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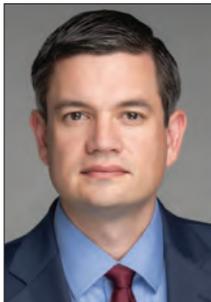
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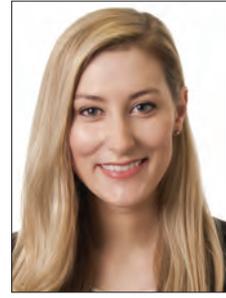
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The ability to reach large numbers of lawyers, judges and in-house counsel has long been a hallmark of the IDC. Historically, the IDC has exercised this ability to educate those groups in Illinois without violating the trust of recipients by marketing ancillary services or pushing an agenda. What you will read in this 2022 installment of the *IDC Survey of Law* pays tribute to the trust of readers by presenting a straight-up snapshot of what happened in 2022 by way of important court cases involving Illinois law and impactful statutes. The quality of writing and the quality of thought is impressive.

We could not afford to publish this *Survey* were it not for the tremendous amount of time given unselfishly by our authors and editors. It is a humbling show of respect for the IDC that professionals choose to give up billable time, family time, and vacation time to create and provide valuable resources for others. In a modern society where it is difficult for parents to get other parents to bring their children to birthday parties on the weekends, this work is a true testament of the dedication, professionalism, and willingness to give to others that is the hallmark of our members. To those of our members who participated in creating the *Survey*, a truly heart-felt "Thank You" from the IDC leadership. Keep up the great work and the great tradition.

We ask the readers to take a moment to note our members who participated in the *Survey*. If you know them, please think about sending a kind note recognizing their involvement. For those you do not know, perhaps reach out next time you see them in Zoom court or real court and tell them you've read the *Survey* and appreciate their involvement. That may lead to you gaining another friend in this noble profession.

Most truly yours,

Terry A. Fox

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We are pleased to provide the *2022 IDC Survey of Law*. The *Survey of Law* is a compilation of case summaries, highlighting significant developments in Illinois law over the past year. This year's summaries focus on Civil Practice, Tort Law, Insurance Law, Labor and Employment Law, Construction Law, Workers' Compensation, Trucking & Transportation, Ethics and Toxic Tort. The *Survey of Law* is a team effort of committee members, editors, publisher and our Executive Director. We'd like to thank everyone who assisted in preparing the *Survey of Law* this year, including all IDC committees' chairs, Sandra Wulf and our front-line editors: Laura Beasley of *Baker Sterchi Cowden & Rice LLC*, Adam Carter of *Esp Kreuzer Cores LLP*, Ryan Chancellor of *Gordon Rees Scully Mansukhani LLP*, John Heil, Jr. of *Heyl, Royster, Voelker & Allen, P.C.*, Tara Kuchar of *HeplerBroom, LLC.*, Michael Resis of *Amundsen Davis, LLC*, Kimberly Ross of *FordHarrison*, and Holly C. Whitlock-Glave of *HeplerBroom, LLC*. Their hard work and dedication to IDC has made this *IDC Survey of Law* an invaluable tool for daily law practice—continuing a long tradition of IDC's devotion to legal education through its publications.



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# Survey of Civil Practice Cases

## Health Club's Failure to Use an Automated External Defibrillator Can be Actionable if the Failure is Willful and Wanton

In *Dawkins v. Fitness International, LLC*, the supreme court took up the question of whether a physical fitness facility has a duty under the Automated External Defibrillator Act (410 ILCS 4/1 *et. seq.* (2012)) and the Physical Fitness Facility Medical Emergency Preparedness Act (210 ILCS 74/1 *et. seq.* (2012)) to use an Automatic External Defibrillator (AED) when a patron is having an apparent cardiac event and whether non-use of an AED would amount to willful and wanton misconduct. The court answered the question in the affirmative.

In *Dawkins*, plaintiff Leo Dawkins sued L.A. Fitness (Fitness) alleging that his wife suffered irreparable brain damage because of Fitness's willful and wanton failure to administer aid to her with the AED on its premises. An AED can diagnose ventricular fibrillation and treat it through electrical therapy. The medical emergency happened in an open, public area of the facility. Fitness staff members were aware of the incident. Other patrons unsuccessfully attempted to administer CPR to the plaintiff's wife and shouted to Fitness staff for assistance. There was an AED on the premises and an employee trained to use it, but the AED was not used.

The plaintiff alleged that under the Facility Preparedness Act (*Id.*), the club was required to (1) have a functioning AED on site, (2) have staff properly trained in the assessment of patrons and the use of AEDs, (3) have properly trained staff that were required to know how to assess patrons who were unconscious, not breathing, or lacked a pulse or circulation in preparation for employing the AED device, and (4) have a medical emergency response plan in place. The plaintiff further alleged that the Act also required Fitness staff members to (1) assess unconscious patrons for signs of breathing, pulse and circulation pursuant to their training as AED operators and the medical emergency plan; (2) assess unconscious patrons for use of an AED; (3) attach the AED pads to an unconscious patron, and (4) follow the visual and voice prompts of the AED.

The circuit court dismissed the plaintiff's two willful and wanton counts of the third amended complaint pursuant to 735 ILCS 5/2-619(a)(9). The court found that Fitness was in compliance

with the Facility Preparedness Act because it had an emergency medical plan, an AED on the premises, and a trained AED operator present during business hours. As such, the Fitness facility was in full compliance with the Facility Preparedness Act and therefore could not be held liable for acts or omissions relating to Dawkins' injuries. Fitness also argued that the Act created no duty to actually use the AED and that the Act afforded no private right of action to enforce any such duty.

The appellate court reversed and held that the plain and obvious meaning of the statute is that civil liability may attach to the willful and wanton failure to use an AED.

The supreme court affirmed, noting that it was the intent of the General Assembly to encourage training in lifesaving first aid, to set standards for the use of emergency equipment and to encourage their use. It also noted that the plain and unambiguous language of the Act states that while civil liability cannot attach to an AED user for an act or omission involving the use of an AED, it can attach for willful and wanton misconduct. The court concluded that the plaintiff could conceivably introduce evidence establishing that Fitness's failure to provide AED treatment in a timely manner amounted to willful and wanton misconduct that breached its duty to the plaintiff's wife.

*Dawkins v. Fitness Int'l, LLC*, 2022 IL 127561.

## Open and Obvious Doctrine Inapplicable to Powerline Injury Case

*Fox v. Ameren Illinois Co.*, 2022 IL App (4th) 210633, was a personal injury negligence action involving powerlines. The plaintiff was a tow truck driver who was injured when his truck's overhead boom came into contact with an Ameren powerline. Ameren admitted that the line did not meet the minimum vertical clearance requirements of the National Electrical Safety Code (NESC) as adopted by the Illinois Commerce Commission (ICC). Ameren moved for summary judgment based on the common law open and obvious doctrine. The circuit court granted Ameren's motion. On appeal, the plaintiff argued that the open and obvious doctrine cannot negate Ameren's statutory and common law duties to maintain powerlines at the minimum height required by the NESC.

— Continued on next page

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## Survey of 2022 Civil Practice Cases (Continued)

The parties admitted that section 5-201 of the Public Utilities Act, 220 ILCS 5/5-201, created a private right of action against utility companies for personal injuries caused by a utility's violation of the Act. The Act likewise created the ICC, which adopted the NESC powerline height requirement as its Rule 232. The appellate court noted that the plaintiff belonged to the class of people that Rule 232 was designed to protect, that his injury—an electrical shock—was of the type the Act intended to guard against, and that the plaintiff's expert asserted that the plaintiff's injuries were proximately caused by Ameren's failure to maintain the electrical line at its required height. This plaintiff, according to the court, pleaded the necessary elements of a negligence claim under Rule 232.

The common law open and obvious doctrine is an exception to the general duty of care owed by a landholder for conditions on land. It is not a defense to negligence, but an analytical doctrine for determining the existence of a common law duty. It does not supersede a statutory duty. Here, the appellate court found that Rule 232's specific regulatory scheme imposed a separate duty and standard of care from the common law reasonableness standard. Ameren nevertheless argued that the open and obvious doctrine should still apply. The appellate court strongly disagreed, finding powerlines to be inherently open and obvious and declaring that application of the doctrine would undermine section 5-201's purpose and render Rule 232 meaningless. Broad application of the doctrine, according to the court, would effectively bar injured parties from recovering damages for their injuries under section 5-201.

Ameren contended that the unavailability of the open and obvious doctrine in cases such as these would impermissibly render a Rule 232 violation a strict liability offense. The appellate court rejected this argument, as well, observing that a violation of the Act is merely *prima facie* evidence of negligence. Ameren retained the right to show that it acted reasonably under the circumstances or that the statutory violation did not proximately cause the plaintiff's injuries.

The appellate court added that, even under the common law negligence standard, Ameren owed a duty of care to the plaintiff. That duty was to maintain the powerlines in a reasonably safe condition. Here, the "reasonably safe condition" was dictated by the height standard requirement of Rule 232. The justices reversed the trial court's summary judgment order and remanded the case for further proceedings.

*Fox v. Ameren Illinois Co.*, 2022 IL App (4th) 210633.

## Filing Suit Against One Tortfeasor Does Not Waive Equitable Tolling Afforded a Disabled Plaintiff with Respect to Another Tortfeasor

Jennifer Andrules, a disabled person, was taken to Adventist Bolingbrook Hospital (Adventist) on May 16, 2014 for a medical evaluation. While at Adventist Hospital she suffered a fall, which resulted in a fracture. She underwent surgery. After she was discharged from Adventist Hospital, she was admitted to Lakewood Nursing and Rehabilitation (Lakewood) where she fell on June 3, 2014.

On May 2, 2016, Northern Trust as Special Administrator of Andrules' estate filed a complaint against Adventist alleging medical negligence. On February 11, 2019 Linda Gavlin as special administrator filed a Third Amended Complaint against Adventist with a new count targeting Lakewood.

Lakewood moved to dismiss, arguing that the claim was untimely. The case was filed beyond the two-year statute of limitations for medical malpractice causes of action. The court initially granted the motion. It subsequently reconsidered its ruling and denied the motion, but certified the question for an interlocutory appeal pursuant to Supreme Court Rule 308. The question certified was:

Does Plaintiff's removal of the disability tolling statute (735 ILCS 5/13-211) by filing a Complaint against Joint Tortfeasor A, act as a removal of the disability tolling statute as to Joint tortfeasor B, if Plaintiff pled actual knowledge of Joint Tortfeasor B's involvement?

The Third District Court of Appeals noted that the tolling statute applies to statutes of limitations and statutes of repose. It found that disability provisions are necessary to protect the interests of the mentally disabled individuals and to preserve their day in court until they are able to file suit on their own. The court further found that other jurisdictions agree that the applicable statute of limitations remains tolled even when a representative plaintiff files suit on behalf of a disabled individual.

The court concluded that the applicable tolling statute is not waived when a disabled person's representative files a suit against one tortfeasor. The tolling due to the disability terminates only with the death of the disabled person or the removal of the disability. The claim against Lakewood was not barred by the statute of limitations or the statute of repose.

*Gavlin v. Adventist Bolingbrook Hospital*, 2022 IL App (3d) 200282.

## Court Extends Protection for Surveillance Materials

The decision in *Horn v. Northeast Regional Commuter Railway Corporation, d/b/a Metra*, 2022 IL App (1st) 210268, allows defendants to claim privilege on more information related to surveillance in Illinois courts. Illinois courts have regularly ruled that not only must surveillance of the plaintiff be produced, but also the identity of the person who conducted the surveillance and their notes.

In *Horn*, a FELA case, Metra utilized an investigator to conduct surveillance of the plaintiff. During discovery, Metra identified the investigator and produced videos and redacted copies of the investigator's reports. The plaintiff next subpoenaed the investigator's "entire file." Metra moved to quash, arguing that, pursuant to Supreme Court Rule 201(b)(3), investigative reports are not discoverable in the absence of exceptional circumstances, and that no such circumstances existed in this case. The Cook County trial court denied the motion to quash and ordered production of the entire investigative file. Metra moved for reconsideration. After prolonged litigation of the issue, the court reiterated its denial of the motion to quash and issued a "friendly contempt" ruling per Metra's request.

On appeal, Metra argued that the recently decided case of *Dameron v. Mercy Hospital and Medical Care Center*, 2020 IL 125219, expanded the protection for consultant reports and materials. *Dameron* allowed a plaintiff to avoid producing an IME report because the doctor who did the report was deemed to be a consultant. The appellate court in *Horn* relied on *Dameron* and found that the consulting expert rule protects more than ordinary work product. The court further found that the consultant rule protects not only conceptual data, but factual data as well. Metra's investigator's file was thus privileged.

The appellate court rejected the notion that Metra's production of the videos waived the consultant privilege. It also rejected the argument that *Dameron* did not cover the investigator because the investigator was not an expert. The court noted that the Illinois rule on consultants only refers to "consultants," and not "expert consultants." Finally, the court ruled that the plaintiff had not established exceptional circumstances justifying the scope of the subpoena in light of the privilege.

*Horn v. Northeast Illinois Regional Commuter Railway Corporation*, 2022 IL App (1st) 210268.

## Fourth District Court of Appeals Addresses Open and Obvious Doctrine

The Illinois Appellate Court, Fourth District, observed in *Hutson v. Pate*, 2109 IL App (2d) 180923, that the open and obvious doctrine may apply in both premises liability and ordinary negligence cases, but only when the cause of injury is a condition on the land. Conditions on the land are static, preexisting conditions, and not circumstances created by the direct action of another party. Prior cases identified fire, height, bodies of water, sidewalk defects, piles of snow, store posts, moving trains, electrified third rails, power wires, and ladders as conditions on the land.

In *Hutson*, a young woman allegedly suffered a fractured leg when the defendant, whom she was assisting in watering plants in his yard, unexpectedly pulled the hose they were using, causing her to fall. The circuit court, applying the open and obvious doctrine, granted summary judgment in favor of the defendant and the plaintiff appealed. The appellate court reversed, finding that the hose was merely the instrumentality of the injury, and not its cause. According to the court, a condition of the land was not the cause of the plaintiff's injury; direct action by the defendant may have been the cause. The matter was remanded to the trial court for further proceedings.

*Hutson v. Pate*, 2022 IL App (4th) 210696.

## Illinois Supreme Court Sets Forth Requirements of *Res Ipsa Loquitur* in Medical Malpractice Actions

In *Johnson v. Armstrong*, 2022 IL 127942, the Illinois Supreme Court addressed the application of the doctrine of *res ipsa loquitur* to medical malpractice claims. The plaintiff brought claims of negligence against his surgeon sounding in two counts; one based on negligence and one based on *res ipsa loquitur*. He also brought a *res ipsa loquitur* claim against a surgical technician who participated in the surgery, and against the hospital sounding in *respondeat superior*. The plaintiff provided one expert, a surgeon, to establish elements of *res ipsa loquitur*. The McLean County circuit court granted summary judgment to the surgical technician because (1) the plaintiff failed present an expert witness to establish the standard of care for a surgical technician, (2) the control element of *res ipsa loquitur* was not met, and (3) there was no evidence of negligence on the part of the surgical technician. The circuit court granted summary judgment on the *res ipsa loquitur* count pending against the surgeon. The appellate court reversed the circuit court's rulings on

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## Survey of 2022 Civil Practice Cases (Continued)

both counts. The case was then accepted for review by the Illinois Supreme Court.

The supreme court first addressed the unusual procedural setting and discussed whether it possessed jurisdiction where a claim remained pending in circuit court. The supreme court found that the effect of the ruling on summary judgment on the *res ipsa loquitor* count against the surgeon precluded the plaintiff from proving the surgeon was negligent under the unique proofs of *res ipsa loquitor*. The ruling did not resolve all of the negligent claims against the doctor. The court also noted that summary judgment for the surgeon was granted on the *res ipsa loquitor* count after the *res ipsa loquitor* count against the technician and the hospital had been ruled on by the circuit court. Because the order against the surgeon was not a final order, the appellate court lacked jurisdiction under Supreme Court Rule 304(a) to review that order.

With respect to the *res ipsa loquitor* count against the surgical technician, the supreme court first noted that plaintiff must plead and prove that he was injured (1) in an occurrence that would not normally happen in the absence negligence (the probability element), and (2) by an agency or instrumentality within defendant's exclusive control (control element).

The plaintiff's expert testified that a complete injury to the femoral nerve, as occurred in this case, does not occur absent negligence. The opinion was based on the doctor's experience and review of the literature. The court found this testimony met the first element.

A plaintiff also must establish that he was injured by agency or instrumentality the defendant's exclusive control. Generally, the plaintiff must identify the instrumentality of his injury, as well as everyone who was in control of the instrumentality. In this case the plaintiff was committed to the care of the surgeon and technician. The supreme court concluded that, consequently, the plaintiff was not required to show the precise instrumentality that caused his nerve damage. The fact that the plaintiff was under the defendants' care during surgery sufficiently establishes, for purposes of *res ipsa loquitor*, that whatever caused plaintiff's nerve damage was under the defendants' control. The court also noted that the control element is flexible on in which the key question is whether the probable cause is one which defendant was under the duty to the plaintiff to anticipate or guard against.

The technician also argued the plaintiff had not established that the technician failed to meet the standard of care. The Supreme Court noted that standard of care evidence is generally required in all professional negligence cases. However, in this case the court noted that by establishing that this injury is one that ordinarily does not occur absence negligence and that all of the instrumentalities that could have caused the injury were in the control of the defen-

dant, Plaintiff has provided the applicable standard of care from which negligence may be found; that under normal circumstances a hip replacement does not result in severe and permanent nerve damage.

The supreme court agreed that the circuit court erred in granting summary judgment in favor of the technician and hospital. It affirmed the appellate court's reversal and remanded with instructions for the circuit court to reconsider its order granting summary judgment in favor of the surgeon.

*Johnson v. Armstrong*, 2022 IL 127942.

### Supreme Court Ties 4-4 on Locomotive Inspection Act Claim Leaving Seventh Circuit Court Opinion in Place

The plaintiff, a conductor for Union Pacific Railroad Company, was in the process of shutting down a locomotive in a rail yard in Salem, Illinois. While traversing the locomotive's exterior walkway, he slipped and fell down the stairs. He was able to power down the locomotive after he fell. He then used his flashlight to identify a slick substance on the walkway.

The plaintiff filed a federal lawsuit against Union Pacific pursuant to the Locomotive Inspection Act (LIA) and the Federal Employers' Liability Act (FELA). The United States District Court for the Southern District of Illinois entered summary judgment for Union Pacific on the LIA claim because the locomotive was not in use at the time of the incident. The court likewise granted summary judgment on the FELA count because the slippery spot on the locomotive was not reasonably foreseeable to Union Pacific. The plaintiff appealed.

The Court of Appeals for the Seventh Circuit noted various circuits' tests for whether a locomotive is "in use." *LeDure v. Union Pacific R.R. Co.*, 962 F.3d 907, 910 (7th Cir. 2020). The Fourth Circuit utilized a "totality of circumstances" test. *Deans v. CSX Transportation*, 152 F.3d 326 (4th Cir. 1998). The Fifth Circuit deemed a locomotive in use if the crew completed a pre-departure inspection. *Trinidad v. Southern Pacific Transportation*, 949 F.2d 187 (5th Cir. 1991). The Seventh Circuit previously held that to service an engine while it is out of service is the antithesis of using the locomotive. *Lyle v. Atchison T & S.F. Ry. Co.*, 177 F.2d 221 (7th Cir. 1949).

The plaintiff argued that a locomotive is only not "in use" when it is being repaired. But the Seventh Circuit regarded this as too narrow a reading. The court noted that the district court found that the locomotive was stationary, on a sidetrack, and part of a train to be assembled before its use in interstate commerce. Based on these

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## Survey of 2022 Civil Practice Cases (Continued)

facts, the Seventh Circuit agreed that the locomotive was not in use. It also agreed that Union Pacific did not have notice of the greasy substance on the locomotive, so Union Pacific was entitled to summary judgment on the FELA count.

The Supreme Court granted *certiorari* on the case. *LeDure v. Union Pacific R.R. Co.*, 142 S.Ct. 1582 (2022). The case was briefed and argued for the Court. Justice Amy Comey Barret could not participate in the decision because she was on the Seventh Circuit panel that heard the case. The justices split 4-4 on the decision. The impact of a tied decision is that the lower court's decision is binding on the parties. However, the decision has no precedential value on any other parties. Thus, the split among the circuits was not resolved.

*LeDure v. Union Pac. R.R. Co.*, 212 L. Ed. 2d 575, 142 S. Ct. 1582 (2022).

### Teaching Physician's Intervention in Care Found Sufficient to Defeat Summary Judgment

The plaintiff appealed the trial court's order of summary judgment in favor of a defendant teaching physician in this medical malpractice case. The teaching physician reviewed a third-year resident's examination and treatment recommendation for the plaintiff. The only issue on appeal was the nature and extent of the teaching physician's involvement in the medical care of the decedent. The plaintiff argued the court improperly granted summary judgment because the extent of the defendant's involvement was a question of fact.

The Fourth District Appellate Court first addressed the issue of negligent supervision by the teaching physician. The court found this allegation was not properly pleaded and the plaintiff failed to introduce evidence regarding supervision. The court also found that the plaintiff could not proceed on a vicarious liability claim. According to the court, without evidence that the teaching physician employed the resident, the theory was not viable.

The final issue was whether the teaching physician acted negligently in his treatment of the decedent. The court noted it is not necessary that a patient and physician have physical contact. The court found the teaching physician was involved with the treatment of the decedent. In reviewing the resident's proposal for treatment, the teaching physician exercised his own judgment. The court concluded that the teaching physician assumed care of the patient for that reason and, as a consequence, the plaintiff could proceed on a negligence claim directly against the defendant. The court noted

that whether the defendant violated the applicable standard of care was a separate inquiry.

*Lewis v. OSF Healthcare System*, 2022 IL App (4th) 220016.

### Statements in Closing Argument Require Reversal

In *McCarthy v. Union Pacific Railroad Company*, 2022 IL App (5th) 200377, the plaintiff brought claims pursuant to the Federal Employees' Federal Employers' Liability Act (FELA) and common law negligence alleging that he sustained injuries from unwanted physical contact by his locomotive maintenance supervisor. Prior to trial, the court granted a defense *in limine* prohibiting the plaintiff from presenting "[a]ny argument, comment, or suggestion that the jurors act as safety advocates in this lawsuit or that they send a message to the corporate defendant with their verdict on the grounds that such argument is improper and inflammatory." The jury returned verdicts against the defendant maintenance supervisor for \$10,000 and against Union Pacific for \$3.14 million.

The defendants appealed, arguing, *inter alia*, that counsel for the plaintiff's closing argument was so prejudicial as to deny the defendants a fair trial. The appellate court's opinion quoted extensively from plaintiff's counsel's closing argument. Examples include:

"Make no mistake. This case is about more than one man getting hurt at work. You have an opportunity to do more for the safety of your community than you will likely ever again in the rest of your lives."

\* \* \*

"The very first words out of my mouth at the beginning of the trial were numbers. 2.8 million workplace injuries in 2018."

\* \* \*

"The simple truth is, some employers don't take \*\*\* safety seriously. Union Pacific is one of those employers."

\* \* \*

"[The supervisor] was the start of all this. He—he is responsible for the unwanted physical contact. He shouldn't be excused for what he did. But the majority of what's going on here is the culture created by the railroad that allows this to happen and does nothing about it. The responsibility for what happened to [the plaintiff] lays directly at the feet of Union Pacific Railroad. Now, if you want to live in a community where employers don't enforce their safety

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rules, your verdict should be for the railroad and for [the supervisor]. And if you want to live in a community where employers refuse to protect employees from unwanted physical contact, your verdict should be for the railroad and [the supervisor].”

Defense counsel objected to most—but not all—of the comments reproduced in the appellate court’s opinion. Several of the objections were sustained. Immediately after the conclusion of the argument, defense counsel moved for a mistrial predicated on plaintiff’s counsel’s “entire closing argument.” Defense counsel stressed that the argument did not discuss the evidence or the law but, instead, appealed to the jury to punish the railroad. The trial court denied the motion. The defense raised the issue again in a motion for a new trial which was also denied.

The Fifth District Appellate Court held that, although the defense failed to object to certain remarks made during the plaintiff’s closing argument, no waiver occurred because counsel objected “numerous times” and immediately filed a motion for a mistrial based on the plaintiff’s “entire closing argument.” The court further held that, although sustained objections and jury admonishments to ignore improper statements can sometimes cure prejudice, that did not happen here. “In this case,” according to the court, “the plaintiff’s blatant disregard of both the sustained objections and order that granted Union Pacific’s motion *in limine* cannot be ignored.” The court observed that the verdict against Union Pacific was \$3.14 million, but the verdict against the maintenance supervisor who performed the alleged acts of misconduct was \$10,000. This, to the court, represented a potentially inconsistent verdict suggesting that the plaintiff’s closing argument improperly prejudiced the jury’s decision. The court concluded that the trial court abused its discretion in denying the defense’s motion for a new trial. The Illinois Supreme Court denied the plaintiff’s petition for leave to appeal.

*McCarthy v. Union Pacific Railroad Company*, 2022 IL App (5th) 200377.

### **Punitive Damages Paid by a Client are an Element of Compensatory Damages in a Subsequent Attorney Malpractice Action**

In *Midwest Sanitary Service, Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 2022 IL 127327, the Illinois Supreme Court considered whether punitive damages assessed against a litigant may be sought by the litigant from its own attorneys as compensatory damages in a legal malpractice action. The underlying lawsuit was for retaliatory discharge, and alleged that Midwest unlaw-

fully terminated an employee after he reported health and safety violations to the Illinois Environmental Protection Agency. The employee’s case proceeded to trial, and the jury found Midwest liable. The jury awarded the employee \$160,000 in compensatory damages and \$625,000 in punitive damages. The damages award was upheld on appeal.

Midwest paid the damages, but then filed a professional negligence action against its attorneys. The suit alleged that, but for certain mistakes made by Midwest’s lawyers, less or no damages would have resulted from the retaliatory discharge action. Midwest sought as compensatory damages both the compensatory and punitive damages it paid in the underlying suit. The defendant attorneys moved to dismiss, arguing that recovery of the punitive damages paid was barred by section 2-1115 of the Code of Civil Procedure and Illinois public policy. The circuit court denied the motion to dismiss and a motion for reconsideration. The following question was certified for immediate appeal:

Does Illinois’ public policy on punitive damages and/or the statutory prohibition on punitive damages found in 735 ILCS 5/2-1115 bar recovery of incurred punitive damages in a legal malpractice case where the client alleges that, but for the negligence of the attorney in the underlying case, the jury in the underlying case would have returned a verdict awarding either no punitive damages or punitive damages in a lesser sum?

The appellate court answered the question in the negative, and an appeal to the Illinois Supreme Court followed.

The supreme court initially reiterated the “case within a case” proof requirement of a legal malpractice action. It emphasized that a plaintiff must prove that “but for” attorney negligence the damages at issue would not have been incurred. The court further emphasized that a professional negligence plaintiff must also establish that the attorney’s negligence proximately caused actual damage to the plaintiff.

The court next turned to the strictures of section 2-1115. It states, in pertinent part, “In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal . . . malpractice, no punitive . . . damages shall be allowed.” 735 ILCS 5/2-1115. The attorneys argued that this prohibition barred Midwest’s effort to recover those damages allocated as punitive in the underlying case. Midwest disagreed, arguing that the punitive damages paid in the retaliatory discharge case were alleged to have been proximately caused by the attorneys’ negligence and, thus, were compensatory in its attorney malpractice suit. The supreme court agreed. It reasoned that an award of the punitive damages paid

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## Survey of 2022 Civil Practice Cases (Continued)

in the underlying case would not operate to punish the attorneys; rather, they would serve as an element of compensatory damages. Together with the compensatory damages in the underlying case, the punitive damages would “make Midwest whole by compensating it for the entirety of its pecuniary loss.” This, to the court, squared with the purpose of compensatory damages.

The court distinguished this matter from its prior decision in *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218 (2006). In *Tri-G*, the plaintiffs sued their lawyers alleging that, but for their negligence, the plaintiffs would have received a punitive damages award in addition to the compensatory damages awarded them by the jury. The *Tri-G* court ruled that the recovery of punitive damages from the attorneys in that circumstance would be illogical, in contravention of the nature of punitive damages (“to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future”), and expressly barred by section 2-1115. The punitive damages sought by Midwest were fundamentally different, according to the court, because they were already paid. Allowing a claim seeking them is not illogical, a punishment, or otherwise barred by section 2-1115 because they were merely intended to replace the money Midwest paid in the underlying action. The damages sought, in effect, were no longer punitive. The court further declared that allowing plaintiffs to seek paid punitive damages as an element of compensatory damages in professional liability cases “presents no risk of a societal cost” and, thus, was not otherwise barred by public policy. The supreme court affirmed the appellate court’s answer to the certified question and remanded the matter to the circuit court.

*Midwest Sanitary Service, Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 2022 IL 127327.

### **First District Allows Plaintiff to Proceed Against Drug Manufacturer after Receiving \$18.5 Million Verdict in Medical Negligence Case Because Failure to Warn Theories Differ**

The peculiar background of *Muhammad v. Abbott Laboratories*, 2022 IL App (1st) 210478, began with in 2006 when C.M. was born with the neural tube defect spina bifida. C.M.’s mother, Angie Muhammad, was prescribed Depakote to treat her mental illness and she became pregnant. C.M.’s birth defects were attributed to his *in-utero* exposure to Depakote. The Muhammads filed suit against Northwestern Memorial Hospital alleging medical negligence against her physicians who prescribed her the drug without sufficiently warning her of the risks of taking Depakote. In August 2018,

the Muhammads obtained a jury verdict of \$18.5 million verdict in the Northwestern case.

In August 2017, the Muhammads filed a separate action against Abbott to preserve the statute of limitations. In June 2018, the Muhammads voluntarily dismissed the suit against Abbott and tried the Northwestern case in August 2018. In 2019, and after the Northwestern case verdict, the Muhammads re-filed the suit against Abbott. The allegations against Abbott were that it failed to sufficiently warn physicians regarding Depakote’s risks of causing birth defects. Abbott moved for summary judgment.

Abbott argued that the Muhammads should be judicially estopped from asserting the cause of action because they took an inconsistent position in the Northwestern case. The primary source of Abbott’s estoppel arguments were comments by counsel out of the jury’s presence discussing barring mention of the other litigation. In the Northwestern case, the Muhammads alleged that the consequences of taking Depakote while pregnant were “well known within the medical and mental health communities as a drug that could cause serious, debilitating birth defects . . . including spina bifida.” Abbott also argued that the Muhammads could not prove its alleged failure to warn was the proximate cause of C.M.’s injuries. In the Northwestern case, Angie’s physicians testified that greater warnings would *not* have affected their decisions in prescribing Depakote.

The trial court found that the Muhammads were judicially estopped and granted Abbott’s motion for summary judgment without addressing the proximate cause issue.

On appeal, the First District disagreed that the Muhammads took an inconsistent position in the two cases. “The Muhammads did not simply flip-flop from ‘the doctors were sufficiently warned to the doctors were not sufficiently warned.’” In the Northwestern case, the Muhammads claimed the physicians were negligent in continuing to prescribe Depakote once they learned she was using unreliable birth control measures. In other words, it was not incorrect to prescribe Depakote, but they should have discontinued it once they learned she could become pregnant. On the other hand, in the Abbott case, the Muhammads alleged Abbott’s insufficient warning of Depakote’s risks of birth defects was another cause of C.M.’s injuries. In neither litigation did the Muhammads claim that any defendant was solely responsible for C.M.’s injuries. The appellate court reiterated that there can be multiple proximate causes of an injury, and there was no grounds for judicial estoppel.

With respect to the proximate cause argument, the appellate court found that the Muhammads must establish whether greater warnings would have led the physicians to make different prescribing decisions such that C.M. would not have been exposed to Depakote. The Muhammads offered evidence that the warnings would have prevented C.M.’s exposure, and Angie’s physicians testified that

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more warnings would not have made a difference. The First District ruled that the conflicting expert testimony is a material fact to be sorted out in a jury trial.

*Muhammad v. Abbott Laboratories, Inc.*, 2022 IL App (1st) 210478.

### **One-Year Delay in Serving Defendant was Unreasonable, But May Not Warrant Dismissal with Prejudice**

*Ollins v. Karl*, 2022 IL App (1st) 220150, addressed diligence in serving a civil complaint. On March 27, 2020, the plaintiffs filed a five-count Cook County lawsuit against an author and others alleging, *inter alia*, that the author's book was defamatory. Five months later, on August 27, 2020, the plaintiffs requested issuance of summons to the author at his Florida home. The plaintiffs mailed the defendant author a request for waiver of service of summons in accordance with section 2-213(a) of the Code of Civil Procedure. The author declined to waive formal service of summons. After a further delay, the plaintiffs obtained alias summons and personally served the author on March 2, 2021. The author's attorneys appeared and successfully sought a 45-day extension of the responsive pleading deadline. They then filed a section 2-619(a)(5) motion on statute of limitations grounds and a Supreme Court Rule 103(b) motion alleging a lack of reasonable diligence in effectuating service of process. The circuit court found that fact questions precluded a determination of the statute of limitations question, but granted the Rule 103(b) motion with prejudice.

On appeal, the plaintiffs presented a series of unsuccessful arguments. Relying on *Lovell v. Hastings*, 11 Ill App. 3d 221 (5th Dist. 1973), they contended that the defendant waived any Rule 103(b) objection because he participated in the case prior to filing his motion. The appellate court disagreed, and contrasted a Rule 103(b) motion with a motion challenging jurisdiction. The prompt filing of a general appearance did not constitute a waiver of the right to contest diligence in service of process. The defendant's concurrent filing of a section 2-619(a)(5) motion was likewise of no moment. Unlike in *Lovell*, the defendant reporter did not participate in written or oral discovery before raising his Rule 103(b) challenge. The suggestion that the defendant's refusal to waive service of process operated as an estoppel was likewise rejected, as was the contention that the circuit court's ruling violated procedural due process.

With respect to reasonable diligence, the appellate court easily agreed that the nearly one-year delay between the filing of the action and serving the defendant was unreasonable. The court noted, however, that the record did not contain evidence of prejudice to the defendant caused by the plaintiffs' lack of diligence. Furthermore, the circuit court made no determination as to whether the plaintiffs'

lack of reasonable diligence took place before or after expiration of the one-year statute of limitations. Such a determination was, in the court's view, a prerequisite for dismissal of the plaintiffs' case *with prejudice*. It reversed and remanded the case for consideration of these two questions.

*Ollins v. Karl*, 2022 IL App (1st) 220150.

### **Rooming House Operator had Duty to Protect Tenant**

The plaintiff was a long-term renter in a rooming house in which the tenants shared kitchen and bathroom facilities. The plaintiff was attacked and stabbed by another tenant in the kitchen. He filed suit against the owners of the rooming house. His second amended complaint alleged that the defendants were negligent in failing to reasonably screen tenants, violated the Premises Liability Act (740 ILCS 130/1 *et seq.*) by failing to maintain the common areas of the rooming house in a reasonably safe condition, and breached an implied warranty allowing the plaintiff to inhabit his room safely and quietly. The defendants filed a 735 ILCS 5/2-615 motion to dismiss alleging that the second amended complaint failed to state a cause of action. The defendants argued that they did not owe a duty to the plaintiff, that the Premises Liability Act count failed because the plaintiff did not plead a defect in the rooming house, and that no implied warranty of habitability could extend to personal injuries suffered through a criminal act by a third party. The trial court granted the motion and dismissed the action with prejudice.

The First District Appellate Court addressed a single issue on appeal: whether the defendants owed the plaintiff a duty of care. After observing that a landlord-tenant relationship does not generally impose upon the landlord a duty to protect tenants from criminal activity by third persons, the appellate court noted that a duty to protect may arise if there existed a "special relationship" between the parties. Such a "special relationship" exists in an innkeeper-guest relationship because an innkeeper retains control over much of the premises. Per supreme court precedent, since a guest necessarily submits to the control of an innkeeper, the innkeeper possesses a duty to take reasonable precautions to protect the guest from attacks by third parties that could reasonably have been anticipated. *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 244 (2000). Here, the plaintiff was stabbed in the common kitchen area under the control of the defendants. The appellate court found the situation analogous to an innkeeper-guest relationship and, thus, ruled that a "special relationship" existed between the plaintiff and the defendants.

The court nevertheless found no allegations in the second amended complaint suggesting that the attack on the plaintiff was reasonably foreseeable to the defendants. It concluded that the

second amended complaint was properly dismissed. The court ruled, however, that dismissal should have been without prejudice. The court afforded the plaintiff another opportunity to amend his complaint to state a cause of action.

*Pan v. King and Mo*, 2022 Ill App (1st) 211482.

### Plaintiffs Seeking TRO Must Give Proper Notice or Plead Sufficiently to Ensure TRO Withstands Appellate Scrutiny

In *Quigg v Saleem*, 2022 IL App (4th) 220720, the plaintiff, Quigg, filed a preliminary injunction against the defendants, Mohammad Saleem, Rebecca Stocker, and Quigg Engineering, Inc., (hereafter collectively referred to as “Saleem”). Quigg sought a declaratory injunction that Saleem breached terms of a stock sale agreement, and a temporary restraining order (TRO) without notice to two defendants—which was granted by the trial court. Saleem moved to dissolve the TRO but, following a hearing, it was denied. The trial court left the TRO in place until a preliminary injunction hearing or full trial on the merits. Saleem appealed. The Fourth District ruled that the trial court erred by entering the TRO and remanded the case.

The appellate court’s ruling centered around the failure of Quigg to put Saleem on notice that she was seeking a TRO. She had been in contact with him and/or his counsel throughout the same period of time, and yet never advised she was seeking a TRO. The appellate court remarked on the cascade of errors that followed and highlighted the vitality of notice in these situations.

At the motion to dissolve hearing, it became clear to the trial court that the situation was not as it seemed in Quigg’s original complaint and TRO hearing—held in Saleem’s absence. Despite this acknowledgment, the trial court granted the TRO. In doing so, it reasoned that it should not consider oral testimony, but only the allegations in the verified complaint. This was error.

The Fourth District held that the party seeking a TRO without notice cannot rely on subsequent proceedings to overcome inadequate factual allegations showing that immediate and irreparable injury will occur in the minutes or hours it takes to provide notice to the defense. If the TRO hearing without notice is deficient, then nothing presented thereafter overcomes that deficiency. The appellate court acknowledged that there may be some circumstances where providing notice will be contrary to the goal of injunctive relief. On the whole, however, Illinois law makes clear that granting a TRO without notice is an extraordinary remedy disfavored in all but the most extreme and urgent circumstances. Appellate review will not tolerate reliance on evidence presented after a TRO is issued to excuse a plaintiff’s failure to make an adequate showing in the first place.

*Quigg v. Saleem*, 2022 IL App (4th) 220720.

### Illinois Supreme Court Finds No Special Relationship between CTA and Trespasser

The plaintiff’s son walked into a Chicago Transit Authority (CTA) subway tunnel and was killed when he was struck by a train. The plaintiff conceded that the decedent was a trespasser, but alleged that he was seen by two passing trains before being struck. The trial court dismissed the plaintiff’s second amended complaint with prejudice, finding that the CTA owed no duty to the trespassing decedent to prevent his injury from the open and obvious danger of a moving train. The appellate court reversed, finding that such a duty was sufficiently pleaded.

In reversing the appellate court and affirming the dismissal entered by the circuit court, the state high court distinguished *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 446 (1992). In *Lee*, the court had found that the CTA owed a duty to protect a pedestrian from the third rail that it was aware of because the electrified rail was at street level near a public sidewalk. The court stated “[t]here was nothing which indicated either the existence or the location of the third rail, or that the electric current was carried in a rail” and that “[t]here were no markings on the third rail itself.” In other words, the nature of the dangerous condition at issue in *Lee* was hidden and latent.” That was not the case here, where the danger to the decedent was open and obvious.

The court also rejected application of sections 336 and 337 of the Restatement (Second) of Torts. The court held that section 337(b), which states “the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved,” could not be satisfied by the plaintiff “because the CTA would have no reason to believe that a trespasser would not appreciate the danger posed by a moving rapid transit train” and the plaintiff did not allege a failure of a duty to warn. This reaffirmation of the open and obvious doctrine is of great importance to Illinois premises liability law.

With regard to section 336, the court rejected the plaintiff’s contention that the CTA owned a duty of ordinary care to the decedent. The court observed that section 336, unlike section 337, was never adopted in Illinois and, in any event, was inapplicable. The court held that “there is generally no legally recognized common-law duty to aid an injured stranger upon one who did not cause the injury unless a special relationship exists.” There being no special relationship between the CTA and the trespassing decedent, no duty arose.

*Quiroz v. Chicago Transit Authority*, 2022 IL 127603.

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# Survey of Construction Law Cases

## City Ordinances Did Not Create Private Right of Action Against Architect

In *1541 N. Bosworth Condo Ass'n*, the Illinois Appellate Court First District reversed the trial court and held a Chicago ordinance did not create a private right of action against an architect and his firm. The City of Chicago maintains ordinances setting standards for construction and maintenance of buildings. For most construction and improvements, a contractor must apply for a permit under the City's Municipal Code. Alternatively, by separate ordinance, the City created a Self-Certification Permit Program (SCPP). Under the SCPP, qualified architects and structural engineers may self-certify plans by stating that the plans contain no false information and comply with the Code. The sole count that proceeded to trial against the architects claimed an implied right of action under the Code and the SCPP program. The appellate court found that although municipal ordinances can create express or implied private rights of action, here, no such cause of action existed because nothing in the ordinance expressly provided such a right, plaintiff failed to meet their burden of proving the defendants even violated the ordinance in question, and it failed to prove the necessary requirements for an implied private right of action. That is, plaintiff failed to show: (1) it was a member of the class for whose benefit the ordinance was enacted, (2) its injuries were the type the ordinance was designed to protect, (3) implying a private right of action was consistent with the purposes of the ordinance and the overall statutory scheme, and (4) implying a private right of action was necessary to provide an adequate remedy for violations of the ordinance.

*1541 North Bosworth Condo. Ass'n v. Hanna Architects, Inc.*, 2021 IL App (1st) 200594.

## First District Affirms Trial Court's Directed Findings in Favor of General Contractor, Despite Contractor's Own Breaches Under the Joint Venture Agreement

In *Chicago Architectural Metals, Inc. v. Bush Constr. Co., Inc.*, the Illinois Appellate Court First District affirmed the trial court's directed findings and judgment in favor of a general contractor/

member of a joint venture accused by its partner in the joint venture of siphoning money from a government contract.

The dispute arose between two members of a joint venture, Chicago Architectural Metals (CAM) and Bush Construction (Bush) who formed the CAM-BUSH joint venture to perform construction work on a government project. The Joint Venture Agreement provided that CAM owned 51% of the company, with Bush owning the remaining 49%. After signing the Joint Venture Agreement, CAM's owner passed away, and his son closed the business in 2011. The joint venture, through Bush's control, continued to work on the project until 2015.

After four years of work, the net profits of the joint venture were roughly \$50,000, which were split between Bush and CAM. CAM was unhappy with the low profits, and filed suit against Bush, alleging breach of fiduciary duty, accounting, breach of contract, and conversion. These claims were primarily based on Bush's failure to establish a joint bank account with the intent to steal profits. At trial, the court entered directed findings in favor of Bush on the contract and conversion claims, and a written trial judgment finding in favor of Bush on the breach of fiduciary duty and accounting claims. CAM appealed.

CAM argued that the trial court erred in ruling in favor of Bush on the counts for breach of fiduciary duty and equitable accounting. Importantly, the appellate court noted that the trial judge did find that Bush breached its duties by taking control of the funds in its own accounts and by failing to provide adequate detail of how they were being used. However, in order to succeed on its claim, CAM had to prove that the money Bush paid itself was money to which CAM was entitled. The Court agreed with the reasoning of the trial court that Bush's conduct constituted a breach, but all of the expenses Bush paid itself were necessary to further the project. Additionally, the appellate court found that CAM failed to uphold its end of the agreement by not working on the project, so CAM was not entitled to damages. "The evidence may have raised some question about the quality of their [Bush's] recordkeeping. But it presented no evidence that came close to proving that Bush stole profits through questionable accounting practices." An accounting was ultimately conducted, and CAM was paid 51% of the net profits.

CAM also challenged the court's directed finding on the contract and conversion counts. CAM argued its breach was not material. The

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The Court agreed with the reasoning of the trial court that Bush’s conduct constituted a breach, but all of the expenses Bush paid itself were necessary to further the project. Additionally, the appellate court found that CAM failed to uphold its end of the agreement by not working on the project, so CAM was not entitled to damages.

appellate court disagreed, finding no evidence was presented at trial that CAM did anything of substance on the project. Instead, “Bush negotiated *all* projects, performed *all* work, and fronted *all* costs.” The Court found no merit in CAM’s argument that its abandonment of the project was not material, especially where, under the contract, CAM was supposed to perform 51% of the labor.

CAM also challenged the court’s determination that it had not presented evidence that there was “an immediate right to possession or control” of the money Bush converted. The joint venture, in an action brought derivatively by CAM, sought conversion of the *entire* \$3.1 million that the federal government paid to Bush over the course of the project. The appellate court found that much like the issues with record keeping, there was no question that Bush improperly maintained control over \$3.1 million that should have been placed into a joint account per the Joint Venture Agreement. However, the poor management of funds did not automatically entitle CAM to damages, and it cannot possibly show that every dollar “at all times belonged” to the joint venture. The Court affirmed the directed findings and judgment in favor of Bush.

*Chicago Architectural Metals, Inc. v. Bush Constr. Co., Inc.*, 2022 IL App (1st) 200587.

### **First District Vacates Order After Trial Court Failed to Label as Contempt Order or Final Judgment**

Defendant Urban Renewal Real Estate & Construction, Inc. (Urban Renewal), a general contractor, appealed a trial court’s order to refund money to a customer after failing to complete work nec-

essary to comply with building code. The Illinois Appellate Court First District vacated the order finding it was not clear on its face as to whether it intended to be civil contempt, criminal contempt, or a final judgment.

