Fall 2018

Dear Friends,

Welcome to our Fall 2018 *Quarterly Review* newsletter, edited by our partners Rex Linder and Mark Hansen, covering recent Illinois state and federal court decisions of interest to insurers.


Craig Young

The winds of change are blowing at Heyl Royster and good things continue to happen. On October 1st, Craig Young became our new Firm Managing Partner as Tim Bertschy will be retiring at the end of the year. Mr. Young is a former president of the Peoria County Bar Association (2014-2015). In 2008, he received the Peoria County Bar Association's Distinguished Community Service Award. He has served as president of the Heart of Illinois United Way. He is past Advisory Board Chair of the Peoria Tri-County Salvation Army, and the recipient of its 2012 William Booth Award for Community Service.

HEYL ROYSTER

Another exciting change happened early this Fall; we moved into our permanent space on the 14th floor of Peabody Plaza in St. Louis. This innovative office space marks our first brick-and-mortar location outside of Illinois. This amazing facility, inspired by client demand, officially makes Heyl Royster a Regional Midwest law firm. According to Heyl Royster's new Firm Managing Partner, Mr. Young, "We plan to continue growing, we think it's necessary for our success." The new St. Louis office is Heyl Royster's seventh office.

If there is anything we can do to help you or your insureds, please do not hesitate to let us know.

Very truly yours,

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A Regional Midwest Law Firm

Quarterly Review Of Recent Decisions

HEYL ROYSTER

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INSURANCE

UIM Suit Time-Barred Despite Insured's Claim Adjuster Extended Limitations During Negotiations

The insured was involved in an accident sustaining severe personal injuries. She settled with the adverse driver for its policy limits of $25,000 on December 21, 2012. The insured's attorney then began settlement negotiations with his client's UIM carrier which were unsuccessful. The policy required suit against the carrier had to be filed within one year from the time the insured received the last payment from the underinsured motorist. Suit was filed June 9, 2014, and the complaint alleged the adjuster extended the one-year limitation requirement, or alternatively, the carrier should be estopped from enforcing it due to the adjuster's conduct. The trial court disagreed and entered summary judgment against the insured.

The first district affirmed. The policy language was plain and unambiguous in that plaintiff was required to file suit within one year of receiving payment from the tortfeasor. Further, the mere pendency of settlement negotiations conducted in good faith is not sufficient to create estoppel. The insured's attorney did not provide any evidence that the adjuster's representations occurred prior to termination of the limitation period or how long the alleged extension for filing of suit would occur. *Sweis v. Founder's Insurance Co.*, 2017 IL App (1st) 163157.

UM Payments Denied Because Claimant Could Not Establish Another Vehicle Forced Him Off The Road

Claimant was driving a semi-truck which hit a curb and flipped over. Following the accident, he told his boss he could not remember what happened. Independent witnesses saw no other vehicles, but claimant subsequently asserted that a light green sedan cut him off and caused him to swerve and hit the curb. Cincinnati filed a declaratory judgment action that it did not owe on the claim because no other vehicle was involved. After a bench trial, the court ruled in favor of Cincinnati.

The third district affirmed. The policy required that if there was no physical contact with the hit and run vehicle, the facts of the accident must be proven. Independent witnesses testified they did not see another vehicle, and apparently the trial court felt claimant was not credible. Consequently, summary judgment for Cincinnati was affirmed. *Cincinnati Insurance Co. v. Pritchett*, 2018 IL App (3d) 170577.

Insured's Failure To List Additional Vehicles In Application Did Not Justify Carrier's Rescission Of Policy

Direct Auto filed a declaratory judgment action seeking a determination it did not owe its insured coverage based upon an alleged material misrepresentation in the insurance application. During investigation of a claim following the insured's accident, Direct Auto learned the insured failed to disclose the existence of another vehicle registered to, and kept at, his home address by his parents. That vehicle was insured under a separate policy with State Farm. In support of a summary judgment motion, Direct Auto had an affidavit from its underwriting manager who said that if it had been advised of the additional vehicle, the policy premium would have been increased by $477. In

the face of opposing summary judgment motions, the trial court ruled for the insured.

