HEYL ROYSTER

A CENTURY OF SERVICE

HEYL, ROYSTER, VOELKER & ALLEN • 1910-2010

Ladies and Gentlemen:

Enclosed is the latest edition of our *Quarterly Review of Recent Decisions*, edited by Rex Linder. We trust that you will find this helpful in your day-to-day handling of Illinois claims.

We are very proud to announce three new partners with the firm: **Mark Ludolph** in the Peoria office, and **Toney Tomaso** and **Jay Znaniecki** in the Urbana office.

After graduating from Eastern Illinois University *summa cum laude*, Mark Ludolph received his law degree in 1997 from the University of Illinois. Mark has developed a practice representing creditors in bankruptcy proceedings and owners and contractors in mechanic's lien litigation as an outgrowth of his commercial litigation experience. In addition, Mark has represented clients in product liability and toxic tort litigation and physicians in professional liability matters.

Toney Tomaso received his undergraduate degree from the University of Illinois and his law degree from Louisiana State University in 1995. He primarily defends employers in workers' compensation and third party claims. He has successfully defended hundreds of workers' compensation claims before various arbitrators throughout the State of Illinois, as well as before all three panels of the Illinois Workers' Compensation Commission. Toney has also defended other types of civil litigation, including toxic tort and asbestos cases.

Jay Znaniecki practiced in the field of general dentistry for 11 years prior to attending law school. He received his law degree (*summa cum laude*) from the University of Illinois in 1997 where he had previously received his B.S. and Doctor of Dental Surgery. His practice focus is professional liability, where he has been involved in the defense of medical, dental and long-term care malpractice claims. Jay also represents dentists in disciplinary matters brought by the Illinois Department of Professional Regulation, and has represented general dentists in the purchase and incorporation of their dental practices.

With their diverse experience and talents, we are confident that Mark, Toney and Jay will continue to provide leadership and add to the quality and depth of the legal services which Heyl Royster provides to our clients.

In May, more than 300 clients and friends of the firm attended our 25th Annual Claims Handling Seminars in Bloomington, Illinois. We thank those of you who joined us for what we hope was an informative and entertaining afternoon.

For those of you who were unable to attend, we invite you to visit the "Resources" section of our web site at www.heylroyster.com to access the materials from both the casualty and workers' compensation seminars. If you have any questions regarding the materials, we invite you to contact the author of the topic or me.

We will be providing our newsletter exclusively via e-mail in the near future. Please visit the "Resources" section of our web site at www.heylroyster.com to provide accurate contact information.

As always, if you have further questions or concerns, please e-mail or phone me or Calista Reed at creed@heylroyster.com.

Very truly yours,

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QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Spring 2010

INSURANCE

Statute Requiring Insurance Policies to Contain Omnibus Clause Did Not Require Coverage be Extended to Persons Using Auto Rented by Insured

State Farm filed a declaratory judgment action seeking a determination that it had no duty to defend or indemnify either the insured or an individual who drove an automobile rented by the insured. The rental car was a total loss after it rolled over while the driver was avoiding a deer. Enterprise sought recovery from State Farm as its insured originally rented the vehicle. State Farm denied coverage because its insured was not driving or occupying the rental car at the time of the accident. The trial court entered summary judgment for State Farm, holding the omnibus clause in its policy did not require it to provide coverage to the driver.

The First District Affirmed. The Court believed the legislature did not intend for the financial responsibility law to apply to rental vehicles. This was because the Illinois Vehicle Code has a separate chapter for rental vehicles which requires a level of insurance exceeding that required for individuals. Treating owned vehicles separate from rental vehicles indicated the legislature did not intend for the financial responsibility law to apply to rental cars. Therefore, the omnibus provision in State Farm's policy did not apply. S*tate Farm Mut. Auto Ins. Co. v. Enterprise Leasing Co.*, 386 Ill. App. 3d 945, 899 N.E.2d 408, 326 Ill. Dec. 191 (1st Dist. 2008).

Policy Providing Occupants With UM Coverage But Restricting UIM Coverage to Policyholder and Her Family Violated UIM Statute

The estate of a passenger killed in an auto accident brought an action seeking underinsured motorist benefits against the carrier of the vehicle in which the passenger was riding. In another action, the insurer filed a declaratory judgment action seeking a determination that a passenger was not entitled to UIM benefits. In one case, the carrier obtained summary judgment, and in the other, it lost. Both cases were consolidated for appeal.

