ILLINOIS DEFENSE COUNSEL

SURVEY OF LAW 2024

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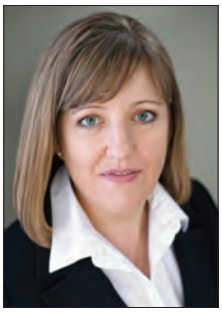

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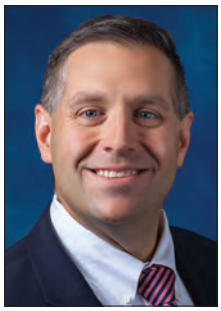

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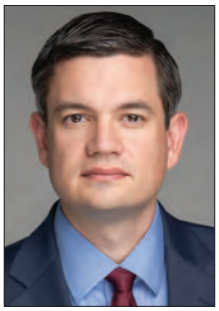

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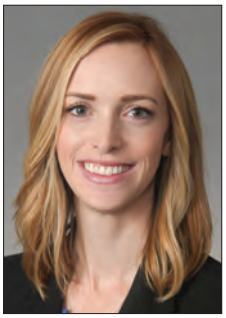

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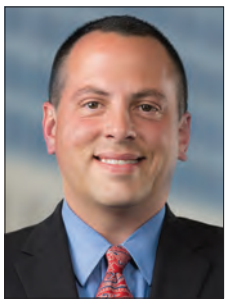

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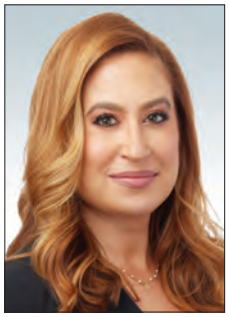

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President's Message

Denise Baker-Seal
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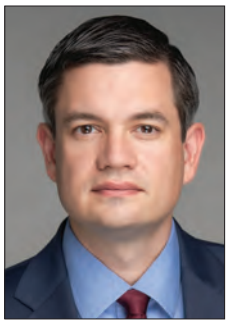
As the voice of the Illinois defense bar, IDC takes its responsibility to its members seriously. One of the core values of IDC is to assist members with education and professional development. Beginning in 2011, IDC began providing its members with an indispensable resource, the *Survey of Law*. The *Survey* provides case summaries drafted by each of IDC's substantive committees, analyzing the most significant cases decided during the previous year. Each submission includes information our members can rely upon when learning a new area of law, drafting a motion or brief, or when researching an issue to advise a client.

The dedicated members of IDC, who are willing and able to share their time and expertise, allow the entire IDC community to share in a comprehensive publication addressing the most recent legal developments. Additionally, the team of *Survey* editors worked tirelessly to produce the one publication that should rest on every civil defense lawyer's bookcase.

Thank you to everyone involved in the production of this year's *Survey of Law*.

Most truly yours,
Denise Baker-Seal
2024-2025 IDC President

Letter from the Editors



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As IDC's Editorial Board, we are pleased to issue the 2024 *Survey of Law*, continuing IDC's long-standing dedication to legal education. The *Survey of Law* is a compilation of case summaries, highlighting significant developments in Illinois law over the past year. This year's summaries focus on Civil Practice, Construction Law, Ethics Law, Insurance Law, Labor and Employment Law, Tort Law and Workers' Compensation, Toxic Tort Law, and Trucking & Transportation Law. The *Survey of Law* is a team effort of committee members, editors, Executive Director, and publisher.

We'd like to thank everyone who assisted in writing and creating the 2024 *Survey of Law*, including all IDC committees' chairs, Executive Director Sandra Wulf, and our front-line editors: Chelsea Caldwell of *HeplerBroom LLC*, John Watson of *Craig & Craig, LLC*, Adam Carter of *Esp Kreuzer Cores LLP*, Kimberly Ross of *FordHarrison*, John Heil, Jr. of *Heyl, Royster, Voelker & Allen, P.C.*, Laura Beasley of *Baker Sterchi Cowden & Rice LLC*, Michael Gallo of *Michael D. Gallo & Associates* and Eugena Whitson-Owen of *Zurich American Insurance Company*. Additionally, we'd like to thank our student research assistants/student editors from College of Lake County: Rhonda Franger, Teresa Drewes, Timothy McElroy, Davon Mclaughlin Almaraz, and Samira Mahzabeen. Their commitment and dedication to IDC has made the *Survey of Law* an invaluable tool for the practice of law.

Survey of Civil Practice Cases

Illinois Supreme Court Finds that Plaintiff's Remarriage Does Not Affect Claim for Loss of Marital Services

The plaintiff, as independent administrator of his wife's estate, filed a medical malpractice action alleging the defendant doctor's negligence caused his wife's death. Prior to trial, the defendant filed motions *in limine* to limit the evidence presented by the plaintiff's economist, Stan Smith, regarding marital services. The defendant argued that the recovery for marital services should be limited until the time the plaintiff remarried. The plaintiff agreed that loss of consortium damages should be limited but argued that marital services should continue because it is a loss of financial support. The trial court allowed the damages to go to the jury and the jury returned a verdict in favor of the plaintiff for $2,121,914, which was reduced to $1,697,531 for comparative fault assessed to the deceased. The appellate court found the trial court properly allowed the submission of the damages. The Illinois Supreme Court held that damages for loss of material services did not terminate as of date of widower's remarriage.

The Illinois Supreme Court found that for more than a century a plaintiff has been able to claim loss of marital services damages in a wrongful death claim. The court found that it is no longer needed to incorporate the loss of services claim into the loss of consortium claim. The Illinois Supreme Court further stated that to hold otherwise would result in disparate treatment of a plaintiff's spouse versus next of kin. The defendant relied on *Dotson v. Sears, Roebuck & Co.*, 157 Ill. App. 3d 1036 (1st Dist. 1987*)*; *Dotson v. Sears, Roebuck & Co*., 199 Ill. App. 3d 526 (1st Dist. 1990); and *Pfeifer v. Canyon Const. Co., Inc.*, 253 Ill. App. 3d 1017 (2d Dist. 1993), for the proposition that marital services are part of a loss of consortium claim and that the damages are limited by remarriage.

The Supreme Court then stated it was overruling *Dotson* and *Pfeifer* to the extent those courts held that marital services are considered part of loss of consortium damages and to the extent that marital services are limited by a spouse's remarriage.

Passafiume v. Jurak, 2024 IL 129761.

Court Issues Opinion Regarding Rules on Table Representatives at Trial

Sanders v. CSX Transp. is a FELA case in which the Estate of Joseph Sanders claimed that the decedent, Joseph Sanders, was exposed to asbestos while working for CSX railroad as a plumber at the Barr Yard in Riverdale, Illinois. The plaintiff claimed the decedent was exposed to pipes covered in asbestos. The plaintiff claimed this exposure caused the decedent's colon cancer. Defendant CSX argued that the Barr Yard had policies in place to avoid employee exposure to asbestos. Also, employees were trained to report asbestos when they located it. CSX further argued that the decedent's colon cancer was not caused by exposure to asbestos but instead was caused by his history of cigarette smoking and failure to follow medical advice.

Prior to the trial, the plaintiff filed a motion *in limine* barring any witnesses from being present during testimony. Defense counsel agreed to the motion.

The plaintiff's former supervisor, Jason Pritchard, was CSX's table representative at trial. He was called as an adverse witness by plaintiff's counsel. During his testimony, it was discovered that he was no longer employed by CSX. The court raised the issue that if he were no longer employed by CSX, then his presence violated the ruling on the motion *in limine*.

The plaintiff argued that Pritchard's testimony should be stricken, and that the court should issue a curative instruction. The defendant claimed that Pritchard's presence did not violate the motion *in limine* because he was a table representative.

The trial court found that Pritchard's presence violated the motion *in limine* and Illinois Supreme Court Rule 615. The court further noted that Pritchard was not a figurehead but provided substantive testimony about the plaintiff's work history. The court decided to issue a curative instruction stating that if the court had been aware that Pritchard was not an employee of CSX, the court would not have allowed Pritchard to be present for the other witness' testimony.

The jury returned a verdict in favor of the plaintiff for $2.2 million dollars but found the plaintiff's decedent was 55% percent at fault. The defendant appealed on the basis that the instruction was improper, and that the plaintiff misstated the law on closing by referring to OSHA standards.

The appellate court noted that it is a well-established tradition to bar witnesses and Supreme Court Rule 615 establishes that witnesses should be barred. Rule 615 has an exception for someone who is an officer or employee of the defendant, but because Pritchard was neither of those, the exception did not apply. The appellate court found that the trial court did not abuse its discretion when issuing the curative instruction.

With respect to the issues regarding the closing arguments, the appellate court noted that it was a small part of the closing argument and that counsel is afforded much latitude in closing. The appellate court upheld the verdict.

Sanders v. CSX Transp., Inc., 2024 IL App (1st) 230481.

Court Grants Sanctions Against Plaintiff's Counsel for Failure to Investigate

In *Wisniewski v. Kellenberger*, the plaintiff, Maciej Wisniewski, sued the defendants, Fox Valley Saddle Association (FVSA), Jessica Kellenberger, and Whitney Sinclair, after he was injured when a horse, owned by Kellenberger and boarded by Sinclair, collided with the car he was driving. The count directed against FVSA alleged that FVSA was in control of the horse when the incident occurred and that FVSA should have known the horse needed to be controlled.

The day after service, counsel for FVSA wrote to plaintiff's counsel that FVSA was not involved and that he should voluntarily dismiss the case. Counsel for FVSA informed plaintiff's counsel that she would move to dismiss and move for sanctions. The plaintiff's counsel responded that discovery would reveal that FVSA was a proper party.

FVSA moved to dismiss pursuant to 735 ILCS 5/2-619.1 with an affidavit from the president of FVSA stating FVSA offered its members a place to ride horses and participate in horse related activities. FVSA did not board, own, or manage horses. Also, attached to the motion was the invoice for defense counsel fees of $2,727. The plaintiff then filed multiple amended complaints that did not change the allegations against FVSA.

Defense counsel wrote plaintiff's counsel stating they would refile the motion to dismiss and motion for sanctions. Plaintiff's counsel responded that they would dismiss FVSA if the defendant would withdraw the motion for sanctions. Defense counsel did not agree.

Plaintiff took the deposition of FVSA's president, who testified that FVSA just provided a location for people to ride horses and did not board or maintain horses. Plaintiff's counsel then took the deposition of Kellenberger and the other defendants.

The court then granted FVSA's motion to dismiss and set the motion for sanctions for hearing. Plaintiff responded to the motion for sanctions arguing that plaintiff's counsel reasonably believed that FVSA was a party based on FVSA's schedule of events and Facebook posts that were shared and liked by Kellenberger. The court granted the motion for sanctions and awarded defense counsel $11,733.19 in fees.

The Illinois Appellate Court Second District first noted that Rule 137 is designed to discourage frivolous filings, not to punish parties for making losing arguments. In deciding sanctions, the court must determine what was reasonable for the attorney to believe at the time of filing, not to look at the facts in hindsight.

The appellate court concluded that Kellenberger's membership in FVSA meant little to the case. Also, it was clear early on that Kellenberger and Sinclair were not agents of FVSA. The court noted that the Facebook posts were of even less significance because they were remote in time and simply showed she was a member. The court compared the relationship to being a member of a church or library. The court further found FVSA's location near where the accident happened was also of no significance when deciding on sanctions.

Based on these factors, the appellate court found the trial court did not abuse its discretion in granting defendant FVSA's motion for sanctions and awarding attorneys' fees to defense counsel.

Wisniewski v. Kellenberger, 2024 IL App (2d) 230221-U.

Court Finds that Defense Expert Physician Testimony was Properly Admitted

In the plaintiffs' medical malpractice action against the delivering obstetrician, they alleged their infant suffered an injury during birth. Complications arose during delivery which interfered with the baby's exit from the birth canal. The delivering obstetrician believed the baby had shoulder dystocia, a condition when, after the baby's head exited the birth canal, one of the baby's shoulders becomes stuck in the birth canal. After delivery, the baby was diagnosed with a brachial plexus injury to the left arm and shoulder, which is a permanent injury to the nerve root. The baby's family sued the doctor alleging medical malpractice in the delivery.

At trial, the plaintiffs' expert testified that this injury could not have resulted from maternal pushing. He testified that the only mechanism of injury was excessive force applied by the doctor.

The defendant's expert, Dr. Steven Clark, testified that based on medical literature there are four different causes of a brachial plexus injury. The possible causes include: (1) in utero crowding,

— Continued on next page

(2) cardinal movements during labor, (3) the result of a lifesaving maneuver by the doctor, and (4) if the doctor pulls down too hard which stretches the brachial plexus.

The jury entered a verdict in favor of the defendant. The plaintiffs appealed on the basis that the trial court improperly admitted the defendant's expert's testimony and that the jury instructions were improper. The plaintiffs argued that the medical literature relied upon by Dr. Clark did not apply to the case. The plaintiffs further argued that the reference of in utero crowding confused the jury because there was no evidence of in utero crowding. The appellate court concluded that the doctor's testimony about other possible causes of the brachial plexus injury was relevant to assist the jury's understanding of the medical record and to rebut the plaintiffs' expert.

The plaintiffs also argued that Dr. Clark referred to post-incident articles. The court found that the admission of the articles was proper because the articles were admitted to counter plaintiffs' expert, not for the purpose of establishing a standard of care. The plaintiffs tendered the following proximate cause instructions:

> "When I use the term "proximate cause" I mean a cause that, in the natural and or ordinary course of events, produced plaintiffs' injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.
>
> If you decide that the defendant was negligent and that his negligence was a proximate cause of injury to the plaintiffs, it is not a defense that something or someone else may also have been a cause of the injury. However, if you decide that defendant's conduct was not a proximate cause of plaintiffs' injury, your verdict should be for the defendant."

The court gave a proximate cause instruction with the first sentence of the second paragraph removed. The appellate court found that the court did not err because there was no evidence that another party was responsible for the injury.

Williams v. Thomas, M.D., 2024 IL App (1st) 221622-U.

Statute of Limitations Discrepancies Between Allegations in a Complaint and "Supporting Exhibits"

Estate of Bulczak v. Alden Poplar Creek Rehab. & Healthcare Ctr., Inc., 2024 IL App (1st) 231180-U, provides an interesting scenario where a *pro se* complaint pleads a date of an accident indicating that the complaint was filed within the statute of limitations, but attaches "supporting exhibits" that indicate otherwise.

In *Bulczak*, the plaintiff underwent hip surgery to repair a hip fracture. She was admitted to Alden Poplar Creek for in-patient rehabilitation. During a physical therapy session, she suffered a fall that greatly complicated her injuries, requiring additional surgeries and left her unable to walk for the rest of her life.

Bulczak filed a *pro se* complaint against Alden Poplar Creek on May 25, 2021. She subsequently filed an amended *pro se* complaint, adding Alden Management Services as a defendant. Thereafter, Bulczak's estate filed a second amended complaint six months after Bulczak died in April 2022. All three complaints alleged that Bulczak's fall took place on May 25, 2019. The plaintiff attached exhibits to the complaints. The first exhibit was a letter from the plaintiff and a California attorney to an Oregon doctor soliciting his opinion as to whether there was a reasonable basis for a medical malpractice suit. The second exhibit was the doctor's opinion and the third exhibit was a recommendation authored by an administrative law judge for the Department of Public Health regarding an administrative hearing. All three "supporting exhibits" indicated that the fall occurred on May 23, 2019, two days prior to the date of accident pleaded in the plaintiff's complaint, making the filing of the complaint outside the statute of limitations. Both defendants moved to dismiss pursuant to 735 ILCS 5/2-615.

Alden Poplar Creek argued that the date shown in the exhibits should control over the allegations of the complaint pursuant to *El Rincon Supportive Services Org., Inc. v. First Nonprofit Mut. Ins. Co.*, 346 Ill. App. 3d 96, 100 (1st Dist. 2004), making the complaint untimely.

In ruling that the complaint was untimely, the trial court relied on *Gagnon v. Schickel* for the proposition that, "[w]here an exhibit contradicts the allegations in the complaint, the exhibit controls." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18.

The appellate court disagreed, holding that:

> "[A]lthough the rule is often stated without qualification, including in *Gagnon*, it is not actually so broad as this formulation suggests. It applies only to written instruments that are required to be attached as exhibits to a pleading that raises 'a claim or defense' that 'is founded upon' that instrument. 736 ILCS 5/2-606. . . . Put more succinctly, only 'operative legal documents attached as exhibits control over inconsistent descriptions of them.'"

Bulczak, 2024 IL App (1st) 231180-U, ¶ 15.

As the exhibits to the complaint were merely evidence supporting the estate's allegations and not exhibits upon which the claim was founded, the court agreed with the estate that for the purpose of a motion to dismiss, the complaint's allegation should have been taken as true, thereby bringing the complaint within the applicable statute of limitations.

Moreover, the court noted that ordinarily a limitations defense would be raised in a Section 2-619 motion for involuntary dismissal, but "'where it appears from the face of the complaint that the statute of limitations has run', a motion to dismiss on limitations grounds can be properly raised in a section 2-615 motion to dismiss a legally insufficient pleading." *Id.* at ¶ 14 (citing *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 456 (1st Dist. 2006)). Regardless, a motion to dismiss under either Section 2-615 or Section 2-619 "admits as true all well pleaded facts and all reasonable inferences from those facts." *Bulczak,* 2024 IL App (1st) at ¶ 14 (citing *Cahokia Unit School District No. 187 v. Pritzker*, 2021 IL 126212, ¶ 24). Because the complaint was not untimely on its face, it should not have been dismissed based on the pleadings alone.

Estate of Bulczak v. Alden Poplar Creek Rehab. & Healthcare Ctr., Inc., 2024 IL App (1st) 231180-U.

Pending Rule 137 Issues Destroy Appellate Jurisdiction

In *Dillon v. Christie Clinic, LLC.*, the plaintiff filed a two-count *pro se* complaint against his physical therapist and her employer for injuries he allegedly suffered from a malfunctioning traction table used during physical therapy. The defendant appeared and filed a motion to dismiss pursuant to 735 ILCS 5/2-615 for the plaintiff's failure to attach a 735 ILCS 5/2-622 affidavit to his complaint. Plaintiff then filed a letter from a doctor, stating that based on his review of the medical records, there was a reasonable probability that the defendant's care fell outside acceptable professional physical therapy standards. The plaintiff then retained counsel, who argued the motion to dismiss, which was granted with leave to replead. First and second amended complaints were filed without any Section 622 affidavits. A case management order governing the disclosure of expert witnesses was entered and later extended by motion. After the plaintiff retained a new lawyer, the date for disclosure of expert witnesses passed without plaintiff disclosing an expert.

The defendants filed a motion for summary judgment claiming that the plaintiff failed to submit any competent expert witness to establish the standard of care. The plaintiff then disclosed two expert witnesses, the first being the doctor who wrote the initial letter and the second being plaintiff's current treater. After that disclosure, the court allowed for additional briefs on the summary judgment motion. The defendants' reply argued that the plaintiff's expert disclosures were defective because the disclosures did not include Supreme Court Rule 191-compliant affidavits and because the plaintiff erroneously relied on his Rule 622 affidavits to respond to the defendants' motion for summary judgment. The plaintiff filed two motions for leave to file amended responses to the defendants' motion for summary judgment.

The court ultimately denied the plaintiff's motion to file a third response to the motion for summary judgment and granted summary judgment in favor of the defendants. The order also granted the defendants their reasonable attorney's fees associated with preparing their objections to the plaintiff's motions for leave to file an amended response to the motion for summary judgment. The order directed the defendants to submit an affidavit regarding their fees and the defendants submitted the affidavit. However, the record did not contain any further documentation regarding the decision on defendants' petition for fees.

The plaintiff filed a *pro se* notice of appeal pursuant to Illinois Supreme Court Rule 303. The appellate court dismissed the appeal for lack of jurisdiction. The appellate court reasoned that final judgments that do not dispose of the entire proceeding are appealed under Supreme Court Rule 304(a) and require "special language, which if accurately provided, will bestow jurisdiction to this court." *Dillon,* 2024 IL App (5th) 230270-U ¶ 27. The court also noted that although the appeal was brought pursuant to Rule 303(a) (*i.e.,* appeal from a final judgment), Rule 303 states "[a] judgment or order is not final and appealable while a Rule 137 claim remains pending unless the court enters a finding pursuant to Rule 304(a)," *Id.* at ¶ 28 (citing Ill. St. Ct. R. 303(a) (eff. July 1, 2017)).

Dillon v. Christie Clinic, LLC, 2024 IL App (5th) 230270-U.

Forfeiture of Contractual Right to Arbitration

In *McGrath Nissan, Inc. v. Fumi Suematsu*, the plaintiff, a car dealership, brought suit against a customer alleging that she defaulted on an automobile sales contract by failing to pay the outstanding balance on a vehicle that she purchased from the plaintiff. The defendant filed a counterclaim, alleging that the plaintiff sold her a defective vehicle, made misrepresentations regarding the vehicle's accident record, and that the sales contract violated the Consumer Fraud and Deceptive Business Practice Act. (815 ILCS 505/2L). The plaintiff

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then filed a motion to dismiss, pursuant to an arbitration clause in the sales contract that the plaintiff argued required the defendant to arbitrate her purported dispute.

The trial court denied the plaintiff's motion, finding that the plaintiff "materially breached the Arbitration Agreement by filing suit and waived its right to demand arbitration." *Id.* at ¶ 2. The plaintiff appealed.

In a Rule 23 opinion, the appellate court affirmed the dismissal, holding that "[i]t is well established that a party who materially breaches a contract cannot take advantage of terms that benefit it. *Chicago Architectural Metals, Inc. v. Bush Construction Co.*, 2022 IL App (1st) 200587, ¶ 72." The court also noted that, pursuant to *Liberty Chevrolet, Inc. v. Rainey*, 339 Ill. App. 3d 949 (2nd Dist. 2003), an election to sue presumptively waives the right to arbitration. The court stated that this presumption may be rebutted by abnormal circumstances where invoking the judicial process "does not signify an intention to proceed in a court to the exclusion of arbitration." *Id.* (citing *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F. 3d 388, 391 (7th Cir. 1995)). The plaintiff argued that Suematsu's counterclaim was an "unexpected development," because it "drastically altered the nature of the litigation in a way that the [plaintiff] could not foresee when it filed its complaint." *Id.* ¶ 15. The appellate court disagreed and found that the plaintiff could have hardly been surprised when the defendant filed a counterclaim for damages and certainly could have foreseen the substance of the counterclaim when it chose to invoke the judicial process against her.

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

Appellate Court Confirms Snow Removal Contractor's Duty is Limited to Compliance With Contract

In *Moscovitch v. Westfield, LLC*, the Illinois Appellate Court First District upheld summary judgment in favor of a snow removal contractor in a slip-and-fall case at a mall. The plaintiff fell in the parking lot which had not been salted or plowed. Snow had fallen for a few hours prior. The plaintiff sued the owner, the property maintenance company, and the snow-removal contractor. The evidence was that the mall owner and its property maintenance company were the decision-makers, per the snow removal contract, as to when the snow removal contractor should be dispatched to the property, how many employees it should bring, and the sequence of its work. The snow removal contractor did not make final decisions on any of those items. There was no evidence the snow removal contractor negligently performed its contractual duties once it was dispatched.

Illinois has long included snow-removal contracts within the ambit of Section 324A of the Restatement (Second) of Torts, recognizing that a contractor's promise to remove snow from a landowner's property is in large part to protect third parties coming onto the land, particularly given that the landowner relies on the snow-removal contractor and thus does not take other measures to remove the snow and ice. *Id.* at ¶ 34. Under Section 324A, a snow-removal contractor who fails to exercise reasonable care in performing its contractual duties is liable to third parties injured as a result. *Id.* at ¶ 36; s*ee also Jordan v. Kroger Co*., 2018 IL App (1st) 180582, ¶ 30; and *Allen v. Cam Girls, LLC*, 2017 IL App (1st) 163340, ¶¶ 28-30.

Illinois has long included snow-removal contracts within the ambit of Section 324A of the Restatement (Second) of Torts, recognizing that a contractor's promise to remove snow from a landowner's property is in large part to protect third parties coming onto the land, particularly given that the landowner relies on the snow-removal contractor and thus does not take other measures to remove the snow and ice.

The defendant snow-removal contractor moved for summary judgment, arguing that the scope of its duty in tort was limited to its contractual undertaking with the mall owner, and the undisputed evidence demonstrated that the contractor complied with the terms of that contract in full. The trial court agreed and entered summary judgment in favor of the snow-removal contractor. The court noted the natural accumulation rule, a common-law doctrine whereby a landowner owes no duty to remove snow or ice that naturally accumulates, does not apply to snow removal contractors. *Moscovitch*, 2024 IL App (1st) 221453-U at ¶ 29. The appellate court held the natural-accumulation rule for landowners has no bearing on the liability of a snow-removal contractor; rather it is the snow-removal

contract, and only that contract, which defines the duty of the snow-removal contractor. *Id*. at ¶ 37.

Here, the only duty the snow-removal contractor owed to a third-party invitee like the plaintiff was to reasonably perform its contract with the property owner, Westfield. Because the undisputed evidence showed that the snow-removal contractor reasonably performed its contract, summary judgment was proper. *Id.* at ¶ 30.

Further, the appellate court noted that, while it has an obligation to review evidence in the light most favorable to the non-moving party, there is a limit as to how far it would allow one statement from one of the defendants' depositions, plucked from all context, to undermine the clear and consistent testimony of other deponents which was consistent with the contract language, in order to defeat the summary judgment motion.

Moscovitch v. Westfield, LLC, 2024 IL App (1st) 221453-U.

Supreme Court Broadens Scope of Illinois Human Rights Act to Include Private Sports Club and Premises It Leased

In *M.U. v. Team Illinois Hockey Club*, the minor plaintiff played Girls U14 hockey with Team Illinois Hockey Club, which rented an ice rink time at Seven Bridges Ice Arena. She tried out for, and was accepted as a member of Team Illinois. The plaintiff and her parents informed her coach that she was being treated for anxiety and depression and was having suicidal thoughts. The team director and the Amateur Hockey Association of Illinois (AHAI) dismissed the plaintiff from the team until she was able to participate in all team activities. Under threat of litigation, the plaintiff was allowed to return to the team after approximately a month.

The plaintiff later filed suit, alleging that Team Illinois and AHAI violated the Illinois Human Rights Act, 775 ILCS 5/5-102(A), by discriminating against a person with a disability in the full and equal enjoyment of a public place of accommodation. The trial court dismissed the action, finding that the defendants were not bound by the Act as renters of a portion of a public ice arena. The Illinois Appellate Court Second District reversed, finding that the United States Supreme Court case of *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (*Martin II*), which dealt with a professional golfer with a physical disability who challenged the PGA's rule prohibiting the use of golf carts on tour, directly controlled this action. The appellate court stated:

> Team Illinois, by virtue of its lease and operation of a place of public accommodation, offered the general public at least three distinct services: (1) watching Team Illinois competitions; (2) open tryouts to earn membership on the team; and (3) the opportunity to actually play in competitive hockey games as a member of the team, if selected. Like in *Martin*, even though earning a spot to play in competitive athletics for Team Illinois is distinctly more difficult and expensive than simply watching the team play, it nevertheless is a privilege that Team Illinois makes available to the public at Seven Bridges. . . .
>
> The fact that Team Illinois is selective in choosing its members is unimportant because, under *Martin*, a facility does not lose its status as a place of public accommodation merely because entry to the field of play during athletic competitions is limited. Accordingly, because plaintiff earned a coveted place on Team Illinois's roster, it could not then deny her on the basis of her disability the privilege of participation at athletic events held at places of public accommodation, such as Seven Bridges.

M.U. by and Through Kelly U. v. Team Illinois Hockey Club, Inc., 2022 IL App (2d) 210568, ¶¶ 39, 41 (internal citations omitted).

The Illinois Supreme Court agreed, finding that under a liberal interpretation of Title III of the ADA, Team Illinois and the AHAI were "persons", Seven Bridges was a "place of public accommodation", and the plaintiff sufficiently alleged a disability. Thus, the complaint pled a cause of action for unlawful discrimination as to the availability of public accommodations under section 5-102(A). The court rejected the notion that a private organization which occupies only a portion of a public accommodation is not bound by the Act. The court found that the plaintiff adequately alleged she was denied the full and equal enjoyment of the parts of the facility that remained open to similarly situated individuals—members of Team Illinois. Therefore, her cause of action was allowed to proceed.

M.U. By & Through Kelly U. v. Team Illinois Hockey Club, Inc., 2024 IL 128935.

Multiple Important Rulings on Disparate Issues in Medical Malpractice Case

In *McCaley v. Petrovic*, the Illinois Appellate Court First District reversed and remanded the case and addressed multiple issues, including the proper allowance for disclosure of rebuttal experts and whether certain expert testimony can support a claim for grief under the Illinois Wrongful Death Act.

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With respect to rebuttal experts, the reviewing court held that the circuit court abused its discretion by barring the plaintiff from presenting any testimony from her rebuttal expert at trial. The court first defined rebuttal evidence as that which "tends to explain, repel, contradict, counteract, or disprove facts placed in evidence by an adverse party." The court stated that there are few "guidelines or timeframes for disclosure of rebuttal testimony" but that "an abuse of discretion may occur where a party is prevented from impeaching a witness, supporting the credibility of an impeached witness, or responding to new points raised by the adverse party." Because the defendants' expert argued a "new" theory of causation for the decedent's death in their case-in-chief, the appellate court held that an abuse of discretion occurred when the circuit court barred the plaintiff from disclosing a rebuttal expert 16 months before trial.

As to the testimony of a grief expert, the court held that the testimony of a grief expert was properly barred and not an abuse of discretion because "her proffered testimony about the grief experienced by Marshana's family due to her death added little that would assist the jury in understanding this evidence. In large part, her disclosed opinions are simply generalized recitations of the family members' statements in depositions. We further find much of her deposition testimony to involve generalities about what Marshana's family members might have experienced, with few statements or opinions that are specific to the actual individuals involved. The family members' own testimony was adequate on this topic."

The court also showed the continued viability of special interrogatories, as judgment in favor of the defendant hospital was affirmed based upon the jury's specific finding that the individual defendant doctor was not the apparent agent of the defendant hospital.

McCaley v. Petrovic, 2024 IL App (1st) 230918.

In Arbitration Dispute Arising from a Tort Claim, All Questions Relating to the Contract at Issue Must Be Adjudicated in Arbitration

The minor plaintiff was injured at a Sky Zone trampoline park and his father sued. The father had signed a waiver that contained an arbitration claim providing that "ANY DISPUTE, CLAIM OR CONTROVERSY ARISING OUT OF OR RELATING TO MY OR THE CHILD'S ACCESS TO AND/OR USE OF THE SKY ZONE PREMISES AND/OR ITS EQUIPMENT, INCLUDING THE DETERMINATION OF THE SCOPE OR APPLICABILITY OF THIS AGREEMENT TO ARBITRATE, SHALL BE *** DETERMINED BY ARBITRATION."

The circuit court made findings about the contract and granted the defendants' motion to compel arbitration and stay the litigation. On appeal, the Illinois Appellate Court First District reversed with instructions to send the entire dispute to arbitration. Relying on precedent from both Illinois courts and the Supreme Court of the United States, the court held that where an arbitration clause invokes the Federal Arbitration Act and the plaintiff challenges the entirety of the contract and not just the agreement to arbitrate, the issue of contract validity must be decided by the arbitrator, not the court. Accordingly, the court held that the circuit court erred in even addressing the legal questions presented by the plaintiff relating to the validity of the waiver agreement. As a result, the court reversed that finding, instructing the circuit court to refer the case to arbitration.

Tupanjac, Next Friend of Tupanjac v. SZ Orland Park, LLC, 2024 IL App (1st) 232467-U.

Plaintiff's Claims are Barred Under Absolute Litigation Privilege

Confirming the broad scope of the absolute litigation privilege, the Illinois Appellate Court First District in *Qualizza v. Freeman* affirmed the dismissal of counterclaims against two lawyers and their firm arising out of communications to interested parties in the litigation that the counter-plaintiff alleged were defamatory. The court observed that the privilege "applies to communications made before, during, and after litigation" and that, in Illinois, it also extends to protect "other attorney conduct" performed in furtherance of representation. The court explained the applicability of the absolute litigation privilege, as follows:

> The touchstone . . . is the "pertinency requirement." A communication is pertinent if it "relates to the litigation and is in furtherance of representation." The pertinency requirement is not strictly applied, and any doubt is resolved in favor of finding a communication pertinent. Communication need not be confined to the specific issues of the litigation to be considered pertinent and thereby protected. Communication with a third party can be protected under the absolute litigation privilege when that third party has some interest in the litigation. Conversely, when a third-party communication is unrelated to the case, the privilege may not apply. [internal citations omitted].

