Spring 2012

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.

Claims Handling Seminar – Thursday, May 17, 2012 – Bloomington, Illinois

Our 27th Annual Claims Handling Seminar will be held on the afternoon of Thursday, May 17. We hope you will consider joining us and other clients from around the Midwest at the Doubletree Hotel in Bloomington, Illinois. Those of you who have attended in the past know that our seminars are designed to address the day-to-day needs of professionals handling claims throughout Illinois. As in the past, 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 the 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 17 in Bloomington.

Heyl Royster New Partners

We are proud to introduce five new partners with the firm: **Renee Monfort** in the Urbana office; **Jana Brady**, Mike **Denning** and **Heidi Ruckman** in the Rockford office; and **Patrick Cloud** in the Edwardsville office.

Renee Monfort received her law degree from Stetson University and began practicing law in 1990. She joined Heyl Royster's Urbana office in 2009. Her practice focuses on the defense of healthcare providers and other professionals in professional liability litigation. She provides general counsel to individual health care professionals, multi-specialty clinics and hospitals on administrative, policy and risk management matters. Her practice also includes representation of clients in administrative proceedings before the Illinois Department of Financial and Professional Regulation and the Illinois Human Rights Commission.

Jana Brady joined the firm's Rockford office following graduation from Northern Illinois University's College of Law in 2003. She focuses her practice on the defense of civil litigation and federal practice, particularly in the context of employment law, civil rights, medical malpractice, correctional medicine, insurance coverage, school law, and nursing home cases, and further practices in the areas of health care law and creditors' rights in the context of lien adjudication.

Mike Denning received his law degree from Northern Illinois University's College of Law in 2002. He was a summer associate for the firm's Peoria office and served as Senior Law Clerk to Justice Tom Lytton of the Illinois Appellate Court, Third District prior to joining Heyl Royster's Rockford office in 2004. He concentrates his practice in civil litigation, including defense medical malpractice and nursing home litigation; auto, premises and trucking litigation; and the defense of toxic tort and asbestos claims.

Heidi Ruckman began practicing law in 2000 following graduation from The John Marshall School of Law. She joined Heyl Royster's Rockford office in 2006. She concentrates her practice in civil litigation, including defense of premises and auto litigation, business related disputes, and the defense of toxic tort and asbestos claims.

Patrick Cloud received his law degree from Washington University School of Law. He was a summer associate for the firm during law school and joined the firm in its Edwardsville office following graduation in 2004. He concentrates his practice on toxic tort matters, insurance coverage litigation, complex civil litigation, and governmental law.

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 later this month.

Gary D. Nelson, Managing Partner

AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Spring 2012

INSURANCE

General Contractor Not An Additional Insured Under Sub-Contractor's Policy As There Was No Privity

FCL was a general contractor who subcontracted steel fabrication to Suburban Ironworks, Inc. who in turn further subcontracted the steel erection to JAK. FCL's subcontract required Suburban provide both FCL and Suburban with general liability coverage. It further provided any subcontractor Suburban might hire must maintain the same level of insurance and include FCL as an insured. A JAK employee was injured when he fell from a steel beam and filed suit against FCL and Suburban. Defense of the suit was tendered to the carrier for JAK, Westfield. It denied coverage saying the policy only extended coverage to entities that had an agreement in writing with JAK. The trial court entered summary judgment for Westfield.

The Second District affirmed. The plain language of the policy required that the additional insured be one for whom JAK was performing operations and that JAK must "have agreed in writing in a contract" that the entity be added to the policy. As there was no evidence JAK had agreed in writing with FCL to be an additional insured, there was no privity of contract, and coverage was not available. *Westfield Ins. Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730, 948 N.E.2d 115, 350 Ill. Dec. 462 (1st Dist. 2011).

