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 Illinois claims.

We would like to take this opportunity to introduce to you 10 new lawyers with our firm and our new Chicago location.

Dan Cheely and **Steve Ayres**, formerly of Cheely, O'Flaherty & Ayres, will practice in the areas of asbestos/toxic tort and general litigation. They will practice out of Heyl Royster's new downtown Chicago offices at **19 S. LaSalle Street, Suite 1203**. Dan and Steve join with our existing Chicago attorney, Maura Yusof, to assist clients with cases in the Chicago area.

A partner in Cheely, O'Flaherty & Ayres since 1994, Dan has substantial litigation experience in the areas of toxic tort litigation, employment, product liability, and medical malpractice defense. He has defended hundreds of cases alleging injuries or disease from asbestos and other environmental agents brought against equipment and building material manufacturers, construction contractors, and property owners. Prior to forming Cheely, O'Flaherty & Ayres, he was a capital partner in the law firm of Baker & McKenzie, where he also served as the chairman of associate training and evaluation for the Chicago litigation department. Dan graduated from Harvard Law School in 1974.

Steve Ayres, also a partner in Cheely, O'Flaherty & Ayres, has focused his practice in civil litigation in the areas of toxic tort and asbestos defense, insurance coverage, employment litigation, construction disputes, and general litigation. He is a frequent speaker at Illinois CLE programs on construction litigation, mold litigation and insurance coverage issues. Prior to joining Cheely, O'Flaherty & Ayres, Steve was a partner at Baker & McKenzie in their Chicago office. Steve graduated from the University of Illinois College of Law in 1984.

Barry Noeltner has returned to Heyl Royster to practice in the Edwardsville office. He formerly worked with the firm from 1985 through 1988. Recently, he has lived and practiced in Atlanta, first as a partner with the law firm of Hawkins & Parnell, and then as a successful solo practitioner. Barry has practiced in the areas of personal injury, construction and insurance coverage matters and is licensed to practice in Georgia and Illinois. He has taken numerous cases to verdict in both state and federal courts and has handled appellate matters in state and federal appellate courts, including the United States Supreme Court. At Heyl Royster, Barry will continue to practice in the areas of the defense of personal injury cases, construction litigation and insurance coverage. In addition, he will handle cases involving the defense of medical malpractice liability, as well as environmental and toxic torts matters.

Shay Matthews has joined the firm in the Edwardsville office. A 2010 graduate of Washington University School of Law, he served as a Law Clerk to The Honorable Daniel Schmidt of the Illinois Appellate Court.

Three lateral attorneys have recently joined the firm in the Peoria office. **Michele Lindsey** is a 1999 graduate of New York Law School. She was most recently an Adjunct Assistant Professor in the Political Science Department of Hunter College of the City University of New York. **Tyler Pratt** is a 2010 graduate of Valparaiso University School of Law. **Andrew Bell** received his law degree from Saint Louis University School of Law in 2009. Tyler and Andrew were both in private practice in Peoria prior to joining the firm.

Joseph Rupcich, who previously practiced with the Office of the Illinois Attorney General and clerked for both Justice Sue Myerscough and Justice John McCullough of the Fourth District Appellate Court, has joined the firm in our Springfield office. He is a 2004 graduate of the Southern Illinois University School of Law.

Brett Siegel, who is a 2012 graduate of Chicago-Kent College of Law, has also joined the firm's Springfield office. **Joseph Pumilia**, who is a 2012 graduate of Northern Illinois University College of Law, has joined the Rockford office. Both Brett and Joe will be sworn in as attorneys on November 1st.

Very truly yours,

HEYL, ROYSTER, VOELKER & ALLEN

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AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Fall 2012

INSURANCE

Homeowner's Carrier Had No Duty To Defend Lawsuit Alleging "Negligent" Battery By Insureds

A homeowner's carrier filed a declaratory judgment action asserting it did not have a duty to defend or indemnify its insureds. A neighbor went into the insured's yard to retrieve a ball his son had knocked into it. The insured drove his truck toward the neighbor and struck him. The insured then got out of the vehicle and beat the neighbor with a golf club. The suit by the neighbor alleged the insured committed a battery but subsequently alleged negligence. The trial court found those allegations were sufficient to state a claim for negligence, and the homeowner's carrier was obligated to defend the insured.