The First District held that the definition of "insured" in the policies, which included occupants for purposes of uninsured motorist coverage but restricted under-insured motorist coverage to the policyholder or a family member, violated the UIM statute. Where insurance coverage is mandated by law, a provision in an insurance policy that conflicts with that law will be deemed void. To adopt the carrier's argument would yield an absurd result differentiating who would be an insured under UM and UIM coverage. *Schultz v. Illinois Farmers Ins. Co.*, 387 Ill. App. 3d 622, 901 N.E.2d 957, 327 Ill. Dec. 224 (1st Dist. 2009).

Insurer Owed No Duty to Defend When Insurer Provided Written Notice of Defamation Suit Two Months Before Trial Was Scheduled to Start

The defendant was sued for defamation. However, the defendant did not notify its insurance carrier for 27 months thereafter, which was two months before trial was scheduled to start. West American filed the present declaratory judgment action seeking a determination that it owed no duty to defend and indemnify due to the insured's failure to give "written notice of the claim or suit as soon as practicable." As there was some evidence the carrier had verbal notice of the claim, the trial court held the carrier had a duty to defend and indemnify.

The Third District reversed. The insured did not provide written notice as soon as practical as required by the policy, and therefore, the carrier had no duty to defend or indemnify. Even if the carrier had actual notice of the action, that did not trump the contractual requirement to give written notice. Insurance policy notice provisions impose valid prerequisites to insurance coverage. *West American Ins. Co. v. Yorkville*

National Bank, 388 Ill. App. 3d 769, 902 N.E.2d 1275, 327 Ill. Dec. 889 (3d Dist. 2009).

Homeowner Policy Exclusion For Intentional Conduct Applied When Insured Struck Another With a Steel Pipe

A homeowner's insurer brought a declaratory judgment action seeking a determination it did not owe a duty to defend the insured in an underlying lawsuit in which he was alleged to have committed intentional torts of assault, battery and intentional infliction of emotional distress. The policy contained an exclusion for bodily injury "expected or intended from the standpoint of the insured." Although the insured contended he acted in self defense, the trial court entered summary judgment for the homeowner's carrier.

The Fifth District affirmed. Although the Complaint alleged negligence, the Court could not reasonably construe the facts alleged in the Complaint to constitute negligence. Each allegation alleged intentional conduct that the insured should have expected or intended and thus were excluded by the policy. *Pekin Ins. Co. v. Wilson*, 391 Ill. App. 3d 505, 909 N.E.2d 379, 330 Ill. Dec. 666 (5th Dist. 2009).

Tenant Was Not an Insured Under Landlord's Liability Policy

The tenant was a college student whose mother fell down steps that were allegedly poorly lighted. The mother filed suit against the landlord who in turn filed a third party action against the tenant. The tenant tendered her defense to the landlord's insurance carrier contending she was a co-insured under the policy. The carrier denied the tenant was an insured since she was not named on the declarations page and did not otherwise qualify as an insured under the policy definitions. The trial court granted summary judgment in favor of the tenant.

The Fifth District reversed. The policy did not include the landlord's tenants within the definition of an insured. As there was no ambiguity with respect to the policy wording, the tenant was not an insured under the plain and ordinary meaning of the terms. Plaintiff relied upon case authority involving fire losses holding a tenant could be a co-insured. The Court noted the issue in the present case did not involve fire insurance, but rather a carrier's "agreement to cover a loss resulting from the insured's liability to a third party." *Hacker v. Shelter Ins. Co.*, 388 Ill. App. 3d 386, 902 N.E.2d 188, 327 Ill. Dec. 433 (5th Dist. 2009).

Exclusion For Contractually Assumed Liabilities Enforced in Construction-Related Accident

The defendant general contractor subcontracted with plaintiff's insured. The subcontract required the purchase of a CGL policy naming the general contractor as an additional insured. The policy also contained an exclusion for bodily injury the insured was obligated to pay "by reason of the assumption of liability in a contract or agreement." Two employees of the property owner were injured and received workers' compensation benefits. The property owner then sued the general contractor to recover its lien, and the contractor tendered the defense to the subcontractor's carrier because it was an additional insured. Based upon the exclusion, the carrier refused to defend, and it obtained summary judgment in this declaratory judgment action.