Insured Made Material Misrepresentation When She Failed To Notify Insurer That Her Son Began Operating The Insured Vehicle

An injured passenger's carrier sought a declaratory judgment that the driver was insured, and therefore, it had no duty to provide UM coverage. The owner of the car involved in the accident completed an insurance application stating she was the only driver of the vehicle. However, she subsequently allowed her 15-year-old son to drive on a learner's permit, and the accident occurred injuring plaintiff's insured. Plaintiff took the position the policy should not be void because at the time the application was completed, the son was not a driver. The trial court ruled in favor of the defendant holding the insured made a material misrepresentation and entered summary judgment in its favor.

The First District affirmed. The insured made a material misrepresentation when she failed to notify her insurer that the son was operating the vehicle. The policy provided that a misrepresentation would cause the policy to be "null and void" and that a fraudulent statement or omission would result in no coverage. Consequently, the carrier was within its rights to rescind the policy. *American Service Ins. Co. v. United Auto Ins. Co.*, 409 Ill. App. 3d 27, 947 N.E.2d 382, 349 Ill. Dec. 745 (1st Dist. 2011).

Policy's Automatic Termination At End Of Its Term Due to Non-Payment of Renewal Premium Was Not A Cancellation Of The Policy

Plaintiff was an insured under a policy issued to her husband's construction company. On June 14, 2006, the insurer sent a notice that the premium was due and that the policy would expire if not received by the due date. He failed to pay the premium before July 20, 2006. On August 7, plaintiff was injured in an accident riding in a car driven by another person. The medical expenses she and the other passengers received exceeded the available insurance coverage of the driver. The husband submitted the premium payment on August 18, 2006 and received a receipt saying "this policy is currently cancelled." Plaintiff claimed that the insurer failed to comply with the notice of cancellation requirements of the Illinois Insurance Code. The trial court disagreed and entered summary judgment for the carrier.

The Third District affirmed. Based upon earlier decisions, it deter-

mined that a "cancellation" referred to a unilateral termination by an insurer prior to the end of a policy period while "non-renewal" referred to the automatic expiration of a policy at the end of a policy period. Contrary to the plaintiff's claim, the policy automatically terminated on July 20, 2006 for non-payment of premium. The termination did not result from any action by the insurer, but rather related solely to her husband's failure to timely pay the premium. As the accident occurred within the lapsed period, it was not covered. *Yunker v. Farmers Automobile Management Corp.*, 404 Ill. App. 3d 816, 935 N.E.2d 630, 343 Ill. Dec. 622 (3d Dist. 2010).

Plaintiff Could Not Obtain Coverage Of Second Insured Vehicle Not Involved In Collision

Plaintiff was injured in an auto accident caused by the negligence of the named insured's son while operating a pickup truck. Another policy covered an automobile. Both had $100,000 liability limits. Plaintiff settled a negligent entrustment claim against the named insured and went to trial against the son. A jury awarded $275,733 in damages. He then filed the present action seeking to obtain the $100,000 coverage applicable to the second vehicle that was not involved in the accident. The trial court held plaintiff could not obtain the additional limits.

The First District affirmed. The policy provided: "When this policy insures two or more cars, the coverages apply separately to each car." Plaintiff's attempt to recover under the coverage of the uninvolved vehicle was contrary to the insurance policy which applied to each specific vehicle. *West v. American Standard Ins. Co.*, 2011 IL App (1st) 101274 (7/26/11).

Proceeds From UIM Policy Were Wrongful Death Damages Distributable To Heirs

The decedent was killed in a rear-end collision by an under-insured motorist. He died intestate survived by his wife and two adult sons from a previous marriage. The widow filed suit against the other driver and received the liability limits of $20,000. She then advanced a UIM claim and received $230,000 which was the difference between the UIM policy limits and that received from the other driver's carrier. She then petitioned the court to award her all of the UIM settlement proceeds as she was the only insured under the policy, and the sons were adults not living at home. The trial court subsequently certified for interlocutory appeal the question of whether UIM benefits should be payable under the Wrongful Death Act or according to the insurance policy.

In a case of first impression, the First District held the proceeds from the UIM policy were wrongful death damages and should be distributed pursuant to the Wrongful Death Act. It ordered that the proceeds were to be distributed among beneficiaries, to include the spouse and children, based upon the proportionate percentages of their dependency upon the deceased. *In Re Estate of Anderson*, 408 Ill. App. 3d 428, 945 N.E.2d 661, 348 Ill. Dec. 892 (1st Dist. 2011).

