CM REPORT

of Recent Decisions

2018 • Vol. 4

Clausen Miller On The Cutting Edge Of The Law

Frye Expert Admissibility Standard Governs In Florida

Ohio Supreme Court Holds Defective Subcontractor Work Not An "Occurrence"

Clausen Miller PC

A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.

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FEATURES

ARTICLES

Report Staff

Clausen Miller On The Cutting Edge Of The Law

*by **Melinda S. Kollross** and **Edward M. Kay***

In the last Sidebar of 2018, we focus on two noteworthy appellate decisions successfully litigated by Clausen Miller trial and appellate attorneys. The first is from the Illinois Supreme Court; the second is from the Eleventh Circuit. Both have significant precedential impact for the defense bar.

Illinois Supreme Court Extends Contribution Rights And Obligations To Vicariously Liable Defendants

Introduction

The Illinois Contribution Act, 740 ILCS 100/1 *et seq.*, creates a right of contribution among joint tortfeasors. A defendant's right of contribution against another defendant turns on the defendants' respective "pro rata shares" of the overall liability and whether the defendant against whom contribution is sought has paid less than its share.

A question unanswered until now is the right to contribution of a vicariously liable defendant. Such a defendant is "blameless" and incurs liability solely out of its relationship with a negligent defendant. In *Sperl v. Henry, et al.*, 2018 IL 123132 (Nov. 29, 2018), the Illinois Supreme Court held that a vicariously liable defendant may obtain contribution from another vicariously liable defendant, even though the liability of each arises out of their agency relationship with the same negligent third defendant.

Facts

In 2004, DeAn Henry drove a semi truck and trailer on an interstate highway. She negligently rammed her rig into several stopped vehicles ahead of her, killing two people and injuring others. Three lawsuits were filed that went to trial in 2009. The defendants were Henry; Toad L. Dragonfly Express, Inc., an interstate carrier whose authority Henry was using at the time; and C.H. Robinson Co. and related companies (Robinson), a logistics company and broker.

At trial Henry and Dragonfly admitted their negligence. Hence, the only liability issue that went to the jury was the vicarious liability of Robinson. The jury found against Robinson, it appealed, and the appellate court affirmed. Subsequently, in 2011, Robinson paid off the damage judgments in the amount of about $23 million, plus $5 million in post judgment interest, for a total of $28 million.

As part of the underlying litigation, Robinson brought a contribution cross claim against Dragonfly. That claim was severed from the main action. In 2015, following a contribution trial on briefs and the underlying record, the trial court entered judgment in favor of Robinson. The court found that Robinson and Dragonfly "equally contributed" to the accident and that Robinson was entitled to recover half the amount it paid, or about $14 million.

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Dragonfly appealed, and Robinson cross appealed. Over dissent, the appellate court reversed. It held that Robinson was not entitled to recover contribution because, among other reasons, it was not "at fault in fact." The court said that the Contribution Act only permitted contribution in favor of defendants who were at fault.

Analysis: Illinois Supreme Court Reverses

In a unanimous decision, the Supreme Court reversed in favor of Robinson, reinstating the trial court's $14 million contribution judgment. In reaching its decision, the Court reasoned that the Contribution Act broadly applies to defendants, as set forth in section 2(a) of the Act, "subject to liability in tort arising out of the same injury," such as Robinson and Dragonfly.

Under section 2(b), moreover, the Court said that the Act applies in favor of a defendant that has paid more than its *pro rata* share of the liability, and that "*pro rata* share" is determined by "relative culpability." Here, the relative culpability of Robinson and Dragonfly was equal, because they both were vicariously liable. The Court also noted that allowing contribution furthered the purposes of the Act, which are the encouragement of settlements and the equitable apportionment of damages.

Learning Point: The Court's holding extending contribution rights to vicariously liable defendants can be expected to have an impact on settlement strategies throughout Illinois and possibly nationwide.

The successful outcome was the result of teamwork within the Clausen Miller Appellate Practice Group, including attorneys **Don Sampen**, **Paul Esposito**, **Melinda Kollross**, and **Ed Kay**, together with CM trial attorney **Tom Ryerson**.

Eleventh Circuit Holds Non-Signatories To Contract Cannot Compel Arbitration Under New York Convention

The Clausen Miller Appellate Practice Group sailed into the choppy pro-arbitration waters of the federal court system and obtained a major reversal in the Eleventh Circuit, clarifying the scope of the New York Convention on the Enforcement of Arbitration Awards and avoiding arbitration in Germany of a large property loss.

Facts

In *Outokumpu Stainless USA, LLC et al v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018), Outokumpu Stainless USA and a number of its Insurers, with the latter being represented by Clausen Miller, filed an action in Alabama state court seeking recovery of damages resulting from the failure of multiple motors that were designed, manufactured, and supplied by defendant Converteam SAS, the electrical subcontractor for the construction of cold rolling (steel) mills in Alabama. Defendant Converteam removed the action to federal court, asserting that federal jurisdiction was provided by the New York Convention, a treaty governing international arbitration. Converteam also sought to compel arbitration in Germany under the Convention. For this gambit, Converteam pointed to an arbitration clause in the general contracts between Outokumpu, the owner, and the general contractor for the construction of the cold rolling mills. Converteam claimed it was a party to the general contracts, despite neither being a named party nor signatory to them. Converteam argued certain language in the general contracts elevated it, as a subcontractor, to "party" status. The District Court agreed with Converteam, finding that it had subject matter jurisdiction and that Converteam, as a party to the contracts, could compel arbitration.

Analysis: The Eleventh Circuit Affirmed In Part: Finding Federal Jurisdiction

The Eleventh Circuit determined that a district court has federal subject matter jurisdiction, under 9 U.S.C. §205, when (1) there is an arbitration agreement that may fall under the New York Convention, and (2) that arbitration agreement sufficiently relates to the dispute in that it may conceivably affect the outcome of the case. This two-step inquiry is resolved based on a limited examination of the pleadings and removal notice.

The Eleventh Circuit Reversed In Part: Non-Signatory To Contract Cannot Compel Arbitration

Here, the Clausen Miller Appellate Practice Group focused on the wording of the Convention, which is limited in scope, *i.e.*, it pertains to agreements signed by the parties before the court. Since Converteam had not signed the cold rolling mill contracts, we argued it could not compel arbitration. We further argued that this "signature" requirement precluded arguments, such as equitable estoppel, that a

non-signatory might use to compel arbitration under Federal Arbitration Act cases, not involving the Convention.

The Eleventh Circuit agreed with Outokumpu and the Insurers, holding that Converteam could not compel arbitration because it was not a signatory to the general contracts that contained the arbitration clause Converteam was trying to enforce.

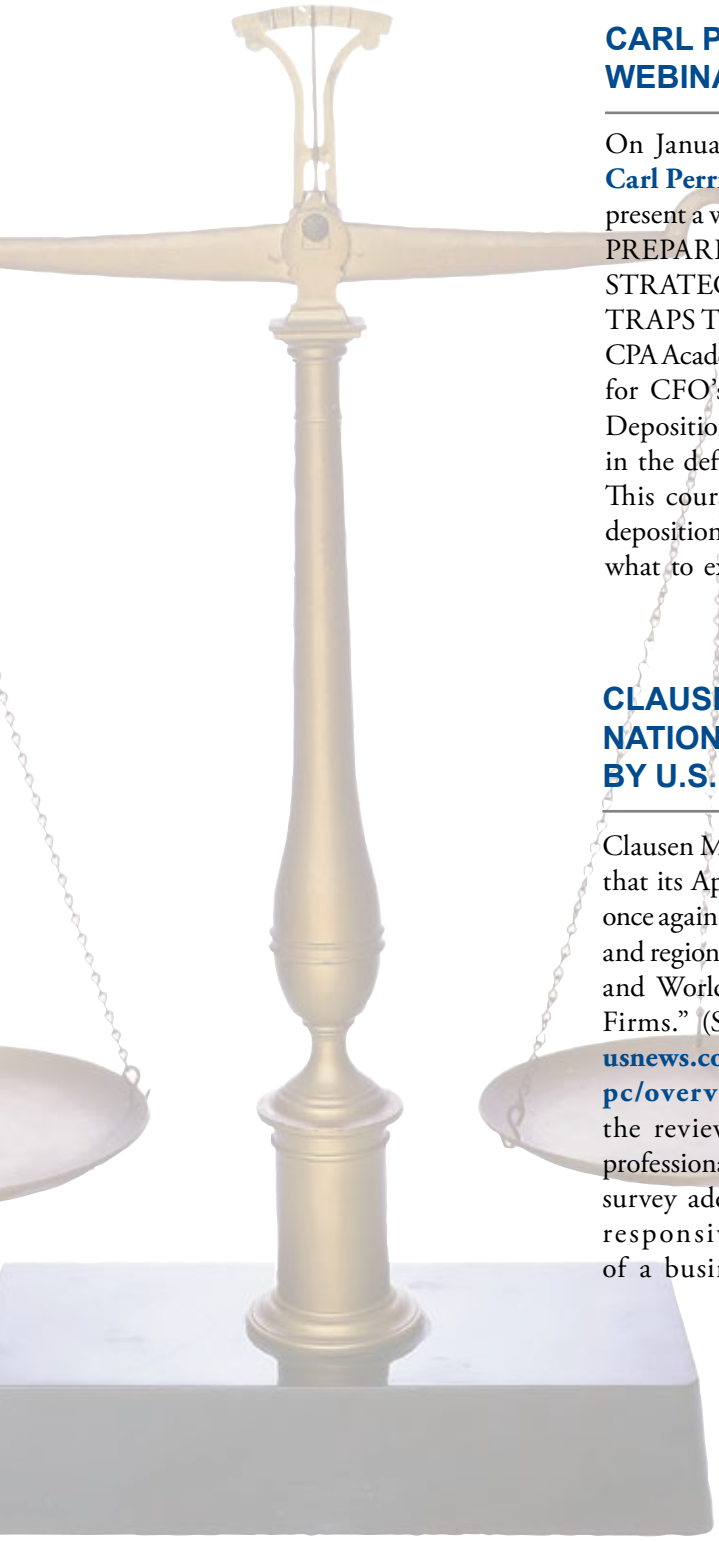
Learning Points: Where an arbitration agreement, falling under the New York Convention, is sufficiently involved in a dispute, a district court likely has subject matter jurisdiction under 9 U.S.C. §205.

