Ladies and Gentlemen:

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.

Claims Handling Seminar – Thursday, May 15, 2014 – Bloomington, Illinois

Our 29th Annual Claims Handling Seminar will be held on the afternoon of Thursday, May 15. We hope you will be able to join us and other clients from around the Midwest at the Doubletree Hotel in Bloomington, Illinois. As in the past, our seminar is designed to address the day-to-day needs of professionals handling claims throughout Illinois. There will be two concurrent programs – one for casualty & property claims, and another focused on workers' compensation. If you would like to review the agenda and register for this free seminar, there is a link to the invitation and registration on the home page of our website at www.heylroyster.com. If you have any questions, please contact Calista Reed at creed@heylroyster.com or 309-676-0400. We hope to see you on May 15 in Bloomington.

Heyl Royster New Partners

We are proud to introduce four new partners with the firm: Tom Dluski and Greg Rastatter in the Peoria office, John Langfelder in the Springfield office, and Andy Roth in the Rockford office.

Tom Dluski received his law degree from Valparaiso University School of Law and began practicing law as an Assistant State's Attorney for Peoria County. He defends one of the largest U.S. railway companies in state and federal court in both FELA and negligence claims. Also, Tom represents insurers in first party property claims involving issues with arson and fraud and defends manufacturers, suppliers and end users in toxic tort and asbestos cases.

Greg Rastatter joined the firm following graduation from the University of Illinois College of Law. He handles many aspects of commercial business advisement, from determining the most advantageous legal structure for a business and ensuring the business client is legally protected as an ongoing concern, to contract negotiations and mergers and acquisitions. His healthcare law practice includes drafting hospital and medical staff bylaws, negotiating contracts with physicians and other professionals, and advising clients on compliance standards such as HIPAA, Stark and anti-kickback regulations.

John Langfelder received his law degree from Capital University Law School in Columbus, Ohio. He practices in the areas of personal injury and property loss defense, workers' compensation, trucking litigation, toxic tort litigation, and governmental law. Prior to attending law school, John was a liability specialist with Country Financial for more than 20 years; he continues to use the knowledge, experience and negotiating skills he gained in his claims career in the defense of clients.

Andy Roth joined the firm following graduation from Northern Illinois University School of Law. His practice focuses in defending manufacturers, suppliers and end users in toxic tort and asbestos cases, and in physician and hospital medical malpractice cases. He also has a wide range of experience defending civil cases involving premises, auto and product liability, trucking, construction, employment law, workers' compensation, and insurance coverage. He has represented clients in alternative dispute resolution, including mediations, settlement conferences, and arbitrations.

We invite you to learn more about our new partners and our firm on our website at www.heylroyster.com. We hope you find our Quarterly Review helpful and look forward to seeing many of you in Bloomington on May 15.

Very truly yours,

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HEYL ROYSTER

AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Spring 2014

INSURANCE COVERAGE

Porch Collapse Killing 12 and Injuring 29 Was One Occurrence Even Though Some People Died Weeks Later

A three-story porch collapsed during a party resulting in the deaths of 12 people and injuries to 29 others. The estates of the deceased and the injured plaintiffs ultimately settled their claims with the building owner. The primary carrier paid its $1 million per occurrence limit. The excess carrier paid the amounts above the primary carrier, but then filed suit against the primary carrier. It sought to require the primary carrier to pay its full $2 million limit because there was more than one occurrence in that a number of people died days and weeks after the collapse. The trial court ruled in favor of the primary carrier holding there was one occurrence, and it was only obligated to pay $1 million.

The First District affirmed. There was no dispute that the porch collapse was the sole cause of all plaintiffs' injuries and death. There was no contention that any separate or intervening act or circumstance contributed to those injuries. Consequently, under the policy terms, it was one occurrence, and the single occurrence limit of liability applied. *Ware v. First Specialty Ins. Corp.*, 2012 IL App (1st) 113340 (1/11/13).

Homeowner's Policy Did Not Cover Suit Against Insured Accountant Filed by Her Clients to Recover Costs Associated With Protecting Information on a Compact Disc Stolen From the Insured's Car

While employed at an accounting firm, the insured had a compact disc belonging to the firm stolen from her personal auto. It contained confidential information belonging to her clients. The clients sued her for credit monitoring and insurance expenses incurred to mitigate potential misuse of the stolen information. She tendered the defense of the case to her homeowner's insurance carrier which then filed the present declaratory judgment action seeking a determination it did not need to defend or indemnify the insured. The District Court granted summary judgment in favor of the carrier.