Wisconsin Three-Year Personal Injury Limitation Extended UM Policy's Two-Year Limitation Provision

The insured was involved in an accident with an uninsured driver in Wisconsin. The policy provided that a demand for arbitration must be commenced within two years from an accident. The demand for arbitration was made more than two years after the accident, and the carrier filed a declaratory judgment action. The insured filed a counterclaim asserting that since Wisconsin had a three-year personal injury statute of limitations, she should have that long to demand arbitration. The trial court ruled in favor of the carrier.

In a split decision, the Third District reversed. The policy behind the UM statute is to place the injured party in substantially the same position as if the uninsured driver had been insured. The two-year limitation of the insurance policy violated public policy because it shortened the applicable Wisconsin statute of limitations from three years to two years. It placed the insured in a substantially different position than if the other driver had been insured. *Country Preferred Ins. Co. v. Whitehead*, 2011 IL App (3d) 110096 (8/30/11).

Auto Carrier Had No Duty To Defend Where Insured Did Not Provide Notice Of Accident For Almost 26 Months

The insured was involved in an accident on May 11, 2008 but fled the scene and denied involvement. He was arrested on August 28, 2009 and convicted June 10, 2010 of leaving the scene of a fatal accident. On April 30, 2010, suit was filed, and the insured was served on June 7, 2010. The carrier was first notified of the accident on July 8, 2010. It filed a declaratory judgment action and obtained summary judgment with the trial court holding the insured failed to give timely notice of the accident.

The Fourth District affirmed. It rejected the insured's claim that the carrier failed to establish prejudice by the late notice. While prejudice is a factor, it is not determinative. The most important factor to be considered in determining whether a notice was reasonable is time itself. In this case, it was almost 26 months after the accident and 11 months after the insured's arrest and arraignment. *Farmer's Automobile Ins. v. Burton*, 2012 IL App (4th) 110289 (3/22/12).

DAMAGES

Awards Of $1 Million For Pain And Suffering Prior To Death And $8 Million For Loss Of Society Were Not Excessive In Wrongful Death Case

The decedent was killed when struck by a truck at a construction site. He was conscious for three or four minutes before dying. He was survived by a wife of 37 years and three adult children. The jury returned a verdict of $1 million for conscious pain and suffering and $8 million for the family's loss of society. The defendants appealed asking for a remittitur or new trial on damages.

The First District affirmed. The record did not reflect the award exceeded the range of fair and reasonable compensation or was the result of passion or prejudice which shocked the judicial conscience. Consequently, the Court would not substitute its judgment for that of the jury. *Colella v. JMS Trucking Co.*, 403 Ill. App. 3d 82, 932 N.E.2d 1163, 342 Ill. Dec. 702 (1st Dist. 2010).

Letter Offering To Pay Judgment Stopped Accrual Of Interest

Following a jury trial, plaintiffs received a verdict of $39,100. Four months later, defense counsel wrote to plaintiff's attorney stating that it was prepared to pay the judgment plus costs, asked for information concerning two liens as well as plaintiff's tax identification number. There was no response to the letter, and plaintiff appealed.

Following affirmance of the verdict, defense counsel again wrote to plaintiff offering to pay the judgment, and again, there was no response. Finally, two years after the verdict, the defense counsel sent a check for the amount of the judgment plus the court filing fee. Plaintiff filed a motion seeking to obtain additional costs plus interest. The trial court held the defendant was obligated to pay interest on the judgment from the date it was rendered until the offer to pay four months later. Plaintiff appealed contending interest should accrue from the time of verdict until payment two years later.

The First District affirmed. A court has no discretion concerning whether interest should be paid. However, it is up to the trial judge, as a question of fact, as to when an appropriate tender of payment was made. The court determined the letter four months after the verdict was a sufficient tender and terminated the defendant's obligation to pay further interest. *Poliszczuk v. Winkler*, 2011 IL App (1st) 101847 (12/9/11).

