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HEYL ROYSTER VOELKER & ALLEN

Spring/Summer 2008


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Ladies and Gentlemen,

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

With this edition, we are proud to highlight the excellent work of our Toxic Tort Practice Group which, at the present time, is particularly focused on the defense of asbestos claims. The group is led by partner **Robert H. "Barney" Shultz**. Other key practice leaders are partners **Kent Plotner** and **Mike Schag** who practice in the Edwardsville office; partners **Chris Larson**, **Lisa LaConte** and **Tobin Taylor** of the Peoria office; and partner **Drew Schilling** of the Rockford office. Our toxic tort team defends mass tort claims brought not only throughout Illinois (particularly focused in Madison County/Edwardsville in the St. Louis Metro-East area, and Cook County/Chicago in northeast Illinois), but in neighboring states as well.

We have two newly-named Heyl Royster partners in this group. One is **Drew Schilling**, who offices in Rockford and serves our toxic tort clients in northern Illinois. For nearly 20 years we have been appearing in Cook County/Chicago representing multiple clients at pre-trial hearings and trials. Our Rockford office supplements our long-standing representation of these clients from our Peoria location by providing an office within the "Greater Chicago Metropolitan area" while preserving the lower overhead (and thus lower fees) associated with downstate Illinois practice. Drew joined us a little over 2½ years ago after cutting his teeth in the toxic tort arena with the Hawkins, Parnell and Thackston firm in Dallas, Texas.

The other new partner is **Mike Schag** of our Edwardsville office. Mike spearheads our representation of a building products manufacturer, and he is also active in defending a national paint and coatings manufacturer and an aeronautical defense contractor. Mike joined our firm in 2004 from the Denver office of the McKenna, Long firm. Both Drew and Mike have now returned to their home state of Illinois – Drew was born and raised in Dixon, and Mike grew up and graduated from high school in Mattoon.

We also want to highlight two very recent Illinois appellate decisions successfully handled by our Toxic Tort and Appellate Practice groups. In *Berry v. Union Carbide*, the Fifth District appellate court affirmed the grant of summary judgment in our client's favor. The issue was whether the deceased plaintiff's discovery deposition could be used to defeat a summary judgment motion where the plaintiff died without giving an evidence deposition. The appellate court held that the discovery deposition was not admissible relying, in substantial part, upon the decision of *Longstreet v. Cottrell*, a case in which we represented the successful defendant in a non-toxic tort case involving a similar issue. A petition for leave to appeal to the Illinois Supreme Court is pending in this case.

The second recent appellate decision is *Cooney & Conway v. LaConte and Larson*. In that case, the First District appellate court reversed the Cook County presiding asbestos judge's order requiring our clients to respond to overbroad, standardized discovery requests. The degree to which two of our partners, Lisa LaConte and Chris Larson, advocated for our clients is noteworthy. Each refused to comply with the trial court's order and was held in "friendly contempt" of court so that the issue could be appealed. Their actions relieved our clients from an onerous discovery obligation at the pre-trial stage, rather than being forced to raise the issue on appeal following trial. Plaintiff has filed a petition for rehearing in this case.

As always, please know that we value and appreciate the opportunity to work with you. Enjoy your summer!

Very truly yours,

HEYL, ROYSTER, VOELKER & ALLEN

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An Illinois Law Firm

Quarterly Review Of Recent Decisions

Heyl Royster Voelker & Allen

Spring 2008

INSURANCE

Lower-Tiered Excess Insured Owed Duty of Good Faith to Higher-Tiered Excess Carrier

An elevator at a power plant dropped 15 floors injuring 23 boiler makers. The power plant operator filed a declaratory judgment action against several insurers seeking to resolve coverage issues. A higher-tiered excess insurer filed a counterclaim against a lower-tiered excess insurer for negligence and bad faith during settlement negotiations with the injured workers. The trial court dismissed the counterclaim because it felt the complaint did not allege the lower-tiered carrier could have settled within its policy limits and attempted to extend the duty to tender its policy limits for the benefit of a higher-tiered carrier.

