appellate court ruled that "Green's and Pan-Oceanic's liability had to rise and fall together." And, although it *would have been* possible for the jury to find Pan-Oceanic's conduct willful and wanton, it must have first found its employee to be negligent. Without the negligent finding against the defendant, Green, the verdict against Pan-Oceanic was inconsistent.

McQueen v. Green, 2020 IL App (1st) 190202.

— Continued on next page

Timeliness of Appeals with Section 2-1401 Rulings and Waiver of Contractual Attorneys' Fees Not Sought in Arbitration

In *Heartland Bank & Trust v. Katz*, 2020 IL App (1st) 182259, the Illinois Appellate Court First District affirmed in part and dismissed in part two circuit court orders addressing a trust agreement. Heartland appealed the trial court's January 17, 2018 order granting one of the two defendants' petition to vacate a default judgment pursuant to section 2-1401 of the Code of Civil Procedure. Heartland also appealed a September 18, 2018 order denying its petition for attorney's fees against the other defendant.

At issue was a commercial real estate lease agreement originally executed by Heartland and both defendants (Katz and Hernandez) in 2004. After the initial term and an extended term of the lease expired in 2012, Katz signed an extension individually with Heartland. In August 2016, Heartland filed a verified complaint alleging that the defendants had vacated the rental property prior to the expiration of the lease and owed over $25,000 in rent plus attorneys' fees and costs.

The circuit court entered a default judgment in favor of Heartland and awarded past due rent plus attorneys' fees and costs. Each defendant successfully litigated petitions to set aside the default judgment pursuant to section 2-1401 of the Code. After the circuit court issued its order granting Hernandez's section 2-1401 petition, the dispute was submitted to the Circuit Court of Cook County's mandatory court-annexed arbitration procedure. The arbitrators found in favor of Heartland and against Katz in the amount of $30,000, and in favor of Hernandez against Heartland. No party rejected the ruling and the circuit court entered a judgment on the arbitration awards. Heartland filed a petition for its contractual attorneys' fees, which the court denied through a written order entered on September 18, 2018.

On appeal, the appellate court found that it lacked jurisdiction to consider the circuit court's order granting Hernandez's section 2-1401 petition. The Illinois Supreme Court Rule 304(b)(3) 30-day requirement for notices of appeal applied because the circuit court's order "fully resolved" Hernandez's petition. According to the appellate court, a section 2-1401 petition begins a separate action and thus, the petition's resolution ends that entire action. Under Rule 304(b)(3), an order resolving a 2-1401 petition is immediately appealable. Because Heartland failed to file its notice of appeal within 30 days of the circuit court's order, it was jurisdictionally barred from seeking to overturn the order after it lost at arbitration.

Heartland's appeal of the circuit court's order denying its petition for attorneys' fees from Katz was timely filed. The central question was whether a party may seek contractual attorneys' fees in the circuit court after the entry of a judgment on an arbitration award. Here, Heartland could have sought its attorneys' fees within the confines of the arbitration but did not. Consistent with the Illinois Supreme Court's ruling in *Cruz v. Northwestern Chrysler Plymouth Sales, Inc.*, 179 Ill. 2d 271 (1997), the appellate court found that Heartland's failure to seek attorneys' fees from the arbitrators and allowance of the circuit court to enter judgment on the arbitration award operated to forfeit its opportunity for attorneys' fees.

Heartland Bank & Trust v. Katz, 2020 IL App (1st) 182259.

Notice Requirements for *Lis Pendens* Actions

In *LLC 1 05333303020 v. Gil*, 2020 IL App (1st) 191225, the plaintiff, LLC 1 05333303020 (LLC), appealed an order of summary judgment entered in favor of the defendant who sought to quiet title to a property located in Des Plaines. LLC was granted title to the property via quitclaim deed, which was recorded on January 28, 2010. Nine days earlier, Bank of America initiated a foreclosure action against the former owner and recorded a *lis pendens* on January 21, 2010. The *lis pendens* was thus on file before the quitclaim deed was recorded. Subsequently, Bank of America conveyed the property via a special warranty deed to Gil. Gil resided on the property ever since. After years of litigation as to ownership of the property, the circuit court entered summary judgment in favor of Gil on May 21, 2019. The circuit court found that title was quieted, established, and confirmed for Gil, and that Gil's claim to the property was stronger than LLC's. Gil also prevailed on LLC's action for foreclosure.

On appeal, the Illinois Appellate Court First District reviewed in detail actions to quiet title and the effects of a *lis pendens* recording. Actions to quiet title are equitable proceedings in which a party seeks to remove a cloud on the title to his or her property. A "cloud" is "the semblance of title, either legal or ethical, appearing in some legal form but which is, in fact, unfounded or which it would be inequitable to enforce." *Hoch v. Boehme*, 2013 IL App (2d) 120664, ¶ 41. Under both section 2-1901 of the Code of Civil Procedure (735 ILCS 5/2-1901) and section 15-1503 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1503), a recorded *lis pendens* constitutes notice of pending litigation implicating real property; it serves as constructive notice to persons with an unrecorded interest in the property.

Section 2-1901 of the Code of Civil Procedure contains a six-month service requirement for notice to persons with an un-

> Actions to quiet title are equitable proceedings in which a party seeks to remove a cloud on the title to his or her property. A "cloud" is "the semblance of title, either legal or ethical, appearing in some legal form but which is, in fact, unfounded or which it would be inequitable to enforce."

recorded interest in a property at issue, whereas section 15-1503 of the Mortgage Foreclosure Law does not. LLC argued that title should have been quieted in its favor because proper service in the foreclosure action was not perfected within six months. The court found that, because a foreclosure proceeding was at issue, section 15-1503 controlled, and there was no six-month notice requirement. The circuit court's ruling was thus correct.

LLC 1 05333303020 v. Gil, 2020 IL App (1st) 191225.

Purchaser of an LLC Interest Was Not Entitled to Member's Benefits

In *Doherty v. Country Faire Conversion, LLC*, 2020 IL App (1st) 192385, the plaintiff's ownership interest and rights under an amended operating agreement for an apartment complex was at issue. After a foreclosure, the plaintiff purchased the interest of Grayslake Investments LLC in County Faire Conversion, LLC (CFC), the defendant real estate development company, through a UCC sale. CFC then sold its sole asset for a large profit. CFC's manager questioned the validity of the Grayslake UCC sale and refused to distribute the plaintiff's share of the sale proceeds. The plaintiff filed suit, seeking a declaration that she was a member of CFC; that she possessed a right to inspect the defendant's books; and that she was entitled to a 25% distribution because Grayslake had made a 25% contribution to CFC. She also sought an accounting and damages from CFC's manager's alleged breach of fiduciary duty.

The amended operating agreement provided the LLC manager with expansive powers, including the full authority to direct, manage, and control the business of CFC, as well as to indemnify and make advances to the manager, employees, officers, directors, shareholders and other agents. It further changed CFC's members' interests from a capital contribution interest to an economic interest in the company's profits and losses. Grayslake's economic interest was set at 13.75%. An "economic interest" was defined as not including the right to inspect company records or to participate in the management of the company. Multiple motions for partial summary judgment resulted in findings that the plaintiff's purchase of Grayslake's shares did not make her a member of CFC; that she had no right to inspect CFC's records or conduct an accounting; and that the CFC's manager did not owe her any fiduciary duties under the amended operating agreement or the Limited Liability Company Act (805 ILCS 805 180/1-1, *et seq.*) (LLC Act).

Following a bench trial, the circuit court found the plaintiff to be a 25% economic interest holder with a 13.75% distributional interest—amounting to $600,477.42—under the amended operating agreement. The trial court further found that CFC's manager, per the amended operating agreement, possessed the right to indemnification for his defense costs. Citing the American rule, the trial court also denied the plaintiff's prayer for attorneys' fees.

On appeal, the Illinois Appellate Court First District agreed that the plaintiff lacked standing under the amended operating agreement and section 10-10 of the LLC Act (805 ILCS 180/10-10) to bring a breach of fiduciary duty claim. The court found section 10-10 inapplicable because it only addressed personal liability for an LLC manager—it did not create standing for a non-member to bring a breach of fiduciary duty claim against a manager. The plaintiff did not contest the trial court's finding that she was not a CFC member. In the same way, the appellate court agreed that the plaintiff did not possess standing to maintain a claim for an accounting under either the amended operating agreement or the LLC Act. With respect to the distribution owed to the plaintiff, the appellate court reviewed testimony provided by experts for the plaintiff and CFC. It agreed with the trial court that CFC's expert's 13.75% calculation was more persuasive and comported with the manifest weight of the evidence. Finally, the appellate court agreed with the trial court's reasoning as to reimbursement of the LLC manager's costs and denial of the plaintiff's request for attorneys' fees.

Doherty v. Country Faire Conversion, LLC, 2020 IL App (1st) 192385.

— Continued on next page

Ohio Vehicle Accident Lacks Venue Because a Corporate Employee's Home Office Does Not Constitute an "Other Office" or Doing Business

After an automobile accident in Ohio, the plaintiff sued a tractor trailer driver and his employer in the Circuit Court of Cook County. The defendants moved to transfer venue pursuant to section 2-101 of the Code of Civil Procedure. Limited discovery revealed that the corporate defendant, a Missouri corporation, had minimal connection to Cook County, as company sales in Cook County did not exceed 0.47% in any year. In opposing the motion to transfer venue, the plaintiff focused on the fact that a part-time employee who handled accounts in DuPage and Kane Counties happened to live in Cook County.

The circuit court denied the motions to transfer venue and the appellate court affirmed. The Illinois Supreme Court started its analysis by observing that venue is a valuable privilege and is accorded significant weight. Although the employee's home office was an office, based on the plain meaning of the word, it did not follow that the employee's office was an office of the corporation. Significantly, the corporation did not select Cook County as an office, did not pay any expenses associated with the employee residence, did not provide any office supplies aside from a computer, did not hold out the employee's residence as an office of the corporation, and did not have customers visit the employee's home office. Accordingly, the corporate defendant did not have another office in Cook County for venue purposes.

Additionally, the corporate employee's home office did not constitute the corporation doing business in Cook County for venue purposes. The corporate employee's residence was merely incidental and the company did not design, manufacture, advertise, finance, or sell its products from Cook County. The Illinois Supreme Court adhered to precedent holding that a fraction of 1% of total sales is insufficient to constitute doing business in a county. As a result, the supreme court reversed and remanded the case with instructions to transfer the case to an appropriate venue.

Tabirta v. Cummings, 2020 IL 124798.

Out-of-State Defendant Subject to Personal Jurisdiction in Illinois Where Allegedly Defamatory E-Mails Were Directed at Illinois Recipient

In this defamation action arising from e-mails sent from an out-of-state foundation to an Illinois doctor, the Illinois Appellate Court Third District considered a certified question that asked whether the circuit court had personal jurisdiction over a physician who lived and worked in Washington, D.C. The plaintiff argued that the statements were published in Illinois when directed to an Illinois physician, so the tort occurred in Illinois. Additionally, the plaintiff argued that the catch-all provision of section 2-209(c) of the Illinois long-arm statute applied.

As to federal due process, the appellate court decided that defamatory e-mails can constitute sufficient minimum contacts to permit the defendant to be sued in Illinois. In this case, the e-mails were published in Illinois, the plaintiff's state of residence, so exercising personal jurisdiction would not offend traditional notions of fair play and substantial justice. Next, the litigation arose from the defendant's Illinois activities, as the e-mails were sent to an Illinois resident. Finally, Illinois has a strong interest in providing a remedy for citizens who are defamed by out-of-state actors. The appellate court found that the plaintiff should not be forced to sue eight defendants in multiple other states and the applicable factors supported a finding that federal due process was satisfied by permitting the plaintiff to proceed in Illinois. As to Illinois due process, the appellate court likewise concluded that it was not unfair, unjust, or unreasonable to require the defendant to litigate this action in Illinois.

One justice concurred in part and dissented in part. The justice would have held that the e-mails, which were part of a national organization's effort to conduct due diligence on the background information provided by an award recipient, did not satisfy either Illinois or federal due process requirements. Rather, the justice concluded that the contact with Illinois was based on the random or attenuated circumstance that the individual with the requisite information resided in Illinois, not an intent to establish contacts with Illinois.

Wesly v. Nat'l Hemophilia Found., 2020 IL App (3d) 170569.

Proper Application of Intrastate *Forum Non Conveniens* Requires Medical Malpractice Action to Proceed in County Where Plaintiffs Resided and Medical Treatment Occurred

In *Kuhn v. Nicol*, 2020 IL App (5th) 190225, the appellate court considered whether the circuit court properly denied the defendant's motion to transfer on the grounds of *forum non conveniens* where the plaintiff filed a lawsuit in St. Clair County even though the alleged medical malpractice occurred in Clinton County and the plaintiffs resided in Clinton County. The parties disputed whether any pertinent records were located in St. Clair County.

The appellate court concluded that the relevant factors strongly favored transfer and the ends of justice and convenience of the parties would be best served by a trial in Clinton County. Although plaintiff pointed to medical professionals who provided rehabilitation services in St. Clair County, the appellate court followed the Illinois Supreme Court's admonition not to give undue weight to the location of treating physicians. As the location of a treating physician or expert could easily be used to frustrate the *forum non conveniens* principles, the plaintiff's argument did not persuade on this point.

Additionally, the appellate court declined to give undue weight to the plaintiff's claim that 25 lay witnesses from St. Clair County would testify to his condition before and after the stroke, particularly where there was no explanation as to why individuals in plaintiffs' county of residence could not provide identical testimony. Even though Clinton County is adjacent to St. Clair County, the defendants should still have been granted *forum non conveniens* transfer to Clinton County based on the balance of the private and public interest factors. Thus, the appellate court reversed the circuit court and remanded with instructions to transfer the action to Clinton County.

Kuhn v. Nicol, 2020 IL App (5th) 190225.

Illinois Personal Jurisdiction Decision in Line with United States Supreme Court Decision

In *Rios v. Bayer Corp.*, 2020 IL 125020, the Illinois Supreme Court issued a holding on personal jurisdiction consistent with the United States Supreme Court decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). The facts presented in the Illinois case involved a consolidated interlocutory appeal, wherein the court was asked to determine whether Illinois may exercise specific personal jurisdiction over claims filed by out-of-state plaintiffs for personal injuries suffered outside of Illinois from a device manufactured outside the state against out-of-state defendants.

According to the Illinois Supreme Court, courts in Illinois could not exercise specific personal jurisdiction under the facts of the case. In reaching this conclusion, the court looked to the Due Process Clause of the Fourteenth Amendment, determining that said amendment did not permit the state to exercise specific jurisdiction over a non-resident, as there were no jurisdictional "links" between the out-of-state plaintiffs' claims and the state. Further, because plaintiffs' cause of action did not relate to the non-resident defendants' "continuous activity" within the state, such "continuous activity" was not enough to confer specific jurisdiction over the non-resident defendants.

Rios v. Bayer Corp., 2020 IL 125020.

No Personal Jurisdiction in Illinois for Out-of-State Defendant

In *Buron v. Lignar*, 2020 IL App (1st) 192152, the Illinois Appellate Court First District reversed an order entered by the trial court which denied a motion to dismiss based on lack of personal jurisdiction. In reversing the lower court's decision, the appellate court determined that Illinois courts lacked specific jurisdiction over the non-resident defendants, as plaintiff's cause of action did not relate to the defendants' in-state activities. The First District also found that there was no support for the lower court to exercise general jurisdiction over the non-resident defendant driver, as his only relation to Illinois was limited work in Illinois, which was not continuous enough to render Illinois as his home state. Similarly, the court ruled that the non-resident defendant driver's employer was not subject to general jurisdiction, as the non-resident employer's activities within the state accounted for no more than 10% of its revenue, which was not enough to establish Illinois as the non-resident employer's principal place of business or "surrogate home."

Buron v. Lignar, 2020 IL App (1st) 192152.

— Continued on next page

Appellate Court Reverses Trial Court on *Forum Non Conveniens* Denial

In *Brandt v. Shekar*, 2020 IL App (5th) 190137, the Illinois Appellate Court Fifth District found that the trial court abused its discretion in finding that St. Clair County was a proper forum for the case as the county's only connection was the residence of one of the defendant doctors and the location of plaintiff's counsel's office. While the doctor's residence made venue proper in St. Clair County, because his residence had no connection to the alleged medical malpractice at issue, forum was not proper.

One of two defendant radiologists resided in St. Clair County but the alleged malpractice was committed in Marion County. Another defendant resided in Iowa and commuted to Marion County. The corporate defendant was located in Marion County. The plaintiff resided in Marion County and received treatment there as well as in St. Louis. The trial court denied the motion to transfer based upon *forum non conveniens* and the defendants appealed.

The appellate court seems to be building on the statement it made in *Shaw v. Haas*, 2019 IL App (5th) 180588, wherein it stated that one of its reasons for transferring an ordinary negligence case away from the county where treatment was received was because testimony of plaintiff's treating physicians is not at the heart of the issue in non-medical malpractice cases. In this medical malpractice case, the plaintiff received treatment in Marion County and St. Louis, making them the more appropriate forum.

One justice filed a dissent and argued that the trial court did not abuse its discretion and thus the majority "lower[ed] our standard of review in order to reverse."

Brandt v. Shekar, 2020 IL App (5th) 190137.

Open and Obvious Defense is Based on Objective, Not Subjective Standard

In *Foy v. Village of LaGrange*, 2020 IL App (1st) 191340, the plaintiff fell while walking on a sidewalk owned and maintained by the Village of LaGrange. The plaintiff claimed he tripped on a raised sidewalk slab. He believes the slab was raised because of tree roots underneath. The plaintiff suffered a broken right wrist and fractured left rib. The defendant moved for summary judgment on the basis that the defect was open and obvious and that any deviation was *de minimus*. The court granted summary judgment.

The appellate court agreed with the trial court that there was no genuine issue of material fact. The plaintiff testified that, had he been looking down at the time of the fall, he would have seen the raised sidewalk. The court found that the plaintiff's failure to notice the raised sidewalk did not render the open and obvious defense inapplicable. The open and obvious determination is based on an objective standard, not a subjective standard. Basing its ruling on the open and obvious issue, the appellate court did not analyze the *de minimus* deviation argument.

Foy v. Village of LaGrange, 2020 IL App (1st) 191340.

Statute of Limitations is Found to Have Run in Legal Malpractice Case

The case of *County Line Nurseries & Landscaping, Inc. v. Kenney*, 2020 IL App (1st) 200615 involves the statute of limitations on a legal malpractice claim. The underlying lawsuit was a contractual dispute between County Line Nurseries & Landscaping (County Line) and the Glencoe Park District. The plaintiff sought $75,000 in damages. During the proceedings, County Line was represented by a number of attorneys.

On May 29, 2014, defendant attorney James Kenney attended a status conference and addressed the court, although he had not filed an appearance. On June 18, 2014, Kenney attended another status conference but still did not file an appearance. After the hearing, Kenney raised the prospect of settlement of the claims for $17,500. The following day, the attorney for the Park District contacted Kenney and told him it would accept the settlement. On June 24, 2014, another attorney contacted counsel for the Park District and told him he had been asked to represent County Line and defendant Michael Collins. That attorney had not heard about the settlement.

On July 1, 2014, the Park District filed a motion to enforce the settlement. On September 23, 2014, the trial court granted the motion to enforce. County Line appealed and the appellate court upheld the motion to enforce, but reversed the trial court's order of sanctions against County Line. On remand, the trial court dismissed County Line's claim with prejudice.

On October 26, 2016, the plaintiffs filed a legal malpractice action against Kenney. The plaintiffs alleged they suffered damages in accepting only nominal fees and attorneys' fees in the appeals. Kenney moved to dismiss on basis of the statute of limitations. The defendant argued the statute of limitations began to run when the court ruled to enforce the settlement, and thus it had run on September 23, 2016.

The appellate court upheld the trial court and found that the plaintiffs should have had knowledge that they suffered an injury

and of its wrongful cause no later than the date the order was entered to enforce the settlement. The plaintiffs also argued that defendant Kenney fraudulently concealed that he was acting as County Line's attorney without authority or consent. The court concluded that despite Kenney's alleged concealment, the plaintiffs had sufficient notice of his malpractice when the trial court entered its first order.

County Line Nurseries & Landscaping, Inc. v. Kenney, 2020 IL App (1st) 200615.

Appellate Court Reverses *Forum Non Conveniens* Dismissal Due to Late Filing of Motion

In April 2018, the corporate plaintiffs brought suit against the defendants alleging breach of contract, breach of duty of good faith and fair dealing, fraud, and unjust enrichment. In January 2020, the circuit court granted the defendants' motion to dismiss based on *forum non conveniens*, finding that Rockland County, New York was the more appropriate forum. Plaintiffs appealed on the basis that the *forum non conveniens* motion was untimely.

The plaintiffs filed their complaint against defendants in Sangamon County on April 26, 2018. On July 16, 2018, the defendants filed a "Consent Motion for Extension of Time to Respond." The defendants filed their answer on July 30, 2018 with affirmative defenses and counterclaims. On August 30, 2018, the plaintiffs filed motions to dismiss and to strike the affirmative defenses and counterclaims. There were a series of filings with respect to the defendants' affirmative defenses and counterclaims. On September 3, 2019, while the plaintiffs' motion to dismiss the defendants' amended counterclaim was pending, the defendants filed a motion to dismiss the plaintiffs' complaint on *forum non conveniens* grounds.

On appeal, the defendants argued that Illinois Supreme Court Rule 187(a)'s "90-day clock" never started because the "responsive pleading was still unsettled." They note the plaintiffs objected to their affirmative defenses and counterclaims. The appellate court noted that the defendants failed to cite any legal authority to support their contention that the relevant 90-day period is paused until the resolution of the defendants' answers. The appellate court found that the deadline is triggered by the filing of a "party's answer," not an amended answer.

The court stated that where a defendant is granted an extension to answer, the last day to file the answer does not begin to run until the last day of the extended deadline, and where the complaint is amended to add a new matter, the 90-day period is not triggered until the answer to the amended complaint is due. The court found nothing to support the conclusion that the 90-day period restarts any time a defendant files an amended answer and also found the defendants had done nothing to show that they fell within the good cause exception to Rule 187. Thus, the appellate court concluded that the *forum non conveniens* motion was filed too late and reversed the trial court.

New Planet Energy Dev. LLC v. Magee, 2020 IL App (4th) 200043.

Fifth District Affirms Denial of a *Forum Non Conveniens* Motion

The case of *Evans v. St. Joseph's Hospital*, 2020 IL App (5th) 190414, is another *forum non conveniens* decision from the Illinois Appellate Court Fifth District. The case involved an allegation of a failure to diagnose recurrent kidney cancer. The claim was filed against St. Joseph's Hospital in Breese, Illinois, and a number of other defendants, including Dugan Radiology Associates, Dr. Thomas Doyle, Urology Consultants, and Dr. Jeffrey Parres. Defendant St. Joseph's Hospital filed a motion to transfer pursuant to *forum non conveniens*. The defendants argued that the plaintiff was a resident of Clinton County and that the alleged malpractice occurred in Clinton County. Dr. Doyle worked in Clinton County, while Dr. Parres worked in Madison County. In response to the motion to transfer, the plaintiff argued that Urology Consultants and its employees practice medicine in St. Clair County. The plaintiff further argued Dr. Doyle and Dr. Parres lived in St. Louis and the Clinton County courthouse was twice as far away from St. Louis as the St. Clair County courthouse.

The appellate court found that some of the alleged malpractice occurred in St. Louis, which was twice as close to the St. Clair County courthouse as it was to the Clinton County courthouse. The court found that court congestion was not as significant of a factor because the other factors did not strongly favor transfer. The court also found that the interest in counties deciding their own local controversies did not favor transfer because Urology Consultants practiced medicine in St. Clair County, and thus, the residents of St. Clair County would have an interest in determining if their resident met the standard of care. The appellate court concluded the trial court did not abuse discretion in denying transfer.

Evans v. St. Joseph's Hosp., 2020 IL App (5th) 190414.

— Continued on next page

Appellate Court Vacates $50 Million Verdict Due to Stricken Expert Disclosures

In this medical malpractice case, the jury awarded the plaintiff $50.3 million in damages. The case arises out of alleged medical negligence at the time of the plaintiffs' child's birth, resulting in injuries to the child. The defendants appealed, contending the trial court erred in striking the defendants' supplemental disclosures of their previously-disclosed expert witnesses, where the disclosures were made in response to the plaintiffs' supplemental disclosure. The defendants also argued the court erred in excluding evidence of the child's autism diagnosis and in allowing the plaintiffs' counsel's remarks in closing argument that the jury should "make a statement" concerning the preciousness of children's lives.

The mother of the child was admitted to Evanston Hospital five days past her due date. She was examined, including a measurement of the fetal heart rate. The mother did not make progress and the doctors decided to give her Pitocin. The baby continued to experience heart decelerations and the doctors decided to perform a caesarean section delivery. When born, the baby was lifeless and blue, had an Apgar score of 1, and his heart had to be pumped to get circulation to his brain. The baby was resuscitated and the body temperature was cooled to avoid further brain damage. The baby exhibited signs of brain dysfunction and within five hours showed signs of seizure activity.

The plaintiffs' attorney supplemented his answers to written interrogatories 56 days before trial. The supplement contained a psychological evaluation of the child. The evaluation was conducted by Dr. Young, one of the child's treating physicians in Michigan, who concluded the child will not exceed an early elementary level of acquired academic development. The defendants forwarded the report to their experts. The defense experts provided supplemental opinions that Dr. Young's records supported their position that the child's disabilities resulted from a chronic condition and not an acute event. The defendants also sought to supplement their disclosures to include Dr. Young as a witness. The plaintiffs moved to strike the defendants' supplemental disclosure on the basis that it was made within 60 days of trial. The trial court agreed and struck the defendants' supplemental disclosure.

In assessing the issues, the appellate court stated the question we must answer is whether Illinois Supreme Court Rules 213(i) and 218(c) allow defendants to file supplemental answers less than 60 days before trial where they file such answers in response to additional information the plaintiff filed less than 60 days before trial. The court noted that Rules 213 and 218 should be liberally construed to do substantial justice between the parties. The court found the trial court should have allowed the defendants to file their supplemental answers in order to do substantial justice between the parties. The court found that nothing in the language of Rule 218 requires the court to hold the 60-day limit above all other considerations. Errors in exclusion of expert testimony warranted a new trial if they were as serious and prejudicial as they were in this case. The court found the experts' opinions on the issue of the child's autism were critical to the defendants' proximate cause defense in the case and remanded the case for a new trial.

Florez v. Northshore Univ. Healthsystem, 2020 IL App (1st) 190465.

Defense Medical Malpractice Verdict Upheld Despite Claims of Reversible Errors at Trial

In *Ittersagen v. Advocate Health & Hospitals Corp.*, 2020 IL App (1st) 190778, the plaintiff brought a medical malpractice suit in Cook County alleging the defendants were negligent for failing to diagnose him with sepsis, failing to refer him to the emergency department for treatment, and for performing an incision and drainage in an outpatient setting without first administering intravenous fluids and antibiotics. The jury returned a verdict for the defendants. The plaintiff appealed on the grounds that the court failed to dismiss a juror for cause, granted a motion *in limine* preventing one of his experts from testifying, and allowed defendant's expert to testify concerning his own personal practices despite a motion *in limine* on the topic.

The plaintiff, a diabetic, saw Dr. Thakadiyil at her office for a carbuncle in his left armpit. The doctor performed an incision and drainage of the carbuncle. The plaintiff started to feel sick after leaving the office and went to another emergency room where it was found he was experiencing renal failure. The following day he was found to have toxic shock syndrome resulting in the development of gangrene and amputation of legs below the knee.

One of the plaintiff's experts, Dr. Hogarth, was a board-certified pulmonologist. The plaintiff also had a family medicine expert. The court barred the pulmonologist from offering standard of care opinions. The court noted for an expert to offer an opinion, it must be shown that the expert is a licensed member of the same school of medicine about which he is to testify and that he is familiar with the methods and procedures ordinarily observed by physicians in the defendant's community or a similar community. The court further found that any error in barring the testimony of Dr. Hogarth was

harmless because the jury heard standard of care testimony from the plaintiff's family medicine expert.

The plaintiff also objected because of the defendant's expert's testimony that he had performed the same incision and drainage on his own daughter. The plaintiff claimed that this testimony was not previously disclosed pursuant to Illinois Supreme Court Rule 213 and that it was in violation of a motion *in limine* ruling on experts' testimony regarding their personal practices. The court found that the plaintiff waived the objection by not objecting the first time the testimony came out on direct examination. Further, the plaintiff was provided the opportunity to cross-examine the expert on this testimony. Also, when the plaintiff objected on redirect, the objection was sustained; thus, the objection cured the prejudicial impact of the testimony. The court found that no prejudice resulted from the testimony.

During the trial, one of the jurors self-reported that his investment firm was responsible for investing funds of the hospital's endowment. The court noted that the endowment and the hospital were separate entities. Further, in examination of the juror, the court found that the juror was credible when he responded that he could be truthful, fair, and unbiased. The appellate court found the trial court properly decided that the juror's actions did not require a mistrial and affirmed the trial court verdict.

Ittersagen v. Advocate Health & Hosps. Corp., 2020 IL App (1st) 190778.

Retained Emergency Room Doctor Barred from Testifying to Standard of Care of Psychiatrist

Zenah S. Muhdi died from a heroin overdose when she was 17 years old. Her death occurred one day after she was treated for a prior heroin overdose and discharged from Advocate Christ Medical Center's emergency department. The plaintiff sued the physicians and hospital because Muhdi was not admitted or held after the first overdose. The jury returned a verdict for the defendants. The plaintiff appealed on the basis that the court improperly granted the defendants' motion *in limine* which prohibited the plaintiff's retained emergency room doctor expert from testifying to the standard of care for a psychiatrist.

The plaintiff disclosed his expert witness to testify that the defendants violated the standard of care in discharging Muhdi without having her undergo a psychiatric evaluation. The records showed that the doctors did consult with the consulting psychiatrist before discharging Muhdi. At his deposition, the plaintiff's expert amended his opinion to state that the psychiatrist had to see the patient in person.

The defendants argued that the expert was not qualified to offer an opinion as to the standard of care of a psychiatrist. The expert practiced in an emergency room between 1980 and 2005, and since that time, he transitioned into practicing in urgent care, teaching, and providing expert testimony. The expert admitted that psychiatric evaluations are beyond what an emergency room physician is qualified to do. The appellate court agreed with the trial court that the expert was not qualified to offer the opinion regarding the consult.

The court further found that, even assuming he was qualified, the expert's opinion lacked proximate cause and thus should be barred. In medical malpractice cases, proximate cause must be established by expert testimony to a reasonable degree of medical certainty. Because the expert could not testify as to what would have occurred as result of an in-person examination, he could not testify to a reasonable degree of medical certainty that the lack of an in-person examination was the proximate cause of Muhdi's death.

The plaintiff also appealed on the issue of whether the expert could testify whether the patient was medically cleared. Because the expert testified at his deposition that he was not sure about that issue, the court concluded the opinion had not been disclosed.

Biundo v. Bolton, 2020 IL App (1st) 191970.

Appellate Court Grants New Trial Based on Incorrect Trial Court Ruling on Witness Disclosure

Perez v. St. Alexius Medical Center, 2020 IL App (1st) 181887, is a wrongful death and survival action raising medical malpractice claims related to the treatment of Marilyn Perez, who died from metastatic pelvic abdominal cancer 7 months after giving birth by caesarean section. The plaintiff brought suit against various physicians including physicians who treated Marilyn before and after the birth of her twins. The case went to trial against Dr. Christopher Michael, an obstetric-gynecologist, and his practice group, Dr. Jeffrey Chung, the radiologist who interpreted Marilyn's ultrasound, and St. Alexius Medical Center under an apparent agency theory. The jury returned a verdict $25 million against Dr. Michael and his practice and returned a defense verdict for Dr. Chung and St.

— Continued on next page

Alexius. The plaintiff settled with Dr. Michael and his practice. The plaintiff appealed the verdict in favor of Dr. Chung and St. Alexius.

The plaintiff first appealed on the basis that the trial court improperly prevented him from using Dr. Chung's Rule 213 disclosure against the defendants. The plaintiff claimed that the defendant argued at trial that Dr. Chung did not know about a teratoma when he reviewed the ultrasound and that barring the plaintiff's use of Dr. Chung's Rule 213(f) disclosure allowed the defendants to hide from the jury Dr. Chung's admission that he had been aware of the teratoma when he reviewed the ultrasound. The court found that the interrogatory answers may have been completed and signed by an attorney as opposed to the expert, but that cannot justify modification of the plain meaning of the rule allowing impeachment.

In this case, the plaintiff's counsel wanted to use Dr. Chung's Rule 213 (f)(3) disclosure as an evidentiary admission or alternatively as impeachment. The trial court distinguished between using the Rule 213 disclosures against a retained expert and a party. The appellate court found Rule 213 does not support the distinction between using the Rule 213 disclosures against an expert but not against a party. The appellate court concluded the court committed prejudicial error in not allowing plaintiff to confront Dr. Chung in cross-examination with his Rule 213 discovery disclosure. The court further found that the trial court committed reversible error in not allowing the plaintiff's counsel to cross-examine Dr. Chung with the radiology practice guidelines.

Finally, the appellate court found the jury was improperly instructed on the apparent agency issues. The jury instruction on apparent agency made no mention of agency but referred strictly to whether Dr. Chung was an employee. The court found the term "agent" should be added to IPI 105.10. For these reasons, the appellate court vacated the jury verdict and remanded the case for a new trial.

Perez v. St. Alexius Med. Ctr., 2020 IL App (1st) 181887.

Plaintiff Deprived of Fair Trial Due to Failure to Give Informed Consent Jury Instruction

Bailey v. Mercy Hospital, 2020 IL App (1st) 182702, is a medical malpractice case in which Jill Hilton-Hampton (Jill) died on March 18, 2012 after she sought emergency room treatment on March 16th and 17th. The plaintiff alleged the defendant hospital and doctors failed to diagnose toxic shock syndrome or sepsis. The jury returned a verdict for the defendants. The plaintiff claimed that the trial court deprived her of her right to a fair trial by refusing to give the informed consent instruction and instruction on missing evidence. The plaintiff also argued the trial judge should have allowed her to give a non-pattern instruction on the last chance doctrine. Further, the plaintiff claimed defendant's expert was not qualified to testify.

Jill initially was evaluated by a triage nurse at Mercy Hospital and then was sent to the emergency department where Dr. Heinrich performed a physical evaluation before she was transferred to Dr. Jones who wanted to admit her to the hospital. Jill refused admission and agreed to return to the ER if she experienced worsening conditions. The following day, Dr. Heinrich returned to the ER and learned that Jill had refused admission. He called Jill and found out she was not doing better. He called Dr. Connolly and instructed Connolly to perform a CT scan on Jill's abdomen. Jill returned to the emergency room, but Dr. Connolly never saw the patient. Tara Anderson, Jill's emergency room nurse, took an initial assessment of the patient and Dr. Arwindekar cared for Jill while she was in the ER. She was transferred to the observation unit in stable condition but shortly thereafter she went into cardiopulmonary arrest and died the following day.

The appellate court found the plaintiff was deprived of a fair trial because the trial court failed to give the informed consent instruction (IPI 105.07.01). The plaintiff's expert testified that Dr. Jones had a duty to inform the patient of what could go wrong by leaving the hospital, including the potential she could die. The defendant's expert testified that if Jones had suspected sepsis, he should have explained his concerns and offered further testing. Jones acknowledged that he was concerned the patient had life-threatening conditions. The appellate court found the trial court should have allowed the plaintiff to submit the informed consent instruction which would require the jury to assess whether a reasonably well-qualified doctor would have disclosed to the patient the risks of leaving the hospital under similar circumstances. The appellate court found the court was not required to give the missing evidence instruction because there was no evidence that some tests in question were ever performed.

The court found the non-pattern loss of chance jury instruction should have been given. The court found that the plaintiff had put forth sufficient evidence to support the theory that the defendants' negligent delay in diagnosis and treatment lessened the effectiveness of the treatment decedent received. The plaintiff's experts testified that Jill's history, symptoms, and test results were consistent with toxic shock syndrome and sepsis which ultimately caused her death.

The appellate court found that the trial court did not abuse its discretion in allowing Dr. Reingold to testify regarding toxic shock syndrome. The court found that his training made him sufficiently

qualified to testify on toxic shock and that the plaintiff's counsel was allowed to cross-examine him on his experience, qualifications, sincerity, and soundness of opinions.

For these reasons, the appellate court reversed the jury's finding in favor of the defendants Brett Jones, Steve Heinrich, Amit Arwindekar, Helene Connolly, and Emergency Medicine Physicians of Chicago and remanded the case for a new trial. The court affirmed the defense verdict of defendants Tara Anderson and Mercy Hospital.

Bailey v. Mercy Hosp. & Med. Ctr., 2020 IL App (1st) 182702.

Redesignation of a Controlled Expert Witness to a Consulting Expert Witness

In *Dameron v. Mercy Hospital & Medical Center*, 2020 IL 125219, the Illinois Supreme Court addressed the question of whether a party may redesignate a disclosed Rule 213(f)(3) witness to a Rule 201(b)(3) consultant and answered the question in the affirmative.

The plaintiff underwent a robotic-assisted hysterectomy at Mercy Hospital. She brought a medical malpractice action against the defendants alleging that due to improper positioning during surgery, she suffered damage to her femoral nerves. On May 30, 2017, the plaintiff disclosed Dr. David Preston as a Rule 213(f)(3) controlled expert witness who would testify regarding the methods of performing and the results of the comparison of electromyogram and/or nerve conduction studies he performed on the plaintiff on June 1, 2017. Dr. Preston performed an EMG study on the plaintiff and prepared a report.

On July 27, 2017, the plaintiff e-mailed the defendants advising them that she was withdrawing Dr. Preston as a Rule 213(f)(3) controlled expert witness and considered him instead to be a non-testifying expert consultant pursuant to Rule 201(b)(3). The plaintiff also informed the defendants that she would not be producing any documents from Dr. Preston's review of the case or his examination.

On August 3, 2017, the plaintiff filed a motion to change Dr. Preston's designation from a Rule 213(f)(3) controlled expert witness to an expert consultant pursuant to Rule 201(b)(3), asserting that Dr. Preston had been disclosed as a testifying expert in error. On August 4, 2017, the court denied the plaintiff's motion and ordered her to produce Dr. Preston's records. The plaintiff refused and the trial court entered a contempt order. The plaintiff appealed the court's interlocutory orders denying her motions to designate Dr. Preston as a consulting expert. The appellate court reversed the circuit court's denial of the plaintiff's motion, relying on several federal cases.

The supreme court first considered the defendants' argument that Dr. Preston was not an expert but was the plaintiff's treating physician in that he provided medical care to the plaintiff in the form of an examination and an EMG study. The supreme court held that the examination did not make Dr. Preston a treating physician. The court also noted that the plaintiff's counsel paid both for Dr. Preston's time and the EMG study.

As to the ability to redesignate Dr. Preston as a consultant, the court noted that the Illinois rules do not expressly permit or prohibit a party from changing a witness's designation, but discerned no reason to prevent her from doing so. The court noted that the redesignation of Dr. Preston occurred approximately one year before the scheduled trial date which would cause the defendants no unfair surprise at trial. Furthermore, because the plaintiff never disclosed Dr. Preston's report to the defendants, it could not be said that the defendants came to rely upon Dr. Preston being called as a witness or that they were prejudiced by his withdrawal.

Finally, the defendants argued that even if Dr. Preston could be redesignated as a consulting expert, the plaintiff still must turn over his report and test results consisting of objective data that is not "core work product." The supreme court rejected this argument, citing the rule itself which states that "the identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means." Ill. S. Ct. R. 201(b)(3).

Dameron v. Mercy Hosp. & Med. Ctr., 2020 IL 125219.

Motions for Substitution of Judge and "Testing the Waters"

In *Simpson v. Knoblauch*, 2020 IL App (5th) 190439, the plaintiff, Simpson, and his passenger, Abert, were injured in an automobile collision with defendant, Knoblauch. Abert filed a claim against Knoblauch and Simpson. Knoblauch filed a third-party contribution action against Simpson. During the pendency of Abert's lawsuit, the court addressed a pending motion for partial summary judgment, a motion to amend the case management order, a motion for sanctions or in the alternative to name a rebuttal expert, and motions *in limine* to bar the testimony of Knoblauch's expert. The court heard arguments and took the motions under advisement and ordered the parties to mediate.

