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Welcome to the latest issue of our *Quarterly Review* newsletter, which covers recent Illinois state and federal court decisions of interest to insurers. I'd also like to take this opportunity to update you on some recent developments at the firm.

On the Move

Chicago – In December, the firm relocated its Chicago office to the Seventh floor of 33 N. Dearborn Street, which is situated directly across from the Daley Center and convenient to both the state and federal courthouses. We plan to continue to grow our presence in Chicago to better serve our clients, and this new office is an important part of those plans. Please feel free to contact our Chicago office Managing Partner, Tobin Taylor, if you'd like to stop by, or use our offices whenever you are in town.


Tobin Taylor

Peoria – After 37 years at our current location in Peoria, the firm is moving in May to new offices in the Hamilton Square Building (300 Hamilton Blvd., Peoria, IL). Our new Peoria office will occupy the building's ground floor, and 5th and 6th floors. On the ground floor, the firm will have a reception area, seven conference rooms, and a training/seminar center.

HEYL ROYSTER

New Partners

In January, the firm announced that five attorneys were elevated to partner: John Redlingshafer in our Peoria office, Joseph Guyette and Cheri Stuart in our Urbana office, and Sara Ingram and Gary Pinter in our Edwardsville office.

Joseph Guyette practices in the area of workers' compensation defense. Joe has handled workers' compensation arbitration hearings at venues throughout the state, and has argued multiple cases before the Workers' Compensation Commission.


Joseph Guyette

Sara Ingram practices in the area of general tort litigation, with a particular interest in the defense of asbestos claims, healthcare matters, and professional liability cases. Sara has defended numerous asbestos personal injury suits involving parties in both Illinois and Missouri.


Sara Ingram

Gary Pinter defends a broad range of litigation, including complex toxic tort, product liability, premises liability, trucking and transportation, insurance coverage, defamation and other general personal injury and property damage liability matters. Prior to law school, Gary served in the U.S. Army, which included being selected as the Distinguished Honor Graduate from the Army's Primary Leadership Development Course and service in combat operations during Operation Iraqi Freedom.


Gary Pinter

John Redlingshafer is chair of the firm's Governmental Practice and a member of the Business & Commercial Litigation Practice. In the area of governmental law, he represents numerous townships, villages, fire districts, road districts, and other governmental entities in a broad range of issues. John is a member of the Tazewell County Board and was appointed to its Land Use, Human Resources, and Finance Committees. John also serves on the East Peoria Fire and Police Commission.


John Redlingshafer

Cheri Stuart's practice is focused on representing doctors and hospitals in the areas of medical malpractice litigation, hospital liability defense, and long term care facility defense, which also includes representation of healthcare professionals in proceedings before the Illinois Department of Financial and Professional Regulation. Prior to becoming a lawyer, Cheri's experience included serving as a registered nurse in a hospital setting, as a nurse case manager for health insurance companies, and as a nurse-paralegal.


Cheri Stuart

Advanced Technology
In February, the firm rolled out its new accounting software – Acumin. Acumin is a best-of-breed, high-performance system that allows for enhanced matter management, improved efficiencies, and better reporting on many levels.

Save-The-Date: Claims Handling Seminar – May 28, 2015 – Bloomington, Illinois
We are currently finalizing the plans for our 30th Annual Claims Handling Seminar, which will be held on the afternoon of Thursday, May 28 at the Doubletree Hotel in Bloomington, Illinois. We hope you will be able to join us and our other clients from around the Midwest for an afternoon seminar designed to address the day-to-day needs of professionals handling claims throughout Illinois. As in past years, there will be concurrent programs: one for casualty and property claims, and another focused on Workers' Compensation. This year, we are also planning an additional program for public-entity insurers.

Very truly yours,

HEYL, ROYSTER, VOELKER & ALLEN

BY: 

Timothy L. Bertschy
Firm Managing Partner
Heyl, Royster, Voelker & Allen
124 S.W. Adams Street, Suite 600
P.O. Box 6199
Peoria, IL 61601-6199
Telephone 309.676.0400 | tbertschy@heylroyster.com

AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Spring 2015

INSURANCE

Commercial Line Policies Did Not Cover Insured Developer's Faulty Workmanship

Plaintiff issued two commercial line policies to a developer. Following completion of the condominiums, water damage occurred to individual units allegedly as a result of negligence of the insured developer. Plaintiff filed a declaratory judgment action seeking a determination that its policies did not cover losses resulting from defective workmanship. The trial court granted summary judgment holding faulty workmanship was not an "accident" within the terms of the policy and that the products-completed operations hazard exclusion applied to personal property allegedly damaged by the water.