The Seventh Circuit affirmed. The policy did not cover damage for property occupied or used by the insured. It also had a business operations exclusion. The Court held both provisions supported the trial court's determination no coverage existed. *Nationwide Insurance Co. v. Central Laborers' Pension Fund*, 704 F. 3d 522 (7th Cir. 2013).

Summary Judgment for Insurer Was Proper as it Had Cancelled Policy Several Months Prior to the Accident for Non-Payment of Premiums

In March, 2005, State Farm issued two insurance policies for two automobiles owned by Debra Smith. Smith arranged to have premiums paid by automatic monthly withdrawl from her checking account. She made the initial premium payment, but when the next payment was due the following month, the bank notified State Farm there were insufficient funds. State Farm generated a cancellation notice mailed to Smith advising that her policies were cancelled as of April 29, 2005. Five months later, Smith was involved in an accident. State Farm refused to defend, and a $900,000 judgment was entered against Smith. Smith then assigned her rights under the policy to the plaintiff in the underlying case who filed suit against State Farm to collect the judgment. It was claimed State Farm should be estopped from denying liability for failing to maintain proof of mailing of the cancellation notice. The trial judge disagreed and entered summary judgment for State Farm.

The First District affirmed. The proof of mailing form used by State Farm was acceptable to the United States Post Office, and therefore, the cancellation notice was effective. Consequently, estoppel did not apply as State Farm had no duty to defend the underlying case as there was no policy in existence at the time of the accident. *Hunt v. State Farm Mut. Auto. Ins. Co.*, 2013 IL App (1st) 120561 (6/28/13).

Insured's Teenage Daughter Entitled to UIM Benefits for Injuries Sustained While a Passenger in Friend's Auto

The insured's daughter was injured while riding in a car driven by a friend. Her medical bills exceeded the $50,000 bodily injury coverage of the driver, and consequently, she sought underinsured motorist benefits under her father's policy which had limits of $300,000.

The carrier filed a declaratory judgment action asserting the daughter was not entitled to UIM benefits because the car in which she was riding was not a "covered auto." The trial court entered summary judgment for the insured's daughter.

The Seventh Circuit affirmed. The UIM endorsement defined who was an insured to include the named insured and family members with no requirement that they occupy a covered auto. There is no question the insured's teenage daughter was a family member. The Court noted that UM and UIM coverage can protect insureds whether they are passengers in a motor vehicle or engaged in another activity such as walking, riding a bicycle or other situation involving injuries sustained from contact with an auto. *Grinnell Mutual Reinsurance Co. v. Haight*, 697 F3d 582 (7th Cir 2012).

Policy Language Prevented Insureds from Stacking UIM Coverage

State Farm filed a declaratory action seeking a determination that it owed no underinsured motorist coverage to two insureds in an accident. The insureds had five separate policies, each with UIM coverage of $100,000. They recovered $250,000 from the adverse driver's insurance carrier and sought to stack the coverage from their five policies to receive an additional $250,000 from State Farm. The trial court held the policy language clearly limited the total liability from all policies to the "limit of liability of the single policy providing the highest limit of liability."

The Second District affirmed. It rejected Plaintiff's claim that the declarations page created an ambiguity with the policy language. The declarations pages, read in isolation, might raise the question of stacking but the anti-stacking provision unambiguously limited coverage. *State Farm Mut Auto Ins. Co. v. McFadden*, 2012 IL App (2d) 120272 (10/31/12).

Policy Language Precluded Replacement Cost for Equipment More Than Five Years Old

The Plaintiff was a contractor whose crane was destroyed in an unexpected microburst storm. It filed a declaratory judgment action seeking to recover replacement costs for damaged property and statutory penalties from its insurer for vexatious refusal to settle the claim. The policy provided the carrier would pay for the replacement cost of the equipment less than five years old. However, it was undisputed the crane was older and the trial court ruled in favor of Travelers.

The First District affirmed. The crane was manufactured 15 years before the incident and, consequently, Travelers would only be obligated to pay the actual cash value which was less than the $25,000 deductible under the policy. Further, it was a legitimate dispute and Travelers could not be guilty of vexatious refusal to settle. *Area Erectors Inc. v. Travelers Property Casualty Co. of America*, 2012 IL App (1st) 111764 (12/7/12).

