

Survey of Tort Law and Workers' Compensation Cases

Legal Secretary Cannot Serve as “Personal Representative” Without Appointment Via Letters of Office

In *Bouloute v. Carrillo*, 2024 IL App (1st) 220454-U, the Illinois Appellate Court First District, held that plaintiff’s counsel’s legal secretary cannot be appointed as the “personal representative” of a deceased defendant’s estate where no petition for letters of office had been issued on behalf of the deceased defendant.

William Bouloute and Collin Swithin were involved in a motor vehicle accident. Shortly before the statute of limitations had run, Bouloute sued Swithin in connection with the motor vehicle accident, unaware that Swithin had died before Bouloute’s complaint was filed. Bouloute did not discover that Swithin had died until after the statute of limitations had run. Upon discovering Swithin’s death, Bouloute named Malina Carrillo, Bouloute’s attorney’s legal secretary, to be the “personal representative” of Swithin’s estate pursuant to 735 ILCS 5/13-209(c) and amended the complaint to substitute Carrillo for Swithin. Counsel purportedly retained by Swithin’s family filed a motion to dismiss, arguing that Carrillo could not be the “personal representative” of Swithin’s estate because she was not appointed pursuant to a petition for letters of office. The trial court denied the motion to dismiss, but counsel on behalf of Swithin filed a motion to certify the question for appeal under Illinois Supreme Court Rule 308. The motion was granted, and the following question was certified:

“Whether Plaintiff can name his legal secretary, Malina Carrillo, as the ‘personal representative’ of the Estate of Collin Swithin under 735 ILCS 5/13-209(c) to represent the estate of the decedent?”

On appeal, both parties agreed that 735 ILCS 5/13-209(c) is the statute that applies. The appellate court held that Carrillo did not constitute a “personal representative” after reviewing the Illinois Supreme Court’s decision in *Relf v. Shateyeva*, 2013 IL 114925, wherein the supreme court defined “personal representative” as someone appointed pursuant to a petition for issuance of letters of office. Since no petition for letters of office was issued, it was impermissible for Carrillo to be appointed as the “personal

representative” of Swithin’s estate. The certified question was answered in the negative, and Bouloute cannot name Carrillo as the “personal representative” of Swithin’s estate. The court did not consider Bouloute’s other arguments under 735 ILCS 5/13-209(b) as they were first raised on appeal, and Bouloute failed to raise them in the trial court.

Bouloute v. Carrillo, 2024 IL App (1st) 220454-U.

Signed Patient Consent Form is Insufficient for the Hospital to Disclaim Apparent Agency if it is Not Presented to the Patient at a Meaningful Time

In *Brayboy v. Advocate Health*, the plaintiff claimed medical negligence, pleading apparent agency to hold the defendant hospital vicariously liable for the alleged negligence of the emergency room physician who treated her son. Forty-five minutes after arriving with her son at the emergency room, the plaintiff received a hospital consent form. The form contained a paragraph providing notice that physicians practicing emergency medicine were not employees even though the plaintiff was told that she had to sign the consent form for continued treatment. The consent form was not explained to her. By the time it was signed, treatment had already started, and the plaintiff had been at the hospital for two hours. The circuit court granted summary judgment for the hospital on the apparent agency claim, relying primarily on the signed consent form.

The First District reversed, finding the timing of the signed consent form raised a question of fact that precluded summary judgment. The language of the hospital’s consent form was consistent with prior case law finding a clear and unambiguous consent form defeats a claim of apparent agency. But the First District also analyzed whether the plaintiff received and signed the consent form at a meaningful time and in a meaningful manner. Reviewing case law from other jurisdictions, the court agreed with the “national trends concerning apparent agency law that a notice or consent form, to be effective, must be given when the patient still has a reasonable opportunity to obtain treatment elsewhere if he or she chooses not to sign the form.” Based on this standard and given the two hours of

treatment before signing the form, the court determined that whether the consent form was presented to the plaintiff at a meaningful time was a material issue of fact.

In addition, the plaintiff alleged that she relied on Advocate's marketing as a provider of quality healthcare. The court reviewed several marketing campaigns by the hospital, as well as the testimony of Advocate's Director of Marketing, in concluding that the plaintiff "presented evidence that Advocate marketed itself in such a manner that could lead a reasonable person to conclude that the hospital accepted responsibility for its choice of doctors based on its extensive advertising campaign, and therefore, the doctors acted as the hospital's agents." The court held that this evidence "clearly raises a question of fact as to whether Advocate held itself out as a provider of emergency room care without adequately informing plaintiff that the care was provided by independent contractors." Thus, triable issues of fact remained regarding both the "holding out" and reliance elements of the apparent agency claim. Notably, the court did not consider whether there was evidence to show that the plaintiff or patient in fact reviewed and relied on the hospital's marketing.

Brayboy is consistent with other recent appellate decisions reversing judgment for the hospital and finding in favor of the plaintiff on the issue of apparent agency. Taken together, these decisions may affect how hospitals disclaim agency, obtain signed consent from patients, and market their medical services and personnel.

Brayboy v. Advocate Health & Hosp. Corp., 2024 IL App (1st) 221846.

Sufficient Contacts for Personal Jurisdiction Over Iowa Based Defendant for the Sale of Products in Illinois

In *Clark Mosquito v. Lee Container Iowa, LLC*, the Illinois plaintiff sued an Iowa defendant for products delivered FOB to Illinois that contained a contaminant that led to the voluntary recall of the plaintiff's product after the EPA raised issues with the product.

The circuit court found that there was specific personal jurisdiction and the Illinois Appellate Court First District affirmed based on, among other things, "defendant purposefully availed itself of the privilege of conducting business in Illinois where Stevens [defendant's sales representative] 'offer[ed] to sponsor pizza as lunch for [plaintiff's] employees in Illinois before having a sales call with them' and went on 'several business trips to [plaintiff's] facility in Illinois in order to 'maintain the business relationship

[]' with plaintiff; and, '[a]s a result of [defendant's] conduct[] ***, [plaintiff] purchased 156,750 containers from [defendant] at a total cost of \$283,336.94 from 2012 to 2020.'"

This finding of sales calls as sufficient minimum contacts builds on *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351, 358 (2021), which held that there was no need for a showing of a causal relationship between the product at issue and the activities of the defendant in the state.

Clark Mosquito v. Lee Container Iowa, LLC, 2024 IL App (1st) 231302-U.

Arbitration Provision in Class Action Suit Unenforceable When Guardians Entered into Contract and Not Minor Plaintiffs

In *Coatney v. Ancestry.com DNA*, the United States Court of Appeals for the Seventh Circuit recently upheld the district court's ruling that the plaintiffs were not bound to arbitrate their claims. This matter involves a class action suit by minor plaintiffs whose guardians used DNA samples of plaintiffs for genetic evaluation. Ancestry was seeking to enforce an arbitration clause in the terms and conditions of service agreed to by the guardians of the plaintiffs. The appellate court ruled that the arbitration provision was unenforceable.

In the agreement between the guardians and Ancestry, there was a dispute resolution clause binding the parties to arbitrate and waive class actions. The trial court ruled that the arbitration clause was non-binding on plaintiffs for two reasons. First, plaintiffs did not assent to the terms and conditions of the contract through conduct because they did not activate their own DNA test or otherwise independently engage with Ancestry's services. Secondly, equitable principles did not bind plaintiffs to the terms of the contract.

On appeal, Ancestry raised three arguments that the arbitration provision applies. Initially, Ancestry argued that plaintiffs' guardians assented to the terms on behalf of plaintiffs. The second argument was that the plaintiffs are bound to the terms as "closely related" parties or third-party beneficiaries. The last prong of Ancestry's argument was that as direct beneficiaries to the terms of the contract, plaintiffs are estopped from avoiding them.

After enumerating rules regarding the elements of arbitration provisions generally, the reviewing court evaluated each argument in turn. As to Ancestry's initial argument, the appellate court noted that contract analysis begins with looking at the contractual language, which is given its plain and ordinary meaning. *Romspen*

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Mortg. Ltd. P'ship v. BGC Holdings, LLC – Arlington Place One, 20 F. 4th 359, 372 (7th Cir. 2021). In this case, there is nothing in the terms and conditions of the Ancestry agreement itself that mentions that they were binding on plaintiffs. Thus, plaintiffs were not bound by the terms.

Ancestry's second argument was that plaintiffs were so closely related that they were bound to the agreement or, alternatively, they were third-party beneficiaries of the agreement. The court noted that in Illinois, there is a strong presumption against conferring contractual benefits on non-contracting parties. *Sosa v. Onfido, Inc.*, 8 F.4th 631, 639 (7th Cir. 2017). In this case, there was no evidence that the plaintiffs knew the terms of the agreement. Thus, they were not "closely related" parties in this case. The court also noted that the plaintiffs are not third-party beneficiaries because there was no direct benefit of the terms to the plaintiffs. The terms themselves are presumed to directly benefit the signatories, who are Ancestry and the guardians. If Ancestry and the guardians expected the plaintiffs to benefit from the terms, language memorializing contrary intent should have been present in the agreement.

Ancestry's last argument was that plaintiffs were estopped from avoiding the arbitration provision because of their direct beneficiary status of their guardian's agreement. The reviewing court held that under applicable precedent, "a benefit derived from the agreement itself is direct. However, a benefit derived from the exploitation of the contractual relationship of parties to an agreement but not the agreement itself is indirect." *Everett v. Paul Davis Restoration, Inc.*, 771 F.3d. 380, 383 (7th Cir. 2014). In this case, the court ruled that the benefit received was not direct but rather potential or inchoate. Although plaintiffs have theoretical access to Ancestry services, there are no allegations that they have ever accessed Ancestry's analyses of their DNA.

Coatney v. Ancestry.com DNA, LLC, 93 F.4th 1014 (7th Cir. 2024).

Hospital Does Not Owe a Duty of Care for Open and Obvious Conditions in Parking Lot

Plaintiff Marla Davis was riding her motorcycle into the Yacktmann Pavilion parking lot, owned and operated by Advocate Health and Hospitals Corporation, when the electronic parking lot gate arm came down and struck her in the head. As she approached the parking lot, the gate arm was up, and there was no parking attendant present. She slowed down to enter, and as she passed under the gate arm it came down and hit her in the head. The Yacktmann Pavilion parking lot does not allow motorcycles to park there and has specific signage

that states the same. Motorcycles are allowed to park at a lot located right across the street. Plaintiff Davis had previously parked in the Yacktmann Pavilion parking lot on ten separate occasions while in her car. On some of these occasions the gate arm would be down, and a parking attendant would be present and open the gate for her.

Davis alleged that she was injured due to Advocate's failure to maintain its premises. Defendant moved for summary judgment, which the circuit court granted. Plaintiff appealed, and the Appellate Court of Illinois First District, affirmed summary judgment in favor of Advocate, holding that Advocate owed no duty to plaintiff because the gate arm was an open and obvious condition. Advocate was not required to foresee that plaintiff would be injured by the parking lot gate while riding her motorcycle into the Yacktmann Parking lot that was for cars only and had signage that clearly stated the same. The court held that the danger posed by the electronic gate arm was clearly open and obvious, and a reasonable person in plaintiff's position would have appreciated the risk it posed. Furthermore, the court cited many courts around the country in New York, Ohio, and Michigan that have found a parking lot gate arm constitutes an open and obvious danger.

Davis argued that the deliberate encounter exception to the open and obvious rule applied is when the landowner has reason to expect that the invitee will proceed to encounter the obvious danger because the advantages of doing so outweigh the apparent risk to a reasonable person. However, this exception does not apply where there is only a minor inconvenience to Plaintiff in taking an alternative path. The court found that the deliberate encounter exception did not apply because Advocate could not have anticipated that plaintiff would attempt to enter the Yacktmann Pavilion parking lot on her motorcycle, and it would have only imposed a minor inconvenience for her to park in the lot that allowed motorcycles, located right across the street. Therefore, the Appellate Court of Illinois First District affirmed the circuit court's ruling of summary judgment in favor of Advocate.

Davis v. Advocate Health and Hospitals, Corp., 2024 IL App (1st) 231396.

A Written Release Is Not A Condition Precedent to a Settlement Agreement Unless it Is Made a Condition Precedent

In *Downs v. Peters*, 2024 IL App (4th) 230571-U, the Illinois Appellate Court Fourth District held that a trial court's findings as to the validity of a settlement agreement will only be reversed on appeal if the trial court's findings are clearly erroneous. Further, the

court found that a written release is not required to enforce a settlement agreement unless the parties intended to make the release a condition precedent to the settlement agreement.

Sherri Downs sued Mandy Peters seeking damages for injuries that Downs sustained in an automobile crash. Peters filed a “Motion to Enforce Settlement Agreement and to Dismiss With Prejudice,” alleging that Downs and Peters had entered into a settlement agreement prior to Downs’ lawsuit. Prior to the lawsuit, Downs’ attorney, Timothy Mahoney, had sent a demand letter to Peters’ insurer for the policy limit of \$100,000 for settlement of all claims. The insurer tendered \$100,000 and included a release for Downs to sign. On the same day as the insurer’s response, a letter electronically signed by Mahoney was sent to Peters’ insurer, agreeing to settle the claim for \$100,000. Downs never signed the release and filed suit instead.

