CM REPORT

of Recent Decisions

2021 • Vol. 1

More Tales From The Minefield Of Post-Trial/Appellate Practice

Duty To Defend COVID-19 Claim Under CGL Policy

Recent BIPA Cases And "Standing" To Sue In Federal Court

Clausen Miller PC

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

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More Tales From The Minefield Of Post-Trial/Appellate Practice: *Omega SA v. 375 Canal, LLC*, 984 F.3d 244 (2d Cir. 2021)

by ***Melinda S. Kollross***

Introduction

During this Sidebar author's nearly 30 years of post-trial and appellate practice, she has guided her work for her clients according to one steadfast rule—always use "belts and suspenders" when it comes to preserving errors and insuring appellate jurisdiction. In one past appeal, four separate notices of appeal were filed in the same case because of uncertainties regarding the finality of the actual final order—and the appellate court accepted all four as properly filed to establish appellate jurisdiction. This recent decision by the United States Court of Appeals for the Second Circuit again illustrates the wisdom of always using "belts and suspenders" in navigating the minefield of post-trial/appellate practice and preserving errors for appeal.

Facts

Defendant Canal owned property in Manhattan which it leased to various tenants. One of these tenants was engaged in selling counterfeit Omega watches. Omega warned defendant about the counterfeiting activity, but defendant took no action to stem it. Omega then sued defendant for contributory trademark infringement alleging that defendant continued to lease space knowing that vendors were using it to sell counterfeit Omega goods.

During the pre-trial phase after discovery, defendant moved for summary judgment on a purely legal issue, contending that Omega's claim was fatally defective because it had not identified a specific vendor to whom defendant continued to lease property despite knowing that the vendor was selling counterfeit goods. The motion was denied.

The case proceeded to trial. At the close of Omega's evidence and at the end of trial, defendant moved for judgment under Federal Rule of Civil Procedure 50 challenging the sufficiency of the evidence presented but did not again raise the legal issue it had presented in its prior motion for summary judgment. The jury returned a verdict for Omega and defendant appealed.

Analysis

Defendant's primary challenge on appeal was that the district court did not require Omega to show that defendant continued to lease space to a specific identified vendor who defendant knew was infringing Omega's trademarks. Defendant raised this issue by asking the Second Circuit to reverse the district court's order denying its motion for summary judgment and entering judgment in its favor instead. The Second Circuit

Melinda S. Kollross
is an AV® Preeminent™ rated Clausen Miller senior shareholder 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 Appeal for the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. Melinda has litigated over 200 federal and state court appeals and has been named a Super Lawyer and Leading Lawyer in appellate practice.
mkollross@clausen.com

in a split decision rejected this request holding it could no longer review a legal issue made in a pre-trial summary judgment motion, where the legal issue had not been raised in a Rule 50 motion at and after trial.

According to the Court, a motion for summary judgment does not preserve an issue for appellate review of a final judgment entered after a trial because once the case proceeds to a full trial, the full record developed at trial supersedes the record existing at the time of the summary judgment motion. Thus to preserve any issues raised in such pre-trial summary judgment motions, including purely legal issues, those issues must be raised again in a Rule 50(a) motion before the case goes to the jury, and again in a Rule 50(b) motion after trial.

The court ultimately reviewed the legal issue raised, finding it was preserved via an objection to jury instructions, but the Court's decision stands as to the requirements to preserve issues for review following a jury trial.

Learning Point: The clear holding in *Omega* is that legal issues raised in pre-trial motions for summary judgment are not preserved following trial unless they are raised again in a Rule 50(a) motion at trial and a Rule 50(b) motion following a trial. This would be the "best practices" the author recommends in any federal district court proceeding in any Circuit to preserve errors, including purely legal ones, for review—especially when there is no definitive United States Supreme Court ruling on the point. Much better that an appellate tribunal says you did not need to raise the issue, unlike the situation in *Omega* where it was deemed essential for review. ♦

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Illinois Super Lawyers 2021

Edward M. Kay

Kimbley A. Kearney

Melinda S. Kollross

Amy R. Paulus

Don R. Sampen

Edward M. Kay
Appellate

Ed is a Clausen Miller senior partner in the Appellate Practice Group. He is rated AV® Preeminent™ by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed 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.