Named Insured's Breach of Duty to Notify Did Not Bar Coverage For Additional Insureds

Mt. Hawley sought a declaratory judgment that it had no duty to defend and indemnify a general contractor in connection with a personal injury suit filed by a subcontractor's employee. The subcontract agreement required plaintiff's employer to name the general contractor as an additional insured under its CGL policy. The policy required the named insured to notify the carrier as soon as practical of an occurrence which might result in a claim and to serve written notice of a claim or suit. The underlying suit was filed 21 months after the injury. Mt. Hawley's first notification of the incident was when it was tendered the lawsuit. The trial court entered summary judgment for Mt. Hawley based upon the named insured's failure to notify it of the potential claim.

The First District reversed. Only the subcontractor was the named insured, and therefore, only it was required to comply with the notice provision. There was nothing in the notice provision making coverage for the additional insured contingent on the named insured's compliance with its duty to notify. The general contractor complied with its requirement of notifying Mt. Hawley as soon as suit was filed. *Mt. Hawley Ins. Co. v. Robinette Demolition, Inc.*, 2013 IL App (1st) 112847 (7/26/13).

ARBITRATION

Plaintiff Cannot Voluntarily Dismiss Case to Avoid Adverse Arbitration Decision

Plaintiff was a passenger in an auto involved in an accident and sued both drivers. After mandatory arbitration proceedings and the entry of a decision in defendants' favor, plaintiff filed a motion to voluntarily dismiss her case without prejudice. The trial court granted plaintiff's motion and denied the defendants' motion for entry of judgment on the arbitration award.

The First District reversed. After the arbitrators found in favor of defendants, plaintiff had 30 days to file a rejection of the award and proceed to trial. She failed to do so but instead filed a motion for voluntary dismissal. Supreme Court Rule 92(c) provides that when a rejection is not filed, a party may move the court to enter judgment on the award. As plaintiff did not file a rejection, judgment should have been entered for the defendants. *Swain v. Bruce*, 2012 IL App (1st) 110425 (1/9/12).

SERVICE OF PROCESS

Dismissal Affirmed Where Plaintiff Did Not Obtain Service of Process for 13 Months After Filing Suit

On February 16, 2007, plaintiff was rear-ended by the defendant. She filed suit on February 13, 2009. Plaintiff performed five skip traces on the defendant to find the correct address for service. Eventually, plaintiff obtained service on the defendant 13 months after the Complaint had been filed. However, the original accident report contained the correct address of the defendant, and consequently, the trial court held plaintiff did not exercise due diligence in obtaining service, and the Complaint was dismissed.

The First District affirmed. Once a defendant establishes the time between filing of the Complaint and date of service suggests lack of diligence, the burden shifts to the plaintiff to provide a satisfactory explanation for the delay. In the absence of a satisfactory explanation, the trial court's discretion will not be reversed on appeal. The Court felt it was fatal that plaintiff failed to consult the accident report which contained the defendant's correct address. *Emrikson v. Morfin*, 2012 IL App (1st) 111687 (9/19/12).

SETTLEMENTS AND RELEASES

Exculpatory Release Barred Claim by Salvation Army Drug and Alcohol Rehabilitation Participant

Plaintiff entered a drug and alcohol rehabilitation program at the Salvation Army. As part of the program, participants were expected to participate in work therapy by performing assigned tasks under the supervision of Salvation Army employees. As a condition for participation, plaintiff signed an exculpatory release protecting the Salvation Army "from any and all liability" in connection with his participation. The trial court granted summary judgment for the defendant.

The Fourth District affirmed. Exculpatory releases are enforceable unless they are against public policy or there is something in the relationship of the parties which militates against upholding it. It rejected plaintiff's argument that he should be considered an employee or that he was economically compelled to execute the release, either of which would have barred enforcement. It held no employment relationship existed, and plaintiff's participation in the program was voluntary. *McKinney v. Castleman*, 2012 IL App (4th) 110098 (4/16/12).

Exculpatory Release Signed by Bicycle Race Participant Applied to Warm-Up Session Collision With Non-Participant

Plaintiff bicyclist was injured when he collided with a non-participating bicyclist while warming up prior to a race. As a condition for participation, plaintiff signed a release waiving any claims against the race organizers or other participants in connection with a "collision with pedestrians, vehicles, other riders, and fixed or moving objects…" Plaintiff claimed the release should not apply because the race was supposed to have been closed keeping non-participants out of the area. The trial court enforced the release and dismissed the Complaint.

