Summer 2015

Dear Friends,

Enclosed is the latest edition of our *Quarterly Review of Recent Decisions*, edited by our partner, Rex Linder. We trust that you will find this helpful in your day-to-day handling of claims.

I would also like to take this opportunity to let you know about some developments at the firm.

Our Firm Continues to Grow

Heyl Royster continues to strategically grow in areas that enable us to effectively provide the legal services that are important to you. In 2015, we bolstered our capabilities firmwide in tort litigation, as well as in specific areas such as workers' compensation, toxic tort defense, commercial litigation, and nursing home defense by adding 14 attorneys – Jessica Bell (Peoria and Springfield); Wade Blumenshine (Peoria); Bide Akande and Stephanie Garces (Chicago); Lindsey D'Agnolo, Alyssa Freeman, Steve Getty, and Meg Hogan (Rockford); Declan Binninger (Springfield); Patrick Folley (Urbana); and Amber Cameron, Mitchell Martin, Robert Rakers, and J. Michael Ward (Edwardsville).


Meg Hogan
Jessica Bell
Declan Binninger
Wade Blumenshine
Patrick Folley
Bide Akande
Amber Cameron
Stephanie Garces
Mitchell Martin
Lindsey D'Agnolo
Robert Rakers
Alyssa Freeman
J. Michael Ward
Steve Getty

Notable Wins

I am pleased to report that we've recently had a number of wins for insurers and insureds:

- We successfully defended a case in the U.S. District Court in Urbana, IL in which the plaintiff asked for nearly $10 million in damages (as well as punitive damages and attorneys' fees under the Consumer Fraud Act) related to the sale of eight grain bins that were destroyed during Hurricane Lane in September of 2006. The contract for the sale of the grain bins had a wind rating of 120 mph. The plaintiff claimed the bins were destroyed by winds below the wind rating, that the bins were negligently designed, and that fraudulent misrepresentations and concealments were made during the transaction. The trial was bifurcated, and the jury returned a defense verdict on the breach of contract and negligence claims, and the judge ruled in our favor on the Consumer Fraud Act and punitive damages claims.
- In an insurance coverage dispute, the firm obtained a $250,000 refund for an insurer client. The issue was whether the driver's personal umbrella policy was triggered by a wrongful death settlement, or if the settlement should first be covered by the excess coverage under the driver's employer's commercial auto coverage policy. The firm successfully claimed that the entire commercial auto policy of the employer should be paid before any of our client's umbrella coverage, which resulted in the refund.
- The firm obtained summary judgment for an insurer client in a case where a driver of a recently purchased vehicle was in an accident that caused significant injuries and damages. The driver had purchased the vehicle but failed to obtain insurance. In dismissing our client, the court rejected the plaintiffs' theory that the insurance company should be obliged to defend and indemnify the driver because the vehicle was covered under the seller of the vehicle's policy and that the driver was driving the vehicle with the permission of the seller.
- In another summary judgment in favor of an insurer client, the plaintiff/property purchaser brought a claim for contribution under a commercial general liability policy based on alleged misrepresentation by the seller/insured in the sale of commercial property. After the sale of the property, the buyers learned that the property was a burial ground for Native Americans and was subsequently declared to be under the jurisdiction of the Illinois Human Skeletal Remains Protections Act and the Illinois Historic Preservation Agency, which required the remains to be removed at the buyer's cost in excess of $300,000.

HEYL ROYSTER

300 HAMILTON BOULEVARD • P.O. BOX 6199 • PEORIA, IL 61601 • TEL 309.676.0400 • HEYLROYSTER.COM • PEORIA • CHICAGO • EDWARDSVILLE • ROCKFORD • SPRINGFIELD • URBANA • A CENTURY OF SERVICE AND BEYOND

Peoria Open House

Our firm has been headquartered in Peoria for more than 105 years. Earlier this year, we relocated our Peoria office to newly renovated office space at 300 Hamilton Blvd. On September 23, the firm celebrated the move with a ribbon cutting ceremony with the Peoria Area Chamber of Commerce and an Open House for clients and colleagues – who toured our new eco-friendly space. The three floors of newly renovated office space feature seven conference rooms on the ground floor as well as a Learning Center that seats 75 people.