CONTRIBUTION AND INDEMNITY

Defendant's Attempt To Preserve Contribution Rights Against Plaintiff's Employer Defeated When Employer Waives Its Workers' Compensation Lien

Plaintiff was injured while working for McMackin Construction. He sued Weberpal Roofing, Inc. who then filed a third party action against McMackin Construction. Plaintiff then settled with the original defendant for $450,000 and signed a release which provided that it "in no way releases McMackin Construction" from any third party contribution claim. McMackin then waived its workers' compensation lien of $134,797.27

and obtained dismissal of the third party action. The original defendant appealed dismissal of its contribution claim.

The Second District affirmed. When the employer waived its lien, the original defendant's right of contribution was extinguished pursuant to *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991). The defendant's attempt to preserve its right to seek contribution in the release had no effect on the employer's right to extinguish its liability by waiving the workers' compensation lien. *McMackin v. Weberpal Roofing, Inc.*, 2011 IL App (2d) 100461 (10/17/11).

SETTLEMENTS AND RELEASES

Covenant Not To Enforce Judgment Against Trucking Company Barred Vicarious Liability Claim Against Its Customer

Plaintiff was injured as a result of negligence by a trucking company's driver. He sued the delivery company, its driver and a furniture company for whom the trucking company was making a delivery. The driver and trucking company's insurer settled with plaintiff under a covenant not to enforce a judgment against the insureds. It also provided that nothing in the covenant barred plaintiff from executing against the furniture company or its insurance carrier. The trial court then dismissed plaintiff's claim against the furniture company holding settlement with the driver and the trucking company barred any claim based upon agency against the furniture company.

The First District affirmed. The furniture company's liability was based solely upon *respondeat superior*. Illinois has recognized that covenants not to enforce judgments are settlements under the Contribution Act. As any settlement between an agent and the plaintiff must extinguish the principal's vicarious liability, the trial court properly dismissed the complaint against the furniture company. *Gibbs v. Top Gun Delivery*, 399 Ill. App. 3d 765, 928 N.E.2d 503, 340 Ill. Dec. 405 (1st Dist. 2010).

Court Orders Settlement Enforced

Plaintiff filed suit alleging defendant failed to make required payments under a number of promissory notes amounting to $95,699.77 plus interest. Defense counsel sent a letter to plaintiff's attorney stating defendant would agree to make a lump sum payment of $45,000 in settlement. Plaintiff's attorney responded that plaintiff "has agreed to accept" the offer. Defense counsel subsequently wrote a letter relating that defendant had a substantial change in her financial condition and now only had $35,000 to settle the case. Plaintiff filed a motion to enforce the settlement, and the defendant asserted the parties had not reached an agreement because the time of payment and other terms were not established. The trial court ordered the settlement to be enforced.

The First District affirmed. A contract will not be unenforceable solely by the absence of a term specifying the time at which an obligation is to be performed. Under those circumstances, a court will imply a reasonable time for performance. *Marblehead v. Ribbeck*, 2011 IL App (1st) 100283 (8/10/11).

Exculpatory Release Signed By Plaintiff As A Condition For Participation In A Salvation Army Rehabilitation Program Barred The Personal Injury Claim Following A Vehicle Accident

As a condition of being permitted to participate in a Salvation Army Alcohol Rehabilitation Program, plaintiff signed an agreement protecting The Salvation Army "from any and all liability" in connection with his participation. Plaintiff was injured while riding as a passenger in a Salvation Army-owned vehicle driven by a Salvation Army employee. The trial court granted summary judgment for The Salvation Army holding the exculpatory clause was a complete bar to plaintiff's claim.

The First District affirmed. It rejected plaintiff's claim that the exculpatory clause was against public policy because of the disparity and bargaining power between plaintiff and The Salvation Army. Plaintiff was not required to enter the program and could have chosen not to agree to the terms of the agreement. Instead, he voluntarily agreed to the requirements and became a ben-

eficiary of the program. *Johnson v. The Salvation Army*, 2011 IL App (1st) 103323 (8/12/11).