The Seventh Circuit affirmed. Illinois courts require that for an incident to constitute an accident in the building construction context, there must be damage to something other than the structure itself. The completed work exclusion also applied because residents had moved their personal property into the units establishing that the intended use had begun by the time the personal property was damaged. *Nautilus Ins. Co. v. Board of Directors of Regal Lofts Condominium Ass'n*, 764 F.3d 726 (7th Cir. 2014).

Homeowner's Policy Excluded Coverage For Fatal Shooting At Party

Allstate filed a declaratory judgment action seeking a determination it was not required to defend its insureds under a homeowner's policy. The policy excluded coverage for injury or damage "which may reasonably be expected to result from the intentional or criminal acts or omissions" of the insured. At a party, people were drinking and smoking pot. The insured pulled out a gun which was passed around among people and eventually given back to the insured when it discharged and killed a lady. The insured was found guilty of involuntary manslaughter. The trial court held the policy exclusion for bodily injury reasonably expected to result from the insured's criminal acts applied, and therefore, there was no coverage.

The First District affirmed. The insured's conviction of involuntary manslaughter constituted a final determination on the merits which collaterally estopped the insured and victim from avoiding the exclusion. Further, it was obvious it was reasonable to expect a person waiving a loaded gun around a group of young people, all of whom had been drinking or abusing drugs, could result in injury to someone. The insured's subjective lack of intent did not void the effect of the exclusion. *Allstate Indemnity Co. v. Hieber*, 2014 IL App (1st) 132557.

Husband Separated From Wife Was Not A "Spouse" Under Terms Of Auto Policy

Plaintiff was injured in an automobile accident while working as a limousine driver. Fourteen months earlier, he moved out of his wife's house but left most of his clothes and other things there. After settling with the adverse driver for the policy limits of $250,000, he made a UIM claim under his wife's auto policy. State Farm denied the claim based upon the policy definition of a spouse which meant "your husband or wife who resides primarily with you." The trial court granted summary judgment for State Farm.

The First District affirmed. Although they were not divorced, the undisputed facts showed that plaintiff did not reside with his wife at the time of the accident. It rejected plaintiff's claim that the policy language was ambiguous. *Gaudina v. State Farm Mut. Auto. Ins. Co.*, 2014 IL App (1st) 131264.

Ambiguity Between Declarations Page And Anti-Stacking Provision Allowed Insured To Stack Multiple UIM Limits

The insured was injured when an under-insured motorist drove his vehicle into a convenience store where the insured was standing. She recovered $100,000 from the driver's insurance carrier and then made a claim to stack UIM coverages on three vehicles. The declarations page provided a $250,000 per person limit. The trial court found the table on the declarations page which listed each of the three $250,000 UIM limits, and the use of the term "the limit" and the endorsement led to an ambiguous interpretation and allowed the insured to recover an additional $650,000 from her auto carrier.

The Third District affirmed. If the terms are susceptible to more than one meaning, the policy is ambiguous and will be strictly construed against the insurer that drafted it. In this case, the under-insured motorist endorsement contained an anti-stacking provision which stated that the "limit of liability" is the maximum limit the company would pay for all damages. However, the anti-stacking provision also stated the limit of liability was based on the description in the declarations page which showed three UIM coverages of $250,000 and a UIM premium for each of the three vehicles. Therefore, the language contained in the declarations page was inconsistent with the endorsements, anti-stacking provision creating an ambiguity. *Bowers v. General Casualty Ins. Co.*, 2014 IL App (3d) 130655.