Ribbon Cutting Ceremony

Protecting Your Valuable Information

We base our client relationships on trust, and the safety of your information and the security of our systems are of paramount concern. Accordingly, we would like to inform you of some of the significant investments we have made to our cyber security systems to protect your valuable data from attacks by unseen enemies. Our cyber security policies and procedures involve a combination of security tools such as:

- Firewalls;
- Anti-virus software;
- Spam filtering;
- Intrusion detection monitoring;
- Monthly Microsoft security updates; and
- Complex user passwords that expire every 90 days.

We have also encrypted all laptops, tablets, Smartphones, and other mobile devices that access firm data. On a regular basis we perform security penetration tests to expose any potential vulnerability to a cyber attack. We constantly review and verify our systems for cyber security risks, and approach every risk strategically – by tailoring a solution based on the nature of the attack. If a security breach that affects a client occurs, it is our promise to notify that client in a timely manner, so that remedial actions can be taken. The firm also maintains an in-force cyber security insurance policy for the benefit of our clients.

Recognizing that threats can also come from within an organization, we have also placed tight controls on administrative privileges and the access to our servers and network systems. The firm's data destruction process involves shredding of all discarded confidential hardcopies and the secure disposal of all electronic hardware. Our Disaster Recovery Plan provides for a failover from our primary datacenter to our secondary datacenter to maximize technology continuity so that client needs are met.

As the risks to your confidential information have increased in both complexity and volume, we want to assure you that Heyl Royster will rise to meet any challenge.

Very truly yours,

HEYL, ROYSTER, VOELKER & ALLEN

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AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Summer 2015

INSURANCE

Carrier Not Guilty Of Vexatious Delay Where Bona Fide Dispute Concerning U.M. Coverage Existed

The insured and her 19-month-old son were involved in an auto accident in which the insured died, and her son was injured. There were two possible scenarios to the accident. One was a single-car accident in which the auto spiraled out of control possibly due to a blown out tire or faulty brakes. The second was a hit-and-run scenario in which a second vehicle collided with the insured's auto. Founders denied uninsured motorist coverage believing the facts supported a single-car accident which would not be covered under the policy rather than hit-and-run. The trial court disagreed and entered summary judgment against the carrier and the insured's estate sought fees and costs for vexatious and unreasonable delay in settling the claim. The trial court entered summary judgment for the carrier on the vexatious refusal claim.

The First District affirmed. Where a bona fide dispute concerning coverage exists, costs and sanctions against a carrier are inappropriate. Where an insurer reasonably relies upon evidence sufficient to form a bona fide dispute, it has not acted unreasonably or vexatiously. As Founders had sufficient evidence on which it could reasonably dispute the hit-and-run theory, its conduct was not unreasonable. *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481.

Auto Carrier Failed To Establish It Exercised Diligence In Obtaining Insured's Cooperation

The insured made a left turn causing another vehicle to swerve and strike another auto. An adjuster spoke with the insured over the telephone, but when he asked to take a recorded statement, the insured hung up. The adjuster called back and left a detailed message regarding the need for additional information. In total, the carrier's efforts to obtain information from the insured spanned 13 days and included five telephone calls and a skip trace. It then filed the present declaratory judgment action against the insured and the other driver holding it had no duty to defend and indemnify the insured because of the insured's breach of the cooperation clause. The trial court granted summary judgment against the carrier on the basis it had not established substantial prejudice.

The First District affirmed. To establish breach of the cooperation clause, the insurer must show that it exercised reasonable diligence in seeking the insured's participation and the insured's failure to participate was due to a refusal to cooperate. An insurer must prove substantial prejudice which will not be presumed. The carrier expended minimal effort to contact the insured personally and much more should have been undertaken to obtain his cooperation. It did not mail any letters, made no attempt to personally visit his known address or pursue alternative methods to talk with the insured. This demonstrated a cursory investigation. Also, the carrier could not prove substantial prejudice when it failed to conduct a proper investigation. *American Access Cas. Co. v. Alassouli*, 2015 IL App (1st) 141413.

Failure To Defend Or Institute Declaratory Judgment Subjected Carrier To Pay Settlement, Fees And Costs Incurred In Resolving Underlying Case

Artisan's insured was a semi-tractor involved in a collision. Artisan denied coverage because the policy excluded coverage when the insured was driving the tractor on behalf of another person. The tractor displayed placards for Unlimited Carrier. Unlimited Carrier eventually settled, and then filed the present declaratory judgment action against Artisan to recover the amount paid in settlement, attorney's fees and

costs. The trial court ruled in favor of Unlimited Carrier holding the denial to defend was wrong.