The Eleventh Circuit held that the New York Convention requires that the arbitration agreement be signed by the parties before the court or their privities. Here, a subcontractor for the construction of the cold rolling mills did not sign the agreement, where the arbitration provision resided, so arbitration against the owner of the mills could not be compelled.

Clausen Miller Appellate Practice Group member **Joseph Ferrini** and trial attorney, **Jim Swinehart**, working with CM attorneys **Greg Aimonette** and **Ken Wysocki** obtained this favorable result in a challenging case.

Illinois Supreme Court

Eleventh Circuit Court of Appeals



CARL PERRI AND HARVEY HERMAN TO PRESENT WEBINAR ON PREPARING FOR DEPOSITION

On January 18, 2019, CM partners **Carl Perri** and **Harvey Herman** will present a webinar entitled "HOW TO PREPARE FOR A DEPOSITION: STRATEGIES FOR SUCCESS AND TRAPS TO AVOID" on behalf of the CPA Academy. The webinar is designed for CFO's, CPA's, and Controllers. Depositions are critically important in the defense of malpractice claims. This course describes the process of depositions, when they are used, and what to expect when being deposed. Throughout the webinar, participants will gain advice on how to prepare for a deposition and how to conduct oneself during the deposition process including behavioral tips and how to respond to certain types of questions. Carl and Harvey will also describe the role of counsel and what to avoid during a deposition. To learn more, contact Carl (**cperri@clausen.com**) or Harvey (**hherman@clausen.com**).

CLAUSEN MILLER'S APPELLATE PRACTICE GROUP NATIONALLY AND REGIONALLY RANKED BY U.S. NEWS AND WORLD REPORT

Clausen Miller is pleased to announce that its Appellate Practice Group has once again been ranked both nationally and regionally (Chicago) in U.S. News and World Reports 2019 "Best Law Firms." (See **https://bestlawfirms.usnews.com/profile/clausen-miller-pc/overview/39045**). As part of the review process, clients and/or professional references are emailed a survey addressing a firm's expertise, responsiveness, understanding of a business and its needs, cost-effectiveness, civility, and whether they would refer another client to the firm. CM's Appellate Practice Group continues to earn recognition for its provision of outstanding trial monitoring, post-trial, and appellate services to savvy clients nationwide and regionally. Please contact Appellate Practice Group Co-Chair **Melinda Kollross** (**mkollross@clausen.com**) to learn more about our services and how we might be of assistance to you.

Clausen Miller P.C. expands its reach in Florida by welcoming Orlando Partner

Scott J. Dornstein

Clausen Miller is proud to announce that Scott Dornstein has joined the Firm's Florida office as a Partner. Scott is located in Orlando and enhances the Firm's ability to cover the central and mid-coastal regions of Florida. The Firm's Florida headquarters is located in Tampa.

Scott has more than 14 years of litigation experience in Florida, where he is licensed in state and all federal courts. Scott's recent focus has been on first-party property insurance coverage and defense matters employing effective strategies to defend against Florida's fee shifting statute and litigation arising from assignments of benefits. Scott received his law degree from the University of Miami, and his Bachelor of Science degree from Florida State University, where he majored in political science.

Headquartered in Chicago, the Firm also maintains U.S. offices in New York, New Jersey, Indiana, Southern California, Wisconsin and Connecticut. Clausen Miller LLP is located in London, England, in the heart of the global insurance market. Clausen Miller P.C. is also the founding member of Clausen Miller International, a cooperative of leading independent law firms with affiliates in Paris, Rome, Brussels, Dusseldorf and Berlin that practice in all aspects of insurance and reinsurance law.

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Ohio Supreme Court Holds That Defective Subcontractor Work Is Not An "Occurrence"

by ***Henry T. M. LeFevre-Snee***

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In *Ohio Northern University v. Charles Construction Services, Inc.*, Slip Opinion No. 2018-OHIO-4057, the Supreme Court of Ohio held that there was no duty to defend a policyholder, because faulty workmanship by a subcontractor was not fortuitous, and therefore did not constitute an "occurrence" under the policy.

Facts

Ohio Northern University contracted with Charles Construction Services, Inc. ("Charles Construction") to build The University Inn and Conference Center ("Project"), a luxury hotel and conference center on Ohio Northern University's campus. The Project's estimated cost was $8 million. After work was completed, Ohio Northern University discovered that the Project had suffered extensive water damage from hidden leaks allegedly caused by the defective work of Charles Construction and its subcontractors. While repairing the water damage, Ohio Northern University discovered other serious structural defects. Ohio Northern University estimated its repair costs at approximately $6 million, and subsequently sued Charles Construction for breach of contract and other claims.

Charles Construction tendered coverage to Cincinnati Insurance Company ("Cincinnati Insurance"), requesting defense and indemnity for Ohio Northern University's claim under a commercial general liability policy ("Policy") issued by Cincinnati Insurance to Charles Construction. Initially, Cincinnati Insurance agreed to defend Charles Construction, subject to a reservation of rights. However, Cincinnati Insurance then intervened, seeking a declaratory judgment that it had no duty to defend or indemnify Charles Construction.

Policy Language

The Insuring Agreement of the Cincinnati Insurance Policy provided as follows:

> COMMERCIAL
> GENERAL LIABILITY
> COVERAGE FORM
>
> * * *
>
> SECTION I—COVERAGES
>
> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those

damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

* * *

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence..."

* * *

The Cincinnati Insurance Policy contained the following definitions:

16. "Occurrence" means:

a. An accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

19. "Products-completed operations hazard":

a. Includes..."property damage" occurring away from premises you own or rent and arising out of..."your work" except:

* * *

(2) Work that has not yet been completed or abandoned.

20. "Property damage" means:

a. Physical injury to or destruction of tangible property including all resulting loss of use. All such loss of use shall be deemed to occur at the time of the physical injury or destruction that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

* * *

29. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance, or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

* * *

The Cincinnati Insurance Policy also contained the following exclusions:

2. Exclusions:

This insurance does not apply to:

* * *

j. Damage to Property
"Property damage" to:

* * *

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

* * *

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

* * *

l. Damage to Your Work:

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the

work out of which the damage arises was performed on your behalf by a subcontractor.

* * *

The Decision Below

Cincinnati Insurance moved for summary judgment, relying on the Ohio Supreme Court's decision in *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269 ("*Custom Agri*"). *Custom Agri* held that, under the common commercial general liability policy definition of "occurrence" as an "accident", property damage caused by a contractor's own faulty work is not covered, because an "accident" involves "fortuity", and such property damage is not accidental. Ohio Northern University, supported by Charles Construction, filed a cross-motion for summary judgment, relying, in part, on the Policy's "Products-completed operations hazard" clause and the subcontractor exception to the "Damage to Your Work" exclusion. The trial court ruled in favor of Cincinnati Insurance, reasoning that it was constrained by *Custom Agri*.

The Third District Court of Appeals reversed, holding that *Custom Agri* was good law as applied to construction defects caused by the insured's own work, but that the decision did not address the "Products-completed operations hazard" clause, or the subcontractor exception to the "Damage to Your Work" exclusion. The appellate court further held that the Policy was ambiguous as to whether it covered property damage caused by a subcontractor's defective work, and construed the language against Cincinnati Insurance Company.