The City of Chicago (City) filed a complaint to abate dangerous conditions at a privately-owned property and obtain equitable remedies and civil penalties. The complaint alleged the residence was owned by defendant Bryan and that Urban Renewal was the general contractor that agreed to perform work needed to comply with the building code. The trial court ordered Urban Renewal to schedule and be present for an inspection with the Department of Buildings and directed a city inspector to submit an inspection report to all parties. The following month, the court ordered Urban Renewal to start work at the property immediately and to provide receipts to the City and Bryan before the next court date.

The City alleged Urban Renewal failed to comply with the order to start work immediately and filed a petition for rule to show cause why Urban Renewal should not be held in indirect civil contempt of court. In response, the trial court ordered Urban Renewal to appear and ordered Bryan to obtain three bids to complete the work in the City’s inspection report.

The trial court entered an Agreed Order that provided a dates upon which Urban Renewal was to start and complete work. The Order further stated that if Urban Renewal did not start work on the agreed date, it would be found in indirect civil contempt of court and shall pay \$100 per day until contempt is purged. Two weeks after entry of the Agreed Order, the court ordered Urban Renewal to provide documentation of the work completed. After the City’s oral motion for a finding of contempt and summary judgment, the trial court ordered Urban Renewal to refund the defendant \$73,888, the amount paid to complete the first two phases of a five-phase project; however, neither order was labeled a contempt order.

In response, Urban Renewal filed a motion to vacate the order arguing that it is invalid on its face because it did not contain a purge provision. The trial court denied Urban Renewal’s motion and reaffirmed its order to pay Bryan, finding Urban Renewal did not complete the work as agreed in the contract and was not in compliance with the building code.

The First District recognized that the trial court most likely intended the disputed order to be a contempt order, however it found that the trial court did not give Urban Renewal the ability to purge the contempt by complying with the order as required. The First District also found that the trial court did not provide Urban Renewal the constitutional guarantees required by an indirect criminal contempt order, including the right to a jury trial.

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## Survey of 2022 Construction Law Cases (Continued)

For these reasons, the First District vacated the order, holding that the trial court was not clear as to whether it intended the order to be a civil contempt, criminal contempt, or final judgment. Accordingly, the First District remanded for further proceedings to permit the trial court to enter the type of order it finds appropriate.

*City of Chicago v. Bryan*, 2022 IL App (1st) 211074.

### **Allegations Concerning Faulty Elevator Installation Do Not Rise to Coverage Under a Commercial General Liability Policy**

In *Korte & Luitjohan Contractors, Inc., v. Erie Insurance Exchange*, the Illinois Appellate Court Fifth District affirmed the trial court's order granting summary judgment to the insurer, holding the insurer did not owe the insured (general contractor) a defense or indemnity in the underlying lawsuit against the insured because the underlying complaint did not allege property damage caused by an occurrence to trigger coverage under the commercial general liability policy (the "Policy").

The underlying lawsuit arose from a contract where Six Mile Regional Library ("Six Mile") contracted with general contractor, Korte & Luitjohan Contractors ("Korte") to install two elevators. The elevators had not worked since installation with one elevator continuously out of service from July 14, 2016 to mid-August 2016. The underlying complaint against Korte alleged breach of contract, breach of warranty of fitness for particular purpose, breach of implied warranty of merchantability, and breach of express warranty arising out of the defective elevator installation.

Korte tendered to its insurer, Erie Insurance Exchange ("Erie"), requesting Erie to defend and indemnify Korte under the Policy. The Policy required "property damage" caused by an "occurrence" to extend coverage. Erie denied Korte's tender. Shortly thereafter, a verdict was entered against Korte in the underlying suit for \$159,464.90. Korte again demanded a defense and indemnity from Erie. Erie denied Korte's second tender because the underlying complaint did not allege "property damage" caused by "an occurrence" to trigger the "products-completed operations hazard" or the "voluntary property damage" coverages in the Policy.

After the second denial, Korte filed suit against Erie for breach of contract and bad faith. Korte retained expert Michael L. Averill—a former manager of the Insurance Service Office Commercial Casualty Division—who opined that Erie's denial of coverage was incorrect and the failure to install working elevators were accidents included in the definition of an "occurrence" under the Policy. Korte issued written discovery to Erie regarding Erie's relationship

with the ISO. Erie objected, and Korte filed a motion to compel. In response, Erie filed a motion to bar Mr. Averill's testimony on grounds that the admission of Mr. Averill's testimony would be an invasion of the circuit court's jurisdiction to determine defense and indemnity obligations under the Policy. Erie also filed a motion for summary judgment on the basis that the underlying complaint did not allege "property damage" as defined by the Policy and did not allege an "occurrence" or accident as required by the Policy. The court found that the underlying allegations did not bring the claim within the potential indemnity coverage of the Policy. Moreover, the court found that Mr. Averill's testimony was improper as the terms of the Policy are unambiguous.

Korte appealed arguing that the court erred in: (1) granting a summary judgment; (2) barring Mr. Averill's testimony; and (3) denying the motion to compel. Regarding the first issue, the appellate court found that construction defects alone do not constitute an accident or occurrence necessary to trigger coverage under the Policy because the underlying complaint did not allege that any of the Six Mile property was physically damaged by faulty elevators. With the second issue, the appellate court found no abuse of discretion as the construction and interpretation of an insurance policy is a question of law for the court—not Mr. Averill. Turning to the final issue, the appellate court found that any ISO evidence Korte sought, constituted, at best, parol evidence, which was not appropriate to interpret the unambiguous policy. The Fifth District affirmed the circuit court's rulings.

*Korte & Luitjohan Contractors, Inc. v. Erie Ins. Exch.*, 2022 IL App (5th) 210254.

### **Illinois Supreme Court Holds that Immunity Only Extends to an Injured Employee's "Immediate Employer" Under the Workers' Compensation Act**

The Illinois Supreme Court ruled that a general contractor was not afforded immunity under the exclusive remedy provisions of the Workers' Compensation Act from a personal injury suit filed by a subsidiary's employee—even though the general contractor paid the workers' compensation policy premiums.

Bulley & Andrews entered into a contract with South Riverside (owner) to serve as general contractor of a construction project located at 222 South Riverside. As part of its scope of work, Bulley & Andrews agreed to perform the concrete work—for which it used Bulley Concrete (a wholly owned subsidiary of Bulley & Andrews).

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## Survey of 2022 Construction Law Cases (Continued)

Per its contract with South Riverside, Bulley & Andrews obtained workers' compensation insurance policy for its employees, as well as the employees of Bulley Concrete. Bulley & Andrews and Bulley Concrete operated as separate entities—each had its own federal tax identification number and filed separate federal and state income tax returns. The companies had different presidents and employed different workforces. The companies had different “specialties” with Bulley & Andrews employing approximately 500 carpenters and laborers, and Bulley Concrete employing approximately 100 laborers, caulkers and concrete finishers.

Munoz filed a personal injury action in Cook County against Bulley & Andrews, South Riverside and the management company operating 222 South Riverside for alleged injuries sustained at the project. Although Munoz was an employee of Bulley Concrete, Munoz alleged that Bulley & Andrews, as the general contractor, “retained control over the safety at the construction site, supervision of the work at the construction site, and control of the means and methods of the work on the construction site to ensure that all work was performed safely by all subcontractors, including [plaintiff’s] employer.”

In circuit court, Bulley & Andrews moved to dismiss the complaint pursuant to Section 2-619(a)(9), arguing that Munoz’s claims were barred by the exclusive remedy provisions of 820 ILCS 305/5(a). Bulley & Andrews argued that it had a pre-existing legal obligation to pay for Munoz’s workers’ compensation benefits, and that it did so by paying more than \$76,000 of Munoz’s medical expenses. The circuit court granted its motion to dismiss, finding that Bulley & Andrews was legally obligated under its contract with South Riverside to pay for the workers’ compensation insurance and benefits that Munoz received.

On appeal, Munoz argued that the circuit court improperly granted the motion to dismiss in that the exclusive remedy provisions under the Workers’ Compensation Act did not bar him from suing Bulley & Andrews—Bulley & Andrews was not his employer; his employer was Bulley Concrete. The appellate court disagreed and affirmed the circuit court’s dismissal of Munoz’s cause of action against Bulley & Andrews.

The Illinois Supreme Court identified the issue on appeal as whether the exclusive remedy provisions of the Workers’ Compensation Act extended to Bulley & Andrews, who paid workers’ compensation insurance premiums and benefits for its subsidiary, Bulley Concrete. Per the plain reading of the Act’s exclusive remedy provisions and definition of “employer,” the supreme court held that immunity only extends to the injured employee’s “immediate employer” (Bulley Concrete). In its ruling, the supreme court reversed and remanded, discussing several prior rulings and offered guidance

as to when contractors may be afforded immunity, and when they will not, pursuant to the Workers’ Compensation Act.

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

### **Court Upholds One Year Statute of Limitations for Local Entities and Rejects Economic Loss Doctrine Theory When There is a Lack of Contractual Relationship**

In *Waldier v. Village of Frankfort et al.*, plaintiffs alleged the Village of Frankfort (Village), Robinson Engineering, Ltd. (Robinson Engineering), and P.T. Ferro Construction Company (Ferro Construction) caused them to sustain property damage during the course of a construction project that involved regrading of ditches and reconstruction of a roadway. The Village contracted with Robinson Engineering to design the project, and the work was performed by Ferro Construction. Plaintiffs claimed that the work performed prevented the proper flow of storm water on their property, resulting in stagnant storm water.

In October 2019, plaintiffs notified the Village regarding their complaints, then brought this small claim lawsuit in April 2021 to recover damages that were alleged to have resulted from the construction project. The trial court dismissed the lawsuit since any civil action against a local entity must be brought within one year of when the action accrues.

On appeal, plaintiffs argued that they did not know they had a cause of action until June 2020—when their discussions with the Village failed—and for this reason, their lawsuit brought in April 2021 was timely. The appellate court rejected these arguments and found that the time limit for plaintiffs’ cause of action began to accrue in October 2019—at the time of the first single violation—and not when a breakdown occurred in the discussions between plaintiffs and the Village.

The appellate court also rejected plaintiffs’ theories of recovery against Robinson Engineering and Ferro Construction that were based on the economic loss doctrine. The economic loss doctrine bars recovery by plaintiffs against contractors and engineers when there is no existing contractual relationship. The economic loss doctrine claims were properly dismissed since there was no dispute that plaintiffs did not have a contractual relationship with Robinson Engineering and/or Ferro Construction.

*Waldier v. Village of Frankfort et al.*, 2022 IL App (3d) 210418-U.

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# Survey of Ethics Law Cases

## First District Affirms Trial Court's Disqualification of a Law Firm Under Rule 1.7 of the Illinois Rules of Professional Conduct

In *re Estate of Matteis*, a widower became involved in a dispute with his late wife's brother and nephew. At the time of her death, she owned a fifty percent interest in two limited liability companies and was a member of both the companies. During the decedent's lifetime, her brother owned the other fifty percent of the companies. After her death, her nephew became a manager and member of both companies.

During her life, the decedent had established a trust and assigned her economic interest in the companies to that trust. Relevant to this case, the trust agreement further provided that after her death, the trust residue would be divided into a family trust and a marital trust. Her husband would be entitled to mandatory income distributions and discretionary principal distributions from the trusts and, upon his death, her nephew would receive the trust corpus. After her death, extensive litigation ensued between the surviving husband, the two companies, the decedent's brother, and her nephew.

In the probate dispute the same law firm represented the two companies, the decedent's brother, individually, and the decedent's nephew, individually, against the decedent's husband. The decedent's husband, therefore, moved to disqualify this law firm arguing that its joint representation violated Rule 1.7 of the Illinois Rules of Professional Conduct because by representing the companies the lawyer had a duty to the estate and trust, which was the holder of the decedent's interest in the companies. He further argued that the lawyer's representation of the decedent's brother and nephew, individually, could limit his representation of the companies because the decedent's nephew might receive a diminished interest in the decedent's trust based on the decedent's husband's renunciation of the decedent's will. The trial court granted the husband's motion in part finding that the law firm could not jointly represent the decedent's brother, decedent's nephew, and the companies, but he could continue to represent either the companies or the individuals.

The trial court reasoned that the law firm owed each client a fiduciary duty to act in the client's best interest, but the clients' interests could conflict with each other and thereby compromise

the law firm's ability to act in the best interests of all of its clients. The court noted that, although the interests of the law firm's clients were not in conflict at the time of its ruling, there was a significant and likely potential that a conflict could arise because the case was complex, all of the parties were closely related, and that about 15 matters involving the parties were pending before the court.

On appeal, the First District noted that, under Illinois law, because the remedy of disqualification exists, in part, to protect the courts' vital interests in maintaining public confidence in the legal profession and ensuring the integrity of judicial proceedings, any doubts as to the existence of a conflict should be resolved in favor of disqualification.

The First District believed that two of the Illinois Rules of Professional Conduct were relevant to its analysis. The first rule was Rule 1.7, which provides in relevant part:

- “(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) each affected client gives informed consent.”

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## Survey of 2022 Ethics Law Cases (Continued)

The second rule was Rule 1.13, which provides that counsel “retained by an organization represents the organization acting through its duly authorized constituents,” and allowing an attorney representing an organization to “also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7.”

The First District reasoned that the parties’ main dispute involved the provision that the decedent’s trust be funded by her ownership interest in the companies. The decedent’s husband was entitled to receive his lifetime mandatory income and discretionary income and discretionary principal distributions from the trust, while the decedent’s nephew would receive the trust corpus after the decedent’s husband’s death. If the companies had a current obligation to transfer decedent’s ownership share of the companies to her trust, this was a conflict with the nephew’s interest to delay the transfer of fund to the trust during the decedent’s husband’s lifetime. The First District, therefore, found that the record supported the trial court’s finding that there was a significant and likely risk that the law firm’s representation of all of its clients in this matter would be materially limited by its separate responsibilities to the companies as opposed to the individuals.

The First District found that this would be a violation of Rule 1.7(a)(2) of the Illinois Rules of Professional Conduct. It, therefore, affirmed the law firm’s disqualification, holding that the plain language of the rule provided the trial court with the discretion to disqualify counsel based upon the existence of the concurrent conflict of interest, despite the law firm’s belief that it would be able to provide competent and diligent representation to all of its clients and each client’s informed consent.

*In re Estate of Matteis*, 2022 IL App (1st) 210800-U.

### **Second District Affirms Trial Court’s Process in Denying as Unreasonable Petition for Attorney Fees in a Dissolution-of-Marriage Proceeding**

In *In re Marriage of Buonincontro*, following divorce proceedings, a husband filed a petition for contribution to attorney fees from his former wife. The trial court denied the petition, questioning, among other things, the reasonableness of the fees. The husband appealed questioning the process used by the trial court.

The Second District affirmed. The Second District reasoned that, under the applicable statute and Illinois case law, in order to justify the fees, the petition has to provide more than a mere compilation of hours multiplied by a fixed hourly rate. It must also provide

sufficiently detailed records maintained throughout the proceeding specifying the services performed, who performed these services, the time expended on these services, and the hourly rate charged. The Second District further stated that, the trial court should then consider several additional factors in assessing the reasonableness of the fees, such as the attorney’s skill and standing, the nature of the case, the novelty and/or difficulty of the issues involved, the matter’s importance, the degree of responsibility required, the usual and customary charges for similar work, the benefit to the client, and whether there is a reasonable connection between the fees requested and the amount involved in the litigation.

The Second District noted that the trial court considered all of these factors and that the trial court discussed the relatively straightforward nature of the underlying case and the lack of evidence regarding the benefit the former husband obtained through the fees incurred. The trial court judge also stated that, in more than four years that he had been a judge, he had never been presented with a fee petition in which the attorney billed such a high hourly rate and that this hourly rate was approximately thirty to fifty percent higher than the average hourly rate was in court’s experience. The appellate court found that the former husband presented no persuasive basis upon which it could conclude the trial court employed an improper procedure in denying the fee petition.

*In re Marriage of Buonincontro*, 2022 IL App (2d) 210380.

### **Was Ineffective in Assistance of Defendant After Finding that Defense Counsel Did Not Concede the Defendant’s Guilt, Adequately Cross-Examined the Witnesses, and Argued in Closing Argument that Defendant was Not Guilty**

In *People v. Boots*, the defendant was convicted of predatory criminal sexual assault on a child. The defendant appealed contending that prejudice from her counsel’s performance in this case should be presumed because her counsel was *per se* ineffective by failing to subject the State’s case to meaningful adversarial testing. The Second District noted, the Illinois Supreme Court had found *per se* ineffectiveness in only two cases in the thirty years since it established the standard.

The defendant relied on a case where the defense counsel admitted in the opening statement that the defendant “did everything” the prosecution stated, did not ask the jury to find the defendant not guilty, and did not make a closing argument. The Second District distinguished the present case because while her counsel stated in

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During trial, defense counsel did challenge the victim's credibility and memory by questioning the victim about her marijuana and alcohol use and her delayed disclosure of the event. While the appellate court agreed that attacking the victim's credibility on this basis was weak, it did not think that this meant that defense counsel failed to provide meaningful adversarial testing.

### **First District Finds that Defense Counsel's Failure to Present Expert Testimony on Unreliability of Eye Witness Identification Did Not Violate Duty to Conduct Reasonable Investigation and Did Not Amount to Providing Ineffective Assistance to the Client**

In *People v. Elliott*, the defendant was convicted of first-degree murder for shooting a teenager. Two of the three eyewitnesses of the shooting were able to identify him. One of these witnesses knew the defendant from previous social interactions. The defendant's phone contained text messages that appeared to admit his guilt. The phone also showed that the defendant was searching for information about the shooting the day after the murder. It also showed that the day before the shooting the defendant purchased bullets of the same caliber as were used in the shooting. During the trial, defense counsel cross-examined the two witnesses and tried to cast doubt on the validity of their identification but never called an expert to testify on the unreliability of the eye witness identification.

After his conviction, the defendant appealed arguing that the failure to call such an expert amounted to ineffective assistance of counsel. The defendant contended that such action could not be regarded as trial strategy because counsel never investigated the possibility of an eye witness expert to testify about the unreliability of the eyewitness' identification in this case. The First District acknowledged that that trial counsel clearly had a professional duty to conduct reasonable investigation. It noted, however, that the defendant did not present any evidence that the defense counsel did not investigate the possibility of expert testimony. The defendant simply asked the appellate court to presume that the defense counsel did not conduct such an investigation from the fact that the counsel never sought to introduce eyewitness expert testimony at trial.

The First District continued its analysis by stating that, even if it assumed that counsel failed to investigate the possibility of expert testimony, it could not conclude that it was objectively unreasonable to forego such an investigation. The appellate court reasoned that even if defense counsel tried to introduce such testimony, the trial court might not have allowed it. Unlike other Illinois cases where courts allowed such testimony, in this case the shooting occurred in broad daylight, one of the witnesses had additional familiarity with the defendant, and there was additional evidence from the defendant's phone implicating him in the shooting. The First District also believed that calling such an expert might have allowed the State to call an expert of its own to bolster the eye witness identification.

the opening statement that "this incident happened in 2010", counsel did not state what specific acts defendant committed and, therefore did not unequivocally concede guilt. The court also noted that the defendant's counsel ultimately argued that the prosecution would not be able to prove the defendant was guilty of predatory criminal sexual assault.

The Second District further rejected the defendant's contention that her counsel in the underlying proceeding did not cross-examine the victim and the investigating detective in such a manner as to cast doubt on their credibility or bolster defendant's defense. During trial, defense counsel did challenge the victim's credibility and memory by questioning the victim about her marijuana and alcohol use and her delayed disclosure of the event. While the appellate court agreed that attacking the victim's credibility on this basis was weak, it did not think that this meant that defense counsel failed to provide meaningful adversarial testing.

The Second District also noted that testimony of the detective investigating the underlying incident was largely related to what was shown on the recorded interview with the defendant, which the trial court was able to view. Moreover, the defendant failed to show which line of questioning her defense counsel failed to pursue.

Finally, the Second District rejected the defendant's contention that defense counsel conceded defendant's guilt during closing argument. It found that the record merely showed that the defense counsel argued during the closing argument that, since the alleged contact satisfied the elements of both predatory criminal sexual assault and aggravated criminal sexual abuse, the defendant should be found guilty of only the lesser offense.

*People v. Boots*, 2022 IL App (2d) 200640.

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## Survey of 2022 Ethics Law Cases (Continued)

The First District did not believe that it could conclude that defense counsel failed to subject the State's case to meaningful adversarial testing. It noted that the right to effective assistance of counsel refers to competent not perfect representation. The First District, therefore rejected the defendant's claim that his counsel rendered ineffective assistance in failing to present expert testimony on the reliability of eyewitness identification.

*People v. Elliott*, 2022 IL App (1st) 192294.

### **First District Finds that Defense Counsel Provided Ineffective Assistance to the Client by Failing to Appropriately Argue that Illegal Seizure Required Suppression of the Gun**

In *People v. McClendon*, a police officer reported gunfire without giving a description of the shooter or saying whether the shooting involved a car. While responding to the call-in plain clothes and driving an unmarked car, two other police officers noticed a car backing into a driveway approximately four blocks from the site of the shooting. The driver of that car and the defendant, who was a passenger, ducked down in their seats as the unmarked car of the officers passed the driveway. As the officers left their car to approach the car they spotted, it drove off.

The officers lost track of the fleeing car, but were able to locate it with the help of the police helicopter. The officers told the police dispatcher that they saw the car "at a home known for shooting", but that those in the car were "probably not" involved in the reported shooting. With the help of the helicopter, the officers located the car in a parking lot. They spotted the defendant and the car driver on a nearby porch. The police then pointed their guns at the two men, ordered them not to move, and took them into custody. A few minutes later, an officer reported finding a gun on the porch.

According to the police officers, following defendant's arrest, he admitted that he had the gun for protection. Because the defendant had two prior felonies he was charged with violating the armed habitual criminal section of the code. The defendant's attorney filed a motion to suppress the evidence of the gun that was found on the porch. At the hearing, the arresting police officer testified that, after pulling into the parking lot, he observed the car driver and the defendant exit the car that the police had chased, saw them run to the porch, and saw the defendant drop an object. Another officer picked up that object, a gun, from behind the couch on the porch. The court found that the defendant had no standing to object to the search of the porch and denied the motion to suppress

At trial, the arresting police officer changed his testimony after the jury saw the video recording taken from the helicopter. He admitted that, by the time his car entered the parking lot, nobody remained in the car the officers were chasing. Rather, the defendant and the car driver were on the porch, apparently trying to enter the building. Although the officer did not think that the two men were probably involved in the reported shooting, he relied on that shooting to point his gun at them and order them to stop. According to the police officer, the defendant then moved one or two feet, pulled out a metal object and dropped it behind a couch on the porch. The officer then directed another policeman to the spot and that officer retrieved the gun. The police did not test the hands or clothes of either men for gunshot residue and did not check the gun for fingerprints.

During the trial, the car driver testified that, when the officers first approached their car prior to the chase, he was parked in the driveway of the friend's home. The driver could not tell whether the men approaching the car were the police, but he had a suspended license and so he drove off fast. He testified that they had returned to a party they previously attended and rang the doorbell before the police came and arrested them. The defendant corroborated this account. Both men denied having a gun or dropping anything on the porch.

After the jury found the defendant guilty, he appealed on the basis that his trial counsel provided ineffective assistance by, among other things, failing to argue that the illegal seizure required suppression of the gun and (as a fruit of the poisonous tree) the defendant's purported admission that the gun was his.

The First District noted that, at the time the officers initially saw the defendant and the driver of his car, no officer claimed to have seen them engage in any criminal activity, at the scene of any crime, or claimed to have seen them in possession of a firearm. The court noted that parking in the driveway of a "house known for shooting" does not justify an investigatory stop or the seizure.

The First District further reasoned that courts have consistently held that running from police, absent other circumstance indicating criminal conduct, is not sufficient to establish the reasonable suspicion necessary to effectuate an investigatory stop. In this case, according to the testimony of the police officer that the trial court found credible, the defendant only moved one or two feet to the couch, the two men submitted to the officer's authority, remained on the porch, thereby completing the seizure before the defendant dropped the gun.

The First District found that the search the officers conducted prior to the defendant's allegedly dropping the gun was illegal because there was no evidence that defendant committed any crime prior to that. It thus found that, if defense counsel had appropriately argued that the illegal seizure made the ownership of the porch ir-

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## Survey of 2022 Ethics Law Cases (Continued)

relevant to the motion to suppress, the trial court should have granted the motion to suppress the gun and ruled the defendant's alleged subsequent admission inadmissible.

The First District, therefore, held that defendant's defense attorney at trial provided ineffective assistance to the defendant and reversed the defendant's conviction and vacated his sentence without remand.

*People v. McClendon*, 2022 IL App (1st) 163406.

### **Second District Finds that Neither Defense Counsel's Promise in the Opening Statement of Testimony Never Later Presented Nor His Failure to Object to Prosecutors Reference in the Closing Argument to Defendant's Failure to Call a Witness Constituted Ineffective Assistance**

In *People v. Suggs*, the defendant was indicted on two counts of domestic battery as a result of his throwing a heavy glass at his stepfather striking his step-father's hand and causing injuries. The defendant's mother was present during the confrontation. Defense counsel's theory was that the stepfather concocted a story that he was injured by the defendant to get the defendant out of the house. When two sheriff's deputies arrived at the scene, the defendant denied injuring his step-father. Nevertheless, the sheriff's deputies arrested the defendant.

The witness list that the State submitted before trial named only three potential witnesses: defendant's step-father and two sheriff's deputies. During his opening statement defense counsel asked the jury "to take into consideration the testimony of both the officers, as well as [the step-father], and draw your own conclusions as to what you believed [sic] happened." Defense counsel further told the jury, "You'll hear testimony from the officers that when [defendant] was asked, did you throw a glass at [the step-father], no. Repeatedly, no. I didn't do that."

The State only called the step-father and did not call either of the officers. The step-father testified, among other things, that he went to the hospital for his injuries. After the court denied the defendant's motion for a directed verdict, the defense rested without presenting any evidence. During closing arguments, the prosecutor referred to the fact that, although defense counsel promised during the opening statement that there would be testimony that defendant told the officers that he did not throw the glass at his father, there was no such testimony presented during the trial.

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Calling the officers as witnesses for the defense would have gained defendant little because, under Illinois law a defendant is generally prohibited from calling a witness to testify about defendant's own self-serving hearsay statements. On the other hand, it would have opened the door for the State to cross-examine the deputies about what they learned at the scene that caused them to arrest defendant for domestic battery.

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During the closing arguments, the defense counsel stressed that, although the defendant's mother witnessed the confrontation, the State never called her as a witness and that the State did not produce sufficient medical evidence to corroborate the stepfather's injuries. In rebuttal, the prosecutor stressed that the defendant had no burden of proof. The prosecutor then argued that the defendant's mother was defendant's blood relative and, if her testimony would have been helpful, the defendant could have subpoenaed her to testify. He also argued that, if the stepfather never went to the hospital for his injuries, it should have been easy to get someone from the hospital to testify that they never saw him there. The defense counsel did not object during the State's rebuttal argument.

After the jury found the defendant guilty, he appealed arguing ineffective assistance of counsel for two reasons. The first reason was that the defense counsel promised that the jury would hear testimony that he then failed to present to the jury. The second reason was failure to object during the rebuttal by the prosecutor leaving the impression that defendant was responsible for lack of exculpatory evidence.

In addressing the failure to present evidence that defense counsel promised the jury in the opening statement, the Second District reasoned that due to the presence of the officers on the State's witness list, it was reasonable for the defense counsel to assume that the State would call them as witnesses presenting an opportunity to elicit during cross-examination the testimony promised in the opening. Calling the officers as witnesses for the defense would have gained defendant little because, under Illinois law a defendant is generally

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## Survey of 2022 Ethics Law Cases (Continued)

prohibited from calling a witness to testify about defendant's own self-serving hearsay statements. On the other hand, it would have opened the door for the State to cross-examine the deputies about what they learned at the scene that caused them to arrest defendant for domestic battery. Therefore, the Second District did not believe that, in this case, failing to present evidence promised in the opening statement amounted to ineffective assistance of counsel.

The Second District also believed that failure to object to the State's rebuttal argument did not constitute ineffective assistance of counsel. The State's comments in rebuttal were invited by defense counsel's comments in closing argument. The State's comments in that context were not improper and so there was no basis for counsel to object. Therefore, failure to object was not deficient performance.

*People v. Suggs*, 2022 IL App (2d) 200713.

### **Seventh Circuit Finds that Criminal Defendant's Waiver of His Counsel's Conflict of Interest was Valid**

In *U.S. v. Bell*, the government accused the defendant of mail fraud related to a real estate scheme. The federal jury indicted defendant and two others in connection with the scheme. When the defendant refused legal representation, the district court, over his objection, assigned him an experienced attorney to serve as stand-by counsel.

On the eve of trial, the defendant moved to retain a recent law graduate as his attorney. In response to the district court's inquiries, the recent law graduate explained that he was newly admitted to the Illinois bar, had never tried a case, and had only met the defendant at the correctional center a few days earlier. The district court advised the defendant that choosing the inexperienced counsel over the appointed stand-by counsel was a serious mistake, but defendant insisted on his choice of counsel.

The recent law graduate also informed the court that he met with the defendant at the behest of one of the co-defendants' counsel. After the court sought clarification, both the law graduate and the counsel for the co-defendant denied that the co-defendant's counsel asked the law graduate to visit the defendant. The district court then obtained conflict attorney from the Federal Public Defendant's Office to discuss this situation with both the defendant and his co-defendant. It also later held a conflict hearing for the other co-defendant.

The conflict counsel assigned to the defendant advised him (1) about his right to conflict-free counsel, (2) of the conflict that could arise if the recent law graduate represented him, (3) that waiving conflict-free counsel would preclude him from raising it during the

trial or on appeal, and (4) of the dangers of choosing an inexperienced attorney like the law graduate. After learning about the potential conflict, the co-defendants chose new attorneys, but the defendant refused to change his counsel but thanked the district court for its concern. The defendant subsequently filed a written, signed waiver acknowledging his right to conflict-free counsel and the potential conflicts associated with having his chosen counsel represent him.

After his conviction, the defendant appealed. He argued, among other things, that the district court erred by allowing him to proceed with his chosen counsel, who allegedly provided ineffective assistance because of the relationship with the co-defendant. The defendant further argued that the district court should have tried harder to convince him to choose a different attorney, or failing that, just forced him to do so.

As part of its analysis the Seventh Circuit noted that, generally, a defendant's waiver is valid when the judge informs him that he has a right to conflict-free counsel and ensures that he understands the potential consequences of the conflict. The district court need only be satisfied that the defendant made an informed decision—not that the decision was a prudent one.

The Seventh Circuit found that the district court conscientiously ensured that the defendant knew his rights and understood the possible pitfalls of choosing his preferred attorney. Yet, the defendant repeatedly, despite the district court's best efforts, insisted on his choice of counsel.

The Seventh Circuit thus found that, under the circumstances, the defendant's waiver of his counsel's conflict of interest was knowing and voluntary. The Seventh Circuit further reasoned that the defendant also failed to demonstrate an actual or serious potential conflict that would have obligated the district court to disregard his waiver. It, therefore, held that the defendant could not argue that his counsel was ineffective because of the conflict of interest and the defendant was not denied right to conflict-free counsel.

*U.S. v. Bell*, 28 F.4th 757 (7th Cir. 2022).

### **Seventh Circuit Declines to Overturn Defendant's Conviction Despite the Ex Parte Communication from the Trial Judge to the Prosecutor**

In *U.S. v. Gmoser*, shortly before the beginning of trial of defendant for distribution of child pornography, the prosecutor sent e-mail to the judge directing him to the previously filed documents. This e-mail was in response to the judge's questioning at the pretrial

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## Survey of 2022 Ethics Law Cases (Continued)

conference whether the government filed these documents. The prosecutor in the e-mail apologized to the judge for any confusion and, in addition to the judge, sent this e-mail to the judge's staff, defense counsel, and prosecutor's co-counsel. The judge responded to the prosecutor with an e-mail stating "My bad. You're doing fine. Let's get this thing done." The judge addressed his response to the prosecutor only. The prosecutor forwarded this e-mail to her co-counsel; however, neither the prosecutor nor her co-counsel forwarded the judge's e-mail to the defense counsel.

After the trial, the information came out that the judge, who had worked in the federal prosecutor's office for more than 20 years before his appointment to the bench, after becoming a judge was for several years sending e-mails to the prosecutor's office without copying counsel for the defense. The Judicial Council of the Seventh Circuit adopted the report of a Special Committee finding that the judge has behaved unethically and needed to take some time off from criminal prosecutions.

The defendant's principal argument on appeal after his conviction was that either the Due Process Clause or 28 U.S.C. § 455(a) (the federal recusal statute) entitled him to a new trial before a different district judge. The Seventh Circuit has previously addressed the fallout from this judge's ex parte communications in three decisions: *U.S. v. Atwood*, 941 F.3d 883 (7th Cir. 2019); *U.S. v. Williams*, 949 F.3d 1056 (7th Cir. 2020); and *U.S. v. Orr*, 969 F.3d 732 (7th Cir. 2020). In *Atwood* and *Orr*, the Seventh Circuit found that the district judge laboring under an ethical problem made discretionary decisions that materially affected the conviction or sentence and remanded so that a different judge could redo the proceedings. In *Williams*, it let the district court's judgment stand because of the absence of a contestable discretionary choice by the district court in the original trial.

The Seventh Circuit found that, in this case, there were only two issues to which the defendant could point as discretionary decisions that a different trial judge might have handled differently. The first issue was that an expert psychiatrist testified for the prosecution without personally examining the defendant. However, the Seventh Circuit found that, by failing to proffer any evidence to the district court that experts in the mental-health field need to question their subjects personally, the defendant forfeited the issue. The second issue was that the district judge admitted evidence supplied by a third-party in response to the subpoena issued by the FBI. The defendant contended that the FBI subpoena in question was defective. The Seventh Circuit found that, if the subpoena was defective that third-party to whom it was directed perhaps could

have moved to quash it. As the third-party did not try to quash the subpoena, defendant was not entitled to enforce the third-party's rights and forfeited this argument by not trying to enforce them in the district court.

The Seventh Circuit further found that, as the case was also transferred to a different judge for sentencing, neither the jury's verdict nor defendant's sentence could plausibly be attributed to a questionable decision by the district judge.

The Seventh Circuit reasoned that circumstances showing a serious potential for bias may require a judge's disqualification, but lesser degrees of bad appearances, of the sort in which the district judge engaged in this case, do not. The Seventh Circuit acknowledged that words "Let's get this thing done" in the district judge's ex parte e-mail to the prosecutor could be understood as equivalent to "Let's get a conviction," However, it believed that it could also be read as equivalent to "Let's get this trial under way, now that you have shown compliance with my discovery order." The lower court held a hearing on the matter and concluded that in the context, the e-mail had later meaning. The Seventh Circuit found that which reading was correct was a question of fact and the finding of the lower court was not clearly erroneous.

The Seventh Circuit noted that the district judge's thoughtless ex parte emails have caused needless problems for litigants and the judiciary as a whole, but as the defendant's trial and sentence were not even arguably affected by any improper communications or any material discretionary decision, there was no reason for a new trial.

*U.S. v. Gmoser*, 30 F.4th 646 (7th Cir. 2022).

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### About the Author



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

# Survey of Insurance Law Cases

## **Mere Presence of COVID-19 on the Premises Does Not Constitute “Direct Physical Loss of or Damage to” Property Under Businessowners Policy**

*ABW Development, LLC v. Continental Casualty Company* involved an insurance coverage dispute arising out of the COVID-19 pandemic. ABW Development, LLC, the owner and operator of medical imaging clinics, sought to recover from its insurer, Continental Casualty Company, losses it allegedly suffered because of the pandemic and resulting governmental shutdown orders. ABW sought coverage under its policy which included a Businessowners Special Property Coverage Form, a Business Income and Extra Expense endorsement, and a Civil Authority endorsement.

The policy’s Businessowners Special Property Coverage Form afforded coverage for “direct physical loss of or damage to Covered Property,” and the “Business Income and Extra Expense” endorsement provided coverage for “loss of Business Income” sustained “due to the necessary ‘suspension’ of [ABW’s] ‘operations’ during the ‘period of restoration.’” Further, any “suspension” of operations had to be “caused by direct physical loss of or damage to property at the described premises.”

Coverage for Business Income and Extra Expense was extended by the Policy’s Civil Authority endorsement for a civil authority action that prohibited access of ABW’s premises. And any civil authority action “must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.”

ABW submitted a claim under its policy, which Continental denied. ABW then filed a complaint for declaratory judgment alleging it was “likely” the COVID-19 virus had been physically present at its premises and, as a result, ABW had sustained direct physical loss and damage to property and the premises. ABW also maintained that its operations had been “suspended” due to (1) the physical loss and damage to its property and (2) the orders issued by civil authorities. A claim for vexatious refusal to pay was also asserted.

Continental sought dismissal on the basis that ABW did not allege, and could not allege, “that there was ‘direct physical loss of or damage to’ its property as required for business loss coverage or ‘direct physical loss of or damage to’ another premises as required

by the civil authority endorsement.” The crux of Continental’s motion to dismiss was there had been no “physical injury,” because the presence of the virus did “not physically alter the appearance, shape, color, structure, or other material dimension of the property,” and the virus died naturally within hours or days or could have been killed or removed by routine cleaning or disinfectants. The trial court dismissed ABW’s complaint with prejudice, and ABW appealed.

On appeal, the Illinois Appellate Court, First District, affirmed, agreeing with Continental that ABW’s alleged losses did not constitute “direct physical loss of or damage to” its property. The First District explained the Illinois Supreme Court previously held that the term “physical injury” as used in an insurance policy unambiguously connoted “an alteration in appearance, shape, color or in other material dimension.” The First District concluded that the Illinois Supreme Court’s decision was controlling and that the Continental policy unambiguously required any covered loss or damage be physical in nature, meaning that the property had been “alter[ed] in appearance, shape, color, or other material dimension.”

Having concluded that the policy required “direct physical loss of or damage to” property, the First District joined the vast majority of other jurisdictions which have examined the same or similar policy language. ABW did not plead any facts suggesting that the virus caused physical loss or damage. Notably, even if the court assumed the COVID-19 virus was present on ABW’s property, the court stated “the mere presence of the virus on surfaces does not constitute ‘physical loss of or damage to property’ because COVID-19 does not physically alter the appearance, shape, color, structure, or other material dimension of the property.” Moreover, the civil authority endorsement, which provided coverage for losses sustained or incurred “by action of civil authority that prohibited access” to covered property, did not provide coverage in the absence of an allegation that the virus caused direct physical loss to the clinics, or that access to the clinics was ever “prohibited.” As no coverage was owed under the policy, the insurer did not act vexatiously or unreasonably with respect to denial of the claim,

*ABW Development, LLC v. Continental Casualty Company*, 2022 IL App (1st) 210930.

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### **Alleged Damage to “Other Property” Caused By Subcontractor’s Defective Work Triggered Duty to Defend Developer as an Additional Insured Under Subcontractor’s CGL Policy**

In *Acuity v. M/I Homes of Chicago, LLC*, the trial court granted summary judgment to Acuity, finding it had no duty to defend the developer, M/I Homes, in a lawsuit brought by a homeowners’ association seeking damages stemming from defective work performed by one of the developer’s sub-contractors. The association alleged that M/I Homes was the successor developer of certain townhomes, and that M/I Homes constructed and sold the townhomes with substantial exterior defects. The construction defects, according to the underlying complaint, “caused physical injury” to other portions of the townhomes after construction was completed.

Acuity sought a declaration that it had no duty to defend or indemnify M/I Homes. Acuity argued that M/I Homes was responsible for all the townhomes and that any allegation of damages necessarily related to defective construction and not to any damage of property beyond the townhomes themselves. Therefore, argued Acuity, there was no covered “property damage” caused by an “occurrence” under the subcontractor’s policy. The trial court agreed, and granted Acuity’s motion for summary judgment. The trial court noted that “Illinois case law considers a subcontractor’s work still within the scope of work of the general contractor.”

On appeal, the First District reversed, holding that damage to “other property” in the association’s lawsuit potentially fell within the subcontractor’s policy’s coverage, triggering a duty to defend the developer, and that the association had standing to sue the developer on behalf of the individual homeowners for the alleged damages to “other property.” The court began by noting that the requirement of damage to “other property” is not explicitly in the policy, but instead comes from a line of cases interpreting CGL policies. The court further noted that some commentators have criticized this requirement for coverage and suggested that the national trend is to move away from this approach and instead view faulty workmanship as an “occurrence” and damage to the project itself as “property damage” triggering a duty to defend. Without endorsing the criticism, the court held that the underlying complaint broadly alleged that the subcontractor’s work damaged other portions of the townhomes, and that interpreting the complaint liberally in favor of the insured, damage to “other property” was alleged, triggering a duty to defend. Finally, the association had standing to sue the developer on behalf of individual homeowners for

alleged damages to “other property” caused by the construction defects, pursuant to a statute giving associations standing to sue in a representative capacity for matters involving common areas or more than one unit in a development.

*Acuity v. M/I Homes of Chicago, LLC*, 2022 IL App (1st) 220023.

### **Insured Unsuccessful in Arguing Regulatory Estoppel to Avoid Virus Exclusion for COVID-19 Losses**

In *AFM Mattress Company, LLC v. Motorists Commercial Mutual Insurance Company*, AFM Mattress, the operator of mattress stores, filed a coverage action against its insurer, Motorists Insurance, after it denied coverage for losses due to government-ordered COVID-19 shutdowns. AFM challenged the denial of its claim under the property insurance policy’s virus exclusion provision. AFM claimed that regulatory estoppel prevented Motorists from relying on the virus exclusion to bar its claim for coverage. The district court disagreed, finding that Illinois does not recognize regulatory estoppel and the virus exclusion was controlling. AFM’s action was dismissed, and it appealed.

The Seventh Circuit affirmed. The court first noted that extrinsic evidence of the policy’s purported meaning was unnecessary, as the policy language was not ambiguous. AFM argued that regulatory estoppel should apply because Motorists, through the Insurance Services Office, Inc., misrepresented the scope of its virus exclusion to the Illinois Department of Insurance in 2006 and 2007 to secure approval of the exclusion’s language. Previously, the policies covered losses caused by severe acute respiratory syndrome, E. coli, and other health-threatening organisms. It was represented to regulators that the proposed additional language was merely clarification of the existing exclusion. As a result of the misleading testimony to regulators, AFM claimed that Motorists secured a broader exclusion without a corresponding reduction in premiums. The Court of Appeals rejected this argument, finding that AFM could point to no Illinois case adopting regulatory estoppel and that regulatory estoppel is not recognized in Illinois. AFM further argued that if regulatory estoppel did not apply, the virus exclusion was still inapplicable because the losses arose out of civil authority. Under the civil authority coverage provision, where a civil authority prohibits access to insured property in response to certain dangerous physical conditions at different, adjacent property, and that access-prohibition causes the insured to lose business income or sustain extra expenses, Motorists agreed to pay for lost business income and extra expenses. The Seventh Circuit rejected this argument as well. Simply put, the

virus, not civil authority, directly caused the business losses, and the virus exclusion applied.

*AFM Mattress Company, LLC v. Motorists Commercial Mutual Insurance Company*, 37 F.4th 440 (7th Cir. 2022).

### **Restaurant Was Not Entitled to “Contamination” Coverage When COVID-19 Virus Was Not Alleged to be Physically Present on the Premises and Executive Orders Prohibiting Dine-In Service Did Not Prohibit Access to Restaurant for Pick-Up Orders**

*Alley 64, Inc. v. Soc’y Ins.* arose from a putative class action brought against an insurer, Society Insurance, seeking a declaration of coverage under the “contamination” provision of businessowners’ policies issued to restaurants which sustained losses due to COVID-19 executive orders prohibiting dine-in and beverage service. Alley 64, a restaurant and bar, filed the suit individually and on behalf of all others similarly situated. Alley 64’s insurance policy provided that if “operations” were suspended due to “contamination,” Society would, in addition to reimbursing costs of sanitizing the premises and equipment, pay for “the actual loss of Business Income and Extra Expense” caused by “contamination that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product.” The trial court granted the insured’s motion for class certification.

The Illinois Appellate Court, Second District, reversed the order granting class certification, holding that the restaurant’s operations were not suspended due to “contamination,” and that the executive orders did not prohibit access to the insured premises. The policy defined “contamination” as “a defect, deficiency, inadequacy or dangerous condition in your products, merchandise or premises.” The court held that the “contamination” coverage was not triggered, however, because the insured alleged only that it was highly probable that the COVID-19 virus was in its products, merchandise, or business premises, and the insured failed to allege that the virus was actually present. Moreover, the executive orders only restricted use of the premises. Customers were still allowed to place and pick-up orders, and employees and staff were not prohibited access to the premises.

*Alley 64, Inc. v. Soc’y Ins.*, 2022 IL App (2d) 210401.

### **Auto Insurer Had No Contractual Obligation to Pay Insured Sales Tax and Title Fees After Total Loss of Vehicle When Plaintiff Did Not Comply With Regulations**

In *Bond v. United Equitable Insurance Group*, plaintiff brought a putative class action against her automobile insurance company. Plaintiff was involved in a car accident, and the insurance company determined that the vehicle was a total loss. The company paid plaintiff for her loss, but did not pay the sales tax, title fees, or tag transfer fees toward the purchase of a new vehicle. The insurance policy required the company to pay “the cost of replacing the owned automobile,” and the company’s obligation was limited to the “actual cash value” of the vehicle. “Actual cash value” was not defined in the policy, and the policy did not mention reimbursement of sales tax or title fees in the context of a total loss. Plaintiff claimed that the company breached its insurance contract when it failed to include sales tax and title fees when calculating the payout for the total loss of her vehicle. The trial court dismissed plaintiff’s complaint, finding that plaintiff’s failure to comply with certain regulatory requirements relieved the insurance company from any obligation to pay sales tax and title fees.