Under Illinois law, so long as the communications are pertinent to the litigation and made to someone with an interest in the litiga-

tion, the statements, even if made before or after the litigation, are protected.

Qualizza v. Freeman, 2024 IL App (1st) 231534-U.

Court Addresses Arbitration Provisions in Skilled Nursing Facility Case

The plaintiff brought claims pursuant to the Survival Act and Wrongful Death Act alleging that the defendants, who operate a skilled nursing facility, were responsible for the decedent's premature death from COVID-19 contracted while under their care. The plaintiff possessed the decedent's medical and financial powers of attorney, and she signed an arbitration agreement in her representative capacity at the time of admission. The defendants successfully moved the circuit court to stay the proceedings and compel arbitration pursuant to the terms of the arbitration agreement. The plaintiff's motion to vacate that order was denied.

The Illinois Appellate Court Fourth District addressed a host of issues. The first was the defendants' motion to dismiss the appeal. The court held, *inter alia*, that an order compelling arbitration is an injunctive order and thus subject to interlocutory appeal under category (2) of Rule 307(a)(1). The denial of a motion for reconsideration of an order compelling arbitration falls under category (4) as an order that refuses to dissolve an injunction. Both orders are appealable, and jurisdiction was proper.

This case required the appellate court to determine whether, under Illinois law, a contract for arbitration was formed and, if so, whether the Federal Arbitration Act required that the arbitrator address any other disputes between the parties. Whether or not a contract for arbitration was formed was examined separately under each claim. First, opposing referral of the Survival Act claims to arbitration, the plaintiff argued that a federal regulation only came into existence after the signing of the agreement, that state law contract defenses must be resolved by the circuit court, and that the contract's termination on "discharge" language was triggered by the decedent's death, and thus, defeated the arbitration agreement. The court pointed to a delegation clause within the arbitration agreement that gave the arbitrator exclusive authority to resolve any dispute about the validity and enforceability of the agreement. As a consequence, each issue raised by the plaintiff must be decided by the arbitrator. Because the plaintiff was authorized to sign the arbitration agreement, the decedent's direct claims pursuant to the Survival Act were subject to the arbitration agreement.

On the other hand, the circuit court should not have referred the Wrongful Death Act claims to arbitration because neither a resident nor his agent has the authority to bind heirs asserting such a claim. The real parties in interest in a wrongful death claim are the decedent's next of kin. Although the plaintiff was the decedent's daughter, she signed the arbitration agreement only in a representative capacity for the decedent. The court held that wrongful death claims arising out of the death of a nursing home resident are not subject to an arbitration agreement to which the wrongful death beneficiaries were not parties.

The appellate court affirmed the circuit court's referral of the decedent's claims under the Survival Act, but reversed the referral of the Wrongful Death Act claims and remanded for further proceedings.

Mikoff v. Unlimited Dev., Inc., 2024 IL App (4th) 230513.

Court Addresses the Admissibility of Medical Billing Expert Testimony

The plaintiffs brought claims of negligence and a violation of the Animal Control Act, both individually and on behalf of their minor son, C.J.P., alleging that C.J.P. was injured by the defendant's dog. A jury returned a verdict in the plaintiffs' favor on the Animal Control Act claim but not on the negligence claim. The jury awarded damages totaling $172,525.80. The plaintiffs raised several issues on appeal, including that the trial court erred by excluding certain testimony of their billing expert, Rebecca Busch, barring Dr. Victor Stams from testifying concerning C.J.P.'s need for fat grafting and the cost of future medical care, barring Dr. Reuben Bueno from testifying as to the need for future medical care, making erroneous rulings on certain pretrial motions, and denying their post-trial motion for an additur or a new trial on the issue of damages.

The trial court limited Busch's testimony concerning the cost of future medical care. The appellate court agreed because the plaintiffs did not present evidence of the need for future care. This followed a trial court ruling barring Dr. Stams from providing opinion testimony as to future medical care because it was not disclosed in discovery. The trial court also barred an attempt to elicit Dr. Stams' opinion through Busch, who was asked to recount her phone conversation with him. The plaintiffs argued that the evidence was admissible under Illinois Rule of Evidence 703 or, alternatively, that it should not have been excluded without a *Frye* hearing. The appellate court noted that Rule 703 does not create a hearsay exception, and that allowing the evidence of Busch's conversation would have elicited an undisclosed opinion through an impermissible "back door." The court observed that *Frye* only applies to new or novel scientific

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methodologies. Here, the defendant did not seek to exclude the testimony based on *Frye* principles, so a hearing was unnecessary. The plaintiffs argued that the trial court also erred in barring Dr. Bueno from testifying about future medical care. The Illinois Appellate Court Fourth District found that Dr. Bueno last examined C.J.P. nearly one year prior to his evidence deposition and two years before trial. He also testified that he would be speculating if he gave an opinion concerning C.J.P.'s need for future treatment. The appellate court thus found no abuse of discretion.

The plaintiffs also challenged several pretrial rulings. The appellate court found that the plaintiffs were not prejudiced by any of these rulings because the jury found for plaintiffs on the Animal Control Act claim. The plaintiffs were only entitled to one recovery for C.J.P.'s injuries even if the defendant was liable under multiple theories. The appellate court rejected that the trial court's exclusion of evidence of the breed of the defendant's dog and its behavior after the accident led to a reduced award of pain and suffering, as occurrences after the accident were irrelevant and there was ample evidence of the dog's size and C.J.P.'s injuries.

The plaintiffs finally argued that the jury erred by calculating C.J.P.'s future surgical costs at $10,000. They pointed to evidence showing a cost of approximately $10,000 per scar removal and that C.J.P.'s parents testified that they planned to have at least 13 scars removed in the future. The trial court denied their request for additur or a new trial on this basis, finding the jury's verdict was not contrary to the manifest weight of the evidence. The appellate court found that because Dr. Stams testified that the scar revision surgery was optional but not imperative, the jury may have found that it was not a reasonably certain future expense. It affirmed in all respects.

Phillips v. Havenar, 2024 IL App (4th) 230204-U.

Court Reverses Dismissal and Arbitration Order in Personal Injury Case Involving Cubs' Media Credential Terms

The plaintiff filed a personal injury complaint against the Chicago Cubs related to injuries he sustained at Wrigley Field while working as a photographer for the Associated Press. The Cubs initially filed a motion to dismiss based upon a mandatory arbitration provision contained in the website terms and conditions which the plaintiff accepted by using his media credential to enter the ballpark. The trial court initially denied the motion without prejudice, and the appellate court affirmed. After remand, the trial court conducted a summary proceeding pursuant to section 2(a) of the Uniform Arbitration Act, 710 ILCS 5/2(a), to determine whether there was an enforceable arbitration agreement between the parties. Following discovery and supplemental briefing on the issue, the trial court granted the Cubs' motion to dismiss and compel arbitration. The plaintiff appealed the decision.

The plaintiff argued both that he did not have a contractual relationship with the Cubs and that the arbitration provision was procedurally and substantively unconscionable as the provision contained an opt-out notice option which required an account number, which the plaintiff did not have. The Cubs argued that the media credential was a revokable license and established that an agreement existed granting its bearer admission conditioned on his assent to its terms and conditions.

The trial court noted that the back of the media credential stated in bold capital letters, "CONDITIONS" which was unobstructed. The plaintiff always had the credential with him while working at Wrigley Field and his pass was scanned 41 times in the three months that he had the pass, including twice on the date of the incident. The trial court also found that the arbitration provision was not unconscionable because the language was clear and unambiguous, despite a "slight degree of substantive unconscionability" due to the requirement of including an account number in order to opt out.

The appellate court found that the trial court did not abuse its discretion in finding that a contract was formed. Under a *de novo* standard, however, it found the contract unconscionable.

The terms and conditions printed on the credential did not contain the word arbitration. Rather, the arbitration provision was contained in the MLBPressbox.com URL printed on the credential. The webpage at that address contained a 6-page, 25-paragraph contract containing an arbitration provision in paragraph 22. The appellate court found that considering all the circumstances in the case, the plaintiff could not have reasonably been aware that he was agreeing to binding arbitration through the use of his media credentials. Therefore, the arbitration provision was procedurally unconscionable. It also found that the provision was substantively unconscionable due to the opt-out provision requiring an injured person an unreasonably short period of only seven days to opt out of the arbitration and required that the ticket holder must include an account number in the request to opt out, which the plaintiff did not possess.

The trial court's judgment granting the defendant's motion to dismiss and compel arbitration was reversed. The case was remanded for further proceedings.

Arbogast v. Chicago Cubs Baseball Club, LLC, 2024 IL App (1st) 230361-U.

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Survey of Construction Law Cases

Appellate Court Finds Error in Trial Court's Assessment of Sole Proximate Cause

In *Johnson v. Illinois State Toll Highway Authority*, the Illinois Appellate Court First District, in a Rule 23 Order, reversed the circuit court's allowance of summary judgment in favor of the Illinois State Toll Highway Authority and other entities on the issue of reasonable foreseeability, and that a driver's negligence was the sole proximate cause of an accident. The appeal stemmed from a single-vehicle accident involving a limousine. The accident occurred in an active construction zone on Interstate 90 after the limousine driver, Nash, missed a lane shift to the right, struck an orange construction barrel, and then an impact attenuator, causing the vehicle to overturn onto its roof, killing one passenger and causing injuries to the other passengers.

Despite the driver's clear negligence, plaintiffs filed amended complaints asserting two theories of negligence. The first was predicated on the alleged omission of warning signs; the second was based on the alleged omission of proper roadway barriers. Plaintiffs alleged that lack of lane shift warning signs caused Nash to miss the lane shift. Plaintiffs further alleged that the placement of the impact attenuator was one of the proximate causes of the accident.

The appellees argued that Nash's reckless driving was an intervening and superseding cause of the crash, which broke any causal connection between their alleged negligence and the accident. Not only was Nash recklessly speeding with the sun in his eyes at the time of the crash, but Nash did not possess a commercial driver's license to operate a limousine in Illinois. One of the passengers warned Nash he was going too fast and asked him to slow down.

While appellees also moved for summary judgment on other grounds, including lack of duty, the circuit court only heard argument on the issue of proximate cause. Following the hearing, the circuit court held that it was not reasonably foreseeable to the appellees that an underage, non-licensed driver, would be driving a limousine when he was not properly qualified to do so. Further, the court found it was not reasonably foreseeable that the driver would not be familiar with the basic principle that he had to slow down when the sun was in his eyes. The court further found that Nash was driving entirely too fast while he was tired, despite being warned by his passenger that he was going way too fast, and that he also ignored the visual cues to change lanes. Nash's intervening action was so beyond the ordinary expectation of drivers, that appellees could not have reasonably expected nor anticipated them.

On appeal, appellants claimed that evidence was presented concerning prior accidents at or near where the instant accident occurred. Appellants also presented testimony from their hired experts that had advanced warning signage been placed in advance of the lane shift, it would have provided Nash information to allow him to safely anticipate and negotiate the lane shift, even despite the sun in his eyes.

Appellees argued they could not have reasonably foreseen that Nash would miss the lane shift where he had successfully driven through it on three occasions prior to the accident and where the highway pavement was painted to indicate the lane shift. Appellees pointed out that Nash testified that on the day of the accident, he did not pay attention to the pavement markings and admitted that he would not have adjusted his driving speed if he had seen the sign indicating the speed limit. From this, appellees argued that it is speculative to assume that Nash would have observed and reacted to the lane shift sign if it had been posted on the roadway.

The appellate court held that the evidence raised by appellants created a reasonable inference that it was foreseeable that the absence of lane shift signs might cause a driver to miss a lane shift, creating a genuine issue of material fact that precluded summary judgment.

Johnson v. Ill. State Toll Highway Auth., 2024 IL App (1st) 210941-U.

With a Focus on Retained Control: Appellate Court Upholds Summary Judgment in Favor of General Contractor

In *Neisendorf v. Abbey Paving & Sealcoating, Company, Inc.*, the Illinois Appellate Court Second District affirmed summary judgment in favor of general contractor on the issue of sufficient retained control over a worksite, and absence of actual or constructive notice. The plaintiff, employee of subcontractor, was injured and filed suit against the defendant, general contractor, when a trench wall collapsed. He alleged defendant had a duty to exercise reasonable care in its control over the project and had a nondelegable duty to provide a safe workplace. Defendant moved for summary judgment

arguing: (1) it owed no duty to plaintiff because it did not retain the requisite control of the details of the work, and (2) it had no actual or constructive notice of the alleged dangerous condition. The circuit court granted defendant's motion and found there was no evidence that defendant's contract with the county created an "automatic duty owed to plaintiff." The court found that it did not retain any control over the "incidental aspects" of plaintiff's work so as to give rise to a duty. In regard to the premises liability allegations, the court found that plaintiff's employer maintained responsibility for the trench work and that defendant did not have actual or constructive notice that the trench presented an unsafe condition.

On appeal, plaintiff argued the contract between the county and defendant showed that defendant owed a duty to plaintiff, defendant had the power to stop plaintiff from performing unsafe work, and defendant had sufficient control to invoke a duty to exercise its supervisory control under Restatement (Second) of Torts §414. The appellate court noted the contract between the county and defendant provided that defendant "shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters." The appellate court rejected plaintiff's argument and found the contract before it did not grant defendant control over the operative details of plaintiff's employer's work and had only the general right to stop work. These were insufficient to grant it the requisite contractual control.

The appellate court next rejected plaintiff's argument that the fact that defendant could stop work was evidence of control under section 414 of the Restatement. According to the appellate court, the evidence was undisputed that the power over safety issues that defendant had over plaintiff's employer was only a general power.

Plaintiff also argued that defendant had actual or constructive notice of a dangerous condition such that it owed him a duty of care under section 343. Plaintiff claimed defendant possessed the land where he was injured and the blueprints gave it actual notice that the trench was over five feet deep and unsafe without shelving, shoring, or a trench box. The trial court found that defendant did not have actual notice that the trench presented an unsafe condition. The court noted that plaintiff's employer maintained responsibility for the trench work. Defendant was not consulted about use of a trench box, shoring, nor the shelving. The court stated that, even if defendant knew from blueprints or otherwise that the depth would be over five feet, there was no evidence that defendant knew that the trench was unsupported or unsecured or that shoring was required by law or contract.

The court noted that the time between digging out the trench and its collapse was less than one hour. Defendant's superintendent, the only representative of the general contractor on site on the day of the accident, arrived four minutes before the trench collapsed. The appellate court found that his presence at the site for such a limited period was not sufficient to create a material factual question concerning defendant's constructive notice of the dangerous condition.

The appellate court further concluded defendant had no constructive notice of anything unsafe with the trench. The court noted that the time between digging out the trench and its collapse was less than one hour. Defendant's superintendent, the only representative of the general contractor on site on the day of the accident, arrived four minutes before the trench collapsed. The appellate court found that his presence at the site for such a limited period was not sufficient to create a material factual question concerning defendant's constructive notice of the dangerous condition.

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

At Some Point All Things Must Come to an End, Including the Fight for Attorney Fees in Construction Contracts

In *Pepper Construction Company v. Palmolive Tower Condominiums, LLC*, the Illinois Appellate Court First District affirmed the trial court's award of attorney fees and costs to Bourbon Marble, Inc. (Bourbon), concluding over 15 years of litigation. The court declined to remand the case for further proceedings, emphasizing that "at some point, all things must come to an end." *Pepper*

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Constr. Co. v. Palmolive Tower Condos., LLC, 2024 IL App (1st) 221319, ¶ 27.

In 2004, plaintiff Pepper Construction Company and Bourbon collaborated on the interior build-out of approximately 96 condominium units. Disputes arose, leading to arbitration in March 2007. The arbitration award was confirmed by the circuit court, and a global settlement agreement was reached, leaving only the issues between plaintiff and Bourbon. *Pepper Construction,* 2024 IL App (1st) 221319, ¶ 5. During the bench trial, plaintiff was awarded $36,312 in back charges. *Id.* On appeal, the appellate court partially reversed, partially affirmed, and remanded the case for further proceedings. *Id.* On remand, Bourbon filed claims against plaintiff for breach of contract and unjust enrichment. Following another bench trial, Bourbon prevailed on both claims. The trial court also awarded Bourbon attorneys' fees and costs. *Id.* ¶ 7. Another appeal ensued, during which the appellate court affirmed the trial court's judgment in Bourbon's favor on the breach of contract claim but reversed the judgment on the unjust enrichment claim. *Id.* The appellate court remanded the case to determine whether Bourbon was still the prevailing party after the reversal of the unjust enrichment claim. *Id.* On remand, the matter was fully briefed, with both plaintiff and Bourbon claiming to be the prevailing party; the trial court ultimately entered an order awarding Bourbon $3,605,880.33 in attorney fees and costs. *Id.* ¶ 9. Both parties appealed.

The issue on appeal was the trial court's award of attorney fees to Bourbon. Generally, each party is responsible for their own attorneys' fees. An exception exists when a contract stipulates that the prevailing party is entitled to reasonable attorneys' fees and costs, as was the case here.

The issue on appeal was the trial court's award of attorney fees to Bourbon. Generally, each party is responsible for their own attorneys' fees. An exception exists when a contract stipulates that the prevailing party is entitled to reasonable attorneys' fees and costs, as was the case here. *Id.* ¶ 20. The subcontract between plaintiff and Bourbon stated "in the event of any legal proceeding, arbitration or other form of dispute resolution procedure . . . between the parties . . . whether in contract or tort, the prevailing party shall be entitled . . . to attorneys' fees and costs." To determine whether a party is considered the prevailing party for the purposes of a fee award, the court determines if: (1) it succeeds on any significant issue in the action and achieves some benefit in bringing suit, or (2) it receives a judgment in its favor, or (3) it obtains affirmative recovery. *Id.* ¶ 22. Even if the party does not succeed on all matters of claims, a party may nevertheless be deemed the prevailing party. *Id.*

The trial court found that plaintiff did not win any significant issue in the case; plaintiff was awarded a fraction of what it had sought. *Id.* ¶ 10. The trial court noted that Bourbon's trial court and two appellate court victories were significant, specifically because Bourbon successfully limited plaintiff's trial court verdict. *Id.* ¶ 11. The trial court concluded that plaintiff breached the contract and failed to pay Bourbon what it was entitled to. *Id.* ¶ 13. The appellate court affirmed and declined to remand for further proceedings. Indicating that the trial court correctly exercised its discretion, specifically when it reviewed each specific time entry for reasonableness. *Id.* ¶ 26. The appellate court emphasized that both parties were fully aware of the additional costs and risks involved in pursuing the litigation for as long as they did.

Pepper Constr. Co. v. Palmolive Tower Condos., LLC, 2024 IL App (1st) 221319.

Keep Your Stories Straight—a Look into Oral Versus Written Contracts

In *Vanderplow v. Miller*, the Illinois Appellate Court Third District affirmed the trial court's dismissal of plaintiff's breach of oral contract claim based on judicial estoppel because plaintiff previously took the position in arbitration that a written contract with different terms controlled. The plaintiff, Cindy Vanderplow, brought an action in small claims court. The claim provided: "defendant built a non-compliant deck; for 9 months defendant has refused to make necessary repairs to bring deck in compliance with Village; and $4,800 due from defendant to bring deck compliant."

The small claims court ordered the parties to participate in non-binding arbitration. Pursuant to Illinois Supreme Court Rule 90(c), plaintiff submitted a packet of documentary evidence to the arbitration panel. Plaintiff's 90(c) packet contained July 6, 2019 *written* contract to build a deck. Further, the plaintiff testified to and regarding the written contract at the hearing. On March 23, 2021, the arbitration panel found in favor of plaintiff, awarding her $9,074

in damages. On April 21, 2021, defendant, who was represented by the same counsel throughout the proceedings below and on appeal, rejected the non-binding arbitration award.

The complaint stated that the parties entered into an *oral* contract to build a deck at plaintiff's primary residence in Roselle "in exchange for money." Plaintiff would "pay for all deck materials and labor" and defendant would "build a deck to the building code specifications as required by the Village of Roselle."

Plaintiff contended defendant's work was defective and did not comply with the local building code, citing several issues such as improperly sized piers, unsafe stairs, and warped decking. Although defendant verbally agreed to correct the issues, he did not follow through, prompting plaintiff to pursue legal action. Plaintiff argued she had a valid oral agreement with defendant, demonstrated by actions like purchasing materials and obtaining permits.

Defendant moved to dismiss the claims by claiming that the written contract signed by the parties on July 6th superseded any oral contract between the parties. Defendant argued that pursuant to the legal principle of judicial estoppel, plaintiff's claim was estopped.

The appellate court affirmed the trial court's ruling under judicial estoppel. Judicial estoppel is an affirmative matter avoiding the legal effect of or defeating a claim, and it is properly raised in a section 2-619(a)(9) motion to dismiss. Judicial estoppel is an equitable doctrine, aimed at protecting the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *See Seymour v. Collins*, 2015 IL 118432, ¶ 36. The five "generally required" elements of judicial estoppel are: (1) the party to be estopped has taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) succeeded in the first proceeding and received some benefit. If the five prerequisites are present, the court then exercises its discretion in deciding whether to apply judicial estoppel. In exercising this discretion, a "critical factor" is whether the party to be estopped intended to deceive the court or whether inadvertence or mistake may account for previous positions taken and facts asserted. *Vanderplow*, 2023 IL App (3d) 230004-U, ¶ 37.

The court reviewed the sufficiency of plaintiff's pleadings and the applicability of judicial estoppel. Ultimately, the appellate court upheld the trial court's dismissal finding that the plaintiff failed to establish the necessary elements of an enforceable oral contract and that her prior reliance on the written agreement in arbitration precluded her claims. The court also believed that plaintiff's oral explanation at the hearing was contradictory. Plaintiff appeared to argue that the terms set forth in the written contract were not followed, not that they were invalid.

Vanderplow v. Miller, 2023 IL App (3d) 230004-U.

Property Damage from Nine Years' Worth of Gradual Water Infiltration Not Caused by Sudden or Dangerous Event Under Economic Loss Doctrine

In *Delacourte Condominium Association v. Focus Development, Inc*., the Illinois Appellate Court First District affirmed the circuit court's dismissal of a third-party complaint based upon a tort claim in that the action was barred by the economic loss doctrine. The plaintiffs' claims for damage to "carpeting, floors, and draperies within [their] homes" were dismissed under the economic loss doctrine. The plaintiffs argued that their damages fell within the economic loss doctrine exception that requires sustained damage to other property caused by a sudden, dangerous, or calamitous occurrence.

The court held that the allegations of the complaint did not support the exception as the alleged damages were not caused by any sudden, dangerous, or calamitous event. Such an event is defined as a "sudden event, consistent with a tortious act" or an event that is "highly dangerous and presents a likelihood of personal injury or injury to other property." The plaintiffs' damages were caused, in part, by gradual water infiltration from normal precipitation over time that was not discovered for over nine years after the allegedly defective repairs were made.

The court ultimately concluded, "the infiltration of water over an extended period of time will generally not constitute a sudden or dangerous occurrence within the meaning of the economic loss doctrine."

Delacourte Condo. Ass'n v. Focus Dev., Inc., 2024 IL App (1st) 230162-U.

No Statutory Fraud when Contractor Acted in Good Faith in Abiding by Condo Board's Insurance and Licensing Requirements

In *Halabi v. Monarch Contract Builders, LLC*, the Illinois Appellate Court First District upheld the trial court's decision that defendant did not violate the Illinois Consumer Fraud and Deceptive Business Practices Act.

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In this case, the plaintiff contracted with defendant to perform demolition and construction work on her bathroom and hallway. She paid defendant a down payment of $4,200. In fall 2019, the plaintiff's condo association did not approve the start of construction due to issues regarding defendant's insurance status and licensing. Plaintiff then cancelled the contract, and defendant returned $1,350 of the down payment. Defendant retained $2,850 of the down payment as compensation for time and expenses.

Plaintiff filed a five-count complaint. She alleged two counts of violations of the Home Repair and Remodeling Act, a violation of the Consumer Fraud and Deceptive Business Practices Act, common law fraudulent inducement, and common law breach of contract. After a bench trial, the plaintiff prevailed only on her breach of contract claim in that defendant's assessment of costs was excessive. The trial court awarded plaintiff $2,400 in damages and ordered that both parties should bear their own costs. Plaintiff appealed.

On appeal, plaintiff only contended that the court erred in finding that defendant did not violate a subsection of the Consumer Fraud and Deceptive Business Practices Act. The relevant court quoted the relevant section as follows:

> 'A person engaged in the business of home repair, as defined in Section 2(a)(1) of the Home Repair Fraud Act who fails or refuses to commence or complete work under a contract or an agreement for home repair, should return the down payment and any additional payments made by the consumer within 10 days after a written demand sent to him by certified mail by the consumer or the consumer's legal representative or any a law enforcement or consumer agency acting on behalf of the consumer.'

815 ILCS 505/2Q(c).

Plaintiff argued that defendant's failure to commence work in and of itself should be interpreted as a failure to complete work under the provision. The court noted that there is a nuanced interpretation of this section in that the party engaging in home repair must (1) breach the contract, (2) refuse to commence or complete work, and (3) fail to return the down payment. In this case, the appellate court ruled that the trial court appropriately determined that defendant's inability to procure the necessary credentials did not constitute a breach of contract. The work did not commence because defendant had not met the condo board's licensing and insurance requirements. Defendant made a good faith effort to provide all information to the association, and defendant's effort was only stymied because plaintiff cancelled the contract. Moreover, the trial court's determination was not against the manifest weight of the evidence.

The appellate court also noted that the record contained no transcript of the bench trial, nor was there a bystander's report. Plaintiff, as appellant, has a burden to present a sufficiently complete record of proceedings at trial to support a claim of error, citing *Foutch v. O'Bryant*, 99 Ill.2d 389, 381 (1984). Because the appellate court was unable to determine whether the trial court's findings were against the manifest weight of the evidence, there is a presumption that the trial court had a sufficient factual basis for its holdings, citing *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 157 (2005). Therefore, the appellate court affirmed the trial court's determination that defendant's failure to perform was not a breach of contract. Without a breach of contract, defendant did not violate that particular subsection of the Consumer Fraud and Deceptive Business Practices Act.

Halabi v. Monarch Contract Builders, LLC, 2024 IL App (1st) 231080-U.

Jury's Assessment of Comparative Fault Does Not Run Afoul of *Carney* and its Application on Retained Control

In *Harris v. Germantown Seamless Guttering, Inc.*, the Illinois Appellate Court Fifth District affirmed the pre-trial and trial rulings of the circuit court and judgment entered on the jury verdict finding plaintiff contributorily negligent. The plaintiff, Stephen Harris, owned API, Inc., the general contractor for a construction project on plaintiff's home. Plaintiff was injured when a tube of gutter sealant fell from the roof and hit him in the eye. The defendant, Germantown Seamless Guttering, was the subcontractor responsible for the gutter installation. Plaintiff's lawsuit alleged that defendant was negligent in failing to keep proper control to secure the tube, failing to warn, and failing to barricade the area.

Defendant filed an answer and asserted affirmative defenses of comparative fault. Defendant asserted three bases to support its affirmative defense: plaintiff's failure to take reasonable precautions to protect himself from injury; walking under an area where he knew or should have known the defendant was working; and his failure to barricade or cordon off the area where defendant worked.

At trial, plaintiff's motion for directed verdict was denied and the jury returned a verdict in plaintiff's favor but assessed 45% comparative fault against plaintiff. Plaintiff moved to set aside the verdict and sought a new trial. Plaintiff argued he was entitled to a new trial because he was "only" an employee of the general contractor and therefore was not contributorily negligent. He also argued that, even if he was the general contractor, per *Carney v. Union Pacific Rail-*

Regardless of duties imposed on a general contractor, the court noted "when plaintiff walked out of the house and moved from beneath the safety of any support above his head, he had a duty to protect himself." Under these facts, the court could not find that the jury's assessment of comparative fault was against the manifest weight of the evidence.

road Company, 2016 IL 118984, he was not contributorily negligent because "one who employs an independent contractor is not liable for the harm caused by the latter's acts or omissions." Per plaintiff, the fact that API maintained the contractual right to oversee safety is insufficient to rise to the level of "retained control" over defendant.

In affirming the verdict, the Fifth District acknowledged the holding in *Carney* on the issue of retained control and the Restatement (Second) of Torts §414, but noted that the theory of "vicarious liability" discussed in *Carney* only addressed one of the three theories posited for plaintiff's negligence. *Carney* only speaks to the theory directed to plaintiff's failure to barricade or cordon off the area under which the defendant worked. The other affirmative defenses of plaintiff's failure to take reasonable precautions to protect himself from injury and his act of walking in an area where he knew, or should have known, defendant was working are not dependent on his status as a general contractor.

The *Harris* court reaffirmed the notion that "the determination of what conduct is negligent or contributorily negligent is the composite of the experience of average people, and is left to the jury for evaluation." Here, plaintiff admitted he was onsite on the date of the occurrence as a contractor and had "years" of construction experience. He admitted he hired the defendant and, per the contract, plaintiff had authority to inspect defendant's work and instruct defendant to do its work in a "safer" manner. Plaintiff admitted he saw defendant's trucks when he pulled into the site, saw people working on the roof when he walked toward the house, and the presence of a ladder extending to the ground.

Regardless of duties imposed on a general contractor, the court noted "when plaintiff walked out of the house and moved from beneath the safety of any support above his head, he had a duty to protect himself." Under these facts, the court could not find that the jury's assessment of comparative fault was against the manifest weight of the evidence.

Harris maintains the precedent of *Carney* and identified other bases for contributory negligence independent of the duties imposed on a general contractor and, as such, is consistent with longstanding Illinois precedent.

Harris v. Germantown Seamless Guttering, Inc., 2023 IL App (5th) 220463-U.

Subcontractor Only Entitled to Interest on Payment Bond Claim for Period between Arbitrator's Interim Award and Final Award, and Not Entitled to Additional Attorney's Fee Award due to General Contractor Not Violating Bond Terms

In *Concrete Structures/Sachi, J.V. v. Clark/Bulley/OVC/Power*, the Illinois Appellate Court First District affirmed the award of an arbitration panel on damages, and affirmed the circuit court's award of prejudgment interest based upon certain bond conditions, but also affirmed the circuit court's denial of prejudgment interest and attorneys' fees under section 23 of the Mechanics Lien Act, under section 2 of the Interest Act, and under section 2 of the Public Construction Bond Act.

The plaintiff, Concrete Structures/Sachi, J.V. (Concrete Structures) performed concrete work on a 41-story hotel project for general contractor, Clark/Bulley/OVC/Power (CBOP). When CBOP did not pay Concrete Structures for its work, Concrete Structures filed a bond claim and a mechanics lien in the amount of $9,247,203 against the hotel project, MPEA (owner), PD3 (designer), and CBOP, pursuant to section 23 of the Mechanics Lien Act. In October 2017, Concrete Structures also filed a complaint with the following counts: count I requested an accounting; count II alleged a breach of contract claim against CBOP; count III asserted a bond claim against Concrete Structures' insurers; and, count IV alleged an unjust enrichment claim against MPEA, PD3, CBOP, and those parties' joint venture partners.

The circuit court granted CBOP's motion to compel arbitration on counts II and IV and stayed counts I and III pending arbitration. On June 19, 2019, the arbitration panel issued Concrete Structures an interim award of $10,629,741, which included the outstanding balance, $6,448,344 in labor productivity damages and compensa-

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tory damages for extended project hours and other delays. In its final arbitration decision on September 20, 2019, the panel reiterated its prior interim award and further awarded Concrete Structures $27,026.75 in attorney fees (reasoning that CBOP's insurance carrier had already paid most of Concrete Structures' attorney fees) and 5% prejudgment interest for the period of time between the issuance of the interim award and the final award. The final award amounted to $10,656,767.75 plus five percent interest.

On December 20, 2019, the circuit court granted Concrete Structures' motion to confirm the arbitration award, and CBOP paid Concrete Structures the arbitration award in full. Concrete Structures, CBOP, and MPEA then filed cross-motions for summary judgment on counts I (accounting pursuant to section 23 of the Mechanics Lien Act) and III (payment bond claim against Concrete Structures' sureties). The court denied Concrete Structures' motion for summary judgment, granted CBOP's and MPEA's cross-motions for summary judgment, and denied any further prejudgment interest and attorney fees owed to Concrete Structures. Concrete Structures appealed the circuit court's grant of summary judgment as to count III only.

On appeal, Concrete Structures argued that section 2 of the Interest Act allowed it to recover prejudgment interest from the date it filed the lawsuit (October 13, 2017) to when the circuit court confirmed the arbitration panel's final award (December 20, 2019), rather than just the period between the panel's interim and final awards. Defendants argued that prejudgment interest began to accrue when money became due under the bond, which did not occur, at the earliest, until the panel's interim award on June 19, 2019.

