HEYL ROYSTER

Fall 2020

Dear Friends:

Welcome to our Fall 2020 *Quarterly Review*, the timing of which has been affected by the COVID delays on issuance of decisions from the Appellate and Supreme Courts of Illinois. Nevertheless, the theme for this issue and letter is *Back to the New Normal*. Despite the reduced number of decisions during the spring and summer, the reviewing courts in Illinois are now back to the normal timetables for briefing and appellate arguments. Arguments are being conducting remotely in most instances.

While many of the scheduled trials were postponed and many courtrooms are closed for in-person argument, Heyl Royster was well-positioned for the technological changes associated with remote appearances, hearings, depositions, mediations, and conferences with experts and clients. We have been able to use the opportunity presented by the pandemic to continue to obtain summary judgments, mediated settlements, complete depositions, and move cases forward. While it appears that we are now in the "second wave" of COVID-19, not only is there light at the end of the tunnel with the advent of vaccines, but we have adapted well to the changes mandated by the pandemic. We are still efficiently handing cases and closing files, and are proud to be of effective service even in these challenging days. It is really much the same, but just different. If COVID has taught us anything, it has taught us that that we are adaptable and capable of continuing to provide high quality legal services for our valued clients and, in many cases, even more effectively than before. So we are embracing the *New Normal*, and look forward to further adventures in 2021!

Briefly highlighting a few of the key decisions attached, we want to direct your attention to *Haage v. Zavala*, a Second Appellate District decision holding that insurance carriers are not exempt from the terms of HIPAA Protective Orders entered in cases because *any* party receiving protected health information under a HIPAA Protective Order must follow the terms of the order, and also because, if there is a conflict between state and federal law, then federal law will be applied. The Appellate Court *rejected* the insurance carrier's argument that it was exempt from the "return or destroy" provisions of the HIPAA order, and it was not entitled to an alternative HIPAA order allowing it to disclose, maintain, use, and dispose of protected health information for other purposes and to comply with other statutes and regulations. This decision has great potential impact on the collection and use of health-related claims information by carriers.

Once again the First District Appellate Court has ruled that the Statute of Limitations was tolled during a legal disability of a dementia patient even though she had never been formally adjudicated as such, effectively extending the statute of limitations until 2 years after her death. *Mickiewicz v. Generations at Regency, LLC* follows a similar decision set forth in our winter 2020 Quarterly Review, *Zayed v. Clark Manor Convalescent Center., Inc.* 2019 IL App (1st) 181552.

A very interesting case in the area of settlements is *Daniels v. Arvinmeritor, Inc.*, where the First District Appellate Court found in a case of very significant exposure that settlements prior to trial were in good faith even without a good faith finding, and even though the trial court did not know the amount of the settlements nor how the settlements would be allocated. The court held that settlements are not designed to benefit non-settling third parties. The court held that if the position of a non-settling defendant is worsened by the terms of the settlement

that is the consequence of the refusal to settle. Despite this case we still recommend that motions for good faith finding be undertaken to avoid potential later litigation of the issue, but this case gives the trial court authority to find that a prior settlement is in good faith even if that good faith finding did not occur.

A business owner's policy was held to provide coverage for an alleged violation of the Biometric Information Privacy Act, the First District Appellate Court holding that the claim fell within the coverage for "personal injury" and violated a person's right to privacy. *West Bend Mutual Ins. Co v. Krishna Schaumburg Tan, Inc.*

There were two satisfying premises liability cases, both from the Fourth District Appellate Court. In a case encouraging personal responsibility a tavern was not liable for ejecting an intoxicated person who fell and died after leaving the premises. Even though the court noted that when the decedent left the bar he was in a bad situation due to his intoxication, the bar did not assume exclusive control for the safety of the decedent by merely instructing him to leave the premises. *Vogt v. Round Robin.* In addition, in a decision supporting common sense the danger of falling off of a roof while doing repairs was considered to be an open and obvious risk precluding duty and resulting in summary judgment. See *Frieden. v. Bott.*

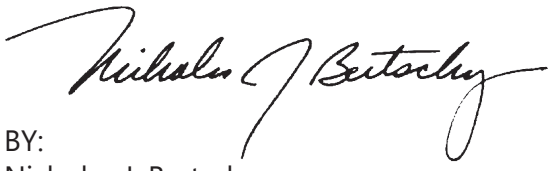
Please consult with us for more information on these cases and for guidance how they may apply to your claim.

