



## 25th Annual Claims Handling Seminars

FIGHTING THE STRATEGIC BATTLE TO WIN THE WAR

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# TORT LAW UPDATE

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## TORT LAW UPDATE

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## TORT LAW UPDATE

### I. ACTING IN CONCERT

*Norman v. Brandt*, No. 4-09-0246, 2010 WL 447328 (4th Dist. Feb. 4, 2010) – The father of a passenger filed a complaint against the driver of a car that the vehicle his son was a passenger of was following. The defendant offered to lead the other vehicle to a lake house, and the plaintiff alleged that the defendant acted in concert with the driver of the vehicle his son was in by forcing the following vehicle to speed, causing it to flip. The court found that the defendant only agreed to lead the way to the lake house, and that there was no agreement or encouragement to speed. The court held that there was no horseplay and no common plan to commit a tortious act, and, therefore affirmed the trial court's decision to grant the defendant's motion for summary judgment.

*Simmons v. Homatas*, No. 108108, 2010 WL 966139 (Mar. 18, 2010) – Plaintiffs, administrators of decedents' estate, brought a negligence action against the owner of an adult entertainment club for requiring an intoxicated patron to drive away from the premises, resulting in a fatal accident. The circuit court denied the club owner's motion to dismiss, and the Appellate Court found that the club owed a duty to the decedents. The club was not allowed to serve alcohol due to the county's laws, but it allowed patrons to bring their own liquor to the club. The club also required valet parking, and required the defendant to leave the club due to his intoxication and then allowed him to drive his car away from the club. The circuit court determined that the club was not subject to the Dramshop Act because it did not sell alcohol, but allowed the issue of whether the club owed a duty to the decedents to remain. The circuit court agreed that no special relationship existed between the defendant and the decedents, but said a duty may exist when the defendant's affirmative behavior creates a risk of harm. The Supreme Court held that had the defendant left on his own, the club owner would not be subject to liability. However, since the club employees assisted the defendant to his car and directed him to leave, they could have been acting in concert with the defendant's tortious conduct. As such, the Supreme Court found the plaintiffs' complaint sufficiently pleaded common law negligence, and remanded the case.

### II. INTENDED USE

*Pence v. Northeast Illinois Regional Commuter R.R. Corp.*, No. 1-08-3668, 2010 WL 395629 (1st Dist. Feb. 3, 2010) – A pedestrian who tripped over a bolt protruding from a railroad tie brought an action against the railroad to recover for injuries he sustained from his fall. Plaintiff alleged that that defendant failed to maintain its premises in a reasonably safe condition. Defendant argued that it was immune under the Local Governmental and Governmental Employees Tort Immunity Act and that plaintiff was not an intended user of the street as he crossed the street outside of a crosswalk. The trial court found the defendant owed no duty because the plaintiff was not a railroad passenger and the defect was de minimis. While the plaintiff did have a

monthly railroad pass, the court held that he was in the parking lot at the time of his injury and not a passenger, and as such, the heightened level of care for common carriers did not apply. The court stated that tort immunity would apply if (1) the injured party was not an intended and permitted user of the property, and (2) the injury arose from a condition on the property. Here, the plaintiff was found to not be an intended user of the property as he was crossing the street outside of the crosswalk. The Appellate Court affirmed the trial court's summary judgment ruling in favor of the defendant.

*Gaston v. City of Danville*, 393 Ill. App. 3d 591, 912 N.E.2d 771, 332 Ill. Dec. 284 (4th Dist. 2009) – Plaintiff was the father of the decedent, a 17-year-old who ditched school with two of his friends and went to a parking deck to hang out. As the decedent was leaving the deck, a stairwell collapsed under his weight, resulting in his death. The City obtained summary judgment from the trial court on the basis that the decedent was not an intended user because he did not own a car, had no driver's license, and was not using the parking deck for a car in any way. The Appellate Court reversed summary judgment. The decedent was using the stairwell for its intended use, descending the stairs by foot. The court stated that the purpose of the stairwell was to provide pedestrian access to the garage. The court held that while the parking ramp itself might have a limited intended use, the same was not true of the stairwell.