The first district affirmed. To rescind a policy based upon a false application, the false statement must have been made with an actual intent to deceive or must materially affect the acceptance of the risk assumed by the insurer. There was no dispute the insured failed to disclose his parents' vehicle in the application. However, the vehicle was separately insured by a different company, and the insured never drove that vehicle. Therefore, there was no nexus between the unsupported conclusion that the carrier substantially increased its risk. The only evidence presented was an increase in premium as a justification for the rescission. *Direct Auto Ins. Co. v. Koziol*, 2018 IL App (1st) 171931.

Auto Policy Required To Defend Named Insured In Negligent Entrustment Claim

The named insured allegedly negligently entrusted her vehicle to someone she knew was intoxicated. The driver struck a pedestrian who filed suit against the named insured and driver. American Access denied coverage to the insured based on the "reasonable belief" exclusion of the policy which excluded coverage for "any person operating the vehicle without a reasonable belief that he or she is entitled to do so." Further, the negligent entrustment claim was not covered because it was a separate tort from operation of the vehicle. The trial court entered summary judgment for American Access.

The first district reversed. The policy did not contain an exclusion for negligent entrustment. The dispositive issue is whether the complaint alleged that the accident arose out of the ownership, maintenance or use of the insured vehicle. The court held it did. *American Access Cas. Co. v. Novit*, 2018 IL App (1st) 171048.

No Duty To Defend Under Claims-Made Policy When Insured Made The Claim Outside Of The Reporting Period

The insured was a not-for-profit corporation that operated an integrated living facility for developmentally disabled adults. On November 25, 2012, one of the residents choked on a piece of food and went into respiratory failure. Suit was filed February 24, 2014. ProAssurance denied coverage under its claims-made policy which required an insured to give notice when it became aware of "any incident which is likely to result in such a claim or suit" as soon as practicable. The insured first reported the incident on March 17, 2014, more than nine months after cancellation of the policy. The circuit court entered summary judgment for ProAssurance.

The first district affirmed. The insured could have reported the potential claim before the policy was cancelled on May 26, 2013 or procured a reporting endorsement providing an extended reporting period. However, it chose not to do so and consequently, the policy was no longer in existence at the time the claim was submitted. *Southwest Disability Services and Support v. ProAssurance Specialty Ins. Co., Inc.*, 2018 IL App (1st) 171670.

Standard Mortgage Clause Protected Mortgagee Even Though Named Insured Did Not Have Insurable Interest In Property

The named insured purchased a homeowner's policy from State Farm for property owned by his father. He filed two claims, one for vandalism and another for a fire that occurred the following day. The property was mortgaged to Seterus. The policy had a standard mortgage clause which protected the mortgagee from being denied coverage based upon acts or omissions of the insured or the insured's non-compliance with policy terms. State Farm denied the claim claiming the policy was void because the policyholder did not have an insurable interest in the property. The trial court ruled in favor of the mortgagee, and State Farm appealed.

The first district affirmed. A standard mortgage clause creates a separate and distinct contract between a mortgagee and the insurer. The policyholder's lack of an insurable interest did not bar the mortgagee from coverage under the policy. The standard mortgage clause protects the mortgagee even if there is no coverage for the named insured because the policy was void as to the named insured. *State Farm Fire & Cas. Co. v. Dubrovsky*, 2018 IL App (1st) 170282.

DAMAGES

Fiancé Could Not Recover For Loss Of Consortium Or Lost Of Chance To Marry

Included in this medical malpractice lawsuit was a claim by a patient's fiancé seeking the recovery of loss of consortium and loss of chance to marry when the patient suffered cardiac arrest and a catastrophic brain injury allegedly due to a doctor's delay in responding to an emergency call. She had been in a long-term committed relationship for many years, and their scheduled wedding was less than 20 days away when the alleged malpractice occurred. The trial court dismissed the claims.