The First District affirmed. Regardless of whether the course was closed, the Release plainly contemplated the possibility of pedestrians, vehicles, other riders or other objects on the course. Therefore, it contemplated the risk that plaintiff could collide with a non-participant bicyclist. *Hellweg v. Special Events Management*, 2011 IL App (1st) 103604 (7/8/11).

SPOLIATION OF EVIDENCE

Plaintiff's Employer Had No Duty To Preserve I-Beam Which Collapsed Injuring Workers

Plaintiffs were employees of a general contractor working on a bridge over a creek. While installing a handrail, a concrete I-beam used to support the bridge deck collapsed causing plaintiffs to fall into the creek and be injured. The next day, plaintiffs' employer destroyed the I-beam by breaking up the concrete portion of the beam with a hydraulic hammer. Plaintiffs subsequently filed suit against various defendants and included a claim against their employer for spoliation of evidence. Plaintiffs and the employer both moved for summary judgment on the spoliation issue, and the trial court held the defendant had no duty to preserve the I-beam. However, the Fifth District reversed.

The Supreme Court reversed the appellate decision and affirmed the trial court's summary judgment for the employer. The general rule in Illinois is that there is no duty to preserve evidence. However, if a defendant voluntarily undertook to preserve an I-beam for its own purposes or other special circumstances exist, a duty is imposed. The employer did not manifest an intention to preserve the I-beam as evidence or even acknowledge its significance as evidence in potential future litigation. It never moved the I-beam from its position in the creek where it fell. Nor did it relocate the beam to a place where it would be protected from loss or destruction. The fact that the defendant was plaintiffs' employer did not create a special circumstance creating a duty to preserve the I-beam. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270 (10/18/12).

PRODUCT LIABILITY

Auto Dealer Cannot Disclaim Manufacturer's Express Warranty

In 2008, plaintiff purchased at 2007 Nissan Pathfinder with 12,800 miles from a dealership. At the time of purchase, Nissan provided a three-year or 36,000 mile bumper to bumper warranty. However, the bill of sale from the dealer said the vehicle was "sold as is." Plaintiff began experiencing mechanical problems with fuel and exhaust systems which could not be corrected. Eventually, she filed suit alleging breach of Magnusson-Moss warranty and breach of implied warranty. Based upon the disclaimer that the vehicle was sold "as is" the trial court dismissed the complaint.

The Fourth District reversed. It rejected Nissan's position that a third party could disclaim the written warranty through an "as is" clause contained in a sales contract. Accepting that position would be an invitation for automobile manufacturers to engage in misleading warranty claims and do an end run around their obligations. *Clemons v. Nissan North America, Inc.*, 2013 IL App (4th) 120943 (10/11/13).

PREMISES LIABILITY

Defendant's Failure to Remove Snow and Ice Mounds Did Not Amount to Reckless Disregard of Safety Under Snow Removal Act

Plaintiff resident brought a negligence action against a condominium association and property manager for injuries sustained when she slipped and fell on an icy sidewalk. She claimed icy snow mounds were formed by snow that was plowed from the parking lot onto the rear entrance sidewalk that led to the building. The defendants moved for summary judgment asserting the Snow Removal Act (745 ILCS 75/2) granted immunity for negligence arising out snow and ice removal from residential sidewalks. The trial court agreed and entered summary judgment holding the defendants were immune from claims of negligent snow and ice removal and that their conduct was not willful and wanton. It also held the Act took priority over a local municipal ordinance.

The First District affirmed. The Act provides that an owner is not liable for personal injuries "caused by the snowy or icy condition of the sidewalk resulting from his or her acts or omissions unless the alleged misconduct is willful or wanton." The failure to remove the snow and ice mounds was an omission, and the defendants were immune. It also held the local ordinance would not apply because the sidewalk was private property. *Pikovsky v. 8440-8460 North Skokie Blvd. Condo. Assoc., Inc.*, 2011 IL App (1st) 103742 (12/27/11).