Downs alleges that she never agreed to settle the claim, and the demand letter was sent by mistake. Downs alleges that Mahoney had a misunderstanding that the case could be settled for policy limits and that she did not consent to the release. As a result, Downs argues a settlement agreement was never reached. Mahoney testified at an evidentiary hearing that he never authorized the sending of the demand letter or the letter agreeing to settle. He was unaware of either letter until Peters’ counsel, Mark McClenathan, informed him of the letters. Mahoney further testified that Downs never agreed to settle for policy limits and that he had told McClenathan that the letters were sent by mistake. However, Mahoney testified that he had a phone conversation with Downs where he believed that Downs had given him permission to settle the case. Mahoney told McClenathan and the trial court that he believed that the case was settled. Downs subsequently told Mahoney that she did not believe that she gave Mahoney authority to settle the case. Mahoney acknowledged that Peters’ insurer had sent a \$100,000 check which was deposited into Mahoney’s firm’s client trust account. One of Mahoney’s assistants emailed McClenathan that Downs was going to sign the release. Downs testified that she never gave Mahoney authority to settle the case.

The trial court granted Peters’ motion to enforce the settlement, concluding that the phone conversation between Downs and Mahoney indicated that the case was settled as Mahoney represented as such to McClenathan and the trial court. The trial court discredited Mahoney’s testimony that there was a misunderstanding that led Mahoney to believe Downs gave him the authority to settle the case. Downs appealed.

On appeal, the appellate court affirmed, finding that the trial court was free to discredit Peters’ and Mahoney’s testimony that Mahoney was not authorized to settle the case, especially since

Mahoney represented to McClenathan and the trial court that the case was settled. Although the issue was first raised by Downs on appeal, the court also held that a written release is not required to enforce a settlement agreement unless the parties intended to make the release a condition precedent to the agreement. The court found that nothing in the record indicated that the parties intended to make the release a condition precedent, so the settlement agreement between Downs and Peters was enforceable.

Downs v. Peters, 2024 IL App (4th) 230571-U.

No Section 1983 Claim in Wrongful Death Case Where Inmate Shows No Obvious Signs of Risk

The United States Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment for defendants (corrections officers and Oneida County), holding the plaintiff-estate’s Section 1983 suit did not implicate the United States Constitution because the record did not support an inference that the arrestee faced a serious risk of harm as he said he was not suicidal and had no mental health issue.

Plaintiff, the estate of Gavin Wallmow, sued correctional officers and the County alleging Section 1983 constitutional claims that the jailers failed to protect Wallmow from himself. The district court granted summary judgment for all defendants, and the Seventh Circuit affirmed.

As to the correctional officers, plaintiff was required to establish that the officers failed to take reasonable available measures to abate the risk, even though a reasonable officer would have appreciated the high degree of risk involved, therefore making defendants’ consequences obvious.

The court found that the record failed to support an allegation that the consequences of the defendants’ conduct were obvious. Plaintiff had to show a reasonable officer in the circumstances would have appreciated the high degree of risk involved, but Wallmow denied any form of suicidal thought on three separate occasions. As such, there was no high degree of risk. Further, once the officers learned of Wallmow’s odd behavior, they took reasonable note of the condition and acted in a reasonable manner when interacting with Wallmow.

As to the County, the court found that plaintiff failed to prove the first element of the claim, that the County took an action pursuant to a municipal policy. Here, the policy referenced was not a policy at all. The Estate also failed to establish that the County’s inaction

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bore a known or obvious risk of causing constitutional violations. The death by suicide here was the first death by suicide in the jail's 20-year history.

Estate of Wallmow v. Oneida County, 99 F.4th 385 (7th Cir. 2024).

Illinois Appellate Court Reversed Circuit Court of Cook County's Dismissal of Children's Negligence and Willful and Wanton Misconduct Claim Against Father's Employer for Exposure to Reproductively Harmful Chemicals

In *Fernandez v. Motorola Solutions, Inc.*, plaintiffs Meg Yukki Fernandez and Jonathon Johnson were children born with severe birth defects allegedly caused prior to their conception when their fathers were exposed to reproductively toxic chemicals and gas while employed at a semiconductor manufacturing facility in Texas owned by Motorola Solutions Inc. The plaintiffs brought separate actions in the Circuit Court of Cook County alleging negligence and willful and wanton misconduct. The circuit court granted summary judgment for Motorola, finding that it did not owe the plaintiffs a duty under Texas law and denied their leave to amend their respective complaints to allege punitive damages. Plaintiffs jointly appealed to the Illinois Appellate Court First District, which reversed the orders granting summary judgment and denying leave to amend.

Motorola is headquartered in Illinois and has semiconductor manufacturing plants in Arizona and Texas. Semiconductors are the "basic materials needed to make integrated circuits." Integrated circuits are silicon wafers which form the fundamental building blocks of modern electronic devices. During the manufacturing process, integrated circuits go through an etching process to remove unnecessary materials, in both a wet etching and dry etching phase, both of which use various chemicals.

Both of the plaintiffs' fathers worked at Motorola's semiconductor facility in Texas, where they were exposed to various toxic chemicals involved in the etching process of integrated circuits. Their wives became pregnant during the time they were employed with Motorola, and both plaintiffs were born with birth defects that resulted in deformities of the limbs, as well as an intellectual and speech disability in Johnson.

One plaintiff argued that Arizona law should have applied to his case because his injuries did not occur until he was born in Arizona. The appellate court disagreed and followed the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, holding that Texas law applied because the harm at issue occurred in Texas, where Norman was exposed to toxic chemicals.

Plaintiffs argued that, under the law of the case doctrine and *stare decisis*, the appellate court's holding in *Ledeaux I*, 2018 IL App (1st) 161345, regarding the existence of a duty on the part of Motorola, was binding on the circuit court. However, the appellate court rejected this argument because the parties, procedural posture, and issues in *Ledeaux I* were dissimilar and *Ledeaux I* did not involve the rendering of a decision as to whether Motorola was entitled to summary judgment.

The appellate court rejected Motorola's argument that the claims asserted could only be addressed under the Texas workers' compensation statute, where the plaintiffs were seeking recovery for their own injuries and not their fathers' injuries. The appellate court found that Texas law allows for the recovery of damages for preconception torts where those torts have been proven by competent evidence.

Plaintiffs also argued that Motorola owed them a duty of care under Texas law and the Restatement (Second) of Torts § 324A (1965), which states that one is liable to a third party when they render services to the third party necessary to prevent harm. Under both theories, the foreseeability of harm is of paramount importance. See *Elephant Insurance Co.*, 644 S.W.3d at 145, and RESTATEMENT (SECOND) OF TORTS § 324A (1965). The appellate court determined that there was a genuine issue of material fact as to whether the harm to Plaintiffs was reasonably foreseeable by Motorola based on the conflicting scientific evidence regarding whether paternal exposure to reproductive toxins causes birth defects presented by plaintiffs and Motorola.

Fernandez v. Motorola Sols., Inc., 2024 IL App (1st) 220884.

Illinois Appellate Court for the First District Affirms Dismissal of Claim Under Local Governmental and Governmental Employees Tort Immunity Act Finding Bicyclist Avoiding Vehicle in Bicycle Lane is Not an Intended Use of the Roadway

In *Foster v. City of Chicago*, the Illinois Appellate Court First District affirmed summary judgment in the City of Chicago's favor. The court held that the City did not owe the plaintiff a duty of care under the Local Governmental and Governmental Employees Tort Immunity Act ("the Act") because Foster was not an intended user of the roadway where he hit a pothole with his bicycle and sustained injuries, including a broken right leg that required a partial amputation above the knee.

Foster alleged that he was riding a bicycle in the marked bicycle lane and left the lane at an intersection to maneuver around a

vehicle that was parked in the bicycle lane. A woman left the parked vehicle, and the plaintiff, admittedly distracted by her “nice figure,” proceeded to strike and fall into a pothole. Plaintiff had previously complained to the City about potholes, but not that exact one.

The Act imposes a duty of ordinary care only for uses of municipal property that are both permitted and intended. *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 160 (1995). Therefore, Foster must have been both a permitted and intended user of the roadway to survive summary judgment. *Alave v. City of Chicago*, 2023 IL 128602, ¶ 39.

Plaintiff argued that he was an intended user of the roadway outside of the bicycle lane for the exceptional purpose of avoiding the parked vehicle and thus was owed a duty of reasonable care by the City. He further argued that the presence of a bicycle lane on the street established that bicycle traffic was intended in the area. Foster also cited *Curatola v. Village of Niles*, 154 Ill. 2d 201 (1993), where the Illinois Supreme Court carved out an exception to the rule that pedestrians are owed no duty when using the street outside of a crosswalk, holding that pedestrians are owed a duty when their use of the street is a necessity. *Id.* at 215-16. The plaintiff argued that this exception of necessity should also have applied to his case.

The appellate court disagreed, stating that the use of the roadway was foreseeable, but foreseeability alone did not establish the City’s intent that a bicyclist would use the roadway. The appellate court relied on *Alave*, which lays out the multifactor analysis to determine whether the use of municipal property is an intended use under the Act. *Alave*, 2023 IL 128602, ¶ 40. The multifactor analysis is limited to the facts of each case, although relevant factors include the nature of the property and “affirmative manifestations to show that the City intends—rather than merely permits—the roadway to be used in a certain manner.” *Id.* Further, the court in *Alave* stated that “foreseeability alone is not the standard for determining whether a duty of care exists.” *Alave*, 2023 IL 128602, ¶¶ 93, 108. The court distinguished the case from *Curatola* because the plaintiff’s use of the roadway was not a necessity; rather, the plaintiff admitted he could have passed the obstacle on the parkway or walked the bike around the vehicle.

The appellate court concluded that the plaintiff’s use of the roadway was not an intended use by the City. Therefore, there was no genuine issue of material fact as to whether he was an intended user of the roadway, and he was unable to meet his burden of establishing that the City owed him a duty of care under the Act.

Foster v. City of Chicago, 2024 IL App (1st) 231540-U.

No Jurisdiction Over Missouri Doctors and Hospital Who Provided Consultation to Illinois Facility

Is there personal jurisdiction over two doctors and a hospital located in Missouri for treatment of a critically ill patient at an emergency room in Illinois where an Illinois doctor called a hotline in Missouri and then received a consultation and instructions on treatment (or was it mere suggestions to facilitate transfer) from those doctors? That is the core of the question answered in *Higgins v. Washington University*.

The circuit court dismissed the doctors and hospital, and the plaintiff appealed.

The plaintiff’s deceased was diagnosed with a pheochromocytoma, a hormone-producing tumor, that caused symptoms where one of the treatments was extracorporeal membrane oxygenation, a treatment that the doctors and the facility at Washington University specialize in providing. In an opinion discussing multiple similar decisions regarding personal jurisdiction in the medical malpractice context, the Illinois appellate court affirmed the circuit court and held that Missouri doctors and a Missouri hospital were not subject to personal jurisdiction in Illinois. With respect to the hospital, the court found insufficient contacts for there to be specific personal jurisdiction for providing advice on care to an Illinois doctor treating an Illinois patient. With regard to the doctors, the court found that they were not subject to general personal jurisdiction. This is an important personal jurisdiction decision as it establishes that the mere providing of a hotline and advice does not create personal jurisdiction. A contrary holding would substantially change the practice of medicine.

Higgins v. Blessing Hospital, 2024 IL App (4th) 321531.

Nonnegligent Continuing Care Insufficient to Toll 4-year Medical Malpractice Statute of Repose

In October 2017, Dean Hild visited Chicago ENT for complaints related to asthma and allergy symptoms. At that time, Hild was HIV-positive and taking the anti-viral drug Norvir to treat his HIV infection. ENT physicians at Chicago ENT prescribed Hild fluticasone, a corticosteroid nasal spray, for his allergy and asthma symptoms. Three weeks after the initial fluticasone prescription, Chicago ENT added Breo Ellipta, another fluticasone aerosol powder inhalation medication, to Hild’s medication regime. It appears undisputed that

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fluticasone, when taken with Norvir, is known to cause Exogenous Cushing syndrome.

While he was seeing Chicago ENT, Hild was also being treated by defendants Lakeshore Infectious Disease Associates, Ltd. and Dr. James Sullivan, presumably to monitor his HIV-positive status. Plaintiff's lawsuit alleged that as early as November and December 2017, Dr. Sullivan was aware that Hild was taking both Breo Ellipta and Norvir. On May 1, 2018, Hild presented to Dr. Sullivan with "Cushingoid face", a symptom of Cushing syndrome. In June 2018, Hild stopped taking the inhalants he had been prescribed by Chicago ENT. From May through December 2018, Dr. Sullivan treated Hild's adverse reaction to the drugs by monitoring his cortisol levels until they returned.