The First District reversed. In determining whether an insurance company has a duty to defend, courts are not required to consider each count in isolation and ignore the facts pleaded in other counts where those separate counts are not pleaded in the alternative. Here, the acts alleged to be negligent could not reasonably be considered accidental, and therefore they were not "occurrences" affording coverage under the policies. The Court also rejected the insured's claim that he acted in self defense as the policy language did not include a self defense exception to the exclusion for intentional acts. *Farmers Auto. Ins. Ass'n v. Danner*, 2012 IL App (4th) 110461.

Underlying Complaint Against Insured Did Not Allege An Accident Under The Policy Provisions Under Homeowners Policy

A homeowner's carrier filed a declaratory judgment action seeking a determination that neither its homeowner's policy nor its umbrella policy were obligated to defend and indemnify its insured. The 21-year-old son of the named insureds lived with them. He invited a friend to the home to share heroin. Sometime in the early morning hours, the guest died from a combination of an overdose and injuries from a beating. The decedent's father sued the insured alleging that he provided heroin to his daughter who suffered an overdose and became violently ill. Despite knowing that she was critical, he failed to call 911, and after she died, drove her body to a library parking lot, abandoned it and went home. The insurer filed a Motion for Summary Judgment based upon a policy exclusion concerning injury or damages which were either expected or intended by the insured or the result of wilful and malicious acts. The trial court entered summary judgment for the carrier.

The First District affirmed. No duty to defend arises when it is clear from the face of the underlying Complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage. The underlying Complaint did not allege facts that might potentially place suit within the coverage of either the homeowner's or excess policies, and therefore, the carrier did not have a duty to defend. *State Farm Fire & Cas. Co. v. Young*, 2012 IL App (1st) 103736.

UIM Carrier Entitled To Set Off Full Amount Received By Insured From Workers' Compensation And Adverse Driver Even Though Part Was Allocated To Wife's Loss Of Consortium

While working, the insured was involved in an auto accident and received workers' compensation benefits of $47,654.08. He also settled with the adverse driver for his policy limits of $100,000 which allocated 60% to the insured for his injuries and 40% to his spouse for loss of consortium. The insured

claimed his UIM carrier could not set off the amount allocated to his spouse's loss of consortium from its limits of $250,000. The trial court ruled in favor of the UIM carrier, and the insured appealed.

The First District affirmed. The policy unambiguously limited the carrier's liability to the per-person limitation. The loss of consortium claim resulted from the insured's injury and, therefore, was a bodily injury to one person under the policy. The loss of consortium claim derived from the insured's bodily injury and, therefore, was subject to the per-person limitation. Consequently, the carrier was entitled to set off the full amount of the settlement with the adverse driver as well as the workers' compensation benefits. *Katz v. State Farm Mut. Auto Ins. Co.*, 2012 IL App (1st) 110931.

Tortfeasor's Lack Of Assets Excused Insured From Giving Prior Notice Of Settlement To His UIM Carrier Because It Could Not Prove Resulting Prejudice

The insured was injured while riding in a car involved in an accident. Without notifying his UIM carrier, the insured settled with the driver for his policy limits of $100,000 and signed a release discharging the driver from future liability. The insured then sought UIM benefits from his own carrier which had limits of $250,000. The carrier filed a declaratory judgment action asserting the insured breached the cooperation clause by not first advising it of the settlement with the tortfeasor. The trial court rejected the insured's argument that since the tortfeasor had no assets, there was no prejudice to his UIM carrier and entered summary judgment for the carrier.

The First District reversed and entered summary judgment in favor of the insured. The Court noted the tortfeasor's carrier was aware of the subrogation provision which should have been sufficient to defeat invocation of the cooperation clause. Further, since the tortfeasor was judgment-proof, it defeated any claim of prejudice by the UIM carrier. *Progressive Direct Ins. Co. v. Jungkans*, 2012 IL App (2d) 110939.