Cincinnati Insurance appealed.

Analysis

The Ohio Supreme Court began by reciting the reasoning for its decision in *Custom Agri*. The policy in *Custom Agri* defined "occurrence", in part, as an "accident", which the Court defined under its "natural and commonly accepted meaning" as "fortuitous." Faulty workmanship, *i.e.*, "business risk" claims generally are not covered, except for their consequential damages, because they are not fortuitous. Therefore, the Court reasoned, claims for faulty workmanship are not "property damage" caused by an "occurrence" under a commercial general liability policy.

Turning to the terms of the Cincinnati Insurance Policy, the Court noted that only "an occurrence" could trigger coverage for property damage, *i.e.*, without an "occurrence", there could be no coverage for any property damage. While there was no question that the water-related damage to the Property was "property damage" discovered after work had been completed, unless there was an "occurrence," the "products-completed operations hazard" and subcontractor language had no effect.

The Court reasoned that, had Charles Construction's subcontractors' faulty work been fortuitous, the "products-completed operations hazard" clause and the subcontractor exception to the "Damage to Your Work" exclusion would have required coverage. However, commercial general liability policies are not intended to protect against ordinary "business risks" that are "normal, frequent or predictable consequences of doing business that the insured can manage." The Court did not conclude that the subcontractors' faulty work was fortuitous.

In so holding, the Court declined to follow decisions by several other jurisdictions, which Charles Construction and Ohio Northern University argued supported a conclusion that the claim at issue was covered under the "products-completed operations hazard" clause and the subcontractor exception to the "Damage to Your Work" exclusion. Those decisions included *Black & Veatch Corp. v. Aspen Ins. (UK), Ltd.*, 882 F.3d 952 (10th Cir.2018) (Colorado law); *Natl. Sur. Corp. v. Westlake Invests., L.L.C.*, 880 N.W.2d 724 (Iowa 2016); and *Cypress Point Condominium Assn. v. Adria Towers, L.L.C.*, 226 N.J. 403, 143 A.3d 273 (2016). The Supreme Court of Ohio concluded that "property damage" must be caused by an "occurrence", and faulty workmanship was not an "occurrence" as defined in the Cincinnati Insurance Policy. Accordingly, there was no coverage.

Learning Point: Under Ohio law, an insurer has no duty to defend a claim alleging property damage caused by the faulty work of the insured or the insured's contractor. Such faulty work is not fortuitous and does not meet the definition of an "occurrence" under a commercial general liability policy. ♦

Contingency Fees And Appraisers In Florida: Not Grounds For Disqualification

by ***Anne E. Kevlin***

A Florida state appellate court has recently addressed the issue of whether an appraiser paid on a contingency fee is "impartial" as required by the subject policy's appraisal provision. *Brickell Harbour Condo. Ass'n v. Hamilton Specialty Ins. Co.*, 2018 Fla. App. LEXIS 14364 (3d Dist. Oct. 10, 2018).

Facts

At issue in *Brickell Harbour* was the insured's objection to an appraiser appointed by the insurer. The insured argued that as an employee of J.S. Held (the building consultant hired by the insurer), this appraiser could not be impartial. There was no indication in the record that this appraiser was directly paid by the insurer, or that any part of the compensation for the appraiser or for J.S. Held would include a contingent fee. The policy's appraisal language required each party to select a "competent and impartial appraiser."

Analysis

The *Brickell Harbour* court held:

> "impartiality" means something other than the "dictionary definition" as it relates to appraisers appointed and paid by the parties.... In *Rios*, this Court concluded that an appraiser's "direct or indirect financial interest in the outcome of the arbitration," including an arrangement for a contingent fee, requires disclosure rather than disqualification in the case of an appraiser. This Court then ordered the appraisers to make the disclosures to each other and the parties as provided by the Code. ...We conclude that this remains a "workable approach to this issue," *id.*, and encourage such disclosures in the present case before the confirmation of the appraisal. On the record before us, we agree with the trial court that the Insurer's appointment of Mr. Ison did not warrant disqualification.

It is not clear from the opinion why this appellate court found that the policy term "impartiality" meant something other than the dictionary definition as it relates to appraisers. Parties to an appraisal may wonder how mere disclosure of an appraiser's partiality protects the appraisal process, or facilitates a fair or efficient appraisal.

The *Brickell Harbour* court did speak to the role of the umpire in an appraisal:

> If an appraiser acts unprofessionally, skews what should be objective calculations regarding materials and labor costs, and puts the proverbial thumb on the scale, the umpire is the safeguard empowered to reject such efforts by siding with the other party-appointed appraiser. Alternatively, a professionally-qualified umpire may negotiate one or both of the party-appointed appraisers into a reasonable compromise.

The *Brickell Harbour* court also indicated, in a footnote, that a contingency fee arrangement may be one factor in a

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determination of partiality, citing the federal trial court decision in *Verneus v. Axis Surplus Ins. Co.*, 2018 U.S. Dist. LEXIS 117005 (S.D. Fla. July 13, 2018). The issue in *Verneus* involved an appraiser, billing at an hourly rate, who the magistrate found was not impartial given the insurer's argument that the appraiser was a former owner of the insured's public adjusting company which did have a contingency fee with the insured.

The *Verneus* magistrate specifically noted he was "not setting forth a rule that an appraiser cannot be impartial whenever his financial compensation is based on a percentage of the recovery." Rather, the court noted the contingency contract was only one of several factors underlying its decision.

Learning Point: At this time there is no other state appellate court in Florida that has opined on this issue; therefore, there is no split of authority that would compel the Florida Supreme Court to accept review, which would be at its discretion. Unless and until the Florida Supreme Court decides the issue of appraiser impartiality and contingency fee arrangement, the *Brickell Harbour* case is binding on Florida courts in the Third District, and persuasive authority elsewhere in Florida.

Therefore, *Brickell Harbour* likely closes out any opportunity to seek disqualification of an appraiser solely due to a contingency fee arrangement. Doing so may invite a bad faith lawsuit and/or attorney sanctions. *Brickell Harbour* does leave open the opportunity to seek disqualification of an appraiser on grounds of bias where a contingent fee agreement is only one factor, presupposing other factors also point toward partiality. And appraisers, when presenting the appraisal to an umpire, may still raise concerns of bias by the other appraiser, although the mechanism for raising these concerns to an umpire is not clear from policy language or from case law. Nor is it clear whether or how a Florida court would respond should an umpire ignore charges of appraiser bias. ♦

"No-Recoupment" Default Rule In Restatement Of The Law: Liability Insurance Cited By Illinois Court In Support Of Ruling Dismissing Insurer Recoupment Claim

by ***Mark W. Zimmerman***

Introduction

In *Gilbane, Inc. v. Liberty Ins. Underwriters, Inc.*, (Case no. 2016CH15163) a Cook County, Illinois court dismissed an insurer's claim for recoupment of a $7.5 million settlement payment from its policyholder based on the equitable theory of unjust enrichment. The insurance policy at issue did not contain a provision addressing the recoupment of indemnity payments. The dispute was governed by Rhode Island law, which did not have any case authority directly on point. In reaching its ruling, the Illinois court cited with approval to RLLI §21 (Insurer Recoupment of the Costs of Defense) and §25 (The Effect of a Reservation of Rights on Settlement Rights and Duties) within Draft no. 4 of the RLLI. While acknowledging that the RLLI was not binding, the Illinois court stated that "this comprehensive Restatement of the Law describes the recent trend and default rule to disallow reimbursement [of insurer payments] absent a provision in the insurance policy or contract between the parties." The Illinois court concluded that "[t]his is consistent with Illinois law and how the Court thinks Rhode Island's highest court would rule" (internal citations omitted).

Analysis

Gilbane is another example of a court looking to the recently-adopted RLLI for support where there is no binding case law on point. In August of 2018, a Delaware state court, applying Tennessee law, cited to the RLLI in connection with its ruling on, ironically, another insurer recoupment claim based on principles of unjust enrichment. *Catlin Specialty Ins. Co. v. CBL & Assocs. Props.*, 2018 Del. Super LEXIS 342 (Del. Super. Ct. Aug. 9, 2018). The *Catlin* court reached the opposite conclusion from the *Gilbane* court, holding that the insurer in question did have a right to recoup defense costs from its policyholder after securing a determination that it had no duty to defend the underlying claim in question. The *Catlin* court noted that RLLI reflected a recent shift by courts against allowing recoupment absent a policy provision permitting the same. Nevertheless, the *Catlin* court also observed that Tennessee courts had not adopted the RLLI recoupment rule. The *Catlin* court ultimately found, based on examination of Tennessee unjust enrichment case authority, that Tennessee law supported the insurer's claim.