On July 12, 2022, Hild sued Dr. Sullivan and his practice group, alleging they negligently failed to timely test his cortisol and ACTH levels and failed to instruct him to stop taking Breo Ellipta. Defendants sought dismissal of the lawsuit as untimely based on the 4-year statute of repose for medical malpractice actions. *See* 735 ILCS 5/13-212(a). The trial court in Cook County granted defendants' motion to dismiss. In affirming the trial court's dismissal, the Illinois Appellate Court First District rejected plaintiff's argument that Dr. Sullivan's continuing treatment of him through December 2018 made his lawsuit filed in July 2022 timely under the statute of repose. The allegations Hild made against defendants, at best, alleged negligent conduct by the defendants between November/December 2017 through June 2018 when he stopped using the Breo Ellipta inhaler. He made no complaints of negligent acts by any defendant after that time. The continuing care exception to the statute of repose only applies if a plaintiff "can demonstrate there was an ongoing course of continuous *negligent* medical treatment." Further, "a physician's nonnegligent treatment of an injured patient after providing negligent treatment does not toll the statute of repose." *Id.* (citing *Cunningham v. Huffman*, 154 Ill.2d 398, 416 (1993)). In Hild's case, based on the allegations in his complaint, the statute of repose began to run in May 2018. Therefore, the filing of his complaint in July 2022 was time-barred.

Hild v. Lakeshore Infectious Disease Assocs., Ltd., 2024 IL App (1st) 230417-U.

Plaintiffs Lack Standing in Class Action Claim for Voluntary Infant Formula Recall

On April 2, 2024, the United States Court of Appeals for the Seventh Circuit affirmed a decision arising out of the Northern District of Illinois that held the plaintiffs, a potential class of con-

sumers who purchased infant formula manufactured by Abbott Laboratories at a facility later deemed unsanitary, had no standing for claims of economic harm based on the risk of injury from the unclean conditions, when after an investigation by the Food and Drug Administration, Abbott had initiated a voluntary recall of all infant formula produced at the plant, including a full refund to anyone who possessed the formula.

Prior to the lawsuit, there had been a variety of agency investigations related to the Abbott plant at issue, but no recall of the infant formula was ever mandated. Nevertheless, Abbott announced a voluntary recall of certain products manufactured at the plant and a refund to those in possession of the infant formula. Thereafter, numerous plaintiffs sued Abbott. The claims were consolidated for pretrial proceedings, which included two categories of claims: (i) personal injury plaintiffs seeking recovery for personal injuries to children caused by consumption of the formula, and (ii) economic harm plaintiffs—putative class claims asserting purely economic losses on account of Abbott's conduct. The appeal concerned only those seeking economic harm (as the personal injury cases remain pending in a variety of jurisdictions). The plaintiffs in the economic harm action alleged violations of various state consumer fraud acts and claims for unjust enrichment, breach of the implied warranty of merchantability, and negligent misrepresentation on behalf of a nationwide class and twenty state sub-classes of consumers who purchased later-recalled Abbott products dating back to 2018. Abbott moved to dismiss, including among other arguments, that plaintiffs did not have facial standing pursuant to Article III of the Constitution.

The Seventh Circuit noted that in order to have standing under Article III, the minimum requirements consist of three elements: (1) an injury in fact that is (2) fairly traceable to the challenged action of the defendant, and (3) is likely, not merely speculative, that the injury will be redressed by a favorable decision. The court went on to state that this case concerned only the first element, "injury in fact," which must be concrete and particularized and not conjectural or hypothetical in nature. While economic harm can be a concrete injury, this must be when this is the result of a deceptive act or unfair practice and when the plaintiff is deprived of the benefit of his bargain.

The court held that the alleged economic harm here was neither, in that the injury was not hypothetical or conjectural – once the plaintiffs learned of the unsanitary conditions at the facility and the risk of contamination, they were told not to use the formula, and Abbott issued a refund. Further, it was not particularized because there was only a "potential risk" that the products may have been contaminated, and there was nothing to indicate they were subject to that risk in a personal or individual way.

As such, the court determined that the plaintiffs here received the benefit of their bargain and suffered no economic loss. They purchased and received infant formula; they did not claim the product they purchased was defective and thus valueless, and do not claim the economic benefit they received from the formula was anything less than the price paid. As such, their risk-of-harm theory of injury did not support Article III standing, and their claims were properly dismissed.

In Re: Recalled Abbott Infant Formula Prods. Liab. Litig., 97 F.4th 525 (7th Cir. 2024).

Receipt Fails to Cure Deception Under Consumer Protection Laws

The United States Court of Appeals for the Seventh Circuit reversed the decision dismissing plaintiff's individual and class claims, holding that plaintiff adequately pled a plausible claim. Plaintiff, a shopper at Walmart, sued Walmart, alleging that its pricing discrepancies violate the Illinois Consumer Fraud Act and equivalent consumer protection statutes in other states. Plaintiff shopped at Walmart in Illinois one day and realized that he was charged more at checkout than the shelf price.

Walmart filed a motion to dismiss, which the lower court granted, holding there is no possibility of deception where Walmart provides a receipt to compare the scanned price with the shelf price, thus curing any potential deception. The lower court also held that plaintiff failed to allege that Walmart intended for him to rely on the inaccurate shelf pricing.

In this case, the Consumer Fraud Act requires plaintiff to plausibly allege that the relevant labels are likely to deceive reasonable consumers. This requires a probability that a significant portion of the general public or targeted consumers could be misled. The court found that it was not unreasonable for reasonable consumers to believe Walmart would sell its merchandise at the prices advertised on its shelves. Misleading statements on price reductions are actionable under the Consumer Fraud Act. The court disagreed with the lower court's analysis of the receipt, eliminating consumer deception because receipts are given only after the transaction has concluded. Instead, any price correction must be made before the transaction. Holding otherwise would require the consumer to go through unreasonable efforts to protect themselves from the deception. Reasonable consumers are not required to audit their transactions and overcome additional hurdles to ensure fair prices. The court agreed with plaintiff's description of

Walmart's alleged selling practices, calling it a bait-and-switch, which Illinois law recognizes as deceptive.

Kahn v. Walmart, Inc., 107 F.4th 585 (7th Cir. 2024).

Conflicting Scientific Evidence About Cause of Birth Defects Defeats Defendant's Motion for Summary Judgment

Plaintiffs, both minor children, brought lawsuits against Motorola based on allegations of negligence, willful and wanton misconduct, and parental loss of consortium after having been born with severe birth defects. Plaintiffs claimed their birth defects were caused by their parents, who worked at Motorola's semiconductor manufacturing facility in Arizona, having been exposed to reproductively toxic chemicals. The Circuit Court of Cook County granted Motorola's motion for summary judgment and found that under Arizona law, Motorola did not owe a duty to plaintiffs, and further denied plaintiffs motion leave to amend their pleadings to allege punitive damages.

Motorola is headquartered in Illinois and has semiconductor manufacturing plants in Arizona and Texas. There were several personal injury lawsuits against it that were brought in Cook County that were related to severe birth defects in children of former Motorola employees.

First, plaintiffs argued that under the law of the case doctrine and stare decisis, the First District's hold in *Ledeaux I*, 2018 IL App (1st) 161345 regarding the existence of a duty on the part of Motorola was binding and should have prevented the circuit court from granting summary judgment in Motorola's favor. The court rejected this argument as *Ledeaux I* involved different issues, claims by different plaintiffs, and because it dealt with a section 2-615 motion to dismiss, not a summary judgment motion.

The parties agreed that Illinois law governed the applicable standard of care for summary judgment and that Arizona law governed the substantive issues, such as whether or not Motorola had a duty of care to plaintiffs. The First District, applying Arizona law, held that plaintiffs could not bring a personal injury cause of action against Motorola that was based on violation of OSHA standards. The Arizona courts have held that personal injury causes of action must be based on a breach of duty under common law, contract, or another statute. The court also rejected the argument that Motorola owed a duty of care under Arizona common law since there was no authority for the proposition that an Arizona employer had a duty to warn its employees of the risk that exposure to chemicals in the workplace may cause birth defects.

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The First District agreed with plaintiffs that Motorola owed a duty of care under the RESTATEMENT (SECOND) OF TORTS §342A (1965) and, for this reason, reversed the order granting summary judgment. Here, Motorola had a reproductive health policy that it undertook to provide services to its employees necessary for the protection of their future offspring. There was conflicting scientific evidence about whether paternal exposure to toxic chemicals was linked to birth defects in offspring. This conflicting scientific evidence was enough to create a genuine issue of material fact and defeat Motorola's motion for summary judgment.

Ledeaux by Ledeaux v. Motorola Solutions, Inc., 2014 IL App (1st) 220886.

Genuine Issue of Material Fact in Slip and Fall Case

The United States Court of Appeals for the Seventh Circuit reversed the grant of summary judgment in favor of defendant's restaurant because there was a genuine issue of material fact as to whether plaintiff identified sufficient evidence that she slipped in liquid at the restaurant.

Plaintiff slipped and fell in a Bonefish Grill restaurant, dislocating her hip. Plaintiff brought suit against defendant Bonefish Grill, alleging that she sustained her hip injury because she slipped and fell on a spill the restaurant negligently failed to clean. The district court entered summary judgment for the restaurant, concluding that plaintiff failed to identify the proximate cause of her fall and injury.

The controlling question was whether plaintiff put forth facts allowing a finding that her fall was caused by a liquid substance on the floor. The Seventh Circuit found that plaintiff repeatedly identified a liquid as the cause of her fall. She immediately identified the liquid after she fell, she reported the liquid to an employee moments later, she testified at her deposition regarding the liquid that led to her fall, she noted her dress was wet after the fall, and third parties corroborated plaintiff's account of events. The court found that these facts together created a genuine issue of material fact as to whether plaintiff slipped in liquid.

Bonefish Grill contended that plaintiff speculated that she slipped in water only because she noticed a wet spot on her dress after falling. The court disagreed and found that plaintiff consistently and specifically pointed to the liquid which she claimed caused her to fall. This account of events was not speculation but sensory perception. Thus, there was sufficient evidence to create a jury issue about whether liquid on Bonefish Grill's floor caused her to slip and injure herself.

LoBianco v. Bonefish Grill, LLC, 94 F.4th 675 (7th Cir. 2024).

Counterclaim Does Not Defeat Presumption of Waiver of the Right to Arbitrate

In *McGrath Nissan, Inc. v. Suematsu*, 2024 IL App (1st) 240461-U, the Illinois Appellate Court First District held that a counterclaim that arises out of the same issues as the contractual dispute in the complaint is foreseeable and does not dramatically alter the nature of the litigation in a way that defeats presumption of the waiver of the right to arbitrate.

McGrath Nissan, Inc. sold Fumi Suematsu a car, and McGrath Nissan and Suematsu entered into an arbitration agreement that rendered any dispute arising "out of or related to the purchase, lease, servicing, or repair of" the car subject to arbitration. McGrath Nissan later sued Suematsu, alleging that Suematsu had failed and refused to pay the remaining \$5000 balance on the car. Suematsu filed a counterclaim alleging that the car was defective and that McGrath Nissan committed various misrepresentations and statutory violations. McGrath Nissan filed a motion to dismiss in favor of arbitration and requested that Suematsu's counterclaim be dismissed so the parties could arbitrate.

The trial court denied McGrath Nissan's motion, finding that the right to arbitrate had been waived by McGrath Nissan filing suit, which breached the arbitration agreement. McGrath Nissan appealed under Illinois Supreme Court Rule 307(a)(1).

On appeal, the appellate court affirmed the trial court. The court held that since McGrath Nissan did not raise the issue of material breach in its initial brief, it forfeited the issue, an independent reason to affirm the trial court's order. Notwithstanding, the right to arbitrate can be waived if a party acts inconsistently with the right to arbitrate. McGrath Nissan argued that Suematsu's counterclaim was an "unexpected development" and presented an "abnormal" situation that defeats the presumption of the waiver of the right to arbitrate. The appellate court disagreed and found that Suematsu's counterclaim arose out of the same facts and involved the same issues as McGrath Nissan's complaint. As a result, Suematsu's counterclaim was not unexpected, and McGrath Nissan waived their right to arbitrate.

McGrath Nissan, Inc. v. Suematsu, 2024 IL App (1st) 240461-U.

Parent Company Held Not Liable for Subsidiary's Actions under Illinois Law

Plaintiff brought suit after her husband, an employee of Industrial Fumigant Company, LLC (IFC), passed away in the course of his employment after inhaling a toxic dose of methyl bromide needed for a fumigation job he was performing. After his death, the

plaintiff filed suit in Illinois state court for wrongful death against IFC and its parent company, Rollins, Inc. IFC and Rollins removed the case to federal court on the grounds of diversity jurisdiction. Subsequently, the plaintiff dismissed IFC from the lawsuit, leaving Rollins remaining. Rollins moved for summary judgment, which the district court granted, finding that Rollins was not liable for IFC's acts under Illinois law and could not be held responsible for the decedent's death.