Carrier Not Estopped From Asserting Policy Defense Even Though It Sent Insured A Reservation Of Rights Letter Before Suit Was Filed Against Insured

A 12-year-old and two friends found hundreds of matchbooks in a dumpster outside a motel. While playing with the matches, one was thrown through a cracked window of a building resulting in a fire. Pursuant to its policy, Westfield paid the building owner $467,235.36. Westfield sent American Family, insurer of the 12-year-old, a copy of a subrogation complaint it intended to file. American Family sent a Reservation of Rights letter asserting the intentional act exclusion. About a month later, Westfield filed suit and American Family provided a defense. The trial court found the insured was negligent and allowed Westfield to recover its subrogated loss. American Family then filed the present declaratory judgment action seeking a determination it was not required to indemnify the insured for the judgment. The trial court held American Family's Reservation of Rights letter was sent so prematurely that the insured could not be properly informed of her rights and entered summary judgment for Westfield.

The Fourth District reversed. There was no requirement that a Reservation of Rights letter had to be sent after filing of the Complaint, although a second letter might have been required if the filed Complaint raised new issues, which was not the case here. It agreed with American Family that a better rule is for a Reservation of Rights letter to be sent earlier if that is possible. *American Family Mut. Ins. Co. v. Westfield Ins. Co.*, 2011 IL App (4th) 110088.

Garage Policy Afforded Coverage For Spoliation Of Evidence After Insured Salvage Yard Destroyed Vehicle Involved In Fatal Crash

Following a fatal auto accident, the insurer of the auto contacted a vehicle repair, storage and salvage business to hold and secure the auto. Sometime thereafter, while it was at the salvage yard, the vehicle was destroyed. The estate filed a product liability suit against the auto manufacturer and included a spoliation claim against the salvage

yard. The salvage yard's insurer filed this declaratory judgment action seeking a determination it did not have a duty to defend and indemnify the salvage yard. The trial court entered summary judgment in favor of the insurer.

The First District reversed. It held the Auto Inventory Policy provided coverage because the underlying Complaint clearly alleged a physical loss or damage to the vehicle as required by the policy. The loss of the ability to use the vehicle as evidence in a product liability action was sufficient to invoke coverage. *Universal Underwriters Ins. Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723.

DAMAGES

Plaintiff Should Have Been Permitted To Testify That Lack Of Health Insurance Prevented Her From Obtaining Additional Medical Treatment.

Plaintiff was injured in a rear-end collision. At trial, defendant's attorney solicited testimony from plaintiff that she had not received any medical attention for three years. Plaintiff then made an offer of proof outside the presence of the jury that after her auto policy's medical payments were exhausted, she could not afford to have additional medical attention because she had no health insurance. The trial court refused to allow the testimony. A Union County jury awarded the exact amount of her past medical expenses, but nothing for future medical and $12,000 for pain and suffering.

The Fifth District held the trial judge's failure to admit plaintiff's testimony regarding her lack of health insurance should explain her lack of treatment over the three years prior to trial and was an error. Although the Court was mindful of the impact plaintiff's financial position might have on sympathies of the jury, it felt under the unusual circumstances of this case, plaintiff should have been allowed to explain her lack of additional treatment. The case was remanded for a new trial. *Vanoosting v. Sellars*, 2012 IL App (5th) 110365.

JUDGMENT INTEREST

Defendant's Letter Offering To Pay Judgment And Costs Did Not Stop Accrual Of Post-Judgment Interest

Following a jury trial, plaintiffs were awarded damages of $39,100. Judgment was entered on the verdict on September 12, 2006. On February 6, 2007, the defendant was prepared to pay the judgment and court costs, requesting direction concerning two liens and plaintiffs' attorney's tax identification number. There was no response to the letter, but plaintiffs appealed the amount of the judgment. On December 1, 2008, the Appellate Court affirmed the judgment. On February 6, 2009, defendant again wrote to plaintiffs expressing a willingness to pay the judgment and costs, but plaintiffs again did not respond. On February 24, 2009, another letter from defense counsel said they stood ready to prepare the drafts for the verdict and costs, but there was no response. On September 11, 2009, plaintiffs received a check for $39,100. Plaintiffs subsequently filed a motion for post-judgment interest and costs. The Court found the letter of February 6, 2007 was a sufficient offer of tender and ordered interest of $1,338. Plaintiffs appealed.