The Seventh Circuit began its opinion stating: "This case provides a warning for insurance companies who refuse to defend their insureds." It held certain allegations of the complaint were potentially within coverage, and Artisan was wrong in failing to defend its insured. Therefore, it was estopped from asserting defenses under the policy. If a carrier does not defend under a reservation of rights or seek a declaratory judgment, it will be estopped from later raising a policy defense. *National American Ins. Co. v. Artisan & Truckers Cas. Co.*, No. 14-2694, 2015 U.S. App LEXIS 13724 (7th Cir. Aug. 6, 2015).

UIM Coverage Not Intended To Permit Injured Employee To Collect More Than Would Be Received From The Tortfeasor

Plaintiff was injured in an auto accident at work. She received $103,224.02 in workers' compensation benefits. The adverse driver's insurance carrier paid its policy limits of $100,000 to the workers' compensation carrier. Plaintiff then pursued a UIM claim against her employer's insurer, and an arbitration panel awarded $310,000. Travelers then paid plaintiff $210,000, the difference between the arbitration award and the amount paid toward the workers' compensation lien. Plaintiff claimed Travelers owed her $100,000 because the adverse driver's carrier paid the money to her employer rather than her. The trial court disagreed and entered summary judgment for Travelers.

The Seventh Circuit affirmed. The purpose of UIM coverage is to place the insured in the same position as she would have occupied if the tortfeasor carried adequate insurance. UIM coverage is not intended to permit an injured employee to collect more than the employee would have been entitled to received from the tortfeasor alone. Refusing to consider the $100,000 payment as an amount that the employee received would lead to an impermissible double recovery making her better off than she would have been had the other driver had sufficient insurance. *Berrey v. Travelers Indemnity Co.*, 770 F.3d 591 (7th Cir. 2014).

Contingent Auto Policy Did Not Provide Excess Coverage

A truck delivering road resurfacing material struck and killed a road construction flagger. Decedent's wife sued the driver and the trucking company that employed him. The truck driver had a $1,000,000 auto policy. The truck broker was an additional insured under that policy but also had a "Contingent Automobile Liability" policy. The policy provided that its coverage would not apply if the insured had "valid and collectible Automobile Liability insurance of any nature." The trial court held the contingent policy did not provide coverage.

The First District affirmed. It rejected plaintiff's argument that the policy should apply as excess coverage over the underlying policy. The policy language "shall not apply" if there is other insurance is different than saying that coverage will apply only in excess of the primary policy. As plaintiff could collect from the primary insurance, the contingent policy did not apply. *Bartkowiak v. Underwriters at Lloyds*, 2015 IL App (1st) 133549.

Wind Shear From Passing Semi Is Not Physical Contact Under UM Policy

The insured and his wife were riding the insured motorcycle when a semi coming from the opposite direction crossed over into his lane of travel. The insured swerved to the right to avoid contact, but his motorcycle was propelled off the roadway by a wind shear of the passing semi onto a gravel shoulder and into a ditch. The policy required the hit and run vehicle either strike the insured or the insured's vehicle. The trial court granted the insured summary judgment holding the wind shear was sufficient physical contact.

The First District reversed. There was no ambiguity in the physical contact requirement of the policy. Illinois courts allow recovery for an indirect physical contact when an object from the hit-and-run vehicle strikes the insured's vehicle. However, "contact" with air generated by a passing vehicle does not equate to indirect physical contact

like a lug nut flying off a hit-and-run vehicle. *State Farm Mut. Auto. Ins. Co. v. Benedetto*, 2015 IL App (1st) 141521.

UM Policy Language Ambiguous As To Whether Coverage Extended For Hit-And-Run Accidents Involving No Physical Contact

Cincinnati sought a declaration that it had no obligation to pay a UM claim because the insured's accident did not involve physical contact between his truck and the hit-and-run vehicle. The insured claimed a car cut in front of him causing him to slam on his brakes, swerve to the right, hit a curb and roll over. A few eye witnesses said there was no other vehicle near the insured's truck. The policy language said: "If there is no physical contact with the hit-and-run vehicle, the facts of the 'accident' must be proved." The trial court certified for interlocutory appeal the question of whether the policy language was ambiguous.