Although they reached divergent conclusions, the Illinois court in *Gilbane* and the Delaware court in

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Catlin share a common thread: both courts applied the law of a jurisdiction other than the one in which they were sitting. And this common thread may explain, at least in part, these divergent rulings. More specifically, the *Gilbane* and *Catlin* rulings were both consistent with the law of the jurisdictions in which they were sitting. The Illinois Supreme Court rejected an insurer recoupment claim in *General Agents Ins. Co. v. Midwest Sporting Goods*, 215 Ill.2d 146 (2005), ruling that an insurer may not unilaterally reserve a right to seek reimbursement. By contrast, and as the *Catlin* court acknowledged, Delaware is among the states that allow insurer recoupment claims. *Nationwide Mut. Ins. Co. v. Flagg*, 789 A.2d 586, 597 (Del. Super, Ct. 2001).

It appears that the *Gilbane* court's citation to the RLLI "no recoupment" default rule was an instance of a court using the RLLI to buttress a conclusion it was likely to have reached even in the absence of the RLLI. However, the explicit reference by the *Gilbane* court to the Restatement's "default rule" of no recoupment is concerning because close examination of RLLI §25 reveals that the rule largely reflects the Reporters' aspirational views as to what the law on recoupment should be, not the law as it currently stands. This deviates from the core objective of Restatements, which are in the words of the American Law Institute (ALI), "[p]rimarily addressed to courts" and "aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might be appropriately stated by a court." The *Gilbane* court appeared to accept as accurate the RLLI's broad statement regarding purported "recent trends" amongst courts regarding insurer recoupment claims. But this broad description is misleading when the comments to the Rule are examined in depth. The comments to §25 state that the default rule is analogous to the default rule followed in RLLI §21 for defense costs. Although the rule in §21 purports to follow what is characterized as an emerging state-court majority rule regarding recoupment of defense costs, the comments admit that "about half of the state courts that have considered this issue, and a majority of the federal courts making *Erie* predictions, have held to the contrary, based on a theory of unjust enrichment." And the comments to §25 acknowledge that most states have not addressed recoupment in the context of indemnity claims.

The Reporters further acknowledge that the no-recoupment default rule as to insurance settlement payments is contrary to the general principles of unjust enrichment articulated in the Restatement Third, Restitution and Unjust Enrichment (Restatement of Unjust Enrichment).

> § 35 PERFORMANCE OF DISPUTED OBLIGATION (1) If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the dispute obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, preserving a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement.

The RLLI Reporters gloss over this clear inconsistency with a sweeping reference to "special insurance law reasons" discussed in RLLI §25, comment "c." However, close examination reveals that most of the proffered reasons appear to spring not from existing law but from the Reporters' own beliefs as to what constitutes "special insurance law reasons." The Reporters conclude, without reference to specific legal authority, that the current practice in most liability insurance markets is for insurers not to seek recoupment and that a no-recoupment rule is "most consistent with the parties' reasonable expectations."

Ignoring the plain language of the Restatement of Unjust Enrichment, the RLLI Reporters also criticize the argument that a no-recoupment rule would provide insureds with coverage that the policy language does not. The Reporters assert that the omission of policy language addressing recoupment of non-covered settlements supports the need for a default rule, but they do not explain why a departure from the Restatement of Unjust Enrichment (which does not require specific contractual language) is necessary in the insurance context. The Reporters also argue that allowing an insurer to seek recoupment would create a moral hazard on the part of insurers by incentivizing insurers to settle more actions "and to work less hard to keep the settlements low." The Reporters cite to no legal or other authority in support of this position while simultaneously acknowledging that their default rule could increase risks to the insured and also implicated relevant empirical questions that have no easy answer. In sum, the special insurance law reasons articulated by

the Reporters tilt heavily towards advocacy by the Reporters themselves.

With the Reporters' advocacy and aspirations now encapsulated under the rubric of "special insurance law reasons," the Reporters conclude that principles of extra-contractual performance and unjust enrichment contained in the Restatement of Unjust Enrichment disappear because "insurance law is understood to include a no-recoupment default rule." Further extending this circular reasoning, the Reporters conclude that when an insurer pays a non-covered settlement under a policy that does not include a no-recoupment provision, it is not performing beyond its contractual obligations because the insurers' contractual obligations include a no recoupment rule.

Conclusion

In sum, RLLI §25 modifies the law on recoupment rather than reflecting where it currently stands. In so doing, the RLLI misleads and does a disservice to its primary intended audience—the courts.

CM's Restatement Task Force will continue to report on all significant developments while maintaining its proprietary database to track the issues, jurisdictions/courts, rulings, briefs and other aspects of how the Restatement is used to alter the current state of insurance law. Our Task Force is positioned to provide consulting services, *amicus* briefing, and generally to assist insurers in setting the record straight. Should you have any questions or wish to discuss any issues relating to the Restatement or our Task Force, please contact Task Force Chair **Amy Paulus** at **apaulus@clausen.com**, or the Senior Members of the Task Force: **Colleen Beverly** at **cbeverly@clausen.com**, **Ilene Korey** at **ikorey@clausen.com**, or **Mark Zimmerman** at **mzimmerman@clausen.com**.

Editor's Note: The views expressed herein are solely those of the author. Mr. Zimmerman devotes his practice to insurance coverage, bankruptcy and other commercial litigation issues and is a senior shareholder and member of the Board of Directors of Clausen Miller. ♦

Florida Supreme Court Decision Affirms The *Frye* Expert Admissibility Standard Governs In Florida Courts

by ***Anne E. Kevlin***

After more than five years of uncertainty, the Florida Supreme Court has settled the debate over the standard for determining the admissibility of expert witness testimony in Florida state courts. In a 4-3 decision, the high court rejected *Daubert* and adopted *Frye*. *DeLisle v. Crane Co.*, 2018 Fla. LEXIS 1883 (Fla. 2018).

Background Facts

The use of expert opinions in trials is to assist the trier of fact in the quest for truth in subject areas that are not commonly known to laypersons. U.S. court proceedings would quickly become circuses if just any "expert" evidence were permitted for consideration by judge or jury. For this reason, courts employ standards by which evidence may, or may not, be admitted as expert evidence.

Almost twenty years ago, the U.S. Supreme Court abandoned the standard that had been in use since the 1923 case *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The so-called "*Frye*" standard for the admissibility of expert evidence required that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Florida courts over time began applying a "pure opinion" exception to the *Frye* standard, admitting into evidence the opinions of any expert who ignored scientific method but relied on his or her own experience or training.

Since the 1993 case from which it was derived, most U.S. courts have employed the *Daubert* standard to determine admissible expert evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The *Daubert* court noted that the *Frye* standard conflicted with Federal Rule of Evidence 702, and failed to require general acceptance of the theory or technique as a precondition of admissibility. The *Daubert* court stressed that the purpose of Federal Rule of Evidence 702 is to ensure expert evidence is both relevant and reliable. The focus of the evidence under Rule 702, and under *Daubert*, is therefore not the opinion itself, but the principals and methods by which the opinion was formed. *Daubert* requires a three-part analysis of expert opinion: was it based upon sufficient facts or data, was it the product of reliable principles and methods, and did the expert reliably apply the principles and methods to the facts of the case.

In 2013, the Florida State Legislature attempted to join the majority of states by passing an amendment to

the Florida Evidence Code codifying *Daubert*. However, in February 2017, the Florida Supreme Court refused to adopt the changes. The Court cited "grave constitutional concerns" raised by The Florida Bar's Code and Rules of Evidence Committee that the amendments: (1) were procedural and infringed on the Court's rulemaking authority, (2) undermined the right to a jury trial and (3) denied access to the courts. Despite the Supreme Court's rejection of the amendments, the *Daubert* standard remained a part of the Florida Evidence Code which most courts followed. Many Florida plaintiff attorneys opposed the codification of *Daubert* and its application by Florida trial courts.

In *DeLisle v. Crane*, the Fourth District Court of Appeals excluded expert testimony under the *Daubert* standard and reversed a trial court's verdict and ruling on directed verdict. The Florida Supreme Court accepted the case for review.

Analysis

The Florida Supreme Court found the attempted codification of *Daubert* unconstitutional, holding that it violated the separation of powers given its exclusive authority to set court procedures. *DeLisle v. Crane Co.*, 2018 Fla. LEXIS 1883 (Fla. 2018). Further, the high court held that the *Frye* standard is the better standard, and the one that will be used in Florida courts rather than *Daubert*. As noted in the concurrence of Justice Pariente:

> I acknowledge that neither *Frye* nor *Daubert* is a perfect standard that will seem fair to all litigants in every proceeding. However, this Court's case law makes clear that a proper and thorough application of *Frye* allows the trial judge to inquire beyond bare assertions of general acceptance. *Daubert*, on the other hand, has the potential to infringe on litigants' constitutional right to access the courts. In addition to the time-consuming and potentially cost-prohibitive expense created by *Daubert* hearings, as well as the onerous barriers to admitting expert testimony, the jury's role in evaluating the merits of the case may nevertheless be usurped even after the trial court has concluded that expert testimony is admissible by an appellate court's overly burdensome application of *Daubert*, as evidenced by the facts of this case. Accordingly, I do not agree that *Daubert* is preferable to *Frye*.