Insureds' UIM Coverage Applied Over Car Rental Company's Liability Under Financial Responsibility Statute

Plaintiff's insureds were injured when their auto collided with a car rented from Hertz. The renter declined to purchase supplemental insurance from Hertz, and therefore, had liability limits of only $20,000 per person. The insureds' policy contained an exhaustion clause saying it was not obligated to pay UIM coverage until the limits of liability of any applicable policies "have been exhausted by payment of judgments or settlements." Based thereon, plaintiff filed the present declaratory judgment action seeking to compel Hertz to pay its UIM coverage before plaintiff's coverage would apply. Hertz filed a Certificate of Self-Insurance which meant there was no limit to their financial responsibility liability as opposed to the $50,000 per person minimum for rental companies to file a bond or an insurance policy. The trial court ruled in plaintiff's favor holding Hertz was obligated to pay UIM coverage.

The First District reversed. Allowing Hertz to be liable under the financial responsibility before UIM coverage in the policy issued by plaintiff would result in a situation where the insureds would receive more benefits in the fortuitous event of being injured by a rental car than a car not owned by a rental company. The legislature could not have intended that result. The insureds received exactly what they paid for in connection with the UIM premium in their insurance policy. *Safeway Ins. Co. v. Hadary*, 2014 IL App (1st) 132554.

SETTLEMENTS AND RELEASES

Broad Release Language In Settlement Of Personal Injury Case Barred Subsequent Property Damage Suit

Plaintiff was injured in an auto accident and filed suit against the adverse driver. He subsequently settled his personal injury case and signed a "Release of All Claims" which relinquished any "rights I now have or may hereafter have" arising out of the accident. He then filed another case seeking recovery for damages to his automobile arising from the same accident. The trial court rejected plaintiff's claim that the earlier release made no reference to property damage, and therefore, parol evidence should be admissible to explain an ambiguity in the language. The property damage case was dismissed.

The First District affirmed. The terms of the release were clear and unambiguous. An unambiguous release will be applied as written without the use of parol or extrinsic evidence. *Badette v. Rodriguez*, 2014 IL App (1st) 133004.

Defendant Entitled to Set Off Full $5,000 In Medical Payments From Jury Verdict Where Plaintiff's Carrier Earlier Settled Its Subrogation Claim for $2,500

Plaintiff was injured in an auto accident and received $5,000 in medical payments from her insurance carrier. Her carrier filed a subrogation action against the defendant whose carrier compromised the claim for $2,500. Plaintiff then sued the defendant and after mandatory arbitration, the defendant rejected the decision. Following a jury trial, a verdict for plaintiff was rendered for $5,395 in damages for necessary medical bills. The defendants sought a setoff of $5,000, the amount of the original subrogation claim. The trial court denied the setoff.

The First District reversed. It noted plaintiff's carrier sought recovery of the full amount of medical payments as the subrogee of its insured. As a result of the compromised settlement of the medical payments claim, that claim was released. Consequently, the defendant was entitled to a $5,000 setoff from the jury verdict. *Segovia v. Romero*, 2014 IL App (1st) 122392.

LIENS

Statutory Health Care Lien Reduction Is Calculated Based Upon Plaintiff's Total Recovery Rather Than After Attorneys Fees And Costs

In two separate cases, plaintiff settled with adverse drivers and then petitioned the court to adjudicate the health care liens. By statute, the total amount of liens cannot exceed 40% of a judgment or settlement. In one case, the trial judge held the 40% should apply against the total settlement while a different judge held it would apply to the net settlement after payment of attorneys fees and costs.

The First District held the health care liens are to be calculated based upon an injured plaintiff's total recovery prior to a reduction for attorneys fees and costs. To hold otherwise would allow plaintiffs to shift their attorneys fees and costs in part on to the health care provider. The Act provides that liens "shall be satisfied to the extent possible" only by the lienholder. *Wolf v. Toolie*, 2014 IL App (1st) 132243.

Chiropractor's Lien Vacated When He Failed To Respond To Petition To Adjudicate

A chiropractor rendered services to a lady injured in an auto accident and asserted a statutory lien for $2,777. The patient subsequently settled with the adverse driver and her attorney filed a petition to adjudicate liens. The chiropractor received a copy of the petition to adjudicate and notice of the hearing but did not appear. The court entered an order finding the chiropractor in default, and his lien was "discharged and voided." The chiropractor subsequently filed a motion to vacate arguing he had not been personally served and filed a separate suit for conversion against the lawyer. The trial court denied the motion to vacate and dismissed the conversion complaint.