PRODUCT LIABILITY

Learned Intermediary Doctrine Protects Drug Manufacturer

Plaintiff tested positive for Hepatitis C and was referred to a physician specializing in liver and digestive tract diseases. The doctor prescribed a combination drug manufactured by the defendant. The doctor was unaware one of the side effects could be blindness and never advised the patient of that risk. However, a package insert listed a number of adverse side effects including "retinal hemorrhages in cotton wool spots." Neither plaintiff nor his wife understood the package insert warned of blindness. He subsequently sustained optic nerve damage and permanent vision loss. The trial court granted the defendant summary judgment on strict liability and negligence claims.

The First District affirmed. Relying upon earlier decisions, the Court held a manufacturer fulfilled its duty to warn under Illinois by providing adequate warning to the physician. Imposing a duty to warn on the manufacturer in this case would interject the manufacturer into the plaintiff's relationship with his physician. The duty to warn of the dangers of prescription drugs is owed to the physician, and therefore, the adequacy of the warning must be judged by whether it sufficiently apprises physicians of the risks in using the drug. *Hernandez v. Schering Corp.*, 2011 IL App (1st) 093306 (9/30/11).

Summary Judgment Proper Where Plaintiff Fails To Have Expert Testimony In Defective Design Claim Against Auto Manufacturer

Plaintiffs were injured while riding in a 1993 Ford Explorer which was struck by another vehicle and rolled over. They claimed the auto was defective because its design rendered it unstable. Plaintiff did not retain an expert witness and summary judgment was entered in favor of the defendant. Plaintiffs asserted that testimony by an engineer would be necessary on a risk-utility approach but contended jurors could find in their own experience evidence necessary for the consumer expectation test.

The Seventh Circuit affirmed. Expert evidence is necessary to establish a complex product's unreasonable dangerousness through a risk utility approach as well as through a consumer expectations approach. Because consumer expectations are just one factor in the inquiry of whether a product is reasonably dangerous, a jury unassisted by expert testimony would have to rely upon speculation. *Show v. Ford Motor Co.*, 659 F.3d 584 (7th Cir. 2011).

IMMUNITY

Recreational Purposes Immunity Protected City And Park District From Liability For Fall On Sidewalk Near A Park

Plaintiff slipped and fell on ice while walking on a sidewalk immediately adjacent to a park. She sued the Village and Park District alleging negligence and wilful and wanton misconduct. The trial court dismissed the complaint holding the recreational purposes immunity of the Local Government Tort Immunity Act applied barring negligence claims, and neither defendant was guilty of wilful and wanton misconduct.

The Second District affirmed. Although the sidewalk was not within the park, it provided access to the park thereby increasing the park's usefulness and therefore the Act applied. The Court further held the allegations of the complaint did not constitute wilful and wanton misconduct. *Callahan v. Village of Clarendon Hills*, 40 Ill. App. 3d 287, 929 N.E.2d 61, 340 Ill. Dec. 757 (2d Dist. 2010).

Park District Entitled To Immunity When Minor Child Was Injured On A Seesaw

A park district was sued to recover damages for injuries sustained by a minor girl who was playing on a seesaw. Apparently, a park district employee failed to discover a defect in the seesaw during his regularly scheduled inspections. However, the trial court held that did not

constitute wilful and wanton misconduct and entered summary judgment in favor of the park district.

The First District affirmed. It was undisputed the injury occurred on property intended for recreational use which protects government entities from liability except for wilful and wanton misconduct. At most, the conduct of the park district employee in failing to discover the defect in the seesaw was negligent. *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235, 944 N.E.2d 884, 348 Ill. Dec. 643 (1st Dist. 2011).

PREMISES LIABILITY

Summary Judgment Affirmed Where Residential Property Owner Did Not Appropriate City Parkway For Their Own Use

Plaintiff was the co-owner of a moving company retained by the defendants to move belongings from a moving van into their home. She injured her foot when she fell on a walkway that straddled a city-owned parkway in front of the owner's home. As the area was owned by the City and the defendants did not use the area to the exclusion of others, summary judgment was entered in their favor holding they owed no duty to plaintiff.