Learning Point: The admissibility of expert testimony in Florida trial courts is now governed by the *Frye* standard, not *Daubert*. This is a big win for the plaintiff's bar, which views *Daubert* as advantageous to defendants because it is applied more broadly than *Frye* and can be used to challenge the admissibility of any expert testimony, whereas *Frye* only applies to opinions based on new or novel scientific evidence. Moreover, *Daubert* hearings are costly, which also favors insurers and deep pocket corporations. Plaintiffs' lawyers believe that a return to *Frye* will level the playing field. For defendants, *Frye* means more of an uphill battle to exclude questionable expert testimony. ♦

Proximate Cause Lacking In Opioid Addiction Case Against Pain Management Physician Absent Expert Testimony From An Addictionologist

by ***Melinda S. Kollross***

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In a split decision, the Illinois Appellate Court, First District holds that a medical malpractice plaintiff failed to prove proximate cause against a pain management physician where there was no evidence from an addiction expert connecting the defendant's failure to identify the patient's opioid addiction and her death/suicide by acetaminophen overdose. Plaintiff's sole medical expert was not an addiction specialist and could not say whether the patient would have seen an addictionologist had the pain management physician referred her to one, or what an addictionologist would have done to help the patient. *Guerra v. Advanced Pain Center*s, 2018 IL App (1st) 171857; 2018 Ill. App. LEXIS 880.

Facts

From 2005 to 2009, Jill Guerra took opioid pain medications and underwent three surgeries to relieve neck pain resulting from a 1982 car accident. After the third surgery, Jill spent a few days in a psychiatric hospital, where doctors diagnosed Jill with major depressive disorder and anxiety disorder. In October 2009, Jill underwent a psychological evaluation to assess her risk for addiction but was found not to be at risk of abusing her medication. When later asked by her pain management doctor to go for another psychological evaluation, Jill refused. In July 2010, that same doctor discharged Jill from her care after discovering Jill received additional pain medication from her primary care physician.

A month later, Jill's primary care physician suggested she get a psychiatric consultation, which she declined to undergo. Jill found another pain management doctor who saw her for a month before referring her to defendant Dr. Lipov in September 2010. By the time Jill came under Dr. Lipov's care, she had seen four pain management doctors, underwent three surgeries, and received four referrals to a mental health professional (although she saw a mental health professional only once).

Dr. Lipov monitored and modified Jill's pain medication based on her complaints of pain. During the 10 months he treated her, Dr. Lipov prescribed Norco, Dilaudid, Vicoprofin, and Opana (opioids), and Klonopin and Xanax (anti-anxiety medications). Twice during her treatment with Dr. Lipov, Jill called and complained that the pharmacy shorted her opioid prescriptions. Both times Jill received a new prescription to make up for the lost pills. Jill also increased her medication on her own, which came to light when she called Dr. Lipov's office to refill prescriptions early.

On July 14, 2011, Jill told Dr. Lipov that she spent two days in the hospital and was unsure what had happened. She informed Dr. Lipov that she wanted to start coming off medications. Dr. Lipov decreased the strength of Jill's prescription. But, at her next appointment on July 21, he increased the strength of Jill's opioid prescription to counter an increase in Jill's pain after another surgery. Three days later, Jill suffered an acetaminophen overdose and died.

Jill's husband John filed a wrongful death action, based on medical malpractice, against Advanced Pain Centers and Dr. Lipov. The case was tried in May 2016. John relied on the testimony of a single expert witness, Dr. Steven Richeimer, who specializes in pain management. Richeimer testified that he was not offering opinions as a psychiatrist. He testified that there were numerous "red flags" that Jill was addicted to opioids including running out of medication early, reporting a high level of pain scores, requesting early medication refills, taking more medication than prescribed, requesting specific medications, seeking medication from other doctors, requesting stronger doses of medication, claiming pharmacy errors in filling a prescription, and unexplained emergency room visits. Richeimer testified that Dr. Lipov failed to meet the standard of care for a pain management doctor by not recognizing these signs of opioid addiction, and a prudent pain management doctor would have discussed addiction with Jill and referred her to an addictionologist, and sent her to a detox program or weaned her off the pills himself. John did not present an expert to testify about what treatments were feasible and how they may have helped Jill.

On cross-examination, Richeimer agreed that some aspects of Dr. Lipov's treatment helped Jill, and that the injections, radio frequency treatments, and referral to an orthopedic surgeon were within the standard of care. He also agreed that Jill was likely addicted to opioids at least as early as 2009 and her treating physician should have weaned her off them then.

The jury returned a general verdict in favor of John but found Jill to be 50% responsible for her own death and awarded no damages. Dr. Lipov moved for judgment notwithstanding the verdict arguing that Richeimer was not an addiction specialist. The trial court granted the JNOV motion because John did not present expert testimony about what treatments were feasible and how they may have helped Jill. John appealed.

Analysis

The First District Appellate Court affirmed. "Proximate cause in a medical malpractice case must be established by expert testimony to a reasonable degree of medical certainty, and the causal connection must not be contingent, speculative, or merely possible." Here, the Court found that John failed to prove proximate cause because Richeimer's testimony leaves an evidence gap. Richeimer is not an addiction specialist and John needed to present testimony from an addiction expert to link Dr. Lipov's alleged deviations from the standard of care to Jill's death, which resulted from suicide by Tylenol overdose.

The Appellate Court cited *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill. App. 3d 967 (1997), and *Townsend v. University of Chicago Hospitals*, 318 Ill. App.3d 406 (2000), in support of its holding. In *Aguilera*, the decedent went to the emergency room complaining of weakness on the left side of his body. After he began suffering seizures, he was given a CT scan, which revealed a massive intracerebral hemorrhage. The plaintiff's expert testified that assuming a prompt CT scan, he would have deferred to a neurosurgeon to decide whether surgical intervention was appropriate. A second expert testified that he would seriously consider, if not defer to the neurosurgeon's opinion. But, the only two neurosurgeons to testify agreed with the treating neurologist that surgery would not have been appropriate, even with an earlier CT scan.

The appellate court upheld the trial's court's judgment notwithstanding the verdict, finding that the experts' opinions failed to establish proximate cause. "Without supporting testimony from a neurosurgeon, plaintiff's experts' testimony was insufficient to show that neurosurgery, much less effective neurosurgery, should have occurred absent defendants' negligence." "The absence of expert testimony that, under the appropriate standard of care, an analysis of an earlier CT scan would have led to a surgical intervention or other treatment that may have contributed to the decedent's recovery creates a gap in the evidence of proximate cause fatal to the plaintiff's case."

In *Townsend*, the plaintiff's expert witnesses claimed the hospital

negligently failed to seek an imaging study for the decedent. The hospital admitted the decedent and improperly treated her for a kidney infection. The decedent died from septic shock caused by an undiagnosed kidney stone, which the medical staff would have found had they followed the standard of care and done an imaging study. Had they ordered the imaging study and found the kidney stone, a radiologist or a urologist would have decided the course of treatment. The plaintiff failed to present testimony from either a radiologist or urologist. The court stated, "there is no evidence of what a urologist or interventional radiologist would have done to relieve the obstruction. No one said what the treatment would have been. No one said whether the right treatment was available or whether [decedent] was a candidate for it. We conclude the jury in this case was left to speculate about proximate cause."

The Appellate Court rejected John's attempted reliance on *Johnson v. Ingalls Memorial Hosp.*, 402 Ill. App. 3d 830 (2010). In *Johnson*, plaintiff's expert witness testified that, if the hospital staff had monitored the decedent after his first heart attack, they would have sooner noticed signs of his second heart attack. Earlier notice would precipitate an earlier intervention preventing oxygen deprivation and brain death (the cause of death several months after the second heart attack). The appellate court reversed JNOV for the defendant, finding the testimony adequately established that the hospital staff's negligent failure to monitor proximately caused the decedent's injury (brain death).