The first district affirmed. Illinois precedent has established that common law marriages are invalid. Although they lived together for 16 years, they were never barred by any state or federal law from marrying each other. They did not seek the protections and privileges that flow from a legally recognized union of marriage for over a decade. That delay was their choice. *The Private Bank v. Silver Cross Hospital*, 2017 IL App (1st) 161863.

Defense Counsel's Failure To Offer Expert Medical Testimony As To Other Causes For Plaintiff's Back Injury Required New Trial On Damages Only

Plaintiff was a UPS driver who injured his back when he was knocked down by an unleashed dog owned by the defendant. In a treating doctor's evidence deposition, defense counsel asked if lifting, twisting or other daily activities can cause back problems similar to that experienced by plaintiff. The doctor said it was possible. However, there was no further medical testimony tying in any of those events to plaintiff's back condition. The jury returned a verdict for $16,000, and plaintiff appealed.

The fifth district reversed. If a defendant seeks to introduce evidence of a plaintiff's prior injuries or medical conditions at trial, the defendant must first introduce expert evidence demonstrating why the prior injury or medical condition was relevant to causation. Defense counsel in the present case "attempted to present a phantom cause of plaintiff's injury without any medical evidence to support such a claim." This constituted inadmissible speculation and conjecture. The case was remanded for a new trial on damages only. *Campbell v. Autenrieb*, 2018 IL App (5th) 170148.

Actual Knowledge Not Necessary To Assert Punitive Damage Claim In Negligent Employment Case

Plaintiff filed a negligent employment claim against the Catholic Bishop of Chicago and a former priest who allegedly sexually molested him while in grade school. Plaintiff sought to amend the complaint seeking punitive damages based upon the defendant's knowledge of sexual misconduct involving priests and minors, knowledge of the defendant priest's misconduct while a seminary student and failing to investigate reports of misconduct after he was ordained as a priest. The trial court certified for interlocutory appeal the question of whether an employer's conscious disregard of an employee's particular unfitness is necessary where the claim is for negligent hiring, supervision and retention.

The first district answered the certified question in the negative. It was not necessary to show the defendant knew of the priest's propensity to sexually abuse children in order to assert a punitive damage claim. Rather, it is sufficient if the defendant has knowledge of surrounding circumstances or utter indifference to the safety of others. Plaintiff presented sufficient facts that would allow a jury to reasonably find the defendant showed an utter indifference to the rights and safety of others and should be allowed to pursue punitive damages. *Doe v. The Catholic Bishop of Chicago*, 2017 IL App (1st) 162388.

IMMUNITY

City Did Not Present Adequate Evidence To Support Immunity Concerning Decision Not To Repair Sidewalk

Plaintiff's foot hit a piece of concrete causing her to trip in a downtown business district. She sued the city which asserted a defense that it could not be liable for an injury resulting from an act or omission in determining policy pursuant to the Tort Immunity Act. It also asserted the height differential in the sidewalk which caused plaintiff to fall was *de minimus* for which there would be no liability. The trial court entered summary judgment ruling only that immunity applied and the decision was affirmed by the Fourth District.

The Supreme Court reversed. It determined the city did not present evidence documenting the decision not to repair the sidewalk at issue. It did not believe the legislature intended to allow discretionary immunity forever for failure to maintain public property. To expand discretionary authority so broadly would eliminate a city's duty to maintain property. It also held a fact question existed as to whether the sidewalk defect would be considered *de minimus. Monson v. City of Danville,* 2018 IL 122486.