The Fifth District reversed. It noted the complaint alleged the lower-tiered excess carrier controlled the settlement process. Given that allegation, the lower-tiered excess carrier could owe a duty to a higher-tiered excess carrier to act reasonably and in good faith because it had control over the litigation process. It was not necessary that the lower-tiered carrier be able to settle the matter within its own policy limits. *Central Illinois Public Service Co. v. Agricultural Ins. Co.*, 378 Ill. App. 3d 728, 880 N.E.2d 1172, 317 Ill. Dec. 180 (5th Dist. 2008)

Subcontractor's Insurer Had Duty to Defend General Contractor Who Was an Additional Insured on a CGL Policy

A subcontractor's employee was injured and filed suit against the general contractor. The general contractor was named as an additional insured on the subcontractor's commercial general liability policy. It provided coverage for work done by the subcontractor for the contractor, but contained an exclusion for professional services that might be rendered by the additional insured. The CGL carrier filed the present declaratory judgment action, and the trial court ruled in its favor holding it had no duty to defend and indemnify the general contractor because of an exclusion for professional services.

The First District reversed. The allegations of the complaint were that the worker was injured in the furtherance of the subcontractor's work for the general contractor and consequently its carrier had a duty to defend unless the professional services exclusion applied. It determined the language of the exclusion applied to architects, engineers or surveyors rather than a general contractor, and therefore the CGL carrier had a duty to defend its additional insured. *State Auto. Mut. Ins. Co. v. Habitat Const. Co.,* 377 Ill. App. 3d 281, 875 N.E.2d 1159, 314 Ill. Dec. 872 (1st Dist. 2007)

Additional Insured Endorsement Limited Liability Solely to Fault of Plaintiff's Employer

After falling from a ladder, a subcontractor's employee filed suit against the property owner. The property owner tendered its defense to plaintiff's employer pursuant to an additional insured endorsement which provided the owner would be insured "only with respect to liability incurred solely as a result" of the employer's negligence. After declining coverage, the subcontractor's insurer instituted the present declaratory judgment action. The trial court held the carrier had a duty to defend the property owner.

The First District reversed. The duty to defend required an analysis of the allegations of the complaint and the policy language. It concluded there was nothing in the underlying complaint to suggest that the employer's actions were "solely" to blame for the accident. As negligence was directly alleged against the property owner, coverage was not available. *Pekin Ins. Co. v. United Parcel Service*, No. 1-06-2254, 2008 WL 642598 (1st Dist. March 7, 2008)

Home Builder's CGL Policy Did Not Provide Coverage As an Additional Insured for Property Owner's Alleged Negligence

The defendant contracted with a general contractor to build a residence. The general contractor named the owner as an additional insured. A subcontractor's employee was injured and sued a number of defendants, including the property owner. The general contractor's carrier denied the owner a defense because the policy provided that the owner was "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 negligence of the additional insured. In this declaratory judgment action, the trial court entered summary judgment for the carrier holding it owed no duty to defend.

The First District affirmed. The policy language clearly provided coverage where liability was incurred solely as the result of an act or omission of the named insured and not for the additional insured's independent negligence. The injured worker's complaint alleged his accident was the result of the owner's negligence and therefore the subcontractor's carrier had no duty to defend. *Pekin Ins. Co. v. Beu*, 376 Ill. App. 3d 294, 876 N.E.2d 167, 315 Ill. Dec. 167 (1st Dist. 2007)

Fraud Exclusion Did Not Require Carrier to Prove Reasonable Reliance or Prejudice

The insured filed a fire loss claim against his homeowner's carrier. Coverage was denied based upon an exclusion voiding coverage where an insured "has intentionally concealed or misrepresented" a material fact "whether before or after a loss." At trial, the court refused a jury instruction from the insured which would have required evidence of common law fraud elements of reasonable reliance and prejudice or injury. The jury found the carrier proved the policy defense by clear and convincing evidence and ruled in its favor. The Fourth District affirmed.

The Supreme Court affirmed. Although the term "fraud" was used in the title of the exclusion, it was not found in the text. Nothing in the text purported to rely upon common law fraud definitions. It rejected the insured's argument that reading the exclusion against the insured required the court to add common law fraud elements into the policy when they were not specifically excluded. *Barth v. State Farm Fire & Cas. Co.*, No. 104378, 2008 WL 733879 (March 20, 2008)

"Owned But Not Insured" Clause Unambiguously Precluded UM Coverage When Insured Was Injured Using a Vehicle Covered Under Another Policy

The insured was injured while riding a motorcycle that was struck by a car driven by an uninsured motorist. The motorcycle was insured under a policy issued by Grinnell Mutual. The insured also owned three autos insured by Farmers. The Farmers' policy stated it did not provide UM coverage for injuries sustained while operating another vehicle which was not insured under its policy. The trial court granted summary judgment to Farmers in this declaratory judgment case.