As you may recall, prior to the advent of the COVID-19 pandemic, we had announced the planned and expanded return of Heyl Royster's Claims Handling Seminar. Well, things certainly do not always go as planned and, although we are disappointed in the inability to go forward as planned, further changes are afoot. While we will greatly miss the opportunity to interact, meet and visit with you in person, please look for our expeditionary forces to continue to provide legal updates to you through webinars and remote learning until the day when we can be together again.

Be safe and well.

Regards,

HEYL, ROYSTER, VOELKER & ALLEN, P.C.



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A Regional Law Firm

Quarterly Review Of Recent Decisions

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AGENCY

No Agency Where Trucking Company Did Not Reserve The Right To Control Independent Contractor's Manner Of Delivery

Plaintiffs were severely injured when their auto was rear-ended by a semi. They sued the trucking company that had contracted with the driver to deliver milk. The driver's contract stated he had "full control" and was solely responsible for operational costs, equipment and would perform services "as an independent contractor." The trial court entered summary judgment holding there was no agency relationship.

The Seventh Circuit affirmed. Illinois courts have declined to find an agency relationship when a company hires an independent driver to deliver a load to designated persons at designated hours, but does not reserve the right to control the manner of delivery. The agreement in question explicitly held the driver had full control of the operational control of the manner of delivery and was an independent contractor. *Kolchinsky v. Western Dairy Transport, LLC*, 949 F.3d 1010 (7th Cir. 2020).

IMMUNITY

Park District Not Protected By Tort Immunities Act After Bride And Groom Were Injured At Campsite

Plaintiffs were injured after they erected a hammock from two posts at a campsite on Peoria Park District property, and the posts fell. The Peoria Park District argued that it cannot be held liable for negligence because they are a local government unit covered under the Tort Immunity Act. The case was dismissed and the plaintiffs appealed.

The Third District reversed the dismissal of the case. The appellate court ruled that the Tort Immunity Act cannot shield the Park District from liability if the Park District was guilty of willful and wanton conduct. The posts were 42 years old. The Park District had a policy of not allowing hammocks to be erected from the posts, but the plaintiffs were not informed of this policy. In fact, they were told they could use the posts for any camping or recreational purpose they desired. The appellate court reversed because these facts were sufficient to allege willful and wanton conduct. *Torres v. Peoria Park District*, 2020 IL App (3d) 190248.

City Immune As Municipality From Civil Claims After A Mother And Children Were Killed In Collision At Railroad Intersection

Crystal Anna was driving her four children to the Halloween Parade in Vandalia, Illinois, when their car was struck by an oncoming train. The collision killed Anna and three of her children. A fourth child was seriously injured. Suit was filed against the City of Vandalia (Vandalia). Vandalia filed a motion to dismiss arguing that the city is immune from liability under the Tort Immunity Act.

On appeal, the Fifth District held that Vandalia was immune from liability. under a section of the Tort Immunity Act that provides that the city cannot be liable for failing to provide adequate police protection service. This section of the Act provides blanket immunity, which precludes application of the willful and wanton exception that is appliable in other circumstances. Even though Vandalia failed to use the police force to direct traffic, they were still not liable because they are immune from claims that arise out of the failure to provide adequate protection services. As a result, the plaintiff did not have a claim

against Vandalia in their capacity as a municipality. *Wisnasky v. CSX Transportation, Inc.,* 2020 IL App (5th) 170418.

INSURANCE

Business Owner's Policy Provided Coverage For Alleged Violation Of Biometric Information Privacy Act

West Bend issued a business owner's policy to a tanning salon. The insured's customers were required to have their fingerprints scanned for purposes of identification which allowed them to use facilities nationwide. In the underlying case, the customer alleged that she never signed a release and therefore circulating her fingerprints was a violation of the Illinois Biometric Information Privacy Act. West Bend sought a declaration it did not have a duty to defend the underlying case. The trial court disagreed holding violation of the Act constituted a personal injury. However, it denied the insured's request for statutory damages for a wrongful refusal to defend.

The First District affirmed. The underlying claims fell within the coverage for personal injury and violated a person's right to privacy. The Court rejected West Bend's claim that a policy exclusion for violations of statutes did not apply to the Act. The Court also held there was a bonafide dispute as to whether coverage applied and therefore, the insured was not entitled to statutory damages under the Insurance Code. *West Bend Mutual Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2020 IL App (1st) 191834.