— Continued on next page

Abert settled her claims against Simpson and later with Knoblauch and the parties filed a stipulation to dismiss the action. Knoblauch's counterclaim was dismissed pursuant to the settlement agreement between Abert and Simpson. The court made a good faith finding as to that settlement and found that all contribution actions were extinguished pursuant to the Illinois Contribution Act (740 ILCS 100/2).

Simpson then filed a new action naming Knoblauch as a defendant and the case was assigned to the same judge that presided over Abert's action. Knoblauch filed a motion for substitution of judge pursuant to 735 ILCS 5/2-1001. Simpson objected to the motion and the motion was denied. The court allowed an interlocutory appeal pursuant to Illinois Supreme Court Rule 308 of the following question:

> Does the trial court have discretion to deny (Knoblauch's) motion for substitution of judge brought pursuant to 735 ILCS 5/2-1001, when the court has found (Knoblauch) tested the waters in a different cause of action arising from the same occurrence brought by a different plaintiff against the same defendant?

In answering the question in the negative, the Illinois Appellate Court Fifth District turned to the Illinois Supreme Court's decision in *Bowman v. Ottney*, 2015 IL 119000, in which the court held that a litigant who had voluntarily dismissed and refiled his case and was assigned to the same judge that was assigned to the original filing, was not entitled to a substitution of judge as a matter of right because he had "tested the waters" in the original litigation.

The Fifth District declined to extend *Bowman*'s holding to deny Knoblauch's motion for substitution of judge on the basis that substantive rulings or extensive discussions occurred in the prior case. The court noted that in the Abert case, a different plaintiff had alleged her claim against Knoblauch and Simpson had declined to raise his claim against Knoblauch in that litigation. Simpson neither refiled nor "repackaged" an identical claim from the prior proceeding. In filing a third-party claim for contribution in Abert litigation, Knoblauch raised the issue of Simpson's liability and his own liability for Abert's injuries. In this case, Simpson was a new and separate plaintiff that filed a negligence claim for the first time against Knoblauch. As the parties were not the same as those in the prior case, the participants stood in different positions than their counterparts in the earlier suit.

Simpson v. Knoblauch, 2020 IL App (5th) 190439.

Union Employee Attorney Not Subject to Legal Malpractice Claim

In *Zander v. Carlson*, 2020 IL 125691, the Illinois Supreme Court issued a consequential decision related to the ability of a union member to sue his union and the union attorney representing him in a disciplinary hearing. The supreme court held that the union member could do neither.

The plaintiff was a police officer, who under the applicable collective bargaining agreement, had the right to proceed with an arbitration or a hearing before the police commission. The plaintiff decided to proceed to arbitration. After a two-day hearing, the arbitrator upheld the decision to terminate the plaintiff. Unhappy with this outcome, the plaintiff brought suit against the union employee-attorney as well as his union under a legal malpractice theory.

The union and the attorney countered that union agents or employees, like the plaintiff's assigned lawyer, cannot be held personally liable for actions undertaken in the course of their employment in furtherance of collective bargaining rights. While the plaintiff couched his theory in legal malpractice, the union contented that in reality the claims the plaintiff advanced were tantamount to a charge that the union and its employed attorney breached their duty of fair representation, a claim that was within the exclusive jurisdiction of the Illinois Labor Relations Board, and not the circuit court.

The Illinois Supreme Court agreed with the above arguments by the union. The court noted an established line of cases beginning with the United States Supreme Court's decision in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), and its progeny had held that individual union members, agents, and representatives are not subject to civil liability for actions they undertake on behalf of the union. The Illinois Supreme Court further held that the plaintiff did not in fact have an attorney-client relationship with the union lawyer. The plaintiff had no input on the union's decision to appoint the particular lawyer and the plaintiff did not directly pay the attorney for his time.

The Illinois Supreme Court held that the circumstances of this case fell squarely within the *Atkinson* line of authority and applied the holding and reasoning of that United States Supreme Court case to Illinois law, noting that Illinois Public Labor Relations Act largely mirrored the federal labor relations scheme. The supreme court determined that the fact that the plaintiff chose not to couch his complaint as an unfair labor practice cut no mustard.

Zander v. Carlson, 2020 IL 125691.

Appellate Court Reverses Trial Court's Good Faith Finding of Settlement

In *Hartley v. North American Polymer Co.*, 2020 IL App (1st) 192619, the Illinois Appellate Court First District issued a notable decision related to the Illinois Joint Tortfeasor Contribution Act (740 ILCS 100/2(a)) (Contribution Act). The court was presented with a settlement of a potentially high-value case and the subsequent request for a good-faith finding from the trial court. Given the facts described below, the appellate court reversed and remanded the trial court's finding that the settlement was in good faith.

In the underlying case, the plaintiff sued the manufacturer of the allegedly defective product for causing the death of plaintiff's decedent, but did not sue the decedent's employer, a company owned by a family member of the decedent. The defendant manufacturer filed a third-party complaint against the decedent's employer, alleging a failure to train and supervise the decedent.

The plaintiff then settled the case with the decedent's employer for $50,000, despite the possibility that the third-party defendant may have had $1,000,000 in coverage. The third-party defendant was being defended under a reservation of rights as the determination of whether the decedent was an employee or an independent contractor could trigger coverage. Following this settlement, the remaining defendants pointed to the familial relationship between the plaintiff and the decedent's employer as well as the fact that the plaintiff had not sued the employer directly.

Initially, the trial court concluded that, based on its evaluation of the factors, the settlement was not made in good faith. However, upon a motion to reconsider, the court concluded that it had erred factually in determining the relationship between the settling parties and that it had overstated the employer's potential liability. The court therefore reversed itself and entered a good faith finding of settlement.

The appellate court noted that the good-faith nature of a settlement is the Contribution Act's only limitation on the right of the parties to settle and it is the good-faith nature of the settlement that extinguishes the contribution liability of the settling tortfeasor. The court noted that the settling parties carry the initial burden of making a preliminary showing of good faith by a preponderance of the evidence. The objecting party then has the burden of proving the absence of good faith by the preponderance of the evidence.

The court noted that Illinois case law defines certain factors that a trial court can evaluate when determining if a settlement was made in good faith: (1) whether the settlement amount was reasonable and fair; (2) whether the parties had a close personal relationship; (3) whether the plaintiff sued the settling party; and (4) whether information about the settlement agreement was concealed. No one factor is determinative.

The appellate court concluded that these factors weighed against a finding of good faith. While the personal relationship of the parties alone was not determinative, that fact paired with the failure of the plaintiff to sue the decedent's employer was consequential. Importantly, the Contribution Act seeks to promote two important public policies: the encouragement of settlements and the equitable apportionment of damages among tortfeasors. The appellate court stated that permitting the plaintiff to settle with the employer under the circumstances described would be "anything but equitable."

Hartley v. N. Am. Polymer Co., 2020 IL App (1st) 192619.

Appellate Court Determines Two Statutes Do Not Conflict, Allowing Wrongful Death Case to Move Forward

In *Zayed v. Clark Manor Convalescent Center*, 2019 IL App (1st) 181552, the Illinois Appellate Court First District reversed a trial court finding that the plaintiff's personal injury claims were untimely following plaintiff's decedent's death.

The plaintiff filed a wrongful death and survival action alleging his decedent, Said Mohammad Zayed, fell and fractured his hip while residing in the defendant's nursing home. Zayed was under legal disability and was unable to manage his own affairs. He died 18 months later. The lawsuit was filed three years and four months after Zayed's fall, and one year and ten months after his death. The suit alleged the fall and fracture caused or contributed to his death.

The defendant moved to dismiss the lawsuit pursuant to section 13-209(a)(1) of the Code of Civil Procedure, arguing the suit was untimely. Section 209(a)(1) extends the time to file personal injury claims one year beyond the death of the decedent. The trial court granted the motion and the plaintiff appealed.

The plaintiff argued the estate had two years to file suit pursuant to section 13-211 of the Code of Civil Procedure, which suspends the statute of limitations for personal injury suits when the injured person is legally disabled. The defendant continued to argue section 209(a)(1) controlled and cited the 2018 case of *Giles v. Parks*, 2018 IL App (1st) 163152, decided by a different panel from the First District. The appellate court looked to similar cases from other states, ultimately deciding that *Giles* was wrongly decided. The appellate court stated that sections 13-209 and 13-211 were enacted to extend the statutes of limitations in different situations, not limit them.

— Continued on next page

The legal disability noted in section 13-211 is removed when the person dies and the right to file suit is vested in the estate, which then has two years from the date of death to file suit. The appellate court further found that sections 13-209 and 13-211, when read together and when considering the legislature's intent, demonstrated that there is no conflict between them and that the plaintiff had two years from the date of the decedent's death to bring the suit, which she did. Thus, the case was remanded.

Zayed v. Clark Manor Convalescent Ctr., Inc., 2019 IL App (1st) 181552.

Granting of Interstate *Forum Non Conveniens* Motion Upheld for Motor Vehicle Accident in New Mexico

In *Sipula v. Stockley*, 2020 IL App (3d) 190214-U, the Illinois Appellate Court Third District affirmed the trial court's granting of the defendant's motion to transfer venue based on *forum non conveniens* for a case based on a motor vehicle accident that occurred in New Mexico.

Defendant Dale Stockley and his wife Margaret Stockley, both lifelong residents of LaSalle County, Illinois, were driving in Albuquerque, New Mexico, when they were involved in a serious motor vehicle accident. Margaret died from her injuries and her estate, through the executor Sipula, Margaret's daughter, filed a wrongful death suit against Dale Stockley in Illinois. The defendant filed a *forum non conveniens* motion seeking dismissal of the case to be refiled in New Mexico, which the trial court granted, finding that even giving the choice of the plaintiff's forum substantial deference, the balance of the relevant private and public factors weighed strongly in favor of dismissal and refiling in New Mexico pursuant to Illinois Supreme Court Rule 187.

On appeal, the appellate court noted the plaintiff's chosen forum, LaSalle County, was given proper deference by the trial court as it was the decedent's home. The appellate court also found the trial court's weighing of private interest factors was proper, as all occurrence witnesses, medical personnel, and police were located in New Mexico, and the New Mexico witnesses would not be amenable to service in Illinois and the cost to have them travel to Illinois would be great.

Further, the possibility of viewing the scene was only available in New Mexico. As for the public interest factors, the trial court found that having localized controversies decided locally favored New Mexico, but the appellate court disagreed, finding both states had an interest in the controversy as New Mexico was the location of the accident but Illinois was the home of the parties. The courts had a similar disagreement as to the imposition of a trial on the citizens and courts of the two fora.

The appellate court concurred with the trial court that the potential applicability of New Mexico law was an important, though not dispositive, factor favoring dismissal.

The appellate court concurred with the trial court that the potential applicability of New Mexico law was an important, though not dispositive, factor favoring dismissal. Because the private interest factors so strongly weighed in favor of dismissal and refiling in New Mexico while the public interest factors were more neutral, the appellate court affirmed the trial court's motion to dismiss for the case to be refiled in New Mexico, finding that decision was not an abuse of the court's discretion.

Sipula v. Stockley, 2020 IL App (3d) 190214-U.

Plaintiff's Late Filing of Complaint Dooms a Counterclaim Against That Same Defendant

In *Danzig v. University of Chicago Charter School Corp.*, 2019 IL App (1st) 182187, two plaintiffs filed identical suits against the defendants alleging negligence and willful and wanton misconduct for damages they sustained when a bench on which they were sitting to watch a school play broke. The incident occurred on February 24, 2017 and the complaints were filed on March 20, 2018. The charter school moved to dismiss, arguing section 101(a) of the Illinois Tort Immunity Act had a one-year statute of limitations. The defendant dance academy filed a counterclaim for contribution against the charter school and also filed a motion to dismiss plaintiff's complaint, citing the one-year statute of limitations. The charter school then filed a motion to dismiss the dance academy's counterclaim contending it was time-barred pursuant to section 13-204(c) of the Code of Civil Procedure.

The trial court granted the charter school's motion to dismiss, including all claims and counterclaims against it. The plaintiff filed an amended complaint against the dance academy and the academy moved to clarify its pending contribution claim against the charter

school. The trial court held the dance academy's counterclaims were "extinguished by operation of law."

The dance academy appealed, arguing the dismissal of its counterclaim was improper because the statute of limitations for counterclaims was controlled by section 13-204(b), which allows for counterclaims to be filed within two years of the date which the defendant was served with process in the underlying action. The appellate court noted the dance academy's argument, but then cited section 13-204(c). Subsection (c) only allows such actions to the extent the claimant in an underlying action could have timely sued the party from whom the contribution or indemnity is sought at the time the claimant filed the underlying action.

The appellate court noted prior rulings in which it found section 13-204 was used to find that a defendant cannot file a timely action for contribution unless the plaintiff could have timely filed an action against the parties from whom the defendant seeks contribution. The court cited the Illinois Supreme Court's dictum in *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 474 (2008), which noted that because the plaintiff in that case could not have sued the third-party defendant directly as required by section 13-204(c), then section 13-204(b) would not apply. For these reasons, the appellate court concluded the trial court's dismissal of the dance academy's counterclaim was proper.

Danzig v. Univ. of Chicago Charter School Corp., 2019 IL App (1st) 182187.

Appellate Court Finds Concussion and Long-Term Repetitive Brain Trauma to Be Separate Injuries, Allowing Claim to Survive Statute of Limitations Challenge

In *Nakamura v. BRG Sports, LLC*, 2019 IL App (1st) 180397, the Illinois Appellate Court First District found the trial court's dismissal of the former football player's action against a football helmet manufacturer was in error.

The plaintiff filed a disability insurance claim with an insurance company in 2013 following a concussion that ended his career. This suit was filed in 2017 and the defendants moved to dismiss, arguing the plaintiff knew about his injuries when he filed the insurance claim in 2013 and became involved in litigation in that claim. Thus, the two-year statute of limitation had run.

On appeal of the dismissal, the plaintiff argued the "discovery rule" applied and postponed the statute of limitations. Specifically, the plaintiff argued he was suing for the long-term, latent brain damage he suffered, which he did not discover until recently before the suit was filed. He argued the 2013 claim was for an acute injury, a severe concussion, he suffered in 2013. The defendants argued that Illinois case law dictates that a plaintiff who knows he is injured does not have to know the exact nature or extent of his injuries in order for the statute of limitations to start running. The appellate court found that the plaintiff's knowledge of his acute concussion in 2013 and his conduct associated with his disability claim was insufficient *per se* to establish that the claims he presented in the later lawsuit were barred by the statute of limitations.

The appellate court believed there was a difference between the acute concussion and the repetitive concussive and subconcussive trauma alleged in the two separate actions. The court further noted the plaintiff was seeking compensation in the forum of contractual benefits based on his inability to perform his occupation in the disability claim, while he was seeking compensation in the form of damages for tortious conduct in preparation of enduring lifelong neurocognitive decline in this case. For these reasons, the court found a single concussion is a different injury than a latent brain injury caused by repetitive head trauma and reversed and remanded the case for further proceedings.

Nakamura v. BRG Sports, LLC, 2019 IL App (1st) 180397.

Estate Found to Have Standing in Lawsuit to Partition Property Based on Language of Deed

In *Estate of Jezewski v. Jaworski*, 2019 IL App (1st) 170100, the Illinois Appellate Court First District reversed the trial court's dismissal of the plaintiff's action in which the plaintiff estate sought the partition of a piece of property. The plaintiff's decedent, Aniela Jezewski, and the defendants, Elizabeth Jaworski, who was Aniela's daughter, and Kaziemierz Jaworski, who was her son-in-law, purchased a piece of property via a trustee's deed. Aniela died and her estate filed a petition to partition the property.

Aniela's son-in-law, Kaziemierz, filed a motion to dismiss the petition for lack of standing, arguing the deed created a joint tenancy and Aniela's interest in the property passed to the Jaworskis upon her death through the right of survivorship. The estate responded by claiming the deeded created a tenancy in common between Aniela and the Jaworskis and a joint tenancy between the Jaworskis, who were husband and wife. The estate also submitted an affidavit of Elizabeth who stated it was always "our" intention that Aniela's interest

— Continued on next page

would pass to her estate upon her death. The trial court granted the motion to dismiss, finding the plaintiff estate lacked standing because the deed was unambiguous and created a joint tenancy such that Aniela's interest passed to the Jaworskis upon her death.

The appellate court noted the deed is to be construed to carry out the parties' intention, as gathered from the instrument as a whole, with every word considered and given effect. The court further held the plain language was clear—that Aniela was a tenant in common with the Jaworskis, who held their interest as joint tenants. Thus, upon Aniela's death, her interest in the property passed to her estate, and her estate had standing to compel a partition. The court further found the deed could not be construed as creating a joint tenancy because it conveyed unequal divided interests in violation of the "unity of interest" requirement at common law.

Because the court found the plaintiff estate had standing, it concluded the motion to dismiss should not have been granted. It reversed the trial court's dismissal and remanded the case.

Estate of Jezewski v. Jaworski, 2019 IL App (1st) 170100.

Appellate Court Gives Relief to Plaintiff After E-Filing Mishap

In *Davis v. Village of Maywood*, 2020 IL App (1st) 191011, the Illinois Appellate Court First District dealt with the issue of an electronically filed complaint that was rejected on the last day of the statute of limitations period. The complaint was electronically filed on a Friday within the first two weeks of Cook County's mandated transition from paper to electronic court filing. The clerk did not notify the plaintiffs' attorney the document was rejected for failing to include the attorneys' Cook County Attorney Code on the accompanying e-filing envelope until four days later. Once alerted, the attorney immediately corrected the omission and resubmitted the complaint and the clerk accepted it and file-stamped it that day.

The trial court denied the plaintiffs' motion to excuse the tardy filing pursuant to Illinois Supreme Court Rule 9(d)(2), which allows the court to grant appropriate relief upon good cause shown when an e-filed document is rejected by the clerk and therefore rendered untimely. The trial court then granted the defendant's motion to dismiss the action as time barred.

The appellate court relied on Illinois Supreme Court Rule 9(d), noting its broad relief language requires the court to consider the totality of the circumstances. The court noted there was no defect in the complaint itself as the clerk later accepted the identical document. The court believed the rejection of the filing based solely on the omission of a five-digit number on the e-filing envelope was not part of the complaint and was not required by the rules of civil procedure, the law that sets limitations periods for filing of tort suits, or the additional law that shortens the limitations period against a local government. It was only an administrative procedure.

After considering the rule and the circumstances, the appellate court found it was an abuse of discretion for the trial court to deny the plaintiffs' Rule 9(d) motion, as good cause was shown. As such, the appellate court reversed and remanded for the trial court to correct the filing date *nunc pro tunc*.

Davis v. Village of Maywood, 2020 IL App (1st) 191011.

About the Authors

C. William Busse, Jr. is the President of the law firm of *Busse & Busse, P.C.* He has more than 33 years of legal experience handling civil jury trials and appeals. Mr. Busse has concentrated his practice in the defense of tort and insurance coverage litigation. He has handled hundreds of personal injury and wrongful death cases in various Illinois venues, including automobile, trucking, premises liability, product liability, aviation and construction injury claims, as well as fire and explosion and property damage claims. Mr. Busse served on the Board of Directors of the Illinois Defense Counsel from 2002 to 2014 and returned in 2018 to serve again and is a co-author of, *The 50 Year History of the IDC*.

Adam C. Carter is a partner with *Esp Kreuzer Cores LLP* in Wheaton. He focuses his practice in the areas of construction law, product liability, professional liability, aviation law, propane and explosives litigation, catastrophic injury and loss litigation, environmental litigation, and business torts and commercial Litigation. Mr. Carter is currently an elected member of the Board of Directors of the Illinois Association of Defense Trial Counsel and serves on the IDC Civil Practice and Legislative Committees. He earned his B.A. *cum laude* from Augustana College in 1998 and earned his J.D. *cum laude* from the University of Illinois College of Law in 2001. He was admitted to the Illinois Bar and United States District Court, Northern District of Illinois in 2001, and has been admitted *pro hac* vice to defend clients in numerous state and federal courts across the country.

Andrew C. Corkery is a partner at *Pitzer Snodgrass, P.C.* in St. Louis. His practice concentrates on defense of transportation and medical malpractice cases. Mr. Corkery is a *cum laude* graduate of St. Louis University School of Law. He serves as the Vice Chair of the IDC Civil Practice Committee and as a member of the IDC Amicus Committee.

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

Steve Grossi is an attorney with *Bruce Farrel Dorn and Associates*, the State Farm Mutual Automobile Insurance Company Claim Litigation Counsel office in Chicago. He is an experienced trial attorney with a practice focused on the defense of automobile negligence and premises liability matters. Mr. Grossi graduated from the University of Illinois at Urbana-Champaign, where he earned both his J.D. and B.A with a double major in economics and psychology. This article is written in his individual capacity, and the views expressed herein do not necessarily reflect the view and position of State Farm or any other person or entity.

John P. Heil, Jr. joined *Heyl, Royster, Voelker & Allen, P.C.* in 2007 after serving for eleven years with the Cook County State's Attorney's Office. Mr. Heil handles matters in the firm's Peoria and Chicago offices. He focuses his practice on business and commercial litigation, complex civil rights litigation, the representation of insurance carriers in liability coverage disputes, and the defense of catastrophic tort claims. Mr. Heil is a Co-Chair of the firm's Business and Commercial Litigation Practice Group and Chair of the Drone Law Practice Group.

Matthew A. Reddy is a trial attorney with *Pretzel & Stouffer, Chartered.* Prior to joining the firm, Mr. Reddy worked at the City of Chicago's Department of Law, where he tried numerous Cook County Law Division jury trials, including cases involving claims of malicious prosecution, battery, and false imprisonment against Chicago Police Department officers. He also tried numerous cases involving premises liability and motor vehicle collisions. While at the City, Mr. Reddy additionally handled a substantial caseload of workers' compensation and administrative review files.

David A. Warnick is a trial attorney at *Johnson & Bell, Ltd*. handling a wide spectrum of matters in litigation ranging from healthcare to products liability, but his primary practice is on transportation litigation and all its intricacies. Mr. Warnick formerly practiced as a plaintiff's attorney which he believes has been a significant benefit to developing his skill-set. Mr. Warnick typically represents primary/excess insurers, trucking companies, variety of different types of business owners, and healthcare providers in all aspects of litigation in both state and federal courts throughout Illinois. Mr. Warnick thoroughly enjoys being a trial lawyer and finding creative ways to fulfill differing client needs.

CIVIL PRACTICE LAW COMMITTEE

Adam C. Carter, Chair
Esp Kreuzer Cores LLP, Wheaton
630-673-3939
acarter@ekclawfirm.com

Andrew C. Corkery, Vice Chair
Pitzer Snodgrass, P.C., St. Louis
314-421-5545
corkery@pspclaw.com

MEMBERS

Denise Baker-Seal	*Brown & James, P.C.*
C. William Busse, Jr.	*Busse & Busse, P.C.*
Donald Patrick Eckler	*Pretzel & Stouffer, Chartered*
Matthew B. Champlin	*HeplerBroom LLC*
Conor J. Fitzpatrick	*Busse & Busse, P.C.*
Michael Gallo	*Bruce Farrel Dorn & Associates*
Henry W. Goldman	*Busse & Busse, P.C.*
Edward T. Graham	*Brown Hay & Stephens*
Edward K. Grassé	*Grassé Legal, LLC*
Steve Grossi	*Bruce Farrel Dorn & Associates*
John P. Heil Jr.	*Heyl, Royster, Voelker & Allen, P.C.*
David A. Herman	*Giffin, Winning, Cohen & Bodewes, P.C.*
Justyna M. Kruk	*Tribler Orpett & Meyer, P.C.*
Danielle R. Luisi	*Husch Blackwell, LLP*
Mark J. McClenathan	*Heyl, Royster, Voelker & Allen, P.C.*
William K. McVisk	*Tressler LLP*
Joshua C. Schumacher	*HeplerBroom LLC*
Zach Shook	*Cray Huber Horstman Heil & VanAusdal LLC*
Ryan Showalter	*Urgo & Nugent, LLC*
Bradley J. Smith	*Keefe, Campbell, Biery & Associates, LLC*
Thorn M. Smith	*Busse & Busse, P.C.*
David A. Warnick	*Johnson & Bell, Ltd.*
Alexandra Zimm	

Survey of Construction Law Cases

No Negligence Duty of Care Owed to Plaintiff by Owner, General Contractor or Subcontractor

In *Jeffords v. BP Products North America, Inc.*, the Seventh Circuit Court of Appeals, applying Indiana law in a diversity case, affirmed the district court's order granting summary judgment to a project owner, general contractor, and subcontractor on the plaintiff crane operator's negligence claim. The Seventh Circuit found none of the defendants owed a *per se* duty of care to the plaintiff; rather, whether a duty existed depended on the parties' contractual language. The owner was the only defendant in privity with the plaintiff's employer and nothing in any of the parties' contracts made any of the defendants responsible for plaintiff's safety. Additionally, the defendants' contractual duties to comply with OSHA regulations did not impose any duty toward the plaintiff because the plaintiff himself was not a party to any of the contracts. Finally, none of the defendants assumed any duties by voluntarily undertaking any supervisory responsibility for plaintiff and there could be no vicarious liability because none of the defendants owed a duty of care.

Jeffords v. BP Products N. Am., Inc., 963 F.3d 658 (7th Cir. 2020).

Damages to Owner's Personal Property from Building Collapse Constitute "Occurrence" and "Property Damage" Under CGL Policy

In *Certain Underwriters at Lloyd's London v. Metro. Builders, Inc.*, the Illinois Appellate Court First District reversed the trial court's order granting summary judgment to the insurer, holding the insurer was required to defend the named insured (a general contractor) because the underlying complaint alleged personal property damage outside the contractor's scope of work. The lawsuit arose after a building collapse occurred shortly after the named insured began making renovations to the building. The underlying complaint, filed by the building owner against the general contractor, alleged damage to the building itself as well as damage to the owner's personal property within the building. The trial court found that neither the real property nor the personal property damage allegations triggered the insurer's duty to defend because no "occurrence" or "property damage" had been alleged as required for coverage under the commercial general liability (CGL) policy. The First District agreed the real property damage allegations did not constitute an "occurrence" or "property damage" under the standard CGL policy definitions. But the allegations regarding the owner's personal property damage constituted both an "occurrence" and "property damage" because such damages were outside the contractor's scope of work and not just repair and replacement of the contractor's work.

Certain Underwriters at Lloyd's London v. Metro. Builders, Inc., 2019 IL App (1st) 190517.

Too Much Notice? The 90-day Notice Requirement Under the Miller Act Must Be Provided Within 90 days of the Last Day of Work Performed, Not Before, for a Subcontractor's Right to Recover for Unpaid Work

The Miller Act requires that a general contractor for a federal government project provide a payment bond to ensure the obligations to suppliers of labor and material of a defaulting contractor. The Miller Act demands strict compliance with two preconditions to a subcontractor's right to recover: (1) notice of nonpayment within 90 days after the last date of work performed or supplies provided, *and* (2) that suit be filed within one year of the last date of work performed or supplies provided.

In *A&C Construction & Installation, Co. WLL v. Zurich American Insurance Co.,* the United States Court of Appeals for the Seventh Circuit affirmed the district court's granting of the defendant's motion for summary judgment, finding that the failure to provide the Miller Act notice within 90 days after (not before) the alleged last day of work does not satisfy the Miller Act's condition precedent to recovery.

A&C, a subcontractor on a U.S. air base project in Qatar, claimed it was not paid $8.5 million for work it performed on the

project, so it filed suit in district court against the prime contractor's two sureties, Zurich and The Insurance Company of the State of Pennsylvania.

The sureties filed a motion for summary judgment, arguing the last day of the work performed was May 16, 2016, and thus A&C's notice on August 16, 2016 was one day too late (outside the 90-day notice period). They also pointed out that the lawsuit was filed too late (on June 7, 2017, well beyond the one-year deadline of May 16, 2017). A&C contended, however, the last day of the work was actually February 28, 2017 because it left equipment on the jobsite to be used by another subcontractor and because it continued to provide supervision of a third-tier subcontractor until the project completion date. A&C argued, therefore, that its notice (served back on August 16, 2016) was early.

The district court disagreed with A&C's arguments and granted the sureties' summary judgment motion, finding that A&C missed both deadlines. The Seventh Circuit affirmed the district court's judgment finding that even if we assume the last day of work was February 28, 2017 for purposes of the Miller Act, there is no dispute that A&C's only "Miller Act notice" was served on August 16, 2016; therefore, A&C failed to comply with the strict condition precedent for the right to recover by providing 90 days' notice *within* or "from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made."

A&C Constr. & Installation, Co. WLL v. Zurich Am. Ins. Co., 963 F.3d 705 (7th Cir. 2020).

Subcontractor's Claim for Lien Under Mechanics Lien Act Valid Despite Recording of Lien Less than 10 Days After Notice

In *Matteo Construction Co. v. Teckler Blvd Development Site, LLC,* an excavation subcontractor brought an action seeking to foreclose its mechanics lien under section 28 of the Mechanics Lien Act, breach of contract, and *quantum meruit*. The subcontractor sent its claim of lien to the owner by certified mail on February 23, 2016 and recorded its lien on February 25, 2016. The owner received the claim of lien via mail on February 26, 2016. On June 1, 2017, the subcontractor filed suit to foreclose its lien. The owner moved to dismiss the foreclosure count, claiming the subcontractor failed to wait 10 days from the date of notice to record its lien. The trial court found the subcontractor failed to properly perfect its lien by recording the lien prior to the 10 days. The trial court granted the owner's motion to dismiss and denied the subcontractor's motion for reconsideration.

The Illinois Appellate Court Second District reversed and remanded. Section 28 of the Mechanics Lien Act states that "[i] If any money due to the laborers, materialmen or subcontractors be not paid within 10 days after his notice is served . . . then such person may file a claim for lien or file a complaint and enforce such lien within the same limits as to time and in such other manner as hereinbefore provided for the contractor in section 7 and sections 9 to 20 inclusive, of this Act . . ." The Second District found that the Mechanics Lien Act's use of the word "or" connotes there are two different alternatives for a subcontractor in section 28—the subcontractor can either record the lien if not paid within 10 days of serving notice, or it can file a complaint to enforce the lien under sections 7 and 9 to 20.

Under the second alternative in section 28, the subcontractor filed suit to enforce its lien after the 10 days expired. Further, section 28 specifically references section 7 which states that a claim for lien may be filed at any time after the contract is made. To hold that section 28 does not allow a subcontractor to record a claim for lien before the expiration of 10 days from date of notice would essentially read section 7 out of the Mechanics Lien Act. The Second District also found the subcontractor's notice to the owner was valid in that it met the requirements of section 24, despite the fact that the subcontractor did not use the suggested form for notice in section 24.

Matteo Constr. Co. v. Teckler Boulevard Dev. Site, LLC, 2020 IL App (2d) 190766.

The Power to Prioritize Receiver Certificates Over Mechanics Liens is Implied in the Mechanics Lien Act

In *REEF-PCG, LLC v. 747 Properties, LLC*, a number of mechanics lien holders appealed a trial court decision finding it had authority pursuant to the Mechanics Lien Act to subordinate their liens to receiver certificates.

In October 2018, 747 Properties, LLC (747 Properties), borrowed approximately $16.9 million from REEF-PCG and others to buy and remodel a four-story office building in Lombard, Illinois. The loan was secured by a mortgage on the property. Thereafter, 747 Properties entered into lease agreements with Pomeroy IT Sales (Pomeroy) for the first two floors and with the General Services Administration (GSA) for the third and fourth floors.

Pomeroy hired Clune Construction Company, L.P. (Clune) to complete approximately $15 million in repairs to both its leased

— Continued on next page

space and the common elements of the building. Pomeroy allegedly breached its lease and defaulted on its payments to Clune and the subcontractors, resulting in $15 million in mechanics liens filed by Clune and the subcontractors on the property.

On November 22, 2019, REEF-PCG filed a mortgage foreclosure action alleging that 747 Properties was in breach for failing to pay amounts due under the mortgage agreement and allowing mechanics liens to be placed on the property. REEF-PCG also sought the appointment of a receiver, to which 747 Properties had consented in the loan documents. Essentially, the receiver asked the court to approve receiver certificates in the amount of $12 million to build out lease space and make general improvements for a future tenant and requested that the loans under the receiver certificates receive priority over all other incumbrances, including the previously filed mechanics liens. The trial court granted the receiver's motion, agreeing that doing so would result in providing the "highest potential value" for the property by securing the GSA as a tenant.

On appeal, the mechanics lien holders argued that the trial court erred in prioritizing the receiver certificates over their mechanics liens because section 16 of the Mechanics Lien Act, which governs the priority of incumbrances, expressly forbids doing so. The Illinois Appellate Court Second District was unpersuaded and held that pursuant to the Mechanics Lien Act as interpreted by the Illinois Supreme Court in *Pittsburgh Plate Glass Co. v. Kransz*, 291 Ill. 84 (1919), wherein the supreme court held that "the power is implied to make the appointment effective by making the receiver's certificates a first lien in cases such as this," the trial court had the power to issue receiver certificates and prioritize them over the mechanics liens.

Nonetheless, the Second District agreed with the lien holders that while the trial court held this authority, the trial court erred in doing so because no evidence was presented that the financial return was in the best interest of all parties. The trial court was presented with absolutely no evidence from which to conclude that subordinating the lienholders to an additional $12 million in debt would be to their benefit. Moreover, no evidence was presented as to the current value of the building, and no evidence was presented as to what the value of the building would be with the GSA as a tenant.

REEF-PCG, LLC v. 747 Properties, LLC, 2020 IL App (2d) 200193.

Where a Contract Requires a Notice of Breach, a Party is Not Required to Give Notice if the Contract was Previously Terminated

In *RDC Case Creek Trails, LLC v. Metropolitan Airport Authority*, the Illinois Appellate Court Third District overturned the circuit court's summary judgment in favor of the Metropolitan Airport Authority (Airport) and the denial of RDC Case Creek Trail's (RDC) summary judgment.

In 2010, the Airport entered into a contract with RDC to develop a piece of airport property. The contract was contingent on RDC obtaining financing within 90 days. The contract also had a breach of notice clause, requiring a non-defaulting party to give notice to a defaulting party and a chance to remedy any breach before filing suit. Subsequently, in August 2011, 11 months after the contract was entered into, the Airport gave RDC notice of default based on RDC's failure to obtain financing. Then, in February 2012, the Airport gave notice of termination of the contract based on RDC's lack of financing.

RDC filed its initial complaint in November 2012 and a fifth amended complaint in March 2016. The complaints alleged a breach of express warranty and that the Airport did not even have the ability to lease the property because the lease was subject to FAA approval. The Airport answered and raised the affirmative defenses of RDC's failures to provide notice of default and to obtain financing. On cross-motions for summary judgment, the trial court granted the Airport's motion, finding that RDC failed to provide notice of the Airport's breach as required by the contract. RDC appealed.

The Third District held a party is not required to send notice when doing so would be futile. Where a contract has been terminated or ceases to exist, the act of notice regarding a contractual issue is excused and a demand is not necessary where the demand would be futile. Once the Airport terminated the contract, any obligations under it also terminated, including RDC's responsibility to send notice to the Airport of the Airport's alleged breach of express warranty. In sum, where a contract requires a notice of breach, a party is not required to give notice of breach following the termination of the contract because that notice would be futile.

RDC Case Creek Trails, LLC v. Metro. Airport Auth. of Rock Island County, 2020 IL App (3d) 190083.

Action for Mandamus Against City is Not the Proper Vehicle to Enforce Zoning Ordinance Against Property Owner Whose New Home is Only 1.42 Feet Away from Neighbor

The plaintiff (Ryan) lived in a home that was more than 100 years old and located in Chicago's Bridgeport neighborhood. Ryan's home was located on or near her east property line. In 2015, a new residence was built 1.42 feet east of Ryan's property line.

Ryan sought a writ of mandamus against the City of Chicago and the Commissioner of the Department of Buildings to have the west wall of the new home be built in compliance with the two foot "Minimum Side Set Back" found in the zoning ordinance. A mandamus is an "extreme remedy, used to enforce as a matter of right, a public officer's performance of his or her official duties where no exercise of discretion on the officer's part is involved." Ryan requested: (a) revocation of the building permit with direction from the City of Chicago that the plans be submitted to comply with the zoning ordinance; and (b) that the City take steps to ensure compliance with the zoning ordinance and municipal building code.

The circuit court granted the City's motion to dismiss since Ryan failed to allege a clear, nondiscretionary duty of the defendants to seek remedies or use enforcement powers for violations of the zoning ordinance. The City's zoning ordinance has minimum distances that buildings must be set back from property boundaries on each side. Here, the builder's subcontractor had incorrect measurements for the home foundation; Ryan's 100 plus year-old home was not built straight; and the front of Ryan's home angled towards her new neighbor's lot. Ryan also had an overhang on her roof that narrowed the distance between the two homes. The subcontractor's measuring mistakes were not known until the walls and roof were complete.

The zoning board ruled in favor of Ryan's new neighbors and granted them a 2.5 inch reduction to the standard set back. The zoning board found: (a) strict compliance would create an undue hardship; (b) the encroachment was unintentional, not profit motivated, and would not impact public safety or be injurious to other property; and (c) a variance would not alter the essential characteristics of the neighborhood.

The Illinois Appellate Court First District affirmed the dismissal of Ryan's action for mandamus expressly brought under section 11-13-15 of the Illinois Municipal Code (Code). It found that the Code did not authorize any suit against a municipality or its officials for any act that related to the enforcement or implementation of the division, or any ordinance, resolution, or other regulation adopted pursuant to the division. It further found section 11-13-15 was meant for private landowners to bring suit against private violators–not municipal officials.

A mandamus is an "extreme remedy, used to enforce as a matter of right, a public officer's performance of his or her official duties where no exercise of discretion on the officer's part is involved."

The dismissal also was affirmed because Ryan failed to establish the necessary elements for a writ of mandamus: a clear, affirmative right to relief, a clear duty of the public official to act, and a clear authority in the public official to comply with the writ. Municipal defendants have extensive discretion in how zoning ordinances are enforced and have authority to depart from the general provisions. The zoning board had properly exercised its discretion when it granted the variance to reduce the set back.

Ryan v. City of Chicago, 2019 IL App (1st) 181777.

Quantum Meruit Saves Construction Company's Claim to Recover Damages Despite Failure to Comply with the School Code Contract Process

The Illinois Supreme Court affirmed the appellate court's reversal of the trial court order granting the defendant school board's motion to dismiss the plaintiff Restore Construction's claims seeking recovery for repair and restoration work performed. The issue before the supreme court was Restore's claim for recovery under *quantum meruit*. *Quantum meruit* is based on an implied promise for the recipient of services to pay for those services.

The supreme court found the school board's failure to follow the required bidding and formal vote process required by the school code was not fatal to Restore's claim to recover damages under either a quasi-contract or contract implied by law basis. In support of this finding, the supreme court first noted that even though all steps of the school code were not followed in this emergency situation, Illinois

— Continued on next page

school boards are authorized to undertake the hiring of construction contractors. Second, Restore performed its obligations in good faith. Finally, the board willingly accepted the benefits of Restore's efforts. It would be unjust to allow the school board to benefit from Restore's services without paying a reasonable sum for such services.

Restore Constr. Co., Inc. v. Bd. of Educ. of Proviso Twp. High School Dist. 209, 2020 IL 125133.

First District Rejects Building Manager and Elevator Company's Arguments That They Had No Duty to Upgrade Their Elevators With the Latest Safety Equipment

In *Greenhill v. Reit Management & Research*, the Illinois Appellate Court First District reversed the trial court's entry of summary judgment in favor of two defendants in a construction accident lawsuit, finding that the defendants and the trial court defined the scope of their duty of care too narrowly and conflated the concepts of duty and breach.

The lawsuit arose out of an incident involving a freight elevator at a construction site. The plaintiff and his coworker were riding the freight elevator with an unrelated worker from a separate contractor when the plaintiff and his coworker mistakenly got off on the wrong floor. The plaintiff and his coworker tried to get back on the elevator, but the unrelated worker did not notice and pressed the button to close the elevator. The gate on the elevator (which moved up and down from the ceiling) came down as the plaintiff was entering the doorway and hit him on the head.

