An Illinois Law Firm

Quarterly Review Of Recent Decisions

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INSURANCE

Insurance Agent Had No Duty Verify Accuracy Of Application

Plaintiff leased warehouse and office space in a building with a history of roof problems. The defendant had been plaintiff's insurance agent for many years when coverage was cancelled because the previous carrier paid more in claims than it received in premiums. The defendant met with plaintiff and an American Family agent and completed an application stating the building's roof was five years old, and there were no problems with it. Subsequently, the roof developed substantial leaks and caused more than $1 million in damage. American Family denied coverage when it learned plaintiff misrepresented the age and condition of the roof. Plaintiff sued the defendant and obtained a verdict against him, but the trial judge vacated the verdict and entered judgment for the defendant.

The first district affirmed. Pursuant to statute, an insurance producer is to "exercise ordinary care and skill" in obtaining coverage "requested by the insured…" Plaintiff did not make a specific request for coverage but only assumed the defendant would find replacement insurance. To require the defendant to review the application for accuracy would extend the statutory duty beyond that defined by the legislature. *Office Furnishings, Ltd. v. A.F. Crissie & Co.*, 2015 IL App (1st) 141724.

Policy Rescinded Due To Material Misrepresentations In Application

Defendant Galilee provided medical services in Chicago and applied for professional liability coverage with Essex. The insurance application asked a number of questions about non-traditional and experimental weight loss procedures. Galilee denied participation in those activities. Galilee was then sued for malpractice by a patient who had been provided masotherapy, a weight loss procedure not approved by the FDA. A trial court held rescission was warranted because the defendant made material misrepresentations in the policy application.

The Seventh Circuit affirmed. The Illinois Insurance Code, Section 154, allows insurers to deny coverage and rescind a policy if a statement in the application is false and the statement was made with the intent to deceive the insurer or materially affects the acceptance of the risk by the insurer. Illinois employs an objective of test of what a reasonably careful and intelligent underwriter would regard the facts as stated to substantially increase the chances of an event insured against or cause a rejection of the application. The statements made by Galilee in the application were material to acceptance of the risk allowing Essex to rescind coverage. *Essex Insurance Co. v. Galilee Medical Center*, 815 F.3d 319 (7th Cir. 2016).

Additional Vehicle Acquired By Insured Covered By 30-Day Automatic Insurance Provision

The insured was driving a recently acquired vehicle for $500 which he intended to be an additional vehicle and not replace the one listed in the policy. Within 30 days of purchase, the insured was involved in an accident. After being sued, the insured tendered his defense to his carrier. The carrier denied coverage based upon a provision that it be notified in writing no later than 30 days after acquisition and that the "newly acquired motor vehicle replaces another owned auto" that is not retained by the insured. The trial court held the carrier had no duty to defend and entered summary judgment in its favor.

The second district reversed. By inserting the automatic insurance provision into the policy, the carrier contracted to provide coverage during the 30-day grace period. If it did not wish to accept the

risk of temporarily insuring a newly acquired vehicle, the option remained to omit the provision altogether. *O'Neil-Vidales v. Clark*, 2015 IL App (2d) 141248.

Other Insurance Provision Unambiguously Limited UIM Coverage

The insureds had four vehicles insured with Nationwide providing UIM coverage limits of $100,000 per person and $300,000 per accident. A separate premium was charged for each vehicle. They settled with the adverse driver for its policy limits of $100,000 and made an UIM demand on Nationwide for $400,000, the aggregate limit of the four insured vehicles. In a declaratory judgment action the trial court ruled that Nationwide did not owe its insured underinsured coverage because the settlement with the adverse driver met the UIM coverage available under the policy.

The Seventh Circuit affirmed. It rejected the insured's argument that the anti-stacking language was ambiguous in conjunction with the declaration page of the policy. As the highest applicable limit for any one vehicle under the policy was $100,000, the "other insurance" provision limited the insured's recovery to that amount. *Nationwide Agribusiness Ins. Co. v. Dugan*, 810 F.3d 446 (7th Cir. 2015).