The United States Court of Appeals for the Seventh Circuit discussed the role of liability of a parent company, noting that “[a]s a general principle of corporate law deeply ingrained in our economic and legal systems, a parent company such as Rollins, is not liable for the acts of its subsidiary.” A narrow exception exists, however, under Illinois law, known as direct participant liability. Under that theory, a parent company may be held liable for acts of its subsidiary if a plaintiff can prove that: (1) the parent had a specific direction or authorization of the manner in which the activity was undertaken, and (2) the injury was foreseeable. Under the first element, the parent is only liable if it “surpasses the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary.” Generally, the imposition of budgetary strategies and business policies is not enough to impose direct participant liability.

Here, the appellate court affirmed the district court's decision in finding that Rollins did not employ specific direction or authorization over IFC's use of or training on methyl bromide in that IFC still had its own methyl bromide specialist, its own safety and regulatory departments, and trained its employees on how to use, store and handle methyl bromide. Further, as to the second element, there was no support to conclude that there was any foreseeability of the injury at issue here. As such, the Seventh Circuit concluded that Rollins, the parent company to IFC, could not be held liable under Illinois' narrow exception under the theory of direct participant liability, as it did not specifically direct any activity where the injury was foreseeable.

Mesenbring v. Rollins, Inc., 105 F.4th 981 (7th Cir. 2024).

General Contractor Not Liable Under Sections 414 and 343 When General Safety Requirements Did Not Amount to Retained Control and No Notice of Hazard

In *Neisendorf v. Abbey Paving and Sealcoating Company, Inc.*, the Illinois Appellate Court Second District ruled that the general contractor was not liable under either Sections 414 or 343 of the RESTATEMENT (SECOND) OF TORTS. In this case, plaintiff was injured

after a trench caved in. He was an employee of the subcontractor, Campton Construction, Inc. (“Campton”), who was retained by general contractor, Abbey Paving & Sealcoating Company, Inc. (“Abbey”). The appellate court upheld summary judgment in favor of Abbey, finding that Abbey did not retain sufficient control over Campton's work such that Abbey owed a duty of care under Section 414 of the Restatement and that Abbey had no actual or constructive notice of a dangerous condition to establish liability under Section 343 of the Restatement.

Abbey had entered into a prime, written contract with a municipality. Abbey then, pursuant to an oral agreement, hired Campton as a subcontractor to handle the project's underground sewer and sanitation installation, general excavation, and foundation excavation. The prime contract stated that Abbey “shall be fully responsible for and have control over construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the work under the contract. . .” An additional section of the document addressed safety and stated that Abbey “shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performances of the contract. . .”

The appellate court noted that Illinois follows Section 414 of the Restatement (Second) of Torts for establishing liability on a general contractor relative to the work of a subcontractor. In general, “one who employs an independent contractor is not liable for the latter's acts or omissions.” *Rangle v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 838 (1st Dist. 1999). That said, “one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability to physical harm to others for whose safety the employer owes a duty to exercise reasonable care which is caused by his failure to exercise his control with reasonable care.” RESTATEMENT (SECOND) OF TORTS § 414, at 387 (1965); *Larson v. Commonwealth Edison, Co.*, 33 Ill. 2d. 316, 325 (1965).

Plaintiff argued that the prime contract's delegation of construction means, methods, techniques, sequences, and procedures for the work established that Abbey had retained control. The court found the prime contract provided that Abbey shall have responsibility for and control over construction means, but it did not grant Abbey control over the operative details over Campton's work. Abbey only had a general right to stop work, but it had insufficient contractual control over Campton's work. Thus, under the language of the prime contract, Abbey had no retained control.

Plaintiff then argued that Abbey had sufficient supervisory control because it had the power to stop Campton from performing unsafe work. The court noted that a “general right to enforce safety... does not amount to retained control under Section 414.” *Carney v.*

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Pac. R.R. Co., 2016 IL 118984, ¶ 47. In this case, the court found that Abbey only had a general responsibility of project safety and a general power to stop Campton's work, but there were no specific discussions regarding worksite safety between the two companies. Thus, the court ruled that Abbey did not have any retained control of Campton's work in this manner.

The court dismissed plaintiff's final notice argument under Section 343 of the Restatement because there was no evidence that Abbey knew of the hazard of the trench, as such information was known by Campton.

Neisendorf v. Abbey Paving and Sealcoating Company, Inc., 2024 IL App (2d) 230209.

Plaintiff's Settlement with Hospital's Alleged Agent Extinguished Vicarious Liability Claims and Hospital Employees were Statutorily Immune from Liability

In *Nott v. Swedish Covenant Hospital*, the plaintiff brought suit against various hospital employees and alleged agents for reporting to DCFS and 911 what he considered to be confidential information shared with staff during an emergency room visit wherein he admitted to illegally videotaping children in a bathroom at a school where he worked. He settled claims with a hospital-based mental health counselor for alleged breach of confidentiality while continuing to claim the defendant hospital was liable for her actions. In upholding a dismissal sought under 735 ILCS 5/2-619, the Illinois Appellate Court First District affirmed the longstanding principle in *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511 (1993) that "any settlement between the agent and the plaintiff must also extinguish the principal's vicarious liability."

Nott further alleged direct liability claims against the defendant Hospital and emergency room physician and nurses for either directing or encouraging the counselor to report plaintiff's statements to DCSF and the Chicago Police (through 911 calls) and/or making those reports directly to both entities through other employees. Defendants argued they had statutory immunity for the mandatory and/or permissive reports of plaintiff's conduct because those reports were made in good faith under the (a) the Reporting Act; (b) the Mental Health Act; (c) the Social Work Act; and (d) the Counselors Act. In upholding the dismissal of the complaint, the court reviewed the language of each of the 4 statutes under which the defendants claimed immunity.

The Reporting Act (325 ILCS 5/4) requires specific professions and institutions to act as mandatory reporters, including physicians and hospitals. Mandated reporters are required to "immediately report or cause a report to be made to [DCFS]" once they have "reasonable cause to believe a child known to them in their professional or official capacity may be an abused or neglected child." *Id.* The court found that the facts of this case did not mandate reporting of Nott's actions because the children he had videotaped in the school bathroom were not known to any of the hospital personnel. However, the court analyzed the permissive reporting allowance within the Act, which was not specific to "a child known to the reporter." The court found that the Act immunizes permissive reports, but only those made to DCFS. As such, the defendants were afforded immunity under the Reporting Act for the alleged participation in reporting plaintiff's conduct to DCSF.

The Mental Health Act (740 ILCS 110/3(a)) protects the confidentiality of communications made in the pursuit of mental health treatment. However, that statute "empowers a therapist to report communications when, and to the extent that the therapist in his or her sole discretion believes disclosure is necessary to protect another person against a clear and imminent risk of serious mental injury." This Act does not limit disclosures to only DCSE, and it is not limited to disclosures based on a known child, and the defendants were immune from liability under this Act.

Both the Reporting Act and the Mental Health Act extend immunity when reporting is done in "good faith." The crux of Nott's argument in opposition to the immunity claim of the defendants was that they acted in bad faith in participating in/disclosing his conduct to both DCFS and the police. In assessing the legislative intent of both Acts, the court noted it begins with a presumption that mandatory or permissive reporting is done in good faith. To rebut that presumption, a plaintiff must come forward with evidence to "burst the [presumptive] bubble"—i.e., evidence the defendant acted "maliciously, dishonestly, or for some improper purpose." The court found Nott's evidence was insufficient to rebut the presumption. However, in dicta, it cautioned the defendants that they could have acted more carefully and that the hospital could have provided more training to its staff on the reporting act requirements.

Nott v. Swedish Covenant Hospital, 2024 IL App (1st) 221940-U.

No Abuse of Discretion By Circuit Court that Refused to Allow Issuance of Jurisdictional Discovery

The plaintiff's decedent was killed when the utility task vehicle rolled over in Wisconsin, and she filed suit in Boone County, Illinois against the manufacturer of the product, the owner of the product, and the retailer, Richmond Motorsports, LLC.

In *Odarczenko v. Polaris*, the Illinois appellate court found that there was no personal jurisdiction over the Kentucky-based retailer of the UTV, which was sold in Kentucky. The vehicle was transferred to an Illinois resident while the purchaser was still in Kentucky. The Illinois resident purchaser saw an advertisement on the defendant's website in Illinois.

The reviewing court also, and more importantly for other cases, found that the circuit court did not abuse its discretion in holding that the plaintiff was not entitled to jurisdictional discovery under Rule 201(l). The plaintiff could not plead *prima facie* facts sufficient to show that Illinois courts could exercise jurisdiction over the defendant in the first instance to entitle the plaintiff to the jurisdictional discovery. The court stated that "[a] similar—and surely unacceptable—argument would run as follows. The defendant might have done something wrong, but because wrongdoers do not typically publicize their wrongdoing, the plaintiff should be allowed to sue the defendant first and find out later, by discovery, whether the defendant did anything wrong. In other words, according to this argument, the plaintiff should be allowed to shoot first and ask questions later." The court further stated that "under the policy determination the [S]upreme [C]ourt has made in Rule 137(a), requests for jurisdictional discovery are no substitute for pleading a *prima facie* case of personal jurisdiction. Arguably, it is unfair to subject a nonresident defendant to the ordeal and expense of jurisdictional discovery if the plaintiff lacks the faintest inkling of how the circuit court would have personal jurisdiction over the defendant."

Odarczenko v. Polaris, 2024 IL App (4th) 230790-U.

Defendant's Expert's Opinions, and Jury Instruction on Parents' Contributory Negligence Affirmed in a Circumcision Trial

In *O'Laughlin v. Northwestern Memorial Hospital*, the plaintiff claimed medical malpractice, alleging negligent performance of a circumcision on her son, causing a urethral fistula. The defendant maintained that the fistula was a congenital condition unrelated to the circumcision. The jury returned a verdict for the defense.

The plaintiff argued for a new trial because the trial court abused its discretion by allowing the defendant's expert to testify to an undisclosed opinion that the child would not be able to urinate if his urethra was crushed during the circumcision. The Illinois Appellate Court First District found the testimony at issue was a logical corollary to the expert's previously disclosed opinion that the clamp did not crush the urethra and cause a fistula. The court explained that the defendant's disclosure set forth the location of the fistula as key to the defense. It concluded that the expert's urination-related trial testimony was a natural extension of the disclosed opinion concerning the anatomy of the penis relative to the location of the clamp. Thus, the First District held that the testimony did not violate Rule 213. The trial court was within its discretion to allow the expert "to elaborate briefly" on her previously disclosed causation opinion. The "remark was well within an expert's latitude to elaborate on a disclosed opinion" and did "not call for a new trial."

The First District further considered whether the trial court improperly denied the plaintiff's request to instruct the jury that the parents' contributory negligence was not at issue. The plaintiff argued that the instruction was necessary because the defendant used the parents' failure to notice the child's fistula for two years to suggest that the defendant did not breach the standard of care when he failed to observe the abnormality before the circumcision and to suggest that he did not cause the fistula because no abnormality was apparent after surgery. The First District reviewed the record and concluded that no argument by defense counsel rose to the level of criticism of the parents. Accordingly, it was reasonable for the trial court to reject the instruction. If the court instructed the jury on the parents' negligence, the court found that it could confuse the issues and mislead them from the central issue: whether the defendant deviated from the standard of care in the circumcision operation.

O'Laughlin v. Northwestern Mem'l Hosp., 2024 IL App (1st) 221956-U.

Trial Court Abused its Discretion in Striking Plaintiffs' Rule 213(f)(3) Disclosures and Barring Plaintiffs from Any Additional Standard of Care Expert Opinions as a Rule 219(c) Sanction

Plaintiffs Janet Olson and Scott Olson sued Defendants Paul Bishop, DPM, and his group, The Centers for Foot and Ankle Surgery, relating to an implant surgery on Mrs. Olson's foot in 2013. She had undergone a prior identical surgery in 2011, for which her

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medical negligence claims were time barred. In prior proceedings, the trial court determined that facts relating to the time-barred 2011 surgery may be relevant to her claims arising out of the 2013 surgery, but plaintiffs were not allowed to argue any claims of negligence relating to the 2011 care. That ruling was upheld on prior appeal, and in this case, only the 2013 alleged negligent conduct was at issue.

Once the matter was returned to the trial court after the initial appeal, plaintiffs disclosed an expert witness who included in his written disclosures opinions relating not only to the 2013 procedure at issue but also incorporated opinions of negligence related to the 2011 procedure. In response to this overly broad expert disclosure, defendants sought to dismiss the entire lawsuit as a sanction under Rule 219(c) for plaintiffs' "continued and repeated violations of court orders barring plaintiffs from alleging negligence or injuries prior to the [2013] surgery."

