AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

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INSURANCE

Single $100,000 Bodily Injury Limit Applied Even Though Policy Covered Both Jet Skis Involved in Accident

A declaratory judgment action was filed by a water craft insurance carrier seeking a determination that its liability was limited to $100,000 for an accident in which two insured jet skis collided severely injuring a passenger riding on one of them. The policy limits were $100,000/$300,000 and contained a provision that those limits were the most the carrier would pay regardless of the number of covered water craft, insured persons or water craft involved in an accident. The injured passenger asserted since separate premiums were charged for each jet ski, that there should be $100,000 in coverage for each jet ski. The trial court granted summary judgment for the carrier.

The Third District affirmed. It rejected the argument that public policy should allow the coverages to stack because the insureds contemplated they would be receiving that protection based upon the premiums paid. However, since Illinois upholds anti-stacking provisions, the public policy argument could not negate the effect of the policies unambiguous terms. *Progressive Premier Ins. Co. v. Cannon*, 382 Ill. App. 3d 526, 889 N.E.2d 790, 321 Ill. Dec. 525 (3d Dist. 2008)

Homeowners Policy Not Obligated to Defend Dog Bite Case Against Insured's Sister Living in Home Owned by Insured

A child was bitten by a dog owned by the named insured's sister who resided in a home owned by the insured. The insured obtained a homeowners policy covering the property, but did not advise the carrier the insured lived at a different address. The policy provided coverage for the named insured and residents of the insured's household. The trial court entered summary judgment for the carrier holding the insured's sister did not qualify as a resident of the insured's household.

The First District affirmed. It was clear the sister was not a resident of the insured's household at the time of the dog bite incident. They occupied separate residences and therefore the insured's homeowners carrier had no obligation to defend or indemnify. *State Farm Fire & Cas. Co. v. Martinez,* 384 Ill. App. 3d 494, 893 N.E.2d 975, 323 Ill. Dec. 501 (1st Dist. 2008)

CGL Carrier Had No Duty to Defend Claim for Insured's Alleged Spoliation of Evidence

Three of the insured's employees were injured when they fell from an I-beam and filed suit against a number of contractors at the construction site. Plaintiffs and the defendants filed claims against the insured for the alleged destruction or disposal of the I-beam. The employer's CGL carrier filed the present declaratory judgment action seeking a determination that it did not owe a duty to defend or indemnify in connection with the claims of spoliation of evidence. The trial court ruled in favor of the insured.

The Fifth District reversed. The policy included an exclusion for "personal property in the care, custody or control of the insured . . ." While loss or damage of the I-beam may be considered property damage, it was excluded because the I-beam was under the insured's care, custody and control at all relevant times. *United Fire & Cas. Co. v. Keeley & Sons*, 381 Ill. App. 3d 1119, 887 N.E.2d 911, 320 Ill. Dec. 767 (5th Dist. 2008)

Innocent Insured Rule Could Not Protect Insured from Husband's Arson

Plaintiff and her husband were joint owners of a home and were named as insureds on a homeowners policy issued by State Farm. The house was significantly damaged by fire and plaintiff's husband was subsequently convicted of arson with intent to commit insurance fraud. State Farm denied the claim because of the Intentional Acts provision which said no insureds will recover if the provision is violated, as well as the conceal-

ment or fraud provision because of a material misrepresentation by the husband in a recorded statement given shortly after the fire. The trial court rejected plaintiff's attempt to rely upon the innocent insured rule and entered summary judgment for State Farm.