The plaintiff sued the manager of the building and the elevator maintenance company, alleging that they negligently failed to install adequate safety mechanisms to prevent the elevator gate from closing while someone was standing in the doorway. The plaintiff relied on the witnesses' conflicting testimony regarding whether the elevator's audible alarm for a closing gate was functioning at the time of the occurrence. The plaintiff also emphasized two prior incidents involving freight elevators at the same project, after which the elevator maintenance company installed upgraded sensors in the elevator doorways. The elevator company had requested, and the building manager had approved, installing the upgraded sensor in the elevator, but the elevator company had not installed it at the time of the occurrence. The elevator company introduced evidence that the elevator was equipped with an earlier version of the sensor, but the elevator company acknowledged that the upgraded version was more effective.

The building manager and the elevator company argued they did not have any duty to install the latest upgrades in their elevators, the hazard of the closing gate was open and obvious, and the worker who pressed the close button was the sole proximate cause of the occurrence. The trial court agreed with the defendants on the issue of duty and granted summary judgment in their favor.

The First District found that the trial court and the defendants improperly framed the question of duty of care as whether the defendants had a duty to install the latest upgrades. The First District explained that the defendants had a duty to exercise reasonable care as a matter of law and whether the defendants breached that duty by failing to install the upgraded sensor was a question of fact for the jury.

The First District also found there were questions of fact regarding whether the hazard was obvious. Notably, the First District explained that the hazard was not simply the closing gate, but the fact that that the plaintiff did not know that the unrelated worker inside the elevator had pressed the close button.

Regarding proximate cause, the First District rejected the defendants' argument that the man who pressed the close button was the sole proximate cause of the occurrence. The First District found there were questions of fact regarding whether the audible alarm was functioning and whether a functioning alarm or the upgraded sensor could have prevented the occurrence.

Greenhill v. Reit Mgm't & Research, LLC, 2019 IL App (1st) 181164.

About the Authors

Amy Doig is an attorney in *Cozen O'Connor's* Commercial Litigation Department. She represents architects and engineers in litigated matters often concerning disputes such as breach of contract, property damage, personal injury, design defects, construction defects, construction management, and design professional's work. Ms. Doig also practices in the area of insurance coverage with a concentration on errors and omissions, directors and officers, property and general liability insurance policies.

Sarah B. Jansen is an associate at *HeplerBroom LLC* in Crystal Lake, Illinois. She primarily focuses her practice in the areas of construction contract, commercial general liability coverage and risk transfer, as well as construction litigation, and complex civil and commercial litigation. Ms. Jansen earned her B.A. from Illinois Wesleyan University and her J.D. from Notre Dame Law School, *cum laude*. She is admitted to practice in the states of Illinois and Wisconsin, the United States Supreme Court, the U.S. Court of Appeals for the 7th Circuit, and U.S. District Courts for the Northern District of

Illinois and Eastern District of Wisconsin. Ms. Jansen is a member of the Illinois Defense Counsel and serves on the Construction Law Committee.

Mark J. McClenathan is a shareholder with *Heyl, Royster, Voelker & Allen, P.C.* Mr. McClenathan concentrates his practice in commercial and civil litigation. He has handled cases in state courts in more than 19 counties in northern Illinois and in the Northern District of Illinois federal courts. Mr. McClenathan has extensively defended construction cases, product liability, professional liability, trucking, aviation, cyber defense, and agriculture liability cases. He is chair of the firm's Construction Practice, and has an extensive background in building construction and mechanics.

Brian H. Myers is senior counsel at *Gordon Rees Scully Mansukhani, LLP* in Chicago where he specializes in the defense of construction, commercial and employment litigation. Mr. Myers has experience trying cases to verdict in the Circuit Court of Cook County, the United States District Courts, and in commercial arbitration, as well appellate experience in Illinois. He graduated cum laude from DePaul University College of Law in 2011 and graduated with departmental honors from Miami University's Farmer School of Business in 2008.

Cecil E. Porter, III of *Litchfield Cavo LLP* in Chicago has over more than 12 years of litigation experience in state courts, federal courts and administrative agencies. He has represented clients in actions involving construction site accidents, premises liability, auto liability, personal injury, workers' compensation, employers' liability, contract disputes, criminal actions and probate actions. Mr. Porter is an active member of the Trial Bar of the U.S. District Court for the Northern District of Illinois. He has tried cases to verdict in Illinois state and federal courts and resolved many cases through arbitration. His defense practice is in the areas of general liability, construction litigation, employers' liability, contractual disputes, premises liability and workers' compensation. From 2011 through 2015, Mr. Porter was selected as an Illinois Rising Star by Illinois Super Lawyers, a designation representing the top 2.5% percent of all lawyers in Illinois that are 40 years of age or younger or that have been practicing law for ten years or less, based on independent research, peer nominations and peer evaluations. From 2015 through 2016, he was selected by Illinois Leading Lawyers, a Law Bulletin Publishing Company, as an Emerging Lawyer in the practice areas of commercial litigation and general personal injury defense. Emerging Lawyers names the top 2% of lawyers in Illinois who are under the age of 40 or have practiced less than 10 years.

Michael A. Schlechtweg is an associate attorney with *SmithAmundsen LLC* who specializes in construction injury and employer liability defense. Mr. Schlechtweg is a graduate of Indiana University (2006) and Chicago-Kent College of Law (2009).

Jason G. Schutte is a partner at *Koepke, Hiltabrand and Schutte, P.C.*, located in Springfield. Mr. Schutte focuses his practice in general tort defense, personal injury defense and professional liability defense

Stephanie W. Weiner of *HeplerBroom LLC* in Chicago focuses her practice on civil litigation and risk transfer, with a focus on construction injury and defect, commercial general liability coverage, trucking litigation, premises liability, and insurance-related matters. She also serves as assistant outside general counsel for a large multi-state commercial construction company and handles general liability claims for subsidiaries of a Fortune 500 company. She has taken a number of jury trials to verdict in various counties across northern Illinois and has also successfully resolved many matters through mediation and arbitration. In addition, Ms. Weiner has experience defending employment discrimination claims before the Equal Employment Opportunity Commission and the Illinois Department of Human Rights.

CONSTRUCTION LAW COMMITTEE

Holly Whitlock-Glave, Chair
HeplerBroom LLC, Crystal Lake
815-444-0250
hwhitlock@heplerbroom.com

Hillary L. Weigle, Vice Chair
SmithAmundsen LLC, Chicago
312-894-3361
hweigle@salawus.com

MEMBERS

Lindsay D. Brown	*Cassiday & Schade, LLP*
C. William Busse, Jr.	*Busse & Busse, P.C.*
Mitchell A. Capp	*HeplerBroom LLC*
Amy Doig	*Cozen O'Connor*
Newton C. Marshall	*Karbal, Cohen, Economou, Silk & Dunne, LLC*
Mark J. McClenathan	*Heyl, Royster, Voelker & Allen, P.C.*
Cecil E. Porter, III	*Litchfield Cavo, LLP*
Jamie M. Rein	*HeplerBroom LLC*
Bruce H. Schoumacher	*Querrey & Harrow, Ltd*
Jason G. Schutte	*Koepke & Hiltabrand, P.C.*
Ryan Showalter	*Urgo & Nugent, LLC*
Bradley J. Smith	*Keefe, Campbell, Biery & Associates, LLC*
John J. Vitanovec	*Cassiday & Schade, LLP*
Stephanie W. Weiner	*HeplerBroom LLC*

Survey of Employment Law Cases

Hostile Work Environment Claims are Actionable Under the ADA

In *Ford v. Marion County Sheriff's Office*, the plaintiff sustained an injury in an on-duty motor vehicle accident. Even after treatment, she did not recover use of her right hand, rendering her unable to resume work in the position that she had at the time of the accident. Eventually, the defendant reassigned the plaintiff with accommodations. The plaintiff subsequently claimed that she experienced harassment and discrimination under the Americans with Disabilities Act (ADA). The Court of Appeals for the Seventh Circuit affirmed the trial court's summary judgment decisions and the jury's verdicts in favor of the defendant. The appellate court observed that, generally, the trial court properly treated each of the claims discussed below separately, because the claims required different factual proof and involved different legal tests.

First, the plaintiff alleged that her reassignment was discriminatory because it involved a demotion. However, the defendant succeeded on this claim at summary judgment because the plaintiff failed to present evidence that any vacant position existed closer to her original job.

A series of personality clashes with co-workers followed the reassignment. The plaintiff claimed that she suffered harassment from two co-workers and that when those two co-workers were transferred following an investigation, the co-workers' replacement harassed her as well. The trial court granted summary judgment to the defendant as to the alleged harassment by the replacement on the grounds that the plaintiff failed to report that the harassment was in connection with her disability, but it denied summary judgment as to the other alleged harassment.

When the claim of harassment by the two co-workers was tried, the jury found that, although the co-workers subjected plaintiff to unwelcome negative comments and behavior, the plaintiff failed to prove that the alleged conduct occurred because of her disability. On appeal, the appellate court expressly held that hostile work environment claims are actionable under the ADA—as opposed to prior decisions in which the court simply assumed that they are. Further, the appellate court considered whether the trial court improperly divided a single unlawful employment practice into two separate hostile work environment claims.

Utilizing the relatedness inquiry from *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the court held that factors that militate against relatedness for hostile workplace claims include time between the incidents, changes in managers, and action by the employer. After examining the facts related to the plaintiff's claims, the appellate court determined that that the trial court properly considered each harassment claim separately, although it erred in doing so on the basis of the identities of the harassers.

Additionally, the plaintiff claimed that she experienced discrimination when the defendant switched her schedule from a fixed schedule to a rotating schedule since the change exacerbated her disability. The defendant contended that switching the plaintiff back to a fixed schedule was not a reasonable accommodation. The claim was also tried to a jury. The jury found in favor of the defendant because the plaintiff failed to prove that she needed the accommodation.

Finally, the plaintiff claimed that the defendant denied her applications for promotions because of her disability and/or in retaliation for her earlier protected activity. However, the plaintiff did not present enough evidence about the jobs or how she compared to the other candidates to support an inference of discrimination that would allow her to overcome the defendant's motion for summary judgment.

Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019).

Seventh Circuit Punts Question of Whether Hostile Work Environment Claims are Actionable Under ADEA

In *Tyburski v. City of Chicago*, the plaintiff brought age-discrimination and hostile-work-environment claims under the Age Discrimination in Employment Act (ADEA) when the defendant failed to promote him. The plaintiff was hired when he was 53 years old and was promoted to his current position at age 73. One year later, he applied for another promotion. The defendant did not promote him because, on a verbal exam that was part of the testing for the position, the plaintiff scored below the passing threshold. The Court of Appeals for the Seventh Circuit affirmed summary judgment in the defendant's favor. In reviewing the hostile work environment claim, the court observed in the past, it

had assumed, but never decided, that plaintiffs may assert hostile work environment claims under the ADEA. It declined to pass on that question, though.

Instead, the court focused on whether the plaintiff adduced sufficient evidence to support his claims and concluded that the plaintiff had not. First, there was no evidence in the record to support the plaintiff's discrimination claim. Specifically, he had failed to identify any younger co-worker who failed the verbal examination and was still promoted to the desired position. Moreover, he failed to show that the scoring of the verbal examination was a sham, as he claimed. The fact that examiners were aware of the plaintiff's age was not enough to show that they had an improper motivation when scoring his exam. Second, the plaintiff failed to establish that the alleged harassment was pervasive enough to rise to the level of a hostile work environment.

Tyburski v. City of Chicago, 964 F.3d 590 (7th Cir. 2020).

Seventh Circuit Creates Potential Circuit Split on Who Bears Burden of Proof as to ADA's Essential Job Functions

The Court of Appeals for the Seventh Circuit seemingly created a circuit split on the burden of proof as to the issue of essential job functions in an ADA claim in *Kotaska v. Federal Express Corp.* The plaintiff was employed by the defendant, FedEx, as a courier-handler and injured her right shoulder, resulting in various permanent lifting restrictions. The lifting restrictions prevented her from meeting the job description's requirement of lifting up to 75 pounds, so the defendant terminated her.

One and a half years later, the plaintiff's original supervisor offered her a position as a handler with an off-the-books promise that she would be promoted to a courier in three weeks. When the plaintiff returned to the defendant's employment, her doctor amended her medical restrictions to allow lifting up to 75 pounds to her waist frequently, but her limits as to lifting above the waist and overhead remained unchanged.

After other managers learned of the plaintiff's rehiring, the defendant terminated the plaintiff a second time. The plaintiff alleged that the second firing was a violation of the ADA. She presented evidence of two couriers who claimed they were not required to lift packages that heavy overhead or even to shoulder height, but the couriers were not asked what weights a handler would need to lift to any given height. Despite a genuine dispute regarding whether lifting a 75-pound package over the waist or head was an essential function of the job, the district court granted the defendant's motion for summary judgment because the plaintiff had not provided evidence that she could perform the essential functions of the job.

The Seventh Circuit affirmed, even though there was evidence that the defendant had shifted its position from the start of litigation and the "little evidence" the court did have was "underdeveloped, murky, and disputed." The court held that, although a rational jury could find that the essential functions of the handler position did not include lifting a 75-pound package overhead, the plaintiff failed to present evidence that she qualified for the position given her lifting restrictions. The court did not find the plaintiff's evidence of her successfully performing the job functions for three weeks prior to her termination as probative, because in prior analogous cases, the disabled employee had worked for a period far longer than three weeks. The court determined that the plaintiff was required to establish the weight a handler needed to lift and confirm that it was within her capabilities.

In a lengthy dissent, Judge David F. Hamilton claimed that the majority's opinion created a split in the circuits by requiring an employee to bear the burden of producing evidence of what the essential functions of a job are, an argument rejected by the majority. Judge Hamilton pointed to the First, Sixth, Eighth, and Ninth Circuits which all impose on the employer the burden of production on the issue of a job's essential functions. In the view of Judge Hamilton, employers must describe the essential functions of a job with enough specificity to tell the employee and the courts what the job entails. Judge Hamilton criticized that majority for reframing the defendant's proposed essential functions and he recommended that plaintiffs insist at the outset of a case that employers specify in detail the essential functions of the relevant job and support the claims with evidence.

Kotaska v. Fed. Express Corp., 966 F.3d 624 (7th Cir. 2020).

Seventh Circuit Continues to Apply "But for" Causation Standard in ADA Discrimination Cases

The ADA originally prohibited discrimination "because of" a disability, but the ADA Amendments Act of 2008 changed the language of the statute to prohibit discrimination "on the basis of" a disability. *See* Pub. L. No. 110-325, § 5(a)(1). Twelve years later, the Court of Appeals for the Seventh Circuit observed in *Kurtzhals*

— Continued on next page

v. County of Dunn that it remains an open question in this circuit as to whether that change affected the "but for" causation standard applied in ADA discrimination claims.

Noting that the plaintiff did not complain about the application of the standard, the court applied the "but for" causation standard to affirm summary judgment in favor of a county after the county sheriff placed the plaintiff, a sergeant, on paid administrative leave and ordered him to undergo a fitness-for-duty evaluation following a threat of physical violence against a co-worker. The plaintiff claimed the sheriff ordered the evaluation due to his history of Post-Traumatic Stress Disorder (PTSD). Meanwhile, the sheriff claimed that he took action because of the plaintiff's violation of the county's workplace violence policy, the plaintiff previously reacting angrily to being passed over for a promotion, and the sheriff's belief that the plaintiff could pose a threat to his colleagues or members of the public. In contrast, the sheriff did not place the co-worker on leave, require him to submit to a fitness-for-duty evaluation, or otherwise discipline him for his role in the altercation.

The district court granted the county's motion for summary judgment on the basis that no reasonable jury could find that the plaintiff's PTSD was the "but for" cause of the county's action or that it was unreasonable for the sheriff to send the plaintiff for a fitness-for-duty evaluation. The Seventh Circuit affirmed and found that the plaintiff failed to satisfy his burden of showing but-for causation because the reasons given by the sheriff did not explicitly mention PTSD. The plaintiff also failed to offer any competent evidence to support his claim of pretext. The evidence did not show that the sheriff knew of the plaintiff's PTSD diagnosis or that he took it into account.

The court further noted that the coworker who initiated the dispute with the plaintiff did not explicitly threaten violence. Additionally, the court found that the county did not violate the ADA by requiring the plaintiff to submit to a fitness-for-duty evaluation because the county had a particularly compelling interest in assuring that the plaintiff was physically and mentally fit to perform his duties since, given the nature of the position, the plaintiff's well-being was essential to his own safety and that of the public.

Kurtzhals v. County of Dunn, 969 F.3d 725 (7th Cir. 2020).

Hiring Candidate Based on Unstructured and Subjective Interview Qualifies as Legitimate, Non-discriminatory Reason

In *Barnes v. Board of Trustees of the University of Illinois*, the plaintiff sued the defendants under Title VII of the Civil Rights Act of 1964 (Title VII) and Section 1983 for discriminating against African Americans in denying him a promotion to chief engineer. The plaintiff worked as an assistant chief engineer for the University of Illinois Chicago (UIC) when he applied for the position of chief engineer. He was one of 11 candidates and one of two African Americans. UIC's administrator reviewed the applications and interviewed each candidate.

The plaintiff and a white candidate both had decades of education and relevant experience and had worked at UIC for several years. Although neither candidate was asked to bring anything to the interview, the white candidate brought a letter of reference, a narrative work history, a proposal to solve problems, and several trainings he developed to teach engineers about working on different systems, and he discussed specific instances of teaching his subordinates. Meanwhile, the plaintiff did not bring any written materials to his interview; he just talked about how he would save UIC money, get the best prices from vendors, establish dress codes for the engineers, and implement a new maintenance program to identify faulty pipes during the summer (rather than wait until they froze in the winter).

The administrator did not review or consider performance evaluations and instead considered only the interviews. Since the white candidate came better prepared for his interview, discussed previous experience supervising dozens of people on a project, and articulated a thoughtful approach to taking over the chief engineer position, the administrator selected the white candidate for the promotion. The defendants moved for summary judgment, arguing that the plaintiff could not show that the successful candidate was not better qualified or that the decision to promote him based on his interview was a pretext for discrimination. The district court granted summary judgment in the defendants' favor, and the Court of Appeals for the Seventh Circuit affirmed.

In analyzing the plaintiff's failure to promote claim, the court found that the defendants established a legitimate, non-discriminatory reason for hiring the successful candidate. The plaintiff denied that the white candidate was selected because of his interview, but he failed to put forth evidence suggesting this reason was a lie, and therefore, could not establish pretext. The court acknowledged the plaintiff's arguments that the interview process was unstructured,

subjective, and unfair and that the administrator conducted the interviews by himself and did not ask the candidates the exact same questions. Nonetheless, the court held that just because interviews are not "cookie-cutter" does not mean they are discriminatory. At best, the plaintiff could have showed that the hiring decision was not accurate or well-considered, but that did not make the stated reason a lie.

The plaintiff also argued that UIC had a history of failing to promote African Americans because UIC never had a chief engineer who was African American. This argument also failed: the plaintiff failed to contradict evidence that the administrator previously promoted African Americans to other head positions on campus and had encouraged African Americans to apply for chief engineer; he did not isolate and identify specific employment practices as to support a disparate-impact theory; and he failed to show a pattern or practice of intentional racial discrimination.

Barnes v. Bd. of Trs. of the Univ. of Ill., 946 F.3d 384 (7th Cir. 2020).

Seventh Circuit Affirms Trial Court's Rulings Limiting Plaintiff's Evidence at Trial

In *Henderson v. Wilkie*, the plaintiff, an African American, brought an action under Title VII, alleging that his employer failed to promote him on the basis of his race. The jury returned a verdict in favor of the employer and the plaintiff appealed the trial court's evidentiary rulings.

First, the plaintiff contended that the trial court abused its discretion when it precluded him from eliciting testimony concerning subjects not disclosed in his interrogatory answer. The Court of Appeals for the Seventh Circuit held that the plaintiff's counsel waived the objection when he represented to the trial court that he did not intend to ask witnesses about topics that exceeded the scope of the plaintiff's interrogatory answer.

Second, the plaintiff claimed that the trial court erred in excluding evidence of discriminatory action against other African Americans after the plaintiff's desired job was awarded to another employee, Cary Kolbe. The court held that the trial court properly excluded the evidence because many of those instances were in litigation. Therefore, their admission would have created unwarranted confusion in violation of Federal Rule of Evidence 403.

Lastly, the plaintiff claimed that the trial court should have permitted him to present testimony about disciplinary matters that implicated Kolbe and had occurred *after* his selection for the position. Although the plaintiff waived the objection, the court agreed with the trial court that the evidence was not relevant to show the discriminatory animus of the defendant at the time of hiring.

Henderson v. Wilkie, 966 F.3d 530 (7th Cir. 2020).

Science Beats Out Clout in Sheriff Officer's Termination for Cocaine Use

The Illinois Appellate Court First District recently warned employers to be diligent in reviewing protocol and processes followed by outside laboratories for testing their employees for drugs. In *Porter v. Cook County Sheriff's Merit Board*, the plaintiff was selected for a random drug test by his employer, the Cook County Sheriff's Office, and he tested positive for benzoylecgonine, a cocaine metabolite. He exercised his right to have a second test performed on the sample by a different lab. The second test also revealed a positive result.

The Cook County sheriff brought an action before the Cook County Sheriff's Merit Board (Board) seeking the plaintiff's termination. After reviewing the evidence, the Board found that the plaintiff had violated various orders, rules, and/or regulations—including the defendant's drug free workplace policy—and terminated him. The plaintiff then sought administrative review. The circuit court affirmed the Board's finding, and the plaintiff appealed.

The plaintiff raised three issues on appeal. First, he contended that the Board's decision was against the manifest weight of the evidence because there was no evidence presented demonstrating that the results of the initial screen exceeded the threshold established by the contract between the employer and the first lab. The court found that the protocol in the contract was followed, and it rejected the contention that the reported result was flawed in not specifically identifying a quantitative result.

Second, the plaintiff argued that the first lab breached testing protocol. The alleged missteps did not affect the validity of the lab results, were corrected, and/or were overcome by other evidence, such as the fact that testing by the second lab yielded a positive result. Third, the plaintiff claimed that the Board erred in admitting into evidence the first lab's litigation package—consisting primarily of test results and chain of custody documents—pursuant to the business records exception to the hearsay rule. More specifically, the plaintiff argued that the documents were not admissible because they were not accurate or valid. The court noted that the accuracy and validity of the results did not affect their admissibility. Regardless, the court found the plaintiff's arguments concerning the alleged inaccuracy or

— Continued on next page

invalidity of the results were without merit and harmless, given the positive result from the second lab. *Porter* provides guidance for employers having to establish sufficient evidence for termination in drug testing cases as to how handle and correct chain-of-custody issues when outside labs fail to follow protocol and/or make mistakes.

Porter v. Cook County Sheriff's Merit Bd., 2020 IL App (1st) 191266.

First District Defines "Low-Level Employees" Under Employee Credit Privacy Act

Rivera v. Commonwealth Edison Co. involved a class action brought against Commonwealth Edison Company (ComEd) and its parent company for allegedly violating the Employee Credit Privacy Act by investigating credit histories of customer service representatives (CSRs). CSRs were given access to a database containing customers' personally identifiable information, such as Social Security numbers, tax ID numbers, driver's license numbers, dates of birth, address histories, and credit card and bank account numbers.

ComEd argued that a bona fide occupational requirement applied to excuse it from adhering to the statute's ban on credit inquiries. More specifically, it claimed that the bona-fide-occupational-requirement exception applied because the position involved personal or confidential information. The statute defines "personal and confidential information" as "sensitive information that a customer or client of the employing organization gives explicit authorization for the organization to obtain, process, and keep; that the employer entrusts only to managers and a select few employees; or that is stored in secure repositories not accessible by the public or low-level employees." 820 ILCS 70/5.

The plaintiff contended that the definition of "personal and confidential information" could not be met because CSRs were low-level employees. She pointed to the fact that the CSR position was an entry-level position which she was initially offered on a temporary, part-time basis and that CSRs' interactions with customers were recorded and/or monitored. The Illinois Appellate Court First District rejected the plaintiff's argument, finding that it did not comport with an ordinary reading of the statute. The court determined that "low-level employees" are employees whose need or ability to access sensitive information is similar to that of the public in general. Since it was undisputed that CSRs needed access to sensitive information to perform their jobs, their need for access could not be likened to that of the general public.

The plaintiff also argued that the bona-fide-occupational-requirement exception did not apply because CSRs did not have meaningful "access" to personal or confidential information. She claimed that CSRs merely functioned as conduits, passing on information provided by customers to other responsible departments. The court viewed the evidence differently. It determined that the evidence showed that CSRs had access to personal and confidential information in ComEd's database and used the information routinely to assist customers as part of their job duties. The fact that some of the personally identifiable information was redacted, in part, did not negate the fact that CSRs had access to personal or confidential information. Similarly, the court opined that the plaintiff's allegations that the position was entry level and/or monitored was immaterial to the question of access.

Rivera v. Commonwealth Edison Co., 2019 IL App (1st) 182676.

First District Allows Plaintiff to Proceed on Retaliation and Whistleblower Claims with Contested Circumstantial Evidence

In *Hubert v. Board of Education of City of Chicago*, the Illinois Appellate Court First District reviewed a summary judgment ruling in a case involving claims of unlawful retaliatory discharge and violation of the Illinois Whistleblower Protection Act. The plaintiff worked for Chicago Public Schools (CPS) managing bus transportation services. He suspected that outside vendors who provided CPS with yellow bus services were engaging in price fixing and were overbilling CPS and he went on a crusade to expose the suspected fraud.

He initially reported his suspicions internally and an investigation was initiated. Nonetheless, the plaintiff marched on with his own investigation, going outside of CPS and the department. He alleged that he was terminated because of his efforts to root out fraud and in response to him raising concerns to another department. Meanwhile, the defendant presented evidence that the plaintiff was terminated for insubordination and divisive workplace conduct. The plaintiff had a well-documented history of treating his colleagues and subordinates in an unprofessional manner, including engaging in multiple verbal altercations. He also clashed with superiors and had trouble taking direction. The circuit court found that the defendant's evidence established a valid, non-retaliatory reason for terminating the plaintiff and granted summary judgment in its favor.

The First District reversed, finding sufficient circumstantial evidence of causation as to create a genuine dispute of material fact.

The court observed that the plaintiff continually pressed his concerns and ruffled feathers along the way. For example, he brazenly confronted a vendor, resulting in his removal from the bidding process. Eventually, his supervisor moved him into different duties where he would not have contact with vendors. Furthermore, the plaintiff and his supervisor disagreed about how to best deal with the fraud and the plaintiff's supervisor expressed frustration with the plaintiff making departmental business public. This frustration was even cited as support for the plaintiff's termination.

Moreover, the court noted that the defendant failed to demonstrate that there was no genuine issue of fact regarding pretext, since the plaintiff presented evidence that his supervisor and the department had sometimes praised his aggressive attitude which they then criticized as it related to the plaintiff's alleged insubordination and divisiveness. In determining that the plaintiff was entitled to present his case to a jury, the court cautioned against the use of summary judgment in cases where both sides present evidence to support their positions and advance a narrative that could be true, and it provided a reminder that plaintiffs are not required to prove their cases at the summary judgment stage.

Hubert v. Board of Educ., 2020 IL App (1st) 190790.

Implementation of Illinois Sexual Harassment Training

In 2019, the Illinois legislature amended the Illinois Human Rights Act (IHRA) to require, among other things, that all employers provide sexual harassment training to all employees on an annual basis. The amendment also required the Illinois Department of Human Rights (IDHR) to create a "model" training program that employers could use to meet the new requirement. Employers may also choose to develop their own program as long as it meets the IHRA's requirements. The training must include: an explanation of sexual harassment consistent with the IHRA; examples of conduct that constitute unlawful sexual harassment; a summary of relevant federal and state statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment; and a summary of responsibilities of employers in the prevention, investigation, and corrective measures of sexual harassment.

In April 2020, the IDHR came out with its "model" training program and then, in October 2020, published a revised program. The program consists of a PowerPoint presentation that is free to download. There is no guidance on how the program must be presented, who must present it, or how long the training must last, but it is doubtful that employers who simply have their employees read a handout would be deemed in compliance with the IHRA. It is recommended that employers use the IDHR PowerPoint as a minimal starting point, enhancing it when logistically and economically feasible; strongly consider incorporating general harassment and discrimination prevention into the required training; and opt for live professional training or, if not possible, recorded video training.

The IDHR has also published a Frequently Asked Questions (FAQ) page which is useful in answering many questions, but it does not constitute legally enforceable regulations under the Illinois Administrative Code. Moreover, it leaves several questions unanswered.

For example, when must the training occur? Although it was clear that employers were required to comply with the training requirement by December 31, 2020, with annual training thereafter, the IHRA is silent on how soon after the start of employment the training must be provided to new employees. The law could be read to simply require it within one year of hire. The IDHR has taken the position in the FAQs that the training should occur as soon as possible. Even though this position may not be enforceable, it is recommended, because an employer is generally responsible for its employee's conduct from the employee's start date.

The IDHR permits employers to abstain from training employees that present documentary proof (which the employer must retain) of having received the requisite training within that year elsewhere, such as at a prior employer or a second job. The risk in this reliance, however, is that the employer would need to verify that the prior training complied with all of the requirements under Illinois law. All training should be documented.

Some employers may also be asking who must receive the training? For most Illinois employers, the answer is simply that all employees in Illinois, regardless of their exact status, must receive the training. The answer to this question is more difficult for employers based outside of Illinois. On the FAQ page, the IDHR has indicated that employers should train any employee who works or will work in Illinois, even if on a temporary basis, and any employee who is based outside of Illinois but regularly interacts with other employees in Illinois, such as a supervisor. This still leaves questions unanswered, though, about what constitutes "working in" Illinois and how much work or interaction must occur to warrant training.

— Continued on next page

About the Authors

Karin Anderson is an attorney with *O'Hallaron Kosoff Geitner & Cook, LLC* and has been with the firm since 2011. Ms. Anderson focuses her practice on employment law, §1983 civil rights litigation, municipal liability defense, and general tort defense. Her comprehensive employment law practice encompasses litigation, training, and consulting. She has extensive experience with cases involving Title VII, ADEA, FLSA, FMLA, ADA, Retaliatory Discharge, IWPCA and IMWL. Before joining OKGC, Ms. Anderson practiced employment law for eight years, primarily in the private sector. She operated her own firm for two years and provided consulting and training services for private employers on compliance with anti-discrimination statutes, various leave laws, employment contracts and miscellaneous human resource matters. She frequently presents on employment law topics and has also served as the Editor of the *Illinois Employment Newsletter*.

Julie A. Bruch is a partner with *O'Halloran Kosoff Geitner & Cook, LLC*. Her practice concentrates on the defense of governmental entities in civil rights and employment discrimination claims.

Terry A. Fox practices law at the Chicago firm of *Flaherty & Youngerman, P.C*. His practice is primarily focused on employment law claims and disputes involving sex, race, national origin, age, disability FMLA and other alleged discrimination, as well as overtime, wage and hour, and ICE investigations. He regularly advises employers in these areas and provides guidance to reduce the risk of claims. Mr. Fox has extensive experience representing insurers and their insureds in high exposure personal injury claims. These claims have arisen from automobile accidents, elevator incidents, dropped power lines, underground utility damage, and industrial injuries. Mr. Fox is a Member of the IDC Board of Directors, and has served in the past as Chairman of the highly respected Insurance Law Committee.

Julieta A. Kosiba is an associate with *HeplerBroom LLC*. She focuses her practice on civil litigation involving employment and labor law and personal injury and property damage claims. Ms. Kosiba earned her J.D. from Washington University School of Law and her undergraduate degree from DePaul University.

Kimberly A. Ross is a partner in the Chicago office of *FordHarrison*. She concentrates her legal practice on defending and counseling management in employment law matters. Ms. Ross' experience includes harassment and discrimination claims under Title VII and the Illinois Human Rights Act, the ADEA, ADA, FMLA, and FLSA, as well as non-compete agreements, whistleblower claims, negligent hiring, supervision and retention, and retaliatory discharge. Ms. Ross conducts seminars, provides training and on proper employment practices including hiring, effective discipline and discharge, performing investigations, maintaining personnel files and properly classifying employees under the FLSA, reviews and drafts employee handbooks, employment policies, employment contracts, and severance agreements. She received her undergraduate degree from the University of Michigan in 1992 and her J.D. from DePaul University College of Law in 1996. She is a past Editor of the *IDC Quarterly*.

Jennifer A. Winking is a partner with the Quincy law firm of *Scholz, Loos, Palmer, Siebers, & Duesterhaus LLP*, where she concentrates her practice on employment law and litigation and workers compensation defense. She has presented for the Illinois State Bar Association on topics of employment law and workers compensation and is a frequent lecturer on various employment topics, including harassment and sensitivity training. Ms. Winking earned her B.A. from Quincy University as a double major graduating *summa cum laude* and her J.D. from the University of Missouri-Columbia School of Law, where she was Managing Editor of the *Missouri Law Review* and was inducted into the Order of the Coif.

Survey of Ethics Law Cases

Fifth District Finds Fee-Sharing Agreement Unenforceable Because Agreement Violated Illinois Rule of Professional Conduct 1.5(e)

In *Bennett v. GlaxoSmithKline LLC*, an attorney filed a complaint on behalf of multiple plaintiffs against a medication manufacturer. Another attorney then agreed to become co-counsel and to act as trial counsel. The attorneys exchanged a series of emails with the subject line "fee split" discussing the fee arrangement. However, a written fee-sharing agreement did not incorporate the sharing of fees and expenses discussed in the e-mail exchange. Neither the original attorney nor the new co-counsel contacted any of the plaintiff-clients to obtain their written consent to the new co-counsel's representation or to the fee-sharing arrangement.

After the underlying litigation resulted in a settlement and a dispute arose between the original attorney and the co-counsel over attorney fees, the circuit court awarded some of the attorney fees to the co-counsel. On appeal, the original attorney contended that the circuit court erred in awarding any of the attorney fees to the co-counsel. The Illinois Appellate Court Fifth District agreed.

The Fifth District reasoned that the co-counsel could not receive attorney fees because none of the plaintiff-clients gave written approval for the representation of co-counsel or the fee-sharing arrangement, which violated Rule 1.5 of Illinois Rules of Professional Conduct. The court noted that the Rules of Professional Conduct are part of the Illinois Supreme Court Rules, which operate with the force and effect of law. The court further stated that the provisions of Rule 1.5 embody Illinois' public policy of placing the rights of clients above any remedies of lawyers seeking to enforce fee-sharing arrangements.

The Fifth District rejected the argument by the co-counsel that it was the original attorney who failed to notify the clients regarding the engagement of co-counsel and to obtain their written consent to the fee-sharing agreement, and the appropriate remedy is not to give the original attorney a windfall at the expense of the less culpable co-counsel. The court, however, reasoned that both the original counsel and co-counsel were seasoned attorneys; each had an obligation to inform the clients about the co-counsel's representation and the fee-sharing arrangement between them, which neither did. Accordingly, the Fifth District vacated the order awarding the attorney fees to the co-counsel. The fees reverted to the original counsel. The court stressed that, in entering this order, it was not excusing the actions of the original counsel. Rather, it was simply upholding the public policy to protect the interests of clients above attorney remedies.

Bennett v. GlaxoSmithKline LLC, 2020 IL App (5th) 180281.

Seventh Circuit Overturns Defendant's Conviction Finding that District Court Judge Violated the Judicial Recusal Statute

In *U.S. v. Orr*, the defendant appealed his conviction as a felon in possession of a firearm arguing that the judge who presided over the case at trial had engaged in improper *ex parte* communications with the U.S. Attorney's Office in other matters and violated the federal recusal statute, 28 U.S.C. § 455(a), by failing to recuse himself.

After the trial but prior to sentencing, the Judicial Council of the Seventh Circuit determined that the trial judge had breached the Code of Conduct for U.S. Judges by engaging in improper *ex parte* communications in other cases with members of the U.S. Attorney's Office for the Central District of Illinois. The Judicial Council found no evidence that those communications affected the outcome of any case, but suspended the judge from all criminal matters involving the U.S. Attorney's Office for the Central District of Illinois for one year. Defendant's case was transferred to another judge for sentencing.

Under 28 U.S.C. § 455(a), "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." On appeal, the government conceded that the trial judge's conduct violated the statute but argued that the error was harmless. Consistent with federal precedent, to determine if the judge's violation of the recusal statute was harmless, the Court of Appeals for the Seventh Circuit analyzed three factors: (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process.

— Continued on next page

In examining the first factor, the court found that the risk of injustice to the government of potentially having to retry the case was relatively slight due to the straightforwardness and brevity of the prosecution's case. The defendant faced only one charge during the original trial and the trial only took two days. The court believed that the risk of injustice to the defendant was greater if the court upheld the conviction.

With respect to the second factor, the government argued that the judge in question was thoroughly investigated, publicly reprimanded, and had implemented new practices to prevent similar issues in the future; therefore no other action was necessary to induce other judges to exercise caution in their communication. The Seventh Circuit believed that this factor favored upholding the conviction.

In its analysis of the third factor, the Seventh Circuit stressed that the trial judge exercised substantial discretion in two of his decisions during the trial. First, he admitted evidence of defendant's drug dealing. Second, he permitted the prosecutor to cross-examine the defendant on his felony conviction for drug dealing. The Seventh Circuit further noted that these evidentiary decisions bolstered the government's case, which rested on circumstantial evidence and credibility calls. The Seventh Circuit believed that, given these rulings, upholding the conviction could damage the public's confidence in the impartiality of the judiciary and, therefore, the third factor favored overturning the conviction.

Based on the first and third factors of the analysis, the Seventh Circuit held that the trial judge's failure to disqualify himself was not harmless error and overturned the defendant's conviction.

U.S. v. Orr, 969 F.3d 732 (7th Cir. 2020).

Second District Upholds Monetary Contempt Sanction Award Against *Pro Se* Plaintiff for Violation of Illinois Rule of Professional Conduct 4.2 Prohibiting Communication with Parties Represented by Counsel

In *Zemater v. Village of Waterman*, a *pro se* plaintiff, after receiving a speeding ticket, filed an action for malicious prosecution against the defendant-village. After filing the action, the plaintiff sent an email to the defendant-village's president and board members, discussing recent negotiations and threatening an appeal. Counsel for the village wrote to the plaintiff, advising that he should direct communications in the matter to him.

[T]he plaintiff argued that both the order of the trial court directing him to communicate with defendant only through counsel and the order of the trial court finding him in contempt were invalid because Illinois Rule of Professional Conduct 4.2 does not apply to a *pro se* litigant.

Defendant requested a court order requiring plaintiff to communicate only with defense counsel regarding issues in this case. A day after the court entered the requested order, the plaintiff wrote directly to the village's president. After the village filed a petition for rule to show cause why plaintiff should not be held in contempt, the plaintiff again wrote an email directly to the village's president stating that he could not be held in contempt and that if counsel for the village did not withdraw the motion to show cause, he would file a lawsuit against the village. Following a subsequent hearing on the rule to show cause, the court found the plaintiff in indirect contempt and awarded the defendant attorney's fees and costs.

On appeal, the plaintiff argued that both the order of the trial court directing him to communicate with defendant only through counsel and the order of the trial court finding him in contempt were invalid because Illinois Rule of Professional Conduct 4.2 does not apply to a *pro se* litigant. Rule 4.2 states that "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

The Illinois Appellate Court Second District examined the language of the rule and noted that the rule references the conduct of a "lawyer." However, it further considered that the title of the rule is "Communication with Person Represented by Counsel." To the Second District, this was an indication that the focus of the rule was less on the party doing the communicating and more on the

status of the person with whom the party is trying to communicate. The court further reasoned that *pro se* litigants must comply with the same rules and are held to the same standards as licensed attorneys. The court stated that the plaintiff chose to represent himself and therefore was subject to Rule 4.2. Accordingly, the Second District upheld the imposed sanction.

Zemater v. Village of Waterman, 2020 IL App (2d) 190013.