The Appellate Court here explained:

> Even if we accept John's argument that Richeimer opined that Lipov should have weaned Jill off her medication *or* sent her to an addictionologist, Richeimer's testimony alone does not establish proximate cause. Richeimer only established that there was a "mere possibility" that intervention by Lipov could have halted Jill's addiction. Moreover, unlike in *Johnson*, where an expert witness testified that monitoring a patient could have led to earlier intervention and prevented his death, neither Richeimer (who, as noted, was not offering opinions in the area of psychiatry) nor any other witness testified that if she had been weaned from opioid medications, Jill, who had a history of depression, would not have committed suicide by overdosing on Tylenol, a non-opioid, over the counter medication.
>
> Like *Aguilera*, there is no expert evidence connecting Lipov's failure to identify Jill's addiction to opioids and her suicide by Tylenol overdoes. No evidence indicates that Jill would have seen an addictionologist had Lipov referred her to one. No evidence indicates what, if anything, an addictionologist would have done to help Jill with her addiction. And no evidence indicates that Jill would have gone to a detox program or would have willingly reduced her pills if Lipov had intervened. Most significantly, no evidence shows that had Lipov taken the steps Richeimer recommended to treat her opioid addiction, it is more likely than not that Jill would not have died from a Tylenol overdose.

Justice Pucinski authored a lengthy dissent. According to Justice Pucinski, "[t]here is no evidence gap. We know everything we need to know about Jill's treatment by Dr. Lipov. He blew it."

Learning Point: Expert testimony from an addiction specialist or addictionologist is required to establish proximate cause in a medical malpractice case alleging that if a pain management physician had recognized a patient's opioid addiction and referred the patient to an addictionologist, a detox program, or attempted to wean patient off pain medications himself, the patient more likely than not would not have died/committed suicide by Tylenol overdose. ♦

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AGENCY

DISTRIBUTION AGREEMENT CREATES FIDUCIARY RELATIONSHIP

Jolen, Inc. v. Brodie and Stone, PLC, 186 Conn. App. 516 (Conn. App.)

Defendant agreed to be plaintiff's distributing agent in distribution agreement. After agreement terminated, plaintiff sued alleging defendant had breached certain fiduciary duties owed to plaintiff. The trial court granted defendant summary judgment on the ground that no fiduciary relationship existed between the parties. ***Held:*** Reversed. The distribution agreement's terms established the existence of a principal-agent relationship between the parties and it necessarily followed that the defendant had been the plaintiff's fiduciary with respect to matters within the scope of its agency.

CIVIL PROCEDURE

INSURER IS PARTY FOR PURPOSES OF STATUTORY OFFER TO COMPROMISE

Meleski v. Estate of Albert Hotlen, 2018 Cal. App. LEXIS 1094 (3d Dist.)

Plaintiff sued decedent's estate following a car accident wherein plaintiff was injured. Prior to trial, plaintiff served a statutory offer to compromise, which defendant's insurer declined. Plaintiff later was awarded damages in excess of the statutory offer and sought recovery of costs from the insurer, but the trial court denied costs because the insurer was not a party. ***Held:*** Reversed. The insurer controlled the litigation, was responsible for rejecting the statutory offer, and was the only entity at risk of losing money. Moreover, the costs could exceed the policy limits and be recoverable because they were not damages.

PREJUDGMENT INTEREST RECOVERY DENIED

Muckle v. Pressley, 185 Conn. App. 488 (Conn. App.)

Plaintiff's vehicle sustained significant damage when struck by defendant driving for defendant municipality. As part of damages claim, plaintiff sought prejudgment interest, which trial court denied. ***Held:*** Affirmed. Prejudgment interest may be recovered and allowed in civil actions, but that general rule does not apply to actions to recover damages for injury to a person, or to real or personal property caused by negligence. The court further noted that prejudgment interest is permitted in negligence cases where a plaintiff files an offer of compromise that is rejected by the defendant and the plaintiff recovers an amount equal to or greater than the offer of compromise.

PRIOR JUDGMENT ON NUISANCE CLAIM PRECLUDED SUBSEQUENT NEGLIGENCE CLAIM PREDICATED ON SAME FACTS

Smith v. BL Companies, Inc., 185 Conn. App. 656 (Conn. App.)

Plaintiff sued defendant construction supervisor alleging professional negligence concerning incident where plaintiff fell from retaining wall onto driveway six feet below. Plaintiff previously had brought action against defendant alleging the wall constituted a public nuisance, which had been resolved in defendant's favor. The trial court granted defendant summary judgment in the negligence action. ***Held:*** Affirmed. Plaintiff's negligence claim was barred by res judicata in light of the judgment on the merits in the nuisance action since both claims arose out of the same nucleus of fact.

TRIAL COURT ACTED WITHIN DISCRETION IN DISMISSING ACTION BASED ON LACK OF READINESS FOR TRIAL

Geffner v. Mercy Med. Ctr., 2018 N.Y. App. Div. LEXIS 8231 (N.Y. App. Div. 2d Dep't)

Plaintiff brought malpractice and wrongful death action against hospital and physicians on behalf of father. Plaintiff requested and received trial adjournment due to her expert's unavailability. Two years later, plaintiff again requested an adjournment as her expert "lost employees in his office and was unavailable" and sought to use a substitute expert whose opinions were not disclosed pursuant to the CPLR. The trial court denied this request and dismissed the action given plaintiff's vague excuse, lack of detail as to when she learned of the expert's unavailability, lack of good cause for substitute testimony, and prior adjournment. ***Held:*** Trial court did not improvidently exercise its discretion in dismissing the complaint, but since a dismissal for default is not a determination on the merits, the dismissal should have been without prejudice.

COSTS

BURDEN ON NON-RESIDENTS DID NOT DENY ACCESS TO COURTS

Clement v. Durban, 2018 NY Slip Op 07693 (N.Y.)

Plaintiff commenced personal injury action and then relocated to Georgia, prompting defendants to move, per statute, for an order compelling plaintiff to post a minimum of $500 security for costs in the event she lost the case. Plaintiff challenged the statutes as denying her access to the courts and the question was certified for the Court of Appeals. ***Held:*** The Privileges and Immunities Clause only prevents a state from imposing "unreasonable" burdens on nonresidents. The statutes in question are not dissimilar from those around the country and one who qualifies for poor person status is not subject to the statutes.

DAMAGES

LOST PROFITS MUST BE PROVEN WITH REASONABLE CERTAINTY

De Auto Transport, Inc. v. Eurolite, LLC, 186 Conn. App. 270 (Conn. App.)

Plaintiff sued defendant for wrongful repossession, conversion, and statutory theft in connection with a business deal involving the purchase and use of a truck and trailer. Defendant had loaned plaintiff money to purchase the truck and trailer. Plaintiff sought lost profits and presented testimony and a financial report from a certified public accountant in support but the trial court ruled in defendant's favor. ***Held:*** Affirmed. No credible evidence was presented providing reasonable certainty as to plaintiff's lost profits. The accountant failed to list some of plaintiff's trucks on its tax returns and was unaware of the terms of the loan agreement and the disclosures of the individual principals of plaintiff failed to comply with generally accepted accounting principles.

NONECONOMIC DAMAGE CAP APPLIES TO DEFAMATION

Wayt v. DHSC, LLC, 2018 Ohio LEXIS 2847 (Ohio)

Jury awarded $800,000 on nurse's defamation claim. ***Held in a split decision:*** The $250,000 cap on noneconomic damages applied. The cap applies to tort actions involving loss to person or property, including injuries to reputation, and not just bodily injury or damages arising out of negligence.

DISCOVERY

TRIAL COURT ERRED IN COMPELLING PRODUCTION OF UNREDACTED LEGAL BILLS AND INSURER'S FILES

Teran v. Ast, 164 A.D.3d 1496, 84 N.Y.S.3d 504 (N.Y. App. Div. 2d Dep't)

Plaintiff filed medical malpractice action against internist and treatment facility for failure to timely and properly treat plaintiff's heart condition. Case settled, leaving facility's cross-claim for contractual indemnification against the internist. Internist sought production of unredacted copies of the facility's attorney's bills and the files maintained by the facility's insurance carrier, which the trial court granted. The facility appealed, arguing privilege. ***Held:*** Unredacted copies of legal bills are privileged as they would reveal factual investigation and legal work performed by counsel. An insurance carrier's file is privileged as it contains material prepared for litigation and should not be produced even if the movant shows "substantial need."

POLICE OFFICER RECORDS PROTECTED FROM DISCLOSURE

Matter of New York Civ. Liberties Union v New York City Police Dept., 2018 NY Slip Op 08423 (N.Y.)

The New York Civil Liberties Union (NYCLU) sought general disclosure of protected disciplinary personnel records from the NYPD pursuant to the Freedom of Information Law. NYCLU contended compliance with Civil Rights Law § 50-a, which requires that police officer personnel records be kept confidential, is unnecessary where an officer's identifying information is adequately redacted. ***Held:*** No disclosure. Civil Rights Law § 50-a was designed to protect police officers from the use of their records as a means for harassment and reprisals and for purposes of cross-examination by plaintiff's counsel during litigation. The statute's protection is not limited to actual or potential litigation.