Kimbley A. Kearney
Civil Litigation: Defense

Kim is a partner with Clausen Miller P.C. and is AV® Preeminent™ rated by Martindale-Hubbell. She has successfully litigated cases involving catastrophic personal injury, wrongful death, property loss, class actions, mass toxic tort, employment discrimination, insurance coverage and commercial disputes in trial and appellate courts throughout the United States. Kim is a Proctor in Admiralty and a former Member of the Board of Directors of the Maritime Law Association of the United States. She received her Juris Doctor, *cum laude*, and M.B.A. from Tulane University.

Melinda S. Kollross
Appellate

Melinda is a shareholder and chair of Clausen's Appellate Practice Group, specializing in post-trial and appellate litigation nationwide. She is rated AV® Preeminent™ by Martindale-Hubbell. Melinda has litigated more than 200 appeals in state and federal reviewing courts, including participation in three appeals before the United States Supreme Court. Melinda has a winning record in appeals, has successfully argued before the Illinois and Idaho Supreme Courts, and has been named an Illinois Super Lawyer and a Leading Lawyer in Appellate practice. Her work spans all areas of firm practice, including commercial, first-party property, liability insurance coverage and liability defense. Melinda is a member of the highly selective Federation of Defense and Corporate Counsel (FDCC) and a frequent author on appellate topics.

Amy R. Paulus
Insurance Coverage

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, and deep understanding of, the insurance industry, Amy is a CPCU (Chartered Property Casualty Underwriter). She is also AV® Preeminent™ rated by Martindale-Hubbell. Her AV® rating is a reflection of her expertise, experience, integrity and overall professional excellence. Amy has earned designations as a Super Lawyer, Leading Lawyer, Top Women Attorneys, and was named a Top Civil Defense Lawyer in Illinois. In addition, Amy is a Fellow of the prestigious Litigation Counsel of America Trial Lawyer Society.

Don R. Sampen
Insurance Coverage

Don 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*, and is currently an Adjunct Professor at Loyola University College of Law teaching a course in Insurance Law. Don is also a prolific writer, authoring articles and book chapters in various areas of the law, including antitrust and whistleblower litigation. He also writes a column in the *Chicago Daily Law Bulletin* which appears twice monthly on insurance coverage matters. He has maintained an AV® Preeminent™ rating (highest possible peer review rating for legal ability and ethical standards) with Martindale-Hubbell for 25 years.

Illinois Rising Star 2021

William C. Dickinson
Civil Litigation: Defense

Will is a partner in the Chicago office. He is an experienced litigator whose practice includes commercial litigation, medical malpractice, products liability, and construction law. Will has successfully defended clients in diverse areas of law, including claims for breach of contract, wrongful death and property damage, obtaining summary judgments and dismissals with prejudice on their behalf. In addition to his success in the courtroom, he has achieved the positive resolution of cases through mediation, arbitration, and settlement negotiations. The Super Lawyers Rising Stars list is a distinction reserved for only 2.5% of the attorneys in Illinois.

William C. Dickinson

CM NEWS

KOLLROSS AND ESPOSITO PUBLISHED IN *IDC QUARTERLY*

Clausen Miller Appellate Practice Group Chair **Melinda Kollross** and Senior Counsel **Paul Esposito** have a feature article published in the first volume of the 2021 *IDC Quarterly*. The article addresses Illinois Pattern Jury Instruction 12.04 on proximate cause. Read IPI 12.04: The "Sole Proximate Cause" Misnomer Should be Replaced by "100% Proximate Cause" to Accurately State the Law and Eliminate Confusion at **https://reader.mediawiremobile.com/IDC/issues/206960/viewer?page=7**.

