CM REPORT

of Recent Decisions

2019 • Vol. 3

Illinois Appellate Court Delivers Illinois Defense Bar A Double Whammy On Damages

CM's Spotlight On Diversity And Inclusion Initiatives

Insurance Coverage And The Cannabis Industry

Clausen Miller P.C.

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.

CM REPORT of Recent Decisions
2019 • Vol. 3

FEATURES

Report Staff

Editor-In-Chief
Melinda S. Kollross

Assistant Editor
Joseph J. Ferrini

Senior Advisor and Editor Emeritus
Edward M. Kay

Feature Commentators
Kimbley A. Kearney

Case Notes Contributing Writers
Melinda S. Kollross
Paul V. Esposito
Joseph J. Ferrini
Don R. Sampen
Patrick L. Breen
Mara Goltsman
Gregory J. Popadiuk
Meredith D. Stewart

The CM Report of Recent Decisions is provided as a general information source and is not intended, nor should it be considered, the rendition of legal advice. Please contact us to discuss any particular questions you may have.

© 2019 Clausen Miller P.C.

ARTICLES

FIRST-PARTY PROPERTY

LIABILITY INSURANCE COVERAGE

PREMISES LIABILITY

Illinois Appellate Court Delivers Illinois Defense Bar A Double Whammy On Damages: *McIntyre v. Balagani*, 2019 IL App (3d) 140543

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

The Illinois Appellate Court's *Balagani* opinion shows the leeway accorded plaintiffs in maintaining claims for a decedent's loss of future income and services. It also puts defendants between the proverbial "rock and a hard place" in trying cases involving soft damages for loss of society and companionship.

Facts

This was a medical malpractice wrongful death action. Decedent was 48 years old at the time of his death in 2009 and left behind a wife, an adult daughter by a previous marriage, and three other minor children. A verdict was rendered in favor of decedent's wife who brought the action as administrator of the estate, with the jury awarding $1.1 million dollars for loss of future income, and $500,000 for loss of society and companionship.

Analysis

The Lost Future Income Claim

Decedent worked at an insurance carrier for 23 years, working his way up to become vice president. But it was decedent's "dream" to own his own printing business. Decedent began his "dream" in 2007, leaving his employment and setting up his own business. The evidence showed only modest growth in 2008 and decreased growth in 2009 and plaintiff never called her expert economist who could have established more specific and less speculative growth projections. Plaintiff's counsel blackboarded $1.25 million as an appropriate lost future income amount.

Defendants relying upon the "new business rule", which Illinois courts have applied in cases where a plaintiff claims damages resulting from the loss of a new business, argued that the jury's $1.1 million dollar award could not stand because there was no reasonable certainty about how much future income would ever be derived from decedent's "dream" of running his own print shop.

The Appellate Court rejected this use of the "new business rule" in a wrongful death personal injury case, holding that Illinois law presumes that decedent's next of kin sustained some substantial pecuniary loss by reason of his death. The court focused on evidence showing decedent's "industriousness, initiative, ingenuity... including his ability to solicit clients and build and grow a business as all supporting the jury's award of $1.1 million for lost future income. The Appellate Court specifically ruled that the jury didn't need hard economic evidence to make a personal injury award..." it was entitled to consider [decedent's] future earnings potential based upon his general abilities, industriousness, work habits, and his lifetime history of providing for his family.

Melinda S. Kollross
is an AV® Preeminent™ rated Clausen Miller senior partner and chair of the Appellate Practice Group. Specializing in post-trial and appellate litigation for savvy clients nationwide, Melinda is admitted to practice in both New York and Illinois, as well as the U.S. Supreme Court and U.S. Courts of Appeals for the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. Melinda has litigated over 150 federal and state court appeals and has been named a Super Lawyer and Leading Lawyer in appellate practice.
mkollross@clausen.com

Edward M. Kay
is a Clausen Miller partner in the Appellate Practice Group. He is AV® Preeminent™ rated by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed has been chosen as a Leading Illinois Appellate Attorney, a Super Lawyer and has over 30 years experience in trial monitoring and post-trial/appellate litigation which he regularly brings to bear in significant cases nationwide. Ed has prosecuted over 500 appeals nationwide.
ekay@clausen.com

Loss of Society and Companionship

Plaintiff sought a new trial on damages alone, claiming that the verdict of $500,000 was grossly inadequate. The Appellate Court agreed and remanded the case back for a new trial on that element of damages.

Plaintiff's evidence of loss society and companionship fit the usual pattern as seen these cases...decedent was the salt of the earth—"a loving and devoted husband and father who was actively engaged in his children's lives." Plaintiff testified that decedent was her "best friend", "soul mate", the man who she would spend the rest of life with. Besides plaintiff's testimony on how great a guy decedent was with her and all the kids, decedent's adult daughter by a previous marriage, as well as the plaintiff's three minor children testified as well, all giving the usual heart wrenching testimony about how great decedent was to everyone and how he will be missed...for example the youngest daughter testified "she no longer laughs as much" since decedent died. According to the Appellate Court, the evidence presented by plaintiff showed that decedent was a "loving, caring, and dedicated father who was very involved in all aspects of his children's lives (educational, athletic, moral, recreational)". Significantly, the Appellate Court found that defendants presented no evidence to rebut plaintiff's evidence of loss of society and thus the unrebutted evidence showed that plaintiff and her children suffered a "substantial loss". And despite the deference that Illinois appellate courts ordinarily gives to a jury's determination of damages—especially non-economic loss—the Appellate Court found that $500,000 was just too paltry of a sum to divide up among five survivors.

Learning Point: This is a very troubling decision.

The Court's action in overturning the $500,000 is shocking. It's obvious that what the Appellate Court did not like here was the fact that the defendants had the benefit of a conservative jury awarding a conservative amount for "soft damages" instead of the typical Illinois sympathetic, runaway jury making an award in the millions of dollars. The court's action puts the defense bar in a tough spot: do nothing and hope for a conservative jury...but if it's too conservative a jury as here, you won't be able to sustain the award on appeal because plaintiff's evidence will be unrebutted. Or attack the plaintiff's loss of society case, and risk antagonizing the jury leading them to rule against you on liability and/or award an even greater amount against the defendant—which will in all likelihood just be affirmed on appeal.

More can be done in attacking future income claims, though.

The $1.1 million verdict for lost future income was pulled from thin air...it was based on nothing more than the decedent "had a dream", and he was going to make that dream happen. If defendants want to build a case to take to the jury and up to the appellate court, they have to have their own experts in there testifying, instead of like this case...not just saying that plaintiff did not have her expert support the award. That's not going to cut it in the Appellate Court for the defense bar as shown by *Balagani*.

Clausen Miller Presents Client-Site Seminars For CLE and/or CE Credit

As part of our commitment to impeccable client service, we are proud to provide client work-site presentations for Continuing Legal Education ("CLE") and/or Continuing Education ("CE") credit. You will find available courses listed below. Please view the complete list of individual course descriptions at www.clausen.com/education/ for information regarding the state specific CE credit hours as well as course and instructor details.

Additional Insured Targeted Tender Issues And Other Emerging Trends Affecting Strategic Claims Determinations

Additional Insured Targeted Tender Issues And Other Legal Considerations Affecting Strategic Coverage And Litigation Determination

Alternatives To Litigation: Negotiation And Mediation

An Ethical Obligation Or Simply An Option?: Choose Your Own Adventure When Adjusting A First Party Property Claim

An Insider's Guide To New York Practice

Appellate And Trial Protocols For Resolving Coverage, Casualty And Recovery Issues Facing The Insurance Claims Professional

Assignments Of Benefits In Florida: How Did We Get Here?

Attorney Fees And Costs In Florida: Can We Avoid A Stick Up?

Avoiding Trial Pitfalls And Maximizing Success On Appeal

Breaking Bad Faith, Failure To Settle Within Policy Limits, And Strategy For The Claims Professional

Builders Risk Insurance: Case Law, Exclusions, Triggers And Indemnification

CALIFORNIA SETS NEW MAXIMUM CONTAMINANT LEVEL ON HEXAVALENT CHROMIUM IN DRINKING WATER: The Background, Remediation, Litigation And Related Claims-Handling And Coverage Issues

Coverage And Trial/Appellate Litigation— Strategies Affecting Coverage Determinations

Coverage Summer School: "Hot" Insurance Topics For "Cool" Claims Handling

Developments In Insurance For The Claims Professional: Time Limit Settlement Demands; Insurance And Legal Issues Related To Drones; And Ensuing Losses Under First Party Property Insurance Policies

Developments In Insurance For The Claims Professional: (1) The New Restatement Of The Law Of Liability Insurance; (2) Protecting Insureds In The Transportation Industry From The Dangers Of Plaintiffs' Reptile Theory; (3) Coverage Issues Regarding "Rip And Tear" Or "Get To" Costs In Construction Defect Claims; (4) When A Collapse Claim Involves More Than "Collapse"; And (5) The Law Of Golf: A Short Course

Developments In Property Insurance Coverage Law

Jumping Over The Evidentiary Hurdles To Victory

Miscellaneous Issues Of Interest Relating To Property Insurance

Negotiation: Methods For Determining Settlement Values And Strategies For Acquiring Movement

Premises Liability/Liquor Liability And Security/Architects And Engineers Construction And Environmental Claims

Recent Trends In Bad Faith And E-Discovery Issues And Protocols To Resolve Same For The Claims Professional

Strategies For Increasing The Settlement Offer

Subrogation: Initial Recognition, Roadblocks And Strategies

The Latest Coverage Battles In Construction Defect And Faulty Workmanship Claims

Tips And Strategies For Claims Professionals: The Affordable Care Act, Unilateral Settlement Agreements, And Ethics In Claims Handling

Tips And Strategies For The Claims Professional: What You Need To Know About Medicare Reporting, The Affordable Care Act, Targeted Tenders, And Unilateral Settlement Agreements

Winning Through Motions And Setting The Stage If All Else Fails

If you are interested in a course or topic not currently listed in our available courses, please contact the Clausen Miller Marketing Department at marketing@clausen.com

Spotlight On Clausen Miller's

Diversity And Inclusion Initiatives

Clausen Miller's Board of Directors is doubling down on its commitment to advance the diversity and inclusion values of the firm. The Board recently announced the goal that by 2021, CM will enjoy a deserved national reputation as a firm devoted to diversity and inclusion, earned by recognized improvements in every rank and category of the firm. While CM has long been committed, and significant progress has been made, CM is striving to move the needle more.

In furtherance of these goals, the Board recently named Clausen Miller's first Chief Diversity Officer, Shareholder and Director Paige M. Neel. Paige recently sat down with CM Report staff to speak about her mission of expanding Clausen Miller's diversity and inclusion efforts.

CM Report: Paige, tell us about some of the advances in diversity and inclusion at Clausen Miller.