The appellate court reviewed the following relevant bond language:

> § 7 When a Claimant has satisfied [certain procedures], the Surety shall promptly and at the Surety's expense take the following actions:
>
> § 7.1 Send an answer to the Claimant, with a copy to the Owner, within sixty (60) days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed; and
>
> § 7.2 Pay or arrange for payment of any undisputed amounts.

The appellate court found that the plain language of section 7.2 of the bond conditions stated that the sureties' payment obligations were limited to undisputed amounts. Accordingly, the existence of undisputed amounts triggered the sureties' obligations, and that was also the time prejudgment interest began accruing. The appellate court affirmed the circuit court's summary judgment ruling that prejudgment interest began on June 19, 2019, when the arbitration panel resolved the dispute and issued its interim award in Concrete Structures' favor.

On appeal, Concrete Structures also argued that the plain language of the bond required an award of additional attorney fees. Defendants contended that the bond allows attorney fees only if PD3 and the sureties had violated the bond's terms. The appellate court found that the defendants did not breach section 7.1 nor section 7.2 of the bond. Additionally, once the arbitration panel resolved the dispute as to the amount owed, CBOP promptly paid Concrete Structures. For these reasons, the appellate court found that the defendants did not owe Concrete Structures any additional attorney fees under the bond, and affirmed the circuit court's summary judgment ruling that Concrete Structures was not entitled to any additional attorney fees.

Concrete Structures/Sachi, J.V. v. Clark/Bulley/OVC/Power, 2024 IL App (1st) 240082.

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Survey of Ethics Law Cases

Illinois Supreme Court Overrules First District and Finds that Violation of Rule 1.5 (e) of the Illinois Rules of Professional Conduct Due to Failure to Memorialize a Fee Division Between Attorneys and Obtain Clients' Written Consent did not Preclude Attorneys from Recovering Their Fees in *Quantum Meruit*

In *Andrew W. Levenfeld and Associates, Ltd. v. O'Brien*, two attorneys from different firms agreed to represent the same clients in an estate dispute. These attorneys negotiated a contingency representation agreement with the clients that stated in relevant part:

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

The attorney-client agreement also provided that "[a]ny party hereto may terminate this agreement upon reasonable advance notice." However, termination of the attorney-client agreement "will not dispel [Clients'] obligation to pay for all work done prior to the end of the attorney-client relationship."

Although the attorneys had a verbal agreement how they would split the fee among themselves, the client agreement did not state how they would split the fee and the attorneys did not disclose this to the clients during their representation.

Over the course of one year and seven months, the attorneys represented the clients in several jurisdictions, spending in excess of 3,100 hours of attorney and paralegal time. After negotiations with opposing party closed the gap between the parties considerably, the clients terminated the representation and two months later, entered into a settlement that was close to the one negotiated by these attorneys.

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

The original attorneys argued that Rule 1.5(e) is not applicable to a claim in *quantum meruit* and that a violation of Rule 1.5(e) does not warrant a nondisciplinary remedy such as barring recovery for the reasonable value of legal services they provided to the clients.

Rule 1.5(e) provides:

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

Ill. R. Prof'l Conduct (2010) R. 1.5(e).

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

[W]hen determining whether an attorney is entitled to recover for its services in *quantum meruit*, Illinois courts recognize a distinction between an attorney-client agreement that is unenforceable because it contains an illegal term or fails to include a legally required term, versus one that is void as against public policy because the subject of the agreement is prohibited by law.

In calculating the amount of the fee, the circuit court noted that, although the attorney-client agreement was unenforceable due to the clients' termination notice, and despite the violation of Rule 1.5(e), the contingency fee structure contained therein could serve as a basis for calculating the amount of the award.

On appeal by the clients, the First District found the trial court erred by awarding a *quantum meruit* award amount equal to a negotiated contingency fee in a contract that violated Rule 1.5(e). The First District ruled that strict compliance with Rule 1.5 is mandatory and, therefore, the attorney-client agreement was void *ab initio*.

The First District remanded the case to the trial court to determine an appropriate attorney fee based on the reasonable value of attorneys' services without relying on the formula in a contingency fee provision that violated Rule 1.5(e).

The Illinois Supreme court, however, overruled the First District. The Supreme Court explained that, when determining whether an attorney is entitled to recover for its services in *quantum meruit*, Illinois courts recognize a distinction between an attorney-client agreement that is unenforceable because it contains an illegal term or fails to include a legally required term, versus one that is void as against public policy because the subject of the agreement is prohibited by law.

The Supreme Court found that the agreement in this case was merely unenforceable and not void as against public policy.

The Court reasoned that the purpose of Rule 1.5's disclosure requirement for fee-sharing arrangements was to preserve a client's right to be represented by an attorney of his or her choosing. The Court noted that, in this case, the clients were aware that the attorneys would jointly represent them and that both would be fully responsible for their case. In fact, both of these attorneys and their respective firms were named in the attorney-client agreement.

The Supreme Court further wrote that while Rule 1.5(e) requires written disclosure to the clients, it does not require provisions addressing the existence of a fee-splitting agreement or how the fees are to be divided to be included in the attorney-client agreement itself.

The Court also found that, while Rule 1.5(e) indicates that failure to abide by these requirements renders a fee splitting agreement unenforceable, it does not indicate that any related attorney client agreement is likewise unenforceable. For these reasons, the Illinois Supreme Court found that the attorney-client agreement in this case was valid on its face and the attorneys' failure to enter into a fee-splitting agreement in compliance with Rule 1.5(e) did not render the attorney-client agreement void ab initio as violative of public policy but, rather, rendered the agreement unenforceable, making quantum meruit recovery a matter of the circuit court's discretion.

The Illinois Supreme Court affirmed the circuit court's determination of the amount of the award and reversed the First District on this point.

Andrew W. Levenfeld and Associates, Ltd. v. O'Brien, 2024 IL 129599.

First District Finds that the Former Prosecutor Could Not Assert Attorney-Client Privilege Over His Communications with Attorney in the Prosecutor's Office Because the Privilege Belongs to the Prosecutor's Office, Not to the Prosecutor Personally

In *People v. Truenko and Horvat*, a criminal defendant was tried twice in the 1980's and tried a third time in 2020. During the second trial, the State introduced testimony of a jailhouse informant who claimed defendant confessed to the crime. This same testimony was also introduced by the prosecution during the third trial. By then, the jailhouse informant had left the United States and proved so elusive that he was presumed dead. During the third trial, the court deemed the jailhouse informant unavailable and, over defense's objection, read his prior testimony into evidence.

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Defense attorneys sought to subpoena the file of the lead prosecutor from the second trial and compel him to testify as a witness. They argued that the documents in the prosecutor's file could be exculpatory because they could cast doubt on the propriety of the lead prosecutor's dealings with the informant during the second trial and undermine the credibility of the jailhouse informant.

The prosecutor's office assigned one of its attorneys to respond to the subpoena for the former lead prosecutor's file. That lawyer conferred with the former lead prosecutor about responding to the subpoena and participated with other attorneys in a witness preparation session over Zoom before the former lead prosecutor took the stand to testify as a witness during the third trial.

During the examination by defense counsel, the former lead prosecutor revealed for the first time that, although the jailhouse informant was presumed dead, he knew that the informant was alive, continued to stay in touch with him, was the godfather to his daughter, and received an e-mail from the informant a few days earlier.

The case against the defendant in the third trial was dismissed with prejudice, and the prosecutor's office fired the lead prosecutor from the second trial and brought criminal charges against him. The State contended that the former lead prosecutor failed to disclose his relationship with the informant and withheld information about informant's whereabouts from the defense despite knowing that the informant could not be located by the defense and that his credibility was at issue in the trial.

During the trial of the former lead prosecutor, the State sought to introduce testimony from the attorney who assisted in responding to the file subpoena to establish that they discussed the issue of the jailhouse informant with the former lead prosecutor. The trial court found that, at a certain point, an attorney-client privilege arose between the attorney working on the response to the subpoena and the former lead prosecutor. The trial court found that from the former lead prosecutor's perspective at the time, it reasonably appeared that the attorney working on the response to the subpoena represented him in connection with the witness subpoena and excluded from evidence certain communications between them. The State filed this interlocutory appeal of this decision.

The First District overruled the trial court finding that, even if the attorney working on the response to the subpoena represented the former lead prosecutor in connection with the subpoena, that representation was limited, as a matter of law, to the former lead prosecutor's official capacity.

The First District noted that, pursuant to 55 ILCS 5/3-9005(a)(4), an assistant state attorney could only represent the former lead prosecutor in that former lead prosecutor's official capacity.

The appellate court reasoned that the key question was not whether the communications in questions were privileged, but who held that privilege—who was the client? Relying in part on comments to Ill. R. Prof'l Conduct R. 1.13, it decided that the privilege belonged to the prosecutor's office, not the former lead prosecutor personally. The prosecutor's office had affirmatively waived the privilege.

The First District further wrote that the former lead prosecutor was not entitled to a personal lawyer at taxpayer expense under 55 ILCS 5/3-9005(a)(4). The court believed that, as a government official conducting public business, the former lead prosecutor was entitled to an official lawyer, one whose ultimate obligation was to serve the public interest and uphold the law. The court empathized that by limiting assistant state attorneys to official-capacity representation, with a privilege that runs to and is controlled by the relevant government entity, this statute helps ensure that assistant state attorneys, as government lawyers, serve the interests of the public, not the personal interests of individual officials.

People v. Truenko and Horvat, 2024 IL App (1st) 232333.

First District Finds Crime-Fraud Exception to the Attorney-Client Privilege Inapplicable in a Defamation Case

In *McDonald v. Wagenmaker*, after a church fired its pastor and the pastor initiated arbitration, the church hired a law firm to look into its corporate structure and finances. The law firm sent a summary report of its preliminary findings to the board of the church. This summary was critical of the former pastor and accused him, inter alia, of misusing the church's financial resources for improper financial benefit.

The church posted on its website the summary along with a letter from accountants hired by the law firm summarizing the findings of the forensic analysis of the purported financial irregularities. On the same day, two of the church elders read a statement to the congregation summarizing the report from the law firm. The church also posted on its website the findings of its investigation and its reasons for terminating the pastor nine months earlier.

In response, the pastor sued the law firm and accountants. The pastor alleged that the statement by the elders to the congregation included intentionally false and salacious details not included in the published versions of the report from the law firm and the letter from the accountants. He also alleged that the law firm helped draft the statement on the church's website. He alleged that the law firm and

the accountants conspired to defame him to help the church gain an advantage in the arbitration.

During discovery, the pastor subpoenaed the law firm as well as another law firm that represented the church during the arbitration, seeking communications among them, the church and the accountants. The law firms moved to quash the subpoenas and declined to produce certain communications, claiming attorney-client privilege. The pastor filed a motion to compel, arguing, in part, that the crime-fraud exception to the attorney-client privilege applied.

After finding the crime-fraud exception could apply, the trial court addressed "whether plaintiff has made a showing sufficient to justify an in-camera inspection of certain documents." The court did not hold an evidentiary hearing but found that the pastor met his burden based on his pleadings. After reviewing the communications in camera, the trial court concluded that the attorney-client privilege had been waived.

The judge found that the law firms obtained permission from the accountants to publish materials that were required to be kept confidential during the initial engagement of the accountants. The court also determined that the lawyers provided the church with advice on a way to potentially avoid liability for defamation, not by avoiding defamation, but by looking to an ecclesiastical privilege that would have excused what otherwise would have been wrongful.

The trial court granted the motion by the law firms for a "friendly" order of contempt and the law firms appealed. The Illinois Appellate Court First District reversed the trial court. It found that the court erred in ordering in-camera review because it relied solely on the pastor's allegations and did not conduct an evidentiary hearing. Additionally, the First District addressed the question of whether the crime-fraud exception was applicable. The appellate court noted that the pastor alleged that the church and its attorneys conducted a public smear campaign to publicize false and defamatory information about him to his former congregation and the wider Evangelical Christian community and that the church's attorneys delayed responding to his arbitration demand until after the publication of the defamatory statements to gain an advantage in the arbitration.

The First District reasoned that, even if the pastor's allegations were true, the law firm's conduct was not fraudulent or akin to fraud, as it was not intended to induce the pastor to act, nor did the pastor rely on the truth of the statements. The appellate court stressed that the pastor alleged traditional defamation claims, not fraud, and presented no evidence showing that the church sought advice from its attorneys with the intent to defame him.

The First District believed that extending the crime-fraud exception to claims like the pastor's would risk deterring clients from seeking legal advice, chilling lawyers from giving advice, and eroding the attorney-client privilege's protection of legitimate communications.

McDonald v. Wagenmaker, 2024 IL App (1st) 230089.

Seventh Circuit Affirms Sanctions Against a Lawyer for Allegedly Assaulting Opposing Counsel during a Deposition and Misleading the Court About it, but Vacates Sanctions Against that Lawyer's Co-Counsels

In *Vega v. Chicago Board of Education*, three separate attorneys represented the plaintiffs. Two of them deposed one of the witnesses in the case. During this multi-hour deposition, the defendants' attorney raised constant and numerous objections.

After the deposition concluded, one of the attorneys for the plaintiffs swore at the defendants' attorney and asked her what her problem was. The defendants' attorney reentered the room and asked the court reporter to go back on the record. The plaintiffs' attorney responded, "No, this is personal," and moved in the defendants' attorney's direction.

The defendants' attorney claimed that, after this, the plaintiffs' attorney physically assaulted her by pushing her out of the room. The plaintiffs' attorney contended that she was simply trying to leave the room and made "unintentional contact" with the defendants' attorney on her way out. The defendants' attorney called the police, pressed charges against the plaintiffs' attorney, filed a complaint with the Illinois Attorney Registration and Disciplinary Commission, and brought the incident to the attention of the district court in the underlying case characterizing the plaintiffs' attorney's conduct as "criminal assault and battery."

The district court gave the plaintiffs' counsel an opportunity to respond to the allegation in a future brief with respect to a motion to compel the deposition of a different witness. The plaintiffs' attorney took the opportunity to accuse the defendants' attorney of violating the rules of professional conduct and biasing the court by presenting the assault allegation, but did not directly address the defendants' attorney's allegations of what happened during the deposition.

During another hearing a few months later, the court asked about the status of the ARDC and police investigations into the incident, prohibited the plaintiffs' and defendants' attorneys in question from

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participating in further depositions in the case, and scheduled an evidentiary hearing about the alleged assault.

Although the plaintiffs' attorney in question initially expressed her intention to testify at the hearing, she retained counsel who later explained to the court that she would not testify. The court did hear the testimony of the other attorney for the plaintiffs who was in the room, the defendants' attorney, the deponent, and the court reporter.

Once all the evidence had been presented, the court informed the parties that they would be allowed to present any additional information in post-hearing briefs. In her post hearing brief, the defendants' attorney deferred to the court on "the appropriate sanctions for [the plaintiffs' attorneys] conduct and misrepresentations," but requested "the attorney's fees and costs incurred as the direct result of [the plaintiffs' attorney's] conduct." The plaintiffs' attorney submitted a brief in support of the discovery sanctions against the defendants' attorney and the defendants, but did not respond to the plaintiffs' attorneys' request for sanctions.

The court found that "[the plaintiffs' attorney] swore at [the defendants' attorney] and then intentionally pushed her with force sufficient to knock her backwards." It also found the plaintiffs' attorney's description of the contact as "unintentional" to be false and vexatious.

As a sanction for her verbal and physical attack on the defendants' attorney, the court prohibited the plaintiffs' attorney from participating as an attorney in the case and found that "Plaintiffs' counsel must reimburse Defendants for the reasonable attorney fees and costs they incurred in litigating the incident." The court overruled the plaintiffs' counsel's arguments that they did not have adequate notice of the sanctions, the sanctions were not warranted, and the court should have abstained from issuing the sanctions given the ongoing ARDC investigation.

On appeal, the Seventh Circuit Court of Appeals found that the plaintiffs' attorney accused of assault had sufficient notice of the potential sanctions against her and the court did not abuse its discretion in issuing the sanctions against her under the circumstances. The appellate court relied on the fact that the district court found that the plaintiffs' attorney engaged in bad faith when she lied to the court about how the alleged assault transpired. It stressed that the court found that "the only reason the court and the parties engaged in the exercise of getting to the bottom of what happened after the deposition was plaintiffs' counsels' representations" about what happened. The appellate court agreed with the district court that the plaintiffs' attorney must have known that her representations were false because she was a direct participant in the confrontation.

The Seventh Circuit also found that the district court did not need to hold off on its sanctions during the ARDC's investigation because the district court's sanction for the plaintiffs' attorney's conduct in the federal case would have no effect (let alone an adverse effect) on the ARDC's decision of whether and how to discipline the plaintiffs' attorney. The Seventh Circuit held that the mere fact that the district court and the ARDC could run parallel investigations and each impose sanctions for the attorney's behavior is not enough to require abstention of the court.

The order of the district court, however, entered sanctions against "Plaintiffs' counsel". Besides the attorney accused of assault, two other attorneys represented the plaintiffs. The Seventh Circuit vacated the sanctions against the other two attorneys. The Seventh Circuit reasoned that the actions of the two other attorneys were the subject of no hearing; defendants did not seek sanctions against them; and they had no chance to respond to or defend themselves against sanctions. The appellate court found that these two attorneys had no notice that they were at risk of being sanctioned or the reason they might be sanctioned and the sanction order itself could not provide the requisite notice. The Seventh Circuit further believed that the sanction order stated no basis for sanctioning these two attorneys.

Vega v. Chicago Board of Education, 109 F. 4th 948 (7th Cir. 2024).

Fourth District Finds that Defense Counsel had a *Per Se* Conflict of Interest Due to Simultaneous Involvement of the Same Prosecutor's Office and Judge in Both Defense Counsel's and Defense Counsel's Client's Cases

In *People v. Harris*, an attorney representing a criminal defendant accused of first degree murder had herself already pled guilty to a felony forgery charge brought by the same prosecutor's office involved with prosecuting her client. The judge who presided over the client's trial was the same judge who had accepted the attorney's plea in her own case and sentenced her to a two-year term of second-chance probation, which the attorney was still serving under this judge's direct supervision while representing the client.

After the jury found the defendant guilty, this defense attorney moved for a new trial. Six days after the judge indicated that he was required to grant the defendant a new trial, the prosecutor's office filed a petition to revoke the defense attorney's probation.

The defense attorney filed a motion to substitute the judge for cause prior to the second trial. Another judge received assignment

to consider the motion. The attorney then amended the motion, disclosing that the prosecutor's office had filed a petition to revoke her probation. The lawyer stated in the motion that, at best, this development compromised her relationship in this particular court, and that her ability to fully represent her client seemed compromised. She filed a motion to withdraw. After the judge stated that he did not have the authority to consider the attorney's motion to withdraw, the attorney withdrew the motion to substitute the judge.

After being convicted at the second trial, the defendant appealed, arguing, *inter alia*, that defense counsel provided ineffective assistance.

The Illinois Appellate Court Fourth District found that the defense attorney had a *per se* conflict of interest in this case because the same prosecutor's office was attempting to revoke her second-chance felony probation while simultaneously prosecuting her client. The appellate court further believed that the record did not reflect that the client was ever admonished regarding the existence and significance of the conflict and, as a result, the record did not reflect that the client made a knowing waiver of her attorney's per se conflict of interest.

The Fourth District believed that a reasonable explanation for the attorney's withdrawal of the motion to substitute the judge in her client's case for cause was that, after the State filed the petition to revoke her probation, she thought proceeding on the motion could negatively impact her own personal situation in the revocation proceedings.

The Fourth District further noted that, when the case was transferred back to the trial judge, the attorney asked to withdraw, but did not inform the judge that she was on probation, that he would likely be presiding over the probation revocation proceedings in her own criminal case, and that if he revoked her probation, he would be resentencing her on a felony charge.

The appellate court further determined that it was difficult to find an explanation for defense counsel's failure to take several actions on defendant's behalf during the sentencing hearing, except for a possible personal desire to neither anger nor aggravate the prosecutor's office or the judge.

The appellate court stressed that it is important for attorneys and trial courts not to be reluctant about addressing potential conflicts at the earliest opportunity. When a potential conflict is disclosed, the trial court then has the opportunity to admonish the defendant of the potential conflict and the significance of the potential conflict. The defendant can then either make a knowing waiver of his right to conflict-free counsel or use a different attorney. Early identification of conflicts fosters transparency in the judicial system, increases the public's confidence in the legal system, and preserves judicial resources.

The Illinois Appellate Court Fourth District found that the defense attorney had a *per se* conflict of interest in this case because the same prosecutor's office was attempting to revoke her second-chance felony probation while simultaneously prosecuting her client.

People v. Harris, 2024 IL App (4th) 230269.

Seventh Circuit, Due to Lack of Standing, Lets Stand Sanction against Attorney for Directly Contacting Parties Represented by Counsel and Knowingly Making False Statement to the Court

In *Mullen v. Butler*, the district court approved a class action notice and advised the class members that they could opt out by a deadline a few months later. Neither the parties nor their attorneys could communicate with putative class members.

Defendants then proceeded to contact prospective class members urging them to opt out of the class. Defendants communicated with prospective class members at least ten times. Defendants' employee also e-mailed prospective class members both through a mass e-mail and individual e-mail to specific class members. In response to one of the class members writing that he decided to opt out, the defendants' employee replied to him thanking him for the show of support. The defendants' employee then forwarded his mass email to class members and forwarded his communications with this specific class member to defendants' attorney as part of a longer email string.

After the plaintiff and the class counsel notified the district court that they suspected the defendants were improperly communicating with the class members and encouraging them to opt out, the court held a status hearing. During this hearing, the court asked the attorney for defendants if defendants were communicating with the class members "in a way other than the only way that it's

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appropriate to do that, which is through the notice." The attorney for defendants responded with unequivocal denial. She represented that defendants received inquiries from class members and responded that they could not talk about it.

Despite this response, both the defendants and their attorney continued to communicate with class members about the suit. Defendant's office administrator emailed two class members with instructions for opting out of the class. One of the defendants responded to a class member's inquiry about opting out. After receiving what appeared to be a forwarded email conversation about opting out of the class, the attorney for defendants directly contacted a class member involved in the exchange.

After the plaintiff submitted to the court copies of defendants' e-mails and text messages with the class members regarding opting out of the suit, including an e-mail forwarded to the defendants' attorney, the court held another status hearing. At the hearing the court asked the attorney for defendants if she wanted to amend her statement during the first hearing that defendants did not discuss the lawsuit with the class members. The defendants' attorney then acknowledged her receipt of a copy of defendants' employee's mass email to class members, and conceded the email was an inappropriate communication. The attorney explained her contrary statement at the first hearing by asserting that she had received that mass email as part of an email conversation with more than one message and that she "did not see" the improper message.

The plaintiff moved for sanctions against both defendants and their counsel for improperly interfering with the class notice process.

The district court entered monetary sanctions against defendants. The court also ruled that defendants' attorney's direct email to a class member violated ABA MODEL RULE OF PROFESSIONAL CONDUCT Rule 4.2, which prohibits attorneys from directly contacting parties they know are represented by counsel. The court also found that this attorney's statement to the court at the first status hearing violated ABA MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.3, which prohibits attorneys from knowingly making false statements to the court.

The court believed that this attorney's characterization of the defendants' statements to class members contained a significant falsehood. It further found that the attorney "took deliberate action to avoid confirming a high probability of wrongdoing" which "amounts to willful blindness" that was "quite serious" and "prejudiced the class." Taking into account the attorney's "relative lack of practice experience," the district court imposed a non-monetary sanction. The court reprimanded that attorney for her false statement to the court and directed her to complete twice the required amount of professional responsibility hours for her next continuing legal education cycle imposed by the state bar.

Defendants appealed sanctions both against them and their attorney to the Seventh Circuit Court of Appeals. On appeal, defendants contended that sanctions against their attorney were not appropriate because she acted in good faith, and she did not knowingly or intentionally violate the rules of ethics.

The Seventh Circuit, however, held that it did not have jurisdiction to address this issue because the defendants, and not the attorney herself, appealed the sanctions. The Seventh Circuit followed the Seventh Circuit case law that a party cannot appeal a sanction against the party's attorney and let the sanctions against the attorney stand.

Mullen v. Butler, 91 F.4th 1243 (7th Cir. 2024).

First District Finds that Defendant's Trial Counsel was Ineffective for Failing to Move to Suppress Client's Arrest

In *People v. Page*, the police officer, while monitoring a remote police observation device camera, observed the defendant four miles away placing an object into his jacket pocket. Although the object appeared for a split second, the police officer believed it to be a firearm magazine. According to this officer, when he and two other policemen arrived to investigate, the defendant was standing next to two cars and threw something into one of the cars before attempting to flee on foot. Police could not determine what the defendant threw into the car. An officer recovered a firearm from the front passenger seat of the other car. Police did not recover the keys to that car and the officer did not observe the defendant drive that car. The defendant had two prior felony convictions.

The only witness for the prosecution at trial was the police officer who observed the defendant place the suspicious object into the jacket pocket and who later recovered the gun from the car. The defense rested without presenting any witnesses or evidence.

Before ruling, the trial judge requested a replay of portions of the remote camera through which the police officer first spotted the defendant and videos from the police body cameras. The prosecution also introduced into evidence the photograph from the remote camera that allegedly showed a gun magazine protruding from the defendant's jacket when the officer spotted him on the camera.

Although the police officer who testified that the object in the photo was the handle or magazine portion of the firearm, the trial judge stated in his ruling that he could not tell from the photo what the object was and it could possibly be keys in the defendant's

While the appellate court did not determine if the motion to suppress would have been successful, it did find that a motion to suppress had a reasonable probability of success, and trial counsel should have pursued it. The First District also took note of the fact that during the trial, defense counsel's opening statement was four sentences. It found that defense counsel was ineffective.

hands. The court, however, believed that in the video, defendant's hands moved in a manner in which one's hands would move when you're racking a firearm.

The trial court found the defendant guilty of being an armed habitual criminal. On appeal, the State argued that the police officer had probable cause to arrest the defendent and search the car (where the gun was found) after the officer observed, via remote camera, the defendent put the extended gun magazine into his jacket.

The Illinois Appellate Court First District, however, disagreed. The appellate court noted that the trial judge after watching the footage could not tell what the defendant had in his pocket, but, instead, concluded that defendant's conduct in the footage was consistent with someone possessing a firearm. The appellate court further noticed that possession of a firearm and large capacity magazine was legal in the jurisdiction. The First District observed that the police officer would have needed to be familiar with the defendant's criminal history (which he was not) to have suspected that the defendant's possession of the firearm was illegal.

While the appellate court did not determine if the motion to suppress would have been successful, it did find that a motion to suppress had a reasonable probability of success, and trial counsel should have pursued it. The First District also took note of the fact that during the trial, defense counsel's opening statement was four sentences. It found that defense counsel was ineffective.

People v. Page, 2024 IL App (1st) 220830.

Fourth District Rejects Defendants Claims that Defense Counsel was Ineffective and Finds Counsel's Actions were a Matter of Sound Trial Strategy

In *People v. Thornton*, the defendant appealed his conviction for first degree murder, arguing among other things, that the trial court erred in not appointing him a new counsel, despite what defendant claimed was ineffective assistance by his attorney.

Defendant claimed four separate acts or omission of his counsel constituted ineffective assistance. He claimed that counsel's failure to call his cousin as an alibi witness was one such act. However, defendant's counsel asserted to the trial court that he met with the witness and the witness[']s recollection was weak and problematic and that the witness had a felony conviction. Counsel stated that it was a strategy decision not to call him. The trial court also noted that the case against defendant was largely circumstantial and defendant's counsel calling this witness would have distracted from defendant's stronger defenses.

Defendant further claimed that his counsel's second omission was failure to contact a confidential witness who, according to discovery documents, allegedly heard somebody other than defendant admitting to killing the victim. Defendant's counsel, however, stated to the trial court that this was a tactical decision as he did not want to get into "into a battle of the [confidential sources]." He wanted to make the State's confidential source look bad. He stated he did not want to assert to the trier of fact that they should not believe the State's confidential source but they should believe the defendant's confidential source's hearsay statement.

The third omission the defendant claimed was the failure to address a letter from one of the witnesses against the defendant. The letter allegedly stated that the witness lied about the defendant, knew the defendant was innocent, and that the witness was on drugs at the time he gave the statement to the police. Defendant's counsel, however, stated to the trial court that the letter was not an affidavit and based upon his experience this type of evidence would not have been effective and would have distracted from defendant's theory and strategy.

The defendant claimed that the last omission of his counsel was that counsel allegedly failed to adopt his pro se filings that contained affidavits from two witnesses, who averred they heard two witnesses against the defendant say that the defendant was innocent. The trial court, however, represented that defendant's counsel actually filed detailed post-trial motions which addressed the legal issues in which

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counsel believed had a legal basis. The trial court found that the matters raised in defendant's pro se filings were either addressed by counsel or legally immaterial.

The trial court found that all four alleged omissions pertained to defense counsel's sound trial strategy and did not amount to ineffective assistance. The Illinois Appellate Court Fourth District agreed and affirmed the decision of the trial court.

People v. Thornton, 2024 IL App (4th) 220798.

Seventh Circuit Holds that a Non-Lawyer Cannot Represent a Limited Liability Company

In *AsymaDesign LLC v. CBK & Assocs. Mgmt., Inc.*, a landlord evicted from its location at the mall a limited liability company operating a virtual reality ride after that company stopped paying rent. The limited liability company subsequently dissolved.

Almost four years later, the former owner of the limited liability company filed a discrimination suit against the landlord for not allowing the company extra time to pay rent. The district court dismissed the suit because the limited liability company, and not its owner, held the lease and was the real party in interest. The former owner of the limited liability company then filed an amended complaint adding the limited liability company as a plaintiff. The district court dismissed the amended complaint because the limited liability company had not even begun to litigate until five years after its dissolution, exceeding the benchmark allowed by Illinois law.

The limited liability company appealed. It was the sole appellant named in the appeal. The only person who signed the notice of appeal was the former owner of the corporation, who was not a lawyer. The landlord objected to the lack of an attorney's signature on the notice of the appeal.

The only argument the limited liability company offered in response was that, under Illinois corporate law, any person may represent a corporation.

The Seventh Circuit first noted that, as a non-lawyer, the former owner of the limited liability company could not represent the limited liability company or anyone other than himself. The Seventh Circuit relied on FED. R. CIV. P. 11(a) which states "Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented."

The appellate court found three problems with the only response of the limited liability company on this point. First, an LLC is not a corporation (separate statutes apply to LLCs and corporations); second, the Illinois statutory reference did not supersede the norm that a member of the bar is needed to represent a corporation in court; and third, in the opinion of the court dispositive, federal rules govern the procedure for litigation in federal court.

The Seventh Circuit Court of Appeals declared that it was publishing this opinion not just to make what it believed to be obvious points but also to urge all lawyers to read and follow Seventh Circuit's Practitioner's Handbook for Appeals (2020 ed.)

The Seventh Circuit Court of Appeals declared that it was publishing this opinion not just to make what it believed to be obvious points but also to urge all lawyers to read and follow Seventh Circuit's Practitioner's Handbook for Appeals (2020 ed.), which is available on the court's web site at https://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf.

AsymaDesign LLC v. CBK & Assocs. Mgmt., Inc., 103 F.4th 1257 (7th Cir. 2024).

Northern District of Illinois Finds that Defendants' Investigation of the Plaintiff was Protected by Attorney-Client Privilege and that Defendants Did Not Waive the Privilege

In *Guster-Hines v. McDonald's USA, LLC*, two plaintiffs sued defendants for discriminatory practices against them. Defendants, with the consent of plaintiffs, placed both plaintiffs on paid leave of absence. Defendants hired outside counsel to investigate the legal risks associated with both plaintiffs.

Defendants claimed an attorney-client privilege with respect to the investigation into both plaintiffs. However, defendants intentionally waived the privilege over the investigation into one plaintiff, yet continued to assert it over the investigation into the second plaintiff. Defendants produced to plaintiffs a non-privileged memorandum authored by the attorney conducting the investigation of the second

plaintiff summarizing some of the conclusion of the investigation.

The memo recommended that, if the second plaintiff returns to the office, she should "be placed in a non-operator facing role." The memo also stated that the second plaintiff was a good leader and that her return would not have a significantly negative impact on the employee morale and work environment. The investigation into the first plaintiff concluded that her return to the office would cause a tremendous disruption and create legal risks for defendants. Defendants terminated the first plaintiff after the investigation.

Plaintiffs objected to the decision of the magistrate judge to deny their motion to override the defendants' assertion of attorney-client privilege over the investigation of the second plaintiff, to allow plaintiffs to depose the attorney conducting the investigation and to obtain that attorney's handwritten notes.