A judgment debtor may only stop a creditor's right to interest during pendency of an appeal when the debtor makes a sufficient tender of payment. Accrual of interest during an appeal may also be terminated if the creditor rejects the debtor's offer of a sufficient tender. For a tender to be considered sufficient, it must include interest on the judgment plus applicable costs. The defendant never offered to pay interest to the date payment would be made, and consequently, the February 6, 2007 letter did not make a legally sufficient tender. Plaintiffs' failure to respond did not waive the accrual of interest on the judgment pending appeal. The case was remanded with instructions to recalculate the appropriate amount of interest to be paid. *Poliszczuk v. Winkler*, 2011 IL App (1st) 101847.

SETTLEMENTS AND RELEASES

Exculpatory Release Protected Defendant Despite Plaintiff's Claim That He Was Disadvantaged By Having Relatively Little Bargaining Power

Plaintiff was a participant in a Salvation Army drug and alcohol rehabilitation program. As a condition to participate, he agreed to hold "the Salvation Army free and harmless from any and all liability" in connection with the program. He subsequently suffered wrist injuries when he fell from a ladder while performing tasks as part of the work therapy. The trial court entered summary judgment holding the exculpatory release barred the suit.

The Fourth District affirmed. It rejected plaintiff's claim of two bases that would avoid the exculpatory release. First, that he was an employee, and second, that he did not freely enter into the agreement as he was disadvantaged by having relatively little bargaining power. The Court noted the Salvation Army could impose conditions upon admission to its rehabilitation program and that plaintiff's participation was not mandatory. It also concluded there was no evidence to support the claim that he was an employee. *McKinney v. Castleman*, 2012 IL App (4th) 110098.

TORTS

Educational Malpractice Is Not A Recognized Tort In Illinois

This was a case of consolidated appeals following a fatal plane crash. The plaintiffs sued various flight instructor organizations whose negligence in training the pilot resulted in multiple wrongful deaths. The trial court entered summary judgment for the flight schools on the basis that the claims sounded in educational malpractice which was not recognized as a tort in Illinois.

The First District affirmed. If a claim raises questions about the reasonableness of an educator's conduct in providing educational services or if a claim requires an analysis of the quality of education, it is a claim for educational malpractice. The allegations of the complaint pertained to teaching, training and instructing the pilot prior to the accident, and therefore, related to the quality of his instruction. In a case of first impression, the Court held Illinois has not recognized a case for educational malpractice. *Waugh v. Morgan Stanley & Co., Inc.,* 2012 IL App (1st) 102653.

CONTRIBUTION AND INDEMNITY

Contractor's Right Of Contribution From Employer Was Extinguished When Employer Waived Its Workers' Compensation Lien

Plaintiff was injured while working on a construction site. He made a workers' compensation claim against his employer and also filed a common law action against another contractor. The defendant contractor filed a third party contribution action against plaintiff's employer. The defendant subsequently settled paying plaintiff $450,000 and included language in the release that it was preserving its right to seek contribution from plaintiff's employer. Thereafter, the employer agreed to waive its workers' compensation lien of $134,797.27. The employer then obtained dismissal of the contribution action filed by the original defendant.

The Second District affirmed dismissal of the contribution action. It rejected the defendant's argument that the settlement was not made in good faith. It also said that because the employer was not a party to the original settlement agreement, the release language preserving the contribution action could not be enforced against it. Finally, it held that plaintiff did not receive a double recovery, and therefore, the defendant was not entitled to set off the amount of the lien waived

by the employer. *McMackin v. Weberpal Roofing, Inc.*, 2011 IL App (2d) 100461.