Paige Neel: Clausen is fully committed to recruit, hire, develop, retain, and promote the best attorneys and staff at all levels—regardless of race, color, ethnicity, gender, religion, age, LGBTQ identification, marital status, disability, military background or viewpoint. Here at Clausen, we are lucky because our senior leaders prioritize diversity. When companies encourage diversity and inclusion, fewer employees think about leaving and employee happiness increases. The largest data sets on the state of women in the workplace absolutely support this conclusion.

As our first Chief Diversity Officer, I am looking forward to implementing some concrete programs and measures. For example, we are implementing training on implicit bias, #MeToo issues, and #PayMeToo issues. We will also work directly with our Attorney Recruitment and Retention Committee, Mentorship Committee and Practice Group Chairs

to improve mentorship and sponsor opportunities for diverse attorneys throughout our firm. I also envision that we will make commitment to diversity and inclusiveness part of our annual performance evaluation of all partners and all attorneys.

CM Report: What is the largest obstacle that law firms currently face when it comes to hiring and retaining qualified diversity candidates?

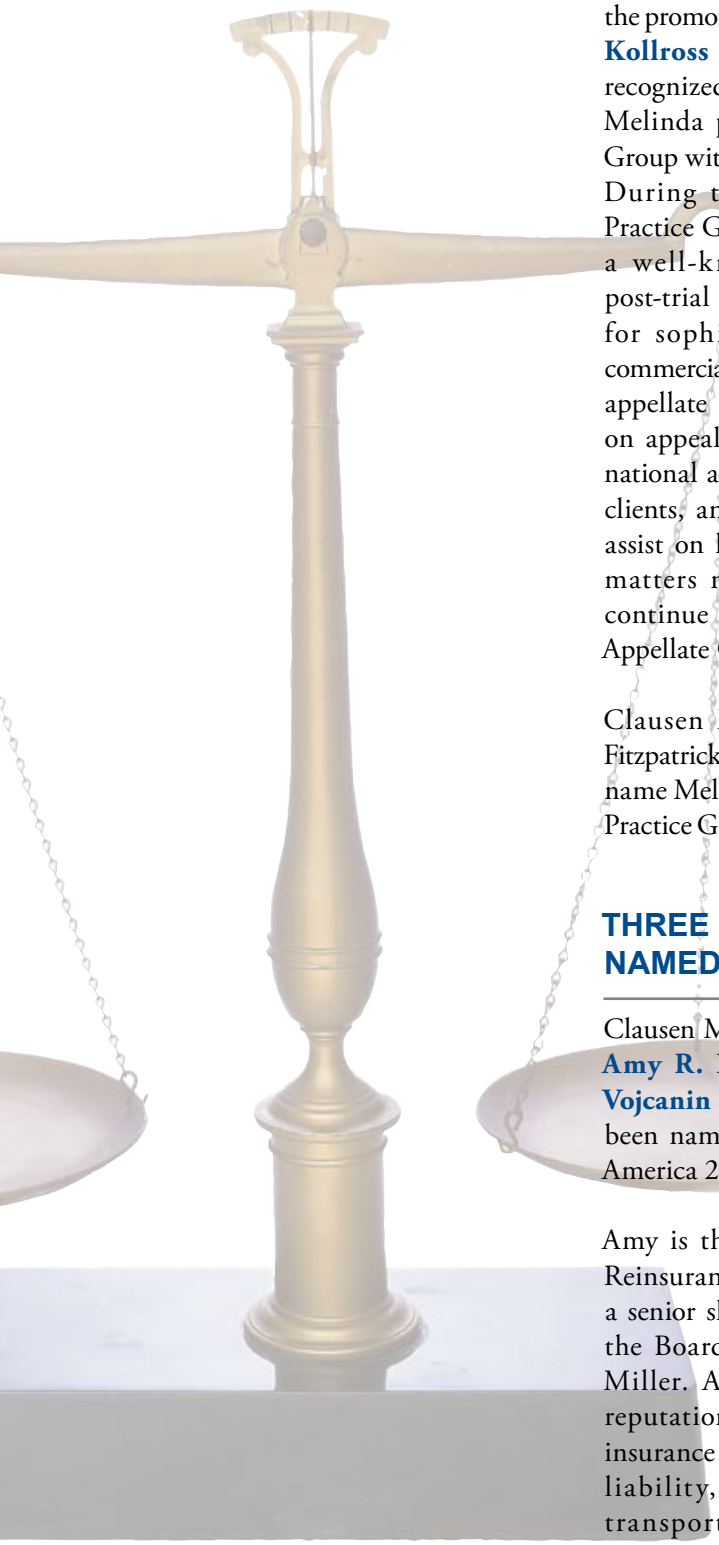
Paige Neel: People are the greatest assets of any law firm. We don't sell products; we sell the talents and expertise of our people. So it is absolutely critical for any law firm to have attorneys that are diverse in thought, experience, race, and other differentiators to insure we can provide excellent solutions to our clients' complex problems. To stay competitive, Clausen Miller places significant focus on the retention aspect and to foster an environment where all of our people thrive. This means providing programs, benefits, and policies that support an inclusive work force in their diverse and ever-changing needs. One of my goals as Clausen's first Chief Diversity Officer is to invest significant time and resources on inclusion areas of gender, race and ethnicity, and sexual orientation. We are rethinking the definition of work—the way it gets done, when, where, and by whom.

CM Report: What new diversity initiatives are you planning in the near future?

Paige Neel: We are continuing to actively recruit diverse attorneys, and I am excited about our latest outreach to diverse law school communities with Clausen's one-day internship program that we will be kicking off later this year. Our program will allow law students to observe and experience a "day in the life" of a Clausen Miller attorney, be it in court, in a deposition, in a meeting with expert witnesses, as well as informal give-and-take discussions with many different Clausen Miller attorneys across our numerous practice groups. Our goal is for law students from diverse backgrounds to experience first-hand what life in a busy litigation firm looks like and to decide for themselves whether they can see their future here with Clausen Miller.

CM Report: How important are mentors to helping advance one's legal career, and does Clausen Miller maintain any mentorship programs, especially for diverse candidates or lawyers?

Paige Neel: We can never underestimate the value of mentors and sponsors in helping navigate our legal careers. Ask any leader how they got where they are today, and most will tell you that they didn't do it alone. Most can point to a mentor or sponsor who took a vested interest in them and advocated on their behalf. Here at Clausen, we have a long-standing mentorship program for all new associates who join us, and we make sure that we connect more senior attorneys with new attorneys to provide sound advice. Although true mentorship and sponsor relationships tend to happen naturally, research shows us that some individuals are less likely to take advantage of informal networks and would benefit from a structured program. That's why at Clausen we offer a variety of opportunities by imbedding them into existing mentorship and development programs. In this way, we can connect high-potential young lawyers with senior leaders to provide them with mentorship and sponsorship and to show their protégés how to own and drive their careers, as well as to illuminate the nuances of navigating the legal profession.



MELINDA KOLLROSS NAMED CHAIR OF CLAUSEN MILLER APPELLATE PRACTICE GROUP

Clausen Miller is proud to announce the promotion of shareholder **Melinda Kollross** to Chair of its nationally recognized Appellate Practice Group. Melinda previously co-chaired the Group with Ed Kay for over a decade. During that time, the Appellate Practice Group has grown to become a well-known trial monitoring, post-trial and appellate powerhouse for sophisticated insurance and commercial clients seeking outstanding appellate representation at trial and on appeal. The Group functions as national appellate counsel for several clients, and is regularly called in to assist on high profile/high exposure matters nationwide. Ed Kay will continue his active practice in the Appellate Group.

Clausen Miller President Dennis Fitzpatrick stated: "We are so pleased to name Melinda Chair of the Appellate Practice Group after 28 years of service to Clausen Miller. She embodies the Firm's longstanding commitment to thoughtfully mentoring its young attorneys, providing outstanding opportunities for career advancement, and fully supporting women in leadership roles. Clients expect the best from Clausen Miller, and Melinda delivers on that promise."

Melinda credits Clausen Miller and her appellate colleagues for her success: "I have been honored and blessed to work for a Firm that has supported me through every stage of my career, to have been mentored by two appellate greats (Jim Ferrini and Ed Kay), and to have Appellate Practice Group members who are not only the best in the business but terrific people as well."

For more information, see **https://www.clausen.com/attorney/melinda-s-kollross/** and **https://www.clausen.com/what-we-do/appeals/**.

THREE CLAUSEN MILLER ATTORNEYS NAMED TO BEST LAWYERS IN AMERICA 2020

Clausen Miller is proud to announce **Amy R. Paulus**, **Sava Alexander Vojcanin** and **Edward M. Kay** have been named to the Best Lawyers in America 2020 ranking.

Amy is the Liability Coverage and Reinsurance Practice Group Leader, a senior shareholder and member of the Board of Directors of Clausen Miller. Amy has built a national reputation in all areas of liability insurance coverage law, professional liability, employment practices, transportation, claims handling issues and best practices, bad faith, excess insurance, intellectual property, cyber losses, and reinsurance matters and arbitrations. Demonstrating her commitment to the insurance industry, Amy is a CPCU (Chartered Property Casualty Underwriter). She is also AV® Preeminent™ rated by Martindale-Hubbell, and a member of the esteemed Litigation Counsel of America Trial Lawyer Society.

Sava is a senior shareholder whose practice focuses on resolving high-exposure property insurance matters.

As coverage and litigation counsel, his experience includes appraisals, arbitrations, mediations, and litigation in jurisdictions across the United States and in England. As a litigator, Sava is hands-on and remains responsible for all phases of litigation, including trial and appeal. As a director, he is responsible for the day-to-day management of the Firm.

Ed is a Clausen Miller Appellate Practice Group partner. He is AV® rated (Preeminent) by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed has been chosen as a Leading Illinois Appellate Attorney, a Super Lawyer and has over 40 years experience in trial monitoring and post-trial/appellate litigation which he regularly brings to bear in significant cases nationwide. Ed has prosecuted over 500 appeals nationwide.

Recognition by Best Lawyers is based entirely on peer review.

PARTNER SERENA SKALA TO PRESENT ON WORK/LIFE BALANCE AT WOMEN IN LEGAL AND LEADERSHIP SUMMIT IN NYC

CM partner **Serena Skala** will speak at the Women in Legal and Corporate Leadership Summit, taking place on November 21, 2019, in NYC (final location to be announced shortly). Serena's presentation explores the importance of achieving a Work/Life Balance for women lawyers.

Serena and her fellow presenters will discuss how to build and manage a high level career while maintaining a balance with their personal lives and family responsibilities. Juggling a dynamic practice and dynamic personal growth can be challenging, and Serena will offer concrete ideas to help achieve this essential balance. Serena's panel will also discuss workplace and corporate policies and practices that will help employees maintain that balance.