At the hearing on defendants' motion to dismiss, the court found plaintiffs' disclosed standard of care opinions to be in violation of prior orders and that their actions "over the last few years demonstrated a 'deliberate and unwarranted disregard of the Court's rulings and authority' which...caused prejudice to defendants." Ultimately the court denied defendants' motion to dismiss, instead entering an order striking plaintiffs' Rule 213(f)(3) disclosures and barring plaintiffs from any additional standard of care opinion disclosures. It also granted defendants' petition for attorneys' fees associated with the motion for sanctions, awarding defendants \$7,000 for the same. Following the sanctions order, defendants filed a motion for summary judgment, arguing in the absence of any expert opinions offered by the plaintiffs, there was no genuine issue of material fact concerning the standard of care. The trial court granted defendants' motion for summary judgment, which disposed of the entire case.

Plaintiffs appealed the summary judgment order, sanctions order, and award of attorney's fees. In analyzing the Rule 219(c) sanctions order, the Illinois Appellate Court Second District confirmed that sanctions can be imposed on any party who "unreasonably fails to comply" with the Illinois Supreme Court's discovery rules of an order entered pursuant to those rules. The court cited to *Shimanovsky v. General Motors Corp.*, 181 Ill.2d 112 (1998), noting that the three orders at issue on appeal were within the "nonexclusive list of sanctions" a court is entitled to impose in "just" circumstances and that the purpose of imposing sanctions under Rule 219(c) is to "coerce compliance with discovery rules and orders, not to punish the dilatory party."

Shimanovsky established factors trial courts must consider when deciding whether to impose sanctions, and the Second District found that the trial court properly exercised its discretion in concluding that the imposition of sanctions was warranted in this case. However,

the appellate court ultimately determined the sanctions imposed on plaintiffs were "a death penalty" which was "an unwarranted abuse of discretion" and, therefore, the order striking plaintiffs' Rule 213(f)(3) disclosure and barring further standard of care disclosures was vacated. The order granting summary judgment in favor of defendants was likewise vacated, and the case has been remanded to the trial court for further proceedings.

Despite vacating the sanctions order and motion for summary judgment, the Second District upheld the trial court's award of defendants' attorneys' fees, noting although the barring sanction was unduly harsh, there was justification for sanctions against plaintiffs.

Olson v. Centers for Foot and Ankle Surgery, Ltd., 2024 IL App (2d) 220380-U.

Statutory Causes of Action Not Present When Not Explicitly Provided by Legislation and Alternative Remedies Available

In *Rice v. Marathon Petro. Corp.*, the Illinois Supreme Court upheld the rulings of both the trial court and appellate court, finding that the statutes at issue did not create causes of action or rights of action for third parties, either expressly or implicitly. Thus, the statutory claims of the plaintiff were rightfully dismissed.

In this case, defendants were owners and operators of a gas station located approximately 1.5 miles from the decedent's residence. Gasoline became displaced from the subject tank and leaked into the nearby sanitary sewer system, which flowed toward the decedent's condominium. At approximately 5:00 p.m. on October 19, 2017, an odor stemming from the gasoline intrusion became apparent in the basement-level apartment units in the decedent's building. At approximately 9:00 a.m. the next day, the decedent started the drying machine in the laundry room, and a spark ignited the gasoline vapors, which led to an explosion. The decedent suffered severe burns and spent two weeks in an intensive care unit, with seven more weeks at a rehabilitation facility. She was not able to return home for over a year while the damage was remediated. She died during the pendency of the litigation.

After an initial complaint, the plaintiff—the decedent's daughter—filed a first amended complaint that contained nine counts against three defendants. The first three counts were for statutory recovery under the Illinois Environmental Protection Act, specifically Title 16, "Petroleum Underground Storage Tanks." 415 ILCS 5/57 to 57.19. The middle three counts were for common law negligence, and the final three counts were negligence claims under the Survival Act. See 755 ILCS 5/27-6.

The trial court granted defendants' motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure for failure to state a claim for the statutory causes of action, ruling that the statute itself did not provide private rights of action, and the appellate court upheld this ruling.

The Illinois Supreme Court considered whether plaintiff had either an express right of action or an implied right of action. With regards to an express right of action, plaintiff presented a hobbled argument, piecing together provisions from Illinois and federal environmental statutes along with accompanying regulations. In ruling that there was no express cause of action, the Illinois Supreme Court quoted the appellate court decision in this matter, stating that plaintiff's "strained interpretation underscores that a private right of action is not clearly and unmistakably communicated in the statute."

The court then considered whether there was an implied right of action. In certain circumstances, a court can take the "extraordinary step" of implying a private cause of action in a statute where none is expressly provided "only when it is clearly needed to advance the statutory purpose and whether the statute would be effective as a practical matter unless a private right of action were implied." *Channon v. Westward Management, Inc.*, 2022 IL 128040, ¶ 33. In a multifactor analysis, the court stated that plaintiff is not a member of the class that the statute was intended to protect. The statute was intended to protect resources, not to protect third parties injured by leaking underground fuel tanks. Additionally the court ruled that the statute itself states that common law liability is not to be altered by enactment of the statute. After noting that the statute does not impose strict liability on violators in actions by private parties alleging personal injuries, the court held that government enforcement provisions, in addition to the threat of common law liability, make it unnecessary to provide a private right of action.

Rice v. Marathon Petro. Corp., 2024 IL 129628.

Appellate Court Affirms Dramshop Act is the Exclusive Remedy for Causes of Action Stemming from the Provision of Alcohol

In *Schramm v. 3258 S. Wells St.*, the decedent worked as a busser at Turtle's Bar & Grill (one of the defendants), and passed away after consuming alcoholic beverages on his shift, falling and sustaining a head injury. Prior to this incident, the decedent had a history of alcoholism, including drinking at the bar while working. According to the plaintiff, the decedent's brother, the owner had

acknowledged the decedent had a drinking problem and had agreed to stop providing him with alcohol while he worked.

After the incident, the plaintiff sued the bar and its owner, on the decedent's behalf, alleging various theories of tort liability in a total of 16 counts, which included various claims against the bar and the owner for wrongful death, claims under the Survival Act, claims of willful and wanton conduct causing wrongful death, claims of "fostering alcoholism", and claims of failing to render aid. In short, the plaintiff did not plead any counts under the Liquor Control Act, 235 ILCS 5/1-1 *et seq.* (under which section 6-21 is commonly known as the Dramshop Act and governs matters arising from a bar's supply of alcohol to persons). Instead, the plaintiff alleged that the bar and its owner undertook a duty to refrain from providing the decedent with free alcohol, breached that duty, and breached the duty of reasonable care to render first aid after his fall. The bar and owner filed a motion to dismiss pursuant to 735 ILCS 5/2-615, arguing that the 16 counts were improper because the entire incident was exclusively covered by the Dramshop Act. The circuit court agreed and dismissed the complaint with prejudice as to both the bar and the bar's owner, and the plaintiff appealed.

The plaintiff, in his appeal, argued that the Dramshop Act does not preempt his common-law causes of action because he sufficiently pled that the bar owner undertook a duty to refrain from serving the decedent alcoholic drinks and that the owner and other employees failed to exercise reasonable care by not rendering timely aid to him after he fell. Further, the plaintiff argued that they helped foster the decedent's alcoholism. The appellate court began its review by noting that Illinois strictly adheres to the "historic common law rule" that no cause of action exists for injuries arising out of the sale or gift of alcohol and that the rationale of the rule is that drinking of the intoxicant and not furnishing it, is the proximate cause of the intoxication and the resulting injury. However, it further noted that the legislature created an exception to the general rule by enacting a limited statutory cause of action available to third parties injured as a result of a dramshop's provision of alcoholic beverages to a person who, after becoming intoxicated, injures the third party, specifically found under 235 ILCS 5/6-21(a).

Regardless of the plaintiff's attempts to argue that the Dramshop Act did not preempt any common law action for voluntary undertaking, fostering of alcoholism or failure to render aid, the appellate court was unpersuaded and noted that it has been consistently held that the Dramshop Act is "the exclusive remedy for holding providers of alcohol liable for actions of an intoxicated person" when there was no third-party involvement. Because there is no codified law that indicates the legislature intended to impose any type of liability

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outside of the well-settled common-law principle providing no liability, aside from what is specifically stated in the Dramshop Act, the appellate court continued to refuse to do so here.

Schramm v. 3258 S. Wells St. Restaurant, LLC, 2024 IL App (1st) 231424.

Plaintiff's Institutional-Negligence Claim Was Not Disguised as Vicarious Liability, and the Prejudgment-Interest Statute is Constitutional

In *Wilcox v. Advocate Condell Medical Center*, the plaintiff brought a wrongful death/medical negligence action against the defendant hospital, alleging institutional negligence and vicarious liability. The suit alleged that the hospital was liable for system failures and the hospital's nurses who failed to warn physicians of the patient's worsening condition, resulting in the patient not receiving his intrathecal baclofen in enough time before his death. The jury rendered a verdict for the plaintiff, and it assessed damages in the sum of \$42.4 million. Post-trial, the circuit court denied the defendant hospital's motion for judgment notwithstanding the verdict or a new trial but granted the plaintiff's motion to modify the judgment to add prejudgment interest. The defendant hospital appealed. On appeal, the hospital argued that the plaintiff improperly employed a theory of institutional negligence to impose direct liability on the hospital for what was actually a claim of vicarious liability, that the plaintiff failed to establish the proximate cause of the patient's death, and that the prejudgment-interest statute is unconstitutional and could not be applied in this case, which accrued prior to the statute's enactment.

First, as to whether the plaintiff's institutional negligence claim was disguised as vicarious liability, the court analyzed the jury instruction on institutional negligence, as well as the expert testimony and closing argument presented by the plaintiff's counsel. The Illinois Appellate Court First District held that the plaintiff's claim was not a disguised claim of vicarious liability for the professional negligence of the patient's healthcare providers. Rather, the plaintiff presented sufficient evidence—in the form of expert testimony, two of the hospital's policies and procedures, and four national standards of the Joint Commission—from which the jury could determine what was required of the hospital as a reasonably careful hospital under the circumstances. The court noted that the plaintiff's expert opined that the hospital violated their procedures in several ways, including the failure to communicate the systems failure and the plaintiff's closing argument, which emphasized the hospital's failure, not the providers.

Next, regarding proximate cause, the court found the plaintiff presented sufficient evidence to find that the hospital was the proximate cause of the patient's death. The court cited the plaintiff's expert's testimony on the hospital's deviation from the standard of care and its effect on the delayed treatment.

As to the prejudgment-interest statute, 735 ILCS 5/2-1303(c), the First District deferred to the two recent rulings in *Cotton v. Coccaro*, 2023 IL App (1st) 220788, and *First Midwest Bank v. Rossi*, 2023 IL App (4th) 220643, both finding the statute was constitutional. Consequently, the court rejected all of the defendant's arguments on appeal and affirmed the judgment in favor of the plaintiff.

Wilcox v. Advocate Condell Med. Ctr., 2024 IL App (1st) 230355.

Village of Berkeley fails to Establish Tort Immunity in Fallen Tree Personal Injury Suit

Michael Williams was walking his dogs on the street on which he lives when a tree branch fell, injuring him and killing one of his dogs. Plaintiff brought suit against the Village of Berkeley alleging that defendant negligently allowed the tree to become and remain in a dangerous condition and that allowing the dangerous condition to exist was willful and wanton. Plaintiff alleges that he informed defendant's employees multiple times that the subject tree was rotting and needed to be removed. However, defendant's employee James Wagner, the superintendent of defendant's public works department, who oversees tree maintenance and serves as the defendant's forester, testified that he was unaware of the tree's rot. Wagner testified that he inspected the tree prior to the branch falling and did not observe any signs of rot.

Defendant asserted immunity defenses under sections 2-109, 2-201, 3-102, and 3-105 of the Local Governmental and Governmental Employees Tort Immunity Act. Sections 2-109 and 2-201 shield a municipality from liability for the discretionary acts or omissions of its employees. Section 3-102 codifies the common-law duty of a local public entity to maintain its property in a reasonably safe condition, and section 3-105 immunizes governments for injuries caused by the effects of weather conditions on the use of sidewalks. The Cook County circuit court initially denied defendant's motion for summary judgment, but after defendant filed a motion to reconsider, the circuit court then granted defendant's motion for summary judgment, finding defendant was immune from suit. Plaintiff raised five arguments on appeal. The Illinois Appellate Court First District reversed the circuit court's grant of summary judgment based on plaintiff's third point that defendant failed to establish discretionary immunity under sections 2-109 and 2-201.

The main issue addressed by the court was whether defendant provided enough evidence to assert the affirmative defense of immunity under Sections 2-109 and 2-201. In order for defendant to establish its entitlement to discretionary immunity under 2-109 and 2-201 for the acts or omissions of an employee, it must show (1) the employee held either a position involving the determination of policy or a position involving the exercise of discretion and (2) the employee engaged in both the determination of policy and the exercise of discretion when performing the act or omission from which plaintiff's injury resulted. There is no dispute that James Wagner is the only person who can decide to have a tree removed. Therefore, he fulfills the first element. However, he was not aware of the subject tree's rotting condition and, therefore, failed the second prong of the test.