AUTOMOBILE

Rescue Doctrine Requires Immediate Peril

The defendant lost control of her vehicle on an icy road and ended up in a ditch. Plaintiff's decedent stopped her vehicle and exited to help the defendant and was struck and killed by another vehicle that lost control on the ice. Plaintiff attempted to assert that the Rescue Doctrine should apply. It arises when a plaintiff brings a negligence action against a defendant whose negligence has placed the third party or himself in a position of peril. It is to protect the rescuer, whose contributory negligence might otherwise preclude recovery for damages sustained in the rescue effort. A jury reached a defense verdict.

The Second District affirmed. A defendant cannot be liable under the Rescue Doctrine unless his conduct is negligent. The evidence was sufficient to establish that the defendant had not been negligent, and therefore, the Rescue Doctrine did not apply. The defendant's vehicle was far off the road, and she was walking around appearing to be uninjured. *Reed v. Ault*, 2012 IL App (2d) 110744.

IMMUNITY

Government-Operated Ambulance Was Immune From Liability Following Intersection Collision As The Tort Immunity Act Took Precedence Over Illinois Vehicle Code

Plaintiffs were occupants in a vehicle that entered an intersection and struck the left side of an ambulance carrying a patient to a hospital. Plaintiffs were on a preferential street while the ambulance drove through a stop sign. Plaintiffs alleged both negligence and willful and wanton misconduct. The trial court refused to invoke the Tort Immunity Act holding the Illinois Vehicle Code took precedence. The Court directed a verdict against plaintiffs on the willful and wanton count, but the jury returned a plaintiffs' verdict of $665,000 on the negligence count. The Appellate Court affirmed.

The Supreme Court reversed holding the trial court should have entered judgment notwithstanding the verdict in favor of the defendant. The Court held the Tort Immunity Act took precedence over the Vehicle Code. There was no question that the ambulance service was owned by a unit of local government, and therefore, the defendant was entitled to judgment. The Court noted a reason for immunity is that if an emergency vehicle operator was "haunted by the possibility of facing devastating personal liability for actions taken in the course of responding to an emergency, driver performance would be hampered." *Harris v. Thompson*, 2012 IL 112525.

PRODUCT LIABILITY

Scaffold Manufacturer Obtains Summary Judgment After Plaintiff's Expert Is Barred Because He Did Not Test His Hypothesis Nor His Design Alternatives

Plaintiff was working on a seven-year-old mini scaffold that collapsed due to a caster stem fracture above one of the wheels. Plaintiff alleged liability and negligence. His expert said the fracture was caused by excess tensile strength brought on by over-tightening the threaded stem. He also said alternative designs could have prevented the injury. However, the expert did not test the premise that the stem broke because of over-tightening nor did he test or examine the alternative designs he proposed. Consequently, the trial court barred his testimony and entered summary judgment for the scaffold manufacturer.

The Seventh Circuit affirmed. It held the expert's testimony and its lack of recognized hallmarks of scientific reliability allowed the trial court to properly bar his testimony in its entirety. Plaintiff failed to prove the scaffold was defective at the time it left the manufacturer's control and failed to exclude the possibility of abnormal use or reasonable secondary causes. Plaintiff needed more than the failure of the caster to prove his case.

Bielskis v. Louisville Ladder, Inc., 663 F.3d 887 (7th Cir. 2011).

Federal Food, Drug and Cosmetic Act Preempted Plaintiff's Claim Of Inadequate Labeling On Defendant's Chewy Bars

Plaintiff alleged that the principal fiber in the defendant's chewy bar contained fewer of the benefits of other forms of fiber and were inferior to natural fiber. Nowhere on the packaging was the type of fiber identified. The trial court held the Federal Food, Drug and Cosmetic Act, 21 USC, §343-1(a)(5) provided states could not impose labeling requirements different than the federal statute. As the label complied with the Act, the complaint was dismissed.