The Women in Law & Corporate Leadership Summit explores the career obstacles, risks and rewards on the path to a fulfilling and productive career for women lawyers including ways to best manage their careers and effective ways for women to promote themselves. This conference will provide networking and learning opportunities on topics including mentorship, gender equity and career management.

Serena is a partner in our New York City office. She focuses on litigation in the fields of professional liability, premises liability and construction site litigation at both the state and federal levels. Please contact Serena (**sskala@clausen.com**) to inquire about complimentary passes to attend this event.

GOLTSMAN SECURES SUMMARY JUDGMENT FOR ENRICHED HOUSING/ASSISTED LIVING FACILITY

Background

Assisted living is the fastest growing segment of membership for the American Health Care Association/ National Center for Assisted Living (AHCA/NCAL). AHCA is a federation of affiliate state health organizations which represents over 13,500 non-profit and for-profit nursing facility, assisted living, developmentally-disabled, and subacute care providers that serve approximately 1 million older and disabled individuals each day. With baby boomers aging and significantly increased longevity, the 50-and over population is projected to increase about 20 percent by 2030, to 132 million. With an increase in the older population moving into enriched housing/assisted living facilities, lawsuits will increase as well.

New York has three assisted living models: adult homes, enriched housing programs and assisted living residences. Resident rooms vary among facilities; however, enriched housing programs generally provide apartment-style living and adult homes provide private or semi-private rooms without kitchens. Generally, residents of adult homes, enriched housing programs, and assisted living residences do not have medical conditions that require 24-hour, on-site skilled nursing or other medical staff, but they may need some assistance with personal care tasks, such as bathing, dressing, ordering and preparing medication, and arranging medical appointments. In all three models, providers routinely assist residents in accessing nursing and other health care services from community home care agencies, under the direction of the resident's physician, for chronic, stable conditions. The residents must not: have a medical condition requiring 24-hour skilled nursing; be a danger to themselves or others; chronically need the assistance of another person to walk, move about, or transfer in and out of bed; or have unmanaged incontinence.

Enriched housing/assisted living facilities do not employ physicians. The residents see their own physicians and health care providers, typically outside of the facility (although some health care practitioners see residents at the facility for the convenience of the residents, but these providers are not employed or provided by the facility).

Facts

Mr. A, a resident of an enriched housing facility represented by Clausen Miller, fell and sustained a hip injury while on an outside shopping trip organized by the facility. Mr. A underwent surgery to repair the hip and died during the hospital admission. Plaintiff sued the facility, claiming that Mr. A sustained personal injury and died as a result of the facility's negligence. Mr. A, who was ambulatory and independent, had falls during the two years that he lived at the facility, including the day before the fall at issue. He was

brought to the Emergency Room after each fall and was always released back to the facility with no further recommendations, including any directive that he required any change in his activity level. Plaintiff argued that the facility should not have allowed Mr. A go on the trip as he had fallen the day before.

Before Mr. A was approved to move in to the facility, he was examined by his primary care physician who made the decision that it was appropriate for Mr. A to live at the facility. Mr. A was categorized as a Basic Care resident, and as such, the facility offered only housing, meals, and the opportunity for planned social activities to Mr. A. Mr. A saw his physician regularly at the physician's practice and this physician never advised that Mr. A required a higher level of care at the facility, nor did he diagnose Mr. A with any condition that would have prevented him from being independent or going on a trip provided by the facility.

The Successful Defense Strategy—Establish Absence of Monitoring/ Supervision Duty Alleged By Plaintiff

Clausen Miller partner **Mara Goltsman** argued that the facility did not cause Mr. A to fall and sustain a hip injury nor did the facility cause his death. The court granted our motion for summary judgment and dismissed the case in its entirety. The court held that we succeeded in proving that the facility breached no duty owed to Mr. A, who needed minimal assistance with his daily activities, was independently ambulatory and was not designated a fall risk by any of his physicians. The court explained that assisted living facility operators (such as the defendant) have a duty to safeguard their residents from injuries as measured by the capacity of each resident to provide for his or her safety, and this sliding scale of duty does not render the facility an insurer of resident safety or require it to keep each resident under constant surveillance.

Plaintiff, Mr. A's son, executed a contract with the facility to provide room and board for his father as a Basic Care resident. As such, the facility did not have a duty to do anything beyond the instructions provided by the Emergency Room physician(s). The facility did not agree, in contract or otherwise, to perform the type of monitoring and supervision of Mr. A that plaintiff alleged. The facility did not have a duty to prevent Mr. A from going on the trip. Furthermore, the facility was not allowed to prevent Mr. A from going on the trip under the terms of the Agreement entered into between the facility, plaintiff and Mr. A. A section of the Agreement titled Rights and Responsibilities of Resident in Assisted Living Residences states that every resident's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed. As such, no one at the facility had the right to prevent Mr. A from going on the trip, an activity that Mr. A had participated in previously and which he decided to participate in on the date at issue.

With the general "greying" of the population and improvement in medicine, people are living longer. Many of these individuals are able to get around on their own but it may be difficult for them to continue living in their home, paying bills and shopping and cooking for themselves. Such individuals certainly do not need to live in a nursing home, which serves residents who need 24- hour skilled nursing care due to acute or unstable medical conditions that require the constant presence of medical personnel. Living in an assisted living facility provides older individuals with a dignified way to live including making decisions to the degree that they can do so.

What many plaintiffs and their attorneys seemingly fail to understand is that an adult home or enriched housing program is not a nursing home, does not have physicians on staff, and does not contract with residents to monitor or supervise their health status—that is done by the residents' physicians, who are not employed by the facility. Plaintiff attorneys often make allegations against these facilities that are applicable to nursing homes. As such, it is crucial to carefully analyze all pleadings as to the statutes cited in order to delineate the duty that the facility owes to the resident as the duty will be different than that of a nursing home. It is also crucial to obtain as much information as possible concerning the resident's level of activity, medical condition and any changes in same when defending an assisted living type facility to determine whether the resident's subsequent assessments took into consideration any information provided by the resident's physician(s) and changes in condition that would result in a change as to the resident's classification, and whether it is still appropriate for the resident to continue to live at the facility.

MINDY MEDLEY SECURES SUMMARY JUDGMENT FOR PROPERTY INSURER

CM partner **Mindy Medley** recently won a significant motion for summary judgment in federal court in Chicago in a $10 million first-party property case. The United States District Court for the Northern District of Illinois (Judge Feinerman) entered summary judgment in favor of our client Philadelphia Indemnity Insurance Company in connection with a hail damage claim at a large condominium complex in Schaumburg, Illinois. Mindy moved for summary judgment on a late notice defense and also moved to exclude two of the insured's experts in a simultaneous effort to knock out the breach of contract claim. The court granted summary judgment on the late notice defense and found the motions directed to the experts to be moot. Judge Feinerman authored a 20-page opinion which contains a detailed analysis of Illinois' test related to late notice (and other Duties in the Event of Loss). Section 155/"bad faith" was also alleged in this case and summary judgment was specifically entered on that count as well. For more information, contact Mindy at **mmedley@clausen.com**.

Property Policy Covers Replacing Undamaged Siding To Achieve Matching

by ***James R. Swinehart***

In a recent case, *Windridge of Naperville Condo Ass'n v. Phila. Indem. Ins. Co.*, 932 F.3d 1035 (7th Cir. 2019), the Seventh Circuit held that, under the facts presented, a property policy covered the cost to replace elevations of aluminum siding at a condominium complex, which were not damaged by hail or wind, to achieve aesthetic matching. Clausen Miller represented the insurer, Philadelphia Indemnity Insurance Company.

Facts

The aluminium siding on two elevations (the south and west) on condominium buildings was physically damaged by wind and hail. The siding on the north and east elevations was not physically damaged. Philadelphia Indemnity paid for the damage to the south and west elevations, which were damaged, but did not cover the undamaged elevations. The aluminium siding on the buildings was no longer available (though it was available for almost a year and a half after the loss).

Analysis

The Seventh Circuit interpreted the property insurance policy under Illinois law. The Court recognized that cases around the country dealing with the so-called "matching" issue had mixed results. It also recognized that Philadelphia Indemnity's position of paying for the damaged siding only was "not indefensible" and had support in the case law. The Court, however, concluded that the unit of covered property under the policy—whether it was each panel of siding vs. each side vs. the buildings as a whole—was ambiguous as applied to these facts. The Court determined that the unit of damaged property should be regarded as the buildings as a whole—they suffered direct physical loss from the storm, which altered the appearance of the buildings. Therefore, under the replacement cost policy, since matching siding was not available, Philadelphia Indemnity was required to replace the siding on all four elevations of the buildings to make Windridge whole and return it to its pre-storm status.

The Court felt its approach left "plenty of room for common sense" situations when property sustained limited damage. For instance, if a shingle in the corner of a roof was damaged and no replacement shingle was available, the insured would not be entitled to a new roof. Rather, that shingle could be replaced with the insured possibly being entitled to compensation, (presumably minor) for the decrease in value of the building due to the non-matching shingle.

Learning Points: This is a significant decision in the realm of property insurance. The central holding of the case was that, under the facts where siding on two of the four elevations of the buildings was damaged by hail and wind and matching siding was no longer available — the specific language of the policy was ambiguous. Accordingly, the buildings were deemed physically damaged from hail and wind, requiring the insurer to pay to replace the siding (even the undamaged siding) on all four elevations, so the buildings matched on all sides. Other considerations from the Seventh Circuit's decision to bear in mind when analyzing whether coverage is afforded to undamaged property to achieve aesthetic matching:

1. Is the property component (such as siding) available for making the repairs or replacement? Must the exact same component be available or is a reasonable match sufficient? The Court did not address this.

2. What is the effect of the Court's "common sense" approach? Was the damage to the component limited, such that repair rather than replacement of all of the component, was warranted, even if a mismatch results? If a mismatch results from the repair, is the insured entitled to some payment for the decrease in the value of the building? ♦

James R. Swinehart
is a shareholder in the Chicago office of Clausen Miller, PC. He has been a lawyer for over 34 years and has specialized in first-party property coverage and litigation throughout the U.S. Jim has practiced in many state and federal courts and has experience in mediation and arbitration. His practice involves substantial dealings with experts in various disciplines and writing opinion letters, motions, and briefs.
jswinehart@clausen.com

10th Circuit Affirms No Coverage For Fraudulent Wine Purchases Under "Private Collections" Policy

by ***Melinda S. Kollross***

Melinda S. Kollross
is an AV® Preeminent™ rated Clausen Miller senior partner and chair of the Appellate Practice Group. Specializing in post-trial and appellate litigation for savvy clients nationwide, Melinda is admitted to practice in both New York and Illinois, as well as the U.S. Supreme Court and U.S. Courts of Appeals for the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. Melinda has litigated over 150 federal and state court appeals and has been named a Super Lawyer and Leading Lawyer in appellate practice.
mkollross@clausen.com

We previously reported on *Hasan v. AIG Property Casualty Co.*, 1:16-cv-02963-RM-MLC (D. Colo. Aug. 2, 2018) (see 2018 CM Report, Volume 3). Serving as coverage counsel, Clausen Miller partners **Dennis Fitzpatrick** and **Erin Pellegrino** correctly advised AIG that there was no coverage for the insureds' claimed economic loss under these circumstances. The federal district court agreed, granting summary judgment to AIG on all claims and denying plaintiffs' motion for leave to file an amended complaint. The Tenth Circuit recently affirmed.