KOLLROSS PUBLISHED IN DRI'S *FOR THE DEFENSE* MAGAZINE

Clausen Miller is pleased to announce that Shareholder and Appellate Practice Group Chair **Melinda Kollross** is a featured author in the February 2021 edition of the Defense Research Institute (DRI)'s *For The Defense* Magazine. February's focus is appellate advocacy. Melinda's article, "Six Steps to a Successful Moot Court", shares wisdom gained through Melinda's nearly three decades of appellate practice, including participation in a recent case before the United States Supreme Court and acting as a moot court judge for a case argued recently before the Georgia Supreme Court. The article can be read at **http://digitaleditions.walsworthprintgroup.com/publication/?m=55594&i=693902&p=32**. For more information, contact Melinda at 312.606.7608 or **mkollross@clausen.com**.

Thomas D. Jacobson

Anne E. Kevlin

Scott R. Shinkan

Daniel L. Polsby

CLAUSEN MILLER P.C. NAMES THREE NEW SHAREHOLDERS AND ONE ATTORNEY TO INCOME PARTNER

Clausen Miller P.C. elected **Thomas D. Jacobson**, **Anne E. Kevlin**, and **Scott R. Shinkan** to Shareholder.

Thomas "Tommy" Jacobson works in both the Florham Park and New York offices. His practice areas include first-party property, liability insurance coverage and subrogation. Tommy has represented insurance companies at both the trial and appellate levels in coverage and bad faith litigation involving all types of insurance policies, including first-party property, commercial general liability and builders risk. Tommy also provides pre-litigation counseling and advice to insurers on complex coverage matters. Rounding out his litigation background, Tommy has prosecuted numerous subrogation matters ranging from simple fires to complex transformer losses. He has directly handled several high profile seven figure recoveries for the firm's clients.

Anne Kevlin is managing partner of the firm's Florida practice group, handling a variety of insurance law issues and disputes. Anne has more than 25 years of insurance litigation, regulatory, and management experience, attained through private law practice as well as in-house counsel roles with insurance entities. Prior to joining Clausen Miller, Anne served as Vice President of Litigation for a Florida property insurance company. She also has experience as in-house counsel for a London market MGA, as well as The Hartford, where she managed panel counsel. Anne brings her experience as a client to Clausen Miller, where she is committed to continuously improving all components of her team's litigation performance, and on fully understanding and achieving the short and long-term goals of her clients.

Scott Shinkan is a skilled trial lawyer, working in the Chicago office, focused on defending insureds and counseling insurers on all aspects of casualty litigation for a wide range of industries. Scott defends physicians, practice groups, hospitals, and state patient compensation funds in medical malpractice lawsuits. He also represents motor carriers and environmental companies in transportation, general liability, and worker's compensation matters. Scott provides nationwide appellate monitoring of complex, high profile trials and represents the interests of excess insurers, including cases involving significant insurance towers.

Additionally, Clausen Miller P.C. elected Chicago attorney **Daniel L. Polsby** to Income Partner.

Daniel Polsby has represented insurance carriers in bad faith and coverage litigation as well as their insureds in casualty and professional negligence claims. He has also handled complex commercial arbitration hearings. Dan currently concentrates his practice in the defense of professional negligence lawsuits in federal and state courts. He represents attorneys, real estate professionals, accountants, architects, property managers, school districts, construction contractors, life insurance companies and businesses.

At Clausen Miller P.C., you will find a group of diverse and experienced attorneys who are business-minded, strategic counselors, as well as aggressive litigators. Our clients' needs, both in the boardroom and in the courtroom, are our priority.

