ILLINOIS DEFENSE COUNSEL
SURVEY OF LAW
2021

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ILLINOIS DEFENSE COUNSEL SURVEY OF LAW 2021

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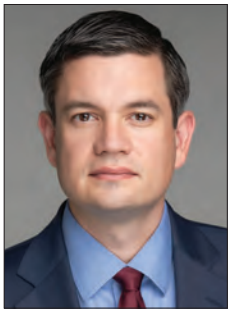

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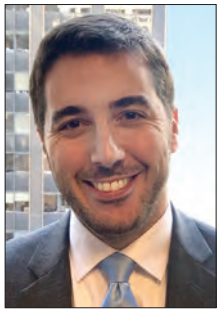

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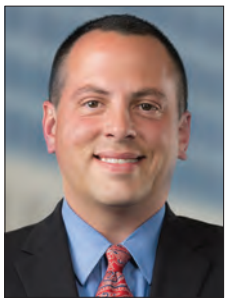

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President's Message

Laura K. Beasley
Baker Sterchi Cowden & Rice, LLC, Belleville

The IDC's *Survey of Law* is an important publication for the legal community. The *Survey* is written by IDC members who volunteer their time and skills to summarize the most important case developments throughout Illinois. The wealth of knowledge contained in the 2021 *Survey* is invaluable.

The *Survey of Law* is a yearly publication of the biggest decisions in Illinois and is a fantastic tool to keep you up to date on areas of law including, civil practice, insurance, torts, toxic torts, employment, and construction law. You can see the *Survey* on the desks of young and old practitioners as well as Judges, throughout the state.

Coming out of the COVID pandemic has given the legal community challenges which the IDC has met head on. The IDC members have worked hard to keep everyone abreast of new developments in the law and overcoming the unique challenges the pandemic handed us. When reading the latest *Survey of Law* edition, it is unbelievable how many rulings and developments occurred while we were working remotely.

I want to thank the IDC Committee Chairs, Vice Chairs, authors, and editors for all the long hours given for the good of the *Survey.* Your brilliant legal skills and hard work is what makes this a high-quality publication that I am very proud of. I would like to thank IDC Executive Director Sandra Wulf who is so amazing at her job and always keep us on track. Finally, I want to thank the law firms and sponsors who support the IDC and this publication.

Please enjoy the *2021 Survey of Law*. I hope you find it as informative as I did.

Regards,
Laura K. Beasley
President of IDC

Letter from the Editors



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The Illinois Defense Counsel is an unparalleled resource in keeping up with new case law, statutes and our defense bar colleagues. IDC publications and the IDC Network educate and inform the defense bar, which are critical to the IDC's mission statement "to advance the interests of the defense bar" by fostering professional competence. The 2021 *Survey of Law* offers a case by case snapshot of developing case law and when aggregated forms a complete picture of how the defense bar in Illinois is faring.

The 2021 *Survey of Law* is an opportunity to review the developments of the last year, connect us with cases outside of our practice area and reconnect us in a time when work from home and physical distancing still occur. This year's *Survey* includes sections on Tort Law, Construction Law, Civil Practice, Employment Law, Toxic Torts and Insurance Law. As always, the Survey provides a brief but thorough synopsis which invites every inquisitive reader to further explore.

The editors want to take this opportunity to thank everyone involved with the publication of the Survey of Law. It takes many hands to compete a publication like this from the authors to the editors, to IDC Executive Director Sandra Wulf and Polly Danforth of *Morning Star Design*. We look forward to maintaining the tradition of the *Survey of Law* for many years to come.

Survey of Civil Practice Cases

First District Reverses Open & Obvious Finding by Trial Court

Becker v. Alexian Brothers Medical Center was a trip and fall case where the trial court granted summary judgment after the defendants asserted the plaintiff's injuries were caused by an "open and obvious" condition. On July 29, 2015, plaintiff arrived at Alexian Brothers Medical Center early in the morning and testified the lighting was dim and there may have been fog. Instead of using a designated sidewalk to access the entrance, plaintiff crossed the street, which was bordered by a shallow drainage trench with a rust-colored grate. Plaintiff testified it was difficult to see, but she saw the drainage grate before stepping into it. As she continued walking, her right foot caught within the metal grate, causing her to fall and sustain injuries. Plaintiff disclosed a structural engineering expert who opined that the lack of contrast due to low lighting between the dark brown rust and the shaded interior of the trench (which housed the grate), camouflaged the openings in the surface of the grating. Defendants asserted that plaintiff encountered an open and obvious condition because she admitted to seeing the trench and knowingly chose to walk into it. Defendants also argued that plaintiff took an abnormal route to enter the hospital when she reasonably could have used the sidewalk.

The Illinois Appellate Court First District noted that when a condition is deemed open and obvious, the likelihood of injury is generally considered slight as it is assumed people encountering dangerous conditions will appreciate and avoid the risks. The appellate court reiterated the open and obvious standard is "objective," and summary judgment is not appropriate when reasonable minds could differ as to whether a condition satisfies the exception. The court posited that it was reasonable to conclude that the grate was not open and obvious because the downslope blended with the surrounding area and the different gaps in the grate were difficult to see in dim lighting. On the other hand, the appellate court reasoned that the grate could be considered open and obvious, but pedestrians could be distracted by looking for oncoming vehicles in the roadway.

The appellate court disregarded the alternative paths plaintiff could have taken, reasoning that it was not within the scope of the court's analysis and would be appropriate for the jury to consider. The appellate court disregarded defendants' argument that plaintiff saw the grate before she stepped into or onto it. Unlike the cases where the plaintiff had previously traversed the same or similar pathways, this was the first time plaintiff encountered the grate. In reversing the trial court's summary judgment ruling, the appellate court made clear that the open and obvious doctrine should be applied only in the most unambiguous of circumstances.

Becker v. Alexian Brothers Medical Center, 2021 IL App (1st) 200763.

Summary Judgment Reversed on Collateral Estoppel Finding and Deceased Co-Accomplice Has Reduced Verdict Upheld by First District

On April 30, 2012, John Givens, Leland Dudley, and David Strong were burglarizing an electronic store in Chicago and the police arrived while the three were inside. The burglars' van was parked inside the store's garage, and in their attempt to escape, the van burst from the garage door and into a hail of gunfire from the police. Strong was struck by gunfire and died. Givens and Dudley, also injured by gunfire, were convicted of felony murder due to Strong's death occurring while they were committing felony burglary.

In *Givens v. City of Chicago*, Givens, Dudley, and Strong's estate filed suit against the City of Chicago. Givens and Dudley's battery claims did not survive summary judgment due to collateral estoppel from their criminal convictions, but Strong's estate proceeded to trial on its survival and wrongful death claims against the City. The City filed an affirmative defense that Strong was contributorily willful and wanton as he was committing a burglary. The jury awarded Strong's estate $1,999,998 while also finding Strong to be contributorily willful and wanton as alleged by the City, reducing the verdict to $999,999. In coming to their conclusion, the jury answered three special interrogatories that were to inform the verdict. The City asserts that these special interrogatories should

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preclude Strong's estate from recovery since the jury came to an inconsistent conclusion.

On appeal, the Illinois Appellate Court First District had to consider three overarching issues. First, it had to determine how the City's affirmative defense regarding Strong's conduct being contributorily willful and wanton, affects the jury's award. Second, it had to determine whether the special interrogatories were dispositive. Finally, it had to determine whether Givens and Dudley's claims should have been dismissed due to collateral estoppel. In short, the appellate court answered that Strong's estate was entitled to the reduced verdict of $999,999, and that collateral estoppel did not apply to Givens and Dudley's claims.

> [N]o Illinois case had ever ruled on whether a tort claimant's own reckless willful and wanton conduct precluded him from recovering against a reckless willful and wanton defendant. If the plaintiff's conduct is deemed to be intentionally willful and wanton, recovery is barred entirely.

As to the issues involving Strong, no Illinois case had ever ruled on whether a tort claimant's own reckless willful and wanton conduct precluded him from recovering against a reckless willful and wanton defendant. If the plaintiff's conduct is deemed to be intentionally willful and wanton, recovery is barred entirely. But the appellate court ruled that a plaintiff's reckless willful and wanton conduct can reduce its damages against a reckless willful and wanton defendant and such a finding does not operate as a complete bar. As to the special interrogatories, the appellate court found that they were vague, confusing, and open to interpretation. Notwithstanding the jury's inconsistent responses to the special interrogatories, the jury returned verdict form B, holding the City liable and finding Strong contributorily at fault—both of which were supported by the evidence. Therefore, the reduced award was reinstated.

The appellate court found Givens and Dudley's claims should be reinstated. For a criminal conviction to apply in civil litigation, the issues in the criminal case must be identical with those in the civil case. Givens and Dudley were convicted under the felony murder statute. The court found that it did not determine whether Givens and Dudley were intentional in murdering Strong, it was the police gunfire that killed him. During the criminal trial, the State, in closing arguments, said that "it is immaterial whether the killing is intentional or accidental," so long as the death occurs during a felony. The criminal trial did not conclusively determine intentionality or recklessness in bringing about their own injuries in the form of substantial gunshot wounds by the police. Likewise, the criminal trial did not address the officers' conduct and their duty in responding to the crime.

Ultimately, the court found it was manifestly unjust to permit Strong's case to proceed in the civil context and preclude Givens and Dudley from prosecuting their respective claims, as the only distinguishing factor was that Strong died where Givens and Dudley survived.

Givens v. City of Chicago, 2021 IL App (1st) 192434.

Claim for Tortious Interference Related to Contract and Thus Was Governed by Arbitration Clause

In *Dustman v. Advocate Aurora Health, Inc.*, the Illinois Appellate Court, Fourth District held that a claim for tortious interference with contract was "relating to" the contract between the parties and thus was governed by the arbitration clause and must be arbitrated. The plaintiff doctors sued the defendants for allegedly interfering with their rights under an operating agreement by withholding their consent to transfer some shares. Pursuant to the agreement, the doctors requested mediation on multiple occasions but were ignored. They then filed suit and the defendants responded by seeking to compel arbitration. The trial court agreed that the dispute had to be arbitrated and dismissed the case. The plaintiffs appealed, contending that the defendants' breach of the agreement expressly waived their right to arbitrate and that, in any event, the dispute was arbitrable. The appellate court affirmed the trial court's judgment.

Dustman v. Advocate Aurora Health, Inc., 2021 IL App (4th) 210157.

Genuine Issue of Material Fact Exists as to Whether Contract Existed Between Baseball Club and Media Member

In *Arbogast v. Chicago Cubs Baseball Club*, the Illinois Appellate Court, First District, in a case factually similar to *Zuniga v. Major League Baseball*, 2021 IL App (1st) 201264, affirmed the denial of a motion to dismiss in a case involving a member of the media who had press credential for Wrigley Field that allegedly

included an arbitration clause. The court held that there was no contract formed between the plaintiff and the club because he did not sign any contract and his mere presence in the ballpark was not a manifestation of his assent to the terms and conditions that included the arbitration provision.

Arbogast v. Chicago Cubs Baseball Club, LLC, 2021 IL App (1st) 210526.

Trial Court Ordered to Revisit Issue of Whether School's Arbitration Clause is Enforceable

In *Hartz v. Brehm Preparatory School, Inc.*, the Illinois Appellate Court, Fifth District issued an opinion reversing the trial court and remanding the matter with instructions that the trial court may look beyond the arbitration clause to determine the clause's enforceability. Whether the contract as a whole is enforceable is left to the arbitrator.

In addition, the appellate court held it had jurisdiction under Rule 307(a) despite the defendant having moved for dismissal, not to compel arbitration, as it was essentially a motion for an injunction, the denial of which is permitted to be appealed on an interlocutory basis under the rule.

Further, the appellate court held the matter was not moot, despite an amendment of the pleadings after the appeal, as the amendment did not affect the order appealed from.

Finally, the appellate court held the appeal was not premature as the trial court sufficiently articulated its reasons for not ordering arbitration.

Hartz v. Brehm Preparatory School, Inc., 2021 Il App (5th) 190327.

Juror Not Biased Even Though His Employer Invested Funds to Expand a Hospital Network Related to the Defendant

In *Ittersagen v. Advoc. Health & Hosps. Corp.*, the plaintiff brought a medical malpractice action against Advocate Health and Hospitals Corporation and one of its physicians alleging they failed to diagnose and properly treat him. The case proceeded to trial, and during the trial, a juror sent a note to the judge. The note informed the judge of the juror's potential bias based on his employer's business relationship with Advocate. The juror's note stated that he did not realize or think of this potential bias until after the trial started.

Upon reading the note, the judge met with the attorneys and the juror. The juror informed the parties of certain fiduciary responsibilities of his employer to Advocate, but that the juror considered Advocate and his employer to be separate entities. The juror also informed the parties that the outcome of the medical malpractice case in no way affected his employment or his compensation. He also stated he had never met the defendant physician.

Plaintiff's attorney asked the judge to strike the juror for actual or implied bias, and to replace the juror with an alternate. The trial court did not do so, finding the juror credible and that the potential relationship between the juror and defendants was too far removed. The trial continued, and the jury eventually found for the defendants.

Plaintiff filed a motion for a new trial based on the juror's bias, which the trial court denied. Plaintiff then appealed, arguing that the trial court's decision not to remove the juror denied plaintiff his right to a trial by an unbiased jury. Plaintiff argued that the juror was implicitly biased as the juror stated he owed a fiduciary duty to an entity related to Advocate. Plaintiff argued that the entity the juror had a fiduciary duty to and the defendants in the case were the same entity.

The Illinois Supreme Court ruled that the trial court's decision to leave the juror on the jury, essentially finding there was no implied bias, was not erroneous as a matter of law. The trial court's finding that the potential relationship between the juror and Advocate was so attenuated, as to not create bias, was not against the weight of the evidence. The supreme court found that the juror only had an indirect relationship with the defendants and pointed out that the relationship was so remote the juror did not even realize the relationship until after the trial started.

Ittersagen v. Advoc. Health & Hosps. Corp., 2021 IL 126507.

Appellate Courts Address Plaintiffs' Capacity to Enter Arbitration Agreements

In *Kizart v. Heather Health Care Center, LLC*, the Illinois Appellate Court, First District held that the trial court erred in not holding an evidentiary hearing on the capacity of the plaintiff to enter into the nursing home arbitration agreement and remanded the matter to the trial court. The plaintiff presented the testimony of an expert who opined that the plaintiff did not possess the capacity to understand the terms and conditions of the arbitration agreement when he signed it. The court came to this conclusion despite the suit being brought in the plaintiff's personal capacity without a guardian or attorney-in-fact.

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This is in contrast to *Taylor v. UDI #4, LLC*, in which the Illinois Appellate Court, Fourth District held that the plaintiff's decedent's capacity could be decided as matter of law. The plaintiff's decedent allegedly lacked capacity and when he was interviewed by the intake staff at the nursing home, they had him execute a healthcare power of attorney. The deceased's son, Jack, was designated as the healthcare power of attorney and they both signed the arbitration agreement. Jack then signed the other admission documents. The trial court granted a motion to dismiss and to compel arbitration and the plaintiff appealed contending that the deceased lacked capacity and that the agreement was substantively and procedurally unconscionable. The appellate court affirmed the trial court.

Kizart v. Heather Health Care Center, LLC, Nos. 1-20-1193 & 1-20-1215, 2021 WL 4478206, (Ill. App. Ct. 1st Dist. September 30, 2021).

Taylor v. UDI #4, LLC, No. 4-21-0057, 2021 WL 4173884, (Ill. App. Ct. 4th Dist. September 14, 2021).

Creation of a Condition by Which an Injury is Made Possible is not the Proximate Cause of the Injury if There is a Subsequent Independent Act of a Third Party

The case of *Empress Casino Joliet Corporation v. Averus* involves a fire that severely damaged the Joliet Empress Casino in 2009. The plaintiff filed suit against Averus alleging that it was negligent in failing to properly clean the ducts of the casino. A number of the defendants prevailed on summary judgment on the basis of a waiver of subrogation argument.

Averus performed cleaning services for the casino, including the removal of cooking grease and other combustible residue from the ductwork above the kitchen. A welding contractor was preparing to weld a piece of sheet metal ductwork to the existing ductwork for a range exhaust hood that was being relocated in the kitchen area. No one performed a "fire watch" and no one took precautions for "hot work." The welder was aware grease was present in the ducts. During the welding work, the grease inside the ductwork caught fire. An employee of the welding contractor told police that the ducts had accumulated nearly 15 years of cooking grease and for that reason, the fire was uncontrollable. Plaintiff claimed Averus was negligent for failure to remove this grease.

Averus claimed that any allegedly negligent act on its part merely furnished a condition and was not the proximate cause of the fire. Averus alleged the acts of the welder who was welding ductwork in the presence of grease without a fire watch, fire extinguisher, or fire blanket present constituted an intervening cause that broke any causal connection between any alleged act on Averus' part and the injury. The trial court granted summary judgment to Averus in part on the argument that their actions only involved a condition, not a cause of the accident.

The Illinois Appellate Court, First District noted that it is well established in Illinois law that if the negligence charged does nothing more than furnish a condition by which the injury is made possible, and the injury is caused by the subsequent independent act of a third person, then the creation of the condition is not the proximate cause of the injury. The appellate court agreed with the trial court that Averus' conduct was not the legal cause of the injury, but merely created a serious condition to exist. If Averus was negligent in not cleaning the inaccessible ductwork, then the independent acts of other actors served as legal cause of the injury. It was not reasonably foreseeable that an individual would observe grease present in a duct, and nevertheless proceed to apply fire to that duct in the form of welding in the absence of any fire prevention equipment and despite expressly acknowledging that such work was dangerous.

Empress Casino Joliet Corporation v. Averus, 2020 IL App (1st) 192071.

"Two Issue" Rule Allows Verdict to Stand Despite Errors During Trial

The medical malpractice case, *Allen v. Sarah Bush Lincoln Health Center*, arises out of a patient's visit to the defendant medical center after feeling a pop in his neck. He was given painkillers and sent home. He came back to the emergency room the next day and again he was sent home based on the belief that he had a viral infection. The next day the Plaintiff collapsed and was eventually taken to a different hospital where an MRI was taken and showed a spinal epidural abscess. Plaintiff underwent spinal surgery but still suffered a spinal cord injury as result of the incident. The jury trial resulted in $14 million verdict for plaintiff.

Defendant appealed on the basis that: 1) the trial court erred by instructing the jury that defendant's sole proximate cause defense should not be based on the act of a non-party agent, 2) the trial court erred by allowing an internist and orthopedic surgeon to testify regarding the standard of care for an emergency room physician, and 3) Defendant was deprived of a fair trial because of counsel's persuasive misconduct.

The Illinois Appellate Court, Fourth District found the trial court should not have instructed the jury that defendant's sole proximate cause defense did not apply to non-party agent. The appellate court explained that sole proximate cause is not an affirmative defense and there is no basis to state it does not apply to an apparent agent. Plaintiff argued the "two issue" rule precluded a new trial. The appellate court agreed.

The two issue rule holds that "if several grounds of recovery are pleaded in support of the same claim, whether in the same or different counts, an entire verdict rendered for that claim shall not be set aside or reversed for the reason that any ground is defective, if one or more of grounds is sufficient to sustain the verdict." 735 ILCS 5/2-1201(d). The Court found that defendant should have requested a special interrogatory that would have revealed whether the jury relied on the questioned instruction in reaching its verdict.

With respect to the Supreme Court Rule 213 challenge, the Appellate Court found there was no requirement that the expert witness be of the same specialization to testify regarding the standard of care. The expert must only be a member of the same school of medicine as the party about whom he or she is testifying.

Defendant claimed that plaintiff's counsel's actions deprived the defendant of a fair trial in that he: 1) circulated a pretrial press release that biased the jury, 2) employed a strategy of asking improper questions to unfairly undermine credibility of defendant's experts, 3) made improper comments about the integrity of defendant, defendant's counsel, and defendant's witnesses, and 4) used improper closing arguments to psychologically pressure the jury.

The appellate court did not disagree with defendant's arguments that plaintiff's counsel's actions were improper. The court did not reverse the verdict because defense counsel did not request a new trial when objecting to these tactics. The appellate court found that defense counsel did not ask for a new trial during the trial, but only asked for one after the verdict. The court found that counsel should have asked for a new trial at the time.

The opinion concludes with the appellate court stating it was not condoning the conduct of plaintiff's counsel during trial. In particular, the court notes that after being told not to divulge that one of the doctors was not at trial because he was sick, plaintiff's counsel specifically asked a witness if he knew why the doctor was not present. Even with this admonition, the appellate court affirmed the verdict.

Allen v. Sarah Bush Lincoln Health Center, 2021 IL App (4th) 200360.

Because Bench Trial Involves Factual Findings in Contract Dispute Regarding Non-solicitation Clause, *De Novo* Review is Not Appropriate

The case of *Quality Transportation Services v. Mark Thompson Trucking, Inc.* arises out of a dispute regarding the language of a transportation brokerage agreement. Plaintiff contends the trial court erred by finding that defendant did not violate the non-solicitation clause of the agreement. The parties had a bench trial and the trial court ruled defendant did not violate the non-solicitation clause.

Plaintiff argued that the appellate court should review the trial court's decision using the *de novo* standard because it was contract interpretation. However, the Illinois Appellate Court, Third District found that the case involved not a finding of facts by the court, but rather a decision on how the court applied the law to these facts.

Plaintiff argued that in responding to inquiries from a potential client, defendant was making bids and thus violating the non-solicitation agreement. The court found this interpretation would impose unreasonable restraint on trade. An agreement restricting competition is reasonable only if the agreement is no greater than is required for protection of the business interest, does not impose undue hardship on the promissor, and is not injurious to the public. The appellate court found that requiring a party to ignore inquiries would violate this policy.

Quality Transp. Services v. Mark Thompson Trucking, Inc., 2021 IL App (3d) 190489.

Punitive Damages in Legal Malpractice Case Allowed Because They Were Not Speculative, as They Were Awarded in Underlying Case

The case of *Midwest Sanitary Service Inc. v. Sandberg Phoenix* is a legal malpractice case filed by the plaintiff, whom the law firm defended in an underlying retaliatory discharge case. In the underlying case, the plaintiff claimed he was retaliatorily discharged because he made complaints to the Illinois Environmental Protection Agency that Midwest Sanitary Service Inc. (Midwest) engaged in unauthorized and illegal dumping. The plaintiff prevailed at trial against Midwest and recovered compensatory and punitive damages.

In the legal malpractice case, Midwest alleged the defendant law firm was negligent in that it: 1) failed to list all witnesses intended to

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be called pursuant to Supreme Court Rule 213, 2) failed to identify a voicemail that claimed defective service, 3) failed to object to the limiting instruction, 4) elicited testimony on cross-examination from the IEPA that it had referred Midwest to the Attorney General for investigation, and 5) failed to engage in settlement negotiations while the case was being appealed.

The law firm moved to dismiss the complaint on the basis that Midwest was attempting to recoup from the defendant the punitive damages the jury awarded to the plaintiffs in the underlying case. Defendant argued that the recovery of these damages is not permitted by Illinois law. The trial court certified this issue and allowed an intermediary appeal pursuant to Illinois Supreme Court Rule 308.

The Illinois Appellate Court, Fifth District began its analysis by looking at *Tri-G v. Burke, Busselman and Weaver*, 222 Ill. 2d 218 (2006), which involved a claim against a plaintiff's attorney where the plaintiff alleged that its former attorney's malpractice prevented it from recovering punitive damages. The *Tri-G* court found that plaintiffs were prevented from recovering lost punitive damages by Illinois law.

The appellate court distinguished the *Tri-G* case on the grounds that in this case the party was found guilty of negligence and punitive damages. If punitive damages were not allowed to be recovered, then the payment of damages by the defendant in the underlying suit would shift from a negligent party to an innocent party. Also, the court in the *Tri-G* case found that awarding punitive damages would be speculative. In this case, the appellate court determined it would not be speculative because the jury awarded a certain amount. The court further found that defendant would not be made whole by the award of only compensatory damages.

The case has been accepted for review by the Illinois Supreme Court.

Midwest Sanitary Service Inc. v. Sandberg Phoenix, 2021 IL App. (5th) 190360.

"Friendly Contempt" in Order to Appeal Issue of Attorney-Client Privilege for Dissolved Corporation Was Done in Good Faith and Sanctions Were Reversed

The case of *John Doe Corporation v. Huizenga Manager's Fund LLC* has a complicated underlying procedural history. The case began with a filing of a complaint in Madison County with an application to proceed under a fictious name. Plaintiff alleged that defendants entered into an agreement to provide managerial services for investment funds. The complaint further alleges that defendants violated the non-disparagement and confidentiality provisions of the agreement. Plaintiff was initially allowed to proceed under a fictious name.

After numerous procedural issues developed throughout the litigation, the issue arose as to whether the plaintiff could claim attorney-client privilege on behalf of a dissolved company. The issue of whether a dissolved corporation may assert attorney-client privilege is an issue that had not been addressed by any Illinois court. The Illinois Appellate Court, Second District looked to federal and other state courts for guidance. The plaintiff admitted it had no officers, directors, or employees and this lawsuit was its only remaining function. A corporation must have a legal successor or management that can assert the privilege for it to apply. Because this dissolved corporation did not have any of these things, the trial court found that the party had no attorney-client privilege.

The court then turned to the issue of "friendly contempt." In response to the trial court's finding that there was no attorney-client privilege, counsel for the plaintiff took a "friendly contempt" in order to appeal the trial court's discovery order. The trial court fined plaintiff's attorney $1,000 per day for every day the records were not produced.

The appellate court stated it understood the trial's court's frustration with the slow progress of the case, but it noted that plaintiff's counsel came into the case late. The appellate court noted that the issue in question was one of first impression in Illinois, and that counsel acted in a professional and responsible manner in asking for a friendly contempt. The court found that counsel acted in good faith, and therefore reversed the trial court on the imposition of sanctions. The court did note that plaintiff was still responsible for sanctions resulting from other aspects of the litigation.

John Doe Corp. 1 v. Huizenga Manager's Fund LLC and Huizenga Capital Mgmt. LLC, 2021 IL App (2d) 200513.

Order Barring Expert for Discovery Violations is Upheld

In *McKinney v. Newgent*, the Illinois Appellate Court, Fifth District, looked at an issue regarding expert disclosures. The case arose out of an auto accident that occurred on Interstate 64. The parties entered a discovery scheduling order that included expert disclosures. On the day the defendant was to disclose experts, defense counsel emailed plaintiff's counsel, stating he was "assuming we now have all the medical records for your client's treatment,

and for our 213 disclosure we will probably proceed with having a records review completed by Dr. Peter Anderson. Once we have his opinions, we will pass them onto you." On the date discovery was to be completed, defense counsel filed a motion to extend time to take depositions of plaintiff's treating physicians and their retained expert.

Four days later, defendant provided the expert disclosure to plaintiff. In the disclosure defendant stated Dr. Anderson may provide testimony as to (1) the plaintiff's injuries caused by the car accident, (2) medical treatment plaintiff received, (3) the plaintiff's diagnosis and prognosis, and the causes of the same, and (4) the reasonableness and necessity of plaintiff's medical bills and treatment. Defendant further indicated that Dr. Anderson would testify to those opinions and conclusions that were in his report, which was currently pending.

Plaintiff responded to defendant's motion by arguing that the disclosure of Dr. Anderson was untimely and insufficient. Defendant then responded by producing Dr. Anderson's report. After an argument on the motion to extend, the trial court granted an extension to take the deposition, but reserved ruling on the admissibility of the deposition.

Plaintiff then submitted supplemental requests to Dr. Anderson, requesting, among other items, 1) the total number of people examined by Dr. Anderson for defendant's attorney, law firm, and insurer, 2) the total number of plaintiffs, parties, or persons examined by Dr. Anderson for defendants or insurance companies for civil litigation cases, 3) the total amount of payment to Dr. Anderson for medical-legal work, (4) the total amount of gross expenses and payments paid for medical examinations, 5) the total amount of gross income paid to Dr. Anderson for medical-legal work, and 6) the total income generated by Dr. Anderson for records reviews from defense counsel and defendant's insurer. The following day Plaintiff served a subpoena on Dr. Anderson's office. Plaintiff then moved for an emergency motion to accelerate discovery to require defendant to produce all document within four days.

At the pretrial hearing, the court granted the motion to expedite. Plaintiff then took the deposition of Dr. Anderson's office manager. Plaintiff's counsel established that certain charges were not included in the lists provided by defendant. The next day Dr. Anderson's deposition was taken. On cross-examination, he admitted that record reviews may not have been included in the list.

Thereafter, the trial court granted plaintiff's motion and barred Dr. Anderson from testifying at trial. The jury returned a verdict for plaintiff in the amount of $129,510. The Illinois Appellate Court, Fifth District found that the trial court did not abuse its discretion in granting the motion to bar Dr. Anderson. The appellate court found that that the trial court gave defense counsel every opportunity to cure his discovery violations, but he ultimately failed to do so. The appellate court further noted that the case illustrates the pitfalls of failing to abide by discovery rules. Additionally, the appellate court admonished plaintiff's counsel for not doing more to resolve the discovery disputes but upheld the verdict.

McKinney v. Newgent, No. 5-17-0471, 2021 WL 5177730 (Ill. App. Ct. 5th Dist. November 8, 2021).

Failure to Allow Cross-Examination of Expert on Authoritative Texts was in Error and Case Remanded for New Trial

In *Ricks v. Advocate Health and Hospital Corp.*, the plaintiff's decedent died from an amniotic fluid embolism while she was in labor at Advocate Christ Medical Center. Plaintiff, who was the decedent's husband, brought a wrongful death and survival action against Advocate and Dr. Naima Bridges, an obstetrical resident who had performed an amniotomy and intrauterine pressure catherization on the decedent.

Prior to trial, plaintiff dismissed Dr. Bridges. Defendant had disclosed Dr. Bridges as a Rule 213(f)(3) witness. At trial, plaintiff's counsel attempted to cross-examine Dr. Bridges on three articles the parties had stipulated were authoritative. Dr. Bridges testified she had never read the articles. The trial court upheld defense counsel's objection and prevented plaintiff from cross-examining Dr. Bridges on the articles. The jury returned a general verdict for defendant Advocate.

The Illinois Appellate Court, First District found that the trial court erred in not allowing plaintiff's counsel to cross-examine Dr. Bridges on these articles. Dr. Bridges testified that she complied with the standard of care. The court found that allowing cross-examination on these articles would have tested her direct testimony. The appellate court found that the trial court's ruling was prejudicial because her cross and re-direct did not address the dangers posed by the amniotomy and thus the court could not agree the issue was cumulative.

Advocate argued that under the two-issue rule which holds that a general verdict where two or more causes of action or defenses were presented to the jury and there was sufficient evidence to present one of the theories or defenses, the verdict will not be disturbed. The appellate court found that the proximate cause issue was not presented free from error, and thus two-issue rule did not apply. Therefore, the case was remanded for a new trial.

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The appellate court also addressed a ruling on the issue of plaintiff's expert's testimony that had been barred by the court. The court found that testimony that Dr. Bridges should have reported any "worrisome change" to the attending physician was a logical corollary of the expert's disclosed opinions and should have been allowed.

Ricks v. Advocate Health and Hospital Corp., No. 1-20-0950, 2021 WL 5407996 (Ill. App. Ct. 1st Dist. November 18, 2021).

A Divided Illinois Supreme Court Finds No Usurpation of Corporate Opportunity

In *Indeck Energy Services, Inc. v. Depodesta*, the Illinois Supreme Court clarified what constitutes the usurpation of a corporate opportunity by a fiduciary.

Indeck filed suit in the Circuit Court of Lake County alleging that two of its former high-ranking employees breached their fiduciary duties to the company and usurped a corporate opportunity for a future energy project in the state of Texas. The two defendants' responsibilities for Indeck included business development. While they were still Indeck employees and in communication with potential energy project partners for Indeck, the defendants participated in the formation of a competing limited liability company for Texas energy generation. The defendants and their LLC agreed to pursue a turbine project with two third-party companies with which Indeck was negotiating. The defendants resigned from Indeck after copying and removing thousands of the company's files, including business development documents related to the Texas energy project.

Through its lawsuit, Indeck sought, among other things, disgorgement of all Indeck compensation and benefits paid to the defendants while they were in breach of their fiduciary duties to Indeck, as well as "any and all benefits they have received or will receive from their wrongdoing after their employment with Indeck . . . ." Indeck further requested damages associated with Indeck's alleged inability to leverage opportunities for energy generation projects with the third-party companies. At trial, the circuit court directed a verdict on behalf of the defendants as to the corporate opportunity claim, finding that the opportunities pleaded were still available to Indeck at the time of trial. It nevertheless found the defendants in breach of a duty of loyalty to Indeck. The court ordered disgorgement of the defendants' salaries for the period leading to their resignations from the company, but no later. It ruled that any breach of loyalty ended when the defendants' employment ended. Indeck appealed. The appellate court agreed with the trial court's disgorgement analysis but disagreed with its ruling as to the usurpation of corporate opportunities. It found it "immaterial" that the alleged corporate opportunities were still available to Indeck. It held that a breach of fiduciary duty, by itself, was sufficient to prove the usurpation of corporate opportunities.

A split Illinois Supreme Court rejected the appellate court's usurpation analysis. It observed that usurpation of a corporate opportunity is "a distinct cause of action" resulting from a breach of fiduciary duty focused on "a particular type of injury: the taking or seizing of a corporate opportunity and the commensurate loss of that opportunity by the corporation." The linchpin of the claim is that the defendant fiduciary "appropriated something for himself that, in all fairness, should belong to the corporation." Here, the defendants' plans to construct two power plants with the third-party companies did not come to fruition. Thus, there was no "wrongful gain" to the defendants "and no wrongful appropriation." Further, the opportunity for funding of such a project was never foreclosed for Indeck. There was no exclusivity provision in the agreement between the defendants and the third-party companies. The evidence thus did not establish that additional funding opportunities for Indeck were off the table. As Indeck could still realize such opportunities, the supreme court could find "no justification" for awarding it damages for usurpation of the funding opportunities. It reversed the appellate court's ruling as to this claim and affirmed the order of the circuit court.

A dissent by three members of the court argued that the defendants' failure to disclose, tender, and obtain Indeck's consent to pursue the corporate opportunities at issue violated long-standing principles and should have resulted in liability for the defendants. The dissent opined that the majority's ruling will encourage self-serving fiduciaries to seek business opportunities for themselves and avoid liability for usurpation of corporate opportunities by contractually specifying that the opportunity "is not exclusive," thus technically allowing for its continued availability to their employer.

Indeck Energy Services, Inc. v. DePodesta, 2021 IL 125733.

Private Process Servers Must Be Specially Appointed by the Circuit Court to Affect Service of Process in Cook County, Even for Actions Pending in Other Counties

In the case of *Municipal Trust and Savings Bank v. Moriarty*, the Illinois Supreme Court addressed the construction of Section 2-202 of the Illinois Code of Civil Procedure as to persons authorized to serve process. At issue was whether a licensed private detective may

serve process in Cook County without a special appointment for a case filed outside of Cook County.

Section 2-202 states, in pertinent part:

> (a) Process shall be served by a sheriff, or if the sheriff is disqualified, by a coroner of some county of the State. In matters where the county or State is an interested party, process may be served by a special investigator appointed by the State's Attorney of the county, as defined in Section 3-9005 of the Counties Code. A sheriff of a county with a population of less than 2,000,000 may employ civilian personnel to serve process. In counties with a population of less than 2,000,000, process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004. . . .
>
> (b) Summons may be served upon the defendants wherever they may be found in the State, by any person authorized to serve process. An officer may serve summons in his or her official capacity outside his or her county, but fees for mileage outside the county of the officer cannot be taxed as costs. The person serving the process in a foreign county may make return by mail.