The Appellate Court, First District, affirmed, holding that the insured was not entitled to the taxes and fees without complying with regulatory requirements to purchase or lease a vehicle and to submit the appropriate documentation Illinois Department of Insurance regulations require an insurance company to reimburse insureds for sales tax and title fees upon replacement of an insured vehicle. Specifically, 50 Ill. Adm. Code 919.80(c)(3)(A)(i)(2002) requires the reimbursement of such costs “if within 30 days after the receipt of the settlement by the insured, the insured has purchased or leased a vehicle.” However, if the insured fails to submit appropriate documentation of such purchase or lease within 33 days after receipt of settlement, “the company shall not be required to reimburse the insured . . .” 50 Ill. Adm. Code 919.80(c)(3)(A)(i)(2002). Here, the insurance company sent a notice to plaintiff advising her of her right to reimbursement should she purchase a new vehicle and outlining the requirements to claim such reimbursement. Plaintiff did not submit any documentation to the company, and she did not allege that she actually incurred sales tax or title fees. Rather, plaintiff argued that the regulations were “a floor, a minimum standard, for policy benefits,” and that the policy required actual cash value—“including all costs that are reasonably necessary to effectuate a replacement.” The court rejected plaintiff’s argument. First, the court noted that “all state laws are incorporated into all contracts of insurance,”

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## Survey of 2022 Insurance Law Cases (Continued)

and that includes administrative rules. Second, nothing about the regulation's prerequisites for insureds conflicted with any policy provision. Third, plaintiff's reading of the policy—that actual cash value always includes sales tax and title fees—would result in the regulation becoming meaningless surplusage. In short, plaintiff's failure to follow the regulatory directives in claiming sales tax and title fees for the purchase of a new vehicle eliminated any requirement on the part of the company to pay for such expenses. Nothing in the policy permitted Plaintiff to bypass the regulations.

*Bond v. United Equitable Insurance Group*, 2022 IL App (1st) 210732.

### **Insurer's Breach of Duty to Defend Did Not Require it to Pay More Than Policy Limits**

A 17-year-old high school hockey player punched his coach in the head because he was not allowed to play in a game, causing the coach serious injuries. The coach sued the 17-year old and his stepfather. Country Mutual, which issued homeowner's and umbrella policies to the player's parents, immediately denied coverage on the basis the bodily injuries did not result from an "occurrence" and the 17-year old's conduct was intentional. The coach thereafter sued the hockey club and its individual board members, including the player's stepfather who was sued both as a board member and as a parent for negligent supervision. Country Mutual declined to defend the claim against the stepfather as a board member, leaving that to another liability insurer, but agreed to defend the stepfather on the claim of negligent supervision. The negligence claim was later dismissed, and Country Mutual then agreed to participate in the defense of the still remaining claim against the stepfather as a board member. In the meantime, the player had affirmatively pled that his coach had instigated and provoked him, that he had felt threatened, and that he did not act intentionally but had just snapped.

Country Mutual did not defend the player and filed a coverage action against the player four and one-half years after the underlying bodily injury action was filed. The player settled the suit for \$5,000, agreed the coach's damages would be determined by a judge or jury, and assigned his rights under the Country Mutual policies to his coach. The coach's attorney then undertook to jointly represent both the player and his coach in the coverage action. The trial court granted summary judgment in favor of Country Mutual, finding it had no duty to defend or indemnify the player because the injuries did not result from an occurrence and fell within the exclusion. The First District in the first appeal reversed based on its determination that the allegations of the complaint revealed potential coverage.

Specifically, the court noted that there may be coverage even for criminal conduct where there is a question as to intent. The court also pointed to Country Mutual's delay of more than four years in filing the coverage action and by Country Mutual's failure to acknowledge a conflict of interest when it defended the player's stepfather and it was in the stepfather's best interest to prove that his son intended to injure his coach. The court remanded the case to the trial court to determine whether the player was prejudiced by Country Mutual's failure to retain independent counsel to represent him.

After the remand, Country Mutual argued that the prior settlement between the player and his coach was invalid because it did not include a specific amount of compensatory damages for the coach's injuries. Counsel, who continued to jointly represent both the player and his coach, amended the settlement agreement whereby the player agreed to pay his coach \$6 million to be satisfied from the proceeds of the insurance policies in exchange for forgiving the player's failure to pay the original \$5,000. The trial court awarded the player \$5,000 under the original agreement because of Country Mutual's failure to defend him, but declined to address whether the amendment to the settlement agreement was reasonable. In the second appeal, the court again reversed and remanded, holding that the trial court should have conducted a hearing to determine the validity of the amended settlement agreement, whether the decision to settle was reasonable, and whether the amount of the settlement was reasonable.

Ultimately, the First District brought the coverage litigation to an end when it finally affirmed the trial court's findings on remand. First, it determined that the amended settlement agreement was not the product of collusion despite counsel's "stunning lack of judgment" in representing both the player and the coach in negotiating their settlement. The First District explained that the original agreement was fair because it left the amount of damages to be determined by a judge or jury, and that the amended agreement was entered into only after Country Mutual argued the original agreement was invalid for lacking a specific dollar amount. The First District also explained that the amended agreement was supported by valid consideration because the player had not fully paid the coach the \$5,000 owed, and the coach could have reinstated his claim against the player but for the amended settlement agreement. Second, the court found that the amended settlement was reasonable. From the player's perspective, it prevented his coach from reinstating the claim against him. Further, although the witness testimony and the evidence was often times conflicting, the \$6 million settlement was not against the manifest weight of the evidence that showed the coach sustained a severe head injury. Third, the court nevertheless agreed that Country Mutual was responsible to pay only its \$3 million limits as a breach of the duty to defend generally does not expand

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## Survey of 2022 Insurance Law Cases (Continued)

the limits. Country Mutual was not entitled to set off the \$750,000 settlement reached between the coach and the other liability insurer which defended the hockey club and board members. Finally, the court agreed that Country Mutual was not guilty of vexatious and unreasonable behavior under section 155 of the Insurance Code, as there was a bona fide dispute over coverage and Country Mutual did not know about the player's affirmative defenses of provocation and feeling threatened until months before it filed its declaratory judgment action.

*Country Mutual Insurance Company v. Olsak*, 2022 IL App (1st) 200695.

### **Mere Loss of Use of Business Due to COVID-19 Closure Order Did Not Constitute "Direct Physical Loss of or Damage to Property"**

*East Coast Entertainment of Durham, LLC v. Houston Casualty Company* arose out of claims for economic losses due to COVID-related closures. The insured, East Coast Entertainment of Durham, LLC ("ECE"), owned and operated movie theaters in North Carolina, and when the Governor of North Carolina imposed a statewide closure in response to COVID-19, ECE submitted claims under its policy with Houston Casualty Company ("HCC"). When HCC denied the claims, ECE sued for declaratory relief. HCC moved to dismiss the claim as the Governor's executive order caused the loss as there was no physical alteration or damage of its property as required under the policy. The district court agreed and dismissed the suit.

The Seventh Circuit determined that Illinois law applied and affirmed the dismissal. On appeal, ECE argued that the business income provision of the policy covered economic losses due to COVID-related closures, as the virus could be transmitted by human contact with surfaces and items of physical property. Even if the virus was physically present on the premises, the virus itself did not physically alter the physical structures. The mere presence of the virus on surfaces did not physically alter the property, nor did the existence of airborne particles carrying the virus. ECE did not allege that it needed to repair, rebuild or replace any structures or items on the premises, or that its business resumed at a new permanent location, as contemplated in the policy. Accordingly, ECE, was not entitled to coverage.

*East Coast Entertainment of Durham, LLC v. Houston Casualty Company*, 31 F.4th 547 (7th Cir. 2022).

### **No Coverage for Tenant's Injury Under Exclusion for Injury to Residents of Premises**

In *Farmers Insurance Exchange v. Cheekati*, the insured landlord sought defense and indemnity for an underlying lawsuit filed by its tenant after the tenant fell and injured herself when the staircase at the rental property collapsed under her. The homeowners insurer, Farmers, denied liability coverage and filed a declaratory judgment action, relying on a policy exclusion barring coverage for bodily injury to "any resident of the residence premises." The trial court granted the insurer's motion for judgment on the pleadings.

The Illinois Appellate Court, Fourth District, affirmed the trial court's ruling in favor of Farmers, holding that the plain, ordinary, and popular meaning of "resident" means the place where a person lives "permanently or for a considerable time." The landlord argued that plaintiff in the underlying action was a "tenant" and not a "resident," and that the resident exclusion did not apply to disclaim coverage. The insured cited two places in the policy where the word tenant was used and argued that tenant could not mean resident, and thus, at best, the word "resident" in the exclusion was ambiguous. The court agreed with Farmers that the tenant was a "resident" because that is where she lived. As the plaintiff was a resident, the resident exclusion of policy applied to preclude coverage for the tenant's injury,

*Farmers Insurance Exchange v. Cheekati*, 2022 IL App (4th) 210023.

### **Physical Presence of COVID-19 Did Not Constitute Direct Physical Loss or Damage to Property Triggering Coverage Under All-Risk Commercial Property Policy**

In *Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, the Illinois Appellate Court, First District, affirmed the trial court's dismissal of the insured's complaint and the denial of its motion to amend its complaint seeking recovery for property damage and business losses due to the presence of the COVID-19 virus on its restaurant premises. In each of the 19 states where the insured, Firebirds, operated restaurants, COVID-19 orders prohibited restaurants from offering dine-in services, and later required greater standards of sanitization and measures to physically separate persons in the restaurant.

Firebird alleged that the "actual presence" of the COVID-19 virus constituted a physical loss or damage that would trigger coverage under the all-risk commercial property policies. The policies contained an exclusion for "contamination" defined as "any condi-

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## Survey of 2022 Insurance Law Cases (Continued)

tion of property due to actual presence of any foreign substance” including “virus.” Firebird argued, however, that the policies contained 31 separate amendatory endorsements, including a Louisiana endorsement which changed the definition of “contamination” to “[a]ny condition of property due to the actual presence of any Contaminants,” removing “virus” from the definition of “contamination.” While the Louisiana endorsement was in the policy, none of the 50 restaurants owned by Firebirds was located in Louisiana so the contamination exclusion including “virus” remained in effect. The court found no ambiguity in the exclusion, and, construing the policy in its entirety, found that contamination was excluded “unless it resulted from direct physical loss or damage not excluded by the policy.” As there was no direct physical loss or damage to property, the court held there could be no recovery under the policies.

*Firebirds Int’l, LLC v. Zurich Am. Ins. Co.*, 2022 IL App (1st) 210558.

### **Insured Tortfeasor’s Denial of Liability for the Accident Does Not Render the Would-Be Tortfeasor an Uninsured Motorist**

In *Great West Casualty Co. v. Brambila*, the Illinois Appellate Court, First District, affirmed summary judgment in favor of the insurer, holding that an insured-motorist’s denial of liability is not the same as being uninsured, and does not entitle an injured party to uninsured motorist coverage. The coverage case arose from an automobile accident involving John Grygorcewicz and Juan Brambila, which resulted in Grygorcewicz’s death and Brambila’s injuries. Brambila sought recovery via his own insurance carrier, Great West, by making an uninsured/underinsured motorist (UM/UIM) claim, and also filed a common-law negligence action against Grygorcewicz’s estate. Great West denied Brambila’s UM claim because, at the time of the accident, Grygorcewicz was insured by State Farm and, therefore, was not uninsured. Great West denied Brambila’s UIM claim because Brambila’s policy provided that his \$100,000 UIM coverage limit was to be reduced by the amount of other available coverage and, because Grygorcewicz’s State Farm policy coverage exceeded \$100,000, Brambila’s UIM coverage would be reduced to zero.

Brambila’s lawsuit against the estate was met with equal resistance because the estate asserted an “act of God” defense, claiming Grygorcewicz was not liable for the accident. Brambila argued this was akin to a denial of coverage making Grygorcewicz an uninsured motorist, but Great West denied the claim, filed a declaratory judgment action, and moved for summary judgment. Brambila conceded

UIM coverage was unavailable, but argued he was entitled to UM benefits because the estate’s denial of liability left him in the same position as someone injured by an uninsured motorist for whom Illinois UM law is designed to protect. Brambila appealed the trial court’s order granting summary judgment in favor of his UM insurer.

On appeal, the First District affirmed. It acknowledged that while Brambila may be in a similar position as someone who has been injured by an uninsured motorist, the language of Brambila’s insurance policies clearly and unambiguously foreclosed the availability of UM coverage. The First District determined there were two reasons why Brambila was not entitled to UM coverage. First, the appellate court held that a denial of liability does not equate to a denial of coverage and, therefore, is insufficient to make UM benefits available. Because Grygorcewicz was insured by State Farm at the time of the accident, and because State Farm had not denied coverage, Grygorcewicz was not an uninsured motorist. Second, the Great West policies provide that they will only pay sums that Brambila “is legally entitled to recover as compensatory damages” from an uninsured motorist. In order to prove he is “legally entitled” to damages, Brambila would have to prove his negligence claim against Grygorcewicz. If the estate’s “act of God” defense was successful, then Brambila would have failed to prove Grygorcewicz’s liability, which is an essential element of his claim. The appellate court noted that “the only impediment to Brambila recovering from Grygorcewicz’s estate would be the lack of liability, and liability is a requirement for the availability of UM coverage.” Accordingly, the First District affirmed the order granting summary judgment in favor of Great West.

*Great West Casualty Company v. Brambila*, 2022 IL App (1st) 210939.

### **Great Disparity in Amounts Claimed Due Supported Denial of Prejudgment Interest**

In *Greater N.Y. Mut. Ins. Co. v. Galena at Wildspring Condo. Assoc.*, the Illinois Appellate Court, Second District, addressed a dispute over whether the insured was entitled to prejudgment interest on its damages award. Greater New York Mutual Insurance Company (GNY) insured Galena at Wildspring Condominium Association (“Galena”), a complex with 33 two-story condominium buildings. Galena was damaged by a storm. After an investigation, GNY determined that “some siding, window screens, gutters, vents, and fascia had plausibly sustained direct physical loss or damage due to hail, but not wind.” Based on an estimate prepared by its consultant, GNY determined it would cost \$730,396.30 to repair or replace the

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## Survey of 2022 Insurance Law Cases (Continued)

hail-damaged items. GNY issued an actual cash value payment of \$527,879.68, which reflected the cost to repair or replace, less prior payments and recoverable depreciation.

Approximately three months later, Galena submitted to GNY a signed sworn proof of loss, valuing the loss and damages at \$5,020,438.90 based on an estimate for replacement of all roofs, siding, window screens, vents, fascia, outlets, light fixtures, and other facets of the exterior on all 33 buildings and demanded an appraisal under the terms of the policy, which GNY rejected.

GNY filed a complaint seeking a declaration that Galena was not entitled to an appraisal or payment in the amount claimed in Galena's proof of loss, and that GNY had no further liability under the policy. Galena filed a counterclaim seeking a declaration that Galena was entitled to an appraisal by an appraisal panel and GNY should be held liable for the amount determined by the appraisal panel.

During the litigation, GNY and Galena agreed to submit the dispute to appraisal and executed a stipulation governing the scope of the appraisal, which provided that GNY would pay the Actual Cash Value (ACV) award determined by the appraisal panel, minus deductibles and prior payments, within 30 days of the award.

The appraisal panel issued its final award on February 16, 2021. Based on the July 2017 date of loss, the ACV was \$1,676,304.46 and the Replacement Cost Value (RCV) was \$2,184,771.03. Pursuant to the stipulation, if Galena performed the repairs that were the subject of the ACV awarded by the panel within one year of the award, Galena could then make claim to GNY for the RCV as of the date of the appraisal, which was \$2,634,946.98.

Galena moved for summary judgment on its counterclaim for declaratory judgment on the same day the final appraisal award was issued, seeking a declaration that it should be paid the amounts determined in the appraisal award, and that it was entitled to 5% prejudgment interest effective as of February 28, 2018—30 days after the proof of loss had been filed. GNY responded that Galena was not entitled to prejudgment interest on the appraisal award. The trial court found that no interest was due because the loss suffered by Galena was not “readily ascertainable and, in fact, was not ascertained at all until February of 2021.”

Galena filed an appeal challenging only the trial court's judgment finding that Galena was not entitled to pre-judgment interest. The Second District affirmed the trial court's order denying an award of interest, finding that for “recovery of prejudgment interest, the sum due must be liquidated or subject to easy determination by calculation or computation.” The Second District found that “although the proof of loss may have provided GNY with the information it needed to determine the amount due, that does not necessarily establish that the amount due was *easily* determinable.” “Given the

great disparity between the amounts claimed due by the parties, as well as the disparity between those amounts and the final amounts determined to be due by the appraisal panel, we cannot say that the court's conclusion that the amount due was not ‘readily ascertainable’ was an abuse of discretion.”

*Greater N.Y. Mut. Ins. Co. v. Galena at Wildspring Condo. Assoc.*, 2022 IL App (2d) 210394.

### **Insured's Obligation to Report Claim Within the Policy Period Did Not Depend on Specific Remedies Sought in the Underlying Action**

The executor for the estate of a minority interest holder in two family-owned businesses sued one of those entities in 2017 seeking the state circuit court's declaratory judgment in respect to the size of her decedent's ownership share in one of those businesses. Although the complaint concerned the other family members' actions as officers, directors, and shareholders, it only alleged that the company was liable. It was not until 2018 that the complaint was amended to state claims against the other business entity and the officers, directors, and shareholders individually.

The parties and the businesses were insured at the time of the original filing and the amended filing by “claims-made” contracts of directors, officers, and entity (D&O) liability insurance, the earlier being in effect at the time of the 2017 filing of the state suit, and the latter being in effect at the time of the 2018 filing of the amended complaint in the state suit. Those policies required, however, that the insured must notify the insurer of a “claim” during the same policy period in which it was first “made.” If the claim was unreported during that respective policy period, then the insurer would owe no duty to defend or indemnify its insureds. The insureds did not notify the insurer of the filing of the original complaint in 2017 during the term of the earlier contract of insurance but did when the complaint was amended in 2018 during the second policy. The insurer denied coverage on ground that the estate's lawsuit was first filed during the 2017 policy period and that the insureds failed to provide notice of that filing within the time prescribed by the policy. The insurer then commenced a coverage action in federal court seeking a declaration that it did not owe any defense or indemnity by the terms of the 2017 policy. The district court granted judgment on the pleadings.

The Seventh Circuit affirmed. The Seventh Circuit determined that the allegations made in the amended complaint against the second of the two-family businesses and the other officers, directors,

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and shareholders individually were not “new” claims allowing for effective notice under the 2018 policy; instead, the estate’s original complaint against one of the entities commenced the claim under the 2017 policy. The broadened allegations in the underlying action’s second amended complaint were related to and treated as part of the original complaint under the reporting requirement’s aggregation provisions in the policies. Further, the policies’ “related claims” provision encompassed claims brought against insured persons and entities in the amended complaint. The insureds’ notice to the insurer was untimely, and the insurer was justified in denying coverage.

*Hanover Insurance Company v. R.W. Dunteman Company*, 51 F.4th 779 (7th Cir. 2022).

### No Appellate Jurisdiction for Insurer’s Interlocutory Appeal from Denial of Venue Motion

In *Highland Management Group, LLC v. Society Insurance*, the defendants, Society Insurance and the Pillar Corporation, filed an interlocutory appeal from the order of the trial court of Madison County denying their motion to transfer venue based on the assertion that plaintiff, Highland Management Group, LLC, was not a Madison County resident. The Illinois Appellate Court, Fifth District, held that it lacked appellate jurisdiction under Ill. Sup. Ct. R. 306(a)(4).

Highland Management brought a declaratory coverage action against Society for business interruption losses Highland sustained as a result of the Illinois governor’s COVID-19 executive orders. In the alternative, Society asserted a claim against Pillar for negligent failure to procure insurance. Pillar filed—and Society joined—a motion to transfer venue, arguing that neither Society nor Pillar resided in Madison County, Highland’s place of incorporation was Champaign County, and Highland did not do business in Madison County.

In response, Highland argued that it was a single-member LLC, and that member lived in Madison County. Since May 2021, the business operated from the LLC member’s home in Madison County, and prior to that most transactions with vendors occurred at the Madison County location, qualifying his home as an “other office” under 735 ILCS 5/2-102. Because actions against insurance companies doing business in Illinois may be brought in any county in which the plaintiff resides, suit was properly venued in Madison County. The trial court denied defendants’ motion to transfer, and defendants appealed under Rule 306(a)(4).

Rule 306(a)(4), however, allows for interlocutory appeals from the denials of motions to transfer venue based on the assertion that

the defendant is not a resident of the county in which the action was commenced. Here, noted the Fifth District, Highland brought its action in Madison County pursuant to 735 ILCS 5/2-103, which provides that actions brought against insurance companies may be brought in any county where the plaintiff resides. The questions on appeal were whether Highland maintained an “other office” in Madison County and whether Highland Management should be defined as a corporation or partnership under section 2-102. Neither of these issues pertained to the residency of the defendants, however, and therefore Rule 306(a)(4) did not provide an avenue for immediate interlocutory appeal.

*Highland Management Group, LLC v. Society Insurance*, 2022 IL App (5th) 210348.

### Insured’s Divorced Father Was Not “Family Member” in his Son’s Household

In *Illinois Farmers Insurance Company v. Godwin*, Eric Pai was killed in a one-car accident while riding in a 1996 Jeep Grand Cherokee being driven by Coalton Godwin. The Grand Cherokee was owned by Godwin’s father, Bruce Godwin. Country Mutual insured that vehicle through a policy issued to Bruce Godwin. Coalton Godwin’s parents were divorced, and he lived with each of them on a rotating basis. Illinois Farmers issued a policy of insurance naming Coalton Godwin and his mother, Kellie as named insureds. Vehicles listed on the policy were a 2011 Ford Escape and a 1999 Jeep Wrangler. The Jeep Wrangler was owned by Coalton Godwin. Neither Bruce Godwin nor his 1996 Cherokee that was involved in the accident was named on the Farmers policy. The Farmers policy contained an exclusion that stated as follows:

This coverage does not apply to:

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12. Bodily injury or property damage arising out of the ownership, maintenance or use of any vehicle other *than your insured car*, which is owned by or furnished or available for regular use by you or a *family member*.”

(Emphases in original). Under this quoted provision, “family member” means “a person related to \*\*\* [an insured] by blood, marriage or adoption who is a resident of \*\*\* [the insured’s] household.”

Farmers denied the claim made by the decedent’s estate against Coalton Godwin and filed suit, seeking a declaration that (1) it had no duty to defend or indemnify Coalton Godwin in the litigation arising from the single-car accident and (2) Coalton Godwin’s use of

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## Survey of 2022 Insurance Law Cases (Continued)

his father's vehicle was excluded from coverage under the Farmers automobile insurance policy. The trial court noted Coalton Godwin's living situation and that Coalton Goodwin's primary vehicle was the 1999 Jeep Wrangler listed on the Farmers policy. He was able to use his father's truck with his father's permission while he was residing with his father if it was available. He also used the vehicle to run errands for his father. The parties agreed that Coalton Godwin used his father's truck approximately one time a week.

Farmers argued that the accident occurred while Godwin was driving a vehicle that was neither owned nor insured by him under the policy, and that it was instead a vehicle that was furnished to him by his father and insured by Country Mutual. Farmers further argued that Bruce Godwin was Coalton's father and met the definition of "family member." Farmers also maintained that the Jeep Grand Cherokee owned by Coalton's father was available for Coalton's regular use and therefore coverage was excluded under the policy.

Pai's estate argued that although the Grand Cherokee was owned and furnished by Bruce Godwin, Bruce was not a resident of Coalton's household under the relevant definition of "family member." "Household," as referenced in the insurance policy, consisted of only Coalton and his mother Kellie. Further, the estate argued that Bruce's Grand Cherokee was not available for Coalton's regular use. Coalton's use of his father's Grand Cherokee was subject to extensive limitations in both time and scope of use. Coalton had no access to the Grand Cherokee at least 50% of the time because he was residing with his mother. The estate also argued that the Grand Cherokee was primarily driven by another resident of Bruce's household.

On cross motions for summary judgment, the trial court granted summary judgment in favor of the estate and against Farmers.

In affirming the judgment, the Illinois Appellate Court, Third District, noted that "Family Member" means "a person related to \*\*\* [Coalton] by blood, marriage or adoption who is a resident of \*\*\* [Coalton's] household." The court agreed that Bruce Godwin was not a resident of Coalton's household, *i.e.*, the household listed under Coalton and Kellie's name in the Farmers insurance policy. The Farmers policy specifically identified the named insureds, their vehicles, and the street address where they resided. Bruce Godwin was not identified in that policy. The exclusion could not apply on the basis that Bruce owned or furnished the Jeep Grand Cherokee involved in the single-car accident at issue. As such, the appeal turned on whether Bruce Godwin's Grand Cherokee was "available for regular use" by Coalton Godwin. The court noted that Bruce's vehicle was available for Coalton's use when the other resident of Bruce's household, *i.e.*, the primary driver of the Jeep Grand Cherokee, was not using it. Coalton's ability to use the Grand Cherokee was contingent upon Coalton residing with Bruce at the time and Bruce's

grant of permission to use the vehicle. Under these undisputed facts, the court concluded the availability of the Grand Cherokee for use by Coalton was not so frequent, habitual, or of a principal nature to be deemed "regular" as a matter of law..

*Illinois Farmers Insurance Company v. Godwin*, 2022 IL App (3d) 210001.

### **No Duty to Defend General Contractor Where Complaint Does Not Allege "Property Damage" Caused by "Occurrence"**

In *Korte & Luitjohan Contractors, Inc. v. Erie Insurance Exchange*, the Illinois Appellate Court, Fifth District, affirmed dismissal of a general contractor's suit against Erie Insurance Exchange, its insurance company, for breach of contract and bad faith. The general contractor, Korte & Luitjohan, contracted with the Six Mile Regional Library District to perform construction work, including the installation of two elevators. After experiencing repeated problems with the elevators, the Library District sued Korte and its sub-contractor which installed the elevators. The Library District alleged that the elevators failed to properly operate on multiple occasions, and it claimed breach of contract, breach of implied warranty of merchantability, breach of warranty for a particular purpose, and breach of express warranty.

Korte tendered the underlying complaint to Erie Insurance, which denied the tender. A verdict was subsequently entered against Korte, and Korte demanded that Erie pay the verdict and reimburse Korte for attorneys' fees incurred in defending the underlying suit. Erie again denied Korte's tender, asserting that the underlying complaint did not allege "property damage" caused by "an occurrence" as defined in the CGL policy. In the coverage suit, the trial court granted Erie's motion for summary judgment.

On appeal, the Fifth District affirmed. The Fifth District noted that the insurance policy at issue defined "occurrence" as "an accident," which was not defined in the policy. Case law generally defines an "accident" as "an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character." Moreover, the court accepted that commercial general liability policies normally do not cover claims for breach of contract, and that "there is no 'occurrence' when a subcontractor's defective workmanship necessitates removing and repairing work." The court concluded that the Library District did not allege that any of its property was damaged because of the faulty elevators or seek money damages for

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any property damage, but instead sought compensation to correct the installation of the elevators, and for economic losses that the District sustained as result of having to use faulty elevators until they could be repaired. The court also rejected Korte's attempts to use expert testimony and parol evidence to establish that the elevator failures were "accidents" within the policy's definition of "occurrence." The construction and interpretation of an insurance policy were matters of law, and absent ambiguity in the policy, expert testimony and parol evidence were inappropriate.

*Korte & Luitjohan Contractors, Inc. v. Erie Insurance Exchange*, 2022 IL App (5th) 210254.

### **COVID-19 Business Interruption Claim Fails Direct Physical Loss Requirement**

In *Lee v. State Farm*, the Illinois Appellate Court, First District, found no business interruption coverage based on COVID-19 closure orders, as there was no physical loss to covered property and the claim would otherwise be excluded under a virus exclusion provision of the policy.

The plaintiff's restaurant complied with Illinois Governor Pritzker's closure orders due to COVID-19 and as a result "suffered business income losses and incurred extra expense" from the business interruption in excess of \$100,000. The insurer denied a business interruption claim, finding no "covered cause of loss" and that the claim was otherwise excluded by a virus exclusion provision.

The plaintiff filed a three-count complaint, seeking declaratory judgment that the "past and future business income loss and extra expenses from the closure orders" were "covered losses" under the policy, and alleging breach of contract and bad faith denial of coverage. The trial court dismissed the complaint with prejudice, finding no direct physical loss and concluding that the claim would also fail as a result of to the policy's virus exclusion provision.

The First District affirmed the dismissal and looked to persuasive authority that interpreted the same policy language of "'direct physical loss' to covered property." Based upon this authority, the First District interpreted "direct physical loss" as requiring a physical alteration to property, and held that the plaintiff's business interruption claim constituted an economic loss and did not trigger coverage under the policy. The First District also held the declaratory judgment action was properly dismissed under the virus exclusion clause of the policy.

*Lee v. State Farm Fire and Casualty Company*, 2022 IL App (1st) 210105.

### **Exclusion for Home Day Care Business in Homeowners Policy Precluded Coverage for Wrongful Death Lawsuit**

In *Liberty Mut. Fire Ins. Co. v. Clayton*, the Court of Appeals, Seventh Circuit, addressed whether Liberty's policy provided liability coverage for a wrongful death suit filed by a mother on behalf of her deceased infant daughter. Liberty filed a declaratory judgment action seeking a declaratory judgment that it did not have a duty to defend or indemnify Kellie Glick, the person in charge of the infant, at the time of her death. Glick provided childcare for the infant without a written agreement. Glick was paid \$25 per day when she provided home day care services and was paid at the end of the week for the days she provided services. The infant died while in Glick's care. The Sangamon County Coroner's Report indicated the death resulted from bedding asphyxia after the infant was placed prone on a couch cushion and covered with a blanket to nap.

Glick had an insurance policy issued by Liberty that provided personal liability coverage. The policy excluded "bodily injury" arising out of or in connection with a "business" engaged in by an "insured." A separate endorsement stated that if an insured regularly provides home day care services to a person other than an insured and received monetary or other compensation for such services, that enterprise was a "business." In a recorded statement given to Liberty, Glick confirmed that she had been operating a day care center out of her home for approximately 13 years for which she received compensation at a rate of \$25 per day per child. Glick further stated that she had not informed Liberty of her day care business. Based upon this information and its investigation, Liberty declined coverage, asserting that it owed no duty to indemnify Glick under her homeowners policy.

In the declaratory judgment action, Liberty filed a motion for summary judgment, which the district court granted, finding that Liberty had no duty to defend or indemnify Glick in the underlying wrongful death lawsuit.

The Seventh Circuit agreed with the district court that the terms "regular" and "compensation" in the business exclusion, as further explained in the daycare endorsement, were not ambiguous, and Liberty had no obligation to defend or indemnify Glick. The home day care services were regular, and would support the finding that the home day care services endorsement precluded coverage. Furthermore, the insured received cash compensation in exchange for providing the home day care services, and the infant's death arose out of the insured's business activity of providing home day care services.

*Liberty Mut. Fire Ins. Co. v. Clayton*, 33 F.4th 442 (7th Cir. 2022).

## **Workers Compensation Act's Exclusive Remedy Provision Does Not Protect Payor of Benefits if Payor is Not Also the Direct Employer**

Dusting off the decision of *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill.2d 437 (1976), the Illinois Supreme Court in *Munoz v. Bulley & Andrews, LLC.*, held that a company related to the employer of an injured worker was not entitled to immunity from civil suit by the injured worker, even though it paid all the workers compensation benefits owed by the employer. Bulley & Andrews, LLC., was the general contractor on a building project in Chicago. Bulley & Andrews LLC purchased Bulley Concrete approximately six years before the occurrence, and operated the subsidiary as a separate company. Bulley Concrete had a separate board of directors, separate tax ID, and filed separate tax returns. Bulley & Andrews, LLC., did not enter into a subcontract with Bulley Concrete for the project.

Pointing to *Laffoon*, the Illinois Supreme Court made clear that “immunity does not hinge on the payment of benefits.” In reversing the lower court decisions, without a dissent, the Supreme Court noted that “the exclusive remedy provisions under section 5(a) and 11 of the Act do not extend to a general contractor who is not the employee’s immediate employer.” It held that the general contractor was not entitled to immunity from the underlying personal injury suit brought by the subsidiary’s employee.

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

## **Automotive Exclusion in CGL Policy Did Not Eliminate Coverage Where Underlying Suit Alleged that Insured Failed to Ensure Public Safety**

In *Nationwide Prop. & Cas. Ins. Co. v. State Farm Fire & Cas. Co.*, the Illinois Appellate Court, First District, ruled that an automotive exclusion in a CGL policy did not extinguish State Farm’s duty to defend and indemnify a sub-subcontractor in an underlying wrongful death lawsuit because one of the counts in the underlying complaint contained allegations of “public safety failures” that did not refer to the use of a motor vehicle. The underlying lawsuit was brought on behalf of the estate of a 13-year-old boy who was fatally struck by a dump truck being driven by an employee of Davis Concrete Construction Co. (“Davis Concrete”). Davis had entered into a contract with RJ&R Trucking & Excavating, Inc. (“RJ&R”) to perform work at a construction site.

At the time of the accident, RJ&R was insured under an automobile liability policy issued by State Farm and a CGL policy that also was issued by State Farm. The CGL policy contained an exclusion for bodily injury arising out of the ownership, maintenance, or use of a motor vehicle. Davis Concrete was covered under a CGL policy issued by Nationwide and was an additional insured on RJ&R’s CGL policy. On behalf of RJ&R, State Farm exhausted the limits of its automobile liability by contributing \$3 million to a settlement of the underlying suit. State Farm denied coverage to Davis Concrete as an additional insured on RJ&R’s CGL policy. According to State Farm, an automotive exclusion on the CGL policy precluded coverage because the underlying fatality arose out of the use of a dump truck.

Nationwide, on behalf of Davis Concrete, contributed \$400,000 to the settlement and then brought a declaratory judgment action against State Farm. Nationwide alleged that State Farm should have defended and indemnified Davis Concrete as an additional insured under RJ&R’s CGL policy because the underlying complaint included an allegation that Davis Concrete “[f]ailed to take adequate precautionary measures to ensure public safety, including use of a flagman at the aforesaid intersection.” Nationwide argued that this allegation did not necessarily implicate the use of the dump truck and, therefore, triggered coverage under the CGL policy. The trial court found that State Farm had no duty to defend Davis Concrete in the underlying suit because coverage was precluded by the automotive exclusion in the CGL policy and, consequently, Nationwide was not entitled to indemnification for the settlement.

On appeal, the appellate court agreed with Nationwide that the automotive exclusion did not preclude coverage under the State Farm CGL policy because the allegation regarding the failure to ensure public safety was outside the scope of the automotive exclusion. The allegation claimed that the child’s death arose from a cause entirely independent of the motor vehicle, namely Davis Concrete’s failure to take adequate precautionary measures to ensure public safety, including the use of a flagman in the construction area. Because State Farm had wrongfully refused to defend and indemnify Davis Concrete without filing a timely declaratory judgment action, the court also held that State Farm was estopped from denying coverage for the underlying settlement.

*Nationwide Prop. & Cas. Ins. Co. v. State Farm Fire & Cas. Co.*, 2022 IL App (1st) 210267.

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## Self-Insured Retention Did Not Make Retailer an Insurer

In *North American Elite Ins. Co. v. Menard, Inc.*, North American, an excess insurer, sued Menard, Inc., for breach of contract, breach of duty to settle, and declaratory judgment. The suit stemmed from a \$13 million personal injury verdict, later reduced to \$6 million pursuant to a high-low agreement. Menard paid its \$2 million self-insured retention, Greenwich Insurance Company paid its \$1 million layer of primary insurance, and North American paid the remaining \$3 million. North American reserved its right to reimbursement.

The overarching issue in North American's subsequent suit against Menard was whether Menard violated duties owed to North American when Menard refused to settle the case within its self-insured retention and instead proceeded to trial. North American argued that Menard's self-insured retention made Menard an insurer, subjecting Menard to additional responsibilities not owed by a traditional insured. The district court dismissed the claims and the excess insurer appealed.

The Seventh Circuit disagreed with the excess insurer and affirmed, holding that Menard's self-insured retention "did not make it an 'insurer' subject to additional responsibilities to its excess insurer when it rejected the settlement of the underlying action . . . . The amount of the self-insured retention was Menard's responsibility regardless of the circumstances. In other words, 'Menard had a \$2 million deductible.'" The court then examined whether Menard had a contractual obligation to settle the case for North American's benefit. Menard's policy with Greenwich (Menard's primary insurer) provided Greenwich with the right to "assume control of the defense or settlement" if, in Greenwich's reasonable judgment, the suit "may result in payments . . . in excess of the Self-Insured Retention . . . ." But North American's policy did not contain a "follow-form" provision, which would have incorporated the Greenwich policy language. North American's policy instead included provisions giving North American the "right, but not the duty, to participate in the defense," and requiring Menard to "[c]ooperate . . . in the investigation, settlement or defense" of the suit. North American had no contractual right to control the defense or settlement of the underlying matter, and North American did not allege a failure to cooperate.

While the Greenwich primary policy required Menard to act in good faith toward reaching settlements within the self-insured retention, the language in the North American excess policy was not as expansive: "Contractual duties are not good as against the world." And while North American argued that "the duty of good faith and fair dealing implied in all Illinois contracts required Menard to give it the same consideration that Menard promised to Greenwich[,] . . .

equating the two duties would disregard the difference in the policies' language." The court concluded that "[t]he duty of good faith does not transmute North American's actual insurance policy into one it would have preferred in hindsight." Menard did not violate any express or implied duties it owed to its primary or excess insurers under the primary liability policy by rejecting the settlement.

*North American Elite Ins. Co. v. Menard, Inc.*, 43 F.4th 691 (7th Cir. 2022).

## No Duty to Defend Consumer Fraud Act Claim Under Intentional-Acts Exclusion

In *Owners Ins. Co. v. Don McCue Chevrolet, Inc.*, the Illinois Appellate Court, Second District, addressed whether the application of an insurer's intentional-acts exclusion applied to avoid a defense obligation. The insured, Don McCue Chevrolet, was sued in a one-count complaint for violation of the Consumer Fraud and Deceptive Business Practices Act ("Act") (815 ILCS 505/1 *et seq.*). Plaintiff in the underlying suit alleged Don McCue Chevrolet entered into a written retail installment sales contract and accepted \$5,000 towards the purchase of a vehicle, but that when the dealership was unable to assign financing, it refused to return the \$5,000 down payment. The dealership tendered the suit to Owners, seeking defense reimbursement. The tender was made under a Customer Complaint Defense Reimbursement Coverage extension which provided that Owners would reimburse the insured for reasonable costs and expenses incurred in defending against a "customer complaint suit." Owners denied the tender, relying upon the intentional-acts exclusion. Owners argued that "any suit resulting from actual or alleged criminal, malicious or intentional acts" was excluded, and the exclusion applied here because the underlying suit only alleged fraudulent conduct and fraud was an intentional tort under Illinois law. On cross-motions for summary judgment, the trial court denied the insurer's motion and granted the insured's motion, ruling that the insurer had a duty under the defense-reimbursement provision to provide coverage for the dealership's expenses incurred in defending the underlying lawsuit. In doing so, the court relied, in part, on the dealership's answer and other materials in the underlying lawsuit.

The Second District reversed and remanded. It first concluded that the intentional-acts exclusion applied to intentional misconduct because the word intentional was accompanied by "criminal" and "malicious," both of which denoted "misconduct." The court next determined that the underlying lawsuit alleged only intentional misconduct despite the complaint not specifically alleging "intentional" or "willful" misconduct, because the Act specifically prohibits

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## Survey of 2022 Insurance Law Cases (Continued)

unlawful practices and because the allegedly “refused” to adhere to the agreement and “refused” to adhere to the Act. “Refuse,” noted the court, “clearly implied intentional or willful misconduct.” The trial court erred in considering the dealership’s answer. The answer denied liability but invoked no exception to the intentional-acts exclusion that would make it inapplicable.

*Owners Insurance Company v. Don McCue Chevrolet, Inc.*, 2022 IL App (2d) 210634.

### All-Risk Commercial Property Policies Did Not Cover COVID-19 Claims

In *Paradigm Care & Enrichment Center, LLC v. West Bend Mutual Insurance Company*, Paradigm filed a claim for loss of income from the childcare centers it operated in Illinois and Michigan due to the COVID-19 closure orders. The governors of both of states issued orders directing all persons living in-state to stay at home except to perform specified essential activities and ordered non-essential businesses to cease all but minimum basic operations. While these restrictions were in place, the daycare centers suspended operations.

The centers, whose insurance policies were virtually identical, filed claims under various sections of their all-risk commercial property insurance policies. The first three were the “Business Income, Extra Expense” and Civil Authority sections. Each of these sections covered the actual loss of income due to the suspension of an insured’s operations “caused by direct physical loss of or damage to property.” The centers argued that “direct physical loss” did not require material, tangible, or corporeal alteration of the property and that “direct physical loss” was broad enough to describe the circumstances where the COVID-19 virus was present in the air and had attached to the surfaces of property, rendering their premises dangerous and unusable, thereby constituting a physical loss. The district court dismissed their claims.

On appeal, the Seventh Circuit held that “direct physical loss” in a commercial property insurance policy requires a physical alteration to property—that is, some alteration in appearance, shape, color or other material dimension as no direct physical loss or damage was alleged in the complaint, there was no coverage under this provision. The centers also argued that coverage should be provided under the Communicable Disease provision of the policy, which covers lost income and extra expenses if a government entity shuts down the business operations due to an outbreak of communicable disease at the insured premises. The court noted that unlike the provisions of the Business Income and Extra Expense provisions, this provision did not turn on the existence of physical loss or damage. The

centers argued they were entitled to coverage because they alleged that the shutdown orders were issued in response to the COVID-19 pandemic and necessarily were directed at their individual premises in Illinois and Michigan. The Seventh Circuit disagreed, finding that the phrase “due to” clearly requires some degree of causation between a shutdown order and a communicable disease outbreak “at the insured premises.” The executive orders that closed the premises were general prophylactic measures taken to stop the spread of the virus and were not issued because of a COVID-19 outbreak at the centers. Therefore, there was no coverage under this section. Finally, the centers argued that coverage should be afforded pursuant to the Sue & Labor Section of the policy. The court noted that this provision is actually titled “Duties In The Event of Loss or Damage” and specifies certain things that an insured is obligated to do when seeking reimbursement for covered losses or expenses. The court held that this provision did not itself establish coverage but rather imposed obligations on the insured seeking coverage outlined elsewhere in policy.

*Paradigm Care & Enrichment Center, LLC v. West Bend Mutual Insurance Company*, 33 F.4th 417 (7th Cir. 2022).

### Department of Insurance Has Jurisdiction Over Rating Dispute Involving Uninsured Subcontractors

The Illinois Supreme Court in *Prate Roofing and Installations, LLC v. Liberty Mut. Ins. Corp.*, rejected the determination of the Illinois Appellate Court, First District, that the Department of Insurance could not decide a ratings issue that arose in an assigned-risk plan workers compensation policy. There, the employer, which held workers’ compensation coverage through the Illinois assigned-risk plan in the risk pool administered by the National Council on Compensation Insurance (NCCI), sought administrative review of the decision of the Department of Insurance, which upheld the insurer’s determination that the failure of one of the insured’s subcontractors to maintain workers’ compensation insurance required the insured’s payment of additional premiums. The appellate court held that the Department of Insurance did not have the authority to resolve a private dispute and vacated the Department of Insurance’s final order and the order of the trial court affirming it.

On further appeal, the Illinois Supreme Court reversed the appellate court and remanded for further proceedings. The Department of Insurance’s resolution of the dispute between the insured and the insurer fell within the scope of the authority granted by section 462

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## Survey of 2022 Insurance Law Cases (Continued)

of the Insurance Code, which provided for the review of the manner in which a rating system was applied in connection with a party's insurance. The supreme court rejected the appellate court's holding that the dispute was private and involved the determination of employment status. Instead, the dispute involved rating, because the assigned-risk insurer had applied a rating provision and determined that the insured owed \$127,305 in additional workers compensation premium based on a rule of the basic manual of the plan, and the insurer calculated the additional premium due pursuant to tables accompanying that rule. The court cited decisions from the Supreme Courts of Idaho and Iowa for the proposition that the determination of additional premium following premium audits of insureds in an assigned-risk pool was a rating issue, and thus within the Department's jurisdiction.

*Prate Roofing and Installations, LLC v. Liberty Mutual Insurance Corporation*, 2022 IL 127140.

### **Assignment of Rights Satisfies “Written Agreement” Requirement to Grant Assignee Additional Insured Status Under Contractor's Additional Insured Endorsement**

The Illinois Appellate Court, First District, in *Secura Ins. v. Phillips 66 Co.*, held that an assignment of rights in a Master Service Agreement (“MSA”) satisfied the “written agreement” requirement to establish additional insured status to an assignee. Premier Insulation, LLC entered into a Master Service Agreement with ConocoPhillips to perform work at its Wood River Refinery. The MSA required Premier to add ConocoPhillips as an additional insured on its policy. Under the policy, “additional insureds” included persons or organizations that Premier added through a written agreement. ConocoPhillips then spun off its refining business and assigned the MSA to Phillips 66. ConocoPhillips informed Premier of the assignment, and Premier later performed work for Phillips 66 under a written compensation agreement, which referenced and incorporated the MSA. After the assignment, a Premier employee sustained injuries at the Wood River Refinery and sued Phillips 66, which tendered its defense of the underlying suit to Premier's insurer, Secura. Secura reserved rights and filed a declaratory judgment action, arguing that (1) Premier and Phillips 66 did not have a written agreement requiring additional insured coverage for Phillips 66, and (2) Secura's policy limited coverage to injuries caused “in whole or in part” by Premier or those acting on its behalf, but Premier was not a named defendant in the underlying litigation. The trial court held

that ConocoPhillips's assignment of the MSA to Phillips 66 did not satisfy the requirement of a “written agreement” in the additional insured endorsement.

The appellate court reversed and remanded. With respect to the first question, the court held that Secura owed a defense to Phillips 66 as assignee. The court found that the refinery operator's assignment of its rights satisfied the requirement for a “written agreement” because the assignment of the MSA was a contract between the assignor (ConocoPhillips) and the assignee (Phillips 66). Further, the MSA provided that Premier would indemnify the “company” which became Phillips 66 after the assignment. Additionally, evidence of a contract was found in the compensation agreement between Premier and Phillips 66, which referenced and incorporated the MSA. Thus, because the Secura policy determined additional insured status by the persons or organizations Premier was required to add as additional insureds through written agreement, Phillips 66 qualified as an additional insured. The court quickly dispensed with Secura's second argument, finding that the complaint's silence as to the acts or omissions of the named insured “must be understood as the possible result of tort immunity for employers,” and thus not a valid basis for refusing to defend Phillips 66 as an additional insured.