The Third District held the policy language was ambiguous. While the policy required that the hit-and-run vehicle must hit, or cause an object to hit, the insured auto, the language also said if there is no contact, the facts of the accident must be proven. Those requirements were in conflict, and therefore, the policy was ambiguous. *Cincinnati Ins. Co. v. Pritchett*, 2015 IL App (3d) 130809.

Auto Liability Policy Did Not Cover Damage To Insured's Rental Car

The insured rented a car from Enterprise and was involved in a collision. Enterprise sued the insured for the damage. Founders filed the present declaratory judgment action on the basis that it issued only a liability policy which did not include collision coverage. The trial court agreed and entered summary judgment for Founders.

The First District affirmed. It noted the insured could have liability to Enterprise for damage to the rental vehicle. However, the fact that the damaged vehicle was owned by someone other than the insured did not automatically invoke liability coverage. The policy excluded injury or destruction of "property rented to or in charge of the insured…" *Founders Ins. Co. v. Walker*, 2015 IL App (1st) 141301.

Captive Insurance Agent Has Duty To Place Requested Insurance Coverage

Through its agent, Country issued an auto policy to its insured. The insured requested his fiancée be named as an insured, but that was not done. The fiancee's minor son was struck by an auto and seriously injured. They made a UIM claim which was denied on the basis that neither fiancée nor her son were listed as an insured. Plaintiff then filed the present negligence action against the agent and Country. The trial court dismissed the claims against the agent on the basis that he did not owe the insured the duty of care in procuring the requested insurance coverage because he was not a broker. The Fourth District reversed.

The Supreme Court affirmed holding the agent had a duty to exercise reasonable care in obtaining the requested coverage. Section 2-2201 of the Insurance Code requires an "insurance producer" to exercise ordinary care in procuring requested insurance. The case turned on whether a captive agent would be considered an "insurance producer." It determined a person required to be licensed to sell insurance has a duty to exercise care in obtaining coverage requested by the insured regardless of whether an independent broker or captive agent. *Skaperdas v. Country Casualty Ins. Co.*, 2015 IL 117021.

SUBROGATION

Settlement Of Property Damage Subrogation Case Did Not Bar Insured From Proceeding With Separate Personal Injury Case Against The Same Defendants

The insured was involved in an auto accident injuring him and causing damage to his auto. His insurance carrier paid for the property damage, except for a $500 deductible, and then filed a subrogation action in the name of the insured against the adverse driver and his employer.

While that case was pending, the insured filed his own personal injury action against the same defendants. After the subrogation was settled, the defendants moved to dismiss the personal injury case claiming it was barred by *res judicata*. The trial court agreed and dismissed the personal injury case.

The First District reversed. The doctrine of *res judicata* requires that all claims arising out of a specific incident be litigated at one time. However, a statute protects an insured from having a claim for personal injury barred by *res judicata* where his insurance carrier has previously litigated a subrogated property damage claim arising out of the accident. It made no difference that the underlying subrogation action named only the insured and did not specify it was a subrogation claim on behalf of the insurer. *Gadson v. Among Friends Adult Day Care, Inc.*, 2015 IL App (1st) 141967.

ERISA Does Not Preempt Illinois Law Concerning Common Fund Doctrine

A worker fell from a ladder and was injured. He received benefits from the defendant Trust Fund of $86,709.73. The fund document included a subrogation agreement requiring the worker to repay 100% of any payments received from third parties without any deduction. The worker then settled his case for $500,000 and tendered the full subrogated amount to the fund. His attorneys then filed the present suit seeking one-third of the amount recovered of $28,903.25 plus costs of $3,020.09. The trial court ruled in favor of the law firm holding it was entitled to the fees pursuant to the Common Fund Doctrine.

The Fifth District affirmed. In Illinois, an attorney's claim pursuant to the Common Fund Doctrine is not preempted by the terms of a self-funded ERISA plan. An action by an attorney under the doctrine is an independent action invoking the attorney's right to the payment of fees for services rendered and is wholly unrelated to the plan. The plan's contractual provisions does not govern an independent attorney whose efforts created the common fund. *Schrempf, Kelly, Napp & Darr, Ltd. v. The Carpenters' Health & Welfare Trust Fund*, 2015 IL App (5th) 130413.