Facts

Since 2000, Malik and Seeme Hasan placed online orders for bottles of wine and "wine futures" from Fox Ortega Enterprises, Inc. d/b/a Premier Cru ("Premier Cru"). The wines purchased were of two types: (1) wine that was physically located in Premier Cru's Berkeley, California warehouse; and (2) wine futures or "pre-arrival" wine that customers paid Premier Cru for and which Premier Cru promised to deliver at some later time. Premier Cru's principal, John Fox, admitted in a plea agreement that the "pre-arrival" wine sales were a fraudulent Ponzi scheme to induce customers to pay for wine that Fox knew would not be delivered.

The Hasans were insured under a "Private Collections" Policy issued by AIG. In February 2016, the Hasans submitted a claim for benefits under the Policy seeking $1,707,985 based on 2,448 bottles of wine that had been purchased but not delivered. AIG denied coverage for the Hasans' claim on two grounds: (1) the Hasans did not own or possess the wine; and (2) the Hasans did not suffer direct physical loss or damage to the wine. The Hasans filed suit and the case was removed to federal district court in Colorado.

Applying Colorado law, the federal district court granted AIG's motion for summary judgment on all claims finding that there was no physical loss or damage as required for coverage under the Policy. The Hasans appealed.

Analysis

The Tenth Circuit affirmed, but on a different ground also raised by AIG with the federal district. The Private Collections Policy insures against "direct physical loss or damage to valuable articles anywhere in the world unless stated otherwise in this policy or an exclusion applies." Valuable articles are defined as "personal property you own or possess[.]"

Because there was no evidence of direct physical loss or damage to property as required under the Policy, the district court had declined to reach the issue of whether plaintiffs owned, possessed, or obtained title to any of the wine. The Tenth Circuit analyzed the ownership/possession issue first,

finding that plaintiffs' loss was not insured because they failed to present adequate evidence that they were the owners of any wine bottles not delivered to them.

Plaintiffs contend that when they sent money to Fox, he used the money to purchase the specified 2,448 bottles of wine for plaintiffs and allocated the bottles to them. Upon this supposed purchase of those bottles, plaintiffs say they owned them. But those bottles have not yet been delivered to plaintiffs. Thus, according to plaintiffs, the bottles must have been lost or damaged and are therefore covered by the Policy, which, they say, must reimburse them for the market value of the bottles.

The problem with plaintiffs' position, the Tenth Circuit wrote, "is the absence of evidence that Fox actually purchased the ordered bottles for Plaintiffs." For many (perhaps all) of Fox's other customers, Fox regularly failed to use the money to purchase the ordered bottles. Some of the money went to his personal expenses. Even money that was used for the business often was used to purchase bottles for prior customers whose orders had not been filled. And sometimes bottles that were purchased were purchased for more than one customer. Fox did not necessarily treat plaintiffs the same way he treated other customers. But plaintiffs needed to provide evidence that they were indeed treated as they contend.

The "habit" evidence plaintiff provided was inadequate. Plaintiffs claim Fox always purchased the wine they ordered, but admitted that wine deliveries to them were frequently, and often significantly, delayed. Such delay implies that the bottles were not promptly purchased by Premier Cru. It is fully consistent with Fox's confession that he was conducting a Ponzi scheme in which the orders of earlier customers were often filled only after additional funds were supplied by later customers, and even then only after complaints from the earlier customers. "This is not the stuff of proof of a habit or routine practice," the Court declared.

Plaintiffs' inventory evidence was likewise insufficient. Plaintiffs argued that some of the bottles identified in the bankruptcy inventory of Premier Cru's warehouse matched those they had ordered and not received. They suggest this is evidence that Premier Cru ordered bottles specifically for plaintiffs (which were owned by them). But plaintiffs failed to cite to a single example of such a bottle. There was no information presented as to when the inventoried bottles were ordered or delivered, or when plaintiffs' orders were placed. Moreover, even if plaintiffs were to identify some overlap between the inventory and their sales orders, the inventory does not reflect that any bottles were allocated to them, despite the bankruptcy trustee's efforts to make such allocations.

Absent evidence that any of the 2,448 bottles of wine which plaintiffs ordered and paid for were actually purchased by Premier Cru, much less specifically purchased for plaintiffs, plaintiffs failed to carry their burden on an essential element of their insurance claim—that there are unaccounted for bottles of wine that they owned. The Tenth Circuit upheld the district court's grant of summary judgment on this basis.

Learning Point: Under property insurance policy language affording coverage for "direct physical loss or damage" to covered personal property "you own or possess," no coverage is provided for property supposedly purchased in a fraudulent scheme but not delivered, absent proof that the subject property was actually purchased for the insured. For more information about this case or other first-party property matters, please contact Dennis (**dfitzpatrick@clausen.com**) or Erin (**epellegrino@clausen.com**). ♦

California Supreme Court Holds That Notice-Prejudice Rule Applies To First-Party Coverage, But Not Third-Party Coverage

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

Henry (Mackie) T.M. LeFevre-Snee
focuses his practice on insurance coverage disputes involving mass torts, environmental pollution, and construction defects in state and federal court. Prior to joining Clausen Miller in Chicago, Mackie was an associate at a New York City-area firm, litigating insurance coverage disputes in state and federal courts in New York, New Jersey, and Delaware. Mackie also served as a law clerk in the Superior Court of New Jersey, for the Hon. Kenneth J. Grispin, P.J.Cv.
hlefevresnee@clausen.com

In *Pitzer College v. Indian Harbor Ins. Co.*, S239510, 2019 Cal. LEXIS 6240, the Supreme Court of California held that (1) California's notice-prejudice rule is a fundamental public policy of California; and (2) the notice-prejudice rule generally applies to consent provisions in first party policies, but does not apply to consent provisions in third party liability policies.

Facts

On January 10, 2011, Pitzer College ("Pitzer") discovered darkened soils at a construction site on its campus. Remediation began on March 9, 2011, and was completed one month later at a total cost of nearly $2 million.

Pitzer was insured under a policy issued by Indian Harbor Insurance Company ("Indian Harbor") ("Policy"). Pitzer did not obtain Indian Harbor's consent before commencing remediation or paying remediation costs, and did not inform Indian Harbor of the remediation until July 11, 2011.

On March 16, 2012, Indian Harbor denied coverage based on Pitzer's failure to give notice as soon as practicable and its failure to obtain Indian Harbor's consent before commencing remediation.

Relevant Policy Provisions

The Policy covered Pitzer for legal and remediation expenses resulting from pollution conditions discovered during the policy period, and contained the following notice provision:

> As a condition precedent to the coverage hereunder, in the event . . . any POLLUTION CONDITION is first discovered by the INSURED that results in a LOSS or REMEDIATION EXPENSE . . . . The INSURED shall provide to the Company, whether orally or in writing, notice of the particulars with respect to the time, place and circumstances thereof, along with the names and addresses of the injured and of available witnesses. In the event of oral notice, the INSURED agrees to furnish to the Company a written report as soon as practicable.

The Policy also contained the following consent provision:

> No costs, charges, or expenses shall be incurred, nor payments made, obligations assumed or remediation commenced without the Company's written consent which shall not be unreasonably withheld. This provision does not apply to costs incurred by the INSURED on an emergency basis where any delay on the part of the INSURED would cause injury to persons or damage to property or increase significantly the cost of responding to any POLLUTION CONDITION. If such emergency occurs, the

> INSURED shall notify the Company immediately thereafter.

The Policy also contained a choice of law provision providing that New York law governed all matters arising under the Policy.

The Decision Below

Pitzer sued Indian Harbor for declaratory relief and breach of contract. Indian Harbor moved for summary judgment declaring that it had no obligation to indemnify Pitzer for remediation costs because Pitzer had violated the Policy's notice and consent provisions. The district court granted the motion, holding that New York law applied, because California's notice-prejudice rule was not California's "fundamental policy." Under New York common law, policies issued and delivered outside New York are subject to a strict no-prejudice rule, which precludes coverage where timely notice is not provided. Summary judgment was warranted because Pitzer did not comply with the Policy's consent provision.

Pitzer appealed, and the Ninth Circuit Court of Appeals certified questions to the California Supreme Court, which restated the questions as follows: (1) Is California's common law notice-prejudice rule a fundamental public policy for the purpose of choice of law analysis? (2) If so, does the notice-prejudice rule apply to the consent provision of the insurance policy in this case?

Analysis

Notice-Prejudice Rule

California's notice-prejudice rule requires an insurer to prove that the insured's late notice has substantially prejudiced the insurer's ability to investigate and negotiate payment of the claim. A finding of substantial prejudice will generally excuse an insurer from its insuring obligations, unless the insurer had actual or constructive knowledge of the claim.

The Court held that California's notice-prejudice rule is a fundamental policy of California because (1) the notice-prejudice rule cannot be contractually waived and, therefore, restricts freedom of contract by preventing enforcement of a contractual term, which in turn prevents inequitable technical forfeitures; (2) the notice-prejudice rule protects insureds against inequitable results that are generated by insurers' superior bargaining power; and (3) the notice-prejudice rule promotes objectives that are in the general public's interest because it protects the public from bearing the costs of harm that an insurance policy purports to cover.

Notice Provision

The Court also held that the notice-prejudice rule is applicable to consent provisions in first party policies, but not third-party liability policies.

The Court reasoned that the general purpose of a notice provision is to protect the insurer's interests, by giving the insurer the opportunity to obtain information about the circumstances of the case, assess its rights and liabilities, and take early control of the proceedings. Strict enforcement of a notice provision forfeits the insured's benefits under an insurance policy, despite a lack of prejudice to the insurer, with consequences that fall on both the insured and the general public. Accordingly, failure to give timely notice should not excuse an insurer's obligations unless the insurer demonstrates prejudice from the failure.

First-party consent provisions guard against the insured making unnecessary expenditures, allow the insurer to approve and control costs, and protect the insurer's subrogation rights. Requiring a first-party insurer to show prejudice protects the insurer's interests while furthering public policy considerations. There is typically no liability claim to defend, and no need for the insurer to retain unimpaired control over claims handling. Because failure to obtain consent in the first-party context is not inherently prejudicial, the notice-prejudice rule applies.