The court noted that discretion connotes a conscious decision. A public entity claiming immunity for an alleged failure to repair a defective condition must present sufficient evidence that it made a conscious decision not to perform the repair. Therefore, due to Wagner's testimony that he was not aware of the rot that allegedly caused the limb to break and injure plaintiff, Wagner could not have made a conscious decision not to address the defect in the subject tree. The court states that if Wagner was aware of the rot in the subject tree and then decided not to address it for any policy reason, including costs, personnel, etc., then that would have been a conscious decision and an exercise of discretion. Defendant would then be entitled to immunity under 2-109 and 2-201. Therefore, the court reversed the circuit court's finding of summary judgment in favor of defendant.

Williams v. Village of Berkeley, 2024 IL App (1st) 231481.

Trial Court Appropriately Permitted Expert's Testimony Regarding Other Possible Causes of Death and Barred Admission of the Death Certificate's Cause-Of-Death Statement

In *Wilson v. Dande*, the plaintiff, as special administrator of her husband's estate, brought a wrongful death/medical malpractice action against a physician and his practice group. The plaintiff alleged that the defendant physician's negligence and untimely treatment of her husband's cardiac condition was a proximate cause of his death. Following a trial, the jury returned a verdict in favor of the defendants. On appeal, the plaintiff argued that the trial court erred by: (1) allowing the defendants' expert to testify about "possible" alternative causes of the decedent's death; and (2) refusing to admit into evidence the decedent's complete death certificate, including

the cause of death indicated therein. The Illinois Appellate Court Fifth District rejected all of the plaintiff's arguments and affirmed the judgment in favor of the defendants.

Regarding the plaintiff's first argument, the Fifth District held that the trial court did not abuse its discretion in allowing the defendants' medical expert's statement that many things "could cause someone to die suddenly or unexpectedly." This testimony was permitted even though the expert also testified that he did not have an opinion to a reasonable degree of medical certainty as to the cause of death. The appellate court expressly found that there was no factual foundation for the expert testimony at issue because the expert's statement was not based on medical information specific to the decedent. Nonetheless, the court explained that the remark had some basis in the decedent's medical records, which included prior conditions that made it reasonable to consider other causes of death, such as a stroke. In addition, the plaintiff's own expert testified that other causes of death could not be conclusively ruled out. Thus, the record showed that the defense expert's testimony was a "single, prefatory statement" that did not result in unfair prejudice to the plaintiff.

Second, the court addressed the issue regarding the admissibility of the death certificate. Upon the close of evidence at trial, the plaintiff moved to admit the decedent's death certificate as evidence, but the trial court only allowed it for the limited purpose of identifying the date of birth, date of death, and the decedent's spouse. The Fifth District held that the trial court properly refused to admit the decedent's complete death certificate, including the cause of death, into evidence. The court explained that pursuant to Illinois Rule of Evidence 803(8), the cause-of-death statement was an expression of the coroner's opinion and, thus, not admissible under the public records exception to the rule against hearsay. The plaintiff alternatively argued that it should be admissible under § 115.1-51 of the Illinois Code of Criminal Procedure as records of the coroner, even though the plaintiff did not rely on this argument at the trial of a civil action. Even considering this novel argument, the court found that this exception is limited to records of autopsy reports, coroner's protocols, or a document of an external postmortem examination. Here, no autopsy was performed in connection with the death certificate. Therefore, the court held that this statutory exception did not apply. Rather, since the cause-of-death statement in the death certificate lacked adequate foundation, the trial court correctly limited its purpose as evidence at trial.

Wilson v. Dande, 2024 IL App (5th) 220552.

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WORKERS' COMPENSATION

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Heart Attack Shoveling Snow Arose Out of and in the Course of Employment

The appellate court reversed the decisions of the Commission and circuit court which had denied survivor benefits to the son of a deceased construction manager who died of a heart attack while shoveling snow at newly constructed home completed by the employer. The appellate court found the Commission's decisions were against the manifest weight of the evidence regarding whether the heart attack arose out of and in the course of employment, and whether it was causally related to the work activities. Clearing snow from a newly built house was a reasonable job duty. The amount of snow shoveled was irrelevant. Both medical experts acknowledged a temporal connection between the shoveling and onset of symptoms. Physical exertion need only be a causative factor, not the sole or primary cause.

Cronk v. Illinois Workers' Comp. Comm'n, 2024 IL App (1st) 221878WC.

Court Affirms Award of Benefits to Traveling Employee Injured in Fall Down Employer's Unobstructed Stairs

Acknowledging that generally, traversing stairs is a neutral risk and injuries resulting therefrom are not compensable under the Illinois Workers' Compensation Act, but construing the state's rules on traveling employees, the appellate court affirmed a finding of the state's Workers' Compensation Commission that a town's "blight inspector" was a traveling employee and accordingly, that injuries sustained by him in a fall down unobstructed stairs at a town office building were compensable. The court agreed that the fact that the inspector was not *traveling* at the time of his injury was not controlling. His workday as a traveling employee had started. His injuries, even on the employer's premises were, therefore, compensable.

Town of Cicero v. Illinois Workers' Comp. Comm'n, 2024 IL App (1st) 230609WC.

Evidence Supported Commission's Finding that Worker's Death Arose Out of and In the Course of Employment

In an unpublished decision, the appellate court affirmed the Commission's decision awarding death benefits to Derek Luers, the adult son of Leonard Luers, who died in a work-related accident. The court upheld the Commission's findings on two key issues: (1) that the decedent's injury arose out of his employment; and (2) that Derek was dependent on the decedent at the time of his death. As to the work-relatedness of the injury, the court found sufficient evidence to support the conclusion that the decedent slipped on cornstarch dust while performing his job duties. The court found that the risk was incidental to employment, or at minimum, the decedent was exposed to a neutral risk to a greater degree than the general public. Regarding Derek's dependency, the court emphasized that Section 7(c) of the Workers' Compensation Act required only that a claimant be "in any manner dependent" on the deceased employee, not totally dependent. The court found ample evidence, including testimony about Derek's health conditions and ongoing financial support from his father, to support the Commission's dependency determination.

Gilster-Mary Lee Corp. v. Illinois Workers' Comp. Comm'n, 2024 IL App (5th) 230479WC-U.

Claimant's Voluntary Activities of Decorating for a Party Did Not Bar Benefits Under Section 11 of the Act as a Voluntary Recreational Program

The claimant worked for the employer as a medical assistant. She was decorating the office for a coworker's birthday, and while standing on a desk, she lost her balance and fell sustaining injuries. The employer argued benefits should be denied pursuant to Section 11 of the Act, which precludes benefits for accidental injuries incurred while participating in "voluntary recreational programs." The appellate court affirmed the Commission's award for benefits. In doing so, the appellate court commented there was no dispute the claimant's decision to decorate the office was voluntary. The appellate court noted the Act does not define "recreational program," so they would apply the rules of statutory construction and give the words in the statute their ordinary and popularly understood meaning. The court then discussed previously decided cases and focused on whether the activities performed by the claimant were part of a "party." It concluded the Commission reasonably found a

Survey of 2024 Tort Law and Workers' Compensation Cases (Continued)

distinction between the claimant's actions and a "party." As such, the claim was not barred by Section 11 of the Act.

The appellate court also affirmed the Commission's decision finding the claimant's injuries arose out of her employment. The appellate court held the claimant's injuries were the result of an employment-related risk. They supported the decision by noting the practice of decorating for birthdays was routinely permitted. The appellate court did not find the Supreme Court's decision in *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38 (1987), which held the acquiescence of an employer, standing alone, cannot convert a personal risk into an employment risk to be applicable to this case. The only distinction noted by the appellate court was that in this case, there was evidence of more than mere knowledge or acquiescence to the activity because it was routine.

Helping Hands Center v. Illinois Workers' Comp. Comm'n, 2024 IL App (1st) 240057WC-U.

Commission's Finding as to Medical Causation was Not Against Manifest Weight of Evidence

The appellate court affirmed the denial of benefits for a claimant's knee and hip conditions allegedly related to a 2012 work-related ankle injury. The court held the Commission's finding that the claimant failed to prove causation between the ankle injury and subsequent knee/hip problems was not against the manifest weight of the evidence. The Commission properly relied on medical opinions that the claimant's degenerative knee/hip conditions were unrelated to his ankle injury or use of an ankle brace. The court rejected the claimant's challenges to the manifest weight standard of review and the Commission's expertise in medical matters.

Osman v. Illinois Workers' Comp. Comm'n, 2024 IL App (2d) 230180WC.

Appellate Court Defers to Commission's Credibility Determinations

The claimant, an airline pilot, alleged that she slipped and fell while performing a pre-flight inspection on December 17, 2017. The Commission found the claimant failed to prove she sustained an accident arising out of and in the course of employment. The appellate court affirmed, deferring to the Commission's credibility determination. The court noted the claimant did not report the alleged accident or seek medical treatment for 19 days, and there were

inconsistencies in her testimony about working after the alleged injury. The court found the Commission could reasonably discount medical records that merely documented the claimant's account of the accident.

Masters v. Illinois Workers' Comp. Comm'n, 2023 IL App (1st) 230984WC-U.

Court Finds Medical Evidence Supports Commission's Causation Findings

The claimant, a meat processing plant worker, alleged a work-related shoulder injury on March 15, 2021. The Commission found the claimant's condition causally related to his work accident. The appellate court affirmed, rejecting the employer's arguments that there was no supporting medical opinion evidence for a repetitive trauma claim and that the Commission erroneously relied on a chain-of-events analysis. The court found the case involved a specific traumatic injury rather than repetitive trauma, and the medical evidence supported a causal connection to the work accident.

Smithfield Foods, Inc. v. Illinois Workers' Comp. Comm'n, 2024 IL App (2d) 230104WC-U.

It is the Role of the Commission, Not the Circuit Court, to Resolve Conflicting Medical Evidence and Inconsistencies in Claimant's Testimony

The appellate court reversed the circuit court's decision and reinstated the Commission's original decision denying benefits to Margaret Webb. Webb claimed a work-related injury on July 9, 2007, while employed as a buffet server. The Commission initially found that Webb failed to prove her injury arose out of and in the course of her employment, citing inconsistencies between her testimony and medical records regarding the date and mechanism of injury. The circuit court reversed this decision, finding it against the manifest weight of the evidence. On remand, the Commission awarded benefits. The employer appealed. The appellate court held the Commission's original decision was not against the manifest weight of the evidence, given the conflicting medical evidence and inconsistencies in Webb's account. The court emphasized the Commission's role in assessing credibility and resolving conflicts in evidence.

Harrah's Illinois Corp. v. Illinois Workers' Comp. Comm'n, 2023 IL App (3d) 220471WC-U.

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Appellate Court Affirms Decision Denying Benefits; Injury Likely Caused by Idiopathic Condition

The appellate court affirmed the circuit court's decision confirming the denial of workers' compensation benefits to Maria Juarez. Juarez claimed she suffered a work-related injury on December 2, 2011, when she allegedly fell from a platform at her workplace. The Commission found that Juarez failed to prove she suffered a compensable work-related injury, citing inconsistencies in her testimony and medical evidence suggesting her symptoms were likely related to uncontrolled diabetes rather than a fall. The appellate court rejected Juarez's argument that the circuit court lacked jurisdiction to confirm the Commission's decision on the basis that no accident occurred. The court held that the circuit court had proper subject matter jurisdiction to review all aspects of the Commission's decision. Furthermore, the appellate court found that the Commission's decision was not against the manifest weight of the evidence, given the conflicting accounts of the incident and the medical evidence suggesting an idiopathic cause (diabetes) for Juarez's condition.

Juarez v. Illinois Workers' Comp. Comm'n, 2023 IL App (1st) 220684WC-U.

Circuit Court's Reversal of Commission's Decision was Erroneous Where Commission Appropriately Resolved Conflict in Medical Evidence

The appellate court reversed the circuit court and reinstated the Commission's original decision denying benefits to Ricky A. Duncan. Duncan, a gas journeyman for Ameren Illinois, claimed that he had developed permanent irritant-induced bronchial reactivity from two workplace chemical exposures in 2013 and 2014. The Commission initially found that while these exposures temporarily exacerbated Duncan's pre-existing asthma, he failed to prove any permanent effects. The circuit court reversed, finding the Commission's findings against the manifest weight of the evidence. On remand, the Commission then awarded Duncan benefits. On further appeal, however, the appellate court held that the Commission's original decision was not against the manifest weight of the evidence. The court emphasized the conflicting medical opinions between Dr. Tuteur, who supported Duncan's claim of permanent injury, and Dr. Hyers, who believed the exposures only temporarily exacerbated Duncan's pre-existing condition. The appellate court

found it was within the Commission's purview to find Dr. Hyers more credible.

Ameren Illinois v. Illinois Workers' Comp. Comm'n, 2024 IL App (5th) 220606WC-U.