ARBITRATION

Arbitration Center's Failure To Provide Notice Allowed Court To Vacate Arbitration Default Judgment

Plaintiff's insurer filed a subrogation action which was placed on the court's arbitration docket. The defendant failed to appear, and an arbitration award was entered in favor of plaintiff for $8,142.52 in property damage and $7,774 for personal injuries. The defendant filed a motion to vacate the award arguing he did not receive notice of the hearing date. The trial court granted the motion, and the case eventually went to trial where a jury found in favor of the defendant.

The First District affirmed the trial court's vacation of the arbitration award. It noted that the failure of a party to attend mandatory arbitration constitutes a waiver of that party's right to reject the award and represents a consent to the entry of judgment against it. However, a party absent from the arbitration has the burden of showing that his or her absence was reasonable or the result of extenuating circumstances. The decision to grant a motion to vacate is within the discretion of the trial court. Had the arbitration panel properly inquired into whether defense counsel received notice of the hearing, the default would not have been entered. Therefore, the trial court did not abuse its discretion. *Glover v. Fitch*, 2015 IL App (1st) 130827.

SETTLEMENTS AND RELEASES

Concealment Of Plaintiff's Death Voids Subsequent Settlement

Plaintiff filed a product liability action in connection with a prosthesis which failed. The case dragged on for almost five years. Shortly before trial was scheduled, the case settled. Unknown to the defendant, plaintiff had died eight months earlier. Defendant first learned of the death during the exchange of settlement documents and moved to vacate the settlement. The motion was denied.

The Fifth District reversed. An attorney's employment is revoked by the death of the client. As there was no plaintiff at the time of settlement, plaintiff's law firm had no authority to act after their client's death. The court found it troubling that plaintiff's attorney intentionally concealed a material fact that would have reduced the overall value of the claim for damages. Given intentional misrepresentations and material omissions during settlement negotiations, the court held settlement was invalid and unenforceable. *Robison v. Orthotic and Prosthetic Lab, Inc.*, 2015 IL App (5th) 140079.

SERVICE OF PROCESS

Case Dismissed When Summons Not Served For Almost One Year

Plaintiff fell in the defendant's back yard pool area on July 18, 2010. Suit was filed July 16, 2012, and summons was issued the same day but incorrectly listed defendant's address. Six weeks later, an alias summons was issued but returned stating "No such address." Nothing happened for the next six months when a second alias summons was issued and again returned "No such address." A third alias summons was issued July 9, 2013 and served on the defendant that day. Defendant moved to dismiss pursuant to Supreme Court Rule 203(b) arguing plaintiff failed to exercise reasonable diligence in obtaining service. The trial court agreed and dismissed the case with prejudice.

The First District affirmed. The defendant need not demonstrate prejudice resulting from the delay in service although it is an appropriate consideration. If a plaintiff waits until close to the expiration of the limitations period to file suit, a lengthy delay in service would nullify the protection against stale claims. Therefore, a delay in service in a case filed well in advance of the expiration of the limitation may be excused where the same delay in a suit filed close to its expiration may not. Plaintiff's delay in obtaining service on the defendant exhibited a lack of reasonable diligence. *Mular v. Ingram*, 2015 IL App (1st) 142439.

LIMITATIONS

Wrongful Death Suit Must Be Filed Within Two Years Of Death Rather Than Discovery Of Alleged Negligence

Plaintiff's 90-year-old mother died in the hospital on May 29, 2009. In 2013, plaintiff had an expert radiologist review a CT scan and concluded the defendant doctor failed to identify the breakdown of an anastomosis which led to her death. Shortly thereafter, plaintiff filed the malpractice action against the defendant who moved to dismiss the case based upon the two-year statute of limitations in the Wrongful Death Act. Plaintiff responded claiming the discovery rule should apply. The trial court disagreed and dismissed the case.

In a split decision the Third District affirmed. The Wrongful Death Act requires suit to be filed within two years from the date plaintiff knew or should have known of the existence of the injury or death for which damages are sought. The required knowledge is of the death or injury, not the negligent conduct. It was undisputed plaintiff immediately knew of his mother's death yet suit was not filed until four years later. *Moon v. Rhode*, 2015 IL App (3d) 130613.

Supplemental Complaint Is Time Barred When Leave Of Court Is Not Obtained Until After Limitation Has Expired Even Where Motion Seeking Leave Was Earlier Filed

In May, 2012, plaintiff filed a three-count complaint seeking money damages for uncompensated construction services performed for the defendants. On May 28, 2013, plaintiff filed a motion to amend the complaint alleging that on August 29, 2012, defendant published defamatory stories against plaintiff. On September 26, 2013, the trial court granted plaintiff's motion to file the supplemental complaint. The defendant moved to dismiss claiming the pleading was time barred because defamation has a one-year statute of limitations. The trial court denied the motion but certified the question for interlocutory appeal.