### **III. SLIP/TRIP AND FALL**

*Gallagher v. Union Square Condominium Homeowner's Ass'n*, 922 N.E.2d 1201, 337 Ill. Dec. 624 (2d Dist. 2010) – A condominium owner sued the condominium association and the snow removal company for injuries arising when the owner slipped and fell on an icy driveway. Plaintiff alleged that defendants failed to inspect the driveway and failed to salt and sand the driveway. The defendants claimed they fell within the Snow and Ice Removal Act, which provides that any person who attempts to remove snow or ice from sidewalks shall not be liable for any personal injuries caused from the condition unless willful and wanton. Plaintiff contended that the Act did not apply because he fell on a driveway, not a sidewalk, and the court agreed. As such, the court reversed the dismissal of the plaintiff's complaint.

*Qureshi v. Ahmed*, 394 Ill. App. 3d 883, 916 N.E.2d 1153, 334 Ill. Dec. 265 (1st Dist. 2009) – The trial court granted a homeowner defendants' motion for summary judgment in a case brought by a plaintiff for the injuries to his 10-year-old daughter in a slip and fall on defendants' treadmill in their home. This was a case of first impression for the Appellate Court, as Illinois had not yet considered whether pieces of home exercise equipment were considered open and obvious dangers to young children. The issue, according to the Appellate Court, was whether there was a dangerous condition present in the defendants' home. The court stated that even if it found the treadmill to be an open and obvious condition, it did not eliminate the duty from the defendants to the child. The court stated that other factors would need to be examined such as the likelihood of injury, the foreseeability of injury, the magnitude of the defendant's burden of guarding against the injury and the reasonableness of this burden. The Appellate Court stated

that it could not conclude that the defendants owed no duty based on the open and obvious nature of the danger posed by the treadmill, and as such reversed and remanded the case.

*Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 914 N.E.2d 632, 333 Ill. Dec. 213 (1st Dist. 2009) – Plaintiff brought a negligence action against a laundromat for injuries sustained after she slipped and fell on water that accumulated at the store’s entryway. The trial court applied the natural accumulation rule, and granted summary judgment in favor of the defendants. The Appellate Court stated that the plaintiff correctly asserted that business owners have a duty to provide a safe means of ingress and egress, but owners are not liable for injuries resulting from a natural accumulation of water. Plaintiff asserted that the owner placed two mats in front of the doorway, but the court held that allowing the saturated mats to sit in the doorway did not create an unnatural accumulation. The court also held that the defendant had no duty to remove the natural accumulation of water regardless of whether he had previously done so. The Appellate Court held there was no error in finding that the defendant owed no duty to the plaintiff.

*Rogers v. Matanda, Inc.*, 393 Ill. App. 3d 521, 913 N.E.2d 15, 332 Ill. Dec. 420 (3d Dist. 2009) – Plaintiff brought a negligence action against a bar for a breach of its duty to provide a reasonably safe means of ingress and egress. Plaintiff had consumed at least 18 mixed drinks on his 21st birthday. Upon trying to reenter the bar after his friends removed him from it, it appeared he fell from a retaining wall, though the plaintiff does not recall doing so. The plaintiff alleged that there was improper lighting in the area of the fall, making ingress and egress unreasonably unsafe. The defendant stated that there was no evidence that ingress and egress to its business were unsafe as the place where the plaintiff fell was not an area of ingress or egress. The court agreed and granted summary judgment. The Appellate Court agreed with the plaintiff that the bar had a duty to provide proper illumination in places of ingress and egress, but stated that the proper places of ingress and egress were properly illuminated and plaintiff had safely entered the bar once that night. The court went further to state that the fact that the plaintiff took a frolic beyond the prescribed areas of ingress and egress did not expand the defendant’s duty. The plaintiff then argued that there was an unreasonably safe condition on the defendant’s property, regardless of whether it was an area of ingress or egress, but the court found that the plaintiff did not show this to be the proximate cause of his injuries as he could not even recall the cause of his fall. The court would not infer liability based on a conjecture of the cause of the injury, and affirmed the trial court’s decision.