First District Holds Provision in Attorneys' Fee Agreement Did Not Violate Illinois Rule of Professional Conduct 1.5

In *Grund & Leavitt, P.C. v. Stephenson***,** the plaintiff law firm filed suit against its former client to recover fees under the agreement for representation in a dissolution of marriage action. The written retainer agreement entered into by the law firm and the client provided that the client would pay the law firm hourly fees, costs incurred, and, additionally, a "final bill." The agreement specified that this "final bill," in addition to the hourly rates, would take into account various factors "as delineated in the Illinois Rules of Professional Conduct (adopted by the Illinois Supreme Court) as being relevant considerations to be included in arriving at a fair and reasonable charge." The results obtained was among the various factors listed in the agreement. The client paid the law firm's hourly fees but refused to pay the "final bill."

The trial court found that the retainer agreement was contrary to public policy and the Illinois Rules of Professional Conduct because it contained a contingency fee by including the results obtained among the factors determining the amount of the final bill, in addition to the hourly-rate fees. The trial court believed this violated Illinois Rule of Professional Conduct 1.5(d)(1), which prohibits a lawyer from entering into an arrangement for, charging, or collecting "any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof." The trial court, therefore, dismissed the plaintiff law firm's suit.

On appeal, the Illinois Appellate Court Second District reversed the decision of the trial court. The Second District reasoned that consideration of the result obtained in the case in determining the reasonableness of the attorney fees is not only permissible, but required by the Illinois Rules of Professional Conduct. It also rejected the assertion that the fee was unreasonable simply because it was in addition to the hourly fees. The Second District instructed the trial court to consider on remand alternative grounds in determining whether the fee was reasonable.

Grund & Leavitt, P.C. v. Stephenson, 2020 IL App (1st) 191074.

Fifth District Holds Court Lacks Discretion to Deny Defendant's Motion for Substitution of Judge as of Right When the Court Discovers Defendant "Tested the Waters" in Action Arising from Same Occurrence Brought by Different Plaintiff Against the Same Defendant

In *Simpson v. Knoblautch*, a passenger involved in a car accident filed a lawsuit against the defendant-driver of another car. After the court dismissed the case pursuant to a settlement between the parties, the driver of the passenger's car filed another lawsuit against the same defendant-driver.

Prior to the dismissal of the first action, the court conducted motion hearings and addressed with skepticism defendant's defense. Also in the first lawsuit, defendant filed a third-party claim for contribution against the driver of the passenger's car. Upon the filing of the plaintiff driver's case, the case was assigned to the same judge that heard the plaintiff-passenger's case prior to its dismissal. The defendant filed a motion for substitution of judge under 735 ILCS 5/2-1001(a)(2)(ii). The trial court denied the motion.

The trial court reasoned that the plaintiff-passenger's case involved many similar or identical issues. The trial court noted that the motion hearings in the plaintiff-passenger case involved extensive discussions regarding issues relevant in the plaintiff-driver case and that counsel benefitted from questions and comments revealing the court's position regarding the issues. The trial court, therefore, believed that defendant had "tested the waters" in the plaintiff-passenger case and was not entitled to a substitution of judge as of right in the plaintiff-driver case.

On appeal, however, the Illinois Appellate Court Second District held that the trial judge did not have discretion to deny a motion for substitution of judge. The Second District reasoned that in this case, two separate plaintiffs filed an action against defendant. It further

— Continued on next page

relied on the fact that no party in the passenger-plaintiff case raised the plaintiff-driver's cause of action against defendant, even though in the plaintiff-passenger's case, the defendant filed a third-party claim for contribution against the plaintiff-driver. Based on this, the Second District determined that the trial court's ruling that the defendant-driver "tested the waters" was insufficient to deny the defendant's motion for substitution of judge.

Simpson v. Knoblautch, 2020 IL App (5th) 190439.

Third District Finds Defense Counsel's Failure to Request DNA Tests on Gun Allegedly Used in a Robbery Constituted Ineffective Assistance

In *People v. Johnson*, the defendant was convicted of armed robbery and aggravated robbery and appealed his conviction, claiming ineffective assistance by his defense trial counsel. A gas station clerk testified at trial that while he was working, a man wearing a mask entered the gas station carrying a black gun and demanding money. He also testified that the man struck him on the head multiple times with that gun. During a search at the defendant's residence, the police seized a black handgun and a broken black BB gun. A police officer testified that he swabbed the handgun for potential DNA because he believed that the gas station clerk had been struck with it. There was never a request for DNA testing on the subject swabs.

In his closing argument, defense counsel criticized the investigators for failing to conduct tests for DNA. During deliberations, the jury sent a written question to the court, asking: "Why wasn't anything tested for DNA?" During deliberations, defense counsel brought to the court's attention the question of the defendant as to why the court could not order the swab to be tested for DNA. The court inquired why such a request was not made weeks or months earlier. Defense counsel replied that the testimony regarding the swab of the gun had come as a surprise, as discovery had not revealed that a DNA swab had been taken from the gun. The State interjected, pointing out that "the discovery did show that a DNA swabbing of the gun was done," though there was no indication that any biological material was present on the gun. Defense counsel withdrew his request.

On appeal, the Illinois Appellate Court Third District noted that a defense attorney's decision to not have a DNA swab tested where the State has conducted no testing would ordinarily be considered a clear matter of trial strategy. The court believed that counsel could reasonably decide that the risk that the results could be incriminating and the opportunity to attack the State's failure to conduct testing outweighed the potential of the test results coming back in the defendant's favor. The Third District, however, found that in this case, the defense counsel did not make a strategic choice, but was under the misapprehension that no DNA swabs had been taken from the firearm.

The Third District held that defendant was prejudiced by the ineffective assistance of counsel because the reasonable possibility existed that the gas station's clerk's DNA would not be found on the handgun, providing evidence that it was not the gun used in the robbery. The court believed such a result would be especially relevant in this case given that the police found a similarly colored BB gun. It further reasoned that defendant was charged with armed robbery, which requires the carrying of an actual firearm in the commission of a robbery and a BB gun is not considered a firearm under the armed robbery statute.

The Third District overturned defendant's conviction because he received ineffective assistance of counsel.

People v. Johnson, 2020 IL App (3d) 160675.

First District Finds Defendant Made Substantial Showing that Defense Counsel's Failure to Investigate or Present Witness Mentioned in Police Report Constituted Ineffective Assistance

In *People v. Simmons*, defendant, along with several co-defendants, was charged with first degree murder and aggravated battery with a firearm as a result of a shooting. After his conviction, defendant presented affidavits from an individual who claimed to be the witness of the shooting. The witness claimed that a man (who the witness believed was one of the lawyers for a co-defendant) visited him in jail and that the witness told him that he witnessed the shooting. The witness further stated in the affidavits that after the lawyer showed him the photograph of his client (co-defendant) and defendant, the witness told the lawyer that the shooter was neither defendant. The witness stated that he told the lawyer that he would be willing to testify, but the lawyer did not contact him again. The police reports listed this person as a potential witness of the shooting.

The Illinois Appellate Court First District determined that the defendant made a substantial showing that defendant's trial counsel

was deficient for failing to contact the witness as a potential exculpatory witness. The First District noted that it is well-established that the choice of what witnesses to call is a matter of trial strategy, left to the discretion of counsel after consultation with the defendant. However, the court could not find a strategic reason to explain why counsel would have decided not to interview the witness in question. It remanded the case to the trial court for a third-stage evidentiary hearing on the issue of whether defendant's trial counsel was constitutionally ineffective for failing to investigate and present the witness as an exculpatory witness.

People v. Simmons, 2020 IL App (1st) 170650.

First District Remands Case on Defendant's Post-Conviction Petition Alleging Ineffective Assistance of Counsel for Usurping Defendant's Decision to Waive Jury Trial Despite Defendant's Failure to Object to a Bench Trial

In *People v. Townsend*, a public defender initially represented the defendant prior to trial. When the trial court asked the public defender whether defendant would receive a bench trial, she responded "jury." A few months later, the public defender withdrew from representing the defendant and a private attorney entered an appearance on the defendant's behalf. A few months later, when the trial judge asked the private attorney whether defendant would receive a bench or a jury trial, the attorney responded: "It will likely be a jury trial date." The appellate record was not clear whether the defendant was present at the time. During a hearing a couple of months later, the defendant was present and the judge stated that the trial will take place on a certain date and it would be a jury trial. The defendant's attorney replied, "Yes." Nothing in the record showed that defendant ever objected to having a jury trial.

After the defendant was convicted of first-degree murder and aggravated discharge of firearm and sentenced to 40 years of prison, the defendant filed a *pro se* post-conviction petition. In support of the petition, he filed an affidavit that the public defender refused to allow him to waive a jury trial and, although he told her that he wanted a bench trial, she told him that she was running the show and that he was getting a jury trial. The trial court noted that defendant's private counsel tried the case before a jury and never mentioned a bench trial and that had it been a bench trial, the result likely would have been the same. The trial court, therefore, denied the defendant's post-conviction petition.

The trial court noted that defendant's private counsel tried the case before a jury and never mentioned a bench trial and that had it been a bench trial, the result likely would have been the same.

In analyzing the issue, the Illinois Appellate Court First District noted that, while trial judges are not required to admonish a defendant as to his right to waive a jury trial, it would recommend that trial judges confirm directly with defendants whether they are selecting a bench or jury trial. The First District mentioned that doing so would resolve the issue raised on appeal. It then concluded that defendant's mere silence on the record when his counsel requested a jury trial did not rebut his ineffective assistance of counsel claim for usurping his right to waive a jury trial.

The First District agreed that defendant's petition was silent on any discussions defendant had about selecting a jury trial as opposed to bench trial with his private counsel. The appellate court also reasoned that the private attorney's response to the judge "It will *likely* be a jury trial date" (emphasis added) indicated that such discussions took place. However, it believed that an evidentiary hearing during the second-stage post-conviction proceedings was the appropriate time to investigate this issue further. The First District, therefore, remanded the case for the second-stage post-conviction proceedings.

People v. Townsend, 2020 IL App (1st) 171024.

About the Author

Alex Belotserkovsky is an associate attorney at *Hepler Broom LLC*. He focuses his practice on trials involving complex litigation matters, including asbestos cases and toxic tort issues. Mr. Belotserkovsky earned his J.D. from Washington University School of Law in 2001. He has coached two Washington University Undergraduate Mock Trial Teams to nationals.

Survey of Insurance Law Cases

Insurance Exhibit to Subcontract Constituted an Agreement to Name a General Contractor as an Additional Insured for Purposes of Triggering Additional Insured Coverage

The coverage dispute in *Westfield Insurance Co. v. Keeley Construction, Inc.* turned on whether an exhibit attached to a construction subcontract satisfied the requirement in an additional insured endorsement that the named insured must agree in writing to provide additional insured coverage for the putative additional insured. In that case, Hamilton Partners, Inc. and Keeley Construction, Inc. entered into a contract to construct a building (Project). The contract required Keeley, the general contractor, to bind each of its subcontractors to the obligations of the prime contract. The prime contract required Keeley to purchase insurance and to name Hamilton as an additional insured.

Keeley entered into a subcontract with William T. Connelly, Inc. to perform electrical work on the Project. The subcontract incorporated the prime contract by reference and also stated that "[t]he Subcontractor assumes toward Contractor all of the same obligation, rights, duties, and redress that the Contractor assumes toward the Owner, Tenant (if applicable) and Architect under the prime agreement." The subcontract required Connelly to "obtain and maintain in force . . . insurance in accordance with" an exhibit attached to the subcontract stating that Connelly must provide a certificate of insurance to the owner naming "[Keeley], Owner, Tenant and anyone required by Contractor" as additional insureds.

Timothy Koziol, a Connelly employee, was killed in a jobsite accident at the Project. Koziol's estate sued Keeley and Hamilton. Keeley tendered its defense of the Koziol lawsuit to Connelly's insurer, Westfield Insurance Company. Westfield responded by filing a declaratory judgment action seeking a declaration that neither Keeley nor Hamilton was an additional insured under its policy. The additional insured endorsement at issue conferred additional insured status upon "any persons or organizations when [Connelly has] agreed in writing in a contract or agreement that such persons or organizations be added as an additional insured." Westfield argued that Connelly never agreed in a written contract to add Keeley and Hamilton as additional insureds on the Westfield policy because the subcontract only required Connelly to name them as additional insureds on the certificate of insurance.

Reviewing the subcontract and its insurance exhibit, the Illinois Appellate Court First District determined that the subcontract required Connelly to procure additional insured coverage for Keeley and Hamilton because the additional insured requirements applied both to the certificate of insurance and the policies that Connelly was required to procure and maintain pursuant to its subcontract. Because the contract documents required Connelly to name Keeley and Hamilton as additional insureds, Westfield was required to defend.

Westfield Ins. Co. v. Keeley Constr., Inc., 2020 IL App (1st) 191876.

Professional Liability Insurer Required to Defend Underlying Legal Malpractice Suit Seeking Damages for Unnecessary Legal Fees

At issue in *Illinois State Bar Association Insurance Co. v. Canulli* was whether a professional liability insurer was required to defend an insured attorney against an underlying legal malpractice action alleging that "as a direct and proximate cause" of the attorney's malpractice, the former client was entitled to recover "attorney's fees and costs for useless and unnecessary legal proceedings . . . ."

The policy at issue required the insurer to defend any suit "that seeks DAMAGES arising out of a WRONGFUL ACT." The policy's definition of "damages" expressly excluded "legal fees, costs or expenses . . . retained or possessed by the INSURED . . . ." The insurer refused to defend, contending that the underlying malpractice suit was not seeking "damages" because the relief sought by the former client was "unnecessary attorney's fees and costs."

Finding that the insurer was obligated to defend, the Illinois Appellate Court First District noted that the fees sought by the former client were a measure of damages for the insured attorney's allegedly unnecessary work. Accordingly, the injury suffered by the former client "was not a consequence of [the insured's] *fees* but a consequence of his alleged failure to handle her divorce proceedings expeditiously and appropriately." Because the underlying

claim was based on legal malpractice rather than a billing dispute, the First District found that the damages sought by the underlying plaintiff were not excluded and, therefore, the insured attorney was entitled to a defense.

Illinois State Bar Ass'n Mut. Ins. Co. v. Canulli, 2020 IL App (1st) 190142.

New Legal Argument Raised in Lawsuit Does Not Constitute a "Claim" for Purposes of Triggering a Claims Made Policy

The underlying lawsuit in *Market Street Bancshares v. Federal Insurance Co.* was commenced many years before Federal Insurance Co. (Federal) issued a claims made professional liability policy to the insured bank. When the bank notified Federal of the lawsuit, Federal denied coverage because the claim had been made before the policy period commenced. The policy at issue defined "claim" to include a "written demand for monetary relief" and a "civil proceeding commenced by the service of a complaint . . . ."

In a written closing argument in the underlying case, the plaintiff's attorney raised a new damages theory that had not previously been made in the case. The bank again sought coverage from Federal, claiming that the new damages theory constituted a new claim. The bank contended that the closing agreement was a written demand for monetary relief. The insurer disagreed with the bank, which filed a coverage lawsuit against Federal.

The district court found that the new damages theory was not a new, separate claim. The United States Court of Appeals for the Seventh Circuit agreed. Noting that the term "'civil proceeding' spans the entire civil action . . . ," the Seventh Circuit found the bank's position that a written demand for relief made during a civil proceeding could constitute a new claim to be unreasonable because that interpretation would render superfluous the "civil proceeding" portion of the definition of "claim." Instead, the Seventh Circuit explained, "if a complaint commences a civil proceeding against the insured, no other claim may form within the claim."

Market St. Bancshares, Inc. v. Fed. Ins. Co., 962 F.3d 947 (7th Cir. 2020).

Uninsured Motorist Insurance Provision Restricting Coverage to Injuries Sustained While Occupying an Insured Vehicle are Void and Against Public Policy

In *Direct Auto Insurance Co. v. Merx*, the Illinois Appellate Court Second District ruled that an auto insurance policy provision limiting uninsured motorist coverage to damages that were caused by an accident while the insured occupied a vehicle insured under the policy was against public policy.

The insured had liability and uninsured motorist (UM) coverage under a policy issued by Direct Auto Insurance Company. The policy provided that an insured under the policy would have UM coverage if the insured suffered bodily injury, provided the damages were:

(1) caused by accident; and
(2) while 'you' are an occupant in an 'insured automobile' as defined herein, and
(3) were as a result of the ownership, maintenance or use of such uninsured motor vehicle.

The policy defined "insured automobile" to include an auto under the policy for which a specific premium charge for uninsured motorist coverage had been paid.

The insured was injured while she was a passenger in a vehicle she did not own, being driven by someone else, which struck another vehicle. Since the driver of the vehicle she occupied was at fault, the only driver from whom she could recover was the uninsured driver of the vehicle she was in when the accident occurred.

The insured did not dispute Direct Auto's argument that the terms of the policy precluded coverage. Instead, she argued that the policy provision limiting coverage to injuries sustained while she occupied an insured vehicle was against public policy. Direct Auto maintained that a 1995 amendment to section 143a of the Insurance Code, 215 ILCS 5/143a, meant that insurers were free to make reasonable limitations on the extent of uninsured motorist coverage.

Section 143a of the Insurance Code provides:

> 1. No policy insuring against loss resulting from liability imposed by law for bodily injury . . . suffered by any person arising out of the . . . use of a motor vehicle that is designed for use on public highways . . . shall be . . . issued for delivery in this State unless coverage is provided . . . for bodily injury . . . of persons insured thereunder

— Continued on next page

> who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . because of bodily injury . . . resulting therefrom. Uninsured motor vehicle coverage does not apply to bodily injury . . . of an insured while occupying a motor vehicle owned by, or furnished or available for the regular use of the insured, a resident spouse or resident relative, if that motor vehicle is not described in the policy under which a claim is made or is not a newly acquired or replacement motor vehicle covered under the terms of the policy.

The Second District stated that under this provision, uninsured motorist coverage "must extend to all who are insured under the policy's liability provisions." If a person is an insured under the policy, "the insurance company may not, either directly or indirectly, deny uninsured-motorist coverage to that person."

The Second District concluded that since the insured qualified as an insured under the policy, she was entitled to coverage if she was injured by an uninsured motorist. The court ruled that "conditioning uninsured-motorist coverage on the insured being 'an occupant in an "insured automobile,"' . . . would violate public policy . . . ." Direct Auto argued that the 1995 amendment to section 143a of the Insurance Code allowed the exclusion. Prior to 1995, the courts had ruled that uninsured motorist coverage had to provide coverage to the insured even if the insured was occupying an owned auto that was not covered under the policy.

The 1995 amendment added the sentence at the end of section 143a, which provided that an uninsured motor vehicle did not include an auto owned by the insured which was not listed under the policy. The Second District rejected the argument that this amendment was intended to give insurers the flexibility to add additional exclusions to the uninsured motorist coverage. Therefore, it concluded that the insured was entitled to uninsured motorist coverage for the injuries she sustained.

Direct Auto Ins. Co. v. Merx, 2020 IL App (2d) 190050.

Vehicle is Not "Out of Use" for Uninsured Motorist Coverage When it is Only Partially Withdrawn from Use

In *State Farm Mutual Automobile Insurance Co. v. Osborne*, the Illinois Appellate Court Fifth District ruled that the insured's decision to discontinue using a car for long trips was not sufficient to render the car "out of use" for purposes of underinsured motorist (UIM) coverage. The *Osborne* decision arose out of a head-on collision while the insured was driving a rental car on a long trip in which three non-resident family members were either killed or seriously injured. At the time of the incident, the driver of the vehicle had a policy with State Farm, which provided med pay coverage and UIM coverage. Both the UIM and med pay coverage limited the people insured to the named insureds and any other person occupying "a temporary substitute car."

The term "temporary substitute car" was defined as a car that:

1. replaces your car for a short time while your car is out of use due to its:
   a. breakdown;
   b. repair;
   c. servicing;
   d. damage; or
   e. theft; and
2. neither you nor the person operating it own or have registered.

The passengers injured in the accident maintained that their car was out of use because, while they used it for driving near their home, they routinely rented a vehicle for long trips because they were concerned that their car was unsafe and would not make it for long distances without breaking down. Notably, on the day they rented the vehicle involved in the crash, they also drove their regular car, and the wife continued to drive it after the husband had taken the rental car on the trip to Florida. The Fifth District observed that it "does not require extensive analysis to establish that a car being driven on roadways is not 'out of use' and has not been temporarily substituted by a different car."

The Fifth District explained that segregating the "use" of the insureds' regular vehicle would require the insurance company to bear the risk of loss from two vehicles being operated simultaneously on the roadways for one premium, with one vehicle being driven out of town while the other was being driven in town. As the Fifth District explained, "the unambiguous language of the policy establishes that the intent was that the coverage applied to only one operating vehicle at a time."

In reaching its decision, the Fifth District distinguished the decision in *Economy Fire & Casualty Co. v. Dean-Columb*, 269 Ill. App. 3d 603 (4th Dist. 1995), in which the insured elected not to take her regular car on a long trip because of its high mileage and fuel line problems. The policy in *Dean-Columb* covered any vehicle the insured did not own while used as a temporary substitute

for any covered vehicle which was "out of normal use because of its breakdown, repair, servicing, loss or destruction." The court in *Dean-Columb* concluded that the insured's covered vehicle was out of "normal use" because it was not being used for out of town trips.

The court also considered whether the "fear of breakdown amounts to a 'breakdown.'" The Fifth District in *Osborne* did not consider *Dean-Columb* to be instructive for two reasons: first, the policy required the covered vehicle to be out of "normal use" instead of just "use"; second, there was no indication that the insured's regular car continued to be used while she was also using the rental car. In contrast, in *Osborne*, the insureds continued to use their regular vehicle at the same time that they were operating the rental vehicle. Additionally, to the extent that *Dean-Columb* suggested that the insured's car was "out of use" because the insured elected not to take it on a long trip to Florida, the Fifth District rejected that analysis because it created a situation in which the policy would cover two vehicles being operated at the same time for one premium.

State Farm Mut. Auto. Ins. Co. v. Osborne, 2020 IL App (5th) 190060.

Antitrust Allegations Do Not Fall Under Personal Injury Coverage for Trade Disparagement and the Insurer is Not Obligated to Provide Independent Counsel Simply Because an Excess Judgment is Likely

In *Joseph T. Ryerson & Son, Inc. v. Travelers Indemnity Co. of America*, the Illinois Appellate Court First District addressed several coverage issues, including the question of what was necessary to allege the offense of trade disparagement under personal and advertising injury coverage and when an insurer is obligated to provide independent counsel. The insured in *Ryerson* brought suit against its insurer based on the insurer's conduct in two underlying suits, an antitrust suit and a case involving a trucking accident, which the insurer did defend, but which resulted in a substantial excess judgment. The insured argued that the insurer had a duty to defend the antitrust suit because it created the potential for coverage under the trade disparagement offense, and that the insurer breached the duty to defend the trucking suit because it did not agree to provide independent counsel despite the likelihood of an excess verdict.

The underlying antitrust suit alleged that the insured and six other defendants who were competitors of the underlying plaintiff had conspired to keep it out of the metal service center industry. The underlying complaint alleged a violation of the Sherman Act, violation of the Oklahoma Antitrust Reform Act, and a count for interference with contractual relations. The insured maintained that the interference with contractual relations claim triggered the duty to defend under the coverage for trade disparagement. The policy provided personal injury coverage, and personal injury was defined to include "injury, other than 'bodily injury,' arising out of one or more of the following offenses: . . .Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."

The insured pointed to the allegations in the underlying complaint that the insured had expressed "disapproval to certain aluminum mills of any intent, plan or consideration to add [the underlying plaintiff] as a distributor or to sell aluminum to [the underlying plaintiff]." The insured argued that the allegation that it expressed "disapproval" was synonymous with an allegation of disparagement. It also pointed to an allegation that an officer of one of the defendants had stated that the underlying plaintiff was "the biggest mistake in the last 30 years in his career," which the insured argued was an example of the disapproving statement about the underlying plaintiff and its services.

The First District defined the word "disparagement" as "words which criticize the quality of one's goods or services." It further stated that, to qualify as disparagement, there must be statements about a competitor's goods that are untrue or misleading and are made to influence the public not to buy the goods or services. The First District found nothing in the underlying complaint that constituted disparagement. It dismissed the argument that the allegation of "disapproval" was disparagement because the disapproval was of the prospect of allowing anyone to do business with a new competitor in the industry, not a disapproval of the new competitor's goods or services. Similarly, the First District did not consider the statement that the underlying plaintiff was the "biggest mistake" to be disparagement because the "mistake" being made was to allow another competitor to get started in the business.

The insured also argued that the title of the count for interference with business or contractual relations established trade disparagement because an Oklahoma case had recognized that such a claim was a disparagement claim. While it agreed that a claim for interference with business or contractual relations could be based on disparaging a competitor's goods, there were no allegations in this case that the insured had disparaged the underlying plaintiff's goods, products, or services. Thus, there was no duty to defend.

— Continued on next page

The next issue the First District addressed concerned whether the potential of an excess verdict created a conflict of interest which entitled the insured to independent counsel. In *Ryerson*, the insurer had defended the insured, a trucking company, in a truck/auto collision case. The insurer had a $2 million policy limit, and another insurer had an excess policy with limits of $25 million. The trial resulted in a jury verdict of $27,672,152. Following the verdict, there were disputes between the primary carrier, the excess carrier, and the insured about the control of the defense on appeal, posting an appeals bond, and whether the insured was entitled to its choice of counsel. The insured lost the appeal and then sued the primary carrier, alleging, among other things, that the insurer breached its duty to defend by not agreeing to pay for counsel of the insured's choice in view of the excess verdict.

The First District noted that the insurer's duty to defend ordinarily includes the right to control the defense, which allows the insurer to protect its financial interests in the outcome of the litigation. There is a "limited exception" to this rule where there is a conflict of interest between the insurer and the insured. In that case, the insured is entitled to assume control of the defense, and the insurer satisfies its duty to defend by reimbursing the insured for counsel of its choice. There are two situations where this may occur: where the insurer is obligated to defend multiple insureds which have adverse interests, and where proof of certain facts in the underlying action would shift liability from the insurer to the insured. However, relying on persuasive authority from the courts within the Court of Appeals for the Seventh Circuit, the insured also maintained that an insurer must provide independent counsel when there is a "nontrivial probability" of an excess judgment.

The First District rejected the insured's argument that this authority mandated a finding that there was a conflict of interest due to the excess exposure. It also disagreed with this authority to the extent that it stood for the proposition "that a conflict exists when there is a nontrivial probability of an excess judgment in the underlying suit, thereby entitling an insured to retain independent counsel at the insurer's expense." It further stated:

> It is axiomatic that many cases involve a "nontrivial probability of a judgment in excess of the applicable policy limits that the insured could be personally responsible to pay. . . . However, this fact alone does not trigger a conflict of interest entitling the insured to hire an independent defense attorney paid for by the insurer. [Citation omitted.] Although it is appropriate and proper to inform the insured of the possibility of an excess judgment and to advise the insured to consult independent counsel regarding excess liability, it would not be at the insurer's expense.

Since there was no dispute that the insured was aware of the potential for an excess judgment and had timely notified its excess carrier of the case, this was not a case where the insurer was "gambling" on reducing damages at trial or appeal without informing the insured about the potential that the insured could face an excess judgment.

Joseph T. Ryerson & Son, Inc. v. Travelers Indem. Co. of Am., 2020 IL App (1st) 182491.

Illinois Supreme Court Rules that the Offense of Malicious Prosecution Occurs at the Time of the Prosecution—Not Upon Exoneration

In *Sanders v. Illinois Union Insurance Co.*, the Illinois Supreme Court resolved the issue of when the offense of malicious prosecution occurs for purposes of determining which policy provides coverage. In 1994, the Chicago Heights Police Department doctored evidence against the plaintiff, Sanders, which led to his prosecution and conviction for murder, and an 80-year prison sentence. In 2011, Sanders' conviction was overturned, and he was retried and ultimately acquitted in 2014.

Sanders filed an action against Chicago Heights based on federal civil rights violations and malicious prosecution. Chicago Heights and Sanders ultimately settled the claim for $15 million, of which Chicago Heights' insurer from 1994 contributed $3 million and Chicago Heights agreed to pay $2 million. Chicago Heights agreed to assign its rights against Illinois Union Insurance Company and Starr Indemnity and Liability Company, its insurers for the 2014 policy period, for the remaining $10 million.

The Illinois Union policy provided that it would pay for an occurrence "happening during the policy period . . . for Personal Injury . . . taking place during the Policy Period." The policy defined "Personal Injury" as "one or more of the following offenses . . . malicious prosecution . . . ." The trial court ruled that the offenses had not taken place during the policy period but had taken place at the time of the original prosecution in 1994. However, a split panel of the appellate court ruled for Chicago Heights, concluding that the term "offense" meant the legal cause of action that arose out of the wrongful conduct, not just the wrongful conduct itself. Since the tort of malicious prosecution is not complete until there

has been exoneration, the offense did not occur until the plaintiff was acquitted.

The supreme court rejected the appellate court's decision, concluding that "the word offense in the insurance policy refers to the wrongful conduct underlying the malicious prosecution." In reaching its conclusion, the court considered both the meaning of the word "offense" and the fact that the policy specified that the offense must both "happen *and* take place during the policy period." The supreme court stated, a "malicious prosecution neither happens nor takes place upon exoneration." It also noted that other courts had ruled that the personal injury of malicious prosecution in the context of an insurance policy differs from the common law elements of the tort of malicious prosecution.

The supreme court stated that the fact that the policy was an occurrence-based policy instead of a claims made policy "weighs heavily into our decision." If exoneration were the trigger for coverage, liability would be shifted to a policy period in which none of the acts or omissions giving rise to the claim occurred, which would violate the intent of an occurrence-based policy.

Sanders v. Illinois Union Ins. Co., 2019 IL 124565.

No Coverage for Car Owner Due to Unlicensed Permissive Driver, Longmire had No Obligation to Allow Car Inspection by UIM Insurer

In *United Equitable Insurance Co. v. Longmire*, a car driven by unlicensed driver Dontea Williams and owned by Chanel Godfrey, struck the rear of Belinda Longmire's auto. The car owned by Godfrey was insured by Founders Insurance Company. Founders denied Longmire's resulting bodily injury claim based on the following policy liability coverage exclusion:

> This policy does not apply under Part I:
>
> * * * *
>
> (p) to bodily injury or property damage arising out of the use by any person of a car without a reasonable belief that the person is entitled to do so[.]

Longmire filed suit against the driver and owner of the car that struck her and made an uninsured motorist's claim pursuant to her personal auto policy issued by United Equitable Insurance Company (UEIC). UEIC requested certain information from Longmire, including either photos or inspection of her car.

Two declaratory judgment actions arose from this collision. Founders sued its insured, the permissive but unlicensed driver, and the injured party Longmire seeking a declaratory judgment. UEIC also sued seeking declaratory relief, although its complaint named Longmire and her husband, Founders, Godfrey, and Williams. UEIC alleged that the Godfrey car driven by Williams was in fact insured by Founders, making the Longmire UIM claim unviable under the UEIC policy. UEIC further alleged that there was no physical contact between the cars and that its insured Longmire failed to cooperate by allowing an inspection of the car following the accident.

These declaratory actions were consolidated and decided in the trial court via motions for summary judgment. The trial court found that the "reasonable belief" exclusion in the Founder's policy precluded coverage for both the driver (Williams) and the owner (Godfrey). In the UEIC case, the trial court granted summary judgment in favor of Longmire, finding that the issue of physical contact between the cars was not disputed because Longmire's tort complaint asserted physical contact and defendants Williams and Godfrey admitted this allegation; that Longmire attached an affidavit in support of her motion for summary judgment in which she averred physical contact; and UEIC submitted only unverified documents in response. Appeals were filed in each action, which were consolidated for decision.

The Illinois Appellate Court First District affirmed the judgment entered for Founders. It relied upon the Illinois Supreme Court decision in *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424 (2010), where the supreme court construed an identical exclusion and found it enforceable and applicable where an unlicensed driver caused an accident in the insured car. UEIC argued that Founders' exclusion did not apply to the owner based on public policy grounds. The *Longmire* court rejected this argument, finding UEIC's authority unpersuasive because it involved application of a liability exclusion to a UIM passenger.

The appellate court also affirmed the grant of summary judgment in favor of Longmire. The First District found that UEIC had not made specific enough requests to establish Longmire failed to cooperate. The requests by the insurer were unspecific because they included language of "if applicable" regarding photos of the auto and/or inspection. Moreover, the UIM policy provision requiring physical contact of cars only applied to "hit and run" accidents. Perhaps more important, the First District noted the insurer only invoked lack of cooperation when it filed its declaratory judgment complaint and had not earlier advised the insured of her alleged non-compliance.

United Equitable Ins. Co. v. Longmire, 2019 IL App (1st) 181998.

— Continued on next page

Employer's Insurer Required to Defend Contractor and Owner as Additional Insureds Where Employee Alleged Failure to Supervise Subcontractors

In *Scottsdale Insurance Co. v. Columbia Insurance Group, Inc.*, Rockwell Properties and Prairie Management & Development were sued by Eduardo Guzman, an employee of TDH Mechanical (TDH) who fell 22 feet through an unguarded opening at a construction site. Rockwell owned the property and Prairie Management was the construction manager on the project. Prairie Management hired Guzman's employer, TDH, to install HVAC systems in the building. TDH agreed to indemnify and insure both the owner and construction manager in the subcontract agreement.

Guzman's complaint alleged Rockwell and Prairie failed to, among other things, "'supervise, inspect, monitor, and coordinate the work of the subcontractors on the construction site" and "supervise the construction site and monitor the work of . . . subcontractors, and thereby allowed . . . subcontractors to engage in the unsafe practice of not covering or guarding the unmarked opening in the floor[.]'"

When sued, Columbia Insurance Group (Columbia) refused to defend Prairie and Rockwell pursuant to the commercial general liability (CGL) policy it issued to TDH. Scottsdale, the CGL insurer for Prairie, defended Prairie and Rockwell, then sued Columbia in federal court for a declaration that Prairie and Rockwell were additional insureds on Columbia's policy. Scottsdale prevailed against Columbia on a motion for judgment on the pleadings in the District Court for the Northern District of Illinois.

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed. It specifically noted that the Columbia policy's limitation on coverage in the additional insured endorsement—that the additional insured's liability arise out of TDH's ongoing operations for that additional insured—was satisfied by the insured employee's allegations that Rockwell and Prairie failed to supervise and monitor subcontractors, one of which *could be* TDH. Because the underlying complaint by the injured employee did not *rule out* liability arising out of TDH's ongoing operations, Columbia was obligated to defend the additional insureds Rockwell and Prairie.

The Seventh Circuit rejected the argument that *National Fire Insurance of Hartford v. Walsh Construction Co.* mandated a different result. That case involved different policy language and different allegations by the insured employee. There, the additional insured language mandated that the additional insured's liability be "'solely . . . due to [subcontractor's] negligence'" and excluded coverage for the sole negligence of the additional insured. In the *National Fire* case, the allegations against the additional insured were that its employees removed structural support for the roof, resulting in the injury. No allegations implicated the actions or operations of the named insured in *National Fire*.

Scottsdale Ins. Co. v. Columbia Ins. Group, Inc., 972 F.3d 915 (7th Cir. 2020).

An Endorsement that Conflicts with the Policy Only Controls If the Policyholder Understood and Accepted the Endorsement

In *Strowmatt v. Sentry Insurance*, the Illinois Appellate Court Fifth District reversed judgment on the pleadings in favor of the insurer and remanded the case to resolve whether the policyholder understood and accepted the endorsement that removed his son from coverage under the policy. The coverage dispute arose after Kent Strowmatt's son sustained injuries while riding as a passenger in a vehicle being driven by an uninsured motorist. The insurer denied coverage for Strowmatt's son's claim for uninsured motorist coverage on grounds the son was not an "insured person" under the policy. Kent Strowmatt was the policy's only named insured.

The dispute arose from contradictory language in the policy and two of its endorsements defining who is an "insured person." The policy and its Personal Auto Policy Amendatory Endorsement both defined an "insured person" as including Strowmatt's relatives, which would include his son. But the policy also contained a Named Non-Owner Endorsement that amended the definition of "insured person" to the named insured only, which would not afford coverage for Strowmatt's son. The court also noted the policy's application created further uncertainty about who would be covered because, among other things, Strowmatt was required to report all persons of legal driving age or older who lived with him temporarily or permanently.

The Fifth District explained that conflicts between the policy and an endorsement are typically resolved in favor of the endorsement when "it is clear that the policyholder understood and accepted the language of the endorsement." It further noted that exceptions to general areas of protection "must be stated in such language and bold type as to warrant the conclusion that the insured understood and accepted them." Because the record was devoid of facts on these critical issues, the case was remanded for further proceedings so the necessary factual determinations could be made regarding whether Strowmatt understood and accepted the language of the Named Non-Owner Endorsement.

The Fifth District also rejected the defendant's argument that Strowmatt's claim for his son's injuries under the policy was an unrecoverable derivative claim. Strowmatt was obligated to pay his minor son's medical expenses under the Illinois family expense statute; and, therefore, Strowmatt had submitted a claim for his own economic loss, not an impermissible derivative claim.

Strowmatt v. Sentry Ins., 2020 IL App (5th) 190537.

Actions Against Insurance Broker Must Typically Be Filed Within Two Years of the Insured Receiving the Insurance Policy

In *Austin Highlands Development Co. v. Midwest Insurance Agency, Inc.*, the Illinois Appellate Court First District affirmed the dismissal of the plaintiff's lawsuit alleging the defendant failed to acquire sufficient insurance to protect its interests because the complaint was not filed within two years after receiving the insurance policy. In November 2015, the defendant was the plaintiff's exclusive agent for procuring insurance for the plaintiff's business and its related entities. The defendant obtained an insurance policy for the plaintiff with a one-year period effective November 25, 2015. The plaintiff was sued in March 2016 and submitted the lawsuit to the defendant for coverage. Around August 25, 2016, the defendant informed the plaintiff that its insurance policy did not provide coverage for the alleged causes of action. The plaintiff filed its complaint against the defendant on October 4, 2018.

The plaintiff alleged the defendant was "an insurance producer" and, therefore, required to exercise ordinary care and skill in procuring, binding, renewing, or placing the insurance coverage requested by the plaintiff. The defendant sought dismissal arguing a cause of action against an insurance producer must be filed within two years of receiving the insurance policy at issue. The circuit court rejected the plaintiff's characterization of the defendant as an agent and not an insurance producer and dismissed the plaintiff's lawsuit.

Similarly, the First District rejected the plaintiff's attempt to avoid the two-year statute of limitations by claiming the defendant was not an insurance producer because the defendant was its broker and worked for the plaintiff. Relying on prior Illinois Supreme Court precedent, the First District held the defendant was an insurance producer under 735 ILCS 5/2-2201, the two-year statute of limitations found in 735 ILCS 5/13-214.1 applied, and the limitation period for negligent procurement (like the plaintiff alleged) accrues upon receipt of a policy unless facts showing the plaintiff "reasonably could not be expected to learn the extent of coverage simply by reading the policy" are alleged.

Having found the plaintiff brought its action nearly three years after it received the policy in November 2015 and pled no facts showing it reasonably could not have been expected to learn the extent of its coverage by reading the policy, the First District affirmed dismissal. The First District also rejected the plaintiff's constitutional challenges on the basis that the plaintiff failed to satisfy its burden of proof.

Austin Highlands Dev. Co. v. Midwest Ins. Agency, Inc., 2020 IL App (1st) 191125.

A *Bona Fide* Dispute Entitled Insurer to Summary Judgment on Vexatious Refusal to Pay Claim While Coverage Dispute Remained Active

The Illinois Appellate Court First District affirmed summary judgment in favor of an insurer holding it did not engage in vexatious or unreasonable conduct under section 155 of the Illinois Insurance Code in *Nine Group II, LLC v. Liberty International Underwriters, Inc.* The plaintiff sued Liberty after it denied coverage under a claims-made Directors & Officers policy, effective August 27, 2012 to August 27, 2013, on grounds the plaintiff's claim arose before the policy's effective date.

The plaintiff Nine Group's membership consisted of several investors, including SY Vegas and B In It LLC. On August 3, 2012, Nine Group entered an agreement (Original Agreement) to sell its 50% interest in N-M Ventures II, LLC to F.P. Holdings, L.P. On August 24, 2012, attorney Justin Jones sent an email on behalf of some of Nine Group's investors (Claimants) to SY Vegas's manager regarding the transaction and threatened litigation if a satisfactory agreement was not reached. On September 6, 2012, the Original Agreement was terminated, and an Amended Agreement was entered into that contained a reaffirmation provision stating the Original Agreement would otherwise continue in full force and effect and was ratified. The transaction closed shortly thereafter.