No Immunity Under Snow and Ice Removal Act Where Accumulation of Ice or Snow Was Caused by Defective Construction or Improper Maintenance

Plaintiff slipped and fell on an icy walkway near the entrance of a residence she leased from defendant. The defendant moved to dismiss based upon the Snow and Ice Removal Act which bars negligence actions against people who remove or attempt to remove ice or snow from residential sidewalks. The trial court rejected plaintiff's claims that the Act would not apply where the accumulation of ice was caused by defective construction or improper maintenance and dismissed the complaint.

The First District reversed. It held the Act did not provide immunity for injuries if the unnatural accumulation of ice was caused by defective construction or improper maintenance of the property rather than by snow or ice removal efforts. Plaintiff was permitted to pursue a negligence claim against the landlord. *Greene v. Wood River Trust*, 2013 IL App (4th) 130036 (10/25/13).

Animal Control Act Does Not Create Strict Liability on Owner Who Had Given Control of Dog to Veterinarian

The defendant took her dog to a veterinarian for minor surgery. A clinic employee used its own noose and chain for walking the dog prior to surgery. The dog got away and ran to an area where the 8-year-old plaintiff was waiting for a school bus. The assistant yelled for help, and plaintiff attempted to pick up the dog who bit her on the right hand at the base of the thumb. She subsequently underwent three surgeries. The trial court entered summary judgment for the defendant on the basis that she did not have care or dominion over the dog at the time of the injury.

The Second District affirmed. The purpose of the Act is to encourage control of animals to protect the public from harm. It imposes penalties against both the owner and anyone who has control of the dog but does not impose strict liability based purely on ownership. Here the defendant was not in a position to control the dog or prevent injury. Rather, she relinquished care and control to the veterinarian, and there was no reason to believe it would allow the dog to escape and bite someone. *Hayes v. Adams*, 2013 IL App (2d) 120681 (2/28/13).

Landlord Not Liable When Tenant's Pit Bull Bites Neighbor Child

A child was sitting on his front porch when the neighbor's pit bull got loose and bit him several times. He sued the neighbor under the Animal Control Act as well as the landlord who rented the home to the neighbor. The owner was sued under the Animal Control Act and

was not part of the appeal. Plaintiff sued the landlord on the basis of private nuisance and negligence. The complaint alleged the landlord knew the dog was vicious and created a nuisance to the property as well as being negligent in failing to repair a gate in the yard. The trial court dismissed the claims against the landlord.

The First District affirmed. In order to sustain a private nuisance claim, plaintiff must establish that there was a substantial invasion of another's interest in the use and enjoyment of property. The single incident of a dog escaping from the tenant's property through the broken gate was insufficient to constitute a private nuisance. The Court also noted there was no evidence supporting the claim that the landlord knew of the broken gate, and therefore, plaintiff could not prevail under a negligence theory. *Solorio v. Rodriguez*, 2013 IL App (1st) 121282 (3/22/13).

Landlord Not Liable Under Animal Control Act or Common Law Negligence For Attack by Tenant's Dog

The defendant hired Chitwood as superintendent of its water treatment plant and rented a home to him on a month-to-month basis. Chitwood had two dogs who he allowed to roam freely around the plant premises. However, after a couple of incidents when one dog growled at people, Chitwood was told he had to get rid of the dogs or find another place to live. Subsequently, the dog attacked plaintiff who was attending a family gathering at Chitwood's home. Plaintiff sued the defendant under the Animal Control Act and common law negligence for the dog's attack while on the defendant's property. The trial court dismissed the complaint holding the defendant did not "own" the dog within the meaning of the Act.

The Fourth District affirmed. The undisputed evidence showed that the injury occurred at a private family gathering on residential property that Chitwood rented from the defendant. A landlord/tenant relationship, without more, is insufficient to establish ownership under the Act. As Aqua did not exercise any measure of care or control of the dogs, it was not liable. The fact that the defendant could terminate Chitwood's tenancy did not constitute requisite control that imposed a common law duty on the defendant. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207 (10/31/12).

Cook County Forest Preserve Was Not an "Owner" of Dogs Who Attacked Two Ladies Walking Through Its Property

In two separate incidents, dogs attacked ladies walking through the defendant's forest preserve. One lady died as a result of the attack, and the other was severely injured. Prior to the attack, a number of individuals had reported seeing aggressive dogs in the area. The forest preserve would call Cook County or the City of Chicago as it had no animal control department. Plaintiff claimed that the defendant permitted pit bulls to remain in the park and therefore would be liable under the Animal Control Act. The trial court disagreed and granted summary judgment to the defendant.