The Second District affirmed. It noted the "owned but not insured" clause unambiguously precluded UM coverage when the insured was injured in an owned vehicle insured for UM coverage under another policy. The court noted the exclusion only becomes effective if the insured has other coverage available and therefore would be in the same position as if the other driver had been minimally insured. *Farmers Automobile Ins. Assoc. v. Rowland*, 883 N.E.2d 625, 318 Ill. Dec. 394 (2d Dist. 2008)

Uninsured Bicycle Was Not a Motor Vehicle Entitling Insured to UM Benefits

The insured was driving his son to preschool when a bicycle rider rode into his vehicle causing the passenger side window to shatter resulting in broken glass injuring his right eye. He made an uninsured motorist claim against his carrier who denied benefits. In a declaratory judgment action, the trial court ruled in favor of the carrier who held the bicycle rider was not considered an uninsured motorist.

The Third District affirmed. The Insurance Code did not define "motor vehicle" and consequently the court looked to the Vehicle Code. Its definition was a "vehicle which is self-propelled" and trolley cars not operated upon rails. As a bicycle would not have been included in that definition, the trial court properly ruled in favor of the carrier. It rejected the insured's public policy argument. *Standard Mut. Ins. Co. v. Rogers*, 884 N.E.2d 845 (3d Dist. 2008)

Employee/Motorist Entitled to Reduction of Set-Off Against UM Benefits Reflecting 25 Percent Paid to Workers' Compensation Attorney

While working at a funeral home, plaintiff was injured in an accident with an uninsured driver. He received workers' compensation benefits of $162,588.33. He then made a claim for uninsured motorist benefits under his employer's policy and an arbitrator awarded $250,000. The UM carrier submitted $87,412 to plaintiff claiming a credit for the full amount of the workers' compensation lien. Plaintiff filed the present declaratory judgment action alleging he was entitled to set off the statutory attorneys' fees in the workers' compensation claim, but the complaint was dismissed.

The Fifth District reversed. Although the policy provided coverage would be reduced by any sums recovered under workers' compensation law, there was no policy language on how to address the 25 percent statutory fee plaintiff paid to his attorney in the workers' compensation claim. Absent specific policy language, the court reasoned that plaintiff should be placed in the same position he would have been had the adverse driver been insured. Therefore, plaintiff was entitled to an additional $40,467 representing the workers' compensation attorneys' fees. *Taylor v. Pekin Ins. Co.,* 376 Ill. App. 3d 834, 876 N.E.2d 1048, 315 Ill. Dec. 458 (5th Dist. 2007)

No Duty to Defend Insured in Defamation Action Brought By Former Employees

Two former employees sued the insured for defamation and retaliatory discharge. The insured tendered its defense to its CGL and commercial umbrella carrier. The carrier filed a declaratory judgment action seeking a declaration it had no duty to defend the underlying cases because "employment related practices" were specifically excluded from their policies. The trial court ruled in favor of the carrier.

The First District affirmed. The alleged defamatory statement was that the workers were involved in fraudulent workers' compensation claims allegedly to justify termination of their employment. As this was related to the employment relationship it was excluded from coverage. *West Bend Mut. Ins. Co. v. Rosemont Exposition Services, Inc*., 378 Ill. App. 3d 478, 880 N.E.2d 640, 316 Ill. Dec. 904 (1st Dist. 2007)

ALLOCATION OF FAULT

Fault of Settling Defendant Not to Be Considered by Jury

Plaintiff's then husband was driving with plaintiff in the passenger seat and two children in the back seat. They were involved in an accident killing one child and severely injuring the other occupants. Plaintiff filed suit on her own behalf as well as her injured son and the estate of her deceased daughter. Her former husband also brought suit for his own injuries which was consolidated with plaintiff's case for trial. Prior to trial, plaintiff settled with her former husband and another defendant. The trial judge ordered that the settling defendant should be excluded from the jury fault allocation forms. The jury determined the former husband was at least 51 percent at fault and received nothing. However, plaintiff was awarded $38.3 million against the non-settling defendants.