On the other hand, a third-party liability policy provides coverage for the insured's liability to a third party injured because of the insured's negligence. Consent provisions in this context are designed to ensure that the insurer has control over the defense and settlement of the claim, which are crucial to the insurer's coverage obligations. Accordingly, the notice-prejudice rule is not applicable to consent provisions in third party policies.

Learning Points: Under California law, the notice-prejudice rule requires an insurer to prove that the insured's late notice has substantially prejudiced the insurer's ability to investigate and negotiate payment of the claim, and is a fundamental policy of the state. The notice-prejudice rule generally applies to consent provisions in the context of first-party coverage and does not apply to consent provisions in third-party liability policies. ♦

Estoppel Doesn't Apply Where Insurer Is Not Controlling Defense

by ***Don R. Sampen***

Don R. Sampen
is a Clausen Miller partner and has over 30 years of trial and appellate experience in various areas, including insurance coverage and commercial litigation. Don is a *magna cum laude* graduate of Northwestern University College of Law, where he was Executive Editor of the *Northwestern Law Review*. Don is an Adjunct Professor at Loyola University College of Law teaching a course in Insurance Law.
dsampen@clausen.com

In Illinois, as in most states, an insurer may be obligated to defend or participate in the defense of an insured even though the insurer believes that the policy does not cover the claim asserted against the insured. In such cases, the insurer may undertake its defense obligations accompanied by issuance of a reservation of rights. If the insurer defends without issuing a reservation, it stands the risk of being estopped from later denying coverage. A party advocating that another is estopped typically must demonstrate some form of prejudice from the other's conduct. In the case of an insurer defending without a reservation, prejudice may be found simply by virtue of the insured surrendering to the insurer the right to control the defense. Notwithstanding this well-established form of estoppel, the United States Court of Appeals for the Seventh Circuit recently held that an insurer was not estopped to deny coverage even though it had participated in the defense of an insured without a reservation, where it did so through counsel appointed by the insured. *Essex Insurance Co. v. Blue Moon Lofts Condominium Association*, 927 F.3d 1007 (7th Cir. 2019).

Facts

The claimant, Blue Moon, sued The Structural Shop (TSS) in state court for construction defects in 2002. Blue Moon caused service of process to be made on TSS's agent, but TSS never responded and a default was entered. The state court entered a default judgment against TSS in 2009 for about $1.3 million.

Blue Moon appears not to have commenced collection proceedings until 2012. At that time, TSS was insured by Essex under a policy that provided coverage for claims first made against TSS between May of 2012 and May of 2013. Believing that it had not been earlier served with process, TSS moved to vacate the default judgment, which was allowed, and then tendered the defense of the claim to Essex.

Essex agreed to participate in the defense of the claim through outside counsel retained by TSS. Thereafter, however, Blue Moon's counsel provided evidence that TSS had, in fact, been properly served with process in 2002, and the default judgment was reinstated. TSS petitioned for relief from the judgment, which was denied, and then took an appeal.

Essex thereupon sent TSS a reservation letter advising that Essex would continue its defense but under a reservation of rights, to the extent of continuing the appeal of the state court order denying relief from the default judgment. At that point, Essex hired a new law firm to handle the appeal.

During pendency of the underlying appeal, Blue Moon and TSS settled for $550,000, plus an assignment of TSS's

insurance rights to Blue Moon. Essex then brought the instant declaratory action for a determination of its insurance obligations. Blue Moon counterclaimed, contending that Essex was estopped from denying coverage and was liable for the default judgment. The district court found in favor of Essex, and Blue Moon took this appeal.

Analysis

In an opinion by Judge Michael Y. Scudder, the Seventh Circuit affirmed. The Court initially described what it referred to as "general estoppel," which requires that the insurer issue a reservation of rights when it undertakes to defend or risk later being estopped from raising policy defenses to coverage. The Court said that this form of estoppel would not apply here because it would apply only where the allegations of the underlying complaint fall within coverage. Here, the claim against TSS, which was first made in 2002, clearly fell outside of coverage under the Essex policy.

A second form of estoppel, equitable estoppel, requires that the insured show that by the insurer taking control of the insured's defense, the insured has been misled into thinking that the insurer will pay for the judgment entered against the insured. The question under this form of estoppel is whether the insurer has actually taken control.

The Seventh Circuit found that Essex never took control because TSS-appointed outside counsel controlled the litigation strategy from the start. This was so even after TSS informed Essex of Blue Moon's claim, for outside counsel continued to act to protect TSS's interest by working to prove that service never occurred. Essex's participation was nothing more than passive.

The Court acknowledged that Essex did eventually replace TSS's outside counsel and take over the appeal, but that was only after Essex issued a reservation of rights. That reservation defeated the application of estoppel based on control of the litigation.

Blue Moon also argued waiver by Essex due to its continued defense of TSS despite its knowledge of the lack of coverage. Unlike a policy defense, such as late notice, however, the Court said that waiver cannot be used to create coverage where none exists. Here, everyone agreed that the policy's terms did not cover Blue Moon's 2002 claim.

Finally, Blue Moon argued that Essex acted in bad faith in refusing to settle the underlying litigation when it had the opportunity. According to the Seventh Circuit, however, such a claim can only be made when the insurer has taken control of the insured's defense, and Essex never did.

The Court therefore affirmed the judgment in favor of Essex.

Learning Points:

(a) Estoppel by virtue of an insurer defending an insured in the absence of a reservation arises only where the insurer has actually assumed control of the insured's defense, and not where the insured is defending through counsel it has selected.
(b) Waiver cannot be used to create or extend coverage where none exists. ♦

Insurance Coverage And The Cannabis Industry

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

The cannabis industry is expanding rapidly in the United States, even in the face of contradictory legal status on the federal level and among the fifty states. With limited exceptions, the cultivation, use, sale and possession of cannabis remains illegal under federal law, but more than two-thirds of states have legalized cannabis in some form. Legal sales of cannabis-related products are anticipated to exceed $20 billion nationwide by the early part of the next decade.

Background Facts

Federal Regulation

The cultivation, use, sale, and possession of cannabis and cannabis products containing over 0.3% THC is prohibited under the federal Controlled Substances Act. Until the passage of the Agriculture Improvement Act of 2018, even cannabis products containing less than 0.3% THC were subject to the Controlled Substances Act, which classifies cannabis as a Schedule I drug. Schedule I drugs are described as having no currently accepted medical use and a high potential for abuse, and include heroin, LSD, ecstasy, and peyote.

Despite *de jure* federal prohibition, over the last decade enforcement of federal cannabis prohibition has eroded markedly. On October 19, 2009, the United States Department of Justice issued the "Ogden Memorandum", which instructed U.S. Attorneys to not focus federal law enforcement resources on individuals who complied with state laws providing for medical marijuana use. The Department of Justice then issued the "Cole Memorandum" on August 29, 2013, directing U.S. Attorneys to not prioritize enforcement of federal marijuana prohibitions in states that had legalized cannabis and implemented strong and effective regulatory and enforcement systems that were consistent with federal crime-prevention priorities. However, on January 4, 2018, at the direction of former Attorney General Jefferson Beauregard Sessions, the Department of Justice rescinded the Cole Memorandum, instructing U.S. Attorneys to follow federal prosecutorial principles. However, current Attorney General William Barr has recently stated his reluctance to go after businesses that have been relying on the Cole Memorandum, citing potential harm to the marketplace and investors.

State Decriminalization

In 1996, California became the first state to legalize medical cannabis use, and was swiftly followed by Washington, Oregon, Alaska, Nevada, and the District of Columbia. Today, it is legal to use cannabis for medical purposes in thirty-three states and the District of Columbia. An additional fifteen states permit cannabis use for medical purposes, subject to THC content restrictions. Many states also allow the sale of cannabis-derived products, such as cannabidiol ("CBD") oil.

In 2012, Washington and Colorado became the first states to decriminalize recreational use of cannabis. Since then, Oregon, Alaska, the District of Columbia, California, Nevada, Maine, Massachusetts, Michigan, Vermont, and Illinois have followed suit.

Gonzales v. Raich, 545 U.S. 1 (2005)

In *Gonzales v. Raich*, the United States Supreme Court held that the Controlled Substances Act did not exceed Congress's powers under the Commerce Clause of the U.S. Constitution, as applied to California's Compassionate Use Act, which created an exemption from criminal prosecution for possession or cultivation of marijuana for medicinal purposes with the recommendation or approval of a physician.

Diane Monson was a California resident who suffered from a medical condition that was treated with marijuana recommended and prescribed by a licensed medical practitioner. Monson grew her own marijuana. One night, federal Drug Enforcement Administration agents came to Monson's home, and despite Monson's use of marijuana being entirely lawful under California law, the federal agents seized and destroyed all of her cannabis plants. Monson and others then brought an action for injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act to the extent it prevented them from possessing, obtaining, or manufacturing cannabis for their personal medical use.

In holding that the Controlled Substances Act was constitutional as applied to the Compassionate Use Act, the Court noted that Congress has power to regulate purely local activities that have a substantial effect on interstate commerce. If the local activity poses a threat to a national market, then Congress may regulate the entire class of activity. The Controlled Substances Act was within Congress' commerce power because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market. Given the difficulty of distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, the Court concluded that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gap in the Controlled Substances Act.

Analysis - Cannabis Coverage Cases

Due to the historic prohibition of cannabis, cannabis-related insurance coverage litigation is a relatively recent phenomenon. Cannabis's inconsistent legal status under federal and state law has led to inconsistent coverage outcomes. For instance, in *Tracy v. USAA Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 35913 (D. Haw. Mar. 16, 2012), a homeowner sought coverage for the theft of cannabis plants, which she legally possessed and cultivated for her own medical purposes under Hawaii law. The insurer initially paid the insured for the loss, but the insured claimed that the amount was insufficient, and sued for breach of contract and bad faith denial of her claim. The court held that, while the cannabis plants were insured under the subject homeowner's policy, the court could not force the insurer to pay proceeds to replace the cannabis plants as a matter of public policy, because to do so would be contrary to federal law as reflected in the Controlled Substances Act, and the Supreme Court's decision in *Gonzales v. Raich*.

Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.

In *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Col. 2016), a retail medical marijuana business and adjacent growing facility ("Green Earth") sought coverage for damage to its plants caused by entry of wildfire smoke and ash into the facility's ventilation systems. The insurer, Atain Specialty Insurance Company ("Atain") declined coverage. Green Earth sued, asserting claims for breach of contract, statutory bad faith, and unreasonable delay in payment. The parties filed dueling motions for summary judgment. Among other arguments, Atain asserted that Green Earth's claim for damages to potted marijuana plants was barred by the "growing crops" exclusion in the Policy. Atain also filed motions arguing that it was illegal under federal law and federal public policy for Atain to pay for damages to marijuana plants and products, that the court could therefore not order Atain to pay those damages, and that the Atain Policy's Contraband Exclusion precluded coverage for Green Earth's claim.