The Fourth District reversed holding the supplemental pleading was barred by the one-year limitation for defense. Supplemental pleadings

may be filed within a reasonable time "by leave of court." Unless and until leave of court is granted, the supplemental pleading is not considered filed. *Bentley v. Hefti*, 2015 IL App (4th) 140167.

IMMUNITY

City Immune From Liability Under Negligence And *Res Ipsa Loquitur* For Sewer Backup Into Homes Following Two-Day Rainstorm

During a two-day rainstorm, sewer water overflowed into multiple homes, and the owners brought suit against the city. The city moved for summary judgment claiming the decision of a sewer maintenance program was a discretionary function rather than ministerial. The trial court agreed and entered summary judgment for the city.

The First District affirmed. Whether a municipality engages in a program of public improvement is a discretionary matter, but the manner in which the municipality implements the program is ministerial. Where an official's conduct requires deliberation or the exercise of judgment, the actions are discretionary. It concluded the city was immune for decisions it made regarding the maintenance and improvement of the sewer system. It also held *res ipsa loquitur* did not apply because the plaintiffs were unable to show the city was sufficiently in control of the sewage system. *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994.

PRODUCT LIABILITY

Neither Successor Corporation Nor Component Manufacturer Owed Duty To Warn

The estates of 15 people killed in the crash of a commuter airline filed negligence and strict liability claims against the successor to the airplane's manufacturer and against the manufacturer of the plane's warning system. The critical element for imposition of a duty on a successor is a continuing relationship between it and the predecessor's customers benefitting the successor. There was no evidence to establish that nexus, and therefore, the manufacturer was not liable. With respect to the component part manufacturer, plaintiff failed to produce evidence that its product was defective, and therefore, there was no duty to warn. Summary judgment was entered for the defendants.

The Seventh Circuit affirmed summary judgment. There was not enough of a continuing relationship between the successor corporation and the original manufacturer that would justify imposition of a duty to warn. With respect to the component part manufacturer, the court said plaintiffs offered no evidence that its product was defectively designed or dangerous. As there was no evidence of a defect, it had no duty to warn. *Thornton v. M7 Aerospace LP*, No. 14-1707; 2015 U.S. App. LEXIS 13759 (7th Cir. Aug. 6, 2015).

PREMISES LIABILITY

Strip Mall Owner Not Liable When Plaintiff Fell In A Pothole On Way To Store

Plaintiff fell in a pothole in a street on her way into a store in a strip mall owned by the defendants. However, the area where she parked was owned and maintained by another developer. Plaintiff asserted that the defendant appropriated the use of the street where she fell, and therefore, it should be liable. The trial court disagreed and entered summary judgment for the defendants.

The First District affirmed. A private landowner owes the duty of care to provide a safe means of ingress and egress to his property but does not owe a duty to insure safe conditions on a public roadway abutting the property. An exception is where the abutting landowner has assumed control of the roadway for its own purposes. There was no evidence of affirmative conduct on the part of the defendant preventing the public from using the roadway where plaintiff nor was it the sole means of ingress and egress to stores in the strip mall. *Caracci v. Patel*, 2015 IL App (1st) 133897.

PEDESTRIANS

Neither City Nor Utility Liable Where Pedestrian Was Struck Crossing Street Outside Of Crosswalk Even Though Street Lights Were Not Functioning

Plaintiff was struck by a vehicle as she crossed a city street and filed suit against the city and its electric utility claiming street lights were not functioning. Defendants moved to dismiss the case because plaintiff was outside of the crosswalk, and therefore, not an intended user of the street. The trial court dismissed the complaint.

The Fourth District affirmed. Plaintiff failed to plead specific facts establishing a duty owed to her by the city. Further, the utility owed no duty for failing to provide illumination where plaintiff was not an intended user of the city street because she crossed in mid-block. *Peters v. Riggs*, 2015 IL App (4th) 140043.

SPORTS AND RECREATION

Mirror Falling From Wall Of Fitness Facility Not Risk Contemplated By Exculpatory Release

Plaintiff was a member of a fitness club who was injured when a mirror fell from a wall and struck him. At the time of joining, plaintiff signed, an agreement that released the facility from any negligent acts "in any way related to members presence at or use of this facility." The trial court granted summary judgment based upon the release language.