The First District affirmed holding the exclusion for contractually assumed liability applied. The general contractor agreed to indemnify the owner, which was an assumption of liability beyond merely accepting its pro rata share of the common liability. The general contractor would not be entitled to greater coverage than the primary insured. As the policy was clear and free from doubt, the exclusion applied. *American Family Mut. Ins. Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 909 N.E.2d 274, 330 Ill. Dec. 561 (1st Dist. 2009).

Additional Insured General Contractor Was Potentially Vicariously Liable For Named Insured's Conduct Triggering Duty to Defend

An insurer sought a declaratory judgment against a general contractor that was named as an additional insured on its policy. The named insured was another contractor who agreed to name the defendant as an additional insured. The policy language provided that coverage for an additional insured "only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation." The trial court ruled in favor of the additional in-

sured holding the carrier had a duty to defend a personal injury lawsuit by an injured worker.

The Second District affirmed. It noted coverage would exist if the general contractor could potentially be liable as a result of the named insured's acts or omissions. As the general contractor on the project, it had responsibility for overall supervision of the site and, consequently, could be exposed to vicarious liability for the acts or omissions of the named insured. *Pekin Ins. Co. v. Hallmark Homes, LLC*, 392 Ill. App. 3d 589, 912 N.E.2d 250, 332 Ill. Dec. 64 (2d Dist. 2009).

DAMAGES

Punitive Damages Not Available in Wrongful Death or Survival Act Claims

A pharmacist employed by the defendant misfilled a prescription for plaintiff's decedent. The jury believed this resulted in severe injury and death. It awarded compensatory damages of $6,351,107 and $25 million in punitive damages.

The First District affirmed the compensatory damages but vacated the punitive damage award. Plaintiff presented no convincing argument to persuade the Court to deviate from strong Illinois public policy and established law that a claim for punitive damages will not survive the death of the original plaintiff. Punitive damages will not survive unless they are specifically authorized by the legislature or there is a strong equitable reason for allowing them. *Marston v. Walgreen Co.*, 389 Ill. App. 3d 337, 907 N.E.2d 851, 330 Ill. Dec. 38 (1st Dist. 2009).

Jury Verdict for $100,000 Wrongful Death Damages For 34-Year-Old Mother and Wife Affirmed

Plaintiff's decedent had a long history of back pain and was treated with various pain medications by the defendant doctor. She died of acute intoxication of multiple medications which shut down her nervous system. She was 34 years old, a wife and mother. During closing arguments, defense counsel said that if liability was found, a fair verdict on damages would be a million dollars. The jury determined the damages were $100,000 and then reduced it by 50% for comparative fault.

The Fifth District affirmed. It is impossible to measure the propriety of damage awards under the Wrongful Death Act by comparison to other wrongful death cases because the awards are not subject to exact mathematical computations. The Court refused to substitute its judgment for that of the jury to determine the monetary value of the loss. The Court would not say the $100,000 award was manifestly inadequate. *Dobyns v. Chung*, No. 5-07-0568, 2010 WL 1055196, (5th Dist. Mar. 19, 2010).

Jury Allowed to Award Damages For The Value of Sick Time Used by Plaintiff

Plaintiff filed a medical malpractice lawsuit following post-operative complications after gall bladder surgery. Evidence indicated the plaintiff used accumulated sick time and therefore lost no income. However, the jury was instructed plaintiff could recover for the sick time he used. The jury returned a verdict for $200,000 including $7,000 for the value of lost benefits.

The Fifth District affirmed. A plaintiff is entitled to recover the full value of time lost from work without regard to benefits he may have received from his employer. The justification for this rule is that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts that may exist between the injured party and third persons. *Cummings v. Jha*, 394 Ill. App. 3d 439, 915 N.E.2d 908, 333 Ill. Dec. 837 (5th Dist. 2009).