Employer Successfully Rebutts Presumption Found in Section 6(f) Related to Firefighters and Others

The appellate court affirmed the circuit court's decision confirming the denial of workers' compensation benefits to Jerry Faruzzi, a firefighter/paramedic who claimed his coronary artery disease was work-related. The court upheld the Commission's finding that Faruzzi failed to prove his condition arose out of and in the course of his employment. The case centered on the application of the rebuttable presumption in Section 6(f) of the Workers' Compensation Act, which presumes certain conditions in firefighters, EMTs, and others are work-related. The court found that while this presumption initially applied, the employer successfully rebutted it with expert testimony. The court stressed that the rebuttable presumption created by section 6(f) does not shift the burden of proof. Rather, it creates a prima facie case as to causation, the effect of which is to shift the burden to the party against whom the presumption operates to introduce evidence to meet the presumption. Once evidence "contrary to the presumption" is introduced, the presumption ceases to operate, and causation is determined based on the evidence adduced as if no presumption ever existed. The court found sufficient evidence to support the Commission's decision, particularly citing the unequivocal opinion of Dr. Samo that firefighting duties cannot cause coronary artery disease.

Faruzzi v. Illinois Workers' Comp. Comm'n, 2024 IL App (1st) 231896WC-U.

Lifeguard's Injury Performing Back Dive During Authorized Break was Compensable

The appellate court affirmed the circuit court's confirmation of the Commission's decision awarding benefits to John Harris IV. Harris, a 17-year-old lifeguard, who was injured while attempting a back dive during an authorized break at the employer's pool. The court upheld the Commission's finding that Harris's injuries arose out of and in the course of his employment, despite the employer's argument that back dives were prohibited. The court found sufficient evidence to support the Commission's conclusions that

Harris was unaware of any rule prohibiting back dives and that such a rule, if it existed, was not consistently enforced. The court added that assuming *arguendo* that the claimant violated one of the employer's safety rules by performing a back dive, the violation did not take him entirely outside the scope of his employment. This was not a case where the claimant was in an area he was not supposed to be or using equipment that he was not allowed to use. At the time of his injury, the claimant was swimming and diving in the pool during his lunch break, which was authorized by the employer. Accordingly, even if the claimant acted negligently while diving, his conduct did not take him wholly outside the scope or sphere of his employment.

City of Mascoutah v. Illinois Workers' Comp. Comm'n, 2024 IL App (5th) 230480WC-U.

Court Upholds Combined PTD and PPD Awards for Catastrophic Work Injury, Rejecting Employer's Attempt to Limit Compensation

The appellate court affirmed a decision allowing a worker with catastrophic injuries to receive both Permanent Total Disability (PTD) benefits for loss of both eyes and Permanent Partial Disability (PPD) benefits for additional unscheduled injuries. The claimant suffered catastrophic injuries in a work-related explosion, including permanent blindness in both eyes, traumatic brain injury, hearing loss, spinal fractures, abdominal injuries requiring removal of his spleen and part of his pancreas, and a fractured hip. The Commission awarded PTD benefits under Section 8(e)(18) for loss of use of both eyes, plus PPD benefits under Section 8(d)(2) for the other unscheduled injuries.

On appeal, the employer argued Section 8(e)(18) limited recovery to the scheduled loss of both eyes and barred additional compensation for non-scheduled body parts. The court disagreed, finding that reading the statute to deny recovery for the claimant's significant unscheduled impairments would leave him uncompensated for the full extent of his lost earning capacity, contrary to the purpose of the Act.

The court explained that Section 8(e)(18) sets a floor, not a ceiling, on recovery for those who lose both eyes. It provides a minimum PTD award even if the claimant can still work. But it does not preclude additional compensation where the claimant suffers other disabling injuries. The court noted the Illinois Supreme Court allowed recovery beyond Section 8(e) in a similar case where the claimant lost both hands but had additional disabling injuries.

Relying upon *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill.2d 364, 909 N.E.2d 818, 330 Ill. Dec. 796 (2009), the court rejected the employer's argument that a separate statutory provision, Section 8(d)(2), is an exclusive remedy that supplants Section 8(e)(18). The court explained these are complementary, not exclusive, provisions. Section 8(d)(2) governs PPD for unscheduled body parts, while Section 8(e)(18) sets a minimum PTD recovery for loss of both eyes regardless of actual loss of earning capacity.

The court held that denying recovery beyond Section 8(e)(18) here would lead to an absurd result, leaving the claimant undercompensated compared to one with even a single non-eye injury compensable under Section 8(d)(2). The court found the Commission's award of both PTD under Section 8(e)(18) and PPD under Section 8(d)(2) was consistent with the Act's purpose of compensating loss of earning capacity.

American Coal Co. v. Illinois Workers' Comp. Comm'n, 2024 IL App (5th) 230815WC.

Claimant's Failure to Conduct a Job Search Does Not Prevent an Award for Permanent Total Disability Benefits

The claimant was a school bus driver. She alleged both physical and psychological injuries as a result of being assaulted on her bus before leaving to drive her route. The arbitrator denied benefits based upon the emergency room records containing a history from the claimant indicating she did not remember the events that occurred. A subsequent history from the claimant was that she started her bus and was then attacked but the evidence established she had not started the bus.

The Commission reversed the arbitrator's denial of benefits noting the medical histories following the emergency room visit consistently stated the claimant was struck in the head by another person. She was diagnosed with a hematoma on her head, and there was urine in the back of the bus suggesting someone else was there. In its decision, the Commission expressly held the claimant was credible in contrast to the determination made by the arbitrator.

The employer appealed the matter to the circuit court, and the circuit court reversed the Commission decision and reinstated the arbitrator's denial of benefits. The circuit court noted the more plausible story was that the claimant fell and hit her head on a slippery snowy day. The circuit court further commented the Commission ignored other evidence including there being two men walking around the yard starting buses who did not see anything.

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After discussing the facts presented at trial, the appellate court held the Commission's decision finding the claimant sustained a work-related accident was not against the manifest weight of the evidence. However, the appellate court disagreed with the Commission on the issue of permanent disability benefits. The Commission held the claimant failed to prove either of the possible methods to demonstrate she is not capable of returning to work. First, she failed to show a diligent but unsuccessful job search, and second, she failed to demonstrate she could not be regularly employed in a well-known branch of the labor market due to her age, skills, training, and work history. Each party presented testimony from a vocational expert. The claimant's expert testified there was no stable labor market for the claimant based upon her age of 77 years and her outdated clerical skills as well as her unrelated health conditions. In contrast, the employer's vocational expert testified the claimant was capable of returning to work based upon a transferable skills analysis indicating the claimant could return to an administrative assistant position. The employer's vocational expert also testified individuals are working later in life, and employers continue to hire older workers.

While the appellate court deferred to the Commission on the issue of accident, it held the Commission's decision denying permanent total disability benefits was contrary to the manifest weight of the evidence. Essentially, the appellate court adopted the opinion of the claimant's vocational consultant over the opinion of the employer's vocational consultant. In doing so, the appellate court granted the claimant odd-lot permanent total disability benefits.

Spencer v. Illinois Workers' Comp. Comm'n, 2024 IL App (2d) 230576WC-U.

Appellate Court Explains Methodology in Calculating § 8(e)(17) Credit For Prior Injury

The appellate court reversed the Commission's permanent partial disability award, finding it incorrectly calculated the § 8(e)(17) credit for a prior injury. The court held the proper method is to subtract the percentage loss of use from the prior injury from the percentage for the current injury, then multiply by the number of weeks provided in § 8(e)(12). The court remanded for the Commission to recalculate the award using the correct method.

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

Appellate Court Defers to Credibility Findings of the Commission

The claimant alleged two work-related accidents on February 19, 2001 - one while lifting a garage door and another while descending a slope. The Commission found the claimant failed to prove either accident arose out of and in the course of employment. The appellate court affirmed, finding the Commission's credibility determinations were not against the manifest weight of the evidence. The court noted inconsistencies in the claimant's testimony and medical records that supported the Commission's decision. The court also upheld the Commission's award of temporary total disability and permanent partial disability benefits related to a separate November 14, 2001, knee injury, as well as its denial of penalties and attorney fees.

Moore v. Illinois Workers' Comp. Comm'n, 2023 IL App (3d) 220524WC-U.

Appellate Court Reiterates Commission's Role in Assessing Credibility and Resolving Conflicts in Medical Evidence

The appellate court affirmed the circuit court's decision confirming the denial of permanent total disability benefits to Stimeling, a security officer for Peoria Public School District 150. Stimeling claimed injuries from a 2009 workplace assault and a 2010 physical therapy incident. The Commission found that Stimeling failed to prove his current conditions were causally related to the 2009 accident and that he didn't sustain a work-related accident in 2010. The court rejected Stimeling's arguments that improper hypothetical questions tainted expert testimony, that the employer was collaterally estopped from arguing he could return to work, and that the denial of "odd lot" category permanent total disability was against the manifest weight of the evidence. The court emphasized the Commission's role in assessing credibility and resolving conflicts in medical evidence. It noted substantial evidence supporting the Commission's decision, including medical opinions questioning Stimeling's credibility and suggesting symptom exaggeration.

Stimeling v. Illinois Workers' Comp. Comm'n, 2024 IL App (4th) 230681WC-U.

Commission's Finding that Employer had Good-Faith Defense was Not Against Manifest Weight of Evidence

The appellate court affirmed the denial of penalties and attorney's fees against the employer, finding the Commission's determination that the employer had a good-faith defense was not

against the manifest weight of the evidence. However, the court reversed the award of § 19(l) penalties as inconsistent with the good faith finding. The court also reversed the circuit court's reversal of the Commission's denial of a § 8(e)(17) credit, finding insufficient evidence supported such a credit. The court emphasized that the Commission was not required to take judicial notice of information from its case docket website, which contained a disclaimer that it was not an official record.

Bowen v. Illinois Workers' Comp. Comm'n, 2023 IL App (4th) 220575WC-U.

Appellate Court Affirms Award for Penalties Despite Claimant Refusing to Answer Questions on "Alive and Well" Questionnaire

About four years after the claimant was awarded wage differential benefits, the employer's insurance carrier sent the claimant a questionnaire requesting the claimant's contact information, work status and other related questions. The claimant did not respond to the questionnaire, and at a subsequent hearing, he testified he never notified the insurance carrier of his change of address. When the insurance carrier did not receive a response to the questionnaire, it sent an email to claimant's attorney advising the wage differential benefits would be terminated until receiving the information contained in the questionnaire. Claimant's attorney responded by indicating the claimant was alive and well, but he did not provide any other information asked in the questionnaire. The insurance carrier responded by indicating they were not satisfied with the attorney's statement, and they requested either an affidavit from the claimant or a photo with a recent publication confirming he is alive and well. Neither claimant nor his attorney provided the requested information.

At a hearing before the Commission, the claimant's attorney raised several issues including whether the insurance carrier was entitled to utilize a questionnaire to terminate previously awarded wage differential benefits as well as claiming the attorney's statement confirming the claimant was alive and well was sufficient to justify the ongoing payment of benefits. The Commission awarded penalties and attorney's fees for the nonpayment of wage differential benefits for the 10 day period between the termination of benefits and the date the claimant's attorney refused to provide the information contained in the questionnaire.

The claimant appealed the Commission decision to the appellate court. In its decision, the appellate court noted both parties agreed the employer had the right to inquire as to whether the claimant was still alive. However, the Commission never commented on whether the questionnaire constituted a proper inquiry. Further, the

Commission never addressed the question of whether an attorney's attestation that his client is alive is sufficient to satisfy an employer's rights to inquire into the continued existence of a former employee to whom it is paying periodic wage differential benefits. Next, the Commission did not address whether the claimant's refusal to supply an affidavit or a recent photo was a reasonable basis for the employer to suspend the wage differential benefits.

The appellate court held the date used to end the period for which penalties were awarded, namely the date the claimant's attorney refused to provide the requested information, was not appropriate. The question to be answered was whether the employer was reasonable in failing to make wage differential payments after the date claimant's attorney refused to provide the requested information. The appellate court remanded the matter to the Commission with directions to make a determination as to whether the claimant was required to answer the questions posed in the questionnaire. The court also instructed the Commission to make a determination as to whether the email from the claimant's attorney attesting to the claimant still being alive satisfied the employer's right to determine the claimant's continued existence, and if not, whether the employer acted reasonably in failing to make wage differential payments after the claimant failed to provide an affidavit or recent picture as requested by the insurance carrier.

Conklin v. Illinois Workers' Comp. Comm'n, 2024 IL App (1st) 232152WC-U.

Circuit Court's Denial of Employer's Motion to Dismiss was Interlocutory and Not Appealable

The case originated from a workers compensation claim settled in 2012. In 2020, Barickello sought to enforce the settlement agreement, but the Commission denied his motion, citing lack of jurisdiction. Barickello then sought judicial review. The employer, Precision Pipeline, LLC, filed a motion to dismiss in the circuit court, which was denied. Precision appealed this denial. The appellate court ruled that the denial of a motion to dismiss was not a final, appealable order, but rather an interlocutory one. The court emphasized that its jurisdiction is limited to reviewing final judgments, with few exceptions provided by statute or Illinois Supreme Court rule. Since the circuit court's order did not dispose of the litigation on its merits and was not among the interlocutory orders appealable as of right, the appellate court had no choice but to dismiss the appeal for want of jurisdiction.