In *Moriarty*, the plaintiff bank filed a complaint for mortgage foreclosure against the defendant in Kankakee County. A registered employee of a private detective agency served summons on the defendant at Rush Hospital in Chicago. The plaintiff never moved for appointment of a special process server. After the defendant failed to answer to the complaint for foreclosure, the trial court found the defendant in default and entered a judgment for foreclosure and sale. The defendant later appeared *pro se* but was unable to stop confirmation of the property sale. The defendant subsequently filed a Section 2-1401 petition for relief of judgment arguing that the circuit court lacked personal jurisdiction over him due to improper service of process. The defendant argued that, pursuant to Section 2-202, a private process server may not serve process in Cook County without first receiving a special appointment by the circuit court. The trial court denied the petition, finding that Section 2-202 allowed the process server to conduct service anywhere in the state without limitation.

On appeal, the Illinois Appellate Court, Third District agreed with the trial court. It held that, because the summons was issued from a county other than Cook County, the licensed private detective was free to serve process, without a special appointment, anywhere in the state.

The Illinois Supreme Court, although sympathetic to the inconvenience of having to obtain a special appointment for a private process server, found the lower courts' rationale unpersuasive. Any consideration of where a lawsuit is filed—as opposed to where a defendant must be served—is irrelevant under the plain language of Section 2-202. Section 2-202(a) dictates that in counties with populations less than 2 million people (*i.e.*, all counties but for Cook), process may be served, without special appointment, by a person licensed or registered as a private detective. As a consequence, according to the court, a private detective charged with serving a defendant in Cook County must first be specially appointed by the circuit court. Subsection (b) does not change that requirement. According to the court, subsection (b) must be read in conjunction with (a) and merely authorizes service statewide by any person authorized to affect service. A private detective, absent special appointment, is not authorized to serve process in Cook County. The supreme court reversed the appellate court's ruling and remanded the matter back to the circuit court of Kankakee County.

Municipal Trust and Savings Bank v. Moriarty, 2021 IL 126290.

No Ambiguity for "Mechanical Device" Policy Exclusions

In *State Farm Mutual Automobile Insurance Company v. Kent Elmore, et al.*, the Illinois Supreme Court had to determine the enforceability of a "mechanical device" exclusion in an automobile insurance policy issued by the plaintiff, State Farm.

The defendant, Kent Elmore, was injured while unloading grain from a truck owned by his father, Sheldon Elmore. Attempting to get extra leverage while unloading, the defendant stepped onto a separate auger that was being used to move grain between trucks. Kent's foot was exposed to the auger's turning shaft and he lost his right leg below the knee. Kent filed a negligence suit against Sheldon, which was settled for $1.9 million. Kent reserved his right to pursue coverage under the State Farm auto policy that covered the grain truck.

State Farm filed a complaint for declaratory judgment, arguing that the auger was a mechanical device and that the policy's "mechanical device" exclusion precluded coverage. The policy specifically provides that there is no coverage for an insured for

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damages resulting from the movement of property by means of a mechanical device "that is not attached to the vehicle described."

Although no Illinois courts had construed the exclusion, State Farm cited to courts in other states that found the exclusion valid. Kent filed his own summary judgment motion, stating that the Illinois Vehicle Code provides that an owner's liability insurance policy shall insure the person named and any other person using the motor vehicle with the permission of the insured. Kent argued that Sheldon both used and was responsible for the use of the insured vehicle at the time of the accident because "use" includes the loading, unloading, and transferring of corn from the field to the grain elevator. The defendant cited to Illinois' "completed operations doctrine," which provides that coverage extends to the insured for all acts that occur in the loading and unloading process. Kent further argued that the exclusion was against public policy when it conflicted with a mandatory omnibus coverage statute.

The circuit court granted State Farm's motion and denied Kent's motion. While it agreed that the vehicle was being used at the time of the accident and that the grain unloading was completing a task, the court agreed with State Farm's argument that the auger was a mechanical device under the policy. The court ruled that the exclusion was unambiguous and not against public policy.

Kent appealed, and the Illinois Appellate Court, Fifth District reversed on the grounds that the exclusion was ambiguous. In reference to the out-of-state cases cited, the appellate court held that the auger was not a motorized or self-powered device and could not move grain without an external power source. The appellate court was concerned that, under State Farm's definition of "mechanical device," coverage would be provided "only for injuries arising when grain is unloaded from the insured truck by hand or by a hand truck." Further, the appellate court noted that the dispute was not one between insurance companies, and the policy language had to be viewed from the standpoint of "an average lay person who is untrained in complexities of the commercial insurance industry." The appellate court held that the exclusion had to be construed in favor of coverage due to its ambiguity, and State Farm was granted leave to appeal.

The Illinois Supreme Court reversed the appellate court's decision and affirmed the circuit court's entry of summary judgment for State Farm. In its ruling, the supreme court agreed that the exclusion was not ambiguous and coverage should be denied. Giving the terms of the policy their plain, ordinary, and popular meaning shows that the exclusion is capable of only one reasonable interpretation and is capable of being understood by the average insured. The supreme court determined that that there was no requirement for a mechanical device to be motorized or self-powered, and that the appellate court did not focus on the plain meaning of the exclusion terms. Additionally, nothing in the State Farm policy indicated that it was meant to cover injuries arising from the use of farm implements, such as the auger. The supreme court further ruled that the exclusion was not void as against public policy. On its face, the exclusion does not discriminate between insureds and permissive users as Kent argued.

State Farm Mutual Auto. Ins. Company v. Elmore, et al., 2020 IL 125441.

The One Year Limitation for Refiling Litigation that has been Dismissed for Want of Prosecution Begins to Run on the Date that the Motion to Vacate is Denied and Not the Date on which the DWP is Entered

In *Broderick Stacken Jr. v. Stratford Moes Inc. et. al.,* the plaintiff filed his personal injury lawsuit on December 31, 2014. The case was dismissed for want of prosecution (DWP) on June 13, 2016. The plaintiff promptly moved to vacate the DWP, which was granted.

A second DWP was entered on December 20, 2016, when the plaintiff's counsel failed to appear at a hearing. The plaintiff moved to vacate the DWP within 30 days on January 18, 2017. The notice of motion was defective because the notice listed an incorrect courtroom. The plaintiff notified defense counsel of the mistake and stated that an amended notice of motion would be filed. The amended notice was filed but was never sent to the defendant, resulting in the motion being stricken from the call on January 30, 2017.

On December 27, 2017, over a year after the second DWP was entered, the plaintiff provided the defendant with another notice of motion to vacate the DWP. On January 8, 2018, the trial judge granted the plaintiff leave to file an amended motion that more fully explained the argument in favor of vacatur. At the subsequent hearing on April 19, 2018, the court denied the motion to vacate.

Six months later, on December 19, 2018, the plaintiff refiled the original action. Thus, the refiled action was filed within a year after the motion to vacate was denied, but it was filed two years after the December 2016 DWP order. The trial court granted the defendants' motion to dismiss, holding that under Section 13–217 of the Code of Civil Procedure (735 ILCS 5/13–217 (West 2020)), the plaintiff was allowed only one year after the entry of the DWP order to refile his action and thus, the refiled action was time-barred.

In an Illinois Supreme Court Rule 23 opinion, the Illinois Appellate Court, First District reversed, noting that the plaintiff's timely

motion to vacate the DWP tolled the one-year clock, and that the one-year limitation period to refile the action did not begin to run until the motion to vacate was denied. Thus, the one-year period for refiling did not begin to run until the motion to vacate was denied on April 19, 2018. As the plaintiff refiled his suit on December 19, 2018, the refiled action was within the one-year limitation. The appellate court also noted that a DWP is not a final judgment disposing of the litigation, subject to appeal or collateral challenge, until the expiration of that one-year period or the remaining limitations period, whichever is longer.

The defendants argued that allowing a motion to vacate to toll the refiling period could lead, as it did here, to very lengthy extensions of the refiling period. The court noted that this was by no means an ideal situation, but defendants are not entirely without recourse against motions to vacate DWPs that linger for months or even years on end while the DWP order remains non–final. The court pointed out that most jurisdictions have rules allowing the court, on motion or *sua sponte*, to deny any motion that is not called for hearing within a certain period of time. In Cook County, for example, the court may deny a motion based on delay alone if it is not called for hearing within 90 days of the date it is filed. Therefore, nothing would have stopped the defendants from requesting a hearing on the motion to vacate the DWP or from asking the court, after 90 days had passed, to deny the motion based on delay alone.

Broderick Stacken Jr. v. Stratford Moes Inc. et. al., No. 1-19-1982, 2021 WL 4988374 (Ill. App. 1st Dist. October 27, 2021).

Refiling a Complaint in a Previously Dismissed Lawsuit as Opposed to Filing a New Action Does Not Satisfy the Language of the Voluntary Dismissal Statute

In *Eighner v. Tiernan*, the Illinois Supreme Court took up the issue of whether the phrase "may commence a new action" in Section 13–217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 1994)) refers to a new lawsuit with a new case number, filing fee, and summons, and answered the question in the affirmative.

Plaintiff filed suit in 2014 against the defendant for personal injuries and property damage arising out of an automobile accident. The case number was 2014 L 11428. The suit was voluntarily dismissed on May 18, 2017, with leave to reinstate within one year of the date of the dismissal order. On April 23, 2018, approximately 25 days before the expiration of the one-year deadline to refile, the plaintiff filed a document entitled, "Plaintiff's Notice of Refiling Complaint Being Reinstated within One Year of Voluntary Dismissal" under the old case number of 2014 L 11428. Included with this notice was a copy of the plaintiff's original complaint. The plaintiff was not assessed a filing fee and no summons was issued. The plaintiff's attorney contacted defense counsel on May 15, 2018 and informed him of the notice of reinstatement. In a subsequent exchange of emails, counsel for defendant informed the plaintiff's counsel that he was unable to find the reinstated case on the Circuit Court website. On October 11, 2018, the plaintiff's counsel sent the defense counsel an email in which he stated that he had tried for two hours to file the case under a different number and that he was afterwards advised by a Circuit Court clerk to keep the same number on the case and, "figure out a way to get it before the judge." Attached to the October 11, 2018, email was a document entitled, "Plaintiff's Motion to Set a Case Management Schedule" which was captioned with the original 2014 L 11428 case number.

On October 15, 2018, the plaintiff filed a new complaint that was docketed as case number 2018 L 11146, paid a new filing fee, and issued a new summons to the defendant.

Upon receipt of the 2018 L 11146 suit, the defendant filed a 2-619(a)(5) motion to dismiss, arguing that the new action was not filed until after the expiration of the one-year period for refiling. Additionally, the defendant argued that Section 13-217 did not permit the plaintiff's filing on April 23, 2018, because that filing was not a new action or lawsuit but rather, an attempt to reinstate the original 2014 L 11428 lawsuit.

The motion to dismiss was denied and the court certified the following question for appeal under Illinois Supreme Rule 308:

> Whether refiling a complaint in a previously dismissed lawsuit as opposed to filing a new action satisfies the language of 735 ILCS 5/13-217, which states a plaintiff may commence a new action after the case is voluntarily dismissed pursuant to 735 ILCS 5/2-1009.

The Illinois Appellate Court, First District answered the certified question in the negative focusing on the meaning of the phrase "may commence a new action." The court concluded:

> The phrase 'may commence a new action' is unambiguous. 'New' denotes a new case number, a new filing fee, and a new summons to issue. Had the legislature intended to allow a plaintiff to file an action after a dismissal under

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> the old case number, it would have so provided and would have not used the words 'new action' in section 13-217.

The Illinois Supreme Court affirmed the appellate court's holding, noting that in *Hawes v. Luhr Brothers, Inc.*, 212 Ill. 2d 93 (Ill. 2004), the court held that an order allowing a voluntary dismissal is a final judgment for purposes of Section 2-1203(a), which allows a party to file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief within 30 days of the entry of the judgment. Therefore, a plaintiff has a right to file a motion to vacate a voluntary dismissal order and reinstate the case up to 30 days after the date of the dismissal order. It is Section 2–1203(a) that governs the process of reinstating a complaint following a voluntary dismissal and not section 13-217. Section 13–217 does not eliminate the rule that the circuit court loses jurisdiction 30 days after the entry of a voluntary dismissal if no post-judgment motion is filed. A plaintiff who wishes to take advantage of Section 13-217 more than 30 days after the entry of a voluntary dismissal order when no post-judgment motion has been filed will necessarily have to file a new complaint because the Circuit Court no longer has jurisdiction over the original case.

The supreme court noted that this issue came before it under a narrow question via Rule 308, which asked only whether a "new action" permitted by Section 13–217 requires a new case number, filing fee, and summons, and the appellate court correctly ruled that it did. Nevertheless, as the circuit court noted, the plaintiff was "trying to reinstate" case number 2014 L 11428 with his filing on April 23, 2018. Given the unique circumstances of the case, the supreme court exercised its authority to enter supervisory orders and treated the plaintiff's April 23, 2018, filing as a motion to vacate the order of voluntary dismissal and to reinstate case number 2014 L 11428 and remanded the case to the circuit court with directions to reinstate case number 2014 L 11428 *nunc pro tunc* to April 23, 2018.

Eighner v. Tiernan, 2021 IL 126101.

Settling Defendants are not "Uncollectible" Under the Contribution Act

In *Roberts et. al. v. Alexandria Transportation*, the Illinois Supreme Court took up the question of whether, under Section 3 of the Joint Tortfeasor Contribution Act (740 ILCS 100/3 West 2018), the obligation of a settling party is "uncollectible." The case came to the supreme court upon a certified question from the Seventh Circuit Court of Appeals. The supreme court answered the certified question in the negative, holding that the obligation of a tortfeasor who settles is not, "uncollectible" within the meaning of that section.

The question arose out of an automobile—truck collision that occurred when Alexandria's truck driver rear-ended a truck operated by plaintiff Roberts. Roberts sued the driver, Alexandria Transportation, Inc., and Alex Express, LLC (Alex Parties). The Alex Parties filed a contribution claim against Edwards-Kamaldusk, LLC (E-K) and Safety International LLC (Safety), the contractor and subcontractor that were performing roadwork in the area where the crash occurred. E-K settled with the plaintiff for $50,000. A joint motion by the plaintiff and E-K for a good faith finding pursuant to the Contribution Act was granted and E-K was dismissed from the litigation.

The Alex Parties later settled with the plaintiff in a release that extinguished the plaintiff's claims against Safety, leaving only the claim of the Alex Parties against Safety for contribution.

Prior to a jury trial on the Alex Parties' contribution claim, Safety asked the District Court to put all of the settling parties, including the plaintiffs, on the verdict form. The request was denied as to the plaintiffs. However, the District Court determined that the Alex Parties, Safety, and E–K had to appear on the verdict form so the jury could adequately apportion fault among every tortfeasor, even though the court had dismissed E–K from the contribution action. The District Court determined, based on its interpretation of the Contribution Act, that any share of liability that the jury assigned to E-K should not be reallocated between the Alex Parties and Safety on a *pro rata* basis. Therefore, the District Court ordered that Safety would pay to the Alex Parties only what the jury determined was Safety's portion of fault and that the Alex Parties would remain liable for E–K's entire share along with its own share.

The jury determined the respective percentage of fault for each tortfeasor as follows:

- 15% to Alex Parties;
- 10% to Safety; and
- 75% to E–K.

Consequently, Safety was obligated to contribute 10% of the accident liability, leaving the Alex Parties liable for their entire settlement for the accident less a $50,000 setoff.

The District Court ruled that E–K's obligation was not "uncollectible" and, therefore it did not reallocate E-K's share of liability between the Alex Parties and Safety, and that E-K's 75% share could not be reallocated between the Alex Parties and Safety. The Court of Appeals agreed and found that, "discharged" does not necessar-

ily mean "uncollectible" and certified the question to the Illinois Supreme Court.

The Illinois Supreme Court agreed, stating that "discharged" means "to free from all obligation that burdens" or "to get rid of" (as a debt or duty) by paying or performing. The court reasoned that "Section (2d) plainly refers to the effect of settlement on the settling tortfeasor and the other joint tortfeasors. In contrast, section 3's exception plainly addresses the separate topic of the nature of a joint tortfeasor's obligation, that is, collectability."

Roberts et. al. v. Alexandria Transp., 2021 IL 126249.

Construction Manager Can Avail Itself of Exclusive Remedy Rule for Subsidiary's Employee's Claim Because of Preexisting Contractual Obligation

In *Munoz v. Bulley & Andrews, LLC*, the Illinois Appellate Court, First District revisited the exclusive remedy provision of the Workers' Compensation Act. Defendant Bulley & Andrews, LLC was a construction manager. Plaintiff was a concrete worker and was an employee of the Bully & Andrews, LLC's wholly owned subsidiary, Bully & Andrews Concrete Restoration, LLC. He was injured while working in the course and scope of his employment on one of the defendant's construction jobs. He filed a workers' compensation claim and received benefits. He then filed a negligence action against the defendant. However, the defendant had paid the workers' compensation benefits on behalf of Plaintiff. It did so as the contract with the property owner required it to purchase insurance, which included "claims under workers' compensation, disability benefit and other similar employee benefit acts that are applicable to the Work performed." Prior to the project, the defendant procured workers' compensation insurance for both itself and its subsidiary that included a $250,000 deductible.

After the plaintiff was injured and filed his claim, the defendant began paying out of pocket for his medical bills. Once the plaintiff filed the third-party suit, the defendant filed a motion to dismiss, arguing the exclusive remedy provision of the Workers' Compensation Act. The trial court granted the motion, noting the owner-construction manager contract obligated the defendant to pay for the workers' compensation insurance and benefits for its subsidiary's employees. The appellate court cited to the Illinois Supreme Court case of *Ioerger v. Halverson Construction Co.*, 232 Ill.2d 196 (2008), that the immunity afforded by the Workers' Compensation Act's exclusive remedy provision is predicated on the simple proposition that one who bears the burden of furnishing the benefits for an injured employee should not also have to answer to that employee for civil damages in court. The appellate court found that, although the defendant was not the plaintiff's direct employer, it had sufficiently proven it had a preexisting legal obligation to pay workers' compensation benefits pursuant to its contract with the owner, as well as the policy itself, and the list of medical payments it had to the plaintiff's medical providers and upheld the trial court's dismissal.

Munoz v. Bulley & Andrews, 2021 IL App (1st) 200254, *rev'd and remanded* 2022 IL 127067.

A Legal Duty is Not Created by a Defendant's Self-Imposed Rules or Guidelines

In *Gore v. Pilot Travel Centers, LLC*, the plaintiff slipped and fell on an icy sidewalk at the defendant's gas station. Weather data revealed there was snow or icy precipitation in the two days prior to the fall. The defendant's employees shoveled and salted the sidewalks and the defendant used a vendor to plow snow and salt the fueling and parking areas. After a number of depositions were taken and one of the defendant's corporate representatives testified that the defendant had an internal corporate snow-removal policy that stated salting will be done "as needed to maintain bare pavement as weather will permit," and that "shoveling and salting/sanding of sidewalks are the responsibility of our store employees," the plaintiff amended his complaint to allege his fall was caused by the negligence of the defendant, acting through its employees.

The defendant filed a summary judgment motion arguing there was no evidence of an unnatural accumulation of ice or that it had actual or constructive notice of ice on the sidewalk before the fall. In response, the plaintiff argued that the defendant undertook a duty to remove the ice and that it violated its corporate policy in its removal efforts. The trial court granted the motion, finding there was no evidence of an unnatural accumulation, the defendant did not assume a duty to remove natural accumulations of ice, the defendant was not subject to liability for an alleged violation of an internal company policy, and the defendant had no actual or constructive notice of the ice on the sidewalk.

The Illinois Appellate Court, Third District, found that the defendant had voluntarily undertaken to remove the natural accumulation of ice and snow, and that the plaintiff failed to present

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evidence that the ice that remained was an unnatural accumulation. Simply because some ice remained after the removal efforts does not constitute negligence. The appellate court also noted that a duty is not created by a defendant's self-imposed rules or guidelines, and an alleged violation of the internal rules or guidelines is not evidence of a defendant's negligence or failure to use reasonable care. As a result, the trial court's ruling was upheld.

Gore v. Pilot Travel Centers, LLC, 2021 IL App (3d) 210077.

The Law of the Case Doctrine Barred the Parties and the Trial Court from Relitigating Issues Decided by the Appellate Court

In *Goering v. Midwest Neurology, Ltd.*, the plaintiff was the guardian and next friend of Laura Martinez, a disabled person who was diagnosed with multiple sclerosis. For over four years, defendant Dr. Andrew Ta treated Martinez with a medication for MS that, if used for longer than two years, places the patient at an increased risk for developing progressive multifocal leukoencephalopathy (PML), a rare brain infection that causes severe disability. Initially, Martinez herself filed a complaint for medical negligence against the defendants in 2015 after she was diagnosed with PML in 2012. The complaint was voluntarily dismissed in 2015. In 2016, Martinez refiled the original complaint but added a physician's report. In 2017, the defendants answered the refiled complaint as well as an affirmative defense that the action was barred by the two-year statute of limitations.

One year later, in 2018, a probate court found Martinez was legally disabled and appointed the plaintiff, her mother, as the guardian of her estate and person. The plaintiff then moved for leave to file an amended complaint and to substitute herself as plaintiff, as guardian of Martinez's estate, and to conform the pleadings to the anticipated proofs.

The trial court allowed plaintiff to file the amended complaint and the defendants filed a combined motion to dismiss and for summary judgment on the statute of limitations. They argued the first two complaints were barred by the statute of limitations that should have expired in 2014, two years after the PML diagnosis. They further argued Martinez waived the right to claim she had a legal disability before the expiration of the limitations period because she admitted in the initial complaints that she did not know the defendants failed to comply with the standard of care until she discovered the drug warnings in 2015. Plaintiff argued there was a genuine issue of material fact whether Martinez was under a legal disability when she was diagnosed with PML. The trial court granted the defendants' summary judgment motion. Upon appeal, the Illinois Appellate Court, Second District, vacated the trial court's judgment and remanded the case in 2019, finding the amended complaint was the operative pleading and that there was a genuine issue of material fact as to when Martinez became legally disabled so as to toll the statute of limitations.

On remand, the trial court granted the defendants' motion for reconsideration and to vacate the 2018 order that granted the plaintiff leave to file the amended complaint. In short, the trial court only allowed the plaintiff to amend the original complaint to change the identity of the plaintiff. The plaintiff moved to vacate the trial court's order that vacated the 2018 order, arguing the trial court ignored the law of the case—the mandate from the appellate court—and the motion was denied. The defendants then moved to strike the doctor's affidavit and moved for summary judgment, which was granted. Plaintiff again appealed.

The issue on appeal was whether, based on the law-of-the-case doctrine, the trial court improperly vacated its order granting the plaintiff leave to amend the complaint. Application of the law-of-the-case doctrine is a question of law with a *de novo* standard of review. The doctrine bars relitigating of an issue decided in the same case. The resolution of an issue presented in a prior appeal is binding and will control upon remand and in a subsequent appeal. It applies to questions of law and fact. The appellate court noted the only proper issue on a second appeal is whether the trial court's order on remand is in accord with the mandate from the first appeal.

In this case, the appellate court found the trial court disregarded the appellate court's earlier mandate, which was the law of the case, by not allowing plaintiff leave to file her amended complaint and acknowledging there was a genuine issue of material fact regarding when Martinez became legally disabled. It reversed the trial court's judgment and again remanded the case for trial on the amended complaint with the doctor's affidavit and in conformance with both appellate opinions.

Goering v. Midwest Neurology, Ltd. and Andrew D. Ta, M.D., 2021 IL App (2d) 200735.

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Survey of Construction Law Cases

Injured Worker can Recover from His Employer via Workers' Compensation and Maintain a Negligence Action Against His Employers Parent Corporation

In *Munoz v. Bulley & Andrews, LLC*, the Illinois Supreme Court reversed the Illinois Appellate Court First District and held that an injured construction worker's allegations of negligence against his employer's parent corporation were not barred by the exclusive remedy provisions of the Workers' Compensation Act, 820 ILCS 305/1, *et. seq.* (the Act).

At the time of the alleged injury, the parent corporation was providing construction management services to a building owner pursuant to a written contract. The contract required the parent corporation to maintain an insurance policy to protect it from workers' compensation claims, "which may arise out of or result from the Contractor's operations and completed operations under the contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable."

The scope of work undertaken by the parent corporation for the project included much of the concrete work. The parent company utilized employees of a wholly owned subsidiary to perform the concrete work, without any written contract between the two entities.

Plaintiff, an employee of the wholly owned subsidiary, allegedly injured himself while moving a heavy blanket in connection with that concrete work. Within a month of the occurrence, plaintiff filed a workers' compensation claim against the subsidiary. Effective at the time was an employer's liability policy previously procured by the parent corporation, that identified both the parent corporation and its subsidiary as insureds. The policy had a $250,000 deductible. In accordance with the deductible, the parent corporation paid plaintiff's medical bills out of pocket while the workers' compensation matter was pending

Plaintiff subsequently sued the parent corporation, alleging common law negligence. The trial court granted the parent corporation's motion to dismiss pursuant to 735 ILCS 5/2-619(a)(9), finding allegations against the parent corporation were barred by Sections 5(a) and 11 of the Act, collectively referred to as the "exclusive remedy provisions." The appellate court affirmed the dismissal, disagreeing with plaintiff's argument that exclusive remedy provisions could not bar the allegations against the parent corporation since plaintiff was not its employee, and was only employed by the subsidiary. The Illinois Supreme Court reversed, reasoning that the immunity is conferred only on immediate employers of an injured worker.

The Illinois Supreme Court addressed its previous opinions in *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437 (1976) and *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196 (2008). *Ioerger* was a unique situation involving a joint venture. In *Munoz*, the Court concluded that the parent and subsidiary were separate entities and operated separately, and therefore, the parent was not entitled to the exclusivity immunity.

Munoz v. Bulley & Andrews, LLC, 2022 IL 127067.

No Duty Owed in Negligence Action Against Contractors for Failing to Remove Debris

In *Grabinski v. Forest Preserve District of Cook County, et. al.*, the Illinois Appellate Court First District confirmed the trial court's dismissal with prejudice of the Cook County Forest Preserve, ComEd and Intren, Inc. from an action alleging negligence in failing to remove construction debris from a drainage ditch. The Forest Preserve commissioned ComEd to provide additional utility lines within the Forest Preserve and ComEd contracted with Intren to bore holes for the project. Over a year after the lines were installed near a drainage ditch, plaintiff's decedents' vehicle hydroplaned on the road adjacent to the ditch. According to the plaintiff, debris from the project (tree limbs, dirt, leaves, etc) caused the drainage ditch to become obstructed and not drain properly, causing water to flood onto the nearby roadway. The court held the defendants owed no duty to the decedents because IDOT owned the road and adjacent ditch and it was not foreseeable to the defendants that over a year after project completion IDOT would fail to remove built up debris. Additionally, ComEd and Intren owed no contractual duty because decedents were not parties to the respective contracts; cleaning up

debris a year after project completion was beyond the companies' contractual scope; and the companies did not own the construction area or have any access to the area once their work was completed.

Grabinski v. Forest Preserve Dist. of Cook County, et. al., 2020 IL App (1st) 191267.

Time Barred Claim and Entitlement to Setoff Result in Reduced Judgment Against Employer on Contribution Claims

Injured while working on a construction site, plaintiff filed suit against the property owner, general contractor and electrical subcontractor. Defendants filed contribution claims against plaintiff's employer. The contribution claims of all three defendants against the employer were later assigned to plaintiff as part of a settlement agreement.

After interim proceedings and appellate practice, the matter proceeded to a jury trial on the contribution claims against the employer. The electrical subcontractor was found 7.5% at fault and the employer was found 92.5% at fault. In affirming the finding that the underlying settlement was in good faith, the court held, where the settlement at issue involves cash payments and assignments of contribution actions, a court determining whether the settlement is in good faith under the Contribution Act will consider the common liability to be the cash payments only. The contribution claims did not constitute a double recovery. Rather, they fulfilled a purpose of the Contribution Act and were found to merely ensure the equitable apportionment of damages.

Plaintiff's employer argued that the assigned claim against the electrical subcontractor was time barred. Plaintiff first sought to add that claim following the court's decision in *Barnai v. Wal-Mart Stores, Inc.*, 2017 IL App (1st) 171940. In that decision, the court held that the electrical subcontractor's absence from the verdict form prejudiced the employer. To conform with the court's opinion in that matter would have required that the verdict form include a fault allocation for the electrical subcontractor, not a revival of the contribution claim. The appellate court reversed the circuit court's order granting plaintiff's motion for leave to file a third amended complaint against the electrical subcontractor.

Plaintiff's employer argued that the circuit court erred in denying its request for a setoff. The employer was obligated to indemnify the property owner and general contractor for liability arising out of employer's work for them. The insurance policy that the employer purchased included the property owner and general contractor as additional named insureds and partially funded the settlement. The court held that, plaintiff may not seek contribution from his employer for those amounts but may seek contribution against the employer for the amounts paid in excess of the insurance payments.

The court, based on its conclusions that the electrical subcontractor contribution claim was time barred and the employer was entitled to a setoff, reduced the judgment against the employer on the contribution claims.

Barnai v. Wal-Mart Stores, Inc., 2021 IL App (1st) 191306.

Careful Construction and Interpretation of a "Pay-if-Paid" Clause in Subcontract is Key to Triggering Contract Termination

In *Pepper Construction Company v. Palmolive Tower Condominium, LLC.*, the appellate court held that Pepper Construction Company's subcontract with subcontractor Bourbon Marble Inc. contained a "pay-if-paid clause"; however the specific language of the clause allowed for the subcontractor to seek recovery for further damages beyond what the subcontractor had already been paid because the clause language limited the "pay-if-paid" to "materials and labor".

Bourbon Marble Inc. worked on an interior build-out of a large condominium building owned by Palmolive Tower Condominium LLC, located in Chicago. The project evidently had numerous problems and the general contractor, Pepper Construction Company and in turn, one of its subcontractors, Bourbon Marble, Inc., stopped working on the project. Pepper Construction and all the subcontractors participated in arbitration. Pepper Construction Company settled with the building owner, however issues with payment remained with subcontractor Bourbon Marble.

In the underlying lawsuit filed by Bourbon Marble, Bourbon sued Pepper Construction for breach of contract and unjust enrichment. Bourbon Marble succeeded on both claims. Pepper Construction appealed and argued that it had paid Bourbon all amounts due under section 20 of the subcontract which contained a "pay-if-paid clause."

Pepper Construction asserted that under section 20 of the subcontract, it paid Bourbon more than was due and that Bourbon could not recover any additional money. Section 20 of the subcontract, titled "Contract Termination," stated in part:

> It is agreed that, should the Owner/PEPPER Contract for the Project for which this Subcontract Agreement is writ-

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> ten, be terminated or the progress of the Work delayed due to conditions which PEPPER cannot control, PEPPER may terminate this Subcontract Agreement without any liability to the Subcontractor and the Subcontractor will be entitled to payment for materials and/or labor approved and accepted by PEPPER and by Owner *** and actually paid to PEPPER by Owner.

Pepper Construction argued on appeal that section 20 limited Bourbon's recovery to the money actually paid to Pepper Construction by the building owner. At arbitration, the arbitrator attributed approximately $1.088 million to Bourbon's work on the project and ruled that Pepper had already paid Bourbon Marble $1.1 million. Therefore, Pepper Construction argued, that it has fully satisfied its obligation under the "pay-if-paid clause" in section 20 of the subcontract (despite Bourbon supporting damages over $2.5 million).

Bourbon Marble argued that the trial court had already rejected the "pay-if-paid" principle of Section 20. However, the appellate court disagreed and held that the trial court had not considered the language of section 20 of the subcontract or whether that section barred Bourbon Marble's efforts for additional recovery of damages, and reviewed the section 20 arguments *de novo*.

The appellate court explained that Illinois courts have distinguished between pay-if-paid and pay-when paid clauses, and finding pay-if-paid clauses are enforceable conditions precedent to payment. A "pay-if-paid" clause 'provides that a subcontractor will be paid only if the contract is paid and thus ensures that each contracting party bears the risk of loss only for its own work. A pay-when-paid clause "governs the timing of a contractor's payment obligation to the subcontractor, usually by indicating that the subcontractor will be paid within some fixed time period after the contractor itself is paid by the property owner." The appellate court held that Section 20 contained a "pay-if paid" clause, and the Bourbon was entitled to payment for "materials and labor" only if Pepper Construction was actually paid by Palmolive for those costs. The court found that the record supported that Pepper Construction was paid by Palmolive for Bourbon Marble's materials and labor through the arbitration settlement, but Pepper Construction did not make payment to Bourbon Marble for those specific costs. Pepper Construction made two payments to Bourbon Marble—one for $850,000 and one for $250,000. The first $850,000 was for Bourbon Marble to release its lien and the other payment was designated to offset arbitration costs. Based on the evidence and the court findings, Pepper Construction did not pay Bourbon Marble for "materials and labor" and found that Bourbon Marble could seek further recovery for those damages.

Pepper Construction Co. v. Palmolive Tower Condo., 2021 IL App (1st) 200753.

Trade Associations have Standing to Sue, But Transportation Tax Revenues are Not Statutorily Required to be Spent on Transportation Expenses

The appellate court has held that various trade groups and associations have standing to sue Cook County as plaintiffs if they can demonstrate they have suffered injury that was distinct and palpable, fairly traceable to county's actions, and substantially likely to be redressed by requested relief, but nonetheless have failed to state a constitutional violation.

In November of 2016, Illinois voters supported an amendment to the Illinois Constitution to protect funds generated from transportation related taxes from being spent for any purposes other than transportation-related ones. Nonetheless, transportation related tax monies were placed into the County's Public Safety Fund for non-transportation purposes to fund the county courts, jails, the sheriff's office, and like items.

As such, on March 6, 2018, a group of business and trade associations filed a suit for declaratory and injunctive relief against the County. The complaint alleged that, "to plug gaps in its budget," the County was diverting "revenue from transportation-related taxes and fees to the County's Public Safety Fund," where it was then spent on non-transportation-related purposes in violation of the constitutional Amendment.

Applying the three-part test articulated in in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), the Appellate Court held that the association plaintiffs have sufficiently alleged their "members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action", and that the interests plaintiffs seek to protect are germane to the organization's purpose. Further the appellate court ruled that neither the claim asserted, nor the relief requested, required the participation of individual members in the lawsuit. As such, the appellate court disagreed with the trial court's ruling and found proper standing for the plaintiffs to sue.

Though holding that the plaintiffs had standing to sue, the appellate court nevertheless found that Plaintiffs failed to state a claim. The appellate court found the language of the Amendment

ambiguous, acknowledging that either parties' interpretation of the Amendment was reasonable. So, the appellate court turned to the legislative debates for ultimate support of its ruling that the interpretation advanced by the County that the Amendment restricts the spending of transportation-related tax revenues when the spending of that revenue is dictated by state law, but it does not impact a home-rule unit's spending of revenue pursuant to its constitutional home-rule spending power. In sum, the Appellate Court held that the taxes imposed by the County that are the subject of the complaint are six different taxes. The County spends the revenue from each of these taxes pursuant to its home-rule spending power, not in accordance with a statute. The Amendment thus does not restrict, or govern in any way, the spending of these tax revenues, and therefore plaintiffs failed to state a claim for a constitutional violation.

Illinois Road and Transp. Builders Ass'n v. County of Cook, 2021 IL App (1st) 190396, *aff'd in part, rev'd in part, remanded in part,* 2022 IL 127126.

Building Owner's Tort Claim Precluded by Economic Loss Doctrine and Contract Claim Precluded by Lack of Privity of Contract

Navigant was the owner of certain real estate. Navigant's tenants hired various contractors (some of whom also hired subcontractors) to design and perform renovation work at the property. Navigant did not hire any of the contractors that performed the renovation work and Navigant was not named on the contractual documents between the tenants and the contractors and subcontractors. Subsequently, certain defects arose regarding the renovation work, specifically with the ceiling trusses. Harleysville was the insurer of Navigant and paid Navigant $870,000 for damages resulting from the defective trusses and lost rent.

In *Harleysville Insur. Co., a.s.o. Navigant Development, LLC. v. Mohr Architecture, Inc*., the insurer brought a subrogation action against various contractors and subcontractors involved in the two renovations of the property. Insurer asserted breach of contract and negligence causes of action related to defects in the ceiling trusses. These claims were dismissed by the Circuit Court which found that the property owners were not an intended third-party beneficiary.