KOLLROSS SECURES AFFIRMANCE OF DEFENSE VERDICT IN MEDICAL MALPRACTICE SUIT

CM shareholder **Melinda Kollross**, Chair of the firm's **Appellate Practice Group**, recently notched a big win in the Illinois Appellate Court, Third District. A three-judge panel unanimously affirmed the jury's verdict in favor of a surgeon accused of negligently failing to perform surgery to repair a possible small bowel obstruction in a 77 year-old man with significant co-morbidities including congestive heart failure, kidney failure, right pleural effusion, liver failure and terminal cancer. *Gretencord-Szobar v. Kokoszka*, 2021 IL App (3d) 200015.

Plaintiff argued on appeal that a new trial was required based upon three alleged jury instruction errors. Two concerned proximate cause and the third addressed life expectancy.

Proximate Cause

The trial judge had instructed the jury pursuant to long form IPI (Civil) No. 15.01 that more than one proximate cause could exist for the purpose of imposing liability. However, plaintiff wanted the jury to additionally be instructed pursuant to short form IPI (Civil) No. 12.05 that defendant's alleged negligence need not be the sole proximate cause of the patient's death. The Third District disagreed, ruling that the trial court did not abuse its authority in rejecting the tendered 12.05 instruction. The Appellate Court noted that the judge's instruction "expressly informed the jury that it did not need to choose just one proximate cause of injury" which adequately addressed plaintiff's concerns that the jury should know the patient's death could have had multiple causes. "[P]roviding the jury with plaintiff's [proposed jury instruction] was unnecessary, given that [the judge's instruction] adequately informed the jury that it was not limited to determining a single cause for [patient's] injury," the Court wrote.

The Appellate Court likewise upheld the trial court's rejection of plaintiff's tendered Non-IPI "lost chance" instruction because the long form IPI 15.01 instruction given adequately states Illinois law on proximate cause, including the lost chance doctrine. The Court explained:

> Illinois courts have "consistently affirmed refusals of similar proffered nonstandard [lost-chance] instructions because IPI Civil 3d No. 15.01 properly states the law in lost chance medical malpractice cases." See *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 45 (2010) (citing *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 466 (2001); *Lambie v. Schneider*, 305 Ill. App. 3d 421, 429 (1999); *Henry v. McKechnie*, 298 Ill. App. 3d 268, 277 (1998)). We see no reason to deviate from these holdings. Providing the jury with IPI Civil

(2011) No. 15.01 properly stated the law as to the lost-chance doctrine; the trial court did not abuse its discretion in denying plaintiff's request to provide the jury with a non-IPI instruction.

Life Expectancy

Plaintiff also contended that the jury was improperly instructed on the patient's life expectancy to be one to three years instead of 10 years as indicated by standard life expectancy tables.

The Third District panel again disagreed, observing that the plaintiff's own medical expert had testified that the patient had a life expectancy of one to three years, and that such subjects are beyond the knowledge of an average person. As the Court succinctly stated:

> [patient's] life expectancy was an issue beyond the understanding of the jury and required a medical basis couched in expert testimony. . . . In this case, the average juror could not be expected to know the impact of incurable mantle cell lymphoma on [patient's] life expectancy. Plaintiff's expert testified that [patient's] life expectancy was one to three years. Defendant did not offer an expert opinion regarding [patient's] life expectancy. This left plaintiff's expert testimony undisputed. As such, there is no factual dispute as to [patient's] life expectancy.

The case was reported in *Law360*. For more information, contact Melinda at 312.606.7608 or **mkollross@clausen.com**.

SUBROGATION GROUP DEFEATS PARTIAL MOTION FOR SUMMARY JUDGMENT ON DAMAGE CALCULATION

CM Partner **Robert A. Stern** was retained to investigate a water loss at a mall in New Jersey. Our Insured was Villeroy & Boch. The Insured submitted a claim to CM's client for the damage to its high-end ceramic dinnerware, and formal dishware, flatware and glassware. After adjustment, CM's client indemnified the Insured at full retail price, pursuant to the Policy. The mall was undergoing renovations at the time of the water loss. After investigation, CM filed a subrogation suit on behalf of its client against the General Contractor, Mall Owner and Management Company. After some discovery, Defendants filed a Partial Motion for Summary Judgment seeking a declaration from the Court that CM's client's recoverable damages should be limited to wholesale costs. After briefing and oral argument, the Court issued a five (5) page Decision denying the Motion and holding that the proper measure of recoverable damages is the retail cost. If you have questions regarding Subrogation or Recoverable Damages, please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212.805.3900).