The First District affirmed. It noted previous decisions under the Act require some measure of care, custody or control. It found there was no evidence to establish the defendant knowingly permitted the attack dogs to be on the property. Rather, the defendant on numerous occasions had called Cook County or Chicago Animal Control agents to remove them. The Forest Preserve District was no more than a passive owner of the property temporarily inhabited by the dogs. *Cieslewicz v. Forest Preserve District of Cook Cty.*, 2012 IL App (1st) 100801 (5/17/12).

No Liability Where Plaintiff Assumed Risk of Being Attacked by Defendant's Llama

Plaintiff was attacked by a llama owned by the defendants while cleaning defendant's barn. Plaintiff had cleaned the barn on other occasions and was familiar with the animal. The trial court concluded plaintiff assumed the risk of injury and granted the defendants summary judgment.

The First District affirmed. It concluded under the facts, that plaintiff assumed the risk that he might be attacked by the llama when he entered the barn. The Court relied upon earlier cases involving an injury to a horse shoer and a horse trainer who were injured. *Edwards v. Lombardi,* 2013 IL App (3d) 120518 (11/20/13).

City Not Liable as Alleged Dangerous Condition of Street Was Open and Obvious

Plaintiff was walking to church and was crossing through an intersection which had resurfacing work being done. She fractured her foot as she stepped on the portion of the street that had been excavated, refilled with concrete, but not yet resurfaced. The trial court granted summary judgment for the City holding the condition of the street was open and obvious as a matter of law. They also refused to employ the deliberate encounter exception.

The First District affirmed. There is no duty of care owed by a landowner regarding open and obvious conditions because the landowner can expect people will exercise reasonable care for their own safety. In the present case, the condition itself served as notice of the danger triggering Plaintiff's duty to exercise ordinary care for her own safety. It also held evidence established that Plaintiff did not deliberately encounter the open and obvious condition. *Ballog v. City of Chicago*, 2012 IL App (1st) 112429 (10/26/12).

Landlord Owed No Duty to Tenant Who Fell on Deteriorated Driveway That Was an Open and Obvious Danger Under Tenant's Control

Plaintiff sued her landlord after falling on the property's driveway when a piece broke off. Prior to renting the property, plaintiff inspected it, and the lease was silent as to maintenance of the property. She had asked the landlord to repair the driveway on at least five occasions before she fell. The trial court granted the defendant summary judgment because the condition of the driveway was open and obvious.

The Fourth District affirmed. A landlord is not liable to a tenant for injuries caused by a dangerous condition existing when the lessee took possession as the property was under the tenant's control. This was based upon the principle that the lease transfers control of the property to the lessee. The Court also relied upon the fact that the danger of the driveway was in open and obvious condition known to plaintiff. *Nida v. Spurgeon*, 2013 IL App (4th) 130136 (10/30/13).

Pothole in Shopping Center Parking Lot Was Not a Public Nuisance

Plaintiff tripped and fell in a pothole in a shopping mall parking lot. She sued a former owner of the mall alleging its failure to properly maintain the parking lot constituted a public nuisance. The trial court held the pothole was not a public nuisance and dismissed the complaint.

In a split decision, the Fifth District affirmed. A public nuisance must affect the safety, health or morals of the public or work some substantial inconvenience or injury to the public. The deterioration of the parking lot did not affect the community at large, but rather a defined segment of the community, specifically those using the parking lot with the intention of shopping at the mall. Therefore, the pothole was not a public nuisance. *Burns v. Simon Properties Group, LLP*, 2013 IL App (5th) 120325 (10/2/13).

Shopping Center Tenant Owed No Duty to Customer Injured on Sidewalk as Lease Retained Exterior Control to Landlord

After plaintiff exited defendant's store, she was struck by a vehicle which jumped the curb striking her. The lease between the defendant and the shopping center owner required that the landlord would make all necessary repairs and maintenance to the exterior and maintain common facilities in good order. Based on the lease provision, the trial court held the defendant did not owe a duty to plaintiff and entered summary judgment in its favor.

The Second District affirmed. Where only a portion of the premises is rented and a landlord retains control of other parts for the common use of all tenants, the landlord has the duty to exercise reasonable care to keep those premises safe. As the injury did not occur on the defendant's leased premises, no duty was owed to plaintiff. *Hougan v. Ulta Salon, Cosmetics and Fragrance, Inc.*, 2013 IL App (2d) 130270 (11/18/13).