The appellate court found that Navigant's ownership of the property where the work was performed by the various contractors and subcontractors was not sufficient to establish breach of contract claims. Navigant did not have privity of contract with the contractors as they were hired by the tenants. Further, Navigant was not an intended third-party beneficiary of the contracts between the tenant and the contractors. Hence, Harleysville's breach of contract claims were properly dismissed by the trial court.

Harleysville also asserted negligence claims against the various contractors and subcontractors. The trial court dismissed these claims pursuant to the economic loss doctrine (a.k.a. the *Moorman* doctrine), which bars recovery of solely economic losses via tort claims. The court noted that damages claimed in this case arose from the defendants' work not living up to commercial expectations. This included the repair of the trusses and lost rent. The court described plaintiff's damages as the "epitome of economic loss". The court further emphasized that Harleysville's inability to succeed on a breach of contract cause of action does not preclude the applicability of the economic loss doctrine to this case. The Circuit Court properly dismissed the negligence causes of action asserted by Harleysville against the contractors and subcontractors.

Harleysville Ins. Co., a.s.o. Navigant Dev., LLC. v. Mohr Architecture, Inc., 2021 IL App (1st) 192427.

Contractor's Failure to Include Mortgagee and Security Interest Holder in Action to Enforce Mechanics Lien Results In Forfeiture Of Lien

In *CB Construction & Design LLC v. Atlas Brookview*, LLC., the Illinois Appellate Court First District affirmed the trial court's dismissal with prejudice of a contractor's claim to enforce its mechanic's lien claim because the contractor failed to join the mortgagee and security interest holder as parties to its action.

The contractor, CB Construction and Design, LLC, timely filed its mechanic's lien for the $1.4 million still owed under its contract with the owner, naming the owner and 3 other named individuals, but not the mortgagee and the security interest holder. Pursuant to Section 34 of the Illinois Mechanic's Lien Act, the owner served CB with a demand to file suit within 30 days. CB timely filed its complaint to enforce the lien, again naming the owner and three individuals, as well as "Other defendants yet to be determined." CB did not join as parties the mortgagee and the security interest holder despite the fact that their interests in the premises were recorded prior to the filing of CB's complaint.

The appellate court affirmed the trial court's decision that the mortgagee and the security interest holder were necessary parties

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under the Mechanic's Lien Act, and that the failure to join them as parties to the complaint within 30 days of the owner's Section 34 demand resulted in forfeiture of the lien.

The court also rejected CB's argument that Section 2-616 of the Code should allow CB to amend its complaint to add necessary parties after the 30-day period where the amended complaint would "relate back" to the original complaint. The court ruled that the failure to follow the strict requirements of the Mechanic's Lien Act to add necessary parties within 30 days in response to a Section 34 demand is fatal, and any attempt to add "other defendants" later will not be allowed.

CB Construction & Design, LLC v. Atlas Brookview, LLC, 2021 IL App (1st) 200924.

Landscaper Escapes Damages Under Section 11 of the Illinois Prevailing Wage Act Since its Contracts Did Not Contain Clear Wage Rate Stipulations

In *Valerio v. Moore Landscapes,* employees of a landscaping company sued their employer seeking unpaid wages, prejudgment interest on back pay and reasonable attorneys' fees and costs. The Illinois Supreme Court found in favor of employer landscaping company. The lawsuit was based on alleged violations of Section 11 of the Illinois Prevailing Wage Act (820 ILCS 130/11). The plaintiffs were employed as tree planters for defendant landscaping company and paid $18.00 per hour. The Plaintiff employees alleged they should have been paid the prevailing Cook County hourly wage rate of $41.20 per hour. Plaintiffs, in support of these allegations, referenced the contract that their employer had with the Chicago Park District. Plaintiffs argued the contract terms required the defendant to pay its employees the prevailing Cook County wage rate, and further that Cook County's published prevailing wage rate for laborers, as of September 1, 2017, was $41.20 per hour. Defendant landscaping company responded by arguing: (a) its contracts did not contain a clear stipulation that the prevailing wage rate was $41.20 per hour so there was never an agreement to pay a certain quantified rate; and (b) the plaintiffs' work as landscapers was not covered by the Act. The circuit court agreed with defendants that the claim could not be pursued because the contracts did not contain a clear stipulation to pay the prevailing wage rate and dismissed the complaint. The Illinois Appellate Court First District reversed and held in part that that whether or not the contracts entered into by the Chicago Park District and defendant landscaper had a proper stipulation should not impact a right of recovery under section 11.

The Illinois Supreme Court, in agreement with the trial court, held that the "Prevailing Wage Rates" clause in the contract had insufficient terms to find that the parties had agreed to a stipulated wage rate. In particular, the supreme court considered the terms which also stated that the prevailing rate would be paid "when applicable." Since there was not a clear stipulation pursuant to section 11 the plaintiffs did not have a right of recovery.

Valerio v. Moore Landscapes, LLC, 2021 IL 126139.

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Survey of Employment Law Cases

Statute of Limitations for BIPA Claim Accrues Each Time an Individual's Biometric Information is Scanned or Captured

In *Watson, v. Legacy Healthcare Fin. Servs., LLC,* a Biometric Information Privacy Act (BIPA) case, the plaintiff appealed the trial court's order dismissing two of the defendants pursuant to the relevant statute of limitations. The trial court dismissed the two defendants because 1) a claim pursuant to the Act accrues the first time that his or her biometric information is obtained by a particular entity; 2) the statute of limitations for the Act is 5 years; and 3) more than 5 years had elapsed between the two defendants first obtaining plaintiff's biometric information and when plaintiff filed suit. On appeal, none of the parties disputed that the relevant statute of limitations is 5 years.

Plaintiff argued on appeal that the accrual date, for purposes of a statute of limitations, occurred with the last scan of plaintiff's fingerprint that lacked notice or consent. Defendants argued that the statute of limitations started to run with the first scan. The Illinois Supreme Court, the Illinois Appellate Court, and the United States Seventh Circuit Court of Appeals have yet to address this issue. The plaintiff's claim required the court to interpret the Act's statutory language.

The Illinois Appellate Court, First District looked to a published federal district court case, *Cothron v. White Castle System, Inc.*, 477 F. Supp. 3d 723 (N.D. Ill. 2020), and noted that the federal court rejected arguments similar to the defendants argument. The appellate court noted that the BIPA does not contain an express statute of limitation and does not set forth an accrual date. Instead, the appellate court looked to the plain language of the statute, its legislative history and purpose, and the dictionary definitions of key terms to establish that the BIPA applies to each and every capture and use of the plaintiff's fingerprint or hand scan. Ultimately, the appellate court determined the accrual date, for purposes of the statute of limitations, does not occur with the first collection of plaintiff's finger or handprint. Finally, the appellate court did not determine or address damages as that issue was not before it. Thus, the appellate court did not determine whether each scan was a new and separate violation or a continuing violation.

Watson, Individually and on Behalf of All Others Similarly Situated v. Legacy Healthcare Fin. Servs., LLC, et. al., 2021 IL App (1st) 210279.

Police Officers are not entitled to Compensation for Off-Duty Driving and Other Activities

Current and former SWAT Unit officers brought a class action suit against their employer, the City of Chicago alleging violations of the Fair Labor Standards Act (FLSA), the Illinois Minimum Wage Law (IMWL), and the Illinois Wage Payment and Collection Act (IWPCA) in *Chagoya v. City of Chicago*.. In their complaint, the officers alleged that when they take their equipment home, some equipment cannot be left in the vehicle. The officers sought compensation for the off-duty time spent transporting, loading, unloading and storing their gear inside their homes. The City moved for summary judgment and the officers filed cross-motions for summary judgment on the FLSA and IMWL claims. The Northern District of Illinois granted summary judgment in favor of the city and the officers appealed.

In their motion, the City took the position that the off-duty driving and transportation of weapons and gear during normal commutes between home and work were not tasks integral and indispensable to the SWAT operators' principal activities. Further, the officers were permitted to store and have stored their equipment at the Chicago Police Department's facility and, without taking their equipment home, were still able to perform their principal activities. Finally, the City argued there was no promise, agreement or practice of compensating officers for time spent during a normal commute or for loading and unloading equipment.

On the FLSA and IMWL claims, the officers argued that transporting and storing their equipment while off duty was integral and indispensable to their ability to maintain mission readiness and directly respond to critical incidents. Therefore, carrying equipment from their home to their vehicle was a compensable activity that marked the start of their workday. Under the continuous workday rule, the workday would extend to when they returned home and unloaded and secured equipment inside their residences. The Dis-

trict Court agreed with the City, concluding the activities were not compensable because loading and unloading was removed from the principal activity of responding to incidents. The court reasoned that while bringing equipment home supported officers' abilities to respond to incidents while off duty, because officers have been able to perform off duty critical response efforts without having their gear at home, the activity was not indispensable.

To prevail on the IWPCA claim, the officers had to establish they were owed compensation under an employment agreement. The City replied that the overtime compensation provision was limited to approved time. The officers relied on the City's requirement that the officers transport and store their equipment as the agreement binding the City under the IWPCA. The City replied that there was no agreement for compensation for transporting and moving equipment and that it had consistently denied request for such overtime pay.

The court relied on general FLSA principles. The FLSA, as amended, applies only to the employee's principal activity which includes anything integral and indispensable to the principal activity. A principal activity commences an employee's workday, once started, that workday continues until the conclusion of the employee's final principal activity of the day. A principal activity is the activity for which the employee is employed to perform. The FLSA does not apply to a preliminary or postliminary activity. The Illinois Supreme Court has interpreted those words in their ordinary sense with integral being necessary to the completeness or integrity of the whole and indispensable being a duty that cannot be set aside. In contrast, a preliminary activity is one engaged in by an employee before the commencement of the principal activity and postliminary activity being engaged in after completion of the principal activity.

The court stated that the 1996 amendments to the Portal to Portal Act through the Employment Commute Flexibility Act (ECFA) coupled with Supreme Court case law make clear that commuting in an employer-provided vehicle, loading and unloading, and storage time is not compensable under the FLSA. The court stated that an activity that allows a reduced response time promotes efficiency, but greater efficiency alone does not turn an activity into an integral and indispensable one. The requirement that equipment not be left in the vehicle is nothing more than a reasonable directive that officers take precautions necessary to ensure the safety and security of equipment. Therefore, the activities for which the officers sought compensation are not integral and indispensable, but rather preliminary and postliminary activities of the workday, and explicitly excluded under the Portal to Portal Act.

Chagoya v. City of Chicago, 992 F.3d 607 (7th Cir. 2021).

Factors Attributable to an Equivalent Position After Return From FMLA Leave

In *Hickey v Protective Life Corp.*, an employee filed suit against his employer, claiming an interference with his rights under the FMLA. Plaintiff took FMLA leave for anxiety and depression following the death of a family member and was approved for the full 12 weeks. While on leave, the employer acquired U.S. Warranty. The employer and U.S. Warranty discussed the possibility of plaintiff's transfer to U.S. Warranty. After returning from FMLA leave, plaintiff was told that he would have a new territory and would need to build up his own book of business. Plaintiff received a performance evaluation which indicated due to his leave he had not started his fourth quarter goals, and a year-end evaluation reflecting an overall inconsistent rating from serving clients prior to his leave. Plaintiff expressed his desire to transfer to U.S. Warranty. The Vice President to whom Plaintiff spoke advised that transfer was not available and instead offered Plaintiff a severance package to leave employment. During a second meeting between the two, the Vice President terminated plaintiff. First, the Vice President asserted plaintiff had lied when plaintiff denied having discussions with others about a possible transfer and when plaintiff discussed the severance offer, which plaintiff was not to discuss. Second, the Vice President believed plaintiff had no interest in continuing to work for his current supervisor.

Plaintiff then sued for wrongful discharge alleging his employer committed three unlawful acts: (1) his fourth-quarter performance review, (2) denial of his transfer, and (3) termination of his employment. Plaintiff sought a determination that his rights under the FMLA were violated, an order reinstating him to his position, and damages consisting of lost wages and benefits, liquidated damages and attorney's fees. The employer asserted that it had not interfered with plaintiff taking his FMLA leave, nor had it retaliated against him, that his performance review reflected his performance before leave, and that his termination was based solely on interactions with the Vice President and had nothing to do with his leave. Plaintiff maintained that whether the employer interfered with his FMLA leave by downgrading his performance evaluation was a question of fact for the jury and that a jury could conclude that he was not reinstated to his former or an equivalent position because he was required to prospect for clients which was a more difficult task than working with existing clients. The employer asserted that plaintiff had been returned to an equivalent position as he had the same title, manager, and team and sold the same products and was guaranteed

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the same pay for six months, and that plaintiff did not consider the job to be inferior. The employer stated that plaintiff's testimony that he would have been allowed to transfer to a different position but for the performance rating was speculative and even if he had been eligible for transfer, he was not entitled to it, therefore there was no adverse action.

According to the FMLA, it is unlawful for any employer to interfere with, restrain or deny the exercise of or the attempt to exercise any right provided in the FMLA. Among the rights guaranteed by the FMLA is the right of the employee to be restored to the same or equivalent position with equivalent benefits, pay and other terms and conditions following approved leave. To prevail on an FLMA interference claim, the employee must establish that (1) he was eligible for the FMLA's protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled. Plaintiff maintained that the employer interfered with exercise of his rights under the FMLA when the employer gave him poor fourth-quarter and year-end reviews and when the employer failed to restore Plaintiff to an equivalent position upon his return.

The court affirmed summary judgment in favor of the employer. The court noted that when plaintiff returned from his leave, he initially received the same salary and benefits as he had received prior to his leave. Under the arrangement given upon his return, plaintiff's compensation could have diminished after six months had he stayed employed for that period; however, he was terminated after about three weeks for reasons unrelated to his leave. Therefore, while he may have eventually suffered damages, at the time of termination he had not suffered any compensable damages. Further, the court stated that plaintiff did not dispute facts surrounding the termination of his employment.

Hickey v. Protective Life Corp., 988 F.3d 380 (7th Cir. 2021).

Summary Judgment Upheld in Title VII Action

In *Khunger v Access Community Health Network*, the Seventh Circuit affirmed summary judgment in favor of an employer on employee's Title VII claim asserting that Plaintiff failed to demonstrate she met employer's legitimate expectations. Plaintiff was a pediatrician at Access Community Hospital and received multiple reported complaints against her from other employees as well as patient guardians. After being placed on 90-day notice required under her employment agreement, plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of race, sex, religion and national origin. Plaintiff further made statements against the facility which colleagues perceived as threatening. Upon reporting plaintiff's behavior, plaintiff met with her supervisor who terminated her. Plaintiff amended her EEOC charge to include wrongful termination and retaliation claims. She was issued a right to sue notice, and she filed her complaint alleging discrimination and retaliation under Title VII of the Civil Rights Act.

Plaintiff asserted that colleagues made discriminatory remarks about her religion, placed a Christian pamphlet in her patient rooms, and mocked her accent. She alleged others stated she was the "anti-christ", not a "good Christian doctor," "not of our background," and does not speak "good English" though none of the allegations were ever reported to the employer. The employer moved for summary judgment on both claims. Following the grant of the employer's motion for summary judgment, plaintiff appealed.

To survive summary judgment in a Title VII claim, a plaintiff must present evidence that would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion or other proscribed factor caused the discharge or adverse employment action. Under the *McDonnell Douglas* framework, Plaintiff must first make out a prima facie case of discrimination by showing that (1) she is a member of a protected class, (2) she was meeting the defendant's legitimate expectations, (3) she suffered an adverse employment action, and (4) similarly situated employees who were not members of her protected class were treated more favorably. If the prima facie case is made the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action, at which point the burden shifts back to the plaintiff to submit evidence that the employer's explanation is pretextual. However, when the main issue is the plaintiff's job performance, it is often simpler to run through the multiple stages once with the goal of determining whether evidence as a whole would permit a reasonable factfinder to conclude that a protected class caused the termination.

Ultimately, following the above analysis, the court concluded that national origin, race, and religion were not factors in the plaintiff's termination. The court examined whether the plaintiff was a satisfactory employee by looking at the plaintiff's performance through the eyes of her supervisors at the time. The question was not whether the employer's performance ratings were correct, but whether the description of the employer's reasons was honest. The plaintiff argued that the complaints were not real, that they are inadmissible hearsay, that the termination reasons were pretextual.

The court disagreed, concluding, as a whole, the evidence showed her performance was woefully deficient and there had not been discriminatory or pretextual reasons behind her termination. Further, the court noted the plaintiff's prima facie case fails because she lacked evidence showing that a similarly situated individual not belonging to her class received better treatment.

As for the retaliation claim, the court concluded that the plaintiff lacked evidence tying her termination to a protected activity. The plaintiff failed to adduce evidence to establish a causal link between her protected activity and the adverse action. The plaintiff's reliance on the suspicious timing between the plaintiff's EEOC complaints and termination was not sufficient. The court reasoned that suspicious timing is rarely enough to create a triable issue, rather, the plaintiff must show the defendant was aware of the protected conduct then demonstrate through suspicious timing that the action followed close on the heels of the protected expression. However, evidence showed the plaintiff's supervisor had no knowledge of the EEOC charge upon her termination. Similarly, the plaintiff's other complaints of discrimination were too far attenuated from her termination.

Khungar v. Access Cmty. Health Network, 985 F.3d 565 (7th Cir. 2021).

Seeking Employee In Earlier Stage of Career Does Not Equate to Age Discrimination

A 62-year-old neonatologist brought a cause of action under the Age Discrimination in Employment Act (ADEA), relating to the termination of employment as part of restructuring at one facility and failure to rehire for an open position at another facility. The Executive Director of the pediatric service line for two separate locations decided restructuring was necessary. The Executive Director decided this restructuring would include terminating one facility's neonatologists and expanding the responsibilities of the neonatologists assigned to the other facility to cover the Carmel NICU. The plaintiff was an employee of the now eliminated medical location and the oldest neonatalogist. The plan left open one neonatologist position. An interview panel was chosen to decide who would take that position and ultimately the location's youngest neonatologist was chosen.

The ADEA extends protection to workers 40 years of age or older, making it unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual, because of such individual's age. When a plaintiff seeks to recover under a theory of disparate treatment, as plaintiff did, she must prove by the preponderance of the evidence, that age was the but-for cause of the challenged adverse employment action.

The plaintiff first alleged that she was unlawfully terminated in violation of the ADEA, specifically challenging the district court's finding that she did not satisfy the similarly situated prong of her case and rejecting evidence that the reasons for the termination were pretext for age discrimination. The district court held that the plaintiff failed to carry her burden with respect to the similarly situated prong, concluding she did not provide the ages, work history, performance review, supervisors, or qualifications of the other doctors, leaving the court to speculate whether age or some other legitimate consideration supported the employer's decision. The plaintiff argued that the court was not viewing the evidence in a light most favorable to her and improperly narrowed the pool of comparators. On appeal, the Seventh Circuit agreed with the District Court stating that there was no need to look beyond the differences in work environment to find material lack of comparability as the two locations were very distinct given varying NICU levels, acuity and pace. The court stated similarly situated employees under the age of forty were not treated more favorably as all five neonatologists with varying ages were given the identical opportunity to apply for the single opening.

The plaintiff also alleged she was discriminated against because the second facility failed to hire her, challenging on appeal the district court's holding that she failed to prove that the rationale for not hiring her was pretext for age discrimination. The record reflected that plaintiff's age was considered as there was discussion of her being a later career person. Further, the committee noted it was seeking a high energy person to fill the open position. The parties agreed that plaintiff established a prima facie case that she was not hired because of her age, however, the employer subsequently overcame its burden of proving a legitimate, nondiscriminatory reason for the adverse employment action. In holding so, the court stated the record reflected the neonatologist hired outshone plaintiff in her interview. The employer established that the new hire had a plan for the transition and impressed the interviewers with her proactive research whereas plaintiff presented as somewhat over-confident in her knowledge and abilities. Therefore, the record supported a range of legitimate non-age-related reasons for choosing to hire another over plaintiff, not simply pretext.

Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc., 986 F.3d 711 (7th Cir. 2021).

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Biased Reporter Isn't Enough to Establish Cat's Paw Theory

In *Vesey v Envoy Air, the* plaintiff, an airline agent, claimed she was subject to a hostile work environment and was terminated in violation of Title VII and the Illinois Human Rights Act anti-retaliation provisions. The plaintiff's employer claimed her termination was a result of the plaintiff abusing her travel privileges. The plaintiff alleged she was harassed because of her race and terminated in retaliation for reporting the harassment. The plaintiff further claimed the employer's findings pertaining to her termination were pretextual. The plaintiff asserted liability under the cat's paw theory, under which a supervisor who lacks decision making power uses the formal decision maker as a front person in a deliberate scheme to undertake a discriminatory employment action. Specifically, the plaintiff alleged that her general manger against whom she attributes the discrimination, encouraged another employee to file a complaint against her. Ultimately, the court decided that the mere fact that an employee's alleged wrongdoing was reported by a biased supervisor with a retaliatory or discriminatory motive does not establish liability under the cat's paw theory. Where the investigation results in an adverse action for reasons unrelated to the supervisor's original biased action, the employer will not be liable. Rather, a plaintiff must show that the biased supervisor's actions were a proximate cause of the adverse employment action. The court noted that even if the manager had a retaliatory motive, there was no evidence that the motive was relied upon in her termination. For example, a retaliatory motive could have been considered if the investigator had relied on the biased complaint into consideration in deciding on her termination, however no such evidence was presented. An employer's explanation is not pretext if the employer honestly believed in the nondiscriminatory reasons it offered.

Vesey v. Envoy Air, Inc., 999 F.3d 456 (7th Cir.), *cert. denied*, 142 S. Ct. 401, 211 L. Ed. 2d 215 (2021).

More Than Conjecture Necessary to Exclude Performance Evaluations as Hearsay

In *Igasaki v Illinois Department of Financial and Professional Regulation*, a gay, Japanese-American employee who was 62 years old and had been diagnosed with gout brought an action against his employer following his termination alleging race and sex discrimination and retaliation under Title VII, age discrimination in violation of the Age Discrimination in Employment Act (ADEA), and disability discrimination under the Americans with Disabilities Act (ADA). The plaintiff's employer provided the court years of specific deficiencies in performance noted in evaluations. The employer had placed the plaintiff on a six-month corrective plan with steps to follow as a result of his performance review which was renewed four times. Throughout, the plaintiff continued to be cited for poor performance. The plaintiff formally requested accommodation for his gout and the employer granted use of ergonomic equipment and an administrative assistant to type his work product but a request for flexible deadlines was denied as the request was not supported by a doctor's note. Instead of renewing the corrective action plan for the fifth time, the employer terminated the plaintiff. However, prior to termination, the employee filed a discrimination charge with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission (EEOC).

The District Court granted summary judgment in favor of the employer on all five of the plaintiff's claims. The court relied primarily upon the plaintiff's failure to dispute the substance of the employer's factual assertions. The court stated that the plaintiff mischaracterized evidence and offered only speculation. The plaintiff's race and sex discrimination claims under Title VII and his age discrimination claim also failed for lack of evidence establishing a prima facie case. Specifically, the plaintiff failed to identify any similarly situated employee who received more favorable treatment than he did. The record did not reveal any prejudice against Asians, gay men or older employees, and the nondiscriminatory reason for the termination was poor work performance. The plaintiff's disability discrimination claim was also "doomed" due to his four-year delay in requesting a reasonable accommodation for his gout. The court noted that once the plaintiff made a request, the employer sufficiently accommodated him. As for retaliation, the plaintiff offered no evidence of engagement in statutorily protected activity because he did not submit the administrative charges as evidence. Even if the plaintiff had engaged in statutorily protected activity, the court concluded that the plaintiff failed to establish a causal connection beyond suspicious timing between the charges and his termination.

On appeal, the plaintiff asserted that the district court erred in dismissing his claims and also alleged that the employer failed to proffer admissible evidence in support of its summary judgment motion. Specifically, the plaintiff challenged exhibits the employer attached to its motion for summary judgment, most of which were performance evaluations, corrective action plans, and disciplinary documents. According to the plaintiff, these documents violated Federal Rule of Evidence 803(6), the business record exception to

hearsay. The plaintiff alleged that the creator of the documents was dishonest and that in the declaration, creator did not assert that what was written in the employment documents was true. The court held that the evidentiary challenge was waived by not being asserted to the District Court. Further, the evidentiary challenge failed on the merits as the performance evaluations, corrective action plans and disciplinary documents are all business records. The plaintiff also argued the performance evaluations were inadmissible as they concerned the creator's state of mind, proposing that rarely is summary judgment appropriate for a district court to make a finding on state of mind. The court rejected that argument clarifying that state of mind concerns arise when a party offers more than conjecture and plaintiff essentially accused the document creator of lying but failed to provide any evidence of same.

The Seventh Circuit Court of Appeals held that the employment documents were admissible under the business records exception to the hearsay rule, that the employee failed to demonstrate that his race or sex, rather than his poor performance, motivated his termination as required to establish Title VII discrimination claim, and failed to show a causal link between his EEOC filing and termination as required for a Title VII retaliation claim, the employee's age was not a factor in termination as required to support the ADEA claim, and that the employer sufficiently provided reasonable accommodations.

Igasaki v. Illinois Dep't of Fin. & Pro. Regul., 988 F.3d 948 (7th Cir. 2021).

Illinois Human Rights Act Amendment—Consideration of Criminal Histories

Effective March 23, 2021, Illinois enacted changes to the Illinois Human Rights Act relating to the review of an individual's criminal record, making it a violation of the Act to discriminate against an individual based on prior convictions unless:

> (1) there is a "substantial relationship" between the conviction(s) and the position sought; or
> (2) granting the employment or continuation of employment would involve an "unreasonable risk" to property or the safety or welfare of specific individuals or the general public. 775 ILCS 5/2-103.1.

"Substantial relationship" means consideration of whether the employment position offers the opportunity for the same or a similar offense to occur and whether the circumstances leading to the conviction will recur in the employment position. The employer must consider the length of time since the conviction, the number of convictions, and the nature and severity of the conviction(s) and relationship to the safety and security of others, as well as the facts surrounding the conviction, the age of the individual at the time of the conviction and evidence of rehabilitation efforts. 775 ILCS 5/2-103.1 (A).

After taking these factors into consideration, if the employer determines that it will not offer employment to an applicant or that it will disqualify an employee for a new position based on his or her criminal record, the employer must first notify the individual of the preliminary decision in writing and the notification must include:

> (1) notice of the disqualifying conviction(s) that are the basis for the preliminary decision and the employer's reasoning;
> (2) a copy of the conviction report; and
> (3) an explanation of the individual's right to respond to the notice before the employer's decision becomes final. 775 ILCS 5/2-103.1(B).

The employee must be given at least 5 business days to respond to the notification. In event that the employer makes a final decision to disqualify or take adverse action against the individual based on the conviction record, the employer must then provide the applicant or employee with notice of the disqualifying conviction(s) that are the basis for the final decision, any information about an the individual's right to challenge this decision if such a process exists, and also inform the individual about his/her right to file a charge with the Illinois Department of Human Rights. 775 ILCS 5/2-103.1(B).

Illinois Business Corporation Act Amendment—Reporting Employee Demographic Information

The Business Corporations Act of 1983 was amended to require each domestic or registered foreign corporation that is required to file an EEO-1 report with the EEOC to provide substantially the same information to the Illinois Secretary of State in a format approved by the Secretary of State, which will publish the data on the gender, race, and ethnicity of each corporation's employees on its official website. 805 ILCS 5/14.05(m). Employers will have to meet this new obligation by including the employee demographic information with the corporation's annual report filed on and after January 1, 2023.

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It is unclear at this time whether the EEO-1 type report to be filed with Illinois will need to include only Illinois employees, or all employees. A plain reading of the Act's language ("[EEO information] of each of corporation's employees") supports the conclusion that the requirement is for all employees regardless of location. Further, other language in the Business Corporations Act specifically carves out other situations in which the corporation need only provide Illinois-based information, or information for wherever the corporation is located, which is not included in the EEO amendment. Ultimately, employers will need to wait to review the Secretary of State's form to learn whether the amendment requires reporting as to all employees; however, employers should anticipate for now that the State will require information for employees in all locations.

Illinois Equal Pay Act of 2003 Amendment—Equal Pay Registration Certificate Required

The Illinois Equal Pay Act was amended to require private employers with more than 100 employees in the State of Illinois to obtain an "equal pay registration certificate" from the Illinois Department of Labor by March 24, 2024. 820 ILCS 112-11. New corporations must acquire certificates within three years after beginning operations. To obtain this certificate, an employer must pay a $150.00 filing fee and provide the gender, race, and ethnicity data of its employees to the Illinois Department of Labor as well as the total wages paid to each employee during the prior calendar year.

To obtain a certificate, the employer also must submit a statement signed by a corporate officer, legal counsel or authorized agent of the business, for each county where the business has a facility or employees, stating:

> (1) that the business is in compliance with Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 163, the Illinois Human Rights Act, the Equal Wage Act, and the Equal Pay Act of 2003;
> (2) that the average compensation for female and minority employees is not consistently below the average compensation (after taking into account factors such as experience, skill, effort);
> (3) that the business does not restrict employees of one sex to certain job classifications and makes employment decisions without regard to sex;
> (4) that wage and benefit disparities are corrected when discovered; and
> (5) how often wage and benefits are evaluated to ensure compliance with the Act. 820 ILCS 112-11(c).

The equal pay compliance statement shall also indicate whether the business, in setting compensation and benefits, utilizes a market pricing approach, state prevailing wage requirements or union contract requirements, a performance pay system, internal audit analysis, or an alternative approach. 820 ILCS 112-11(c).

An employer who does not obtain a certificate or whose certificate is suspended or revoked after an IDOL investigation is subject to a mandatory civil penalty equal to 1% of "gross profits." Recertification is required every two years. 820 ILCS 112-11(j).

This section of the law also includes whistleblower protection, stating that a business shall not take any retaliatory action (reprimand, discharge, suspension, demotion, denial of promotion or transfer, or change in terms and conditions of employment) against an employee who: (a) discloses or threatens to disclose to a supervisor or to a public body any activity, inaction, policy, or practice implemented by a business that the employee reasonably believes is a violation of a law, rule or regulation, or provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry into any violation of a law, rule, or regulation by a nursing home administrator, or assists or participates in a proceeding to enforce this Act. 820 ILCS 112-11(k).

Illinois Human Rights Act Amendment—Work Authorization Status

On August 2, 2021, Governor J.B. Pritzker signed into law Public Act 102-0233, which adds work authorization status to the list of protected classifications in Illinois. Effective immediately upon signing, the Illinois Human Rights Act now makes it a civil rights violation for an employer to discriminate in any employment action (*i.e.* hiring, discipline, promotion, termination, etc.) based on an employee's Work Authorization Status. "Work Authorization Status" means the status of being a person born outside of the United States, and not U.S. citizen, who is authorized by the federal government to work in the United States. 775 ILCS 5/1-102.

Illinois Human Rights Act Amendment—"Association" Disability Discrimination

Effective August 20, 2021, the Illinois Human Rights act now adds to the definition of disability discrimination "unlawful discrimination against an individual because of the individual's association

with a person with a disability." This definition brings Illinois' law in line with the federal Americans with Disabilities Act (ADA). The difference, however, is that the ADA applies to employers with 15 or more employees and the IHRA defines employers as having one or more employees. 775 ILCS 5/1-103(I)(2).

Non-Compete Agreements and Other Restrictive Covenants

On August 13, 2021, Governor J.B. Pritzker signed into law Public Act 102-0358, an amendment to Illinois' "Freedom to Work Act," which both codifies existing requirements under Illinois precedent, and imposes new restrictions on when, with whom, and under what circumstances Illinois will enforce non-compete and non-solicitation agreements. 820 ILCS 90/5.

The law took effect on January 1, 2022, and only applies to agreements entered into after that date. The Freedom to Work Act defines a "covenant not to compete" to include an agreement between an employer and employee:

- that restricts the employee from performing any work for another employer for a specified period of time, or from performing work for another employer that is similar to the employee's work for the employer who is party to the agreement; or
- that imposes adverse financial consequences on a former employee if he/she/they engage in competitive activities after the termination of the employee's employment with the employer.

Excluded from the definition are covenants not to solicit, confidentiality agreements, non-disclosure agreements covering trade secrets or inventions, invention assignment agreements, agreements related to the purchase or sale of a goodwill or ownership interest of a business, no rehire agreements, and agreements requiring advance notice of termination where the employee remains employed during the notice period.

Although the Act excludes "covenants not to solicit" from the definition of "covenant not to compete," it does apply to non-solicitation covenants, as noted below. A covenant not to solicit is an agreement that restricts an employee from soliciting other employees for the purposes of employment with another entity, and/or restricts an employee from soliciting the employer's customers or clients for the purpose of products or services (regardless of whether the solicitation is for a competing business or product) or otherwise interfering with the customer relationship. 820 ILCS 90/10.

The new law proscribes non-compete agreements and non-solicitation agreements in certain circumstances. The Freedom to Work Act previously prohibited employers from entering into non-compete agreements with "low wage workers," effectively defined to include anyone who earned under $13.00 per hour. With the amendments in the Act, employers may not enter into a covenant not to compete with any employee who earns (or is expected to earn) $75,000 or less per year, and may not enter into a non-solicitation agreement with an employee who earns (or is expected to earn) $45,000 or less per year. Notably, the Act defines earnings more broadly than base salary to include bonuses, commissions, and tips; as well as elements of an employee's total compensation that may not be reflected on a W-2 such as contributions to a 401(k) or to a flexible spending or health savings account. For both non-compete agreements and non-solicitation agreements, the thresholds are scheduled to increase every five years until January 1, 2037, when the minimum annual earnings limits will be $90,000 for non-compete agreements and $52,500 for non-solicitation agreements. 820 ILCS 90/10.

The law also provides that covenants not to compete with individuals (a) covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act, and (b) employed in construction (except for management, engineering, design, architectural, or sales employees) are "void and illegal."

Interestingly, the law further prohibits non-compete and non-solicitation agreements with "any employee who an employer terminates or furloughs or lays off as the result of business circumstances or governmental orders related to the COVID-19 pandemic," or under circumstances similar to the pandemic. This provision does not appear to be limited by the earnings thresholds noted above. How business circumstances may be "related" to the pandemic is likely to remain an open question, even as the pandemic subsides at some point in the future.

Where non-compete and non-solicitation agreements are allowed, they must meet certain requirements to be enforceable:

- The employee must receive adequate consideration. The law defines "adequate consideration" as either (1) the employee worked for the employer for at least two years after the employee signed a covenant not to compete or covenant not to solicit; or (2) "consideration adequate to support an agreement not to complete or not to solicit,"

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consisting of "a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves."
- The agreement must be ancillary to a valid employment relationship.
- The agreement must be no more restrictive than required for the protection of the employer's legitimate business interest.
- The agreement may not impose undue hardship on the employee.
- The agreement may not harm any public interest. 820 ILCS 90/15.

The above requirements are not entirely new, as they have been part of Illinois court precedent for some time. For example, the Act seemingly codifies the 2013 decision in *Fifield v. Premier Dealer Services, Inc.*, in which an Illinois appellate court held that absent (undefined) consideration, an employee must remain employed for two years for continued employment to constitute adequate consideration for any post-employment restrictive covenant. Under *Fifield,* if an employee subject to a non-compete agreement voluntarily left employment prior to two years, and no other consideration had been paid, the restrictive covenant was unenforceable. Unfortunately, this Act contains no provisions for a court to address that situation, and will still leave employees free to compete at will with no restriction, or to leverage significant additional sums from employers lest they lose their competitive advantage. Going forward under the Act, if an employer wishes to enforce any restrictive covenant against a departing employee but did not provide other consideration at the outset of employment, such as an undefined amount of money or additional "professional" benefit of value, the employer will still have to provide additional consideration at the conclusion of employment to ensure enforceability. 820 ILCS 90/5.

Notably, additional consideration need not be monetary, but employers should be prepared to establish any "professional" benefits the employee received in order to avoid a court finding an agreement unenforceable for lack of "adequate consideration." There is no guidance in the law as to any formula that would be used to make this determination; but the definition of "adequate consideration" seems to indicate that if an employer provides some sort of financial or professional benefit at the outset of employment and the employee works for some period of time less than two years, even if the financial or professional benefit is not adequate to support the restrictive covenants on its own, the agreement may be enforceable.