On September 18, 2012, the plaintiff's attorney forwarded Jones' emails to the plaintiff's insurance broker with a subject line "potential demand" and stated the emails "could potentially be construed as a demand from certain members of the Nine Group." Liberty was subsequently notified and acknowledged receipt on October 19, 2012, but did not take any action. On March 15, 2013, the

— Continued on next page

Claimants filed a lawsuit in Nevada federal court. Liberty informed the plaintiff on June 11, 2013 there was no coverage under the policy because the Claimants' claim arose before the policy period.

Thereafter, the plaintiff sued Liberty asserting, among other things, claims for breach of contract and bad faith. The plaintiffs filed a motion for summary judgment seeking coverage under the policy and a finding that Liberty's conduct was vexatious and unreasonable. Liberty opposed the motion and filed a cross-motion seeking judgment as a matter of law that there was no coverage and no bad faith because there was a *bona fide* coverage dispute. While both motions regarding coverage under the policy were denied, the circuit court granted Liberty's motion on the bad faith claim. On appeal, the First District reaffirmed the general principles that an insurer reasonably relying on sufficient evidence to show a *bona fide* dispute does not act unreasonably and vexatiously—a *bona fide* dispute is "real, actual, genuine, and not feigned."

The First District affirmed judgment in Liberty's favor because there was sufficient evidence to show it had a genuine basis for disputing coverage: the allegations in the Nevada complaint and Jones' emails showed the claim arose prior to the policy period. Moreover, the plain language of the Amended Agreement clearly *amended* the Original Agreement executed before the policy's inception. Thus, the salient facts, in total, created a reasonable, genuine basis for dispute. The First District further noted that it could not find Liberty engaged in vexatious and unreasonable conduct based on the timing of its coverage decision as a matter of law and reiterated when there is a *bona fide* dispute, a delay in settling a claim may not violate section 155. Finally, summary judgment was proper even though there may be a finding of coverage under the policy.

Nine Grp. II, LLC v. Liberty Int'l Underwriters, Inc., 2020 IL App (1st) 190320.

Insurer Owed No Duty to Defend Its Insured/Supplier, Who Unilaterally Chose to Ship Non-Compliant Lumber; Despite Negligence-Based Claims, the Insured's Conduct Was Not Accidental and Did Not Constitute an "Occurrence"

In *Lexington Insurance Co. v. Chicago Flameproof & Wood Specialties Corp.*, the United States Court of Appeals for the Seventh Circuit held an insurer owed no duty to defend its insured despite the presence of multiple negligence-based claims asserted in the underlying liability lawsuits. The insured was in the business of providing construction materials, including flame-retardant lumber. The insured had its own brand of lumber, Flame Tech, which it knew was non-compliant with the International Building Code (IBC) because it had not been tested, certified, listed or labeled pursuant to IBC requirements.

The underlying suits alleged the insured contracted not only to provide IBC-compliant lumber but that the insured contracted to provide a specific brand of lumber, D-Blaze. The insured was sued for negligent misrepresentation, fraudulent misrepresentation, deceptive business practices, false advertising, consumer fraud, breach of warranties, and breach of contract. Despite multiple negligence-based claims, the district court held—and the Seventh Circuit affirmed—that no "occurrence" was alleged against the insured and granted summary judgment to the insurer in a declaratory judgment action.

The Seventh Circuit found the insured's conduct was not accidental because the result was the natural and ordinary consequence of the insured's actions. Specifically, the Seventh Circuit concluded the insured made—or was at least alleged to have made—a unilateral decision to ship its own brand of lumber that it knew was not IBC-compliant. Also significant to the Seventh Circuit was that the insured further concealed from the purchaser that it had shipped lumber other than what was called for in the contract. The natural consequence of this conduct is that the lumber would have to be removed and replaced with lumber that was IBC-compliant.

Because the insured's alleged conduct was deliberate and the insured was aware of the natural and probable consequences of its deliberate conduct, it did not matter that some of the claims asserted against the insured were based in negligence, as courts give little weight to the label that characterizes the underlying conduct, but look to the underlying complaints as a whole to determine the true nature of the insured's alleged conduct.

Lexington Ins. Co. v. Chicago Flameproof & Wood Specialties Corp., 950 F.3d 976 (7th Cir. 2020).

Insured Complied with Duties Under Policy When He Filed a Police Report 11 Days After Accident Involving Hit-and-Run Driver

In *Lathrop v. Safeco Insurance Co.*, the Illinois Appellate Court First District addressed whether an insured complied with his duty to file a police report "as soon as practicable" after he was struck by a hit-and-run driver. In *Lathrop*, the insured was riding his bicycle when he was struck by a hit-and-run driver. The collision caused the insured to fall from his bicycle. Although he was near a police

station and had his cell phone, after the accident, the insured was in shock. He could not identify the driver or any witnesses. He did not think he was injured that severely, and he did not know that reporting the hit-and-run driver to the police was necessary for a claim.

Three days after the accident, when his pain did not subside, the insured went to the hospital. The hospital diagnosed the insured with a cervical fracture and referred him to a spine specialist, who he saw five days later. Then, at the prompting of his physicians and his mother, the insured filed a police report eleven days after the accident.

The insured was covered under his mother's auto policy and submitted an uninsured motor vehicle claim. One of the insured's duties under the policy was to "report an accident to the police or other civil authority within twenty-four (24) hours or as soon as practicable if a hit-and-run driver is involved." After the insurer denied coverage for the insured's asserted non-compliance with this duty, the insured filed a declaratory judgment action. On cross-motions for summary judgment, the circuit court found that the insured had violated his duties for making a claim by filing a police report eleven days later.

The First District reversed. First, after applying the rules of construction applicable to insurance contracts, the First District ruled that the insured's duties required him to report the accident to the police within twenty-four hours *or* "as soon as practicable." According to the First District, "as soon as practicable" means within a reasonable time depending on the facts and circumstances of the case. In evaluating whether the insured acted reasonably, the First District stated that a trial court should consider the same five factors used when evaluating whether an insured gave timely notice of an accident or occurrence to an insurer: "(1) the specific language of the policy's notice provision, (2) the insured's sophistication in commerce and insurance matters, (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer." Applying these factors to the facts of the case, the First District determined that the insured reported the accident to the police within a reasonable amount of time, reversed the trial court, and directed the trial court to enter judgment in the insured's favor.

Lathrop v. Safeco Ins. Co., 2020 IL App (1st) 190741.

Repeating the Limits of Liability on the Second Page of a Policy's Declarations Does Not Stack the Limits of Liability

In *Hess v. Estate of Klamm*, the Illinois Supreme Court found that liability coverage within a multicar auto policy did not stack. In this case, the insured was covered under a four-vehicle multicar policy with the following anti-stacking language:

> LIMIT OF LIABILITY
> The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of "bodily injury" sustained by any one person in any one auto accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Bodily Injury Liability is our maximum limit of liability for all damages for "bodily injury" resulting from any one auto accident.
>
> The limit of liability shown in the Declarations for each accident for Property Damage Liability is our maximum limit of liability for all "property damage" resulting from any one auto accident. This is the most we will pay regardless of the number of:
>
> 1. "Insureds;"
> 2. Claims made;
> 3. Vehicles or premiums shown in the Declarations; or
> 4. Vehicles involved in the auto accident.

The declarations of this policy had three physical pages. The first page listed three vehicles, but only listed the liability limits of $100,000 per person/$300,000 per accident only once. The second page listed the fourth vehicle and listed the liability limits again.

After the insured was involved in an accident leading to three deaths (including his own) and a severe injury, claims were brought against the insured's estate and a dispute arose regarding the amount of coverage available. This led to a declaratory judgment action where the trial court ruled that the limits of liability stacked for each vehicle listed on the policy. The appellate court reversed in part and affirmed in part, finding that the coverages

— Continued on next page

stacked, but only for the two times that they were listed on the declarations, leading to liability limits of $200,000 per person and $600,000 per accident.

The supreme court reversed both the trial court and appellate court, finding that it was not reasonable to read the policy to allow stacking at all. According to the supreme court, the "only reasonable explanation for restating the liability limits on the second page [of the declarations] is that the information for all four vehicles could not fit on one physical page." Therefore, when read together with the declarations, the supreme court found that the anti-stacking clause unambiguously prohibited the stacking of bodily injury liability coverage.

Hess v. Estate of Klamm, 2020 IL 124649.

Illinois Appellate Court Finds that Assault and Battery Exclusion and Firearm Exclusion Preclude the Duty to Defend

In *Markel International Insurance Co. Ltd. v. Montgomery,* the Illinois Appellate Court First District determined that a policy's assault and battery exclusion and firearm exclusion precluded the duty to defend even though the claims against the insured sounded in negligence. In this case, a nightclub was covered under a commercial general liability (CGL) policy that contained the following exclusions:

> The coverage under this policy does not apply to any claim, suit, cost or expense arising out of assault and/or battery, or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of any Insured or Insured's employees, patrons or any other person. Nor does this insurance apply to any claim, suit, cost or expense arising out of the alleged negligence or other wrong doing in the hiring, training, placement, supervision or monitoring of others by the insured.
>
> This insurance does not apply to "bodily injury" *** arising out of the existence, ownership, rental, maintenance, use, misuse, or accidental discharge of firearms whether by any insured or insured employees, patron, tenant, guest or any other person, regardless of individual circumstances or location.

According to a complaint against the insured nightclub, two individuals were assaulted with firearms by two patrons of the nightclub in the club's parking lot. One of the individuals was shot and killed. For the injuries and death caused by this assault, the plaintiffs brought suit against the patrons, two security guards of the nightclub, and the nightclub. The claims against the patrons alleged assault and battery and intentional infliction of emotional distress. The claims against the nightclub and its security guards alleged negligence.

In the ensuing coverage litigation, the First District found that these exclusions precluded coverage for the claims against the nightclub and its security guards. According to the First District, the exclusions were "unambiguous in their exclusion of coverage for any claim arising out of an assault and battery, any claim arising out of any act or failure to act to prevent an assault or battery, or any claim arising out of the use or misuse of a firearm resulting in bodily injury, including accidental discharge."

Markel Int'l Ins. Co. Ltd. v. Montgomery, 2020 IL App (1st) 191175.

A *Bona Fide* Coverage Dispute Precludes Imposition of Penalties Pursuant to Section 155 of the Illinois Insurance Code

In *Wells v. State Farm Fire & Casualty Co.,* the Illinois Appellate Court First District affirmed the dismissal of a claim against an insurer pursuant to section 155 of the Illinois Insurance Code. In *Wells*, a homeowner filed a breach of contract and section 155 claim against her insurer for the denial of a flooding claim. The flooding claim had been denied because, according to the insurer, each potential cause of the flooding would have been excluded and also because the insured made material misrepresentations during the investigation. The trial court granted the insurer's motion to dismiss the section 155 count and the First District affirmed.

In reaching its decision, the court reviewed the general principles applicable to section 155 claims. Liability can only be imposed under section 155 only if the insurer acted vexatiously and unreasonably. While "no single factor is dipositive in determining whether an insurer's conduct was vexatious or unreasonable," "[r]elevant factors include the insurer's attitude, whether the insured was forced to file suit, whether she was deprived of the use of her property, the extent of the insurer's investigation and the sufficiency of the communication between the insurer and the insured." Additionally, "section 155 cannot be invoked for an insurer's assertion of a legitimate policy defense or its denial of coverage based on a policy's express

wording[,]" and "an insurer has not acted vexatiously or unreasonably where it reasonably relied on evidence sufficient to create a *bona fide* dispute." Finally, "[t]o state a claim under section 155, the insured must provide a modicum of factual support; she cannot merely allege that the insurer acted vexatiously and unreasonably."

In applying these principles to the homeowner's complaint, the First District determined that the trial court had appropriately dismissed the section 155 claims under both 735 ILCS 5/2-615 and 5/2-619. The First District noted that the factual allegations of the complaint suggested the presence of a *bona fide* dispute. Likewise, for the section 2-619 motion, the court observed that the plaintiff did not submit any materials contradicting the materials submitted by the insurer and those materials revealed that a *bona fide* dispute was present.

Wells v. State Farm Fire & Cas. Co., 2020 IL App (1st) 190631.

Auto Policy's "Mechanical Device" Exclusion Was Unambiguous and in Conformity with Public Policy

In *State Farm Mutual Automobile Insurance Co. v. Elmore,* in a case of first impression, the Illinois Supreme Court enforced an auto policy's "mechanical device" exclusion. In this case, a truck was covered under an auto policy which contained the following exclusion:

> THERE IS NO COVERAGE FOR AN *INSURED* FOR DAMAGES RESULTING FROM . . .
> (c) THE MOVEMENT OF PROPERTY BY MEANS OF A MECHANICAL DEVICE, OTHER THAN A HAND TRUCK, THAT IS NOT ATTACHED TO [the covered truck].

While a farm worker was unloading grain from the truck through the use of a tractor-powered auger, the worker's right leg became entangled in the auger, and the worker lost his right leg below his knee. It was undisputed that the auger was not connected to the covered truck. After the farm worker filed suit against the owner of the truck, the insurer of the truck filed a complaint for declaratory judgment, arguing that the policy's "mechanical device" exclusion precluded coverage. The trial court granted summary judgment in favor of the insurer. The appellate court reversed. The supreme court reversed the decision of the appellate court and affirmed the trial court's decision.

First, the supreme court found that the "mechanical device" exclusion was unambiguous. According to the supreme court, "[g]iving the terms of the policy their plain, ordinary, and popular meaning shows that the exclusion is capable of only one reasonable interpretation." Using Webster's Third New International Dictionary as a guide, the supreme court observed that the term "mechanical" means "'of, relating to, or concerned with machinery or tools'" or "'produced or operated by a machine or tool'" and that the term "device" means "'a piece of equipment or a mechanism designed to serve a special purpose or perform a special function.'" Applying these definitions to the exclusion, the supreme court ruled that "not only was the grain auger clearly a machine or tool designed to move grain from one place to another, it was also a device that was 'operated by a machine or tool' (a tractor)."

Additionally, the supreme court determined that the exclusion conformed to public policy because it did not violate the Illinois mandatory insurance law. In doing so, the supreme court reaffirmed the long-standing principle that an exclusion within an auto policy does not violate the Illinois mandatory insurance law as long as the exclusion does not "differentiate between named insureds and permissive users." As such, because the "mechanical device" exclusion implicated by this policy applied equally to the named insured and permissive users of the truck, it was permissible under the mandatory insurance law.

State Farm Mut. Auto. Ins. Co. v. Elmore, 2020 IL 125441.

Insurer Entitled to Setoff for Amounts Paid By Underinsured Motor Vehicle and Workers' Compensation When Calculating Amounts Payable on an Underinsured Motor Vehicle Claim

In *Amico v. Allstate Corp.*, the Illinois Appellate Court First District evaluated whether an insurer was entitled to a setoff during an underinsured motor vehicle claim for the amount paid on behalf of the underinsured motor vehicle and workers' compensation. In this case, the insured was covered by an auto policy that provided $500,000 in uninsured/underinsured motor vehicle benefits. The policy defined an underinsured motor vehicle as a type of an uninsured motor vehicle.

The policy's uninsured/underinsured motor vehicle coverage also had a damages payable clause, specifying that the damages payable under the coverage "will be reduced by: . . . all amounts

— Continued on next page

paid by or on behalf of the owner or operator of the uninsured auto or anyone else responsible . . . [and] all amounts payable under any workers' compensation law." The coverage also had a limits reduction clause, specifying that, "if the accident involves the use of an underinsured motor vehicle," the limits for the coverage "will be reduced by: . . . all amounts paid by or on behalf of the owner or operator of the underinsured auto or anyone else responsible . . . [and] all amounts payable under any workers' compensation law."

The insured was involved in an accident with an underinsured motor vehicle that resulted in a payment of $100,000 by the insurer of the underinsured motor vehicle and of $143,078 by workers' compensation. The insured and insurer also went through an underinsured motor vehicle arbitration that resulted in an arbitration award of $306,067.72.

Following the arbitration award, the insured and insurer disputed the amount of the setoff against the arbitration award. The insurer argued that it was entitled to a setoff in the amount of $243,078, while the insured argued that the insurer was only entitled to a reduction of the limits, not a reduction in the amount payable.

In the ensuing coverage dispute, the First District agreed with the insurer. According to the appellate court, the policy explicitly included underinsured motor vehicles within the definition of "uninsured motor vehicle" and the damages payable provision of the coverage unambiguously allowed a setoff for the amount paid on behalf of the underinsured motor vehicle and payable by workers compensation. The court also held that the insured's proposed interpretation would violate the legislative purpose behind providing underinsured motor vehicle coverage because it would allow the insured to ultimately recover more than his awarded damages of $306,067.72.

Amico v. Allstate Corp., 2020 IL App (1st) 191421.

Anti-Concurrent Causation Clause Did Not Preclude Coverage When a Covered Cause and Non-Covered Cause Resulted in Two Different Losses

In *4220 Kildare, LLC v. Regent Insurance Co.*, the Illinois Appellate Court First District considered the scope of a commercial property policy's anti-concurrent causation clause. In this case, the insured's refrigerated warehouse was covered by an all risk insurance policy with an earth movement exclusion, precluding coverage for damage resulting from "earth rising, sinking and/or shifting including soil conditions which caused disarrangement of the foundation . . . including contraction, expansion, freezing, thawing, erosion, and the action of water under the ground surface." The earth movement exclusion also had an anti-concurrent causation clause, stating that, if the exclusion applied, the exclusion precluded coverage for a loss "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

The insured's warehouse suffered a loss when one of its freezer floors buckled. The insurer denied coverage on the basis of the earth movement exclusion. The insured contested the denial of coverage. According to the insured, the floor buckled because the freezer door was left open, which caused humidity to enter the freezer and freeze, and thus eventually lead to a buildup of ice.

According to the insured, the removal of this ice resulted in water seeping through the concrete floor, which eventually seeped into the ground. The insured contended that the freezing of this water caused the floor to buckle. However, the insured also had evidence that the alleged seepage of the water damaged the insulation underneath the concrete floor, and that this damage to the insulation alone would have required replacement of the insulation and the concrete floor. The insurer had a conflicting theory and its own expert evidence concerning causation, including disputing that the insulation was damaged by water seeping through the floor.

The case proceeded to trial, and the jury entered a verdict in favor of the insured. After trial, however, the trial court entered a JNOV in favor of the insurer. The trial court reasoned that even the insured's experts admitted that the freezing of subsurface water caused the floor to buckle—irrespective of how the water got there. As a consequence, according to the trial court, the policy's earth movement exclusion precluded coverage.

On appeal, the First District disagreed. It noted that the insured had evidence of two separate losses: 1) damage to the subfloor insulation (which would have required the replacement of the concrete floor anyway), and 2) the actual buckling of the concrete floor. While the "earth movement" exclusion would have applied to the second loss, it would not have applied to the first loss. Additionally, the First District rejected the insurer's argument that the earth movement exclusion's anti-concurrent causation clause still applied to preclude coverage. This was because the water damage to the subfloor insulation was a prior separate loss than the damage to the concrete floor caused by earth movement.

4220 Kildare, LLC v. Regent Ins. Co., 2020 IL App (1st) 181840.

An Insurer Had No Duty to Defend When the Factual Allegations of the Underlying Complaint Alleged Intentional Misconduct

In *General Casualty Co. of Wisconsin. v. Burke Engineering Corp.*, the Illinois Appellate Court First District affirmed a trial court judgment which found that an insurer had no duty to defend under a general liability policy where the underlying complaint alleged that the insured engaged in intentional misconduct. In this case, the insured engineering firm was covered by a general liability policy which only covered bodily injury "caused by an 'occurrence.'" The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In this case, residents from the Village of Crestwood (Village) sued the insured engineering firm, alleging that the engineering firm assisted the Village in concealing from its residents that the Village was supplying contaminated ground water for consumption. The complaint sought recovery for a variety of personal injuries, including cancer and death. Additionally, although the complaint alleged different theories of recovery, it factually alleged that the insured "intentionally concealed the fact that [the Village of Crestwood] was using well water contaminated with hazardous chemicals to supply tap water *** to avoid the cost of making water safe."

The insurer denied coverage, and the plaintiff residents settled with the engineering firm, took an assignment of the engineering firm's rights against the insurer, and filed suit against the insurer. The trial court entered judgment in favor of the insurer and the First District affirmed, finding that the underlying complaint did not allege the presence of an occurrence. The First District reasoned that the complaint at issue alleged that the engineering firm "knew the well water to be contaminated and intentionally advised the Village to hide that fact" and that the firm "intentionally concealed the facts from the plaintiff-residents and intentionally misrepresented the water's safety."

According to the First District, these "factual allegations do not allege 'an unforeseen occurrence' or 'sudden or unexpected event'"– which would be necessary for the presence of coverage. Finally, the fact that the underlying complaint contained negligence counts was "irrelevant" because a "court looks at the actual factual allegations, not the label" when determining if a complaint is covered.

General Cas. Co. of Wis. v. Burke Eng'g Corp., 2020 IL App (1st) 191648.

Conversion Not Covered Under CGL Policy Where the Complaint Alleges Intentional Conduct

In *Pekin Insurance Co. v. McKeown Classic Homes*, McKeown entered into a contract with the underlying claimants to perform construction work on their home. The underlying claimants filed suit against McKeown alleging breach of contract and conversion. The underlying complaint alleged that McKeown removed a Dutch door, knotty pine planks and other items without the knowledge or consent of the claimants. Count II, the conversion count, alleged that the claimants demanded McKeown return the missing items, but it refused to do so. In the underlying complaint, they alleged that McKeown's acts were, "willful, wanton, malicious, and oppressive and were undertaken with the intent to defraud and that they justify the awarding of punitive damages."

Pekin declined McKeown's tender of defense on the grounds that the underlying complaint alleged no "occurrence". The policy defined occurrence as "an accident, including continuous or repeated exposure to substantially the same general or harmful conditions." Its definition of "property damage" included loss of use.

McKeown filed a counterclaim alleging that the materials at issue were mistakenly removed by a subcontractor and stated that the incident constituted an occurrence because the subcontractor's mistake in removing the property was an accident.

Cross-motions for summary judgment were filed. In support of its motion, McKeown cited to an interrogatory answered by the claimants in the underlying litigation that identified the subcontractor who removed the items from their house. The claimants also stated in their answer that they brought this to McKeown's attention and that he refused to return the items. The trial court granted Pekin's motion for summary judgment, finding that the underlying complaint alleged intentional conduct in that when the incident was brought to McKeown's attention, he refused to return the items. The trial court found no allegations of negligence in the underlying complaint.

On appeal, McKeown argued that the trial court incorrectly made its findings in favor of Pekin based solely on the allegations in the underlying complaint and without any consideration of the facts pled by McKeown in its counterclaim for declaratory judgment. The Illinois Appellate Court Second District rejected this argument and affirmed the trial court's judgment. While noting that a trial court may look beyond the underlying complaint in order to determine an insurer's duty to defend, it is the pleadings in the underlying

— Continued on next page

case that must be considered, not the pleadings in the subsequent declaratory judgment action.

The court also found that the "true-but-unpleaded-facts" doctrine would not aid McKeown because there was no evidence presented that Pekin possessed knowledge of true but unpleaded facts that when taken together with the allegations in the complaint, indicated that the claim was within or potentially within the policy coverage. Moreover, the Second District observed that unpleaded facts that the insured gives the insurer should be viewed with suspicion when determining the duty to defend, because the insurer has no way of knowing whether the facts are true without conducting its own investigation or otherwise verifying the information independently.

Pekin Ins. Co. v. McKeown Classical Homes, 2020 IL App (2d) 190631.

Per Occurrence Policy Limits Applied in Multi-Year Policies

In *John Crane Inc. v Allianz Underwriters Insurance Co.*, John Crane Inc. (JCI) was named as a defendant in over 325,000 cases claiming exposure to its asbestos-containing products. JCI obtained primary insurance coverage from Lumbermen's Mutual Insurance Company and American Motorists Insurance Company (hereinafter referred to collectively by their tradename, Kemper). JCI filed a declaratory judgment action seeking a declaration that Kemper's primary coverage was exhausted and also sought a declaration as to the obligations of its umbrella and excess insurance carriers. JCI entered into a settlement agreement with Kemper regarding its primary policies. The trial court found that the primary policies were not exhausted.

Prior to the trial, the defendants filed a motion for summary judgment regarding three multi-year Kemper umbrella policies. The policies each covered approximately a three-year period. Each policy had an occurrence limit of $20,000,000 with an aggregate limit of $20,000,000. The defendants claimed that the per occurrence limits for the three policies were annualized and thus totaled $180,000,000. The court granted the motion as to the first umbrella policy only, (the other umbrella policies did not contain such language) relying on the statement in endorsement 3 of the policy that the "limits of the company's liability shall apply separately to each consecutive period." The trial court determined that the per occurrence limit in the first umbrella policy was $60 million for the three-year policy and that the limit for the other two policies remained at $20 million for a total of $100 million.

On appeal, JCI challenged the trial court's interpretation of the per occurrence limit in the first Kemper umbrella policy. The declarations page of the first Kemper umbrella policy showed a policy period from 12-1-67 to 12-1-70. The page also stated: "Occurrence Limit: $20,000,000 and Aggregate Limit: $20,000,000." Under the Limits of Liability section, the policy stated:

> The total limit of the company's liability for any one occurrence shall be the ultimate net loss resulting therefrom in excess of the underlying limit and then only up to the amount stated in the declarations as the occurrence limit, provided however the company's liability is further limited to the amount stated in the declarations is the aggregate limit, with respect to all ultimate net loss resulting from one or more occurrences during each annual period while this policy is in force.

The policy was subsequently amended by two endorsements. Endorsement 1 added two months to extend the policy period to 2-1-71. Endorsement 3 provided:

> 3. It is agreed that the policy period is comprised of the following three consecutive periods:
> From 12-1-67 to 2-1-69
> From 2-1-69 to 2-1-70
> From 2-1-70 to 2-1-71
> The limits of the company's liability shall apply separately to each such consecutive period.

JCI acknowledged that the aggregate limit of the first Kemper umbrella policy was $20,000,000 per year. However, JCI argued that the trial court erred in finding that the occurrence limit in the policy was also $20,000,000 per year. JCI argued that the limits of liability section of endorsement 3 shows an intent to apply only the aggregate limits annually and that the language in endorsement 3 merely clarifies that point.

The Illinois Appellate Court First District found that if endorsement 3's limit of liability language was intended to apply only to the policy's aggregate limits, that intent should have been made clear where the original provisions addressed two different types of limits. Consequently, the per-occurrence limit for the first Kemper umbrella policy was $20,000,000 for each consecutive period, or $60,000,000 for the entire policy period.

John Crane Inc. v Allianz Underwriters Ins. Co., 2020 IL App (1st) 180223.

About the Authors

C. William Busse, Jr. is the President of the law firm of *Busse & Busse, P.C.* He has more than 33 years of legal experience handling civil jury trials and appeals. Mr. Busse has concentrated his practice in the defense of tort and insurance coverage litigation. He has handled hundreds of personal injury and wrongful death cases in various Illinois venues, including automobile, trucking, premises liability, product liability, aviation and construction injury claims, as well as fire and explosion and property damage claims. Mr. Busse served on the Board of Directors of the Illinois Defense Counsel from 2002 to 2014 and returned in 2018 to serve again and is a co-author of, *The 50 Year History of the IDC*.

Patrick D. Cloud is an attorney in *Heyl, Royster, Voelker & Allen, P.C.*'s Edwardsville office. Mr. Cloud concentrates his practice on insurance coverage litigation, toxic tort matters, complex civil litigation, and products liability defense. As part of his practice, he takes a lead role in significant pretrial discovery, motions and briefs, such as those involving federal preemption, *forum non conveniens,* the Illinois *Frye* doctrine, consumer fraud, and insurance coverage litigation pending throughout the Midwest.

Terry A. Fox practices law at the Chicago firm of *Flaherty & Youngerman, P.C.* His practice is primarily focused on employment law claims and disputes involving sex, race, national origin, age, disability FMLA and other alleged discrimination, as well as overtime, wage and hour, and ICE investigations. He regularly advises employers in these areas and provides guidance to reduce the risk of claims. Mr. Fox has extensive experience representing insurers and their insureds in high exposure personal injury claims. These claims have arisen from automobile accidents, elevator incidents, dropped power lines, underground utility damage, and industrial injuries. Mr. Fox is a Member of the IDC Board of Directors, and has served in the past as Chairman of the highly respected Insurance Law Committee.

Kenneth R. Goleaner is an attorney at *Sandberg Phoenix & von Gontard P.C.* with more than fifteen years of litigation experience. Prior to entering private practice, Mr. Goleaner was a law clerk for The Honorable Kathianne Knaup Crane of the Missouri Court of Appeals, Eastern District. While experienced in many areas of defense litigation, the focus of his practice is on insurance coverage and bad faith. Mr. Goleaner has been involved at all phases of insurance and bad faith matters from the initial claim investigation and throughout the litigation and appellate process. Mr. Goleaner speaks on various insurance coverage topics and currently covers Illinois and the 7th Circuit Court of Appeals for his firm's Insurance E-Newsletter.

Seth D. Lamden is a partner with *Blank Rome LLP*'s insurance recovery practice group, and he practices out of the firm's Chicago office. For more than 20 years, Mr. Lamden has focused his practice exclusively on helping policyholders understand and enforce their rights to insurance coverage. He is a past member of the IDC's Board of Directors and two-time chair of the IDC's Insurance Law Committee. He is a fellow of the American College of Coverage Counsel. He also maintains an AV Preeminent® rating with Martindale-Hubbell® and is listed in the area of insurance coverage law in Best Lawyers in America, Illinois Super Lawyers, and the Leading Lawyers Network.

William K. McVisk is a partner at *Tressler LLP* in Chicago where he focuses his practice on complex insurance coverage litigation, and hospital law and medical liability. He has handled all areas of coverage and bad faith litigation, especially third-party bad faith and coverage litigation involving commercial

general liability, professional liability coverages, as well as personal lines coverages such as auto and homeowners' coverages. Mr. McVisk is the 2019-2020 President of the Illinois Defense Counsel, the former chair of the IDC Insurance Law Committee, and a member of the DRI Insurance Law Committee. He has tried declaratory judgment actions in several jurisdictions and has briefed and argued appeals concerning coverage matters in several courts. He is a member of the bars in Illinois and Indiana and is admitted to practice before several federal district and appellate courts. He graduated with honors from Northwestern University Law School in 1977.

Stephen M. Murphy is a shareholder at *Sandberg Phoenix & von Gontard P.C.* He focuses his practice in the areas of business litigation, insurance law (primarily coverage and bad faith) and professionals (design professionals and brokers). He represents a diverse clientele, including large businesses, professionals and individuals. Mr. Murphy has handled all phases of litigation, from claim investigation, commencing litigation, discovery, motions for summary judgment, mediation and trial. He routinely authors featured articles for the firm's Insurance Coverage Team's E-Newsletter.

Survey of Tort Law and Workers' Compensation Cases

Ambiguous Consent Form Coupled with Other Evidence Precludes Finding of Apparent Agency as a Matter of Law

In this medical negligence action, the plaintiff appealed an order granting summary judgment in favor of the defendant hospital on the issue of apparent agency. During a delivery of twin children, the second twin sustained serious injuries due to a compressed umbilical cord. The plaintiff mother sued individually and on behalf of her child.

The defendant hospital relied on a consent for treatment form in 8-point font that identified the hospital physicians as independent contractors, not employees or agents of the hospital. The plaintiff signed 13 individual consent to treatment forms with that language. The plaintiff argued that the paragraph was placed within a two-page document that consisted of 16 paragraphs and that a patient reading the title of the form would not have any notice of the independent contractor provision. The plaintiff further argued that obstetricians were not specifically listed, whereas other specialists such as radiologists were identified. The plaintiff testified that she arrived at the hospital in labor with contractions and thought that she was signing a consent form in case the physician identified had to deliver her children.

In applying the *Gilbert* elements, the appellate court first noted that a signed consent form is not dispositive of the first two—holding out—elements. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511 (1993). Further, the appellate court held that the consent form used in this case was distinguishable from the unambiguous consent form in *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558 and *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081 (1st Dist. 2009). Further, the doctor's office was located in the hospital's building and the hospital's website advertised the doctor. The ambiguous independent contractor disclosure coupled with additional evidence presented by the plaintiff precluded summary judgment on the holding out elements of apparent agency.

The appellate court went on to conclude that the plaintiff justifiably relied on the hospital to provide treatment, even though her OB/GYN practiced there, as she reviewed the hospital website, which advertised specialized services in the event of delivery complications. Thus, the appellate court reversed summary judgment and remanded to allow the jury to decide the issue of apparent agency.

Williams v. Tissier, 2019 IL App (5th) 180046.

Property Owners Not Liable for Fatal Automobile Accident Because Impaired Driver Was Not an Agent or Acting in Concert with Owners

In this automobile accident personal injury accident, the appellate court considered whether the estate of a deceased individual could pursue a wrongful death and survival action against owners of the property where an impaired driver had been just prior to the accident. The vehicle driver had arrived on the property uninvited, volunteered to unload grain while on the property, and stayed for an hour or two to drink beer and socialize. The trial court granted summary judgment because the plaintiff failed to establish agency or in-concert liability.

The appellate court relied on facts establishing that the ranch was not operated as a business, the defendants did not ask the vehicle driver to help at the ranch, the vehicle driver was not compensated by the defendants, and the vehicle driver was free to come and go as he pleased on the evening of the accident. Even though a witness testified that the vehicle driver had an employment relationship with the defendants, that assertion was unsupported by facts and did not preclude summary judgments for the defendants.

The appellate court noted that even if an agency relationship did exist, the vehicle driver would not have been acting within the scope of that relationship at the time of the accident. And the appellate court declined to allow the plaintiff to proceed on an in-concert liability claim, as the defendant did not encourage or substantially assist the vehicle driver in operating his vehicle in an impaired state where the defendant merely allowed the vehicle driver to drink beer from a cooler.

Bowyer as Next Friend of Eskra v. Adono, 2020 IL App (3d) 180685.

Plaintiff's Action Survives the Dead-Man's Act Because the Deceased Defendant Gave a Discovery Deposition and Affirmatively Introduced Evidence of the Accident

In this personal injury action arising from a rear-end automobile accident, the trial court granted summary judgment for the deceased defendant based on the Dead-Man's Act. The trial court did not consider either the deceased defendant's discovery deposition transcript or the plaintiff's discovery deposition transcript, and it concluded that the officer's testimony was insufficient to prove liability.

Importantly, the defendant had attached the decedent's full discovery deposition transcript to the motion for summary judgment, which the appellate court held resulted in a waiver of the protections of the Dead-Man's Act. After the Dead-Man's Act protection was waived, the plaintiff should have been permitted to attach the plaintiff's discovery deposition transcript to be considered as evidence of liability. The appellate court also concluded that, waiver aside, the deceased defendant's discovery deposition transcript was admissible to the same extent as any other admission, pursuant to Illinois Supreme Court Rule 212(a). Admission of the deceased defendant's testimony was necessary in order to do substantial justice. After considering the testimony of both the plaintiff and the deceased defendant, the appellate court concluded that the trial court erred in granting summary judgment.

Eyster v. Conrad, 2020 IL App (5th) 180261.

Property Owner Cannot Be Held Liable for Toilet Paper Roll that Fell from Atop a Bathroom Stall

The plaintiff, a patron who used a truck stop restroom, was injured while using a handicapped bathroom stall when a roll of industrial-sized toilet paper fell from the top of the stall onto her head. She had no idea how the roll got there or how long it had been present. A jury awarded her damages from the defendant property owner and the trial court denied the defendant's motion for judgment notwithstanding the verdict.

The appellate court reversed the jury verdict and remanded with instructions to enter judgment notwithstanding the verdict for the defendant. The appellate court reasoned that for a duty to exist, an injury must be objectively foreseeable, not the result of unusual or unexpected circumstances. All witnesses who testified agreed that this condition had not been present in the years prior to the accident. Because a prankster balancing toilet paper on top of a stall to booby trap the entryway was not objectively foreseeable, no duty was owed by the property owner. Additionally, the doctrine of *res ipsa loquitur* did not apply because no duty was owed. While *res ipsa loquitur* can be used as a type of circumstantial evidence, it does not support recovery absent an independent legal duty.

Pearson v. Pilot Travel Centers, LLC, 2020 IL App (5th) 180505, *appeal denied*, 154 N.E.3d 764 (2020).

Appellate Court Provides Guidance on Contesting Claimed Medical Bills

In *Verci v. High*, the appellate court analyzed what evidence could be presented to challenge more than $1,000,000 in medical expenses, including approximately 80% from a single physician and entities related to the physician. The trial court prohibited the defendants from cross-examining the physician about the cash value he advertised for the medical care provided, but the defendants' expert was permitted to opine about the reasonable value of medical services that the plaintiff received.

The appellate court held that the trial court erred in prohibiting the defendants from cross-examining the plaintiff's physician about the cash prices that his medical entities advertised for their services. The charges claimed were 547% higher than the advertised cash prices. This type of evidence was not barred by the collateral source rule.

The defendants' expert relied primarily on the FAIR Health Database to opine that the reasonable and customary total for the services provided was approximately $148,118.00. The information contained therein was not evidence of what other area providers charged for similar services because the data came from unknown numbers of insurance companies, not healthcare providers. More importantly, the databases were incomplete and used to determine reimbursement rates rather than the reasonableness of provider charges.

The appellate court further reasoned that the FAIR Health Database does not include information about amounts charged to uninsured individuals; thus, it was not a true representation of what medical providers charge. The appellate court explained that expert witnesses are not allowed to testify that a providers' medical charges are unreasonable based upon reimbursement rates, as reimbursement rates are irrelevant and violate the collateral source rule.

Verci v. High, 2019 IL App (3d) 190106-B.

— Continued on next page

Dispositive Motion Deadline Prior to Expert Discovery Leads to Reversal of Summary Judgment in Medical Malpractice Case

The court in *Guo v. Kamal* reversed the grant of summary judgment in a medical malpractice case brought by the estate of a deceased individual who was brought to the defendant's emergency room with a headache and high blood pressure, was discharged after one doctor read a CT scan to be normal, and died three days later of an alleged brain hemorrhage. During those three days, another doctor at the hospital reviewed the CT scan and identified signs of a brain bleed. The patient was informed of this finding, went to the emergency room of a second hospital, and was discharged from the second hospital without treatment after a series of tests did not diagnose a brain bleed. The first hospital sent records to the second hospital, but the images themselves were not provided.

The trial court granted summary judgment to the first hospital and its radiologist finding that the misdiagnosis at the second hospital broke the chain of causation. The appellate court disagreed and held that questions of fact precluded summary judgment. Rather than a mere condition that made the accident possible, the alleged negligence of the first hospital substantially increased the risk of harm by depriving the patient of a definitive opportunity for treatment that could have alleviated the medical condition that caused her death.

Notably, the appellate court pointed out that setting a dispositive motion deadline prior to controlled expert witness disclosures was problematic. Although no objection was made by the parties, the appellate court found that the completion of expert discovery is "critical to the issue of proximate cause" and stated that irrespective of a dispositive motion deadline placed prior to expert discovery, the parties may raise the issue of lack of proximate cause after expert discovery where the argument is factually supported.

Shicheng Guo v. Kamal, 2020 IL App (1st) 190090.

Voluntary Undertaking Claim Denied Where the Defendant Did Not Place a Patron in a Worse Position After Ejection From the Bar

In *Vogt v. Round Robin Enterprises, Inc.*, the Illinois Appellate Court Fourth District affirmed the dismissal of a complaint which alleged that the defendant had voluntarily undertaken a duty to prevent harm to an intoxicated patron who died following his ejection from the bar. The defendant demanded a bill of particulars to ascertain the specifics of when, where, and how the deceased died. The trial court denied that demand. However, the trial court subsequently granted dismissal with prejudice pursuant to section 2-615 of the Code of Civil Procedure.