*Secura Insurance v. Phillips 66 Company*, 2022 IL App (1st) 210069.

### **Professional Services Exclusion Did Not Eliminate Coverage for Fire Loss Caused by Heating Pipes with a Torch**

In *Stonegate Ins. Co. v. Smith*, 2022 IL App (1st) 210931, the Illinois Appellate Court, First District, held that a professional services exclusion in a homeowner's insurance policy did not eliminate coverage for fire damage that occurred when a carpenter performing plumbing work at a townhouse used a torch to heat the pipes he was working on, causing fire to spread upstairs to an adjacent unit.

The carpenter was insured under a homeowner's liability policy that excluded coverage for property damage “[a]rising out of the rendering of or failure to render professional services.” The insurer filed a declaratory judgment action, alleging that it had no duty to defend or indemnify due to the professional services exclusion in the policy. The trial court found that the loss was covered.

The appellate court affirmed, rejecting the insurer's argument that the loss did not arise out of excluded “professional services.” Noting that the term “professional services” encompasses any business activity conducted by an insured that involves specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual in nature, the court found that heat-

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## Survey of 2022 Insurance Law Cases (Continued)

ing the pipes was not a professional service. As the court explained, “[i]t would defy common sense to contend that using a flame to heat pipes is a predominantly mental or intellectual endeavor.” As such, the heating of the pipes did not constitute a “professional service” and the exclusion did not apply to preclude coverage.

*Stonegate Ins. Co. v. Smith*, 2022 IL App (1st) 210931.

### **COVID-19 and Pandemic-Triggered Executive Orders Fail to Establish Direct Physical Loss or Damage to Property**

In *Sweet Berry Café v. Soc’y Ins. Inc.*, the Illinois Appellate Court, Second District, confirmed that COVID-19 related coverage of business income and extra expense claims must relate to direct physical loss or damage to the covered property as listed within the policy provisions. The plaintiff appealed a judgment on the pleadings entered against it after it unsuccessfully sued for declaratory judgment seeking coverage under “Business Income,” “Extra Expense” and “Civil Authority” insurance policy provisions regarding alleged “direct physical loss of or damage” to property as a result of COVID-19. The plaintiff also alleged that it incurred covered losses resulting from the Governor’s executive order, which prohibited in-person dining.

The Second District affirmed, holding that the policy unambiguously required a physical alteration or substantial dispossession of the covered property rather than mere loss of use. Simply suffering economic loss was not enough. The policy defined “physical” as “having material existence...” and “of or relating to material things.” The court also noted that its interpretation of the term “physical injury to tangible property” was consistent with the Illinois Supreme Court’s interpretation of that term in *Traveler’s Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278 (2001).

*Sweet Berry Café, Inc. v. Society Insurance, Inc.*, 2022 IL App (2d) 210088.

### **Insurer’s Complaint Seeking Declaration of Nonliability for Previous Rejection of Insured’s Demand for Appraisal Was Not a Proper Subject for a Declaratory Judgment**

In *Travelers Indemnity Company of America v. Townes of Cedar Ridge Condominium Association*, the Illinois Appellate Court, Third District, affirmed the dismissal of Travelers’ declaratory judgment complaint, finding no actual controversy, after Travelers

A declaratory judgment action is not the vehicle for a declaration of nonliability for past conduct, as it deprives the potential plaintiff of the right to determine whether to file suit, and, if so, when and where.

rejected the insured’s appraisal demand. In 2019, a condominium association, Cedar Ridge, informed Travelers that its buildings suffered hail damage two months earlier. Travelers inspected the property, found some hail damage to gutters, downspouts, air conditioning units, and one roof shingle, and determined the rest of the damage was from ordinary wear and tear, and excluded from coverage. Travelers issued a check for the undisputed amount of \$17,140.88 and denied the remainder of the claim. Cedar Ridge then provided a repair estimate of \$2,078,657.08 to Travelers and demanded an appraisal under a policy provision which allowed either party to demand an appraisal if there was a disagreement on the property value or the amount of the loss. Travelers rejected the appraisal demand on the basis that it had denied the remainder of Cedar Ridge’s claim because it found no wind or hail damage to the buildings, not because it disagreed with the amount of loss. According to Travelers, Cedar Ridge was disputing coverage, which was precluded under the appraisal provision. Travelers filed a declaratory judgment action. Cedar Ridge moved to dismiss the complaint, which the trial court granted.

In affirming the dismissal, the appellate court noted that one of the elements of a declaratory judgment action is an actual controversy between the parties concerning the plaintiff’s tangible, legal interest. While the court found that Travelers had a tangible legal interest in “upholding the provisions of its insurance policy, including rejecting Cedar Ridge’s appraisal request,” and that Cedar Ridge had an opposing interest in that it wanted to use the appraisal process, the court also found that there was no actual controversy between the parties. In that respect, the court noted that once Travelers denied Cedar Ridge’s request for an appraisal, there was no longer an actual controversy regarding the applicability of the appraisal provision. The court rejected Travelers’ arguments that (1) the coverage issue regarding hail damage was in limbo because Cedar Ridge never withdrew its appraisal request, and (2) a declaration would guide the parties’ future conduct regarding the appraisal process. A declaratory

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judgment action is not the vehicle for a declaration of nonliability for past conduct, as it deprives the potential plaintiff of the right to determine whether to file suit, and, if so, when and where. The court noted that had Travelers wanted guidance on the scope of the appraisal provision, it should have sought a declaration prior to denying Cedar Ridge's appraisal request. Once Travelers denied the appraisal request, Cedar Ridge did not need to do anything further other than to file a breach of contract action.

*Travelers Indemnity Company of America v. Townes of Cedar Ridge Condominium Association*, 2022 IL App (3d) 200542.

### **“Reasonable Belief” Exclusion Applies to Driver with Graduated Driver’s License who Violates the Restrictions Placed on License**

In *United Equitable Insurance Company v. Calhoun*, the Illinois Appellate Court, First District, addressed a coverage dispute over liability coverage and the applicability of an exclusion, which provided that the policy did not apply to “any person operating the owned automobile or a non-owned automobile without a reasonable belief that he or she is entitled to do so.” United Equitable Insurance Company’s (UEIC) insured, a 16-year old, was driving his mother’s Chevy Impala two weeks after receiving his graduated driver’s license and drove into a light pole while he had five passengers under the age of 20 in his car. The 16-year old was driving the vehicle in violation of the graduated licensing statute and the Illinois Vehicle Code, both of which prohibited him from driving with more than one passenger in the front seat and more passengers in the back seats than the number of available safety belts. The graduated licensing statute imposed other conditions on his license, including that he could not operate a vehicle with more than one passenger under the age of 20, excluding siblings, stepsiblings, children, or stepchildren of the driver. One of those passengers made a claim for injuries against the driver and UEIC denied liability coverage relying on its “reasonable belief” exclusion.

Specifically, UEIC argued that the driver was legally prohibited from driving with more than one passenger under the age of 20 and that he could not have had reasonably believed he was allowed to drive with five such passengers. UEIC argued therefore that there was no liability coverage available to either the teenage driver or his mother. Neither the driver nor his mother participated in the declaratory judgment action, but the injured passenger argued that applying the exclusion to a permissive passenger would violate public policy and that there were issues of fact as to what the teenage driver knew or believed. The trial court rejected those arguments, finding that

UEIC had no duty to defend or indemnify either the teenage driver or his mother.

The First District affirmed the finding of no liability coverage based on the “reasonable belief” exclusion. Noting that the case involving the “reasonable belief” exclusion and a driver with a graduated driver’s license was one of first impression, the court held that the insurer owed no duty to defend or indemnify the driver or his mother where the facts were undisputed and he had no legal right to drive the car which contained seatbelts for four passengers and the car had five passengers who were all under 20 years of age. The undisputed facts showed that the teenage driver was not allowed to drive the vehicle under these circumstances in conformity with the state’s public policy to protect young drivers.

*United Equitable Insurance Company v. Calhoun*, 2022 IL App (1st) 210525.

### **Insurer Had a Duty to Defend Claims Against USA Gymnastics Despite “Wrongful Conduct” Exclusion**

USA Gymnastics (USAG), the non-profit organization that was the national governing body of gymnastics in the United States, was forced into Chapter 11 bankruptcy as a result of litigation and investigations related to sexual assault of hundreds of young women committed under the guise of medical treatment by Larry Nassar, a former gymnastics team doctor, over decades. USAG brought a declaratory judgment action against its insurer, Liberty Insurance Underwriters, Inc. (Liberty), seeking a ruling that it was owed coverage under its claims-made directors and officers (D&O) liability insurance policy for the investigations as well as the lawsuits. The case was removed to federal court where the parties filed cross-motions for summary judgment. The bankruptcy court made proposed findings of fact and conclusions of law, finding that Liberty had a duty to defend most of the underlying claims. Liberty filed objections, which the district court overruled, adopting the proposed findings and conclusions of the bankruptcy court. Liberty appealed.

The Seventh Circuit affirmed in part, reversed in part, and remanded. The parties agreed that Indiana substantive law controlled. The Seventh Circuit held that the claims were timely made within the policy period under the claims-made policy and rejected Liberty’s argument that coverage should be excluded because the initial Nassar-related claims were made before the inception of the Liberty policy period. The Seventh Circuit agreed with USAG that the FBI’s interview of two athletes at the request of USAG before the policy inception did not constitute a formal investigation. The

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## Survey of 2022 Insurance Law Cases (Continued)

policy deemed a claim made only once “an Insured receives a written demand, complaint, indictment, notice of charges, or order of formal investigation.” The FBI’s interview of one athlete twice, at USAG’s request, was not “any of those things.”

The Seventh Circuit also analyzed the wrongful conduct exclusion in the policy. The exclusion (also called an intentional-acts exclusion) barred coverage for claims “made against any **Insured**” “based upon, arising from, or in any way related to” “any deliberately dishonest, malicious, or fraudulent act,” “or any willful violation of law by any **Insured**,” provided such conduct was “finally adjudicated” and “in fact occurred.” The Seventh Circuit found that the phrase “in any way related to” in the wrongful conduct exclusion was so broad that it should not be taken literally and . The Seventh Circuit concluded that the phrase “in any way related to” was ambiguous as applied to these facts and, therefore, should be construed in favor of the insured. The “final adjudication” requirement was strictly construed and the wrongful conduct exclusion applied only to ten claims on which Nassar pled guilty to a sexual crime and was finally adjudicated, and not to other claims, including claims which had been settled, for which Liberty had to provide coverage. The Seventh Circuit also found that the bodily injury exclusion did not relieve Liberty of its duty to defend the athlete lawsuits to the extent the claims sought recovery for emotional distress and/or mental anguish.

*USA Gymnastics v. Liberty Ins. Underwriters, Inc.*, 27 F.4th 499 (7th Cir. 2022).

### **Insurer Not Liable for Failure to Settle Within the Policy Limits**

Plaintiff was injured in an altercation at a club and brought a personal injury lawsuit against the club’s owner. The club owner was insured by defendant Illinois Casualty Company (ICC) with a policy limit of \$1,000,000. Plaintiff made a settlement demand of \$1,000,000 asserting that, if rejected and an excess judgment was returned, he would assert a claim for the full amount of the judgment against the club owner and his insurer. ICC rejected the demand and proceeded to jury trial. Plaintiff won a judgment of \$2,000,000.

As part of a post-judgment settlement agreement, the club owner assigned any potential claims he had against ICC to the plaintiff, who then brought suit against ICC, alleging ICC breached its duty of good faith and fair dealing to its insured by rejecting a settlement offer within the policy limits. Plaintiff sought to recover the excess judgment plus costs, interest, and statutory damages for ICC’s alleged “vexatious and unreasonable” behavior. The trial court

granted ICC’s section 2-615 motion to dismiss the fourth amended complaint, and.

The Appellate Court First District affirmed. To state a cause of action for failure to settle, a plaintiff must allege that (1) a third party demanded settlement within the policy limits, (2) there was a “reasonable probability” of a finding of liability against the policyholder, and (3) there was a “reasonable probability” of recovery in excess of the policy limits. An insurer that fails to settle under such circumstances is liable for the full amount of a judgment against the policyholder, regardless of the policy limits. Here, taking the allegations of the complaint as true, and viewing them in the light most favorable to plaintiff, the complaint properly alleged facts identifying the “reasonable probability” of a finding of liability against the policyholder. That said, the complaint, incorporating plaintiff’s demand in the underlying suit, did not sufficiently allege the “reasonable probability” of an excess judgment. Bare conclusions of law or conclusory factual allegations unsupported by specific facts are insufficient to withstand a section 2-615 motion to dismiss. Plaintiff alleged no facts that would identify an excess judgment as being reasonably probable aside from his subjective characterization of his injury as “grievous” and his unsupported, conclusory assertions that his “loss of normal life,” “pain and suffering,” and “permanent disfigurement” were likely to result in a judgment over \$1,000,000.

Neither did the plaintiff allege facts that would show ICC rejected his settlement demand in bad faith. “Bad faith” consists of failing to give at least equal consideration to the insured’s interests in deciding whether to settle a claim. Relevant factors in making such determination include (1) potential for an adverse verdict, (2) potential for damages in excess of policy limits, (3) refusal to negotiate, (4) communication with the insured, (5) adequate investigation and defense, and (6) advice of the insurance company’s own adjusters and defense counsel. Plaintiff did not allege that ICC refused to negotiate; on the contrary, after he made his settlement demand, ICC made a counteroffer to which plaintiff did not respond. ICC then indicated its willingness to double that offer. Plaintiff also made no allegations regarding the adequacy of ICC’s investigation and defense or the advice of ICC’s adjusters and counsel. The trial court properly dismissed his claim for breach of the duty of good faith and fair dealing. In the absence of “fraud, negligence, or bad faith,” an insurer cannot be held liable for failing to settle within the policy limits even if an excess judgment is rendered against the policyholder.

*Valdez v. Illinois Casualty Company*, 2022 IL App (1st) 201121-U.

— Continued on next page

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## Survey of 2022 Insurance Law Cases (Continued)

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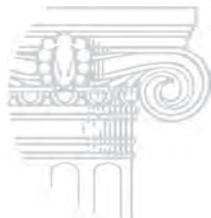


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# Survey of Labor and Employment Law Cases

## Plaintiff Fails to Identify Proper Comparator and Cannot Survive Summary Judgment

In *Abebe v. Health & Hospital Corp. of Marion County*, a Black woman of Ethiopian origin claimed she was discriminated against based on her race and national origin in violation of Title VII and Section 1981 when she received a low rating on her performance review that resulted in her not receiving a merit-based raise and was placed on a Performance Improvement Plan. The plaintiff began working for the employer in 2014 as an expanded function dental assistant. Her annual reviews documented a history of behavior problems throughout her employment. Employees received scores from 0 (unsatisfactory) to 4 (outstanding) on their reviews. Between 2014 and 2017, Plaintiff was disciplined for arguing with a co-worker, and was told to work on her personal issues that affect her interaction with her co-workers, balance her personality, and not react so severely to negative events. Her highest evaluation was a 2.27.

In 2018, Plaintiff was still struggling with her communications skills. Earlier that year, she accused a white dental hygienist of deliberately leaving out an open needle for her to clean. Later she claimed a dentist pushed her and communicated rudely with her. Finally, Plaintiff alleged that the other expanded function dental assistant, who was Hispanic, had better access to equipment because it was kept in her office. Plaintiff received a score of 1.43 and the clinic manager told her that she needed to “solve conflict the proper ways without becoming personal to others” and “address issues properly in a respectful manner to others.”

In March 2019, the employer announced merit-based pay raises for all employees who received a 2.0 or higher on the 2018 performance evaluation. Plaintiff was not eligible for the raise. In September 2019, Plaintiff went to the EEOC and received a PIP later that month. The parties dispute whether the PIP was issued or merely discussed, but it was undisputed that Plaintiff never received a written PIP.

The analysis for discrimination and retaliation under Title VII and Section 1981 is the same. To survive summary judgment, the plaintiff in a Title VII discrimination suit must first establish a prima facie case of discrimination by showing that: (1) she is a member of a protected class, (2) she was meeting the employer’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 back 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.

The court found Plaintiff failed to identify a proper comparator. Plaintiff compared herself to the Caucasian dental assistant who, like plaintiff, got into a physical altercation with the dentist, and the Hispanic expanded function dental assistant who was not subject to the same check-out protocol for the dental equipment as Plaintiff. Neither of these comparators received a negative performance review. Plaintiff focused on the wrong features, precluding a meaningful comparison. The court explained that Plaintiff received low scores on her performance reviews not because she was involved in the same incidents with her non-Black co-workers, but because she addressed them in a confrontational way. Plaintiff did not believe that she behaved disrespectfully, but disagreement with her supervisor’s assessment does not establish pretext.

Plaintiff also failed to survive summary judgment on her retaliation claim because PIPs, without more, are not adverse employment actions and plaintiff failed to establish causation since the PIP was ultimately dropped.

*Abebe v. Health & Hosp. Corp. of Marion Cnty.*, 35 F.4th 601 (7th Cir. 2022).

## Amendment of The Victims’ Economic Security and Safety Act (VESSA) Protection for Extended Family and Expansion of Covered Crimes

The Victims’ Economic Security and Safety Act was enacted in 2003 and was amended through the years to protect employees who are victims of domestic, sexual or gender violence. The Act allows the victims of such crimes, including family or household members leave to seek medical assistance for physical or psychological injuries, legal assistance, counseling or services from a victim’s service organization, or safety planning including temporary or permanent relocation or other assistance. 820 ILCS 180/20 (a) (1).

The Act prohibits employers from discriminating against or taking adverse action against employees or their family members who take leave under the Act. Effective January 1, 2023, Public Act 102-0487 expands the definition of “family,” allowing a spouse of a civil union, grandparent, child, grandchild, sibling, any person related by prior or present civil union and any other person who shares a relationship through a child or any other individual whose close association with the employee is equivalent of a family relationship determined by the employee. 820 ILCS 180/10 (12). The employee can take the leave consecutively, intermittently or on reduced work schedule. 820 ILCS 180/20 (a)(3).

Also effective January 1, 2023, VESSA requires an employer to allow leave for any crimes of violence, including any conduct under the Criminal Code of 2012 or similar provision of the Code of 1961 under

- Article 9, Homicide;
- Article 11, Sexual Offenses;
- Article 12, Bodily Harm
- Article 26.5, Harassing and Obscene Communication
- Article 29D, Terrorism; and
- Article 33A, Armed violence. 720 ILCS 5/9, 11, 12, 26.5, 29D, 33A.

The employee must provide 48 hour notice of leave, unless providing notice is not practicable. 820 ILCS 180/20 (b). Upon request from the employer, the employee should provide certification that the employee or a family member is a victim of violence as defined under the Act. 820 ILCS 180/20 (c)(1). An employee can satisfy the employer’s request for certification by providing a sworn statement and if the employee has possession of such documents, a police record or documents from a lawyer or victims services. 820 ILCS 180/20 (c)(2) (A) (B). The employee can choose which document to submit and the employer cannot require more than one document to be submitted during the twelve (12) month period leave is requested or taken if related to the same incident of violence or same perpetrators.

An employer is prohibited from discriminating against any employee who is perceived to be a victim of domestic, sexual, gender or any other crime of violence or with a family or household member who is perceived to be a victim of this same violence. 820 ILCS 180/30 (b) (1) (B) (i-ii) All information provided to the employer pursuant to the Act, including any statements that the employee requested or received an accommodation, must be retained in strict confidence, except if requested in writing by the employee or otherwise required by applicable federal or state law. 820 ILCS 180/30 (d)(1-2)

## Amendments to Nurse Agency Licensing Practices Act Preclude Noncompete Agreements, Increased Reporting Requirements

Effective July 1, 2022, amendments to the Nurse Agency Licensing Practices Act (Act) places greater restrictions on nurse staffing agencies and imposes additional reporting requirements. Under the Act, staffing agencies are barred from entering into non-compete agreements with nurses and certified nurse aids (CNAs). 225 ILCS 510/14(g). Any non-compete agreement executed on or after July 1, 2022, is now illegal and void. *Id.* In addition, agencies cannot, in any contract with either an employee or health care facility, require the payment of liquidated damages, conversion fees, employment fees, buy-out fees, placement fees, or other compensation in the event an employee obtains permanent employment with a health care facility. *Id.*

Each staffing agency must also ensure its employees meet the minimum licensing, training, continuing education, and orientation standards for which they are licensed or certified, and maintain a nurse to serve as a manager or supervisor of all nurses and CNAs. 225 ILCS 510/14(b)-(c). When it comes to recruitment, nurse staffing agencies are prohibited from recruiting potential employees on the premises of a health care facility or requiring, as a condition of employment, assignment, or referral, that their employees recruit new employees for the nurse agency from among the permanent employees of a health care facility. 225 ILCS 510/14(f). Any violation of this provision constitutes a business offense. *Id.*

Nurse staffing agencies must adhere to additional reporting requirements. For example, executed contracts between the nurse agency and health care facility to which it assigns or refers nurses or CNAs must be sent to the Illinois Department of Labor (IDOL) within 5 business days of their effective date and provide to the IDOL copies of all invoices to health care facilities with full disclosure of the charges. 225 ILCS 510/14(a)(2). Quarterly, each nurse agency must submit a report to the IDOL (via an online portal) for each health care entity with whom it contracts that contains the following information by provider type and county in which the work was performed:

- (1) A list of the average amount charged to the health care facility for each individual employee category;
- (2) A list of the average amount paid by the agency to employees in each individual employee category; and
- (3) A list of the average amount of labor-related costs paid by the agency for each employee category, including payroll

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## Survey of 2022 Labor and Employment Law Cases (Continued)

taxes, workers' compensation insurance, professional liability coverage, credentialing and testing, and other employee related costs.

On an annual basis, the IDOL will then publish, both on its website and in each county in which work was performed, the average amount charged to health care facilities by nurse agencies for each individual worker category and the average amount paid by the agency to each individual worker category. 225 ILCS 510/14(h)-(i). Finally, nurse and CNA's wages must match the wage amount listed in the nurse staffing agency contract. Agencies must pay employees 100 percent of the salary listed in their contracts. 225 ILCS 510/14(a) (3). Nurse staffing agencies and health care facilities should immediately review their existing and potential contracts to ensure they comply with these changes that are now in full force and effect.

### **Chicago Employers: Notable Amendments to Chicago's Sexual Harassment Ordinance**

The City of Chicago amended its sexual harassment Ordinance on April 27, 2022, with changes that took effect on July 1, 2022. The amended Ordinance imposes new training, recordkeeping, written policy language requirements, and increases penalties for violations. Inconsistencies between the new Ordinance and existing law also create questions.

The definition of "sexual harassment" now includes "sexual misconduct," which is defined as "any behavior of a sexual nature which also involves coercion, abuse of authority, or misuse of an individual's employment position." This adds to the Illinois Human Rights Act's (IHRA) definition of sexual harassment found at 775 ILCS 5/2-101(E). All Chicago employers are now required to annually provide one hour of sexual harassment prevention for all employees, or two hours for supervisors and managers as well as one hour of "bystander" training for all employees.

Notably, the Ordinance states employers can use the training module created by the Illinois Department of Human Rights (IDHR) as part of the IHRA's sexual harassment prevention training, but that creates inconsistencies with the Ordinance that will need clarification. First, it is unclear whether the training employers are required to provide to comply with Illinois law also complies with the Ordinance. Second, the State of Illinois' training module is merely a self-executing PowerPoint that simply narrates the slides created by the IDHR. The module takes about 40 minutes to watch, which would not be compliant with the Ordinance's one-hour requirement.

Third, the IDHR's module provides the definition of sexual harassment found in Illinois law, which does not include the newly

added portion to the City's definition pertaining to "sexual misconduct." Fourth, the State of Illinois training module does not include instructions for filing claims with the Chicago Commission on Human Relations (CCHR), which is included in the City's sample training module. The City's training module suggests requirements that are not actually found in the Ordinance and, therefore, cannot be enforced as law.

All Chicago employers must have a written sexual harassment policy that, at a minimum, includes the new requirements outlined in the amended Ordinance. The written policy must be available in the employee's primary language within the first calendar week of the start of their employment. Additionally, employers will be required to display a poster advising of the prohibition on sexual harassment where employees can see it.

The statute of limitations to report all forms of discrimination to the CCHR has been increased from 300 to 365 days. Thus, Chicago employees who miss the deadline to file with the IDHR or EEOC have a reprieve to file with the CCHR. The CCHR also now has 30 days (increased from 10 days) to provide an alleged harasser with a copy of the complaint filed against him or her. Monetary penalties for all forms of discrimination, including sexual harassment, have increased from \$500 to \$1,000 per violation to \$5,000 to \$10,000 per violation. Existing penalties remain. In addition, the City can award injunctive relief to eliminate discriminatory practices.

Employers must also retain a record of their written policies, trainings, and all other records necessary to show compliance with the Ordinance for at least five years or for the duration of any pending claim, civil action, or investigation under the Ordinance, whichever is longer. Failure to maintain records of the written policy document prohibiting sexual harassment and trainings given to each employee creates a rebuttable presumption that the employer violated the Ordinance. Thus, it is critical for employers to keep records of their policies as they are updated or amended.

### **Illinois Appellate Court for the First District Affirms Chicago Board of Education's Dismissal of School Teacher's Unfair Labor Practice Charge Finding no Connection Between Employee's Dismissal and Protected Activity**

Louise DeBerry alleged that on May 17, 2018, student M.M. hit autistic student F. DeBerry said she gave M.M. a "time out," but M.M. continued to be disruptive. She asked student J.W. to get teacher Antoine Brown for assistance. DeBerry attempted to lead M.M. into the hallway toward Brown's classroom, but he became

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## Survey of 2022 Labor and Employment Law Cases (Continued)

aggressive. Brown and J.W. came into the hallway during the tussle. According to DeBerry, she was unaware she struck J.W. with a ruler until she saw J.W. holding his head. DeBerry called his mother T.W. to inform her of his injury.

T.W. contacted the administrative office to report DeBerry. The administrative office alerted Wadsworth school's assistant principal Dr. Rashid Shabazz. Shabazz notified the Illinois Department of Children and Family Services and Chicago Board of Education (CBE), which retained an outside investigative agency. M.M. told the investigator DeBerry made him stand in the corner, and he stepped out to pick up a pen. Then, DeBerry hit him with the ruler.

Students corroborated M.M.'s statement and refuted DeBerry's assertion M.M. was disruptive. Student J.J. said DeBerry hit him on the legs with the ruler. Student J.B. saw a "knot" on J.J.'s head and also saw DeBerry hit M.M. and J.J. with a ruler. The investigator's report to the CBE concluded DeBerry violated policies by striking J.W. with "significant force" and failing to report the incident to Shabazz, or obtain medical attention for J.W. CBE held a hearing resulting in suspension without pay pending a dismissal hearing.

In September 2019, DeBerry filed an unfair labor practice charge against CBE, alleging Shabazz coached students to fabricate the incident. The Board's executive director opened an investigation. DeBerry asserted that Shabazz accused teachers of "bringing the union in the building to throw him under the bus." CBE submitted a statement contending it initiated dismissal proceedings due to DeBerry's conduct, not retaliation for protected activities.

In January 2020, the Executive Director dismissed the Charge, finding DeBerry was involved in protected activity but failed to prove causation. Shabazz was not involved in the suspension and dismissal proceedings against DeBerry when he called DCFS and contacted CBE. Nothing indicated Shabazz fabricated evidence concerning the incident. In short, CBE dismissed her solely based on the incident. DeBerry appealed.

To establish an unfair labor practice violation, the charging party must show protected union activity, the employer's awareness of that activity, and the employer's adverse action. The Board found DeBerry engaged in protected activity, and CBE knew about it. The Court agreed DeBerry failed to present evidence sufficient to connect the dismissal to protected activity. Assertions that it appeared Shabazz could have influenced students amounted to speculation, which was insufficient to create an issue of law or fact warranting a complaint or hearing.

DeBerry further contended Shabazz's alleged antiunion remarks constituted evidence of causation between her protected activity and the disciplinary action. Shabazz reported the incident to DCFS, as required by law. The Board found J.W.'s mother's complaint

triggered the investigation, and DeBerry did not show Shabazz influenced the investigation.

Finally, DeBerry contended she was treated differently and alleged other staff abused students. Even if these disheartening allegations were true, they were not evidence of disparate treatment because DeBerry failed to allege these staff were similarly situated, that is, engaged in protected activity but not disciplined. Absent evidence, the opposite conclusion was clearly evident, requiring the court to affirm.

*DeBerry v. Illinois Educ. Labor Rels. Board*, 2021 IL App (1st) 201127-U.

### **Illinois Appellate Court for the Fourth District Affirms Dismissal of Retaliation Claim Under Workers' Compensation Act Holding Employee's Discharge was Not Causally Related to Protected Activity**

In *Eckerty v. E. Illinois Foodbank*, the Illinois Appellate Court, Fourth District affirmed summary judgment in an employer's favor. The court held the employer did not unlawfully terminate Dana Eckerty in retaliation for exercising rights under the Workers' Compensation Act (Act).

Eckerty's job at Eastern Illinois Foodbank (EIF) required him to stand, walk, and use a forklift. During his employment, Eckerty reported three work injuries. He received no negative treatment and remained employed. On April 26, 2018, Eckerty left work without reporting any injury. The next morning, he texted his supervisor Gavin Gordon, "Won't be in today. My hip is hurting." On May 15, Eckerty texted Gordon that he would undergo foot surgery on May 29 with a 6–8-week recovery time.

On May 22, Eckerty attended a meeting at EIF but could not provide a time frame to return due to an additional medical concern delaying surgery. On June 12, Eckerty updated EIF that his recovery would keep him off work until July 23. He acknowledged his time and benefit accruals would end on June 29 and that he would retain insurance if he remained a full-time employee.

On July 3, Eckerty's paid time-off expired. He was terminated effective July 24 and filed an Illinois Workers' Compensation claim on August 18. Nearly a year later, he filed a retaliatory discharge complaint with the circuit court.

Eckerty claimed his injury occurred due to "repetitive work-related motions" over time. He confirmed he had not informed EIF of his injury due to it not being related to a workplace accident,

— *Continued on next page*

and it may have prevented his colleagues from receiving a safety bonus. During depositions, the chief executive officer, senior vice president, administrative supervisor, and Gordon testified Eckerty never reported a work injury, and no one knew he intended to file a workers' compensation claim.

The employer moved for summary judgment, which was granted. The trial court concluded no one knew of Eckerty's intended workers' compensation claim, filed after he was terminated. Eckerty appealed, claiming EIF was aware of his injuries due to his colleagues witnessing him limping and "using the wall to walk."

A retaliatory discharge action has three elements: status as an employee before injury, exercise of a right granted by the Act, and a causal connection between discharge and protected activity. Employers must know the employee filed or intended to file a workers' compensation claim for there to be causality.

In Illinois, an at-will employee may be fired for valid reasons or no reason. Valid reasons include absenteeism, even if caused by a compensable injury or inability to physically do the work. The appellate court agreed Eckerty's discharge was not causally related to protected activity. By contrast, Eckerty filed his workers' compensation claim six weeks *after* learning he would be terminated. This fact belied a causal connection between his claim and termination.

The Fourth District affirmed the judgment, finding causality for retaliatory discharge does not exist if the basis for discharge is valid and non-pretextual. Non-pretextual termination includes terminating an employee for an inability to physically perform their duties or failure to return from medical leave. The record showed Eckerty could not physically perform the job.

Additionally, the Fourth District noted knowledge is key to establishing causality. Eckerty's claim that his colleagues observed his labored walking was insufficient to create a reasonable inference that he suffered a work-related injury that would lead to a workers' compensation claim.

*Eckerty v. Eastern Illinois Foodbank*, 2022 IL App (4th) 210537.

### **Seventh Circuit Holds Employer Can Deny Participation in Temporary Alternate Duty Policy to Pregnant Employees**

In *EEOC v. Wal-Mart Stores East, L.P.*, 46 F.4th 587 (7th Cir. 2022), the Equal Employment Opportunity Commission (EEOC) filed suit against Wal-Mart on behalf of a class of pregnant workers arguing that Wal-Mart violated Title VII and the Pregnancy Discrimination Act by excluding pregnant employees from its temporary alternate duty policy. Wal-Mart's policy offered temporary light duty

only to employees who were injured on the job. Thus, employees who were injured outside of work or who were pregnant were unable to take advantage of the policy. The EEOC argued that the exclusion of pregnant women was sex discrimination. Wal-Mart argued that the purpose of the policy was to reduce its worker's compensation costs and improve employee morale. On the other hand, pregnant workers had to make the choice between continuing to work at a job that was becoming physically too demanding, or even dangerous, and going on unpaid leave for several months.

In determining the merits, the Seventh Circuit followed the approach set forth by the United States Supreme Court in *Young v. United Parcel Service, Inc.*, 575 U.S. 206, 229, 135 S.Ct. 138 (2015), requiring pregnant employees to provide "sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden . . . giv[ing] rise to an inference of intentional discrimination." An employee can do this by offering evidence "that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." *Young*, 575 U.S. at 229-30. In *Young*, the plaintiff satisfied her burden because UPS accommodated drivers who were injured off the job or whose disabilities stemmed from diseases, such as cancer, but UPS would not grant similar accommodations to pregnant women. *Id.* at 217.

Here, Wal-Mart introduced evidence that the temporary alternate duty policy reduced costs overall because the company received work from an associate with an occupational injury and thus did not have to hire a different associate to do the work and it reduced Wal-Mart's legal exposure because the injured employee earned full wages instead of the reduced wages under the worker's compensation system. *Wal-Mart Stores East*, 46 F.4th at 595. The court found that this was a legitimate, nondiscriminatory justification for denying accommodations under the temporary alternate duty policy to everyone else, such as individuals not injured on the job and pregnant women. *Id.* at 596. In making this determination, the court rejected the EEOC's claim that *Young* required Wal-Mart to satisfy a heightened burden by articulating the reasons why it excluded pregnant employees from the benefit. *Id.* The court ultimately distinguished *Young* and ruled in favor of Wal-Mart because, unlike UPS, Wal-Mart did not provide light-duty assignments to workers who did not have work-related injuries. *Id.* at 597.

*EEOC v. Wal-Mart Stores East, L.P.*, 46 F.4th 587 (7th Cir. 2022).

## Equal Pay Act Amendments in 2021 and 2022

The Illinois Equal Pay Act (“EPA”) was amended in 2021 and 2022:

- Section 10, subsection (b-15) (2) was amended to confirm that the EPA does not prohibit employers from discussing with an applicant the applicant’s expectation with respect to compensation, including unvested equity or deferred compensation that the applicant would forfeit from a current employer. When such information is volunteered by the applicant without employer prompting, the employer may request a letter or document to verify the amount of such unvested equity or deferred compensation.
- Section 11 contains the registration requirements for businesses. The definition of business was revised slightly to include any private employer with “100 or more employees” (previously “more than 100 employees”) and which is required to submit an EEO-1. In addition, Section (b) of Section 11 provides that employers authorized to do business in Illinois as of March 23, 2021, are required to apply to obtain an Equal Pay Registration Certificate (EPRC) from IDOL between March 24, 2022, and March 23, 2024, and then recertify with the IDOL every two (2) years thereafter. New businesses authorized after March 23, 2021, must apply within three (3) years of commencing business, but not before January 1, 2024, and recertify every two (2) years thereafter. Businesses will be given a date on which to submit an application with recertification requirements every two (2) years. New businesses shall submit contact information and will be assigned a date upon which the application is due. However, failure of IDOL to assign a due date does not relieve the business of the obligation, although it may serve as a mitigating factor in determining a violation of this Section.
- Section 11 (c) (1) requires submission of an Equal Pay Compliance Statement (EPCS) and sets forth the application process for equal pay registration. The application must include wage records along with the business’s EEO-1 report filed with the EEOC. The business shall also compile a list of all employees during the past calendar year, separated by gender and the race and ethnicity categories on the EEO-1, the county in which the employee works, the date the employee started working for the business, any other information the Department deems necessary

to determine if pay equity exists among employees, and a report of total wages.

- Section 11 (h) protects access to data. Any individually identifiable information submitted to the Director within or related to an application shall be considered confidential and not subject to disclosure pursuant to FOIA. Decisions relating to issuance, suspension, and revocation of the EPCS is public information. A current employee of a covered business may request anonymized data regarding their job classification without violating this section. The information gathered may be shared with the Department of Human Rights with penalties for the Department employees who willfully divulge information.
- Section 30 penalties have been updated to include violations of both Section 10 and Section 11. Penalties for employers with 100 or more employees, who violates any Section of this Act except for Section 11, shall be fined up to \$10,000 per employee affected. An employer with 100 or more employees that is a business as defined under Section 11 and commits a violation of Section 11 shall be fined up to \$10,000. Before any imposition of a penalty, an employer who violates the EPRC requirement and inadvertently fails to file an initial application or recertification, shall have 30 days’ notice to submit the application or recertification.

The IDOL provides materials on its website to assist employers in completing their EPRC application. The website is located at: <https://www2.illinois.gov/idol/Laws-Rules/CONMED/Pages/eprc-faqs.aspx>

## Just Because the Health Department Can Do It Does Not Mean Employers Cannot

*Glass v. Department of Corrections* involved a suit by public employees seeking temporary restraining orders against their employers and other governmental actors to prevent enforcement of a workplace policy that required all employees to undergo either COVID-19 vaccination or regular testing for the virus. The Illinois Appellate Court Fourth District held that the circuit court did not abuse its discretion in finding that the employees failed to establish a likelihood of success on the merits of their claims.

The employees claimed that the policy violated the Health Care Right of Conscience Act (Conscience Act). Section 5 of the

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## Survey of 2022 Labor and Employment Law Cases (Continued)

Conscience Act prohibits “any person, public or private institution, or public official” from “discriminat[ing] against any person in any manner . . . because of such person’s conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience.” 745 ILCS 70/5. The legislature amended the Conscience Act to make clear that it was not a violation of the statute for any employer to take measures calculated to prevent the spread of COVID-19. The Court did not address the employees’ argument that the amendment was inapplicable because it had not gone into effect yet.

Instead, the Court analyzed whether Section 5 was ambiguous in order to address the employees’ argument that the amendment could not retroactively change the meaning of such an unambiguous statute. The Court did not agree that the statute was unambiguous. In finding ambiguity, the Court focused on the word “discriminate,” in Sections 2 and 5 of the Conscience Act. Although the Appellate Court’s application of that definition in other cases was clear and unambiguous, the Court believed that the legislature could have intended to use the word in an unconventional manner. The circuit court’s resort to the amendment as an interpretative aid was, therefore, defensible.

The employees also claimed that the policy violated the Department of Public Health Act (Health Act). Section 2(a) of the Health Act provides the Health Department with “supreme authority in matters of quarantine and isolation.” 20 ILCS 2305/2(a). Under Section 2(d), “[t]he [Health] Department may order physical examinations and tests and collect laboratory specimens as necessary for the diagnosis or treatment of individuals in order to prevent the probable spread of a dangerously contagious or infectious disease.” *Id.* § 2(d). If the individual refuses to consent to such testing and “that refusal results in uncertainty regarding whether he or she has been exposed to or is infected with a dangerously contagious or infectious disease or otherwise poses a danger to the public’s health, the individual may be subject to isolation or quarantine.” *Id.* § 2(d). Similarly, under, Section 2(e), “[t]he [Health] Department may order the administration of vaccines . . . to prevent the probable spread of a dangerously contagious or infectious disease” and may “isolate or quarantine persons who are unable or unwilling to receive vaccines.” *Id.* § 2(e).

The Court did not find any violation of the Health Act. It considered whether the employers were quarantining employees and determined that they were not because the only threatened penalty was loss of employment—not isolation or quarantine. It also considered whether the employers were encroaching upon the Health Department’s powers under the Health Act. The Court noted that,

“[j]ust because section 2 of the Health Act confers upon the Health Department such authority, it does not logically follow that the employers lack authority over workplace safety, such as the authority to require employees, on pain of loss of employment, to undergo vaccination or testing for infectious diseases.”

*Glass v. Dep’t of Corr.*, 2022 IL App (4th) 220270.

### No Irreparable Harm for Mandated COVID-19 Vaccine

In *Halczenko v. Ascension Health*, the Court of Appeals for the Seventh Circuit affirmed a ruling from the Southern District of Indiana that held that an employee failed to satisfy the irreparable harm and inadequate remedy of law requirements for preliminary injunction. The plaintiff was employed as a pediatric critical care specialist in a Pediatric Intensive Care Unit (PICU). In the summer of 2021, the employer adopted a COVID-19 vaccination requirement. Employees had until November 12, 2021 to get vaccinated against COVID-19, unless they received a medical or religious exemption. In reviewing requests for exemptions, the employer considered, among other factors, the employees’ position, amount of contact with others, the current health and safety risk posed by COVID-19, and the cost and effectiveness of other safety protocols. The plaintiff requested a religious exemption, which was denied. The plaintiff was suspended in November 2021 and terminated in January 2022.

In November 2021, the plaintiff and four other employees filed a putative class action seeking preliminary injunctive relief and damages. The plaintiffs alleged that the employer violated Title VII by denying their religious exemption requests. As of May 2022, when the case was argued in front of the Seventh Circuit, the plaintiff had been unable to secure other employment. The plaintiff claimed that preliminary injunctive relief was necessary to prevent irreparable harm. The plaintiff provided a sworn declaration stating that his professional skills would dull so rapidly and so extensively during any period of extended leave that within six months of his suspension, that is by May 12, 2022, he would no longer be fit to work in a PICU.

The District Court rejected this argument, concluding that the plaintiff had failed to show either irreparable harm or an inadequate remedy of law required for preliminary injunctive relief. The court was “not convinced that without immediate injunctive relief” the plaintiff—a highly trained physician with years of practical experience—would be unable to continue his career as PICU physician, even if doing so required a touch of training to freshen his skills. The court also had trouble accepting that the plaintiff was unable

to secure any other work as a physician during the pendency of the litigation. The plaintiff appealed the request for preliminary injunctive relief to the Seventh Circuit Court of Appeals.

The Seventh Circuit affirmed the lower court decision. First, the Circuit Court noted that despite the plaintiff's continued argument that he would need preliminary injunctive relief by May 12, 2022 to ensure that his skills would not irreparably diminish, the plaintiff failed to move to expedite his appeal. The case was argued and decided after the plaintiff's self-imposed deadline, making preliminary injunctive relief inconsequential. However, even if the deadline had not passed, the Seventh Circuit agreed that the alleged harm of atrophy of skills was too speculative, and therefore did not warrant preliminary injunctive relief.

Even if the plaintiff's alleged harm came to pass, the Seventh Circuit noted that Congress has provided adequate remedies of law within Title VII, including training programs and potential for lost future earning capacity. These remedies make preliminary injunctive relief unwarranted. Further, despite the plaintiff's contention that he had an unusually difficult job search, the Circuit Court has long found that a permanent loss of employment, standing alone, does not lead to irreparable harm as to warrant preliminary injunctive relief.

*Halczenko v. Ascension Health, Inc.*, 37 F.4th 1321 (7th Cir. 2022).

### **National Transit Systems Security Act of 2007 Provides Statement of Public Policy for Retaliatory Discharge Claim**

In a suit filed against the Chicago Transit Authority (CTA) for retaliatory discharge, the First District held, in an unpublished order, that the National Transit Systems Security Act of 2007 (NTSSA) constituted a clear mandate of public policy that could support a retaliatory discharge claim. In that case, the plaintiff claimed that she was terminated for raising concerns about the quality and testing of oil filters the CTA planned to install on its buses and contended that, when she informed her superiors that the filters were of inferior quality and could damage bus engines, they pressured her to fast-track testing and approval of the filters and fired her when she refused to comply. The plaintiff relied on the NTSSA to satisfy the element requiring a showing of a violation of a clearly mandated public policy.

The NTSSA provides that public transportation agencies may not terminate an employee who provides information that constitutes a violation of a federal law as to public transportation safety or security or fraud, waste, or abuse of federal grants or other public funds intended to be used for public transportation safety or security.

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The Court rejected the defendant's argument that the NTSSA was limited to terrorism prevention or waste and abuse of terrorism grants or funds. It even determined that the plaintiff did not have to specifically cite to the statute to identify with specificity the expression of public policy that she claimed was violated. In the Court's view, it was sufficient that she identified the public policy expressed in the statute.

*Harvey v. Chicago Transit Auth.*, 2022 IL App (1st) 200973-U.

### **U.S. Supreme Court to Determine Whether Executive Employee Earning Over \$200,000 Annually is Entitled to Overtime Pay under the Fair Labor Standards Act**

While most people may view executive employees earning over \$200,000 annually as clearly except from overtime under the Fair Labor Standards Act (FLSA), the Fifth Circuit, *en banc*, found that an employee is not exempt from overtime under the FLSA unless his employer compensates him in accordance with 29 C.F.R. §541.604(b). Under that section, "An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned." The United States Supreme Court accepted cert. and the case will be decided this term.

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The facts are undisputed that Plaintiff Hewitt performed executive duties and met the annual earnings threshold. A divided appellate court found that Hewitt was non-exempt and entitled to retroactive overtime pay because he was paid on a daily rate, not a weekly rate, even though his daily rate was more than twice the weekly minimum. The majority reached that conclusion by applying section 541.604 instead of relying on section 541.601 which is known as the HCE regulation standing for “highly compensated employees.” Under the HCE regulation, an employee “with total annual compensation of at least \$100,000 is deemed exempt” as long as her compensation includes “at least \$455 per week paid on a salary or fee basis” and she customarily and regularly performs any one of the duties in the traditional duties tests for executive, administrative, or professional employees.” 29 C.F.R. §541.601(a)-(b). The employer argued that an employee who satisfies the HCE regulation is exempt from overtime pay under the FLSA.

In contrast, Hewitt argued that the employer’s choice of compensating him on a day-rate as opposed to on a salary basis meant that his employer failed both the general “salary basis” rule, 29 C.F.R. §541.602(a) as well as 29 C.F.R. §541.604(b). Because his employer paid Hewitt by the day, his compensation did not meet the general rule because he was paid with, not without, regard to the amount of days he worked and because he did not receive an amount that was predetermined for any week. The employer did not meet the rule in section 541.604(b) either. Thus, the question on appeal is whether an employer can be responsible to pay overtime to an employee who satisfies the HWE regulation but cannot satisfy the other tests in the FLSA.

*Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289 (5th Cir. 2021), *cert. granted*, 212 L. Ed. 2d 762, 142 S. Ct. 2674 (2022), and *aff’d*, 143 S. Ct. 677 (2023).

### **Illinois Legislature Passes CROWN Act to Protect against Hair Discrimination in Employment and Other Areas**

With unanimous legislator support, Illinois passed a CROWN Act (Create a Respectful and Open Workplace for Natural Hair). The CROWN Act creates a definition of “race” under the Illinois Human Rights Act (IHRA) to include “traits associated with race, including, but not limited to, hair texture and protective hairstyles such as braids, locks, and twists.”

Previously, on August 13, 2021, Governor Pritzker signed into law a version of a CROWN Act which, due to various amendments, ended up only applying to schools and not places of employment,

despite the “CROWN” acronym referencing a respectful and open “workplace.” (Some more broadly refer to the “W” in CROWN as “world” rather than “workplace.”) The original version of the bill introduced by the Senate would have added the new definition of “race” under the definition of “Unlawful Discrimination” found in the General Definitions section of the IHRA, but specifically limited to use in Article 2 of the IHRA relating to employment. In a House amendment, the definition of “race” stands on its own in the General Definitions section, which means that it also applies to all other areas of the IHRA that prohibit discrimination, including, among other areas, housing, public accommodation, and real estate transactions.

At the time signed into law, Illinois joined 13 other states with CROWN laws, including California, Colorado, Connecticut, Delaware, Maryland, Nebraska, Nevada, New Mexico, New Jersey, New York, Oregon, Virginia, and Washington. Dozens of municipalities around the country have also passed CROWN laws, and CROWN law legislation is pending in many other states. Perhaps not surprisingly, most of the states that have enacted or proposed CROWN Act legislation did so shortly after the animated short film called “Hair Love,” which drew national attention to the issue of protective hairstyles, won an Academy Award on February 9, 2020. On March 18, 2022, the U.S. House of Representatives passed a CROWN Act bill (H.R.2116), and it is currently pending in the Senate. Regardless of what happens on a national level, with this new wave of CROWN Act legislation, employers should be wary of how they outline their grooming guidelines when it comes to hairstyles as their state or city laws could be changing in 2023 and beyond if they have not already.

### **Illinois Appellate Court for the Third District Affirms Dismissal of Professor’s Intentional Infliction of Emotional Distress and Tortious Interference with Employment Expectancy Claims Against Co-Professor for Failure to State a Claim**

Plaintiff Krishna taught in the Industrial and Manufacturing Engineering department for approximately 39 years at Bradley University and planned to retire in 2020. He was 79 years old and in poor health. Professor Joseph Chen was the department chair. In 2017, Krishnamoorthi ran against Chen for the position and authored a “manifesto” critical of Chen. In 2018, Krishnamoorthi informed the associate dean that Chen allowed an unqualified graduate student to enroll.

Subsequently, Chen assigned Krishnamoorthi to teach a facilities planning course. Krishnamoorthi declined the assignment, claiming ill health and lack of expertise, but Chen refused to release

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## Survey of 2022 Labor and Employment Law Cases (Continued)

Krishnamoorthi from the course. The dean denied Krishnamoorthi's appeal because the department chair was responsible for teaching assignments. Krishnamoorthi began experiencing physical and emotional problems and was hospitalized in October 2018.

Krishnamoorthi filed a grievance with the grievance committee, which recommended Chen withdraw the assignment. He did not withdraw it, and Krishnamoorthi took medical leave. Upon return, Krishnamoorthi requested a full-time load that did not include the facilities planning course. When Chen refused, Krishnamoorthi took half-time medical leave but was still required to teach facilities planning. After the dean intervened, Chen excused Krishnamoorthi from teaching the course but would not assign him a course in his area of expertise.

Krishnamoorthi filed a lawsuit, alleging intentional infliction of emotional distress (IIED) and tortious interference with an employment expectancy. The trial court granted Chen's motion to dismiss. Krishnamoorthi appealed. In IIED actions, the complaint must allege the (1) defendant's conduct was extreme and outrageous; (2) defendant intended to cause severe emotional distress or knew there was a high probability his conduct would lead to severe emotional distress; and (3) defendant's conduct caused severe emotional distress. In an employment context, courts look at whether the conduct involves an abuse of power and furthers a legitimate business objective.

Krishnamoorthi alleged Chen assigned him to teach the class in retaliation for Krishnamoorthi's manifesto and that Chen refused to reconsider the decision despite its adverse effect on Krishnamoorthi's well-being. Krishnamoorthi alleged such conduct did not further the school's objective to provide a quality education, and Krishnamoorthi suffered resulting severe physical and emotional distress.

These allegations were insufficient to sustain a claim. Chen used his position of authority to further the legitimate objective of assigning courses. Chen did not engage in coercive tactics or threaten Krishnamoorthi. There are only allegations of conduct that Krishnamoorthi disliked. The allegations did not support that any action by Chen was outrageous.

Regarding the tortious interference count, Krishnamoorthi argued Chen's conduct forced him to work part time and deprived him of income. To sustain an action for tortious interference with an employment relationship, the plaintiff must establish (1) a reasonable expectation of continued employment; (2) defendant's knowledge of the plaintiff's expectancy; (3) defendant's intentional and unjustified interference caused the employment to be terminated; and (4) damages.

Krishnamoorthi had a reasonable expectation of continued employment. He was employed for nearly 40 years and reasonably anticipated his tenure would continue until retirement. It was not a

reasonable expectation, however, that he would only be assigned coursework he enjoyed. Finally, Krishnamoorthi was not terminated. Krishnamoorthi voluntarily took medical leave and requested a part-time load. He retained his professorship and continued to teach classes. Thus, there was no tortious interference with his employment relationship. The trial court properly dismissed the action for failure to state a claim.

*Krishnamoorthi v. Chen*, 2022 IL App (3d) 210199-U.

### **Human Resources Manager States Retaliatory Discharge Claim by Alleging Criminal Stalking in Response to Investigation of Co-worker's Potentially Criminal Conduct**

In *Lemus v. Color Point, LLC*, the plaintiff, as the human resources manager for the defendant, was responsible for investigating and reporting incidents of sexual harassment and misconduct. The plaintiff received complaints regarding another employee of the defendant and investigated those complaints in her role as human resources manager. The plaintiff alleged that the defendant engaged in a campaign of intimidation (including stalking) to stop her from investigating the complaints and ultimately terminated her after she reported the intimidating conduct to her superiors. The plaintiff filed suit for retaliatory discharge, claiming a violation of the public policy against stalking and enforcement of the criminal code, and intentional infliction of emotional distress. The defendant filed a motion to dismiss both claims. Although the circuit court granted the motion on both claims, the plaintiff only appealed dismissal of her retaliatory discharge claim. The Third District reversed dismissal of the plaintiff's retaliatory discharge claim.

First, the Court held that the plaintiff sufficiently alleged a claim of retaliatory discharge. In reaching its holding, the Court noted that, in *Palmateer v. International Harvester Co.*, the Illinois Supreme Court found that the plaintiff stated a cause of action for retaliatory discharge when he alleged that he was fired for reporting a coworker's possible theft and agreeing to participate in a criminal investigation. The Court went on to determine that employees deserve the same protection regardless of whether they choose an internal or external process of reporting criminal decisions. Therefore, the plaintiff's reporting of potential criminal acts by a coworker to the defendant were sufficient to protect her from retaliatory discharge. The Court rejected the defendant's contention that the plaintiff's concerns related purely to a private dispute with a coworker. In the

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## Survey of 2022 Labor and Employment Law Cases (Continued)

Court's view, the relationship only existed because of the plaintiff's and the coworker's employment with the defendant and, therefore, was not private.

Second, the Court held that the plaintiff's retaliatory discharge claim was not preempted by the Illinois Human Rights Act. The Act preempts any tort claims that are inextricably linked to a claim of sexual harassment. According to the Court, the plaintiff's claim which was based upon her reporting of alleged criminal stalking was not inextricably linked with a civil rights violation, since the plaintiff could establish the necessary elements of her retaliatory discharge claim independent of any legal duties created by the Act.

*Lemus v. Color Point, LLC*, 2022 IL App (3d) 210611-U.

### **Exclusivity Provision of Workers' Compensation Act Did Not Bar Employee's Claim for Liquidated Damages Under Biometric Information Privacy Act**

An employee filed a class action lawsuit against her employer alleging her employer violated the Biometric Information Privacy Act (BIPA) when it collected, used and stored employees' fingerprints in its timekeeping system. The employer used the system to authenticate employees and track their time, but the plaintiff alleged her employer never had her execute a release consenting to the collection, use and storage of their biometric identifiers and biometric information; never informed her of the purposes or length of time for which the biometric identifiers and biometric information was being stored; and never provided her with a retention schedule or guideline for permanently destroying the biometric identifiers and biometric information. Plaintiffs sought injunctive and equitable relief, liquidated damages for each negligent violation of BIPA and reasonable attorney fees and costs.

The employer filed motions to dismiss, arguing that the Worker's Compensation Act (WCA) is the exclusive remedy for accidental injuries transpiring in the workplace and that an employee has no common-law or statutory right to recover civil damages for injuries incurred in the course of employment. The circuit court denied the motions, holding the plaintiff's injury involved the loss of her privacy rights, which were not covered by the WCA.

The employer filed a motion to reconsider or in the alternative a motion to certify questions for immediate appeal pursuant to Rule 308(a). The court denied the motion to reconsider and certified for interlocutory appeal the question of whether the exclusivity provisions of the WCA bar a claim for statutory damages under BIPA. The appellate court held that the trial court must consider whether the

injury is the type of work-related injury within the purview of WCA, and concluded an employee's claims for liquidated damages under BIPA—available without any further compensable actual damages being alleged or sustained and designed in part to have a preventative and deterrent effect—does not represent the type of injury that categorically fits within the purview of the WCA, a remedial statute providing financial protection for workers that have sustained an actual injury. Accordingly, the court held that exclusivity provisions of the WCA do not bar a claim for statutory, liquidated damages, under BIPA, and remanded.

Subsequently, the Illinois Supreme Court allowed the employer's petition for leave to appeal and analyzed the language of both BIPA and the WCA to determine whether the legislature intended the WCA's exclusivity provisions to bar an employee's claims for BIPA statutory damages. The court noted that BIPA provides for a private right of action in a state circuit court or as a supplemental claim in federal district court, and the legislature enacted the WCA to abrogate the common law rights and liabilities which previously governed an injured employee's ability to recover against his employer. In exchange for no-fault liability upon the employer, the WCA sets statutory limits on the amount of an employee's recovery and awards damages according to a predetermined fee schedule. An employee can escape the exclusivity provisions of the Compensation Act if the employee establishes that the injury (1) was not accidental; (2) did not arise from his employment; (3) was not received during the course of employment; or (4) was not compensable under the Compensation Act.

The Court found that the personal and societal injuries caused by violating BIPA's prophylactic requirements are different from the types of work injuries that are compensable under the WCA. Therefore, the circuit court correctly reasoned that the plaintiff's loss of ability to maintain her privacy rights was not a psychological or physical injury that is compensable under the WCA. In sum, plaintiff's claims for liquidated damages under BIPA were not barred by the exclusivity provisions of the WCA.

*McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511.

### **District Court Denied Plaintiffs' Untimely Third Motion to Extend Deadline to File Summary Judgment Response Based on No Excusable Neglect**

In *Miller v. Chicago Transit Auth.*, two Caucasian employees sued their former employer and an African American supervisor alleging racial discrimination and retaliation in violation of federal

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## Survey of 2022 Labor and Employment Law Cases (Continued)

and state law. Plaintiffs worked in bus maintenance and failed to ensure the cooling systems in the buses were working. The employer received complaints regarding these “hot buses” and discovered that most of the reported bus cooling issues originated in a garage that one of the plaintiffs managed. That same plaintiff had received two written warnings and a 10-day suspension for other infractions. He also failed to report dozens of late bus departures from his garage. The second plaintiff failed to discipline the first plaintiff and upper management believed he provided them with inaccurate and misleading information about the “hot buses” issue.

The plaintiffs separately contacted the employer’s EEO manager and complained of being targeted by their supervisor, but could not ascribe a racial motivation for this targeting. The EEO manager set up interview times with each plaintiff, but before either met with the EEO manager, they were called into a meeting with their supervisor and offered the choice of resigning or being discharged. Both plaintiffs contended they were terminated because of their race, or alternatively, in retaliation for complaining to the EEO manager.

During discovery, both plaintiffs testified that they never heard the supervisor use racially discriminatory language, mention race, display racial preferences, or discipline them based on race. Plaintiffs also admitted that they never told the supervisor or anyone else about their EEO complaints. The EEO manager testified that she did not tell the supervisor about plaintiffs’ complaints until after they left.

Following discovery, Defendants filed their motion for summary judgment and supporting memorandum of law. Multiple requests for extensions of time to respond to dispositive motions were granted, but on the third such motion, Defendant opposed the additional time. The court concluded that plaintiffs had not offered adequate reasons for neglecting the twice-revised deadline or for failing to seek an extension in a timely manner and denied the motion. Accordingly, the court deemed plaintiffs to have conceded the absence of a material factual dispute under Local Rule 56.1 and considered the summary judgment motion without a response. The district court concluded that plaintiffs failed to establish their prima facie case for discrimination or retaliation and plaintiffs appealed.

The Seventh Circuit upheld the lower court’s decision not to extend the time for plaintiffs to file a responsive pleading. The Court found that neglect due to counsel’s busy schedule was generally not excusable nor was neglect due to a need to relocate his office. The court understood that counsel may not have wanted to publicly disclose his medical information, but reiterated that it was counsel’s burden to provide the court with sufficient information that his medical condition prevented him from requesting a timely extension. The court took issue with the fact that plaintiffs contacted the clerk for a trial date, but waited weeks before requesting a third extension

of time, reminding plaintiffs that trial judges are just as busy, if not busier, than trial attorneys and must coordinate multiple competing demands on their time. The district court was within its right to deny the untimely third motion to extend and treat the statement of material facts as undisputed.

The Seventh Circuit reviewed the retaliation claim, holding merely complaining of discrimination or harassment in general terms, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient. Furthermore, the supervisor was not aware of the EEO complaints at the time he terminated plaintiffs so his actions could not be retaliatory.

*Miller v. Chicago Transit Auth.*, 20 F.4th 1148 (7th Cir. 2021).

### **Pertinent Amendments and Requirements to One Day Rest in Seven Act Become Effective January 2023**

On May 13, 2022, Illinois amended its One Day Rest in Seven Act (Act), 820 Ill. Comp. Stat. 140/1 et seq., to revise the required timing of rest days and meal breaks and to increase the Act’s penalties and notice requirements of Illinois employers. Section 2 will require employers to provide their employees at least twenty-four consecutive hours of rest in every consecutive seven-day period rather than every calendar week (Sunday at 12:01 a.m. to midnight on Saturday). The twenty-four consecutive hours of rest is in addition to the regular period of rest allowed at the close of each working day. 820 Ill. Comp. Stat. 140/2(a).

Domestic workers may voluntarily work on the rest day so long as employers compensate them at the overtime rate for all hours worked. *Id.* Additionally, the day of rest should, whenever possible, coincide with the traditional day reserved by the worker for religious worship. *Id.* The required rest day does not apply to all employees, and employers should review the excepted categories.

Section 3 requires employers to permit employees who work for a continuous period of seven and one-half hours to take a meal break of at least 20 minutes beginning no later than five hours after the start of the work period. 820 Ill. Comp. Stat. 140/3. Employees who work more than seven and one-half continuous hours are entitled to an additional 20-minute meal period for every additional four and one-half continuous hours worked, i.e. at the 12-hour mark. *Id.* The meal period requirements do not apply to all employees.

Section 7 amends the potential penalties and damages for employer violations. Any employer who violates Sections 2 or 3 is guilty of a *civil* offense, rather than a petty offense, and is subject to

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## Survey of 2022 Labor and Employment Law Cases (Continued)

a civil penalty. Employers with fewer than 25 employees will incur a penalty not to exceed \$250 payable to the Department of Labor (DOL) and damages up to \$250 payable to the employee affected per offense. Employers with 25 or more employees will face a penalty not to exceed \$500 payable to the DOL and damages up to \$500 payable to the employee affected per offense.

It will constitute a separate offense each week an employee is found to not have been allowed 24 consecutive hours of rest or found not to have been provided a meal period as required in sections two and three. A violation of section 8.5 will constitute a single offense and is subject to a civil penalty not to exceed \$250 payable to the DOL. The DOL will enforce these penalties and damages in accordance with its powers and the parties' rights as provided in the Illinois Administrative Procedure Act. Any funds collected by the DOL will be deposited into the Child Labor and Day and Temporary Labor Services Enforcement Fund.

Finally, under section 8.5, every employer covered by the Act must keep posted, in one or more conspicuous places on the employer's premises where employee notices are customarily posted, a notice provided by the DOL, summarizing the Act's requirements and information pertaining to filing a complaint. The DOL will provide complimentary, sample notices to employers upon request. Employers must provide the notice via email to remote employees and traveling employees or post the notice on a website regularly used by the employer to communicate work-related information.

Employers should familiarize themselves with these new requirements as the foregoing amendments will become effective on January 1, 2023.

One Day Rest in Seven Act, 820 Ill. Comp. Stat. Ann. 140/0.01 et seq.

### **Retaliatory Discharge Claims Relating to Jury Service and Refusal to Participate in Sale of Product Illegal Under Another State's Law Fail**

The plaintiff, a sales representative employed by the defendant, sued for retaliatory discharge, in *Perez v. Staples Contract & Commercial LLC*, claiming that the defendant retaliated against him because he served on a jury and refused to participate in the defendant's sale of a product in New York that was banned by New York law. The defendant claimed that the plaintiff was terminated for failing to meet the requirements of the defendant's associate success plan that was instituted to address the plaintiff's continued failure to meet the defendant's sales expectations. Before the plan was signed

by the plaintiff, the defendant sold a client in New York a laundry detergent that was banned by New York law. After the plan started, the plaintiff served on a jury. Four days after the plan ended, the plaintiff was terminated. The circuit court granted summary judgment in the defendant's favor on all claims. The Seventh Circuit affirmed.

The only dispute as to the plaintiff's claims alleging that he was terminated in retaliation for his jury service was whether the plaintiff's jury service caused his termination. The Seventh Circuit noted that Illinois does not apply the *McDonnell Douglas* burden-shifting in retaliation cases. This means, that to establish retaliatory discharge under Illinois law, a plaintiff must establish that the employer was improperly motivated before the employer is required to provide a legitimate reason for the termination.

The Court found that the evidence did not sufficiently establish causation on the plaintiff's claim relating to jury service. The fact that the plaintiff's manager made an allegedly funny facial reaction upon being informed of the jury summons and that he inquired whether the plaintiff could get out of jury duty was not sufficient to establish causation. Likewise, the plaintiff's manager's emails about the possibility that plaintiff may be terminated before the plan ended did not establish causation, because the manager did not actually ask for permission to terminate the plaintiff. The Court further rejected the plaintiff's attempt to establish causation by making a comparison to a purportedly similarly-situated employee, noting that comparisons to similarly-situated employees are not relevant to common-law retaliatory discharge claims. Finally, the Court determined that the plaintiff was unable to establish that he satisfied all of the plan requirements as to rebut the defendant's claim that the plaintiff was terminated for his deficient performance.

In ruling on plaintiff's claims alleging that he was terminated for objecting to the illegal sale of laundry detergent, the Court considered whether a plaintiff could maintain a retaliatory discharge claim relating to a violation of another state's laws. The Court decided that the plaintiff could not, particularly when he did not show that the other state's law implicated an interest of Illinois citizens.

Further, the Court concluded that the evidence did not sufficiently establish causation on the plaintiff's claims relating to the illegal sale of laundry detergent. First, the plaintiff could not establish causation since the issue arose before the plan was signed. Second, the plaintiff could not establish causation since there was no allegation that the plaintiff reported the allegedly retaliatory acts to authorities (either outside or inside of the company). Finally, the plaintiff could not establish causation, because the termination was immediately preceded by an intervening event unrelated to his complaints—the plaintiff's three-month failure to comply with the plan's requirements.

*Perez v. Staples Cont. & Com. LLC*, 31 F.4th 560 (7th Cir. 2022).

### **Seventh Circuit Reverses Summary Judgment to City Because Genuine Disputes of Material Fact Remained as to Plaintiff's Race Discrimination and Retaliation Claims Under Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment's Equal Protection Clause**

Diane Runkel worked as assistant purchasing agent for the city of Springfield, Illinois and sought a promotion. Instead, the City promoted a black candidate, Kassandra Wilkin. Runkel, who was offered a \$5,000 raise, told Mayor James Langfelder and Director William McCarty she believed the promotion was discriminatory. The City revoked Runkel's raise due to "offensive or profane" statements. Runkel retired and filed an EEOC discrimination charge.

Runkel sued the City and the mayor claiming they refused to promote her based on race and retaliated against her. The district court granted summary judgment to the City, and Runkel appealed. Avoiding judgment required Runkel to show the City discriminated against white people, that she was qualified for the position, rejected, and the position was given to a similarly or less qualified person outside her protected class.

Runkel offered evidence the mayor chose Wilkin partly because he wanted to appoint a black person for political reasons. The Mayor stated hiring a black woman moved toward reflecting the city's demographics. There was also evidence Wilkin's resume was emailed *after* the mayor offered her the role, supporting the reasonable inference he was more interested in race than qualifications.

As to the second element, Runkel demonstrated McCarty planned to promote her in an acting capacity, and Runkel managed the office's duties in the prior purchasing agents' absence. A reasonable jury could find the third element of rejection because Runkel asked for updates on the process, and McCarty told the mayor of Runkel's interest. Finally, a reasonable jury could find the candidates were similarly qualified. Runkel worked in purchasing at a more senior level for eight years longer. Wilkin had experience in the City's electric utility company and attained higher education levels. For summary judgment purposes, Runkel supported a *prima facie* case, shifting the burden to the City.

The City claimed Wilkin was better-educated, had more seniority, displayed greater professionalism, and Runkel misbehaved after learning of Wilkin's appointment. The City's fourth reason was an after-the-fact rationalization of the decision. Runkel's actions could not have been a reason for the earlier decision. As for the other reasons, the mayor testified he never compared Runkel and Wilkin.

Consequently, a reasonable jury could find the first three justifications were dishonest, permitting an inference of unlawful motive.

Employers cannot retaliate against employees. Runkel engaged in activity protected, suffered an adverse employment action, and a causal connection existed. Through counsel, Runkel indicated she considered filing a discrimination charge and filed in April 2018. The City placed her on a Last Chance Agreement rescinding her raise and making it easier to fire her. Thus, Runkel satisfied the first two elements. Runkel demonstrated the City's true concern was her discrimination complaints. The City had no documentation of her offensive conduct other than McCarty's vague recollection, and Mayor Langfelder testified he did not recall why he rescinded her raise. This evidence would allow a reasonable jury to find the City retaliated for Runkel's protected activity.

The appellate court did not decide the merits. Summary judgment required the court give Runkel the benefit of conflicts in the evidence and let the case go to a jury. The judgment of the district court was reversed and the case remanded.

*Runkel v. City of Springfield*, No. 21-2418, 2022 U.S. App. LEXIS 28872 (7th Cir. Oct. 18, 2022).

### **An Employer May Enforce a Restrictive Covenant Agreement in Spite of Its Potential Breach When a Legitimate Business Interest Exists**

In *Segerdahl Corp. d/b/a SG360<sup>o</sup> (SG360) v. Giovanni*, Giovanni signed an "Employee Restrictive Covenant Agreement" in 2017 as part of a promotion to director of data services production, in which he agreed, in part, not to compete with SG360 for a period of 12 months following the end of his employment. In 2021, Giovanni resigned and accepted an offer from direct competitor, American Litho. SG360 filed a verified complaint for injunctive relief against Giovanni and American Litho, seeking an injunction preventing Giovanni from breaching the agreement and American Litho from "intentionally inducing such breaches." The circuit court granted the preliminary injunction and the First District affirmed.

To obtain a preliminary injunction, the moving party must demonstrate (1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case. On appeal, the court examines only whether the party seeking the injunction demonstrated a *prima facie* case that there is a fair question concerning the existence of claimed rights. The question

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## Survey of 2022 Labor and Employment Law Cases (Continued)

of whether injunctive relief is appropriate to enforce a restrictive covenant in an employment contract depends on the validity of the covenant, which is a question of law reviewed *de novo*.

A restrictive covenant in an employment agreement is valid if it contains a reasonable restraint and the agreement is supported by consideration. A restraint is reasonable only if it (1) is no greater than is required for the protection of a legitimate business interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.

On appeal, Giovanni argued that SG360 had not shown a legitimate business interest which could support enforcement of the agreement because SG360 failed to establish any basis for its claim that there was any confidential information in need of protection and SG360 materially breached the agreement by failing to provide him the opportunity to earn an annual bonus that was promised in the agreement and therefore was unable to enforce its provisions.

The Court found that SG360 demonstrated that it had a clearly ascertained right in need of protection by virtue of its legitimate business interest in protecting its confidential information Giovanni learned after his promotion. Giovanni's duties after his promotion included participation in numerous meetings and interactions with leadership in all areas of the company. SG360 had taken numerous steps to limit the disclosure of the information known to Giovanni by virtue of his position as director. The court further found that the industry was highly competitive, and that SG360 would be harmed if the information Giovanni possessed was given to a competitor.

With regard to the breach of contract argument, the court found there was no question that SG360 failed to provide the opportunity for Giovanni to earn bonuses. The court found, however, that there was a "complicated question of fact" that could not be resolved in these proceedings. The court could not find with the evidence before it that the breach was material such that it prevented SG360 from enforcing the agreement.

*Seگردahl Corp. d/b/a SG360 (SG360) v. Giovanni*, 2022 IL App (1st) 211610-U.

### **Seventh Circuit Agrees Constitutional, Title VI, Title VII, and Illinois State Law Claims Against Cook County Office of the Chief Judge and Plaintiff's Union Must Fail**

Probation Officer Jason Smith worked with the Cook County Juvenile Probation and Court Services Department until 2018. Before he left the job, he was elected union vice-president. He alleged his county supervisors retaliated against his union-based opposition

to workplace race discrimination by changing his schedule and maligning him. These actions prompted him to resign and to work with the City. Thereafter, he alleged county workers falsely told the City that the County fired him for disciplinary reasons. The City then fired him.

After filing an EEOC charge, Smith filed two suits. The suits claimed the Chief Judge of the Circuit Court of Cook County, Office of the Chief Judge (OCJ), the City of Chicago, his union, and agents of each violated the First and Fourteenth Amendments, the Illinois Whistleblower Act, Illinois Civil Rights Act, Titles VI and VII of the Civil Rights Acts of 1964, and the Illinois Slander and Libel Act.

Ultimately, only the claims against the City survived, and to facilitate an appeal of the adverse rulings, the court certified for appeal under Rule 54(b) the partial judgment. Smith challenged dismissal of his Title VII claims against the OCJ for lack of administrative exhaustion. Before a plaintiff brings a Title VII claim, he must exhaust the claim administratively by filing a discrimination charge with the EEOC. Smith brought a charge against *the City* for acting against him after he left his County job, but his first suit also complained of actions by the OCJ, an unrelated party not mentioned in the charge. The district court thus correctly ruled Smith did not exhaust his claims against the OCJ because they were not "within the scope" of the EEOC charge.

The District Court also properly rejected the First and Fourteenth Amendment claims against the OCJ for failure to state a claim. Smith admitted he voluntarily left his job for a job with the City. This admission fatally undermined the Fourteenth Amendment claim that the Office deprived him of a protected employment interest. Smith also contended, before he left the County, supervisors retaliated for his union-based advocacy. Smith did not, however, develop credible arguments that the alleged interference was so severe that it would deter a reasonable worker from advocacy. Without such argument, he did not state a First Amendment claim.

Smith's claims against his union failed for several reasons. The Title VII claim ended at summary judgment. Smith argued the union materially harmed his employment by not compelling arbitration of his grievance concerning discharge from the City, but he did not dispute the union pursued arbitration shortly after discharge. Smith offered no evidence that discriminatory animus motivated the union and did not explain how the union agent's delay to communicate the grievance's status materially harmed him. The district court also properly dismissed Smith's First and Fourteenth Amendment claims against the union which did not allege the union was a state actor.

The United States Court of Appeals for the Seventh Circuit also held that the District Court appropriately dismissed Smith's Illinois

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## Survey of 2022 Labor and Employment Law Cases (Continued)

law claims because the failure of the federal claims gave the court discretion to decline supplemental jurisdiction. Finally, the appellate court agreed claim preclusion barred Smith's second suit against the OCJ and union. The doctrine applied because the second suit arose out of the same operative facts. The doctrine bars claims in a first suit and claims that could have been raised there.

*Smith v. Evans*, No. 20-2556, 2022 WL 205414, at \*1 (7th Cir. Jan. 24, 2022).

### BIPA Preempted by the Labor Management Relations Act

The Illinois Appellate Court recently held, in two separate decisions, that the Biometric Information Privacy Act (BIPA) is preempted by Section 301 of the Labor Management Relations Act (LMRA). Section 301 sets forth the provisions for suits by and against labor organizations.

In *Walton v. Roosevelt University*, the plaintiff claimed that the defendant violated BIPA by requiring use of hand scans as a means of timekeeping, and the defendant moved to dismiss the plaintiffs' claims on grounds of preemption under the LMRA. The circuit court denied the motion but certified the question for appeal. Relying upon the Court of Appeals for the Seventh Circuit's decision in *Fernandez v. Kerry, Inc.*, 14 F.4d 644 (7th Cir. 2021), the Illinois Appellate Court First District held that Section 301 of the LMRA preempts BIPA claims asserted by bargaining unit employees covered by a collective bargaining agreement. The Court referenced language in BIPA enabling a "legally authorized representative" to act on behalf of an individual as indication that the union may negotiate regarding a member's biometric information. The Court further reasoned that timekeeping procedures are a topic for negotiation under broad management rights clauses in collective bargaining agreements.

The Illinois Supreme Court granted a petition for leave to appeal the *Walton* case. The petition was granted on May 25, 2022.

Thereafter, the Illinois Appellate Court Second District decided the *Soltysik v. Parsec, Inc.* case in which the plaintiffs alleged that the defendant violated BIPA when it required its employees to use fingerprint scanners to clock in and out. The defendant argued that Section 301 of the LMRA preempted plaintiffs' claims and, therefore, the circuit court lacked subject matter jurisdiction to adjudicate the plaintiffs' claims. The circuit court granted the defendant's motion to dismiss. The Court affirmed dismissal on the basis of preemption under Section 301 of the LMRA. However, the Court found that the circuit court did not lose subject matter jurisdiction despite such preemption. The Court reasoned that exhaustion of remedies is not

jurisdictional. Instead, it functions an affirmative defense that may be waived if not timely asserted.

*Soltysik, et al. v. Parsec, Inc.*, 2022 IL App (2d) 200563, and *Walton v. Roosevelt University*, 2022 IL App (1st) 210011.

### New Calculations Required Under Illinois Minimum Wage Law

In *Soucek v. Breath of Life Professional Services, NFP*, the plaintiff filed suit for recovery of wages under the Illinois Minimum Wage Law. The plaintiff worked as an overnight caregiver at a group home for two disabled adults for \$200 (plus lodging) per week. She claimed that the defendants failed to pay her overtime and a minimum wage. After a bench trial, the trial court concluded that: (1) the group home was exempt from paying overtime pursuant to Section 4(a)(2)(H) of the Act and (2) the value of plaintiff's lodging, with her weekly \$200 salary, satisfied the Act's minimum wage requirement.

The Act provides for a minimum wage and generally requires employers to pay overtime to all employees working in excess of 40 hours. Section 4a(2)(H) of the Act provides an exception from overtime pay for:

Any employee of a not-for-profit educational or residential child care institution who (a) on a daily basis is directly involved in educating or caring for children who (1) are orphans, foster children, abused, neglected or abandoned children, or are otherwise homeless children and (2) reside in residential facilities of the institution and (b) is compensated at an annual rate of not less than \$13,000 or, if the employee resides in such facilities and receives without cost board and lodging from such institution, not less than \$10,000.

The Court reversed the trial court and remanded the case for further proceedings. First, the Court found that there was no evidence that the persons at the group home for whom the plaintiff cared for were orphans, foster children, abused, neglected or abandoned, or otherwise homeless, as required for the exception in Section 4a(2)(H) to be satisfied. Second, the Court determined that the evidence did not support the value that the trial court attributed to the lodging that the plaintiff was provided.

The Court provided instructions to the trial court for determining the plaintiff's damages on remand. The Court directed the trial

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## Survey of 2022 Labor and Employment Law Cases (Continued)

court to determine what, if any, credit is to be accorded to the particular lease, with its unusual restrictions, that the plaintiff received as a result of the lodging provided by the group home and to hear additional evidence as necessary. The Court also instructed the trial court to calculate the total number of hours worked during the week and the total number of hours that qualified for overtime pay each week versus the total number of hours that qualified for simply the minimum wage during that same week, and it further instructed the trial court to assess whether any attorney fees, costs, interest, or other damages or penalties may be due to the plaintiff.

*Soucek v. Breath of Life Pro. Servs., NFP*, 2021 IL App (1st) 210413.

### **Illinois Appellate Court for the First District Affirms Illinois Human Rights Commission’s Decision to Sustain Dismissal of Employment Discrimination Charge Based on Sexual Orientation for Lack of Substantial Evidence**

Petitioner Helene Williams appealed the Illinois Human Rights Commission’s order sustaining the Illinois Department of Human Rights’ dismissal of her employment discrimination charge against Safety Service Systems pursuant to the Human Rights Act (Act).

On August 27, 2019, Williams filed a charge with the Department alleging harassment based on her sexual orientation (Lesbian). Safety Service was aware of her sexual orientation when it hired her as an event security officer. She alleged from July 27 through August 22, human resources representative Monique McFields harassed her by constantly criticizing Williams and calling her names. Allegedly, similarly situated heterosexual employees were treated more favorably.

The Department interviewed Williams, President and Managing Partner Mary Gerlach, and McFields. Its report indicated Safety Services hired Williams in June or July 2019 and terminated her on August 30, citing attendance issues. Williams’ harassment charge rested on one incident. Allegedly, she and McFields were in the uniform room in August when McFields asked Williams for her shirt size, rolled her eyes at Williams, and uttered “retarded dyke ass bitch.” Williams stated McFields was aware of her sexual orientation because of Williams’ “tom-boyish” appearance and gay pride bracelet. No one witnessed this incident, and Williams did not report it. Williams argued Safety Service’s termination reasons was pretextual because its policy allowed event security personnel to “set their own schedules” and “call in” absent without penalty.

McFields denied making the remark, ever being alone with Williams, and knowing Williams’ sexual orientation. According to Williams’ job description, employees chose the events for which they were available. During the 90-day probationary period, performance and attendance were evaluated. Attendance records indicated Williams arrived late twice and missed her shift three times. Timecards showed Williams worked 14 days between July 19 and August 30. McFields worked the same event as Williams on four occasions.

Williams did not attend the Fact-Finding Conference, and the investigator recommended a finding of lack of substantial evidence. The Department dismissed Williams’ charge. On August 4, 2020, Williams filed a request for review with the Commission, and the Department responded contending Williams failed to establish a *prima facie* harassment case. On October 30, 2020, the Commission sustained the dismissal.

Williams filed a petition for direct review with the court. A harassment claim contains four elements: (1) the employee experienced unwelcome harassment; (2) the harassment was unlawful; (3) the harassment was so severe or pervasive that it altered the conditions of employment and created a hostile or abusive working environment; and (4) there is a basis for employer liability.

The court considered the frequency and severity of the conduct; whether it was physically threatening or humiliating; and whether it unreasonably interfered with Williams’ work. The court agreed Williams failed to provide substantial evidence to establish a *prima facie* harassment case based on sexual orientation. The court stated “to trigger the protective measures of anti-discrimination laws, an employee must face a “steady barrage” of offensive comments and more than a “few isolated incidents of harassment[.]” The court concluded even if the allegation was accepted as truth, the solitary instance of an offensive comment is a “far cry from the “steady barrage” required to substantiate a claim under the [Illinois Human Rights’] Act.” Therefore, the Commission did not abuse its discretion, and the court affirmed the decision.

*Williams v. Illinois Human Rights Comm’n*, 2022 IL App (1st) 201299-U.



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She has extensive experience with cases involving harassment and discrimination under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Illinois Human Rights Act, the Family Medical Leave Act and the Fair Labor Standards Act. In addition to defending employers and managers against allegations of gender discrimination, sexual harassment, hostile work environment and equal protection claims. Ms. Anderson is a member of the IDC Employment Law Committee and writes for the *IDC Quarterly*. Ms. Anderson received her J.D., *summa cum laude*, from DePaul University College of Law and her B.A., *cum laude*, from Harvard University. Ms. Anderson is a member of the Order of the Coif and while at DePaul University College of Law, she received a Health Law Certificate and a CALI Award in Disability Law.



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**Christi Coleman** is a partner in the Madison County office of *Lewis Brisbois Bisgaard & Smith LLP* and a member of the Labor & Employment Practice. With over twenty years representing management of every size, Ms. Coleman offers counseling and representation in a broad range of traditional labor and employment issues. She has extensive experience in state and federal courts, as well as grievance arbitrations and unfair labor practice charges with public sector labor relations boards. In addition to her labor and employment practice, Ms. Coleman regularly represents local and municipal organizations on Sunshine Law/FOIA and Open Meetings compliance, governance issues, and litigation defense.



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Ms. Ross would like to thank **Douglass Nolan** of *FordHarrison* for his assistance in the preparation of the Labor and Employment Law section of the *Survey of Law*.



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Ms. Winking is a past President of the Adams County Bar Association. She is a member of the Employment Law Committee and was previously on the Board of Directors of the Illinois Defense Counsel.

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# Survey of Tort Law and Workers' Compensation Cases

## No Proximate Cause Found in Slip and Fall Case

The Illinois Appellate Court, First District, held that there was no evidence of a defective condition that caused the plaintiff to fall in a hotel lobby or that the condition was caused by defendants. The plaintiff brought a personal injury suit against a hotel following a fall that she sustained at the hotel in Chicago. She claims she tripped on a ledge in the floor, but she admitted in her deposition she never saw a ledge and that she was looking up at a Christmas tree at the time of her fall. In her deposition, she could not describe the thing that caused her to trip and no one witnessed her fall. The circuit court granted summary judgement in favor of the defendants, finding she failed to identify a defective condition that caused her fall.

The plaintiff appealed from the grant of summary judgment. She argued the circuit court's application of *Kimbrough v. Jewel Companies, Inc.*, 92 IL App. 3d 813 (1st Dist. 1981), to her case was improper. *Kimrough* held that merely showing a slip and fall on the defendant's premises is not enough to satisfy pleading requirements and that "the plaintiff must go further and prove that some condition caused the fall and that this condition was caused by the defendant."

In its analysis, the appellate court found the application was proper, discussing that the facts in *Kimrough* were similar to the case at hand, where the plaintiff, with no witnesses, fell and was unable to explain the cause of the fall.

The appellate court held that the plaintiff must establish with "reasonable" certainty that the defendant's acts or omissions caused injury. The plaintiff may establish proximate cause through circumstantial, rather than direct, evidence that will reasonably suggest that the defendant's negligence operated to produce the injury.

In her brief, the plaintiff introduced the surveillance video of her fall but the footage never showed what caused her to fall. She also introduced photographs of a metal strip at the end of the carpet, but the strip was never mentioned in her complaint or deposition, making her later claim that the strip caused her fall disingenuous. Finally, she introduced the post-accident report made by a hotel representative but the report does not detail or allege any defect that led to the fall. None of this evidence supports the plaintiff's assertion that she proved proximate causation or that a dangerous condition existed or caused her fall.

The appellate court held that the plaintiff failed to uphold her burden to "affirmatively and positively show the element of proxi-

mate cause.” She could not point to any defective conditions that caused her to fall or that the condition was caused by any of the defendants.

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

### **Duty to Repair Sidewalk Exists Based on Contractual Obligation**

The Illinois Appellate Court, First District, held that defendants SL Civic and Lyric Opera were contractually obligated to follow the Chicago Municipal Code, creating a duty to repair the sidewalk. A pedestrian was injured when she tripped and fell on an uneven seam in a sidewalk owned by the City of Chicago. The sidewalk was located next to the Civic Opera building over underground storage vaults used by the building’s owner, SL Civic, and its tenant, Lyric Opera. The City had issued SL Civic a public way use permit to construct and maintain the vaults. The pedestrian filed a premises liability action against the City, SL Civic, and Lyric Opera, alleging that they negligently maintained the sidewalk by failing to repair the cement.

The City filed counterclaims against SL Civic and Lyric Opera seeking contribution and indemnity, arguing they were liable for any negligence to the pedestrian because the Chicago Municipal Code provisions governing public way and sub-sidewalk space use required them to maintain the sidewalk over the vaults. Both SL Civic and Lyric Opera argued they owed the pedestrian no duty of care regarding the maintenance, repair, or use of the sidewalk where she fell. The City maintained that a duty of care was imposed stemming from their contractual permit and lease obligations in which they agreed to comply with all Municipal Code provisions. The circuit court granted SL Civic’s dismissal motions for the counterclaim and the pedestrian’s negligence claim. The circuit court also granted summary judgement in favor of Lyric Opera.

The First District reversed, finding the circuit court erred in holding that SL Civic owed no duty of care, statutory or otherwise, to the pedestrian regarding the maintenance, repair, or use of the sidewalk where she fell. The scope of its duty was governed by the terms of its permit. The permit stated that the vaults would be maintained in accordance with all ordinances of the City of Chicago. The Municipal Code § 10-28-015(e)(1) relevantly provides that “the permittee shall keep that portion of the public way in, over, under or adjacent to the public way use in good condition and repair,” which expressly requires SL Civic to keep the public sidewalk over the vaults in good condition and repair, creating a legal duty of care through its permit obligations.

Similarly, it was error to grant summary judgment in favor of Lyric Opera, as the lease agreement with SL Civic required Lyric Opera to “comply with all Laws” including those set forth in the Municipal Code. As § 10-28-540 of the Municipal Code provides, “every person using the space under any sidewalk shall at his own expense and at all times keep such sidewalk in good and safe condition and repair.” This provision established a duty of care which required Lyric Opera, which used the vaults under the sidewalk of the incident, to keep them in good condition. As such, the First District found that a duty of care for SL Civic and Lyric Opera arose based on contractual obligations.

*Bray v. City of Chicago*, 2022 IL App (1st) 201214.

### **Appellate Court Reverses Personal Jurisdiction Decision as to Two Wisconsin-Based Treating Providers**

In *Clemens v. Greenberg*, the plaintiff sued various medical treaters for medical malpractice, two of which were located in Wisconsin: (1) an infectious disease doctor whose practice and the hospital at which he worked were in Green Bay, Wisconsin, and who was not licensed to practice medicine in Illinois and did not treat patients within Illinois; and (2) a hospital also in Green Bay, Wisconsin. After contentious discovery, including being converted from respondents in discovery to defendants, the Wisconsin providers filed motions to dismiss for lack of personal jurisdiction.

The circuit court denied the Wisconsin providers’ motions to dismiss, stating that while the Wisconsin providers did not maintain sufficient contacts to exercise general jurisdiction, it was fair, just, and reasonable to exercise specific jurisdiction over them. The Wisconsin providers then filed a petition for leave to appeal under Illinois Supreme Court Rule 306(a)(3), which was denied, and thereafter appealed to the supreme court. The supreme court entered a supervisory order directing the appellate court to allow the petition for leave to appeal which required the Illinois Appellate Court for the First District to consider the appeal.

The appellate court ultimately reversed the circuit court’s denial of the Wisconsin providers’ motions to dismiss for lack of personal jurisdiction, finding that the plaintiff did not meet her burden to establish that said providers were subject to specific personal jurisdiction in Illinois. In so holding, the court noted that while the plaintiff argued that the Wisconsin providers participated in activities related to her ongoing treatment in Illinois, the complaint itself was absent such language and only related to care the plaintiff received at an

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Illinois facility for deep vein thrombosis and not the care for which the Wisconsin providers had actually given (i.e., an infectious disease condition – endocarditis). The only act that connected the Wisconsin providers to the plaintiff's cause of action in Illinois was a phone call made by an Illinois doctor to the Wisconsin providers, which at best was only brief and informative, not a part of the decision-making process with regard to the plaintiff's actual medical care for her deep vein thrombosis treatment received in Illinois. The appellate court stated that to subject the Wisconsin providers to personal jurisdiction based on this attenuated connection with Illinois via the phone call would violate due process and did not create sufficient minimum contacts for an Illinois court to exercise personal jurisdiction. In addition to reversing, the appellate court directed on remand that the circuit court to enter an order dismissing the Wisconsin providers as parties. General jurisdiction was not asserted.

*Clemens v. Greenberg*, 2022 IL App (1st) 201129.

### **Defendant's Denial in Answer Controls Over Language Indicating Lack of Knowledge**

In *Dartt v. Pegman*, the Illinois Appellate Court, First District, answered the following certified question in the negative: Under 735 ILCS 5/2-610(b), when an answer to an allegation in a complaint concludes, "and therefore it is denied," is the denial to be disregarded when earlier in the answer the defendant stated that it lacks sufficient knowledge, and did not attach an affidavit of no knowledge?

The underlying case involved a personal injury action where the plaintiff was injured by another patron while at a bar. He sued the attacker and two Illinois corporations he alleged owned the bar. One of the defendants filed an answer and responded to several allegations as follows: "[t]his defendant lacks sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph [number] and therefore they are denied." The defendant did not attach an affidavit supporting its claims of insufficient knowledge.