The Act also borrows from existing precedent to instruct courts regarding the factors to be considered in evaluating whether a covenant not to compete or covenant not to solicit is reasonable in light of an employer's legitimate business interest(s). In evaluating whether a "legitimate business interest" exists, courts are to consider "the totality of the facts and circumstances of the individual case," including such factors as:

- the employee's exposure to the employer's customer relationships or other employees;
- the near-permanence of customer relationships;
- the employee's acquisition, use, or knowledge of confidential information;
- time and place restrictions and the scope of any activity restrictions. 820 ILCS 90/7.

As helpful as the guidance above may have been, the legislature also emphasized that the above factors are not the only ones that can be considered; that no single factor is to be controlling or given extra weight; that the determination is to be guided by all of the surrounding circumstances; and (unhelpfully) that "[t]he same identical contract and restraint may be reasonable and valid under one set of circumstances and unreasonable and invalid under another set of circumstances." The new statute appears to merely summarize the body of case law regarding reasonable restrictions and legitimate business interests, but it provides no guidance regarding matters such as what constitutes a near-permanent customer relationship, whether activity restrictions should be limited to activity that is the same or similar as the activity the employee performed for the party employer, or timing and extent of exposure to customers and other employees of the party employer. Those matters—often at the heart of enforceability concerns—remain up to the discretion of the courts, to be decided on a case-by-case basis.

The Act imposes the following, comparatively clear, new rules as well:

- Employers must provide at least 14 calendar days for the employee to review the provisions; and
- Employers must advise employees in writing to consult with an attorney before entering into the agreement. 820 ILCS 90/20.

Enforcement actions will take on considerable additional risk, in that employees who prevail in such actions (whether brought as a complaint or counterclaim by the employer) will be able to recover

reasonable attorneys' fees and costs in addition to any remedies available pursuant to the agreement. There are no restrictions in the Act that would prevent an employer from including a provision requiring the employee to pay attorney's fees if the employer is successful. 820 ILCS 90/25.

Additionally, the law gives the Illinois Attorney General the power to conduct an investigation and bring an enforcement action where it "has reasonable cause to believe that any person or entity is engaged in a pattern and practice prohibited by" the Act. The Attorney General may obtain monetary damages, restitution, injunctive relief, and civil penalties of up to $5000 for a violation and up to $10,000 for each repeat violation within a five-year period. Each violation for each person subject to an agreement that violates the Act is considered a separate violation. 820 ILCS 90/30.

One of the few aspects of the law that appears to be relatively employer-friendly is the exclusion of "garden leave" type of agreements that mutually require the employer and employee to provide notice prior to separation, pursuant to which the employee remains a paid employee (but does not work) for the duration of the notice period. Such arrangements, in theory, bench an employee about whom an employer has concerns with respect to competition, but do not involve the same complexities with respect to protection of legitimate business interests, consideration, or reasonableness of restrictions. Going forward, Illinois employers may want to evaluate such agreements as an alternative to non-compete agreements.

Employers should also be mindful that unless and until the full consideration for a covenant not to compete or covenant not to solicit has been paid or provided, such covenants will remain unenforceable. For example, if a non-compete or non-solicitation agreement relies solely on two years of continued employment for consideration, until the employee has worked for the employer for two years after signing the agreement, the employee is free to engage in competitive employment or to solicit customers or employees. Thus, employers should also review their existing confidentiality, non-disclosure, and invention assignment agreements to ensure that their confidential and proprietary information, intellectual property, and trade secrets remain protected.

Illinois employers should begin reviewing any agreements or other forms that include restrictive covenants, including but not limited to employment agreements, offer letters, compensation packages, incentive plans, and separation or severance agreements. At a minimum, employers should update such documents that will be entered into in 2022 to include language:

- advising employees to consult counsel;
- providing the 14-day review period discussed above;
- authorizing courts to reform the agreement; and
- documenting "adequate consideration."

Employers may also want to consider whether to have current Illinois employees sign new, renewed, and/or updated non-compete and non-solicitation agreements prior to the end of 2021 to avoid those agreements being subject to the Act. Of course, any revised agreement in late 2021 will restart the two-year timeclock for continued employment as consideration and that must be considered as well.

Employers should also evaluate their practices that may impact enforceability under the Act. For example, employers need to ensure that they allow for the full 14-day review period before requiring employees to sign non-compete and non-solicitation agreements. Employers should also consider how to determine whether an employee's total earnings meet the monetary thresholds for coverage by the Act and whether they have been provided all consideration promised in support of the agreement at issue. Finally, the Act's prohibitions mean that robust confidentiality and non-disclosure agreements with heightened monitoring provisions are even more important than before.

Victims' Economic Security and Safety Act (VESSA) Amendments

Effective January 1, 2022, Illinois' VESSA law covers not only leaves for victims of domestic, sexual, or gender violence, but also victims of any "crime of violence." The amended law refers to various crimes under the Illinois Criminal Code, including homicide, sex offenses, bodily harm, harassing and obscene communications, terrorism, and armed violence. 820 ILCS 180/5.

The amendments also expand the definition of "family or household member" to include a broader range of individuals beyond spouses and parents and other household members, including parties to civil unions, children, grandparents, grandchildren, siblings, any person related by blood or by marriage or civil union, and any other person who shares a relationship through a child, or any other individual whose close association with the employee is the equivalent of a family relationship, as determined by the employee. 820 ILCS 180/10.

While leave previously had to be intermittent or on a reduced schedule, employers now must allow leave to be taken consecutively.

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Finally, the original law listed various types of documentation that can be provided to the employer to support the need for leave, and per the amendments, it is entirely the employee's choice which type of documentation he or she wishes to provide. The employer can only request one document, one time within 12 months for leave arising out of the same incident(s) of violence. 820 ILCS 90/20.

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Survey of Insurance Law Cases

"Reasonable Belief" Exclusion Applies to Unlicensed Permissive Driver and Named Insured

In *United Equitable Ins. Co. v. Longmire*, the Illinois Appellate Court First District addressed a coverage dispute over UM coverage and the applicability of a "reasonable belief" exclusion. United Equitable Insurance Company's (UEIC) insured, Belinda Longmire, was involved in a car accident with Dontea Williams. Williams was operating the vehicle with permission of its owner, Chanel Godfrey, insured by Founders Insurance. Founders discovered Williams was unlicensed at the time of the accident and denied Longmire's claim for bodily injury, relying on a policy exclusion to exclude coverage for "bodily injury" if "arising out of use by any person of a vehicle without a reasonable belief that person is entitled to do so."

Longmire submitted an uninsured motorist claim to UEIC. UEIC subsequently denied coverage, claiming even if the exclusion applied to Williams, Godfrey was insured by Founders, and therefore, UM coverage was not applicable. UEIC also claimed there was no evidence of contact between the vehicles to show proof of an accident. The trial court granted summary judgment in favor of Founders and Longmire.

The First District affirmed, finding the "reasonable belief" exclusion in Founders' policy operated to exclude coverage for both Williams and Godfrey, because the policy provided that when applicable "this policy does not apply under Part I"—that is, the policy would not apply to Godfrey. The First District further held the exclusion did not violate public policy where a named insured permitted an unlicensed driver to operate her vehicle. Finally, the First District reasoned UEIC's physical contact defense was meritless because the parties involved in the accident all admitted there was contact of the vehicles.

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

Insured Bears Burden of Proving Exception to Policy Exclusion for Failing to Maintain Heat in Building

In *Wells v. State Farm Fire & Cas. Co.*, the Illinois Appellate Court Fifth District confirmed the majority view that an insured bears the burden of proving an exception to a policy exclusion applies to bring a claim back within coverage. The insured owned a warehouse insured by State Farm. During a period of below-freezing weather, the water pipes burst, causing flood damage to the warehouse. State Farm denied the insured's claim because the policy excluded coverage for burst water pipes unless the insured did its "best to maintain heat in the building or structure." State Farm presented evidence at trial that the insured knew the furnace was inadequate to prevent the pipes from freezing, having suffered three pipe bursts in the past, had shut off water at the warehouse for a time to avoid this issue, and had not replaced a stolen heat pump. At the time of the incident, the insured had turned the water back on, but was not properly heating the warehouse, instead using space heaters in the area of the eventual pipe burst.

> An insured has the burden to prove an exception to an exclusion because it is likely in possession of the relevant information, particularly where the question is whether best efforts were used to maintain heat.

An insured has the burden to prove an exception to an exclusion because it is likely in possession of the relevant information, particularly where the question is whether best efforts were used to maintain heat. The Fifth District held the standard in determining whether an insured applies his or her "best efforts" is a question of fact concerning whether the insured made a "reasonable effort" in

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specific circumstances. The Fifth District reasoned a rational trier of fact here would find reasonable efforts to maintain heat in the warehouse necessarily required the insured to attempt to restore the heating system in the building before turning the water on. The use of space heaters was not a reasonable effort.

Wells v. State Farm Fire & Cas. Co., 2021 IL App (5th) 190460.

Insurer May Not Depreciate Labor Costs in Determining "Actual Cash Value" Where Term is Undefined in Homeowners Policy

In *Sproull v. State Farm Fire and Cas. Co. Ins.*, the Illinois Supreme Court held that State Farm was not entitled to depreciate labor costs in determining actual cash value under a homeowner's insurance policy. Actual cash value was not defined in the policy, and the definition of actual cash value contained in Illinois insurance regulations does not put a reasonable insured on notice that labor will be depreciated.

Jarret Sproull filed a property damage claim under his homeowner's insurance policy with State Farm. The policy provided a two-step process for payment on the loss. First, prior to any repairs being made, State Farm would pay the insured the actual cash value (ACV) of the property at the time of loss. Second, once repairs are made, State Farm would pay the difference between the ACV paid and the costs of the completed repairs.

In computing ACV for Sproull's loss, State Farm applied depreciation to both materials and labor. Sproull filed a putative class action, claiming that State Farm's application of depreciation to labor costs was deceptive and a breach of contract. The trial court denied State Farm's motion to dismiss, but certified for appeal the question of whether the State Farm policy and Illinois insurance regulations allowed for depreciation of labor costs. The appellate court held that depreciation only applied to the physical property, and it did not apply to the intangible labor component.

The Illinois Supreme Court agreed, finding that State Farm's policy, which failed to define "actual cash value," was ambiguous as to whether labor could be depreciated. Moreover, while Illinois insurance regulations provide that actual cash value means replacement cost less depreciation, this does not necessarily inform a reasonable insured that labor will be depreciated. This is because "labor is not logically depreciable," as it does not deteriorate over time like materials. Depreciating labor also fails to fulfill the principle of indemnity, as it could place the insured "in a worse position than he was in before the loss." After all, labor costs are the same for installing old materials and new materials. Finally, State Farm's own estimate software, Xactimate, easily allows the insurer to differentiate between labor and materials depreciations. Given this, State Farm could not credibly argue that Sproull's policy interpretation was unreasonable, or that it was impractical or impossible to make such a distinction. Because the policy language was ambiguous, and Sproull offered a reasonable interpretation, the policy is construed against State Farm. Labor costs were not depreciable.

Sproull v. State Farm Fire and Cas. Co. Ins., 2021 IL 126446.

Businessowners' Insurer Owes Duty to Defend BIPA Allegations

In *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, an insurer that issued two successive "businessowner" liability insurance policies to a tanning spa was required to defend allegations by a customer that the tanning spa shared fingerprints with an out-of-state third-party vendor. Those acts of sharing by the businessowner supported customer claims of violation of Illinois' Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.* (BIPA). West Bend contended that the allegations failed to meet the policies' definition of "publication" because the information was shared with one vendor. The policies covered "personal injury" caused by "[o]ral or written publication of material that violates a person's right of privacy."

The West Bend policy form also contained an exclusion for personal injuries "'[a]rising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.'" A policy endorsement added an exclusion that provided as follows:

> This insurance does not apply to:
> DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES
> 'Bodily injury', 'property damage', 'personal injury' or 'advertising injury' arising directly or indirectly out of any action or omission that violates or is alleged to violate:
>
> (1) The *Telephone Consumer Protection Act (TCPA) [(47 U.S.C. §227 (2018)]*, including any amendment of or addition to such law; or
>
> (2) The CAN-SPAM Act of 2003 [(15 U.S.C. §7701 (Supp. III 2004)], including any amendment of or addition to such law; or
>
> (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits

> the sending, transmitting, communicating or distribution of material or information.

Both the trial and appellate courts held that West Bend owed a defense to insured Krishna Schaumburg Tan. The supreme court affirmed.

The Illinois Supreme Court first held that the policy term "publication" was at least ambiguous, resulting in a construction in favor of coverage. The supreme court found that the term "publication" has at least two definitions. It means both "communication of information to a single party," as well as the "communication of information to the public at large." Here, there was one communication to the third-party vendor, which used the information for marketing.

The exclusion for violation of statutory prohibitions on distribution was found inapplicable because that exclusion was directed only at the method used for publication or communication. The "other" portion was limited in scope to similar statutes that barred delivery methods of information, not the type of information delivered, and under the doctrine of *ejusdem generis*, the preceding specific terms in the exclusion govern and limit what follows.

Note: The *Krishna* court did not address the exclusion for willful violation of statutes. That exclusion could ostensibly bar coverage if the insured "willfully" violated BIPA. Nor did the *Krishna* court address the West Bend policy exclusion for materials published outside of the dates of coverage, which is important for purposes of what limit of liability applies with successive policies. Here, there appears to have been only a single disclosure on a date easily established.

West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc., 2021 IL 125978.

Subrogee Insurer of Landlord Owes Defense to Tenants Sued for Contribution

In *Sheckler v. Auto Owners*, the insurer paid its insured landlord/property owner for property damage after a fire in an apartment rented to the Shecklers. The carrier initiated a subrogation action against a third-party that performed service work on the apartment oven that caused the fire by leaking gas. The third-party filed a contribution complaint against the Shecklers, who tendered their defense to their landlord's carrier, claiming that as tenants they were co-insureds on the landlord's policy.

Relying on the Illinois Supreme Court decision of *Dix Mut. Ins Co. v. LaFrambroise*, 149 Ill. 2d 314 (1992), the appellate court found that, "regardless of the policy language," the tenants were co-insureds on the landlord's policy because the Shecklers paid rent which accounted for the amount paid for insurance, and the lease required the landlord to obtain fire insurance while exculpating himself from liability for damage to the tenants' personal property. The Shecklers' insured status precluded the carrier from subrogating directly against them. The court found it "absurd," then, that the carrier could avoid defending the Shecklers in the contribution action yet recover subrogation damages from them through the equitable apportionment of damages in that action. Accordingly, the court found, "So, to make a long story even longer, this is the bottom line. In situations such as this, the insurance company owes its coinsured not just a duty to refrain from suing it but also a duty to defend and, if appropriate, indemnify when someone else sues the coinsured to recover for fire damage to the insured structure."

Sheckler v. Auto Owners, 2021 IL App (3d) 190500.

Department of Insurance Lacked Statutory Authority to Decide Private Dispute Between Insurer and Insured

Prate Roofing & Installations, LLC v. Liberty Mut. Ins. Corp. arose out of a workers' compensation insurance dispute. Prate appealed the order of the Circuit Court of Cook County affirming the Director of Insurance's final decision in favor of Liberty that Prate owed additional workers' compensation premiums in the amount of $127,305.

The issues on appeal were: (1) whether the Department of Insurance (DOI) lacked authority to issue its final order; (2) whether the circuit court erred in dismissing Prate's request for declaratory relief, and (3) whether the DOI erred in finding that Prate's subcontractor had its own employees who worked on Prate jobs, justifying charging an additional $127,305 premium.

Prate asserted on appeal that the DOI acted without authority when it issued its final order, citing *CAT Express, Inc. v. Muriel and Liberty Mut. Ins. Co.*, 2019 IL App (1st) 181851. Prate contended that pursuant to *CAT Express*, the DOI does not have express or implied statutory authority to resolve a private dispute between an insurer and its insured. The DOI agreed with Prate that under *CAT Express*, the DOI had no general authority to resolve the dispute between Liberty and Prate. Rather, the DOI recognized that its authority has been characterized as specific and limited, and thus, not implicated simply because the matter has some relevance to the rules. Liberty, on the other hand, contended that *CAT Express* was distinguishable,

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because the DOI's authority came from a different section of the Illinois Insurance Code, namely, 215 ILCS 5/462.

The appellate court disagreed with Liberty, finding that the decision in *CAT Express* was dispositive on the merits. According to the court, *CAT Express* was sufficiently similar in that the parties' dispute was an employment status dispute, *i.e.*, whether Prate's subcontractor, who had no workers' compensation coverage, had employees that would trigger additional premiums under Prate's policy. The Court further held that:

> there must be findings of fact and conclusions of law made to establish [the subcontractor's] status as an employer and if so, whether any of its employees completed work on Prate's projects. As we concluded in *CAT Express*, such determinations require the DOI and the Director to make factual findings regarding the parties' private interests in the scope of their insurance contract. No public interest or administration of any insurance law or regulation is implicated by the dispute at bar.

In line with this reasoning, the court held that the DOI (and the Director) were without express or implied authority to issue the final order, thereby making it void. The court vacated the DOI's final order and the circuit court's order affirming it.

Prate Roofing & Installations, LLC v. Liberty Mut. Ins. Corp., No. 1-19-1842, 2021 WL 843229 (Ill. App. Ct. 1st March 5, 2021).

Insurer Owed Additional Insured Defense Where Underlying Complaint Potentially Asserted Claim for Vicarious Liability

United Fire & Cas. Co. v. Prate Roofing & Installations, LLC involved an insurance coverage dispute arising out of an accident on a commercial roofing project. SparrowHawk, LLC (SH) contracted with All Seasons Roofing, Inc. (ASR) to inspect two warehouses owned by SH in Illinois. ASR arranged for Prate Roofing & Installations, LLC (Prate) to serve as the general contractor of the project, while ASR would act as subcontractor. The contract between ASR and Prate provided that ASR would provide all materials and labor, maintain safety, and supervise the project. ASR obtained commercial general liability insurance with United Fire & Casualty Company, and the policy listed Prate as an additional insured.

The United Fire policy limited coverage for Prate as an additional insured in that it did not cover Prate for its own negligence. The policy only covered Prate "with respect to [its] liability for 'bodily injury'…which may be imputed to that person or organization directly arising out of: 1. Your [ASR's] acts or omissions; or 2. The acts or omissions of those acting on your [ASR's] behalf; in the performance of your [ASR's] ongoing operations for the additional insured [Prate]."

ASR retained another subcontractor to perform the work, and an employee of that subcontractor fell through an unprotected skylight and perished. The employee's estate sued Prate, ASR, and SH, among others. The complaint sought damages from Prate under theories of construction negligence, premises liability, and general negligence. The plaintiff alleged that Prate "by and through its agents, servants and employees, was then and there guilty of one or more of the following careless negligent acts and/or omissions."

Prate tendered its defense to United Fire, which declined the tender and filed a complaint for declaratory judgment. The district court found that United Fire owed a duty to defend Prate because the allegations of the underlying complaint could result in vicarious liability for Prate.

On appeal, the Seventh Circuit affirmed. The court initially noted that the dispositive duty-to-defend inquiry was whether the estate's allegations sought to hold Prate liable—at least in part—for actions of others. The court examined the four corners of the insurance policy and the four corners of the underlying complaint. Quoting the district court's opinion, the court noted that "the underlying complaint alleges that [ASR] committed one or more of 19 alleged acts of negligence or omission…" Thus, the court framed the relevant question as "whether any of those 19 alleged acts or omissions could be alleged acts or omissions by other entities for which the estate seeks to hold Prate…liable."

Answering that question in the affirmative, the court highlighted three portions of the underlying complaint alleging that Prate: (1) "individually and through its agents" participated in coordinating the work and had authority to stop the work; (2) had a duty to exercise reasonable care in controlling the construction site, including provision of safe and suitable work site conditions and fall protection for plaintiff's decedent; and (3) "by and through its agents" failed to supervise the work, failed to provide safe and suitable fall protection measures, and failed to ensure safe, suitable and proper working conditions. According to the court, "[n]othing in the estate's allegations made it impossible for Prate Roofing to be held liable for actions or omissions of [ASR] and/or [ASR's] agents. The estate's allegations against Prate Roofing were phrased so as to straddle the line between holding it liable for its own actions and omissions and holding it

> The court initially noted that the dispositive duty-to-defend inquiry was whether the estate's allegations sought to hold Prate liable—at least in part—for actions of others. The court examined the four corners of the insurance policy and the four corners of the underlying complaint.

vicariously liable for acts and omissions of non-employee agents, such as, potentially, [ASR]."

The court noted that *Pekin Ins. Co. v. Centex Home*s, 2017 IL App (1st) 153601, and *Pekin Ins. Co. v. Lexington Station, LLC*, 2017 IL App (1st) 163284, closely tracked its reasoning. "In both cases, an 'additional insured' was covered only as to vicarious liability and sought a defense in cases where plaintiffs alleged liability on the basis of wrongdoing by, among others, the additional insureds' 'agents.' In both cases, the appellate court applied the general principles of Illinois insurance and contract law to hold that the insurer indeed owed a defense to the additional insured."

Rejecting United Fire's attempt to cast away *Centex Homes* and *Lexington Station* as contrary to Illinois law, the court found that those decisions are based on two pragmatic observations:

> First, both opinions recognize that the boundaries between direct liability, liability under Restatement § 414 for negligent selection or supervision of contractors, among other things, and vicarious liability are not as crisp and sharp as United Fire argues. Second, both opinions recognize that a plaintiff in the underlying lawsuit often will not be able to determine before filing a complaint what the relationships are among potential defendants as spelled out in written contracts, let alone in actual practice in the construction project.

Here, United Fire owed a duty to defend Prate because the underlying complaint contained factual allegations making it possible that Prate would be held liable for ASR's acts and omissions. That said, the court was also tasked with deciding whether United Fire's subsequent settlement with the estate on behalf of ASR negated United Fire's continuing duty to defend. According to the court, while United Fire owed a duty to defend Prate for potential vicarious liability based on the pleadings, the *potential* for vicarious liability of Prate "evaporated" with the ASR settlement. United Fire therefore had no ongoing duty to defend Prate after ASR settled out of the underlying action.

United Fire & Cas. Co. v. Prate Roofing & Installations, LLC, 7 F.4th 573 (7th Cir. 2021).

No Duty to Defend or Indemnify School District in Sexual Assault Lawsuit Alleging a Pattern of Behavior Apparent to the District Prior to Issuance of Claims-Made Policy

Freeburg Cmty. Consol. School Dist. No. 70 v. Country Mut. Ins. Co., 2021 IL App (5th) 190098, addressed procedurally complicated issues involving the availability of extrinsic evidence in the context of a coverage dispute over a claims-made insurance policy.

Through an insurance cooperative, Defendant RSUI Indemnity Company (RSUI) issued a policy to the Freeburg school district and its directors and officials (collectively, "Freeburg") for claims made during the policy period of July 1, 2013 and July 1, 2014. Prior to issuance of the policy, at least three federal lawsuits were filed against Freeburg by John Doe plaintiffs alleging sexual abuse at the hands of a former Freeburg employee over a period of several years. The employee, who variously served the district as teacher, counselor, coach, principal, and superintendent, committed suicide in 2009. A fourth John Doe case (Doe 4) was filed in the United States District Court for the Southern District of Illinois on June 11, 2014. Freeburg submitted a demand for coverage, and RSUI responded with a denial letter. RSUI alleged that Freeburg was aware of multiple allegations of sexual abuse by the employee dating back decades. It contended that coverage did not exist because Doe 4's claim arose out of the same facts and circumstances as the Doe 1-3 actions, and thus the claim was first "made" prior to issuance of the policy. RSUI's denial letter also cited a "Bodily Injury Exclusion" and "Sexual Abuse with EPL Carve Back" provision, and further reserved RSUI's right to deny coverage on any other basis permitted by law.

In September 2014, Freeburg filed a declaratory judgment action against RSUI and other defendants in the circuit court of St. Clair County seeking a judicial declaration that RSUI had a duty to defend and indemnify Freeburg against the Doe 4 lawsuit. RSUI filed a section 2-619(a)(9) motion to dismiss, which provided a de-

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tailed summary of the Doe 1-3 actions. RSUI argued, among other things, that Doe 4's claims were substantially the same as those raised in the prior actions and that, consequently, all of the Doe actions amounted to a single claim that was raised years prior to the inception of the coverage period. The circuit court denied RSUI's motion, finding the policy overbroad and the "single claim" concept ambiguous. Protracted and complicated litigation ensued. Ultimately, the court granted summary judgment in Freeburg's favor, finding in two separate orders that RSUI had a duty to defend and indemnify Freeburg under the policy. RSUI timely appealed in March 2019.

The Fifth District reviewed the trial court's denial of RSUI's section 2-619 motion on a *de novo* basis. It reviewed the meaning of an "affirmative matter" pursuant to section 2-619(a)(9) and conducted a detailed analysis of the use of extrinsic evidence throughout this litigation. It approved of the lower court's review of extrinsic evidence and RSUI's reliance on it in reaching its coverage determination. After acknowledging the long-referenced "eight corners rule" in insurance coverage cases, the court found that it only bars the consideration of extrinsic evidence if the plaintiff in the underlying lawsuit could be hampered by collateral estoppel. In this case, collateral estoppel was not a concern because it was undisputed that the Doe 1-3 actions predated the coverage period and, by the time of this appeal, a monetary judgment was already entered in the underlying Doe 4 case. Extrinsic evidence of the earlier sexual assault claims was properly considered by RSUI and the circuit court.

The appellate court found that the policy's single claim provision was not ambiguous. It found that a plain, ordinary reading of the provision would lead a reasonable person to conclude that the Doe 4 action reasonably falls under the provision because it resulted from "the same or related" series of facts as the prior Doe cases. Freeburg's alleged conduct—deliberate indifference to sexual abuse—was "the overriding common event" among the various Doe actions. Claims involving the same, continuing course of misconduct leading to the same type of harm are, according to the court, a single claim. It found this especially true here, where a claims-made policy was at issue. The appellate court reversed the trial court's ruling on RSUI's motion to dismiss and entered an order dismissing the claims against RSUI with prejudice.

Freeburg Cmty. Consol. School Dist. No. 70 v. Country Mut. Ins. Co., 2021 IL App (5th) 190098.

Collateral Estoppel Bars a Finding of No Uninsured Motorist Coverage

American Freedom Ins. Co. v. Garcia, 2021 IL App (1st) 200231, involved a declaratory judgment action brought by an auto insurer against its insured, the driver of the other vehicle involved in the underlying auto accident, and the insurer of the other vehicle. At issue was whether, because the other driver was not covered under her policy at the time of the accident, uninsured motorist (UM) coverage from the plaintiff's insurer applied.

American insured Garcia with an automobile policy including UM coverage. Garcia was in a collision with Nancy Benitez-Yanez in September 2013. The accident report listed Direct Auto Insurance Company as Benitez-Yanez's insurer. Direct brought a declaratory judgment action in 2014 against Benitez-Yanez and a co-insured, arguing that the co-insured made an intentional and material misrepresentation in his insurance application that warranted rescission of the policy prior to the collision. The court agreed. It entered summary judgment in Direct's favor and found that Direct had no duty to defend or indemnify Benitez-Yanez or her co-insured for the 2013 auto accident. American was not a party to Direct's declaratory judgment action. In light of Benitez-Yanez's lack of coverage, Garcia pursued an uninsured motorist claim against American.

American filed the declaratory judgment action at issue, against Garcia, Benitez-Yanez and her co-insured, and Direct. American sought a declaration that it owed no uninsured motorist coverage to Garcia because Benitez-Yanez was insured by Direct. Direct moved to dismiss pursuant to 735 ILCS 5/2-619, arguing that American was collaterally estopped from relitigating the question of coverage determined by the prior court's summary judgment order affirming rescission of the policy. In response, American argued that because it was not named as a party to the original declaratory judgment action—and it should have been named as a necessary party—Direct was barred by *res judicata* from contesting coverage for the accident. Direct and Garcia maintained that American was not a necessary party to Direct's declaratory judgment action because American did not have an immediate and substantial interest in the first action, only a contingent future interest. They further argued that collateral estoppel was appropriate because American was in privity with Garcia due to the existence of the insurance contract between them. The trial court agreed, finding that Garcia and American were in privity, and that collateral estoppel barred American's declaratory judgment action.

On appeal, the First District initially assessed whether American was a necessary party to the first action. It found that, although an

injured party is a necessary party to a declaratory judgment action involving insurance coverage, the injured party's insurer is not also a necessary party. The injured party has a "present and substantial interest" in the determination of whether a liability insurer owes coverage to its insured. Conversely, the existence of an uninsured motorist claim by an injured party against his own insurer is entirely contingent on the outcome of the dispute between the liability insurer and its insured. The injured party would have no reason or ability to bring a UM claim against his own insurer unless the insured's liability policy was found not to apply. American was unnecessary for resolution of the issues in Direct's declaratory judgment action and thus not a necessary party. Direct had no cause to name American and no claim to assert against it.

The appellate court further ruled that collateral estoppel barred American's declaratory judgment action. It found that the overarching issue addressed by the previous court was decided through a final judgment on the merits and was identical to the issue in play in the instant case; that is, whether Direct owed coverage to Benitez-Yanez at the time of the collision. It also agreed with the trial court's determination that American was in privity with Garcia, a party to the prior action. Finally, it found that fairness dictated the result: if American prevailed, the court reasoned, Garcia would be left with no liability coverage from Direct and no UM coverage from American.

American Freedom Ins. Co. v Garcia, 2021 IL App (1st) 200231.

Subcontractor's Waiver of the *Kotecki* Cap Did Not Subject Its Insurer to Liability for Its Alleged Breach of Warranty

In *StarNet Ins. Co. v. Ruprecht*, Deerfield Construction Co. served as the general contractor on a project to renovate a shopping mall space. Deerfield entered into a subcontract with P.S. Demolition, Inc. to demolish the space's façade. As part of the subcontract, P.S. Demolition agreed it would provide all labor, material, equipment, and other things necessary to fulfill its obligations in a workmanlike manner, including taking all necessary safety precautions, and it agreed to indemnify and hold Deerfield harmless from all claims, including claims for bodily injury caused in whole or in part by P.S. Demolition. During demolition, an unsecured piece of material fell from the building, killing one of P.S. Demolition's employees and injuring another.

The employees, one through his estate, brought suit against both Deerfield and P.S. Demolition. Deerfield in turn filed a counterclaim against P.S. Demolition, which included a claim for contribution. P.S. Demolition then filed for bankruptcy, and the bankruptcy court found that the company had no assets. Consequently, any recovery against the company would be limited to insurance coverage it had with StarNet Insurance Company. Deerfield then settled the two lawsuits and, as part of the settlement, Deerfield assigned to the claimants its tort-based contribution claim against P.S. Demolition.

StarNet provided workers' compensation and employer liability coverage to P.S. Demolition. Under the employer liability coverage, StarNet agreed to pay all sums P.S. Demolition became legally obligated to pay because of bodily injury suffered by its employees, including damages for which P.S. Demolition became liable to third parties for indemnification. However, a policy exclusion as modified by an endorsement, stated StarNet would not cover liability assumed under a contract wherein P.S. Demolition agreed to waive its right to limit its liability to its workers' compensation obligations (StarNet Exclusion). The StarNet Exclusion had an exception for a warranty that work would be done in a workmanlike manner.

Under the Illinois Workers' Compensation Act, P.S. Demolition's liability to the claimant employees was subject to statutory caps. Those same limits ordinarily apply when a third-party to the employment relationship—like Deerfield—sues an employer in contribution for its *pro rata* share of common liability for a workplace injury. This is known as the "*Kotecki* cap."

The district court found P.S. Demolition's agreement to indemnify Deerfield was a waiver of the *Kotecki* cap, because in the absence of such waiver, P.S. Demolition's liability would have been limited to its workers' compensation obligation. Therefore, the district court entered judgment on the pleadings in favor of StarNet on the basis the StarNet policy expressly excluded coverage for liability that P.S. Demolition assumed in excess of its workers' compensation liability (*i.e.*, the *Kotecki* cap) by virtue of the indemnity agreement. The Seventh Circuit affirmed.

Notably, on appeal, claimants focused on the workmanlike warranty exception of the StarNet Exclusion. But the Seventh Circuit reasoned a claim for breaching the warranty of workmanlike manner is based in contract–not tort. Claimants, on the other hand, were asserting tort-based contribution claims assigned to them by Deerfield, and the Seventh Circuit found the claimant employees' claims did not invoke the warranty exception to the StarNet Exclusion.

StarNet Ins. Co. v. Ruprecht, 3 F.4th 342 (7th Cir. 2021).

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Parties' Intention Determines Ownership of Automobile for Purposes of Determining Primary Coverage

At issue in *Continental Western Ins. Co. v. Country Mut. Ins. Co.* was what entity owned—and therefore was primary insurer of—an ambulance involved in a motor vehicle accident that resulted in three lawsuits. In 1989, two fire protection districts (Hamel Fire Protection District and Alhambra Fire Protection District) formed a joint venture, known as the Alhambra-Hamel Ambulance Service (Ambulance Service), to provide ambulance service to residents of both towns. At the time of the collision, Country Mutual insured the Ambulance Service under a commercial lines policy that specifically identified the ambulance as a covered auto. Continental Western insured the Hamel Fire Protection District under a policy that included business auto coverage but did not list the ambulance in the schedule of covered vehicles.

After providing a defense to Hamel Fire Protection District, Continental Western sued Country Mutual seeking reimbursement of the money it spent defending the underlying suits. The district court determined that Country Mutual's insured, the Ambulance Service, owned the ambulance and, therefore, Country Mutual's policy provided primary coverage. The district court also noted that while Hamel Fire's automobile policy with Continental also covered the ambulance, it was only in excess to Country Mutual's policy.

On appeal, Country Mutual argued that the Hamel and Alhambra Fire Protection Districts shared equal ownership of the ambulance and that the Ambulance Service was not the owner. Country Mutual relied on a 1989 written agreement between the Hamel Fire Protection District and Alhambra Fire Protection District that stated "[a]ll [p]roperty, both real and personal, would be owned equally[.]" The Seventh Circuit rejected that contention because, under Illinois law, ownership of a vehicle is determined by the parties' intention, and the evidence showed the parties' intended for Ambulance Service to be the owner.

The Seventh Circuit found Country Mutual's contention was contradicted by the express language of the Country Mutual policy issued to the Ambulance Service identifying the ambulance under the "Schedule of Covered Autos You Own." The intention that the Ambulance Service was the owner was further evidenced by Ambulance Service being identified as the owner of the ambulance on its 2009 bill of sale, 2009 certificate of title, and the Illinois Traffic Crash Report. The Seventh Circuit acknowledged that while the fire departments may have intended equal ownership in 1989, "overwhelming" and "overriding" evidence showed the parties' intentions had evolved and the Ambulance Service was the ambulance owner in 2012. Having established that the Ambulance Service was the owner, the "other insurance" provisions in the policies—which both provided the policy would be primary for any covered auto owned by the entity—placed Country Mutual as the ambulance's primary insurer and Continental as the secondary insurer.

Continental Western Ins. Co. v. Country Mut. Ins. Co., 3 F.4th 308 (7th Cir. 2021).

Coverage Exclusion for Claims "Arising Out Of" Violation of Statute Includes All Claims, Whether Expressly Alleging Statutory Violation or Arising at Common Law

Mesa Laboratories, Inc., a Colorado corporation, sent faxes promoting its dental-industry-related services to an industry-wide mailing list governed by the terms of the Telephone Consumer Protection Act (TCPA) of 1991, but did not provide recipients an opt-out notice as required by that statute. In 2018, a Chicago-area dentist filed a class-action lawsuit against Mesa in federal court after receiving unsolicited fax advertisements. The dentist alleged violations of the TCPA and the Illinois Consumer Fraud and Deceptive Business Practices Act, and further alleged that the conduct constituted common-law conversion, nuisance, and trespass to chattels because of Mesa's appropriation of the recipients' fax equipment, paper, ink, and toner. Mesa notified its insurer and demanded a defense. The insurer, however, declined to provide a defense, relying on the "Information Laws Exclusion" in the policy, which required that the policy "does not apply to any damages, loss, cost or expense *arising out of* any actual or alleged or threatened violation of ... the United States of America Telephone Consumer Protection Act (TCPA) of 1991 ... or any similar regulatory or statutory law in any other jurisdiction."