The Fifth District affirmed. The Circuit Court did not need personal jurisdiction over the chiropractor nor was he required to be personally served with process. The court had *in rem* jurisdiction over the settlement proceeds and could therefore adjudicate the chiropractor's rights. Further, since the attorney disbursed settlement funds pursuant to a valid court order, the conversion complaint could not stand. *Smith v. Hammel,* 2014 IL App (5th) 130227.

SERVICE OF PROCESS

Ten-Month Delay In Obtaining Service Of Process Warranted Case Dismissal

Plaintiff was injured in a vehicle accident on November 4, 2009. On November 2, 2011, she filed a personal injury complaint but was unsuccessful in obtaining service upon the defendant at the address listed in the accident report. There were multiple unsuccessful attempts at service, some at the incorrect address in the accident report as well as other addresses before plaintiff was

finally served in September, 2012 where he was serving time in prison. Upon the defendant's motion, the trial court dismissed the complaint for plaintiff's failure to exercise diligence in obtaining service of process as required by Supreme Court Rule 103.

The First District affirmed. It rejected plaintiff's argument that defendant's incarceration created a special circumstance that affected her ability to serve him. Where service on the defendant occurs after expiration of the statute of limitations, plaintiff's failure to exercise reasonable diligence will result in dismissal with prejudice. It is reasonably foreseeable that a person might move during a two-year period. Plaintiff must do more than merely attempt to serve the defendant at the address listed in the accident report in order to establish reasonable diligence. *Carman-Crothers v. Brynda*, 2014 IL App (1st) 130280.

ESTOPPEL

Plaintiffs Were Judicially Estopped From Pursuing Personal Injury Claim Which They Failed To List In Their Bankruptcy Proceeding

Plaintiff was injured at work and while being transported to the hospital, the ambulance was involved in a vehicle accident resulting in additional injury. Earlier, plaintiff filed a petition for Chapter 13 bankruptcy and remained pending when he filed the present personal injury claim. The trial court entered summary judgment for the defendant on the basis that plaintiff was barred by judicial estoppels from proceeding with their claims because of his failure to list the claim in the bankruptcy proceeding.

The Second District affirmed. Judicial estoppel provides that a party who assumes a particular position in a legal proceeding is stopped from assuming a contrary position in a subsequent legal proceeding. Its purpose is to prevent abuse of the judicial process and protect the integrity of our system of justice. Plaintiffs knowingly took inconsistent positions in the bankruptcy court and the trial court regarding the existence of their personal injury claims as a classic situation to which the doctrine of judicial estoppel applies. *Seymour v. Collins*, 2014 IL App (2d) 140100.

NEGLIGENCE

Summary Judgment Proper Where Plaintiff Has No Recollection Of Accident And No Other Witnesses Or Sufficient Circumstantial Evidence Would Support Theories Of Recovery

Plaintiff was a truck driver who suffered a serious head injury while picking up a load of freight from the defendant. He had no memory of the incident, and the only other person in the area did not see the occurrence. He filed suit based upon negligence, premises liability and spoliation of evidence. The trial court granted summary judgment and subsequently dismissed a later-filed *res ipsa loquitur* claim.

The First District affirmed. While proximate causation can be established with circumstantial evidence, it cannot be based upon speculation. In the absence of evidence that the defendants did or failed to do something, plaintiff has no means to establish negligence on their part as a proximate cause. Similarly, *res ipsa loquitur* would not apply because it would be impossible for a jury to find the injury was caused by an instrumentality under the defendant's control or that it would not have occurred in the normal course of events had the defendants used ordinary care. *Rahic v. Satellite Air-Land Motor Service, Inc.*, 2014 IL App (1st) 132899.

AUTOMOBILE

Illinois Suit Following Multiple Vehicle Accident In Indiana Required Application Of Indiana Law

A multi-vehicle accident occurred on I-65 in Indiana when Kallis drove the wrong way on the interstate causing numerous vehicles to take evasive action. Defendant's employee driving a semi tractor trailer ultimately rear-ended plaintiff's vehicle. Plaintiffs received a $100,000 settlement from the Kallis estate and then filed suit in Illinois claiming the truck driver was negligent. The defendant filed a motion seeking to apply Indiana substantive law concerning

liability and damage issues. Unlike Illinois, Indiana maintains that a defendant is only severally liable for its own percentage of fault. It also allows the defendant to prove the negligence of an absent or settling tortfeasor. The trial court denied the motion but certified for interlocutory appeal the question of which substantive law should apply.