The appellate court held that the defendant did not place the decedent in a worse position upon his ejection and that the defendant did not undertake to do anything for the deceased after he was asked to leave. Because the defendant owed no duty to get the deceased home safely, the case was distinguishable from *Simmons v. Homatas*, 236 Ill. 2d 459 (2010), where a patron was placed in a car and drove; *Wakulich v. Mraz*, 203 Ill. 2d 223 (2003), where the defendant provided care to the intoxicated person; and *Harris v. Gower, Inc.*, 153 Ill. App. 3d 1035 (5th Dist. 1987), where the patron was placed in a cold car where he froze to death. In this case, the undertaking ended when the defendant escorted the decedent off the property. Accordingly, the appellate court affirmed the trial court's grant of dismissal with prejudice.

Vogt v. Round Robin Enterprises, Inc., 2020 IL App (4th) 190294.

Common Carrier Owes No Duty to Protect Severely Intoxicated Passenger From Death That Was Not Caused By the Hazards of Travel

In *Daniel v. Chicago Transit Authority*, the Illinois Appellate Court First District held that the duty owed to a passenger of a common carrier is not to increase the danger to the intoxicated passenger. This ruling mirrors the duty owed by non-common carriers as set forth in the recent decision of *Vogt v. Round Robin Enterprises, Inc.*, 2020 IL App (4th) 190294.

In this case, a passenger entered the bus intoxicated, threw a bottle out of the door of the bus, and then sat down in the rear of the bus. Upon discovering the passenger, who did not exit at the end of the route, the bus driver called for assistance from the police. A short time later, the police arrived and found that the passenger was dead. The trial court dismissed the case finding no duty, and the appellate court affirmed.

The appellate court relied on video of the passenger, as the plaintiff failed to argue against its admissibility on appeal after contesting admissibility before the trial court. The appellate court noted that it was not the first appellate court to consider video evidence in support of a section 2-619 motion to dismiss. The defendant argued that the video was admissible both because of the silent witness rule described in *People v. Taylor*, 2011 IL 110067, and because an affidavit authenticated the video.

The appellate court noted that the intoxication of a passenger does not create a duty requiring the common carrier to stand guard over the passenger. However, if a common carrier becomes aware that a passenger is intoxicated, then it is legally required to exercise care to prevent exposing the passenger to a risk of unreasonable harm. But here, the hazards of travel did not cause the decedent's death. Rather, the decedent died of prolonged alcohol toxicity and the fact that the death occurred on a bus was a mere coincidence. The common carrier was not required to exercise continual oversight or call an ambulance every time that a passenger was intoxicated.

Daniel v. Chicago Transit Auth., 2020 IL App (1st) 190479.

Railroad Conductor Denied Recovery for Unforeseeable Fall Before Locomotive Departed

After the plaintiff slipped and fell while preparing a locomotive for departure, he brought a claim pursuant the Federal Employers' Liability Act and the Locomotive Inspection Act. The defendant moved for summary judgment on the basis that the locomotive was not "in use" for purposes of the Locomotive Inspection Act (LIA) and failed to establish the foreseeability element of Federal Employers' Liability Act (FELA).

For the LIA to apply, the plaintiff must show that the locomotive was in use on the defendant's line at the time of the alleged incident. A locomotive is "in use" if it is assembled and the crew has completed pre-departure inspections. The district court found that the locomotive was stationary on a sidetrack with part of a train needing to be assembled, and for these reasons was not "in use." The Court of Appeals for the Seventh Circuit agreed and affirmed the district court's grant of summary judgment for the defendant because the locomotive was not in use.

The plaintiff further argued that even if defendant was entitled to summary judgment on the LIA claim, he could still pursue the FELA claims because the oil was not cleaned. The Seventh Circuit found that the district court properly decided that the plaintiff failed to show that his injury was foreseeable. The plaintiff did not claim that the defendant had notice of the slick spot, and there also was no evidence that an earlier inspection would have cured the hazard. Based on these findings, the Seventh Circuit held that the defendant was entitled to summary judgment.

LeDure v. Union Pacific R.R. Co., 962 F.3d 907 (7th Cir. 2020).

Craft Brewery Prevails in Lawsuit Filed By Patron Who Slipped on Unknown Liquid

In *Tafoya-Cruz v. Temperance Beer Co., LLC*, the plaintiff sued a craft brewery and the architectural firm that designed the premises and alleged that the defendants negligently caused him to fall. Notably, the plaintiff had been drinking both before and during his visit to the brewery and was unable to describe the liquid that caused his fall. The defendant brewery moved for summary judgment and argued that it did not have constructive notice of the wet floor.

The appellate court focused on the plaintiff's deposition testimony. Specifically, the plaintiff testified that he did not see the liquid before slipping, could not identify the type of liquid on the floor or describe it with specificity, and did not know how long it was present prior to the fall. As the plaintiff failed to present critical testimony to establish whether the liquid was present for one minute, one hour, or somewhere in between, he failed to establish constructive notice. Even drawing all reasonable inferences in the plaintiff's favor, the evidentiary facts lacked sufficient information to establish notice, so summary judgment for the defendant properly entered.

The appellate court also held that the plaintiff's motion to reconsider was properly denied because he sought to advance an entirely new argument in the motion to reconsider. The plaintiff argued in his motion to reconsider that the defendant brewery had actual knowledge of recurring incidences of water dripping or splashing on the floor. The appellate court echoed the trial court's comment that the motion to reconsider appeared to be an entirely new motion and accordingly deemed the argument waived on appeal.

Tafoya-Cruz v. Temperance Beer Co., LLC, 2020 IL App (1st) 190606.

Homeowner Not Liable for Negligence of a Volunteer Independent Contractor Where the Deliberate Encounter Exception Does Not Apply

In *Frieden v. Bott*, the plaintiff worker brought a negligence action in the Circuit Court of Champaign County against a homeowner for back injuries that he allegedly incurred after falling from the homeowner's roof. Bott had planned a roof replacement project for his home and enlisted the help of his family members, including his brother-in-law, Frieden. It was undisputed that Frieden worked on a voluntary basis at the direction of Bott. In granting summary

— Continued on next page

judgment, the circuit court concluded that Bott owed no duty to Frieden, an independent contractor, and Frieden could not recover under a premises liability theory because falling from a roof was an open and obvious danger. The plaintiff appealed.

The Illinois Appellate Court Fourth District rejected Frieden's argument that the homeowner owed him a duty to exercise reasonable care and that the deliberate encounter exception to the open and obvious rule applied. First, in its analysis, the appellate court reiterated the general rule that principals are not liable for the negligence of independent contractors. An exception to this rule exists under section 414 of the Restatement (Second) of Torts, but section 414 did not apply because Bott did not control the incidentals of Frieden's work.

The appellate court found the fact that Frieden was a volunteer to be compelling. As a volunteer, the level of control that could be exercised over him was even less than that which could be exercised over a paid worker. The appellate court stated: "we know of no case in which section 414 has been applied to a case involving a volunteer." Therefore, the appellate court declined to find the existence of a legal duty.

Second, because the plaintiff was a volunteer and therefore under no compulsion, economic or otherwise, to encounter the obvious danger of being on the roof, the deliberate encounter exception to the open and obvious doctrine did not apply. Generally, a landowner has no duty to protect invitees from open and obvious dangers. "The deliberate encounter exception applies when the possessor of land has reason to expect that an invitee or licensee will proceed to encounter a known or obvious danger because a reasonable person in plaintiff's position would do so." Although there need not be an economic compulsion to encounter the danger, there nonetheless must be some driving force that will cause the person to encounter the danger at issue. The appellate court found that this case does not present a situation in which Frieden would gain any advantage by going on Bott's roof; therefore, the deliberate encounter exception did not apply. The trial court judgment was affirmed.

Frieden v. Bott, 2020 IL App (4th) 190232.

ATV Passenger Injured on Land of Another Is Barred from Bringing Premises Liability Action Absent Evidence of Willful and Malicious Conduct

In *Jones v. Steck*, the plaintiff, an all-terrain vehicle (ATV) passenger, brought a negligence action in the Circuit Court of Henderson County against the defendants, the driver of the ATV, and the owners and maintainers of the levee on which the ATV crashed. The trial court granted the owners' motion for summary judgment on the grounds that section 11-1427(g) of the Illinois Vehicle Code (ATV Statute) precluded premises liability. Jones appealed.

The Illinois Appellate Court Third District analyzed the ATV Statute, which limits premises liability for ATV injuries. The ATV Statute states that property owners, lessees, and occupants owe no duty of care to keep their premises safe "for entry or use by others for use by an ATV." The term "use by others," is crucial, according to the appellate court, and means use by someone other than an owner, lessee, or occupant. The appellate court reasoned that use of an ATV is inherently dangerous, and the plain language of the ATV Statue "clearly implies, if not expressly states, a legislative intent to impose a different standard of care and bar ATV users from bringing negligence actions against landowners, except in cases of willful and malicious conduct."

The appellate court rejected Jones' argument that the ATV Statute only applies to trespassers, as this construction would render most of the language in the statute superfluous and meaningless. Therefore, the appellate court held that because Jones was injured while riding on the ATV and she was not an owner, lessee or occupant of the levee, her premises liability claims were barred under the ATV Statute, and summary judgment for defendants was affirmed.

Jones v. Steck, 2020 IL App (3d) 180548.

Defense Verdict Upheld Because the Defendant Doctor Attending to Juror Who Became Ill During Closing Argument was Not Grounds for a Mistrial

In this medical malpractice action, the jury returned a verdict in favor of a defendant doctor who performed spine surgery and provided follow-up care to a patient who subsequently suffered from a cerebral spine fluid leak, a known potential complication of the surgery. Remarkably, during plaintiffs' closing argument, a juror fell ill, went to the jury room, and was reportedly unresponsive and not breathing. Defense counsel and a defendant physician went to the jury room to provide aid and the juror stabilized. After the ill juror was replaced by an alternate juror, the case resumed, and the next day, the jury returned a verdict for the defendant doctor.

The trial court denied the plaintiffs' motion for a mistrial and denied the plaintiffs' post-trial motion. The appellate court reviewed the record and concluded that the plaintiffs' conduct during the closing argument, including the fact that there was no objection to the ill juror remaining on the jury, suggests that the events were not

chaotic or extraordinary. The plaintiffs also did not establish that the verdict was the result of actual prejudice. Thus, the trial court acted within its discretion by declining to disturb the defense verdict.

Tirado v. Slavin, 2019 IL App (1st) 181705.

Wrongful Death Action Based on Alleged Injury to Fetus May Proceed Despite Actual Cause of Death Being a Lawful Abortion

In *Thomas v. Khoury*, the Illinois Appellate Court First District considered whether section 2.2 of the Wrongful Death Act, 740 ILCS 180/2.2, precludes an action against physicians where the physicians' conduct allegedly caused a fetus to become non-viable and the non-viable fetus died due to a lawful abortion performed with the requisite consent. The trial court denied the defendants' motion to dismiss and certified a question on the interpretation of section 2.2 to the appellate court.

Section 2.2 addresses when a wrongful death action may be maintained following the death of a fetus. The second paragraph of section 2.2 bars a wrongful death action against a physician where the wrongful death of the fetus was caused by an abortion permitted by law and performed with the requisite consent. The third paragraph of section 2.2 bars a wrongful death action against a physician where the physician did not know—and had no medical reason to know—that the mother of the fetus was pregnant. These paragraphs were noted to be independent limitations on causes of action against a physician.

The appellate court began by observing that interpretation of statutes in derogation of the common law, such as the Wrongful Death Act, must be limited to the express language of the statute or necessary implications from that express language. In finding that the third paragraph did not bar the action, the appellate court relied on three cases that each involved a stillborn fetus. The defendants argued that a closely analogous appellate court opinion decided that a woman who voluntarily terminated her pregnancy by abortion could not maintain a wrongful death action.

The appellate court also concluded that the second paragraph of section 2.2 did not bar an action because the decision to abort the fetus arose out of the defendants' alleged negligence, even though the actual cause of death was the abortion. The Illinois Supreme Court subsequently allowed a petition for leave to appeal, which appeal remains pending as of the date of this publication.

Thomas v. Khoury, 2020 IL App (1st) 191052.

Expert Causation and Permanency Testimony Lacks Reliability Where Expert Did Not Examine Patient or Review Recent Medical Records

In this medical malpractice action, the plaintiff was injured when a physician allegedly perforated her esophagus during an endoscopy. The plaintiff relied on an expert physician to testify that her injuries were permanent due to a subsequent thoracotomy performed to repair the perforation, and that post-surgical bowel problems were caused by the surgery and permanent.

As to the causation and permanency opinion, the appellate court observed that the plaintiff's expert was a gastroenterologist, not a cardiothoracic surgeon, and that the expert does not perform thoracotomies. The trial court excluded the proffered expert opinion on causation and permanency that was based on a telephone conversation the night before the expert's deposition. The appellate court affirmed. Significantly, the expert never examined the plaintiff and did not review any recent medical records regarding the subject of the permanency opinion. Although the expert couched his opinion as a "might or could" possibility, the opinion was inadmissible because it was not based on facts reasonably relied on by experts in the field.

Further, the appellate court held that the trial court properly excluded a courtroom demonstration that it found was not substantially similar to the conditions and circumstances of the case. Specifically, the trial court conclude that the demonstration, which the court observed outside the presence of the jury, involved a use of force that would not occur during the actual procedure and made the procedure appear to be deceptively easy. This ruling, to exclude a dissimilar demonstration, was a proper exercise of discretion. As the two claimed errors in the plaintiff's post-trial motion did not amount to errors at all, the appellate court affirmed the jury verdict in favor of the defendants.

Ackerman v. Yapp, 2020 IL App (1st) 182708.

— Continued on next page

WORKERS' COMPENSATION

Kenneth F. Werts
R. Mark Cosimini

COVERAGE AND COMPENSABILITY

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Slip and Fall Injury was Not Compensable Where Parking Lot was Not Owned or Controlled by Employer

Claimant sustained injuries when he slipped and fell on an icy patch of a parking lot near his employer's restaurant. The arbitrator denied the claimant's request for benefits, finding that claimant failed to prove he sustained an accident that arose out of and in the course of his employment with the employer. The Commission reversed, finding the employer provided the parking lot for its employees and that the accidental injury, therefore, was within the course and scope of the employment. Citing *Maxim's of Illinois, Inc. v. Industrial Comm'n*, 35 Ill. 2d 601, 604, 221 N.E.2d 281 (1966), the appellate court indicated "[t]he decisive issue in parking lot cases usually is whether or not the lot is owned by the employer, or controlled by the employer, or is a route required by the employer." Here, the uncontroverted evidence established that although the employer had a long-standing agreement with the owner of the nearby hardware store that allowed the employer's employees to park in 13 specific parking spaces from January through October (the employee's slip and fall occurred during February), those parking spaces were also open to the general public, and there were no signs indicating the spots were reserved for the employer's employees. It was undisputed that the employer did not own the hardware store parking lot and the evidence also showed that the employer did not control the parking lot. The Commission erred, therefore, in finding the accidental fall occurred within the course and scope of the employment.

Walker Bros. v. Illinois Workers' Comp. Comm'n, 2019 IL App (1st) 181519WC.

Claimant's Injuries Sustained Off the Employer's Premises as She Sought to Pick Up Lunch Did Not Arise Out of and in the Course of the Employment

The appellate court held the Commission's decision that the claimant was not a traveling employee at the time of her injuries and thus her injuries did not arise out of and in the course of her employment was not contrary to law or against the manifest weight of the evidence where the Commission found that claimant's trip to procure lunch at a restaurant—during which she sustained her injuries—was made for personal reasons and was not incidental to her employment. The court did not agree with the claimant's contention that her injuries were compensable under the personal comfort doctrine. The court's review of case law indicated that injuries incurred away from the employer's premises and while not engaged in employment-related activities were not compensable under the doctrine.

Harris-Williams v. Illinois Workers' Comp. Comm'n, 2019 IL App (5th) 190042WC-U.

Commission's Decision was Reversed Where the Appellate Court Found it Utilized an Improper Risk Analysis

Claimant, a 32-year-old with no prior back injuries or pain, started employment with the employer as a general laborer in August 2014. The claimant worked 7 a.m. to 5:30 p.m. mowing lawns, trimming trees, lifting rock and stone, and, occasionally, lifting and moving heavy machinery and trees. On August 25, 2014, the claimant and his supervisor lifted and transported five flagstones, each weighing approximately 150 pounds. Shortly after completing this work, the claimant felt "a real light [pain] in [his] lower back." The claimant did not immediately seek medical care because he believed the pain would subside and he did not think it was "an emergency." The claimant worked the remainder of the week and did not mention his low back pain to management or his coworkers.

On September 2, 2014, the claimant informed the owner of his employer that he was unable to work because of an August 29, 2014 altercation at a bar. When the claimant returned to work on September 4, 2014, the claimant mowed lawns and operated a weed trimmer and blower. The claimant testified that on September 5, 2014, he felt a popping sensation in his lower back when he bent over to pick up a six-liter, 30-pound gas can. Although the claimant

clarified that he had not actually lifted the can, he explained that he had been unable to straighten from the bent-over position for approximately 15 minutes because of pain. The claimant had not previously felt pain in his back or left testicle prior to this incident.

Following a hearing, an arbitrator determined that the claimant had not sustained an injury that arose out of and in the course of employment with the employer on August 25, 2014, and that the claimant had failed to provide timely notice. The arbitrator also found that the claimant's injury from the September 5, 2014 accident was not due to a risk distinctly associated with his employment. The arbitrator applied a neutral risk analysis, finding that the evidence was deficient to establish that the claimant was exposed to a greater risk, both qualitatively and quantitatively, than the general public. The arbitrator concluded that the evidence was insufficient to establish that the injury arose out of and in the course of his employment. The Commission affirmed the arbitrator's decision, finding that "the Arbitrator properly applied the neutral risk analysis and found the evidence to establish accident deficient under either the qualitative or quantitative analysis" pertaining to the September 5, 2014, accident. The circuit court confirmed the Commission's decision.

The appellate court observed that, as part of its decision, the Commission categorized the risk of injury to which claimant was exposed as employment, neutral, or personal when he bent over or forward with the intention of lifting a gas can. In categorizing claimant's risk, however, the Commission utilized an improper analysis that resulted in the automatic exclusion of his risk of injury from the employment-risk category without reference to his employment or his specific work duties. As a result, the Commission failed to determine the connection, or lack thereof, between the claimant's injury and his employment duties. This was error, said the court. Here, the arbitrator concluded that claimant was not exposed to an employment-related risk because "the act of bending over or bending forward is a movement consistent with normal daily activity." The Commission affirmed and adopted the arbitrator's decision.

The appellate court stressed that here, both the arbitration and Commission decisions reflected adherence to the *Adcock* analysis [*Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC, ¶ 39, 395 Ill. Dec. 401, 38 N.E.3d 587]. That neutral-risk definition had been rejected in *McAllister v. Illinois Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, ¶ 38, 430 Ill. Dec. 434, 126 N.E.3d 522. In other words, the Commission automatically excluded the claimant's risk of injury from the employment-risk category because the activity resulting in injury involved a common bodily movement. The Commission's decision reflected that, because it applied an *Adcock* analysis, it did not consider the nature of the claimant's employment and his required work duties before finding that the claimant's injury stemmed from a neutral risk. Given this error, the case was remanded in order that the Commission could apply the proper risk analysis.

It should be noted that the *McAllister* case here relied upon by the appellate court was appealed to the Illinois Supreme Court and was reversed.

Moreno v. Illinois Workers' Comp. Comm'n, 2020 IL App (2d) 170736WC-U.

Supreme Court Reverses Denial of Benefits to Claimant Who Sustained Injuries While Performing His Job Duties Despite the Mechanism of Injury Being a Routine Activity of Daily Living

The claimant worked as a sous-chef. His job duties included organizing the restaurant's walk-in cooler. While assisting a coworker to locate a misplaced pan of carrots, the claimant was kneeling down on both knees. When he stood up from the kneeling position, his knee popped and "locked up." The claimant was diagnosed with a meniscus tear and underwent surgery on his knee.

After an Arbitrator awarded benefits, the Commission reversed finding the claimant's injury did not arise out of his employment because he was subjected to a neutral risk which had no particular employment or personal characteristics. The Commission determined the claimant had not established that he was exposed to the neutral risk to a greater degree than the general public. The Circuit Court confirmed the denial of benefits, and the case was appealed to the Appellate Court. A unanimous panel agreed with the Commission's denial of benefits based upon the claimant not being injured due to an employment-related risk. A majority of the Appellate Court determined that even though the claimant was performing an act he might reasonably be expected to perform incident to his employment, the case was not compensable because the risk of standing from a kneeling position was not distinctly related to his employment. Two justices wrote concurring opinions citing to *Adcock v. Illinois Workers' Compensation Comm'n,* 2015 IL App (2d) 130884WC for the proposition that a claimant who was injured while performing an everyday activity could only obtain compensation if he could establish the job duties required him to engage in that activity to a greater degree than the general public. The Appellate Court certified the case for review by the Supreme Court of Illinois.

— Continued on next page

The Supreme Court reversed the Appellate Court's denial of benefits. The Court relied upon the *Caterpillar* case which described risks distinctly associated with an employee's employment if among other things the employee was engaged in an act which might reasonably be expected to be performed incident to his or her assigned duties. Because the claimant was assisting a coworker as would be expected by the employer, the Supreme Court held the Commission's denial of benefits was contrary to the manifest weight of the evidence.

The Court also discussed the issue of injuries caused by common bodily movements. To the extent *Adcock* requires claims involving common bodily movements and everyday activities to be analyzed under a neutral-risk doctrine and benefits should be allowed only if a claimant can establish an exposure to a risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, it is overruled.

McAllister v. Illinois Workers' Compensation Comm'n, 2020 IL 124848.

Where there was a Conflict in the Evidence as to Why a Traveling Employee Returned to His Truck, it was for the Commission to Find the Facts; the Circuit Court's Decision to Review the Case on *de novo* Basis was Erroneous

The claimant was employed as an over-the-road driver for the employer. His typical trip would begin on Sunday or Monday, with the claimant returning home on Friday or Saturday. The route began and ended in Danville and he drove throughout all the states east of the Mississippi. When the claimant returned after his week of work, he parked the truck on a dead-end street about three miles from his home. After he parked the truck, his wife would pick him up. The claimant stated that the employer was aware of where he parked his truck when he was off duty. The claimant also testified that he was responsible for completing paperwork, such as logbooks and trip sheets, that the trip sheets were to be completed at the end of every trip when the load was delivered, and that the trip sheets had to be turned in by midnight on Saturday night or else he would not get paid. He turned in his trip sheets at the closest Pilot Truck Stop because it had a fax machine.

The claimant testified, that on Friday, April 16, 2010, he returned home to Danville between 5:00 p.m. and 6:00 p.m. and parked the truck at his usual spot on the dead-end street. When he arrived, his wife was waiting for him. The claimant testified that he exited the truck, completed his vehicle inspection, and got in the car wife his wife. His work schedule indicated his next workday would be the following Monday. Upon leaving with his wife, they went to dinner and then went shopping to look around and stretch his legs. After the shopping trip, but before returning home, the claimant returned to his truck at about 9:00 p.m. to retrieve his personal belongings and fill out his trip sheets. He stated that he completed trip sheets for three trips that were completed earlier in the week, not for the load he was currently hauling when he arrived home, as he was in the middle of a trip. It took him approximately 30 to 40 minutes to complete his paperwork and his wife waited in the car. There was some variance in the facts at issue here; the employer contended the claimant only reported that he returned to the truck to retrieve personal belongings. The claimant testified that as he exited the truck, his foot slipped off the step and he lost his balance and fell. The claimant testified that he attempted to hold on to the truck with his right hand to prevent himself from falling but was unsuccessful and landed on his left hip and left elbow. Upon falling, he immediately felt pain in his ribs and left shoulder and was unable to move his left arm.

The claimant subsequently testified that he did not immediately report the accident to his employer because he already had a couple of prior workers' compensation cases. He advised the emergency room to bill his group health insurance carrier. The claimant eventually notified the employer of this accident but could not recall the exact date. He testified that he notified the employer after he received a letter from his health insurance carrier on June 7, 2010, denying payment of his medical bills. The arbitrator concluded that the claimant did not sustain an accidental injury arising out of and in the course of his employment with the employer on April 16, 2010. The Commission affirmed and adopted the arbitrator's decision. The circuit court, stating it conducted *de novo* review, found that the claimant's injury arose out of and in the course of his employment with the employer because it was reasonable and foreseeable that he would return to the company-owned truck to gather his personal belongings for the weekend. The court reversed the Commission's decision on the issue of accident and remanded the case back to the Commission for further proceedings consistent with that ruling. The Commission subsequently found, in relevant part, that the claimant sustained an accidental injury arising out of and in the course of his employment with the employer. The circuit court confirmed, and the employer appealed. Initially, the appellate court said it was evident that the claimant qualified as a traveling employee. The court noted that there was conflicting evidence as to the

reason the claimant returned to his truck three to four hours after he parked, completed his vehicle inspection, then went to dinner and shopped with his wife. Thus, it is clear that a dispute of facts and inferences was presented to the Commission, rendering the circuit court's *de novo* review erroneous. The Commission's decision on questions of fact was reviewed under the manifest-weight standard. Here, the claimant's own testimony established that he was not in the course of his employment when the accident occurred. At the time of the accident, he returned to his truck to obtain his personal belongings. He was not scheduled for his next shift until Monday. Although there was disputed evidence as to why the claimant returned to his truck after three or four hours, the Commission found the claimant's claim that he returned to his truck to complete his trip sheets to not be credible. It was the Commission's function to judge the credibility of the witnesses and resolve the conflicting evidence. The circuit court's decision confirming the Commission's decision on remand was accordingly reversed.

Transport Am. v. Illinois Workers' Comp. Comm'n, 2019 IL App (4th) 180709WC-U.

Lack of Credibility Results in Denial of Accidental Injury Claim

The claimant was employed by A&D as a truck driver for approximately five years prior to the events giving rise to this claim. According to the claimant, as he was pushing a loaded dolly down the ramp, a wheel came off, causing him to fall off the ramp onto the street about four feet below. He stated that his left knee struck the ground first and he came to rest on his side. The claimant described experiencing pain in his left knee that he characterized as a 9 on a scale of 10. The claimant completed the remainder of his deliveries before returning to A&D's distribution center in Chicago. The claimant testified that, on the following day, he could not bend his left knee. Nevertheless, he was able to work. The claimant first sought medical care for his left knee on March 29, 2016. He went to the emergency room at Good Samaritan Hospital, complaining of bilateral knee pain and left knee swelling. The claimant was diagnosed with a contusion of the knee and prescribed icing, Tylenol, and Ibuprofen. He was advised to follow up with a physician. According to the claimant, he could not schedule a follow-up appointment because he was unable to obtain a "work comp number" from A&D. In subsequent months, claimant saw numerous health care professionals for his symptoms. According to the claimant, he has not worked since June 14, 2016, when his physician, Dr. Bayran, restricted him from working. The claimant testified that he was unable to complete his deliveries on April 30, 2016, due to left knee pain. He discontinued his delivery route and returned to A&D's facility. After that date, the claimant was not put on any A&D work schedule. He testified that he "guessed" that he had been fired but denied that he was ever told that he was fired.

The arbitrator found that the claimant failed to prove (1) that he sustained accidental injuries on March 17, 2016, that arose out of and in the course of his employment with A&D, or (2) that he provided A&D with timely notice of an accident on March 17, 2016. Consequently, the arbitrator did not award the claimant any benefits pursuant to the Act. In so ruling, the arbitrator found that the claimant's testimony was not credible. He noted the discrepancies in the reported accident dates contained in the claimant's medical records and the fact that the claimant first sought medical treatment on March 29, 2016, and sought no further treatment until after he was terminated on April 30, 2016.

The court noted that although the record supported the conclusion that the claimant told A&D's dispatcher on March 17, 2016, that he injured his left knee when he fell while working that day, the question remained whether he proved that he actually suffered an accident on that date. Although the claimant was consistent in reporting that he was injured when he fell while making a delivery while working, the discrepancies in the date of accident contained in his medical records called into question his testimony that his condition of left knee ill-being was the result of an accident on March 17, 2016. The Commission's finding that the claimant was not credible was also supported by the evidence of record relating to the extent of the claimant's claimed condition of ill-being. The claimant characterized the pain he experienced when he fell as 9 on a scale of 10. He testified that, on March 18, 2016, the day following his accident, he could not bend his left knee and that the condition became progressively worse. According to the claimant, he knew something was "really wrong" with his knee. However, the record established that he continued working his regularly scheduled workdays throughout the month of March 2016, and never sought medical treatment for his knee until March 29, 2016, 12 days after his alleged accident. During the month of April 2016, the claimant worked his regularly scheduled workdays and there was no record of his having sought any medical care for his left knee during that month. Whether the appellate court might have reached the same conclusions as the Commission was not the test

— Continued on next page

of whether the Commission's determination was supported by the manifest weight of the evidence. Rather, the appropriate test was whether there was sufficient evidence in the record to support the Commission's determination. Here, the Commission's decision was clearly supported.

Gonzalez v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 191650WC-U.

CAUSAL CONNECTION

Commission has Broad Discretion to Weigh Conflicts in Medical Evidence and Resolve the Facts as to Causation

Claimant sought benefits for injuries to his lumbar spine that he allegedly sustained on September 5, 2008, while working for the employer. On October 2, 2008, the claimant underwent an MRI, which showed mild disc degeneration at L4-L5 and L5-S1, a minimal disc bulge at L5-S1, and a mild bulge with a small central protrusion at L4-L5 with a mild narrowing of the central spinal canal. The physician recommended the claimant undergo epidural steroid injections to his back. The claimant saw multiple other physicians and medical care providers for his alleged injury. The employer contended on numerous occasions he told the physicians he had not suffered from earlier back issues. It appeared, however, that the claimant had filed a workers' compensation claim in 2002, alleging a lower back injury. The arbitrator found that, because the claimant was not truthful with his treating physicians, their opinions were based on erroneous information and were, thus, of no evidentiary weight. The arbitrator found the IME physician's opinions to be more credible because "he was not operating on incorrect information." The arbitrator found no causal connection between the claimant's current condition of ill-being and the September 5, 2008, work accident. The Commission, with one commissioner dissenting, found that the claimant did not sustain his burden of proving that his current condition of ill-being of his lumbar spine resulted from the accident on September 5, 2008. Therefore, the Commission affirmed the arbitrator's denial of compensation. The circuit court confirmed the Commission's decision.

The appellate court affirmed. noting that in as much as the IME physician's opinion was based on his examination of the claimant, the MRI and the objective diagnostic testing, it was apparent there was a sufficient factual basis to support the Commission's resolution of the conflicting medical evidence against the claimant. The appellate court stressed that it was not the fact-finder. The issue was not whether the court would have found a causal connection to the claimant's condition of ill-being and his accident. Rather, the question was whether the Commission's decision was against the manifest weight of the evidence. Here, the Commission provided its reasoning in giving greater weight to IME physician's opinion over that of the other medical professionals. Based on the court's review of the record, in its entirety, it could not say that the opposite conclusion was clearly apparent.

Triplett v. Illinois Workers' Comp. Comm'n, 2019 IL App (1st) 190647WC-U.

Commission has Broad Discretion in Weighing Medical Evidence

Claimant contended that she injured her left hip at work on January 26, 2012, as she was descending a stepladder. She missed the first step of the stepladder, and her left leg slipped on the floor and overextended, causing a labral tear in the left hip. Claimant contended that she later suffered a right hip injury that was caused by her need to overcompensate for the left hip condition. The Commission indeed found that claimant had sustained a right hip injury that arose out of and in the course of the employment. The appellate court noted that the arbitrator had found no compensable right hip injury, but also stated that if the injury of her left hip in turn caused an injury of her right hip or exacerbated a preexisting condition of her right hip, the injury or exacerbation of her right hip arose out of the course of her employment, just as the injury of her left hip did. Claimant's medical expert opined that the claimant's right hip pain and current condition were caused by the left hip injury. That her right hip did not hurt constantly was not a relevant issue, said the court. Inconstant pain was not necessarily trivial. The question for the Commission was whether any of claimant's activities was an independent intervening cause, breaking the causal connection between the workplace injury and her right hip problem. The court said the difficulty in the employer's position was that, on the one hand, it raised the possibility that occasional activities, such as dancing, a long drive, or working out with a fitness trainer might have exacerbated claimant's right hip problem; and, on the other hand, the employer dismissed, as inherently implausible, the possibility that overcompensation over the course of many months did so. In short, said the court, there was a difference of expert opinion whether claimant's right hip condition had anything to do with the work-related injury to her left hip. The Commission's determination

of factual issues, including the resolution of conflicting medical evidence, and the credibility and weight of testimony, would not be disturbed unless against the manifest weight of the evidence. Since it was not impossible for a rational trier of fact to believe the claimant's treating physician and disbelieve the employer's expert, the Commission's decision was affirmed.

Lifetouch Portrait Studios v. Illinois Workers' Comp. Comm'n, 2019 IL App (1st) 182263WC-U.

Inconsistencies in Claimant's Version of the Event, Lack of Objective Medical Evidence of Injury, and Claimant's Significant History of Sustaining Work-related Injuries Provides Sufficient Basis for Commission to Deny Injury Claim

Claimant sought benefits from his employer, alleging he sustained a work-related injury on March 2, 2015, when he slipped and twisted his back. He visited the on-site medical office, disclosed the incident to his supervisor, and went home without finishing his shift. He visited several treatment providers, including a physical therapist. Because he was still experiencing pain, he requested back surgery, which one physician performed in July 2015. Eventually, his pain improved, and he returned to work. The arbitrator found claimant had failed to prove he sustained an accident that arose out of and in the course of his employment and denied him all benefits under the Act. The arbitrator awarded the employer a credit in the amount of $15,878.57 for "other credits." On review, the Commission adopted the arbitrator's decision in full. On judicial review, the circuit court of Peoria County confirmed the Commission.

On cross-examination, without objection, claimant acknowledged multiple prior workers' compensation claims, in which he had recovered more than $250,000 in benefits. After his alleged injury while working for the employer, claimant saw the employer's senior safety and health specialist, who testified that he met with claimant the morning of the incident in the medical office, that claimant denied tripping over anything, and suggested he may have had hydraulic fluid on the bottom of his shoes. According to the specialist, claimant did not appear to be in any pain, distress, or discomfort until the nurse approached him and asked him his pain level. The specialist said he observed the area where the incident occurred, and he did not observe any ice in the area. The arbitrator found claimant's credibility to be suspect based on (1) numerous inconsistencies in claimant's version of the event, (2) the lack of objective medical evidence of any injury, and (3) claimant's "significant history of sustaining work-related injuries" and his receipt of monetary settlements. Claimant did not object to the arbitrator's consideration of these prior monetary settlements. The arbitrator denied claimant's claim.

On appeal, the court noted that it was within the exclusive purview of the Commission to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine the weight to be given to evidence, and resolve conflicts arising from the evidence. Here, the Commission found claimant's account of the details of the incident were inconsistent. The Commission found no treating provider was of the opinion, nor had any observed, that there existed any objective findings to support claimant's complaint of pain or accidental injury. Indeed, the surgeon who performed surgery on claimant admitted he had done so based wholly on claimant's subjective complaints, as he had found no objective findings during his physical or clinical examination. Lastly, the Commission found claimant's "significant history" of sustaining work-related injuries suggested his testimony was suspect. The appellate court found there was ample support for the Commission's findings.

Hamann v. Illinois Workers' Comp. Comm'n, 2020 IL App (3d) 190486WC-U.

Claimant Failed to Establish Her Fibromyalgia and Depression were Causally Related to 2006 Work-related Injury

Claimant, an accountant, sought benefits for an injury to her right hand when she tripped on a computer cord on June 1, 2006. On October 2, 2006, the claimant sought treatment from Dr. Terry Light of Loyola University. His treatment notes indicated the claimant reported falling onto her extended right wrist in June 2006. She reported swelling and pain and that she continued to have pain with wrist movement and hand numbness at night. Dr. Light diagnosed possible mild right median nerve compression. The claimant began working for Waldo Corporation in October 2006 performing light accounting work and keyboarding. The claimant testified that Waldo accommodated her right thumb issues by providing her with an ergonomic keyboard. The claimant worked at Waldo until June 30, 2008, when Waldo closed.

On August 20, 2007, the claimant fell from an escalator in a Metra station. According to the accident report generated by the Chicago fire department, the claimant had four lacerations on the

— Continued on next page

right arm, right shoulder, right side of the face, and cheek. She slid down the escalator face first on her right side. She was transported to Northwestern Memorial Hospital where it was noted she had abrasions to the right side of the face, forehead, forearm, and hand. The claimant testified that she has no memory of injuring her right hand in the Metra fall. The claimant worked for an accounting firm in Crestwood, Illinois for six weeks in July and August 2008. She testified that she quit that employment after undergoing an emergency hysterectomy on August 20, 2008. On October 2, 2008, the claimant sought treatment for pain and numbness in her right hand that she attributed to the June 1, 2006, accident. The claimant underwent a right thumb surgery and right carpal tunnel release surgery performed by Dr. Fernandez, who prescribed post-surgical physical therapy. The record established that the claimant filed a claim for bilateral carpal tunnel syndrome against Waldo, alleging a date of accident of June 30, 2008. The claimant subsequently settled her claim against Waldo on April 14, 2011, for $39,114.

On August 14, 2009, Dr. Fernandez performed a right thumb joint fusion. During a post-surgical visit on September 29, 2009, the claimant reported that her pain had decreased, and she was pleased. On January 5, 2010, the claimant reported jamming her right thumb causing the tip of the thumb to be painful all day. On September 28, 2010, the claimant presented for a surgical follow up with Dr. Fernandez. His examination notes indicate that the claimant was using a wheelchair. She reported that she used a wheelchair most of the time and had difficulty getting around. She reported difficulty with daily tasks, such as dressing, feeding herself, and typing on a computer. Dr. Fernandez noted that further treatment for her carpal tunnel would not be beneficial. On March 2, 2011, the claimant treated for depression with Dr. Yolanda Solecki, a psychiatrist. The claimant reported that her symptoms have been present for a year or longer. She subsequently was seen by multiple other health care providers. In March 2012, claimant was examined at the request of her employer by a board-certified orthopedist with a specialty in hand surgery. Claimant told the physician her right hand was "dead." The physician, however, observed no objective pathology to explain the claimant's complaints. Based on these observations, he stated with a reasonable degree of medical certainty that the claimant's current inability to work was not based on any injury to the right upper extremity. He opined that she could work as an accountant without restrictions. In March 2012, the claimant was awarded Social Security disability (SSDI) benefits.

The arbitrator found that the claimant established a causal connection between the June 1, 2006, accident and her current conditions of fibromyalgia and major depression. The Commission rejected, however, the arbitrator's finding that the claimant's fibromyalgia and depression were causally related to her employment. The Commission noted that the claimant's "lack of credibility when coupled with the medical evidence" led to the conclusions that her fibromyalgia and depression were not causally related to the June 1, 2006, accident. The appellate court affirmed, finding the claimant's current condition of ill-being did not arise out of and in the course of her employment with the employer was not against the manifest weight of the evidence. The court observed that the Commission had considered the conflicting medical evidence and gave greater weight to the physician that opined that claimant was fully employed and able to meet all physical demands immediately prior to her emergency hysterectomy. He also noted that psychological symptoms likewise began following the emergency hysterectomy. The Commission further noted that the physician "found strong evidence that [the claimant] was not providing an accurate, reliable history." There was no error.

Fogarty v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 182719WC-U.

The Commission Utilized its Broad Discretionary Responsibilities and Resolved Conflicting Medical Evidence as to Causation Against Claimant

The appellate court affirmed the circuit court's judgment confirming the Commission's decision finding that the claimant failed to prove (1) that he sustained an accidental injury arising out of and in the course of his employment or (2) that his current condition of ill-being was causally connected to a work accident and denying the claimant benefits under the Workers' Compensation Act. According to one of the examining physicians, the degeneration at C4-C5 was the source of the claimant's shoulder pain and neck pain and was not causally related to his alleged October 1, 2014 work accident, as the degeneration at C4-C5 would have occurred regardless of the claimant's work activities. It was the function of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence.

Hooten v. Illinois Workers' Comp. Comm'n, 2019 IL App (5th) 180528WC-U.