Failure to Award Damages for Disability or Loss of Normal Life Affirmed Following Rear-End Accident

A 17-year-old boy and his 15-year-old sister were passengers in a car that was rear-ended by the defendant. The defendant confessed liability, and the jury awarded the boy $9,000 for past and future pain and suffering and medical expenses, but nothing for disability or loss of normal life. The jury awarded the girl $30,100 for pain and suffering and medical expenses, but nothing for disability or loss of normal life.

The First District affirmed. The determination of damages is a question of fact and is within the discretion of the jury. There was conflicting evidence between plaintiffs' treating doctors and the defense doctors as to the cause of ongoing

complaints by both plaintiffs. The record supported the jury's conclusion that neither plaintiff was disabled or would have a loss of normal life. It noted where evidence is contradicted or merely based on the subjective testimony of a plaintiff, a jury is free to disbelieve it. *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 899 N.E.2d 1115, 326 Ill. Dec. 464 (1st Dist. 2008).

JOINT TORTFEASORS

If Injuries Can be Apportioned Among Multiple Tortfeasors, They Are Not Joint And Severally Liable

Plaintiff was injured in two separate car accidents which occurred three months apart. In the first accident, she had an injury to her eyes and upper back. In the second accident, she had leg, back and shoulder pain, as well as problems with her eyes, and eventually had surgery. While the jury was deliberating, one of the defendants settled for $150,000. The jury returned a verdict against both defendants for $518,000 finding both of them equally responsible. The trial court entered judgment against the non-settling defendant for 50% of the verdict.

The First District affirmed. It rejected plaintiff's argument that both defendants should be jointly and severally liable and that the non-settling defendant should pay the verdict less a setoff for the $150,000 paid by the settling defendant. The Court noted that when two or more persons produce a single indivisible injury by their concurrent negligence, they are jointly and severally liable. The existence of a single indivisible injury is necessary to establish joint and several liability. However, if plaintiff's injuries can be apportioned among multiple tortfeasors, then they are not jointly and severally liable. Plaintiff's contention that she was injured twice on the same part of her body did not transform two injuries into one. *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 909 N.E.2d 353, 330 Ill. Dec. 640 (1st Dist. 2009).

AUTOMOBILE

Proper For Jury to Know About Plaintiff's Prior Accidents and View Photos Showing Minimal Damage to Vehicles

Plaintiff sustained neck injuries after being rear-ended by the defendant's vehicle. Over plaintiff's objection, the defendant introduced evidence of pre-existing neck problems and photographs showing little damage to the vehicles. A defense verdict resulted.

The Fifth District affirmed. A prior injury or pre-existing condition may be relevant to negate causation, reduce damages or for impeachment. However, there should be expert evidence unless a lay person can readily understand the relationship between the prior injuries and the present complaints. Here plaintiff was under active treatment for neck problems at the time of the accident. Photographs showed minor damage to the defendant's vehicle and no damage to plaintiff's vehicle which was relevant to the nature and extent of plaintiff's injuries. *Ford v. Grizzle*, No. 5-08-0185, 2010 WL 572527 (5th Dist. Feb. 17, 2010).

No Special Circumstances Existed Which Would Impose a Duty on Roommates of an Allegedly Negligent Driver

Plaintiff was injured in an accident and alleged the roommates of the other driver were negligent in allowing the other driver to obtain access to the keys of a vehicle. The complaint alleged the other driver was a house guest without a permanent residence and a user of crack-cocaine. He stole the keys to one of the roommate's cars and was involved in the accident. The trial court dismissed the complaint.

The Third District affirmed. There was no duty to a third person injured by the defendant's stolen vehicle absent special circumstances that made the theft foreseeable. The allegation that the driver was a drug user did not establish a propensity for him to take the vehicle without permission. *Johnson v. Bishop*, 388 Ill. App. 3d 235, 902 N.E.2d 763, 327 Ill. Dec. 642 (3d Dist. 2009).

PRODUCT LIABILITY

Ammunition Seller Not Liable When Purchaser Commits Suicide

Decedent's husband, individually and as administrator of her estate, sued Wal-Mart alleging it was negligent in selling bullets to his wife when she did not have a valid Firearm Owner's Identification Card.

(FOID) The complaint alleged the decedent would have been unable to obtain an FOID card because she had been a mental patient within five years of the incident. After purchasing the bullets, she used them to commit suicide. The District Court entered summary judgment for the defendant.