Plaintiffs argued to the district court that the investigation of the second plaintiff was not privileged because it was undertaken for business purposes rather than to provide legal advice. They further claimed that, even if the investigation was privileged, defendants waived that privilege by both producing the memo summarizing the investigation of the second plaintiff and by allowing discovery about the investigation of the first plaintiff. They also argued that the fairness doctrine compelled the court to allow discovery regarding the entirety of the investigation of the second plaintiff.

Plaintiffs argued that the investigation of the second plaintiff could not have been for a legal purpose and thus must have been for a business purpose because defendants failed to identify a specific and concrete legal risk that preceded the investigation. The district court, however, rejected that argument, relying on the authority that attorney-client privilege protects confidential communications between a lawyer and her client "[w]here legal advice *of any kind* is sought . . . from a professional legal advisor in [her] capacity as such." [emphasis in the original].

The district court also found that production of the memo summarizing the investigation did not amount to a waiver of the privilege because the parties agreed that the memo was not privileged and was not prepared for the purposes of providing legal advice.

The district court then rejected the plaintiffs' argument that disclosure of the investigation of the first plaintiff waived the privilege of the investigation of the second plaintiff because it was a "joint investigation."

Plaintiffs stressed that defendants' attorney conducted investigations into both plaintiffs, interviewed many of the same individuals for both investigations at the same time, and took notes regarding both plaintiffs in the same notepad.

The district court, however, found that defendant's attorney was separately investigating legal risks related to "*each* [p]laintiff." [emphasis in the original]. The court noted that the lawyer investigated both plaintiffs, prepared separate reports regarding both plaintiffs, and ultimately concluded that different actions were appropriate for each plaintiff. The court found that defendants were not selectively waiving privilege over discrete aspects of one investigation. The court concluded that the fact that both investigations were headed by the same person who took notes in the same notepad did not transform two distinct investigations into distinct individuals with distinct findings and outcomes into one joint investigation.

Finally, the court rejected plaintiffs' arguments based on the fairness doctrine because, in the opinion of the court, plaintiffs failed to explain how waiving privilege over the investigation of the first plaintiff, but not over the investigation of the second plaintiff, was in any way unfair.

The district court found that the magistrate judge did not clearly err in finding that the investigation of the second plaintiff was protected by attorney client privilege.

Guster-Hines v. McDonald's USA, LLC, 2024 WL 4476155 (N.D. Ill. 2024).

About the Author

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Survey of Insurance Law Cases

Illinois Appellate Court Adds to Law Interpreting Professional Liability Exclusion

In *Allied Design Consultants, Inc. v. Pekin Insurance Company*, 2024 IL App (4th) 230738, the Illinois Appellate Court Fourth District found that the professional liability exclusions in an architect's general liability policy and umbrella policy applied to prevent coverage for lawsuits filed by staff and students after an exhaust pipe for a water heater separated and resulted in a carbon dioxide leak in a middle school. The plaintiffs sued, among others, Allied Design Consultants, which was registered in the State of Illinois as a "design firm." *Allied*, 2024 IL App (4th) 230738, ¶ 11.

In the underlying lawsuit, the plaintiffs alleged that Allied had contracted with the school district to perform professional architecture services related to the construction of an addition to the middle school. Allied also allegedly "designed and/or constructed" the mechanical systems in the school addition, which included "domestic hot water heaters, hot water boilers and an air handling unit located in a mechanical room along with the venting systems appurtenant thereto." *Id.* ¶ 10. Plaintiffs also alleged that Allied performed a Health/Life Safety Survey pursuant to the Health/Life Safety Code for Public Schools (23 Ill. Adm. Code 180.310 (2005)) (Health/Life Safety Code) and prepared a Health/Life Safety Survey Report from that survey. *Id.* ¶ 11. The plaintiffs alleged Allied owed duties related to that survey; duties under the Illinois Architecture Practice Act of 1989 and the Health/Life Safety Code; duties pursuant to the public policy of Illinois; a duty to perform its work in good/workmanlike manner in accordance with industry standards, customs and practice; and a common law duty of ordinary care. *Id*. As a proximate result of the breach of one or more of the duties, the exhaust vent pipe separated resulting in a leak of carbon monoxide gas that injured the plaintiffs. *Id.* ¶ 12.

Allied sought coverage for the underlying lawsuit under a primary policy and an umbrella policy, each of which contained a professional liability exclusion. *Id*. ¶¶ 12, 13. The defendant-architect argued the exclusions did not prevent coverage since the plaintiffs' complaint included allegations of a non-professional nature, such as negligently failing to warn, maintain, repair, and follow the manufacturer's instructions. *Id.* ¶ 34.

The court rejected Allied's argument, finding that all allegations against Allied were tied to the failure to adequately perform its professional services namely, conducting the Health/Life Safety Survey, the failure to discover or report the mechanical system in violation of the Safety Code, or were tied to the architectural services Allied contracted with the school district to perform for the construction project. As each allegation of negligence involves "specialized knowledge, labor, or skill, and is predominately mental or intellectual as opposed to physical or manual in nature," all allegations against Allied fell within the professional liability exclusion. *Allied*, 2024 IL App (4th) 230738, ¶¶ 38, 40. As a result, the court found that the professional liability exclusion applied to prevent coverage.

Allied Design Consultants, Inc. v. Pekin Insurance Company, 2024 IL App (4th) 230738.

Court Grants Summary Judgment for Insurer Where Insured Repeatedly Materially Misrepresented the Extent of Their Damages

In *Pittsfield Development LLC v. Travelers Indemnity Company*, the court granted summary judgment for the insurer, Travelers Indemnity Company, on the basis that the policy was void after the insured violated the terms of the policy by materially misrepresenting the extent of their damages.

The insurance dispute began after two pipes burst in the Pittsfield Building in downtown Chicago causing water damage to the first 10 floors. The Pittsfield Entities, as owner of the building, filed a claim with Travelers. Both sides disputed the amount in damages, with Travelers ultimately paying out $300,000 for the claim after its adjustment. Pittsfield then sued for breach of contract claiming Travelers failed to pay the full amount of the loss—which they believed to be more than $8 million. Travelers brought a counterclaim for breach of contract claiming Pittsfield intentionally made a misrepresentation of its damages that voided the policy. The Travelers' insurance policy contained a provision rendering it void in the event of fraud or misrepresentation by the insured.

Pittsfield hired a licensed public adjuster to assist in submitting their claim and preparing an estimate. The public adjuster inspected the property, and the estimate included more than 900-line items identifying work he believed was necessary to repair the property.

The Pittsfield Entities relied on this estimate in their claim and argued they were owed the balance after Travelers' payment.

The specific line item at issue is one for "Lead Paint & Asbestos Removal," based on a purported "Bid Item" from Bluestone Environmental for $950,000. The policyholder's public adjuster testified the "Bid Item" was an oral estimate received over the phone from an employee of Bluestone Environmental. Travelers contends this quote or estimate was never given, a position supported by deposition testimony from Bluestone Environmental president and the employee involved in the phone call, both of whom had no knowledge of a $950,000 verbal estimate ever being given. Travelers argued that, per the public adjuster's own testimony, any such oral quote would, at best, be a "loose and generalized" estimate for work that could "possibly" be needed "if" there was asbestos.

The court concluded that as a matter of law the Pittsfield Entities made a material and intentional misrepresentation by taking the purported Bluestone estimate and presenting it to Travelers as proof of their damages. The court agreed with Travelers that even accepting there was an oral bid, it was conclusory at most. The court admonished the Pittsfield Entities for doubling down on their claim that they were owed those damages by including it as part of the disclosure of their damages expert, who based his opinions on the public adjuster's estimate that included the $950,000 line item at issue, without establishing the work was even required. The court emphasized this was not a case involving a simple discrepancy in damage estimates, or a good faith disagreement of some work item. Rather, Pittsfield Entities had no basis to cite the "quote" as proof they were entitled to the payment and provided none in their summary judgment response. The court noted that the question was not whether the abatement was actually needed, but whether Pittsfield Entities was truthful when it repeatedly claimed that the abatement was; Pittsfield Entities was not because it had no proposal saying so.

The court acknowledged that while it was somewhat unusual to resolve the issue of intentional misrepresentation in the summary judgment phase, other courts have entered judgment in similar fashion when the insured grossly inflated their damages to the extent there was no way their conduct could reasonably be considered innocent.

Pittsfield Dev. LLC v. Travelers Indem. Co., No. 18 CV 06576, 2024 WL 3292797 (N.D. Ill. July 3, 2024).

Lack of Express Language Fatal to Additional Insured Coverage

The Illinois Appellate Court First District affirmed the circuit court's grant of summary judgment for the defendant State Auto Mutual Insurance Company where there was no basis to find that the plaintiffs were additional insureds under the insurer for the defendant's policy.

The dispute arose between the plaintiffs AXIS Insurance Company, as subrogee for multiple Chicago White Sox companies (White Sox plaintiffs), and the defendant State Auto, insurer for the defendant We Clean Maintenance and Supplies, Inc. (We Clean). From 2008 through 2012, White Sox plaintiffs entered into written agreements with We Clean in which We Clean agreed to provide cleaning services at White Sox home games. In 2011, a patron was injured while walking down a ramp. White Sox plaintiffs attempted to tender the defense of that suit to State Auto as an additional insured under We Clean's insurance policy. State Auto refused to accept, claiming White Sox plaintiffs were not additional insureds under We Clean's policy.

Both parties moved for summary judgment, primarily concerned with whether the 2011 service contract was a written agreement that White Sox plaintiffs be added as additional insureds, thus affording them coverage under We Clean's State Auto policy. State Auto argued that the absence of an indemnification and insurance agreement meant We Clean and White Sox plaintiffs never expressly agreed to add White Sox plaintiffs as additional insureds.

The court found that the service contract did not expressly require We Clean to name White Sox plaintiffs as additional insureds under its policy. The court stated a lack of express language is fatal to a claim that a party is an additional insured. The service contract stated We Clean was required to comply with White Sox plaintiffs' insurance requirements. Here, however, there were no written insurance requirements in 2011. Without a written agreement expressly stating White Sox plaintiffs were to be named as additional insureds under We Clean's policy, there was no basis for finding that they were, in fact, additional insureds.

The court rejected the argument that "insurance requirements" was an ambiguous term thus warranting extrinsic evidence to be considered in determining the terms of the contract. The court found that We Clean was required to comply with the insurance requirements, but in 2011 there were no insurance requirements for We Clean to follow. Where the contract itself is clear and unambiguous, extrinsic evidence is not allowed. Thus, based on the agreement between the parties, the court found no basis to include White Sox plaintiffs as additional insureds.

Chicago White Sox, Ltd. v. State Automobile Mutual Insurance Company, 2023 IL App (1st) 230101.

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Failure to Comply with Regulatory Requirements is Not an Occurrence

The Illinois Appellate Court First District affirmed the grant of judgment on the pleadings finding that the plaintiff-insurers (Insurers) owed no duty to defend the defendant 401 North Wabash in a lawsuit filed against it by the State of Illinois.

The State of Illinois sued 401 North Wabash alleging that the property's HVAC system released a contaminant into the Chicago River. The trial court granted the state's motion for judgment on the pleadings and found 401 North Wabash liable for violating environmental laws and regulations.

In a subsequent case regarding the Insurers' duty to defend, Insurers sought a declaration that they owed no duty to defend or indemnify 401 North Wabash in the underlying litigation. The Insurers filed motions for judgment on the pleadings and claimed that: (1) there was no alleged occurrence under the policies, (2) the underlying complaints did not seek to recover damages for property damage, and (3) even if coverage requirements were otherwise satisfied, the pollution exclusions precluded coverage. The circuit court granted the Insurers' motions, and the Insurers appealed.

The appellate court focused on whether the conduct in the underlying litigation constituted an occurrence under the policies. An occurrence was defined under each policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." 401 North Wabash contended that the relevant inquiry is whether it expected or intended for its withdrawal of river water to cause harm to aquatic life. The Insurers maintained that the proper focus was on the defendant's intentional operation of its water intake structure in the absence of a valid NPDES permit.

The court agreed with the Insurers, finding that the complaints make clear that the challenged conduct is the failure to comply with the Clean Water Act and its regulations, not the impact of the water intake structures on fish and other aquatic wildlife. 401 North Wabash was sued for failing to comply with regulations that require it to study and minimize the impacts of its cooling operations on fish. As such, the failure to comply with statutory and regulatory requirements could not be considered an occurrence. Regardless, the court also would find no occurrence even if the impact on wildlife was the relevant focus. The court found that 401 North Wabash was aware that impingement and entrainment were natural and ordinary consequences of operating its cooling water intake structure. Therefore, the conduct by 401 North Wabash could not be considered an occurrence because the discharge from its HVAC system was an expected result and not accidental. The conduct in the underlying complaint thus did not constitute an occurrence under the insurance policies, and the Insurers had no duty to defend or indemnify 401 North Wabash.

Because the court affirmed no duty to defend due to lack of an occurrence, it did not reach the issues of whether the complaints sought to recover monetary damage for property damage or whether the pollution exclusions precluded coverage.

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

The Illinois Appellate Court Applies the Common Law Innocent Insured Doctrine in the Context of a Valid Misappropriation Exclusion under the Policy to Uphold Judgment for Plaintiff

In *Dana v. Great Northern Insurance Company*, 2024 IL App (1st) 230224, the Illinois Appellate Court First District was called upon to interpret a misappropriation exclusion in an insurance policy and to determine whether the innocent insured exception applied. Great Northern Insurance Company (Great Northern) issued an insurance policy on the plaintiff's engagement ring valued at $139,906. *Dana*, 2024 IL App (1st) 230224, ¶ 5. Both the plaintiff and her husband were named insureds under the policy. In March 2018, the plaintiff's husband took her ring after an argument and told the plaintiff in a recorded conversation a few weeks later that "she would never see the ring again." *Id.* After filing for divorce, the plaintiff obtained an emergency order of protection requiring her husband to return the engagement ring. *Id.* In June 2018, a gemologist confirmed that the natural diamond in the ring had been replaced with a synthetic diamond. *Id.*

The plaintiff initiated a claim with Great Northern for the loss of her diamond in January 2019. *Id.* ¶ 6. Great Northern conducted an investigation, which included examinations under oath of both the plaintiff and her husband. *Id.* The plaintiff reported her husband substituted a synthetic diamond, and her husband indicated the diamond "may have been substituted by a pawn shop" by the plaintiff's father to frame him. *Dana*, 2024 IL App (1st) 230224, ¶ 8. Great Northern denied coverage under the misappropriation exclusion of the policy. *Id.* ¶¶ 6-7. The misappropriation exclusion provided, in relevant part: "We do not cover any loss caused by the taking or other misappropriation by or directed by a person named in the Coverage Summary, that person's spouse, a family member, or a person who lives with you." *Id.* ¶ 7.

The plaintiff filed a complaint for declaratory judgment and breach of contract alleging that the misappropriation clause was

"vague, ambiguous, and undefined" and that she was entitled to coverage under the innocent insured doctrine. *Id.* ¶ 9. The plaintiff and Great Northern filed cross-motions for summary judgment. *Id.* The trial court found that the misappropriation clause was clear and excluded coverage where one of the insureds substituted the diamond with a synthetic one. *Id.* ¶ 10. The trial court further held that the innocent insured doctrine applied to the policy. *Id.* Because both parties stipulated that the plaintiff was innocent, the trial court entered judgment in favor of plaintiff. *Dana*, 2024 IL App (1st) 230224, ¶ 11.

On appeal, the appellate court upheld the judgment. *Id.* ¶ 33. It found that the language of the misappropriation clause in the policy was clear and unambiguous. The court looked to a prior Illinois Supreme Court case for the meaning of "or," which "marks an alternative indicating the various parts of the sentence which it connects are to be taken separately." *Id.* ¶ 19 (quoting *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130 (2006)). While misappropriation was not defined in the policy, the court looked to definitions in Black's Law Dictionary and the Merriam-Webster Online Dictionary. *Id.* ¶ 20. The court ultimately held that the exception was applicable because the evidence indicated that one of the insureds took the ring or otherwise wrongly made use of the diamond. *Id.*

The common law innocent insured doctrine allows an insured who is innocent of wrongdoing to recover despite the wrongdoing of another insured. Looking to *Wasik v. Allstate Insurance Co.*, 351 Ill. App. 3d 260 (2d Dist. 2004), *State Farm Fire & Casualty Ins. Co. v. Miceli*, 164 Ill. App. 3d 874 (1st Dist. 1987), *Economy Fire & Casualty Co. v. Warren*, 71 Ill. App. 3d 625 (1st Dist. 1979), and *West Bend Mutual Ins.Co. v. Salemi*, 158 Ill. App. 3d 241 (2d Dist. 1987), the appellate court held that the doctrine applied because the misappropriation exclusion did not include a "clear statement that the policy was void as to *all* insureds in the event of wrongdoing." *Id.* ¶¶ 29-30.

Dana v. Great Northern Insurance Company, 2024 IL App (1st) 230224.

Illinois Supreme Court Holds that Policy Limiting UM Coverage to Occupants of an Insured Vehicle Violated Section 143a of the Illinois Insurance Code

The Illinois Supreme Court in *Galarza v. Direct Auto Body Insurance Company*, 2023 IL 129031, recently considered whether an uninsured motorist (UM) provision of an automobile liability policy violated Section 143a of the Illinois Insurance Code.

> The supreme court looked to the "plain language" of Section 143a and held that the plaintiff's minor son was an insured under both Part I and II of the policy. It reasoned that "whether the injured person occupied a vehicle at the time of the accident within uninsured vehicle is not the proper inquiry." The proper inquiry is "whether the person's injuries resulted 'out of the ownership, maintenance or use of a motor vehicle,' including the uninsured at-fault vehicle."

In *Galarza*, the plaintiff and his minor son filed a UM claim against Direct Auto Insurance Company (Direct Auto) after the minor son was involved in a hit-and-run accident while riding a bicycle. *Galarza*, 2023 IL 129031, ¶ 1. Part I of the policy provided liability coverage for an "insured who causes bodily injury or property damage 'caused by [an] accident arising out of the ownership, maintenance or use of the owned automobile or a non-owned automobile.'" *Id.* ¶ 7. Part I of the policy defined "insured" with respect to an owned automobile as "(1) the named insured or (2) any other person using such automobile to whom the named insured has given permission, provided the use is within the scope of such permission." *Id.* The policy defined insured with respect to non-owned automobiles as "(1) the named insured, provided the named insured received permission, or (2) a relative, but only with respect to a private passenger automobile, provided the person using such automobile has received permission." *Id.* Part II of the policy provided UM coverage to insureds for damages "(1) [that] were caused by accident, (2) while the insured was an occupant in an "insured automobile," and (3) were as a result of the ownership, maintenance, or use of the uninsured motor vehicle." *Id.* ¶ 8. Part II of the policy defined "insured" as "(1) the named insured and (2) a 'relative' as defined under part I of the policy." *Id.* Part II also provided potential coverage for hit-and-run motor vehicles where

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there was "actual physical contact between the insured automobile and the hit-and-run motor vehicle." *Galarza*, 2023 IL 129031, ¶ 8. Direct Auto denied the minor son coverage because he was not an occupant of a covered vehicle at the time of the accident. *Id.*

Direct Auto filed a complaint for declaratory judgment and a subsequent motion for summary judgment. *Id.* ¶ 2. The circuit court granted summary judgment in Direct Auto's favor. The appellate court reversed and remanded, finding that the pertinent policy provision violated Section 143a of the Illinois Insurance Code and was thus unenforceable as against public policy. *Id.* ¶ 3. On appeal, the Illinois Supreme Court affirmed and reversed the judgment of the circuit court. *Id.*

The supreme court looked to the "plain language" of Section 143a and held that the plaintiff's minor son was an insured under both Part I and II of the policy. *Id.* ¶ 55. It reasoned that "whether the injured person occupied a vehicle at the time of the accident within uninsured vehicle is not the proper inquiry." *Id.* The proper inquiry is "whether the person's injuries resulted 'out of the ownership, maintenance or use of a motor vehicle,' including the uninsured at-fault vehicle." *Id.* (quoting 215 ILCS 5/143a). The court concluded that a bicyclist injured by an uninsured motor vehicle is a "person" who suffered injuries arising from the ownership, maintenance or use of a motor vehicle. *Id.* Because the plaintiff's minor son qualified as a "relative" under the plaintiff's policy, he was entitled to UM coverage even where he did not occupy an insured vehicle. *Id.* ¶ 56.

Galarza v. Direct Auto Insurance Company, 2023 IL 129031.

Policy Language Relieves Carrier from Obligation to Defend

In *Great American Insurance Company v. State Farm Fire and Casualty Company*, 104 F.4th 1011, 1012-13 (7th Cir. 2024), a board member was sued by the former board president alleging he was harmed by, among other things, defamatory statements by the board. The board was insured by an insurance policy issued by the Illinois Community College Risk Management Consortium (Consortium) that did not include a duty to defend, but rather an obligation to pay legal fees as part of an insured's total net loss. *Great American,* 104 F.4th at 1013. The board member also was insured under a personal liability umbrella policy issued by State Farm that provided a defense when the loss was covered by the State Farm policy, but not covered by any other policy. *Id*. at 1013-14. The Consortium policy and the State Farm policy provided coverage for claims of libel, slander, or defamation of character. *Id*. at 1013, 1014.

State Farm refused to defend the underlying lawsuit after learning that the Consortium had agreed to defend under a reservation of rights. *Id*. at 1014. The Consortium eventually indemnified the board member for the settlement of the underlying lawsuit and her legal fees. The Consortium assigned to Great American all of its litigation-related rights, including the right to reclaim from State Farm the costs of defending the underlying lawsuit. *Id*.

Great American filed suit against State Farm seeking a proportionate share of all defense costs paid on behalf the board member, arguing that State Farm estopped from denying coverage since it did not defend under a reservation of rights or file a declaration of no coverage. *Id*. The district court found in favor of State Farm, finding that because the Consortium policy covered the loss, State Farm had no liability for defense costs. *Great American*, 104 F.4th at 1014-15.

Great American argued on appeal that State Farm was required to provide a defense since the Consortium policy did not provide an on-going defense but instead reimbursed the insured for defense costs. *Id.* at 1018-19. The appellate court rejected that argument, recognizing that the parties to an insurance policy "have the power to define the terms, including the limits of the defense obligations." *Id*. at 1016. State Farm's policy did not link its obligation to defend to the Consortium's obligation to defend, but instead to the Consortium's duty to cover the loss. And, since the Consortium policy covered the loss, State Farm's obligation to defend was never triggered. *Id*. at 1019. As a result, the appellate court affirmed the district court's finding that State Farm did not have a duty to defend.

Great American Insurance Company v. State Farm Fire and Casualty Company, 104 F.4th 1011 (7th Cir. 2024).

Seventh Circuit Finds All Enumerated Set-Offs Enforceable Where it was Not Clear Underinsured Motorist Carrier and Claimant Entered into "Settlement Agreement"

The dispute in *Hartford Accident & Indem. Co. v. Lin*, 97 F.4th 500 (7th Cir. 2024) stemmed from a 2017 auto accident, in which Lin allegedly sustained injuries while driving a vehicle owned and insured by his employer. After the accident, Lin filed a lawsuit against the at-fault driver. Lin also filed a workers' compensation claim with his employer. In the tort lawsuit, Lin sought permission to settle for the at-fault driver's $100,000 limit, but without a response, entered into the settlement agreement. Months later, Hartford Accident responded that it had "no objection" to the settlement. Lin was paid out $301,259.90 in workers' compensation. Since his employer was

not at fault, it was entitled to a lien against the $100,000 obtained from the at-fault driver. Lin paid the workers' compensation carrier $73,320.72 and then made a claim to Hartford Accident for underinsured motorist coverage under a commercial auto policy issued to his employer. A dispute ensued about whether the underinsured motorist carrier could reduce the limit of the policy by the amount Lin was paid in workers' compensation benefits.

The policy provided that "except in the event of a 'settlement agreement,'" the limit of insurance shall be reduced by all sums "paid or payable" by anyone legally responsible for the accident and by all sums paid under any workers' compensation. On the other hand, according to the court, "when the insurer and the insured settle, the $1 million policy limit is reduced only by 'the limits of bodily injury liability bonds or policies applicable to the owner or operator of the 'underinsured motor vehicle.'" A "settlement agreement" exists if the parties: "agree that the 'insured' is legally entitled to recover, from the owner or operator of the 'underinsured motor vehicle,' damages for 'bodily injury' and, without arbitration, agree also as to the amount of damages."

Lin argued that there was a "settlement agreement" between the underinsured motorist carrier and Lin because the carrier had "no objection" to Lin's settlement with the at-fault driver. The carrier asserted that there was not a "settlement agreement" and that the underinsured motorist limit was offset by the $100,000 recovered from the at-fault driver and all workers' compensation benefits paid to Lin. The district court found no "settlement agreement" and Lin appealed.

The Seventh Circuit Court of Appeals rejected Lin's "settlement agreement" argument. The court found that the clear and unambiguous terms of the underinsured motorist coverage, which provided there was a "settlement agreement" only if the parties agree on liability and the amount of damages the insured suffered in the accident, must be enforced as written. In this case, there "simply was no discussion—much less agreement—about what Lin's total damages might be." The court explained that the carrier's confirmation via email that it had "no objection" to Lin's settlement with the at-fault driver, which was provided after the settlement was already accepted, was not an agreement as to liability and damages, and also pointed to the fact Lin previously requested arbitration of his damages.

Hartford Accident & Indem. Co. v. Lin, 97 F.4th 500 (7th Cir. 2024).

Plain Language of Governmental Action Exclusion Prevents Coverage

In a case of first impression, the court in *McCann Plumbing, Heating & Cooling, Inc. v. Pekin Insurance Company*, 2023 IL App (3d) 190722, found that damage to the insured's building caused by the government's demolition of an adjacent building fell within the policy's governmental action exclusion.

A contractor damaged the insured's building while demolishing an adjacent building pursuant to a governmental order. *McCann*, 2023 IL App (3d) 190722, ¶¶ 5-6. The insured sought coverage for the damage under its commercial lines policy, but the carrier denied coverage based on several exclusions, including the governmental action exclusion. *Id.* ¶¶ 6-7. The governmental action exclusion provided in relevant part:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss....
>
> c. Governmental Action
>
> Seizure or destruction of property by order of governmental authority.

Id. ¶ 7. The circuit court found that the exclusion applied to prevent coverage. *Id.* ¶ 11.

The appellate court rejected the insured's argument that the exclusion was inapplicable since the governmental order was for the adjacent property and not the insured's premises. *Id.* ¶ 14. Examining the language of the policy, the court held the exclusion applies when the destruction of the property occurs through an order of a governmental authority. *Id.* ¶ 23. The court found that the damage to the insured premises was a loss that "grew out of" and therefore was "caused indirectly" from the destruction of property that stemmed from the local government's demolition order. *McCann*, 2023 IL App (3d) 190722, ¶ 24. Moreover, the phrase "caused directly or indirectly" was not ambiguous, and while the phrase is broad the parties agreed to the provision without any limiting language. *Id.* ¶ 25. As a result, the court concluded that exclusion was not limited to an order to demolition the insured's premises. *Id.* ¶ 27.

McCann Plumbing, Heating & Cooling, Inc. v. Pekin Insurance Company, 2023 IL App (3d) 190722.

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Existence of Multiple Policies with Separate UIM Limits Does Not Create Inherent Ambiguity Where Policies Include an Antistacking Provision

The plaintiff was injured when she was riding as a passenger on a motorcycle that was struck by another vehicle. *Id.* ¶ 4. She settled with the driver of the other vehicle for the full amount of the per person liability limit of his automobile policy. *Id.* ¶ 6. Plaintiff thereafter made a claim for up to $1.425 million in underinsured (UIM) benefits under three policies issued by State Farm. *Id.* ¶ 6. The respective declarations pages for the three policies provided for $500,000 in UIM bodily injury coverage. *Id.* ¶ 10. The language of the UIM provision of each policy was the same and read:

> If Other Underinsured Motor Vehicle Coverage Applies
>
> 1. If Underinsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to *you* or any *resident relative* by the *State Farm Companies* apply to the same *bodily injury*, then:
>
> a. the Underinsured Motor Vehicle Coverage limits of such policies will not be added together to determine the most that may be paid; and
>
> b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. *We* may choose one or more policies from which to make payment.

Id. ¶ 11.

The plaintiff filed a complaint for declaratory judgment against State Farm, arguing that the UIM coverage language in the body conflicted with the language on the declarations pages, namely the existence of three policies with separate UIM coverage limits and separate premiums, such that she was entitled to the $500,000 UIM coverage limit of all three policies less the $25,000 settlement. *Id.* ¶¶ 7, 27. The circuit court granted State Farm summary judgment, and the appellate court affirmed.

The appellate court noted that antistacking provisions are expressly permitted under the Illinois Insurance Code. *Id.* ¶ 28. The court differentiated the policy language at issue from prior cases where, despite antistacking language in the body of the policy, the declarations page of a single policy listed UIM limit multiple times for multiple vehicles with separate premiums. *Id.* ¶¶ 29-31. Because the State Farm policies at issue each included identical antistacking language, the only reasonable interpretation of that language was that the UIM coverage limits from multiple policies would not be aggregated. *Id.* ¶ 32. The court likened the case to that in *State Farm Mutual Automobile Ins. Co. v. McFadden*, 2012 IL App (2d) 120272, and likewise found that "'the declaration sheets, read in isolation, might leave open the question of stacking, but the antistacking provision unambiguously answers that question in the negative.'" *Id.* ¶ 35 (citing *McFadden*, 2012 IL App (2d) 120272, ¶ 36)).

Miecinski v. State Farm Mutual Automobile Insurance Company, 2024 IL App (1st) 230193.

Coverage for a BIPA Lawsuit Excluded by Policy's Catch-All Provision

In *Nat'l Fire Ins. Co. of Hartford v. Visual Pak Co.*, 2023 IL App (1st) 221160, the Illinois Appellate Court First District affirmed a circuit court's judgment finding a catch-all provision of a policy's "Recording And Distribution Of Material Or Information In Violation Of Law" exclusion barred coverage for claims alleging violation of Illinois' Biometric Information Privacy Act (BIPA). Visual Pak was insured under policies issued by three different CNA affiliates. At issue were a commercial general liability policy issued by CNA affiliate National Fire Insurance, and an excess/umbrella policy issued by CNA affiliate Continental Insurance. National Fire Insurance and Continental Insurance (the "CNA Affiliates") denied coverage under their policies.

Both policies issued by the CNA Affiliates contained an exclusion titled "Recording And Distribution of Material Or Information In Violation Of Law" and excluded coverage for:

> Personal and advertising injury arising directly or indirectly out of any action or omission that violates or is alleged to violate . . . . (4) any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits *the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information*.

Visual Pak, 2023 IL App (1st) 221160, ¶ 52 (emphasis in original).

Courts have referred to this exclusionary language in subparagraph 4 as a catch-all provision. The *Visual Pak* decision reached the opposite conclusion that the Court of Appeals for the Seventh Circuit reached months earlier when construing a similar–but not identical–exclusion under Illinois law in *Citizens Ins. Co. of Am. v. Wynndalco Enters., LLC*, 70 F.4th 987 (7th Cir. 2023) and the Illinois

Supreme Court's earlier decision in *West Bend Mutual Insurance Co. v. Kirshna Schaumburg Tan, Inc.*, 2021 IL 125978. The court's lengthy and thorough decision explained why neither prior decision was controlling of the CNA Affiliates' policies.

The court's analysis began by finding a plain text reading of the catchall provision clearly encompassed alleged violations of BIPA. It noted the title of the exclusion in *Wynndalco* was "Distribution of Material in Violation of Statutes," while the exclusion before the court was titled "*Recording* And Distribution Of Material Or *Information* In Violation Of Law." *Visual Pak*, 2023 IL App (1st) 221160, ¶ 71-72 (emphasis original). This additional language compelled a broader reading that encompassed privacy interests. The court also rejected the Seventh Circuit's views that a reasonable purchaser of business insurance would not understand that the statutes identified in the catch-all involved a privacy interest and that enforcement of the catch-all would swallow the coverage provided by the policies, rendering coverage illusory.

Similarly, the court distinguished *West Bend* based on its differing policy language. The court determined: (1) the catch-all provision in the CNA Affiliates' policies was broader because it addressed "the disposal, collecting, [and] recording" of information; and (2) the CNA Affiliates exclusions' titles did not limit their application to modes of communications like the policy in *West Bend*. *Id.* ¶ 98.

Finally, having determined there was no coverage, the court rejected the contention the estoppel doctrine prevented the CNA Affiliates from raising their coverage defenses. The court stated, "estoppel does not even factor into the equation if the court ultimately determines that the insurer owed no duty to defend." *Id.* ¶ 125.

Nat'l Fire Ins. Co. of Hartford v. Visual Pak Co., 2023 IL App (1st) 221160.