BENEFITS

AVERAGE WEEKLY WAGE

Corrections Officer's Work at Metrolink was Not "Concurrent Employment" for Purposes of Computing Average Weekly Wage

The appellate court held the Commission's decision that claimant's secondary work was not concurrent employment was not against the manifest weight of the evidence. It was undisputed that claimant, a corrections officer for the St. Clair County Sheriff's Department, sustained a work-related injury. He was also working as "a public safety officer" with Metrolink. He had performed work for Metrolink for approximately a year and a half on a consistent basis (16 to 20 hours per week). In his duties at Metrolink, he earned $16.50 per hour. His work at Metrolink was scheduled by the sheriff's department. When he performed secondary duty, claimant would wear his sheriff's department uniform, carry his regular badge, and carry the weapon issued by the sheriff's department.

The arbitrator determined that claimant's average weekly wage was $1,202.92 (based on claimant's earnings at both the Sheriff's Office and Metrolink). The Commission modified the arbitrator's decision, finding that wages earned from claimant's work at Metrolink should be excluded from the average weekly wage calculation. According to the Commission, claimant's earnings at Metrolink amounted to voluntary overtime.

The appellate court observed that 820 ILCS 305/10 (2012) provided, in pertinent part, "When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation." Thus, the court said the question was whether Metrolink was claimant's employer when he performed duty there or whether he remained in the employ of the Sheriff's Office.

The court found the Commission was justified in concluding that control remained primarily with the Sheriff's Office. Claimant testified that the Sheriff's Office scheduled his shifts, he would report arrests to the Office, he was subject to discipline by the Office, and he was ultimately terminated by only the Sheriff's Office. While there was some contrary evidence in the record (i.e., claimant had to interview with Metrolink's human-resources representative), it is not so significant that it rendered an opposite conclusion to the Commission's clearly apparent, said the court. Further, the Sheriff's Office provided the instrumentalities of claimant's duties

"When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation."

with Metrolink—specifically, his badge, gun, and uniform. The nature of the work performed at Metrolink was the sort of work the Sheriff's Office performed—policing—as opposed to Metrolink's business—transportation. Although it was true that some evidence favored claimant's position here, such as the fact that Metrolink withheld taxes and issued claimant a W2 form, it was not sufficient to render the Commission's decision contrary to the manifest weight of the evidence, particularly given that the two most important considerations (right to control and nature of work) supported the Commission's conclusion.

Beattie v. Illinois Workers' Comp. Comm'n, 2020 IL App (5th) 190041WC-U.

MEDICAL CARE

Medical Care Providers May Not Reach Workers' Compensation Settlement Proceeds

Enactment by the Illinois Legislature of the 2005 amendments to the state's Workers' Compensation Act, specifically 820 ILCS 305/8, and the enactment of a new section 8.2 did not alter the important underlying policy in Illinois—that workers' compensation benefits are beyond the reach of creditors. Accordingly, responding to a question certified to it by the Seventh Circuit Court of Appeals, the Illinois Supreme Court held that the proceeds of a workers' compensation settlement remain exempt from the claims of medical care providers who treated the illness or injury associated with that settlement.

In re Hernandez, 2020 IL 124661.

— Continued on next page

No Penalties were Appropriate for Delay in Authorizing Medical Care

While the Illinois Workers' Compensation Act provides, under some circumstances, for the imposition of penalties for the delay in paying medical expenses and other benefits, there is no statutory authority for imposing penalties for an alleged delay in authorizing medical treatment, held a state appellate court. An arbitrator found that the employer's initial refusal to authorize treatment (the decision was later reversed) had not been made in good faith and imposed a $6,900 penalty pursuant to 820 ILCS 305/19(l) "for without good and just cause failing, neglecting, refusing, and unreasonably delaying payments under section 8(a) of the Act (820 ILCS 305/8(a) (West 2016)), i.e., authorizing the surgery" [emphasis added]. In addition, the arbitrator found respondent liable for attorney fees in the amount of $1,380 pursuant to section 820 ILCS 305/16. A divided Commission reversed. The appellate court stressed that the statute spoke to delays in payment of benefits, not the delay in authorizing same. The court added that it was "not unsympathetic" to claimant's concerns, but added that it simply could not read into the statute any exceptions, limitations, or conditions that the legislature did not intend.

O'Neil v. Illinois Workers' Comp. Comm'n, 2020 IL App (2d) 190427WC.

PERMANENT TOTAL DISABILITY

Case Reversed Where Commission Failed to Consider All Elements of Odd-Lot Theory

Claimant sought workers' compensation benefits for injuries he allegedly sustained to his back and neck on November 17, 2010, while working for the employer. The arbitrator found, in relevant part, that the medical and vocational evidence presented by claimant established that he was permanently and totally disabled as a result of his work-related injuries. As such, the arbitrator awarded lifetime PTD benefits of $431.91 per week. The Commission vacated the arbitrator's award of PTD benefits, substituting in its stead a PPD award of $259.15 per week for a period of 250 weeks, representing the loss of use of 50% of the person as a whole pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (2010)). In reaching this conclusion, the Commission found that there was insufficient medical evidence to establish that claimant was permanently and totally disabled. The Commission further found that claimant did not qualify for PTD benefits under the odd-lot category because he failed to show a diligent but unsuccessful job search. The county circuit court confirmed the Commission's decision.

The appellate court noted that an employee generally fulfills the burden of establishing that he or she falls into the odd-lot category by showing a diligent but unsuccessful search for employment or by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. Here, claimant did not dispute the Commission's finding that he had not made a diligent job search. The Court noted, however, that the Commission never addressed whether claimant established that he fell into the odd-lot category by demonstrating that because of his age, training, education, experience, and condition, there are no available jobs for a person in his circumstance. While it was true that the employer sought reversal of the arbitrator's decision before the Commission on the basis that claimant failed to satisfy his burden under either prong of the odd-lot analysis, the Commission's analysis was incomplete. After finding that claimant failed to show a diligent, but unsuccessful job search, the Commission terminated its analysis and concluded that claimant did not qualify to be declared permanently and totally disabled from gainful employment under an odd-lot theory.

The Court said that was error as the Commission failed to consider the second method of establishing odd lot. Upon remand, the Commission shall make appropriate findings of fact and conclusions of law necessary to determine whether the claimant proved he was permanently and totally disabled under an odd-lot theory by demonstrating that because of his age, training, education, experience, and condition, there are no available jobs for a person in his circumstance.

Barnett v. Illinois Workers' Comp. Comm'n, 2019 IL App (4th) 180788WC-U.

TEMPORARY TOTAL DISABILITY

Commission's Decision that Injured Employee Could Return to Some Type of Work was Not Erroneous

While medical experts for the claimant and the employer agreed that the claimant could not return to her former position with the employer as a package handler, those opinions were not dispositive on the issue of whether claimant could return in any other capacity.

Here, the commission had before it evidence of a FCE conducted on January 31, 2013, which found that the claimant could perform at a light physical demand level. The commission also had evidence that, when the claimant was ordered to restrict her work activities following shoulder surgery, the employer was capable of accommodating her restrictions. Neither doctor gave a contrary opinion regarding sedentary work. Therefore, the commission's determination that the claimant was capable of returning to work was not against the manifest weight of the evidence. Moreover, claimant's inability to return to her prior position was irrelevant to the question of whether the claimant was entitled to TTD benefits. Rather, the test was whether the employee remained temporarily totally disabled as a result of a work-related injury and whether the employee was capable of returning to the work force.

Serna v. Illinois Workers' Comp. Comm'n (*FedEx Ground*), 2019 IL App (1st) 180956-WC-U

Where there was Conflicting Medical Evidence as to Claimant's Condition and Whether He had Reached MMI, it was for the Commission to Make its Findings

The appellate court observed that the Commission had before it conflicting opinions regarding whether the May 10, 2013 accident resulted in a temporary aggravation of claimant's preexisting conditions or whether it resulted in a permanent aggravation or an acceleration of any condition in his neck, back, bilateral knees, or left shoulder. The Commission adopted the former position and, the appellate court said such was a reasonable position to take based on the evidence of record. Since there was conflicting medical testimony as to whether claimant had reached MMI, that was a matter for the Commission in the first instance.

Henderson v. Illinois Workers' Comp. Comm'n, 2019 IL App (2d) 190012WC-U.

SETTLEMENTS

Trial Court was Wrong to Converted PPD Award to Lump Sum

Observing that the Illinois Legislature had indicated a strong preference for periodic payments, rather than lump sum awards, a state appellate court recently held it was error for a state trial court to order immediate payment, in a lump sum, of all PPD benefits that a workers' compensation claimant might ever collect for the injury. Stressing that the nature of workers' compensation benefits was to provide a substitute for an injured worker's lost wages, the Court said the employer could not be ordered to pay the worker a lump sum benefit unless the worker had sought such a lump sum pursuant to special statute, 820 ILCS 305/9. In as much as the worker had not done so, it was error for the trial court to short-cut the payment mechanisms.

Iannoni v. City of Chicago, 2019 IL App (1st) 182526.

PERMANENT PARTIAL DISABILITY BENEFITS

There was No Error in Awarding PPD Benefits, Rather than Odd-lot Benefits

The Commission's decision denying the claimant benefits after September 15, 2011, and awarding PPD benefits, rather than odd-lot PTD benefits, was not against the manifest weight of the evidence where the Commission appropriately found claimant reached MMI on September 15, 2011 (a physician released the claimant to work without restrictions because the claimant experienced no complications following March 18, 2011 surgery and the repaired bicep tendon was functioning without "deficits" at the time of the September 15, 2011 examination) and the Commission appropriately found claimant did not fall within any of the odd-lot categories. The appellate court stressed the Commission determined that the claimant failed to provide sufficient evidence of a diligent and unsuccessful job search. Specifically, it found that the claimant's job search was merely "perfunctory," and that his job search logs did not reflect a convincing job search effort. The Commission also found that the claimant was employable and that he had employment opportunities in a reasonably stable job market. The finding was supported by the claimant's own testimony, which showed he secured several jobs following his injury, but voluntarily left each job. Although the claimant quit each job due to his dissatisfaction with his earnings and perceived inability to perform adequately, he had been released to work without restrictions and produced no corroborating evidence to show he was unable to perform his job duties.

Villegas v. Illinois Workers' Comp. Comm'n, 2018 IL App (1st) 182709WC-U.

— Continued on next page

Commission's Finding that Claimant Sustained PPD was Not Against Manifest Weight of Evidence Where Employer's Expert Admitted Claimant Could Not Return to Former Position of Aircraft Mechanic

The appellate court affirmed the circuit court's judgment confirming the Commission's decision finding that the claimant sustained injuries to his left leg and right knee that arose out of and in the course of his employment and awarding the claimant benefits over the employer's argument that the Commission's decision was against the manifest weight of the evidence. The court noted that the claimant's medical expert found the claimant's condition of right leg ill-being to be permanent. The employer's medical examiner testified that the claimant could not return to his previous employment as an aircraft mechanic. Consequently, the court found that the Commission's determination that the claimant was partially incapacitated from pursuing his usual and customary line of employment as an aircraft mechanic was supported by the evidence of record. Further, there was nothing in the record that would allow the court to disturb the Commission's determination that the injury to the claimant's right knee caused a 35 percent permanent and partial loss of the person as a whole. Based upon the record in this case, the court concluded that the Commission's award of PPD benefits to the claimant for a 35 percent loss of use of a person as a whole as a result of his right knee injury is not against the manifest weight of the evidence.

Air Wis. Airlines v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 191268WC-U.

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATORS

Claimant Could Not Withdraw § 19(b) Petition After Arbitration Hearing had Commenced

There was no abuse of discretion in the arbitrator's decision to deny the claimant's motion to withdraw his § 19(b) petition [820 ILCS 305/19(g) (2016)] (and the Commission's tacit approval of that ruling) because the motion was clearly filed after the arbitration hearing had commenced and the employer would have been prejudiced since testimony unfavorable to the claimant's position had been elicited. On a separate issue, the Commission erred in failing to award penalties and attorney fees under §§ 16, 19(k), and 19(l) of the Act [820 ILCS 305/16, 19(k), (l) (2014)], regarding the employer's failure to pay an additional $1,101.57 in temporary total disability benefits and its failure to pay the uncontested portion of medical bills because the employer acknowledged that these portions of the awards were uncontested, and it failed to offer a valid excuse for non-payment.

Centeno v. Illinois Workers' Comp. Comm'n, 2020 IL App (2d) 180815WC.

JURISDICTION

Commission and Trial Court Sometimes Enjoy Concurrent Jurisdiction Over Workers' Compensation Disputes

While workers' compensation issues generally are to be determined exclusively by the Illinois Workers' Compensation Commission under 820 ILCS 305/18, nevertheless, that statutory provision does not divest the circuit court of jurisdiction of all issues involving workers' compensation, held an Illinois appellate court. In some circumstances, a trial court must determine whether the issue in contention is reserved exclusively for the Commission or whether the circuit court and the Commission hold concurrent jurisdiction. If both the Commission and the circuit court have a claim to concurrent jurisdiction, a court must determine which has paramount jurisdiction.

Illinois Ins. Guar. Fund v. Priority Transp., 2019 IL App (1st) 181454.

Supreme Court Says Circuit Court Erred in Staying IWCC Proceedings While the Employer and Insurer Disputed the Issue of Coverage

Plaintiff, West Bend Mutual Insurance Company (West Bend), filed a complaint for declaratory judgment in a county circuit court against defendants, TRRS Corporation (TRRS), Commercial Tire Services, Inc. (Commercial Tire), and their employee, Gary Bernardino. West Bend alleged that it issued a workers' compensation and liability insurance policy to TRRS and Commercial Tire, effective from June 20, 2016, to June 20, 2017. The policy required,

in relevant part, that TRRS and Commercial Tire provide timely and proper notice of a covered worker's injury.

West Bend further alleged that on April 18, 2017, Bernardino was injured while working in the scope of his employment with TRRS and Commercial Tire. West Bend claimed, however, that TRRS and Commercial Tire did not timely report Bernardino's injury when it occurred but chose to handle the injury, and in the process paid Bernardino's lost wages and medical expenses relating to the injury without West Bend's knowledge or permission.

West Bend alleged that it first learned of Bernardino's injury on April 5, 2018, almost a year after his work-related injury. Soon thereafter, West Bend sent TRRS and Commercial Tire a reservation of rights letter raising the issue of late notice. The letter also advised TRRS and Commercial Tire that West Bend would not reimburse them for any voluntary payments they made in connection with Bernardino's injury. West Bend's complaint noted that Bernardino had filed an application for adjustment of claim with the IWCC. Bernardino also filed a separate negligence action in the circuit court seeking recovery for his personal injuries against several defendants, including his employers. Ultimately, West Bend sought a judgment declaring that it did not have a duty to defend or indemnify TRRS and Commercial Tire in connection with Bernardino's workers' compensation claim or his personal injury lawsuit, both predicated on his April 18, 2017, work-related injury.

One week after West Bend filed its complaint seeking a declaratory judgment, it also filed an emergency motion to stay a pending IWCC proceeding. In its emergency motion, West Bend informed the circuit court that Bernardino's pending workers' compensation case had been set for trial in the IWCC on November 19, 2018. On October 12, 2018, the circuit court entered an *ex parte* order granting West Bend's emergency motion to stay Bernardino's IWCC proceedings.

Bernardino filed an emergency motion in the circuit court asking the court to vacate its October 12 stay order. Bernardino argued, in relevant part, that West Bend's declaratory judgment action alleged factual issues related to late or unreasonable notice by TRRS and Commercial Tire that were best resolved by the IWCC. Bernardino also argued that the circuit court should exercise restraint and allow the IWCC to take jurisdiction. Bernardino asked the circuit court to vacate its October 12 stay order and enter an order staying West Bend's complaint for declaratory judgment pending resolution of his claim in the IWCC. Ultimately, after a hearing, the circuit court entered an order granting West Bend's emergency motion to stay the pending IWCC proceeding and scheduled a hearing for January 7, 2019, for status on the completion of written discovery. After several additional hearings, the matter was appealed to the intermediate appellate court.

At issue was the proper application of "the primary jurisdiction doctrine." Generally, that doctrine "provides that where a court has jurisdiction over a matter, it should in some instances stay the judicial proceedings pending referral of a controversy, or some portion of it, to an administrative agency" [*Employers Mutual Cos. v. Skilling*, 163 Ill. 2d 284, 206 Ill. Dec. 110, 644 N.E.2d 1163 (1994)]. The instant case provided a twist, however, since here, the issue was whether a circuit court could rely on the doctrine *not to stay its own judicial proceeding* but, instead, to enter an order staying an administrative proceeding in the Illinois Workers' Compensation Commission (IWCC).

The appellate court interpreted the doctrine to stand only for the proposition that a circuit court may, in certain circumstances, stay its own judicial proceedings pending the referral of a controversy to an administrative agency having specialized expertise over the disputed subject matter. The court disagreed with and rejected the decision in *Hastings Mutual Insurance Co.*, 2012 IL App (1st) 101751, 358 Ill. Dec. 585, 965 N.E.2d 656, that reached the opposite conclusion [for a summary of the appellate court decision see last year's *Illinois Workers' Compensation Guidebook*, § 50.03[3]].

Upon further appeal, the Supreme Court of Illinois affirmed. It concluded that a circuit court cannot rely on the primary jurisdiction doctrine to stay an administrative proceeding in the IWCC. The Court also overruled the appellate court's decision in *Hastings Mutual Insurance Co.*, 2012 IL App (1st) 101751, 358 Ill. Dec. 585, 965 N.E.2d 656, to the extent that it relied on the doctrine to direct the trial court to stay an IWCC proceeding. Here, the trial court erred as a matter of law when it relied on the doctrine to stay Bernardino's IWCC action, and its stay order issued on that basis was reversed.

West Bend Mut. Ins. Co. v. TRRS Corp., 2020 IL 124690.

— Continued on next page

Department of Insurance had No Jurisdiction to Decide Employee Versus Independent Contractor Status

Where the dispute between a trucking company and an insurer was essentially an employment status dispute—the parties disagreed as to whether owner-operators of vehicles were employees of the trucking company or merely independent contractors—the Department of Insurance acted without authority in resolving the issue.

CAT Express, Inc. v. Muriel, 2019 IL App (1st) 181851.

WAIVER

Employer Forfeits Statute of Limitations Defense Where Not Raised in Either Petition for Review or Statement of Exceptions

The application for adjustment of claim originally alleged an accident date of January 4, 2011. The arbitrator allowed petitioner, over respondent's objection, to amend the application by substituting December 23, 2010, as the date of the accident. Respondent's objection to this change was that (1) the amended application would fail to relate back to the original application and (2) since it now was June 13, 2017, the claim in the amended application would be barred by the three-year statute of limitations. The petitioner countered by pointing out, *inter alia*, that respondent, in its petition for review and statement of exceptions, never challenged the arbitrator's relation-back ruling or raised the statute of limitations. The petitioner argued, therefore, that the respondent had procedurally forfeited this affirmative defense. The respondent contended that the Workers' Compensation Act expressly required the Commission to review all questions of law or fact which appear from the statement of facts or transcript of evidence. The appellate court disagreed, stating that just because the Commission had jurisdiction to raise questions that are not raised in the petition for review, it did not necessarily follow that the Commission had a duty to do so. To the court's knowledge, no published decision had ever interpreted section 19(b) and (e) as requiring the Commission, on its own initiative, to raise an issue that a party refrained from raising in either its petition for review or its statement of exceptions. Since the respondent omitted the issue from both its petition for review and statement of exceptions filed with the Commission, it forfeited its statute of limitations defense.

Du Quoin Home Lumber v. Illinois Workers' Comp. Comm'n, 2019 IL App (5th) 180541WC-U.

APPEALS

Circuit Court Lacked Subject-matter Jurisdiction to Review Commission's Decision Where Claimant Failed to Show Appropriate Proof of Timely Notice of Intent to File for Review

The appellate court held claimant's failure to comply with Illinois Supreme Court rules resulted in forfeiture of issue raised on appeal. Forfeiture aside, the court held the circuit court lacked subject-matter jurisdiction to review the decision of the Commission where claimant failed to exhibit to the clerk of the circuit court, within 20 days after receiving the Commission's decision, either (1) proof of having filed with the Commission a notice of intent to file for review in the circuit court or (2) an affidavit setting forth that notice of intent to file for review in the circuit court had been given in writing to the secretary or assistant secretary of the Illinois Workers' Compensation Commission.

Miller v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 191951WC-U.

Circuit Court Erred by Reviewing Commission's Accident and Causation Findings *de novo*, Rather than Under Manifest Weight of the Evidence Standard

Claimant sought benefits for an injury to his left shoulder which he sustained on May 2, 2016, while working for the employer. An arbitrator found that the claimant had sustained an accidental injury arising out of his employment with the employer and that the current condition of ill-being in the claimant's left shoulder was causally related to that work-related accident. The arbitrator awarded the claimant medical expenses and prospective medical care, including surgical repair of claimant's torn rotator cuff in his left shoulder, as recommended by the claimant's treating orthopedic specialist. The Commission unanimously reversed. Applying *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, 395 Ill. Dec. 401, 38 N.E.3d 587, the Commission found that: (1) the claimant was injured while "reaching," which presented a neutral risk; and (2) the claimant had failed to prove that the reaching he performed at work was either quantitatively or qualitatively different from acts of reaching performed by members of the general public.

The Commission also reversed the arbitrator's finding of causation, noting that it was undisputed claimant suffered from a preexisting degenerative condition in his left shoulder at the time of the accident. It found that the claimant had failed to prove that the May 2, 2016, work injury aggravated or accelerated his preexisting condition or otherwise causally contributed to his current condition of ill-being. In so holding, the Commission relied upon the opinion of the employer's section 12 medical examiner and rejected the contrary opinion of the claimant's treating orthopedic specialist, which failed to acknowledge and account for the claimant's preexisting condition and which the Commission found to be conclusory.

The circuit court reversed the Commission's decision and reinstated the arbitrator's decision. Reviewing the Commission's decision *de novo*, the circuit court held that the claimant had sustained an accident arising out of his employment. The circuit court agreed with the Commission that the act of reaching and pulling which caused the claimant's work injury presented a neutral risk under *Adcock*. However, the circuit court found that, because the claimant's job duties required him to reach up and pull a lever on a machine hundreds of times per day, the claimant was exposed to the neutral risk of reaching far more frequently than were members of the general public. The risk confronted by the claimant was therefore "distinctly associated with his employment." The circuit court further held that the claimant had established causation.

The circuit court indicated it had reviewed the Commission's decision *de novo* because it concluded that the relevant facts were undisputed and the only question was whether the Commission properly applied the law. The employer argued that the circuit court erred and that the Commission's decision should be reviewed under the manifest weight of the evidence standard because several relevant facts were disputed. The appellate court agreed with the employer. Several issues were disputed, including: (1) whether the claimant was injured while pulling a lever, while reaching for the lever, or while transferring a part; (2) the degree of force that had to be applied to the lever at the time of the claimant's injury; (3) whether reaching for and/or pulling down the lever with the requisite degree of force could have causally contributed to the claimant's current condition of ill-being. The circuit court applied an erroneous standard of review, concluded the appellate court.

Lannon v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 181903WC-U.

The Circuit Court Lacked Subject-matter Jurisdiction to Review the Commission's Decision

The appellate court held a circuit court lacked subject-matter jurisdiction to review a decision by the Commission unless the party seeking review filed with the circuit court, within 20 days after receiving the Commission's decision, either (1) proof of having filed with the Commission a notice of intent to file for review in the circuit court or (2) an affidavit by the party's attorney that such a notice of intent had been given in writing to the secretary or assistant secretary of the Commission. Accordingly, the appellate court vacated the circuit court's judgments.

Williams v. Illinois Workers' Comp. Comm'n, 2020 IL App (3d) 000088WC-U.

Where Circuit Court Makes Determination, but Specifies No Disposition, the Finding is Modifiable by the Court

In an action for administrative review, if the circuit court makes a finding that a decision by the Commission is against the manifest weight of the evidence but the court specifies no disposition, the action remains pending, and the finding is interlocutory and modifiable by the court.

Carlinville United Sch. Dist. No. 1 v. Illinois Workers' Comp. Comm'n, 2020 IL App (4th) 190548WC-U.

Commission Order that Merely Recites the Employer's Obligation, Without Specifics, is Not a Final Order and is, Therefore, Not Appealable

Where the Commission entered an order that merely recited the employer's statutory duty to pay reasonable and necessary medical and incidental expenses, without specifying which of the employee's claimed expenses that the employer had to pay pursuant to that statutory duty, the Commission's order was interlocutory and unappealable; it left the dispute unresolved. The circuit court lacked subject-matter jurisdiction.

Montgomery v. Illinois Workers' Comp. Comm'n, 2020 IL App (3d) 190351WC-U.

— Continued on next page

No Judicial Review Allowed Where Claimant Failed to File Petition for Review Within 20 Days of Receiving Notice of Commission's Decision

The appellate court affirmed the order of the circuit court dismissing claimant's petition for judicial review for lack of jurisdiction where claimant failed to file a petition for judicial review within 20 days of receiving notice of the Commission's decision.

Krutal v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 190303WC-U.

EMPLOYERS' LIABILITY

EXCLUSIVE REMEDY

Exclusive Remedy Rule Does Not Bar Suit Under Illinois Biometric Information Privacy Act

The putative class action filed by an employee against his employer alleging its use of a fingerprint timekeeping system violated the Illinois Biometric Information Privacy Act ("BIPA") was not barred by the exclusive remedy provisions of the Illinois Workers' Compensation Act, held a federal district court. Stressing that the plaintiff had not alleged any sort of physical or mental injury that resulted from the employer's actions, the federal court predicted that the Supreme Court of Illinois would likely find plaintiff's alleged injuries were not the sort that fit within the purview of the state Act. Accordingly, the tort action against the employer was not barred, at least as a matter of law.

Treadwell v. Power Solutions Int'l, 2019 U.S. Dist. LEXIS 215467 (N.D. Ill., Dec. 16, 2019).

Exclusive Remedy Rule Does Not Bar Suit Under Illinois Biometric Information Privacy Act

Finding that plaintiff's loss of her ability to maintain her privacy rights under BIPA was neither a psychological nor a physical injury and thus was not compensable under the IWCA, the court held the IWCA did not preempt plaintiff's civil action against the employer.

Robertson v. Hostmark Hospitality Group, 2019 Ill. Cir. LEXIS 119 (July 31, 2019).

Factual Issues Preclude Dismissal of Civil Action on Exclusive Remedy Grounds

Where a factual issue existed as to whether the plaintiff police officer's injuries arose out of and in the course of the employment, the trial court's dismissal of plaintiff's claims against a co-officer defendant was erroneous.

Daggs v. Pan Oceanic Eng'g Co., 2020 IL App (1st) 190577-U.

RETALIATORY DISCHARGE

Former Employee Fails to Establish that His Termination was Based on His Exercise of Rights Under the Workers' Compensation Act

Plaintiff filed a retaliatory discharge claim against his former employer and its parent company (collectively referred to as "ComEd"), alleging that he was fired in retaliation for exercising his rights under the Illinois Workers' Compensation Act. After a bench trial, the trial court found in favor of ComEd. The plaintiff appealed, contending that (1) the trial court misapplied the law regarding causation and (2) the trial court's findings were against the manifest weight of the evidence. It was undisputed that the plaintiff worked for ComEd for over 20 years, between 1979 and September 20, 2004. It was further undisputed that, during his employment with ComEd, the plaintiff filed two separate workers' compensation claims seeking benefits from ComEd. The first such application was filed on July 8, 2003, for injuries suffered to his right shoulder on April 23, 2002. The second application was filed on October 23, 2003, for injuries suffered to his left shoulder and psyche on October 3, 2003. While the second claim was pending, the plaintiff filed his retaliatory discharge claim against ComEd, alleging that he was terminated because he exercised his right to seek workers' compensation benefits. The workers' compensation claims and the retaliatory discharge action were litigated in parallel. The appellate court stressed that it isn't enough for the plaintiff to establish that his workplace injury and initiation of a workers' compensation claim set in motion a chain of events that ended in his discharge; the plaintiff must show a true causal connection. Here, the trial court found that the two reasons for discharge articulated by ComEd, namely, that the plaintiff was

terminated because of (1) his misrepresentation about his condition during medical leave and (2) his "total work" record, were valid and supported by the evidence. The trial court explicitly stated that the plaintiff was terminated on the basis of these two valid reasons and not because of any retaliatory motive. The appellate court noted that there was abundant evidence offered at trial that the plaintiff had been engaged in fraudulent conduct towards ComEd. The trial court explicitly found that ComEd's motivation in terminating the plaintiff on the basis of his "total work" record was valid and nonpretextual. Substantial evidence supported the trial court's decision. There was nothing manifestly erroneous in the trial court's decision.

Matros v. Commonwealth Edison Co., 2019 IL App (1st) 180907.

Former Employee Fails to Show that She was Fired in Retaliation for Exercising Her Workers' Compensation Rights

A grant of summary judgment in favor of defendants in plaintiff's retaliatory discharge claim was proper because she was unable to show that defendants retaliated against her based on her exercising her workers' compensation benefits. The court observed that the lengthy lapse of time between plaintiff's return from her workers' compensation leave and her termination weakened any inference that defendants fired her for exercising her protected right to take workers' compensation leave. Moreover, several intervening events established that retaliation was not a plausible motive for discharging her. After she returned to work in March 2014, she received in April and May 2014 two written warnings for matters that could have resulted in her discharge, but defendants exercised their discretion and kept her in her wellness manager position.

Fox v. Adams & Assocs., 2020 IL App (1st) 182470.

Former Employee Fails to Overturn Jury Verdict in Retaliatory Discharge Action

Plaintiff filed a retaliatory discharge complaint against the Chicago Transit Authority (CTA), her former employer, claiming she was fired for making a claim under the Workers' Compensation Act. She alleged in relevant part that she sustained injuries in the course and scope of her employment as a CTA bus driver on September 12, 2014. According to the plaintiff, the CTA subsequently attempted to force her to return to work in violation of her physician-imposed work restrictions. The plaintiff alleged that the CTA terminated her employment on March 30, 2015, because she had exercised her right to workers' compensation benefits and followed the work restrictions in accordance with the Act. The CTA contended it had a legitimate nonpretextual basis for discharging the plaintiff: her violation of the CTA rules of conduct based on her failure to report or call in to her work location after being instructed to do so. The CTA also contended that since the plaintiff applied for workers' compensation benefits more than six months prior to her termination, there was no causal or temporal nexus between her workers' compensation benefit request and her discharge. After a three-day trial, the jury returned a verdict in favor of the CTA and against the plaintiff. The trial court entered judgment on the verdict.

The appellate court stressed that the record indicated that the CTA presented a purportedly valid, nonpretextual basis for discharging the plaintiff, i.e., her AWOL status violated CTA policies. In light of its verdict in favor of the CTA, the jury presumably rejected the plaintiff's evidence of retaliatory discharge and/or accepted the CTA's proffered reason for her termination. The court found the plaintiff had failed to appropriately challenge the jury verdict. To the extent that she also argued the trial court failed to give her non-IPI instruction to the jury on pretext, the motion was unsupported and unpersuasive.

Housley v. Chicago Transit Auth., 2019 IL App (1st) 181835-U.

METHODS OF INSURANCE

Claimant's Introduction of Nonrenewal Notice was Alone Insufficient to Show that it had been Mailed to Employer; U.S. Post Office Form Showing Delivery was Required

The Commission erred in finding that an employer knowingly failed to provide workers' compensation coverage as required by the Illinois Workers' Compensation Act where the claimant obtained and introduced into evidence the Nonrenewal Notice itself, but claimant did not produce proof of mailing of the Nonrenewal Notice by the carrier on "a recognized U.S. Post Office form or a form acceptable to the U.S. Post Office or other commercial mail delivery service." Absent evidence of proof of mailing of the Nonrenewal Notice in accordance with 215 ILCS 5/143.17a (2016), the appellate court held that the record was insufficient, as a matter of law, to support the Commission's finding that the notice was sent to respondent "as early as October 30, 2017."

American Kitchen Delights, Inc. v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 191593WC.

— Continued on next page

About the Authors

Andrew C. Corkery is a partner at *Pitzer Snodgrass, P.C.* in St. Louis. His practice concentrates on defense of transportation and medical malpractice cases. Mr. Corkery is a *cum laude* graduate of St. Louis University School of Law. He serves as the Vice Chair of the IDC Civil Practice Committee and as a member of the IDC Amicus Committee.

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

Matthew T. DiCianni is an Associate in the Chicago office of *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer*, where he focuses his practice on employment, insurance coverage, and business litigation, regularly appearing in court on behalf of employers, insurance companies, and businesses. Mr. DiCianni also has considerable experience advising clients on compliance with ERISA, the Fair Labor Standards Act, Title VII of the 1964 Civil Rights Act, and the Americans with Disabilities Act. Mr. DiCianni has also represented primary insurers, excess carriers, and insureds in a variety of complex insurance coverage matters. He has litigated several declaratory judgment actions, resolved disputes between primary and excess insurance carriers, and provided clients with coverage opinions.

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, hand-ling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

Steve Grossi is an attorney with *Bruce Farrel Dorn and Associates*, the State Farm Mutual Automobile Insurance Company Claim Litigation Counsel office in Chicago. He is an experienced trial attorney with a practice focused on the defense of automobile negligence, premises liability, and other personal injury matters. Mr. Grossi graduated from the University of Illinois at Urbana-Champaign, where he earned both his J.D. and B.A with a double major in economics and psychology.

Erica S. Longfield is an associate attorney with *Swanson Martin & Bell, LLP* in Chicago, Illinois. Her practice is focused in the areas of toxic tort litigation, asbestos litigation and products liability, representing the interests of large corporations and insurance carriers in the defense and management of lawsuits in preparation for and at trial.

Kasia Nowak is an attorney in *Foley & Mansfield*'s Chicago office and an experienced litigator. She began her legal career with the Cook County, Illinois State's Attorney's Office. Currently, Ms. Nowak defends product manufacturers, premises owners, contractors and suppliers by implementing unique defense and trial tactics. Additionally, she represents corporations and business owners in class action claims brought under the Illinois Biometric Information Privacy Act. Ms. Nowak earned her J.D. from The John Marshall Law School in 2013 and a B.A. from Northeastern Illinois University in 2008.

Jason G. Schutte is a partner at *Koepke, Hiltabrand and Schutte, P.C.*, located in Springfield. Mr. Schutte focuses his practice in general tort defense, personal injury defense and professional liability defense

Kenneth F. Werts is a member of the firm of *Craig & Craig, LLC* in Mt. Vernon. Admitted to the bar in Illinois, Mr. Werts focuses his practice on workers compensation law; black lung; occupational disease law and personal injury litigation. He received his undergraduate degree from the University of Illinois and his law degree from Southern Illinois University. Prior to becoming the IDC President in 2010, Mr. Werts has served as the IDC Workers' Compensation Committee Co-Chair, Employment Law Committee Co-Chair and as a member of the Board of Directors. In addition to his work as a volunteer for the IDC, Mr. Werts is a member of the Jefferson County, Illinois State (Past Chairman, Workers' Compensation Law Section Council) and American (Member, Workers' Compensation and Employers' Liability Law Committee, 2001-Present) Bar Associations; Defense Research Institute; Association of Defense Trial Attorneys and the College of Workers' Compensation Lawyers.

Survey of Toxic Tort Law Cases

Employers' Liability Insurer's Duty to Defend and Indemnify Not Triggered by Employee Asbestos Suit

The Illinois Appellate Court Fifth District affirmed the Circuit Court of Madison County's award of summary judgment to an insurer issuing employers' liability policies on the basis that underlying asbestos employee suit did not fall within coverage provisions.

Apex Oil was sued by a former employee of Apex from 1975 to 1996, alleging exposure to asbestos during the course of the former employee's work resulted in the former employee developing mesothelioma in 2008. Arrowood issued Apex various employers' liability insurance policies from 1966 to 1982. Apex argued that because it was an insured under the employers' liability policies, Arrowood had a duty to defend and indemnify Apex in the underlying suit. Arrowood denied Apex's tender. Apex filed suit to recover its defense costs and a confidential settlement of the underlying suit under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)) for Arrowood's vexatious and unreasonable refusal to defend or pay indemnity for the underlying employee suit. Arrowood filed a counterclaim seeking a declaratory judgment that it had no duty to defend or indemnify Apex. The trial court granted summary judgment in Arrowood's favor and Apex appealed.

Arrowood argued that based on the last day of exposure provision in the policy, coverage was precluded as the employee's last day of employment was in 1996. The last day of coverage issued by Arrowood was 1982. The Arrowood policies also contained a 36-month provision that precluded coverage for any written claim or suit against the insured for damages because of "bodily injury by disease" if suit was not made or brought within 36 months after the end of any Arrowood policy period. The underlying suit against Apex was not filed until 2010, 28 years after the last Arrowood policy expired in 1982. The court rejected the argument that the employee's mesothelioma should be considered a "bodily injury by accident" because the underlying complaint did not allege an accident resulting from an occurrence. Under the workers' compensation and occupational disease laws, an "accident" is traceable to a "definite time, place and cause." Therefore, the underlying complaint's allegations fell within the policy's "bodily injury by disease" limitations.

Apex Oil Co. v. Arrowood Indem. Co., 2020 IL App (5th) 180396-U.

Madison County Asbestos Trial Judge Denies Motion to Dismiss Based Upon *Forum Non Conveniens*

In *Ellerbrock v. A.O. Smith Corp.*, Madison County asbestos trial judge Steven Stobbs denied defendant PW Power Systems' motion to dismiss based on *forum non conveniens*. The plaintiff, Mary Ellerbrock, filed suit against numerous defendants on behalf of the estate of Alex Kaszynski alleging that the decedent was exposed to asbestos while working at a power plant owned by defendant PW Power Systems.

The defendant moved to dismiss the case and to transfer it from Madison County to LaSalle County, Illinois, arguing that LaSalle County was a more convenient forum because all of the named fact witnesses were located there, all of the alleged asbestos exposures occurred there, and a majority of the decedent's work history occurred in LaSalle County. The defendant also noted that most of the co-defendants in the case had raised the issue of *forum non conveniens* and that the plaintiff's choice of forum was entitled to less deference because it was not the location of the plaintiff's residence or the location of the injury.

In response, the plaintiff argued that her forum choice of Madison County was entitled to substantial deference. She also argued that the defendant did not meet its burden with respect to the private or public interest factors weighing in favor of dismissal. Specifically, the plaintiff claimed that only one fact witness was identified by the defendant and the defendant's expert witnesses were not located in LaSalle County. With respect to the public interest factors, the plaintiff claimed that asbestos cases in Madison County are handled expeditiously and that nothing was offered to support the argument that LaSalle County would handle the matter in a more efficient manner.

On a January 3, 2020, Judge Stobbs denied PW Power Systems' motion to dismiss. In ruling, the court noted that no other defendant joined in PW Power Systems' motion, and that the moving party is required to show that a plaintiff's forum is inconvenient to the moving party and that another forum is more convenient to all parties involved. The court went on to highlight the fact that PW Power Systems was the only defendant to appear at the hearing, and that if

— Continued on next page

the court were to dismiss PW Power Systems, it would still have to try the case in Madison County against the remaining defendants. Such a result would not "unburden" Madison County from litigation that could be more conveniently tried in another forum. The court, therefore, concluded that PW Power Systems failed to meet its burden to show that the public and private interest factors overwhelmingly favored dismissal in favor of another forum.

Ellerbrock v. A.O. Smith Corp., No. 18-L-1434 (Cir. Ct. Madison Cnty. Jan. 9, 2020).

Grant of Summary Judgment in Favor of an Illinois Defendant Creates an Opportunity to Remove an Asbestos Case to Federal Court Based on Diversity Jurisdiction

In *Hicks v. Ford Motor Co.*, Ford Motor Co. moved to remove a case to federal court after an Illinois resident, John Crane, Inc. (Crane), was granted a summary disposition against the plaintiff. Crane moved for summary judgment based on lack of identification, and the plaintiff did not submit a response. The court entered an agreed order which stated "John Crane, Inc.'s Motion for Summary Judgment is hereby granted based on lack of product identification over Plaintiff's objection." (Doc. 12-20). Subsequently, Ford Motor Co., a Delaware company with its principal place of business in Michigan, filed a Notice of Removal and the plaintiff filed an immediate Motion for Remand, which was denied. (Doc. 1, 7). The United States District Court for the Central District of Illinois discussed a feasible theory under which the plaintiff could have prevailed but ruled it did not apply to this case. Therefore, the court denied the plaintiff's motion to remand.