EVIDENCE

TEXT MESSAGE CONTENT ALLOWED WHEN TEXT MESSAGES UNAVAILABLE

Meeks v. AutoZone, Inc., 24 Cal. App.5th 855 (4th Dist.)

Plaintiff sued her employer for sexual harassment after another coworker sent plaintiff pornographic videos and images via text message. However, plaintiff could not produce the text messages during discovery because she no longer had them nor had the coworker preserved them. Prior to trial, defendant employer obtained sanction excluding text message claims because plaintiff failed to preserve the messages. Then, the defendant employer obtained exclusion of all evidence of, or reference to, text messages and photos allegedly sent by the coworker. ***Held:*** New trial granted. Secondary evidence did not need to be proved verbatim when the text messages were no longer in the plaintiff's possession and there was no prejudice to defendant because the evidence could be contradicted by testimony and challenged through cross-examination of the plaintiff.

EXCESS INSURANCE

FAILURE TO MAINTAIN PROPER PRIMARY COVERAGE DOES NOT INVALIDATE UMBRELLA COVERAGE

Gabriel v. Mount Vernon Fire Ins. Co., 186 Conn. App. 163 (Conn. App.)

Plaintiff sustained severe injuries when van in which he was passenger crashed into building and wife brought subrogation action seeking damages under a $1 million umbrella policy issued by the defendant insurer to its insured, the vehicle operator. The subject van was covered by a primary business policy with a $300,000 limit, which amount was paid towards plaintiffs' $1.8 million in judgments. Defendant refused to apply its $1 million umbrella coverage to the unpaid balance because the primary insurance had been insufficient to trigger excess coverage. The trial court rendered judgment in favor of the plaintiffs. ***Held:*** Affirmed. The umbrella insurance policy's terms provided that the failure to maintain underlying insurance meeting minimum limits would not invalidate the policy but would merely adjust the net loss defendant was to pay.

LIABILITY INSURANCE COVERAGE

LOST ABILITY TO USE PROPERTY COVERED UNDER PROPERTY DAMAGE POLICY

Thee Sombrero, Inc. v. Scottsdale Ins. Co., 28 Cal.App.5th 729 (4th Dist.)

After a fatal shooting at a nightclub owned by plaintiff, plaintiff obtained a default judgment against the security company because after the shooting plaintiff's conditional use permit was revoked, leaving it to operate only as a banquet hall. Thereafter, plaintiff filed a direct action against the security guard services' liability insurer. Summary judgment was entered in favor of the insurer because the trial court found the insurance policy for property damage did not extend to plaintiff's economic losses caused by the security guard services. ***Held:*** Reversed. The loss of the ability to use the property as a nightclub was a loss of use of tangible property under the policy. The insured had a reasonable expectation that "loss of use" meant the loss of any significant use of the premises, not the total loss of all uses.

TWO WRONGS MADE FOR ONLY ONE OCCURRENCE

Auto-Owners Ins. Co. v. Long, 2018 Ind. App. LEXIS 395 (Ind. App.)

Postal worker suffered injury when an improperly labeled and sealed package spilled toxic chemicals. ***Held:*** The number of occurrences is determined by the cause or causes of the damages. Although the package was both improperly labeled and sealed—two wrongs—there was only one accident, and so only one occurrence resulting from the spill.

INSURER NOT LIABLE FOR ENVIRONMENT CLEAN-UP COSTS

Franke Plating Works, Inc. v. Cincinnati Ins. Co., 2018 Ind. App. LEXIS 378 (Ind. App.)

At least nine years after paying environmental clean-up costs and related expenses, an insured notified its insurer about the costs and requested indemnification. ***Held:*** Insurer properly rejected the claims as late. The policy required written notice "as soon as practicable" and further required that if a claim is made or suit filed, insured must "immediately forward" to insurer the relevant documents. Because insured's notice was unreasonable, prejudice to the insurer was presumed. Insured

failed to rebut the presumption.

INSURERS OWED DUTY TO DEFEND AGAINST ADVERTISING INJURY CLAIM

Holyoke Mut. Ins. Co. v. Vibram U.S.A., Inc., 106 N.E.3d 572 (Mass.)

Insurers denied duty to defend advertising claim arising out of insured's use of deceased track star's name. ***Held:*** A covered "advertising idea" includes concepts, methods, and activities calling the public's attention to a business, product, or service. An idea must relate to marketing, not manufacture or production. The star's family created a connection between their name and the star's legacy to attract customers to their commercial ventures. The family alleged that the insured used the name for the same purpose. It was unnecessary for the family to market a product or idea to develop a secondary meaning for the name. It was enough to use the term in soliciting business.

MASSIVE FOREST FIRE IS SINGLE OCCURRENCE

SECURA Ins. v. Lyme St. Croix Forest Co., LLC, 918 N.W.2d 885 (Wis.)

Massive forest fire destroyed properties of individuals and businesses. ***Held:*** Fire was a single occurrence for coverage purposes. If a single, uninterrupted cause results in damages to many properties, there is still only one occurrence as long as events are so closely linked in time and place to be viewed as one event. The fire had a single precipitating event despite the number of property lines it crossed and amount of materials it consumed.

LIMITATIONS OF ACTIONS

DISCOVERY RULE APPLIES TO EX-FOOTBALL PLAYER'S COMPLAINTS OF CTE INJURIES

Schmitz v. Nat. Coll. Ath. Ass'n, 2018 Ohio LEXIS 2614 (Ohio)

Almost 40 years after his college football career, a player sued the NCAA and his former school for injuries caused by chronic traumatic encephalopathy. ***Held in a split decision:*** Barring his action under the two-year statute of limitations was premature. Mere discovery of injury will not start the statute absent an indication of tortious conduct giving rise to a legal claim. The player's disorientation at the time of injury was inherent to football and did not suggest wrongdoing. The player alleged that he neither knew nor had reason to know of a football-related brain injury. Medical literature was not readily available, and his coaching staff downplayed the seriousness of head impacts. Discovery was needed. ***Also held:*** Player's fraud claims were subject to the two-year statute. They arose out of the school's failure to warn about the risks of football.

MEDICAL MALPRACTICE/ LIMITATIONS OF ACTIONS

WHEN INJURIES AND PSYCHIATRIST'S ACTIONS ARISE FROM SAME CONDUCT, COMPLAINT SOUNDS IN MEDICAL MALPRACTICE

Stagnitta v. Ambrosino, 2018 N.Y. App. Div. LEXIS 7957 (N.Y. App. Div. 2d Dep't)

Plaintiff commenced fraud action against psychiatrist who induced her into a sexual relationship, claiming post-traumatic stress, depression and failed marriage, resulting in financial loss. Defendant moved to dismiss complaint as time barred because beyond the 2 ½ year medical malpractice statute of limitations period. ***Held:*** The sexualization of a physician-patient relationship sounds in medical malpractice and the injuries incurred under the fraud claim are not separate and distinct from the medical malpractice injuries. Therefore, the 2 ½ year statute of limitations period applied.

COURT DISMISSES AMENDED COMPLAINT FILED AFTER STATUTE OF LIMITATIONS EXPIRED

Cengiz v. Saedeline, 2018 N.J. Super. Unpub. LEXIS 2459 (N.J.)

Plaintiff brought medical malpractice action against physician and fictitious providers alleging they failed to properly diagnose and treat his father's blocked carotid artery. The action was timely filed two years after the stroke. Plaintiff then filed an amended complaint eight months later

naming two other cardiologists, who successfully moved to dismiss based on untimeliness. Plaintiff had claimed the statute was tolled until he discovered that one of the doctors checked his father's neck several months prior to the stroke and should have appreciated the extensive blockage. ***Held:*** Affirmed. The initial complaint showed awareness of an actionable claim. Furthermore, plaintiff had been at the appointment in question and been concerned with the treatment.

CONTINUOUS TREATMENT OF RELEVANT CONDITION TOLLS STATUTE OF LIMITATIONS

Cohen v. Gold, 165 A.D.3d 879 (N.Y. App. Div. 2d Dep't)

Plaintiff sought dental treatment from defendants between 2009 and 2015. She saw a periodontist in 2015 who diagnosed her with periodontal disease and bone loss and she underwent numerous procedures. Plaintiff then sued defendants, who successfully moved to dismiss claims for treatment rendered before December 2012 as time barred. ***Held:*** Reversed. Plaintiff established the patient/physician relationship was not terminated as the parties explicitly anticipated further care and monitoring of the condition, by scheduling future appointments. Plaintiff's timely return visit to complain about and seek treatment for a matter related to the initial treatment constitutes continuous treatment. ***Further held:*** Doctor who retired in 2012 could be reached by doctrine via imputation of treatment by other dentists in the practice.

MUNICIPAL LAW AND CORPORATIONS

SCOPE-OF-EMPLOYMENT RULE APPLIES TO SEXUAL ASSAULTS BY POLICE OFFICERS

Cox v. Evansville Police Dept., 107 N.E.3d 453 (Ind.)