The First District affirmed holding it was proper for the trial court to exclude the settling defendants from the jury fault allocation forms. It determined settling defendants were no longer "defendants sued by the plaintiff" and consequently their fault should not be considered by the jury. It rejected the defendants' argument that the ruling violated due process determining that the removal of settling defendants from fault allocation and retaining rights of setoff supports the promotion of settlements. It also reduces the amount of damages a minimally responsible party may have to pay. *Yoder v. Ferguson*, Nos. 1-04-3214, 1-04-3230,

2008 WL 623778 (1st Dist. March 8, 2008)

Proper for Jury to Consider Conduct of Settling Tortfeasor in Apportioning Fault

Two cars were involved in an intersection collision. The defendant's car spun onto an adjacent sidewalk and struck plaintiff causing serious injuries. Prior to filing suit, plaintiff settled with the other driver for the policy limits of $100,000. At trial plaintiff argued that since the other driver was never a defendant the court lacked jurisdiction to apportion liability to her. The trial court disagreed and included the non-defendant driver on one of the verdict forms. A defense verdict resulted.

The First District affirmed. The court noted that the case was unique because the other driver was never named as a defendant. However, it determined the legislative intent should allow the jury to consider the fault of all involved in an accident. It noted the present case "involved exactly the type of potential gamesmanship that the statute was intended to protect against." *Heupel v. Jenkins*, No. 1-07-1338, 2008 WL 615932 (1st Dist. March 5, 2008)

Trial Court Properly Refused to Allow Jury to Consider Fault of Nonparty

Plaintiff was a carpenter who was injured when he fell from a wooden sill plate mounted on a structural steel beam while taking measurements for the layout of floor joists. He sued the owner/general contractor who in turn filed a third-party complaint against plaintiff's employer, a carpentry subcontractor. At trial, the court directed a verdict in favor of the employer on the contribution claim. It also refused to allow the jury to consider the potential fault of the steel supplier. The jury returned a plaintiff's verdict.

The Second District held the trial court erred in directing a verdict in favor of the plaintiff's employer. It rejected the employer's argument that the only evidence against it was produced in the plaintiff's case holding such evidence could be sufficient to sustain a verdict. It affirmed the refusal to include the fault of the steel supplier in the verdict form. The statute does not include the division of fault among anyone who could have been sued by the plaintiff but rather it included "any third-party defendant who could have been sued by the plaintiff." In order for the steel contractor to be on the verdict form it must have been named as a party. *Jones v. DHR Cambridge Homes, Inc.*, No. 1-05-3526, 2008 WL 598440 (1st Dist. March 4, 2008)

SERVICE OF PROCESS

Case Dismissed Where Seven Month Delay in Serving Complaint Did Not Exhibit Reasonable Diligence by Plaintiff's Attorney

Plaintiff filed a malpractice action on December 3, 2004, alleging medical malpractice in connection with surgery that occurred on December 3, 2002. Service was made on the defendant hospital on July 6, 2005, seven months after expiration of the statute of limitations. The hospital moved to dismiss the complaint because plaintiffs failed to comply with the due diligence requirements of Supreme Court Rule 103. Plaintiff's attorney filed an affidavit stating that he had directed staff on multiple occasions to obtain service, but it was never accomplished. The trial court dismissed the complaint.

The First District affirmed. Due diligence is determined by an objective standard and a defendant is not required to establish it was prejudiced by plaintiff delay. In the present case, delay, even when inadvertent and unintentional, did not support the reasonable diligence requirements of Supreme Rule 103. Therefore, dismissal was proper. *Long v. Elborno*, 376 Ill. App. 3d 970, 875 N.E.2d 1127, 314 Ill. Dec. 840 (1st Dist. 2007)

DAMAGES

Fetal Wrongful Death Claim Denied Where Mother Voluntarily Terminated Pregnancy Rather than Risks Injury to Fetus Through X-rays and Treatment of Mother

Plaintiff was 10 ½ weeks pregnant when she was involved in an auto accident sustaining a broken hip and pelvis. Physicians told her the fetus was not injured, but risked injury due to exposure to radiation, drugs and prolonged immobilization due to the fractured pelvis. The mother terminated the pregnancy one week after the accident and pelvic surgery was performed two weeks after the accident. The trial court entered summary judgment

in favor of the defendant on the fetal wrongful death claim but a divided panel of the appellate court reversed.