The Second District affirmed. It held the plain language of the policy stated that coverage would be excluded as to all insureds in the event of improper behavior by any insured and consequently the innocent insured rule would not apply. Similarly, policy language unambiguously excluded coverage of all insureds if any one of them intentionally conceals or misrepresents a material fact either before or after a loss. *Aurelius v. State Farm Fire & Cas. Co.*, 384 Ill. App. 3d 969, 894 N.E.2d 765, 323 Ill. Dec. 739 (2d Dist. 2008)

Electrical Subcontractor's Insurer Had Duty to Defend Additional Insured in Injury Claim For Exposure to Fluorescent Lighting

A worker filed suit against a building owner alleging exposure to unfiltered and undiffused fluorescent lighting aggravated her pre-existing Lupus condition. Pursuant to being named an additional insured on the electrical subcontractor's policy, the building owner tendered its defense to the carrier. The carrier denied the tender contending the underlying Complaint did not allege negligence by the electrical subcontractor who was not even named as a defendant. The trial court granted summary judgment to the building owner holding the carrier had a duty to defend.

The First District affirmed. The duty to defend does not depend upon a sufficient suggestion of liability raised in the underlying Complaint. Rather, an insured has the duty to defend unless the allegations of the underlying Complaint demonstrate that the underlying plaintiff will not be able to prove the insured liable under any theory supported by the Complaint. In order to establish the obligation to defend, the building owner need only show that "but for" the work performed by the subcontractor, it is potentially liable. *American Economy Ins. Co. v. DePaul University*, 383 Ill. App. 3d 172, 890 N.E.2d 582, 321 Ill. Dec. 860 (1st Dist. 2008)

Mold Caused by Covered Water Damage Was Excluded Under Homeowner's Policy

When the insureds were on vacation, a water valve ruptured causing significant flooding damage to their home. Their homeowner's carrier paid clean up and repair costs, but refused to pay for mold removal or containment. The policy had an exclusion for losses caused by "condensation, mold, wet or dry rot." Following a bench trial, the court entered judgment for the carrier.

The Second District affirmed. The policy language clearly and unambiguously excluded coverage for losses resulting from mold caused by the water leak. The court was obligated to give the policy language its plain and ordinary meaning so that the exclusion was enforceable. *DeVore v. American Family Mut. Ins. Co.*, 383 Ill. App. 3d 266, 891 N.E.2d 505, 311 Ill. Dec. 490 (2d Dist. 2008)

Cracks in Home and Foundation Were Not Caused by an Occurrence Within Builder's CGL Policy but Were Natural Consequences of Defective Workmanship

The insured homebuilder brought a declaratory judgment action against its CGL carrier seeking to require it to defend a lawsuit filed by a couple for whom it built a home. An arbitrator awarded the homeowners $291,537.04 but it was uncollectible because the insured was insolvent. However, the insured assigned its rights against its CGL carrier to the homeowners who instituted the present litigation. The trial court entered summary judgment for the homeowners.

The Second District reversed. It held the damage to the home was not the result of an "occurrence" or "property damage" as defined in the policy. The cracks that developed in the home were not an unforeseen occurrence that would qualify as an "accident" because they were the natural and ordinary consequences of defective workmanship, specifically the faulty soil compaction. *Stoneridge Development Co., Inc. v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 888 N.E.2d 633, 321 Ill. Dec. 114 (2d Dist. 2008)

Statute Requiring Omnibus Coverage for Permissive Users Applied to Insurance Policies Issued to Commercial Truckers

A liability insurer for the lessee of a semi-tractor trailer involved in an accident brought an action against the liability carrier for the trucking company that was the permissive user of the truck, seeking declara-

tion that permissive user's insurer owed the primary duty to defend and indemnify permissive user in a wrongful death action. Permissive user's insurer counterclaimed, asserting that under the omnibus clause of the lessor's policy its policy should be primary. The trial court granted the lessee's insurer summary judgment.

The First District reversed, holding that Illinois public policy requires omnibus coverage for *all* motor vehicle liability policies. The statutory requirement for omnibus insurance coverage applies to the entire Illinois Vehicle Code. Therefore, if a policy provision provides coverage to the named insured and precludes coverage to an expressed or implied permissive user, it is in violation of the statute and Illinois public policy. *Zurich American Ins. Co. v. Key Cartage, Inc.*, 386 Ill. App. 3d 1, 896 N.E.2d 400, 324 Ill. Dec. 614 (1st Dist. 2008)