The Seventh Circuit affirmed. Traditionally, Illinois courts have found suicide to be an unforeseeable act that breaks the chain of causation. Accepting plaintiff's argument would potentially make every murder or violent crime committed with a gun purchased by someone without an FOID card impose liability on the retailer. Without explicit legislative dictate requiring such a strict liability regime, the Court concluded that could not have been the legislature's intent. *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439 (7th Cir. 2009).

Successor Corporation Not Liable for Predecessor's Actions

Plaintiff was injured when his right hand was caught in a printing press while at work. The defendant's predecessor sold the press to plaintiff's employer in 1992. The manufacturer went into bankruptcy, and the defendant purchased its assets in 2002, two years prior to the accident. The trial court granted summary judgment because the defendant neither designed nor manufactured the press, nor assumed the manufacturer's liabilities in the purchase agreement.

The First District affirmed. It noted the majority ownership of the defendant consisted of entities different from the manufacturer. The fact that the defendant continued to produce the same product lines and did business with the same customers did not create liability. Illinois has consistently rejected the product line approach to successor liability. *Diguilio v. Goss International Corp.*, 389 Ill. App. 3d 1052, 906 N.E.2d 1268, 329 Ill. Dec. 657 (1st Dist. 2009).

Defense Summary Judgment Appropriate Where Plaintiff's Expert Does Not Support Allegations in Complaint

Plaintiff filed a strict liability action against the manufacturer of a piece of equipment on which he was injured while working in a factory. The complaint alleged the machine was unreasonably dangerous because it did not have a proper safety guard, did not have a safety gate nor a safety device to prevent injury to the operator. When plaintiff's sole expert was deposed, he did not advance any of those theories but, under a mistaken assumption of fact, opined that the machine was unsafe because it required an operator to be inside of the machine to determine if adjustments to the cutter bar were effective. He admitted in his deposition that if his understanding was incorrect, the machine was not defective. Based thereon, the trial court granted summary judgment.

The Fourth Circuit affirmed. It noted the machine was a specialized piece of equipment whose design and manufacture involved specialized knowledge. Therefore, plaintiff could not establish breach of the standard of care without expert testimony. As plaintiff did not have an expert opinion supporting any of the three specific allegations of design defect, summary judgment was appropriate. *Henry v. Panasonic Factory Automation Co.*, 396 Ill. App. 3d 321, 917 N.E.2d 1086, 335 Ill. Dec. 22 (4th Dist. 2009).

PREMISES LIABILITY

Customer Who Slipped And Fell on Drug Store Floor Failed to Establish Constructive Knowledge by Defendant

Plaintiff went to defendant's drug store on a winter morning. While inside, he slipped and fell. In his deposition, he stated he assumed the floor was wet because of the presence of an unknown substance, but he did not know the color, size, length or texture of the substance that caused him to fall. He also testified that there were no signs posted warning customers of the dangerous condition. He noticed after the fall his clothes were wet. The defendant obtained summary judgment with the trial court ruling that plaintiff failed to establish the defendant knew or should have known of the liquid before his fall, and therefore, it did not have constructive knowledge of the alleged dangerous condition.

The First District affirmed. The Court noted there was no evidence as to the amount of time any liquid may have been on the floor. It also noted the store manager thought the cause of plaintiff's fall may have been his wet shoes from snow outside. It noted the existence of

one fact cannot be inferred when a contrary fact can be inferred with equal certainty from the same set of facts. Absent evidence of liquid on the floor prior to plaintiff's fall, summary judgment was appropriate. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 901 N.E.2d 973, 327 Ill. Dec. 240 (1st Dist. 2009).

Laundromat Owed No Duty to Clean up Water Tracked in by Customers

Plaintiff was a customer at defendant's Laundromat. It was drizzling outside, and as plaintiff walked into the Laundromat, she fell on a puddle of water as she stepped off a mat onto the bare floor. Plaintiff testified it was her understanding the wetness came from outside and that the puddle of water was there for 60 to 90 minutes without the defendant attempting to dry the area. Summary judgment was entered for the defendant.