One and One-Half Inch Crack Was *De Minimis* and Not Actionable

Plaintiff was a truck driver who delivered a load to defendant's facility. After exiting his truck, his foot caught on a difference in elevation in the ground which estimated to be 1½ inches causing him to fall and be injured. The defendant moved for summary judgment claiming the defect in question was *de minimis* and, therefore, not actionable. The trial court agreed and entered summary judgment for the defendant.

The Second District affirmed. The *de minimis* rule recognizes minor defects are outside the scope of a landowner's duty to maintain property in a safe condition. It precludes negligence claims for minor defects in the walking surface. The Court concluded plaintiff's injury was not reasonably foreseeable as it involved a 1½ inch height differential in an industrial area used for large semi-trailers to be loaded. *Morris v. Ingersoll Cutting Tool Co.*, 2013 IL App (2d) 120760 (9/16/13).

Fireman's Rule Did Not Bar Claim by Firefighter Investigating False Fire Alarm

Plaintiff was a firefighter injured when he fell responding to a fire alarm at the defendant's warehouse. He was directed to investigate a trouble fire alarm and fell through an 11-foot drop off to the ground floor fracturing his spine. He fell because the warehouse was dark and a light switch could not be found until after the incident. Yellow and black stripe safety tape that had earlier been installed was worn out and not replaced. The trial court granted the defendant summary judgment holding the Fireman's Rule protected it from liability.

The Second District reversed. The Fireman's Rule limits the extent to which firefighters or other public officials may recover for injuries incurred when entering onto private property in the discharge of their duties such as fighting fires or other emergency situations. However, an occupier of land still has a duty to exercise reasonable care to maintain its property in a safe condition to prevent injury that a firefighter might sustain from a cause independent of a fire. In the present case, plaintiff contended he was injured due to the negligent maintenance of the property while responding to a trouble alarm. Therefore, defendant owed a duty of reasonable care, and the Fireman's Rule did not apply. *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818 (8/9/12).

RAILROADS

Railroad Owed No Duty to Child Trespassers Because Moving Freight Train Presented an Obvious Risk of Harm

A 12-year-old boy tried to jump aboard a moving train and severed his foot above the toes. The trial court held it was for the jury to determine whether the defendant should have constructed more adequate fencing to keep out children. A jury returned a verdict of $3.875 million which was affirmed by the First District.

The Supreme Court reversed. Citing case law going back as far as 1897, it held a railroad does not have a duty to keep watch and warn boys not to jump onto its cars as "all men and all ordinarily intelligent boys know it" is dangerous. *Choate v. Indiana Harbor Belt Railroad Co.*, 2012 IL 112948 (9/20/12).

CONSTRUCTION ACCIDENTS

Repairs Do Not Extend Ten-Year Construction Statute of Repose

Plaintiff was a policeman who was injured when he accidentally fell off an unguarded retaining wall while patrolling an area in the course of his duties on April 6, 2001. The wall was constructed in 1990, but a portion of the wall collapsed due to heavy rain and was rebuilt in 1994. Plaintiff fell from an area of the wall that had not been reconstructed. The defendant attempted to assert the Ten-Year Construction Statute of Repose, but the trial court refused on the basis that the 1994 reconstruction was the date from which the Repose period should begin. A St. Clair County jury found in favor of plaintiff but reduced the verdict by 50% for his contributory negligence.

In a split decision, the Fifth District reversed. The Statute of Repose applies to "an improvement to real property," and the Court held that this required more than a mere repair or replacement but needed to be something which "substantially enhances the value of the property." The Court also noted that the area where plaintiff fell had not been damaged by rain and was not repaired in 1994. *Schott v. Halloran Construction Co., Inc.*, 2013 IL App (5th) 110428 (1/10/13).

IMMUNITY

Companies Retained by Plaintiff's Employer to Perform Safety Inspections Were Immune from Common Law Liability For Employee's Injury

Plaintiff suffered severe injuries when she fell from the first floor opening of a manlift platform which had no guardrail. The Defendants were safety consultants for Plaintiff's employer. Plaintiff claimed the lack of guardrail violated various OSHA regulations for which the employer was cited and the consultants should be responsible. Based upon Section 5(a) of the Workers' Compensation Act, the trial court granted summary judgment holding the Defendants were immune.