Policy Issued Two Days After Earlier Policy was Canceled was a Reinstatement Which Did Not Require Offer of Higher UIM Limits

Beginning in 1980, the insured had auto coverage with the defendant which was renewed every six months. When the policy was in effect, the carrier made four offers to increase the UIM limits to an amount equal to the bodily injury limits but each offer was rejected. On March 4, 2002, plaintiff advised her insurance agent she wished to cancel the policy. However, two days later, she told the agent she wanted to be insured by the defendant again. A policy was issued having liability limits of $250,000 per person and UIM limits of $20,000 per person. About a year later, she was involved in an accident and incurred $13,527.85 in medical bills. The trial court granted summary judgment holding the carrier was not obligated to offer higher UIM limits.

The First District affirmed. It rejected plaintiff's argument that because she received a different policy number and there was a one day lapse in coverage, the carrier was required to re-offer higher UIM coverage. The court disagreed noting the policy had the same coverages and premiums as the canceled policy, and the insured was not required to submit a new application. Therefore, the policy continued through the expiration date of the canceled policy rather than starting a new six month policy period. *Chatlas v. Allstate Ins. Co.*, 383 Ill. App. 3d 565, 892 N.E.2d 106, 322 Ill. Dec. 859 (1st Dist. 2008)

DAMAGES

Injured Motorist Recovery of Medical Expenses Was Not Limited to Amount Paid by Medicare/Medicaid

Plaintiff was injured in an auto accident and incurred medical bills totaling $80,163.47. However, the amount actually paid by Medicaid and Medicare in full settlement of the bills was $19,005.50. Following the jury verdict for the full amount of the medical bills plus $7,500.00 for pain and suffering, the trial judge granted defendant's motion to reduce the award for medical expenses to the amount actually paid. The appellate court affirmed.

The Supreme Court reversed. It noted most jurisdictions follow the reasonable-value approach to the recovery of medical bills. They hold that a plaintiff can recover the reasonable amount of medical services and do not distinguish between whether plaintiff has private insurance or is covered by a government program. Adopting this approach to the collateral source rule, plaintiff could recover the reasonable value of medical services regardless of whether plaintiff has private insurance or is covered by a government program. A defendant could cross-examine any witness about the reasonable value of medical services but may not introduce evidence that plaintiff's bills were settled for a lesser amount. *Wills v. Foster,* 229 Ill. 2d 393, 892 N.E.2d 1018, 323 Ill. Dec. 26 (2008)

Claim for Negligent Infliction of Emotion Distress Does Not Require Expert Testimony

Plaintiff was at the hospital for delivery of a premature infant with a gestational age under 24 weeks. Within a few minutes after plaintiff's water broke, the baby partially delivered in a breach position and became trapped. However, the defendant doctor did not arrive for one hour and ten minutes by which time the baby had died. At trial, plaintiff, her husband and other family members testified concerning the effect of the baby's death and circumstances of the delivery, but no expert witnesses testified. The jury awarded $700,000 for negligent infliction of emotion distress.

The Third District affirmed. It held that Illinois does not require expert testimony to prove claims of negligent infliction of emotional distress. The jury has the ability to determine what is or is not emotional distress without the need for expert testimony. *Thornton v. Garcini*, 382 Ill. App. 3d 813, 888 N.E.2d 1217, 321 Ill. Dec. 284 (3d Dist. 2008)

CONTRIBUTION AND INDEMNITY

Neither Two-Year Contribution/ Indemnity Limitation Nor Four-Year Construction Claim Limitation Applied to Express Indemnification Based upon Written Contract

Plaintiff alleged that it incurred $510,904.52 in losses, costs and expenses in connection with a construction performance bond issued to the insureds. In consideration of issuing the bonds, the insureds signed a general indemnity agreement. The Insureds moved to dismiss the complaint claiming it was barred by the four-year statute of limitations relating to the construction of improvements to real property. The trial court agreed, but dismissal was reversed by the Second District who held the 10-year limitation for written contracts should apply.