Anti-Stacking Provision Of Multiple Vehicle Auto Policy Prevented Aggregation Of Policy Limits

Klamm's auto crossed the center line and struck another vehicle head on killing the driver and a passenger as well as severely injuring another passenger. The estate and injured passenger sued Klamm who was insured under a policy covering four vehicles. The liability limits were $100,000 per person and $300,000 per accident. However, the plaintiffs claimed they should be allowed to stack coverages because of an ambiguity in the policy. The trial court ordered that the liability coverage should be stacked four times resulting in coverage of $400,000 per person and $1.2 million per accident. The Fifth Circuit modified the judgment allowing limits to be stacked twice based upon a provision of the declarations page for a total of $200,000 per person and $600,000 per accident.

The Supreme Court reversed. Anti-stacking provisions in insurance policies are not contrary to public policy. However, if ambiguous, they will be construed liberally in favor of coverage and against the insurer who drafted the policy. It determined the policy did not list liability limits separately for each covered vehicle, and therefore, the anti-stacking provision was not ambiguous. The policy clearly provided coverage in the amount of $100,000 per person and $300,000 per accident regardless of the number of claims, insureds, covered vehicles or premiums paid. *Hess v. Estate of Klamm*, 2020 IL 124649.

Court Declares That Insurance Company Is Not Exempt From HIPAA Regulations Forcing Company To Comply With Qualified Protective Orders

After a multi-vehicle collision, plaintiffs brought a claim against the driver responsible for the accident. The plaintiffs moved for the entry of qualified protective orders under HIPAA to protect their personal health information (PHI). The defendant's insurance carrier intervened in the case. The carrier argued that the proposed protective orders cannot apply to the insurance carrier because it was exempt. Instead, the carrier proposed a protective order that would permit insurers to disclose, maintain, use, and dispose of PHI to comply with statutes and regulations for certain purposes, while exempting insurers from "return or destroy" provisions.

The Second District ultimately decided that the carrier was not exempt from the terms of the HIPAA protective orders because

any party receiving protected health information under a HIPAA protective order must follow the terms of the order, and also because if there is a conflict between state and federal law, then the federal law will be applied. *Haage v. Zavala*, 2020 IL App (2d) 190499.

Claim For Section 155 Violation Was Unsuccessful When Insured Gave Inconsistent Statements During Investigation

Gia Wells lived with her former husband in Crete, Illinois, until he passed away in 2006. Wells kept the property, but no longer lived in the home after her husband's death. In May of 2016, Wells submitted a claim to her insurance carrier because the basement had flooded. Wells claimed to be unaware of the cause of the flooding because she had not actually lived at the home in ten years, but also stated that she visited frequently. The carrier denied the claim because Wells failed to exercise reasonable care and abide by the terms of the policy for when an insured home was unoccupied. During the investigation, Wells made many false representations about how frequently she visited the house and whether she took reasonable care of the property. After coverage was cleared, Wells brought a bad faith claim. The circuit court granted the carrier's motion to dismiss and Wells appealed.

The First District found that the carrier did not act vexatiously or unreasonably because they relied on evidence from an investigator that was sufficient to create a bona fide dispute as to coverage. The appellate court held that there was clear evidence from the investigation and Wells' inconsistent statements to affirm the court's dismissal of the Section 155 violation. *Wells v. State Farm Fire & Casualty Co.,* 2020 IL App (1st) 190631.

JURISDICTION

Circuit Court Granted Jurisdiction In Case Involving State Employee When Chicago State Professor Committed Battery Against Student

The Illinois Court of Claims is a forum of specific jurisdiction for cases brought against the state, with the exception of federal and worker's compensation claims. A disruption in a class at Chicago State University led to an alleged altercation between a student and her professor. The student filed suit for battery in circuit court. The defendant argued that the circuit court lacked jurisdiction because he was a state employee and was acting within the scope of his employment. The circuit court dismissed the case for lack of jurisdiction.

The First District found that the circuit court did have jurisdiction because the defendant acted outside of the scope of his employment when he allegedly committed battery. As a result, he breached a duty owed to the general public rather than a duty owed to his students in his capacity as a professor. The appellate court reversed, finding the circuit court had jurisdiction over the battery claim because the defendant owed a duty as an individual rather than as an employee of the state. *Rideaux v. Winter*, 2020 IL App (1st) 190646.

LIMITATIONS

Statute Of Limitations Tolled During Legal Disability Allowing Suit To Be Filed Within Two Years Of Death

Plaintiff's decedent suffered from dementia and was considered legally disabled although she had never been formally adjudicated as such. While residing in the defendant's nursing home, she suffered several falls, the last of which was on January 27, 2016. A nurse also spilled hot coffee on her on November 26, 2015. She died on April 18, 2016. On February 16, 2018, decedent's personal representative filed claims under the Nursing Home Care Act and common law negligence relating to those incidents. The trial court dismissed the Complaint because they were filed more than two years after the alleged negligence.