The First District affirmed. Although a private landowner owes a duty of care to provide a reasonably safe means of ingress and egress from his property, there is no duty to ensure the safe condition of a public sidewalk or parkway abutting that property. While an abutting landowner may be held responsible for a condition of a public sidewalk or parkway if he assumes control of it for his own purposes, there was no evidence the defendants did so in the present case. *Gilmore v. Powers*, 403 Ill. App. 3d 930, 934 N.E.2d 564, 343 Ill. Dec. 240 (1st Dist. 2010).

Distraction Exception Rule Not Applicable Following Fall Due To Open And Obvious Gap In Concrete

Plaintiff was a tenant in defendant's apartment complex who fell while carrying two bags of groceries into her apartment. A heel of her boot got caught in a one-inch gap between concrete slabs of a sidewalk. She testified she knew the gap existed and was in plain view, but claims to have been distracted carrying the groceries. The trial court disagreed and entered summary judgment for the landlord.

The Fourth District affirmed. A possessor of land is not liable for injuries caused by a danger that is known or obvious. An exception to the rule is where someone would not discover what is obvious or forget about it. However, in the present case, the defendant did not create the distraction; but rather, plaintiff was apparently distracted by her own conduct of carrying bags of groceries. *Lake v. Related Management Company*, 403 Ill. App. 3d 409, 936 N.E.2d 704, 344 Ill. Dec. 175 (4th Dist. 2010).

Cleaning Snow From Apartment Stairway On Prior Occasions Did Not Create Continuing Duty To Remove A Natural Accumulation

Plaintiff provided workers' compensation coverage for its insured who had an employee that was injured when she slipped and fell on a rear apartment staircase covered with snow and ice. It is alleged the defendants were negligent in failing to remove snow and ice from the premises and as a result, their insured's employee was injured. It contended that the defendants had removed snow from the staircase over a period of years prior to the incident, and therefore, voluntarily assumed a duty to keep the premises free of ice and snow. A contract between the defendant property management company and a snow removal contractor required removal of snow and ice from the sidewalks and parking area, but not the staircase where the employee fell. The trial court granted the defendants summary judgment.

The Second District affirmed. It rejected plaintiff's claim that the contractual obligation to keep "sidewalks" encompassed staircases. The fact that the defendants had cleaned staircases on earlier occasions did not create a continuing duty to remove natural accumulations. *Claimsone v. Professional Property Management, LLC*, 2011 IL App (2d) 101115 (9/12/11).

Plaintiff Need Only Prove Ordinary Negligence Against Snow Removal Contractor

Plaintiff slipped and fell on a patch of ice in the parking lot of a building where she worked. She sued the snow removal contractor responsible for clearing the lot alleging it was negligent. At trial, the court instructed the jury for law applicable to owner/occupiers, rather than contractors, which resulted in a defense verdict.

The First District reversed. In her deposition, plaintiff said she slipped on ice that appeared to have melted from snow piled in the middle of the parking lot by the defendant. The Court noted that for the defendant to be an owner/occupier of land, it must occupy or possess the land with the intent to control it. As it was a snow removal contractor rather than one in control of the property, plaintiff only had to establish ordinary negligence. *Williams v. Sebert Landscape Co.*, First Dist. Docket No. 1-10-1794 (3/8/11).

Owner And Manager Of Apartment Complex Did Not Voluntarily Undertake To Provide Security Measures And Therefore Were Not Liable For Attack

Plaintiff was injured in an attack by an unknown assailant at an apartment complex owned by a defendant and managed by a co-defendant. There was no evidence the owner or manager undertook to provide security measures and therefore, they would not be liable. Summary judgment was entered in their favor.

The First District affirmed. Generally, a landowner has no duty to protect others from criminal activities by third persons. Under some limited circumstances, a duty can exist, but the relationship between a landlord and tenant is not one that would impose a duty to protect against the criminal acts of others. Nor did the landlord or building manager voluntarily undertake to provide security measures which could potentially make it liable if that was negligently done. *Sanchez v. Wilmette Real Estate & Mgmt.*, 404 Ill. App. 3d 54, 934 N.E.2d 1029, 343 Ill. Dec. 426 (1st Dist. 2010).