The First District reversed. A party may contract to avoid liability for his own negligence. However, the incident causing injury must be within the scope of dangers ordinarily associated with the activity. A literal reading of the membership agreement indicated plaintiff released defendant from injury no matter what the cause or circumstance. However, the court concluded it could not rule as a matter of law that a falling mirror was a danger within the scope of the exculpatory clause. *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716.

Resort Owner Owed No Duty To Customer Who Dove Into Lake And Broke Neck

After paying admission, plaintiff dove into a lake at defendant's resort and broke his neck. The defendant moved for summary judgment because the danger of diving into water is open and obvious. In his deposition, plaintiff said he did not see any signs prohibiting diving and because the water was dirty, he could not tell how deep it was. The trial court entered summary judgment for the defendant.

The Second District affirmed. The open and obvious rule generally applies to the usual risks that are posed to a body of water which include drowning and injury from diving. The danger is "open and obvious" not because plaintiff knows in advance that the water was shallow, but because he knows in advance that the body of water may be too shallow for a safe dive. The fact that defendant had a pier from which plaintiff dove did not create a new risk which plaintiff was incapable of appreciating. *Bujnowski v. Birchland, Inc.*, 2015 IL App (2d) 140578.

UTILITIES

Public Utilities Act Does Not Preempt Property Owner's Rights To Sue Utility For Wrongful Tree Cutting

Plaintiffs owned property abutting railroad tracks. To block the view of trains and noise, they planted trees and other vegetation. Com Ed periodically trimmed the trees to prevent interference with its lines. However, Com Ed then decided to remove plaintiff's trees as well as those of other property owners. A private tree-cutting service requested permission to remove pine trees, but plaintiffs refused. Nonetheless, they cut down the trees without authorization. Plaintiffs then filed a class action alleging trespass, conversion, and violation of the Wrongful Tree-Cutting Act. The trial court dismissed the complaint based upon §8-505.1 of the Public Utilities Act which granted the ICC exclusive jurisdiction to investigate and hear complaints against the utility.

The First District reversed. It noted inconsistent language in that the ICC was given exclusive jurisdic-

tion, but it also said the provision would not "in any way diminish or replace other civil or administrative remedies…" The court concluded the Act did not suggest a legislative intent to deprive tort victims of common law remedies. *Durica v. Commonwealth Edison Co.*, 2015 IL App (1st) 140076.

EMPLOYERS

Circuit Court Lacked Jurisdiction Over Claim For Additional Workers' Compensation Benefits Following Settlement Of Common Law Claim

Plaintiff was injured in a vehicle accident while working. Plaintiff filed a common law action against the other driver, and her employer intervened in the case to protect its workers' compensation lien. Plaintiff settled for $650,000 and the employer was reimbursed $190,112.89 for benefits they had paid which was 75% of the total lien amount. Plaintiff then sought additional workers' compensation benefits which the employer denied. Plaintiff filed suit seeking a declaratory judgment against his employer, and the employer filed a counterclaim. At a hearing, the trial court determined it did not have jurisdiction and dismissed the case.

The Fifth District affirmed. Subject matter jurisdiction cannot be waived, stipulated or consented to by the parties. The legislature vested exclusive jurisdiction in the Industrial Commission over matters involving an injured worker's rights to benefits under the Act as well as an employer's defenses to claims under the Act. *Bradley v. City of Marion*, 2015 IL App (5th) 140267.

RAILROAD

FELA Suit Not Timely Where Employee Knew Of Repetitive Trauma Problems More Than Three Years Before Filing

Plaintiff began working for the railroad doing heavy manual labor in 2006. On November 19, 2009, he saw a nurse for bilateral hand pain. Suit was filed November 30, 2012. The trial court dismissed the Complaint based upon the three-year limitation applicable to FELA claims.

The Seventh Circuit affirmed. It rejected plaintiff's argument that intermittent pain should be insufficient to trigger accrual of the claim and that he thought his problems was nothing more than muscle soreness. He knew or through the exercise of reasonable diligence, should have known that his problems were caused by his work more than three years prior to the time he filed suit. *Sweatt v. Union Pacific Railroad Co.*, No. 14-2451, 2015 U.S. App. LEXIS 13706 (7th Cir. Aug. 6, 2015).

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

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