The First District reversed and held Indiana law should apply. There is a legal presumption that the law of the state where the injury occurred should apply unless the forum state has a more significant relationship. While Illinois has an interest in compensating its residents for injuries, that interest did not outweigh that of Indiana to maintain safe highways or protect individuals or businesses from being apportioned a greater cost in negligence actions. The relationship of Illinois to the case is not so pivotal as to overcome the presumption that Indiana law should apply. *Denton v. Universal Am-Can, Ltd.*, 2015 IL App (1st)132905.

PRODUCT LIABILITY

Jury Rejects Claim Microwave Manufacturer Was Negligent In Recall Efforts

Seven years after plaintiff purchased a microwave oven manufactured by the defendant, a fire occurred resulting in physical and emotional injuries. He sued the manufacturer under strict liability and negligence. Plaintiff claimed the fire was caused by a defect that was the subject of a recall after he purchased the microwave. However, defendant's engineer said the fire hazard only existed when splattered food had gone uncleaned for an extended time, and the microwave was running when the fire started. Neither of those conditions existed, and the jury found in favor of the manufacturer.

The Seventh Circuit affirmed. With respect to the recall, plaintiff asserted that since he purchased the microwave with a credit card, Whirlpool should have done more to track him down and advise him of the recall. Evidence indicated Whirlpool was able to contact 75% of the affected microwave owners which is far better than the average consumer product recall. Therefore, it was reasonable for the jury to find in the defendant's favor. *Plyler v. Whirlpool Corp.*, 751 F.3d 509 (7th Cir. 2014)

Product Distributor Reinstated As A Defendant When Manufacturer Was Not Subject To Illinois Jurisdiction

Plaintiff was injured at work lifting batteries when a strap used to carry the battery gave way. Plaintiff filed a product liability claim against the distributor and Chinese manufacturer. The distributor certified the manufacturer and was dismissed from the case. Plaintiff then obtained a default judgment against the Chinese manufacturer but was unable to satisfy the judgment. Consequently, plaintiff moved to reinstate the distributor, but the trial court denied the motion.

The First District reversed. The certification statute allows a plaintiff at any time to move to vacate the order of dismissal if it can show that the correct manufacturer is judgment proof, not amenable to service of process or otherwise unable to satisfy a judgment or reasonable settlement. It concluded the manufacturer of the battery strap could not be subject to jurisdiction in Illinois as it did not market its product to this state. Consequently, plaintiff was entitled to reinstate the American distributor. *Chraca v. U.S. Battery Mfg. Co.*, 2014 IL App (1st) 132325.

Defense Summary Judgment Affirmed Where Plaintiff Cannot Establish He Used Product That Was Recalled

Plaintiff suffered complications after wearing contact lenses manufactured by the defendant. The defendant discovered a large number of contact lenses it manufactured had poor ion permeability not permitting enough oxygen to reach the cornea and recalled 11 million contact lenses. The defendant moved for summary judgment after discovery revealed that none of the recalled lenses were shipped to the optical store where plaintiff purchased his lenses. The trial court agreed.

The Seventh Circuit affirmed. It rejected plaintiff's argument that CIBA's voluntary recall was so huge that the company could not possibly have known which lenses were defective. All evidence indicated plaintiff never used the recalled lenses nor did he provide any evidence that the

lenses he used were defective. *Kallal v. CIBA Vision Corp.,* 7th Cir. No. 13-1786 (2/24/15).

PREMISES LIABILITY

Supreme Court Holds Distraction Exception For Open And Obvious Danger Was Not Available To Elderly Lady Focusing On Building Entrance.

Plaintiff was an elderly woman who drove to an eye clinic for a scheduled appointment. She parked on the street and walking toward the clinic, tripped on a crack in the sidewalk and was injured. She said she was looking toward the door and the steps rather than the sidewalk when she fell and claimed the distraction exception to the open and obvious danger rule should apply. Even though the city had notice of the uneven sidewalk, the court entered a defense summary judgment. The Fifth District reversed.