Amount Of Setoff In UIM Claim For Workers' Compensation Benefits And Common Law Settlement Discussed

Acuity was the insurance carrier for Decker's employer who paid workers' compensation benefits of $350,942. Decker then settled with the adverse driver's insurance carrier for its policy limits of $50,000 and paid Acuity $37,067.48 after deducting the statutory 25% attorney's fee. Acuity had UIM limits of $2,000,000 and sought a declaratory judgment that it should be entitled to a setoff of $400,942. Decker disagreed saying that Acuity was entitled to a setoff of only $363,874.52 which was the amount he received in workers' compensation benefits plus the $50,000 settlement minus the $37,067.48 reimbursed to Acuity. The trial court ruled in favor of Decker.

The second district affirmed. Acuity was claiming a double setoff. It was claiming a setoff of the full $50,000 even though $37,067.48 was reimbursed to it. In actuality, the full $50,000 was being set off when Acuity received the payment from Decker. Therefore, Decker would be placed in the same position he would have occupied had the tortfeasor carried adequate insurance. *Acuity v. Decker*, 2015 IL App (2d) 150192.

Letter From Insured's Attorney Within Two Months Of Accident Advising Of Attorney Lien For UIM And Medical Payments Was Timely Demand For Arbitration.

The insured was involved in an accident with a driver having policy limits of $20,000. Within two months of the accident, the insured's attorney wrote a letter to Memberselect advising of an Attorney's Lien for uninsured motorist and medical payments claim which also requested arbitration of the underinsured motorist claim. Three years later the insured settled the underlying personal injury suit for the policy limits. The insured's attorney then advised Memberselect that the insured had medical bills totaling $15,196.40 and that the attorney would be in touch with Memberselect in the next few weeks. Memberselect denied the claim because the demand for arbitration was not made within the policy limitation of three years from the date of the accident. The trial court entered summary judgment for Memberselect.

The first district reversed. It rejected Memberselect's argument that the letter sent within two months of the accident did not demand arbitration or select an arbitrator. It did not believe a reasonable person, reading the insurance policy provision, would require the selection of an arbitrator to be part of the commencement of the arbitration. *Memberselect Ins. Co. v. Luz*, 2016 IL App (1st) 141947.

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Driver Reasonable Belief Exclusion In UIM Coverage Violated Public Policy

The insured was driving on an expired driver's license when he was involved in a hit-and-run accident in which his passenger was injured. The passenger denied having knowledge the insured driver did not have a valid license. The carrier denied coverage based upon the "reasonable belief exclusion" which held UIM coverage did not apply if the driver "was without reasonable belief that he was entitled" to drive the vehicle. The carrier obtained summary judgment with the trial court holding the insured did not have a valid driver's license and could not have had a reasonable belief that he was entitled to drive.

The second district reversed. It held the reasonable belief exclusion was unenforceable as against public policy when applied to a permissive passenger. The reasonable belief exclusion applicable to the insured did not further the purpose of public policy protecting a permissive passenger injured by a hit-and-run motorist. She was a permissive user as a passenger in the vehicle entitled to protection for economic loss related to her personal injury due to an at-fault hit-and-run motorist. *Safe Auto Ins. Co. v. Fry*, 2015 IL App (1st) 141713.

Insureds Who Received Settlement From Adverse Driver In Amount Equal to UIM Limit Not Entitled To Additional Benefits

Plaintiffs were occupants of a vehicle who were injured in a collision. They eventually settled with the adverse driver for her policy limits of $500,000 with one plaintiff receiving $250,000, another receiving $238,000 and the third receiving $12,000. They then sought UIM benefits under a policy issued by the defendant. The policy had UIM limits of $500,000. The trial court rejected plaintiffs' claim the policy language was ambiguous and entered summary judgment for the defendant holding plaintiffs were not entitled to additional money under the UIM coverage.

The Seventh Circuit affirmed. A provision in an insurance policy is ambiguous only when it is susceptible to more than one reasonable interpretation. The policy was unambiguous and recovery was limited to its single limit endorsement. As plaintiffs have already received $500,000, they were not entitled to additional UIM benefits. *Trotter v. Harleysville Ins. Co.*, 7th Circuit No. 15-3654 (5/10/16)

Carrier Required To Defend When Timely Notice Of Claim Was Given To Independent Agent

An employee of the insured corporation was involved in an auto accident. The insured's president notified the insurance agent of the accident, but the information was not passed onto the carrier. The carrier's first notice was 31 months after the accident. The trial court held the insured's notice to the insurance agent was timely, and therefore, the carrier had a duty to defend.