VENUE

Forum Non Conveniens Required Venue Transfer From Cook County To Kane County Where Accident Occurred And Plaintiffs Resided

Plaintiff was a pedestrian struck by a vehicle operated by a defendant within the course of her employment. Plaintiff and her husband, both residents of Kane County, sued the defendant driver, her employer and lessee of the vehicle. The accident occurred in Kane County and first-responders were from police and fire protection districts in Kane County. The defendant was a resident of DuPage County, and the corporate defendants had facilities in Cook County. Suit was filed in Cook County, and although venue is technically proper, the trial court granted a motion to transfer venue pursuant to *forum non conveniens* holding the case should proceed in Kane County.

The first district affirmed. Usually a plaintiff's initial choice of forum will prevail provided the inconvenience factors do not greatly outweigh plaintiff's right to try the case in the chosen forum. The trial court noted that the location of the accident and affidavits of three occurrence witnesses, as well as first-responders, were from Kane County. Also, the possibility of viewing the site where the accident occurred could be important. Further, the alleged negligence at issue occurred in Kane County which had a public interest in deciding local controversies. *Schuster v. Richards*, 2018 IL App (1st) 171558.

PREMISES LIABILITY

Defense Summary Judgment Affirmed Where Plaintiff Could Not Testify She Fell As A Result Of An Unnatural Accumulation Of Ice

Plaintiff slipped in the parking lot of a strip mall then sued the property owner and snow removal contractor. In her deposition, plaintiff said she did not know what caused her to fall but assumed it was ice. She had experts who testified there was an unnatural accumulation of ice in the parking lot. However, because she could not establish a causal relationship between the alleged unnatural accumulation and her fall, a defense summary judgment was entered.

The first district affirmed. A property owner has no duty to remove natural accumulations of snow and ice because it is unrealistic to expect property owners to keep all areas where people might walk clear from ice and snow at all times during the winter months. Although plaintiff presented some evidence of an unnatural accumulation of ice, she stated she did not know whether she fell on ice. It is axiomatic that mere guesswork or speculation is insufficient to create a genuine issue of material fact to survive a summary judgment motion. In a slip-and-fall case, summary judgment for the defense is proper where plaintiff has no evidence regarding the cause of the fall. *Allen v. Cam Girls, LLC*, 2017 IL App (1st) 163340.

Defense Summary Judgment Vacated as Factual Dispute Existed As To Depth Of Parking Lot Pothole

Plaintiff was injured when she stepped into a pothole in the defendant's parking lot. In her deposition, she testified the parking lot was "fairly dark," but she could not estimate "precisely" how much of a height difference was present. She said the height difference was large enough for her two-inch heel to get wedged. The defendant moved for summary judgment based upon an affidavit of the defendant's owner that the depression in the parking lot where plaintiff fell did not have a height difference greater than one-half inch. Consequently, the trial court held the height differential was *de minimus* and entered summary judgment for the defendant.

The first district reversed. Generally, liability only attaches for defects approaching two inches in height. The *de minimus* rule usually precludes negligence claims on lesser defects absent aggravating circumstances. The court felt the depth of the pothole was somewhere between one-half inch and two inches which could put it within purview of the *de minimus* rule. However, the pothole was several feet long and wide located in an area where it would be likely pedestrians would encounter it. Consequently, it felt a fact question existed as to the size and depth of the pothole as well as whether a duty was owed to repair the pothole. *Barrett v. FA Group, LLC*, 2017 IL App (1st) 170168.

Jury Properly Instructed In Premises Liability Rather Than Negligence

Plaintiff fell down a flight of basement stairs on a service call to fix a boiler belonging to the defendants. The one-count complaint alleged the defendant failed to maintain the stairs in a safe manner, failed to warn of the dangerous condition of the stairs, violated a city building code and similar assertions. At trial, plaintiff's attorney submitted a jury instruction based upon ordinary negligence which required proof of three elements: existence of a duty, breach of that duty and injury caused by the breach. Defendant submitted a premises liability jury instruction which added three additional elements: there was a condition on the property presenting an unreasonable risk of harm; the defendant knew or reasonably should have known of the condition and risk; and the defendant could reasonably have expected people on the property would not realize or discover the danger. The trial court gave the premises liability instruction, and the jury returned a defense verdict.