Mesa subsequently filed suit against its insurer alleging breach of contract, bad faith, and improper delay and denial of claims under Colorado law. The parties agreed that the policy excluded coverage for claims alleging explicit violations of TCPA and the Illinois Consumer Fraud and Deceptive Business Practices Act, but Mesa asserted that the common-law claims were not expressly excluded and therefore should have been covered. The Seventh Circuit disagreed.

The common-law claims of conversion, nuisance, and trespass to chattels *arose out of* the same underlying conduct as the statutory claims—the sending of unsolicited faxes. As the court previously explained in *Zurich Am. Ins. Co. v. Ocwen Fin. Corp.*, 990 F.3d 1073, 1078 (7th Cir. 2021), the 'arising out of' phrase presents a 'but-for' inquiry: if the plaintiff would not have been injured but for the conduct that violated an enumerated law, then the exclusion applies to *all* claims flowing from that underlying conduct regardless of the legal theory used." Where all the class action claims against Mesa, whether based in statute or common law, arose out of the same conduct (*i.e.*, the sending of unsolicited faxes) the exclusion applies to *all* claims flowing from that underlying conduct regardless of the legal theory asserted.

Mesa Laboratories, Inc. v. Federal Ins. Co., 994 F.3d 865 (7th Cir. 2021).

Rooker-Feldman Doctrine Inapplicable to Preclude Federal Court Jurisdiction in Litigation Following Municipal Administrative Order

Plaintiff appealed from a grant of summary judgment in favor of his homeowner's insurance company after two trees fell on his home, three months apart, resulting in its total destruction. The undisputed facts showed that the insurer paid all sums owed to plaintiff, including the policy limits for the total destruction of his home and all other claims for which he documented costs actually incurred. Nevertheless, the homeowner filed suit in state court against his insurer alleging breach of contract and bad-faith denial of policy benefits. The insurer removed the case to federal court based on diversity jurisdiction. The district court subsequently granted summary judgment in favor of the insurer. On appeal, the homeowner argued, among other things, that the *Rooker-Feldman* doctrine required remand to state court for lack of federal jurisdiction, claiming that that a municipal administrative order requiring the homeowner to demolish his irreparably damaged home constituted a final state court judgment. The Seventh Circuit disagreed and affirmed summary judgment in favor of the insurance company.

The *Rooker-Feldman* doctrine bars lower federal courts from exercising what would effectively be appellate jurisdiction over final state-court judgments. It is a narrow doctrine, confined to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced, and inviting a district court to review and reject those judgments. Here, however, the municipal administrative order requiring the homeowner to demolish his irreparably damaged home did not constitute a final state court judgment that would otherwise preclude federal court jurisdiction over the parties' dispute. Therefore, summary judgment in favor of the insurer was affirmed.

Christopherson v. American Strategic Ins. Co., 999 F.3d 503 (7th Cir. 2021).

Extra Contractual Damages Allowed Under Section 155 of the Illinois Code of Civil Procedure, but Only if One of Three Issues is Undecided

In *Creation Supply, Inc. v. Selective Ins. Co. of the Southeast*, 995 F.3d 576 (7th Cir. 2021), the 7th Circuit Court of Appeals overturned the district court which had granted Section 155 damages to Creation Supply, Inc. (CSI). The 7th Circuit held that Section 155 permits an insured to seek extra-contractual damages only if one of three issues remains undecided: (1) the insurer's liability under the policy, (2) the amount of the loss payable under the policy, or (3) whether there was an unreasonable delay in settling a claim.

CSI imports and sells writing markers. In 2012, a competitor sued CSI in Oregon federal court for selling copycat products. CSI tendered its defense to Selective Insurance Company of the Southeast, which Selective refused. Selective then sued CSI in Illinois state court seeking a declaration that it did not owe CSI a duty to defend.

The court granted summary judgment to CSI. In 2015, that decision was affirmed by the Illinois Appellate Court, which also held in 2017 that Selective owed CSI reimbursement of the $195,000 that CSI spent on the Oregon action. CSI then filed the present action seeking extra-contractual damages for Selective's failure to pay CSI's fees and expenses in the Oregon action for over one year.

The 7th Circuit found that Illinois courts hold that Section 155 does not create a cause of action, but rather provides an extra-contractual remedy for policyholders who have suffered unreasonable and vexatious conduct by insurers with respect to a claim under a policy. The court then analyzed the above three issues to determine if the court could award damages. Because the Illinois Appellate Court had earlier determined that Selective owed CSI a defense under its policy, and because the Illinois Appellate Court previously fixed the amount of loss payable under the policy, the first two issues were

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decided. The 7th Circuit further held that the third issue—whether Selective unreasonably delayed settling a claim—was inapplicable, because there was no longer an insurance claim pending but that CSI was seeking extra-contractual damages for Selective's failure to pay CSI's fees.

Creation Supply, Inc. v. Selective Ins. Co. of the Southeast, 995 F.3d 576 (7th Cir. 2021).

Reference to Negligent Conduct in Common Law Invasion of Privacy Count Insufficient to Overcome Policy Exclusions for FDCPA and TCPA Violations

Ocwen Financial Corporation (Ocwen) collects and services debts. Its commercial general liability carrier was Zurich American Insurance Company. In 2015, Tracey A. Beecroft sued Ocwen in federal court in Minnesota for attempts to collect on a mortgage loan that had been discharged in bankruptcy. Ocwen aggressively pursued this debt. Ms. Beecroft filed a five-count complaint alleging violations of the Fair Debt Collection Practices Act (FDCPA), the Telephone Consumer Protection Act (TCPA), and common law defamation and invasion of privacy.

Zurich's CGL policy contained two exclusions. The first, "recording and distribution of material or information in violation of law," precluded coverage based on any action or omission that violates or alleged to violate the TCPA or any federal, state statute, ordinance or regulation other than the TCPA, at common law or otherwise that addresses, prohibits or limits collecting or distribution of material or information. The second exclusion, "violation of communication or information," precluded recovery or coverage for any violation arising out of the TCPA or any federal, state or local statute, regulation or ordinance that imposes liability for the unlawful use of telephone, electronic mail, etc.

Ocwen tendered its defense to Zurich. Zurich denied the defense and filed a declaratory judgment action in federal court. The district court concluded all of the factual allegations in the complaint fell within the scope of the policy exclusions and granted declaratory judgment in favor of Zurich.

On appeal, Ocwen argued that the exclusion should not have applied to the common law invasion of privacy claim. Ocwen contended there was potential coverage for liability because the complaint included the possibility that some telephone calls were made to Beecroft's home using a live operator and some calls were not made with the intent to annoy, abuse or harass.

In examining the coverage dispute, the 7th Circuit recognized that Illinois courts liberally construe policy terms and the allegations in an underlying complaint in the insured's favor. While Ocwen was correct in its argument that the TCPA was inapplicable to live calls, held the court, the FDCPA would still apply to such calls if they were made repeatedly or continuously with the intent to annoy, abuse or harass any person. Ocwen's attempt to seek refuge in Beecroft's vague reference to negligent conduct was not enough to avoid the fact that the complaint showed an intent to annoy and harass, bringing the claim under the FDCPA. Indeed, the 7th Circuit noted that such harassment may exist where a debt collector continues to call a debtor after the debtor has requested that the collector cease and desist communication, as Beecroft had done.

The 7th Circuit found that there was no coverage and affirmed the district court.

Zurich Am. Ins. Co. v. Ocwen Fin. Corp., 990 F.3d 1073 (7th Cir. 2021).

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Survey of Tort Law and Workers' Compensation Cases

Municipality not Liable for Pedestrian Injury on Service Road

In *Crespo-Fregoso v. City of Chicago*, the plaintiff sued the city for physical and financial injuries after she fell into a pothole while crossing a service drive. The service road was located between a residential parking area and the plaintiff's home. The City of Chicago moved for summary judgment, and the trial court granted defendant's motion.

The appellate court affirmed summary judgment in favor of the City of Chicago, looking to the Local Governmental and Governmental Employees Tort Immunity Act and finding that the plaintiff was not an "intended and permitted" user of the service road. The appellate court noted a municipality generally does not owe a duty of reasonable care to persons who cross a street outside of a crosswalk. The plaintiff argued that the location at which she crossed the service road was an "intended" crosswalk and triggered a duty of care by the city to maintain the location. However, there were no crosswalk markings where the plaintiff fell in the service road. The court indicated that while crosswalks at intersections may be intended and unmarked, crosswalks at non-intersection locations—such as the service road at issue—are required to be distinctly designated as a crosswalk. Because there were no crosswalk markings on the service road, the court held that the city did not intend it to be a crosswalk. Thus, the defendant owed no duty to maintain.

Even though it was not considered by the circuit court, the appellate court further held that even if the plaintiff was an intended and permitted user of the service drive, the City of Chicago did not owe her a duty because the pothole was an open and obvious danger. The plaintiff testified that she was aware of the pothole and had attempted to avoid it before she fell on snow and ice. Additionally, the pothole was two feet long and three to five inches deep. The plaintiff argued that the deliberate encounter exception to the open and obvious rule should apply. The court refused to apply the exception, noting that it does not apply where the plaintiff could have taken an alternative path to her home and economic compulsion was not an issue. In reaching this conclusion, the appellate court emphasized the extreme burden and costs that would be imposed on municipalities if all public roadways were required to be made reasonably safe for unregulated public use.

Crespo-Fregoso v. City of Chicago, 2021 IL App (1st) 200972.

Consent Forms Support Summary Judgment Finding in Favor of Hospital on Vicarious Liability Issue

In *Delegatto v. Advocate Health and Hospitals*, the plaintiff, individually and as a representative of his late wife's estate filed a medical negligence claim against a hospital. The defendant hospital moved for partial summary judgment as to claims of vicarious liability on the grounds that the physician and the physician's assistant that treated the plaintiff's decedent at the hospital were not the hospital's agents. The circuit court granted summary judgment for the defendant, and the appellate court affirmed.

To hold a hospital liable under an apparent agency theory, three elements are required: (1) the hospital was holding out the individual as an employee or agent, (2) the acts of the agent created the appearance of authority, and (3) the plaintiff relied on the conduct of the hospital or its agent.

The plaintiff's decedent signed multiple clear and unambiguous consent forms which indicated that all physicians and physician's assistants were independent contractors of the hospital. The appellate court began by agreeing with the plaintiff that consent forms are not dispositive of the issue of agency. However, they are extremely relevant, particularly as to the holding out factor. Because the plaintiff's decedent signed the consent forms, the appellate court could not be convinced that the hospital held out the physician as an employee or agent. Thus, the appellate court declined to impose vicarious liability on the defendant hospital for the acts of a physician and physician's assistant who were independent contractors and not employees of the hospital.

Delegatto v. Advocate Health and Hospitals, 2021 IL App (1st) 200484.

Appellate Court Finds Contractor Liable for Failure to Warn of Open Manhole on Owner's Premises

In *Studer v. Central Illinois Scale Co.*, the plaintiff filed suit for negligence after he fell into an open manhole on his job site. The plaintiff hired the defendant, an independent contractor, to recalibrate scales on the premises, which required the defendant to uncover a manhole to gain access to the scale's underground mechanisms. The defendant's employees did not place warnings of any kind around the open manhole before the plaintiff's injury. Still, the circuit court granted summary judgment in favor of the defendant after concluding that the defendant did not owe a duty to the plaintiff. The appellate court reversed because an independent contractor can be liable for either creating a dangerous condition on the premises or the presence of a dangerous condition on the premises that the contractor controls on behalf of the property owner.

The appellate court found guidance in sections 383 and 384 of the Restatement (Second) of Torts, which impose the same liability on someone who does an act or activity on land on behalf of the possessor as would apply if the contractor actually possessed the land. Because the defendant's employees created the dangerous condition on the premises, the defendant contractor was not immune from liability for the plaintiff's injuries even though it did not actually possess the premises.

In reaching this conclusion, the appellate court analyzed the traditional duty factors and concluded that the defendant owed a duty of care, because the plaintiff's injury from stepping into an uncovered or unmarked manhole was reasonably foreseeable; the injury was extremely likely; and the solution to warn the plaintiff of the manhole was not such a heavy burden to place on the defendant to guard against the plaintiff's injury. The appellate court also found that while the defendant could invoke the open and obvious danger rule, the danger of the uncovered manhole was not open and obvious under the facts of this case. In particular, the manhole was not open and obvious because it was not visible to persons immediately stepping outside of the business office on the premises. Based on these findings, the Illinois Appellate Court Third District reversed summary judgment.

Studer v. Cent. Ill. Scale Co., 2021 IL App (3d) 200277\, *petition for leave to appeal denied*, No. 127748 (Ill. Jan. 26, 2022).

Court Orders for Protected Health Information Must Meet QPO Definition in the HIPAA Privacy Rule

In *Haage v. Zavala*, a case involving two automobile personal injury actions, the plaintiffs moved for entry of a qualified protective order (QPO) pursuant to the HIPAA Privacy Rule and its implementing regulations. The plaintiffs' proposed QPOs provided that protected health information (PHI) could be released subject to the following restrictions: (1) nonlitigation use or disclosure of PHI is prohibited and (2) PHI must be returned or destroyed at the conclusion of the litigation.

State Farm, the liability insurer for the named defendants in both cases, intervened in each lawsuit and sought entry of its own protective order, which provided that insurance companies could use, disclose, and maintain PHI for purposes beyond the litigation and exempted insurers from the "return or destroy" requirement.

The Circuit Court of Lake County granted plaintiffs' motions, entered the plaintiffs' QPOs, and denied State Farm's motions. State Farm filed an interlocutory appeal, and the Illinois Appellate Court affirmed the circuit court.

The Illinois Supreme Court allowed State Farm's petition for leave to appeal and affirmed. The Illinois Supreme Court held that while State Farm was not a covered entity pursuant to HIPAA, the Privacy Rule applied to the cases at issue because State Farm was the entity requesting the PHI. State Farm could not use an independent disclosure order under these circumstances, so any protective order entered had to meet the QPO requirements of HIPAA.

Haage v. Zavala, 2021 IL 125918.

Section 143.24b of the Illinois Insurance Code requires Disclosure of Personal Private Automobile Liability Insurance Policies but not Umbrella Policies

The plaintiff in *Kim v. State Farm Mutual Automobile Insurance Co.*, a personal injury action, sent a written request to State Farm pursuant to 215 ILCS 5/143.24b of the Illinois Insurance Code and asked for the insured's policy limits. State Farm responded that the insured had bodily injury coverage of $100,000 per person and $300,000 per accident. Not long after the injury suit was filed, the plaintiff's attorney sent a written request to clarify whether the coverage limit information provided included

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disclosure of all policies applicable to the accident. State Farm responded that the insured was also covered under an umbrella policy with a $1M liability limit.

The plaintiff's amended complaint raised claims against State Farm for common law fraud for violation of Section 143.24b of the Illinois Insurance Code and for violation of the Consumer Fraud Act for failure to initially disclose the umbrella policy. The trial court sided with State Farm and dismissed the plaintiff's action.

The Illinois Appellate Court First District held that the Illinois Insurance Code requirement that an automobile insurer must disclose the insured's liability insurance policy did not require disclosure of the insured's umbrella coverage when requested by a claimant seeking recovery against the insured. The appellate court decided that Section 143.24b requires an automobile insurer, upon receipt of a certified letter from a claimant and description of injuries, to "disclose the dollar amount of liability coverage under the insured's personal private automobile liability insurance policy." Therefore, the issue was whether the term "personal automobile insurance policy" included an umbrella policy. The appellate court held that it did not and decided that the plaintiff's common law and statutory fraud claims failed for this reason. Accordingly, the appellate court affirmed summary judgment in favor of State Farm.

Kim v. State Farm Mut. Auto. Ins. Co., 2021 IL App (1st) 200135.

Vindication for the Jury's Role as Fact Finder, and Reemphasis of the High Standard for Judgment *N.O.V.*

In *Steed v. Rezin Orthopedics & Sports Medicine, S.C.*,a plaintiff brought a wrongful death and survival action in Will County, claiming negligence against an institutional defendant who allegedly failed to timely schedule a follow-up appointment within two weeks of casting the decedent's leg. The plaintiff claimed that this omission proximately resulted in a failure to discover and treat the deep vein thrombosis and pulmonary embolism that caused the decedent's death. At trial, the plaintiff's expert testified that if the decedent had been examined and properly diagnosed and treated within two weeks, then he likely would have survived. The defendant presented expert testimony that the timing of the follow-up appointment was inconsequential; that the decedent was not at a high risk for DVT; and that the incidence of DVT formation and a fatal pulmonary embolism were astoundingly low. Following the jury's verdict in favor of the defendant, the plaintiff filed a motion for judgment *n.o.v.*, which was denied by the circuit court. The appellate court reversed the circuit court, and the Illinois Supreme Court granted the defendant's petition for leave to appeal.

Reversing the appellate court, the supreme court reiterated the high bar set by the *Pedrick* standard for entry of judgment *n.o.v.*, which provides that a motion should be granted only when all of the evidence, when viewed most favorably to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). Entering judgment *n.o.v.* is inappropriate where reasonable minds may differ as to the inferences and conclusions to be drawn from the facts presented. The supreme court found that the evidence on proximate cause did not overwhelmingly favor the plaintiff and that the appellate court ignored evidence supporting a reasonable conclusion that the DVT formed after the two-week period for a follow-up appointment.

The court observed that the appellate court did not address legal cause—whether the decedent's injury was the natural, and not merely a remote, consequence of the defendant's failure to schedule a follow-up appointment within two weeks. Because the jury heard significant expert testimony suggesting that the decedent's development of DVT and fatal pulmonary embolism were medically unforeseeable, a jury could reasonably conclude that the plaintiff did not establish legal cause.

The Illinois Supreme Court also addressed the plaintiff's request for a new trial. The supreme court noted that in contrast to the standard applicable to a motion for judgment *n.o.v.*, on a motion for new trial, the court shall only set aside the jury's verdict if the verdict is contrary to the manifest weight of the evidence, *i.e.*, where the opposite conclusion is *clearly* evident or where the findings of the jury are unreasonable, arbitrary, and not based on any of the evidence. Based on this standard, the court held that the jury's verdict was not contrary to the manifest weight of the evidence. Rather, the evidence supported the jury's conclusion that the defendant's alleged failures were not the proximate cause of the fatal pulmonary embolism. The supreme court reiterated long-established law that a reviewing court may not simply reweigh the evidence and substitute its judgment for that of the jury. Finally, the plaintiff's allegations of error involving the admission of evidence and closing argument on the standard of care and breach did not warrant relief, as they were not essential to the disposition of the case.

Steed v. Rezin Orthopedics & Sports Medicine, S.C., 2021 IL 125150.

The "Test the Waters" Doctrine Conflicts with the Statutory Language Providing Substitution of Judge as a Matter of Right, Resolving an Appellate Court Split

In *Palos Community Hospital v. Humana, Inc.*, the plaintiff moved for substitution of judge as a matter of right on the basis that the judge had not made any substantial ruling. The trial court denied the motion under the "test the waters" doctrine, explaining that the plaintiff filed its motion after the court had held two hearings in which the court had shown reluctance to strike the discovery master and his report. Following trial and the entry of a jury verdict in favor of the defendant, the plaintiff appealed, raising issue with the denial of its motion for substitution. The appellate court affirmed.

The supreme court unanimously resolved a conflict in the appellate court regarding whether the "test the waters" doctrine constitutes a valid basis on which to deny a party's motion for substitution of judge as of right under 735 ILCS 5/2-1001(a)(2). The doctrine permitted a court to deny a motion for substitution of judge before substantial rulings have been made if the party presenting the motion has been able to form an opinion as to the court's disposition toward his or her case. Writing for the court, Justice Theis explained that the doctrine is incompatible with the unambiguous language of section 2-1001(a)(2), which plainly states that so long as a party requests substitution "before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case," the motion "shall be granted."

Applying the cardinal canon of ascertaining and effectuating the legislature's intent based on the statute's plain meaning, the supreme court held that section 2-1001(a)(2) unambiguously provides that a motion for substitution "shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." 735 ILCS 5/2-1001(a)(2). The statute does not provide an exception where the party seeking substitution has been able to form an opinion as to the court's disposition toward the case. Rather, the right to substitution is absolute and not subject to discretion. Thus, by filing its motion for substitution before the trial court ruled on a substantial issue, the plaintiff's motion complied with the requirements of section 2-1001(a)(2), and the trial court was *required* to grant the motion as a matter of right.

As to the defendant's arguments that concerns for gamesmanship were a valid basis for the "test the waters" doctrine, the supreme court opined that circuit courts still retain the inherent authority to prevent abuse and manipulation. The supreme court remanded the matter with instructions to vacate all orders entered after the inappropriate denial of the motion.

Palos Cmty. Hosp. v. Humana Ins. Co., Inc., 2021 IL 126008.

The Illinois Supreme Court Addresses Proper Jury Instructions in Medical Malpractice Trials

In *Bailey v. Mercy Hospital and Medical Center*, a medical malpractice action, the supreme court reversed the appellate court and held that the trial court did not deny the plaintiff a fair trial when it refused to issue a nonpattern jury instruction on loss of chance doctrine. Because the jury was given IPI Civil No. 15.01, a pattern instruction on proximate cause, the plaintiff was not denied a fair trial.

The plaintiff had sought damages from a hospital and several medical professionals for wrongful death and medical negligence after the defendants rendered care to the decedent in the hospital's emergency department. There, the decedent reported that she had recently recovered from the stomach flu but complained of abdominal pain and other symptoms. After evaluation and testing, a physician—concerned with the decedent's elevated heart rate—advised the decedent that a serious condition may be involved and recommended that the decedent agree to be admitted for further observation and testing. The decedent elected to leave the hospital, but she returned later that day. The next morning, the patient was transferred from the emergency department to an observation unit where she went into cardiopulmonary arrest and died later that day.

The case proceeded to trial on the plaintiff's theory that the decedent died from an untreated bacterial infection that resulted in sepsis, which could have been appropriately treated with antibiotics if the defendants had timely diagnosed the condition. The defendants countered that the patient died from myocarditis, a condition that could not have been treated with antibiotics, and that her symptoms were consistent with the diagnosis of a viral illness. The trial court rejected three pattern jury instructions that the plaintiff proffered: (1) Illinois Pattern Jury Instruction, Civil, No. 105.07.01 (2011) (regarding informed consent); (2) Illinois Pattern Jury Instruction, Civil, No. 5.01 (2011) (regarding missing evidence or witnesses); and (3) a nonpattern jury instruction on the loss of chance doctrine. Ultimately, the jury returned a verdict for all the defendants.

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On appeal, the Appellate Court of Illinois First District concluded that the trial court denied the plaintiff a fair trial by refusing the plaintiff's "loss of chance" nonpattern jury instruction and instead instructing the jury with the pattern instruction on proximate causation. The appellate court also faulted the trial court for refusing a pattern informed consent jury instruction.

The Illinois Supreme Court disagreed and concluded that a separate nonpattern jury instruction on loss of chance was not necessary to accurately instruct the jury on proximate cause principles. The lost chance doctrine relates to the proximate cause analysis in medical malpractice cases where a defendant's negligent delay in diagnosis or treatment reduces the effectiveness of treatment. The doctrine, however, is not a separate theory of recovery and does not require relaxing long-established standards for proving proximate cause. Based on these principles, the supreme court held that IPI Civil No. 15.01 properly states the law and sufficiently instructs a jury in lost chance medical malpractice cases. It further concluded that a trial court does not deny a plaintiff a fair trial by refusing a jury instruction articulating the loss of chance doctrine.

Finally, the supreme court held that the appellate court erred in concluding that the trial court's decision to refuse an informed consent instruction necessitated a new trial. The issued instruction included a provision adequately informing the jury of the plaintiff's claim that one of the physicians failed to warn the decedent of the risks of leaving the hospital. Determining that the failure to allege or present evidence on two essential elements of an informed consent claim (*i.e.*, that the patient consented to medical treatment without adequate information and that the patient was injured due to the proposed treatment) the court found no error in the trial court's refusal of the plaintiff's instruction.

Bailey v. Mercy Hosp. and Med. Ctr., 2021 IL 126748.

Common Carrier's Highest Degree of Care Does Not Extend to an Injury on a Staircase After the Plaintiff Alighted from a Train

In *Avila v. Chicago Transit Authority*, the Illinois Appellate Court considered the duty owed by a public entity to an individual who fell down a staircase at a Chicago Transit Authority elevated station. The jury returned a verdict for the defendant, and the plaintiff appealed.

The plaintiff, alleging misfeasance of a voluntary undertaking, claimed that the CTA fell short of a voluntary undertaking to equip all staircase landings with Wooster plates. But the appellate court concluded that the facts amounted to nonfeasance, if anything, as the CTA did not take any action to install a Wooster plate on the staircase at issue. Because the CTA never expressed an intent to install a Wooster plate there, and the plaintiff did not allege reliance on any promise to do so, the appellate court affirmed the trial court decision to strike the plaintiff's voluntary undertaking theory.

The appellate court also considered the scope of the highest degree of care owed by common carriers. A common carrier's duty extends to providing a reasonable opportunity to board and leave the common carrier. Importantly, though, once a passenger has safely alighted from a train, the duty owed is ordinary care. The plaintiff here was not waiting for a train or in the process of boarding a train. Because the danger presented to an individual in a train station is distinct from the danger presented to an individual on a moving train, the appellate court held that the defendant only owed a duty of ordinary care to the plaintiff.

Avila v. Chicago Transit Auth., 2021 IL App (1st) 190636.

Plaintiff Places Mental Health at Issue by Alleging Wrongful Death Due to Suicide

Ambiguity as to whether a plaintiff has placed his or her mental condition at issue is frequently a subject of discovery motions. In *Doe v. Great America LLC*, a wrongful death action, the appellate court looked to the specific facts of a case in determining whether the plaintiff's mental condition was an element of the claim. The plaintiff's decedent was attacked by a group of youths while at an amusement park, and his estate later filed a wrongful death action against the amusement park.

The plaintiff initially denied claiming any psychiatric, psychological, or emotional injuries in an interrogatory answer. However, the plaintiff then filed an amended complaint alleging that the plaintiff's decedent suffered a brain injury that rendered her bereft of reason and caused her to commit suicide. Even after amending the complaint, the plaintiff refused to identify any mental health providers and claimed that the mental health records were privileged under the Mental Health and Developmental Disabilities Confidentiality Act, 710 ILCS 110/10.

First, the appellate court pointed to the Illinois Supreme Court decision in *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 61 (2002), which held that a neurological injury alone does not automatically introduce mental condition as an element. Then, the appellate court decided that *Reda* was distinguishable because the plaintiff's decedent in this case committed suicide. A claim that the plaintiff's

decedent committed suicide because she was bereft of reason and insane requires an examination of the decedent's mental condition. Thus, the plaintiff introduced the decedent's mental health condition as an element of the wrongful death claim, and the trial court properly compelled the plaintiff to identify the decedent's mental health providers.

Doe v. Great Am. LLC, 2021 IL App (2d) 200123.

Fine Print on Ticket Not Enough to Require Arbitration of Injury Claim After the Plaintiff was Struck by a Foul Ball at Wrigley Field

In *Zuniga v. Major League Baseball*, the plaintiff sued Major League Baseball and named the Chicago Cubs as a respondent in discovery after being struck by a foul ball at Wrigley Field. Both MLB and the Cubs sought to compel binding arbitration of the plaintiff's claim based on provisions included on the reverse side of the plaintiff's paper ticket.

Two-thirds of the space on the reverse side of the ticket included six paragraphs of fine print. In the third paragraph, a boldface, capitalized warning provided that spectators should stay alert because baseballs might be hit into the stands and that the Cubs and other entities would not be liable for injuries. In the fifth paragraph, the ticket provided that any claim relating to these terms would be resolved by binding arbitration. The plaintiff averred that she never read the fine print or any of the full terms and conditions available on the Cubs' website.

The trial court applied the doctrine of procedural unconscionability to conclude that the arbitration provision was unenforceable. This doctrine applies if a contract term is so difficult to find, read, or understand that the plaintiff cannot be held to have agreed to the contract term. Yet, a consumer contract will not be found procedurally unconscionable simply because a business used a contract of adhesion or because the term appeared in fine print or contained legal language, as these characteristics are a fact of modern life.

The Illinois Appellate Court First District affirmed the trial court's conclusion that the arbitration provision was procedurally unconscionable. First, the paper ticket contained only a summary of the contract terms, not the actual terms and conditions of the contract. Second, the plaintiff was not already at a website with the terms and conditions available, as she had a paper ticket. Third, the full terms and conditions were four-and-a-half pages of single-spaced paper when printed. Fourth, a ticketholder is unlikely to find, obtain, and read the full arbitration provision because little effort is made on the ticket to draw the ticket holder's attention to that aspect of the ticket, which appears in four-point font. Finally, a ticket holder assents to the contract by conduct, which is not the traditional method to form a contract.

For all these reasons, the appellate court held that the baseball ticket was distinguishable from cases involving a signed contract or an internet transaction. Since the plaintiff did not sign a contract containing the terms and conditions at issue or otherwise affirmatively assent to the conditions after an opportunity to review, the arbitration provision was procedurally unconscionable and unenforceable.

Zuniga v. Major League Baseball, 2021 IL App (1st) 201264.

Public Entity Owed No Duty to a Plaintiff Walking on the Edge of a Dirt Pathway

Section 3-102 of the Tort Immunity Act codified the common law duty that requires a local public entity to exercise ordinary care to maintain its property in a reasonably safe condition. Before considering whether a local public entity is immune from liability, Illinois courts must determine whether the entity owed a duty under the traditional duty factors. Like other property owners, local public entities may avail themselves of the open and obvious rule.

In *Godair v. Metro East Sanitary District*, the plaintiff was injured while walking on a dirt pathway that allegedly contained soft ground at the edge of a ditch and caused her to fall while chasing after her grandchild. The pathway was located along a maintenance road that was used by maintenance vehicles to perform work on the ditch. The circuit court concluded the plaintiff was not an intended and permitted user of the maintenance road and that, even if she was, the traditional duty factors weighed against imposing a duty. The plaintiff appealed from the circuit court's order granting summary judgment for defendant.

The Illinois Appellate Court Fifth District looked to the plaintiff's deposition testimony that she recognized the ditch and the danger posed by a deep slope, as well as the need to walk away from the ditch's edge. Because the ditch was open and obvious, the first two duty factors weighed against imposing a duty. The appellate court declined to create an exception to the open and obvious rule for plaintiff, who left a place of safety to attempt to prevent injury to her grandchild. The plaintiff was not distracted, as she had focused her attention on the danger posed by the ditch.

Additionally, the local public entity could not reasonably be expected to maintain hundreds of miles of drainage ditches in a

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manner that would prevent injuries such as the one alleged by the plaintiff. A local public entity only has a duty to maintain property in accordance with its normal and intended uses. Thus, the appellate court affirmed summary judgment for the defendant public entity.

Godair v. Metro E. Sanitary Dist., 2021 IL App (5th) 200160.

Statute of Repose Stops Medical Malpractice Action Brought More than Four Years After Allegedly Negligent Treatment

Section 13-212 of the Code of Civil Procedure provides that a medical malpractice action cannot be brought more than 4 years after the date of the occurrence or the allegedly negligent act or omission. 735 ILCS 5/13-212(a) (West 2018). In *Kollross v. Goldstein*, the plaintiff sought to circumvent the statute of repose by arguing both a continuous course of treatment and fraudulent concealment. The Illinois Appellate Court First District affirmed the trial court's dismissal of the plaintiff's complaint because an allegedly negligent failure to diagnose in 2013 was no longer actionable in 2018.

> The continuous course of negligent treatment doctrine applies when the course of treatment is continuous, unbroken, and so related as to constitute one continuing wrong. Significant gaps in treatment generally preclude application of the doctrine.

The continuous course of negligent treatment doctrine applies when the course of treatment is continuous, unbroken, and so related as to constitute one continuing wrong. Significant gaps in treatment generally preclude application of the doctrine. Because the plaintiff treated twice in 2013 and only a third time in 2017, the continuous course of treatment doctrine did not apply.

The plaintiff also failed to establish fraudulent concealment. Under 735 ILCS 5/13-215 (West 2018), the concealment must consist of affirmative acts or representations that the plaintiff detrimentally relied on. In this case, the plaintiff was informed of the missed diagnosis during a subsequent phone call and given an amended report to include the additional diagnosis. The plaintiff could not establish fraudulent concealment simply because a colleague, rather than the original physician, informed the plaintiff of the additional diagnosis. Any method of communication that would indicate receipt—including a letter, phone call, or other correspondence—is sufficient to provide an additional diagnosis.

Kollross v. Goldstein, 2021 IL App (1st) 200008.

Sole Proximate Cause Defense Saves Physician from Liability

In *Mims v. Paintsil*, an Illinois physician successfully defended against allegations that the physician permitted abuse, neglect, and wrongful death while the plaintiff's decedent was under the physician's care. Relying on the sole proximate cause jury instruction, the physician obtained a jury verdict in his favor. Because the verdict was not against the manifest weight of the evidence, the appellate court affirmed the trial court's denial of the plaintiff's motion for a new trial.

The plaintiff's decedent suffered from a progressive, incurable, fatal disease and had advanced cognitive decline, complete immobility, and double incontinence. Both the disease and these symptoms predated the treatment at issue. The plaintiff's decedent was treated by the defendant physician while at her fifth nursing home and again at her sixth nursing home.

The plaintiff claimed that a herpes outbreak and pregnancy tests were a sign of sexual abuse. But the evidence at trial showed that the plaintiff's decedent was diagnosed with herpes before she ever treated with the defendant, and expert testimony demonstrated that nursing home patients routinely receive pregnancy tests as a precautionary measure. Additional evidence established that the plaintiff's decedent ultimately passed away—after she stopped treating with the defendant—due to the incurable, fatal neurodegenerative disease that predated the defendant physician's treatment.

Mims v. Paintsil, 2021 IL App (1st) 191285.

Defense Verdict Affirmed Based on Proper Sole Proximate Cause Defense and Instructions

In *Ghostanyans v. Goodwin*, the Illinois Appellate Court First District held that the trial court properly instructed the jury with both the long version of IPI Civil No. 12.04 and a special interrogatory

on sole proximate cause. A sole proximate cause instruction is appropriate when there is some evidence that a third or other person was the sole proximate cause of the plaintiff's injuries. The third or other person's conduct need not be negligent, and an expert need not expressly opine that another person was the sole proximate cause of the plaintiff's injuries. When supported by the facts, a sole proximate cause defense focuses the attention of the jury on the plaintiff's duty to prove proximate cause and does not confuse or distract a jury.

In this case, the defendant medical provider presented evidence that supported a conclusion that a different physician applied excessive traction and caused the plaintiff's injuries. Therefore, the trial court properly instructed the jury on sole proximate cause and gave a special interrogatory on the subject. Additionally, the trial court properly permitted defense counsel to cross-examine a witness about the negligence of the other physician, who had been dismissed pursuant to settlement, as that evidence was relevant to the sole proximate cause defense, causation, and negligence. Finally, the appellate court held that the jury verdict was not against the manifest weight of the evidence and affirmed judgment for the defendant.

Ghostanyans v. Goodwin, 2021 IL App (1st) 192125.

Absolute Litigation Privilege Absolves Attorney Even Before Action

An attorney is absolutely privileged to publish defamatory matter that pertains to a judicial proceeding in which the attorney participates as counsel. This privilege applies to communications that are made before, during, or after litigation and applies irrespective of the attorney's motive or unreasonableness. Any doubts regarding pertinency should be resolved in favor of finding that the communication was pertinent to the litigation.