The first district affirmed. The carrier encouraged policy holders to report claims to their insurance agent if they felt more comfortable in doing so. The carrier's documents and payment schedules either provided only the agent's contact information or expressly referred to it as "agent." Under these facts, the insured's agent was the apparent agent of the carrier, and therefore, notice was timely. *First Chicago Ins. Co. v. Molda*, 2015 IL App (1st) 140548.

Carrier Had Duty To Defend Additional Insured Contractor Even Though Some Allegations Of The Complaint Alleged Contractor's Independent Negligence

An ironworker employed by a subcontractor was injured when rebar forms collapsed. He filed suit against two other contractors claiming they were in charge of the work and failed to provide the him with a safe support. Pekin's policy named Martin Cement as an additional insured providing coverage for vicarious liability, but not Martin's own negligence. Pekin filed a declaratory judgment action, and the trial court entered summary judgment in its favor as the

allegations of the complaint alleged Martin was guilty of negligence.

The first district reversed. It noted the duty to defend is broader than the duty to indemnify. The allegations of the complaint sufficiently alleged acts or omissions of the ironworker's employer that caused the injury, and summary judgment in favor of Pekin was an error. The court ordered that summary judgment should be entered in favor of Martin. *Pekin Ins. Co. v. Martin Cement Co.*, 2015 IL App (3d) 140290.

LIMITATIONS

Relation Back Applies If New Defendant Knew Or Should Have Known Plaintiff Would Have Sued Him From Outset If Identity Had Been Known

Plaintiff was hit in the head with a brick during a fight involving many participants. He timely filed suit against two participants and named five "John Does." Eventually, he filed a fourth amended complaint naming a new defendant who he had discovered was the person who hit him with the brick. The newly-named defendant moved to dismiss the complaint against him because it was filed more than two years after the incident. The trial court certified for interlocutory appeal the issue of whether relation back applies where allegations against the new defendant are the same as against the originally-named defendants who remained defendants.

The first district held the relevant inquiry was whether the newly-added party knew or should have known that plaintiff made a mistake in failing to name him or her as a defendant in the initial complaint. If a party is aware of a lawsuit arising out of a set of facts in which he was involved, and if that party knew or should have known the only reason he was not sued was due to a mistake on the plaintiff's part, relation back will apply. It does not matter whether the originally-named defendants remained in the amended complaint. *Zlatev v. Millette*, 2015 IL App (1st) 143173.

One Year Limitation Statute For Suing Government Entities Begins To Run At Eighteenth Birthday

Plaintiff was a 17-year-old student injured while playing soccer in a physical education class on May 12, 2012. Her 18th birthday was August 21, 2012. She filed suit against the school district within two years of the incident, but more than one year after her 18th birthday. The trial court dismissed the complaint rejecting plaintiff's argument that she had two years within which to bring suit after reaching age 18.

The second district affirmed. Plaintiff was afforded an additional seven months, until reaching age 18, before the one-year limitation period would begin to run. Since she failed to file within that time, her claim was time-barred. The holding protects local governmental entities from the possible claims of minors by preserving the repose period for them. *Lee v. Naperville Community Unit School District 203*, 2015 IL App (2d) 150143.

DAMAGES

Jury Award Of No Damages For Future Pain Or Medical Treatment Affirmed

Plaintiff filed suit after the defendant rear-ended her vehicle. Plaintiff confessed liability, and the trial focused on damages. One of plaintiff's treating doctors said she was likely to experience symptoms and receive periodic medical treatment in the future. A jury awarded zero damages for future pain and medical treatment.

The first district affirmed. The jury was not obligated to award damages for future pain or medical treatment even though her doctor said that was likely to occur. Even without conflicting testimony disputing the doctor's opinion, the jury was entitled to find that the doctor's testimony was not credible. The fact that the jury did not award future damages does not render the verdict against the manifest weight of the evidence. *Kayman v. Rasheed*, 2015 IL App (1st) 132631.