Declaratory Actions: Pleading Affirmative Defenses and Counterclaims

After incurring hailstorm damage, Hometown Cooperative Apartments, Inc. (Hometown) submitted a notice of loss to its insurer, Philadelphia Indemnity Insurance Company (Philadelphia). Hometown engaged two experts to establish the scope and cost of repairs, and to make those repairs. Both parties agreed with the initial estimate that was prepared by Hometown's experts.

Almost two years later, Hometown's experts notified Hometown that they were seeking additional "unforeseen" payments which now included a new price list, new construction of wood framing, overhead and profit. Philadelphia disputed the new amount, stating that the appraisal demand improperly implicated questions of insurance coverage, contract interpretation and law.

Philadelphia's policy contained an appraisal clause that stated if Philadelphia and the insured disagreed on the value of the property or the amount of the loss, either could make written demand for an appraisal by selecting an impartial appraiser. The two appraisers would then select an umpire. If the two appraisers failed to agree on the amount of the loss, the question would then be submitted to the umpire, who would make the final decision on the amount of the loss.

Philadelphia filed a three-count declaratory judgment action, requesting a declaration that Hometown's new estimate was "impermissibly appraised and resolved through appraisal questions of insurance coverage and law." Hometown answered and raised affirmative defenses of breach of contract and breach of the covenant of good faith and fair dealing. Hometown also counterclaimed for breach of contract and bad faith.

In its breach of contract counterclaim, Hometown alleged that Philadelphia breached the insurance contract by refusing to pay for the items included in the updated estimate. Hometown alleged that when it demanded appraisal, Philadelphia refused to pay and instead, filed the declaratory judgment action. Philadelphia moved under Federal Rules of Civil Procedure 12(b)(6) and 12(f) to strike the affirmative defenses and to dismiss the counterclaims.

In granting the motion to dismiss the breach of contract counterclaim, the court found that Hometown failed to point to any specific breached contract provision. Moreover, the court felt that Hometown's breach of contract claim was premature. Under the insurance contract, Hometown was not entitled to litigate the amount of the loss until its appraisal demand was rescinded or denied—neither of which had been done by Philadelphia.

Hometown's bad faith counterclaim was based on section 155 of the Illinois Insurance Code for "vexatious and unreasonable conduct." Here, the court found that a claim under section 155 required more than just a simple denial of coverage, especially where the denial of coverage was reasonable or involved a *bona fide* dispute. The court noted that Philadelphia had already paid more than $3 million to Hometown under the policy. Consequently, Hometown's allegation of Philadelphia's unreasonable delay was contrary to the facts. Without any more specific allegations of bad faith, the counterclaim could not stand.

The court also dismissed Hometown's affirmative defenses of breach of contract and breach of the covenant of good faith and fair dealing. The court held that these allegations did not constitute affirmative defenses to a declaratory judgment action. The court further noted that as to the counterclaim of bad faith, and unfair

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dealing, section 155 preempted this common law action and that it limited damages to the amount stated in the statute.

Philadelphia Indemnity Insurance Company v. Hometown Cooperative Apartments, Inc., No. 23 C 4977, 2024 WL 342591 (N.D. Ill. January 30, 2024).

No Uninsured Motorist Coverage Where Excluded Driver is Operating Insured Vehicle

The Illinois Appellate Court First District affirmed the circuit court's holding that a named insured cannot file an uninsured motorist claim with his insurer arising from a collision in which the named insured was a passenger in his own vehicle while such vehicle was being driven by a driver the named insured had explicitly excluded coverage.

Jafar Al-Rifaei (Jafar) was a passenger in his own vehicle being driven by his daughter, Waed Al-Rifaei (Waed). They were involved in a collision with another driver. Jafar sued Waed and the other driver. Jafar asked his insurer, Safeway, to provide Waed a defense and told Safeway that if it refused to do so, then Jafar would make an uninsured motorist claim.

In spite of deciding to exclude his daughter from coverage, Jafar still permitted his daughter to drive the car. The court found that the level of control an insured has regarding the amount of coverage under a policy was critical in its determination.

Safeway filed a declaratory action and argued that Jafar's uninsured motorist claim was barred because he excluded his daughter from coverage. Safeway argued the named driver exclusion is enforceable and bars coverage not only for the excluded drivers themselves, but also for Jafar himself. Jafar filed a cross-motion for summary judgment, countering that the named driver exclusion violates Illinois mandatory insurance law and public policy. The trial court granted Safeway's motion and held that the driver exclusion was enforceable and did not violate public policy; therefore, barring Jafar's claim.

On appeal, the First District found that the driver exclusion was enforceable because Jafar had control over the amount of coverage he purchased for the vehicle and the control over whom to include and exclude from coverage. Jafar explicitly chose to exclude his daughter from coverage. In spite of deciding to exclude his daughter from coverage, Jafar still permitted his daughter to drive the car. The court found that the level of control an insured has regarding the amount of coverage under a policy was critical in its determination. Here, Jafar had complete control over coverage, so there is no reason to require Safeway to defend Jafar's daughter in the suit he brought against her when Jafar explicitly excluded his daughter from the policy.

The court also found its decision consistent with public policy and fairness. Once a named insured excludes a driver from his insurance policy, the named insured is obligated to ensure the excluded driver does not operate the vehicle. Therefore, it would be against public policy to require Safeway to provide coverage in this case because Jafar knew he excluded his daughter yet still allowed her to drive the vehicle.

Safeway Ins. Co. v. Al-Rifaei, 2024 IL App (1st) 231391.

Illinois Appellate Court Fourth District Finds Underinsured Motorist Coverage Not Automatically Required in Minimum Limits Liability and Uninsured Motorist Policies

The Illinois Appellate Court Fourth District found that underinsured motorist coverage is not automatically required in policies that provide minimum limits liability and uninsured motorist coverages.

Two plaintiffs were in an accident and incurred more in medical bills than they recovered from the at-fault driver. They made claims for underinsured motorist coverage under the plaintiff-driver's auto policy issued by American Alliance. The driver's policy was a minimum limits liability policy that also provided uninsured motorist coverage at the minimum limits. American Alliance denied the claims because the policy did not on its face include underinsured motorist coverage. Plaintiffs filed suit, in part, for declarations that the policy must provide underinsured motorist coverage under 215 ILCS 5/143a-2(4).

The circuit court denied American Alliance's motion to dismiss, but certified the following question to the appellate court: Pursuant to 215 ILCS 5/143a-2(4), is underinsured motorist coverage automatically required to be included in a policy insuring liability for bodily injury where the policy provides uninsured motorist coverage at the minimum limits required by 625 ILCS 5/7-203?

In its review, the court emphasized the following language at 215 ILCS 5/143a-2(4):

> [N]o policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be renewed or delivered or issued for delivery in this State … *unless underinsured motorist coverage is included in such policy in an amount equal to the total amount of uninsured motorist coverage provided in that policy* where such uninsured motorist coverage exceeds the limits set forth in Section 7-203 of the Illinois Vehicle Code.

Despite plaintiffs' argument that underinsured motorist coverage must be included in all policies "due to public policy, court interpretation of the statute and the legislative history of amendments to the statute in order to maintain consistency and eliminate absurd results," the court was more convinced by American Alliance's plain language argument. The court found, like the statute says, that underinsured motorist coverage is only statutorily required "where such uninsured motorist coverage" exceeds minimum limits. Dispensing with the absurd results doctrine, the court reiterated that it "cannot omit this clear limitation in the statute under the guise of statutory interpretation."

The court's decision reinforces the rule that plain and unambiguous statutory language controls, and the absurd results doctrine does not permit judicial rewrites even where undesirable results might follow.

Scott v. Am. All. Cas. Co., 2024 IL App (4th) 231305.

No Duty to Indemnify or Defend for Property Damage Outside CGL Coverage

The United States Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment for plaintiffs St. Paul Guardian Insurance Company, Charter Oak Fire Insurance Company, and Travelers Property Casualty Company of America ("Insurers") where plaintiffs had neither a duty to indemnify nor the duty to defend defendant Walsh Construction Company (Walsh) in an underlying lawsuit.

Walsh contracted with the City of Chicago for a construction job at O'Hare International Airport. The city sued Walsh for breach of contract and contractual indemnity to recover the costs incurred after discovering cracks in the welding performed by a subcontractor, an insured of the Insurers. Walsh was listed as an additional insured under the subcontractor's policy, so Walsh tendered its defense of the City's claims to the Insurers under the subcontractor's policies. The Insurers did not defend Walsh in the lawsuit. Walsh filed and was successful in its third-party complaint against the subcontractor.

In the instant suit, Insurers sued Walsh seeking declaratory judgment that (1) the subcontractor's Commercial General Liability policies ("CGL policies") do not cover the judgment against the subcontractor, and (2) the Insurers did not have a duty to defend Walsh in the underlying suit against the City. The district court found in favor of the Insurers.

Relevant here, Walsh presented two arguments on appeal: (1) the district court erred in determining that the Insurers' policies did not cover Walsh's damages; and (2) the district court erred when it found that the Insurers owed no duty to defend Walsh in the underlying lawsuit.

The court found that the Insurers' policies did not cover Walsh's damages. The subcontractor's policies only covered damage to the property of others, not to the subcontractor's own property. For Walsh to succeed on this claim, Walsh needed to demonstrate some physical injury to tangible property beyond the steel elements fabricated by the subcontractor. The court did not find any evidence showing property damage to anything other than the property of the subcontractor; therefore, falling outside of the coverage limits.

Walsh argued that once the welding cracked, the entire canopy structure became unstable creating a harmful physical change sufficient to trigger coverage. The court denied this argument because the increased potential for property damage is not actual physical damage and does not trigger coverage. Therefore, the Insurers were not required to indemnify Walsh for its losses.

The court also found no duty to defend because, under the eight-corners rule, there were no allegations that gave any indication that other parts of the canopy system experienced damage. As such, there was no duty to defend.

St. Paul Guardian Insurance Company v. Walsh Construction Company, 99 F.4th 1035 (7th Cir. 2024).

Duty to Defend and the Eight Corners Analysis : When Can an Insurer Look Beyond the Allegations of the Complaint to Determine if Coverage Exists?

In *State Auto Property & Casualty Insurance Company v. Distinctive Foods LLC*, the Illinois Appellate Court First District recently discussed some of the extraneous facts an insurer can and cannot

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consider when "the insurer has knowledge of true but unpled facts, which, when taken together with the complaint's allegations, indicate that the claim is within or potentially within the policy's coverage."

The underlying dispute arose out of an agreement between RyKrisp and Distinctive Foods (Distinctive) to manufacture crackers for RyKrisp. After having some concerns about the ability of Distinctive to manufacture the crackers in a cost-effective manner, RyKrisp removed the equipment that it purchased to manufacture the crackers from the custody of Distinctive. RyKrisp then entered into a contract with iBake to manufacture the crackers.

Distinctive's CEO issued a cease-and-desist letter to iBake advising iBake that RyKrisp and Distinctive had entered into a confidentiality agreement and instructing iBake not to use any of Distinctive's proprietary information in connection with the services it provided to RyKrisp. Because of the cease-and-desist letter, iBake terminated its agreement with RyKrisp.

RyKrisp sued Distinctive for detinue, conversion, replevin, tortious interference with contract and tortious interference with business expectancy, alleging Distinctive's CEO acted "out of malice" in contacting iBake and causing the cease-and-desist letter to be sent. Distinctive tendered the litigation to its insurer, State Auto Property & Casualty Insurance Company ("State Auto"), requesting a defense.

State Auto initially undertook the defense of Distinctive under a reservation of rights. It ultimately withdrew its coverage, and an adverse verdict was entered against Distinctive in the underlying trial. State Auto filed a declaratory action against Distinctive and was ultimately granted partial summary judgment.

On appeal, Distinctive argued that State Auto should have considered the trial testimony of its CEO which demonstrated that Distinctive mistakenly believed that it had the right to withhold RyKrisp's equipment and did not do so with the intention of violating RyKrisp's legal rights, and that correspondence between Distinctive and State Auto during the underlying litigation.

The Illinois Appellate Court First District rejected Distinctive's argument that State Auto should have considered these facts which were beyond the four corners of the underlying complaint and the four corners of the State Auto policy of insurance. The court held the true but unpleaded facts doctrine is typically applied in cases where "the extraneous facts possessed by the insurer and known to be true were facts the insurer discovered during its own investigation of the underlying action." Additionally, it held that the "exception for true but unpleaded facts was not meant to be applied to situations where the only extraneous facts are supplied by the insured."

State Auto Property & Casualty Insurance Company v. Distinctive Foods LLC, 2024 IL App (1st) 221396.

Court Finds for Insurer Where Insurance Coverage is Independent of Obligation to Provide Defense Costs Under LLC Agreement

In *S-R Investments LLC v. Federal Insurance Company,* Federal Insurance Company (Federal) refused to reimburse the SRI Parties over the fronting of legal costs in an underlying action. The SRI Parties are a series of limited liability companies that had an agreement to install Stevard LLC as their manager of the associated LLCs. The relationship between Stevard LLC and the SRI Parties soured, and Stevard claimed the SRI Parties owed additional profits and interest of at least $1 million. Per the LLC Agreement, the SRI Parties were advancing the Stevard Parties' defense costs but found out the Stevard Parties had an insurance policy issued by Federal, which also provided coverage and defense costs for the Stevard Parties.

The SRI Parties argued Federal was "primarily liable" to advance the Stevard Parties' defense costs, and that the SRI Parties are "secondarily liable." To that effect, the SRI Parties asked the court to enter a declaratory judgment that Federal is primarily liable to advance defense costs, or alternatively, that Federal's duty was co-equal with the SRI Parties' duty to advance costs under the LLC Agreement. Federal filed a motion to dismiss SRI Parties' complaint on two theories: (1) that the SRI Parties had no legal right to sue for remedies under Federal's insurance policy that was issued to the Stevard Parties as they lack prudential standing to bring suit because they are not real parties in interest; and (2) the SRI Parties failed to state any valid claim that they are entitled to equitable contribution or subrogation from Federal.

In terms of prudential standing, the SRI Parties noted that they were seeking a determination of their own rights to seek contribution and subrogation directly from Federal for defense costs they advanced to the Stevard Parties. The court noted that to determine standing and if they have any interest in vindicating their own rights, it must look to whether the SRI Parties state any valid claim.

The court concluded the SRI Parties had no legal right to seek equitable contribution from Federal because, while the SRI Parties' and Federal's separate and independent obligations may overlap, it is not the same as saying both were obligated to pay the defense costs. As such, the court found the SRI Parties' contribution claim failed as a matter of law because they were not a coinsurer nor were they jointly obligated to the Stevard Parties and had no right to seek equitable contribution from Federal.

The court further noted the SRI Parties have no legal right to seek equitable subrogation from Federal and concluded the SRI

Parties' argument on subrogation failed because they cannot say they are "secondarily liable" for the advancement of defense costs from the plain language of the LLC Agreement that says nothing about priority of payments with respect to other sources of coverage or indemnification.

S-R Invs. LLC v. Fed. Ins. Co., No. 22 CV 03781, 2024 WL 1363716 (N.D. Ill. Mar. 30, 2024).

BIPA Claim Covered by Umbrella Policy After Exhaustion of Primary Policy

In *Thermoflex Waukegan, LLC v. Mitsui Sumitomo Ins. USA, Inc.*, the United States Court of Appeals for the Seventh Circuit affirmed the district court's entry of summary judgment finding the umbrella coverage part of an Excess and Umbrella policy provided coverage for a lawsuit asserting violation of the Biometric Information Privacy Act (BIPA) after exhaustion of a primary policy. Plaintiff Termoflex Waukegan (Thermoflex) was sued for violating BIPA because it required workers to use their handprints to clock in and out. One of Termoflex's insurers that had policies in force during the years in question was Mitsui Sumitomo Insurance USA (Mitsui). Although Mitsui issued several policies, it declined to defend or indemnify Waukegan with respect to the BIPA lawsuit. The Seventh Circuit referred to the policies as a Basic policy and an Excess and Umbrella policy.

The Basic policy excluded coverage for the BIPA lawsuit pursuant to a policy exclusion barring coverage for claims:

> arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information.

The Seventh Circuit affirmed the district court's reasoning that the ordinary understanding of the phrase "confidential or personal information" in the above exclusion encompassed handprints and other biometric identifiers usable for identity theft. The court rejected Thermoflex's argument that the phrase was ambiguous because the exclusion contained mismatched items (*i.e.* that referenced patents, which are public, and confidential items, which are not public). Further, the Seventh Circuit also rejected Thermoflex's invitation to rely on *Citizens Ins. Co. v. Wynndalco*, 70 F.4th 987 (7th Cir. 2023), as precedent for the exclusion not barring BIPA claims. The Seventh Circuit acknowledged that the Illinois Court of Appeals, First District, held in *Nat'l Fire Ins. Co. v. Visual Pak Co.*, 2023 IL App (1st) 221160, that *Wynndalco* misunderstood Illinois law and such clauses bar coverage for BIPA claims.

The Seventh Circuit found that there are two coverage parts under the Excess and Umbrella policy. Coverage E, excess coverage, contains the same provisions as the Basic policy. Thus, like under the Basic policy, there is no coverage under Coverage E of the Excess and Umbrella policy. However, the Seventh Circuit agreed with the district court that there was coverage for the BIPA lawsuit under the umbrella coverage part.

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The court further found that Coverage U, umbrella coverage, did not contain the aforementioned policy exclusion and, consequently, unless another policy exclusion applied, the BIPA lawsuit would be covered. Relying on the Illinois Supreme Court's decision in *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978 (2021), the Seventh Circuit agreed with the district court that Coverage U's Statutory Violation Exclusion did not bar coverage. Applying the *ejusem generis* cannon, the Illinois Supreme Court held an exclusion citing the TCPA and CAN-SPAM Act of 2003 would not bar coverage for BIPA claims. While the Statutory Violation Exclusion added another statute, the Fair Credit Reporting Act, the Seventh Circuit did not believe its addition expanded the scope of the exclusion to encompass BIPA claims.

Finally, the Seventh Circuit determined neither the "Data Breach Liability" exclusion nor "Employment-Related Practices"

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exclusion barred coverage. These exclusions did not apply to the underlying facts of the BIPA claim being pursued against Thermoflex. Although the Seventh Circuit affirmed summary judgment finding there was coverage under Coverage U of the Excess and Umbrella policy, the Seventh Circuit noted that "[b]ecause Thermoflex has at least one other policy that applies to the BIPA claims . . . the duty to defend does not begin until the limits of that policy (plus deductibles) have been exhausted." The court did not address the duty to indemnify.

Thermoflex Waukegan, LLC v. Mitsui Sumitomo Ins. USA, Inc., 102 F.4th 438 (7th Cir. 2024).

Duty to Defend Implicated Under Premises Environmental Insurance with Transportation Coverage Even Where Explosion, Not Contamination, Allegedly Caused Damage

After delivering a tanker of isopentane, the insured trucking company, Altom, left the tanker at a facility to be cleaned. Cleaners found isopentane in the tanker and started to drain it into the facility's drainage system, but it reacted with an open flame in an adjacent boiler room and caused an explosion. The cleaners suffered serious burns and sued Altom for negligence, including that it failed to warn the facility that isopentane remained in the tanker and failed to exercise reasonable care in delivering the tanker.

Tokio Marine denied Altom's claim under a "premises environmental liability" policy that insured losses "that [Altom] becomes legally obligated to pay as a result of a claim for bodily injury ... arising out of 'contamination' that is caused by 'transportation.'" "Contamination" was defined "broadly to include '[t]he discharge, dispersal, release or escape of any contaminant into or upon … any structure on land,'" while "transportation" included the "loading or unloading of . . . waste onto or from a vehicle," and "begins upon loading … waste onto a vehicle and ends when . . . waste has been unloaded from a vehicle." Tokio Marine sought a declaration that it owed no duty to defend or indemnify Altom,. However, the district court found coverage was potentially implicated and, therefore, there was a duty to defend.

On appeal, Tokio Marine argued, first, that the policy's use of "environmental" in the title meant it intended to cover injuries arising from pollution, not from explosions. Noting that the title did not end the inquiry because a policy's intent is influenced by all its terms, the court found that the policy neither referred to "pollutant" nor "pollution," but to "contaminant" and "contamination," and there was no dispute that isopentane qualified as a "contaminant," or that "contamination" includes "draining." Thus, the policy was not "restricted to pollution-based injuries."

Tokio Marine next argued that injuries "arising out of contamination" were not alleged because the "draining [of] isopentane is not 'contamination,'" and, even if it was, coverage is implicated only if Altom drained the tanker, which it did not. The court rejected these positions because the policy did not condition coverage on exposure to a contaminant, as "the definition of 'contamination' appears to include draining the isopentane," and "arising out of" requires only "but for" causation, *i.e.*, the injuries need only have flowed from the contamination. Further, the policy "broadly" defined "contamination," which was "arguably" met since the explosion would not have occurred but for the draining of isopentane. The fact allegations Altom drained the tanker were not present did not matter because if Altom "negligently transported the truck and failed to warn the facility owner about the excess contaminant in the tank, then it may become legally obligated to pay the [cleaners] for the bodily injuries arising out of the release of that contaminant."

The court also said the complete operations doctrine had not been applied to a contamination coverage policy. The complete operations doctrine is interpreted by Illinois courts to say "unloading" in the context of auto policies, is complete when "subsequent to removal of the material from the vehicle, the deliverer has finished his handling of it, and the material has been placed in the hands of the receiver at the designated reception point." The court said the policy could reasonably be read as "ongoing any time a contaminant is in the truck" and the workers alleged that they were still working on the tanker when the explosion occurred.

Tokio Marine Specialty Ins. Co. v. Altom Transp., Inc., 23-1443, 2024 WL 808059 (7th Cir. Feb. 27, 2024).

Property Manager's Policy Provides Excess Coverage for Accident on Premises

In *Travelers Prop. Cas. Co. of Am. v. Benchmark Ins. Co.*, a property manager's liability policy was excess to the tenant's policy for personal injuries allegedly sustained on the premises. Brian Haro fell and sustained severe and permanent injuries when leaving his employer's office. He filed a lawsuit against the owner of the office building, Rogers Industrial Park (Rogers), and Roger's agent and property manager, Arthur J. Rogers & Co. (AJR), alleging his fall was caused by their negligent maintenance of the property.

AJR was insured under a liability policy issued by Travelers Property Casualty Co. of America (Travelers) at the time of the

occurrence. Haro's employer, Heglet Gas Products, Inc. (Heglet), was insured under a liability policy issued by Benchmark Insurance Company (Benchmark). AJR was an additional insured under the Benchmark policy. Travelers initiated a declaratory judgment action seeking a declaration the Benchmark policy was primary and an award of its defenses costs expended defending the lawsuit under theories of contractual and equitable subrogation.

The court relied on the plain language of the policies to find the Benchmark policy was primary on four different grounds. First, the court found the Benchmark policy's "Primary and Noncontributory-Other Insurance Condition" endorsement did not apply because the lease did not state that Heglet's insurer would be precluded from seeking contribution from any other insurer. Second, the policies' "other insurance" clauses rendered the Benchmark policy primary. Although there were five provisions in Benchmark's "other insurance" provision that would render its coverage excess, none of those exceptions applied because, among other reasons, there was no other liability insurance policy that named Heglet as an additional insured that would provide primary coverage for Haro's injuries. Moreover, the Travelers' policy stated it would be excess when AJR was an additional insured under the Benchmark policy, which was other primary insurance available to AJR. Thus, reconciling the "other insurance" provisions to effectuate the intent of the parties as required by Illinois law renders the Benchmark policy primary and the Travelers policy excess.

Third, the plain language of the "Real Estate Property Managed" endorsement of Travelers' policy rendered it excess because Haro's complaint alleged AJR caused his injuries through its management and operation building while acting as Rogers' agent and property manager. The court noted Benchmark waived any contention this provision did not apply by failing to address this provision in its briefing

Fourth, the court rejected Benchmark's contention that the lease's indemnity provision was relevant when evaluating coverage under the insurance policies. Whether or not the allegations of Haro's lawsuit trigger the indemnification provision requiring Heglet to indemnify AJR has no bearing when construing coverage under the policies because there is no language suggesting the indemnity provision modifies the conditions of the Benchmark policy. A promise to indemnify a party and a promise to secure insurance are separate and distinct contractual promises under Illinois law.

Finally, although the court agreed that Travelers was entitled to contractual subrogation under the terms of the Travelers policy for defense costs incurred in defending AJR, it is well settled under Illinois law that partial subrogation is not allowed. Because the Haro lawsuit was ongoing and Travelers may incur additional defense costs and/or indemnity payments, Travelers's claim for subrogation was denied without prejudice to being refiled. The court also noted that an equitable subrogation could not be pursued when an insurer has a contractual subrogation claim and, therefore, denied Travelers' claim for equitable subrogation with prejudice.

Travelers Prop. Cas. Co. of Am. v. Benchmark Ins. Co., 718 F. Supp. 3d 851 (N.D. Ill. 2024).

Condominium D&O Coverage—Property Damage and Adequate Reserves

In *Truck Insurance Exchange v. Marian Ulman, The Landings Condominium Association*, a fire destroyed the Landings, a condominium building in Des Plaines. The cost of repairs exceeded the available insurance by nearly $2 million. The condominium unit owners sued the Landings Condominium Association, its directors and others, alleging that they violated the Condominium Act (765 ILCS 605 *et.seq.* (West 2020)) and breached their duties by failing to purchase enough insurance to cover the cost of repairs and mismanaged the reconstruction process.

The Truck Insurance Exchange policy included condominium liability coverage for bodily injury, property damage or personal and advertising injury. The policy also included Director and Officers Liability coverage. The D&O coverage contained exclusions, including Exclusion 1 excluding coverage for claims for any bodily injury or property damage or personal and advertising injury, and Exclusion 8(c) excluding claims "relating to or arising from any failure of the Named Insured or any 'insured person' to establish or maintain adequate reserves or levy special assessments for the repair, replacement, improvement or maintenance of any common area elements or property owned by the Name Insured…"

Truck Insurance Exchange sought a declaration that it had no duty to defend or indemnify the insured defendants under the D&O coverage of its policy, under the liability coverage of the policy, or under Truck's umbrella policy. Truck contended that Exclusion 8(c) barred coverage because the underlying complaint pled that the insured defendants' failure to establish or maintain adequate reserves or levy special assessments for the repair, replacement, improvement or maintenance of the property." Additionally, Truck argued the underlying complaint did not allege "personal injury" or "property damage" caused by an "occurrence," or "personal and advertising injury," as defined in the policy.

The trial court granted Truck's motion for a judgment on the pleadings, finding that although the underlying complaint did al-

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lege "an occurrence" the underlying plaintiffs did not allege that the insured defendants had any role in causing the fire, but instead that they failed to maintain adequate insurance. The trial court reasoned that those alleged breaches of contract and fiduciary duty, if proven true, were not the sort of bodily injury or property damage contemplated by the Condominium Liability portion of the policies. The court also found that Exclusion 8(c) applied because the failure to procure enough insurance to cover a loss was the functional equivalent of failing to establish or maintain adequate reserves or levy special assessments for the repair of the property.

On appeal, the defendants argued that the trial court erred in finding that: (i) Truck had no duty to defend under the condominium liability coverage provisions, and (ii) that Exclusion 8(c) barred coverage.

The Illinois Appellate Court First District reversed and remanded, disagreeing with the trial court's finding regarding the applicability of Exclusion 8(c). The court said the functional equivalent interpretation inserted language into the policy that was not there. The court felt that in addition to the allegations regarding insufficient insurance, the underlying complaint also alleged that the insured defendants failed to obtain competitive bids for the reconstruction project and improperly managed the reconstruction in violation of the Condominium Act and the Declarations. Accordingly, those allegations could result in liability even if the defendants had obtained sufficient insurance, but failed to manage the reconstruction project properly, thereby potentially triggering coverage.

Truck Insurance Exchange v. Marian Ulman, The Landings Condominium Association, 2023 IL App (1st) 220804.

"Expected or Intended"

Westfield Premier Insurance Company v. Kandu Construction, Inc. is a declaratory judgment action that arose out of an underlying wrongful death lawsuit. The issue in the case involved an exclusion in the Westfield policy that precluded coverage for "expected or intentional injuries."

The underlying wrongful death complaint alleged that on September 5, 2021, the Kandus and Kandu Construction, Inc. (Kandu) hosted an illegal underage drinking party at the Kandu Construction warehouse located in Skokie, Illinois. Attending the party were the underlying plaintiff's decedent, Dilan Durakovic (Durakovic), and Adrian Alic (Alic), both of whom were under the legal drinking age. Allegedly, the Kandus shut down the party and ordered the minor invitees to vacate the premises when the party became overcrowded with underage drinkers, and that they required Alic to drive away from the premises with Durakovic as his passenger while Alic was visibly intoxicated. Shortly after they left the party, Alic's automobile slammed into a tree, killing Durakovic.

Westfield issued a General Liability policy to Kandu that provided coverage for bodily injury and excluded coverage for expected or intended bodily injury from the standpoint of the insured. Westfield filed a motion for judgment on the pleadings, arguing that the Kandus provided the venue for Alic to become intoxicated, and in ordering him to vacate the premises in his automobile with his passenger, Durakovic, it was foreseeable on the part of the Kandus that their actions would result in Alic being involved in a potentially fatal automobile accident.

Westfield cited a number of foreign cases in which harm to a plaintiff could be traced to the provision of alcoholic beverages to minors by insured homeowners. The court felt that one of the cases cited by Westfield—*American Modern Home Ins. Co. v. Corra*, 222 W.Va. 797 (W.Va. 2008)—was analogous.

In that case, an underage person consumed alcohol on the homeowner's premises as a social guest, became intoxicated and was later involved in an auto accident that killed the plaintiff, resulting in a state court tort case against the homeowner. The policy provision in that case was virtually identical to the language in the Westfield policy. The West Virginia Supreme Court held that "knowingly permitting an underage adult to consume alcoholic beverages on homeowner's property" does not constitute an "occurrence" within the meaning of the homeowner's policy at issue. A dissenting judge criticized the majority opinion, observing that the majority allowed its aversion to teenage drinking to color its decision to the detriment of the law, noting that in most cases the determination of whether an act was intentional or expected is based on the subjective intent of the policy holder. The dissent characterized the policy holder's decision to make alcohol available to the minor as obviously careless, but not deliberate.

The United States District Court for the Northern District of Illinois noted that in determining whether there was coverage, the complaint must be liberally construed in favor of the insured. In holding that there was coverage, the court held that it must determine whether the injury was expected or intended and not whether the acts were performed intentionally. The determination of whether an occurrence qualifies as an accident requires a review of the matter from the objective foreseeability of the insured to determine whether the contingency would be known to all sensible people as likely to follow naturally from the insured's conduct.

Westfield Premier Insurance Company v. Kandu Construction, Inc., 688 F. Supp. 3d 737 (2023).

Insurable Interest of Homeowner Who Lost Ownership of Property Limited to Temporary Right of Possession

In *Werner v. Auto-Owners Insurance Company*, the court addressed the question of "whether and to what extent the owner of a home in foreclosure has an insurable interest in the property *after* a judgment of foreclosure, *after* a judicial sale, and *after* expiration of all the owner's rights of redemption, but *before* judicial confirmation of the foreclosure." The court found that the owner's only insurable interest is the value of his temporary right of possession, which was the rental value of that temporary right.

An Illinois state court entered a default foreclosure judgment against the plaintiff and ordered the home to be sold upon expiration of his statutory right of redemption. The house was sold in a judicial sale, but a fire destroyed the home before the state court ruled on the motion to confirm the judicial sale. That state court eventually confirmed the foreclosure sale and ordered the plaintiff to vacate the home within 30 days.

The plaintiff sought recovery for the value of the home from his homeowner's insurer. Plaintiff filed suit against his carrier after it denied the claim for the replacement value of the home. The district court found that after the judicial sale plaintiff had an insurable interest in his home only to the extent that Illinois law granted him the right to occupy the house for up to 30 days after the confirmation of the sale and therefore awarded him the monthly rental value. The appellate court affirmed.

Illinois courts find that a person has an insurable interest in property when the person would profit or gain some advantage by its continued existence and suffer loss or disadvantage by its destruction, and that the person's insurable interest is assessed at the moment of loss. The court predicted the Illinois Supreme Court would hold that the plaintiff did not have an insurable interest in the full value of the residence since he no longer had a legal path to retain ownership. The court found that at the time of the fire the plaintiff's rights in the home had expired and therefore he was destined to lose title of the home. His only right at the time of the fire was to occupy the home for 30 days, which was the limit of his insurable interest.

Public policy considerations supported the court's finding the plaintiff did not have an insurable interest in the full value of the home. A ruling in the plaintiff's favor would provide him with a windfall since at the time of the fire he would have been able to occupy his home for only 30 days after confirmation of the judicial sale. Similarly, allowing a foreclosure-judgment debtor to recover the full value of the home, even though the debtor could not otherwise retain title, would create a moral hazard incentivizing property damage at a time when the owner has little left to lose. The appellate court therefore affirmed the district court's decision.