In *Bedin v. Northwestern Memorial Hospital*, the plaintiff sued for intentional infliction of emotional distress after the defendant filed a petition for temporary guardianship, sought to appoint a guardian for a disabled person, and moved to revoke the plaintiff's power of attorney. The appellate court held that the defendant's statements at issue were related to the guardianship action. Further, the privilege is not restricted to members of a corporation's control group. Furthermore, the fact that the plaintiff would not have been a party to the guardianship proceeding did not defeat the privilege. Thus, the absolute litigation privilege barred the plaintiff's claim.

Bedin v. Nw. Mem'l. Hosp., 2021 IL App (1st) 190723.

Plaintiff Injured in Police Chase Can Pursue Claim Because Officers Did Not Have Physical Custody of Fleeing Driver Before Accident

In *Robinson v. Village of Sauk Village*, the plaintiff sued two local public entities and four police officers to recover for injuries sustained when he was struck during a police chase. The pedestrian plaintiff was in a crosswalk when he was struck by the fleeing vehicle. The circuit court concluded that the defendants were immune based on section 4-106 of the Tort Immunity Act, which precludes liability for injuries inflicted by an escaped or escaping prisoner, and granted summary judgment for all the defendants.

The Appellate Court First District reversed. First, the appellate court held that the fleeing driver was not an escaping prisoner because he was not held in custody. Although the police confronted the fleeing driver at one point during the chase, the officers did not establish physical custody in that interaction. Next, the appellate court concluded that issues of fact precluded summary judgment as to whether the defendants' conduct was willful and wanton. The fleeing vehicle had traveled up to 100 mph and disregarded traffic signals during the chase. Finally, the appellate court found a jury question as to the issue of proximate cause, as reasonable minds could differ as to whether the pursuit at high rates of speed through residential areas was a material element and substantial factor in bringing about the accident.

Robinson v. Vill. of Sauk Vill., 2021 IL App (1st) 200223.

9-1-1 Call Without Words Is Insufficient to Establish that a Law Enforcement Officer Knew or Should Have Known of Domestic Violence at Residence

A Clay County deputy responded to a residence after the operator who answered a 9-1-1 call that originated at the residence did not receive any response from the caller. No one responded at the residence. The deputy returned to the residence less than an hour later and subsequently entered the residence, where he found the plaintiff's decedent had been fatally shot. The plaintiff in *Wendling v. Milner* filed a wrongful death and survival action against the deputy and county. The circuit court dismissed the action following a section 2-619.1 combined motion. The Illinois Appellate Court Fifth District affirmed.

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The Illinois Domestic Violence Act of 1986, 750 ILCS 60/101 *et seq*. (West 2018), provides certain duties and responsibilities of law enforcement officers to effectively aid victims of domestic violence. Under the Domestic Violence Act, a law enforcement officer may be liable for willful and wanton conduct in connection with the failure to prevent domestic violence after the officer has reason to believe that a person has been abused by a family or household member. But the plaintiff in *Wendling* did not allege sufficient facts to bring this case within the purview of the Domestic Violence Act. Notably, no facts established that the defendants knew or had reason to believe that the 9-1-1 call involved domestic violence. Without that evidence, the plaintiff could not recover under the Domestic Violence Act, and the circuit court properly dismissed the plaintiff's complaint.

Wendling v. Milner, 2021 IL App (5th) 190532.

Fiduciary Duty Does Not Extend from All Attorneys at Law Firm to All Clients

In *Khoury v. Niew*, a law firm allegedly received money from the plaintiffs to purchase real estate. Rather than purchase real estate, attorneys at the law firm allegedly removed $2.34 million from the firm IOLTA account that held the funds, spent the funds for their own benefit, and did not return the funds to the plaintiffs. Unsurprisingly, the plaintiffs sued and named the law firm along with two attorneys as defendants. The circuit court granted summary judgment for the plaintiffs. One individual defendant—the president of the husband and wife law firm—appealed.

The Illinois Appellate Court Second District reversed. The plaintiffs produced no evidence that the individual defendant ever performed legal work for the plaintiffs or billed them for any services. Additionally, the plaintiffs did not contend that the individual defendant owed a fiduciary duty based on trust or confidence in their interactions, which were comprised mostly of small talk. The appellate court declined to adopt the plaintiff's argument that a fiduciary duty arose simply because the plaintiffs entrusted funds to another attorney at the law firm. Although the funds were placed in a firm IOLTA account, only the attorney representing the plaintiffs owed a fiduciary duty with respect to those funds. An attorney owes a fiduciary duty to a nonclient only under the most limited of circumstances, which were not present in this case. Therefore, the circuit court erred in finding that every attorney at the law firm owed a fiduciary duty to all clients of the law firm.

Finally, no facts demonstrated that the individual defendant had actual knowledge of the other attorney's misconduct at a time when it could have been avoided or mitigated. As the individual defendant did not owe a fiduciary duty to the nonclient plaintiffs, the appellate court granted summary judgment for the individual defendant.

Khoury v. Niew, 2021 IL App (2d) 200388.

Statute of Limitations Bars Claim for Sexual Abuse that Occurred in 1990s

In 2019, in *Presberry v. McMasters*, a plaintiff filed suit to recover for sexual abuse that allegedly occurred at a juvenile detention center in 1994, shortly before she reached the age of majority. The circuit court dismissed the action based on the statute of limitations in 735 ILCS 5/13-202.2 (West 1994). The plaintiff filed an amended complaint and alleged that while she was aware of the sexual conduct when it occurred, she was not aware that the acts constituted sexual abuse and caused her significant harm until she broke through a repressed memory in June 2018. The circuit court again dismissed the action as time-barred.

The appellate court first considered whether the plaintiff was judicially estopped from alleging the date when she recovered her repressed memories. Specifically, the defendant pointed to allegations in an oral contract lawsuit that was filed three to four months before June 2018 based on an agreement to keep silent about the alleged abuse in exchange for annual payments. The appellate court declined to apply judicial estoppel because the plaintiff did not receive any benefit from the oral contract case, which was dismissed at the pleading stage.

Next, the appellate court considered the discovery rule, which provides that a party's cause of action accrues when the party knows or reasonably knows of the injury and that the injury was wrongfully caused. Although the plaintiff in this case did not realize the full extent of the harm caused by the sexual abuse, she was aware of the sexual activity and did not repress knowledge of the sexual activity itself. Because the plaintiff was always aware of the sexual contact, the statute of limitations was not tolled by the fact that the plaintiff did not link the sexual conduct with harm until years later.

Presberry v. McMasters, 2021 IL App (2d) 200538.

A Reasonable Dog Can React to Intrusion into Home Through the Mail Slot, Verdict Against the Mail Carrier

To prevail under the Animal Control Act (ACA), a plaintiff must prove four elements, including lack of provocation. A dog may be provoked by any activity that would be reasonably expected to cause a normal dog to react similarly in similar circumstances. The plaintiff's subjective intent is not determinative.

In *Claffey v. Huntley*, a mail carrier sought to recover under the ACA after he reached through a mail slot while delivering mail and the defendants' dog bit his hand. The matter proceeded to trial, and the jury returned a verdict for the defendants. The plaintiff appealed. The appellate court concluded that a reasonable dog could react similarly when faced with an intrusion into the home through the mail slot. Thus, the court affirmed the circuit court's order denying the plaintiff's motion for a new trial.

Claffey v. Huntley, 2021 IL App (1st) 191938.

A Successful Contribution Claim Does Not Change the Defendant's Obligation to Pay the Entire Judgment Entered in Favor of the Plaintiff

Following a $300,000 judgment in favor of the plaintiff and against a defendant physician, the defendant pursued a third-party contribution claim in *Victim A. v. Chung Song*. The contribution claim went to judgment, and the defendant physician obtained judgment against the third-party defendant, who was found to be 90% of the total proximate cause of the plaintiff's damages.

Rather than pay the entire judgment and then seek recovery from the third-party defendant, the defendant physician paid only 10% of the judgment to the plaintiff. The plaintiff brought post-judgment proceedings to recover the remaining judgment amount. The defendant physician argued, based on 735 ILCS 5/2-1117, that a minimally-responsible defendant should not have to pay the entire amount of recoverable damages.

The appellate court explained that the Contribution Act allows the defendant physician to recover 90% of the judgment amount from the third-party defendant. But the defendant physician is not excused from paying the entire judgment amount to the plaintiff. Joint and several liability has no application where, as in this case, the other at-fault party was not a direct defendant. Thus, the appellate court affirmed the trial judge's denial of the defendant's motion to reconsider and to stay the judgment in favor of the plaintiff.

Victim A. v. Song, 2021 IL App (1st) 200826.

Appellate Court Affirms Verdict Finding Burglar Equally At Fault As the Officers Who Shot Him and Reinstates Injury Claims of Two Burglars Imprisoned for Felony Murder

Chicago police responded to a burglary perpetrated by the plaintiffs at an electronics store. When the three burglars' stolen van burst through the store's garage door, police officers shot at the van, striking each burglar multiple times. One burglar died, and the two surviving burglars were convicted of felony murder. All three—one by his estate—filed a civil lawsuit against the City of Chicago for battery, and the estate also pursued a survival action and wrongful death claim in *Givens v. City of Chicago*.

> The court held that the criminal convictions did not collaterally estop the plaintiffs from pursuing a personal injury claim, as the issues involved were not identical.

The circuit court granted summary judgment in favor of the City of Chicago on the claims by the two plaintiffs who were imprisoned for felony murder. The estate of the third burglar proceeded to trial, where a jury rendered a verdict of just under $1M after reducing the damages by 50%. But two special interrogatory answers negated the general verdict, and the circuit court entered judgment for the defendant municipality.

The appellate court reversed the judgment for the defendant and reinstated the verdict in favor of the plaintiff's estate. First, the appellate court held that the decedent's contributory willful and wanton conduct in participating in the burglary reduced the estate's recovery. Next, the appellate court held that all three special interrogatories were impermissibly compound, as well as vague and confusing. Additionally, two of the special interrogatories were found to be not absolutely irreconcilable with the general verdict. Although the

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case was tried before section 2-1108 was amended, the appellate court nevertheless pointed to the fact that the legislature amended the statute on special interrogatories as persuasive authority to support the court's decision.

The appellate court went on to reverse the trial court's grant of summary judgment in favor of the defendant municipality and against the two plaintiffs who were convicted of felony murder. The court held that the criminal convictions did not collaterally estop the plaintiffs from pursuing a personal injury claim, as the issues involved were not identical. Although—in affirming the felony murder convictions—the appellate court previously concluded that the burglars knew that it was practically certain that they would hit an officer when driving through the garage door, but this was not enough to preclude liability in this case because the jury in the criminal matter did not consider the officers' duty to respond to a crime.

Givens v. City of Chicago, 2021 IL App (1st) 192434, *petition for leave to appeal allowed*, No. 127837 (Ill. Jan. 26, 2022).

Convicted Criminal Defendant Cannot Allege Legal Malpractice Related to Conviction But Can Sue to Recover Fees Withheld After Attorney Withdrew

In *Rojo v. Tunick*, the defendant attorney was sued after he withdrew as counsel in a criminal case. After counsel withdrew, the plaintiff hired another attorney and was convicted in criminal court. The plaintiff then sued the first criminal defense attorney for legal malpractice and breach of fiduciary duty for allegedly deficient representation leading to a conviction and refusing to refund fees after withdrawing. The circuit court dismissed the plaintiff's claims.

The appellate court affirmed in part and reversed in part. First, the plaintiff's failure to allege actual innocence was fatal to his claim for legal malpractice. This rule prevents a person from profiting from criminal activity. However, the actual innocence rule does not apply to a fee dispute. Thus, the circuit court erred in dismissing the plaintiff's claim to recoup unrefunded fees.

Rojo v. Tunick, 2021 IL App (2d) 200191.

WORKERS' COMPENSATION

Kenneth F. Werts
R. Mark Cosimini

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Minor Deviation Results in No Recovery for Trip and Fall Injury

Where a university employee tripped and fell as she tried to step over a chain barrier outside the university's personnel department, where she had intended to turn in her semi-weekly timecard, her injury claim was not compensable, held an Illinois appellate court. Noting that the Commission found the employee's decision to stray from the sidewalk "exposed her to an unnecessary danger entirely separate from her employment responsibilities," the appellate court discounted the employee's contention that the act that caused her injury was one the university might reasonably expect her to perform, the appellate court approved of the Commission's reliance upon *Dodson v. Industrial Comm'n*, 308 Ill. App. 3d 572 (1999).

Purcell v. Illinois Workers' Comp. Comm'n, 2021 IL App (4th) 200359WC.

Lack of Credibility Key in Claimant's Failure to Show He Sustained Compensable Accident

Claimant sought workers' compensation benefits for injuries he allegedly sustained while working for the employer. In particular, claimant asserted that while lifting a piece of steel at work on May 12, 2015, he suffered a hernia and injuries to his back and the "man as a whole." The arbitrator concluded that claimant failed to prove that he sustained an accident that arose out of and in the course of his employment with the employer. In support of this conclusion, the arbitrator found, inter alia, that claimant was not a credible witness. The arbitrator also noted "numerous inconsistencies" in the

testimonial and medical evidence. The Commission unanimously affirmed and adopted the decision of the arbitrator. Claimant then sought judicial review in the circuit court, which confirmed the decision of the Commission.

The appellate court stressed that it could not say that the Commission's decision was against the manifest weight of the evidence. The court observed that the Commission found that while claimant easily answered questions on direct examination from his attorney, he was evasive on cross-examination by the employer's attorney. On direct examination, claimant provided detailed testimony regarding his medical history, including descriptions of accidents, dates and particulars of treatment, and what medical personnel told him. In contrast, on cross-examination, claimant could not even remember speaking with Dr. Bernstein, the independent medical examiner. In addition, claimant was unable to recall whether he was involved in a motor-vehicle accident in 2006, whether he treated for complaints of back pain in 2011, whether he received L5-S1 facet injections in 2012, and whether he pleaded guilty to a charge of theft in 2010. Further, the Commission questioned claimant's credibility based on the types of positions for which he applied during his job search. As the Commission intimated, claimant applied for many jobs that appeared to be outside the scope of his qualifications as a union painter, including pilot, news anchor, meteorologist, and psychologist. Claimant did not dispute this finding on appeal. The Commission also cited inconsistencies in the testimonial and medical evidence. The court also stressed that it was not whether claimant pleaded guilty to theft in 2010 that the Commission found significant in assessing claimant's credibility, but rather his inability to remember whether he pleaded guilty to the theft charge. In any event, this was but one of many reasons the Commission found claimant lacked credibility. Given the record as a whole, the court could not say that this factor alone rendered a conclusion opposite the Commission clearly apparent. The judgment of the circuit court was affirmed.

Werneburg v. Illinois Workers' Comp. Comm'n, 2020 IL App (3d) 190529WC-U.

Employee's Injuries on Employer's Stairs Arose Out of and In the Course of the Employment

The claimant sought benefits for injuries he allegedly sustained while ascending stairs at his employer's premises. The arbitrator found that the claimant had sustained an accident arising out of and in the course of his employment. In reaching this conclusion, the arbitrator applied a neutral risk analysis and found that the claimant had proven that the risk that the claimant encountered by traversing stairs was both quantitatively and qualitatively increased by virtue of his employment. The arbitrator also found that the current conditions of ill-being in the claimant's cervical spine, upper right arm, and left knee were causally related to his work accident. The arbitrator awarded the claimant TTD benefits, medical expenses, and prospective medical care. The Commission rejected the neutral risk analysis applied by the arbitrator. It found that the claimant was a traveling employee at the time of his injury and that his claim was compensable pursuant to that doctrine. The Commission also corrected a clerical error in the arbitrator's calculation of TTD benefits and affirmed and adopted the arbitrator's decision in all other respects. The circuit court confirmed the Commission's decision.

The court indicated that in the appeal, the employer argues that: (1) the clamant failed to establish an injury arising out of his employment under a neutral risk analysis; and (2) the Commission erred by concluding that the claimant was a "traveling employee" at the time he was injured and by applying the traveling employee doctrine in deciding the case. The court said it not need address either of these arguments because the appeal could be decided on other grounds supported by the record. The court stressed that even if the claimant were not deemed to be a traveling employee at the time of his accident, and even if he failed to establish a claim under neutral risk principles, he would be entitled to benefits. The court reasoned that the claimant's injuries arose out of his employment because he was injured while performing an act that he would reasonably be expected to perform incident to his assigned job duties. The shipping and receiving desk at the employer's facility was where the claimant dropped off the paperwork from his prior trip and received orders and paperwork for his next trip. The claimant was required to ascend stairs at the facility to reach the shipping and receiving desk. Traversing those stairs belonged to or was connected with what the claimant had to do in fulfilling his job duties. Thus, walking up the stairs at the facility was an act that the claimant might "reasonably be expected to perform incident to his assigned duties." Because he was injured while walking up those stairs, the claimant's injuries were compensable.

Flex-N-Gate Logistics v. Illinois Workers' Comp. Comm'n, 2020 IL App (4th) 190467WC-U.

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Attorney's Claim for Injuries Sustained at Bus Stop Were Barred by Going and Coming Rule

Brustin, an 81-year-old attorney and the president of Brustin & Lundblad, Ltd., a law firm in Chicago, sustained injuries at a bus stop. He had been watching for the arrival of a bus to ride to the office, tripped on the edge of a sidewalk slab and fell, injuring his left shoulder. Pursuant to the going and coming rule, the Commission denied his claim for compensation. The circuit court confirmed and Brustin appealed. He contended in relevant part that he was an "on-call employee," meaning that, in the event of an emergency or if a problem arose that had to be handled in some delicate or important fashion, he would be available to be on-call to solve the problem or participate in the solution. At 10 a.m. on Thursday, October 27, 2011, a client, Casey Boback, had an appointment to see Brustin. The appointment was to take place in the law firm's offices on North Dearborn Street. A little before 8 a.m. that day, petitioner was at home when he received a call from the office manager informing him that Boback already had arrived and was waiting for him. Boback was the business agent of a local labor union and a large source of business for the firm, and the firm had a rule that important clients, such as Boback, were not to be kept waiting. Accordingly, Brustin got dressed in a hurry and walked briskly to a bus stop. As he was watching for the southbound bus, he tripped on the edge of a sidewalk slab and fell on his left shoulder. He was helped to his feet by bystanders. He found he was in so much pain that he had to support his left arm with his right hand. He took a cab to the hospital and, on the way, called on his cell phone to let the office manager know he was unable to meet with Boback. Brustin was diagnosed with a torn rotator cuff, for which he was prescribed physical therapy. He still has pain, weakness, and stiffness in his left shoulder and arm.

The appellate court reviewed the various exceptions to the going and coming rule, including the "usual access route," employees who are actively engaged in work while en route, on-call employees, the "special mission" rule, and the rule for traveling employees. The court discounted Brustin's argument that since he met with clients at his residence and had a law library in his home, that it constituted a separate premises (generally speaking, travel between two premises of the employer is not considered a commute). The court observed that ordinarily a "traveling employee" is an employee whose work requires the employee to travel away from the employer's office. Those facts did not fit Brustin's scenario, indicated the court. His injuries occurred during a commute and where, therefore, not compensable.

Brustin v. Illinois Workers' Comp. Comm'n, 2021 IL App (1st) 200502WC-U.

Claimant's Injuries in Employer's Parking Lot Were Not Compensable

Claimant fell in a parking lot on her employer hospital's premises. The arbitrator issued a written decision, finding that claimant sustained an accidental injury on October 29, 2015, arising out of and in the course of her employment. The arbitrator found that claimant had encountered a hazardous or defective condition—uneven surface—while she was walking to an employee parking lot immediately after leaving work. The arbitrator concluded that claimant's risk of tripping presented a neutral risk, which was greater than that encountered by the general public. Accordingly, the arbitrator awarded claimant temporary total disability benefits, medical expenses and permanent partial disability compensation representing 25 percent loss of use of the right leg. The Commission unanimously reversed, finding the case was factually similar to the circumstances in Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989), where the claimant was injured when he stepped off a curb featuring a "slight slope between the curb and the driveway" in front of his place of employment. The Commission emphasized that the Illinois Supreme Court clarified in Caterpillar Tractor Co.,129 Ill. 2d at 61–2, that the arising out of element was not satisfied by the claimant merely taking an acceptable route to and from employment. Thus, the Commission found claimant failed to establish that she was exposed to a risk not common to the general public to a greater degree because curbs and the risk inherent in traversing them, confront all members of the general public.

The appellate court agreed with the Commission. Having reviewed the photographic exhibits, the court could not say an opposite conclusion was clearly apparent. The possibility of mis-stepping while stepping from a sidewalk, over a curb and onto a slanted surface in close proximity to an access ramp was not a risk peculiar to claimant's employment where there was simply no evidence of a defect. The court added that it was well settled that injuries are not compensable if they arise from a risk common to people generally. Here, claimant failed to prove that her injuries arose from some risk connected with, or incidental to, her employment, or an exposure to a common risk to a greater extent than the general public.

Vaughan v. Illinois Workers' Comp. Comm'n, 2021 IL App (4th) 200253WC-U.

Injuries Away From Employer's Premises During Break Were Not Compensable

Claimant was employed by a marketing company. The company rented space on the seventh floor of a building it did not own. Claimant was allowed a 30-minute lunch break and two, 15-minute breaks that she could take at her discretion, one in the morning and one in the afternoon. Claimant testified that her position was stressful. She would take a walk during her breaks to manage her stress. Claimant was injured in two accidents while walking during her breaks. The first occurred on June 6, 2012, when she tripped on a raised piece of concrete about three blocks from her employer's premises. The second occurred on November 14, 2012, when she twisted her ankle and fell about half a block away from the premises. The arbitrator concluded that claimant's accidents did not arise out of her employment since the risks to which she was exposed were risks to which the general public was also exposed. The arbitrator further concluded that as the accidents occurred off of the employer's premises, neither occurred in the course of employment. The arbitrator also expressly found that the personal-comfort doctrine did not apply. The Commission affirmed (one Commissioner specially concurring), adopting the decision of the arbitrator. The appellate court indicated the appeal was controlled, in large part, by *Eagle Discount Supermarket*, 82 Ill. 2d 331, 412 N.E.2d 492, 45 Ill. Dec. 141. In that case, the claimant was injured when engaged in a recreational activity (frisbee) on the employer's premises during his unpaid lunch break. Claimant acknowledged the hurdle that *Eagle* presented, but argued that Eagle involved a lunch break while this case did not. The appellate court said the distinction was not significant, and claimant offered no authority recognizing such a distinction. She did not explain why it is significant. The judgment of the circuit court confirming the decision of the Commission was affirmed.

Suits v. Illinois Workers' Comp. Comm'n, 2020 IL App (3d) 190491WC-U.

Employer's Failure to Properly Train Claimant Contributed to an Award for Benefits

The Appellate Court affirmed an award for benefits to a claimant who was injured while performing activities which may not have been consistent with his job duties. The claimant was working as a "spotter" which primarily involved moving trucks from one location to another to allow for loading and unloading. The claimant's only instruction from the employer was to do what another coworker did. The claimant testified the coworker performed activities on behalf of one of the employer's customers which were not consistent with the spotter duties. The claimant was injured when he was helping to unload a truck. The employer acknowledged there was no formal training program and there was no job description which was provided to the claimant. There was a dispute concerning whether the employer made it known to the claimant that he was not supposed to load and unload trucks. The Commission determined that based upon the lack of training and the observations made by the claimant as to what other spotters did, the claimant reasonably believed he was assisting his employer by helping to unload a truck. The Commission concluded the claimant's injuries were sustained while performing his job duties. The Appellate Court affirmed noting the Commission's Decision was not contrary to the manifest weight of the evidence.

Purdy Brothers Trucking, LLC v. Illinois Workers' Comp. Comm'n, 2021 IL App (3d) 200463WC-U.

Commission's Decision Denying Accident Based Upon Credibility Issues Overturned by Appellate Court

Prior to the alleged accident date, the claimant had a history of treatment for her lower back including a diagnosis of a large extruded disc fragment for which she underwent surgery. She continued having difficulties with her lower back, and a recommendation for a spinal fusion was rendered by Dr. Yang, but the claimant declined to undergo the surgery. The claimant's alleged accident occurred two years after her final treatment with Dr. Yang. The claimant alleged she injured her lower back as a result of lifting boxes in the employer's cooler. The claimant testified she told two coworkers of the incident. In contrast, the two coworkers testified that on the date of the alleged accident, the claimant looked pale and weak. The coworkers testified the claimant indicated she was feeling ill due to high blood pressure. Reportedly, the claimant often complained of issues with high blood pressure, and on two occasions prior to the alleged accident date, an ambulance was called for the claimant.

The claimant did not immediately seek medical treatment, but when she did report to a doctor two days later, she provided a history of lifting boxes at work resulting in low back pain. Several months later, the employer had an IME performed, and the examining doctor rendered an opinion the claimant's degenerative condition in her lumbar spine was not significantly changed based upon the diagnostic films from more than two years before the claimed accident date.

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He only diagnosed an acute back sprain as a result of the claimed work accident. He also noted the claimant's complaints were out of proportion to her condition. Additionally, the employer presented surveillance evidence showing the claimant being active without any apparent difficulty in contrast to her claimed level of disability.

Based upon the credibility issues, the Arbitrator and the Commission found the claimant failed to prove she sustained a compensable accident. The Appellate Court reversed the Commission's Decision notwithstanding the deference to be given to the Commission on credibility issues. The Appellate Court noted the coworkers were not in the cooler with the claimant at the time of the alleged accident. The claimant's medical records consistently documented the claimed work accident, and despite the other credibility issues, the Appellate Court held the Commission's Decision denying that the claimant sustained accidental injuries which arose out of and in the course of her employment was contrary to the manifest weight of the evidence. The Appellate Court did not make any findings or issue any rulings with respect to the extent of the claimant's injuries or whether the claimant's low back condition was causally related to the work accident. The matter was remanded to the Commission for further proceedings.

Parys v. Illinois Workers' Comp. Comm'n, 2021 IL App (1st) 210601WC-U.

CAUSAL CONNECTION

Coal Miner Establishes Causal Connection Between COPD and his Employment

Claimant sought workers' compensation benefits, contending he had sustained injuries to his lungs, heart, pulmonary system, and respiratory tracts that he alleged were caused by exposure to coal dust and other substances during the 40-year period that he worked as a coal miner. After a hearing, the arbitrator found that the claimant had failed to prove that he sustained an occupational disease arising out of and in the course of his employment, that his current condition of ill-being was causally connected to his employment, or that he suffered a timely disablement. Accordingly, the arbitrator denied the claimant's claim for benefits. The Commission affirmed the arbitrator's finding that the claimant had failed to prove that he suffered from coal miner's pneumoconiosis (CWP). However, the Commission found that the claimant had sustained chronic obstructive pulmonary disease (COPD) and chronic bronchitis arising out of or and the course of his employment and that the claimant's current condition of ill-being due to both of those conditions was causally related to his employment. The Commission further found that the claimant was permanently disabled to the extent of 10 per cent of the person as a whole and ordered the employer to pay the claimant permanent partial disability (PPD) benefits. The circuit court confirmed the Commission's decision.

On appeal, the court said that it could not conclude the Commission's findings that the claimant suffered from the occupational diseases of chronic bronchitis and COPD and that both of those conditions were causally related to his employment as a coal miner were against the manifest weight of the evidence. After examining the claimant, taking a medical history from him, and conducting a pulmonary function test, a physician had diagnosed the claimant with COPD and chronic bronchitis and opined that these conditions were causally related to his exposure to coal dust during his employment. Although the employer's physician disagreed, the Commission was entitled to credit the claimant's physician over that offered by the employer.

American Coal Co. v. Illinois Workers' Comp. Comm'n, 2020 IL App (5th) 190522WC.

Current Condition of Ill-Being was Not Causally Related to Work Accident

The Commission found that the claimant sustained a work-related accident on December 18, 2016, but, because claimant returned to full duty employment and did not seek subsequent medical treatment until April 2017, his current condition of ill-being was not causally related to the work accident. The Commission awarded benefits under the Workers' Compensation Act (Act) in the form of medical expenses and permanent partial disability. The circuit court confirmed the Commission's decision in full. The appellate court affirmed the judgment of the circuit court. The appellate court indicated that, contrary to claimant's position, the case did not involve a battle of the experts. Instead, the two experts, Drs. Kube and Weiss, agreed that, according to the May 2017 MRI, claimant suffered a herniated disc. Their opinions differed when it came to determining when the herniation occurred. Dr. Kube opined that the herniated disc was caused by claimant's December 2016 fall since no other reported or documented event had occurred that would cause this acute herniation. Dr. Weiss opined that the herniated disc was caused by some intervening event in mid-April 2017, not by claimant's fall in December 2016. Other record evidence supported Dr. Weiss's opinion that the fall did not cause claimant's herniated disc.

Dr. Weiss noted that, if a person was able to continue his full-time duty as a tow truck driver for three or four months after his fall, it indicated to him that the patient was not having a serious problem with **his or her** back at the time. The Commission's determination on a question of fact would not be disturbed on review unless it was against the manifest weight of the evidence.

Maroney v. Illinois Workers' Comp. Comm'n, 2021 IL App (3d) 200213WC.

Claimant Fails to Establish that His Iron Deficiency Anemia was Connected to Workplace

The Commission's finding that claimant failed to prove his diagnosis of iron deficiency anemia was causally related to a workplace exposure to hazardous chemicals was not against the manifest weight of the evidence, and, in light of claimant's failure to establish causation, the appellate court would not address claimant's argument that he was entitled to medical benefits, temporary total disability benefits, and permanent partial disability benefits. The court said that the claimant in an occupational disease case had the burden of proving both that he suffered from an occupational disease and that a causal connection existed between the disease and his employment. While the occupational activity need not be the sole or even principal causative factor, it did have to be a causative factor in the resulting condition of ill-being. The court observed that the Commission was faced with conflicting medical opinions in this matter. Claimant's medical expert opined that claimant's exposure to hazardous chemicals in the workplace caused or contributed to his iron deficiency anemia. The employer's expert disagreed. The court observed that the Commission attributed less weight to the opinion of claimant's expert because:

1. The doctor did not know the extent of claimant's exposure to any of the chemicals at the employer's facility;
2. The doctor acknowledged that iron deficiency anemia was a common condition suffered by members of the general public who had not been exposed to the chemicals present in the factory;
3. There was a lack of evidence causally relating the chemicals to which claimant was exposed to iron deficiency anemia;
4. None of claimant's other doctors rendered an opinion on causation; and
5. The NIOSH study in the case did not find an overexposure in the workplace to suggest a causal relationship between claimant's employment and his condition of ill-being.

After reviewing the record, the court indicated it could not say that the Commission's findings were against the manifest weight of the evidence.

Balensiefen v. Illinois Workers' Comp. Comm'n, 2021 IL App (3d) 200316WC-U.

Commission May Not Base its Decision on Speculation and Conjecture

The appellate court held that the Commission's finding that claimant failed to prove that the current condition of ill-being of his low back was causally related to his compensable work accident of December 1, 1995, and its resulting denials of his petitions under sections 8(a) and 19(h) of the Workers' Compensation Act (820 ILCS 305/8(a), 19(h) (2006)) were against the manifest weight of the evidence. Claimant testified that he caught his right foot in the indentation of a steel staircase, causing his ankle to twist. In December 1995, claimant underwent right ankle surgery, which involved a repair with hardware insertion for complete ligament ruptures of the right ankle with subluxation of the mortise. An operation to remove the hardware was performed on February 2, 1996. Claimant testified that in the months following the December 1995 accident, he was unable to bear weight on the right ankle. This caused an altered gait and increased low-back pain. Claimant testified that on August 22, 1996, while lifting a 55-pound crate during work hardening, he noticed increased low-back pain and numbness down the right leg. Claimant testified that this lift "did him in." Thereafter, claimant began treating for low-back pain with Dr. Richard Noren, who diagnosed right sciatica. A lumbar MRI taken on October 24, 1996, revealed a central L5-S1 disc herniation. On February 19, 1997, Dr. Freitag performed an L5-S1 lumbar discectomy with foraminotomies bilaterally. Following the operation, claimant continued to complain of low-back pain. On November 3, 1998, Dr. Freitag diagnosed claimant with failed-back syndrome.

In February 1999, claimant moved to California to be near family. Ultimately, an arbitrator issued a decision in June 2004, finding a causal relationship between the conditions of ill-being involving claimant's low back and right ankle and the December 1,

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1995, accident. The arbitrator awarded claimant medical expenses and temporary total disability benefits. Regarding the nature and extent of the injury, the arbitrator determined that claimant failed to prove that he was entitled to a wage-differential award. In support of this determination, the arbitrator found that there was no evidence that claimant attempted to seek alternative employment within his restrictions and that claimant was "clearly able to perform beyond the physical limitations of his doctors." With respect to the latter finding, the arbitrator referenced three videotapes of claimant lifting weights. The arbitrator noted that on one of the videotapes, claimant was seen at a workout session bench pressing 275 pounds with a spotter after having already done multiple repetitions with increasing weights ranging from 135 pounds (9–10 repetitions), 185 pounds (8 repetitions), and 225 pounds (5 repetitions). The arbitrator also cited claimant's physical appearance at the hearing, which he described as "well-tanned and physically fit." The arbitrator concluded that the videotapes and claimant's physical appearance belied claimant's contention that he was unable to return to work as an electrician. However, because the evidence established that claimant sustained significant injuries to his back and foot, the arbitrator awarded claimant 338.75 weeks of permanency benefits, representing a 25 percent loss of use of claimant's right foot pursuant to section 8(e) of the Act (820 ILCS 305/8(e) (2004)), and, relative to claimant's back, a 60 percent loss of use of the person as a whole pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (2004)). Each party filed a petition for review of the arbitrator's decision with the Commission. The Commission affirmed and adopted the decision of the arbitrator. Neither claimant nor respondent sought judicial review of the Commission's decision.

In May 2007, claimant filed a petition for review pursuant to sections 8(a) and 19(h) of the Act (820 ILCS 305/8(a), 19(h) (2006)) based on a claim of additional disability and medical treatment involving the low back. Claimant was seen by multiple physicians and underwent an independent medical evaluation. In January 2019, the Commission denied claimant's petitions for review under section 8(a) and 19(h) of the Act. The Commission found that claimant failed to demonstrate that his physical condition after the arbitration hearing on April 28, 2004, was causally related to his December 1, 1995, accident. Instead, the Commission concluded that claimant's condition of ill-being was "attributable to an undisclosed injury that occurred sometime after [claimant's] April 28, 2004, arbitration hearing." In support of its decision, the Commission cited gaps in claimant's medical treatment, the "questionable completeness" of claimant's medical records, and credibility issues with claimant and one of his physicians. The Commission noted that there was no evidence that claimant received any medical treatment for his low back between February 11, 2003, when claimant last treated with Dr. DeFeo, and June 29, 2006, when he was seen by Dr. Bennett. This constituted a period of more than three years and four months. Even more significant to the Commission was the fact that claimant did not submit any records from his brother, Dr. Alevizos, who occasionally acted as his primary-care physician and coordinated his medical care.

The appellate court was unconvinced by the Commission's findings, noting that the Commission's determination that claimant failed to establish causation and that the current condition of ill-being of claimant's back was due to an undisclosed injury was based solely on speculation and conjecture without any support in the record. Quite simply, stressed the appellate court, the undisputed objective medical evidence and the multiple causation opinions linked the migrating hardware to claimant's surgery in 2000, which the Commission had previously concluded was causally related to claimant's December 1995 accident. As such, the court concluded that the Commission's decision that claimant failed to prove that the current condition of ill-being of his low back was causally related to his compensable work accident of December 1, 1995, and its resulting denials of his petitions under sections 8(a) and 19(h) of the Workers' Compensation Act (820 ILCS 305/8(a), 19(h) (West 2006)) were against the manifest weight of the evidence.

Alevizos v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 200184WC-U.