The Seventh Circuit affirmed. Congress did not want to allow states to impose disclosure requirements of their own on packaged food products which are sold nationwide. To do so could require manufacturers to print 50 different labels. The information required by federal law did not include disclosing the fiber in the product had different qualities than natural fiber, and the case was properly dismissed. *Turek v. General Mills, Inc.*, 662 F.3d 423 (7th Cir. 2011).

Fact Question Existed As To Whether Removal of Guard Gate From Scissor Lift Was Foreseeable

Plaintiff was a painter on a construction site who fell off a scissor lift and was injured. A guard gate, designed to allow access to the lift but prevent the user from falling from it, had been removed. Plaintiff sued on theories of strict liability and negligence contending the product was unreasonably dangerous because the guard gate could easily be removed. The trial court granted the defendant summary judgment holding removal of the guard gate from the lift was not reasonably foreseeable.

The Second District reversed. If a product is capable of easily being modified and the operator has a known incentive to effect the modification, it is objectively reasonable for a manufacturer to anticipate the modification. However, if alteration requires special expertise, then it is not objectively reasonable to foresee the modification. As the guard gate was affixed to the guard rail with a bolt and nut, plus two locking pins, it appeared reasonably easy to remove it. Consequently, a fact question existed as to foreseeability, and the case was remanded for trial. *Perez v. Sunbelt Rentals, Inc.*, 2012 IL App (2d) 110382.

Although Some Installation Services Were Included, Contract Held Was For The Sale Of Goods And Therefore Not Timely Filed Within Four Years Under The UCC

Plaintiff sold noise monitoring equipment to defendant to monitor excessive noise from an airport. It identified plaintiff as seller and defendant as buyer, and also included a requirement that plaintiff would furnish installation and annual maintenance services. When the defendant did not pay in full, plaintiff filed suit. The trial court dismissed the complaint holding it was filed outside the four-year statute of limitations that applies to the sale of goods under the Uniform Commercial Code.

The Second District affirmed. Where a contract mixes the sale of goods and the provision of services, application of the Uniform Commercial Code is determined by a "predominant purpose" test. If the contract is predominantly for goods and only incidentally for services, the UCC will apply. The Court noted the parties were identified as buyer and seller and concluded that the agreement provided for the sale of goods with any specified services being only incidental to that sale. *Bruel & Kjaer v. The Village of Bensonville*, 2012 IL App (2d) 110500.

SPOLIATION OF EVIDENCE

Plaintiff Failed To Establish Hospital Owed A Duty To Preserve Floor Mat Precluding Recovery For Spoliation.

Plaintiff was a physician who tripped and fell while waiting for an elevator at the hospital where he worked. Stepping backwards, he apparently tripped over a buckle in a floor mat and sustained quadriplegic injuries. During discovery, plaintiff requested production of the floor mat, but it had been

disposed of. In addition to a negligence theory, plaintiff claimed the defendant should be liable for spoliation of evidence. The trial court entered summary judgment for the hospital.

The First District affirmed. It noted neither the fall itself nor any witnesses implicated the mat until 3½ months after the occurrence. Under these circumstances, plaintiff was unable to establish that the hospital owed him a duty to preserve the mat. It noted that even if the mat had been produced months later when suit was filed, it would not have been probative as to whether a fold or buckle existed at the time of the fall. *Caburnay v. Norwegian American Hospital*, 2011 IL App (1st) 101740.

PREMISES LIABILITY

Apartment Complex Had No Duty To Provide Lifeguard And Was Not Liable For Drowning Death of Seventeen-Year-Old

A 17-year-old boy was playing with friends at an apartment complex owned and managed by the defendants. There was a pool attendant but no lifeguard. In compliance with state regulations, a sign at the pool advised no lifeguard was on duty and that children under 16 must be accompanied by an adult. Plaintiff contended the defendant had a duty to provide a lifeguard. The trial court disagreed and entered summary judgment for the defendants holding they owed no duty to the decedent.

The Second District affirmed. It refused to find a common law duty that a lifeguard was required at the pool. Further, it noted the danger posed by water was open and obvious. *Barnett v. Ludwig & Co.*, 2011 IL App (2d) 101053.