Werner v. Auto-Owners Insurance Company, 106 F.4th 676 (7th Cir. 2024).

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Survey of Labor and Employment Law Cases

ERISA's Broad Preemption Provision Applied to Plaintiff's State Law Insurance Claim Against the Administrator of His Employer's Self-Funded Employer-Sponsored Health Plan

In *Carnes v. HMO Louisiana, Inc.*, the United States Court of Appeals for the Seventh Circuit affirmed that the plaintiff's state law insurance claim against HMO Louisiana, Inc. was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). The court held that the plaintiff's claim fell within the scope of ERISA's broad preemption clause that supersedes any state laws relating to employee benefit plans.

The plaintiff was diagnosed with degenerative disc disease and the defendant, the administrator of the self-funded employer-sponsored health plan, paid for part of the plaintiff's treatments. The plaintiff filed a workers' compensation claim against his employer, who did not accept responsibility. The plaintiff then sued the defendant, alleging it violated Illinois law by not paying for the entirety of his medical treatment and sought penalties for the defendant's alleged "vexatious and unreasonable" conduct. The district court dismissed the plaintiff's claims on the grounds that they were preempted by ERISA but allowed him to amend his Complaint to plead an ERISA claim. The plaintiff declined to do so and instead moved for the court to reconsider, which was denied. The plaintiff then appealed.

The plaintiff argued that the defendant impermissibly refused to pay him benefits in violation of Article IX of the Illinois Insurance Code but failed to cite to a particular provision. The Seventh Circuit disagreed, stating that ERISA's preemption clause contains "deliberately expansive language," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990), which instructs that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). A state law relates to an ERISA plan when it "has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). The court reasoned that this applies even if a state law does not explicitly reference ERISA when the law "governs a central matter of plan administration or interferes with nationally uniform plan administration." *Halperin v. Richards*, 7 F.4th 534, 541 (7th Cir. 2021). As such, the Seventh Circuit agreed with the district court that the plaintiff's claim fell squarely within ERISA's expansive preemption.

The plaintiff further argued that the defendant violated Illinois law by vexatiously and refusing to pay his medical bills, citing to 215 ILCS 5/154.6, and argued that the defendant committed improper claims practice by "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlement of claims" or by "[r]efusing to pay claims without conducting reasonable investigation." 215 ILCS 5/154.6(d) & (h).

The court held that ERISA's exclusive civil enforcement provision, 29 U.S.C. § 1132(a), was fatal to the plaintiff's claim because the plaintiff impermissibly sought to "interfere with nationally uniform plan administration by requesting "alternative enforcement mechanisms" to ERISA. *Halperin*, 7 F.4th at 541. The court further held that ERISA's saving clause, which grants the states the power to enforce state laws that regulate insurance, did not save the plaintiff's claim because, under ERISA's "deemer clause," an exception to the savings clause, self-funded ERISA plans are exempted from state laws that regulate insurance as covered by the savings clause.

The plaintiff additionally argued that his claim was a "coordination of benefits dispute," and not an effort to enforce his rights under the plan. The court held that this was an impermissible attempt to plead his way out of ERISA's preemption and that ERISA provided the proper remedy for the plaintiff's grievance. Accordingly, the court held that the plaintiff's state law claim was preempted by ERISA.

Carnes v. HMO Louisiana, Inc., 114 F.4th 927 (7th Cir. 2024).

U.S. Court of Appeals for the Seventh Circuit Found Against Plaintiff on Racial Discrimination Claim Due to Lack of a Similarly Situated Comparator

In *Gamble v. County of Cook*, the United States Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of the defendant Cook County on the plaintiff's claims for racial discrimination.

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The plaintiff, a Black physician, worked at Cook County Health's John Stroger Hospital ("Stroger") for around eleven years in the Obstetrics and Gynecology ("OB/GYN") department. The plaintiff was hired in 2009 as a generalist, with the expectation that she would have responsibilities in the specialized urogynecology clinic as well as the general OB/GYN clinic. The plaintiff was asked to cover on-call shifts usually staffed by general obstetricians for twelve to eighteen months until more generalists were hired, but she continued to cover these shifts for the entirety of her employment. She additionally dealt with large patient loads and requested additional support at different times, which went unanswered.

The plaintiff's employment, including her compensation, was governed by a collective bargaining agreement (CBA) between Cook County and Services Employees International Union, Doctors Council. Under the CBA's compensation framework, employees were assigned a numeric grade level based on factors including qualifications and experience. The plaintiff was hired as a grade level ten and received annual pay increases.

The plaintiff resigned from Stroger in 2020 and filed suit against Cook County and her former department and division chairs. The plaintiff alleged violations of Title VII of the Civil Rights Act of 1964 and the Illinois Human Rights Act, and also claimed the department and division chairs violated 42 U.S.C. §§ 1981 and 1983. The plaintiff claimed that she was paid less than similarly situated non-Black physicians.

The court addressed the third prong of the relevant prima facie case, i.e. whether the plaintiff was paid a lower salary than a "similarly situated" nonprotected class member. To be considered "similarly situated," the comparator must be "directly comparable . . . in all material respects," to "eliminate other possible explanatory variables." *Williams v. Off. of Chief Judge of Cook Cnty.*, 839 F.3d 617, 626 (7th Cir. 2016). In determining the direct comparability of two employees, courts consider factors including: "(i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications." *Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520, 532 (7th Cir. 2003).

The plaintiff identified two white physicians as comparators. The court disagreed that the first comparator was similarly situated to the plaintiff, reasoning that the first comparator was part time, had many years of experience in urogynecology, held a different title, and performed different duties. They further reasoned that there was no evidence that this comparator was subject to the same CBA that governed the plaintiff's employment.

The court additionally disagreed that the second comparator was similarly situated, reasoning that this employee was hired at a different grade level pursuant to the CBA agreement governing both of their employments. The plaintiff was hired as a grade level ten while the second comparator was hired as a grade eleven.

The plaintiff then asserted that all evidence must be evaluated in totality for racial discrimination claims, pursuant to *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 766 (7th Cir. 2016). The court concluded that when taken as a whole, the evidence that the plaintiff put forth did not support a finding of racial discrimination because her purported comparators were not similarly situated.

Gamble v. Cnty. of Cook, 106 F.4th 622 (7th Cir. 2024).

The United States Supreme Court Holds That Whistleblowers Who Invoke U.S.C. § 1514A Need Not Prove Employer's Retaliatory Intent

In *Murray v. UBS Securities, LLC*, the United States Supreme Court held that a whistleblower who invokes 18 U.S.C. § 1514A must prove that his protected activity was a contributing factor to the unfavorable personnel action but does not need to prove that his employer acted with "retaliatory intent."

The plaintiff Trevor Murray was hired as a strategist by defendant UBS Securities, LLC, in 2011. Pursuant to regulations under the Securities and Exchange Commission ("SEC"), the plaintiff was required to certify that he independently produced his reports and that they accurately reflected his own views. The plaintiff claimed that two of the defendant's leaders pressured him to misrepresent his research reports to benefit the defendant's traders. The plaintiff reported this to his supervisor on numerous occasions, but no action was taken. The plaintiff was terminated in 2012 and filed suit, alleging that he was terminated in retaliation for his complaints in violation of the antiretaliation provision of the Sarbanes-Oxley Act. The plaintiff obtained a verdict in his favor. The defendant appealed on the grounds that the jury should have been instructed that the plaintiff had to prove the defendant's retaliatory intent. The United States Court of Appeals for the Second Circuit agreed and vacated the district court's decision.

The whistleblower-protection provision of the Sarbanes-Oxley Act prohibits employers from "discharge[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or discriminat[ing] in any other manner against an employee because of protected whistleblowing activity." 18 U.S.C. § 1514A(a). The whistleblower bears the initial burden of showing his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii). Then the burden shifts to the em-

ployer to show that it would have engaged in the same unfavorable personnel action without the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iv).

The Supreme Court found that Section 1514A's language does not include a "retaliatory intent" requirement and the burden-shifting framework of this provision cannot be squared with that requirement. The Court agreed with the Second Circuit's treatment of "retaliatory intent" as animus but disagreed with the weight that the Second Circuit conferred onto the word "discriminate" as used in Section 1514A. The Court relied on *Brogan v. United States*, 522 U.S. 398, 403, n. 2 (1998) in their reasoning that the word was included in the section's catchall provision and thus was not meant to imbue the preceding terms with a new or different meaning. Here, the plaintiff was "discharged," so the "or in any other manner discriminate" clause is not relevant to his claim. However, the defendant argued that "discriminate" in the catchall provision applied back to "discharge," and so discharge must have been a manner of discriminating. Applying this meaning for argument's sake, the Court concluded that the word "discriminate" does not inherently require retaliatory intent.

The defendant further argued that the statute's burden-shifting framework addressed only causation. The Court disagreed, reasoning that burden-shifting frameworks have historically provided a mechanism for the issue of intent in employment discrimination cases. The Court concluded that the statute's burden-shifting framework worked as it should in this case.

The defendant lastly argued that innocent employers would face liability for legitimate, nonretaliatory personnel decisions without a retaliatory intent requirement. The Court quickly dismissed this because under the statute's burden-shifting framework, an employer will not be held liable where it "demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of" the protected behavior. 49 U. S. C. § 42121(b)(2)(B)(ii).

Murray v. UBS Sec., LLC, 601 U.S. 23 (2024).

Seventh Circuit Affirms Summary Judgment in Employer's Favor on Plaintiff's Claims of Unequal Pay, Sex Discrimination, Retaliation, and Hostile Work Environment

In *Rongere v. City of Rockford*, the United States Court of Appeals for the Seventh Circuit affirmed the district court's ruling in favor of defendant City of Rockford on the plaintiff's claims of unequal pay, sex discrimination, hostile work environment, and retaliation.

The plaintiff was terminated from her role as Diversity Procurement Officer, after about two years of employment, on the basis that her work performance had fallen short of the defendant's expectations due to mismanagement and poor communication. The plaintiff sued under the Equal Pay Act ("EPA"), Title VII, and the Illinois Human Rights Act ("IHRA"). The district court granted summary judgment in favor of defendant, and the plaintiff appealed.

On the plaintiff's equal pay claim, the court of appeals stated that to establish a prima facie case under the EPA, a plaintiff must show "(1) that different wages are paid to employees of the opposite sex; (2) that the employees do equal work which requires equal skill, effort, and responsibility; and (3) that the employees have similar working conditions." *Markel v. Bd. of Regents of Univ. of Wis. Sys.*, 276 F.3d 906, 912–13 (7th Cir. 2002). The second element requires that the jobs being compared are "substantially equal" based on a "common core of tasks." *Id.* at 913 and *Jaburek v. Foxx*, 813 F.3d 626, 632 (7th Cir. 2016). The plaintiff asserted two male employees as comparators. The court found that these comparators were not substantially equal despite all three being "senior managers," because the plaintiff's daily tasks significantly differed from her purported comparators.

The plaintiff's failure to provide similarly situated male employees was critical in the failure of her claims under Title VII and IHRA. The plaintiff brought these claims under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which also required the plaintiff show she was part of a protected class, was meeting legitimate performance expectations, and suffered an adverse employment action. *Id.* The court reasoned that the plaintiff's failure to provide similarly situated male employees prevented her from eliminating confounding variables that could explain her termination or higher workload.

The court was unconvinced by the plaintiff's retaliation claims. For these claims to succeed, the plaintiff must show that she engaged in a protected activity, she suffered an adverse employment action, and that a causal connection existed between the adverse action and the protected activity. *Miller v. Polaris Labs.*, LLC, 797 F.3d 486, 492 (7th Cir. 2015). Further, the plaintiff must hold an objectively reasonable belief that the action she opposed violated the law. *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752-53 (7th Cir. 2002). The court reasoned that the plaintiff admitted that her job duties differed considerably from her comparators, and thus she could not reasonably believe male employees were being paid more than her for the same work. Further, she did not know her comparators' salaries while employed.

Similarly, the court disagreed with the plaintiff's claim of a hostile work environment. This claim requires a showing that the

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work environment was objectively and subjectively offensive, the harassment was due to the plaintiff's membership of a protected class or in retaliation for protected behavior, the conduct was pervasive or severe, and there is a basis for employer liability. *Boss v. Castro*, 816 F.3d 910, 920 (7th Cir. 2016). These claims are considered based on the totality of the circumstances. The court found that the plaintiff's circumstances, including being ignored and not receiving responses to her emails, amounted to a frustrating work environment and not a hostile one.

Rongere v. City of Rockford, 99 F.4th 1095 (7th Cir. 2024).

Seventh Circuit Affirms Summary Judgment for Restaurant in Sexual Harassment, Discrimination, and Retaliation Case

In *Anderson v. Street*, the United States Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of the defendant, Mott Street, a Chicago restaurant, in a lawsuit brought by a former employee who alleged sexual harassment, discrimination, and retaliation in violation of Title VII of the Civil Rights Act of 1964. In this case, the plaintiff, a host at Mott Street from September 2015 to September 2017, claimed that she experienced unwelcome conduct based on her gender, such as inappropriate touching by a coworker, name-calling by a manager, and pressure to wear tight clothing by another manager. She also claimed that she was treated differently than a male coworker who received fewer complaints from customers and was not disciplined or fired. She further claimed that she was fired in retaliation for sending two emails to a front-of-house manager in which she complained about the men at Mott Street and the degrading environment for women, which included patrons touching her inappropriately "a lot," and a coworker grabbing her buttocks once and hugging her two or three times. Anderson also complained her bar manager called her a "bitch," and her general manager told her to wear tight, form-fitting clothing because it looked better on her.

Mott Street moved for summary judgment, arguing that it fired Anderson for legitimate, nondiscriminatory reasons—namely, her poor performance, negative customer reviews, and insubordination. Mott Street also argued there was no causal connection between her emails and her termination. The district court agreed and granted summary judgment. Upon Anderson's appeal, the Seventh Circuit affirmed the summary judgment, holding that Anderson did not show that the alleged harassment was so severe or pervasive as to alter the conditions of her employment and create a hostile work environment. The court noted that the incidents she cited were isolated, lacking in frequency and severity, and did not interfere with her ability to do her job.

Notably, the court also found that Anderson did not identify a proper comparator to support her discrimination claim. The court explained that the male coworker she pointed to was not similarly situated to her in all material respects, as he did not have the same performance issues, negative reviews, or insubordination as she did.

The court further found that Anderson did not show that Mott Street's reasons for firing her were pretextual, or that they were false and covering up for a discriminatory motive. The court observed that Anderson's belief that she was performing satisfactorily did not contradict Mott Street's evidence of her sub-par performance and inappropriate behavior, and that Mott Street's employee handbook did not require progressive discipline before termination.

Finally, the court found that Anderson did not establish a retaliation claim, as she did not engage in any protected activity under Title VII, and there was no evidence of any causal connection between her vague August 26 email (which the court stated was too general to constitute a complaint of sexual harassment or discrimination).

Anderson v. Street, 104 F.4th 646 (7th Cir. 2024).

Illinois Court Denies Software Vendor's Motion to Dismiss Biometric Privacy Claims

In a recent decision, the United States District Court for the Northern District of Illinois denied most of a software vendor's motion to dismiss a class action lawsuit alleging that it violated the Illinois Biometric Information Privacy Act (BIPA) by capturing and collecting the biometric information of job applicants during virtual interviews. The court found that it had personal jurisdiction over the Utah-based defendant and that the plaintiffs had sufficiently stated claims under most of the BIPA's provisions.

BIPA regulates the collection, use, and storage of biometric information, such as fingerprints, iris scans, and facial scans. It requires entities that collect biometric information to obtain written consent from the individuals, inform them of the purpose and duration of the collection, and provide a written policy for the retention and destruction of the information. BIPA also prohibits entities from selling, leasing, trading, or otherwise profiting from biometric information, or disclosing it to third parties without consent, and provides a private right of action for individuals whose rights are violated, and allows them to recover statutory damages, attorneys' fees, and injunctive relief.

The case, *Deyerler v. HireVue, Inc.*, involved six Illinois residents who used HireVue's online platform to interview for positions

in Illinois with various employers. HireVue, a Delaware corporation based in Utah, develops and markets software to assess job applicants' performance during virtual interviews. HireVue's software allows customers to record video interviews with potential candidates and analyze their performance with artificial intelligence, with each recorded interview yielding data points used to assess candidates' cognitive ability, personality traits, emotional intelligence, and social aptitude. The plaintiffs alleged that HireVue violated BIPA by capturing and collecting their biometric identifiers, such as their facial geometry, without their consent, notice, or disclosure, and without a publicly available retention and destruction policy.

HireVue filed a Rule 12(b)(2) and (6) motion to dismiss, claiming a lack of personal jurisdiction because it claimed it did not have sufficient contacts with Illinois, and the plaintiffs failed to state a claim under BIPA. The court granted HireVue's motion to dismiss the plaintiffs' claim under subsection 15(c) of BIPA, which prohibits profiting from biometric information, because the plaintiffs did not allege how they were harmed by HireVue's conduct. However, it subsequently rejected HireVue's remaining arguments, finding that it had specific personal jurisdiction over HireVue because HireVue intentionally sold its software to at least one company headquartered in Illinois and that company used the software to capture at least one of the plaintiffs' biometric information. The court also found that the plaintiffs had adequately alleged that HireVue violated BIPA by failing to provide a written policy, obtain consent, or disclose the collection of biometric information.

Deyerler v. HireVue, Inc., No. 22 CV 1284, 2024 WL 774833 (N.D. Ill. Feb. 26, 2024).

EEOC Wins Disability Discrimination Case Against Wal-Mart

The United States Court of Appeals for the Seventh Circuit affirmed a jury verdict in favor of the Equal Employment Opportunity Commission (EEOC) in a disability discrimination case against Wal-Mart Stores, involving a former Wal-Mart employee with Down syndrome who was fired after the company changed her work schedule and refused to accommodate her request to restore her original hours. The court upheld the jury's finding of liability and award of damages but remanded the request for injunctive relief.

In *Equal Employment Opportunity Commission v. Wal-Mart Stores East, L.P.* , 113 F.4th 777 (7th Cir. 2024), the EEOC filed the lawsuit on behalf of Marlo Spaeth, who had worked as a sales associate at a Wal-Mart Supercenter store in Manitowoc, Wisconsin for over 15 years. Spaeth was born with Down syndrome, and as a result, had difficulty coping with changes to her routine and relied on public transportation to get to work. She had a consistent work schedule of 12:00 p.m. to 4:00 p.m., four days a week, excluding Thursdays and weekends. However, in November 2014, Wal-Mart's home office issued a directive that managers were to cease making manual adjustments to computer-generated staff work schedules in the absence of a business justification. The computerized work schedules were intended to match staffing with customer traffic patterns. As a result, Spaeth's schedule was changed to 1:00 p.m. to 5:30 p.m., to which she had trouble adapting. She repeatedly asked to return to her old schedule. Her requests were denied, perceiving her requests as similar to the complaints of other employees who did not like the new scheduling policy, rather than construing her request as an accommodation due to a disability. Unlike in the past, Wal-Mart also failed to help her adjust to the new schedule, and they never conveyed her request to higher-up managers who may have been able to make the accommodation. Spaeth's sister called the store's personnel coordinator and explained that Spaeth could not handle the new schedule because of her Down syndrome and asked that her hours be changed back to restore order. She also met with several store managers after Spaeth was discharged in July 2015 for attendance infractions. She invoked Spaeth's right to accommodation under the Americans with Disabilities Act (ADA) and asked that Spaeth be given her job back and restored to her former work schedule. The managers did not reconsider the termination decision or explore the possibility of an accommodation. Instead, they cut off communications with Spaeth's family and upheld the discharge based on Spaeth's attendance violations.

The EEOC brought suit under the ADA, alleging that Wal-Mart failed to accommodate Spaeth's disability by not modifying her work schedule. After a four-day trial, the jury found in the EEOC's favor and awarded and issued a special verdict included findings that: (1) Wal-Mart was aware that Spaeth needed an accommodation due to her disability; (2) Wal-Mart could have accommodated her without undue hardship; and (3) Wal-Mart failed to provide Spaeth with a reasonable accommodation, discharged her, and declined to reinstate her, all in violation of the ADA. The jury awarded her $150,000 in compensatory damages and $125 million in punitive damages. The district court reduced the punitive damages to $150,000 in order to comply with the ADA's damages cap of $300,000 for large employers. The court also awarded equitable relief in the form of backpay, prejudgment interest, and tax consequences, for a total monetary award of $419,662.59. The court agreed to order Spaeth's reinstatement and to require that Wal-Mart contact Spaeth's guard-

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ian regarding any future issues but denied the EEOC's requests for other injunctive measures.

Wal-Mart appealed the jury's verdict and the damages award, and the EEOC cross-appealed the denial of injunctive relief. The Seventh Circuit affirmed the jury's finding of liability and the award of damages, but vacated and remanded the judgment as to the injunctive relief. The court held that the evidence was sufficient to support the verdict that Wal-Mart was aware of the link between Spaeth's disability and her inability to comply with the new work schedule and thus that Spaeth was in need of a reasonable accommodation. The court noted that Wal-Mart's managers knew that Spaeth had Down syndrome and that she had difficulty coping with changes to her routine. The court also noted that Spaeth's sister had explicitly advised Wal-Mart that Spaeth could not adapt to the new schedule because of her Down syndrome. The court rejected Wal-Mart's argument that it needed a doctor's note or other medical evidence to support the request for an accommodation, pointing out that Wal-Mart never asked for such evidence and that it was Wal-Mart's responsibility to solicit the information it needed to evaluate the request.

The court also held that the evidence was sufficient to support the award of punitive damages, finding that Wal-Mart was recklessly indifferent to Spaeth's statutory rights as an individual with a disability. The court reasoned that Wal-Mart did nothing to address the possibility of an accommodation and instead cut off communications with Spaeth's family. The court also found that Wal-Mart's post-discharge investigation was inadequate and did not consider whether Spaeth's disability contributed to her attendance problems or whether a schedule accommodation would have been feasible.

The court further held that the award of compensatory damages was rationally related to the evidence and roughly comparable to awards made in similar cases. The court noted that multiple witnesses, including a physician, testified that Spaeth experienced significant and lasting emotional distress and depression as the result of the loss of her job. The court did not agree that the award grossly exceeded those in comparable cases and thus rejected Wal-Mart's request for a remittitur.

Finally, the court vacated and remanded the judgment as to the injunctive relief, finding that the district court erred in denying most of the injunctive relief requested by the EEOC. The court noted that proof that the Wal-Mart had previously engaged in widespread discrimination or had engaged in any documented discrimination beyond the case at hand was not a prerequisite to injunctive relief addressing the type of discrimination that the plaintiff had proven. The court also noted that, once the plaintiff had shown the employer engaged in intentional discrimination, it became the employer's burden to prove that the discrimination was unlikely to continue or that the claimant's case was somehow different from the norm. The court observed that the district court did not take into account the totality of the trial evidence bearing on why Spaeth was denied an accommodation in her work schedule, and that some of the circumstances in this case were not unique to Spaeth and raised the possibility that this may have been more than an isolated incident.

The court remanded the case for the district court to reconsider the possibility of injunctive relief, giving deference to the district court's balancing of equitable factors.

Equal Employment Opportunity Commission v. Wal-Mart Stores East, L.P., 113 F.4th 777 (7th Cir. 2024).

Seventh Circuit Finds Employee Who was Terminated After Multiple Extensions of Leave Could Not Prove Constructive Discharge, Discrimination, or Retaliation

Plaintiff Henry Beverly is a Black man who worked for Abbott Laboratories in 2002 briefly, and then was rehired as a senior financial analyst in 2007. In 2008, he transferred laterally to an undisclosed position and worked for Abbott until 2015 when he requested a leave of absence. Beverly claimed that during his employment his role was gradually diminished, and he was required to train new employees who eventually took on his responsibilities. Beverly alleged that prior to his leave he was only performing one to two hours of work per week. His work consisted of preparing portions of PowerPoints and answering ad hoc requests from colleagues. Prior to Beverly's leave in 2014, he was earning $100,839.48.

Beverly was aware of Abbott's leave policy and understood that Abbott did not guarantee reinstatement from leave and that he was prohibited from securing full time employment while on leave. When Abbott granted Beverly's leave request, it was unaware that Beverly had secured full time employment with Cook County.

At the end of Beverly's leave, he contacted his supervisor to request a leave extension which was granted. A few days after the leave extension was granted, Beverly's position was posted internally without his knowledge. Beverly requested a second leave extension, and while he was on leave, his position was offered to an Asian American man, who accepted the position. When Beverly requested a third extension, Beverly was contacted by human resources and his supervisor and advised that his employment would be terminated. When Beverly's supervisor contacted security to have his access revoked, she advised them that Beverly could be a security threat

and had a history of lying, even though there was no evidence to support these statements.

Beverly filed suit against Abbott alleging racial discrimination, constructive discharge, and retaliation in violation of the Illinois Human Rights Act (IHRA), wrongful termination in violation of 42 USC § 1981, and defamation. The trial court partially granted Abbott's motion for summary judgment dismissing the claims for racial discrimination and retaliation. Prior to the remaining issues proceeding to a jury, the court ruled on Abbott's opinion defense stating that "the opinion defense involves a question of law that [it] must decide before the defamation claim may go to the jury and Beverly cannot claim surprise." *Beverly v Abbott Laboratories*, 107 F. 4th 737, 744 (7th Cir. 2024). The court entered an order for Abbott on the defamation claim stating that without specific facts, calling someone a liar is a non-actionable opinion. The remaining issues were decided by a jury in favor of Abbott. The United States Court of Appeals for the Seventh Circuit affirmed the decision of the district court.

The Seventh Circuit found that the reduction of Beverly's duties did not amount to constructive discharge. Beverly worked at Abbott for two years after his duties began to diminish and he felt secure enough in his position to request leave. There was no indication that Abbott intended to terminate Beverly. There are no allegations by Beverly that he had bad experiences with his coworkers, and he continued to receive raises. The claims did not rise to constructive discharge.

Regarding Beverly's discrimination claim, the court determined that Abbott's reason that it needed someone to take on Beverly's job duties was not pretext. Abbott's policy regarding unprotected leave was clear, and Beverly admitted that he understood the policy. Additionally, Beverly violated the leave policy by securing full time employment with Cook County, and he was only replaced after he requested multiple extensions of his leave. Abbott had a non-discriminatory reason for Beverly's termination.

Beverly also appealed the district court's decision to enter judgment on the defamation claim mid-trial. The Seventh Circuit found that the opinion defense to defamation is a question of law to be addressed by the court and not by the jury; however, the district court's approach should be avoided if possible. Despite the timing of the judgement and Beverly's claim that he was prevented from offering evidence of the defamation at trial while Abbott was able to present evidence that the defamation was true, there was no evidence that would overcome the protected opinion defense. Any timing with the court was harmless.

Lastly, the Seventh Circuit found that there was no reason to question the discretion of the court in denying Beverly's request for a new trial. Beverly presented no evidence that the court abused its discretion in deciding the defamation claim or that the court failed to adhere to Federal Rule of Evidence 613. There was also no reason to allow evidence of Beverly's supervisor's post-termination statements.

Beverly v. Abbott Laboratories, 107 F.4th 737 (7th Cir. 2024).

Seventh Circuit Court Finds Plaintiff Could Not Prove Employment Relationship to Hold Company Responsible for Independent Contractor's Sexual Harassment

The United States Court of Appeals for the Seventh Circuit affirmed the United States District Court for Southern Indiana, dismissing Alexis Wells' claims for violation of the Title VII of the Civil Rights Act of 1967 (Title VII) and the Indiana Wage Payment Statute (IWPS). Wells filed suit against the Freeman Company (Freeman) alleging it was responsible for the actions of its alleged employee Timothy Vaughn (Vaughn), who was accused of sexually assaulting Wells. Wells initially filed suit against Vaughn and settled the claims. Wells subsequently filed suit against Freeman, the company that had an independent contractor agreement with Vaughn. Freeman is a corporate event agency, and Vaughn worked with the company as a technical solutions manager in the company's audio-visual department. Vaughn worked remotely out of the church where he originally met Wells. When Wells was a senior in high school, Vaughn requested Wells' measurements and photos of her in athletic wear and partially nude under the guise that he could assist her with her modeling career.

Vaughn also asked Wells to be a production assistant for a project he had with Freeman in Florida. Wells agreed to the position but never filled out any paperwork for the position. She also was not sure how much she would be paid; she only knew that Vaughn told her she would be paid hourly and to keep track of her hours. Following Wells' acceptance of the position, Vaughn emailed his supervisor at Freemen and explained the costs for Wells would be minimal. Vaughn's supervisor, VanRosendale, replied to Wells' email and told him to make sure the costs were approved and that she trusted what he was doing. Wells' and Vaughn's accounts of what occurred once she was on site for the job in Florida differ. Vaughn alleges that following dinner he followed Wells up to her room at her request so he could look at her clothes for the event. Vaughn claims that once in the room, Wells requested that Vaughn take nude photos of her in the bathtub. When he noticed her falling asleep, he helped her put on her clothes and get into bed.

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Wells alleged that Vaughn followed her to her room under the guise that he wanted to update her portfolio. Vaughn directed her to lay on the bed in thong underwear, and he took photos with his iPhone. Wells claims that Vaughn instructed her to shave and followed her into the bathroom where he took the razor from her and shaved her pubic region. Vaughn took photos of her pubic region and groped her genitals. The next morning Vaughn texted Wells to meet in the hotel lobby before going to the event site but when she arrived in the lobby, Vaughn was gone. Wells made it to the site but the only task she was given was to plan a golf outing. At the end of the day, Wells had dinner with Vaughn and another independent contractor on the project. She excused herself from dinner, called her family and left the hotel. Wells filed suit three months later.

Wells alleged claims of violation of Title VII, the IWPS, intentional infliction of emotional distress, and negligent infliction of emotional distress. The court found that Wells was an independent contractor and her claims under Title VII and IWPS failed as a matter of law. Additionally, there was no evidence to support a claim for intentional or negligent infliction of emotional distress.

The court used the factors in *Knight v. United Farm Bureau Mut. Ins. Co*., 950 F.2d 377 (7th Cir. 1991) to determine whether an employment relationship existed. The factors are:

> "(1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations."

Included within these five factors, the court can also consider "(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;" (2) "the length of time during which the individual has worked;" and (3) "the method of payment, whether by time or by the job." *Id*.

The court noted that the most important factor was still control and, in this case, it was important not to confuse Vaughn's unprofessional and predatory conduct with control exercised by Freeman. The evidence showed that there was no control exercised by Freeman over Wells' work or schedule; it was Vaughn using the pretense of work to advance his personal interests and not Freeman's business.

Wells' form of payment and length of employment also did not support her position being indicative of employment. Wells was retained to work on the project for a week and was requested to keep track of her hours and submit them after the project ended. The hourly rate of pay is not enough to demonstrate employment status. The factors surrounding her pay weighed in favor of independent contractor status. The evidence also showed that Freeman bore very limited costs for Wells. She was never onboarded to Freeman, she did not have credentials, and she was not given access to Freeman's computer system. The evidence shows that Freeman did very little to support Wells's work, much less than a bona fide employer. Thus, the court found that the factors weighed in favor of Wells being an independent contractor and therefore, her claims under Title VII and Indiana law failed.

The court also found that there was no evidence that Freeman intentionally caused Wells emotional distress, and that any pre-litigation tactics (such as Freeman failing to follow its policy when investigating Wells' claims, claiming it had limited evidence of her being at the event, and classifying her as Vaughn's business guest), were not so extreme to be considered intolerable. Additionally, there was no evidence that Vaughn was acting within the scope of his employment to hold Freeman vicariously liable for his actions. There is no evidence that Freeman entrusted Vaughn with any responsibilities related to scouting models or preparing portfolios.

The Seventh Circuit affirmed the granting of Freeman's motion for summary judgment.

Wells v. Freeman Co., No. 23-1320, 2024 WL 1197929 (7th Cir. Mar. 20, 2024).

Seventh Circuit Holds that Request for Removal of Education Requirement from Employment Contract Does Not Violate ADA or IHRA

In *Bruno v. Wells-Armstrong*, the United States Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of the defendants the City of Kankakee, Kankakee Mayor Wells-Armstrong, and Human Resources Director James Ellexson. The Seventh Circuit held that the defendants did not discriminate or retaliate against the plaintiff under the Americans with Disabilities Act (ADA) or the Illinois Human Rights Act (IHRA) when the plaintiff's request to remove an education component from his employment contract was denied.

The plaintiff was a veteran firefighter with the Kankakee Fire Department. He enrolled in college courses after receiving advice

from the Fire Chief that obtaining his degree could increase his chances of being promoted to Deputy Chief. However, later, he suffered a severe cardiac event that prevented him from attending classes. Following his return to work, Wells-Armstrong promoted the plaintiff to Deputy Chief. Bruno reenrolled in classes for one semester but did not continue based on his doctor's advice.