In its analysis, the court provided a detailed description of Green Earth's growing operation. "Mother plants" are used solely for producing a constant and reliable supply of genetically-identical "clones", and are not cultivated to produce useable marijuana. A "clone" is a portion of the mother plant that is cut off, planted, and grown to maturity. Green Earth kept mature clones in either a "vegetative" state, in which the plant was under near constant lighting to prevent it from flowering, or a "flowering" state, in which the plant was subjected to intermittent light and darkness for flower and bud production. The flowers and buds were then harvested, dried, and sold. Green Earth's claim consisted of damage to its mother plants and clones, as well as buds and flowers that had been harvested and were being prepared for sale.

The Atain Policy provided coverage for "Business Personal Property located in or on the [covered] building[s]," including "Stock," which the Atain Policy defined as "merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping." While the parties agreed that the harvested buds and flowers qualified as "Stock", they disagreed as to whether the mother plants and clones also came within that definition. The court concluded that the mother plants and clones qualified as "Stock", relying upon certain authorities defining growing plants as "raw materials."

However, the Atain Policy also contained an exclusion for "Land (including land on which the property is located), water, growing crops or lawns", which Atain argued precluded coverage for the mother plants and clones, even if they qualified as "Stock." The court agreed, rejecting Green Earth's arguments that "crops" must grow in outdoor soil, and that "growing crops" should be limited to crops attached to the surface of the earth, rather than crops grown in pots. Accordingly, the "growing crops" exclusion precluded coverage for damages to the mother plants and clones.

Atain further argued that the Atain Policy's exclusion for "Contraband, or property in the course of illegal transportation or trade" and public policy precluded coverage for Green Earth's damaged flowers and buds. While the court agreed that the flowers and buds came under the common and ordinary meaning of "contraband", and that their possession for distribution constituted a federal crime, the court nonetheless demurred, citing the federal government's ambivalence towards enforcing the Controlled Substances Act where a person or entity's possession and/or distribution of marijuana was consistent with state law. The differences between the federal government's *de jure* and *de facto* public policies regarding state-regulated marijuana rendered the "Contraband" exclusion ambiguous and unenforceable. The court declined to follow *Tracy v. USAA Cas. Ins. Co.*, noting that any clear federal public policy had eroded in the intervening years, and refused to void the Atain Policy on public policy grounds. Further, in light of the parties' explicit and mutual intentions that the Atain Policy provide coverage for Green Earth's marijuana inventory, the court held that even if it were contrary to public policy to enforce the parties' agreement, Green Earth would still be entitled to recover from Atain under a theory of unjust enrichment.

K.V.G. Props., Inc. v. Westfield Ins. Co.

In *K.V.G. Props., Inc. v. Westfield Ins. Co.*, 900 F.3d 818 (6th Cir. 2018), a commercial landlord sought coverage for damage to property caused by its tenant's cannabis cultivation operation. After federal agents raided the property, the landlord evicted the tenants, and discovered that, in the course of the tenants' cannabis cultivation operations, the tenants had removed walls, cut holes in the roof, altered ductwork, and damaged the property's HVAC system. In seeking to evict the cultivation operation, the landlord had argued that its tenant was not operating legally. The insurer denied coverage, citing the policy's criminal acts exclusion. The insured sued.

The court agreed that coverage was precluded by the policy's criminal acts exclusion. Although lawful cultivation of cannabis for medical purposes was legal in Michigan, the court noted that the insured had argued that its tenants were in violation of the law in the underlying eviction proceedings. Further, federal agents raided the property as part of a criminal investigation, even in the face of the Ogden and Cole Memoranda, which the court assumed federal agents did not ignore in deciding whether to conduct the raid. Accordingly, the criminal acts exclusion applied. Notably, regardless of federal prohibition, the court expressed reluctance to enforce the criminal acts exclusion if the subject operation were in fact legal under Michigan law, citing federalism concerns.

Learning Points: Despite federal law criminalizing the cultivation, use, possession, and sale of marijuana containing greater than 0.3% THC, the cannabis industry's sales in the next decade are forecasted to exceed $20 billion. In recognition of the cannabis industry's reliance on state legalization and federal guidance, and the potential for real harm to the marketplace and investors, the federal government has demonstrated reluctance to prosecute persons and entities operating in compliance with state law. In light of the federal government's *de facto* non-enforcement of cannabis prohibition, insurers issuing policies to cannabis industry operators may expect to see courts continue to decline to enforce criminal acts exclusions and demurring on public policy arguments in states that have legalized cannabis for medical and recreational purposes. ♦

California Appellate Court Specifies Landowners' Duty Of Care In Premises Liability Case

by ***Tyler M. Costanzo***

In *Jones v. Awad*, No. F077359, 2019 Cal. App. LEXIS 881 (Cal.App.5th), California's Fifth Appellate District provided a nuanced analysis of issues related to premises liability actions. In affirming summary judgment in favor of the defendant landowners, the appellate court illustrated some of the subtleties of the "open and obvious" exception to a landowner's duty of care. Moreover, its finding that the defendant landowners lacked actual knowledge of a dangerous condition of their property, despite numerous building code violations, demonstrates that the existence even of an unlawful condition on the premises which could be observed upon a reasonable inspection will not subject a landowner to liability if the condition is not "dangerous."

Facts

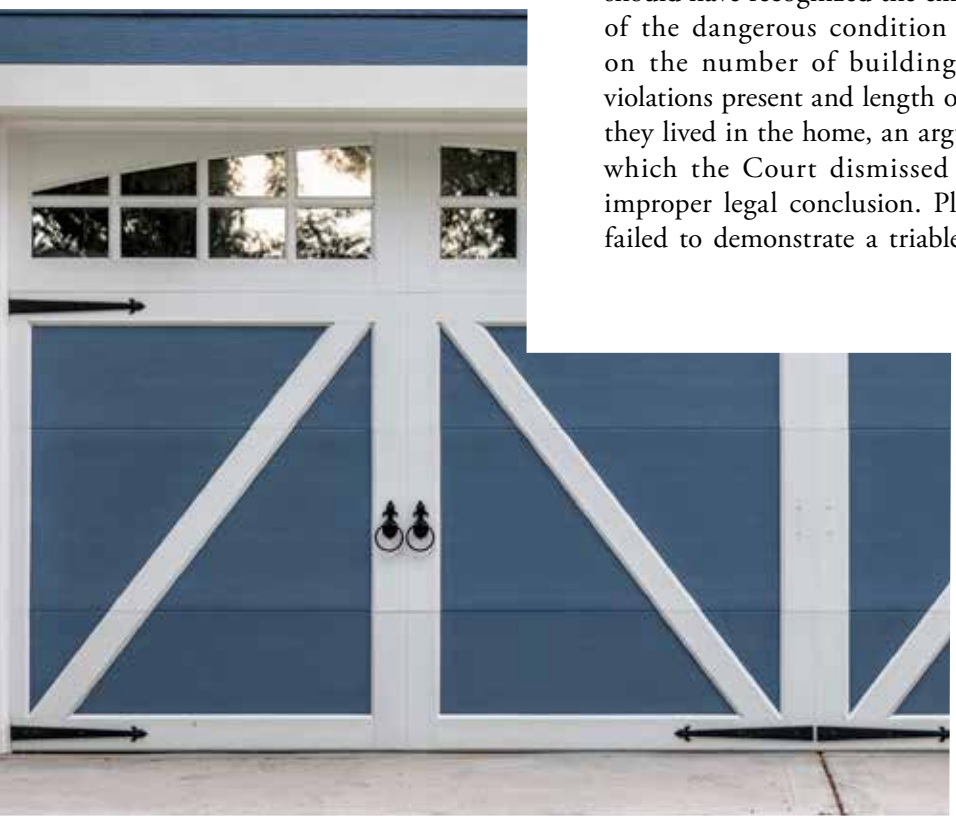
In December of 2014, Plaintiff Theresa Jones ("Plaintiff") visited the home of Defendants Clyde and Julia Awad ("Defendants") and sustained injuries when she fell on a step leading from the house to the garage. From the inside of the house to enter the garage, there was a step down from the parquet floor landing inside the home onto a step with a rattan mat on top of a piece of carpet, measuring approximately ten-and-a-half inches. From that step, there was another step down to the garage floor measuring approximately seven inches. Plaintiff stepped onto the first step with the rattan mat and fell. She alleged both that the mat on the first step moved when she stepped on it and that the unexpected difference in step height further caused her to fall. It was found that the garage steps violated a number of provisions of the Uniform Building Code, although Defendants were not aware of these violations. The home was built in 1977 and purchased by Defendants in 1989, and the steps were in the same condition when they purchased the home as they were on the date of the incident. Mrs. Awad testified she never tripped or fell on the steps and was not aware of anyone else ever having done so before Plaintiff. Defendants succeeded on a summary judgment motion on the grounds that Plaintiff could not establish the essential element of a breach of duty. The Fifth Appellate District affirmed and provided additional analysis regarding the condition of the garage steps.

Analysis

Generally, well-settled California law requires landowners to maintain land in their possession and control in a reasonably safe condition. *Ann M. v. Pacific Plaza Shopping Ctr.*, (1993) 6 Cal.4th 666, 674. Landowners are therefore held liable for injuries caused by a lack of due care in the maintenance of their property. *Davert v. Larson*, (1985) 163 Cal.App.3d 407, 410. However, an exception to this general standard applies when a danger on a landowner's property is "open and obvious." In such instances,

Tyler M. Costanzo
is an associate in the Irvine office of Clausen Miller. Prior to joining the firm, Tyler gained civil litigation experience in a variety of practice areas, including personal injury, employment, and intellectual property and unfair competition. Additionally, Tyler gained experience in an in-house position at Kia Motors America, focusing on lemon law, personal injury, and compliance.
tcostanzo@clausen.com

landowners have no duty to warn of such conditions because the open and obvious dangers serve as warnings themselves. *Christoff v. Union Pacific Railroad Co.*, (2005) 134 Cal.App.4th 118, 126. While Defendants asserted this exception to argue they owed no duty to warn Plaintiff regarding the open and obvious condition of the garage steps, the Court found the exception inapplicable. While the existence of the steps themselves was obvious, the Court found that the indistinct change in elevation between each step would not have been apparent to an individual stepping down. The Court also found that the lack of any debris or other obstacles on the steps would further reduce an individual's expectation of danger. Thus, the "open and obvious" exception did not apply to relieve Defendants of their duty of care.