Shopping Mall Operator Obtained Summary Judgment When Plaintiff Cannot Establish Actual Or Constructive Knowledge Of Foreign Substance On Floor

Plaintiff worked as a sales person at a department store in an indoor shopping mall. During a break, she walked across the lower level of the mall when she slipped and fell. In her deposition, she said after falling, she had "some type of substance" on her hands and pants which smelled like a cleaning solution. It was a clear liquid. The defendant obtained summary judgment on the basis that plaintiff's claim amounted to nothing more than speculation that her fall was caused by a liquid substance of which the defendant had actual or constructive knowledge.

The First District affirmed. The issue on appeal was whether there was evidence that gave rise to a reasonable inference that the liquid substance on the floor was tied to the defendant mall operator. The Court concluded there was no evidence that the liquid came from cleaning people working for the mall nor that the defendant had actual knowledge of its presence. Further, there was no constructive notice as there was no evidence showing the length of time the liquid substance was on the floor. *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919 (3/16/12).

No Duty To Warn Teenage Diver Of Shallow Depth Of Lake

Plaintiff dove head first from a boat into a shallow area of a lake about 400 feet from shore and became paralyzed when his head struck the lake bottom. His Complaint alleged the defendant had a duty to warn boaters and swimmers of the risk of diving into shallow water far from the shore where the water was only three feet deep. The defendants moved to dismiss the case on the basis that the risk of diving into water was open and obvious, and therefore, they owed no duty to plaintiff. The trial court dismissed plaintiff's Second Amended Complaint.

The Second District affirmed. A condition is open and obvious where a reasonable person exercising ordinary care would recognize both the condition and the risk. Common open and obvious condi-

tions include fire, height, and bodies of water. It should be known that natural lakes are of uneven depth and can have fluctuating water levels at various points. Consequently, the Court concluded the open and obvious doctrine applied and no duty existed. *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 1009481 (3/15/12).

SPORTS AND RECREATION

Release Executed By Tour Participant Applied To Fall From Segway

Plaintiff and her son signed up for a segway tour of Chicago. Prior to the tour, she signed an exculpatory release which included language recognizing hazards and risks arising from irregular road and pavement surfaces. During the tour, she rode her segway onto a grassy hill where she fell and was injured. In her deposition, she admitted she read and understood the release before signing it. The trial court entered summary judgment for the defendant.

The First District affirmed. In the release, plaintiff accepted the risk she could fall and accepted the risk of riding on irregular roads and pavement surfaces. There was no special relationship between the plaintiff and the defendant which prevented the Court from enforcing the release, and summary judgment was properly entered. *Hamer v. City Segway Tours of Chicago LLC*, 402 Ill. App. 3d 42, 930 N.E.2d 578, 341 Ill. Dec. 368 (1st Dist. 2010).

Recreational Use Act Provided Baseball Association And Coach With Immunity From Negligence Suit Of Spectator Hit By Ball

A spectator at a child's baseball game was hit by a baseball thrown by a coach's 11-year-old son who was warming up for the next game. The Association was a not-for-profit corporation run by unpaid volunteers. It paid a local park district $100 per year and built fences, dugouts, scorer's, booth, installed light poles and maintained the fields over the years. Players paid a $35 sign-up fee but spectators were admitted without charge. The trial court directed a verdict in favor of the defendant Association and its coach based upon the immunity provisions of the Recreational Use of Land and Water Areas Act.

The Fifth District affirmed. Under the Act, owners are defined to include a tenant, lessee, occupant or other person in control of the premises. The Association was a lessee of the park district and, therefore, was protected. The Court noted the players were not charged an admission fee to come onto the land but were charged to play in the baseball league. The Act protects landowners except for wilful and wanton misconduct or where the owner charges a fee for people to go onto the land. *Vaughn v. Barton*, 402 Ill. App. 3d 1135, 933 N.E.2d 355, 342 Ill. Dec. 769 (5th Dist. 2010).

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

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