The Supreme Court reversed the appellate court and held that the trial court properly dismissed the wrongful death claim. A wrongful death action is premised upon the deceased's potential, at the time of death, to bring an action for injury. Evidence disclosed the fetus could not have maintained a claim for personal injury against the defendant based upon the automobile collision itself. It rejected the plaintiff's claim that radiation exposure created an increased risk of future harm as that was not a present injury. Further, there was no evidence that the fetus was injured as a result of the increased risk. *Williams v. Manchester*, No. 104524, 2008 WL 879036 (April 13, 2008)

Damages of $275,000 for 15 Minutes of Pain and Suffering and $1.45 Million for Wrongful Death of 83-Year-Old Man Affirmed

The decedent was an 83-year-old man who was crossing the street when he was struck by defendant's truck. Witnesses said he laid in the street moving his lips but could make no sound, his chest was moving very fast as though he was having difficulty breathing and his eyes were open moving to the right and left. The estimate was that this continued for about 10 to 15 minutes until paramedics arrived. When he reached the hospital he was alive but unresponsive. He was survived by four adult children who said that he gave them an occasional gift, but did not give them money on a regular basis. The jury awarded $275,000 for pain and suffering and $1.45 million in wrongful death damages.

The First District affirmed. It determined the evidence that the decedent had pain and suffering for 10 to 15 minutes was sufficient to support the survival claim award. It also held plaintiff presented substantial evidence concerning the loss of society to the four adult children which bolstered the legal presumption that they sustained substantial pecuniary loss. As he was healthy and independent, with a family history of longevity, it was likely he could defy the average life expectancy listed in statistical tables. *Clarke v. Medley Moving & Storage, Inc.*, No. 1-06-3072, 2008 WL 642599 (1st Dist. March 7, 2008)

IMMUNITIES

Local Government Tort Immunity Act Protected Police Involved With Pursuit of Fleeing Vehicle

A city police car began pursuit of a vehicle whose occupants failed to wear seatbelts. The suspect vehicle stopped and one of the officers began to approach it. Suddenly, the vehicle sped away and the officers pursued. The suspects then ran into a car occupied by the plaintiffs injuring them. The city moved for summary judgment based upon the Tort Immunity Act which required willful and wanton misconduct for liability would attach. The trial court granted summary judgment for the city.

The First District affirmed. It was not willful conduct to attempt to apprehend a fleeing offender even for a minor traffic violation. Additionally, the failure to follow certain police guidelines would not impose a legal duty let alone constitute evidence of willful and wanton misconduct. There was nothing to suggest that the police pursued the suspects in a reckless fashion. *Shuttlesworth v. City of Chicago*, 377 Ill. App. 3d 360, 879 N.E.2d 969, 316 Ill. Dec. 581 (1st Dist. 2007)

AUTOMOBILE

Employer Not Liable for Employee's Negligence While Driving Company Vehicle on a Personal Errand

A motorist and his passenger filed a negligence action against the defendant driver and his employer following a vehicle accident. The defendant's pick-up truck crossed the center line and collided with the plaintiff's vehicle. At the time of the collision, the defendant driver's truck was owned by his employer and displayed magnetic signs with the employer's name. However, the accident occurred outside of working hours when the employee was traveling for personal reasons. The trial court granted summary judgment in favor of the employer holding it could not be liable under *respondeat superior*.

The Second District affirmed. It was undisputed the defendant driver was not working when the collision occurred. Although his employer may have derived some incidental benefit from the adver-

tising sign on the vehicle, the employee was not within the scope of his employment at the time of the accident. *Nulle v. Krewer*, 374 Ill. App. 3d 802, 872 N.E.2d 567, 313 Ill. Dec. 584 (2d Dist. 2007)

$27 Million Verdict Vacated Because Trial Judge Refused to Admit Alcohol Evidence

A sheriff's deputy was responding to a call when plaintiff's vehicle made a sudden left turn in front of it. As a result of the collision, plaintiff was paralyzed and required to reside in a nursing home. The defense had expert testimony that by employing retrograde extrapolation, plaintiff's blood alcohol was 0.116 which would have impaired her ability to drive. The trial court refused the testimony believing it was speculative and prejudicial. The jury determined plaintiff's damages were $35.8 million but it was reduced by 25 percent for contributory negligence to almost $27 million.