The first district affirmed. The negligence instruction would focus upon the conduct of the defendants while the premises liability instruction would focus on the condition of the property. The court held the alleged dangerous condition of the steps and failure to warn related to the condition of the property, and therefore, the proper instruction was given. *Garcia v. Goetz*, 2018 IL App (1st) 172204.

Promoter Not Liable To Attendee Who Slipped On Mud Leaving Outdoor Concert As Mud Was An Open And Obvious Condition

Plaintiff slipped and fell as she was leaving the 2011 Lollapalooza Music Festival in Grant Park. She claimed the concert promoters failed to properly light the grounds, place mats over slippery areas, provide safe egress from the grounds, and similar activities. In her deposition, plaintiff testified that there was mud everywhere, and it was slippery. She also said that she was walking cautiously because she knew the ground was muddy and slippery but fell and broke her ankle. The trial court granted a defense summary judgment holding the mud was an open and obvious condition.

The first district affirmed. It was undisputed it had been raining for many hours, and the ground was muddy. The mud was an open and obvious condition evident to any reasonable concert attendee. It also held the distraction exception would not apply because plaintiff testified she was aware of the obvious slippery condition and attempted to protect herself by walking carefully. There was no evidence that she was distracted or forgot the slippery and muddy condition. *Rozowicz v. C3 Presents, LLC*, 2017 IL App (1st) 161177.

No Liability Under Animal Control Act Where Dog Benignly Moved Near Plaintiff Who Was Petting It

Plaintiff was a CNA providing home health care services to the defendants' mother who resided with the defendants. On March 19, 2013, she made a social visit to see the defendants' mother. As she was leaving, standing on the top step of porch stairs, defendants' dog approached plaintiff who began petting it. In her deposition, plaintiff said the only thing that contributed to her fall was the dog being petted and nuzzling up to plaintiff which caused her to move off the edge of the step, fall and be injured. The trial court entered summary judgment holding there was no evidence of premises liability negligence nor a violation of the Animal Control Act.

The fifth district affirmed. There was nothing to indicate the dog was out of control or that the dog's actions were startling, irregular or erratic. It was not the type of behavior contemplated by the Act which would impose liability upon the owner. The fact the dog was benignly moving while standing near plaintiff did not translate to a finding that it caused plaintiff's injury. *Crosson v. Ruzich*, 2018 IL App (5th) 170235).

Tavern Liable For Assault And Battery Of Customers By Another Customer In Parking Lot

Two customers at defendant's tavern were attacked and battered in a parking lot after leaving the night club. Plaintiffs and their attacker were all patrons who got into an argument in the bar. The assailant had a reputation for aggressive behavior and had been ejected from the bar on previous occasions. Following a bench trial, the court awarded damages to the man of $50,622.29 and to the woman in the amount of $2,894,519.09 after finding her to be 50% contributorily negligent.

The second district affirmed. It rejected the defendant's argument there should be no liability because the attack occurred around the corner from the front door and out of view of the defendant's bouncers. There are exceptions to the general rule that a bar owner's duty to protect patrons from criminal acts of third parties ends at the bar's property line. The attack was foreseeable because the bouncers knew the assailant had

reputation for aggressive behavior and had been ejected on previous occasions. It also affirmed the finding that the female plaintiff was 50% contributorily negligent because she interjected herself into the argument and used foul language which escalated the confrontation. *Cooke v. Maxum Sports Bar & Grill, Ltd*., 2018 IL App (2d) 170249.

Hotel Could Be Liable For Rape Of Unconscious Guest

After eating dinner and drinking alcohol in the defendant hotel's restaurant, plaintiff went to her room where she was raped while unconscious by a hotel security guard. The trial court dismissed the complaint holding the defendants owed no duty to foresee that an employee might rape a guest.