SPORTS AND RECREATION

Tort Immunity Act Protects Park District When Tennis Player Runs Into Structural Steel Beam Hidden By Tarp

A visitor to a park district indoor tennis facility ran into a structural steel beam located behind an opaque tarp/curtain behind the base line. The Complaint alleged the defendant was guilty of wilful and wanton misconduct. The defendant moved to dismiss the Complaint asserting it was immune from liability for mere negligence and that the allegations of the Complaint constituted nothing more than ordinary negligence. The trial court granted the motion.

The Fourth District affirmed. Wilful and wanton conduct is established where the public entity has been informed of the dangerous condition, knows that others have been injured because of that condition or removes a safety feature from its property. There was nothing to indicate the defendant had prior notice of injuries caused by the beams occurring in a similar matter. As plaintiffs failed to sufficiently plead facts establishing willful and wanton conduct, the park district was immune. *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024.

Contact Sports Exception Did Not Relieve Softball League Organizer And Employee From Liability

Plaintiff was playing first base in a softball tournament organized by the defendant. As he was reaching for a throw from the third baseman, the batter ran into him causing a fracture and nerve damage. The Complaint alleged the defendant and its employee did not follow two safety rules of the Amateur Softball Association. The defendants moved for summary judgment based upon the Contact Sport Exception which provides that a participant in a contact sport is only liable for injuries if they were caused by intentional or wilful and wanton misconduct. The trial court granted the defendant summary judgment.

The Fifth District reversed. Illinois law holds that softball is a contact sport, and consequently, the exception is applicable to claims involving plaintiffs and defendants who are both participants in the game. However, as the defendants were not participants, but rather, the organizer of the tournament, the exception would not apply. *Gvillo v. DeCamp Junction, Inc.*, 2011 IL App (5th) 100262.

RAILROADS

Railroad Had No Duty To Warn Pedestrian Of Approaching Train Due To Open And Obvious Danger Rule

Plaintiff's son was struck and killed by an Amtrak train as he crossed the tracks at a commuter station. He was struck by a train that always passed through the station without stopping. The suit claimed the railroad was negligent in failing to warn pedestrians of the approaching train and that it would not stop. The trial court dismissed the Complaint holding the railroad had no duty to warn of the non-stopping train that was approaching.

The First District affirmed. A condition is open and obvious where a reasonable person exercising ordinary perception, intelligence and judgment would recognize both the condition and the risk involved. It is not dependent upon a plaintiff's subjective knowledge, but rather upon the objective knowledge of a reasonable person confronted with the same condition. The defendant had no duty to warn plaintiff's decedent of the type of train that was approaching because the danger of stepping in front of a moving train is open and obvious regardless of the kind of train. *Park v. Northeast Illinois Regional Commuter Railroad Corp*., 2011 IL App (1st) 101283.

EMPLOYER LIABILITY

Worker's Compensation Exclusive Remedy Provision Barred Negligence Claim of Employee's Estate Against Employer Following Fatal Shooting At Work

An employee's estate filed a negligence action against his employer claiming the employer negligently hired and retained a co-worker. There was an altercation between the decedent and the co-worker resulting in the employer sending the co-worker home to cool off. The co-worker returned the next day, got into an argument with the decedent and shot him. The trial court granted the employer summary judgment based upon the exclusive remedy provision of the Workers' Compensation Act.

The First District affirmed. It rejected plaintiff's claim that the incident was not accidental and therefore not barred by the Act. An accidental injury in an employment context includes intentionally inflicted injuries by a co-worker that are unexpected and unforeseeable from the injured employee's point of view. There was no reason for the decedent to have expected the shooting to occur. Unless an employer has committed or expressly authorized a co-employee to commit an intentional tort against an employee, the Act prohibits common law actions seeking damages for such torts. As plaintiff cannot recover against the defendant for the shooting, plaintiff cannot bring an action against the employer for negligently hiring and retaining the co-worker. *Rodriguez v. Frankie's Beef/Pasta & Catering*, 2012 IL App (1st) 113155.

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

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