The First District reversed. The jury could have used the testimony as an explanation for why plaintiff's vehicle made a left turn in front of an oncoming emergency vehicle. In prohibiting the evidence, plaintiff's attorney was left free to argue that the defendants could not provide a reason why plaintiff would have turned in front of the squad car unless she had a green arrow. The expert testimony that plaintiff's blood-alcohol level created a presumption of intoxication was extremely probative on the issue of whether plaintiff was partially at fault, particularly when the jury found her 25% at fault without hearing any evidence of alcohol consumption or intoxication. *Petraski v. Thedos*, No. 1-06-2914, 2008 WL 588544 (1st Dist. March 3, 2008)

PRODUCT LIABILITY

Strict Liability, Warranty and Negligence Claims Expressly Preempted by FDA Medical Device Amendments

Plaintiff's decedent was injured as a result of a cardiac catheter inserted by a physician during a coronary angioplasty. Plaintiff alleged the manufacturer was liable in negligence, strict liability and implied warranty because of a failure to design the device safely and to adequately warn about its risks. The trial court granted the manufacturer summary judgment holding plaintiff's claims were preempted by FDA procedures which was affirmed by the Second Circuit.

The U.S. Supreme Court affirmed, holding federal law expressly granted plaintiff's claims of strict liability, implied warranty and negligence relating to the design, testing, inspection, distribution, labeling, marketing, and sale of the cardiac catheter. It recognized that the FDA pre-market approval process was rigorous. Inherent in the process is that the FDA may approve devices that have great benefits even if they present great risks because the public health will benefit overall. The Supreme Court held that to allow common law claims could disrupt the federal scheme, noting that state law claims might mandate that the devices could be safer, but less effective, than an FDA-approved product. *Riegel v. Medtronic, Inc*., 128 S. Ct. 999 (2008)

Handgun Was Not Unreasonably Dangerous Under Consumer Expectation Test or Risk Utility Test, But Fact Issue Existed as to Whether Warnings Were Adequate

Parents sued a police service revolver manufacturer after their son was killed when his 13-year-old boyfriend was playing with the handgun and it fired. The shooter realized the handgun was dangerous, but thought the magazine had to be loaded in order to fire a bullet. The trial court granted the defendant summary judgment.

Although the First District reversed, it held the gun operated as it was supposed to in discharging a bullet and therefore was not unreasonably dangerous under a Consumer Expectation Test. It also held the gun was not defective under a Risk Utility Test because a magazine disconnect safety as advocated by plaintiff would undermine the utility of the handgun as a law enforcement weapon. However, the court held a fact question existed as to whether a failure to warn that the gun would not fire with its magazine removed could subject the manufacturer to liability. *Adames v. Sheahan,* 378 Ill. App. 3d 502, 880 N.E.2d 559, 316 Ill. Dec. 823 (1st Dist. 2007)

Michigan Law as Accident Site Applied in Illinois Suit Against Illinois-Based Mower Retailer

While operating a riding mower, the minor plaintiff's father put it in reverse and backed over the child's leg which required an amputation of the right foot. Suit was filed against the retailer of the mower alleging negligence and strict liability for failing to have a "no-mow-in-reverse" safety feature to prevent leg and foot injuries. Although the accident occurred in Michigan, suit was filed in Cook County which was the location of the defendant's home office. Michigan does not apply strict liability, imposes caps on non-economic damages, and prohibits punitive damages in product liability actions. The trial court's decision that Michigan law should apply was affirmed by the First District.

The Illinois Supreme Court reversed. Under Illinois choice-of-law analysis for personal injury claims, the law of the state where the injury occurred should determine the rights and liabilities of the parties unless Illinois has a more significant relationship with the occurrence and parties. Therefore, a presumption exists which can be overcome only by showing a more or greater significant relationship to another state. While Illinois has legitimate interests in a liability to be imposed upon its resident defendant, Michigan has equally legitimate interests in the remedies to be afforded its residents who suffered tort injuries. Therefore, the presumption was not overcome and Michigan law would apply. *Townsend v. Sears, Roebuck and Co.*, 227 Ill. 2d 147, 879 N.E.2d 893, 316 Ill. Dec. 505 (2007)

PREMISES LIABILITY

Company that Managed Hospital's Parking Garage Had No Duty to Plow Snow or Provide Safe Egress for Hospital Employee

The defendant operated a parking deck at a hospital. Although its contract with the hospital did not require snow removal, it was listed as a reimbursable expense. Plaintiff parked on the top floor of the deck and slipped on snow that had fallen during the night. At the time, snow removal operations were under way on the opposite of the deck. The trial court granted summary judgment holding the defendant had no duty to remove a natural accumulation of snow.