However, the Court still found that Defendants did not breach their duty because, even though the condition of the steps was not "open and obvious," Plaintiff could not establish that Defendants had actual or constructive notice of the dangerous condition. Plaintiff attempted to argue that Defendants had actual knowledge of the dangerous condition because the placement of the rattan mat, which did not meet the 30-inch width requirement and therefore violated the building code, constituted a dangerous condition. However, the Court found that, while it is true that the mat placement violated the building code, it does not necessarily follow that it constituted a "dangerous condition" within the meaning of premises liability law. Thus, there was no actual notice. Similarly, the Court found that Plaintiff's only argument as to Defendant's constructive knowledge was that Defendants should have recognized the existence of the dangerous condition based on the number of building code violations present and length of time they lived in the home, an argument which the Court dismissed as an improper legal conclusion. Plaintiff failed to demonstrate a triable issue of material fact as to Defendants' actual or constructive notice of any dangerous condition, and the trial court therefore properly granted Defendants' summary judgment.

Learning Points: *Awad* provides guidance as to the nuances of the "open and obvious" exception and notice requirements in premises liability law. The Court distinguishes between the fact that the steps themselves are "open and obvious," but the condition of the steps (i.e., the mat placement and/or the elevation difference) was not readily apparent. Accordingly, California attorneys should be diligent in determining the exact condition at issue. Is there some visible obstacle on the premises which constitutes a dangerous condition, or does the danger lie in some unobserved, more subtle condition of the obstacle? Additionally, the Court's finding that Defendants lacked actual knowledge is significant. Even if a condition is present at a defendant's premises and would be observable upon the defendant's regular inspection, the defendant cannot be held liable if the condition is not actually dangerous. Here, even numerous violations of building code standards which could easily be observed by Defendants upon inspection, including standards regarding the placement of the rattan mat on the first step, were not enough to hold Defendants liable for a condition of their premises. Even if the condition of the property is unlawful, it must also be considered "dangerous" before premises liability will apply. ♦

APPELLATE PRACTICE

INADEQUATE RECORD CREATES PRESUMPTION COURT ACTED CORRECTLY

Peter White v. Latimer Point Condo. Assoc., Inc. et. al., AC 41345 (Conn. App.)

Plaintiff condo owner sought a permanent injunction against the condo association and a neighboring condo unit, to prevent them from rebuilding the unit after the original unit sustained storm damage. The rebuilding would allegedly have reduced plaintiff's primary water view. ***Held:*** Plaintiff did nothing to ensure that the appellate court would have a record on appeal that included the factual findings and legal bases for the trial court's decision. The appellate court, therefore, presumed that the trial court undertook a proper analysis of the law.

ARBITRATION

INFANT NOT BOUND BY AGREEMENT EXECUTED BY HER MOTHER

Bates v. Andaluz Waterbirth Ctr., 2019 Ore. App. LEXIS 1019 (Ore. App.)

Baby died at hospital due to birth complications and father sued as representative of estate for wrongful death. Defendants moved to dismiss and compel arbitration, arguing the mother signed an agreement requiring arbitration. Trial court denied motion and defendants appealed. ***Held:*** Affirmed. Arbitration arises as a matter of contract and a party cannot be required to arbitrate a dispute the party has not agreed to submit. Baby was not a party to, and not bound by, the contract signed by her mother.

AUTO INSURANCE

FAILURE TO COMPLY WITH COOPERATION CLAUSE PRESUMED DETRIMENTAL TO INSURER'S INTERESTS

Amica Mutual Ins. Co. v. Michelle Levine, AC 40999 (Conn. App.)

Insurer sought a declaratory judgment to determine the rights of the parties related to a provision in an automobile insurance policy it had issued to the defendant, which required the defendant to undergo an independent medical examination ("IME") at the insurer's request. ***Held:*** IME was necessary for the insurer to properly evaluate the claim for benefits. The insurer was prejudiced by defendant's failure to submit to an IME in that it was unable to properly evaluate the claim and determine the causal relation of treatment and care expenses.

CIVIL PROCEDURE

PRIOR SMALL CLAIMS ACTION BARS SHODDY WORKMANSHIP CLAIM

Platon v. Linden-Marshall Contracting Inc., 2019 NY Slip Op 07015, ¶ 1 (N.Y. App. Div 1st Dep't)

Plaintiff sued defendant for unsatisfactory bathroom renovation work. Plaintiff had previously brought a small claims action against defendant. ***Held:*** Plaintiff's negligence, fraudulent inducement, and General Business Law claims are all barred by the doctrine of *res judicata*. It does not matter that the small claims court has jurisdictional limits on the amount of damages that may be sought, as it was plaintiff's choice to proceed in that court first.

EMPLOYMENT DISCRIMINATION

DEFICIENT PERFORMANCE IS A LEGITIMATE NONDISCRIMINATORY JUSTIFICATION FOR DISCHARGE

Ulyses Alvarez v. City of Middletown, AC 41478 (Conn. App.)

Plaintiff, a Hispanic American citizen of Puerto Rican descent, brought an employment discrimination claim, alleging defendant had discriminated against him on the basis of national origin and race. ***Held:*** Summary judgment affirmed. Defendant presented evidence that it had similarly discharged a Caucasian officer during his probationary period due to a failure to meet the police department's expectations and to properly document reports in accordance with department requirements.

EVIDENCE

PRIOR MISCONDUCT EVIDENCE HELD ADMISSIBLE

David Blinn v. Desh Sindwani, AC 40985 (Conn. App.)

Plaintiff sought damages for negligence arising from a 2012 automobile accident. During trial, the court allowed treatment records referencing plaintiff's prior conviction for operating a motor vehicle while

under the influence and a citation for a 2014 car accident. ***Held:*** The probative value of the prior misconduct evidence outweighed its prejudicial effect as it tended to show that plaintiff's treatment did not result from the underlying motor vehicle accident but from the prior misconduct.

EXPERT'S PAST PROFESSIONAL DISCIPLINARY HISTORY ADMISSIBLE TO CHALLENGE CREDIBILITY

Tunstall v. Manning, 124 N.E.3d 1193 (Ind.)

During trial of rear-end accident, defendant challenged expert's past probationary status and reasons for expert's past professional discipline. ***Held in a case of first impression:*** Evidence of witness' licensure status and the reasons for professional discipline are admissible to impeach credibility. The rule is subject to any statutory restrictions or limitations in rules of evidence.

LEGAL MALPRACTICE

HYPOTHETICAL RESULT INSUFFICIENT TO PROVE PROXIMATE CAUSE

Edwards v. Moore, 2019 Ga. App. LEXIS 412 (Ga. App.)

Plaintiff's former attorney drafted a settlement agreement whereby her husband paid alimony while the two were legally separated. Plaintiff changed attorneys and a divorce was granted. Plaintiff's former husband stopped paying alimony as they were no longer legally separated. Plaintiff sued her divorce attorneys, arguing they should have asserted a counterclaim for alimony and sought to reform the settlement agreement to include post-divorce alimony. ***Held:*** Plaintiff cannot prove the attorneys proximately caused her alimony to cease. There is no evidence that plaintiff would have succeeded on such a counterclaim nor is there evidence of a damages amount.

COURT ESTABLISHES TEST FOR EMOTIONAL DISTRESS DAMAGES

McFarland v. Rieper 2019 Iowa App. LEXIS 721 (Iowa App.)

Plaintiffs obtained emotional distress damages in a jury trial against an attorney who represented them in an unsuccessful adoption. Defendant appealed. ***Held:*** Emotional distress damages are available only if plaintiffs can prove that defendant had a duty to exercise ordinary care to avoid causing emotional harm and that the defendant's acts were illegitimate and especially likely to produce serious emotional harm. Here plaintiffs failed to meet this standard.

CLIENT LOSES MALPRACTICE LAWSUIT WHEN HE WAS FULLY AWARE OF AND AGREED TO CONTRACT TERMS

Jenkins v. Bakst, 2019 Mass. App. LEXIS 91 (Mass. App.)

Plaintiff alleged his attorney was negligent in negotiating a stock buy-back clause in his employment agreement; that he advised his attorney he wanted his stock's value measured based on employer annual revenues; that the attorney did not follow instructions; and that he received inadequate payment when subsequently terminated. ***Held:*** Plaintiff, an experienced business person, read the employment agreement before he signed it and accepted the terms. He was not misled nor did his attorney conceal details. ***Further held:*** Plaintiff cannot establish causation because he could not show that it was more likely than not that his employer would have accepted his proposed formula.

LIMITATIONS OF ACTIONS

ATTIC PULL-DOWN LADDER AN IMPROVEMENT FOR STATUTE OF REPOSE PURPOSES

Harrell v. Ryland Grp., 2019 Fla App. LEXIS 12372 (Fla. App.)

Homeowner was injured when attic pull-down ladder collapsed. ***Held:*** Owner's claim failed under the 10-year statute of repose. The ladder improved the property by adding utility to home operation. Owner filed suit more than ten years after the issuance of certificate of occupancy, possession of property, and completion of work. Owner failed to create issue of fact as to whether work continued after occupancy.

FRAUD CLAIM SUBJECT TO MEDICAL CLAIM STATUTE OF REPOSE

Freeman v. Durrani, 2019 Ohio App. LEXIS 3732 (Ohio App.)

Plaintiff sought to cast medical claim as fraud, alleging physician committed fraud by recommending unnecessary surgery and failing to disclose the risks of surgery. Court dismissed plaintiff's lawsuit as barred under four-year statute of repose related

to medical claims. ***Held:*** Affirmed. Clever pleading cannot transform a medical claim into a claim of fraud and claims that arise out of medical care and treatment are considered medical claims for the purpose of the statute of repose.

MUNICIPAL LAW AND CORPORATIONS

CITY AND FIREMAN IMMUNE FROM LIABILITY FOR VEHICLE ACCIDENT

Pitzer v. City of Blue Ash, 2019 Ohio App. LEXIS 2994 (Ohio App.)

Woman's car struck firetruck that was on way to emergency. ***Held:*** City is immune from liability unless firefighter responding to emergency is guilty of willful or wanton misconduct. Wantonness requires a lack of any care for other drivers. Firefighter was exercising care. ***Further held:*** Firefighter not personally liable for recklessness, which requires a conscious disregard or indifference to a known or obvious risk. He activated engine lights, used horn, and almost stopped before entering intersection. Technical violation of departmental policy on stopping did not contribute to accident.

NEGLIGENCE

NO CREDIBILITY DETERMINATION IN DECIDING SUMMARY JUDGMENT

Isha Sen v. Kostas Tsiongas, AC 40963 (Conn. App.)

Plaintiff sought damages from the landlord and owner of her apartment for negligence in connection with a dog bite she received in the building's common stairway. The landlord obtained summary judgment on the ground that he did not have any knowledge of the alleged vicious propensities of the dog. Plaintiff appealed. ***Held:*** Reversed. Contradictory accounts of the dog's behavior thwarted summary judgment. For example, plaintiff had claimed that the dog acted viciously towards her when she approached the building and had scratched her husband and bit the son of the dog's owner prior to the incident.