Update: Florida Enacts New Law Modifying Appellate Jurisdiction Over County Court Appeals

by ***Benjamin S. Burnstine***

Introduction

Florida has amended Florida Statutes Section 26.012, significantly limiting the appellate jurisdiction of Florida circuit courts. Effective January 1, 2021, the new law divests the circuit courts of their general authority to hear appeals from county courts. Litigants will now appeal most county court decisions directly to the district court of appeal. Importantly, unlike decisions by a circuit court, any decision by one of Florida's five district courts of appeal is binding upon all circuit and county courts unless there is a conflicting opinion from another district court of appeal.

Analysis

The Florida Supreme Court has specifically acknowledged the impact the new law will have on Florida's appellate structure in a recent opinion where it considered and approved proposed amendments to the Florida Rules of Appellate Procedure. *See In re Amendments to the Fla. Rules of Appellate Procedure—2020 Fast-Track Report*, 2020 Fla. LEXIS 1781 (Fla. 2020) ("The amendments to rule 9.030 . . . are in response to recent legislation that transfers much of the circuit courts' appellate jurisdiction to the district courts of appeal and takes effect January 1, 2021."). Under the new law, however, Florida circuit courts will retain jurisdiction to hear appeals over certain types of cases. The new law specifically provides that the circuit courts will retain jurisdiction over "appeals from final administrative orders of local government code enforcement boards *and of reviews and appeals as otherwise expressly provided by law*." The full extent of the appellate jurisdiction retained by the circuit courts under the new law is currently unclear and will likely be the subject of future litigation. A non-exhaustive list of the types of actions that Florida circuit courts will statutorily maintain appellate jurisdiction over can be located at **https://www.flcourts.org/Know-Your-Court/#footnote-2**.

Learning Point: As of January 1, 2021, it is important that litigants in Florida are mindful of the fact that most county court decisions will be directly appealable to the district courts of appeal as opposed to the circuit courts. ♦

Benjamin S. Burnstine
is a senior associate with Clausen Miller based in the firm's Orlando office. Ben brings to the firm a diverse background of legal experience and prides himself on being an efficient, strategic, and aggressive advocate. Prior to joining Clausen Miller, Ben was an associate attorney at a high-volume family law practice where he represented clients in all aspects of litigation throughout the state of Florida. Ben also spent time working as a legal consultant for a prominent boutique business litigation firm in Atlanta, Georgia, where he assisted the firm in its representation of companies involved in various legal disputes. At Clausen Miller, Ben concentrates his practice primarily in the area of first-party property coverage disputes.
bburnstine@clausen.com

Update: Recent BIPA Cases And "Standing" To Sue In Federal Court

by ***Brian J. Riordan, Mindy M. Medley and Alexander J. Brinson***

Brian J. Riordan
is a shareholder at Clausen Miller P.C., having joined the firm in 1996. Brian represents both foreign and domestic professional indemnity and general liability carriers and their insureds in the full range of both litigated and non-litigated matters. He also specializes in the defense of cases involving commercial and professional liability, including the representation of attorneys, architects, engineers, insurance and investment advisors and broker/dealers.
briordan@clausen.com

Mindy M. Medley
is a shareholder at Clausen Miller P.C. Mindy is a practical, results-oriented, and efficient first-party property coverage counselor and litigator. Mindy has a national coverage and litigation practice, and regularly advises single insurers and markets on complex insurance coverage matters in jurisdictions throughout the United States. With a deep understanding of the insurance industry, Mindy appreciates the importance of a close analysis of the insurance coverage that is provided under first-party property insurance policies.
mmedley@clausen.com

Introduction

Clausen Miller's Technology & Cyber Group provides the following update to keep you informed on recent important cases adjudicating Illinois' Biometric Information Privacy Act ("BIPA"). BIPA regulates the collection, use, safeguarding, handling, storage, retention, and destruction of individuals' biometric information, such as fingerprints.