The Supreme Court held the Second District appropriately applied the 10-year statute of limitations. The present dispute emanated not from a construction-related activity, but rather from breach of a contractual obligation to indemnify. It also held the two-year contribution and indemnity limitation provisions of 735 ILCS 5/13-204 applied only to situations involving tort claims for injury to persons or property, and is not applicable for express indemnification based upon a written contract. *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill. 2d 461, 893 N.E.2d 583, 323 Ill. Dec. 311 (2008)

COSTS AND FEES

Defendant Required to Pay Court Reporter and Videographer Fees for Deposition of Plaintiff's Treating Doctor

Following a jury trial stemming from an auto accident, a jury awarded plaintiffs $1,930.41. Thereafter, plaintiffs filed a motion for costs incurred in taking the video evidence deposition of a treating physician in Wisconsin. The trial court granted plaintiff's motion and awarded $744.00 for court reporter fees and $754.50 for videographer fees.

The Third District affirmed. Supreme Court Rule 208 provides that the person who takes the deposition should pay the fees of the witness, for the recorder or stenographer. However, the Rule also provides those fees may be taxed as costs at the discretion of the trial court. As the doctor lived in Wisconsin, and was beyond the subpoena power of Illinois courts, he was unavailable to testify at trial and awarding the fees was proper. *Peltier v. Collins*, 382 Ill. App. 3d 773, 888 N.E.2d 1224, 321 Ill. Dec. 291 (2d Dist. 2008)

EVIDENCE

Discovery Deposition of Plaintiff with Terminal Mesothelioma Inadmissible at Trial

A worker had been diagnosed with terminal mesothelioma and sued 47 defendants. Plaintiff's attorney served a notice to take the worker's evidence deposition but the defendants objected, requesting that a discovery deposition take place first. The trial court agreed with the defendants. Because of the number of defendants and the worker's inability to give no more than three hours of testimony per day, it took a number of months to complete his discovery deposition. Shortly after it was completed, he died without his evidence deposition being taken. Plaintiff attempted to use the discovery deposition as an evidence deposition at trial but the court refused.

The Fifth District affirmed. Illinois has long recognized a distinction between depositions taken for discovery and those for use as evidence at trial. Discovery depositions are not permitted to be used as trial testimony because it would inhibit free discovery by requiring time consuming evidentiary objections at every deposition. Supreme Court Rule 212 bars the use of a party's discovery deposition at trial and a trial court has no discretion in the matter. *Berry v. American Standard, Inc.*, 382 Ill. App. 3d 895, 888 N.E.2d 740, 321 Ill. Dec. 221 (5th Dist. 2008)

AUTOMOBILE

Defense Summary Judgment Affirmed Based On Unavoidable Collision as Defendant's Conduct Was Not Proximate Cause

Plaintiff's daughter was killed in an accident when she rolled through a stop sign into an intersection and was struck by a garbage truck traveling on a preferential street with a 35 mph speed limit. The garbage truck driver said he was traveling 35-40 mph and that he saw decedent's car two or three seconds before impact. The trial court entered summary judgment for the defendant.

The Fourth District affirmed. Even if the garbage driver was exceeding the speed limit and failed to keep a proper lookout or brake, plaintiff failed to establish that conduct was the proximate cause of the accident. Courts recognize that in an "unavoidable collision" the conduct of the driver on a preferential highway is not material. It noted the plaintiff failed to produce any evidence that the garbage truck driver could have avoided the accident if he had been driving slower, keeping a better lookout or applied brakes. Decedent pulled out in front of the garbage truck and there was no time to avoid the accident regardless of any breach of duty. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 893 N.E.2d 303, 323 Ill. Dec. 289 (4th Dist. 2008)

Photographs of Vehicles after Low Impact Rear-End Accident Properly Admitted Without Expert Testimony

At trial, plaintiff testified the force of impact was "just a push" and did not strike any part of her vehicle. She incurred chiropractic bills of $10,225. The defendant testified that she was traveling under 14 mph when she struck the rear of plaintiff's auto and that her air bags did not deploy. Defendant also testified that there was no damage to her vehicle and observed only minor scratches to plaintiff's rear bumper. Over plaintiff's objection, the defendant introduced two pictures of defendant's car which showed no damage and two pictures of the rear of plaintiff's car with only minor damage. The defendant also had testimony from a neurologist who examined the plaintiff and concluded she had degenerative disc and joint disease but no other abnormalities. The jury returned a verdict of $3,141 and plaintiff appealed.