The First District affirmed. Section 5(a) provides there is no cause of action for damages against an "employer, his insurer, his broker, or any service organization retained by the employer …" It held the safety consultants were service organizations hired by the employer and therefore entitled to immunity. *Mockbee v. Humphrey Manlift Co., Inc.*, 2012 IL App (1st) 093189 (5/18/12).

Student Has No Negligence Claim Against High School for Accident in Gymnasium

Plaintiff was a student at the Defendant high school who was injured in the gymnasium when a volleyball net crank she was turning either broke loose or snapped back, striking her in the face. Plaintiff alleged various acts which she contended amounted to wilful and wanton misconduct. The local governmental tort immunity act provides that any local public entity is only liable for wilful and wanton misconduct for injuries relating to "public property intended or permitted to be used for recreational purposes …" The trial court held that these allegations did not constitute wilful or wanton misconduct and dismissed the complaint.

The Second District affirmed. Even accepting as true, Plaintiff's allegation that the Defendant was aware of prior difficulties with the equipment, the allegation did not support a claim of wilful or wanton misconduct. Arguably, the school may have been negligent, but it did not act with an utter indifference to a conscious disregard for Plaintiff's safety. *Leja v. Community Unit School District 300*, 2012 IL App (2d) 120156 (11/6/12).

Recreational Property Immunity Statute Applied to Unnatural Accumulation of Snow on Park District Parking Lot

Plaintiff's decedent slipped and fell in a parking lot leaving a Chicago Park District Field house. She stepped on an unnatural accumulation of snow left from plowing, fractured her leg, suffered complications which led to brain damage and died. The trial court certified for interlocutory appeal the question of whether "an unnatural accumulation of snow and ice constitutes the existence of a condition of any public property" of the Tort Immunity Act. The First District answered the question no.

The Supreme Court reversed. The statute applies to the "existence of a condition of any public property intended or permitted to be used for recreational purposes…" The Court held an unnatural accumulation of snow would

be a condition of public property, and therefore, the immunity statute applied. *Moore v. Chicago Park District*, 2012 IL 112788 (10/18/12).

Neither City Nor Utility Owed Duty to Person Not in Crosswalk Even Though Street Lights Were Out

Plaintiff was hit by a vehicle while crossing a street outside of a crosswalk. Street lights were not operating at the time. The trial court entered summary judgment for the defendant city and utility company on the basis that plaintiff was not an intended user of the street, and therefore, they owed her no duty.

The First District affirmed. It rejected plaintiff's argument that decedent was in an unmarked crosswalk. As plaintiff failed to show decedent was an intended user of the street, the defendants owed no duty. *Dunet v. Simmons*, 2013 IL App (1st) 120603 (4/23/13).

City Has Immunity for Pedestrian's Injury Even Though Crosswalk Marking was Covered by Snow

Plaintiff slipped and broke her leg on a large metal plate while crossing a street and sued the City. There had been a dusting of snow on the ground covering the lines marking the crosswalk. In her deposition, plaintiff testified that she was in the middle of pedestrian traffic with people on all sides of her. She contended the area should have been considered an unmarked crosswalk. The trial court disagreed and entered summary judgment for the City.

The First District affirmed. A municipality does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside of a crosswalk. It rejected plaintiff's argument that the City had a duty because she was in an informal crosswalk as the lines defining it were covered by snow. *Harden v. City of Chicago*, 2013 IL App (1st) 120846 (11/22/13).

Summary Judgment Affirmed Where Plaintiff Could Not Establish Actual or Constructive Notice to City of Height Difference in Sidewalk

Plaintiff tripped and fell due to an approximately two-inch differential in height between two sidewalk slabs. The City moved for summary judgment on the basis that the Tort Immunity Act required plaintiff to establish the City had notice in advance of the incident. In support, a portion of a deposition of a city engineer stated that there was no way to tell when the defect came into existence. The trial court granted summary judgment.

The First District affirmed. The Tort Immunity Act requires a local government to have timely notice of a specific defect which caused the injury and not merely a general condition of the area. Plaintiff was required to produce evidence to support a jury finding that the City had actual or constructive notice of the raised sidewalk in time to have taken measures to repair it. *Zameer v. City of Chicago*, 2013 IL App (1st) 120198 (7/19/13).

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

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