HOSPITAL NOT LIABLE FOR EMPLOYEE'S RELEASE OF CONFIDENTIAL MEDICAL RECORDS

Hayden v. Franciscan Alliance, Inc., 2019 Ind. App. LEXIS 374 (Ind. App.)

Spiteful hospital employee released confidential records about a former patient. ***Held:*** Hospital not liable under respondeat superior doctrine. Employee was not authorized to review patient records for personal reasons and had agreed to access records only for work purposes. ***Further held:*** Hospital was not liable for negligent hiring, retention, training, and monitoring. Employee's checkered criminal background did not involve medical confidentiality issues.

SCHOOL NOT LIABLE FOR MURDER OF DELINQUENT STUDENT

Murray v. Indianapolis Pub. Schs., 128 N.E.3d 450 (Ind.)

Student was murdered, possibly while engaging in firearms deal or buying marijuana, after he ditched school through an unmonitored exit. ***Held:*** Student's contributory negligence barred recovery. Comparative Fault Act is inapplicable to governmental entities. A 16-year old student is charged with exercising adult standard of care. He was involved in crime during the prior evening, left school property to commit a crime, and was found in a complex known for crime. He knew the risk of harm. Even if slight, his negligence barred recovery.

DUTY TO SUPERVISED CHILD ON ZIP LINE MUST BE VIEWED FROM ADULT'S PERSPECTIVE

LaForce v. Dyckman, 2019 Mass. App. LEXIS 116 (Mass. App.)

Father allowed six-year old to ride backyard zip line lacking seat. ***Held:*** The duty to a supervised child and an adult are identical. Whether danger is open-and-obvious to the child must be viewed from an adult's perspective. ***Further held:*** There was no duty to remedy the zip line, which was not unreasonably high or improperly constructed.

PROOF OF BUILDING CODE VIOLATION NOT ENOUGH FOR SUMMARY JUDGMENT

Hartnett v. Zuchowski, 2019 NY Slip Op 06934 (N.Y. App. Div. 4th Dep't)

Plaintiff sought summary judgment based on an architect expert's opinion that the staircase on which plaintiff fell violated several sections of the applicable building code. ***Held:*** In New York, evidence of building code violations constitutes only some evidence of negligence rather than negligence *per se*. The evidence thus failed to carry plaintiff's initial prima facie burden regardless of what evidence defendant had in opposition.

PLAINTIFF'S DEPOSITION SHOWS CASE RESTS ON SPECULATION

Phillips v. LSS Leasing Ltd. Liab. Co., 2019 N.Y. App. Div. LEXIS 7120 (N.Y. App. Div. 2d Dep't)

Plaintiff fell in the lobby of defendant's building and sued. Plaintiff surmised at her deposition that she tripped and fell on a defective part of a runner mat that was located in the lobby of the defendant's building. ***Held:*** Since plaintiff, who traversed this lobby practically every work day, testified that she did not see the alleged defect either before or after she fell, her testimony was based on speculation, entitling defendant to summary judgment.

PLAINTIFF DEFEATED BY INFORMAL JUDICIAL ADMISSION THAT DEFENDANTS WERE NOT AT FAULT

Rosales v. Rivera, 2019 NY Slip Op 07105 (N.Y. App. Div. 2d Dep't)

Plaintiff was injured in a vehicular accident and sued multiple defendants. While making arguments against some of the defendants, plaintiff asserted they were the sole proximate cause of the accident. ***Held:*** This informal admission that some defendants were the sole cause of the accident entitled the other defendants to summary judgment.

NO-DUTY WINTER RULE PROTECTS STORE OWNER FROM LIABILITY IN PARKING LOT SLIP AND FALL

Bakies v. RSM Maint., Inc., 2019 Ohio App. LEXIS 3405 (Ohio App.)

Patron slipped on black ice while exiting car in store owner's parking lot. ***Held:*** The no-duty winter rule assumes that everyone will appreciate and protect themselves from the risks of natural accumulations of ice and snow. The formation of black ice occurred naturally. By contracting with a plowing service, owner did not assume a duty of care as to natural accumulations. Moreover, patron failed to provide expert testimony as to meaning of contract requirements. Owner did not have superior knowledge of situation, nor was there evidence that the black ice concealed another danger.

PRODUCTS LIABILITY

COMPONENT-PART MANUFACTURER SUBJECT TO LIABILITY FOR FAILING TO INCLUDE NECESSARY SAFETY FEATURES

Brewer v. PACCAR, Inc., 124 N.E.3d 616 (Ind.)

Manufacturer produced a glider kit—the body and frame of a semi-truck—to be incorporated by an end-user into a truck assembly. ***Held:*** Manufacturer could be liable for failing to include safety features needed to eliminate a blind spot. Generally, no duty exists if a component has multiple uses that prevent its manufacturer from knowing whether and how to install safety feature. If only one use is foreseeable, component manufacturer has no duty to install feature if (1) end user declined it, or (2) component can be used safely without it. Because glider kit had only one foreseeable use, the component manufacturer needed to meet this standard. ***Further held:*** Sophisticated-user defense applies to defective-design claims for a lack of safety features.

SUBROGATION

CONTRACTUAL WAIVER OF SUBROGATION UPHELD

Rural Mut. Ins. Co. v. Lester Bldgs., LLC, 929 N.W.2d 180 (Wis.)

Farmer and builder included a waiver of subrogation in contract for construction of a barn. ***Held in a split decision:*** Waiver did not violate statutes or constitute an exculpatory contract violating public policy. It

only waived those damages covered by property insurance, and was approved by farmer's property insurer. The waiver was not an exculpatory contract because farmer could collect damages not covered by the policy. The dissent argued that the majority had confused liability and damages.

ECONOMIC LOSS DOCTRINE BARS RECOVERY FOR DAMAGES TO PURCHASED PRODUCT EVEN IF OTHER PROPERTY INVOLVED

Secura Ins. v. Super Products LLC, 2019 Wisc. App. LEXIS 433 (Wis. App.)

Fire resulted in damages to excavator and other property, plus cleanup costs. ***Held:*** Economic loss doctrine barred recovery for damages to excavator and cleanup costs despite ability to recover for loss of other property. The doctrine precludes purchaser from recovering in tort for solely economic losses arising from the product and so protects freedom to allocate risks by contract. It is irrelevant that damages were abrupt or accidental. Cleanup costs are unrecoverable consequential damages.

TORTS

GARDEN-VARIETY EMPLOYEE-RELATED CLAIMS INSUFFICIENT TO SUPPORT A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Nailia Vodovskaia v. Hartford Headache Ctr., LLC, et. al., AC 41049 (Conn. App.)

Plaintiff physician sought damages from a medical practice and its sole member for intentional infliction of emotional distress in connection with the termination of her employment. Defendants obtained summary judgment and plaintiff appealed. ***Held:*** Affirmed. Plaintiff did not allege any racial, ethnic or similar type of slurs or animus. Allegations of garden-variety employee-related claims do not constitute extreme and outrageous behavior. ***Further held***: Defendants did not owe plaintiff a duty to ensure she was given time off from work to seek medical treatment when not feeling well.

WORKERS' COMPENSATION

STANDARD OF JUDICIAL REVIEW

Thomas McGinty v. Stamford Police Dept., et. al., AC 41943 (Conn. App.)

Plaintiff, a police officer, had retired in 2011 with a service related disability pension. In April 2009, he had been diagnosed with coronary artery disease and hypertension and filed a claim for benefits. The Workers' Compensation Commissioner determined his claim for benefits was compensable under the Heart and Hypertension Act. The Workers' Compensation Review Board affirmed that decision and defendants appealed. ***Held:*** Affirmed. Plaintiff's testimony from two cardiologists was credible and persuasive. The role of the court was not to retry the facts, but to determine whether the Commissioner's award could be sustained in view of the factual record.

Clausen Miller PC

is proud to announce the opening of an additional office location

San Francisco, CA

100 Pine Street, Suite 1250

Further expanding Clausen Miller's presence in the West and its ability to serve its clients in the Bay Area

Visit us at ***clausen.com***

Clausen Miller PC

is proud to announce the opening of additional office locations in Florida

Tampa & Orlando

4830 West Kennedy Boulevard, Suite 600

618 East South Street, Suite 500

Further expanding Clausen Miller's presence in the Southeast and its ability to serve its clients in this region

Visit us at ***clausen.com***

Clausen Miller P.C.

10 South LaSalle Street
Chicago, IL 60603
Telephone: (312) 855-1010
Facsimile: (312) 606-7777

28 Liberty Street
39th Floor
New York, NY 10005
Telephone: (212) 805-3900
Facsimile: (212) 805-3939

17901 Von Karman Avenue
Suite 650
Irvine, CA 92614
Telephone: (949) 260-3100
Facsimile: (949) 260-3190

100 Campus Drive
Suite 112
Florham Park, NJ 07932
Telephone: (973) 410-4130
Facsimile: (973) 410-4169

200 Commerce Square
Michigan City, IN 46360
Telephone: (219) 262-6106

4650 West Spencer Street
Appleton, WI 54914
Telephone: (920) 560-4658

68 Southfield Avenue
2 Stamford Landing Suite 100
Stamford, CT 06902
Telephone: (203) 921-0303

4830 West Kennedy Boulevard
Suite 600
Tampa, FL 33609
Telephone: (813) 509-2578

100 Pine Street
Suite 1250
San Francisco, CA 94111
Telephone: (415) 745-3598

618 East South Street
Suite 500
Orlando, FL 32801
Telephone: (813) 509-2578

Clausen Miller LLP
34 Lime Street
London EC3M 7AT U.K.
Telephone: 44.20.7645.7970
Facsimile: 44.20.7645.7971

Clausen Miller Speakers Bureau

Clausen Miller Offers On-Site Presentations Addressing Your Business Needs

As part of Clausen Miller's commitment to impeccable client service, our attorneys are offering to share their legal expertise by providing a client work-site presentation regarding legal issues that affect your business practice. If you are interested in having one of our attorneys create a custom presentation targeting the specific needs of your department, please contact our Marketing Department:

Stephanie Cebuhar
Clausen Miller P.C.
10 South LaSalle Street
Chicago, IL 60603
(312) 855-1010

marketing@clausen.com
clausen.com

Clausen Miller International:

CMI CLAUSEN MILLER INTERNATIONAL

Grenier Avocats
9, rue de l'Echelle
75001 Paris, France
Telephone: 33.1.40.20.94.00
Facsimile: 33.1.40.20.98.00

Studio Legale Corapi
Via Flaminia, 318
00196-Roma, Italy
Telephone: 39.06.32.18.563
Facsimile: 39.06.32.00.992

van Cutsem-Wittamer-Marnef & Partners
Avenue Louise 235
B-1050 Brussels, Belgium
Telephone: 32.2.543.02.00
Facsimile: 32.2.538.13.78