First, the United States Senior District Judge Joe Billy McDade confirmed the dismissal of Crane was involuntary, as the granting of the motion was over the plaintiff's objection. (Doc. 12-20). The voluntary/involuntary rule generally bars a case from becoming removable where any non-diverse defendants are dismissed against a plaintiff's wishes; voluntarily dismissed non-diverse defendants, however, present no obstacle to removal. *Poulos v. Naas Foods, Inc*., 959 F.2d. 69, 71 (7th Cir. 1992). Second, the court noted where a defendant was dismissed against the plaintiff's wishes, the doctrine of "fraudulent joinder" nevertheless allows an out-of-state diverse defendant to access the federal courts where there exists a claim against an in-state defendant, but it simply has no chance of success. *Poulos*, 959 F.2d at 73. Under this complex doctrine, the court must essentially predict whether there ever would be an instance in which the dismissed defendant may be reinstated based on a theory brought by a plaintiff.

In *Hicks*, the plaintiff made two arguments for remand: (1) the allegations in the complaint were distinguishable from *Poulos*; and (2) allowing removal would essentially make fraudulent joinder present whenever a plaintiff loses a motion for summary judgment. (Doc. 7 at 10-11). Ford, by contrast, argued the plaintiff could not reinstate Crane because the plaintiff failed to oppose Crane's motion for summary judgment and therefore waived the right to an appeal. (Doc. 8 at 10-11). In support of its argument, Ford relied on *Chambers v. MW Custom Papers, LLC*, No. 19-cv-5363, a nearly identical case from the United States District Court for the Northern District of Illinois where the court held fraudulent joinder allowed for removal. (Doc. 7 at 8-1).

The district court ultimately sided with Ford and agreed *Chambers* applied. It was pivotal to the court's analysis that the plaintiff forfeited his right to an appeal by failing to oppose Crane's motion for summary judgment. Specifically, the court noted "the clear direction of the inquiry prescribed in *Poulos* is to determine whether a non-diverse defendant might yet return to the case." *Poulos*, 959 F.2d at 73. Accordingly, the facts of the case presented no scenario in which the plaintiff could have overcome the grant of summary judgment in favor of Crane and reinstate Crane because the plaintiff waived his right to an appeal by not responding to Crane's motion for summary judgment.

Hicks v. Ford Motor Co., No. 1:20-cv-1019, 2020 WL 902528 (C.D. Ill. Feb. 25, 2020).

No Third Bite at the Apple for Insured in Coverage Dispute Involving Underlying Asbestos Claims

After two exhaustion trials, the Illinois Appellate Court First District affirmed the Circuit Court of Cook County's determination of coverage limits, finding that the insured had not demonstrated its primary policies were exhausted, and properly denied the insured's motion for a new trial.

John Crane Inc. (Crane) was a manufacturer of asbestos-containing gaskets, mechanical seals, and packing products. As of 2017, Crane had been named in over 325,000 asbestos cases claiming exposure to these products. Crane had primary insurance coverage from Kemper as well as umbrella and excess coverage from the defendants. In 2004, Crane filed a claim for a declaratory judgment that Kemper's primary coverage was exhausted and

sought a declaration of the obligations of its umbrella and excess carriers. After an exhaustion trial was held, the trial court found that Crane did not prove that the primary policies were exhausted. Crane appealed, and the appellate court remanded the case for a second exhaustion trial.

During the second exhaustion trial, the parties stipulated the amount of the Kemper primary policies to be exhausted relying on Crane's expert to establish that the primary policies were exhausted. The trial court, however, found the expert's method of allocation problematic and that the expert did not always follow his own methodology. The trial court found Crane's expert committed error in determining the trigger dates of six claims. This error resulted in the expert's allocation no longer demonstrating that the primary policies were exhausted. Crane moved for a new trial, which the trial court denied. Because Crane relied on its expert's testimony to demonstrate exhaustion of the primary policies, the appellate court found the trial court, as the trier of fact, assessed the credibility of the expert and found the evidence did not prove exhaustion of the primary policies. Therefore, the appellate court refused to disturb the trial court's findings as it was not against the manifest weight of the evidence. The appellate court also found that the trial court's denial of Crane's motion for a new trial would not be reversed absent an abuse of discretion. Because the appellate court found that the trial court did not err in the rulings challenged by Crane, there was no basis on which to order a new trial.

John Crane Inc. v. Allianz Underwriters Ins. Co., 2020 IL App (1st) 180223.

Illinois Appellate Court Fourth District Reverses Circuit Court of McLean County in Asbestos Litigation on the Issue of Causation Evidence

In *Krumwiede v. Tremoco, Inc.*, the Illinois Appellate Court Fourth District determined that the plaintiffs failed to establish at trial that the decedent's work with the defendant's products was a substantial factor in the cause of the decedent's illness. In that case, the plaintiffs alleged that the decedent was exposed to asbestos, in part, through his work with Tremco caulk and tape, and that he developed mesothelioma as a result of asbestos exposure. The decedent worked as a window glazier from the mid-1950s to the early 1990s. At trial, two of the decedent's former co-workers testified that they and the decedent used Tremco caulk and glaze in their roles as glaziers. The witnesses, however, could not recall seeing dust emanate from the Tremco products or anything on the products' packaging indicating that they contained asbestos.

Plaintiffs' medical expert, Dr. Arthur Frank, testified that a person's cumulative dose of asbestos contributes to the development of mesothelioma. In elaborating on this opinion, Dr. Frank testified that there is no scientific way to determine what exposure to asbestos caused a person's illness, but rather, a person's total exposure is considered the cause of the illness. Dr. Michael Graham, a pathologist, testified for Tremco, opining that there were amosite asbestos fibers found in the decedent's lung tissue, but that those fibers had nothing to do with the decedent's work with Tremco products, as those products only contained chrysotile asbestos fibers. Dr. William Longo also testified for Tremco, explaining that he previously tested the Tremco products and found no detectable asbestos fibers, which was because the products were thermoplastic materials. Dr. Longo admitted, however, that he could not rule out that Tremco products released respirable asbestos fibers. Ultimately, the jury returned a verdict for the plaintiffs.

On appeal, the Fourth District concluded that the plaintiffs failed to establish that the decedent's work with Tremco products was a substantial factor in the cause of his mesothelioma. Under Illinois law, the plaintiffs were required to prove that the decedent was exposed to asbestos from Tremco's products with such frequency, regularity, and proximity that the asbestos from those products could be viewed as a substantial factor in causing the decedent's mesothelioma. According to the court, simply proving that the decedent worked in proximity to Tremco products did not satisfy this standard because it did not establish that the decedent had frequent, regular, and proximate contact with respirable asbestos fibers from the products.

The court believed that there was an absence of evidence explaining under what circumstances Tremco's products released respirable asbestos fibers that were inhaled by the decedent. Stated differently, just because Tremco's products were capable of releasing asbestos fibers did not mean they actually did so when the decedent worked with the products. The court also determined that the plaintiff failed to present evidence showing that Tremco's products released more than a *de minimis*, casual, or minimum amount of asbestos fibers when the decedent encountered the products. Illinois law does not require a plaintiff to quantify the number of asbestos fibers to which a decedent was exposed, but a plaintiff must show more than a *de minimis* exposure to the defendant's asbestos. Finally, while the court found that Dr. Frank's "cumulative exposure" testimony was admissible under Illinois law, the court concluded

— Continued on next page

that his testimony did nothing to aid the plaintiffs in satisfying the substantial factor test under Illinois law because he did not opine that exposure from Tremco products was a substantial factor in bringing about the decedent's illness. Rather, Dr. Frank generically testified that the decedent's exposures to asbestos, without specifying exposures to asbestos from Tremco's products, caused him to develop mesothelioma. Ultimately, the court concluded that the trial court should have granted judgment *N.O.V.* to Tremco due to the plaintiffs' failure to present evidence showing that the decedent's exposure to respirable asbestos fibers from Tremco's products on a frequent, regular, and proximate basis was a cause in bringing about the decedent's mesothelioma.

Krumwiede v. Tremco, Inc., 2020 IL App (4th) 180434.

In Lead Poisoning Case, Personal Injury or Property Damage is Required to Recover Costs of Medical Care Covered Under Medicaid, and State's Right of Recoupment Against Wrongdoer Does Create Liability

Three plaintiffs in *Lewis v. Lead Industries Association*, filed a class action in Cook County, Illinois against four defendants, each of which was a former manufacturer of white lead pigments or the alleged corporate successor to such a manufacturer. The plaintiffs sought to recover costs of blood lead screenings, which their children underwent as required by the Lead Poisoning Prevention Act (Act) (410 ILCS 45/1 *et seq*. (West 2000)). The complaint specifically excluded any claim for recovery for physical injury to their children. Rather, their claims were solely one for economic injury to the parents for the costs of the lead screening.

The defendants filed a motion for summary judgment on the basis that none of the three plaintiffs incurred any expense, obligation, or liability for the lead toxicity testing of their children, as the testing costs were covered under Medicaid for two of the plaintiffs and there was no evidence to show that the third plaintiff or her insurer had paid anything for her child's screening. The circuit court granted defendants' motion for summary judgment finding that none of the three plaintiffs had an actual injury, and the plaintiffs appealed. The appellate court reversed the summary judgment order as to the two plaintiffs whose expenses were covered under Medicaid finding that, although the plaintiffs did not incur any costs, they nonetheless had a legally sufficient claim of injury because they incurred an obligation for the cost of the tests. The defendants appealed.

Reversing the judgment of the appellate court, the Illinois Supreme Court reiterated the common law that a plaintiff cannot sue in tort to recover for solely economic loss without any personal injury or property damage. "The wrongful or negligent act of the defendant, by itself, gives no right of action to anyone." Rather, a plaintiff can sustain a cause of action only where he or she has suffered an actual injury caused by the defendant's conduct. No cause of action accrues until the defendant's wrongful or negligent act produces injury to the plaintiff's interest by way of loss or damage. Accordingly, the court held that the plaintiffs were required to establish actual economic loss as an essential element of their claims. And further, because the plaintiffs never became indebted to the medical providers who conducted the screenings, they did not incur a legal obligation to pay for the screenings, and thus, an injury did not accrue. The state's right of recoupment for Medicaid payments also did not create an injury; this right is a claim against a *wrongdoer* and not against the Medicaid recipient. Furthermore, the court rejected the notion that the collateral source rule can be used to satisfy the injury element of the plaintiffs' cause of action when the plaintiffs have suffered no injury. "Preventing a plaintiff who has not been injured from recovering money does not confer a 'windfall' on the defendant. Nor does a defendant 'benefit' from avoiding compensating the plaintiff for a noninjury." The plaintiffs did not incur any liability and did not suffer any actual economic loss in this case. Accordingly, the court held that the circuit court properly granted summary judgment in favor of defendants and therefore, the judgment of the appellate court was reversed, and the cause was remanded to the Circuit Court of Cook County for further proceedings.

Lewis v. Lead Industries Ass'n, 2020 IL 124107.

Illinois Appellate Court Finds Tortious Act Within the State Not Required for Specific Jurisdiction in an Asbestos Case

In *Linder v. A.W. Chesterton Company,* the Illinois Appellate Court Fifth District upheld an order from the Circuit Court of Madison County denying a pump manufacturer's motion to dismiss for lack of personal jurisdiction. The plaintiffs, Joel and Linda Linder, filed a lawsuit in this case alleging that asbestos dust arising from pumps manufactured by defendant, GIW Industries, contributed to Joel Linder's development of mesothelioma.

The plaintiffs alleged that Mr. Linder was exposed to asbestos attributable to GIW Industries' pumps through his employment in Illinois. GIW Industries filed a motion to dismiss for lack of

personal jurisdiction. The arguments focused on whether the Illinois court could exercise specific personal jurisdiction over defendant GIW Industries. GIW Industries maintained that the circuit court lacked specific jurisdiction over the plaintiffs' claims because the pumps sold by GIW Industries to Mr. Linder's employer did not contain asbestos.

Through discovery, GIW Industries produced Bills of Materials for pumps sold to Mr. Linder's employer. GIW Industries' corporate representative testified that pumps sold to Mr. Linder's employer did not contain asbestos. The corporate representative explained that GIW Industries included a notation on its Bills of Materials when the pumps that it sold came with asbestos-containing packing. The corporate representative testified that pumps sold to Mr. Linder's employer lacked such designation and were, therefore, asbestos-free. GIW Industries argued that it did not commit a tortious act in the state of Illinois because the pumps sold to Mr. Linder's employer did not contain asbestos. GIW Industries further argued that it was not subject to specific jurisdiction in Illinois absent a tortious act in the state.

The court rejected GIW Industries' argument that the plaintiffs must prove that it committed a tortious act within the state of Illinois for the circuit court to exercise personal jurisdiction. The court held that GIW Industries' sale of pumps to Mr. Linder's employer in Illinois was sufficient for the court to exercise specific personal jurisdiction over GIW Industries. GIW Industries admitted that it purposefully sold pumps to Illinois that were the subject of the plaintiffs' claims.

The Illinois Constitution and United States Constitution require that a defendant purposefully direct its activities at the forum state and that the cause of action arose out of or relates to the defendant's contacts with the forum state. Affirming the trial court's order denying GIW Industries' motion to dismiss for lack of personal jurisdiction, the court held that the constitutional standard was met by GIW Industries' sale of products to Illinois that were the subject of the plaintiffs' claims.

The court also addressed the plaintiffs' argument that the circuit court erred in granting GIW Industries' motion for protective order to prohibit the dissemination and use of the Bills of Material regarding sale of pumps outside of the present litigation. The plaintiffs argued that the Bills of Materials could not be the subject of a protective order because the documents were not confidential. The court rejected the plaintiffs' argument that materials must be confidential to be the subject of a protective order. Illinois Supreme Court Rule 201(c) grants trial courts considerable discretion in determining whether protective orders are appropriate. Citing to S*kolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221 (2000), the court stated that it would only alter the terms of the protective order if no reasonable person could adopt the position taken by the lower court.

Linder v. A.W. Chesterton Co., 2020 IL App (5th) 200101.

Illinois Appellate Court Second District Rules in Favor of County Health Department in Dispute Regarding COVID-19 Patient Information

In *McHenry County Sheriff v. McHenry County Department of Health*, the Illinois Appellate Court Second District reversed a McHenry County trial court's order finding that the trial court abused its discretion in denying the McHenry County Health Department's motion to dissolve a temporary restraining order which required it to provide the names and addresses of individuals who tested positive for COVID-19.

In April 2020, the McHenry County Sherriff's Department and four local municipalities sought information regarding the names of those infected with COVID-19 to provide to responding officers. The information was to be provided to the McHenry County Emergency Telephone System Board so that individual police officers could be notified when they were encountering an infected person, thereby allowing the individual officers to take "adequate precautions" to minimize the risk of infection. The McHenry County Department of Health (Health Department) opposed the information request. The Health Department argued that the information sought was protected health information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA); the information sought was ineffective for the purpose of protecting individual police officers because of deficiencies in testing for infections; the estimated infection count was believed to be some 10 times greater than the reported confirmed infections, and the worry that the illness could be spread through asymptomatic infected persons.

On April 10, 2020, the trial court granted the Sheriff's Department's emergency motion for a temporary restraining order (TRO). The trial court determined that the Sheriff's Department had demonstrated "a certain and clearly ascertainable right needing protection" due to the health risks associated with COVID-19 and to assist police officers in the performance of their duties to the best of their ability. Following the ruling, the Health Department filed a motion to reconsider and to dissolve the temporary restraining order. On June 16, 2020, the trial court denied the motion to reconsider and

— Continued on next page

motion to dissolve. The Health Department filed an interlocutory appeal the following day.

On appeal, the Second District found in favor of the Health Department and dissolved the temporary restraining order compelling it to provide the names and address of COVID-19 positive individuals. As an initial matter, the appellate court found that it could not address the issuance of the TRO given the Health Department's failure to timely appeal that ruling. However, because the motion to dissolve was filed and denied by the lower, court, the Second District could address the issue under Illinois Supreme Court Rule 307(d)(1). The court found it was undisputed the information fell within an exception to HIPAA that permitted, but did not require, a local health department to release protected health information. The court determined where discretion to provide the information sought exists, the party seeking the information cannot claim a right to that information. Further, because there was no right to the information sought, the Sheriff's Department could not demonstrate the existence of a fair question regarding the right sought. An essential element to obtaining a TRO is to demonstrate the existence of a fair question as to whether it has a right to the relief requested. As such, the Second District concluded that the trial court abused its discretion in denying the motion to dissolve the TRO.

McHenry County Sheriff v. McHenry County Dep't of Health, 2020 IL App (2d) 200339.

Illinois Circuit Court Reverses Prior Ruling on the Issue of Personal Jurisdiction In Asbestos Lawsuit

In *Riebel v. 3M Co.*, defendant, United States Steel Corporation (U.S. Steel), a Delaware corporation headquartered in Pittsburgh, operated a steel mill in Gary, Indiana. The plaintiff's decedent, Fred Riebel, was a resident of Illinois, and a member of the International Heat & Frost Insulator's Union, Local 17. The decedent was hired by an Illinois insulation contractor to work at U.S. Steel's Gary Works in 1994 and again in 1995. The decedent also worked at numerous industrial sites in Illinois. He died from mesothelioma, an asbestos-related disease, and the plaintiff brought premises liability claims against multiple defendants for wrongful death, including against U.S. Steel for its Indiana plant.

U.S. Steel brought a motion to dismiss for lack of personal jurisdiction, arguing that there was no general jurisdiction over a Delaware corporation headquartered in Pennsylvania, and no specific jurisdiction because the alleged tortious conduct (asbestos exposure) occurred in Indiana, not Illinois. In response, the plaintiff asserted the Circuit Court of Cook County, Illinois had specific personal jurisdiction over U.S. Steel, on the basis that (1) U.S. Steel had the requisite minimum contacts with Illinois because U.S. Steel "purposefully directed its activities toward Illinois" and this suit arose directly from or was connected to U.S. Steel's conduct in Illinois; and (2) it was reasonable to require U.S. Steel to litigate this matter in the state of Illinois. Although not alleged in her complaint, the plaintiff also claimed that the decedent "carried home asbestos fibers" to Illinois on his return from work in Indiana.

In reply, U.S. Steel argued that: (1) the location of the decedent's employer was not a purposeful factor in U.S. Steel's selection of a contractor, nor was the residence of the contractor's employees afforded any weight or consideration by U.S. Steel in soliciting bids for its contracting activity; and (2) there was insufficient evidence to establish the plaintiff's newly-raised allegation that the decedent was somehow exposed to asbestos from U.S. Steel's Gary Works facility within the state of Illinois (*i.e.*, in the form of "take home" exposure to asbestos).

Judge Clare McWilliams initially granted U.S. Steel's motion on November 26, 2019. The court agreed with U.S. Steel that the United States Supreme Court case *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773, 1781 (2017) stood for the well-settled rule that a plaintiff's cause of action must arise directly out of a defendant's contacts with the forum for a state court to exercise specific personal jurisdiction over an out-of-state defendant. The court disagreed with the plaintiff's contention that U.S. Steel's "contractual contacts" with decedent's Illinois employer were the "but-for" cause of the decedent's employment "which directly gave rise to the decedent's presence at the U.S. Steel Gary Works facility in Gary, Indiana, and caused his regular and frequent exposure to asbestos."

On the contrary, the court found that notions of due process require "that defendants be hailed into court in a forum State based on their own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts they make by interacting with other persons affiliated with the State." Additionally, the court stated that the plaintiff's observation of the decedent returning from work to their residence in Illinois with *dust and dirt* on his person from various job sites did not establish that the decedent was exposed to asbestos in Illinois, particularly from U.S. Steel.

In her November 26, 2019 Memorandum and Opinion, Judge McWilliams additionally found it would be unreasonable to litigate this case within the state of Illinois, because litigation in this

state would offend "traditional·notions of fair play and substantial justice" (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310,316 (1945)), and that the "circumstances surrounding this matter were far too attenuated and speculative to establish a connection between U.S. Steel's allegedly tortious conduct in the operation of its Gary Works facility and U.S. Steel's purposeful affiliations with this State."

On a motion to reconsider, the court reversed course and denied U.S. Steel's motion on January 29, 2020. Contrary to its initial ruling, the court applied a "but-for" analysis and ruled that because U.S. Steel contracted with an Illinois employer of the plaintiff, the court had jurisdiction over an Indiana premises owner.

The plaintiff again argued that U.S. Steel possessed the requisite minimum contacts with this state by entering into a contractual relationship with the decedent's Illinois employer at the time the decedent would have worked as an insulator at U.S. Steel's Gary Works facility in Indiana. This time around, the court stated that it had misapplied the *Bristol-Myers* decision and found it had jurisdiction on the basis that U.S. Steel's "minimum contacts" with the state of Illinois (*i.e.*, U.S. Steel's contractual agreements with the decedent's Illinois employer ultimately gave rise to the decedent's exposure to asbestos and asbestos-containing materials at U.S. Steel's Gary Works facility in the state of Indiana, the underlying cause of action in this matter).

This decision appears to readopt the same "sliding scale" approach to specific personal jurisdiction that the United States Supreme Court rejected in *Bristol-Myers* as violative of a defendant's due process rights. Allowing personal jurisdiction in a tort action based upon a contractual connection to an unrelated party seems to stretch the interpretation of the recent string of Supreme Court decisions on the issue of personal jurisdiction. It will be interesting to see how the Illinois Supreme Court weighs in on this issue.

Riebel v. 3M Co., No. 15-L-2124 (Cir. Ct. Cook Cnty. Nov. 26, 2019).

Illinois Supreme Court Finds No Personal Jurisdiction Over Claims of Out-of-State Plaintiffs

In *Rios v. Bayer Corp*., the Illinois Supreme Court held that Illinois courts lacked personal jurisdiction over claims against an out-of-state defendant as to claims of out-of-state plaintiffs for personal injuries suffered outside of Illinois from a device manufactured outside of Illinois.

The plaintiffs alleged personal injuries from the use of Essure, a permanent birth control device for women. In two separate cases filed in 2016, 179 plaintiffs from numerous states brought claims against various Bayer entities incorporated and located outside of Illinois. Less than one year after plaintiffs filed their complaints, the United States Supreme Court issued its decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), holding that California did not have personal jurisdiction over a nonresident defendant when the conduct giving rise to the claims did not occur in the forum state. Bayer moved to dismiss as to the nonresident plaintiffs for lack of specific jurisdiction under *Bristol-Myers*. The Madison County Circuit Court denied Bayer's motion to dismiss and the Illinois Appellate Court Fifth District affirmed. The Illinois Supreme Court granted leave to appeal.

Relying on *Bristol-Myers*, the Illinois Supreme Court held that while Bayer had conducted clinical trials in Illinois, held physician training programs for Essure in Illinois, and coordinated a marketing strategy in Illinois, the nonresident plaintiffs' claims did not arise out of, or relate to those activities in any meaningful sense of the terms. First, the court found that plaintiffs failed to assert that Essure devices were manufactured in Illinois or that Bayer established manufacturing procedures in Illinois. Therefore, there was not an adequate link between the nonresident plaintiffs' manufacturing defect claims and the forum. Second, the court also found that plaintiffs failed to allege that either they or their physicians received false information in Illinois, as the plaintiffs and their physicians resided outside of the forum and the devices were implanted outside the forum. Therefore, there was nothing linking Bayer's alleged failure to warn to any activities that occurred in Illinois. Finally, the court found that plaintiffs failed to allege Bayer breached a duty to properly train physicians, as there were no allegations the physicians were trained in Illinois. Having identified no jurisdictionally relevant links between plaintiffs' claims and Illinois, the court held that Illinois lacked specific personal jurisdiction over the plaintiffs' claims.

The Illinois Supreme Court further held that it would not be reasonable for the nonresidents' claims to proceed in Illinois. In assessing reasonableness, courts consider (1) the burden on defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, and (4) the judicial system's interest in obtaining the most efficient resolution of the controversy." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291-92 (1980). The court found these factors weighed strongly against Illinois courts exercising specific personal jurisdiction because Illinois has no interest in resolving claims that do not

— Continued on next page

arise out of or relate to activities occurring in the forum and this is not outweighed by non-Illinois plaintiffs' interest in obtaining relief. In addition, the nonresidents failed to explain how Illinois could be a convenient location when they were implanted with their devices outside of the forum and had identified no other activity connecting their specific claims to Illinois. Further, many nonresident plaintiffs initiated duplicate actions in California, which demonstrated that the interests of judicial economy would not be furthered by permitting their claims to proceed in Illinois.

The Illinois Supreme Court concluded that the nonresident plaintiffs' claims did not arise out of or relate to defendants' in-state activities and thus, Illinois courts lacked specific personal jurisdiction over Bayer. Accordingly, the court reversed the judgments of the appellate and circuit courts and remanded the actions to the trial courts for entry of orders granting Bayer's motions to dismiss for lack of personal jurisdiction.

Rios v. Bayer Corp., 2020 IL 125020.

Illinois Appellate Court Fifth District Finds that a Decedent's Estate is Not Time-Barred From Filing Benzene Lawsuit Despite Decedent's Prior Benzene Lawsuit and Workers' Compensation Claim

In the unpublished opinion *Stamper v. Turtle Wax, Inc.*, the Illinois Appellate Court Fifth District reversed the granting of a section 2-619 motion to dismiss by the Circuit Court of Madison County, based on the expiration of the statute of limitations under section 13-202 of the Code of Civil Procedure. The plaintiff was special administrator to the estate of her late husband, who had worked for the Village of Roxana as a firefighter and repairman on street and sewer lines. The decedent was diagnosed with glioblastoma multiforme (GBM), a type of brain cancer, in August 2010 and died on January 31, 2014.

In July 2011, the decedent filed an application for adjustment of claim with the Illinois Workers' Compensation Commission, claiming that his cancer was caused by benzene exposure he experienced while working for the Village of Roxana. However, the claim was withdrawn by the plaintiff after the decedent's death. In November 2013, the decedent joined a lawsuit against past and present owners of a refinery in Roxana, alleging they had negligently polluted ground water in areas where he resided and worked.

In October 2017, the plaintiff filed the underlying action against multiple defendants alleging the wrongful death of the decedent from exposure to benzene. The defendants filed motions to dismiss, arguing the expiration of the two-year statute of limitations because the decedent knew or should have known benzene exposure caused his injury when he alleged benzene exposure in filing his application for adjustment of his workers' compensation claim in 2011 and when he joined the prior benzene exposure lawsuit in Madison County. The trial court granted the motion to dismiss, finding it "pretty obvious" that the decedent knew or should have known of benzene causing his injury when he signed his name to his application for adjustment of his worker's compensation claim. Thereafter, plaintiff filed a motion to vacate the dismissal, asserting that the decedent's signed application for adjustment of his workers' compensation claim was not considered a binding judicial admission. The trial court denied the plaintiff's motion to vacate and the plaintiff appealed.

On appeal, the plaintiff argued the trial court should be reversed for granting the motion to dismiss based solely on the decedent's 2011 workers' compensation claim. The plaintiff argued that the decedent filed his claim only with suspicion, which did not rise to actual knowledge, that the GBM was wrongfully caused, as evident by a lack of medical records indicating causation at that time. According to the plaintiff, the statute of limitation actually accrued in October 2016 when she read medical articles that benzene exposure could be a cause of GBM.

In accepting the plaintiff's argument and reversing the trial court, the Fifth District found the trial court did not consider the factual circumstances surrounding the decedent's prior actions and should not have considered the decedent's signature on the workers' compensation filing as "definitive proof" of the decedent having known, or that he should have known, that his injury was wrongfully caused by another's actions. The Fifth District further found that there were factual issues regarding whether the decedent knew his GBM was caused by benzene exposure, even though he made two prior filings alleging such. The plaintiff had offered affidavits indicating that: (1) the workers' compensation claim was withdrawn because an expert would not confirm the decedent's GBM was caused by benzene, and (2) despite diligent attempts by the decedent, his treating medical providers could not provide a definitive or specific cause of his GBM. According to the Fifth District, the defendants did not sufficiently rebut these claims with contradictory factual evidence, and the filing of the prior claims alleging benzene exposure were insufficient *per se* because the decedent could have filed the prior claims with a mere suspicion that his cancer was caused by benzene exposure.

The defendants made a *res judicata* argument based on a recent settlement of the action filed in Madison County in 2013, which the Fifth District declined to consider because such settlement did not occur until after the arguments were heard on the motion to dismiss.

Moreover, even though the defendants included a dismissal order from the 2013 action in the record, they did not include an underlying settlement and release.

Stamper v. Turtle Wax, Inc., 2020 IL App (5th) 180514-U.

Southern District Remands Asbestos Case for Lack of Complete Diversity

In *Wieland v. Arvinmeritor*, plaintiffs, Arlan Wieland and Dina Wieland, alleged that Arlan Weiland sustained injuries arising from exposure to asbestos-containing products attributable to defendant, Arvinmeritor, and other defendants. Arvinmeritor removed the case from the Circuit Court of Madison County to the United States District Court, Southern District of Illinois, on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. The plaintiffs filed a motion to remand the case to the Circuit Court of Madison County.

Removal to federal court is appropriate if the federal court has original jurisdiction pursuant to 28 U.S.C. § 1441. Citing *Howell v. Tribune Entertainment*, 106 F.3d 215, 217 (7th Cir. 1997), the court held that civil "[c]ourts have original jurisdiction . . . if there is complete diversity between the parties and the amount in controversy exceeds $75,000." To meet the requirements for complete diversity, "none of the parties on either side of the litigation may be the citizen of the state of which a party on the other side is a citizen." *Howell*, 106 F.3d at 217.

Arvirmeritor maintained that two, diverse defendants remained in the case. Those defendants were both incorporated in Delaware. The Weilands argued that a third defendant remained in the case. After a review of the court record, the district court determined that a third, non-diverse defendant that was not identified by Arvinmeritor was still listed as an active defendant in the case. The presence of diversity is determined by the jurisdictional circumstances at the time of removal. Thus, the district court found that Arvinmeritor had not met its burden of establishing complete diversity.

Ultimately, the district court held that it lacked subject matter jurisdiction over the plaintiffs' claims and remanded the case to the Third Judicial Circuit, Madison County, Illinois.

Wieland v. Arvinmeritor Inc., No. 20-CV-196-SMY, 2020 WL 833047 (S.D. Ill. Feb. 20, 2020).

About the Authors

James A. Cook is an associate attorney at *McKenna Storer* in Chicago, where he practices toxic tort, insurance defense and appellate litigation. His civil litigation experience includes litigating motions and evidentiary hearings, as well as brief writing and oral argument before the Illinois Appellate Court. Prior to joining Mc-Kenna Storer, Mr. Cook served as a research staff attorney to the Illinois Appellate Court, Fourth District in Springfield, Illinois. He graduated in 2017 from John Marshall Law School, *magna cum laude*, where he served as a lead articles editor on law review. Mr. Cook also obtained his B.S. in 2013 from the University of Iowa, with highest distinction, Phi Beta Kappa.

Kelly M. Libbra is a partner in the Edwardsville, Illinois, office of *HeplerBroom LLC*. Ms. Libbra focuses her practice on trials involving complex business litigation matters, including toxic torts, premises liability, and product liability. She received her J.D. from St. Louis University School of Law and also holds an M.S. in Experimental Psychology from Western Illinois University.

Erica S. Longfield is an associate attorney with *Swanson Martin & Bell, LLP* in Chicago, Illinois. Her practice is focused in the areas of toxic tort litigation, asbestos litigation and products liability, representing the interests of large corporations and insurance carriers in the defense and management of lawsuits in preparation for and at trial.

Danielle R. Luisi is an attorney with the law firm *Husch Blackwell LLP* where she focuses her practice on the defense of product liability, premises liability, toxic tort and environmental claims. She has experience defending clients in various industries against claims alleging personal injury as a result of toxic exposures. Ms. Luisi also serves as part of the national coordinating counsel and trial teams for corporations in toxic tort litigation. She is licensed in Illinois and Missouri and is a member of the Defense Research Institute, Illinois Defense Counsel, Women's Bar Association of Illinois, and Chicago Bar Association.

Edward J. Matushek III is the founding partner of *Matushek LLC* in Chicago, with a branch office in Madison County. He has more than 37 years of experience in the defense of asbestos and toxic tort claims on behalf of international manufacturers and premises owners, as well as local distributors and contractors. He has tried high-profile cases to verdict in Cook County, McLean County and Madison County, Illinois. In addition to jury trials, Mr. Matushek has a lengthy record of success in the appellate courts and the Illinois Supreme Court. He received his B.A. from Illinois Wesleyan University

— Continued on next page

in 1975, and obtained his J.D. from The UIC John Marshall Law School, where he placed first in the JMLS Moot Court Competition, receiving both the Outstanding Oralist Award and Best Brief Award. Mr. Matushek is a member of the Legislative and Toxic Tort Committees of the IDC, and for the past 19 years has been a featured speaker at the Chicago Bar Association's annual seminar, *"Taking and Defending Depositions in State and Federal Courts."* Mr. Matushek has served on the Board of Managers for the Chicago Bar Association, and is a past Chair of its Continuing Legal Education Committee. In 1990, he was Chair of the Young Lawyers Section of the Chicago Bar Association, with responsibility for guiding more than 30 substantive law and service committees. From 1992 to 1998, he served on the Board of Directors of the American Judicature Society. He has received the highest professional rating, "*AV Preeminent* (5.0 out of 5)" from his peers in *Martindale-Hubbell Law Directory*. Mr. Matushek also has given back to the community; he was elected to two terms as Village Trustee for the Village of Tinley Park, Illinois, and was recently Chair of its Plan Commission.

Kasia Nowak is an attorney in *Foley & Mansfield*'s Chicago office and an experienced litigator. She began her legal career with the Cook County, Illinois State's Attorney's Office. Currently, Ms. Nowak defends product manufacturers, premises owners, contractors and suppliers by implementing unique defense and trial tactics. Additionally, she represents corporations and business owners in class action claims brought under the Illinois Biometric Information Privacy Act. Ms. Nowak earned her J.D. from The John Marshall Law School in 2013 and a B.A. from Northeastern Illinois University in 2008.

Gregory W. Odom of *Baker Sterchi Cowden & Rice, LLC* in Belleville is an experienced trial attorney whose practice is focused on complex business litigation matters in the areas of toxic torts, personal injury, product liability, premises liability, environmental law, and commercial litigation. He represents individuals, local businesses, and Fortune 500 companies in state and federal courts across Illinois and Missouri. He has successfully tried multiple cases to verdict and has successfully argued before the Illinois Court of Appeals. Mr. Odom received his B.A. from Southern Illinois University in Carbondale in 2005 and his J.D. from Southern Illinois University in 2008. He is Chair of the IDC Toxic Tort Law Committee for the IDC and a member of the IDC Board of Directors. In addition to his membership in the IDC, Mr. Odom is a member of the Madison County and St. Clair County Bar Associations. He also serves as an arbitrator for the Third Judicial Circuit Court-Annexed Mandatory Arbitration Program.

Patrick W. Stufflebeam is a partner in the Edwardsville office of *Tressler LLP*. He concentrates his practice on the defense of civil litigation including toxic tort (asbestos, talc, and benzene), premises liability, product liability, commercial litigation, and insurance coverage issues. Mr. Stufflebeam also maintains a practice in assisting individuals and businesses with cybersecurity and privacy issues, corporate formation, reorganization, acquisition, and contracts. Mr. Stufflebeam obtained his law degree from Saint Louis University School of Law after graduating from Western Illinois University. He is a member of the Illinois Association of Defense Trial Counsel (twice elected Director, 2011-2017), Madison County Bar Association, International Association of Privacy Professionals, and the Claims and Litigation Management Alliance. Mr. Stufflebeam holds an AV Preeminent® rating with Martindale-Hubbell and was named a 2018 Leading Lawyer by Leading Lawyers, Products Liability Defense and Toxic Torts Defense.

Justin S. Zimmerman is a partner in the Madison County, Illinois office of *Lewis Brisbois Bisgaard & Smith LLP* and a member of the General Liability and Environmental & Toxic Tort Practices. He represents clients throughout Illinois and Missouri on various matters including commercial litigation, product liability, premises liability, automotive claims, and general practice matters. Mr. Zimmerman is a trial attorney who has participated in jury trials in both state and federal court.

TOXIC TORT LAW COMMITTEE

Gregory W. Odom, *Chair*
Baker Sterchi Cowden & Rice, LLC, Belleville
618-202-5802
godom@bscr-law.com

Erica S. Longfield, *Vice Chair*
Swanson, Martin & Bell, LLP, Chicago
312-222-8578
elongfield@smbtrials.com

Tucker Blaser	Brown & James, PC
James A. Cook	*McKenna Storer*
Danielle R. Luisi	*Husch Blackwell, LLP*
Kelly M. Libbra	*HeplerBroom LLC*
Edward J. McCambridge	*Segal, McCambridge, Singer & Mahoney, Ltd.*
Edward J. Matushek	*Matushek LLC*
Howard Pikel	*Pretzel & Stouffer, Chtd.*
Patrick W. Stufflebeam	*Tressler LLP*
Tobin J. Taylor	*Heyl, Royster, Voelker & Allen, P.C.*
Kenneth F. Werts	*Craig & Craig, LLC*
Justin S. Zimmerman	*Lewis Brisbois Bisgaard & Smith LLP*

Survey of Law

Index of 2020 Cases

CIVIL PRACTICE LAW

CONSTRUCTION LAW

EMPLOYMENT LAW

ETHICS LAW

INSURANCE LAW

TORT LAW

— Continued on next page

TOXIC TORT LAW

WORKERS' COMPENSATION LAW

Survey of Law

Index of Advertisers

ILLINOIS DEFENSE COUNSEL

The Voice of the Defense Bar in Illinois

Promoting a level playing field in civil litigation

Representing the interests of business and industry in Illinois

Dedicated to improving the quality of the legal profession

To learn more about the Illinois Defense Counsel, Visit us online at

www.IDC.law

What is the IDC?

We are the premier association of attorneys in Illinois representing business, corporate, professionals, and other individual defendants in civil litigation. The IDC is an exceptional community of defense attorneys dedicated to improving the judicial system and the practice of law.

The IDC is a reasoned and independent voice for fairness in the legal system. We work with the business, insurance, and medical communities to ensure a fair and equal justice system for all litigants.

The IDC is

- An advocate for the legal profession
- nearly 600 members strong
- Looked to for advice and support by the judiciary
- A resource for legislators

How is the IDC Making a Difference?

The IDC strengthens the practice of law and improves the skills of lawyers that defend individuals and businesses in Illinois. We enhance the knowledge of defense attorneys through our nationally respected publication the *IDC Quarterly* and the new *Survey of Law*, by our continuing legal education programs, and committees that focus on specialty practice areas like **Civil Practice**; **Construction Law**; **Employment Law**; **Insurance Law; Tort Law** and **Toxic Tort Law**.

The IDC is working to protect the Illinois legal system, demanding a level playing field and resisting attempts to dismantle the jury system. The IDC is a respected resource providing:

- Fact sheets on the impact of pending litigation
- Expertise to legislative committees and political leaders
- Amicus briefs on legal issues pending before the Illinois reviewing courts

IDC members are as diverse as the clients we represent

From big firms and small and all corners of the state, attorneys join the IDC based on our common issues and a common desire to improve our legal system.

Over the past five decades, we have grown from an organization of mostly insurance defense attorneys to a broad-based association of litigators who represent an entire range of business and industry throughout Illinois and the United States. The diversity of our membership and clientele informs our independent and balanced view of Illinois's judicial system and the litigation that affects it.

What are Our Core Values?

- To promote and support a fair, unbiased, and independent judiciary
- To take positions on issues of significance to our membership, and to advocate and publicize those positions
- To promote and support the fair, expeditious, and equitable resolution of disputes, including the preservation and improvement of the jury system
- To provide programs and opportunities for professional development to assist members in better serving their clients
- To increase its role as the voice of the defense bar of Illinois, and to make the IDC more relevant to its members and the general public
- To support diversity within our organization, the defense bar, and the legal profession

ILLINOIS DEFENSE COUNSEL
P.O. Box 588 • Rochester, IL 62563-0588

Presorted
Standard
U.S. Postage
PAID
Permit No. 650
Springfield, IL