The Supreme Court reversed the Appellate Court reinstating summary judgment for the city. A defendant does not have a duty to warn of or correct open and obvious dangers. An exception can apply if the plaintiff is distracted. However, a plaintiff should not be allowed to recover for self-created distractions. As there is no evidence the defendant did anything which created the purported distraction, the exception did not apply. *Bruns v. City of Centralia*, 2014 IL 116998.

Defense Summary Judgment Proper Where Plaintiff Cannot Establish Store Had Actual Or Constructive Knowledge of Spill

Plaintiff slipped and fell in a puddle of water on the concrete floor of defendant's store. In her deposition, she testified the puddle was two feet in diameter and blended in with the floor. There were no tracks, marks, or footprints leading to or from the puddle. The trial court entered summary judgment for the defendant because plaintiff could not establish it caused the puddle nor did it have actual or constructive knowledge of its presence prior to the incident.

The Seventh Circuit affirmed. Liability can be imposed upon a defendant where the substance was placed there by its negligence or it had actual or constructive knowledge of its presence While it was acknowledged the defendant sold bottled water, plaintiff offered no other evidence to show that it was more likely the defendant's employees were responsible for spilling it on the ground. Further, absent evidence demonstrating the length of time the substance was on the floor, constructive notice was not established. *Zuppardi v. Wal-Mart Stores, Inc.*, 770 F.3d 644 (7th Cir. 2014).

Property Owner Who Hired Contractor To Remedy Unsafe Condition Was Not Liable For Injuries To Contractor's Employees When The Feared Event Occurred

Con Agra discovered a burning smell in a grain bin and hired a contractor who claimed expertise in handling "hot bins." Three workers were injured when the grain bin exploded. They filed suit alleging the property owner, Con Agra, was negligent. A jury awarded almost $180 million in compensatory and punitive damages.

The Seventh Circuit reversed. Someone who hires an independent contractor to correct an unsafe condition is not liable when the feared event occurs. Consequently, the trial court should have granted the defendants' motion for judgment as a matter of law. *Jentz v. ConAgra Foods, Inc.*, 767 F.3d 688 (7th Cir. 2014).

Absent Knowledge Of Dog's Dangerous Propensity, There Is No Common Law Duty On Condo Homeowner's Association To Prevent Condo Owner's Dog Attack In Common Area

The two plaintiffs were attacked by a condo owner's dog in a common area. The complaint alleged the dog weighed more than the 25-pound limit contained in the condo association regulations. They sued the association in negligence rather than under the Animal Control Act. The trial court determined that allegations in the complaint about

the defendant's knowledge of the dangerous propensity of the dog were conclusionary and dismissed the complaint holding it owed no duty to plaintiffs.

The First District affirmed. Although the complaint alleged a prior attack by the dog, there were no facts alleging the circumstances of that attack. Further, Illinois law does not presume that a dog weighing over 25 pounds is vicious. As the complaint failed to establish prior knowledge of the vicious nature of the dog, the defendant owed no duty to plaintiffs. *Tyrka v. Glenview Ridge Condominium Ass'n*, 2014 IL App (1st) 132762.

Landlord's Unkept Promise To Fix Broken Gate Did Not Render It Liable When Tenant's Dog Got Loose And Attacked Plaintiff.

The defendant leased a home to people who had a Labrador retriever. The lease contained a pet policy which required that all dogs needed to be restrained by a leash in common areas and prohibited "aggressive dog breeds." The landlord maintained the outside of the premises and agreed to fix a broken gate but never did so. The tenants then kept a Rottweiler for friend which got loose through the broken gate and injured plaintiff. Plaintiff sued the landlord claiming the promise to fix the fence rendered it liable because it failed to perform a voluntary undertaking. The trial agreed disagreed and entered summary judgment for the defendant holding it did not owe a duty to plaintiff.

The Second District affirmed. The defendant's promise to fix the gate did not amount to the undertaking of a duty to protect third parties off the premises. Where there was no undertaking of a duty, the court would not hold a landlord liable for injuries to a third person caused by a tenant's dog off of the leased property. *Sedlacek v. Belmonte Properties, LLC*, 2014 IL App (2d) 130969.