Commission's Original Decision that Claimant's Condition of Ill-Being was not Causally Related to Accident Should Have Been Confirmed

Claimant filed an application for adjustment of claim, seeking benefits for injuries she sustained from an accidental fall in February 2013, while working for her employer, Proviso High School District #209 (Proviso). The Commission found claimant had failed to prove that her condition of ill-being subsequent to June 28, 2013, was attributable to the work-related accident. On review, the circuit court reversed and remanded the Commission's decision, finding it was against the manifest weight of the evidence. On remand, acknowledging that it was bound by the circuit court's decision, the Commission found that claimant's condition of ill-being after June 28, 2013, was causally related to the February 2013 accident and awarded additional benefits, including TTD benefits through August

12, 2013. The circuit court later confirmed the Commission's decision on remand, and Proviso appealed. The appellate court found that the Commission's original decision was not against the manifest weight of the evidence. Accordingly, it reversed the circuit court's judgment reversing and remanding the Commission's original decision, and reinstated the Commission's original decision.

The court said the crux of the dispute centered on whether claimant's left knee injury—either a torn meniscus or a peroneal nerve contusion to her left leg—had sufficiently resolved itself by June 28, 2013. The court said, more precisely, the issue was whether the record supported the Commission's original determination that the claimant failed to prove by a preponderance of the evidence that her condition of ill-being after June 28, 2013, was causally related to the work accident. The court said that, upon careful review of the record, it could not say that the Commission's finding that the claimant failed to meet her evidentiary burden in that regard was unreasonable and unsupported by the evidence. The court noted that the Commission had relied heavily upon the reports of Dr. Miller, the IME, as well as surveillance footage. According to the court, the record showed that Dr. Miller reviewed the pertinent medical records, including Dr. Jones' (the first treating physician) reports and MRI results. Dr. Miller also obtained an independent history from claimant and conducted a physical examination before rendering his opinions. Although Dr. Miller noted that the mechanism of injury was a competent cause of her complaints, he believed that claimant's complaints were unsupported by the MRI results, which were consistent with some mild degenerative changes. Additionally, based on his independent review of the MRI and claimant's physical examination, Dr. Miller disagreed with the radiologist's opinion that the MRI showed evidence of a torn meniscus. Instead, given the absence of effusion combined with diffuse and nonfocal tenderness, Dr. Miller diagnosed claimant with a peroneal nerve contusion. Dr. Miller issued an addendum to his original report on May 2, 2013, in which he concluded that claimant could return to work as a full-time teacher. On June 28, 2013, after reviewing the surveillance footage, Dr. Miller issued a second addendum, in which he reiterated his April 1, 2013, findings that claimant had significantly more symptoms than he could substantiate on the minimally abnormal examination, and he asserted that the surveillance footage revealed no evidence to support a finding of a physical disability in claimant's left leg. Dr. Miller also indicated that the video suggested that whatever symptoms claimant may or may not have had at the time of his earlier examination had resolved. Based upon the video, Dr. Miller said no further treatment was necessary.

The court said, contrary to the circuit court's finding that the video was "not really evidence of anything," the surveillance videos showed claimant carrying items and repeatedly traversing a flight of stairs with no outward signs of pain or discomfort more than one month prior to claimant presenting to her physical therapists and a physician with complaints of knee locking. According to the appellate court, the videos could reasonably be viewed as corroborating Dr. Miller's opinions that the subjective complaints could not be reconciled with the objective evidence, and that claimant was physically able to return to work. Accordingly, the Commission's original decision was amply supported, and the opposite conclusion was not clearly apparent from the record.

Proviso High Sch. Dist. #209 v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 191428WC-U.

Two-Year Gap in Medical Treatment Supports Commission's Findings that Claimant's Current Condition of Ill-Being Was Not Related to Original Chemical Exposure

The Commission's finding that claimant failed to prove a causal connection between her occupational exposure to chemicals and her current condition of ill-being was not against the manifest weight of the evidence where an examining physician's opinion that claimant had sustained chemically induced bronchial reactivity as a result of her exposure to chemicals while working on May 7, 2013, but where there was no evidence of a current condition of ill-being that was causally connected to the May 2013 event. The Commission noted the significant gap in medical treatment since May/June 2014 and found it suspicious that claimant resumed medical treatment just months before trial. There was no record of claimant receiving any medical treatment between April 3, 2015, and July 26, 2017, when she began seeing a physician "to get established and for some breathing issues." During this two-year gap in treatment, claimant remained active and did not limit her activities to avoid potential environmental triggers as demonstrated by surveillance evidence and social-media posts. Given this evidence, the Commission could have reasonably concluded that claimant failed to establish that she had any pulmonary-related complaints during this time.

Caponigro v. Ill. Workers' Comp. Comm'n, 2020 IL App (4th) 200096WC-U.

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Police Officer Sustains Mental Injury Following Prisoner's Bizarre Attempted Escape from Custody

The Workers' Compensation Commission found that Schneider, a police officer employed by the City of Elgin, had sustained a psychological injury, post-traumatic stress disorder, in subduing a prisoner who was trying to escape. The Commission ordered Elgin to pay temporary total disability benefits, temporary partial disability benefits, and medical expenses. Elgin sought judicial review. The circuit court confirmed the Commission's decision. Elgin appealed. The appellate court noted that prior to *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556 (1976), "mental disability was compensable only if it was precipitated by physical contact or injury." After Pathfinder, the theory of recovery could be, alternatively, "mental-mental," if the psychological injuries were caused by sudden, severe emotional shock traceable to a definite time and place and cause even though no physical trauma or injury was sustained. Here, on March 17, 2012, Schneider was assigned to transport two prisoners to the courthouse in Rolling Meadows, Illinois, for the Saturday morning bond call. During the transport, one of the two prisoners kicked out a window in the vehicle, jumped out, tried to hijack another car, was unable to do so, and was shot twice by Schneider as he attempted to get away. The prisoner survived the shooting.

Elgin argued that because Schneider's physical safety was never seriously at risk and because he witnessed no grave bodily injury, it was against the manifest weight of the evidence for the Commission to find that he suffered a "sudden, severe emotional shock." The court observed that Schneider had, of course, witnessed the serious injuries that he himself deliberately inflicted upon the prisoner, but Schneider could not have been shocked, properly speaking—i.e., he could not have experienced "a feeling of disturbed surprise"—at his or her own volitional act of shooting the prisoner twice. The court noted other facts in the case—e.g., that the prisoner kicked the glass out of the squad car, that there was onrushing traffic near the prisoner and Schneider, that there was an internal affairs investigation, a formal interrogation, and the subsequent cessation of his duties as an officer. The court acknowledged that the psychological evaluations in the case were in sharp conflict. The court could not say that it would be impossible for a reasonable trier of fact to believe Schneider's experts over those offered by Elgin. The court concluded that, in sum, by finding that Schneider suffered a sudden, severe emotional shock traceable to a definite time, place, and cause, which caused psychological injury or harm to him, the Commission did not make a finding that was against the manifest weight of the evidence.

City of *Elgin v. Illinois Workers' Comp. Comm'n*, 2020 IL App (2d) 190713WC-U.

Commission's Decision that Emphysema was Caused or Aggravated by Work in Coal Mines was not Against Manifest Weight of Evidence

Claimant appealed an order of the circuit court reversing a decision of the Commission awarding him benefits pursuant to the Illinois Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 et seq. (2012)). The Commission modified, in part, the decision of the arbitrator, finding that the claimant established that he suffered from emphysema that arose out of and in the course of his employment and his current condition of ill-being was causally related to his employment. Claimant had worked in coal mines for 32 years, 11 of which were underground. During that time, he was exposed to silica dust, roof bolting glue fumes, diesel fumes, coal dust, and smoke from coal fires. He last worked in the mines on June 21, 2013, when he retired. He started to have breathing problems and coughing towards the end of his career. The claimant stated that he started smoking in 1975 and quit in 2002, though he reported to a doctor that he quit in 2013. In 2015, he was diagnosed with colon cancer that metastasized to his bladder. He had surgery to remove part of his colon and bladder. His cancer then metastasized to his lungs, and he was undergoing chemotherapy.

One physician, specializing in allergy and pulmonary diseases, and board certified in allergy, immunology, and asthma, testified that coal mine exposure like that of the claimant could result in or aggravate emphysema. He stated that emphysema was multifactorial in origin and inhaling dust or fumes could cause or progress emphysema. A second physician, who was board certified in internal medicine, specializing in pulmonary disease, testified that the National Institute for Occupational Safety and Health (NIOSH) performed a study and determined that coal mine dust could cause emphysema and that the risk of emphysema from mining was similar to the risk from smoking. The arbitrator found that there was no credible evidence or opinions by any healthcare providers to support a finding that the claimant's diagnosis of emphysema was caused or aggravated by his work in the coal mine.

The arbitrator found it significant that the claimant had a history of smoking that could have caused or contributed to his diagnosis of emphysema. The Commission disagreed with the arbitrator as to the claimant's emphysema, stating that the evidence supported that the claimant had a lengthy history working in and around the coal mine

The Commission's decision that the claimant's emphysema arose out of and in the course of his employment was not against the manifest weight of the evidence. The record provided two causes for the claimant's emphysema: coal mine dust inhalation and cigarette smoking. Both doctors testified that emphysema can be multifactorial in etiology, and when it is, the resulting impairment can be additive.

and exposure to hazardous fumes. It thus found that the claimant's emphysema was causally related to his job duties. As noted above, the circuit court reversed the Commission's decision regarding the cause of the claimant's emphysema.

Initially, the appellate court noted that whether a claimant suffered from an occupational disease that was causally related to his employment presented a question of fact. The Commission's decision that the claimant's emphysema arose out of and in the course of his employment was not against the manifest weight of the evidence. The record provided two causes for the claimant's emphysema: coal mine dust inhalation and cigarette smoking. Both doctors testified that emphysema can be multifactorial in etiology, and when it is, the resulting impairment can be additive. As the evidence presented showed that emphysema could have multiple causes, including both smoking and coal mine dust, the Commission's decision that the claimant's coal mine exposure was a causative factor of his emphysema was not against the manifest weight of the evidence.

Reese v. Illinois Workers' Comp. Comm'n, 2021 IL App (4th) 190630WC-U.

Evidence Supported Commission's Finding that Claimant's Condition was Causally Related to Accident

The appellate court said ample evidence existed to support the Commission's causation finding where it was undisputed that claimant suffered from preexisting problems with his lumbar spine prior to the work accident, yet claimant's pre-accident complaints involved mainly low-back pain with intermittent radiation to the right leg, a condition that was treated conservatively with pain medication and physical therapy. There was no indication that claimant was prescribed surgery or that his symptoms caused him to miss work. Indeed, when a physician examined claimant 10 days prior to the accident, he did not order any tests, make any referrals, or take claimant off work because of his complaints. The accident at issue occurred on September 28, 2017, when claimant was hit by a steel skid-steer bucket at work. Claimant was able to finish his shift the day of the accident and work a full shift the following day. However, his pain became more severe in the days that followed. On October 1, 2017, claimant presented to the emergency room, where he was diagnosed with a lumbosacral strain, prescribed medication, and instructed to follow up with his primary-care physician. Later, claimant's symptoms worsened, and he sought additional medical care with other physicians, one of whom concluded that claimant's current condition of ill-being was causally connected to the work accident. Based on this record, the Commission could reasonably conclude that the condition of ill-being of claimant's lumbar spine was aggravated or accelerated by the work accident.

Zoie, LLC v. Illinois Workers' Comp. Comm'n, 2020 IL App (5th) 200161WC-U.

Commission's Denial of Causal Connection Reversed by Appellate Court Despite More Than a Year Gap in Medical Treatment

The claimant sustained three undisputed accidents. The first involved an injury to the neck for which the claimant received chiropractic treatment. The treatment stopped March 11, 2015, but the chiropractic note from that date indicated the claimant was still experiencing symptoms. The second accident occurred 13 months later on April 15, 2016 when the claimant injured his lower back. The third accident occurred July 14, 2016 when the claimant again injured his lower back. Just before the third accident, the claimant

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attended an IME arranged by the employer. The IME doctor opined the claimant was not yet at maximum medical improvement for either his neck or his lower back. Following the IME, the claimant received treatment for his lower back. The claimant ultimately underwent additional treatment for his cervical spine including surgery. The Commission determined that because the claimant did not receive any treatment for his cervical spine or document any complaints of problems with his neck between the end of the chiropractic treatment in March 2015 and the time of the second accident in April 2016, there was no causal relationship between the first accident and the subsequent treatment for the neck. The Appellate Court reversed the Commission's finding noting it was contrary to the manifest weight of the evidence. The Appellate Court pointed to the employer's IME from July 2016 which indicated the claimant was not at maximum medical improvement with respect to his work related cervical condition. With the employer's examining physician rendering an opinion the claimant's cervical condition was still related to the work accident, the Appellate Court held the Commission's reliance upon the gap in treatment was misplaced and was contrary to the manifest weight of the evidence.

Kelly Melton v. Illinois Workers' Compensation Comm'n, 2021 IL App (5th) 200404WC-U.

EMPLOYMENT STATUS

Employment Contract's "Last Act" Supplies Jurisdiction for Out-of-State Injury

The appellate court affirmed a decision by the Illinois Workers' Compensation Commission that found it had jurisdiction to consider the injury claim of an operating room nurse hired by an Illinois staffing company who suffered injuries while working in an Indiana hospital. In its unpublished decision, the Illinois court agreed that the last act necessary to give validity to the employment contract had been completed within Illinois—the nurse used a computer at an Illinois public library to complete, electronically sign, and send her completed employment contract to the employer. The staffing company contended Illinois lacked jurisdiction because, at the time she had electronically signed the agreement, the nurse still had not completed all the required requisites for working in Indiana. For example, she had not yet been licensed in that state. The appellate court said the staffing company had improperly conflated the employment relationship with the nurse's assignment in Indiana. Hiring the nurse and assigning her to a particular job were two separate events. There was ample support to give validity that the contract of employment was made in Illinois and that, therefore, the Illinois Commission could adjudicate the claim.

Aureus Med. Grp. v. Illinois Workers' Comp. Comm'n, 2021 IL App (3d) 200201WC-U.

Commission Erred When it Held Claimant had Failed to Establish Employee-Employer Relationship

Claimant appealed a circuit court decision confirming the decision of the Illinois Workers' Compensation Commission (Commission). The Commission had adopted and affirmed the decision of the arbitrator denying claimant benefits under the Illinois Workers' Compensation Act (Act). The Commission found that claimant had failed to prove the existence of an employer-employee relationship between him and WK Heating, Inc., on the date of the accident. Claimant was the sole owner of SO System, Inc., a company engaged in the business of providing heating and cooling services. Sometime after claimant incorporated SO System, Inc. in September 2013, he expressed interest to work for another company engaged in the business of repairing and replacing heating and cooling systems. This second company was solely owned and operated by Kowalczyk. Kowalczyk informed claimant that he required all workers to form their own business and obtain an individual workers' compensation insurance policy through that business. Despite this requirement, Kowalczyk allegedly told claimant that, in the event of an accident, Kowalczyk would cover claimant's injuries under his company's workers' compensation insurance policy. Following this conversation, claimant obtained a workers' compensation insurance policy on May 20, 2014, for SO System, Inc.

Claimant sustained an injury in January 2015, when he slipped while helping another worker carry a furnace, which weighed 140 to 150 pounds. The arbitrator found that claimant had not proven an employer-employee relationship with Kowalczyk or the latter's company and that claimant's own signed workers' compensation insurance application and exclusion form supported a finding that claimant had voluntarily and knowingly excluded himself from coverage under SO System, Inc.'s workers' compensation insurance policy. The Commission, with one commissioner dissenting, adopted and affirmed the arbitrator's decision.

In finding that there was no employment relationship, the Commission analyzed various factors. First, the Commission believed that the evidence demonstrated that Kowalczyk was clearly not

monitoring claimant's work in a detailed manner. The Commission noted that although Kowalczyk supplied job materials for claimant, Kowalczyk's actions were more a function of complying with Codes and the requirements specified by the General Contractor when he met with claimant at job sites. Moreover, given claimant had incorporated a business engaged in repairing and replacing heating and cooling systems, the Commission found claimant's testimony incredible where he asserted that he lacked experience in the HVAC industry and did not own tools to perform such work. With regard to claimant's work schedule, the Commission determined that it was dictated by when the General Contractor had the job site open and when the other trades were on site, not by Kowalczyk. The Commission also stressed that claimant received no benefits such as paid time off, vacation or health insurance from Kowalczyk's company; his checks were made out to SO System, Inc. The circuit court confirmed that the Commission's findings were not against the manifest weight of the evidence and claimant appealed.

Turning to the most important factor, the right to control, the appellate court concluded that the manifest weight of the evidence clearly establishes that Kowalczyk exercised control over claimant's on-the-job activities. Despite Kowalczyk's testimony that he did not control claimant, the record supported a finding that Kowalczyk met claimant at job sites, not only to provide claimant with a physical copy of a general contractor's blueprints, but to "explain the [blueprint] plans" to claimant to ensure his compliance. The court said that it appeared, therefore, that if, and when, a substantial change was required, it was Kowalczyk, not claimant, who evaluated and directed the change. Additionally, claimant's testimony demonstrated that Kowalczyk actually exercised control over the manner in which claimant performed his work. The appellate court said that the manifest weight of the evidence clearly established that Kowalczyk dictated claimant's schedule. Moreover, the materials and specialized equipment used on the work site were furnished by Kowalczyk. Summarizing, the court said it could not agree with the Commission's determination that "Kowalczyk was clearly not monitoring claimant's work in a detailed manner. Rather, the evidence demonstrated that Kowalczyk had the right to, and actually exercised, control over claimant's activities by supervising and instructing claimant as to the manner in which claimant performed his work, dictating claimant's schedule and supplying claimant with materials and specialized equipment to perform work for respondent. Thus, these factors indicate an employment relationship between claimant and respondent on the date of the accident.

Olesky v. Illinois Workers' Comp. Comm'n, 2021 IL App (1st) 191939WC-U.

Commission's Decision that Trucking Company Was Borrowing Employer Stands

The appellate court held the Commission's determination that Rock Solid was a borrowing employer was not against the manifest weight of the evidence. Claimant testified that he was employed by Super Mix as a truck driver. During the summer of 2011, Super Mix sent the claimant on an out-of-state job in Nebraska. In August 2011, Super Mix dispatcher asked the claimant to go to North Dakota with another Super Mix driver to haul cement for Rock Solid. The job required the claimant to make daily runs to ship cement to a construction site from South Dakota to North Dakota. The evidence presented demonstrated that Super Mix was owned by Jack Pease and Rock Solid was owned by Jack's son, Jonathan Pease. On September 28, 2011, the claimant sustained injuries in a vehicular accident while driving the truck. At the time of the accident, the claimant was driving a Super Mix truck. He was paid by Super Mix, and Super Mix covered his lodging expenses. The claimant never received any compensation from Rock Solid. The claimant's Application for Adjustment of Claim named both Super Mix and Rock Solid as his employers. A "Certificate of Liability Insurance" was entered into evidence, which listed Rock Solid as the insured and Super Mix as the certificate holder. The certificate provided that Rock Solid had, among other things, "workers' compensation and employers' liability" coverage between November 15, 2010, and November 15, 2011. The arbitrator found that Super Mix was a lending employer and Rock Solid was a borrowing employer. The arbitrator also found that the claimant sustained an accident arising out of and in the course of his employment with Rock Solid and that his condition of ill-being was causally related to the accident. Accordingly, the claimant was awarded benefits under the Act. The Commission affirmed and adopted the arbitrator's decision. The circuit court confirmed, and Rock Solid appealed.

According to the court, the evidence showed that the claimant received his daily dispatch orders the night before from a Rock Solid employee who was staying at the same motel, and he worked essentially the same hours as Rock Solid's employees. He would follow Rock Solid's lead driver during the delivery process with each delivery run, and when he arrived at the jobsite, he would follow Rock Solid's lead driver and wait for direction to transfer his load from his truck to Rock Solid's truck that was designed to accept the cement. The claimant stated that laborers onsite, Rock Solid drivers, or another Rock Solid employee, himself told him what to do. It is undisputed that no supervisors from Super Mix were present. There

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was testimony that Rock Solid was not empowered to discipline or terminate the claimant. Although the claimant appeared to have contact with Super Mix's dispatcher, he stated that the dispatcher did not provide his orders and didn't know what was going on out there. Given the testimony of the various witnesses, the court could not say that the Commission's determination was against the manifest weight of the evidence.

Rock Solid Stabilization & Reclamation, Inc. v. Illinois Workers' Comp. Comm'n, 2020 IL App (2d) 190877WC-U.

In Reliance Upon a Union Agreement, the Appellate Court Reversed the Commission's Finding of Jurisdiction Based Upon the Last Act Necessary for Hiring

The claimant worked as an electrician and was a member of the IBEW Union in Danville, Illinois. The employer is an electrical contractor based in Indiana. The claimant sustained an undisputed accident while working as an apprentice in Indiana. The claimant filed an Application for Adjustment of Claim in Illinois. The Arbitrator and the Commission concluded Illinois had jurisdiction because the claimant was hired in Illinois. Pursuant to the Union Agreement, the Union Hall referred the claimant to the employer. The phone call from the Union to the employer was made from Illinois. The Commission noted the place the contract for hire arose is the "sole factor" in determining whether Illinois had jurisdiction.

The Appellate Court reversed the Commission's finding and held Illinois did not have jurisdiction over the case. The Appellate Court looked to the Union agreement which expressly stated the Union was the exclusive referral agent for the employer and the employer retained the right to reject a referred individual. The employer presented testimony indicating an applicant had to go through a series of requirements in order to become an employee of the company. Additionally, the employer had a right to reject the claimant even after she completed safety training. The Appellate Court held the last act necessary to form a contract for hire occurred in Indiana after the claimant reported to the employer's job site. Therefore, the Commission's Decision finding Illinois had jurisdiction was contrary to the manifest weight of the evidence.

Industrial Contractors Skanska v. Illinois Workers' Comp. Comm'n, 2021 IL App (4th) 210003WC-U.

REPETITIVE TRAUMA

Court Weighs Factors in Determining Manifestation Date of Claimant's Carpal Tunnel Syndrome

On May 18, 2015, claimant filed an application for adjustment of claim under the Act against the employer, seeking benefits for arm and hand injuries which she allegedly sustained while driving a city bus. Claimant testified that in 2008, before working for respondent, she noticed tingling in her hands and fingers. Her doctor ordered an electromyography (EMG) test which revealed bilateral moderately severe carpal tunnel syndrome. This October 2008 EMG report was entered into evidence. According to the report, claimant had complained of weakness, achiness, and numbness in both hands. Although surgery was recommended, claimant said the symptoms were tolerable, so she declined treatment. The arbitrator issued a decision, in which he found claimant had sustained a work-related injury with a manifestation date of July 14, 2015, not April 27, 2015, as alleged by claimant. The arbitrator found July 14, 2015, the day of claimant's first surgery, was the "date of collapse"—the day claimant could no longer work without intervention for her repetitive injuries. The arbitrator also found claimant had given timely notice of the injury on April 27, 2015. The arbitrator awarded TTD benefits, PPD benefits, and medical expenses. The Commission affirmed and adopted the arbitrator's decision in full, over one commissioner's dissent. The dissent found the increase in claimant's symptoms were due to the natural progression of the condition and that claimant's job duties were not repetitive and did not cause or aggravate the condition. The circuit court confirmed.

The appellate court noted that the date on which the employee notices a repetitive-trauma injury is not necessarily the manifestation date. Summarizing the facts, the court said here, claimant was diagnosed with moderate to severe carpal tunnel syndrome in 2008. Claimant testified her symptoms were tolerable or manageable between 2008 and 2012. Once she began driving a bus for respondent in 2012, her symptoms began to gradually increase in severity. In late 2014, her symptoms were bad enough that she mentioned them to her general practitioner at an appointment on an unrelated matter. He referred her to Dr. Mahoney, who recommended surgery after reviewing the November 2014 EMG results. Dr. Mahoney diagnosed claimant with bilateral carpal and right cubital tunnel syndromes. At that time, although claimant suspected her work was

aggravating her symptoms, she was unwilling to have the surgery immediately because she could not afford to take time off work. That is, she continued to perform her daily work. The court said fairness and flexibility are the common themes in repetitive-trauma cases and that the court should weigh many factors in deciding when a repetitive-trauma injury manifests itself. Although claimant did not miss work due to her condition until July 14, 2015, she became keenly aware on April 27, 2015, that her work as a bus driver was greatly aggravating her condition. Thus, the court concluded April 27, 2015, was the more appropriate manifestation date—the date which both the injury and its causal link to her work became plainly apparent to a reasonable person. Three weeks later, on May 18, 2015, she filed her application for benefits, well before the date she stopped working to undergo surgery on July 14, 2015. Based on this record, the court said it believed the date of July 14, 2015, chosen by the Commission as the manifestation date, was against the manifest weight of the evidence. The case was remanded for a recalculation of benefits.

Greater Peoria Mass Transit Dist. v. Illinois Workers' Comp. Comm'n, 2021 IL App (3d) 200170WC-U.

AVERAGE WEEKLY WAGE

Money Paid to Decedent Under Company's Instant Profit Sharing Plan Was a Bonus and Should Not be Used to Compute AWW

An arbitrator conducted a hearing on the sole issue of whether funds paid to the decedent by his employer pursuant to a profit-sharing program were "wages" or a "bonus" under 820 ILCS 305/10 (2012) for purposes of calculating the decedent's average weekly wage. The arbitrator found that these payments were wages rather than a bonus and should be counted as such when determining the decedent's average weekly wage. The effect of the decision was to increase the claimant's death benefit from $547.49 per week to $647.48 per week. The Commission reversed the decision of the arbitrator and found that the profit-sharing payments at issue were a bonus rather that wages pursuant to section 10 of the Act. The circuit court reversed the decision of the Commission, finding that the funds at issue were wages rather than a bonus and therefore should be counted in determining the decedent's average weekly wage.

The appellate court said that, ordinarily, the Commission's determination of an average weekly wage was a question of fact which the court would reverse only if it was contrary to the manifest weight of the evidence. The court said here, the material facts, while undisputed, were capable of more than one reasonable inference. Specifically, the testimonial and documentary evidence were capable of supporting the inference that the "Instant Profit Sharing" (IPS) payments to the decedents were discretionary, and were therefore a bonus; but the evidence was also capable of supporting the inference that the IPS payments were required consideration for the decedent's work performance, and therefore earned wages. The Commission chose between these two inferences based upon its interpretation and weighing of the factual evidence. The court, therefore, reviewed the Commission's decision under the manifest weight of the evidence standard. The only thing that the claimant knew about it was that employees needed to work a required amount of hours in order to qualify for the IPS payment. The employer's records showed that the decedent did not receive an IPS payment in 2005 given that he did not work enough hours to meet the eligibility requirements of the IPS program. However, he did receive IPS payments every year from 2006 through 2012, and his payment increased every year during that period. The claimant testified that these payments were included in her husband's yearly W–2 statements. In support of this finding, the Commission noted that documents describing the IPS program clearly showed that the program was discretionary, and that the employer reserved the right to amend or even cancel the program in whole or in part without notice and in its sole discretion.

[T]he testimonial and documentary evidence were capable of supporting the inference that the "Instant Profit Sharing" (IPS) payments to the decedents were discretionary, and were therefore a bonus; but the evidence was also capable of supporting the inference that the IPS payments were required consideration for the decedent's work performance, and therefore earned wages.

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The Commission further found that these documents explicitly showed that the employer's intention to pay these benefits was not a guarantee, and that no contractually enforceable rights between the employer and its employees were created in the process. The Commission also found that the evidence shows that IPS payments were not tied to individual performance, but were instead dependent upon the profitability of the unit in which a Team Member worked, assuming an employee met the requisite number of hours worked. In light of all this, the court said the Commission's finding that the IPS payments to the decedent constituted a bonus rather than wages was not against the manifest weight of the evidence. There was no collective bargaining agreement or any other agreement that gave the decedent a contractual right to the IPS payments based upon his work hours or performance. In fact, the program manual explicitly provided otherwise. The circuit court erroneously reversed the Commission's decision, said the court.

Alvarado v. Illinois Workers' Comp. Comm'n, 2020 IL App (2d) 191105WC-U.

MEDICAL CARE

It Was the Commission's Responsibility to Resolve Conflict in Medical Evidence as to Claimant's Need for Surgery

Stressing that it was the function of the Commission to resolve conflicts in the evidence, including medical testimony, to assess the credibility of the witnesses, to assign weight to the evidence, and to draw reasonable inferences from the evidence, the appellate court affirmed a decision that denied claimant's request for an order for prospective medical care in the form of spinal surgery consisting of an arthroplasty at C5–6 and C6–7. The court acknowledged the opinion of claimant's expert that the appropriate medical treatment for the claimant's condition of cervical spine ill-being was a cervical arthroplasty at C5–6 and C6–7. In contrast, another expert opined that the standard does not usually indicate a 2-level arthroplasty. According to that second physician, the surgery would be reasonable based on the radiographic findings if they specifically correlated with the claimant's clinical findings. The second doctor found, however, that it is difficult to reconcile the radiographic findings relating to the claimant's cervical spine in a specific distribution with her nonfocal clinical exam. The Commission relied upon the second physician's opinion, and necessarily rejected the contrary opinion of claimant's expert. It was the function of the Commission to resolve the conflict in medical opinions. It resolved that conflict in favor of the second physician's opinion, and the court was unable to find that an opposite conclusion was clearly apparent. In urging reversal of the Commission's determination that she is not entitled to prospective medical care in the form of an arthroplasty at C5–6 and C6–7, the claimant was asking the appellate court to substitute its judgment for that of the Commission on matters of credibility and weight of the evidence. It declined to do so.

Bell v. Illinois Workers' Comp. Comm'n, 2021 IL App (1st) 200024WC-U.

VOCATIONAL REHABILITATION

Commission's Finding of Claimant Being Precluded from Returning to her Usual and Customary Employment Triggers Employer's Obligation to Administer a Vocational Rehabilitation Assessment

The claimant's back went out while she was performing her job duties. After undergoing a course of medical treatment, she was left with permanent restrictions which precluded her from returning to work in her usual and customary capacity. At trial, each party presented testimony of a vocational rehabilitation counselor. Despite each counselor rendering an opinion the claimant was capable of returning to work with some assistance, the Arbitrator awarded permanent total disability benefits. On review, the Commission reversed the Arbitrator's Decision and awarded a percentage of disability to the person as a whole. The Commission explained the injuries sustained by the claimant did not result in an impairment of her earning capacity. The Circuit Court reversed the Commission's Decision and held the claimant was entitled to permanent total disability benefits. The Appellate Court reverse the Circuit Court's Decision.

The Appellate Court determined that based upon Commission Rule 9110.10(a), the employer was required to perform a vocational rehabilitation assessment when it can be reasonably determined the injured worker will be unable to resume the regular duties at which he or she was engaged at the time of the injury. Here, the claimant requested vocational rehabilitation, but the employer did not provide it. The Appellate Court remanded the case to the Commission for a vocational rehabilitation assessment to be performed. Surprisingly, the Appellate Court affirmed the permanency award for a percentage of disability to the person as a whole despite the vocational rehabilitation assessment and possible vocational rehabilitation program not being completed.

CDW Corporation v. Illinois Workers' Comp. Comm'n, 2021 IL App (2d) 200562WC-U.

PERMANENT TOTAL DISABILITY

Appellate Court Reverses Commission's Decision that Claimant Failed to Show "Odd Lot" Status

The appellate court affirmed the judgment of the circuit court setting aside the decision of the Illinois Workers' Compensation Commission and reinstating the decision of the arbitrator where the Commission's finding that claimant failed to prove entitlement to an award of permanent total disability benefits under the odd-lot theory was against the manifest weight of the evidence. The arbitrator found that claimant proved entitlement to PTD benefits under an "odd-lot" category by introducing the opinions of a certified rehabilitation counselor, along with evidence of his receipt of Social Security disability benefits, which showed that there were no available jobs for him, given his age, training, education, experience and condition. The arbitrator also found that the employer failed to meet its burden of showing that suitable, regular and continuous work was available to claimant by either providing claimant with light-duty work or introducing the opinions of a vocational expert. On review, the Commission issued a decision which modified the arbitrator's decision by vacating the arbitrator's award of PTD benefits and, instead, awarding claimant PPD benefits for 50 percent loss of use of his person as a whole. The Commission also found that claimant "implicitly waived" his right to a wage differential award by failing to present evidence to demonstrate entitlement to such an award. Following a hearing, the circuit court determined that the Commission's finding that claimant failed to establish entitlement to PTD benefits by showing he fell within the odd-lot category was against the manifest weight of the evidence. Thus, the court set aside the Commission's decision and reinstated the arbitrator's decision. The appellate court concluded that the Commission arbitrarily rejected the counselor's unrebutted opinions in finding claimant failed to prove entitlement to PTD benefits under the odd-lot theory. The court said that it was reluctant to disturb a factual determination made by the Commission, but it would not hesitate to do so when the clearly evident, plain, and undisputable weight of the evidence compelled an opposite conclusion, as it did here.

AC McCartney Farm Equip. v. Illinois Workers' Comp. Comm'n, 2020 IL App (2d) 190720WC-U.

TEMPORARY TOTAL DISABILITY

Claimant was Not Entitled to TTD Benefits Where He Refused Work Within Medical Restrictions

The appellate court agreed that the Commission's decision vacating an award of TTD was appropriate where claimant's resignation from employment constituted a refusal to work within medical restrictions. The court observed that in April 2014, when claimant sought further treatment from a physician, the doctor did not restrict claimant's work activity. He was advised to use over-the-counter pain relief but was cleared to perform all job functions. Another doctor reported that claimant had not worked since March 11, 2014, and was currently unemployed. Claimant conceded that the IME report stated that claimant had told a doctor he had given his two-week notice in February 2014. Claimant also admitted he had conversations with someone at his former employer about moving out of state for financial reasons. Thus, there was ample evidence to support the Commission's finding that, although claimant had not reached MMI, his separation from employment on or about March 19, 2014, constituted a refusal to work within any stated medical restrictions.

Kmieciak v. Illinois Workers' Comp. Comm'n, 2020 IL App (4th) 200091WC-U.

Claimant was Entitled to TTD Benefits Despite Resigning from his Employment

The claimant sustained an undisputed accident resulting in injuries to his shoulder. After undergoing a considerable amount of treatment for the shoulder, permanent restrictions were imposed on the claimant's activities. On January 13, 2016, the employer sent a letter to the claimant indicating the permanent restrictions imposed by the treating physician could not be accommodated. If the claimant was not able to return to work either with no restrictions or with restrictions which could reasonably be accommodated, then the claimant would be subject to employment termination. The claimant responded January 22, 2016 by submitting a letter of retirement to the employer advising his retirement date would be effective February 13, 2016.

In its Decision, the Commission concluded the claimant took himself out of the work force as of February 13, 2016 and was therefore not entitled to TTD benefits after that time. The Commission also determined the date of maximum medical improvement

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was August 18, 2016. The Appellate Court reversed the Commission's TTD finding. The Appellate Court noted TTD benefits are generally to be paid until the injured employee reaches maximum medical improvement. However, there are exceptions to that rule including when the employee refuses to work at a position within the prescribed physical restrictions. The Appellate Court held the claimant did not refuse to work within his restrictions. It was only after the employer advised it would not be able to accommodate the claimant's restrictions when the claimant submitted his retirement letter. A job offer was not extended to the claimant and refused by the claimant. The Appellate Court found the Commission's termination of TTD benefits as of the time of the retirement letter was contrary to the manifest weight of the evidence and awarded TTD benefits through the MMI date.

City Water, Light & Power v. Illinois Workers' Compensation Comm'n, 2021 IL App (4th) 200488WC-U.

PERMANENT PARTIAL DISABILITY BENEFITS

"Future Earning Capacity" Need Not Consider Non-Employment Related Income

The appellate court found that the "future earning capacity" factor under section 8.1b(b)(iv) of the Illinois Workers' Compensation Act (820 ILCS 305/8.1b(b)(iv) (2016)) does not require consideration of non-employment related income, such as line-of-duty disability pension or PSEBA benefits. Accordingly, the court affirmed the judgment of the circuit court of Peoria County confirming the Commission's decision to award claimant (a police officer for the City of Peoria, with 16 years on the force) permanent partial disability benefits, representing a 40 percent loss of a person as a whole. Here, the Commission, in affirming and adopting the arbitrator's decision, concluded that claimant's injuries partially incapacitated her from performing the duties of her usual and customary line of employment.