The First District reversed. The decedent was legally disabled at the time of the incident and continued to be legally disabled until her death. Therefore, from the time the injuries occurred until her death, the statute of limitations was tolled. That disability was removed upon her death, and therefore, suit was timely filed within two years thereafter. *Mickiewicz v. Generations at Regency, LLC,* 2020 IL App (1st) 181771.

Negligence Suit Against Insurance Producer Must Be Brought Within Two Years From Delivery Of Policy

Plaintiff was an agent for various entities that owned apartment complexes in the Midwest. It sued the defendant for failing to procure insurance protecting it against claims that were raised in a federal class action lawsuit against it. Plaintiff received the policy in November, 2015 and filed the lawsuit in October, 2018. A statute provided that any suit against an "insurance producer" must be brought within two years from the date the cause of action accrued. The trial court held the cause of action accrued upon delivery of the policy and dismissed the case because it was not filed within two years.

The First District affirmed. The Court noted that both insurance agents and brokers are considered insurance producers and protected by the statute. It held the cause of action accrued for negligent procurement of insurance when the breach occurred, not when the damage occurred. Therefore, the statute began to run when the policy was delivered to plaintiff. *Austin Highlands Development Co. v. Midwest Ins. Agency, Inc.*, 2020 IL App (1st) 191125.

PREMISES LIABILITY

Tavern Not Liable For Ejecting Intoxicated Person Who Fell After Leaving Premises

Plaintiff's decedent was employed by the defendant's bar. The defendant provided free alcoholic beverages to its employees. Decedent consumed alcohol and became intoxicated. Defendant ejected him from the premises. Decedent walked from the bar and later fell, suffering a traumatic brain injury resulting in death. The trial court held the ejection of decedent did not proximately cause the injuries, and therefore the complaint was dismissed.

The Fourth District affirmed. The defendant did not assume exclusive control for the safety of the decedent by merely instructing him to leave the premises. Rather, defendant ejected the intoxicated decedent in a routine manner. The Court noted that when he left the bar, decedent was in a bad situation because of his intoxication, but it was not due to any action taken by the defendant. *Vogt v. Round Robin Enterprises, Inc.*, 2020 IL App (4th) 190294.

Falling Off Roof While Doing Repairs Was An Open And Obvious Risk

While working on repairs to his brother-in-law's roof, plaintiff fell and injured his back. He volunteered to do the work without pay. Plaintiff claimed his defendant brother-in-law was negligent in failing to provide a suitable and proper harness or lifeline and failed to provide other safety equipment. Defendant moved for summary judgment on the basis that he did not owe plaintiff a duty because falling from the roof was an open and obvious risk. The trial court agreed and entered a defense summary judgment.

The Fourth District affirmed. The danger of falling from the roof was open and obvious. The "deliberate encounter" exception did not apply as plaintiff was a volunteer and under no compulsion to work on the roof without safety equipment. *Frieden v. Bott*, 2020 IL App (4th) 190232.

SETTLEMENTS AND RELEASES

Settlement Was In Good Faith Even Though The Court Was Never Advised Of The Settlement Amounts

Plaintiff's decedent was a union pipefitter for over 40 years who filed suit against a number of manufacturers of asbestos-containing products. All defendants

except one settled, and the trial court held those settlements to be in good faith although it did not know the amounts of the settlement nor determine how those settlements would be allocated. The case went to trial against the remaining defendant resulting in a plaintiff's verdict for $6,022,814.06. The trial court directed a $1,137,500 setoff which was the total settlement amount and entered judgment on the verdict for $4,885,314.06.

The First District affirmed the jury verdict and also held that the trial judge did not abuse his discretion in finding the earlier settlements were made in good faith. A trial court abuses its discretion where its ruling was so arbitrary or illogical that no reasonable person would adopt it. There is no rule that the judge must know the amount paid by each defendant. The trial court had before it all of the pleadings, motions and depositions when it entered the good faith finding. Settlements are not designed to benefit non-settling third parties. If the position of a non-settling defendant is worsened by the terms of the settlement, that is a consequence of the refusal to settle. *Daniels v. Arvinmeritor, Inc.*, 2019 IL App (1st) 190170.

Subsequent Suit Barred By Broad Release Language In Earlier Settlement

Plaintiff settled a lawsuit against a Chicago police officer who allegedly shoved him out of a third floor window before making an arrest. In exchange for $5,000, he signed a release of "all claims" against the police officer, Chicago, and all other future, current or former officers arising "out of the incident which was the basis of this litigation…" Three years later, he filed suit against Chicago, the officer, and other officers who allegedly lied in the earlier case. He did not allege the claim of excessive force from the earlier case. The trial court dismissed the case holding the earlier release barred the current suit.