The First District affirmed. While business owners have a duty to provide reasonably safe means of ingress and egress, they do not have a duty to remove natural accumulations of ice, snow or water that is tracked inside. It is irrelevant whether the natural accumulation remained on the property for an unreasonable length of time. The fact that the defendant placed a floor mat did not create liability as there was no evidence the mat was in bad shape. *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 914 N.E.2d 632, 333 Ill. Dec. 213 (1st Dist. 2009).

Store Not Liable For Failing to Help Plaintiff Load Purchases Into Her Truck

After purchasing landscaping materials from defendant's store, plaintiff asked a cashier for help loading. She was directed to a secured area where she was to be helped. However, after waiting 15 minutes, plaintiff decided to load the merchandise herself. In attempting to open her tailgate, she fell backwards and was injured. The trial court entered summary judgment for the defendant holding the cause of plaintiff's injury was the defective tailgate of her truck and not the breach of a duty by a defendant.

The Third District affirmed. While a voluntary undertaking can establish a duty, a plaintiff must also establish proximate causation. The defendant accepted the task to lower plaintiff's tailgate and load the truck, but failed to perform the undertaking within 15 minutes. Plaintiff knew defendant failed to perform the task and decided to do it herself and suffered injuries. Therefore, there was no reliance upon the defendant's promise, and summary judgment was proper. *Day v. Menard, Inc.*, 386 Ill. App. 3d 681, 899 N.E.2d 501, 326 Ill. Dec. 284 (3d Dist. 2008).

Mall Owner and Contractor Not Liable for Fall of Elderly Person Suffering From Tremors, Macular Degeneration and History of Falling

Decedent's son filed a negligence action against a commercial strip mall owner and construction company after his elderly mother fell in a parking lot under construction. Through depositions, it was established that the decedent suffered from tremors affecting her balance and ability to walk, macular degeneration and had a history of falling. The trial court entered summary judgment for the defendants holding plaintiff could not establish conduct by the defendants was the proximate cause of plaintiff's fall and subsequent death 11 days later.

The Third District affirmed. Proximate cause cannot be established by speculation, surmise or conjecture. No one saw the decedent fall, and the only thing she said afterwards was that she noticed a high step, reached for a pole and fell. This was insufficient to determine whether she lost her balance due to one of her medical conditions or to rule out that she tripped or slipped for any one of the other countless reasons people fall. If all a plaintiff can establish was that the decedent's injuries were possibly related to the defendant's negligence, causation is not established. *Majetich v. P. T. Ferro Construction Co*., 389 Ill. App. 3d 220, 906 N.E.2d 713, 329 Ill. Dec. 515 (3d Dist. 2009).

Decedent's Careful Habits Did Not Establish Proximate Cause for Slip and Fall on Staircase

The decedent's wife brought a negligence wrongful death action against her landlord for fatal injuries her husband sustained in a slip-and-fall accident on a staircase. The decedent was a 60-year-old retired paramedic who had lived at the property for 8½ years. There were no witnesses to the fall. The trial court entered summary judgment

for the defendant landlord holding there was no evidence establishing proximate cause.

The First District affirmed. An accident does not support an inference of negligence, and without affirmative proof of causation, plaintiff cannot satisfy the burden of proof. Proximate cause is established when there is reasonable certainty that the defendant's acts or omissions caused the injury. The fact that plaintiff had an expert who would testify the steps failed to meet building codes and were dangerous did not mean that was the cause of the fall. Evidence of the decedent's careful habits did not establish proximate cause. *Strutz v. Vicere*, 389 Ill. App. 3d 676, 906 N.E.2d 1261, 329 Ill. Dec. 650 (1st Dist. 2009).

Bar Did Not Breach Duty to Provide Invitees With Safe Means of Ingress And Egress

Plaintiff went to defendant's bar to celebrate his 21st birthday with friends. After consuming 18 mixed drinks and some beer, friends tried to get him to leave. They took him outside behind the bar where he fell on uneven ground trying to re-enter the tavern. The area was lighted only by two beer signs. The trial court entered summary judgment for the defendant holding it had no duty to provide lighting or warnings of the drop-off as the area was not intended as a means of ingress and egress to the bar.