The court noted that the Commission had reviewed the claimant's statutory benefits, finding properly that the benefits were not earnings and had no impact on claimant's earning capacity. Citing *Larson's Workers' Compensation Law*, the court stressed that although wages were indicative of earning capacity, they were not necessarily dispositive. The test did not focus exclusively on the amount earned, but instead focuses on the capacity to earn. Here, the Commission emphasized that section 8(d)(2) of the Act did not require a loss of earning capacity to receive an award and noted that the City had failed to support its argument with citation to authority. Moreover, contrary to the City's argument that the benefits provided claimant with guaranteed income to eliminate any loss of her future earning capacity, the Commission specifically noted that the benefits were subject to an annual review by an independent physician and, thus, claimant's ability to continue to receive benefits was out of her control. Accordingly, the court concluded that the Commission's award of PPD benefits for a 40 percent loss of use of a person as a whole was not against the manifest weight of the evidence.

City of Peoria v. Illinois Workers' Comp. Comm'n, 2020 IL App (3d) 190746WC-U.

SANCTIONS

Commission's Decision Not to Award Penalties and Attorney's Fees Was Not Against Weight of Evidence

Claimant, the decedent's surviving spouse, sought death benefits following the death of her husband. Earlier, he had been awarded workers' compensation benefits for an impaired lung function that included both restrictive airway disease (RAD) and chronic obstructive pulmonary disease. The employer denied responsibility for death benefits, claiming that decedent's death was unrelated to his RAD or COPD. The matter proceeded to a hearing before an arbitrator. The hearing centered on whether decedent's death was causally connected to his work-related illness. Ultimately, the arbitrator found that decedent's death arose out of and in the course of his employment and that his condition of ill-being was causally connected to the same. The Commission affirmed in relevant part. It awarded the surviving spouse $10,000 in penalties under 820 ILCS 305/19(1) (2016). The Commission affirmed and adopted the remainder of the arbitrator's decision, including his decision not to award penalties pursuant to 820 ILCS 305/19(k) (2012)) or attorney fees pursuant to 820 ILCS 305/16 (2012). Regarding the issue of penalties, the Commission found that respondent had a good-faith basis to deny claimant's application for benefits under section 7 of the Act until the parties took the evidence deposition of Dr. Fintel on May 1, 2017. It had no reasonable basis to deny the claim thereafter. Claimant sought judicial review of the Commission's decision in the circuit court. The circuit court confirmed the decision of the Commission and claimant appealed.

The appellate court observed that the intent of sections 16, 19(k), and 19(1) was to implement the Act's purpose to expedite

The appellate court observed that the intent of sections 16, 19(k), and 19(1) was to implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. Awards under sections 16 and 19(k) are proper only if the employer's delay in making payment is unreasonable or vexatious.

the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. Awards under sections 16 and 19(k) are proper only if the employer's delay in making payment is unreasonable or vexatious. That is, the refusal to pay must result from bad faith or improper purpose. Accordingly, an employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act. Here, the Commission concluded that respondent had a good-faith basis for the denial of benefits. In support of this finding, the Commission relied on the reasons cited by the arbitrator, notably the arbitrator's findings that decedent died from a cardiac condition and a genuine question existed as to the cause of decedent's death given the confusing nature of the death certificate. The Commission acknowledged that respondent relied upon the opinion of Dr. Fintel, a medical practitioner whose conclusions were flawed because he was provided incomplete information. The Commission observed, however, that once respondent realized the incorrectness of its actions, it paid the arbitration award and moved to dismiss its petition for review of the arbitrator's decision. Accordingly, the Commission concluded that respondent did not act vexatiously, and it denied claimant's request for section 19(k) penalties and section 16 attorney fees. The appellate court stressed that it could not say that the Commission's factual findings were against the manifest weight of the evidence or that it was an abuse of discretion to refuse to award such penalties and fees under the facts presented.

Baker v. Illinois Workers' Comp. Comm'n, 2020 IL App (1st) 192455WC-U.

APPEALS

Appeal Dismissed Where Employer Failed to File Notice of Appeal Within 30 Days of Entry of Circuit Court's Order

Where the circuit court's order confirming the Commission's decision was filed on July 3, 2019, and the employer filed a notice of appeal with the clerk's office on August 5, 2019, the appeal was untimely. Because the employer failed to file a timely notice of appeal, the appellate court lacked jurisdiction and was required to dismiss the appeal. The court acknowledged that dismissal was a harsh result, but noted that the employer could have sought an extension of time to file a late notice of appeal under Rule 303(d), but failed to do so.

Advance Servs. v. Illinois Workers' Comp. Comm'n, 2020 IL App (3d) 190468WC-U.

Commission's Decision Remanding for Further Proceedings Was Interlocutory

The appellate court held that a decision of the Commission remanding to the arbitrator for further proceedings on the issue of vocational rehabilitation was interlocutory and, thus, not final and appealable.

Service Drywall & Decorating v. Illinois Workers' Comp. Comm'n, 2020 IL App (2d) 200217WC-U.

Appellate Court Will Not Reweigh the Evidence

Stressing that it was not for the appellate court to reweigh the evidence before the Commission, the court held the Commission's finding that the claimant did not suffer a disease which arose out of and in the course of his employment was not against the manifest weight of the evidence. The court noted that the commission was faced with conflicting medical opinions. It found the report of one of them to be very cursory in nature, with the other physician's report and reasoning was more convincing and entitled to greater weight.

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The weighing of the evidence in that fashion was within the Commission's purview and would not be disturbed.

Dotson v. Illinois Workers' Comp. Comm'n, 2020 IL App (5th) 190226WC-U.

SUBROGATION

Intervening Insurer is Not a Party to Injured Worker's Third-Party Tort Suit

Under section 5(b) of the Illinois Workers' Compensation Act [820 ILCS 305/5(b)], an employer or insurer who intervenes in a civil action filed by the injured employee against a third-party is only allowed to play a limited role in such litigation, held a state appellate court. The employer or insurer does not become a "party" to the underlying litigation by intervening to protect its lien. It was error, therefore, for a state trial court to hold an intervening insurer in contempt for failing to comply with discovery orders. The trial court's sanctions order entered against the insurer was also inappropriate, held the court. The insurer had contended it would have cost $200,000 to comply with the plaintiff's discovery request, an amount that exceeded its lien. The appellate court noted that the plaintiffs had provided no contradictory evidence as to the insurer's contention and held that in as much as it was not a "party" to the underlying lawsuit, it was not subject to the ordinary discovery rules.

Burdess v. Cottrell, Inc., 2020 IL App (5th) 190279.

EXCLUSIVE REMEDY

Civil Action for Violation of Biometric Information Privacy Act Not Barred by Exclusive Remedy Rule

An Illinois appellate court, rendering a decision that is consistent with earlier federal court decisions on the same subject, held that an employee's civil action claim for statutory, liquidated damages against her employer for alleged violations of the state's Biometric Information Privacy Act was not barred by the exclusive remedy provisions of the Illinois Workers' Compensation Act. The court noted that the type of injury alleged, and the damages sought, were not the sort that came within the coverage of the state's workers' compensation laws.

McDonald v. Symphony Bronzeville Park LLC, 2020 IL App (1st) 192398.

Temporary Staffing Worker May Not Sue Borrowing Employer in Tort

A packaging company that contracted with a temporary staffing agency was entitled to summary judgment on the workers' compensation exclusive-remedy defense in 820 ILCS 305/5(a) (2016) in a personal injury action brought by a temporary worker who was injured at the packaging company's facility because the staffing agency was a loaning employer as defined in 820 ILCS 305/1(a)(4) (2016) and no fact issues existed as to either the packaging company's direction and control of the work or the temporary worker's consent to a borrowed-employee relationship.

Torrijos v. International Paper Co., 2021 IL App (2d) 191150.

Where Parent Corporation had Contractual Obligation to Provide Workers' Compensation Coverage for Subsidiary's Employees, it was Immune from Tort Liability

Defendant Bulley & Andrews, LLC (Bulley LLC) entered into a contract with building owner RAR2–222 South Riverside, LLC (South Riverside) to be the construction manager on a construction project at the building. As per the contract, Bulley LLC obtained a workers' compensation insurance policy for its employees as well as the employees of Bulley & Andrews Concrete Restoration, LLC (Bulley Concrete), its wholly owned subsidiary, which contained a $250,000 deductible. Plaintiff Munoz, an employee of Bulley Concrete, injured his back while working on the project. Because of his injury, Bulley LLC provided plaintiff with workers' compensation benefits, including paying more than $76,000 in medical bills. Later, plaintiff sued Bulley LLC for his injuries. On Bulley LLC's motion, the circuit court dismissed plaintiff's lawsuit, finding that Bulley LLC was immune from the lawsuit under the exclusive remedy provisions of the Workers' Compensation Act (Act) (820 ILCS 305/5(a), 11 (West 2018)). Plaintiff appealed the circuit court's dismissal order and contended that, because Bulley LLC was not his employer, it was not immune from a lawsuit under the exclusive remedy provisions of the Act. The appellate court affirmed.

The court observed that the immunity afforded by the Workers' Compensation Act's exclusive remedy provisions was predicated on

the simple proposition that one who bears the burden of furnishing workers' compensation benefits for an injured employee should not also have to answer to that employee for civil damages in court. On the other hand, immunity under exclusive remedy provisions could not be predicated on a defendant's payment of workers' compensation unless the defendant was under some legal obligation to pay. While the appellate court agreed that the instant case was similar factually to Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 359 N.E.2d 125, 3 Ill. Dec. 715 (1976), it stressed that in Laffoon, the supreme court did not have to consider a preexisting contractual obligation to provide workers' compensation benefits under the facts of the case because there was no evidence that the general contractors there had preexisting legal obligations to pay for workers' compensation insurance. Here, however, Bulley LLC had a preexisting legal obligation to pay for workers' compensation insurance and any benefits that might result by virtue of the contract it executed with South Riverside. Consequently, the circuit court correctly found that the exclusive remedy provisions of the Act barred the lawsuit by plaintiff against Bulley LLC and properly granted Bulley LLC's motion to dismiss.

Munoz v. Bulley & Andrews, LLC, 2021 IL App (1st) 200254.

Plaintiff's Negligence Action Against Employer Barred by Exclusivity Even Where Employer Separately Denied Claim Pending Before IWCC

Sampson filed a negligence action against the defendant for physical injuries he sustained while working for the defendant. The defendant sought to dismiss the complaint based upon the exclusive remedy provisions of the Illinois Workers' Compensation Act. Plaintiff was performing maintenance work on one of the defendant's machines when he injured his arm and hand, which resulted in the amputation of his right fifth finger. At the time of the injury, plaintiff was working on the machine while it was still running. Later that same month, he sought workers' compensation benefits. While his application for benefits was pending, he filed the instant negligence action against the defendant employer. The plaintiff contended in relevant part that the defendant had taken the position in the workers' compensation claim that the plaintiff's injuries did not arise out of and in the course of the employment. The plaintiff argued that the defendant was judicially estopped from taking an inconsistent position in the negligence action. The defendant countered that it had taken consistent positions in both proceedings: that the Commission had exclusive jurisdiction over the plaintiff's claim but that the claim was not compensable under the Act because plaintiff's injury resulted from actions that plaintiff took that were in violation of an established safety rule. The trial court agreed with the defendant and dismissed the complaint.

The appellate court acknowledged that the doctrine of judicial estoppel required that party be estopped from taking conflicting positions, the record in the appeal showed that defendant had taken the same position in both the trial court and IWCC proceedings. Moreover, judicial estoppel also could not be applied in this case because defendant had not yet succeeded on, and received a benefit from, the position it had taken before the IWCC. The court said that, in sum, plaintiff alleged in this case what the trial court correctly characterized as a "garden variety" workers' compensation injury—that he was an employee of defendant and that he had been accidentally (through negligence) injured at work while performing his job duties in the manner that he had been trained and instructed. Absent an exception, such an injury fell within the exclusive coverage of the Act, and plaintiff's sole remedy is to pursue workers' compensation benefits in a claim before the IWCC.

Sampson v. Prairie Farms Dairy, Inc., 2021 IL App (3d) 200163-U.

RETALIATORY DISCHARGE

Jurisdiction for Retaliatory Discharge Action Was Appropriately in Illinois Where Termination Occurred in the State and Little Burden Imposed on Defendant to Litigate in Illinois

Plaintiff filed a complaint against his former employer for retaliatory discharge. The complaint alleged that plaintiff's termination was in retaliation for his reporting of a workers' compensation claim against defendant. In response, defendant filed a motion to dismiss for lack of personal jurisdiction. In its motion to dismiss for lack of personal jurisdiction, defendant argued that Illinois could not exercise general or specific personal jurisdiction over defendant because it (1) is a pump distributor with a home office in St. Louis, Missouri, (2) is a business incorporated under Missouri law, (3) maintains a principal place of business in Missouri, (4) makes all hiring and firing decisions from the home office in Missouri, (5) neither owns nor operates any facilities in the State of Illinois, (6) has no employee that maintains an office in Illinois,

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and (7) was served this lawsuit by hand delivery at the home office in Missouri. Plaintiff's response alleged, inter alia, that there was a basis for personal jurisdiction because (1) defendant terminated plaintiff over the phone on Tuesday, July 23, 2019, while plaintiff was in Illinois; (2) plaintiff performed a majority of his work in Illinois; and (3) plaintiff's filing of a workers' compensation claim in Illinois creates personal jurisdiction over defendant in Illinois. The circuit court issued an order denying defendant's motion to dismiss for lack of personal jurisdiction. For purposes of the motion, all factual conflicts were to be resolved in favor of the plaintiff, indicated the appellate court. It found the termination occurred while plaintiff was in Illinois. Since the tort occurred in Illinois, defendant had the requisite minimum contacts with Illinois. The court added that there was little burden imposed on defendant to litigate in Illinois. Defendant's home office was approximately 35 miles from St. Clair County Courthouse in Belleville, Illinois, and defendant affirmed that it services customers in Illinois. Illinois had an interest in resolving a dispute concerning a tortious act that occurred in the state, particularly when the injury involved a business that sends employees to service customers throughout Illinois.

Lusk v. Unckrich Corp., 2021 IL App (5th) 200368.

SETTLEMENT AND WAIVER

Workers' Compensation Settlement Agreement Specifying Injury to Knee Bars Evidence of Additional Injuries in Tort Action

Plaintiff was involved in a vehicular accident with one of defendant's semi-trucks. At the time of the accident, plaintiff drove a semi-truck for his employer. He filed a workers' compensation claim in Pennsylvania and was represented by counsel. In November 2016, plaintiff signed a settlement agreement settling the Pennsylvania workers' compensation claim. In the body of the Agreement, under "[s]tate the precise nature of the injury," the description indicates "[r]ight knee strain. The parties agree that Claimant did not sustain any other injury or medical condition as a result of his 3/06/2015 work injury." Plaintiff certified the complete Agreement by signature. Plaintiff then sued the defendants herein, alleging that he had sustained back, shoulder, and knee injuries that occurred as a result of the accident. He maintained the accident caused injuries to his back, shoulder, and knee in interrogatories. Under their judicial admission argument, defendants maintained that plaintiff could not present evidence of injuries other than to his knee based on the signed settlement agreement. The circuit court agreed in relevant part and entered a partial grant of summary judgment limiting plaintiff's tort claim injuries to knee issues. Initially, the appellate court found that the statement in the settlement agreement amounted only to an evidentiary admission. On rehearing, however, the court reversed course. Noting that collateral estoppel was an equitable doctrine, which precludes a party from relitigating an issue decided in a prior proceeding, the court said the minimum threshold requirements for the application of collateral estoppel were;

1. The issue decided in the prior adjudication is identical with the one presented in the suit in question,
2. There was a final judgment on the merits in the prior adjudication, and
3. The party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication.

The court observed that there was no dispute that the first element of collateral estoppel had been met. The issue in the Pennsylvania workers' compensation settlement was identical to the issue in the present case. The second element had also been satisfied. The Agreement entered in the workers' compensation proceedings set the parties' rights and liabilities based upon the agreed facts stated in the Agreement. Thus, it qualified as a judgment on the merits. This was true even though the Agreement came from a settlement between the parties rather than an independent determination. Finally, the court found that the third element of collateral estoppel had also been satisfied. The plaintiff in the instant case was the same party to the workers' compensation case. Only the party against whom estoppel is asserted must be the same or in privity with the party in the prior adjudication. Since all three elements of collateral estoppel had been met, the plaintiff was estopped from seeking compensation for any injury beyond that contained in the Pennsylvania settlement agreement.

Armstead v. National Freight, Inc., 2020 Ill. App.(3d) 170777.

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Survey of Toxic Tort Law Cases

Allegations that the City of Chicago's Actions in Replacing Water Mains and Meters Created Increased Risk of Lead Exposure Fails to Allege Cognizable Injury

In *Berry v. City of Chicago,* the Illinois Supreme Court reversed the Illinois Appellate Court First District and reinstated the trial court's dismissal of the class action holding that an increased risk of future harm is not a compensable injury. The Illinois Supreme Court further held that "dangerousness" is not objectively measurable, therefore, "dangerousness alone cannot constitute damage under the Illinois takings clause.

Plaintiffs filed suit in the Circuit Court of Cook County alleging increased lead in their drinking water due to construction performed by the City of Chicago. Until 2008, 80 percent of the residential water lines in Chicago were made of lead. Although the City of Chicago chemically treated these lines to prevent corrosion, the protective coating can become compromised from construction, or by a sudden rush of water after a line is turned back on after a period of inactivity. If the protective coating is compromised, then it can result in lead in the drinking water.

Plaintiffs' class action complaint centered on allegations that the City of Chicago was negligent in their replacement of water mains and meters that supplied water to its residents, and a legal theory of inverse condemnation due to the city making residents' water lines more dangerous. The City responded by moving to dismiss the complaint for (i) failure to state a claim, and (ii) the City's immunity under the Local Governmental and Governmental Employees Tort Immunity Act. The trial court dismissed the case. The appellate court reversed and remanded.

The supreme court agreed with the City that an increased risk of future harm alone is not an injury. The supreme court also held that the need for medical monitoring due to increased risk of lead exposure is not an injury because the need for medical monitoring would be based on the potential increased risk of harm, which is not an injury.

Further, the supreme court quoted language from its earlier precedent which stated:

> the injury amounts only to an inconvenience or discomfort to the occupants of the property but does not affect the value of the property, it is not within the provision of the constitution even though a personal action would lie therefor. The injury complained of must also be actual, susceptible of proof and capable of being approximately measured, and must not be speculative, remote, prospective or contingent.

Finally, the court noted that the plaintiffs did not allege any depreciation to their property value, which is required.

Berry v. City of Chicago, 2020 IL 124999.

Timeliness of Removal of Asbestos Case Not Met under the "Federal Officer" Jurisdiction Requiring Reasonable Certainty of Federal Jurisdiction Rather than an Absolute Certainty

The United States District Court for the Southern District of Illinois has further clarified the standard that defendants must meet in order to survive a motion to remand pursuant to 28 U.S.C. § 1447. In *Murphy v. Air & Liquid Systems, Inc.*, the Southern District Court found that the 30-day removal deadline set forth in 28 U.S.C. § 1446(b)(1) is not triggered when a defendant is able to determine that a plaintiff's liability claims against it are based on exposure to the defendant's specific products. In *Murphy*, the plaintiff filed his complaint on February 2, 2021 in St. Clair County, Illinois, against several defendants including Westinghouse. Plaintiff asserted that he served in the U.S. Navy as a machinist mate from 1965 to 1968. During his naval service, the plaintiff was allegedly exposed to and inhaled asbestos fibers emanating from products manufactured, sold, distributed, or installed by the defendants. Westinghouse removed the case on May 28, 2021.

Prior to Westinghouse's removal, the plaintiff served written discovery responses confirming that his allegations of asbestos exposure were limited to his service in the U.S. Navy. The plaintiff described his duties as a machinist mate in the U.S. Navy and

described the alleged asbestos-containing products that he worked with and around. The plaintiff gave his discovery deposition on April 28, 2021 and identified the brands and manufacturers of the alleged asbestos-containing products he worked with during his service in the U.S. Navy. The plaintiff moved to remand his case back to state court based on the fact that Westinghouse failed to file its notice of removal within 30 days of being served with the plaintiff's complaint. In response, Westinghouse stated that, based on a reading of plaintiff's complaint and discovery responses, it could not determine whether the plaintiff was asserting liability based on the plaintiff's exposure to Westinghouse's specific products. Rather, Westinghouse did not learn of the *plaintiff's specific allegations relating to Westinghouse's products until the plaintiff's deposition.*

The court disagreed with Westinghouse. In order to remove a case based on "federal officer" jurisdiction, the removal statute requires "a defendant to have a 'reasonable certainty of federal jurisdiction, not an absolute certainty.'" (citing *Fields v. Jay Henges Enters., Inc.* The 30-day removal period set forth in 28 U.S.C. § 1447 is triggered when removal became ascertainable, not when it becomes uncontestable. *(*citing *Addison v. CBS Corp.* "A defendant cannot ignore facts that are readily known to it, such as the brands they control and the items they manufacture." Thus, Westinghouse did not need any further information outside of the plaintiff's complaint and written discovery responses to ascertain whether the plaintiff's claims against Westinghouse were removable.

Murphy v. Air & Liquid Sys., Inc., No. 21-cv-519, 2021 WL 4169986 (S.D. Ill. Aug. 3, 2021).

Ceramics Product Manufacturer Not Liable for Asbestos Contaminated Vermiculite Packing Material

In *Johnson v. Edward Orton, Jr. Ceramic Foundation*, the defendant Edward Orton, Jr. Ceramic Foundation (Orton) prevailed on a motion for summary judgment in an asbestos product liability lawsuit. Plaintiff, Deborah Johnson, alleged that her decedent husband, Bruce Johnson, developed cancerous mesothelioma from his exposure to asbestos in products sold by Orton, and others, in his work with ceramics. While still living, decedent filed a civil action in state court, and Orton removed the lawsuit to the United States District Court for the Northern District of Illinois after decedent settled with the last non-diverse defendant.

The decedent worked with ceramics from 1971 to 1984 in various schools and companies and utilized Orton pyrometric cones during that work. Orton manufactured pyrometric cones which were placed into kilns to measure temperature and indicate when the kilns were ready for firing. Orton cones did not contain asbestos. Orton packaged its cones in cardboard boxes and used the mineral vermiculite as a packing material. Orton did not manufacture or mine the vermiculite, and instead, Orton sourced vermiculite from two other companies who were not defendants in the lawsuit. Orton obtained vermiculite from W.R. Grace between 1963-75 and 1979-81, and from J. P. Austin from 1975-79 and 1982-83. The lawsuit alleged that W.R. Grace vermiculite, mined in Libby, Montana, contained small amounts (less than .1% by weight) of asbestos.

The plaintiff alleged that Orton was negligent for failing to warn decedent regarding the risk or hazards of asbestos with use of its product. After noting the traditional elements of a tort action, the court indicated the first step in its analysis was evaluating whether Orton owed decedent a duty. "In the product liability context, a manufacturer has a duty to warn potential customers when 'the product possesses dangerous propensities and there is unequal knowledge with respect to the risk of harm, and the manufacturer, possessed of such knowledge, knows or should know that harm may occur absent a warning.'"

The court determined that it was the second element, Orton's knowledge of the danger, that was at issue in the case. Noting that the knowledge analysis is an objective one that relies on industry knowledge at the time, the court ultimately determined that the plaintiff failed to establish that Orton knew, or should have known, that W.R. Grace was supplying vermiculite from Libby, Montana, or that Libby vermiculite was contaminated with asbestos. The only knowledge that Orton appeared to possess prior to 1981 (the year in which it stopped using vermiculite) was that W.R. Grace had Libby as one of its two sources of vermiculite. There was no evidence presented that Orton knew, or should have known, that the vermiculite it obtained from W.R. Grace's facility in Wilder, Kentucky, came from Libby. Moreover, the court determined that there was no evidence that ceramics manufacturers like Orton knew or should have known that W.R. Grace's vermiculite was sourced from Libby, Montana, or that Libby vermiculite contained asbestos. Accordingly, summary judgment was appropriate.

Finally, the court addressed plaintiff's contention that Orton should have been held to a higher standard of knowledge as a

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manufacturer as manufacturers are held to a degree of knowledge and skill of experts. The plaintiff argued that Orton should have been an "expert" in vermiculite. Orton countered that it manufactured the pyrometric cones and not the vermiculite used as a filler in its boxes. The court agreed noting the distinction between a seller and a manufacturer contained with the Restatement (Second) of Torts § 402 which allows a seller to assume goods from a "reputable" source are safe for use.

Because there was no evidence that Orton knew or shouldhave known of the risk present in the vermiculite, there was no issue of fact that would allow a jury to determine that Orton was negligent in failing to provide a warning and summary judgment was appropriate.

Johnson v. Edward Orton, Jr. Ceramic Found., No. 19-cv-06937, 2021 WL 2633308 (N.D. Ill. June 25, 2021).

Out-of-State Defendant Manufacturer Subject to Specific Personal Jurisdiction in Illinois When Injury Occurred in Illinois and Defendant had a Long History of Sales and Distribution in Illinois

In *Levy v. Gold Medal Products Co.*, the Illinois Appellate Court First District recently held that Illinois could exercise specific personal jurisdiction over a non-resident defendant manufacturer pursuant to the Illinois long-arm statute. 735 ILCS 5/2-209 (West 2016). Levy filed a complaint alleging strict liability and negligence against Gold Medal Products Co. and Ventura Foods, LLC, among other defendants, seeking recovery for lung injuries allegedly resulting from her exposure to diacetyl and acetyl propionyl—chemicals used for butter flavoring in popcorn. Levy claimed that she worked with these chemicals sold and distributed by defendants while she was employed by Long Grove Popcorn Shoppe, Inc. in Illinois.

Gold Medal did not argue that there was general jurisdiction over Ventura, so the appellate court only addressed whether the circuit court had specific jurisdiction over Ventura. A court is required to find that the nonresident defendant has "purposefully directed its activities at the forum state and the cause of action arose out of or relates to the defendant's contacts with the forum state" to establish specific jurisdiction over a nonresident defendant. (quoting *Russell v. SNFA*, (citing *Burger King Corp. v. Rudzewicz*,)).

The appellate court compared the *Levy* facts to *Russell*, holding that the circuit court could exercise specific personal jurisdiction

A court is required to find that the nonresident defendant has "purposefully directed its activities at the forum state and the cause of action arose out of or relates to the defendant's contacts with the forum state" to establish specific jurisdiction over a nonresident defendant.

over Ventura with respect to Gold Medal's claims for contribution under the Joint Tortfeasor Contribution Act. The court reasoned that the circuit court "can assert personal jurisdiction over Ventura as long as it is involved in 'the regular and anticipated flow of products from manufacture to distribution to retail sale' and is 'aware that the final product is being marketed in" Illinois. (citing *Asahi Metal Indus. Co. v. Sup. Ct. of Cal., Solano Cnty*. In *Levy*, the appellate court found that Ventura regularly manufactured products for Gold Medal that were subsequently distributed and sold in Illinois. Further, the appellate court held that Ventura was aware that Gold Medal products containing Ventura's chemical products were being marketed in Illinois.

The appellate court distinguished Ventura from a manufacturer whose injury-causing product is taken to another state by a customer's unilateral actions. The appellate court was not convinced by Ventura's claim that it was unaware that Gold Medal sold popcorn to Illinois and construed the conflict in facts in favor of Gold Medal. Gold Medal's representatives contradicted this claim, and Gold Medal's web site and product catalogs listed two branches in Illinois. Ventura sold 200,000 to 400,000 pounds of popcorn per year to Gold Medal for at least 25 years with the knowledge that those products would be sold nationwide.

In holding that this specific set of facts rendered Ventura amenable to Gold Medal's claims against it in the circuit court, the appellate court stated that "Ventura has thus done more than simply place its popcorn products into the nationwide stream of commerce; it has also engaged in conduct purposefully directed at Illinois regarding those products, which is all that is required under the narrow stream of commerce theory to allow the circuit court to

assert specific personal jurisdiction" over Ventura as to Gold Medal's action for contribution. The appellate court further concluded that Gold Medal's third-party claims against Ventura "arose out of or was related to Ventura's contacts with Illinois." In addition to Ventura's 25-year or more history of selling popcorn products to Gold Medal for nationwide distribution, Levy was injured after Gold Medal resold products to Levy's employer in Illinois.

Levy v. Gold Medal Prods. Co., 2020 IL App (1st) 192264.

Madison County Asbestos Trial Judge Issues Order Denying Motion to Dismiss Under Exclusive Remedy of the Illinois Workers' Compensation Act and Workers' Occupational Disease Act

In *Patton vs. McNulty Brothers Company*, the Circuit Court of Madison County asbestos trial judge Steven Stobbs denied defendant McNulty Brothers Company's motion to dismiss based on the exclusivity remedy provisions of the Illinois Workers' Compensation Act and Workers' Occupational Disease Act. Defendant argued that those laws were unconstitutionally amended with the additions of 820 ILCS 305/1.2 and 820 ILCS 310/1.1, and that they were the exclusive remedies for asbestos claims made against an employer.

The plaintiff, John Patton, filed suit against numerous defendants based on his development of mesothelioma. Plaintiff alleged that he was exposed to asbestos while employed by McNulty Brothers from 1969-1973 as a union carpenter at projects in Chicago, Illinois.

The defendant moved to dismiss the case claiming the Workers' Compensation Act and the Workers' Occupational Diseases Act are the exclusive remedies for an employee against his employer for alleged asbestos-related injuries received in the course of his employment. Therefore, any action against the defendant should have been brought through the Workers' Compensation Act. The defendant argued that the Workers' Compensation Act and Workers' Occupational Diseases Act were both in place when the plaintiff was employed by the defendant, and that the Illinois Supreme Court consistently ruled in favor of the exclusive remedy provision citing the decision in *Folta v. Ferro Engineering*, 2015 IL 118070 (2015). Further, the defendant argued that the 2019 amendments were unconstitutional because the expiration period for a cause of action against it had expired and that the legislation deprived it of due process provisions under the Illinois Constitution. Additionally, the defendant also moved to dismiss under the applicable statute of repose arguing that the plaintiff's claims were time barred because they were not brought within 25 years or by 2008. Thus, according to the defendant, the legislature essentially revived a time barred claim after the expiration of the statue of repose which violated due process.

The plaintiff filed a response in opposition arguing that his claims accrued following the amendments to the applicable statutes and that the defendant failed to demonstrate that its due process rights were violated. Specifically, the plaintiff argued that his diagnosis of mesothelioma in September 2019 was his date of injury, which occurred following the statutory amendments in May 2019. Thus, the amendments to the Workers' Compensation Act and the Workers' Occupational Diseases Act applied to hisclaims. Further, the defendant's due process rights were not violated because the defendant, as an employer, had no vested right to the exclusive remedy provisions. The plaintiff claimed that the legislature previously amended the Workers' Compensation Act and shifted the rights of workers and employers. The defendant allegedly failed to cite any authority that the legislature is constrained from amending the scope of exclusivity based on a constitutional limitation.

Following oral arguments on June 3, 2020, Judge Stobbs denied the defendant's motion to dismiss.

Patton v. McNulty Bros. Co., No. 2019L001460 (Cir Ct. Madison Cnty. Ill. Date).

Motion to Dismiss for Lack of Personal Jurisdiction Denied for an Ohio Defendant Sued by a Michigan Plaintiff for Michigan Asbestos Exposure

In *Roger Doane v. A.W. Chesterton Company*, a Cook County Circuit Judge denied defendant Cincinnati Incorporated's motion to dismiss for lack of personal jurisdiction in an asbestos exposure case. The Michigan plaintiff was employed as a machine operator at Steelcase in Grand Rapids, Michigan, for 37 years from 1965 to 2002. The plaintiff alleged that he developed mesothelioma due to exposure to asbestos brake components contained in Cincinnati's mechanical presses. All of the plaintiff's alleged asbestos exposure to Cincinnati products occurred in Grand Rapids, Michigan. Cincinnati was incorporated in Ohio, with its principal place of business in Ohio.

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In his response to Cincinnati's motion, the plaintiff did not contest the lack of general personal jurisdiction. However, he maintained that there were two bases on which the court should find that Cincinnati was subject to specific personal jurisdiction. First, the asbestos brake components in the Cincinnati mechanical presses were manufactured by Gatke Corporation located in Illinois. Second, Cincinnati had two facilities in Illinois. In support of his first basis, the plaintiff provided historical documentation to show generally that Gatke was an Illinois manufacturer of asbestos brake components. The plaintiff then cited to internal reports produced by Cincinnati concerning environmental brake testing conducted in the 1980's, in which Gatke asbestos brakes were prominently mentioned. The plaintiff asserted that because Gatke was an Illinois supplier of asbestos brake components, and because the Cincinnati testing reports almost exclusively referred to Gatke brakes, Gatke was most likely the exclusive supplier of brakes to Cincinnati manufactured in Illinois. Therefore, the plaintiff asserted that he must have been exposed to asbestos brake components manufactured by Gatke in Illinois, thereby conferring specific Illinois jurisdiction.

The plaintiff asserted that because Gatke was an Illinois supplier of asbestos brake components, and because the Cincinnati testing reports almost exclusively referred to Gatke brakes, Gatke was most likely the exclusive supplier of brakes to Cincinnati manufactured in Illinois. Therefore, the plaintiff asserted that he must have been exposed to asbestos brake components manufactured by Gatke in Illinois, thereby conferring specific Illinois jurisdiction.

In its reply, Cincinnati did not dispute that Gatke was one of its suppliers of brake components, however, Cincinnati maintained that Gatke was not its exclusive brake components supplier and that that Gatke brake components were not manufactured in Illinois. Further, that without proof that Gatke was the exclusive supplier brake components to Cincinnati, the plaintiff could not establish that he was exposed to Gatke brake components manufactured in Illinois. Cincinnati argued further that the lack of evidence presented by the plaintiff and the unrebutted testimony presented by Cincinnati would require the court to assume that the plaintiff was exposed to Gatke components manufactured in Illinois in order to find specific jurisdiction against Cincinnati.

In support, Cincinnati cited the testimony of the plaintiff and the Cincinnati corporate representative. The plaintiff testified that he could not identify the manufacturers of any of the brake components contained in the Cincinnati mechanical presses at Steelcase. Cincinnati's representative testified that Gatke was not Cincinnati's exclusive supplier of asbestos brake components. Rather, Cincinnati obtained brake components from at least five suppliers: Gatke, Johns Manville, Abex, American Brake Block, and Wichita Clutch. In addition, Gatke asbestos brake components were not manufactured in Illinois—they were manufactured in Warsaw, Indiana, and Brookfield, Massachusetts. There also were no Cincinnati records identifying which of the manufacturers supplied the brake components to Cincinnati in the mechanical presses sold to Steelcase.

As to the plaintiff's second basis to deny Cincinnati's motion, he cited to the existence of two Cincinnati facilities in Illinois. In response, Cincinnati's representative testified that any Cincinnati mechanical presses located at Steelcase in Grand Rapids, Michigan, were manufactured in Ohio and distributed through the Cincinnati representative located in Grand Rapids, Michigan. Cincinnati also addressed the existence of its two Illinois facilities: one of the facilities was a distributor that did not have authority to produce or deliver any Cincinnati machinery to Michigan; and the other facility manufactured coil processing equipment. However, that facility never sold equipment in Michigan, and the plaintiff did not testify to an exposure to Cincinnati coil processing equipment.

At the hearing on June 15, 2021, the court questioned whether assumption or speculation was required to find in favor of the plaintiff. In ruling from the bench, the trial court denied Cincinnati's motion stating that there was enough circumstantial evidence and logical corollaries that would demonstrate that Gatke was a supplier of asbestos brake components, and that Cincinnati had a relationship with Illinois sufficient to confer jurisdiction.

On June 21, 2021, Cincinnati filed its motion for leave to appeal, which was granted on July 16, 2021. On September 9, 2021, Cincinnati dismissed its appeal pursuant to settlement.

Doane v. A.W. Chesterton Company, No. 2020L013085 (Cir. Ct. Cook Cnty. Jun. 15, 2021).

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