The Fifth District affirmed. It held the trial judge did not abuse his discretion in admitting the photographs without expert testimony. The jury could assess the relationship between the damage to the vehicles and the injury claim by plaintiff without the aid of an expert. The photos were relevant to prove whether plaintiff's injury was more probable or less probable. *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 895 N.E.2d 1125, 324 Ill. Dec. 410 (5th Dist. 2008)

PRODUCT LIABILITY

Manufacturer Has Duty to Design Vehicle That Is Safe for Occupants but Owes No Duty to Those Who Collide with That Vehicle

Plaintiff's minivan collided with the rear of a trailer manufactured by the defendant. Allegedly because the trailer had a defective underride guard, plaintiff was seriously injured and his wife was killed. After removal to federal court, the case was dismissed on the basis that under Illinois product liability law, a vehicle manufacturer owes no duty to those who collide with the vehicle.

The Seventh Circuit affirmed. It noted prior decisions in Illinois had held that a manufacturer has a duty to design a vehicle that is reasonably safe for its occupants, but owes no duty to those who collide with that vehicle. Applying Illinois law, the trial judge properly dismissed the complaint. *Rennert v. Great Dane Ltd. Partnership*, 543 F.3d 914 (7th Cir. 2008)

Plaintiff Must Establish That Non-Manufacturing Defendant Had Knowledge of the Product's Dangerous Characteristics to Avoid Dismissal Through Certification

Plaintiff was seriously injured when an automobile purchased from the defendant rolled over. He sued both the dealer and auto manufacturer. The trial court dismissed the strict liability claim against the dealer pursuant to the certification provisions of 735 ILCS 5/2-621. Plaintiff

obtained an interlocutory appeal of the decision.

The First District noted that Section 2-621 provided a means whereby a non-manufacturing defendant could remove itself from product liability litigation unless the plaintiff can show that the defendant "exercised some significant control over the design or manufacture of the product or had actual knowledge of, or created, the defect." This means that a plaintiff must establish the defendant had actual knowledge of the unreasonably dangerous nature of the physical characteristics or design of the product, not just actual knowledge that the physical characteristics or design existed. *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 381 Ill. App. 3d 768, 887 N.E.2d 569, 320 Ill. Dec. 425 (1st Dist. 2008)

Discovery Request for Pump Manufacturer's Records Covering a 38-year Period Was Overly-Broad in Consolidated Asbestos Litigation

Plaintiffs, tradesmen who contracted asbestos-related injuries, sued a manufacturer of industrial pumps and the designer/manufacturer of boilers and fuel firing equipment. Plaintiff served a discovery request asking for product sales information in all 102 Illinois counties covering a 38-year period which the defendant refused to answer. The trial court granted plaintiff's motion to compel discovery and entered an order of "friendly contempt" citing defense counsel one dollar.

The First District reversed. Illinois courts generally hold that wide, sweeping discovery requests are considered an abuse of discretion. Although asbestos litigation is complex and distinct from the typical personal injury case, plaintiff's discovery request was overly broad and did not comply with discovery rules or the case management order in Cook County governing asbestos litigation providing that discovery should be specific to the case, the job site and the defendant. Therefore, the contempt citation was vacated and the defendant was not required to produce excessive documentation. *In Re All Asbestos Litigation v. Lisa A. LaConte*, 385 Ill. App. 3d 386, 895 N.E.2d 1155, 324 Ill. Dec. 440 (1st Dist. 2008)

PREMISES LIABILITY

***Res Ipsa Loquitur* Did Not Apply to Premises Liability Claim Arising Out of Broken Glass in Revolving Door**

A hospital visitor was injured while entering the hospital through a revolving door. As plaintiff pushed the door with his left hand, it jammed, and he gave it a shove which caused the curved glass surrounding the revolving door to break and injure him. He filed a Complaint alleging both negligence and *res ipsa loquitur*. The trial court granted the hospital summary judgment.