To bring BIPA claims in federal court, plaintiffs must establish "standing," or the right to bring their claims given plaintiffs' alleged damages (or lack thereof). Four recent decisions have analyzed the issue of standing with respect to claims under BIPA: *Miller*, *Patel*, *Bryant*, and *Fox*.

Analysis

In *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019), the Seventh Circuit analyzed two class actions by unionized airline employees who were required to clock in and out of their shifts by scanning their fingerprints. Despite the absence of financial harm to these employees, the Seventh Circuit held that they had standing to sue. Specifically, the Court held that the "prospect of a material change in the workers' terms and conditions of employment gives these suits a concrete dimension" sufficient to establish standing. The Court, however, ended up dismissing these claims as preempted by the Railway Labor Act governing bargaining between unions and management.

In *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019), plaintiffs sued Facebook alleging BIPA violations stemming from Facebook's "Tag Suggestions" feature, which uses facial-recognition technology to identify users. The Ninth Circuit held that the users' alleged injuries were sufficiently concrete and particularized to establish standing to sue.

In *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617 (7th Cir. 2020), the Seventh Circuit examined a BIPA lawsuit filed by a vending-machine customer who set up payment links with her fingerprints. Consistent with the above rulings, the Court held that the customer had Article III standing to bring a claim alleging her lack of consent. The Court reasoned that those allegations involved "an invasion of her private domain, much like an act of trespass would be." However, the Court held that the customer *did not* have standing to allege BIPA violations involving the alleged failure to publicly disclose data-retention and destruction protocols. Because those claims did not allege a particularized injury to the customer, the Court found that she lacked standing to assert them.

Most recently, in *Fox v. Dakkota Integrated Systems*, the Seventh

Circuit went further than *Bryant*, and found standing to assert claims alleging violations of BIPA disclosure requirements. Unlike the *Bryant* plaintiff, the *Fox* plaintiff alleged more than a mere failure to publicly disclose a data-retention policy. Rather, the *Fox* plaintiff alleged an unlawful *retention* of her biometric data, which allegedly caused her to suffer particularized injury. As the Court held, "an unlawful *retention* of a person's biometric data is as concrete and particularized an injury as an unlawful *collection* of a person's biometric data."

Learning Point: BIPA jurisprudence continues to develop, but there is a clear theme. Courts appear increasingly willing to permit plaintiffs to file BIPA claims in federal court, and to find standing for those claims, as long as plaintiffs craft allegations that BIPA violations caused personal and particularized harm. The inevitable result, as we are seeing already, is intensified BIPA litigation in federal court. That said, defendants still have substantial grounds on which to seek dismissal of these claims, including standing, and Clausen Miller's Technology & Cyber Group sees strong opportunities to defend these cases despite the increasingly challenging jurisprudential landscape. ♦

Alexander J. Brinson
is an associate in Clausen Miller's Chicago Office. As a young attorney, he is gaining experience across different insurance related areas; however, he focuses his practice on property coverage and casualty defense litigation. Alex graduated *cum laude* from Chicago-Kent College of Law in 2019. While in law school at the Valparaiso University School of Law, he participated on the Moot Court and Trial Advocacy teams, where he earned the competition awards of Best Oralist and Best Defense Counsel Opening. Alex also participated in Chicago-Kent's Civil Litigation clinic, as well as the Mediation and Alternative Dispute Resolution clinic, where he became a certified mediator.
abrinson@clausen.com

Florida Supreme Court: Extracontractual Damages Not Recoverable In Florida First-Party Property Policy Claim Litigation Absent Policyholder Compliance With Florida's Civil Remedy Notice (CRN) Statute