Barickello v. Illinois Workers' Comp. Comm'n, 2023 IL App (1st) 230165WC-U.

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Circuit Court Loses Jurisdiction When it Remands Case to Commission

Dowdle, a teacher and basketball coach, claimed work-related injuries from a student-teacher basketball game on January 31, 2014. The Commission initially denied her claim. The circuit court reversed the Commission's decision and remanded for findings on medical causation and disability benefits.

The Commission issued a new decision on remand on January 26, 2022. Then, in the circuit court, the school filed a motion to return the case to the docket. On the authority of *Kudla v. Industrial Comm'n*, 336 Ill. 279, 168 N.E. 298 (1929), the court granted Dowdle's motion for dismissal, concluding that, upon remanding the case to the Commission, the circuit court lost jurisdiction. The school appealed. The appellate court agreed, holding that in order to review the Commission's decision on remand, the school district was required to file a new action for judicial review within 20 days, following the procedures outlined in Section 19(f) of the Workers' Compensation Act. It had failed to do so.

South Berwyn Sch. Dist. #100 v. Illinois Workers' Comp. Comm'n, 2024 IL App (1st) 230273WC-U.

Claimant's Appeal to Circuit Court Properly Dismissed Where Appeal Filed 11 Days Past the 20-Day Jurisdictional Deadline

Saucedo-Diaz filed a motion with the Commission to rescind a settlement agreement, but the Commission struck the motion for lack of jurisdiction. He then appealed to the circuit court but filed his appeal 11 days past the 20-day jurisdictional deadline. Based upon that untimely filing, the circuit court dismissed the case for lack of subject matter jurisdiction. Saucedo-Diaz appealed. The appellate court affirmed. The court held that Saucedo-Diaz failed to timely file his appeal within the required 20 days of receiving notice of the Commission's decision. His unsworn explanation for the delay was deemed inadmissible, and even if considered, did not show good cause for relief under Illinois Supreme Court Rule 9(d)(2).

Saucedo-Diaz v. Ill. Workers' Comp. Comm'n, 2024 IL App (3d) 230263WC-U.

Court Determines that Judgment Interest Should Be Computed on Entire Third-Party Recovery Before Deducting Workers' Compensation Lien Owed to Employer's Carrier

Frank Barnai sued Wal-Mart Stores, Inc. (Walmart), International Contractors, Inc. (ICI), and Nuline Technologies, Inc. (Nuline), after he was injured while working at a Walmart store construction site in 2007. Walmart, ICI, and Nuline, in turn, filed contribution claims against Barnai's employer, Summit Fire Protection Company (Summit). Barnai settled with Walmart, ICI, and Nuline for \$5,073,463.71. The settlement expressly assigned each of the settling defendants' contribution claims to Barnai. Barnai then proceeded to trial against Summit, not as an employee suing his employer, but rather as assignee of the contribution claims against Summit, for the purpose of allocating fault among them for the gross settlement. After a jury trial on those assigned contribution claims, Summit was found 52 percent liable for plaintiff's injuries, ICI 38 percent liable, and Walmart, 10 percent. Nuline was voluntarily dismissed before the trial and was not listed on the verdict form. Around the same time, the circuit court entered an order finding that Summit's workers' compensation insurer, Wausau Underwriters Insurance Company (Wausau)—which had intervened into Barnai's lawsuit—had a net recoverable workers' compensation lien of \$1,938,586. After several appeals, the primary issue remaining related to the computation of interest on the workers' compensation judgment where a workers' compensation lien was involved. The court affirmed that interest should accrue on the entire judgment before deducting the workers' compensation lien. It rejected the argument that interest should only accrue on the amount remaining after subtracting the lien. The court also reversed the lower court's decision to terminate interest accrual on a specific date, ruling that interest must continue to accrue until the judgment is fully paid.

Barnai v. Wal-Mart Stores, Inc., 2023 IL App (1st) 220900.

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

The plaintiff filed a complaint seeking damages for the death of her son, who was murdered by a coworker at an Arby's restaurant. The circuit court granted summary judgment to the employer defendants, finding the exclusive remedy was under the Workers'

Compensation Act. The appellate court affirmed, holding that the plaintiff failed to provide sufficient evidence that the murder arose from a purely personal dispute between the employees unrelated to their work. The court rejected the plaintiff's arguments that circumstantial evidence showed a personal motive, finding there was no concrete evidence of any personal dispute between the employees. The court concluded the plaintiff did not meet her burden to show the injury did not arise out of employment, and therefore the exclusive remedy provision barred the civil suit against the employer.

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

Borrowing Employer Enjoys Immunity from Tort Liability

The appellate court affirmed a summary judgment in favor of Intren, LLC, based on the exclusive remedy provision of the Workers' Compensation Act. The court held that Intren was the borrowing employer of Keith Leman, who suffered injuries while working at an Intren jobsite. The court found no genuine issue of fact regarding Intren's status as a borrowing employer, concluding that Intren had the right to control and direct Leman's work, and there was at least an implied contract of hire between Leman and Intren. The court rejected arguments based on the terms of a Master Subcontract Agreement between Intren and Pinto Construction, emphasizing that the facts of the employment relationship, rather than contractual labels, are determinative.

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

Trial Court's Dismissal on Exclusive Remedy Grounds Was Erroneous Where Material Issues of Fact Existed as to Employment Status

In February 2014, Bader sold his agricultural services business to Helena Agri-Enterprises, LLC (Helena) and became a branch manager of Helena's location in Meredosia, Illinois. On February 13, 2019, after Bader's doctor advised Helena that Bader could not work "without posing a safety risk" to himself, O'Brien (Helena's leave specialist) commanded Bader to "go home and call in a disability claim." Sometime around that date, Bader was placed on disability with Helena's insurance carrier. The area manager, Brian Mattingly, questioned O'Brien about Bader's restrictions as a Helena employee while on disability. Mattingly indicated they were "going to need his advice going into [the] spring season," so they "need[ed] this to

go as smoothly as possible." Mattingly asked whether Bader could use his company phone, drive the company vehicle, talk to customers, and visit the office while on disability. O'Brien warned about the "consequence[s] of allowing him to work while on disability leave." O'Brien posed what seemed to be a rhetorical question: "If he were to fall doing any of these things, would it be viewed in the scope of company business?" She went on to state Bader had been "very reluctant to be on leave in the first place and if we don't give him hard lines of what he can and can't do[,] I worry that he will do more than he should."

On July 9, 2019, as various parties were trying to retrieve a crop sprayer that had become stuck in a field, Bader backed his personal vehicle over the plaintiff, causing him serious injuries. The plaintiff subsequently filed a civil action against various parties, including Bader (later his estate). Ultimately, the trial court dismissed the plaintiff's complaint against Bader, finding that Bader was an employee acting within the scope of his employment at the time of the injuries and that the tort action was, therefore, barred by the exclusive remedy doctrine. The plaintiff appealed. The appellate court found that material issues of fact remained regarding Bader's employment status and whether he was acting within the scope of his employment at the time of the incident. The court emphasized that being a co-employee alone is not sufficient for the exclusive remedy provision of the Workers' Compensation Act to apply; the accident must have arisen from and occurred within the scope of employment. Given the uncertainty surrounding Bader's authorization to be at the job site while on disability leave, the court held that dismissal was premature and remanded the case for further proceedings.

Shoemaker v. Bader, 2023 IL App (4th) 230145-U.

Illinois Supreme Court Affirms Application of Immunity for Health Care Facilities, Practitioners, and Volunteers Who Rendered Assistance to the State of Illinois' COVID Response

In response to the COVID-19 pandemic, on March 9, 2020, Governor Pritzker declared all counties of the State of Illinois disaster areas as a result of the COVID-19 pandemic. The declaration of disaster triggered the Illinois Emergency Management Agency Act, 20 ILCS 3305/15 (hereinafter IEMA Act). Nearly a month later, Governor Pritzker issued Executive Order 2020-19 on April 1, 2020, which called on Health Care Facilities, Health Care Professionals, and Health Care Volunteers to "render assistance in support of the

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State's response to the disaster recognized by the Gubernatorial Disaster Proclamations (COVID-19 outbreak)." EO 2020-19 at §2.

Executive Order 2020-19 goes on to define who and what qualify as a "Health Care Facility," "Health Care Professional," and "Health Care Volunteer." *Id.* at §1. Further the Executive Order 2020-19 provides guidance regarding what actions constitute rendering assistance. The guidance changes depending upon whether an institution or individual is seeking immunity.

James involves a consolidation of cases that were filed in the summer of 2020 claiming negligence, violation of the Illinois Nursing Home Care Act, and willful and wanton negligence in failing to prevent the decedents, who were all residents at Bria Health Services of Geneva, from contracting and dying from COVID-19 during the first few months of the pandemic. On behalf of defendant, a motion to dismiss pursuant to 735 ILCS 5/2-619 was filed, supported by the affidavit of the facility administrator, which set forth various ways, consistent with Executive Order 2020-19, the facility was rendering assistance to the State of Illinois and was thus entitled to immunity for the negligence claims. The trial court denied the motions to dismiss but agreed to certify a question to the Illinois appellate court. The question certified was: "Does [EO20-19] provide blanket immunity for ordinary negligence to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic?" See *James v. Geneva Nursing & Rehabilitation Center, LLC.*, 2023 IL App (2d) 220180.

The Illinois Appellate Court Second District initially took up this issue in *James v. Geneva Nursing & Rehabilitation Center, LLC.*, 2023 IL App (2d) 220180. The Second District took issue with the language of the certified question and modified it instead to "Does Executive Order No. 2020-19, which triggered the immunity provided in 20 ILCS 3305/21(c), grant immunity for ordinary negligence claims to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic?" *Id.* at ¶21. The Illinois appellate court answered in the affirmative and tied the analysis of immunity to the IEMA.

The Illinois Supreme Court granted the consolidate estates' petition for leave to appeal, and the matter was briefed before the Illinois Supreme Court. Like the appellate court, the Illinois Supreme Court Agreed that the immunity referenced in Executive Order 2020-19 derives from section 21(c) of the IEMA. *Id.* at ¶27. However, the Illinois Supreme Court found that the language of Executive Order 2020-19 must be construed to determine "whether it grants immunity for ordinary negligence claims to health care facilities that rendered assistance to the State during the COVID-19 pandemic." *Id.* at ¶28.

Turning to the language of Executive Order 2020-19, the Illinois Supreme Court concluded that immunity is available for ordinary

negligence claims. *Id.* at ¶35. The majority went further to state that the scope of claims immunized is not just those that "relate to COVID-19." *Id.* Instead, "the language states that a health care facility is immune from ordinary negligence if the negligence 'occurred at a time' the health care facility was 'rendering assistance' to the State by providing health care services during the Governor's disaster proclamation. *Id.* Further explaining their reasoning, the court noted, "given the novelty of COVID-19 and the uncertainty that surrounded COVID-19 at the time the Governor issued Executive Order No. 2020-19, we find a broad reading of the executive order is appropriate and consistent with the plain language." *Id.*

With respect to the length of time that the immunity is available, the majority opinion noted: "We agreed with the appellate court that Bria would have immunity from ordinary negligence claims arising during the Governor's disaster declaration *if and only if* it can show it was 'render[ing] assistance' to the State during that time." *Id.* at ¶36 (emphasis in original). The conclusion is therefore that immunity is available up to May 11, 2023, provided the requirement of "rendering assistance" can be established.

The dissent, authored by Justice Cunningham, rejected that the scope of immunity is so broad as to cover "all claims of negligence." She focused instead on the language of Section 21(c) of the IEMA, the dissent concludes that the immunity must be limited to "negligent conduct arising out of the act of providing assistance to the State." *Id.* at ¶73.

James v. Geneva Nursing & Rehabilitation Center, LLC., 2024 IL 130042.

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Mandy Kamykowski is first and foremost a trial lawyer, a dying breed in world dominated by litigation practice groups. However, Mandy knows being a defense lawyer requires more than zealously advocating for her clients in the courtroom. It is important to Mandy that her clients understand the litigation process and are as involved in their representation as they wish to be. She makes it a point to develop a personal relationship with each client so they feel they are a part of a team and not just a defendant in a lawsuit. Mandy's trial experience has focused on professional liability claims. Having practiced throughout the States of Missouri and Illinois for over 20 years, Mandy prides herself in having earned a reputation within the bench and bar as an honest, hard-working advocate for her clients who upholds the rule of law while practicing with the utmost professionalism. She has participated in countless mediations and direct settlement negotiations, using creativity in her approach to resolving claims and lawsuits to the satisfaction of her clients.



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