#### **IV. DUTY TO DEFEND**

*American Service Ins. Co. v. Franchini*, 396 Ill. App. 3d 413, 920 N.E.2d 1142, 336 Ill. Dec. 552 (1st Dist. 2009) – Defendant was a policyholder with American Service Insurance Co. (ASI) for a motor vehicle accident caused by defendant’s sister. ASI brought a declaratory judgment action seeking a declaration that the defendant had defrauded ASI by not stating that his sister lived with him and frequently drove his vehicle, and as such, the policy was void *ab initio*. The defendant sought to file a counterclaim that ASI had committed vexatious conduct by denying

his claim. The circuit court denied the defendant's request for leave to file the counterclaim. The court found no evidence to support the defendant's claim of vexatious conduct, and pointed to the fact that the insurance company did provide a defense, but it reserved its right to cancel the representation. The court held that the allegations fell short of establishing any claim on which relief could be granted, and affirmed the circuit court's ruling.

*Pekin Ins. Co. v. Wilson*, 391 Ill. App. 3d 505, 909 N.E.2d 379, 330 Ill. Dec. 666 (5th Dist. 2009) – The injured plaintiff filed suit alleging battery, assault and intentional infliction of emotional distress against the defendant. The tortfeasor's insurer filed a declaratory action based on the intentional acts exclusion of the policy, and the injured plaintiff filed an amended complaint alleging additional counts in negligence, based on the same facts. The court stated that the factual allegations of the complaint, rather than the legal theory under which the action is brought, determine whether there is a duty to defend. Accordingly, the trial court held that there was no coverage based on the intentional acts exclusion. The Appellate Court agreed and affirmed the decision, stating that the insurer has no duty to defend the insured where the complaint in the underlying lawsuit alleged intentional conduct, but labeled it as negligence. To escape the intentional acts exclusion, one cannot merely file a complaint using the term "negligence" but showing intentional acts, but must plead acts that show negligence. However, the court did determine that it could look beyond the complaint to determine self defense, which was an exception to the exclusion of intentional acts.

*Hacker v. Shelter Ins. Co.*, 388 Ill. App. 3d 386, 902 N.E.2d 188, 327 Ill. Dec. 433 (5th Dist. 2009) – The mother of a tenant sued a landlord after suffering an injury by falling in a stairwell. The landlord filed a third-party action against the tenant for contribution. The daughter claimed that the landlord's insurance policy owed her a duty to defend and indemnify, and the court found in favor of the tenant. The Appellate Court reversed, finding that the definition of "insured" in the policy fit only the landlord and could not be construed to include the tenant also. The court distinguished this case from a previous case involving a tenant contributing to fire insurance through her rent by noting that it is common practice for tenants to obtain their own renter's insurance to cover liabilities.

*American Family Mut. Ins. Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 909 N.E.2d 274, 330 Ill. Dec. 561 (1st Dist. 2009) – The case involved a dispute between an insurance company for a subcontractor and the general contractor, which claimed to be an additional insured and claimed damages for the insurance company's refusal to defend it. The trial court granted summary judgment for the insurance company. The insurance policy contained a clause excluding coverage for liability for bodily injury "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." The subcontractor entered into an indemnification agreement with the general contractor. Because of this language, the Appellate Court held the insurance company had no duty to defend the general contractor.

*National Fire Ins. of Hartford v. Walsh Const. Co.*, 392 Ill. App. 3d 312, 909 N.E.2d 285, 330 Ill. Dec. 572 (1st Dist. 2009) – Subcontractor's general liability insurer brought a suit for declaratory

judgment that it had no duty to defend the general contractor for a claim brought by the subcontractor's employee. The trial court ruled in favor of the insurer. The policy provided that there would be no coverage where the sole negligence was that of an additional insured. The Appellate Court found the injury was a result of the sole negligence of the general contractor and the property owner, and was therefore outside the realm of coverage; as such, the insurer was held to have no duty to defend.

## **V. USE OF EXPERTS**

*Henry v. Panasonic Factory Automation Co.*, 396 Ill. App. 3d 321, 917 N.E.2d 1086, 335 Ill. Dec. 22 (4th Dist. 2009) – Plaintiff brought a suit against the manufacturer of a machine, alleging negligence and product defects. The plaintiff's expert admitted that the machine would not be dangerous if adjustments were made and observed from the outside of the machine, which the defendant contended that it could. The trial court granted the defendant's motion for summary judgment based on the fact that an expert's opinion testimony was necessary to show that the machine was inherently dangerous, and that the plaintiff's expert's testimony was based upon an incorrect assumption. The Appellate Court stated that to recover from a manufacturer on a products liability case, plaintiff must show that his injury resulted from an unreasonably dangerous condition of the product that existed when it left the manufacturer's control. Because the court found the defendant's product to be a specialized piece of equipment, it concluded that a breach of the standard of care could not be established without expert testimony and affirmed the decision of the trial court.