In response, the plaintiff moved for summary judgment, claiming that the allegations should be deemed admitted because of the defendant's failure to attach an affidavit supporting the claims of insufficient knowledge. Defendant opposed the motion and argued that all answers ended with "and therefore they are denied," which indicated an explicit denial. The circuit court granted the motion for summary judgment. Following the court's ruling, the defendant moved for a certified question under Illinois Supreme Court Rule 308(a). The court certified the above-mentioned question for the appellate court.

On appeal, the appellate court analyzed the requirements of an answer under 735 ILCS 5/2-610. The court reasoned that section 2-610 requires a two-step process. First, one must determine whether an explicit admission or denial of the allegation occurred. Next, the analysis turns to whether the party claimed a lack of sufficient knowledge and supported this assertion with an affidavit. Ultimately, the appellate court answered the certified question in the negative, finding that the explicit denial in the answer controlled. Any other language and the claim of the lack of knowledge was "surplusage" and should be disregarded.

*Dartt v. Pegman*, 2022 IL App (1st) 210633.

### **Plaintiff Not Falsely Imprisoned by Physician**

The Illinois Appellate Court, Second District, held that a defendant physician did not falsely imprison the plaintiff after following proper involuntary commitment procedures in good faith. The plaintiff brought suit against a nurse, OSF Healthcare System, and Dr. Martin Fields for false imprisonment, assault, and medical battery. She settled her claims with the nurse and the hospital, leaving only her false imprisonment claim against Dr. Fields. Both parties filed cross-motions for summary judgment and the trial court granted Dr. Field's motion, denying the plaintiff's motion. The appellate court affirmed this holding.

The plaintiff was brought to Saint Anthony's Hospital following a drug and alcohol overdose. She had also overdosed several days earlier in an apparent suicide attempt but had been released from the hospital. Dr. Fields concluded that the plaintiff was subject to involuntary admission because she was a danger to herself and needed placement in a facility with inpatient mental health care. Following this evaluation, Dr. Fields prepared an initial inpatient certificate.

In the first certificate, Dr. Fields found that the plaintiff was "a person with mental illness who, because of his or her illness is reasonably expected, unless treated on an inpatient basis, to engage in conduct placing such person or another in physical harm or in reasonable expectation of being physically harmed" and that she was "in need of immediate hospitalization." Dr. Fields agreed that, while plaintiff was not free to leave the hospital, he personally did not order hospital security or personnel to ensure she did not leave.

The court first held that the plaintiff's claim of false imprisonment failed because no evidence established that Dr. Fields detained the plaintiff. Rather, the evidence offered by the plaintiff speaks to the hospital staff detaining her. While the hospital may have relied on the evaluation made by Dr. Fields, there is no evidence that he

detained her or ordered anyone to do so. Dr. Fields was a consulting psychiatrist and not compensated by the hospital.

While her claim necessarily fails as the first element of false imprisonment is not shown, the court also discussed that it was not Dr. Field's responsibility to serve the plaintiff with documentation under the Mental Health Code, prepare or file petitions with the court, or prepare the second certificate. Moreover, the court held that even if Dr. Fields failed to comply with the Mental Health Code, there is no proof that his actions were not taken in good faith. As there was no bad faith, Dr. Fields had civil immunity under the Mental Health Code.

*Gibbons v. OSF Healthcare System*, 2022 IL App (2d) 210038.

### **Substitution of Judge as of Right Improperly Denied Based on Trial Court's Ruling on Scheduling and Procedural Issues**

In *Gohari v. McDonald's Corp.*, the plaintiff moved for substitution of judge as a matter of right under 735 ILCS 5/2-1001(a)(2) on the basis that the judge had not yet made any substantive rulings. Counsel for the plaintiff orally made the motion at a hearing on a discovery motion and motion for leave to file an amended complaint. The trial court denied the motion, finding that the hearing on a substantive motion already began and finding that the motion was done in part to "test the waters."

On appeal, the Illinois Appellate Court, First District, overruled the trial court's ruling. The appellate court's analysis addressed the recent Illinois Supreme Court decision in *Palos Community Hosp. v. Humana Ins. Co.*, 2021 IL 126008, which abolished the "test the waters" doctrine as an exception to a substitution of judge as of right under 735 ILCS 5/2-1001(a)(2). The court next evaluated whether the trial court judge made any substantive rulings which would also be a basis to deny the substitution motion. The trial court did not rule on a substantive issue when it decided the order in which it would consider the two pending motions at the hearing. The appellate court cited case law that consistently found scheduling and procedural rulings related to discovery are not substantial issues.

Finally, the court analyzed the actual hearing where the motion for substitution of judge as a matter of right under was made. The appellate court found that the statute refers to a hearing on the merits and because the hearing at issue involved a discovery issue that would not determine the merits of the complaint, the appellate court did not need to actually determine whether the hearing in fact began before the motion was made. Further, because the trial judge

did not rule on any substantial issues and a hearing on the merits did not begin, section 2-1001 required the trial court to grant the motion for substitution of judge. The appellate court vacated all rulings following the denial of the motion for substitution of judge and remanded the case for further proceedings.

*Gohari v. McDonald's Corp.*, 2022 IL App (1st) 201086.

### **Dram Shop Act Held Inapplicable to Unborn Fetuses**

In this case, a lawsuit was filed on behalf of an unborn fetus for its alleged wrongful death following a motor vehicle collision with the defendant, an alleged intoxicated person. The defendant collided with another driver, killing her and her unborn child. The case was ultimately consolidated with a lawsuit filed on behalf of the deceased driver/mother and included allegations pursuant to the Liquor Control Act of 1934, otherwise known as Dram Shop Act, in causing the defendant driver's intoxication. One of the dram shop defendants named in the suit moved to dismiss the complaint filed by the estate of the unborn fetus pursuant to Section 2-615 of the Code of Civil Procedure, claiming that the unborn baby's estate was not a proper plaintiff and no cause of action existed under the Dram Shop Act for the death of an unborn fetus. The circuit court granted the motion. Thereafter, another dram shop defendant moved for judgment on the pleadings, also arguing that no cause of action existed under the Dram Shop Act for an unborn fetus. The plaintiff estate appealed.

The Illinois Appellate Court for the Second District pointed out that in creating the Dram Shop Act, the legislature devised the only means by which liability may be imposed on dram shops for serving alcoholic liquor. As a result, the court noted that any extension of liability for damages arising from intoxication must come from the legislature and not the courts. This required looking to the plain language of the Act and determining the meaning of "loss of society." The appellate court noted that Act's use of the phrase "loss of society" is not ambiguous and is defined as "the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance and protection." 235 ILCS 5/6-21(a).

The appellate court went on to note that the words "unborn fetus" are not included in the Dram Shop Act's loss-of-society definition, unlike the Wrongful Death Act which was amended to include such language in 1980. To include such language, the court stated it would be rewriting the statute, rather than interpreting it,

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which it could not do. Because unborn fetus was not included in the language of the Act for which a party may bring a loss of society claim and because the court could not go beyond the scope of the Act as written, it had to determine that there was no cause of action for such claim. Thus, the appellate court agreed with the decision of the trial court and upheld the dismissal and the judgment on the pleadings.

*Herndon v. Kaminski*, 2022 IL App (2d) 210297.

### **Defendant's Active Negligence Negates Open and Obvious Defense**

In *Hutson v. Pate*, the plaintiff filed a complaint on behalf of his minor daughter against the defendant, individually and as father of his minor son. The lawsuit alleged injuries to the minor child plaintiff following an incident where the minor child defendant was playing with a garden hose and, without warning, pulled the hose, causing the plaintiff to fall and seriously injure her ankle.

In response, the defendant filed a motion for summary judgment. The trial court granted the motion for summary judgment primarily based upon the open and obvious rule, finding that the plaintiff was an active participant in the activity which allegedly caused the injury. The court also determined that assuming the hose was a danger, it was an open and obvious one to the plaintiff. Plaintiff appealed.

On appeal, the Illinois Appellate Court, Fourth District, found that the open and obvious doctrine only applied when the alleged cause of injury is a condition on the land, not a case of a defendant's active negligence. Here, the plaintiff was injured by the defendant's active pulling of the hose, not a passive feature of the hose independent of the defendant's ongoing conduct. Thus, the open and obvious doctrine did not apply. The appellate court reversed the lower court's ruling and remanded for further proceedings.

*Hutson v. Pate*, 2022 IL App (4th) 210696.

### **First District Rejects Defendant's Post-Trial Motions Following Remand to Circuit Court for New Trial on Liability**

In *Inman v. Howe Freightways, Inc.*, a widow brought a wrongful death action after her husband was killed in a multi-vehicle accident that occurred on Interstate 80 in Iowa. This case has an extensive and complex procedural history with this second appeal addressing the following issues: (a) *Forum Non Conveniens*; (b) Motion by

Defendant to Reopen Discovery; (c) Plaintiff's motion for summary judgment; and (d) Post-Judgment Interest.

On the first issue of *forum non conveniens*, the Illinois Appellate Court, First District, applied the traditional balancing test of the public interest factors between the private interest factors and found this did not favor dismissal. This ruling was in part because out of state witnesses had testified via videotaped evidence depositions for the first trial, and this case would have to start over if it was dismissed in Illinois and pursued in Iowa. This suggests that consideration should be given to the common post-pandemic use of platforms such as Zoom and other means for remote depositions if it is anticipated that *forum non-conveniens* will be raised at a later point in time.

The second issue was defendant Howe's motion that was denied by the circuit court, to reopen discovery and allow for plaintiff to be deposed on the issue of damages. The appellate court held that its remand order for a new trial had specific directions that this new trial was only for issues of liability—not damages. Defendant's motion to reopen discovery to depose plaintiff on damages was properly denied by the circuit court since damages had not been raised during the first appeal and since damages were not part of the appellate court's mandate for the new trial.

The third issue was defendant Howe's appeal of summary judgment having been granted in favor of plaintiff by the trial court. The appellate court found that summary judgment was properly granted in favor of plaintiff because, by the time this motion was brought, there were no longer any other defendants in the case for a jury to find at fault for this fatal collision involving multiple parties. At the time of plaintiff's summary judgment motion, there had already been: (a) an earlier ruling by the appellate court that defendant Howe was the proximate cause of plaintiff Inman's injuries and death, (b) a good faith settlement finding in favor of plaintiff and co-defendant Hiner that went unchallenged by defendant Howe, and (c) a trial award for damages that had gone unchallenged. The appellate court agreed with the trial court that under these circumstances, there was no way for a jury to find anyone but defendant Howe 100% liable for plaintiff's injuries and damages.

Defendant Howe's final issue brought on appeal was whether post judgment interest should have been awarded from May 17, 2017 (the date that the trial court entered judgment on the jury's verdict) or February 11, 2021 (the date that summary judgment was granted in favor of plaintiff). The trial court had used May 17, 2017, as the date of accrual for post judgment interest. The appellate court held the trial court was correct since there was nothing about the post-trial proceedings that changed the amount of damages for which defendant Howe was liable to plaintiff.

*Inman v. Howe Freightways, Inc.*, 2022 IL App (1st) 210274.

## Amended Claim Does Not Relate Back in Slip and Fall Case

The Illinois Appellate Court, Second District, upheld the Circuit Court of Lake County's decision that the plaintiff's amended complaint did not relate back to her original complaint and was thus filed after the expiration of limitations period.

The plaintiff was a customer at a convenience store when she allegedly slipped and fell. She sued the defendant business owners alleging negligence. She originally alleged that while she was exiting the store, she slipped and fell on ice and that the defendants breached their duty to maintain their premises in a reasonably safe condition. After dismissal for failure to state a claim in her original complaint, the plaintiff was granted leave to file an amended complaint. The plaintiff's amended complaint alleged that she slipped and fell on an unnatural accumulation of water on the floor as she was shopping, alleging hazardous conditions creating an unreasonable risk of harm.

The circuit court dismissed the plaintiff's amended complaint with prejudice, finding it did not relate back to her original complaint. On appeal, the plaintiff argued that the circuit court erred in dismissing her amended complaint, maintaining that it relates back since the location, time, and injuries are nearly identical such that the amended complaint "grew out of the same occurrence" of the original pleading. The appellate court rejected her argument.

Employing the sufficiently-close-relationship test adopted by the Illinois Supreme Court in *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343 (2008), the court concluded that the material facts between the original complaint and amended complaint differed. The plaintiff alleged slipping on two different substances in two different locations. Also, the substantive and evidentiary issues implicated by the amended allegations are different from those in the original complaint, as the two complaints involve different alleged duties owed by the property owners. The original complaint did not put defendants on notice of a potential change in the cause and location of plaintiff's accident or allow preparation of an appropriate defense. From these material differences, it cannot be said that the original and amended complaints grew out of the same occurrence as alleged in the original complaint.

As a result, the amended complaint does not relate back to the original complaint because it alleges new facts concerning key aspects of the alleged incident and they implicate different substantive evidentiary issues.

*Johnson-Jordan v. Citgo Petroleum Corp.*, 2022 IL App (2d) 210209.

## Evicted Tenants Failed to State Claim Under the RLTO or for Conversion

The Illinois Appellate Court, First District, held that the plaintiffs failed to state a claim under the Residential Landlord and Tenant Ordinance (RLTO) or for conversion, but the appellate court remanded so the plaintiffs could have an opportunity to remedy the defective complaint.

The plaintiffs, evicted tenants, filed suit against their property management company, owners, and purchasers of the building, as well as individual defendants. They claimed that during the eviction process, several of the defendants unlawfully entered the premises and disposed of plaintiffs' personal property. They alleged violations of the RLTO and asserted claims for conversion of personal property. The Circuit Court of Cook County granted the defendants' motions to dismiss the complaint.

The appellate court affirmed that the plaintiffs failed to state a claim for conversion holding that, to state a claim for conversion, the plaintiff must establish that "(1) he has a right to property, (2) he has absolute and unconditional right to immediate possession of property, (3) he made demand for possession, and (4) defendant wrongfully and without authorization assumed control, dominion, or ownership over property." Ultimately, the court held that the fourth element was not alleged in their claim, as there were no allegations identifying who was responsible for the removal of their property from the apartment. As such, the conversion counts were properly dismissed.

The court also affirmed that the plaintiffs failed to state a claim under the RLTO against two individual defendants because they did not allege that either of these individual defendants owned the premises, or that they were an "agent, lessor, sublessor, or successor in interest to the owner of the premises." In addition, there were no facts alleging that they entered the premises or removed the tenants' property. However, this court reversed the designation of this dismissal as being "with prejudice," so the plaintiffs could remedy any defects in their complaint. The court also reversed dismissal as to two other defendants because the statute of limitations for the RLTO claim was five years, not two years.

The appellate court reversed in part the dismissal of some of the plaintiffs' claims. In interpreting the landlord and tenant ordinances, the court determined that a five-year limitations period should apply, rather than two years. So, the claims for alleged violation of the city's residential landlord and tenant ordinances dismissed by the Circuit Court for falling outside the limitations period were reversed.

*Mayle v. Urban Realty Works, LLC*, 2022 IL App (1st) 210470.

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## Court Finds Bickering Neighbors Should Abide by Terms of Settlement Agreement

In *McGoey v. Brace*, the Illinois Appellate Court, First District, had before it a dispute between neighbors about a July 10, 2012, settlement agreement that was supposed to have resolved issues regarding the relocation of a driveway easement. The settlement agreement included terms that provided for installation of a parking pad to be located in part on property owned by defendant Brace and in part on property owned by defendant Lesser. Brace and Lesser could not agree on the materials for the parking pad and this disagreement resulted in Lesser building a fence that bisected the properties and crossed the area that was meant for the parking pad. Subsequently, Brace entered into a listing agreement for the sale of her property and then filed a motion to enforce the settlement agreement since the issue of the parking pad had to be resolved before the property could be sold.

Lesser filed a motion to dismiss on the basis that the circuit court no longer had jurisdiction over the settlement agreement and therefore could not enter an order to enforce the terms about building the parking pad. The Illinois Appellate Court, First District, held that the circuit court properly rejected this motion and cited to the very specific terms of the settlement agreement, which included terms stating, “Judge Hyman or, if applicable, his calendar successor, shall retain jurisdiction over this matter for purposes of enforcing this settlement agreement.”

Next, Lesser unsuccessfully argued that the settlement agreement and motion to enforce settlement did not provide enough details for specific performance about the parking pad because there were insufficient details for the legal description, the construction materials, when it was supposed to be installed, and who was going to install it. These arguments were rejected, held to be collateral, and deemed not significant enough to prevent specific performance.

Lesser continued to make arguments to avoid performing under the settlement agreement and claimed that Brace did not present evidence of the easement for a parking pad, a description of the parking pad, or how the fence violated the settlement agreement. The appellate court found there was no dispute that the settlement agreement was a valid contract, that Brace attempted to follow it when getting the quote for the parking pad, that Lesser violated the settlement agreement by building a fence in the area of the parking pad, and that the settlement agreement had created a valid easement that had been for the benefit of both properties.

*McGoey v. Brace*, 2022 IL App (1st) 210322.

## Illinois Supreme Court Finds Plaintiffs' Legal Malpractice Claim Not Time Barred

The plaintiffs filed a legal malpractice suit in May 2016 after having judgment entered against them in a June 2015 bench trial. By way of background, in May 2010, plaintiffs had retained defendant law firm for legal advice in unwinding plaintiffs' company with another company. In August 2010, that separate company sued the plaintiffs' company alleging a breach of fiduciary duty. In October 2010, the plaintiffs retained a separate law firm, not the defendant law firm, to represent them in that alleged breach of fiduciary duty claim. After losing the bench trial, plaintiffs filed a lawsuit for legal malpractice against the defendant law firm. As a result of the legal malpractice claim, the defendant law firm moved for summary judgment pursuant to 735 ILCS 5/2-1005, claiming that the legal malpractice claim was barred by the two-year statute of limitations. The trial court granted summary judgment in favor of the defendants, finding that the plaintiffs had notice of the malpractice claim as early as 2010, when the underlying lawsuit was filed against them, and no later than in April 2013, when the trial judge told counsel that the plaintiffs' malpractice action was a certainty.

The appellate court reversed and remanded, holding that the plaintiffs had timely filed their legal malpractice claim and finding that the plaintiffs did not suffer a realized injury until the trial court found a breach of fiduciary duty and entered judgment against them in June 2015. The defendant law firm petitioned for leave to appeal, which was granted by the supreme court. The Attorneys' Assurance Society Ltd. filed an *amicus curiae* brief in support of the defendants' position.

The supreme court affirmed the decision of the appellate court, looking to Section 13-214.3(b) of the Code of Civil Procedure, which provides that a claim for legal malpractice accrues when the client “knew or reasonably should have known of the injury for which damages are sought.” 735 ILCS 5/13-214.3(b). In order to determine when the claim accrues, the supreme court stated that the injury must be identified, and then, the supreme court stated there must be a determination as to when the injury was discovered or should have been discovered. Thus, the crux of the issue was the meaning of “injury” in the context of a legal malpractice claim. The supreme court found that “injury” in a legal malpractice claim is not a personal injury or the attorney's negligent act but is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission—i.e., a client is not injured unless and until he has suffered a loss for which monetary damages may be sought. The court then went on to

state that an injury does not accrue—and the statute of limitations does not begin to run—until a judgment, settlement, or dismissal of the underlying action.

Viewed in this light, the supreme court agreed with the plaintiffs in that their cause of action did not begin to accrue until the judgment in the underlying claim was entered against them. Prior to this adverse ruling, there was no monetary loss caused by the defendant law firm's negligent advice. While plaintiffs may have been notified in April 2013 by the trial court that a legal malpractice action may exist, the possibility of damages were not actionable until the underlying litigation ended and the plaintiffs became obligated to pay a sum of money they otherwise would not have had to pay but for the defendant law firm's alleged negligence. Therefore, the supreme court affirmed the judgment of the appellate court which reversed the trial court's summary judgment order and remanded the case for further proceedings.

*Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935.

## WORKERS' COMPENSATION

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### ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

#### Injuries Sustained While Walking at Work Are Determined Under Neutral Risk Analysis

Claimant filed a claim for workers' compensation benefits against the employer for injuries to his right knee that he allegedly sustained on August 31, 2015, while working for the employer. After conducting a hearing, an arbitrator found that the claimant had sustained an accident that arose out of and in the course of his employment and that the claimant's right knee injury was causally related to the accident. The arbitrator awarded TTD benefits, medical benefits, and prospective medical treatment in the form of a total right knee replacement. The Commission reversed, and the circuit court confirmed the Commission's decision. The Commission

indicated that the claimant provided no fewer than three different accounts of his injury to various caregivers, in addition to the version of events he provided at arbitration. The Commission further found that, under a neutral risk analysis, the claimant failed to show that an incident at the station house wherein claimant's right knee gave out while he was walking down the hallway arose out of his employment. On further appeal, the claimant argued, inter alia, that the Commission erred by reviewing his claim under a "neutral risk" analysis rather than an "employment risk" analysis. The appellate court acknowledged that Illinois courts generally recognized three categories of risks: (1) risks distinctly associated with the employment, (2) risks personal to the employee, and (3) neutral risks. The appellate court stressed that the Commission employed a neutral risk analysis only after determining that the claimant's injury had no particular employment characteristics. Specifically, the Commission found that the evidence failed to show that the claimant sustained any kind of specific accident or injury while responding to a vehicle accident or while returning to the firehouse while seated in the cramped quarters of the fire engine. That left only the claim that the claimant had injured his knee while walking at work. Such claims were subject to a neutral risk analysis. By itself, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public and is therefore a neutral risk. Based on its review of the medical records, including the statements the claimant had made to various treaters, therapists, and his employer, and upon its review of the claimant's testimony at arbitration, the Commission found that the claimant's statements regarding the circumstances and mechanics of his injury were inconsistent, and therefore not credible. After carefully reviewing the record, the appellate court agreed with the Commission's finding. It was within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. The Commission had done so, and its decision would not be overturned.

*Buckley v. Illinois Workers' Comp. Comm'n*, 2022 IL App (2d) 210055WC-U.

#### Credibility Issues Sink Claimant's Argument that She Was a Traveling Employee at Time of Accident

The Commission's findings that the claimant was not a traveling employee acting within the course of her employment at the time of

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her vehicle accident and that the claimant did not sustain accidental injuries arising out of and in the course of her employment were not contrary to law or against the manifest weight of the evidence. The appellate court noted that the claimant presented no evidence that she was instructed by her employer to travel the morning of the accident for any business-related purpose, that she was required to travel that morning for any business-related reason, or that she had any business-related appointments that morning. The court noted conflicts in the evidence. For example, at the same time that claimant indicated she was talking on the phone with her sister—the sister testified that claimant told her she was traveling to Chicago on a work-related errand—computer records indicated claimant had sent an e-mail message from her home. Based upon this and other findings as to witness credibility, the Commission found claimant was not engaged in any business activity. Given the evidence contradicting claimant's case, the court could not conclude that the Commission's findings were against the manifest weight of the evidence.

*Brettman v. Illinois Workers' Comp. Comm'n*, 2021 IL App (1st) 210145WC-U.

### **Claimant Fails to Recover Following Explosion of Firework in His Hand**

Claimant worked for a job staffing company and, on July 12, 2017, was working at a city reservoir. He had been instructed to remove tree branches and to mow the lawn on the property. While walking on the lawn, the claimant picked up a round object that was lying on the ground with his right hand. The object was a firework, which exploded while the claimant was holding it. The explosion caused extensive injuries to the claimant's right hand and fingers and burns to his left hand, chest, and torso. The parties dispute how the accident occurred. Based upon the testimony of its expert witnesses and other evidence, the employer maintained that the claimant lit the firework himself. The claimant testified that the firework blew up in his hand immediately after he picked it up. He denied that he lit the firework. The claimant stated that, just before the accident, he was picking up tiny branches and moved them from his right hand to his left hand. A lighter was found on the ground in the area of the blast. The claimant admitted that he had carried a lighter on the date of the accident. The arbitrator rejected the claimant's contention that the firework had spontaneously combusted. The arbitrator denied benefits. The Commission unanimously affirmed, and the circuit court confirmed the Commission's decision. The appellate court said ample evidence supported the Commission's decision. The court noted that two experts testified that the location of the lighter and

the nature of the claimant's injuries suggested that the claimant was holding the lighter in his left hand at the time of the explosion and that the lighter had been near the firework when it exploded. They further testified that the location where the lighter was found, the burnt condition of the lighter, the presence of carbon on the lighter, and the lack of any burns to the claimant's pants, belt, or belt loops suggested that the lighter was close to the firework and was not clipped to the claimant's pants at the time of the explosion as the claimant alleged. Moreover, both experts testified that the firework at issue in this case could not have exploded without an ignition source. This evidence cast considerable doubt on the veracity of the claimant's account of the incident. The Commission's decision to credit the two experts' opinions over the evidence offered by claimant was reasonable. The Commission's finding was not against the manifest weight of the evidence.

*Junior v. Illinois Workers' Comp. Comm'n*, 2022 IL App (4th) 210341WC-U.

## **CAUSAL CONNECTION**

### **Claimant Shows Workplace Accident Aggravated Preexisting Disc Disease and Caused Need for Surgery**

The Illinois Workers' Compensation Commission could reasonably conclude that claimant's work accident of January 10, 2019, aggravated his preexisting cervical degenerative disc disease where claimant was able to function and work prior to the accident, but following the accident, claimant's condition deteriorated to the extent that he was unable to continue his employment as a bus driver. In addition, the evidence supported an inference that the accident accelerated claimant's need for surgery where claimant's treating physician testified that the symptoms resulting from the work accident were the impetus for claimant to seek medical attention. Accordingly, the Commission properly determined that claimant's condition of ill-being was causally related to his work accident of January 10, 2019.

*Greater Peoria Mass Transit Dist. v. Illinois Workers' Comp Comm'n*, 2021 IL App (3d) 210223WC-U.

### **Claimant Fails to Show Causal Connection Between Conditions of Ill-Being and His Work Accident**

Claimant filed an application for adjustment of claim for injuries he allegedly sustained while in the employ of Mt. Vernon Police Department. Following a hearing, the arbitrator found that claimant sustained an accident arising out of and occurring in the course of his employment. The arbitrator further found that because claimant reached maximum medical improvement (MMI) from his injuries three months after the accident, his current conditions of ill-being were not causally related to the accident. Accordingly, the arbitrator awarded claimant medical expenses through the date of MMI but denied claimant's requests for temporary total disability (TTD) benefits for a period after the date of MMI and permanent partial disability (PPD) benefits. The Commission affirmed and adopted the decision of the arbitrator. On judicial review, the circuit court of Jefferson County confirmed the decision of the Commission. Claimant appealed, challenging the Commission's findings with respect to causation, TTD benefits, and PPD benefits. With regard to causation (i.e., the connection between his employment and the conditions of ill-being), claimant argued that he had no significant problems or symptoms with either his left shoulder or left wrist near the time of the March 5, 2014, accident. Further, claimant contended that the opinions of his two medical experts were more credible than those offered by the employer. Noting that the issue of causal relationship was a question of fact, the appellate court stressed that it could not reject, or disregard permissible inferences drawn by the Commission simply because different or conflicting inferences may also reasonably be drawn from the same facts, nor could it substitute its judgment for that of the Commission on such matters unless the Commission's findings were against the manifest weight of the evidence. The court noted that claimant waited 16 days after the accident before seeking treatment. Further, there was a significant gap in claimant's medical treatment. Claimant initially sought care for his work injuries on March 21, 2014, at Express Care. He followed up at Express Care on April 28, 2014, and June 6, 2014. After the June 2014, visit, however, claimant waited more than nine months (until March 25, 2015) to consult Dr. Mall about his left shoulder and left wrist. While there were multiple references in the Express Care records to orthopedic referrals on earlier dates, there were no corresponding office notes to confirm that these visits ever occurred. In short, the Commission's conclusion that claimant failed to establish that the conditions of ill-being involving his left shoulder and left wrist after June 6, 2014, were causally related to his work accident of March 5, 2014, was not against the manifest weight of the evidence.

*Bullard v. Illinois Workers' Comp. Comm'n*, 2021 IL App (5th) 210024WC-U.

### **Medical Evidence, While Conflicting, Was Sufficient to Establish Claimant's Occupational Disease**

Claimant sought benefits for a kidney condition (membranous nephropathy) that he allegedly developed from cumulative exposure to hazardous chemicals while working for respondent, Emerald Performance Materials (Emerald). Following a hearing, the arbitrator found that claimant sustained an occupational disease and that his membranous nephropathy and associated symptomology (hypertension and diabetes) were causally related to his workplace exposure. The arbitrator awarded claimant medical expenses, temporary total disability (TTD) benefits from October 27, 2011, through February 23, 2012, and permanent partial disability (PPD) benefits, representing 40 percent loss of use of the person as a whole. The Commission modified the arbitrator's decision and affirmed the decision as modified, with one commissioner dissenting. Specifically, the Commission found that claimant failed to prove a causal connection between his diabetes and workplace exposure and, thus, modified the arbitrator's award of medical expenses, including prospective medical, to exclude expenses for treatments relating to claimant's diabetes. On judicial review, the circuit court of Tazewell County confirmed the Commission's decision. Emerald appealed, arguing that the Commission's decision awarding claimant benefits under the Act was against the manifest weight of the evidence.

In relevant part, Emerald challenged the Commission's findings pertaining to disease and causation, arguing that claimant failed to prove membranous nephropathy was an occupational disease or that he was exposed to a workplace hazard "which would increase his risk of developing or aggravating membranous nephropathy." According to Emerald, the credible evidence established that claimant was not exposed to any chemicals which increased his risk of developing or aggravating membranous nephropathy. Emerald further argued that the medical opinions offered by claimant's expert were speculative and insufficient to support the Commission's findings. The court stressed that nothing in the Occupational Diseases Act required proof of a direct causal connection. Rather, a causal connection could be based on a medical expert's opinion that an accident "could have" or "might have" caused an injury. In addition, a chain of events suggesting a causal connection may suffice to prove causation even if the etiology of the disease is unknown. Here, the Commission, in affirming and adopting the arbitrator's decision, found that claim-

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ant proved he was exposed to hazardous chemicals while working at Emerald. The Commission also found that claimant proved his membranous nephropathy and hypertension were causally related to his workplace exposure. After carefully reviewing the record, the court could not say that the Commission's findings were against the manifest weight of the evidence. While the court might have reached a decision different from that of the Commission, such an opposite conclusion was not clearly apparent.

*Emerald Performance Materials v. Illinois Workers' Comp. Comm'n*, 2021 IL App (3d) 200224WC-U.

### **Record Evidence Supported Commission's Finding that Claimant's Preexisting Disc Disease Was Aggravated by Work-Related Accident**

The appellate court said it was undisputed that claimant suffered from preexisting cervical degenerative disc disease prior to her accident of June 15, 2016. Despite her preexisting condition, claimant was asymptomatic prior to the accident and able to work full duty as a bus driver. After the accident, however, claimant had ongoing problems with her cervical area. In this regard, claimant testified that she had stiffness and numbness in her neck. Although claimant denied any neck pain during her initial visit, the physician's assistant noted that claimant's neck was tight. Moreover, on June 21, 2016, just days after her initial examination, claimant told the physician's assistant that she was experiencing a trapezius strain radiating towards the neck. Moreover, there was medical evidence linking the work accident to claimant's cervical condition. In his addendum report, Dr. Ross unequivocally opined that claimant's cervical condition was causally related to her work accident. In support of this conclusion, Dr. Ross observed that claimant denied any symptoms involving the cervical spine prior to the accident and he had not been presented with any medical records that called into question her veracity on this matter. Based on the record before the court, there was clearly support for the Commission's finding that the work-related accident of June 15, 2016, aggravated claimant's preexisting condition.

*Danville Mass Transit v. Illinois Workers' Comp. Comm'n*, 2022 IL App (4th) 210490WC-U.

### **Medical Evidence Was Insufficient to Show Causation Where it Relied upon Claimant's Testimony Re: Unwitnessed Accident, and Commission Found Claimant's Credibility Suspect**

Claimant sought benefits for a low back injury he sustained while working for the employer, Williamson County Sheriff's Department. Following a hearing, the arbitrator found that claimant sustained a compensable injury and awarded him temporary total disability (TTD) benefits, along with medical expenses and prospective medical treatment. The Commission, with one commissioner dissenting, reversed the arbitrator's decision and vacated the award of benefits, finding that claimant failed to prove he sustained an accident at work. Claimant sought judicial review of the Commission's decision in the circuit court of Williamson County. The court reversed the Commission's decision, finding it to be against the manifest weight of the evidence, and affirmed the arbitrator's decision. The employer appealed.

Claimant testified that the accident occurred in a stairwell while he was retrieving his lunch box during his assigned shift on May 30, 2019. Specifically, claimant testified that he slipped "due to visibility," twisted his ankle, and fell backwards down the stairs. According to claimant's medical records, some introduced by the employer, he sought immediate medical treatment after the alleged accident and follow-up treatment in the months following the alleged accident. The court indicated claimant provided a generally consistent history of the alleged accident to each medical provider, as documented in his medical records.

In a divided decision, the appellate court indicated the Commission found that claimant failed to prove he sustained an accident on May 30, 2019. Specifically, the Commission found that, although claimant may have been in the stairwell on the alleged date and an ambulance was called in response to an alleged accident, he failed to prove he sustained any accident at all on the alleged date. Because no one witnessed claimant's alleged accident on May 30, 2019, and claimant was the only witness who testified that the accident occurred, the Commission's finding was based upon its determination that claimant's testimony and "claimed mechanism of injury" lacked credibility. Additionally, the Commission determined that claimant's failure to submit the May 30, 2019, ambulance record and the second page of a doctor's June 3, 2019, treatment record into evidence led to "the permissible inference" that those records contained information detrimental to his claim. The appellate court said that such a determination was within the Commission's purview and was reasonable given the evidence. Similarly, the Commission

questioned claimant's claim of twisting his ankle on the stairs, given that no ankle injury was documented in his initial medical records. As well, the Commission found it was "extremely unlikely" claimant could have fallen backwards down a flight of stairs without any visible signs of trauma documented in his medical records.

As to the physician's opinion that claimant's symptoms were consistent with a disc injury and that claimant's symptoms were causally related to the alleged May 30, 2019, accident, such opinion was based on claimant's description of the alleged fall. As for the doctor's MRI findings, the Commission disregarded them, finding that the MRI findings "a month and a half later" did not support claimant's claim without contemporaneous medical evidence of trauma. The court said it recognized the MRI confirmed the physician's opinion that claimant sustained a disc injury, but the Commission determined the alleged mechanics of the injury proffered by claimant were not credible. Thus, the doctor's opinion that claimant's symptoms and disc injury were causally related to the alleged accident was not credible either. As such, the Commission's decision to disregard the MRI findings was supported by the evidence.

*Murray v. Illinois Workers' Comp. Comm'n*, 2022 IL App (5th) 210129WC-U.

### **Where Claimant Had Preexisting Degenerative Condition, Expert Medical Opinion was Required to Show Condition was Work-Related, and Not Merely Normal Degenerative Process**

Claimant sought benefits for a repetitive trauma injury to his left shoulder that he allegedly sustained while working for the employer. After conducting a hearing, the arbitrator found that the claimant had sustained a repetitive trauma injury that arose out of and in the course of his employment and that the current condition of ill-being in the claimant's left shoulder was causally related to the accident. The arbitrator awarded TTD benefits, PPD in the amount of 12.5 percent loss of the person-as-a-whole, and expenses for reasonable and necessary medical services related to the treatment of the work-related injury. The arbitrator acknowledged that the claimant did not offer any medical testimony on the issue of causation. However, citing the Illinois Supreme Court's decision in *Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill. 2d 244 (1976), and the appellate court's decision in *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470 (1987), the arbitrator opined that our court "has noted that such testimony is not required to establish a compensable injury where the nature

and effect of the work activities is within the common knowledge of laypeople." The Commission, with one commissioner dissenting, affirmed and adopted the arbitrator's decision.

The circuit court found the claimant's case was a "close one," but it also found the evidence of the vigorous nature of the repetitive activities performed by the claimant at work, the mechanics of those activities, and the onset of the claimant's pain symptoms while working provided sufficient circumstantial evidence to support the claimant's theory of a repetitive trauma arising out of work that was causally connected to his current condition of ill-being. Accordingly, it confirmed the Commission's decision. The employer appealed.

The appellate court observed that in order for claimant to recover for a repetitive trauma injury, there must be a showing that the injury was work-related and not a result of the normal degenerative aging process. Normally, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability. The court added that where there is evidence of a preexisting degenerative condition, medical opinion evidence is necessary to establish a causal connection between the repetitive trauma injury and the claimant's work duties.

Summarizing the record before the appellate court, the court said that the claimant failed to prove by a preponderance of the evidence that he sustained a repetitive trauma injury arising out of his employment. The medical records revealed that the claimant had osteoarthritis and other preexisting degenerative conditions in his left shoulder. The claimant presented no expert medical opinion, medical evidence, or any other evidence suggesting that his injuries were work related and not merely the result of a normal degenerative process in his left shoulder. The only evidence that the claimant presented connecting his injuries to his employment was his own un rebutted testimony regarding the repetitive work duties he performed, the arm and shoulder movements he made while performing those duties, and the increased frequency of those movements in the months leading up to the manifestation of his injury. However, even assuming *arguendo* that this testimony was credible, it merely established a *correlation* between his increased work activities and the occurrence of his symptoms. The claimant's testimony did not, and could not, establish that his injuries were the result of his employment, as opposed to the natural progression of his preexisting degenerative conditions. Because this question is not within the common knowledge of a layman, only a medical opinion from an expert or a treating physician could provide evidence of causal connection. No such evidence was presented here. Accordingly, the court reversed the judgment of the circuit

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court, which confirmed the Commission's decision, and reversed the Commission's decision granting the claimant's claim for benefits under the Act.

*University of Ill. v. Illinois Workers' Comp. Comm'n*, 2021 IL App (4th) 210236WC-U.

### **Commission's Denial Was Improper Where Claimant Provided Unrebutted Testimony of Her Unwitnessed Accident and Further Provided Consistent Histories to Medical Providers**

The appellate court held the Commission's decision finding that the claimant had failed to prove that she suffered a work-related accident was against the manifest weight of the evidence where the court found claimant had offered unrebutted testimony of an unwitnessed work-related accident on December 2, 2017, and had provided consistent histories to her medical providers.

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

## **EMPLOYMENT STATUS**

### **No Jurisdiction Where Last Act of Forming Employment Contract Was in Indiana**

The county circuit court erred when it confirmed an award of workers' compensation benefits for an Illinois resident who sustained injuries at her employer's work site in Indiana and who completed her employment application in Indiana after reporting to the employer for duty. In a decision not designated for publication, the Illinois appellate court stressed that since the last act necessary to form the contract of employment took place outside Illinois, as did the injury, the Illinois Commission had no jurisdiction over the claim. The claimant had admitted in her testimony that under the terms of the International Brotherhood of Electrical Workers "inside labor agreement," which covered her employment, the Indiana employer could reject her application even after she had reported for duty.

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

## **INJURIOUS PRACTICE**

### **Commission's Refusal to Terminate or Reduce Benefits Based Upon Alleged Injurious Practice Was Supported by Evidence**

Claimant sought benefits for injuries she sustained to her right ankle when she tripped and fell while walking down a hallway at work on March 13, 2012. Claimant specifically alleged that she fell when she "tripped over loose carpet" and a "carpet strip" in the hallway. On June 17, 2014, claimant filed a second application for adjustment of claim seeking benefits for an additional injury she sustained to her right ankle while working for respondent on November 12, 2012. Claimant alleged that she sustained the second injury to her right ankle when a student fell into her in a hallway. The cases were consolidated for a hearing before the arbitrator without objection by either party. The arbitrator issued written decisions in both cases. In the first decision, the arbitrator found that claimant had sustained an accidental injury arising out of and in the course of her employment with respondent on March 13, 2012. Specifically, the arbitrator found that claimant had sustained a right ankle sprain that aggravated her preexisting arthritis in her right ankle and accelerated her need for a right ankle fusion. The arbitrator also found that claimant's current condition of ill-being was causally connected to the March 13, 2012, accident but that claimant had engaged in an injurious practice and, thus, the causal connection ended on April 16, 2013, pursuant to section 19(d) of the Act (820 ILCS 305/19(d)).

In the second decision, the arbitrator found that claimant had sustained an accidental injury arising out of and in the course of her employment with respondent on November 12, 2012. The arbitrator found, however, that claimant had sustained an ankle contusion that resolved the same day and, thus, the causal connection for that condition ended on November 12, 2012. Accordingly, the arbitrator ordered respondent to pay reasonable and necessary medical expenses, totaling \$816, for treatment claimant received on November 12, 2012.

The Commission, with one commissioner dissenting, issued a decision that modified the arbitrator's decision, in part, but otherwise affirmed and adopted the arbitrator's decision. The Commission first disagreed with the arbitrator's determination that claimant had engaged in an injurious practice that ended the causal connection on April 16, 2013. The Commission found that there was no evidence showing claimant deliberately attempted to impede her recovery. The Commission, instead, found that claimant's employment remained a cause of her current condition of ill-being. Thus, the

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## Survey of 2022 Tort Law and Workers' Compensation Cases (Continued)

Commission modified the arbitrator's award to include all reasonable and necessary medical expenses pursuant to sections 8(a) and 8.2 of the Act, including those incurred after April 16, 2013, and additional TTD benefits from April 17, 2013, to April 4, 2014. The Commission also disagreed with the arbitrator's decision to award claimant PPD benefits, representing 25 percent loss of use of her right ankle, finding that claimant established her entitlement to permanent total disability (PTD) benefits under the odd-lot theory. The Commission modified the arbitrator's decision by awarding claimant PTD benefits, rather than PPD benefits, in the amount of \$483.36 per week for life pursuant to section 8(f) of the Act. The dissenting commissioner indicated that she would have affirmed the arbitrator's decision in its entirety, including the finding that claimant's failure to comply with treatment directives resulted in an injurious practice under section 19(d) of the Act that should have precluded a finding of causation after April 16, 2013. Following a hearing, the circuit court confirmed the Commission's decision.

As to the injurious practice issue, the appellate court noted that according to the respondent employer, the medical evidence clearly showed that claimant engaged in an injurious practice by failing to comply with a doctor's repeated instructions to remain non-weight bearing following surgery. Claimant argued that the Commission's finding was neither against the manifest weight of the evidence nor an abuse of discretion because the evidence showed that claimant did not intentionally bear weight on her foot to impede her recovery or to harm herself. The appellate court indicated it could not say that the Commission abused its discretion by declining to reduce or suspend claimant's compensation. The Commission found that there was no evidence showing claimant intentionally disregarded the doctor's instructions to impede or harm her recovery, such that her conduct rose to the level of an injurious practice that would require a termination of her benefits. After considering respondent's arguments and the evidence presented, the court could not say that no reasonable person could agree with the Commission's position.

Here, claimant admitted that she placed her foot on the ground to balance herself on occasion but denied bearing weight on her foot. The respondent pointed out that, on May 16, 2013, the doctor noted concern about claimant's compliance with her instructions because it sounded as though claimant had been walking on her right foot "somewhat." The court said this notation, however, merely documented the doctor's suspicion regarding claimant's compliance and did not conclusively show that claimant had walked on her foot against the doctor's instruction. Moreover, stressed the court, the doctor released claimant to bear weight on her foot as tolerated that same day, indicating that claimant was progressing with, rather than impeding, her recovery. Based upon the foregoing, the court could

not say that the Commission abused its discretion by declining to terminate claimant's benefits under section 19(d) of the Act.

*Mt. Vernon Sch. Dist. #80 v. Illinois Workers' Comp. Comm'n*, 2021 IL App (5th) 210047WC-U.

## AVERAGE WEEKLY WAGE

### Commission Erred in considering Claimant's Concurrent Employment Where There Was No Evidence Primary Employer Knew About Concurrent Work

Claimant, a captain in the Springfield Fire Department, sought workers' compensation benefits following his response to a call involving a young girl who had been viscously attacked by a dog. One issue before the arbitrator related to the claimant's average weekly wage. The arbitrator determined that his annual salary was \$97,418.47. This was based on \$90,537.97 working for the City and \$6,880.50 working for a funeral home. The arbitrator awarded benefits based on the computed average weekly wage that included both employments and the City appealed. In relevant part, it objected to the AWW computation. The appellate court reversed. It noted that Section 10 of the Act mandated that an employer have knowledge of concurrent employment for it to be considered in calculating claimant's average weekly wage [*see* 820 ILCS 305/10 (2014); *Jacobs v. Industrial Comm'n*, 269 Ill. App. 3d 444 (1995)]. Claimant pointed to two facts—that he had worked for the funeral home concurrent with his employment with the City for 14 years and that personnel records from the funeral home indicated "its ability to communicate with the City." The appellate court said that neither of these facts was sufficient to show awareness of claimant's concurrent employment. To assume that the City had knowledge of claimant's work at the funeral home because he had been there a long time would require one to speculate that the subject must have been discussed at some point during that time. Similarly, it would be speculation to conclude that the funeral home had contacted the City simply because it was able to do so. An award under the Act could not be based on mere speculation. Therefore, the Commission erred in considering claimant's concurrent employment in determining his average weekly wage. The case was remanded to allow the Commission to recalculate claimant's average weekly wage without considering concurrent employment.

*City of Springfield v. Illinois Workers' Comp. Comm'n*, 2022 IL App (4th) 210338WC-U.

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## MEDICAL CARE

### PERMANENT TOTAL DISABILITY

#### Claimant Recovers Under Odd-Lot Theory After Showing No Work was Available for Him

Construing the application of the so-called “odd-lot” theory, the appellate court, citing *Larson’ Workers’ Compensation Law*, in relevant part stressed that an employee generally fulfills the burden of establishing that he or she falls into the odd-lot category in one of two ways: (1) by showing a diligent but unsuccessful search for employment or (2) by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. If an employee makes this showing, the burden shifts to the employer to show that some kind of suitable work is available to the employee. The court acknowledged that there was no evidence that claimant was obviously unemployable and there was no medical expert opinion that claimant was permanently and totally disabled. Thus, claimant was required to demonstrate an entitlement to PTD benefits by proving he fit within the “odd lot” category. In adopting and affirming the decision of the arbitrator, the Commission observed that because claimant had not performed a job search, he could only fall into the odd-lot category by demonstrating there were no available jobs for a person in his circumstance given his age, training, education, and work history. The Commission, finding the testimony of claimant’s certified vocational counselor persuasive, concluded that claimant had met his burden and that the burden therefore shifted to respondent to show that some kind of suitable work is available to claimant. The Commission determined that respondent failed to meet its burden because (1) the employer’s expert failed to offer any evidence that suitable work was consistently available in claimant’s labor market and (2) the watchman position the employer offered claimant in February 2017 was a “sham.” Based on the court’s review of the record, there was ample evidence in the record to support the Commission’s findings. At most, there was conflicting evidence on the issue of available jobs. The Commission had exercised its discretion in finding in favor of the claimant on the issue.