The Seventh Circuit affirmed. Under Illinois law, the intention of the parties controls the scope and effect of a release. The intent is determined from the language used in the instrument when read in light of the circumstances surrounding the transaction. The release in question was designed to resolve all claims related to the incident, not only the ones asserted in the first suit. *Crosby v. City of Chicago,* 949 F.3d 358 (7th Cir. 2020).

Proceeds Of A Worker's Compensation Settlement Are Exempt From Claims Of Medical Care Providers

Hernandez filed a Chapter 7 bankruptcy proceeding and reported unsecured claims by three healthcare providers totaling $137,772.06 in connection with treatment provided in connection with a worker's compensation injury. Two days later, she settled a worker's compensation claim for $30,566.33. She claimed the settlement was exempt pursuant to a provision of the Workers' Compensation Act which holds that any payment, claim, award or decision is not subject to any lien, attachment, or garnishment. The healthcare provider claimed the exemption should not apply, and the bankruptcy court ruled in favor of the healthcare provider. Hernandez appealed to the United States District Court who affirmed the opinion. It then went to the U.S. Seventh Circuit Court of Appeals who asked the Illinois Supreme Court to rule on whether the worker's compensation settlement was exempt from the claims of medical care providers who treated the injury associated with the settlement.

The Illinois Supreme Court held in favor of Hernandez. Under the express terms of the Act, the settlement was unequivocally free from liability to the healthcare providers. Therefore, Illinois residents seeking relief through federal bankruptcy proceedings are entitled to invoke the Act. *In Re Hernandez*, 2020 IL 124661.

VEHICLES

Neither CTA Nor Its Driver Liable For Passenger's Death From Prolonged Alcohol Toxicity

Plaintiff's decedent entered defendant's bus at 2:52 a.m. in an intoxicated condition. He continued drinking and eventually laid across the bus seats. At 3:37 a.m., the bus parked at the terminal, and the driver called for emergency help. Police and paramedics arrived and attempted to resuscitate the decedent. Plaintiff claimed the CTA and its driver had a common carrier duty to exercise the highest degree of care. The trial court disagreed and dismissed the complaint with prejudice.

The First District affirmed. A common carrier has a duty to its passengers to exercise the highest degree of care to transport them safely and give them a reasonable opportunity to safely leave the conveyance. However, mere intoxication of a passenger does not give rise to a duty on the part of the common carrier to stand guard over the passenger. If intoxication left the decedent in a helpless condition such that the hazards of travel were increased, CTA would have a duty to not expose him to a risk of unreasonable harm. However, decedent did not die as a result of entering or exiting the bus, by the movement of the bus or being left in a dangerous location. Rather, he died as a result of prolonged alcohol toxicity wholly unrelated to the operation of the bus. The Court noted in all probability he would have died if he had been at home in his bed. *Daniel v. The Chicago Transit Authority*, 2020 IL App (1st) 190479.

ATV Statute Barred Rider's Negligence Suit Against Landowners

Plaintiff was injured while a passenger on an ATV that went into a brush-covered washout on a levee. Included as a defendant were the property owners who were allegedly negligent in failing to repair the levee washout or warn of its existence. The defendants moved to dismiss based upon the ATV statute provides that landowners owe no duty of care to keep premises safe "for use by an all-terrain vehicle or off-highway motorcycle…" The trial court agreed and dismissed the case.

The Third District affirmed. The use of ATVs is inherently dangerous. Riders travel several miles at high rates of speed across acres of land often without the knowledge or permission from landowners. The fact that plaintiff sued under the Premises Liability Statute did not take precedence of the ATV Statute. *Jones v. Steck*, 2020 IL App (3d) 180548.

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

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Heyl Royster is a regional law firm with more than 100 lawyers and eight offices located in Illinois (Peoria, Champaign, Chicago, Edwardsville, Rockford, and Springfield), Missouri (St. Louis), and Mississippi (Jackson). The firm provides legal services for businesses and corporations, professionals, healthcare organizations, governmental entities, universities, insurance carriers and other major institutions. Our lawyers have successfully defended clients in state, federal and appellate courts, and before the Illinois Workers' Compensation Commissions throughout Illinois, as well as in courtrooms in Indiana, Iowa, Missouri, Wisconsin, and Mississippi. Our attorneys also counsel clients on commercial transactions and all aspects of business life. Through our lawyers' participation in bar and industry activities, we identify and help develop trends in the law which we believe will be of benefit to our clients.

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