*Ford v. Grizzle*, No. 5-08-0185, 2010 WL 572527 (5th Dist. Feb. 17, 2010) – Plaintiff sued the defendant for a motor vehicle accident in which the defendant rear-ended the plaintiff. The trial court entered judgment in favor of the defendant, and plaintiff appealed on various procedural issues. The Appellate Court affirmed the trial court's admission of plaintiff's two previous car accidents, stating that the defendant showed these accidents to be relevant as a possible cause for plaintiff's injuries. The Appellate Court also affirmed the trial court's decision to allow the admission of photographs of plaintiff's vehicle without expert testimony as the court determined the pictures could speak for themselves.

## **VI. UNCATEGORIZED CASES**

*Pickel v. Springfield Stallions, Inc.*, No. 4-09-0490, 2010 WL 1205959 (4th Dist. Mar. 29, 2010) – The plaintiff was injured while watching an indoor football game when a player fell out of bounds and over a wall and collided with her. She sued the five partners that operated and possessed the arena, claiming that they were negligent in three ways: (1) encouraging spectators to sit dangerously close to the playing field, (2) failing to warn spectators of the danger of this designated area, and (3) failing to construct a high enough and sturdy enough wall between the playing field and the spectators. The trial court ruled for the defendants, who cited *Karas v. Strevell*, 227 Ill. 2d 440, 884 N.E.2d 122, 318 Ill. Dec. 567 (2008) to say that football is a contact

sport and violent collisions are inherent in the game. Thus, plaintiff was required to plead culpability greater than negligence. In *Karas*, the Supreme Court held that in full contact sports a player is liable only for intentional harm to another player. The Appellate Court reversed the trial court's ruling and distinguished *Karas*. The rule in *Karas* applied only to participants of a contact sport, not spectators. The fact that the plaintiff was behind a barrier, as opposed to simply standing on the sidelines, was also important to the court because it negated the affirmative defense that the plaintiff should have known the risk of injury.

*Gibbs v. Top Gun Delivery and Moving Services, Inc.*, No. 1-08-2986, 2010 WL 1033052 (1st Dist. Mar. 29, 2010) – Plaintiff filed a negligence action against a truck driver, the truck driver's employer, and Harlem Furniture, the company for which the truck driver was delivering material. Safeco, as the insurer for the driver and his employer, entered into an agreement with the plaintiff for \$735,000 in exchange for a covenant not to enforce a judgment above that amount against either Safeco or the insureds. Harlem Furniture filed a motion to dismiss on the basis that any settlement between an agent and a plaintiff must also relieve the principal of any vicarious liability. Illinois courts have recognized covenants not to enforce judgments as "settlements," and as such, the Appellate Court affirmed the trial court's decision to grant Harlem Furniture's motion to dismiss.

*Mayer v. Chicago Mechanical Services, Inc.*, No. 2-09-0239, 2010 WL 989033 (2d Dist. Mar. 16, 2010) – In this appeal, the court considered whether plaintiffs, who alleged that a defective heating and air conditioning system furnished and installed by one of the defendants caused mold growth that rendered their homes temporarily uninhabitable, were entitled to compensation for discomfort and inconvenience associated with being displaced from their homes. While the court left open the possibility that damages for discomfort and inconvenience might be available in appropriate circumstances, they held that they were not available here because the plaintiffs did not state a viable theory for damages. Plaintiffs' theory was rooted in sentimental attachment to their homes, not tangible comforts and conveniences of living in the homes.