The First District affirmed. A property owner has no duty to remove natural accumulations of snow and ice. The hospital's contract with the defendant allowed for reimbursement of plowing expenses but did not create a duty to plow the deck. *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 875 N.E.2d 1209, 314 Ill. Dec. 922 (1st Dist. 2007)

Parking Lot Owner Had No Duty to Motorcyclist Because Presence of Loose Gravel Was Open and Obvious

Plaintiff rode his motorcycle to Gold's Gym for a workout. When no parking spaces were available, he parked in an adjacent hardware store parking lot. After working out, he got on his motorcycle and as he approached the street noticed a pot hole with loose gravel and steered to avoid the pothole. The motorcycle caught some gravel from the pothole which caused it to tilt, plaintiff stuck out his leg to steady it and sustained a fracture to his tibial plateau. He sued both the gym and the adjacent hardware store. The trial court dismissed the claim against the gym because it did not own or control the parking lot. It granted summary judgment to the hardware store because the danger of loose gravel was open and obvious.

The Fourth District affirmed. Plaintiff saw the gravel around the pothole and also was aware that riding on gravel at slow speeds could cause a motorcycle to slip. As he was aware of the gravel and the risk it posed, it was a known condition to him. Additionally, gravel is something which most people encounter on a daily basis without injury. To guard against it, a parking lot owner would have to keep the lot free of gravel which could be an unreasonable burden. *Ford v. Round Barn True Value, Inc.*, 377 Ill. App. 3d 1109, 883 N.E.2d 20, 318 Ill. Dec. 186 (4th Dist. 2007)

SPORTS AND RECREATION

Supreme Court Holds Full Contact Sport Duty of Care to Co-Participant Must Be Totally Outside the Range of Ordinary Activity in the Sport

The minor plaintiff was injured while playing in an organized hockey game when he was body

checked from behind by two opposing players. Body checking from behind was against the rules and the complaint alleged the opposing player's conduct was willful and wanton. Plaintiff also sued the opposing players' team, the governing officials of the association and the amateur hockey league. Relying upon the contact sports exception, the trial court dismissed the complaint. The appellate court reversed holding plaintiff successfully pled willful and wanton conduct on the part of the other players and ordinary negligence on the part of the organizational defendants.

The Illinois Supreme Court reversed. In full contact sports such as tackle football and ice hockey, a conscious disregard for the safety of the opposing player is an inherent part of the game. Therefore, the traditional willful and wanton standard is unworkable. The court concluded that in a full contact sport, a participant breaches a duty of care to a co-participant only if the participant intentionally injures the co-participant or engages in conduct totally outside the range of ordinary activity involved in the sport. It extended this rule to include the organizational defendants. *Karas v. Strevell*, 227 Ill. 2d 440, 884 N.E.2d 122, 318 Ill. Dec. 567 (2008)

EMPLOYMENT LAW

General Release Following Settlement of UIM Claim Did Not Bar Workers' Compensation Action

While in the scope of his employment and driving a company truck, plaintiff was injured in an auto accident. The plaintiff's employer did not have workers' compensation insurance and the other driver was uninsured. The employee filed a workers' compensation claim and also made an underinsured motorist claim under the 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 the employee breached the release by continuing to pursue the workers' compensation claim. The employee counterclaimed alleging he had been fraudulently induced to sign the release. The trial court entered summary judgment for the employer.

The Second District reversed. It noted 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 first be approved by the Commission. As the employee's release was not approved by the Commission, it was not effective to bar the workers' compensation claim. *Maxit, Inc. v. Van Cleve*, 376 Ill. App. 3d 50, 875 N.E.2d 690, 314 Ill. Dec. 717 (2d Dist. 2007)

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

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