Written Off Portions Of Medical Bills Improperly Admitted Into Evidence Where Plaintiff Did Not Provide Proper Foundation

Plaintiff filed suit following an automobile accident and obtained partial summary judgment on the

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issue of defendant's negligence leaving only damages for the jury to consider. Plaintiff introduced into evidence medical bills totaling $83,788.34. Most had been paid by Medicare and that which was unpaid was written off by the healthcare providers. There was no testimony establishing the written off charges were fair and reasonable. The jury returned the verdict for the full amount of the medical bills.

The first district reversed. Plaintiff was entitled to recover the amount billed and paid by Medicare and the collateral source prevented the defendant from advising the jury of the compromised amount that was paid. However, with respect to the bills that written off, plaintiff presented no evidence that the charges were reasonable and related to the accident and therefore the case had to remanded back to the trial court to determine the proper amount of damages. *Klesowitch v. Smith*, 2016 IL App (1st) 150414.

SERVICE OF PROCESS

Failure To Name Defendant On Face Of Summons Voids Jurisdiction

Plaintiff filed a foreclosure action but failed to name the defendant on the face of the summons. It did name her on an attachment directing that she be served. After service was obtained, defendant did not appear, and a default judgment was entered. Defendant then moved to vacate the judgment which the court denied holding the objective of service of process was met.

The second district reversed. Supreme Court Rule 101(a) requires that the summons "shall be directed to each defendant." For a summons to be valid, the defendant's name must appear on its face. As the summons did not name the defendant, the summons was invalid and the court was without jurisdiction. *Arch Bay Holdings, LLC-Series 2010B v. Perez*, 2015 IL App (2d) 141117.

SETTLEMENT & RELEASES

A Settlement Agreement Is Enforcible Despite The Omission Of Certain Terms As Long As Those Terms Are Not Material

Plaintiff filed an employment discrimination and retaliation suit against the defendant. During mediation, a handwritten agreement stated that plaintiff demanded $210,000 and mediation costs in exchange for dismissing the lawsuit. The next day the employer accepted the demand and forwarded a more formal settlement proposal. Plaintiff refused to sign the agreement contending there was no settlement because the defendant interjected additional terms. The trial court disagreed and enforced the settlement.

The Seventh Circuit affirmed. A settlement agreement is enforceable if there was a meeting of the minds or mutual assent to its material terms. The objective is to give effect to the intent of the parties as expressed by the terms of the agreement. The fact that the anticipation of a more formal future writing does not nullify at otherwise binding agreement. The parties' failure to execute a typewritten proposal left the handwritten agreements enforceability undisturbed. A settlement agreement may be enforceable despite the omission of certain terms as long as those terms are not material. *Beverly v. Abbott Laboratories*, 817 F.3d 328 (7th Cir. 2016).

Post-Judgment Interest Statute Not Applicable To Binding Mediation Award Which Included High-Low Agreement

Plaintiff was injured in an accident with Allstate's insured. She entered into a written agreement for binding arbitration which included a high-low provision of $50,000 and $100,000. The mediator awarded $194,231 which triggered the maximum award. Allstate tendered $100,000 but refused to pay interest as requested by plaintiff, and she filed suit. The trial court dismissed the complaint which sought statutory interest pursuant to 735 ILCS 5/2-1303.

The first district affirmed. The statute provides for interest of 9% per annum from the date of judgment until it is satisfied. However, decisions have held high-low agreements are settlement agreements rather than an adjudication. As the award was pre-determined by the high-low agreement, plaintiff was not

entitled to interest on the $100,000 award. *Pinske v. Allstate Property & Casualty Ins. Co.*, 2015 IL App (1st) 150537.

Employer's Waiver Of Workers' Compensation Lien Permits Dismissal Of Third Party Contribution Action

Plaintiff ironworker became a quadriplegic after suffering a work-related injury. He made a workers' compensation claim and received over $5.2 million in benefits. He also filed a common law action against the owner of the property who acted as the general contractor. The owner filed a third party contribution action against plaintiff's employer. The employer subsequently settled directly with plaintiff for a waiver of its workers' compensation lien, and after a good faith finding, the contribution claim against it was dismissed. A jury subsequently determined plaintiff's damages to be $80 million which was reduced by 20% for contributory negligence resulting in a verdict of $64 million against the owner.