The Third District affirmed. The bar provided a safe means of ingress and egress through the front door. The fact that plaintiff went beyond the prescribed means of ingress and egress did not expand the defendant's duty. The Court also noted that plaintiff had no recollection of the incident and therefore could not testify that the drop-off caused his fall. *Rogers v. Matanda, Inc.*, 393 Ill. App. 3d 521, 913 N.E.2d 15, 332 Ill. Dec. 420 (3d Dist. 2009).

Comparative Negligence Does Not Apply to Animal Control Act

A 7-year-old girl was kicked in the back by a horse at defendant's farm. Suit was filed on her behalf under the Animal Control Act (510 ILCS 5/16) and the Family Expense Act (750 ILCS 65/15) against the owners. At trial, the jury was instructed in both negligence and comparative negligence. It returned a defense verdict.

The First District reversed. It noted the Animal Control Act did not specifically provide for a comparative negligence defense. By statute, comparative negligence applies to actions "based on negligence" or product liability based on strict liability." As it did not specifically mention the Animal Control Act, comparative negligence was not available. *Johnson v. Johnson*, 386 Ill. App. 3d 522, 898 N.E.2d 145, 325 Ill. Dec. 412 (1st Dist. 2008).

CONSTRUCTION

General Contractor Retained Sufficient Control of Crane to Make it Potentially Liable for Injury to Subcontractor's Employee

Plaintiff was an employee of a subcontractor who sustained a herniated disc lifting heavy kegs of bolts unloading a crane basket. The construction contract provided the general contractor would provide the crane and control its use. The general contractor obtained summary judgment with the court finding it did not exercise sufficient control to render it potentially liable for injuries to the subcontractor's employee.

The First District reversed. It held the general contractor's control over the use of the crane raised a fact question precluding summary judgment. Generally, one who employs an independent contractor is not liable for injuries to the independent contractor's employees. The general contractor could have directed that the basket of bolts plaintiff was lifting not be done manually. *Garcia v. Wooton Construction, Ltd.*, 387 Ill. App. 3d 497, 900 N.E.2d 726, 326 Ill. Dec. 829 (1st Dist. 2008).

EMPLOYMENT

Employer Strictly Liable for Co-Worker's Sexual Harassment

Plaintiff was a records clerk with a sheriff's department and filed a sexual harassment charge against the department and a sergeant. The sergeant was a supervisor, but not plaintiff's supervisor. The Human Rights Commission found the department was strictly liable for the harassment because the sergeant was a supervisory employee. The Appellate Court reversed asserting the department took reasonable corrective measures upon learning of

the harassment by suspending him for four days without pay and issuing a reprimand.

The Supreme Court held the department was strictly liable under the Human Rights Act for a co-worker's sexual harassment of an employee regardless of whether it was aware of the harassment or took measures to correct it. It did not matter that the co-worker was not the employee's supervisor where the co-worker was in a supervisory position. The dissent disagreed, holding the department should not be held vicariously liable because the sergeant was not in a supervisory position with respect to the harassed employee. *Sangamon County Sheriff's Department v. Illinois Human Rights Commission,* 233 Ill. 2d 125, 908 N.E.2d 39, 330 Ill. Dec. 187 (2009).

Release of Workers' Comp Claim Not Enforceable Without Industrial Commission Approval

While in the scope of his employment driving a company truck, plaintiff was injured in a vehicle accident. His employer did not have workers' compensation insurance, and the other driver was uninsured. Plaintiff filed a workers' compensation claim and also made an underinsured motorist claim against his employer's policy. The UIM claim was settled for $800,000 and plaintiff signed a "Release of All Claims." The employer filed the present case alleging plaintiff breached the release by continuing to pursue the workers' compensation claim. Plaintiff counterclaimed alleging he had been fraudulently induced to sign the release. The trial court entered summary judgment for the employer, but the decision was reversed by the Second District.

The Supreme Court held that even if the release was intended to apply to both the UIM claim and the workers' compensation claim, it would not be enforced to bar the workers' compensation claim. Section 23 of the Workers' Compensation Act provides that an employee cannot waive any of its provisions without approval of the Industrial Commission and that any settlement must be approved by the Commission. As the plaintiff's release was not approved by the Commission, it did not bar the workers' compensation claim. *Maxit, Inc. v. Van Cleve*, 231 Ill. 2d 229, 897 N.E.2d 745, 325 Ill. Dec. 206 (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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