Wells-Armstrong and Ellexson presented the plaintiff with a new contract, requiring him to enroll in college courses to keep his position. The plaintiff requested that the provision be removed as an accommodation under the ADA. Ellexson agreed on condition that the plaintiff obtain a doctor's note excusing him from attending classes, which he did.

Later, Wells-Armstrong denied the plaintiff a raise but presented him with a new contract that conditioned additional compensation on his enrollment in college classes. The plaintiff, again, requested that Ellexson remove this condition as an ADA accommodation. Ellexson refused, and the plaintiff signed the contract and then retired.

The plaintiff filed claims of disability discrimination and retaliation under the ADA and IHRA. Bruno claimed discrimination for failure to accommodate based on the rejection of his request to waive the education condition and disparate treatment based on the decision to deny him a raise. The district court granted summary judgment in favor of the defendants.

The Seventh Circuit affirmed the district court's decision. First, the court noted that Bruno's request for accommodation did not qualify as a reasonable request for accommodation because the removal of the education provision of his employment contract would not enable him to perform the essential duties of his job. Instead, it was a request for an unearned pay increase. Second, the court held that the disparate treatment claim failed because the defendants' belief of insubordination was a legitimate, nondiscriminatory reason for not granting a raise. Third, the court held that the retaliation claim failed because the plaintiff's alleged protected activity (contact with a Kankakee firefighter who had filed discrimination claims against the City) was not covered by the ADA.

Bruno v. Wells-Armstrong, No. 22-2945, 93 F.4th 1049 (7th Cir. 2024).

Employer's Motion to Dismiss for Failure to State a Claim under GIPA is Rejected

In *Taylor v. Union Pacific Railroad Company*, the Northern District of Illinois denied Union Pacific Railroad Company's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). This case arises out of the Genetic Information Privacy Act of 1998 (GIPA). One of GIPA's purposes is to regulate the "use of genetic testing information by employers." 410 ILCS 513/25.

The plaintiff brought a putative class action against Union Pacific, alleging it violated Section 25(c)(1) of GIPA by requiring employees to disclose family medical history as a precondition of employment.

The plaintiff applied for a position with Union Pacific's Train Crew and was required to submit to a pre-employment physical conducted by one of Union Pacific's medical providers. The plaintiff alleged that the provider solicited the plaintiff to disclose her family medical history, including cardiac issues, cancer, diabetes, or other conditions. Union Pacific did not direct the plaintiff to withhold any genetic information. Another named plaintiff put forth identical allegations about her application for a position as a Customer Service Representative. Both the plaintiffs were ultimately hired.

Union Pacific filed a motion to dismiss for failure to state a claim, arguing that the plaintiffs failed to plausibly allege that they were "aggrieved by" Union Pacific's conduct pursuant to GIPA. To determine this issue, the court attempted to ascertain how the Illinois Supreme Court would rule, and ultimately relied on the Illinois Supreme Court's interpretation of "aggrieved person" under the Biometric Information Privacy Act (BIPA) in *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 1, which held that a party need not allege actual injury or adverse effect beyond violation of their rights under the Act.

Union Pacific further argued that the information they requested did not constitute "genetic information" as protected under GIPA because the employer must use the information as genetic information for it to qualify as such. The court rejected this argument. The court noted that "genetic information" under GIPA adopts the same meaning from 45 CFR § 160.103, which includes the manifestation of a disease or disorder in family members of the individual. 45 CFR § 160.103(iii). The court also relied on the federal Genetic Information Nondiscrimination Act (GINA), which parallels the language of 45 CFR § 160.103, as well as guidance from the EEOC that supports that GINA is concerned only with a family's potentially inheritable "diseases or disorders." The court determined that GIPA must be similarly interpreted.

Union Pacific also argued that the plaintiffs' allegations fell within the "inadvertent request" exception under Section 25(g) of GIPA. The court held that the "inadvertent request" exception is an affirmative defense under GIPA and thus the plaintiffs do not need to attempt to plead around the defense.

Union Pacific additionally argued that the plaintiffs did not allege that their genetic information was used as a means of dis-

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crimination. However, the court held that the plaintiffs did not have to allege discriminatory use of the information because their sole legal theory was that Union Pacific violated GIPA by requiring them to disclose family medical history as a precondition to employment.

The court also rejected Union Pacific's statute of limitations argument that GIPA is subject to either a one year or two-year statute of limitations, holding the five-year limitations "catchall" period applies to claims under GIPA.

Taylor v. Union Pac. R.R. Co., No. 23-CV-16404, 2024 WL 3425751 (N.D. Ill. July 16, 2024).

SCOTUS Lowers the Bar for Title VII Litigants

In *Muldrow v. City of St. Louis*, the United States Supreme Court upset long-standing measurements for Title VII actionability, lowering the bar for plaintiffs seeking relief under the Civil Rights Act, specifically in cases involving job transfers. In this case, the Supreme Court examined whether a job transfer that does not result in a decrease in pay or benefits can still be considered discriminatory under Title VII. Muldrow argued that his transfer to a new position within the City of St. Louis Police Department was motivated by discriminatory intent, as he believed the new position was less desirable than his previous role because it stripped him of certain credentials and required him to patrol. The City of St. Louis argued that because the transfer did not result in a change to his pay or benefits, there was no adverse employment action. The district court and Court of Appeals for the Eighth Circuit agreed with the City of St. Louis. Muldrow took his case to the Supreme Court, arguing that financial implications are not the only factors a court should examine when determining whether discrimination occurred.

SCOTUS sided with Muldrow, holding that even if a job transfer does not result in a tangible harm, it can still be considered discriminatory if the employee believes that the transfer was motivated by discriminatory factors.

This decision emphasizes the importance of subjective perceptions in discrimination cases and represents a significant shift in the legal landscape for Title VII litigants. Employers should now tread more carefully when making job transfer decisions, as even seemingly minor changes in an employee's position could potentially lead to costly litigation if the employee feels that the transfer was discriminatory in nature.

Muldrow v. City of St. Louis, 601 U.S. 346 (2024).

U.S. Supreme Court Ruling Brews Up Trouble for the NLRB

On June 13, 2024, SCOTUS issued its opinion regarding the standard for granting preliminary injunctions in labor disputes involving the National Labor Relations Board (NLRB). The case, *Starbucks Corporation v. McKinney*, involved a petition by the NLRB's regional director to reinstate fired Starbucks employees who promoted their unionization effort to the media. The Court held that district courts must apply the traditional four-factor test for preliminary injunctions, rather than a more deferential test that some lower courts had used.

In 2022, six employees at a Starbucks store in Memphis, Tennessee, announced plans to unionize and formed an organizing committee. They invited a news crew from a local television station to visit the store after hours to interview them about their reasons and goals for organizing. The next day, Starbucks management learned about the media event and launched an investigation. Starbucks fired several employees involved in the media event for violating company policy, including the members of the organizing committee.

The union coordinating with the employees filed charges with the NLRB, alleging that Starbucks unlawfully interfered with the employees' right to unionize and discriminated against union supporters. The NLRB issued a complaint against Starbucks and the regional director filed a petition under section 10(j) of the NLRA, seeking a preliminary injunction to require Starbucks to reinstate the fired employees and cease its anti-union conduct.

The United States District Court for the Western District of Tennessee granted the injunction, applying a two-part test that asked whether there was reasonable cause to believe that unfair labor practices had occurred, and whether injunctive relief was just and proper. The district court found that the NLRB had shown reasonable cause by presenting a substantial and not frivolous legal theory, and that relief was just and proper because it was necessary to return the parties to the status quo and protect the NLRB's remedial powers. Starbucks appealed to the United States Court of Appeals for the Sixth Circuit, which followed its own precedent and applied the same reasonable-cause standard as being consistent with the statutory language and purpose of Section 10(j). The Sixth Circuit also rejected Starbucks' argument that the district court should have applied the traditional four-factor test for preliminary injunctions, which requires a clear showing of likelihood of success on the merits, irreparable harm, balance of equities, and public interest.

Starbucks petitioned the Supreme Court for review, arguing that the Sixth Circuit's standard was too lenient and conflicted with other circuits that applied the traditional four-factor test. The Supreme

Court held that district courts must use the traditional four-factor test for preliminary injunctions when evaluating the NLRB's request for preliminary injunction under section 10(j). The Court reasoned that there was a strong presumption that courts would exercise their equitable authority to grant injunctions in a manner consistent with traditional principles of equity unless Congress clearly indicated otherwise. The Court rejected the NLRB's argument that statutory context required district courts to apply the traditional criteria in a less exacting way, consistent with the Sixth Circuit's reasonable-cause standard – which it said substantively lowered the bar for securing a preliminary injunction by requiring courts to yield to the NLRB's preliminary view of the facts, law, and equities, rather than making an independent assessment.

The Supreme Court said that the NLRB's authority to adjudicate unfair labor practices and the deferential review of its final decisions by the courts of appeals did not justify a watered-down approach to equity, because the views advanced in a Section 10(j) petition were preliminary and did not represent the NLRB's formal position. The Court also said that deference to the NLRB's litigating position was inappropriate.

Starbucks Corp. v. McKinney, 602 U.S. 339 (2024).

EMPLOYMENT AND LABOR LAW LEGISLATION UPDATES

The Illinois Legislature was busy in 2024, passing more than 10 new employment laws or amendments to existing employment laws, only one of which in any manner affirmatively helps employers. Below is a summary of the laws that were signed into law by Governor J.B. Pritzker in 2024.

Limitation to Biometric Information Privacy Act (BIPA)

In perhaps the only amendment helpful to employers in the 2024 legislative session, SB2979 provides some much-needed limitation on the concept of what constitutes a violation of BIPA. Courts have been forced to interpret not only the original collection of biometric data as a violation of BIPA, but also find separate violations each time someone uses the device (i.e. each fingerprint scan), which can be multiple times per day over many years. SB 2979 states that for the purposes of both Subsections (b) and (d) of Section 15 of the Act (which prohibit collection or being in possession of biometric information without proper notice and consent), if the company is using the same biometric identifier (i.e. a fingerprint) or biometric information from the same person using the same method of collection, this will constitute a single violation of Section 15, and the person will be entitled to at most, one recovery under that section. The amendment also allows a release to be signed electronically. Unfortunately, the law does not include language that would make the changes retroactive and protect companies that may have violated BIPA in the past.

Changes to Illinois Human Rights Act (IHRA)

Statute of Limitations – 2 Years

In perhaps the most significant of all changes to the employment law landscape in Illinois in 2024, the Legislature, in SB3310, extended the statute of limitations from 300 days to 2 years for employees to file employment claims under the IHRA. (The original proposed amendment was 3 years!) There is no language in the bill regarding applying it prospectively and therefore, the presumption is that, just like when the statute of limitations was extended from 180 to 300 days, it will apply retroactively, which could resurrect prior claims that have already expired under the 300-day statute of limitations but which are still less than 2 years old. The new statute of limitations took effect January 1, 2025.

Family Responsibilities

HB2161 adds "family responsibilities" to the list of classes protected from harassment and discrimination under the IHRA. "Family responsibilities" is defined as an employee's "actual or perceived provision of personal care to a family member." "Personal care" and "family member" have consistent definitions as found in the Employee Sick Leave Act, which are broad. The legislation does state, however, that it is not intended to obligate an employer to make accommodations or modifications to reasonable workplace rules or policies for an employee based on family responsibilities, including accommodations or modifications related to leave, scheduling, productivity, attendance, absenteeism, timeliness, work performance, etc. The amendment took effect January 1, 2025.

Reproductive Health Decisions

HB4867 adds "reproductive health decisions" to the list of classes protected from discrimination under the IHRA. "Reproductive health decisions" is defined as a person's decisions regarding

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their use of: contraception; fertility or sterilization care; assisted reproductive technologies; miscarriage management care; healthcare related to the continuation or termination of pregnancy; or prenatal, intranatal, or postnatal care. The amendment took effect January 1, 2025.

Artificial Intelligence and Zip Codes

HB3773 regulates the use of artificial intelligence in matters relating to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure, or the terms, privileges, or conditions of employment. Specifically, employers will be prohibited from using artificial intelligence that has the effect of subjecting employees to discrimination on the basis of protected classes under the IHRA. Employers will also be prohibited from using zip codes as a proxy for protected classes under the IHRA. Employers must also provide notice to employees that they are using artificial intelligence in their employment decisions listed above. "Artificial intelligence" means "a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Artificial intelligence includes generative artificial intelligence. "Generative artificial intelligence" means "an automated computing system that, when prompted with human prompts, descriptions, or queries, can produce outputs that simulate human-produced content, including, but not limited to, the following:

1) textual outputs, such as short answers, essays, poetry, or longer compositions or answers;
2) image outputs such as fine art, photographs, concep tual art, diagrams and other images;
3) multimedia outputs, such as audio or video in the form of compositions, songs, or short form or long form audio or video; and
4) other content that would be otherwise produced by human means.

The amendment is effective January 1, 2026.

New E-Verify Requirements

Employers in the United States are required by federal law to verify the identity and work authorization for each person they hire by completing and retaining Form I-9 Employment Eligibility Verification for each employee. Most employers fulfill this task through manual review of documents. The standard imposed on these employers is that the document must reasonably appear genuine on its face and relate to the person presenting it. Therefore, manual review can be somewhat subjective and may cause a fraudulent document to be accepted, particularly with improving technology used to create fake identifications. As a result, some employers will opt to use the Federal E-Verify system, which allows the federal government to review and match the information provided by the employee and alert the employer if there is a potential issue.

Illinois has previously attempted to ban the use of E-Verify in 2007 legislation, which was subsequently struck down by the Illinois Supreme Court as unconstitutional. In 2023, the Legislature proposed an amendment to the Illinois Right to Privacy in the Workplace Act (SB1515), which in its original form also would have banned the use of E-Verify unless required by law to use it. The final version of SB1515 removed the barring language and passed both chambers, but was ultimately vetoed by Governor Pritzker at the request of the sponsors due to "irreconcilable drafting errors" that, in their estimation, would have an adverse effect on the workers it sought to protect.

Similar legislation was introduced in 2024 (on a second Senate amendment to what was introduced as a shell bill in February 2023) in the form of SB0508. The bill went through numerous additional amendments and ultimately resulted in the enrolled version that was sent to Governor Pritzker for signature on June 20, 2024, effective January 1, 2025. The language of SB1515 can be read to serve as a ban for employers to voluntarily use E-Verify. Specifically, Section 12(a) of the Right to Privacy in the Workplace Act states:

> "Nothing in this Act shall be construed to require an employer to enroll in any Electronic Employment Verification System, including the E-Verify program . . . beyond those obligations that have been imposed upon them by federal law."

Further, Section 13(b) states that "[a]n employer shall not impose work authorization verification or reverification requirements greater than those required by federal law."

Thus, reading these two sentences together, if employers are not required by federal law (i.e. the federal government or a federal contractor) to use E-Verify (which most are not), then they cannot use E-Verify or another verification system to determine work authorization status. Despite presumably knowing that the state is prohibited from barring the use of E-Verify, whether intended or not, this legislation, as written, would seemingly do just that. If it is not the intent to prohibit the use of E-Verify, an easy fix would be to add something like: "nothing in this Act shall be construed

to prohibit an employer from using E-Verify" or by changing the word "required" to "allowed" to read that an employer shall not impose work authorization verification greater than what is allowed by federal law. Attempts to have such language added or clarified, however, failed.

Since the time the legislation passed, however, the IDC Legislative Committee and other employment defense attorneys lobbied the IDOL for clarification, contacted members of the Legislature, and also got the word out publicly about the drafting issues and possible interpretation. In late October, the IDOL finally published a (non-binding) Frequently Asked Question (FAQ) on the topic and has clarified that the law does not prohibit an employer from voluntarily using E-Verify. It is important to note that there are clear disclaimers on the use of FAQs and that they are not to be considered complete and do not constitute a legal opinion. It would, however, tend to show that the IDOL will not interpret the legislation to constitute a ban on the voluntary use of E-Verify despite the wording in the statute to the contrary.

New Requirements if Verification Discrepancy

Employers should also be prepared to comply with the new required procedures provided in the amendment if they either find a discrepancy in an employee's employment verification information, or if they receive notification from the Social Security Administration or IRS of a discrepancy. If an employer discovers a discrepancy in an employee's employment verification information, the employer must provide the employee with: 1) the specific document or documents that are deemed to be deficient and the reason why they are deficient; 2) instructions on how the employee can correct the deficient documents; 3) an explanation of the employee's right to have representation present during the verification or re-verification process; and 4) an explanation of any other rights the employee may have with the verification or reverification process.

If the employer receives notice from a federal or state agency of a discrepancy as it relates to work authorization, the legislation adds new language that was not found in the vetoed SB1515. The new language states in Section 13(d)(1) that when notified by a federal or state agency of a discrepancy, "The employer must not take any adverse action against the employee, including the re-verification, based on the receipt of the notification." There is no further language found in the amendment that would actually give employers the green light to terminate an employee following such a notification, even after the employee has exhausted the appeal process, has indicated they do not intend to challenge the finding, or after a final nonconfirmation notice has been issued. Thus, the legislation can be interpreted as trying to prohibit employers from ever acting on information they receive from the federal government after discovering an employee might not have the legal right to work in the United States. While this also might not have been the intent, the language of the law can certainly be read that way and the IDOL has not spoken on this subject.

In addition to not taking any adverse action, there are further steps required of an employer when it receives notice of a discrepancy from a state or federal agency. The employer must also provide notice of the discrepancy to the employee within five business days after notification with: 1) an explanation that the federal or state agency has notified the employer that the work authorization documents do not appear to be valid or reasonably relate to the employee; and 2) the time period the employee has to contest the determination. The notice shall be hand delivered if possible and, if not, notification by mail or email is acceptable. The employee must be allowed to have a representative present during any meetings, discussions, or proceedings with the employer. The employer will be prohibited from taking any adverse action during the above process.

The amendment also requires employers to notify employees when employers have been notified of an inspection of I-9 Employment Eligibility Verification forms, within 72 hours of receiving the notice. If, during an inspection of the I-9 forms, the inspecting entity determines the employee's work authorization documents do not establish the employee is authorized to work in the United States, the employer shall notify the employee of the finding within five business days. The employee then has time to inform the employer whether he is contesting the determination.

Illinois Personnel Record Review Act (IPRRA)

Pay Stubs

SB3208 provides for new mandates pertaining to the preservation and production of employee pay stubs under the IPRRA. The amendment requires employers to maintain copies of employee pay stubs for not less than three years after the date of payment, regardless of whether the employee's employment ends during that period, and regardless of whether the pay stub was provided on paper or electronically. In addition, the amendment requires employers to provide copies of pay stubs on request (which can be required to be in writing). Employers have 21 days to provide the pay stubs after the request.

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The employer must provide the pay stubs in the manner requested by the employee, either physical or electronic, email, through computer access, or regular mail. Importantly, employers who furnish electronic pay stubs in a manner that the former employee cannot access after separation shall, upon separation from employment, offer to provide the outgoing employee with a record of all the pay stubs from the year prior to the separation. The employer must record in writing that the offer was made, when, and how the employee responded. Thus, it will be a best practice for employers to add this task to their separation checklists and exit interview process. Noncompliance with the pay stub requirements may result in a civil penalty of up to $500 per violation payable to the IDOL. This change took effect January 1, 2025.

Additional Documents Employers Must Produce

The IPRRA requires certain documents to be produced upon request. Specifically, the IPRRA requires employers to produce "any personnel documents which are, have been, or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge, or other disciplinary action" (with a few exceptions). Thus, it has been important for employers to understand and follow this standard and not just produce a personnel "file" when requested. It requires employers to dig deeper and gather other possibly relevant documents pertinent to the requesting employee, which could include time records, performance evaluations, write ups, complaints about the employee, sales records, other performance documentation, and much more depending on the circumstances of each individual employee's employment and decisions made throughout employment. Employers have an initial seven days to produce the records but, if needed, can take up to seven additional days. Employers who fail to produce all such records upon request may be barred from later using them in litigation and also may be subject to an adverse inference as to the genuineness of documents that were not originally produced.

HB3763 greatly expands the documents that must be provided to requesting employees, and with no additional time in which to comply. Specifically, employers will now be required to also provide:

- Any employment-related contracts or agreements that are legally binding on the employee;
- Any employee handbooks that the employer made available to the employee or that the employee acknowledged receiving (which presumably includes all prior versions); and
- Any written employer policies or procedures that the employer contends the employee was subject to and that concern qualifications for employment, promotion, transfer, compensation, benefits, discharge, or other disciplinary action.

Thus, employers must be aware of these requirements (which are automatically included with a request for "personnel records" and do not require any additional request language other than simply requesting "all" records under the Act). Best practices will include creation of a checklist for employers to follow each time they receive requests for personnel records. Employers must also train supervisors on what to do when such a request is made, which would likely include providing the request to an HR department without delay.

The employee's request must: 1) specify what personnel records the employee is requesting or if the employee is requesting all the records allowed to be requested under this Section; 2) specify if the employee is requesting to inspect, copy, or receive copies of the records; 3) specify whether records be provided in hardcopy or in a reasonable and commercially available electronic format; 4) specify whether inspection, copying or receipt of copies will be performed by the employee's representative (including family members, lawyers, union stewards, or other union officials, or translators); and 5) if the records include medical information and medical records, must include a signed waiver to release medical information and records to the employee's representative. This legislation has an effective date of January 1, 2025.

Freedom of Speech Act

The Freedom of Speech Act ("the Act") (SB3649) was signed into law on July 31, 2024, and took effect January 1, 2025. [Note that as of time of publication, there are pending legal challenges to this law, though the law remains in effect.] The name of the Act is a bit of a misnomer, however, as it actually restricts employers' speech rather than protects any particular speech. The Act states that it is in the public policy interests of the State for all working Illinoisans to have protections from mandatory participation in employer-sponsored meetings if the meeting is designed to communicate an employer's position on "religious" or "political" matters. It also prevents employees from being subjected to intimidation tactics, including acts of retaliation, discipline, or discharge from their employer for choosing not to participate in employer-sponsored meetings. To that end, the Act provides that employers may not discharge, discipline, or otherwise penalize, threatened to discharge, discipline, or otherwise penalize, or take any adverse action against an employee: 1) because the

employee declines to attend or participate in an employer-sponsored meeting or declines to receive or listen to communications from the employer or the agent, representative, or designee of the employer if the meeting or communication is to communicate the opinion of the employer about religious matters or political matters; 2) as a means of inducing an employee to attend or participate in meetings or receive or listen to communications described in paragraph (1); or 3) because the employee or a person acting on behalf of the employee, makes a good faith report, orally or in writing, of a violation or a suspected violation of this Act.

Importantly, "political matters" is broadly defined as matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulations, proposals to change public policy, and the decision to join or support any political party or political, civic, community, fraternal, or labor organization. The inclusion of the term "labor organization" is notable since it would include, among other scenarios, employers holding meetings designed to discourage organizing efforts. Further, since "employee" is not limited in the Act to non-managerial employees, this could also mean that employers would not be able to require managers to attend meetings designed to train them in union avoidance. "Religious matters" means matters relating to religious belief, affiliation, and practice and the decision to join or support any religious organization or association.

Whether the Act, or at least the inclusion of the definition of "labor organization," remains intact and goes into effect will remain to be seen. Previous challenges in other states to legislation that would quash employer speech have been made based on preemption under the National Labor Relations Act (which allows for employers to hold union meetings and protects employer speech on such subjects), and/or a violation of the First Amendment.

Section 20 of the Act provides that employees who believe this law has been violated may bring a civil action to enforce the Act within one year after the date of the alleged violation. The court may award the prevailing employee relief including injunctive relief, reinstatement to the employee's former position or an equivalent position, back pay, reestablishment of any employee benefits, including seniority, to which the employee would otherwise have been eligible if the violation had not occurred, and any other appropriate relief deemed necessary by the court to make the employee whole. The court "shall" also award a prevailing employee reasonable attorney's fees and costs. Not surprisingly, the Act is silent as to awarding a prevailing employer any attorney's fees or costs, which likely means the only option for employers to recover attorney's fees will be if the employer can prove the litigation was frivolous under state or federal procedural rules.

In addition, the Illinois Department of Labor (IDOL) must inquire into any alleged violations that are brought to its attention by an "interested party" to institute actions for additional penalties that are called for in the Act. Section 25 of the Act states, "In addition to the relief set forth in Section 20, an employer shall be assessed a civil penalty of $1,000 for each violation of Section 15, payable to the Department." Although it is not clear, presumably the IDOL must institute a proceeding to impose the penalty, rather than a court having jurisdiction to impose a fine that becomes payable to the IDOL. In addition, the Act also calls for "interested parties" to bring claims to the IDOL.

An "interested party" means an organization that monitors or is attentive to compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements. This is an exceptionally vague definition (and the term "organization" is not defined) and might be broadly interpreted to include nearly anyone who claims to care about worker rights. Thus, this could mean not only a union that seeks to organize at a particular company but could also include an attorney who represents employees in employment-related claims. Interested parties may bring actions for penalties in the county where the violation is alleged to have occurred or where the principal office of the employer is located in the following sequence of events:

1) The interested party submits to the Department a complaint describing the violation and naming the employer;
2) The Department sends notice of the complaint to the named party alleged to have violated the Act and to the interested party. The named party may either contest the alleged violation or cure the alleged violation;
3) The named party contests or cures the alleged violation within 30 days after the receipt of the notice of complaint or, if the named party does not respond within 30 days, the Department issues a notice of right to sue to the interested party as described in paragraph 4;
4) The Department issues a notice of right to sue to the interested party, if one or more of the following has occurred: a) the named party has cured the alleged violation to the satisfaction of the director; b) the director has determined that the allegation is unjustified or that the department does not have jurisdiction over the matter or the parties; or c) the director has determined that the allegation is justified or has not made a determination, and either has decided not to exercise jurisdiction over the matter or has concluded an administrative enforcement of the matter.

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The Act then provides conditions under which an interested party can initiate litigation. Astonishingly, interested parties are given three years after the alleged conduct to file suit, which is tolled during the investigation period at the IDOL. Thus, this Act gives so called "interested parties" more rights and leeway than actual "aggrieved parties." Even more astounding is the fact that these interested parties can not only recover the damages allowed for aggrieved parties, but also 10 percent of any statutory penalties assessed, plus any attorney's fees and expenses in bringing the action. Thus, employers can likely expect a slew of litigation by plaintiffs' lawyers, union representatives, and others purporting to be "interested parties," whether legitimate or not, and whether damages have been suffered or not (much like claims under the BIPA and Illinois Genetic Information Privacy Act (GIPA)). There are a few exceptions to the Act, such as voluntary meetings that discuss religious or political matters; conveying information required by law; communicating information necessary for employees to perform their job duties; attending training intended to foster a civil and collaborative workplace or prevent workplace harassment or discrimination; or prohibiting political or religious organizations from requiring their employees to attend meetings discussing that organization's political or religious beliefs.

Expansion of Illinois Whistleblower Act

Under HB5561, which went into effect January 1, 2025, employees can now bring a claim under the Whistleblower Act for retaliation based on their report to an internal supervisor, manager, officer, or board member. Pre-amendment, actions under the Whistleblower Act were limited to retaliation based on reports to law enforcement or a government agency or court. But Illinois has long had a common law action for retaliatory discharge that allowed lawsuits based on discharge (and only discharge) in retaliation for reporting an alleged violation of a clear mandate of Illinois public policy (which, according to case law, is found under Illinois statutory and regulatory law). The two have never been completely co-extensive, but overlapped in enough ways that whistleblowers were reasonably covered. Put another way, because of the common law cause of action, employers would always be advised against taking adverse action of any sort against an employee who reported a violation of state or federal law, even if that report was limited to an internal report. If, however, an employee filed a lawsuit under the Whistleblower Act only, employers would have had a defense based on the employee not reporting to anyone outside of the organization. That defense will no longer be available with this amendment.

The Whistleblower Act amendments expand the Act in several additional ways. First, a retaliatory action need not be an adverse employment action and now can also be a non-employment action "that would dissuade a reasonable worker from disclosing information under [the Whistleblower Act]." Several specific examples are included in the statute, including: (1) taking or threatening to take action that would intentionally interfere with an employee's ability to obtain future employment, or post-termination retaliation to interfere with a former employee's employment; (2) taking or threatening to take actions prohibited under the Illinois Human Rights Act; or (3) contacting or threatening to contact immigration authorities.

Second, penalties and damages have been expanded to include, in addition to reinstatement, backpay, and attorneys' fees and costs: (1) permanent or preliminary injunctive relief; (2) front pay and 9% interest on any back pay award; (3) liquidated damages of up to $10,000; and (4) "the court shall award a civil penalty of $10,000 payable to the employee." The amendments also provide for Attorney General enforcement of the statute.

PAY TRANSPARENCY: POSTINGS NOW REQUIRED

In 2023, Illinois amended the Illinois Equal Pay Act (IEPA), which requires that all employers with 15 or more employees (anywhere, not just in Illinois), and with employees employed in Illinois, must include the "pay scale and benefits" for a position in any specific job posting, including through postings by third party entities. The law went into effect on January 1, 2025. The posting requirements apply to positions that will either: 1) be physically performed, at least in part, in Illinois, or 2) that will be performed outside of Illinois but the employee reports to a supervisor, office, or other work site in Illinois. "Pay scale and benefits" means the wage or salary, or the wage or salary range, and a general description of benefits and other compensation, including but not limited to bonuses, stock options, or other incentives the employer reasonably expects in good faith to offer for the position.

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

The Illinois Department of Labor created (non-binding) Frequently Asked Questions, which clarify questions many employers have been asking since the law was passed in 2023. One question that has been answered is that if an out-of-state employer posts for a remote position, unless that position will be supervised by someone in Illinois, or the employer has reason to know or foresee that the work will, at least in part, be performed in Illinois, the employer will not need to include the pay and benefits information in the posting. Also, the ultimate offer made can be outside the originally posted pay range as long as the pay scale information was created and disclosed in good faith. Employers are not required to post for every job and instead can recruit in other ways; however, if a candidate for which there was no formal posting requests the pay scale and benefits information, the employer must provide it before making an offer.

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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. Ancestory.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. Ancestory.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 Yacktman 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 Yacktman 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 Yacktman 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 Yacktman 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 Yacktman 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 consumers 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 contact 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 DCSF, 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 multifactored 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

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

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

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 Rebuts 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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Survey of Toxic Tort Law Cases

Parent Company Not Liable Under Direct Participation Theory for Subsidiary Employee's Toxic Chemical Exposure

Plaintiff was a fumigator and inhaled a toxic/lethal dose of methyl bromide while transferring product from a large container to a smaller one. Plaintiff's direct employer was dismissed under the worker's compensation exclusive remedy provision, and plaintiff pursued his employer's parent company under the direct participant theory, an exception to the general rule that a parent is not liable for the acts of its subsidiary.

"To prevail, a plaintiff must show: 1) a parent's specific direction or authorization of the manner in which an activity is undertaken and 2) foreseeability of injury." A parent will only be liable if it surpasses the control normally incident to ownership. Here, the parent did not specifically direct or authorize the practice employed by plaintiff. The subsidiary exercised its own expertise in how to operate day-to-day.

There was no evidence that the parent could foresee that safety would be compromised as a result of its general budgetary control. Post-accident changes in policies and procedures also did not reveal foreseeability. Dismissal affirmed.

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

Fourth District Rejects Application of "Stream of Commerce" Theory of Specific Personal Jurisdiction to South Korean Battery Manufacturer for Injury Sustained to Plaintiff in Illinois

Plaintiff alleged that he sustained third degree burns after an e-cigarette in his pocket containing an 18650 lithium-ion battery cell manufactured by Samsung exploded in his pocket. Samsung is a manufacturer and seller of rechargeable 18650 lithium-ion battery cells. Samsung is a South Korean corporation with a principal place of business in South Korea. Samsung does not have any employees, representatives, property or bank accounts in Illinois. Samsung sells batteries to sophisticated users of its batteries to be incorporated as a component of authorized products or assembly in battery packs. There was no evidence that Samsung shipped any batteries to Illinois. Samsung does not authorize its batteries for use in e-cigarette/vaping devices such as the one used by plaintiff.

The Illinois Appellate Court Fourth District analyzed whether the trial court's exercise of personal jurisdiction over Samsung was a violation of the due process clause of the fourteenth amendment. Plaintiff admitted that Samsung is not subject to general personal jurisdiction in Illinois because Samsung is not "essentially at home" in Illinois. *See Goodyear v. Dunlop Tires Operations, S.A. v. Brown*, 964 U.S. 915, 919 (2011). Therefore, the Fourth District focused on the sole question of whether the Illinois trial court could exercise specific personal jurisdiction over Samsung.