The first district affirmed dismissal of the third party contribution action. A good faith settlement is not judged by the obstacles it creates for a non-settling tortfeasor. Setting aside a settlement agreement on the basis that a non-settling party would be subject to judgment greater than what that party believed was appropriate would defeat the public policy favoring settlements. Dissatisfaction with a settlement agreement is insufficient to establish bad faith. *Bayer v. Panduit Corp.*, 2015 IL App (1st) 132252.

SPOLIATION

Mere Complaints About Evidence In Defendant's Possession Are Not Sufficient To Create Duty To Preserve Evidence

The trial court certified for interlocutory appeal the question of whether complaints made to a defendant about evidence is sufficient to require the defendant to preserve it. The court noted the general rule is that a defendant has no duty to preserve evidence unless plaintiff can show an exception applies. A plaintiff must show that there is some agreement or special circumstance to justify imposition of a duty. Plaintiff must then show that a reasonable person would have foreseen that the evidence was relevant to a potential civil action. The court noted knowledge of an accident and a possible cause of the accident, standing alone, was insufficient to create a duty to preserve evidence. It held mere complaints about the evidence in defendant's possession and control are not sufficient to create a duty to preserve evidence. *Combs v. Schmidt*, 2015 IL App (2d) 131053.

Limitation Applicable To Negligent Spoliation Action Will Be The Same As The Underlying Cause Of Action

Plaintiff filed product liability action alleging wrongful death, survival and family expense claims against General Motors following an accident involving plaintiff's wife and son. The adverse driver's insurance carrier investigated the accident and sold the vehicle for salvage seven weeks after the crash. Plaintiff sued the adverse driver for negligence and the manufacturer of her auto for product liability. About four years later plaintiff added claims alleging negligent spoliation of evidence because the auto carrier failed to download the sensory diagnostic module and destroyed evidence as to the speed and braking of the other vehicle prior to the accident. The trial court dismissed the negligent spoliation claim based upon the statute of limitations.

The second district affirmed. A split of opinions existed as to whether the statute of limitations for the underlying claim applies to spoliation or whether it was the five year provision for claims "not otherwise provided for by statute." It determined the same statute of limitations should apply to a negligent spoliation action as applied to the underlying cause of action. As the underlying claims were subject to the two year statute, the spoliation claims were not timely filed. *Skridla v. General Motors Co.*, 2015 IL App (2d) 141168.

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PREMISES LIABILITY

Landlord Is Not Liable For Injuries Caused By A Dangerous Condition On Premises Under Tenant's Control

Plaintiff was a stage hand employed by Broadway in Chicago who fell into an uncovered orchestra pit at the Oriental Theater after being struck by a pipe that fell from the ceiling. The pipe was being lowered by a co-worker as they were preparing for the next show. The lease required plaintiff's employer to maintain the theater in good repair. It also said the employer could not make changes without obtaining the lessor's consent. The trial court entered summary judgment for the landlord holding it had no duty to plaintiff.

The first district affirmed. A landlord is not liable for injuries caused by a defective or dangerous condition on premises that are under the tenant's control. There are a few exceptions such as a latent defect or fraudulent concealment of a dangerous condition. However, in the present case, they did not apply, and since plaintiff's employer agreed to maintain the premises, the landlord had no liability. The fact that the lease prohibited the employer from making certain changes without the lessor's consent did not create an implied duty on the landlord to make repairs. *Richard v. Nederlander Palace Acquisition, LLC*, 2015 IL App (1st) 143492.

Snow Removal Act Does Not Apply Where An Unnatural Accumulation Of Ice Was Caused By Defective Construction Or Maintenance Of The Property

Plaintiff slipped and fell on ice walking outside of her condominium. She brought suit against the condominium management company and the association. The complaint alleged plaintiff fell on ice she believed came from previous raining and freezing by a downspout. The trial court entered summary judgment holding the Snow and Ice Removal Act protected them from ordinary negligence.