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

#### Commission’s Decision On “Odd-Lot” Issue was Not Against Manifest Weight of Evidence

Claimant appealed the judgment of the circuit court of McLean County confirming the decision of the Commission finding that he failed to prove he was permanently totally disabled based on an odd-lot theory. This case was before the appellate court on a previous appeal by claimant [*see Barnett v. Illinois Workers’ Comp. Comm’n*, 2019 IL App (4th) 180788WC-U]. In the earlier appeal, the court had noted that the Commission neglected to perform part of the analysis pertaining to the odd-lot theory. Following remand, the case returned to the court, which affirmed.

The appellate court noted the odd-lot rule in Illinois: Where a claimant’s disability is of such a nature that he is not obviously unemployable, or there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove by a preponderance of the evidence that he fits into an “odd lot” category; that being an individual who, although not altogether incapacitated, is so handicapped that he is not regularly employable in any well-known branch of the labor market. The court observed further that a claimant’s burden could be met in two ways:

1. By showing diligent but unsuccessful attempts to find work, or
2. By showing that, because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market.

Here, only the second method was at issue. The court said claimant’s brief was basically an invitation to the court to reweigh the evidence in the case. That was not proper. The court noted the conflict among the medical and vocational experts as to claimant’s employability. There was some evidence that in spite of his condition, claimant could be retrained at a community college. In short, said the court, the Commission’s decision was not against the manifest weight of the evidence.

*Barnett v. Illinois Workers’ Comp. Comm’n*, 2021 IL App (4th) 210159WC-U.

## WAGE-DIFFERENTIAL BENEFITS

### **Circuit Court Had Jurisdiction to Determine Amount of Unpaid Medical Bills Following Execution of Workers' Compensation Settlement Agreement; Attorney's Fees and Costs were Appropriately Awarded**

Morse sustained an injury to her cervical spine while working for the employer. The arbitrator found that Morse sustained a compensable injury and awarded her benefits under the Act, including temporary total disability benefits and medical expenses in the amount of \$17,621.11. The arbitrator also ordered the employer to pay for prospective medical treatment, including a decompression fusion surgery recommended by Morse's treating physician. Neither party sought review of the arbitrator's decision before the Commission. Morse subsequently underwent the recommended surgery at Frontenac Surgery and Spine Care Center (Frontenac). Prior to surgery, Morse signed a financial agreement with Frontenac, wherein she agreed to pay all sums due for the surgery at Frontenac's usual and customary charge. Morse further agreed that her insurer's failure to make payment would not relieve her obligation to pay Frontenac. Shortly after Morse's surgery, Frontenac submitted a claim for reimbursement to Casey's third-party administrator. The claim for reimbursement listed Frontenac's charges for Morse's surgery, including, *inter alia*, charges for four medical implants that totaled \$24,190. In support of the implant charges, Frontenac attached the invoice it received from New Age Medical, a wholesale supplier of medical devices, for the four implants, which listed a total price of \$12,095.

The TPA processed Frontenac's claim and issued partial reimbursement for the billed charges, including, *inter alia*, a partial payment of \$9,912.03 for the medical implants. The TPA sent Frontenac an explanation of reimbursement, which provided reasons for the partial reimbursement of the billed charges and indicated the reimbursement was made according to the fee schedule provided in section 8.2 of the Act. The explanation of reimbursement also indicated that Foresight conducted a separate review of Frontenac's implant charges and made recommended reductions. Foresight, an agent for the employer, issued a separate explanation of reimbursement, which provided reasons for the recommended reductions and indicated the review was conducted in accordance with the Act. Frontenac disagreed with the explanation. Specifically, it noted that it charged \$24,190 for the implants but expected a reimbursement payment in the amount of \$15,118.75 in a workers' compensation

case. Frontenac also noted that the partial payment of \$9,912.03 left an outstanding balance of \$5,206.72. Frontenac paid the New Age Medical invoice, which totaled \$12,095, in full on January 8, 2018.

Subsequently, the Commission approved a settlement agreement between Morse and the employer, wherein the parties agreed to settle Morse's claim arising under the Act. In the "Medical Expenses" section of the agreement, a box was checked that indicated the employer had paid all medical expenses, and no unpaid medical bills were listed on the space provided. The settlement agreement listed a total settlement amount of \$44,000 and indicated that Morse would receive \$32,284.06 after a \$8,800 deduction for attorney fees and a \$2,915.94 deduction for medical reports and x-rays. In a separate part of the agreement, the employer agreed to pay "open medical rights" related to the reasonable, necessary, and causally related medical treatment for Morse's condition, but reserved the right to dispute and refuse medical treatment.

Morse subsequently filed an application for entry of judgment pursuant to section 19(g) of the Act. Morse alleged that pursuant to the settlement agreement approved by the Commission, the employer agreed and was required to pay all medical bills according to the provisions of the Fee Schedule contained in Section 8.2 of [the Act]. Morse alleged that the employer had refused to properly pay Frontenac's medical bill for the implants in the amount of \$5,206.72. The circuit court eventually entered a written order finding that Morse established there were unpaid medical expenses totaling \$5,206.72. The court also found that the unpaid medical expenses should have been paid pursuant to the settlement contract because the unpaid balance represented payment for implants (hardware) billed at 25 percent above the net manufacturer's invoice. The court also ordered the employer to pay \$11,650 in attorney fees and \$1,081.14 in associated court costs. The employer appealed.

The appellate court rejected the employer's argument that the circuit court had lacked subject-matter jurisdiction to determine the amount owed under the settlement agreement because it was required to both construe the Act and consider matters that were never properly presented to the Commission. Because neither party sought review of the Commission's decision approving the agreement, the circuit court had exclusive jurisdiction to resolve the issue. While the settlement agreement did not provide a specific dollar amount of medical expenses, the agreement specified, and the parties agreed, that the amount should be calculated as provided in section 8(a) and the fee schedule set forth in section 8.2 of the Act. The parties further agreed that, pursuant to section 8.2(a-1)(5) of the Act (820 ILCS 305/8.2(a-1)(5)), reimbursement for implants must be 25 percent above the net manufacturer's invoice price less

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rebates, plus actual reasonable and customary shipping charges. Under these circumstances, the court did not exceed the scope of its limited jurisdiction by looking to the Act for guidance in calculating the amount owed under the settlement agreement.

We affirm the orders of the circuit court entering judgment in favor of petitioner for unpaid medical expenses and awarding petitioner attorney fees and costs pursuant to section 19(g) of the Workers' Compensation Act (820 ILCS 305/19(g)), where the court properly determined that respondent failed to tender full payment of the amount awarded to petitioner in a settlement agreement approved by the Illinois Workers' Compensation Commission

*Morse v. Casey's Gen. Store*, 2021 IL App (5th) 200157-U.

## PERMANENT PARTIAL DISABILITY BENEFITS

### Court Affirms Arbitrator's Use of Five-Factor Test in Statute to Determine Claimant's PPD Rating

Claimant sought benefits for injuries to his left shoulder sustained on April 22, 2013, while working for First Priority Elevator. After First Priority's workers' compensation insurance carrier, AmTrust Insurance, filed for bankruptcy, the Illinois Guaranty Fund was joined as a party-respondent. The Commission awarded benefits, including permanent partial disability benefits for a 20 percent loss of use of a person as a whole. The Guaranty Fund appealed. The appellate court noted that the arbitrator, whose decision the Commission had affirmed, addressed the five factors to be considered in determining PPD as set forth in section 8.1b(b) of the Act [820 ILCS 305/8.1b(b)]. The court noted that the Guaranty Fund had not seriously argued that the claimant was not entitled to an award of PPD benefits, as evidenced by its prayer for relief which asks this court to, *inter alia*, "set aside the Commission's decision and enter a 2 percent PPD determination." The Guaranty Fund contended that the Commission "effectively ignored" one of the medical expert's 2 percent AMA impairment rating. It asserted that the physician's 2 percent rating had never been challenged or refuted and that none of the other statutory enumerated factors for consideration support a PPD determination in excess of 2 percent. The Guaranty Fund concluded, therefore, that the Commission's award of PPD benefits for a 20 percent loss of use of the person as a whole was against the manifest weight of the evidence. The claimant asserted that the Guaranty Fund's argument ignored the evidence before the arbitrator establishing that he sustained a serious injury to his left shoulder

which required two surgeries and resulted in a noticeable loss of use of his shoulder as determined by his FCE and the imposition of permanent lifting restrictions. He argued that the Commission's PPD determination was supported by the evidence of record and should be given substantial deference. The court said it agreed with the claimant.

The nature and extent of an injured employee's disability was a question of fact to be determined by the Commission. Contrary to the Guaranty Fund's assertion, the court stressed the arbitrator did not ignore the expert's reported level of impairment. The arbitrator specifically noted the 2 percent impairment rating but assigned "minimal weight" to the rating. The court said the arbitrator had reasoned, in part, that in calculating the impairment rating, the doctor utilized the default extremity rating related to residual loss with normal motion, which was contradicted by the claimant's testimony that he suffered a loss of motion. The court added that nothing within the statutory language of section 8.1b(b) required the Commission to automatically adopt the doctor's reported level of impairment merely because he was the only physician who submitted an impairment report. To the contrary, the Commission was obligated to weigh all of the factors listed within section 8.1b(b) and make a factual finding with respect to the level of the injured worker's permanent partial disability with no single factor being the sole determinant of disability.

*First Priority Elevator & Ill. Guar. Fund v. Illinois Workers' Comp. Comm'n*, 2022 IL App (1st) 210477WC-U.

### Commission is Responsible for Weighing Medical Evidence, Not the Appellate Court

Claimant was employed by the City of Peoria (City) as a police officer. On October 28, 2016, the claimant approached a suspect and went to stop him. The suspect pulled away from the claimant, causing the claimant to trip on an uneven sidewalk. He fell forward, extending both arms forward to brace his fall, and landed on his hands. The claimant noticed pain in his left wrist going up his arm and pain in his right wrist and right hand. He filed a police report with the City and did not complain of any pain in his left shoulder. Surgery was performed to address a tear in the claimant's left wrist. Thereafter, the claimant had his left arm in a sling, continued to take pain medication, and underwent physical therapy. The claimant testified that he noticed pain in his left shoulder during physical therapy and it never went away. In April 2017, the claimant presented to Dr. Peter Hoepfner, an orthopedic surgeon specializing in hand and upper extremity surgery, for an independent medical examination (IME).

The report noted that the claimant denied shoulder complaints and had a normal shoulder exam. In May 2017, the claimant sustained an injury to his right shoulder during work hardening. In September 2017, the claimant underwent surgery for a rotator cuff tear in his right shoulder. Claimant's surgeon subsequently opined that it was more likely than not that the claimant's left shoulder was injured in the October 2016 accident. He stated that the claimant's mechanism of injury was of the type that could cause a shoulder problem.

The arbitrator found that the claimant's left shoulder condition of ill-being was causally related to the October 2016 accident. The Commission reversed the arbitrator, finding that the claimant failed to prove a causal connection between his left shoulder condition of ill-being and the October 2016 work accident. The Commission observed that the claimant had 14 visits to see two doctors between the date of the accident (October 2016) and his evaluation with Dr. Garst where he complained of left shoulder problems (June 2017), and none of the notes from those 14 appointments contained left shoulder complaints. The circuit court confirmed the Commission's determination. Claimant appealed.

The appellate court said the claimant was essentially asking it to reweigh the evidence in his favor. That task was for the Commission, not the appellate court. The court reiterated that claimant had over a dozen appointments where he sought treatment for injuries related to the October 2016 incident and the first record of any left shoulder pain did not occur until June 2017 when he first met with Dr. Garst. It was true that two doctors agreed that the October 2016 accident could cause the left shoulder issues the claimant experienced, but one of them stated that when the claimant first presented for his initial IME in April 2017, he denied shoulder complaints, which would remove the October 2016 accident as a source of his injury. The other doctor expressed a similar opinion, stating that if the claimant presented to another provider two months prior to his June 2017 meeting with the claimant and denied shoulder complaints, it would contradict his causation opinion. Based on the facts presented, the court said the record was devoid of a causation opinion to support the contention that the claimant's left shoulder condition of ill-being was a result of the October 2016 accident.

*Jordan v. Illinois Workers' Comp. Comm'n*, 2022 IL App (3d) 210213WC-U.

## EVIDENCE; ADMISSIBILITY

### Commission Enjoys Broad Discretion in Weighing the Evidence

The appellate court held the Commission's determination that the claimant suffered a work accident and was entitled to TTD benefits was not against the manifest weight of the evidence, where the court noted the employer largely relied on its position that the accident did not and could not occur as described by the claimant, and the court acknowledged there was some confusion as to whether claimant was operating a forklift in forward gear or reverse at the time of the incident. The task of weighing the evidence was within the exclusive purview of the Commission. Although the Commission's discretion is not absolute, the court said its review of the record demonstrated there was ample evidence to support the Commission's decision. It agreed with the Commission that the claimant's testimony was more credible than the other testimony presented.

*Unistaff, Inc. v. Illinois Workers' Comp. Comm'n*, 2022 IL App (2d) 210273WC-U.

## JURISDICTION

### Where Evidence of Notice of Injury was Conflicted, it was for the Commission to Resolve the Conflict and Make its Findings

On appeal, claimant raised three main arguments. First, she asserted that the Commission erred in determining that she failed to prove she suffered a work-related accident. Second, she argued that the Commission erred in finding that she did not provide notice to respondent. Third, claimant contended that the Commission's determination that she failed to satisfy the causation element was contrary to the manifest weight of the evidence. Since the court determined that claimant failed to establish that she provided the required notice to respondent, her arguments regarding accident and causation were moot. The court noted that the Act required that a claimant give notice to his or her employer "as soon as practicable, but not later than 45 days after the accident" [see 820 ILCS 305/6(c)]. A claimant must not only apprise the employer of the existence of an injury, he or she must also notify the employer of its relationship to employment. The court noted the conflict of evidence as to notice, but also stressed that it was for the Commission to resolve the conflict. It had done so.

*Becker v. Illinois Workers' Comp. Comm'n*, 2022 IL App (1st) 211076WC-U.

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## SANCTIONS

### Employer's Actions Found Unreasonable; Penalties and Fees Awarded

The appellate court affirmed the Commission's award of attorney's fees and penalties, finding the employer's unreasonable conduct started with its contest of notice of the accident at arbitration. The court said the employer then, however, failed to produce any evidence challenging claimant's report and notice given of the accident. Further, the form 45 was the employer's own form, which was dated the day of the accident, signed by one of claimant's supervisors, and contained a description of the mechanism of the accident and injury. One of claimant's supervisors testified he completed the form and sent it to the employer's franchise office, and the office administrator there testified she received the notice. Some days later, claimant received a letter from the insurer acknowledging receipt of the report of accident. Further, the employer's franchise owner testified an accident occurred, though neither he nor the office administrator were ever contacted by the insurance company to ask about the accident or notice thereof. Thus, the employer's conduct was not reasonable given the facts and presented no real controversy. It presented no evidence in support of its position, and it possessed evidence that proper notice was given. Its contesting the issue of notice served only to introduce delay in the proceeding, and increase the time and cost required by the parties, the arbitrator, and the Commission. This was the type of conduct that the Act sought to discourage.

*McDonalds v. Illinois Workers' Comp. Comm'n*, 2022 IL App (1st) 210928WC.

## APPEALS

### Only Final Orders Are Appealable

Stressing that only final orders are appealable, the Supreme Court of Illinois held a lower appellate court had erred when it affirmed a trial court's ruling that a plaintiff in a negligence action filed against a third party was barred from pursuing damages for alleged injuries to the plaintiff's shoulder and back since he had earlier signed an agreement with his employer settling his workers' compensation claim in which he acknowledged that his work-related injuries were limited to his knee. The high court said the trial court's order had disposed only of a certain issue—whether plaintiff's injury allegations were limited by a previous judicial admission; the

underlying negligence claim survived the defendant's motion. Both the lower appellate court and the Supreme Court lacked jurisdiction to hear the appeal.

*Armstead v. National Freight, Inc.*, 2021 IL 126730, 2021 Ill. LEXIS 1187 (Dec. 16, 2021).

### Circuit Court Erred in Finding Commission's Decision Was Against Manifest Weight of Evidence

Duncan sought workers' compensation benefits from Ameren Illinois (Ameren) for an alleged permanent and irreversible condition of irritant-induced bronchial reactivity. Duncan claimed that he contracted this condition by inhaling fumes on September 4, 2013, and October 8, 2014, while he was on duty as a gas journeyman. The arbitrator found that although the two exposures had temporarily exacerbated Duncan's preexisting asthma, Duncan had failed to prove any permanent ill effects from the two exposures. Ameren had paid for medical treatment and other workers' compensation benefits for what the arbitrator found to be these temporary exacerbations. The arbitrator further indicated that Duncan had failed to meet his burden of proof as to any indication of permanent aggravation or permanent partial disability relating thereto in terms of the underlying asthma—rather, that any perceived progression of symptoms would be compatible with his ten plus year history of symptoms compatible with asthma. Accordingly, the arbitrator denied Duncan's claim for permanent total disability benefits, additional temporary total disability benefits, and additional medical benefits. The Commission adopted the arbitrator's decision.

The circuit court reversed the Commission's decision, finding it to be against the manifest weight of the evidence. Ameren appealed. The appellate court said it was unconvinced that a conclusion opposite to that which the Commission reached was clearly demanded by the evidence. Therefore, it reversed the circuit court's judgment, and reinstated the Commission's decision. It was the responsibility of the Commission to judge the credibility of witnesses; neither the circuit court nor the appellate court could substitute its judgment for that of the Commission merely because different or conflicting inferences might also be drawn from the same facts. There is evidence that Duncan's asthma had become substantially worse. It was for the Commission to decide what inferences or conclusions should be drawn from that evidence. The court ought not to assume or take judicial notice that the reactivity of asthma, in its natural course, always stays the same over the course of a person's life. The court stressed that it was unaware of any

expert testimony, nor had Duncan cited any, that asthma in its natural progression never worsens with age. The Commission's decision was not against the manifest weight of the evidence. Therefore, the appellate court reversed the circuit court's judgment and reinstated the Commission's decision.

*Duncan v. Illinois Workers' Comp. Comm'n*, 2021 IL App (5th) 200346WC-U.

### **Appellate Court Remanded Case Where it was Not Clear if Claimant had Timely Filed Petition for Review with Circuit Court**

Claimant sought workers' compensation benefits for injuries she allegedly sustained to her right arm, neck, and back on May 30, 2014, while working as a bus driver for Chicago Transit Authority (CTA). The arbitrator awarded claimant temporary total disability (TTD) benefits and ordered CTA to pay all reasonable and necessary medical expenses incurred by claimant. Neither party sought review by the Commission. On September 11, 2018, the arbitrator conducted a second hearing about medical expenses and nature and extent of claimant's disability. On December 26, 2018, the arbitrator issued a decision, finding claimant no longer physically capable of working as a bus driver. The arbitrator also found claimant secured alternative employment as a full-time security guard earning a lower wage. Accordingly, the arbitrator awarded claimant a wage differential award of \$613.60 per week, from September 11, 2018, until she turned 67 years old, pursuant to section 8(d)(l) of the Act.

On January 28, 2019, CTA filed a timely petition for review of the arbitrator's decision before the Commission. On August 23, 2019, the Commission issued a unanimous decision modifying the arbitrator's decision by reducing the wage differential award from \$613.60 to \$344.80 per week. The Commission found that CTA terminated claimant's employment for cause on February 12, 2015, and claimant failed to prove, absent her injury, she would earn \$35.01 per hour as a CTA bus operator. The Commission also determined, as evidenced by claimant's pay stubs, that claimant worked 33.47 hours per week, rather than 40 hours per week, as a security guard. Consequently, the Commission determined the amount of wage differential based on claimant's average weekly wages of \$918.83 at the time of the accident and her average weekly wage of \$401.64 as a security guard. The circuit court confirmed the Commission's decision and claimant appealed.

The appellate court said that it would begin by addressing whether claimant complied with the statutory requirements to perfect review before the circuit court. Subject matter jurisdiction

either exists or it does not, and it cannot be waived, stipulated to, or consented to by the parties. The court observed that there was no information in the record showing the date claimant received notice of the Commission's decision and, thus, the record failed to show that claimant filed her petition for review within 20 days as required by section 19(f)(1) of the Act. The timely filing of a request for issuance of summonses is a 'jurisdictional requirement that must be strictly adhered to in order to vest the circuit court with jurisdiction. In this case, claimant filed her request for the issuance of summonses in the circuit court on September 17, 2019. That was 25 days after the Commission issued its decision. However, as CTA correctly noted, nothing in the record affirmatively established when claimant received notice of the Commission's August 23, 2019 decision. Whether claimant filed her request for the issuance of summonses within 20 days of receiving notice of the Commission's decision was a question of fact, which she had a duty to prove. The appellate court could not conclude that the circuit court had subject-matter jurisdiction to review the Commission's decision. It could not, therefore, reach the merits of the appeal and the matter had to be remanded for a hearing on the jurisdictional issue.

*Carter v. Illinois Workers' Comp. Comm'n*, 2022 IL App (1st) 210515-U.

### **Failure to File Request for Summons Addressed to Borrowing Employer Deprived Circuit Court of Jurisdiction**

Claimant filed three applications for adjustment of claim. Each application listed "Labor Network, Inc.—loaning employer and Cloverhill Bakery, Inc.—borrowing employer" as the "Employer Respondent." Labor Network Corporation (Labor) is an employment agency; it loaned Claimant to work as a packer at Clover Hill Bakery, a/k/a Cloverhill Bakery, Inc. (Cloverhill). In the first application, Claimant alleged that, on December 29, 2012, she sustained injuries to her neck, left wrist, left arm, left shoulder, and left hand. In the second claim, she alleged that she sustained repetitive trauma injuries to her neck, left arm, left shoulder, and left hand, manifesting on March 7, 2013. In the third claim, Claimant alleged that, on September 23, 2013, she sustained injuries to her neck, back, and left hand. The three applications were consolidated for hearing. The arbitrator made a limited award for the first claim, but not for the second or third claims.

Claimant and "respondent" filed petitions for review of all three decisions of the arbitrator by the Commission. The caption

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of the respondent's petition listed Belen Trujillo as the Employee/Petitioner and Labor Network as the Employer/Respondent. Clover Hill Bakery, Inc., was not referenced in the respondent's petition for review. The Commission, with one commissioner dissenting, rendered a separate decision in each claim, affirming and adopting the arbitrator's decisions. In the caption of each of those decisions, "Labor Network, Inc., Loaning Employer and Cloverhill Bakery, Inc., Borrowing Employer" was designated as the "Respondent."

On February 11, 2020, a Notice of Intent was filed with the Clerk of the Circuit Court of Cook County (the clerk). The caption of that document listed Belen Trujillo as the Employee/Petitioner and Labor Network, Inc. as the Employer/Respondent. All three of the Commission's decisions were referenced in the caption. The document indicated that it was prepared by the attorney for the respondent. Clover Hill Bakery, Inc. was not referenced in the Notice of Intent. On that same date, the attorney for Labor Network, Inc. filed with the clerk a written request for the issuance of summons, identifying: Labor Network, Inc. as a party in interest and Robert L. Smith of the law firm of Gaido & Fintzen as attorney of record; and Belen Trujillo as a party in interest and Alexandra Broderick of the law firm of Steven B. Salk & Associates, Ltd., as attorney of record. The caption of that document listed Labor Network, Inc., as the petitioner and the Commission and Belen Trujillo as the respondents. Clover Hill Bakery, Inc. was not referenced in the request for issuance of summons. That same date, the clerk issued one summons addressed to the Commission and one summons addressed to Belen Trujillo as the respondent and Alexandra Broderick/Steven B. Salk & Associates, Ltd., as attorney for respondent. The captions of both summonses listed Labor Network, Inc., as the petitioner and the Commission and Belen Trujillo as the respondents. The summonses indicated that they were prepared by the attorney for Labor Network, Inc. Clover Hill Bakery, Inc., was not referenced in either summons. Also on that same date, the clerk executed a Certificate of Mailing Again, Clover Hill Bakery, Inc., was not referenced.

The claimant filed a motion to dismiss the judicial review action, arguing that the circuit court lacked jurisdiction over the matter by reason of Labor's failure to name Clover Hill Bakery, Inc., as a respondent and request summons to issue against it in the manner provided in section 19(f)(1) of the Act (820 ILCS 305/19(f)(1)). The circuit court granted the claimant's motion to dismiss, and an appeal followed. Labor argued that it substantially complied with the requirements of the Act in filing its action for judicial review. The appellate court disagreed.

The court stressed that the timely filing of a written request for the issuance of summons made in compliance with the provisions of section 19(f)(1) of the Act was a jurisdictional requirement that

must be strictly adhered to in order to vest the circuit court with subject-matter jurisdiction over an action for judicial review of a decision of the Commission. The court found that Labor failed to file a timely written request for the issuance of summons addressed to Cloverhill, a party in interest, and no such summons was ever issued. The failure of Labor to strictly comply with the provisions of section 19(f)(1) of the Act deprived the circuit court of subject matter jurisdiction.

*Labor Network Corp. v. Illinois Workers' Comp. Comm'n*, 2022 IL App (1st) 211090WC-U.

### **Circuit Court's Dismissal of Claimant's Action for Lack of Subject-Matter Jurisdiction was Appropriate Where Claimant Failed to Abide by Section 19(f) of Act**

Claimant appealed the judgment of the circuit court of La Salle County dismissing his action for review of the decision of the Commission denying his claim for benefits. The appellate court indicated the primary issue before it was whether the circuit court's dismissal was appropriate. Claimant had sought to recover benefits under the Act from respondent for injuries allegedly arising out of and occurring in the course of his employment, specifically repetitive trauma injuries to his right hand and shoulder. The arbitrator found that claimant had failed to prove he sustained such injuries. The Commission affirmed and adopted the decision of the arbitrator in its entirety. Claimant sought review in the circuit court of La Salle County. The circuit court dismissed claimant's petition, citing lack of subject matter jurisdiction. The circuit court noted that the Act requires, *inter alia*, that the party seeking review file a notice of intent to file for review with the Commission [*see* 820 ILCS 305/19(f)(1)]. It further requires that the party file with the circuit court proof that the notice was filed with the Commission or an affidavit of an attorney "setting forth that notice of intent to file for review in the Circuit Court has been given in writing to the Secretary or Assistant Secretary of the Commission." *Id.* The circuit court found that claimant had failed to comply with these procedures.

The appellate court observed that while Illinois trial courts typically exercise general jurisdiction and enjoy a presumption of subject-matter jurisdiction, that was not the case concerning review of administrative proceedings. Illinois courts may review administrative proceedings only as prescribed by law. The court stressed that Section 19(f) of the Act sets forth the procedures for reviewing a decision of the Commission. In relevant part, subsection 19(f)(1) of the Act states, "The Commission shall not be required to

certify the record of their proceedings to the Circuit Court, unless the party commencing the proceedings for review in the Circuit Court as above provided, shall file *with the Commission* notice of intent to file for review in Circuit Court.” (Emphasis added by the court.) Additionally, this section requires that the party seeking review exhibit *to the clerk of the Circuit Court* proof of filing with the Commission of the notice of the intent to file for review in the Circuit Court or an affidavit of the attorney setting forth that notice of intent to file for review in the Circuit Court has been given in writing to the Secretary or Assistant Secretary of the Commission.” (Emphasis added by the court) *Id.* Thus, two actions are required: (1) filing a notice of intent with the Commission and (2) the exhibition of proof of that filing to the clerk of the circuit court or the filing of an affidavit by an attorney confirming that notice was filed in the Commission. The court indicated claimant had complied with neither requirement. Claimant asserted that it filed the required documents with the circuit court and asked that they be forwarded to the Commission. The court stated, however, that claimant cited nothing that would allow him to shift this burden to the circuit court, and he further does not explain why he simply did not file the required notice of intent with the Commission himself. The circuit court appropriately dismissed claimant’s action for lack of subject-matter jurisdiction.

*Vanda v. Illinois Workers' Comp. Comm'n*, 2022 IL App (3d) 210250WC-U.

## SUBROGATION

### Auto Insurance Carrier Entitled to Offset Comp Benefits Against its UIM Obligation

Where a gas station employee was struck and injured by a vehicle in a hit-and-run incident at his workplace and subsequently received more than \$25,000 in workers’ compensation benefits, the employee’s auto insurance carrier was entitled, as a matter of law, to offset the full amount of benefits received by the policy-holder against its \$25,000 obligation to pay uninsured motorist coverage, held an Illinois appellate court in a decision not designated for publication. The court looked to the auto policy provisions, which were abundantly clear and unambiguous. The policy provided that payments under the UM/UIM provision were to be reduced by sums paid because of the bodily injury or property damage under, *inter alia*, “workers’ compensation law.” That the employee had not and could not recover for pain and suffering in the workers’ compensation proceeding was not relevant, added the court.

*First Acceptance Ins. Co. v. Stephens*, 2021 IL App (3d) 200490-U.

### State Employees’ Retirement System was Entitled to Reimbursement from Third-Party Funds Without Reduction

Roberts brought suit against the defendants, Edward Lee Burdick and GDL Transport, Inc., for injuries Roberts sustained as a result of a motor vehicle accident. Roberts settled his claim against the defendants and brought a petition to adjudicate liens held by the Department of Central Management Services (CMS) and the State Employees’ Retirement System (SERS). SERS intervened, seeking to establish its right to reimbursement and a lien against the personal injury settlement proceeds for occupational disability benefits and retirement account contributions it made to, and on behalf of, Roberts. In adjudicating the liens, the circuit court entered an order reducing SERS’s right to reimbursement by \$150,000, to account for funds Roberts transferred to his ex-spouse pursuant to an order entered in his dissolution proceeding. SERS appealed the circuit court’s order reducing SERS’s reimbursement rights. Roberts cross-appealed, asserting the circuit court erred by failing to find that SERS consented to the reduction of its lien rights and by failing to order any offsets of disability benefits taken by SERS to be backdated to the date of injury. The appellate court found that the circuit court erred by reducing the SERS’s right to reimbursement by \$150,000 because SERS’s right to offset occupational disability payments by workers’ compensation benefits, even when the Department of Central Management Services (CMS) was reimbursed for those benefits, was authorized by 40 ILCS 5/14-129 (2012) of the Pension Code and 80 Ill. Adm. Code 1540.90(a)(9) (2021). Moreover, the injured employee’s position ran contrary to the concepts of reimbursement and double recovery because, after the accident, he received the benefits from CMS and SERS to which he was entitled, and the funds he used to reimburse the agencies were obtained from the tortfeasor. Under the statutory scheme, SERS had a clear right of reimbursement when it paid benefits to an employee as a result of injuries sustained due to the actions of a third-party tortfeasor.

*Roberts v. Burdick*, 2021 IL App (5th) 190119.

## CONTRIBUTION

### Court Agrees Complex Settlement was in Good Faith

Barnai was injured while working for Summit at a Wal-Mart store construction site. Barnai then sued Wal-Mart (the property owner), ICI (the general contractor), and Nuline (the electrical sub-

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contractor). Those defendants answered Barnai's complaint and filed claims against Summit pursuant to the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/0.01 *et seq.*). ICI later moved for partial summary judgment against Summit, which the circuit court granted, finding that Summit waived its *Kotecki* limitation (*see Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 166 Ill. Dec. 1, 585 N.E.2d 1023 (1991)) and ICI was entitled to seek unlimited contribution against Summit based upon Summit's contract with ICI in which Summit agreed to waive the *Kotecki* limitation and fully indemnify both Wal-Mart and ICI. Barnai eventually settled with Wal-Mart, ICI, and Nuline for \$5,073,463.71. Summit did not contribute to the settlement. After extended proceedings and an appeal and remand, the appellate court ultimately found that the circuit court did not err in finding the settlement was made in good faith and that the employer's claim that companies only paid their pro rata shares and were not entitled to contribution under 740 ILCS 100/2(b) (2018) was untenable. The employer had paid nothing toward the settlement despite the jury's finding of 92.5 percent responsibility. Two companies were found to be not responsible at all, but they paid nearly \$ 2.6 million and \$ 1 million, respectively, and the other company, found 7.5 percent responsible, paid about four times its pro rata share. Where the settlement 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. Common liability here was the amount of the cash payments stated in the settlement.

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

## EXCLUSIVE REMEDY

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

The employee's loss of the ability to maintain her privacy rights was not a psychological or physical injury that was compensable under the Illinois Workers' Compensation Act. Accordingly, the employee's Biometric Information Privacy Act claim for liquidated damages was not categorically within the purview of the Compensation Act. Because the injury alleged was not the type of injury compensable in a workers' compensation proceeding, the employee's lawsuit was not preempted by the exclusive remedy provisions of the Act.

*McDonald v. Symphony Bronzeville Park LLC*, 2022 IL 126511.

### Contractor Providing Coverage for Subcontractor's Employees is Not Immune from Civil Suit

Reversing a decision of a lower appellate court, the Supreme Court of Illinois held that a general contractor who provided workers' compensation insurance coverage for its subcontractors and their employees did not enjoy the immunity afforded an "employer" under 820 ILCS 305/5(a). Accordingly, where a subcontractor's employee sustained work-related injuries, the injured employee could sue the general contractor in tort. The Court observed that it had previously addressed the issue in *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 3 Ill. Dec. 715, 359 N.E.2d 125 (1976). The lower appellate court had acknowledged *Laffoon*, but had not followed it. That decision was erroneous. The high court stressed that the Illinois Act included no category granting nonemployers of the injured worker the ability to acquire immunity by either paying workers' compensation insurance premiums on behalf of the injured worker's direct employer or compensation benefits directly, as the general contractor did here.

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

### Borrowing Employer May Not Rely Upon Exclusive Remedy Argument Where Underlying Contract Itself was Unenforceable

Daniels was directed to remove debris by his employer, the defendant American Bare Conductor, Inc. (ABC), now known as Venta Corporation (Venta). Evidence that Daniels worked with Manpower Group US, Inc. (Manpower) and that ABC employed Daniels pursuant to a labor agreement with Manpower. The debris was near the facility that ABC leased from the defendant Sycamore Industrial Park Associates (SIPA). At that time, the defendant Robert Boey was a general partner of both ABC and SIPA. According to the allegations of the complaint, none of the defendants informed Daniels that the debris he was directed to remove contained asbestos. In 2017, after developing terminal mesothelioma, Daniels filed a complaint against all the defendants, sounding in negligence and intentional tort. The circuit court subsequently dismissed Daniels' sixth amended complaint with prejudice. The plaintiff, Anna Daniels, Daniels' widow and the administrator of his estate, thereafter appealed.

The appellate court acknowledged that the exclusive remedy provision extended to borrowing and loaning employers as well. The court added that in order to determine whether a borrowed-

employee relationship existed, the inquiry was twofold: (1) whether the special employer had the right to direct and control the way the special employee performed the work and (2) whether there existed a contract of hire between the special employee and the special employer, either express or implied. Here, stressed the appellate court, there was no enforceable contract. When ABC directed Daniels to remove the asbestos, that directive violated the Commercial and Public Building Asbestos Abatement Act because ABC was not licensed to do that work. Since no valid contract existed between Daniels and ABC, the exclusive remedy provisions of the Workers' Compensation Act did not prevent Daniels from bringing an action against ABC. The circuit court therefore erred in dismissing counts V and VI of the plaintiff's complaint based on the exclusive remedy provisions of the Workers' Compensation Act.

Addressing the plaintiff's contention that the circuit court erred in dismissing her claim that ABC committed an intentional tort against Daniels, the court noted that to survive the exclusive remedy provisions of the Act, a plaintiff who brings an intentional tort claim must allege that the defendant acted deliberately with the specific intent to injure. An allegation that the defendant was "substantially certain," or knew with a "strong probability," that injury would result from its actions is not sufficient to escape the strictures of the Workers' Compensation Act.

Here, the plaintiff alleged that the officers of ABC—Boey and Krieger—had acquired sufficient knowledge and information concerning asbestos and the hazards thereof that, by and well before August 1996, they knew that persons inhaling asbestos would be medically compromised and suffer immediate bodily injury and harm. Having this knowledge, ABC then deliberately and with specific intent to cause Daniels bodily injury directed him to remove scrap materials from the Quonset hut while intentionally concealing from him that said materials contained asbestos. ABC did not tell Daniels that such work was illegal, hazardous, and injurious. ABC intentionally determined not to provide him with the information, instruction, and equipment needed to reduce or eliminate his exposure to and inhalation of asbestos. ABC specifically intended that Daniels, an uninformed temporary worker, would be medically compromised as a consequence of unprotected exposure to asbestos, because protecting or informing him would have jeopardized ABC's plan to perform the project as cheaply as possible. An intentional tort claim was sufficiently pleaded because allegations that the defendants knew asbestos removal would injure Daniels, but told him to do it anyway, showed specific intent to harm.

*Daniels v. Venta Corp.*, 2022 IL App (2d) 210244.

## RETALIATORY DISCHARGE

### Plaintiff's Retaliatory Discharge Complaint Appropriately Dismissed Where She Failed to Show She had Actually Been Discharged

Stadel filed an amended complaint against her former employer, Heritage Operations Group, LLC (Heritage), asserting a claim of common law retaliatory discharge. The amended complaint alleged Heritage employed plaintiff, whose job title was Vice President of Operations, from 1979 until late 2014. On August 13, 2014, plaintiff sustained injuries resulting from a verbal argument with her supervisor, Peter Bolt. Plaintiff notified Heritage's human resources personnel of the confrontation and indicated she was "so distressed and humiliated... that she was physically unable to work under Peter Bolt due to his threatening and bullying actions." To alleviate her feelings of anxiety and distress, plaintiff was advised to go home and rest. The following day, plaintiff returned to work and attended a meeting with members of Heritage's senior management and human resources. During the meeting, plaintiff alleged senior management personnel requested she pick a day so that they could "roll this into a retirement," which plaintiff refused. She alleged that personnel were told that she was retiring and that the action undermined her employment, forcing her to resign. The trial court dismissed the action, finding that Stadel had failed to state a viable claim for retaliatory discharge. The appellate court affirmed. It noted that Stadel did not allege she was threatened with discharge, nor did she allege her employment would have been terminated had she not resigned. The court concluded that because it found the discharge element lacking, it did not need to consider whether Stadel adequately alleged the other elements of retaliatory discharge.

*Stadel v. Heritage Operations Group*, 2022 IL App (4th) 200366-U.



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## About the Authors



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**Meghan Kane** of *Baker Sterchi Cowden & Rice LLC* focuses her practice on trials involving complex business litigation matters, including in mass toxic torts. In addition to her toxic tort litigation work, Ms. Kane has pursued and defended declaratory judgment actions; conducted insurance coverage analyses; defended various personal injury claims—including auto accident, Dram Shop, slip-and-fall, and construction accident claims; and represented multiple local government agencies—including municipalities and police departments in a variety of intentional and unintentional tort claims. Ms. Kane has experience in pre-trial, trial, and post-trial proceedings. She also has appellate experience in the Illinois Appellate Courts for the 4th and 5th Districts and the United States Court of Appeals for the 7th Circuit. Meghan is a co-chair of Baker Sterchi's Product Liability Practice Group.



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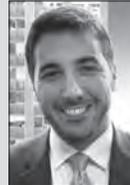


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# Survey of Toxic Tort Law Cases

## **Unlicensed Asbestos Removal Contractor Does Not Get Benefit of Workers' Compensation Act Exclusive Remedy Protections in Tort Lawsuit Brought by Former Employee**

*In Daniels v. Venta Corp.*, the appellate court reversed dismissals of causes of action for asbestos exposure based upon the exclusive remedy provided by the Workers' Compensation Act. In 1996, Venta Corporation predecessor American Bare Conductor, Inc. ("ABC") directed its employee Darnell Daniels to remove debris from a building known as a Quonset hut from a premises owned by Sycamore Industrial Park Associates ("SIPA"). SIPA knew that the debris contained asbestos and knew that ABC was not a licensed asbestos removal contractor, yet nevertheless hired ABC for the removal. Daniels was employed by Manpower Group US, Inc. ("Manpower") who placed him in temporary employment with ABC. Unknown to Daniels when he began the work, the debris that he was handling contained asbestos. Twenty-one years later in 2017, Daniels contracted peritoneal mesothelioma, and filed a seven-count lawsuit against defendants alleging it was that exposure to asbestos that caused his terminal disease.

The Circuit Court dismissed with prejudice the negligence and willful and wanton misconduct claims against Venta, the intentional tort claim against Venta, and the premise liability claims against SIPA. The premises liability counts were dismissed by the trial court who determined that there was no duty of reasonable care owed to Daniels. The trial court also dismissed the intentional tort counts finding that they were not sufficiently pleaded. The court then dismissed the claims against Venta finding the claims barred by the exclusive remedy provided by the Workers' Compensation Act finding that Daniels was an employee of ABC as a borrowing employer.

On appeal, the appellate court addressed the exclusivity argument by noting that both the Workers' Compensation Act applied by the trial court and the Workers' Occupational Diseases Act (which the appellate court thought might be more appropriate) required the same analysis. The court noted that an employee can escape the exclusive remedy provisions if the employee establishes that the injury (1) was not accidental, (2) did not arise from his employment, (3) was not received during the course of employment, or (4) was not

compensable under the Workers' Compensation Act. The court noted that for a borrowed-employee relationship to exist, the employment must be based upon a valid contract between the parties. A contract that requires illegal action is not a valid contract. Because ABC was not licensed to do the asbestos removal, its directive to Daniels to remove asbestos material violated the Commercial and Public Building Asbestos Abatement Act and was not a valid contract. Accordingly, the exclusive remedy of the Workers' Compensation Act did not bar the tort claims against ABC.

As to the intentional tort allegations, the appellate court noted that ABC had sufficient knowledge that inhaling asbestos would be hazardous, yet directed Daniels to do the work. Thus, the court thought the claim sufficiently pleaded rejecting arguments that the Daniels had to allege that ABC specifically intended him to be fatally injured. Finally, with respect to the premises liability claims, the appellate court determined that Daniels was on SIPA's premises as a business visitor, properly an invitee, for reasons directly related to SIPA's business dealings, thus demonstrating a relationship between SIPA and Daniels where a duty of care could arise. Further, the complaint sufficiently alleged that SIPA was aware of the dangerous condition caused by asbestos on the property, and knew that the asbestos would injure anybody who encountered it. As such, it was foreseeable that Daniels would be injured if SIPA did not inform him of the asbestos, satisfying Section 343 of the Restatement (Second) of Torts. Therefore, the appellate court determined SIPA owed Daniels a duty of care under the circumstances.

*Daniels v. Venta Corp.*, 2022 IL App (2d) 210244.

## **Illinois District Court Finds Defendant Preserved Jurisdiction Defense After Participating in Pre-Trial Discovery and No Specific Jurisdiction Despite Defendant's Forum State Contacts**

*In Lishman v. Air & Liquid Sys. Corp.*, the District Court for the Northern District of Illinois granted defendant Alfa Laval's motion to dismiss for lack of personal jurisdiction. In that case, the plaintiff, a lifelong Illinois resident, alleged that he developed mesothelioma due to asbestos exposure. Regarding Alfa Laval, the plaintiff alleged

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## Survey of 2022 Toxic Tort Law Cases (Continued)

that he was exposed to asbestos through lube oil purifiers manufactured by Alfa Laval's predecessor, Sharples. Plaintiff, however, did not clarify the location of his exposure to the lube oil purifiers until he filed a third amended complaint. In the third amended complaint, the plaintiff alleged that his exposure to the lube oil purifiers occurred outside of Illinois while the plaintiff served in the Navy.

In response to the third amended complaint, Alfa Laval filed an answer, which included an affirmative defense based on lack of jurisdiction. Four months later, Alfa Laval filed a motion to dismiss for lack of jurisdiction. In the interim, Alfa Laval participated in status reports, responded to discovery requests, and filed Rule 26(a)(1) disclosures. Subsequently, Alfa Laval initiated the scheduling of its Rule 30(b)(6) deposition and attended Rule 30(b)(6) depositions of co-defendants.

In response to Alfa Laval's motion to dismiss, the plaintiff argued that Alfa Laval waived its jurisdiction defense by failing to raise the defense at an earlier point in the litigation. Relying on Seventh Circuit precedence, the court explained that for a defendant to waive a personal jurisdiction defense, a defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking. *Mobile Anesthesiologists Chic., LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010). A plaintiff may demonstrate a reasonable expectation through: 1) the defendant's untimeliness in asserting the affirmative defense of jurisdiction; and 2) defendant's involvement in the case.

The plaintiff argued that Alfa Laval's untimeliness in filing its motion to dismiss and involvement in the litigation both weighed in favor of finding waiver. Alfa Laval countered by arguing that it did not become aware of its personal jurisdiction defense until the plaintiff filed the third amended complaint. Moreover, Alfa Laval indicated that it timely raised its personal jurisdiction defense through an affirmative defense contained in its answer. The court determined that Alfa Laval did not learn that the plaintiff's alleged exposure to the lube oil purifiers occurred outside of Illinois until the plaintiff filed the third amended complaint. In response to that complaint, Alfa Laval timely filed an answer, asserting a defense based on lack of jurisdiction. Thus, the court believed that Alfa Laval's delay in asserting its jurisdiction defense was excusable. The court further concluded that Alfa Laval preserved its defense despite waiting four months after its answer to file a motion to dismiss. The court reasoned that Alfa Laval did not actively participate in the litigation during the four months, but rather, engaged in preliminary pre-trial litigation. The court specifically noted that it made no substantive rulings during the four-month period.

As to the substance of Alfa Laval's jurisdiction defense, despite his exposure to the lube oil purifiers occurring outside of Illinois, the plaintiff argued that Alfa Laval, through Sharples, maintained contacts with Illinois and his injuries arose out of those contacts. According to the plaintiff, Sharples possessed manufacturing plants in Illinois and maintained a sales office in Illinois. However, the plants did not manufacture the lube oil purifiers at issue, and the sales office did not sell those purifiers. Thus, the court found no connection between Sharples' Illinois contacts and the plaintiff's injury.