To exercise specific personal jurisdiction over a defendant, plaintiff must demonstrate "that the defendant purposefully directed its activities at the forum state and the cause of action arose out of or related to the defendant's contacts with the forum state." *See Russell v. SNFA*, 2013 IL 113909, ¶ 40; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Once the "minimum contacts" test has been met, the next step is for the court to consider the "reasonableness of requiring the defendant to litigate in Illinois." The requirements for a court to exercise specific personal jurisdiction equate to the following three steps: (1) purposeful availment; (2) relatedness; and (3) reasonableness.

> Under the stream of commerce theory, a seller's amenability to suit does not travel with the products, even when those products are highly mobile.

While it was undisputed that Samsung's 18650 lithium-ion battery cells were present in Illinois and available for sale from third parties, the court ruled that was insufficient to establish specific jurisdiction. Under the stream of commerce theory, a seller's amenability to suit does not travel with the products, even when those products are highly mobile. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980). The court noted that the United States

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Supreme Court has not released a majority opinion on the stream-of-commerce theory as a basis for specific personal jurisdiction. However, the Supreme Court has stated that "the mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.'" *See World-Wide Volkswagen,* 444 U.S. at 298. The court focused on Samsung's contacts with the forum state itself.

There was no evidence that Samsung purposefully availed itself of the privilege of conducting activities within Illinois. In fact, there was no evidence that Samsung had any contact with Illinois. The unilateral actions of a third party are insufficient to serve as the basis of jurisdiction. Because plaintiff failed to meet the first test of purposeful availment to establish specific personal jurisdiction, the court did not analyze the second and third prongs, relatedness and reasonableness.

The Fourth District reversed the trial court's judgment and remanded the case to the trial court with instructions to dismiss plaintiff's claims against Samsung for lack of personal jurisdiction.

Wood v. Samsung SDI Co., 2024 IL App (4th) 230994.

First District Affirms Trial Court's Denial of Defendants' Motion to Transfer Venue Based on Forum Non Conveniens

In *Starr v. Presence Central and Suburban Hospitals Network,* Defendants Presence Central and Suburban Hospitals Network, and two of its nurses, Debra L. Juhant, RN and Larissa Chaidez, RN, unsuccessfully moved to transfer the case from Cook County, Illinois to Will County, Illinois, on the basis of *forum non conveniens*.

The underlying lawsuit was filed in Cook County on the basis of medical negligence against several defendants, including Presence, and nurses Juhant and Chaidez. All of the negligence alleged occurred at Presence, which was located in Will County. However, plaintiff received post-injury treatment at the University of Chicago, Rush University, and several Duly Health & Care facilities, all of which were located in Cook County.

At the trial court level, defendants argued that the relevant private and public interest factors weighed in favor of transfer for the following reasons: (1) the purported negligence occurred at Presence, which was located in Will County; (2) both nurses resided, as well as worked, in Will County; (3) other key witnesses and evidence were located in Will County; and (4) Will County was the forum with the greatest public interest in the resolution of the controversy. Furthermore, the defendants contended that plaintiffs' choice of forum should have been given little deference as they were not residents of Cook County, nor did the alleged negligence take place there.

Plaintiffs' argument focused on the post-injury treatment at the University of Chicago, Rush University, and Duly Health & Care, and the corresponding witnesses that would be called to testify at trial from these facilities. Because these facilities were located in Cook County, and the witnesses to be called from these facilities were also located in Cook County, plaintiffs contended that Cook County was the most convenient forum.

Plaintiffs' argument focused on the post-injury treatment at the University of Chicago, Rush University, and Duly Health & Care, and the corresponding witnesses that would be called to testify at trial from these facilities. Because these facilities were located in Cook County, and the witnesses to be called from these facilities were also located in Cook County, plaintiffs contended that Cook County was the most convenient forum. Moreover, plaintiffs argued that because Will County and Cook County were adjacent to each other, the defendants had failed to meet their burden of showing that the relevant factors strongly favored transfer to Will County.

Defendants submitted several affidavits detailing the inconveniences related to litigating the case in Cook County. Specifically, Presence's president averred that holding the trial in Will County would minimize caretaker time away from patients, avoid staff disruptions, and permit the continuity of care to patients. Nurses Juhant and Chaidez claimed that attending trial in Cook County would impair their ability to obtain coverage for their professional duties. Conversely, a trial in Will County would allow them to be in close proximity to their patients, or others who were in need of their care.

The trial court denied defendants' motion while acknowledging that plaintiffs' choice of forum was entitled to less deference than if they resided in Cook County, or if the alleged negligence occurred there. The trial court opined that transfer would only be granted if the balance of private and public interest factors strongly favored Will County, and in the trial court's opinion, they did not.

The trial court noted that the private interest factors "only very slightly" favored transfer to Will County. Ease of access to evidence, as well as the cost of obtaining witnesses favored transfer. However, the convenience of the parties did not. Regarding the private interest factors, the trial court held that the interest in deciding local controversies locally, and the desire to not burden a forum with little to no ties to the litigation both favored transfer. Issues concerning court congestion, however, disfavored transfer.

Analyzing the trial court's reasoning under an abuse of discretion standard, the Illinois Appellate Court First District refused to overturn the decision. The First District conceded "another result in this case [was] certainly conceivable" especially because "the alleged malpractice occurred solely in Will County." However, the court acknowledged that its role was to determine whether the trial court abused its discretion in denying the motion to transfer, it was not tasked with reweighing the factors and making a decision as to whether the case should be transferred.

Starr v. Presence Central and Suburban Hospitals Network, 2024 IL App (1st) 231120.

Illinois Appellate Court Affirms Verdict Despite Alleged Misstatement of Law and Disputed Jury Instructions in FELA Case Against Company

In *Sanders v. CSX Transportation, Inc*., the Illinois Appellate Court First District reviewed a wrongful death and survival action brought by Annette Sanders under the Federal Employers Liability Act (FELA). The case centered on claims that her late husband, Joseph Sanders, developed colon cancer due to workplace exposures to asbestos and diesel fumes during his employment with CSX from 2002 to 2014.

The estate argued that CSX negligently failed to provide a safe work environment. Evidence included testimony from the estate's experts, industrial hygiene, Dr. Hernando Perez, and medical causation expert, Dr. Steven Newman, who linked Sanders' cancer to his workplace exposures. CSX's experts countered, claiming smoking was the sole cause of his cancer. CSX's witness Jason Pritchard, a former supervisor, testified but was subject to curative instructions after it emerged he was no longer employed by CSX, violating a motion to exclude witnesses from the courtroom during trial proceedings. The jury awarded Plaintiff $2.2 million for pain and suffering. The judgment was reduced to $770,000 after determining Joseph was 65% contributorily negligent. CSX filed a motion for new trial, arguing that the estate's counsel improperly suggested OSHA violations equated to negligence *per se* under FELA. The court rejected this argument, finding the comments consistent with FELA's standard that a plaintiff need only prove slight negligence. CSX also contended the court erred by instructing the jury how to weight Pritchard's credibility after his improper courtroom presence. CSX argued that despite the motion *in limine* order barring witnesses from the courtroom during proceedings, Pritchard was allowed to be in the courtroom under an exception in Illinois Rule of Evidence 615 for a designated corporate representative. The corporate-representative exception to Rule 615 allows corporate parties to have a representative present during proceedings, ensuring they are on equal footing with natural parties. However, this exception is limited to an "officer or employee" of the corporation. Ill. R. Evid. 615(2).The trial court upheld the instruction, noting it acted reasonably to address potential prejudice without striking Pritchard's testimony.

On appeal, CSX argued that the trial court erred in denying its motion for a new trial. The appellate court held that the estate's reference to OSHA violations during closing arguments did not constitute a claim of negligence *per se* under FELA. The court determined that while OSHA violations were admissible as evidence of CSX's negligence, they did not automatically establish liability. Additionally, the court noted that the trial court upheld its decision to issue a curative instruction, emphasizing the unique circumstances of the case and its gatekeeping role. The Estate and the court were unaware that Pritchard was no longer employed by CSX until trial, precluding an earlier objection to his presence at counsel's table. Given Pritchard's critical role as the only witness capable of refuting key testimony from the Estate's witness, former CSX employee Horne, the court instructed the jury to consider Pritchard's prior exposure to Horne's testimony when evaluating his credibility.

The First District held that there was no prejudice to CSX and therefore there was no abuse of discretion in the trial court's handling of the issues raised by CSX, affirming denial of CSX's motion for a new trial.

Sanders v. CSX Transportation, Inc., 2024 IL App (1st) 230481.

Third-Party Claims Remain Stayed and Severed on the Asbestos Docket

This matter involves an appeal of the ruling of the Circuit Court of Cook County (Hon. Patrick J. Sherlock), staying and severing third-party claims filed by defendant Avon Products, Inc. In its Rule 23 opinion, the appellate court agreed with the trial court and upheld

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staying and severing the claims in this case, finding it was proper under the circumstances.

Ramirez claimed exposure to allegedly contaminated talcum powder manufactured at the Avon former facility in Morton Grove, Illinois. Avon filed a motion with the trial court to add plaintiff's former employers to the matter under the contribution theory and the motion was granted. However, the court severed and stayed the claims until "the underlying action would be adjudicated.

Avon countered that it had acted diligently to determine the addresses and contact information for the four companies, that the fact that two of them were dissolved did not mean that there could not be any recovery through "unexhausted policies" or "assets," that there was evidence of asbestos exposure by the companies and that, while Avon was "sympathetic" to Ramirez's condition, it was equally important that former employers were "not left immune from their liability for exposures and causing Ramierz mesothelioma." In a footnote, Avon addressed the request for severance and a stay, saying that Avon objected to the request and further stating that plaintiff needed to bring a separate motion for such relief.

The appellate court agreed with Avon that as a matter of best practices, the circuit court should have required the Ramirezes to separately move for a stay so that the competing concerns of the parties could be fully aired in briefing on that separate motion. However, the competing interests were essentially the same as laid out in the motion for leave.

The appellate court diverted to two prior decisions and declined to follow Avon's arguments on how these cases were distinguishable. The appellate court reviewed the decision by the circuit court about how to proceed as they did in those cases—by asking whether what the circuit court decided to do was arbitrary, exceeded all bounds of reason, or ignored or misapprehended the law. *Cholipski*, 2014 IL App (1st) 132842, ¶ 39. It did not find that to be the case. The court did not give any particular weight to any of the factors considered but acknowledged both sides had competing, but fairly important interests in securing justice for its clients.

Ramirez v. Avon Products, Inc., 2024 IL App (1st) 240441-U.

Galich Court Continues to Confer Constitutionality to Prejudgment Interest in Illinois First District Appeal

In another recent challenge to the constitutionality of Illinois' prejudgment interest statute, the Illinois Appellate Court First District again upheld the constitutionality of Illinois' amendment of 735 ILCS 5/2-1303(c), which provides for plaintiffs to recover statutory prejudgment interest. The First District rejected the defendant's arguments that allowing for prejudgment interest violated basic due process, equal protections, and separation of powers. This was the second time a defendant has challenged the prejudgment interest statute to the First District. In the earlier instance, the First District also rejected similar arguments in *Cotton v. Coccaro*, 2023 IL App (1st) 220788, and found the statute constitutional.

In *Galich v. Advocate Health and Hospital Corporation*, 2024 IL App (1st) 230134, defendant Advocate Health and Hospital Corporation ("Advocate") appealed the trial court's ruling, claiming among other issues, that the trial court's award of $2.8 million in prejudgment interest to plaintiff in addition to the verdict amount was improper because the above-referenced Illinois statute providing for prejudgment interest was unconstitutional on five separate challenges.

The case arose from allegations that Advocate, through its emergency room physician employee, was liable for medical malpractice in the treatment of Steven Butts, who sought treatment for a fractured jaw but ultimately suffered permanent brain damage after Butts was not properly intubated and was deprived of oxygen. The jury awarded plaintiff $45.3 million in damages and subsequently the trial court ordered defendants to also pay $2.8 million in prejudgment interest. Illinois' prejudgment interest amendment to 735 ILCS 5/2-1303 went into effect on July 1, 2021, providing for statutory six percent per year pre-judgment interest to be recovered by a plaintiff on all judgment damages including future damages, with the exception of punitive damages, sanctions, statutory attorney's fees, and statutory costs. The total prejudgment interest is then added to the judgment amount to be paid by the liable defendants/judgment debtors.

On appeal, Advocate argued that the prejudgment interest amendment was unconstitutional because it: (i) burdens a defendant's right to a jury trial, (ii) is not narrowly tailored to stated legislative purpose, (iii) violates due process by penalizing defendants for litigation delays, (iv) constitutes special legislation and violates equal protection, and (v) violates the separation of powers. Advocate also challenged the amendment under procedural grounds as to the "three readings rule" and challenged whether the amendment could be retroactively applied to cases where the alleged tortious conduct occurred prior to the enactment of the amendment. Similar to its findings in *Cotton*, the First District disagreed with each and all of these challenges, first finding that the amendment did not infringe on defendants' right to a jury trial, because a) the amendment does not penalize a defendant who elects a jury trial, and b) the jury does not calculate or award prejudgment interest, and because other states with similar prejudgment interest laws had found that the right to a jury trial was not impacted because interest was not "damages" in the ultimate sense.

The *Galich* court next held that that prejudgment interest does not circumvent due process despite arguments that the amendment penalizes a defendant for litigation delays out of its own control, particularly where those delays were caused by the plaintiff. In citing to *Cotton*, the *Galich* court found that regardless of the cause of the delay, "a defendant benefits from retaining funds until judgment and a plaintiff is burdened by being deprived of those funds until judgment." The *Galich* court also found no merit in Advocate's claim that the prejudgment interest amendment was not narrowly tailored to achieve the legislative interest because it permitted interest to be awarded on future damages, rather than being limited to interest on compensation for damages already incurred.

Additionally, the First District in *Galich* again found that the amendment does not constitute special legislation as the it bears a rational relationship to the legitimate governmental interest of promoting expeditious settlement of tort claims to ease the burden on the court system. The First District also noted that treating personal injury and wrongful death plaintiffs differently than other litigants was reasonable given that "[w]rongful conduct has violated their bodily integrity in a way victims of property or reputational torts do not suffer." The court also dismissed a challenge to the amendment under separation of powers analysis, by noting that the statute does not usurp the judiciary's powers, given that trial courts in money judgment cases have no discretion to impose prejudgment interest absent a statutory mandate. and arguments as to technical violations by the General Assembly's procedure in enacting the bill.

Finally, as it also held in *Cotton*, the First District found that retroactive application of the amendment to injuries that occurred prior to the enactment of the amendment, to be constitutional. On this issue, the *Galich* court noted that "no one has a vested interest in a rule of law, nor entitled to insist the law remain unchanged for their benefit." While the court agreed that the prejudgment interest could not be calculated to a date earlier than proscribed by the statutory language itself, it rejected the notion that cases filed after the amendment was enacted could not pursue prejudgment interest just because the injury occurred prior to the amendment's enactment.

As it did in *Cotton*, the First District under *Galich* failed to consider how the application of the amendment impacts practical applications, including how prejudgment interest is to be divided under joint and several liability, with regard to insolvent or non-paying defendants, or setoffs of prior settlements by former defendants or nonparties. As this was not an issue in *Galich*, further appeal of the *Galich* ruling would not provide further clarity.

In light of this ruling, businesses sued in Illinois, particularly within the First District, will continue to face difficulties created by the amendment, in that the short timeframe required by the amendment for compliance means that many claims are not fully investigated by the expiration of the statutory deadline and encourages settlements without fully developing the evidence. Defendants should consider aggressively investigating plaintiffs' claims early in the case to develop evidence essential to informed decision-making on case valuation for settlement purposes, knowing that timely compliance with the amendment is essential to avoid or reduce application of the amendment against a judgment.

Galich v. Advocate Health and Hospital Corporation, 2024 IL App (1st) 230134.

The Illinois Supreme Court Affirms Section 1(f) of the Illinois Worker's Occupational Disease Act is a Period of Repose and Prospective Application of the Exception in Section 1.1 Does Not Violate the Employer's Right to Due Process

In *Martin v. Goodrich Corp*., the Illinois Supreme Court held that prospective application of section 1.1 of the Illinois Worker's Occupational Disease Act, which creates an exception to the exclusivity of the Act for claims which would otherwise be precluded by a period of repose, does not violate an employer's right to due process.

The case arose from Rodney Martin's employment with B.F. Goodrich from 1966 to 2012. During his employment, he was exposed to vinyl chloride monomer and products containing vinyl chloride until 1974. These chemicals are alleged to be known causes of angiosarcoma of the liver. He was diagnosed with angiosarcoma of the liver on December 11, 2019 and died on July 9, 2020. His widow, Candice Martin, filed a civil action in November 2021 and amended her complaint on July 1, 2022, asserting causes of action under the Wrongful Death Act (740 ILCS 180/0.01 et seq.) and the Survival Act (755 ILCS 5/27-6), alleging that Martin's occupational exposure to hazardous levels of vinyl chloride monomer caused his illness and death. The complaint named Goodrich and PolyOne, as successor-in-interest to Goodrich. Because plaintiff filed a civil suit outside the compensation system provided under the Illinois Workers' Occupational Diseases Act (820 ILCS 310/1 et seq.), she invoked the exception in section 1.1 of the Act to avoid its exclusivity provisions for work-related exposures to hazardous materials. However, defendants argued the exception in section 1.1 did not apply. The United States District Court for the Central District of Illinois denied the defendants' motion to dismiss but allowed for

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an interlocutory appeal to address key legal questions involving controlling questions of law.

The United States Court of Appeals for the Seventh Circuit agreed to take the appeal and after reviewing the statutory provisions of the Act, found the issues fit for certification to the Illinois Supreme Court. Recognizing the intricate interplay of statutory interpretation, retroactivity, and constitutional due process concerns under Illinois law, the Seventh Circuit deferred to the Illinois Supreme Court to provide authoritative guidance, emphasizing the broader implications including potential impact on numerous claims involving long-latency occupational diseases. The Seventh Circuit certified three questions:

(1) Whether section 1(f) of the Act is a "period of repose or repose provision" for purposes of the exception provided in section 1.1?
(2) If section 1(f) falls within the section 1.1 exception, what is its temporal reach—either by its own terms or through section 4 of the Statute on Statutes?
(3) Whether applying the exception in section 1.1 prospectively violates Illinois's guarantee of due process?

Recognizing the intricate interplay of statutory interpretation, retroactivity, and constitutional due process concerns under Illinois law, the Seventh Circuit deferred to the Illinois Supreme Court to provide authoritative guidance, emphasizing the broader implications including potential impact on numerous claims involving long-latency occupational diseases.

The Illinois Supreme Court accepted these certified questions and held in the affirmative that section 1(f) is a period of repose, that section 1.1 is a substantive change to the Act and applies prospectively, and that section 1.1 does not violate Illinois's due process guarantee. First, in analyzing the Act, the Court concluded that the time period referenced in section 1(f) serves a statute of repose because it bars compensation after a defined period of time regardless of whether a claim has occurred, or injury has resulted and effectively extinguishes an employee's right to file a claim under the statute. Second, in considering the temporal reach of section 1.1, the Court looked to section 4 of the Statute on Statutes to find that section 1.1 was a substantive change because it gave employees the ability to seek compensation outside the Act for work-related injuries that would otherwise be covered. As a result, application of section 1.1 must be prospective. Finally, the Court clarified that the exclusivity provisions under the Act are affirmative defenses which accrue when an employee discovers their injury. In this case, since Martin's diagnosis and complaint occurred after section 1.1's enactment in 2019 (see Pub. Act 101-6, § 10 (eff. May 17, 2019) (adding 820 ILCS 310/1.1)), the Court held that defendants had no vested right to assert the exclusivity defense and applying section 1.1 prospectively would allow claims such as Martin's to proceed without violating due process.

Martin v. Goodrich Corp., 2025 IL 130509 (January 24, 2025).

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Survey of Trucking and Transportation Law Cases

Federal District Court Holds that Non-Union Truck Driver was Covered by Collective Bargaining Agreement Such that BIPA Claim Against Motor Carrier was Preempted

In *Sanders v. E.A. Sween*, the United States District Court for the Northern District of Illinois considered whether plaintiff's claims, as a non-union truck driver, for BIPA violations against his employer were preempted by federal law.

Plaintiff was a truck driver and delivery person at E.A. Sween Company's facility in Woodridge, Illinois. There was a union for truck drivers at the facility that had a collective bargaining agreement ("CBA") with E.A. Sween. Plaintiff was not a member of the union as his employment fell within the 90-day training period before drivers joined the union. Plaintiff claimed E.A. Sween violated the Illinois Biometric Information Privacy Act ("BIPA") by requiring him to scan his biometric identifiers and/or information to clock in and out of work without providing plaintiff with written disclosures describing the purpose and duration of such use or obtaining his consent. E.A. Sween moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction, arguing that the claim was preempted by Section 301 of the Labor Management Relations Act. Plaintiff argued that Section 301 preempts a state law claim where resolution "requires the interpretation of a collective-bargaining agreement."

Plaintiff, as a probationary driver, argued that the CBA only covered members of the union and he was never a part of the union. The court found that the CBA covered all E.A. Sween employees "who are members of the unit certified by the National Labor Relations Board." In turn, the National Labor Relations Board certified the voting unit as "all full time and regular part time drivers" at the Woodridge facility. As plaintiff was a driver, he is within the bargaining unit certified by the National Labor Relations Board and bound by the CBA. Since plaintiff was covered by the CBA, his BIPA claim was preempted by the Labor Management Relations Act, and the Court lacked subject matter jurisdiction over the claim. Further, the court held that whether employees in their training period are not covered by the CBA because they are not entitled to certain rights and benefits, is a question of interpreting the CBA, which is also preempted by the Labor Management Relations Act.

Sanders v. E.A. Sween Company, 2024 WL 3275494 (N.D. Ill. July 2, 2024).

U.S. District Court Holds Illinois Negligent Hiring Claim Against Broker is Preempted by the FAAA

In *Montgomery v. Caribe Transport II LLC*, the United States District Court for the Southern District considered whether a claim for negligent hiring is preempted by the Federal Aviation Administration Authorization Act ("FAAA"). The case involved a plaintiff that was injured when struck by a tractor and trailer driven by defendant Varela-Mojena. Varela-Mojena worked as a driver for Caribe Transport II, LLC. Defendants C.H. Robinson Company, C.H. Robinson Company, Inc., C.H. Robinson International, Inc. and C.H. Robinson Worldwide, Inc. ("the Robinson Defendants") hired Caribe Transport to transport the goods that Varela-Mojena was hauling. Plaintiff asserted claims for vicarious liability and negligent hiring as to Caribe Transport and Varela-Mojena.

The Robinson Defendants initially moved to dismiss the negligent hiring claims on the basis they were preempted by the FAAA. The court denied the motion because, at the time, the Seventh Circuit had not yet taken up the issue and the court found the Ninth Circuit Court of Appeals' reasoning persuasive.

Subsequently, the Seventh Circuit Court of Appeals took up the issue and held that the FAAA's express preemption provision bars Illinois negligent hiring claims and that the safety exception set forth in Section 14501(c)(2)(A) "does not save the claim." (quoting *Ye v. GlobalTranz Enterprises, Inc.*, 74 F.4th 453, 456 (7th Cir. 2023). The United States Supreme Court denied the petition for writ of *certiorari*, "making *Ye* the settled law of [the Seventh] Circuit."

The Robinson Defendants thereafter moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Relying on *Ye*, the court held that the "FAAA preempts Plaintiff's negligent hiring claims" and granted the motion with respect to those claims.

Montgomery v. Caribe Transport II LLC, 2024 WL 129181 (S.D. Ill. Jan. 11, 2024).

Illinois Supreme Court Refuses to Adopt Bright-Line Rule Regarding Stacking Policy Limits in Case Where Commercial Vehicle Policy Declarations Pages Listed Limits of Liability Separately for Several Commercial Vehicles

Plaintiff was driving a school bus west on the interstate when a semitruck with attached trailer, driving in the opposite direction, crossed the center median and struck the bus head-on. Defendant Owners Insurance Company insured the semitruck under a commercial vehicle policy that listed the driver as a covered driver. The policy also covered two additional semitrucks and four trailers. There were $1 million liability limits in the insurance policy covering the semitruck and the six other vehicles.

Plaintiff brought a declaratory judgment action seeking a declaration that the $1 million liability limits in the insurance policy could be stacked for a combined $7 million in liability coverage. The parties filed cross-motions for summary judgment. The trial court granted plaintiff's motion, finding that the policy language was ambiguous and therefore construed against Owners Insurance. The appellate court reversed.

The declarations pages included a section titled "ITEM TWO – SCHEDULE OF COVERED AUTOS AND COVERAGES" that listed "$1 Million each accident" as the coverage for "Combined Liability." A section titled "ITEM THREE – SCHEDULE OF COVERED AUTOS, ADDITIONAL COVERAGES AND ENDORSEMENTS" contained separate listings for seven vehicles, including the premium for each vehicle, and stating "1 Million each accident" in "Combined Liability" for each.

Section II of the policy provided, in pertinent part:

> C. LIMIT OF INSURANCE
>
> We will pay damages for bodily injury, property damage and covered pollution cost or expense up to the Limit of Insurance shown in the Declarations for this coverage. Such damages shall be paid as follows:
>
> 1. When combined liability limits are shown in the Declarations, the limit shown for each accident is the total amount of coverage . . .
> 2. When separate bodily injury and property damage limits are shown in the Declarations: . . .
> 3. The Limit of Insurance applicable to a trailer . . . which is connected to an auto covered by this policy shall be the limit of insurance applicable to such auto. The auto and connected trailer . . . are considered one auto and do not increase the Limit of Insurance. . . .
> 4. The Limit of Insurance for this coverage may not be added to the limits for the same or similar coverage applying to other autos insured by this policy to determine the amount of coverage available for any one accident . . . regardless of the number of:
>   a. Covered autos;
>   b. Insureds;
>   c. Premiums paid;
>   d. Claims made or suits brought;
>   e. Persons injured; or
>   f. Vehicles involved in the accident.

Id. at ¶ 10.

Pointing to its prior decisions in *Bruder v. Country Mutual Insurance Co.*, 156 Ill. 2d 179 (1993), and *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11 (2005), the Illinois Supreme Court again reiterated that there is "no *per se* rule that an insurance policy will be construed as being ambiguous regarding the limits of liability any time that the limits are listed more than once in the declarations." The court held that the policy as a whole was subject to only one reasonable interpretation - that it "provides $1 million per accident liability limit and prohibits stacking the liability limits of each insured vehicle."

The court reasoned that the declarations page listing the limits of liability in conjunction with each vehicle was not enough to render the policy ambiguous. The court focused on language of the antistacking clause in Section II(C)(5) of the policy, which directly prohibited stacking. In looking to the declarations pages, the court noted that "ITEM TWO" listed the relevant liability limit of $1 million once, which indicated coverage would not be stacked. While "ITEM THREE" listed a combined liability limit of "$1 Million each accident" for each vehicle, the court took a "wide-angled view" of the declarations page to conclude that "ITEM THREE" merely provided a "more specific breakdown" of the information included in "ITEM TWO." The Illinois Supreme Court affirmed the judgment of the appellate court, which reversed the judgment of the circuit court and remanded with directions to enter summary judgment for Owners.

Kuhn v. Owners Insurance Company, 2024 IL 129895.

— Continued on next page

Illinois Supreme Court Finds 65 ILCS 5/1-2.1-2 Does Not Preempt a Home Rule Municipality's Authority to Administratively Adjudicate Violations of Ordinances

The City of Joliet is known as the "Crossroads of Mid-America" because, among other reasons, two major interstates cross within its boundaries and it is serviced by a designated Illinois truck route. The City incorporates the Illinois Vehicle Code into its ordinances, designates certain thoroughfares as approved truck routes, and does not permit commercial trucks to operate on non-designated routes. It posts "No Truck" signs on many roadways, and its police department has a "Trucks Enforcement" division that enforces compliance with its trucking regulations.

In *Cammacho v. City of Joliet*, 2024 IL 129263, the plaintiffs were cited for traveling within the city's "no truck" routes. Plaintiffs appeared at an administrative hearing and objected to the City's jurisdiction to adjudicate the ordinance violations, arguing that they should be adjudicated in the circuit court. The hearing officer overruled the objections, found plaintiffs liable for the violations and imposed fines. Plaintiffs then filed a complaint for administrative review in the circuit court, asking the court to vacate the fines and dismiss the violations. The appellate court reversed, finding that 625 ILCS 5/1-2.1-2 prohibited the City from administratively adjudicating the violations.

The parties agreed that the City constitutes a "home rule unit." As such, the Illinois Supreme Court recognized that the City's authority to administratively adjudicate its ordinances is broad but may be limited by statute. The Illinois Supreme Court found that Division 2.1 of the Illinois Municipal Code does not limit the City's authority to administratively adjudicate its ordinances, but it does state that some ordinance violations are outside administrative adjudication to which Division 2.1 applies. 65 ILCS 5/1-2.1-2. The Illinois Supreme Court found that the appellate court erred in reversing the decisions of the hearing officer on the basis of Section 1-2.1-2.

The City's own Code of Ordinances delineated whether an ordinance violation is to be adjudicated through the circuit courts or the City's administrative process. The Code specified that traffic offenses requiring reporting to the Secretary of State are to be prosecuted in the circuit court, while all other traffic offenses not requiring reporting to the Secretary of State are to be adjudicated through the administrative process. Because plaintiffs were CDL holders, the Illinois Vehicle Code requires reporting of all violations of the Vehicle Code and "similar" local ordinance violations other than parking tickets. 625 ILCS 5/6-204. The Illinois Supreme Court ultimately found that the ordinance violations were "reportable" because they restricted the movement of vehicles over a certain weight and length as the Illinois Vehicle Code does. Thus, plaintiffs should have been issued uniform traffic citations, requiring their appearance in the circuit court rather than ordinance violations requiring their appearance at an administrative hearing. The Illinois Supreme Court affirmed the appellate court's holding on that basis and reversed the circuit court judgment and administrative decisions.

Cammacho v. City of Joliet, 2024 IL 129263.

The United States District Court Finds that a Company Misclassified Its Drivers as Independent Contractors for Purposes of the Illinois Wage Payment Collection Act

In *Prokhorov v. IIK Transp., Inc.*, No. 20 CV 6807, 2024 WL 3694523 (N.D. Ill. Aug. 7, 2024), plaintiff worked as a delivery driver for IIK Transport ("IIK"), a trucking company that provided long-haul delivery services. IIK classified plaintiff as an independent contractor, and plaintiff signed an independent driver agreement. Drivers, including plaintiff, were paid by the mile or weight of their freight and drove company trucks with IIK's logo and IIK's DOT number. The trucks were equipped with GPS technology that would send alerts to IIK. Drivers received assignments from IIK dispatchers, regularly checked in with the dispatchers and received direction on which routes to travel. Drivers had to notify IIK in advance before taking time off and had to submit weekly packets regarding deliveries to IIK.

Plaintiff alleged that the company misclassified him and other similarly situated drivers as independent contractors and violated the Illinois Wage Payment Collection Act by making improper deductions from drivers' pay and requiring them to incur expenses for which they should have received reimbursement. The court held the Illinois Wage and Payment Collection Act governs the payment and collection of employee wages. *See* 820 ILCS 115/1 *et seq*. The Act prohibits employers from taking improper deductions from an employee's paycheck unless certain requirements are met and further requires employers to reimburse employees for certain expenditures. § 115/9; 115/9.5. Importantly, the Act only applies to employees. It does not apply to anyone:

> (1) who has been and will continue to be free from control and direction over the performance of his work, both under his contract of service with his employer and in fact; and (2) who performs work which is either outside the usual course of business or is performed outside all of the places

of business of the employer . . . ; and
(3) who is in an independently established trade, occupation, profession or business.

820 ILCS 115/2.

> The Illinois Wage and Payment Collection Act governs the payment and collection of employee wages. The Act prohibits employers from taking improper deductions from an employee's paycheck unless certain requirements are met and further requires employers to reimburse employees for certain expenditures.

This test is conjunctive, which means an employer must satisfy all three elements to classify a worker as an independent contractor. Additionally, the Act only "applies to all employer and employees *in this State*" (emphasis added). *Id.* at § 115/1. IIK argued that the Act did not apply to the class members because of the lower number of miles driven by them in Illinois. However, the district court held that because drivers "performed *some* work in Illinois," the Act applied.

Regarding whether the drivers were employees within the terms of the Act, the parties primarily contested the second element of the three-prong test. The court found driving was part of the usual course of IIK's business as a freight delivery service, and IIK's "place of business" extended to its delivery routes regardless of whether they were intrastate or interstate.

Prokhorov v. IIK Transport, Inc., 2024 WL 3694523 (N.D. Ill. August 7, 2024).

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