While responding to calls, police officers sexually assaulted women. ***Held in a case of first impression:*** The scope of employment rule may include conduct that an employer expressly forbids. Investing officers with considerable and intimidating powers creates an inherent risk of abuse. Holding employers liable will discourage recurrence of problems. Conduct unrelated to serving the employer is outside the rule. ***Further held:*** Municipalities do not owe a common-carrier duty of care. The common-carrier duty arises out of a contract of passage.

NEGLIGENCE

NO SPECIAL RELATIONSHIP BETWEEN UNIVERSITY AND INVITEE INJURED AT OFF-CAMPUS PARTY

Univ. of So. Cal. v. Sup. Ct., 2018 Cal. App. LEXIS 1183 (2d Dist.)

Plaintiff was dancing on a platform at a fraternity party near the University of Southern California ("USC") when another partygoer bumped plaintiff causing her to fall. Plaintiff suffered serious injuries and sued USC for negligence claiming it breached a duty to protect her from an unreasonable risk of harm by failing to shut down the party. USC sought summary judgment but the trial court denied the motion. ***Held:*** Reversed. A defendant may have an affirmative duty to protect the plaintiff from the conduct of a third party if there is a special relationship between the defendant and the plaintiff. However, plaintiff was not a USC student and was not engaged in an activity closely related to the delivery of educational services. Further, USC did not exercise control over the property where the injury occurred. USC and colleges generally have little control over noncurricular, off campus activities and it is unrealistic for students and guests to rely on the college for protection in those settings.

BED BUG BITES DID NOT CREATE INFERENCE OF NEGLIGENCE

Johnson v. Blue Chip Casino, LLC, 110 N.E.3d 375 (Ind. App.)

Bed bugs bit guest during hotel stay. ***Held:*** The presence of bugs did not create an inference of negligence under the *res ipsa loquitor* doctrine. An inference requires proof that (1) the circumstances of the injury were under the management or exclusive control of defendant, and (2) the occurrence does not ordinarily happen absent due care. Because bugs hide and the hotel had preventative procedures in place, the guest could not prove that the bugs' presence probably resulted from the hotel's negligence. ***Also held:*** Hotel's lack of actual or constructive notice of the bugs doomed plaintiff's premises liability claim.

INJURY FROM UNATTENDED VEHICLE WAS FORESEEABLE

R. L. Currie Corp. v. East Coast Sand & Gravel, Inc., 109 N.E.3d 524 (Mass. App.)

After driver left front-end loader unattended and idling on lot shared with plaintiff, unauthorized user damaged plaintiff's trucks. ***Held:*** The damage was foreseeable. In the wrong hands the loader could cause damage. Defendant failed to follow past practice of hiding keys. There had been prior trespasses, and defendant knew that plaintiff stored equipment on the lot. Defendant did not need to foresee the precise act of vandalism.

IMPROPER CONDUCT BY SENIOR MANAGEMENT NEEDED TO INVOKE THE *IN PARI DELICTO* DOCTRINE BARRING NEGLIGENCE RECOVERY

Merrimack College v. KPMG, LLP, 108 N.E.3d 430 (Mass.)

College sued auditors for negligently failing to catch fraud in college's financial aid unit. ***Held:*** To bar recovery under the *in pari delicto* doctrine, a corporation's senior management must be involved in misconduct. The doctrine is equitable in nature but does not apply to all agents of an organization. The morally blameworthy conduct needed to trigger the doctrine must be committed by those leading the organization.

ACTUAL OR CONSTRUCTIVE NOTICE OF ALLEGED DANGEROUS CONDITION REQUIRED

Bradley v. HWA 1290 III LLC, 32 N.Y.3d 1010 (N.Y.)

Trial court dismissed plaintiffs' claim asserting violation of ANSI standards. ***Held:*** While plaintiffs could properly rely on violations of ANSI standards as evidence of negligence, actual or constructive notice of the alleged dangerous condition was also required. Plaintiffs had failed to submit sufficient evidence of notice of the condition, necessitating dismissal.

MOM WAS RIGHT: GO TO THE BATHROOM BEFORE GETTING INTO A CAR

Smith v. Hess, 108 N.E.3d 1266 (Ohio App.)

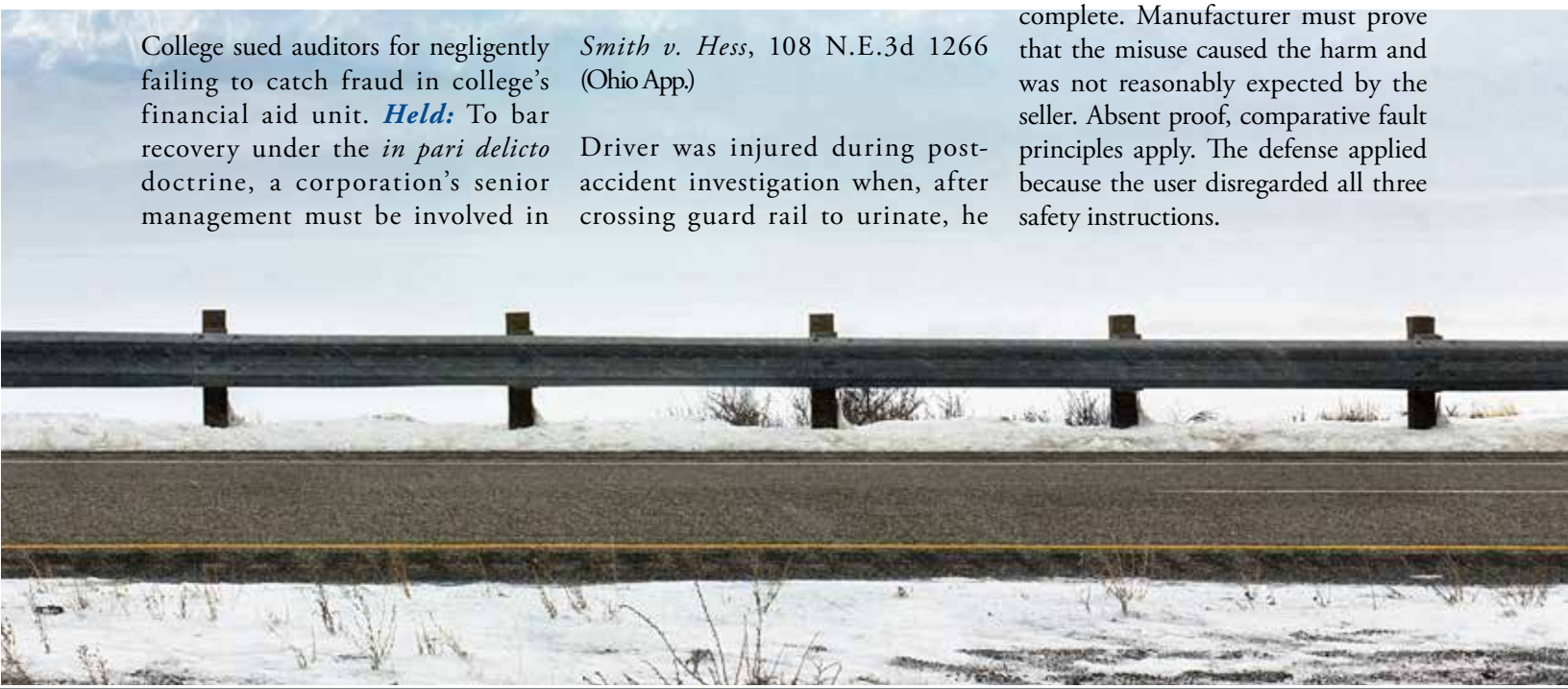
Driver was injured during post-accident investigation when, after crossing guard rail to urinate, he slid down icy embankment into a ravine. ***Held:*** Driver's conduct was not reasonably foreseeable and so broke the chain of causation. The driver was not injured from the vehicle collision. He had exited his car, surveyed the scene, waited several minutes for police to arrive, spoken many times with the responding officer, and at officer's suggestion crossed over the guardrail to walk down a steep ice-covered hill.

PRODUCT LIABILITY

MISUSE IS A COMPLETE DEFENSE FOR MANUFACTURER

Campbell Hausfeld/Scott Fetzer Co. v. Johnson, 109 N.E.3d 953 (Ind.)

User injured eye after disregarding manufacturer's instructions in using a grinder. ***Held:*** If proven, misuse is a complete defense. It acts as an intervening cause where conduct is not reasonably foreseeable by a manufacturer. Two other product defenses—incurred risk and alteration—are also treated as complete. Manufacturer must prove that the misuse caused the harm and was not reasonably expected by the seller. Absent proof, comparative fault principles apply. The defense applied because the user disregarded all three safety instructions.



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