*Reed v. White*, 921 N.E.2d 1243, 337 Ill. Dec. 105 (5th Dist. 2010) – Plaintiff, an employee of the defendant, was injured on defendant's property while dropping off a tool per the request of her husband, who also worked for the defendant. The plaintiff denied that she was working at the time of the injury, and she was not scheduled to work that day. The defendant began voluntarily paying the plaintiff workers' compensation benefits. The plaintiff filed a negligence claim almost two years after the injury. The defendant contested that the plaintiff had an exclusive remedy of recovering under the Illinois Workers' Compensation Act (Act), and the trial court agreed and dismissed the complaint. On appeal, the Appellate Court held that injured employees are not entitled to seek recovery both under the Act and under common law. Because the plaintiff did not file a suit under the Act, but merely accepted unsolicited benefits offered by the defendant, her common law claim was not barred.

*Eckburg v. Presbytery of Blackhawk of Presbyterian Church (USA)*, 396 Ill. App. 3d 164, 918 N.E.2d 1184, 335 Ill. Dec. 371 (2d Dist. 2009) – Plaintiff was driving a motorcycle when a large portion of

a tree located on the defendant's property fell, injuring him and killing his wife. Plaintiff alleged that there were numerous rotting trees on the defendant's property, that the defendant had notice of the rotting trees, and that many of the trees were located near a busy highway. Defendant argued that because his land was not in an urban area and he had 360 acres to maintain, he could not be held liable for the injuries. The trial court granted the defendant's motion to dismiss, holding that the plaintiff failed to show the defendant had actual or constructive notice that the tree that fell was defective. Further, imposing a duty to inspect trees surrounding a highway would undermine the protection from overly burdensome obligations given to rural landowners under the Second Restatement of Torts. As a matter of first impression in Illinois, the Appellate Court declined to follow the Second Restatement of Torts and held there should be no distinction between the duty of an urban versus a rural property owner, and that a traditional negligence analysis should apply, taking into account various factors such as property size and the amount of traffic on the road near the trees. Accordingly, the court reversed the decision of the trial court, finding that the dismissal of plaintiff's complaint was erroneous.

*Gregory v. Farmers Auto. Ins. Ass'n*, 392 Ill. App. 3d 159, 910 N.E.2d 763, 331 Ill. Dec. 354 (5th Dist. 2009) – Plaintiff brought an action for the death of a decedent in an automobile accident. The tortfeasor's vehicle was covered by a personal automobile policy which provided indemnity for the accident and provided a defense to the insured. A business policy also existed. While the tort case was still pending, the plaintiff brought a declaratory action to determine whether the business policy would provide excess indemnification. The business policy insurer moved to dismiss on the basis that the issue was not ripe until there was a determination that the insured was liable and that the excess policy might be implicated in paying the damages. The trial court denied the motion to dismiss, finding that a duty to indemnify existed. The Appellate Court reversed, agreeing that any declaration of coverage or of the amount of the policy limits would be an advisory opinion where the fact of liability or total amount of damages was still undetermined.





## **Daniel R. Simmons**

*- Partner*

Dan concentrates his practice in the areas of workers' compensation and general insurance defense, including auto liability, premises liability and third-party defense of employers. Since graduation from law school in 1984, he has spent his entire legal career at Heyl Royster in the Springfield office. He became a partner in 1996.

Dan has extensive litigation experience. He has taken numerous cases to jury verdict both in state and federal courts. Additionally, he has arbitrated hundreds of workers' compensation claims before the Illinois Workers' Compensation Commission. Dan appreciates that his client's goal is to conclude claims in the most efficient, economical means possible and strives to achieve that goal through motion practice, settlement or trial.

Dan is a frequent author and lecturer on civil liability and workers' compensation issues. His speaking is both to clients and to Illinois attorneys for continuing legal education. Dan continues to provide writing and speaking services to the Property Loss Research Bureau/Liability Insurance Research Bureau's annual conference that is routinely attended by over 2,500 senior claims professionals from around the United States.

Dan is a past president and program director of the Lincoln-Douglas American Inn of Court. The Inn is designed to promote legal education, civility and collegiality among members of the bar.

### **Professional Recognition**

- Martindale-Hubbell AV Rated

### **Professional Associations**

- Lincoln-Douglas American Inn of Court (past president and program director)
- American Bar Association
- Illinois State Bar Association
- Sangamon County Bar Association
- Central Illinois Claims Adjusters' Association

### **Court Admissions**

- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit

### **Education**

- Juris Doctor, University of Iowa, 1984
- Bachelor of Arts (Magna Cum Laude) - Political Science, Speech and Humanities, Augustana College, 1981