The first district reversed. It relied upon the Restatement (2d) of Torts, §314A which holds an innkeeper is under a duty to take reasonable action to protect guests from physical harm. The duty to protect extends to risks arising from acts of third persons, whether innocent, negligent, intentional or criminal. Relying on earlier case authority, it noted a guest has a right to rely upon the innkeeper to do all within its power to prevent an assault, and should be required to exercise a high degree of care. Given the pervasiveness of sexual assaults and generalized crimes in hotels, it was reasonably foreseeable that a hotel guest will from time-to-time be at such risk in hotels. *Gress v. Lakhani Hospitality, Inc.*, 2018 IL App (1st) 170380.

Summary Judgment Proper Where Plaintiff Provided No Evidence Her Fall Was Caused By An Unnatural Accumulation Of Ice

Plaintiff slipped and fell on ice in an outside stairway leaving her apartment on the second floor. Plaintiff claimed she fell on an unnatural accumulation of ice formed as a result of faulty gutters allowing water or ice to drip. However, the trial court entered summary judgment because the mere presence of icicles on a gutter does not establish that the gutters were faulty or defective. There was no evidence the gutters themselves were the cause of an unnatural accumulation.

The first district affirmed. Property owners have a duty to exercise ordinary care in maintaining their property, but they are not liable for the failure to remove natural accumulations of ice and snow. The court noted plaintiff testified ice was formed by dripping icicles but admitted she did not know if the ice could have been formed by the naturally accumulating snow melting and re-freezing. *Cole v. Paper Street Group, LLC,* 2018 IL App (1st) 180474.

CONSTRUCTION

Four-Year Construction Statute Of Repose Required Dismissal Of Suit Filed Four Years And Ten Months After Alleged Faulty Roof Construction

In a complaint filed August 14, 2015, plaintiff alleged the defendant left a large overhead dock door open during severely high winds on October 27, 2010. As a result, a portion of defendant's roof detached and struck power lines servicing plaintiff's building creating an electrical surge damaging plaintiff's computer numerical control machines. Plaintiff's expert said that deck panels of the roof were not attached to the roof joists in violation of building code requirements. Plaintiff contended not only was the roof originally improperly installed, but also defendants failed to inspect and maintain it. The trial court held the four-year construction Statute of Repose applied and dismissed the complaint.

The first district affirmed. It disagreed with plaintiff that liability should be predicated upon an ongoing duty to maintain the roof. Rather, it held the claim involved a defectively-constructed roof, a single event,that did not entail an ongoing duty of daily inspection. Consequently, the four-

year construction Statute of Repose barred the action. *M&S Industrial Co., Inc. v. Allahverdi*, 2018 IL App (1st) 172028.

RAILROADS

FELA Award Not Subject To Withholding Under Railroad Retirement Tax Act

A railroad freight conductor sued his employer under Federal Employers Liability Act claiming negligence for injuries he sustained at work. A jury awarded plaintiff $821,000 including $310,000 for past and future lost wages. The railroad subsequently moved for a setoff claiming plaintiff owed taxes on the lost wages under the Railroad Retirement Tax Act (RRTA). The RRTA funds railroad employees retirement benefits pursuant to federal statute. The trial court denied the motion holding it was a personal injury judgment, and the Act did not require employers to withhold taxes for personal injury awards.

In a split decision, the first district affirmed. The RRTA defines compensation as "any form of money enumeration paid to an individual for services rendered as an employee…" There are numerous exceptions to the definition of compensation, none of which refer to lost wages or FELA awards. It does not refer to services that an employee would have rendered, but could not. Therefore, lost wages do not fit within the RRTA's meaning of compensation. The dissent would hold the majority opinion produced a financial windfall for the plaintiff. *Munoz v. Norfolk Southern Railway Co.*, 2018 IL App (1st) 171009.

We recommend the entire opinion be read and counsel consulted concerning the effect these decisions may have upon your claims —

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