The plaintiff argued that Sharples' Illinois contacts were sufficient to establish specific jurisdiction based on the United States Supreme Court opinion, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021). While the Supreme Court determined in *Ford* that a plaintiff need not show a "strict causal relationship" between a defendant's in-state activity and the litigation, the District Court believed *Ford* was factually distinct. Specifically, in *Ford*, specific jurisdiction existed because the plaintiffs' injuries occurred in the forum states, where Ford had extensively marketed, sold, and supported repairs of the same model vehicles involved in the plaintiffs' accidents. The District Court instead relied on *Bristol-Myers Squibb Co. v. Superior Ct. of Ca.*, 137 S. Ct. 1773 (2017). In *Bristol-Myers Squibb*, the Supreme Court found no specific jurisdiction because the offending product did not malfunction in the forum state, and the plaintiffs did not suffer injuries from the product in the forum state. *Id.* Given the similarities to *Bristol-Myers Squibb*, the District Court determined that the plaintiff failed to show an affiliation between Illinois and the underlying controversy.

*Lishman v. Air & Liquid Sys. Corp.*, No. 21-cv-001570, 2022 U.S. Dist. LEXIS 66120 (N.D. Ill. April 11, 2022).

### **One Pair of Counterfeit Shorts Could Be Sufficient to Confer Specific Personal Jurisdiction**

Plaintiff professional and collegiate sports associations filed an action under the Lanham Act, 15 U.S.C. sec. 1051, *et seq.*, against defendant, a Chinese-based retailer, alleging that the defendant infringed on NBA trademarks by selling counterfeit products in its online store. The Seventh Circuit affirmed personal jurisdiction over the Chinese-based retailers. The defendant Chinese-based retailer alleged that it's only connection with Illinois was its sale of a pair of shorts to an investigator for plaintiff. The products at issue were available for sale in Illinois to other customers, in addition to the investigator.

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## Survey of 2022 Toxic Tort Law Cases (Continued)

The Seventh Circuit focused on whether the Illinois court had specific personal jurisdiction over the defendant Chinese-based retailers. The federal requirements for establishing specific personal jurisdiction mirror the Illinois requirements. To establish specific jurisdiction over a non-resident defendant, the defendants must have done the following:

- 1) Purposefully directed themselves of the privilege of conducting business in the forum; and
- 2) The alleged injury must arise out of or relate to the defendants' forum-related activities; and
- 3) The exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice

The court concluded that the three factors had been met. While the mere availability of a retailer's website in the forum is insufficient to confer jurisdiction, the court found that the retailer's readiness to do business with the forum and knowingly doing business and shipping products to the forum *that were the subject of the lawsuit* was a crucial factor. The defendant established an online store, structured its sales activity to invite sales from Illinois residents, asserted a willingness to ship goods to Illinois, and established the capacity to do so. The defendant retailer's shipment of the shorts at issue to Illinois met the first prong that defendant purposefully avail itself of the forum of conducting business in the forum.

The second prong of the specific jurisdiction test was met because the defendant's sale to Illinois involved the shorts were the basis of plaintiff's claim, meeting the requirement that the defendant's sale of goods in the forum state include the infringing product. Defendant's listing of the product and its sale of the product in Illinois were directly related to the basis of the suit.

Finally, the court held that the third principle was met and it would not offend traditional notions of fair play and substantial justice by asserting jurisdiction over Chinese retailer. The court reasoned that there is no unfairness in making a seller defendant defend a lawsuit in a state where it structured its business to easily serve the state's consumers (following *Curry v. Revolution Laboratories*, 949 F.3d 385, 402 (7th Cir. 2020)). Defendant did not set forth an unusual burden in defending the matter in Illinois.

A defendant's connection with Illinois must meet the three-prong test to confer jurisdiction. In this case, the Seventh Circuit held that the defendant availed itself to the Illinois market by offering and shipping a product to the forum. As a result of its purposeful direction and relatedness of the sale to the suit, defendant is subject to jurisdiction in the state of Illinois.

*NBA Properties, Incorporated, et al. v. Hanwjh*, 46 F.4th 614 (7th Cir. 2022).

## Southern District Court Finds Plaintiff Fails to Sufficiently Allege Facts Establishing Specific Jurisdiction

In *Romig v. MW Custom Papers, LLC*, the District Court for the Southern District of Illinois granted a defendant's motion to dismiss for lack of jurisdiction in an asbestos lawsuit. In that case, the plaintiff, a resident of Ohio, alleged that she was exposed to asbestos through automotive repair work performed by her father in Ohio and through her and her husband's work at a factory located in Illinois. In response to the complaint, the defendant Honeywell International moved to dismiss for lack of jurisdiction. The plaintiff failed to respond to the motion, leaving the court to evaluate the sufficiency of the plaintiff's complaint allegations.

The court noted that the plaintiff's complaint was devoid of any allegation that her injuries arose out of or relate to Honeywell's contacts with Illinois. Specifically, the plaintiff did not allege that she worked with or around any products or equipment attributable to Honeywell while she or her husband worked at the Illinois factory or resided in Illinois. Consequently, the court found that it lacked specific personal jurisdiction over the plaintiff's claims against Honeywell.

Additionally, Honeywell is neither incorporated in Illinois, nor does it maintain its principal place of business in Illinois. Its affiliations with Illinois are not continuous and systematic, and the court found that it lacked general jurisdiction over plaintiff's claims.

*Romig v. MW Custom Papers, LLC*, No. 22-cv-1101-SMY, 2022 U.S. Dist. LEXIS 129915 (S.D. Ill. July 21, 2022).

## Central District Strikes Plaintiff's Causation Expert, Resulting in Summary Judgment for Defendant

In *Sherman v. BNSF Ry. Co.*, the plaintiff alleged that she worked for the defendant at its Galesburg, Illinois railyard from 1957 to 2001. According to the plaintiff, during her employment with BNSF, she was exposed to various toxic substances and carcinogens, including asbestos, coal dust residue, solvent fumes, oil mist, diesel exhaust, benzene, and brake dust. She alleged that she developed rectal cancer due to her exposure to those substances.

The plaintiff disclosed Dr. Mark Levin, a board-certified physician with specialties in internal medicine, oncology, and board-eligible in hematology, as an expert on medical causation. In a report, Dr. Levin opined that the plaintiff's exposure to asbestos and diesel

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## Survey of 2022 Toxic Tort Law Cases (Continued)

exhaust while employed by BNSF contributed to the development of her rectal cancer. During his deposition, Dr. Levin testified that he “explored the literature,” reviewed a report from plaintiff’s industrial hygiene expert, and relied upon his “understanding based on education, training, and experience” to address whether asbestos causes rectal cancer. He further indicated that he typically performed a Google search regarding asbestos, diesel exhaust, and rectal cancer to begin his investigation.

BNSF filed a motion to bar Dr. Levin. BNSF challenged both the general and specific causation opinions offered by Dr. Levin. BNSF characterized Dr. Levin’s methodology as unreliable because he did not retain a list of what he viewed and what information he considered. Additionally, Dr. Levin had no record of what Google search he performed, what search terms he used, which sites he reviewed, which articles he reviewed, and what information he considered and discarded. In response, the plaintiff argued that Dr. Levin’s causation opinions were reliable because Dr. Levin drew from his extensive knowledge, training, and experience as a medical oncologist, he reviewed “the available literature,” and he reviewed publications of authoritative bodies.

The District Court examined the admissibility of Dr. Levin’s opinions pursuant to Federal Rule of Evidence 702 and the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In doing so, the court determined that Dr. Levin’s methodology (*i.e.*, his Google search) “seriously lack[ed] indicia of reliability.” Dr. Levin did not retain, nor could he recall, any studies that resulted from his search that would have been negative or not supported a connection between rectal cancer and asbestos or diesel exhaust. Additionally, Dr. Levin did not prepare a list of every document he reviewed, or a list of documents that were specifically negative. Dr. Levin also did not maintain a record of the particulars of his Google searches, including the date(s) on which he performed the searches. Based on this lack of information, the court determined that it would have been essentially impossible for defense counsel to cross-examine Dr. Levin at trial. The court noted that it was “abundantly clear” from Dr. Levin’s deposition testimony that he expected the parties to accept that the plaintiff’s work exposure to asbestos and diesel exhaust caused her rectal cancer because Dr. Levin said it did. As the court explained, neither his say so, nor his knowledge, training, and experience, was enough to eliminate the shortcoming that the full extent of the data he reviewed was unknown.

The court next examined the reliance sources cited by Dr. Levin in his report. According to the court, those sources did not speak in definite terms. Rather, one source stated that studies have “suggested” that workplace asbestos exposure “may” be linked to rectal cancer, but the source noted that the link “is not as clear as it is for

other cancers.” A study relied upon by Dr. Levin regarding asbestos exposure stated that it “did not provide any clear evidence of an association with rectal cancer.” One study showed a small increase for rectal cancer after workplace diesel exhaust exposure, but noted that the “finding could be due to chance.” Similarly, another study suggested that sustained high-level exposures to diesel exhaust “may” increase the risk of rectal cancer, but the authors cautioned that the finding “should be viewed with caution” as the finding may have been due to chance. According to the court, the reservations contained in Dr. Levin’s reliance sources underscored the need for him to provide a more robust explanation regarding the information he considered and accepted or rejected. The court reasoned that without such an explanation, it could not determine whether Dr. Levin’s opinions were based upon more than his mere say so.

Plaintiff attempted to bolster the reliance sources by citing to portions of Dr. Levin’s deposition testimony. Specifically, Dr. Levin testified that “associated with” and “caused” are basically equivalent and that medical literature typically speaks in terms of association as opposed to causation due to the high level of proof and certainty required to use the term “caused.” The court, however, explained that Dr. Levin’s testimony actually magnified the shortcomings in his report. As the court explained, Dr. Levin definitively opined in his report that the plaintiff’s occupational exposures to asbestos and diesel exhaust were contributing factors in the development of her rectal cancer. Thus, it was incumbent upon Dr. Levin to present a methodology showing that he considered a high level of proof. Having failed to do so, the court determined that Dr. Levin’s general and specific causation opinions were not reliable.

While Dr. Levin’s flawed methodology was enough to exclude his opinions, the court also determined that Dr. Levin failed to grasp the basic facts of the case. For example, Dr. Levin incorrectly identified the dates on which the plaintiff worked for the defendant, mistakenly indicated that she was married, erroneously testified regarding the length of time she performed certain job duties for defendant, and twice referred to the defendant as “BSNF.” The court explained that his misstatements only “further detracted from the representation that Dr. Levin [was] a qualified witness.”

Finally, the court granted BNSF’s motion for summary judgment. According to the court, proving causation was an essential element of the plaintiff’s claim. Plaintiff’s only evidence of causation was Dr. Levin’s stricken opinions. Consequently, the plaintiff could not prove causation, entitling BNSF to summary judgment.

*Sherman v. BNSF Ry. Co.*, No. 1:17-cv-001192-JEH, 2022 U.S. Dist. LEXIS 7561 (C.D. Ill. Jan. 14, 2022).

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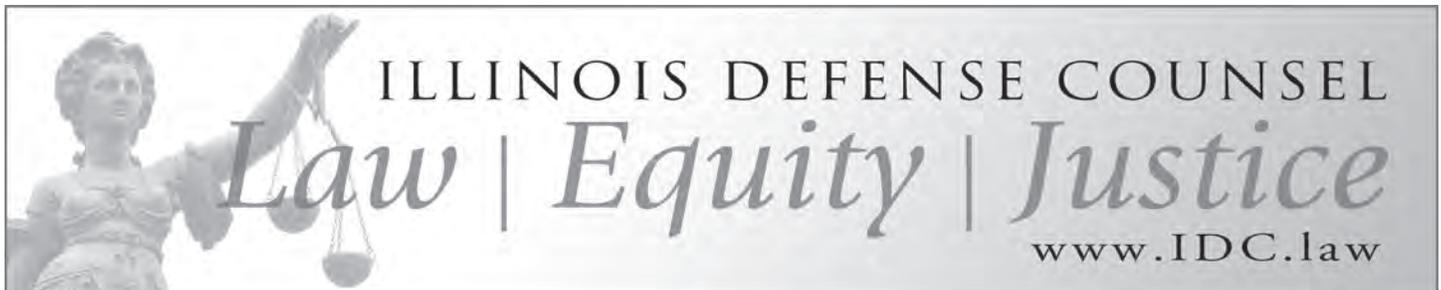
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# Survey of Trucking and Transportation Law Cases

## Jury Allowed to Determine whether Truck Driver's Inability to Speak English Proximately Caused Accident

Federal Motor Carrier Safety Regulation (FMCSR) 391.11(b) (2) requires that a commercial driver “read and speak the English language sufficiently to converse with the general public,” and “understand highway traffic signs and signals in the English language.” In *Abrams v. FedEx Ground Package Sys., Inc.*, the plaintiff alleged the driver’s inability to speak English supported a claim against the driver’s employer for negligent hiring and retention. The truck driver was a native Albanian speaker. He had driven for the employer for seven years with no history of discipline, driving, or medical issues. He had a valid commercial driver’s license. However, there was a factual dispute as to how well he could speak English. The driver testified he spoke a “little bit” of English. Several co-workers and business contacts believed the driver’s English was adequate. While not required by the FMCSR, the employer’s internal policy was to administer an English language assessment. A score below three out of five on the assessment would result in the driver being placed on “inactive safety” status and prohibited from driving. Whether the driver passed was disputed. One tester noted a failing score of 2.2 and later changed the score to a three; another gave a three; the third tester recorded no score, but testified the driver passed.

In the accident giving rise to this case, the driver admitted he failed to stop in slowing traffic, crushing the plaintiff’s vehicle between two semis and causing multiple deaths. At the scene, officers felt the driver could not effectively communicate and issued a citation for “unqualified driver, speak/read English.” The driver claimed shock caused him to revert to his native language. The employer later received a FMCSR violation notice for employing a non-English speaking driver. The employer moved for summary judgment arguing that there was no evidence the driver’s language skills caused the accident. A negligent hiring or retention action requires proof that: (1) the employer knew or should have known of the particular unfitness for the job to create a danger to third persons; (2) the unfitness should have been known at the time of hiring or retention; and (3) the unfitness proximately caused the plaintiff’s injury. *Van Horne v. Muller*, 185 Ill. 2d 299 (1998). The plaintiff must establish a nexus between the unfitness and the plaintiff’s injury. *Id.*

The court found that the evidence discussed above, if viewed in a light most favorable to plaintiff, could support a finding of proximate cause. The court denied summary judgment, allowing the negligent hiring and retention claim to go to the jury to determine if there was a causal nexus between the driver’s poor English and the accident.

The district court also denied the employer’s summary judgment motion as to punitive damages. The court held even when an employer has admitted *respondeat superior* liability, a negligent hiring and retention claim can go to a jury where there are allegations of “willful and wanton conduct.”

*Abrams v. FedEx Ground Package Sys., Inc.*, 3:19-CV-01391-JPG, 2022 WL 444459 (S.D. Ill. Feb. 14, 2022).

## Oversize/Overweight Citations Cannot Be Adjudicated in A Local Government's Administrative Proceedings

In *Cammacho v. City of Joliet*, the plaintiffs were a group of truck drivers who were cited for violating a city ordinance which imposed weight limits on commercial trucks traveling on certain highways within the city limits. The city ordinance required citations for violation of the city’s oversize/overweight law to be adjudicated through an administrative process, rather than through Illinois Circuit Courts. The plaintiffs were adjudicated guilty at the administrative procedure by a hearing officer and ordered to pay a fine. Plaintiffs appealed to the Will County Circuit Court, which affirmed the hearing officer’s decision. Plaintiffs then appealed to the Illinois Appellate Court, 3rd District.

The plaintiff argued that the Illinois Municipal Code does not authorize the city to adjudicate violations of its oversize/overweight ordinance through administrative proceedings. While the Municipal Code does allow home rule municipalities such as the City of Joliet to adjudicate local ordinances through administrative proceedings, there is a specific exception for traffic regulations governing the movement of vehicles under the Illinois Vehicle Code. The city’s oversize/overweight ordinance clearly governs the movement of vehicles. As such, the city lacks the authority to administratively adjudicate such citations. To properly prosecute violations of its local ordinance prohibiting overweight vehicles from operating on

restricted roads, the city must prosecute the matter in the Circuit Courts in the same manner as traffic citations.

*Cammacho v. City of Joliet*, 2022 IL App (3d) 210591.

## Trial Court Grants Summary Judgment to Broker in Double Brokering Situation

In *Crouch v. Taylor Logistics Company, LLC*, the Southern District of Illinois granted defendant broker's motion for summary judgment. In *Crouch*, Plaintiffs sought to recover damages arising from a fatal traffic accident involving a tractor-trailer truck operated by defendant motor carrier and its driver. Plaintiffs also asserted claims against the brokers of the load under state common law negligence theories. Specifically, vicarious liability and negligent hiring.

Notably, the load had been "double brokered." The defendant broker assigned the load to a motor carrier, who – unbeknownst to the broker defendant – assigned the load to the defendant motor carrier. The defendant broker had no relationship whatsoever with the defendant motor carrier or its driver or its driver. The defendant broker was unaware of the defendant motor carrier's existence or involvement in shipment of the load.

As it relates to the vicarious liability count, the court found no agency relationship between defendant broker and the negligent driver because there was no evidence in the record to support "even an inference" that defendant broker controlled the driver. The court reiterated that an agency relationship cannot be found where a broker does not exercise control over the delivery. The court similarly found the defendant broker did not negligently hire the defendant motor carrier or its driver, as there was no agency or hiring relationship between defendant broker and the driver.

In Illinois, one who employs an independent contractor is not liable for the latter's acts or omissions unless the employing party fails to use reasonable care in selecting the contractor or directs the contractor to commit the act in question. To succeed in a claim alleging negligent hiring or retention of an independent contractor, a plaintiff must prove that: (1) the principal negligently hired or retained the independent contractor, (2) when principal knew or should have known that the contractor was unfit for the required contracted job (3) so as to create a danger of harm to other third parties. Since there was no evidence of a relationship between the broker and the tortfeasors, Plaintiffs' complaint could not survive.

Finally, the court allowed plaintiff to present an alternate legal theory of voluntary undertaking, noting that absent unfairness to defendant or the case, plaintiffs may present alternate legal theories based on the factual allegations pleaded in their complaint. The court,

however, found plaintiff's legal theory failed. There was no legal duty owed to plaintiff, and "[w]here the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines." *Quoting Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill.2d 213, 216 (1996). Since the defendant broker did not impose a duty upon itself; had no knowledge of the double brokering situation; and did not have a level of control over the tortfeasors, the court found the defendant broker did not undertake a duty to plaintiff. As a result, the court entered summary judgment for the defendant broker.

*Crouch v. Taylor Logistics Company, LLC*, 563 F. Supp. 3d 868 (S.D. Ill. 2021).

## Freight Broker's Carmack Amendment Waiver Flies the Nest

In *Eastern Express Inc. v. Pete Rahn Construction Co.*, the district court held (1) a broker can invoke a written Carmack Amendment waiver and (2) when claims involve state and federal law, removal under nesting jurisdiction can stand only when the right to relief depends on the application of federal law *and* the issue is important to the federal system as a whole, not just to the particular parties in a suit.

The Carmack Amendment governs the relationship between cargo shippers and cargo carriers. It preempts all state or common law remedies available to a shipper against a carrier for loss or damage to interstate shipments. *N. Am. Van Lines, Inc. v. Pinkerton Sec'y Sys., Inc.*, 89 F. 3d 452, (7th Cir. 1996). It is "[t]he exclusive remedy for any alleged breach of contract" unless "the shipper and carrier, in writing, expressly waive any or all rights and remedies . . . for the transportation covered by the contract." 49 U.S.C. § 14101. Further, the Carmack Amendment allows for suit to be filed in federal court "against the carrier alleged to have caused . . . loss or damage." *Id.* at § 14706.

Eastern Express, a freight broker, and Pete Rahn Construction, a motor carrier, entered into a written contract in which Rahn agreed to transport cargo belonging to U.S. Steel Corporation. Unfortunately, the cargo never arrived at U.S. Steel and was never found. Eastern reimbursed U.S. Steel for the value of the lost cargo. Eastern then sued Rahn in Illinois Circuit Court for breach of contract and indemnity under Illinois law. Rahn removed the case to the U.S. District Court for the Southern District of Illinois under federal-question jurisdiction via application of the Carmack Amendment. Eastern then moved to remand, arguing the parties waived Carmack in their written contract and no federal question was present.

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The Court initially ruled that even though the Carmack Amendment’s language only refers to shippers and carriers, as a broker, Eastern acted as a conduit for the shipper, US Steel. As such, brokers may enforce a Carmack waiver under § 14101. After analysis of the contract between Rahn and Eastern, the Court ruled that the parties had expressly waived the Carmack Amendment. Rahn argued the case should remain in federal court under the doctrine of nesting jurisdiction. *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (federal jurisdiction over a state law claim is proper if a party’s right to relief depends on the construction or application of federal law). The Court held ruled that for federal question jurisdiction to apply when there is overlap between the federal Carmack Amendment and a state’s common law of contracts or indemnity, the federal issue must be substantial and “important to the federal system as a whole,” not just to the particular parties in the immediate suit. In light of the parties’ waiver, the relief sought in the lawsuit did not depend on application of the Carmack Amendment. Similarly, the application of the federal Carmack Amendment on the state law breach of contract and indemnity claims is minimal. As such, the district court remanded the case back to state court.

*Eastern Express, Inc. v. Pete Rahn Constr. Co.*, 554 F. Supp. 3d 960 (S.D. Ill. 2021).

### **Trial Court Denies Motion to Dismiss Truck Driver’s Suit Against Motor Carrier’s Facial Recognition Sensor Vendor**

In *Karling v. Samsara*, a truck driver filed an action against a third-party provider who sold and installed facial recognition software and sensors to a trucking company employer. The software was installed without the driver’s consent and was intended to monitor driver’s fatigue and distraction. The Northern District of Illinois denied defendant (third-party vendor)’s motion to dismiss. The district court held that despite Congress’s uniform scheme of federal regulation of trucking safety technology and express intent to encourage the use of biometric technology, the Illinois Biometric Information Privacy Act (BIPA) is not preempted.

Federal law may preempt state law in three situations: when Congress expressly states so, when a federal regulatory scheme implies exclusive congressional legislative power, and in cases of “actual conflict.” Defendant does not argue BIPA conflicts with a particular federal statute; rather, they cite a law that directed the Department of Transportation to conduct research and rulemaking on driver monitoring systems and a recent federal initiative to incentivize driver-safety technologies. The Court held, at least in the motion

to dismiss stage, they cannot find a clear and manifest Congressional purpose to preempt state regulation of truck safety technology from the “scattershot nature” of these disparate sources. The district court acknowledged that these sources potentially touch on biometrics and privacy concerns, and that their aim is traffic safety, but they do not address BIPA’s regulation requirements on biometric identifiers specifically enough to justify preemption.

*Karling v. Samsara Inc.*, No. 22 C 295, 2022 WL 2663513 (N.D. Ill. July 11, 2022).

### **Airline Deregulation Act Preempts BIPA in Case Where Airline Company’s Customer Hotline Collected Biometric Data Via Voice Response Software**

In *Kislov v. Am. Airlines, Inc.*, the Northern District of Illinois dismissed plaintiff’s complaint without prejudice, finding the Illinois Biometric Information Privacy Act (BIPA) claim was preempted by Airline Deregulation Act (ADA). Plaintiff alleged American Airlines violated BIPA by using interactive voice response software in its customer service hotline to collect biometric data and then storing the same on a cloud server for analysis.

The ADA provides that a state may not enact or enforce a law, regulation, or other provision related to the prices, routes, or services of an air carrier. The Seventh Circuit has previously held a claim is preempted if the state rule expressly refers to or has a significant economic impact upon an air carrier’s rates, routes, or services. *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F. 3d 605, 609 (7th Cir. 2000), *citing Rowe v. New Hampshire Motor Transp. Ass’n*, 552 U.S. 364, 368, 370–71 (2008). However, there is no preemption where the effect on rates, routes, or services is only tenuous, remote, or peripheral. *Id.*

The operative question in *Kislov*, then, centered on the airline’s voice response system and whether it is a “service” which would be significantly affected by BIPA. A “service” is defined as “a bargained-for or anticipated provision of labor from one party to another.” *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F. 3d 1423, 1432 (7th Cir. 1996). The district court reasoned that when customers purchase airline tickets, they will usually expect customer assistance as part of their air travel, so the voice system included in the customer hotline is a component of customer assistance that the customer “bargained for.” As such, the district court found that the airline company’s collection of voice data was part of the airline company’s “services.” Finally, the district court found that complying with BIPA would have a significant economic effect

on the airline's service because the airline would need to provide written notice and receive a written consent or waiver from every caller before providing customer service through its hotline. On that basis, the plaintiff's putative class action was dismissed.

*Kislov v. Am. Airlines, Inc.*, No. 17 C 9080, 2022 WL 846840 (N.D. Ill. Mar. 22, 2022).

### **Appellate Court Reverses \$3.14 Million Verdict for Plaintiff's Improper Comments on Jurors Acting As Public Safety Advocates During Closing Argument**

Plaintiff John McCarthy filed suit under the Federal Employers Liability Act (FELA) against his employer, Union Pacific Railroad Co. (UP) and his supervisor Glen Elliot. The plaintiff alleged that on four occasions in 2016, Elliot had either touched him on the head and neck or tossed heavy objects toward him to catch. The plaintiff had been previously injured in a motor vehicle accident in 2015, suffering severe neck and cervical spine injuries. Plaintiff was able to return to work after his 2015 motor vehicle accident but claimed that Elliot's actions in 2016 resulted in further injury to his neck and cervical spine, rendering him unable to work thereafter.

Under FELA a rail carrier is liable for injuries to its employees "resulting in whole or in part from negligence of any of its officers, agents, or employees...due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. 45 U.S.C. § 51. To show a rail carrier is vicariously liable for the negligent or intentional acts of its employee, a plaintiff must show the employee's acts were in furtherance of the employer's objectives. *Lancaster v. Norfolk & Western Ry. Co.*, 773 F. 2d 807, 818 (7th Cir. 1985). To show a rail carrier is directly liable for failing to provide a reasonably safe work environment, a plaintiff must prove the elements of common law negligence (duty, breach, foreseeability, causation of damages). *Morris v. Union Pacific R.R. Co.*, 2015 IL App (5th) 140622, ¶ 33. Unlike Illinois' workers compensation scheme, an injured rail worker must prove the rail carrier was negligent to recover.

Prior to trial, the rail carrier presented motions *in limine* to prohibit plaintiff from presenting arguments, comments, or suggestions that the jurors act "as safety advocates in this lawsuit or that they send a message to the corporate defendant with their verdict." The trial court granted said motions. However, during closing arguments at trial, Plaintiff's counsel stated to the jury that they had "an opportunity to do more for the safety of [their] community" in this trial they were ever likely to have for the rest of their lives. Over

numerous sustained objections and repeated instructions by the trial court to disregard such arguments, plaintiff's counsel further argued that there were 2.8 million work-related injuries in the past year—a statistic which had not been introduced into evidence at all—and that the jury should "protect us all" as "you have the power to make this community safer" because "If the railroad isn't going to enforce its safety rules, that burden falls to you." Defendant's counsel moved for a mistrial immediately after Plaintiff's closing argument concluded, arguing the plaintiff clearly intended to inflame the jury's passions and obviously requested for a moral or social judgment—rather than a judgment on the evidence presented in the case. The trial court denied the motion. The jury returned a verdict for the plaintiff for \$3.14 million.

The Illinois Appellate Court, 5th District, reversed, finding that the plaintiff's "blatant disregard of both the sustained objections and order that granted Union Pacific's motion *in limine* cannot be ignored." While a violation of a motion *in limine* is not *per se* reversible error, an improper insinuation during closing argument which violates an *in limine* order can be the basis for a new trial. Improper comments during a closing argument must substantially prejudice the defendant to justify a new trial. Reversal is warranted where a verdict is the product of the jury's passion or prejudice, rather than objective consideration of the evidence. In *McCarthy*, the plaintiff's blatant appeal to the jury's sympathy and its injection of an improper element into the case—plaintiff's repeated instructions to jurors to act as safety advocates—makes it very likely that the jury's verdict was influenced by improper comments. As such, the 5th District reversed and remanded the case for a new trial.

*McCarthy v. Union Pacific Railroad Co.*, 2022 IL App (5th) 200377.

### **Illinois Supreme Court Rejects the McHaffie Rule – Plaintiffs May Raise Both Vicarious Liability and Direct Liability Tort Theories Against Employers**

In *McQueen v. Green*, the plaintiff was injured in a motor vehicle accident between a semi-truck and passenger vehicle. The defendant-employee was a semi-truck driver who was assigned to pick up a piece of construction equipment, known as a skid steer, from a supplier. The supplier's employees loaded the skid steer onto the defendant-employee's trailer. The driver-employee noticed the skid steer was not properly loaded and asked that it be reloaded. The supplier's employees refused. The driver-employee called his supervisor to report the issue, telling the supervisor the skid steer looked

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“crooked.” The supervisor told the driver-employee to transport the load, but to “be safe” in doing so. During transport, the skid steer began bouncing on the semi-trailer. The driver-employee attempted to brake and change lanes to exit the highway, but lost control of the truck. The semi-trailer swung around and hit the plaintiff’s vehicle.

In his complaint, the plaintiff alleged the defendant-employer was vicariously liable for its employee’s negligent operation of a semi-truck with an improperly secured load. However, the plaintiff also alleged that the defendant-employer was directly liable for negligent hiring and training of the employee. The defendant-employer admitted the driver-employee was its agent and was acting within the scope of his employment at the time of the collision. The employer filed a motion arguing that under *Gant v. L.U. Transport, Inc.*, 331 Ill. App. 3d 924, 928 (1st Dist. 2002), plaintiff’s direct negligence theories were derivative of the vicarious liability claim and should be barred. The trial court denied the motion, reasoning that the negligence claim against the employer was premised on the employer’s own conduct rather than a derivative claim against the driver-employee. The jury found the employer negligent, but not the employee-driver. On appeal, the Illinois Appellate Court, First District, reversed, holding under *Gant* that the plaintiff could not proceed against the defendant employer for direct negligence because it admitted responsibility for the employee-driver’s conduct.

The Illinois Supreme Court reversed. In doing so, the Court explicitly rejected *Gant* and the reasoning behind the Missouri Supreme Court’s “McHaffie Rule,” which bars plaintiffs from pursuing a direct negligence claim against an employer after vicarious liability for an employee’s conduct is admitted. *See McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995). The Illinois Supreme Court held that “an employer’s acknowledgment of vicarious liability for its employee’s conduct does not bar a plaintiff from raising a direct negligence claim against the employer.” However, a plaintiff must show the existence of a “good-faith factual basis” for a claim of direct negligence against an employer which is based on conduct “separate and apart” from the conduct of the allegedly negligent employee. The Court reasoned that the evidence in this case supported a claim of direct negligence against the employer because the employer’s supervisor directed the driver-employee to transport the load even after the driver-employee raised concerns over the skid steer’s alignment and securement to the trailer.

*McQueen v. Green*, 2022 IL 126666.

## **Trial Court Denies Motion to Dismiss Willful and Wanton Allegations Due to Pleading Standard Differences Between State and Federal Courts**

In *Montgomery v. Caribe Transport II, LLC*, the Southern District of Illinois denied a defendant motor carrier’s motion to dismiss willful and wanton claims. In Illinois, willful and wanton conduct is a form of aggravated negligence and is not a separate tort. It can be pled along a scale with a heightened degree of ordinary negligence on one end and intentional tortious misconduct on the other. In *Montgomery*, the plaintiff alleged that the defendant motor carrier flouted safety standards and regulations; encouraged its driver to ignore safety standards and regulations; failed to adequately train its driver; and recklessly hired and/or retained the driver, who had a history of motor vehicle accidents.

Defendant asserted that Plaintiff’s willful and wanton claims were impermissible because they were substantially the same as the negligence allegations. Specifically, the Defendant asserted that despite the different pleading rules, the Southern District, along with other Federal Courts in Illinois, have required heightened pleading requirements with respect to willful and wanton conduct, such that merely re-labeling a negligence allegation as a willful and wanton conduct was insufficient. The district court, citing *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997), disagreed and held that Illinois’ fact pleading standard does “not govern complaints in federal court.” Accordingly, the district court found that the plaintiff’s allegations were sufficient to sustain a cause of action for willful and wanton conduct.

*Montgomery v. Caribe Transport II, LLC*, 2021 WL 4132221 (S.D. Ill. 2021).

## **No Private Right of Action to Enforce FMCSA Regulations Implementing or Interpreting the Carmack Amendment**

The defendant was hired to transport twenty-eight specialized fire extinguishers to the plaintiff. Defendant’s truck was involved in a serious accident, resulting in significant damage to the cargo. On that basis, the plaintiff rejected delivery of the fire extinguishers when the defendant’s truck arrived to tender the same. The defendant (or its insurer) subsequently sold the damaged fire extinguishers – without providing notice to the plaintiff before the salvage sale. The plaintiff filed a two-count complaint in federal court, alleging 1) a cause of action under the Carmack Amendment for recovery of the “actual

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## Survey of 2022 Trucking and Transportation Law Cases (Continued)

loss or injury to the property caused by the carrier” (i.e.: the value of the damaged fire extinguishers); and 2) a cause of action under Federal Motor Carrier Safety Administration (FMCSA) regulation 49 U.S.C. § 370.11, claiming that the defendant breached its duty to notify the plaintiff of a salvage sale and breached its duty to salvage the fire extinguishers for fair market value. The defendant moved to dismiss Count II.

The court found that there is no private right of action to enforce the regulation at issue. The court recognized a regulation *can* be privately enforceable, but such a right can only come from Congress. Congress can either pass a statute authorizing a private right of action as to the specific regulation or pass a statute authorizing a private right of action as to all regulations promulgated under a certain statute. While Congress *did* authorize a private right of action as to the Carmack Amendment itself, Congress did not explicitly authorize a private right of action to enforce regulations promulgated by FMCSA to implement or interpret the Carmack Amendment. The plaintiff did not identify a textual basis for his argument that Congress intended the regulation itself to be privately enforceable. As such, the district court dismissed the second count of plaintiff’s complaint.

*Nexus Alarm & Suppression, Inc. v. MG Logistics, Inc.*, No. 20-cv-6043, 2021 U.S. Dist. LEXIS 100730, at \*1 (N.D. Ill. May 27, 2021).

### **Metra’s Covid-19 Vaccine Mandate Ruled a “Minor” Dispute Under the Railway Labor Act**

In *Northeast Illinois Regional Commuter Rail Corp v. Int’l Association of Sheet Metal, Air, Rail & Transportation Workers—Transp. Div.*, the plaintiff, also known as Metra, sued three labor unions, seeking a declaratory judgment that its Covid-19 vaccine mandate is a “minor” dispute under the Railway Labor Act (RLA). Under the RLA, there are two different statutory processes for resolving labor disputes. For “major” disputes, the parties must engage in the “extensive and exhaustive bargaining” process—which includes negotiation, mediation, and an emergency board appointed by the President. For “minor” disputes, the parties must submit to mandatory arbitration before an adjustment board. In “minor” disputes, a disputed policy may be implemented immediately, whereas in “major” disputes, the parties must maintain the status quo. The union counterclaimed and sought an injunction to bar imposition of the vaccine mandate.

The purpose of the RLA is to avoid disruptions in railroad operations. As such, the 7th Circuit ruled “in making the choice between major and minor, there is a large thumb on the scale in favor of

minor.” *Ry. Lab. Execs. Ass’n v. Norfolk & W. R.R.*, 833 F. 2d, 700, 705 (7th Cir. 1987). If there is any doubt as to whether a dispute is major or minor, federal courts are to construe the dispute as minor. *Id.* If a railroad seeks to unilaterally implement a policy, it must only show the policy is not “obviously insubstantial or frivolous, nor made in bad faith.” *Consol. Rail Corp. v. Lab. Execs.’ Ass’n (Conrail)*, 491 U.S. 299 (1989).

The district court held in Metra’s favor that this was “minor” dispute. The applicable collective bargaining agreement permits implementation of safety policies and Metra showed its long history of implementing fitness and safety standards for employees and passengers. Further, refusing to impose a vaccine mandate would jeopardize Metra’s government contracts. The balance of harms vs. public interest weighs heavily in Metra’s favor because, at the time this opinion was published, the Covid-19 pandemic had resulted in about three hundred million infections and around five-and-a-half million deaths worldwide. Vaccines have dramatically reduced the potential risk of illness and death.

The district court entered an order which allowed immediate implementation of the vaccine mandate - pending the resolution of arbitration. Union employees who refuse vaccination are not without a remedy, however. If the adjustment board finds the mandate should not be imposed, reinstatement and back pay will be available to make terminated employees whole.

*Northeast Illinois Regional Commuter Rail Corp. v. Int’l Ass’n of Sheet Metal, Air, Rail, & Transportation Workers—Transp. Div.*, 578 F. Supp. 3d 985 (N.D. Ill. 2022).

### **District Court Denies Motion to Certify Interlocutory Appeal When Two Judges Within Same District Disagree on Whether Federal Transportation Statutes Preempt BIPA**

In *Rogers v. BNSF*, Richard Rogers sued BNSF Railway Company on behalf of a putative class alleging violations of the Illinois Biometric Information Privacy Act (BIPA). Prior to trial, the defendant argued in its motion for summary judgment that Plaintiffs’ BIPA claim is preempted by several federal statutes, including the Federal Railroad Safety Act (FRSA), the Interstate Commerce Commission Termination Act (ICCTA), and the Federal Aviation Administration Authorization Act (FAAAA). The Northern District of Illinois denied defendant’s motion for summary judgment, ruling that the federal statutes cited by the defendant do not preempt BIPA.

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The defendant moved to certify an interlocutory appeal. To certify an interlocutory appeal under 28 U.S.C. § 1292(b), a court must find that “[its] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” Defendant argued an interlocutory appeal should be certified because a conflicting decision within the Northern District of Illinois on a similar issue of federal preemption showed a reasonable ground for difference of opinion, such that an appeal should be allowed to avoid “massive financial liability” under BIPA. Defendant cited another recent Northern District decision, which found that BIPA was preempted by the Airline Deregulation Act (ADA). The district court held that a disagreement between two district judges is not sufficient to establish a “substantial ground for difference of opinion” within the meaning of Section 1292(b). In the end, the court was not convinced an interlocutory appeal would “materially advance the ultimate termination of the litigation.”

*Rogers v. BNSF Ry. Co.*, No. 19 C 3083, 2022 WL 2208824 (N.D. Ill. June 21, 2022).

### **Supreme Court Rules Airline Cargo Loaders Are Exempt from Federal Arbitration Act**

In a unanimous (8-0) decision, the Supreme Court held in *Southwest Airlines Co. v. Saxon* that airline cargo loaders are exempt from the Federal Arbitration Act (FAA) because they are within the “class of workers engaged in foreign or interstate commerce” exempted from arbitration in §1 of the FAA.

In *Saxon*, the plaintiff filed a putative class action lawsuit alleging the defendant airline failed to pay proper overtime earnings to ramp supervisors, such as herself. The plaintiff frequently loaded and unloaded cargo items on and off airplanes. Citing the FAA and an employment contract between the parties, the airline moved to dismiss the plaintiff’s class action lawsuit and enforce the parties’ arbitration clause. The plaintiff argued that cargo loaders are exempt from arbitration because they are in the “class of workers engaged in foreign or interstate commerce” exempt from arbitration under §1 of the FAA. The district court disagreed and dismissed the case. The 7th Circuit reversed, noting a circuit split on the issue, the Supreme Court granted certiorari.

The Supreme Court addressed the definition and scope of the “class of workers engaged in foreign or interstate commerce” exempt from arbitration under the FAA. The plaintiff argued for an industry-wide definition of the “class of workers” which would include all airline employees. Since airline operations generally

involve travel and transportation of goods and people between state and international borders, Plaintiff argued that all airline employees engaged in the “customary work” of the airline are in the relevant class. The defendant argued the “class of workers”, and therefore the exemption, is defined by the specific plaintiff’s work duties, not the employer’s industry. The defendant argued that only airline workers who actually “move goods or people across foreign or international boundaries – pilots, ship crew, locomotive engineers, and the like” are engaged in foreign or interstate commerce. The Court partially agreed with the defendant airline, ruling the “class of workers” exempt from arbitration under §1 of FAA would be defined by the nature of their work. However, focusing on the text of §1 itself, the Court ruled that workers “directly involved in transporting goods across state or international borders falls within §1’s exemption.” The Court went on to find that airline cargo loaders are engaged in foreign or interstate commerce because they “plainly do perform activities within the flow of interstate commerce” by loading and unloading cargo which travels across state and international borders.

*Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022).

### **Crash Victims Plead Sufficient Facts to State Claims for Willful and Wanton Conduct and Corporate Complicity Against Trucking Company**

Following an accident on Interstate 55 in which a semi-truck rear-ended a car, multiple plaintiffs filed personal injury actions against the semi-truck driver and his motor carrier employer. These actions were removed to federal court on diversity grounds and later consolidated. The plaintiffs alleged the defendant motor carrier was vicariously liable for its driver’s conduct, specifically driving the truck with an inoperable electronic logging device and inoperable brakes modified with pliers, failing to keep a proper lookout, and using a cell phone while driving. The plaintiffs also alleged the motor carrier was directly liable for negligent maintenance of the truck, contacting the driver when it was not safe to do so, and negligently hiring, training, supervising, and retaining the driver despite knowledge of speeding incidents and prior accidents. The plaintiffs also alleged the driver and motor carrier engaged in willful and wanton conduct and sought punitive damages against both.

The defendants filed motions to dismiss, arguing plaintiffs had not pled sufficient facts to establish gross negligence or willful and wanton conduct. The defendants further argued the plaintiffs had not sufficiently pled the corporate complicity doctrine to make the motor carrier responsible for the willful and wanton conduct of its driver.

## Survey of 2022 Trucking and Transportation Law Cases (Continued)

Finally, the employer moved to dismiss the direct negligence claims against the motor carrier because the driver's agency was admitted.

The court noted that the plaintiffs were not required to plead a formulaic recitation of the elements of a cause of action and pointed out that willful and wanton conduct is an aggravated form of negligence, and not a separate and independent tort. The court ruled the plaintiffs' alleged facts which, if taken as true, would constitute gross negligence or willful and wanton conduct on the part of both the driver and the motor carrier. Although not specifically referenced in the plaintiffs' complaint, the court stated that the plaintiffs had sufficiently pled the corporate complicity doctrine for holding the employer responsible for willful and wanton conduct of its agent. In a harbinger of the Illinois Supreme Court's *McQueen* decision, the court further ruled that the plaintiff's direct negligence claims could proceed because they were based on the employer's independent acts which could have caused the collision.

*Swanson v. Murray Bros., LLC*, 19-CV-3220, 2021 WL 782273 (C.D. Ill. Mar. 1, 2021).

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**James Kelly** of the *James Kelly Law Firm PC* in Peoria is a civil litigator who has extensive experience in complex litigation involving trucking, construction, products liability, civil rights, and employment law. He appears in federal, state, and appellate courts representing employers, insurance companies, self-insureds, municipalities, and individuals. Mr. Kelly regularly conducts jury trials in multiple federal and state courts throughout the Midwest, but he also has substantial experience representing employers in mediations and arbitrations. Mr. Kelly provides opinions and participates in arbitrations and administrative hearings involving OSHA, EEOC, Labor, EPA, FTC, and IWCC. Mr. Kelly has successfully defended thousands of employment claims. He has arbitrated cases in every venue in Illinois and has taken appeals to all appellate levels.



**Adam C. Konopka**, Partner with *Chartwell Law*, has an active role in the firm's growing regional trucking practice. Mr. Konopka represents transportation/trucking clients in various capacities, from catastrophic losses to commercial and contract disputes. He has extensive experience with catastrophic losses and representing his clients from emergency response through litigation. Licensed in Illinois, he manages the firm's Chicago office. Mr. Konopka currently serves as the vice-chair of the Trucking Industry Defense Association (TIDA) Marketing & Industry Engagement Committee and chair of the Illinois Defense Counsel (IDC) Trucking and Transportation Law Committee. He is also a member of the Defense Research Institute (DRI) and regularly attends various seminars across the country. Mr. Konopka has been invited to present at the American College of Transportation Attorneys (ACTA) conference and conducted speaking engagements across the country as part of the Trucking Claims Boot Camp. In addition to his professional affiliations, he is also the President of the Chicago Society of the Polish National Alliance, serves as Secretary for the Chicago Society Foundation, and is a member of the Polish Chamber of Commerce and Polish American Police Association.



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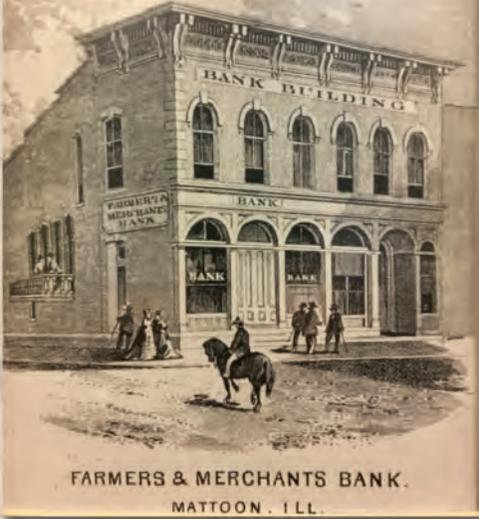
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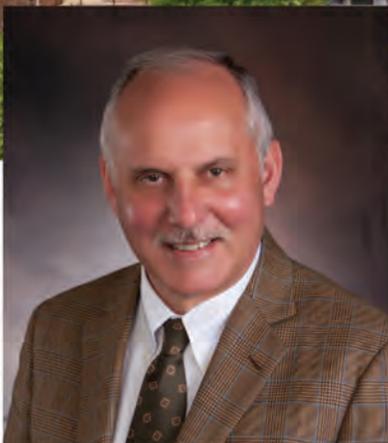
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