The First District affirmed. There was no evidence indicating the hospital was negligent in its maintenance of the door. Additionally, *res ipsa loquitur* would not apply because the hospital did not have sole and exclusive control of the revolving door at the time of the injury. As no other person was within the door at the time, plaintiff was the sole agency which caused the door to revolve, and consequently, the hospital had no control over it. *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009, 889 N.E.2d 706, 321 Ill. Dec. 441 (1st Dist. 2008)

Summary Judgment Proper When Plaintiff Did Not Know What Caused Him to Slip and Fall

Plaintiff slipped and fell after walking about 12 feet into defendant's grocery store. He said the floor was wet because of an unknown substance, but he did not know the color, size, length or texture of the substance which caused him to fall. He assumed the floor was wet because he noticed after he got up his clothes were wet. A light snow had fallen. The trial court entered summary judgment for the defendant because it could not be established what caused plaintiff to fall or the source of the liquid he claims caused the incident.

The First District affirmed. Plaintiff testified he did not know why he fell or what caused him to fall, but assumed that the floor was wet because his clothes were wet after he fell. The store manager acknowledged that plaintiff's knees were wet, but said she did not notice any liquid on the floor beforehand and noted it was snowing lightly that day making it likely plaintiff's shoes were wet and slippery. Therefore, there was no clarity as to what caused the floor to be wet. Absent evidence of a specific liquid on the floor summary judgment is proper

because there was no genuine issue of material fact as to the cause of plaintiff's fall beyond mere speculation. *Richardson v. Bond Drug Co.,* 1st Dist. Docket #1-07-3349 (1/14/09)

Summary Judgment Proper as it is Not Foreseeable an Invitee Will Be Injured by an Obvious or Known Condition

Plaintiff was a freelance landscaper and tree trimmer. In order to perform tree trimming services on property near a power line, the defendant had to remove a utility pole. When plaintiff subsequently went to the site he noticed the pole had not been completely removed but was cut to the same height as a nearby fence. He then conducted a pre-climb inspection but slipped and fell hitting his right hip on the top of the cut off pole. The trial court granted the defendant summary judgment.

The Fourth District affirmed. It is not foreseeable that an invitee will be injured when a potential dangerous condition is obvious or known. Plaintiff testified that he saw the cut off utility pole and continued with his work. He did not forget about the pole nor was he distracted. The defendant was entitled to an expectation that plaintiff would exercise reasonable care for his own safety that would not anticipate he would fall or slip onto the pole. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 893 N.E.2d 702, 323 Ill. Dec. 430 (4th Dist. 2008)

Snow Removal Act Properly Applied to Fall in Condominium Parking Lot

A condominium owner was walking from his car to his unit when he fell in the parking lot. He alleged that he fell on ice or snow and sued the condominium association, condominium management company and snow removal contractor. Based upon the Snow Removal Act (745 ILCS 75/1) the trial court granted summary judgment for all defendants. That Act protects possessors of residential property or their agents from liability for attempting to remove snow or ice from sidewalks butting their property.

The First District affirmed. It noted there was nothing in the record to show that the ice upon which plaintiff claims to have fallen was an unnatural accumulation. It also noted the plaintiff was walking to his unit on the driveway and therefore would be considered to be within the purview of the Act. *Flight v. American Community Management, Inc.*, 384 Ill. App. 3d 540, 893 N.E.2d 285, 323 Ill. Dec. 271 (1st Dist. 2008)

Snow Removal Act Protects Snow Removal Contractor

A condominium unit owner brought a personal injury action against the condominium management and snow removal contractor for injuries arising out of a slip and fall on ice. The complaint alleged that snow had fallen on the property and that as a result of "incomplete and improper" snow removal several large patches of ice accumulated on the walkway. The trial court dismissed the complaint based upon the Snow and Ice Removal Act which protects property owners or their agents from liability for injuries caused by removal efforts unless the conduct was willful and wanton.