TRUCKING

Summary Judgment Granted To Transportation Broker Where No Evidence Existed To Create Agency Of Alleged Negligent Independent Truck Driver

Plaintiff's wife died from severe injuries sustained when her vehicle collided with a tractor trailer driven by an employee of Pella Carriers. She alleged Pella and its driver were agents of the defendant transportation broker and that the defendant was negligent in contracting with them to haul loads. Discovery revealed the defendant did not own or operate any vehicles, but rather, contracted with Pella and others to haul loads for third parties. Also, evidence indicated the driver had no moving violations within the previous seven years. The trial court entered summary judgment for the defendant holding there was no evidence to support the agency allegation nor the claim of negligence in retaining Pella.

The Third District affirmed. One who employs an independent contractor is not liable for the contractor's negligence except where the principal directs the acts causing the harm or negligently selects an independent contractor. It was undisputed that Pella maintained its federal licensing with the DOT and had a satisfactory safety record. The defendant acted as a broker, not as a carrier, and was interested only in the end result of getting the load to its destination. *Hayward v. C.H. Robinson Co.*, 2014 IL App (3d) 130530.

EMPLOYER LIABILITY

Employer Can Be Sued When Employee First Learns Of The Injury After Expiration Of The Statute Of Repose Under Workers' Compensation Act And Workers' Occupational Diseases Act

Plaintiff's husband was exposed to asbestos at a plant owned by the defendant from 1966 to 1970. Forty-one years after leaving employment, he was diagnosed with mesothelioma. The employer was sued at common law because the statute of limitations of the Workers' Compensation Act and Workers' Occupational Diseases Act had expired. Plaintiff claimed the exclusive remedy provisions of those Acts did not apply to claims that are "not compensable under the Act." The trial court dismissed the complaint.

The First District reversed. The Supreme Court has held an employee may file a common law action against an employer under certain

exceptions, one of which is when the injury is "not compensable under the Act." The court held the employee's injury was not compensable under the Act because all possibility of recovery was foreclosed long before the employee learned of his injury. Through no fault of his own, the employee never had an opportunity to seek compensation under the Act. *Folta v. Ferro Engineering*, 2014 IL App (1st) 123219.

CONSTRUCTION ACTIVITIES

General Contractor Did Not Retain Control To Render It Liable For Injuries To Subcontractor's Employee

Plaintiff was a subcontractor's employee who was injured when he fell while setting roof trusses in a residential subdivision. He sued the general contractor alleging it failed to insure the subcontractor would maintain safe work practices at the job site. The construction contract provided that the subcontractor would "be fully and solely responsible for job site safety at the Project." Discovery established that the general contractor employed "expeditors" whose responsibility was to see that the subcontractors had adequate materials for the job but did not prescribe the means or methods of performing the work. The trial held the general contractor did not retain sufficient control to render it liable for injuries to a subcontractor's employee and entered summary judgment. The Second District affirmed. A duty arises if the general contractor controls not only the "desired ends," but also the "incidental aspects" of the subcontractor's work. The best indicator of whether the contractor retained control is the contract between the parties. Retained control may also be demonstrated by a course of conduct at variance with the contract. In the present case, the contract clearly made the subcontractor responsible for the safety of its employees and the general contractor's actions did not establish it controlled the subcontractor's work. *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482.

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

Rex K. Linder, Editor
rlinder@heylroyster.com

Peoria, Illinois 61601-6199
Suite 600, Chase Building
124 S.W. Adams Street
P.O. Box 6199
Fax (309) 676-3374
(309) 676-0400

Chicago, Illinois 60603
Seventh Floor
33 N. Dearborn Street
(312) 853-8700

Edwardsville, Illinois 62025-0467
Suite 100
Mark Twain Plaza III
105 West Vandalia
P.O. Box 467
Fax (618) 656-7940
(618) 656-4646

Rockford, Illinois 61105
PNC Bank Building, Second Floor
120 West State Street
P.O. Box 1288
Fax (815) 963-0399
(815) 963-4454

Springfield, Illinois 62791
3731 Wabash Ave.
P.O. Box 9678
Fax (217) 523-3902
(217) 522-8822

Urbana, Illinois 61803-0129
Suite 300, 102 East Main Street
P.O. Box 129
Fax (217) 344-9295
(217) 344-0060

www.heylroyster.com