The first district reversed. The plain language of the Act stated that the legislature intended people to be "encouraged to clean the sidewalks abutting their residences of ice and snow." Immunity will apply to one who engages in proactive actual conduct as opposed to one who passively enters into a contract for snow or ice removal services. It does not apply where the unnatural accumulation of ice was caused by defective construction or inadequate maintenance of the property rather than snow and ice removal efforts. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2015 IL App (1st) 142804.

Slippery Swim Step On Boat Was Open And Obvious Danger

Plaintiff was a guest on a large boat who slipped and fell on a swim platform and was injured. She fell as she walked over to a group of people waiting to ride a tender that was pulling up to the platform. She sued the boat owners claiming they failed to warn her that the platform could become dangerously slippery if water collected on it. The trial court entered summary judgment for the defendant holding the danger posed by the condition of the swim platform was open and obvious.

The first district affirmed. The mere fact an accident occurred does not give rise to a presumption that there was a dangerous condition. Both the number of guests on the swim platform and the fact that it could become wet were open and obvious conditions. Crowds and the dangers they present by possibly obscuring objects on the ground are open and obvious. It also held the distraction exception did not apply as plaintiff was looking at the crowd of people on the swim platform which was the very hazard she complained the defendants had created by offering to give rides on the tender. *Schade v. Clausius*, 2016 IL App (1st) 143162.

Store Not Liable For Customer's Fall In Parking Lot Pothole Which Was Open And Obvious

After loading her purchases into her vehicle, plaintiff returned a shopping cart to the cart corral and was returning to her vehicle when she fell in a pothole and broke a foot. As plaintiff was not looking down, she did not see the pothole which she described as a couple feet long and a few inches deep. The store moved for summary judgment on the

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basis that the pothole was open and obvious. The trial court agreed and held that the distraction doctrine did not apply. Summary judgment was entered for the defendant.

The fourth district affirmed. When there is no dispute about the physical nature of the condition, the question was whether it is open and obvious is a legal one for the court. Under the circumstances of the case, a reasonable person in plaintiff's position, exercising ordinary perception, intelligence and judgment, would have avoided the open and obvious hazard posed by the pothole. The fact that plaintiff's attention was focused elsewhere at the moment she fell did not constitute a distraction. *Wade v. Wal-Mart Stores, Inc.*, 2015 IL App (4th) 141067.

Resort Owner Owed No Duty To Person Who Dove Off Dock Into Shallow Water

Plaintiff and friends were at defendant's resort. A friend did a flat dive off the dock. Plaintiff, an experienced swimmer, then dove in and hit bottom breaking his neck. He claimed the defendant was negligent and failing to post "no diving" signs or similar warnings. The trial court entered summary judgment holding the defendant owned no duty because the danger of diving into water was in open and obvious danger.

The second district affirmed. The open and obvious doctrine applies to the usual risks posed by a body of water such as drowning or injury from diving. The uncertainty of a water's depth places the onus of accuracy on the person who chooses to dive. The danger is open and obvious not because the plaintiff knows in advance the water is shallow, but because he knows in advance that a body of water may be too shallow for a safe dive. *Bujnowski v. Birchland, Inc.*, 2015 IL App (2d) 140578.

SPORTS AND RECREATION

Leaky Roof Of Gym Not A Risk Contemplated By Exculpatory Release

Plaintiff was injured while playing basketball in defendant's fitness facility when he slipped on water he believed came from a leaky roof or skylight. Prior to participation, he signed an exculpatory release protecting the defendant "from any liability and all claims arising" from use of the facility. Based on the release, the trial court dismissed the negligence claim.

In a split decision, the first district reversed. The release did not make mention of shielding the defendant from liability from the building being defective. Plaintiff could not have contemplated that a leak from a defective roof would cause his injury. Therefore, the risk was not one contemplated by the parties at the time plaintiff signed the release. The dissent felt that slipping on a wet substance of a gym floor was a foreseeable danger associated with using a fitness center. *Offord v. Fitness International, LLC*, 2015 IL App (1st) 150879.

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

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