The First District affirmed. It rejected plaintiff's argument that the Act should not apply to parties who enter into contractual obligations to remove snow and ice. The legislature has determined as a matter of public policy, to encourage people to clear their residential sidewalks of snow and ice. *Divis v. Woods Edge Homeowners' Ass'n*, 385 Ill. App. 3d 636, 897 N.E.2d 375, 325 Ill. Dec. 127 (1st Dist. 2008)

Property Owner and Property Manager Not Liable to Bicyclist for Failing to Remove Natural Accumulation of Dirt From Sidewalk

Plaintiff's seven-year-old daughter was riding her bicycle on a sidewalk behind defendant's apartment building and as she attempted to turn onto another sidewalk, she lost control of her bicycle and fell down a grassy embankment into a pond where she drowned. The complaint alleged the defendants should be liable for allowing loose dirt, gravel, rock and other debris to remain on the sidewalk. Following trial, the jury awarded $100,000 but answered "No" to a special interrogatory on proximate cause. Consequently, the court entered judgment n.o.v. in favor of the defendants.

The First District affirmed. There was no evidence that the dirt or mud on the sidewalk was anything

other than a natural accumulation of dirt formed as a result of the sidewalk's close proximity to a grassy area and natural soil erosion. The court then noted Illinois law does not require landowners to remove natural accumulations of ice or snow and recognized it would be equally onerous to require a landowner to remove all of the naturally accumulated dirt from every sidewalk on the property. Consequently, the defendants were not liable to plaintiff in failing to remove a natural accumulation of dirt from the sidewalk. That, coupled with the irreconcilable answer to the special interrogatory finding no proximate cause, made it appropriate for the trial court to grant judgment n.o.v. *Ahmed v. Pickwick Place Owners' Ass'n*, 385 Ill. App. 3d 874, 896 N.E.2d 854, 324 Ill. Dec. 778 (1st Dist. 2008)

Homeowner May Be Liable When a Guest is Injured After Diving Into Backyard Swimming Pool

Plaintiff was a 21-year-old man who dove into an in-ground swimming pool in the defendants' backyard and was injured becoming a quadriplegic. The homeowners moved for summary judgment on the basis that the danger of diving into a pool was open and obvious and therefore they owned no duty to plaintiff. The trial court agreed and granted the homeowners summary judgment.

The First District reversed. It held a material issue of fact existed as to whether the homeowner knew of the danger and should have taken steps to protect plaintiff from injury. It could not conclude that the danger of the pool was obvious because it was all one shallow depth but had a ladder typically found at the deep end. The fact that plaintiff had been drinking did not enter into a decision as to whether the danger was obvious. *Duffy v. Togher*, 382 Ill. App. 3d 1, 887 N.E.2d 535, 320 Ill. Dec. 391 (1st Dist. 2008)

RAILROADS

Fog, Rain and Darkness Did Not Constitute Special Circumstances Requiring Railroad to Warn of Stopped Train at Unlit Crossing

On a winter night, plaintiff's decedent drove his car into the side of a train stopped at an unlit crossing. In an attempt to create special circumstances, the Complaint alleged the area was unlit with overcast sky and precipitation. The trial court dismissed the Complaint holding the train stopped at a crossing is generally held to be adequate notice of its presence to any traveler and there was no duty to give additional signs or warnings.

The Fourth District affirmed. A railroad only has a duty to provide warnings beyond the presence of the train on the track if plaintiff can establish special circumstances. A combination of darkness, and overcast sky, fog and rain are common occurrences in an Illinois winter and do not give rise to special circumstances. Therefore, the railroad owed no duty to the plaintiff. *Morris v. Illinois Central Railroad Co.*, 382 Ill. App. 3d 884, 892 N.E.2d 36, 322 Ill. Dec. 789 (4th Dist. 2008)

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

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