*by **Anne E. Kevlin** and **Ross S. Felsher***

Anne E. Kevlin
is managing partner of the firm's Florida offices, handling a variety of insurance law issues and disputes. Anne has more than 25 years of insurance litigation, regulatory, and management experience, attained through private law practice as well as in-house roles with insurance entities. She is passionate about measuring and continuously improving all components of her team's litigation performance, and on fully understanding and achieving the short and long-term goals of her clients.
akevlin@clausen.com

Ross S. Felsher
is a senior associate out of the firm's Tampa, FL office. Ross focuses his practice on civil litigation defense, with an emphasis on first party property disputes. Prior to joining Clausen Miller, Ross concentrated his practice on insurance defense, general liability, premises liability, products liability, transportation, commercial trucking, mortgage foreclosures and creditors' rights litigation. Originally from Kiev, Ukraine, Ross moved to the Tampa Bay area in 1994 and is fluent in Russian.
rfelsher@clausen.com

On January 21, 2021, the Florida Supreme Court decided in the ***negative*** the following certified question:

In a first-party breach of insurance contract action brought by an insured against its insurer, not involving [bad faith] under section 624.155, Florida Statues, does Florida law allow the insured to recover extra-contractual, consequential damages?

The Florida Supreme Court's determination does not change the law in Florida, but generally reinforces that parties cannot litigate extracontractual damage claims (including bad faith and consequential damages) prior to adjudication or formal appraisal of policy damages. This holding, in essence, ensures that contract damage litigation is bifurcated from bad faith and consequential damage litigation in Florida first-party property matters. *Citizens Prop. Ins. Corp. v. Manor House*, No. SC19-1394, 2021 Fla. LEXIS 91.

Procedural History

The Florida Supreme Court reviewed a certified question of the Florida Fifth District Court of Appeal in *Manor House, LLC v. Citizens Prop. Ins. Corp.*, 277 So. 3d 658 (Fla. 5th DCA 2019). In *Manor House*, the Fifth District found that the trial court erred in awarding partial summary judgment to Citizens on Manor House's claim regarding lost rental income—not covered under the property policy—as consequential damages. The Fifth District determined that Citizens, which is statutorily immune from bad faith claims, was not statutorily immune from consequential damages. The Fifth District held that the consequential damages suffered by Manor House arose out of the breach of the insurance contract, requiring no demonstration that Citizens acted in bad faith.

Florida Supreme Court Ruling

The Florida Supreme Court concluded that "extra-contractual [(bad faith)], consequential damages are not available in a first-party breach of insurance contract action because the contractual amount due to the insured is the amount owed pursuant to the express terms and conditions of the insurance policy. Extra-contractual damages are available in a separate bad faith action pursuant to section 624.155 but are not recoverable in this action against Citizens because Citizens is statutorily immune from

first-party bad faith claims." *Citizens Prop. Ins. Corp. v. Manor House*, No. SC19-1394, 2021 Fla. LEXIS 91, at *11-12 (Jan. 21, 2021).

Florida Supreme Court Rationale

The Florida Supreme Court reasoned that "the trial court properly concluded [that] the parties must rely on what they actually have pursuant to the express terms and conditions of the insurance policy," instead of what "parties can 'contemplate' [their] remedies [are] outside the insurance policy's express terms" as concluded by the Fifth District. Moreover, given that Citizens is a governmental entity and the Court had "concluded that Citizens was statutorily immune from first-party claims . . . extra-contractual damages are not recoverable in this action against Citizens."

Learning Point: The Florida Supreme Court has made clear that no bad faith or any other damages that fall outside of policy terms can be brought in a Florida first-party property matter until/unless the Insured complies with Florida's Civil Remedy Notice (CRN) statute, Section 624.155(3)(a), which bifurcates extra-contractual claim litigation from policy claim litigation. ♦

Eleventh Circuit Upholds Summary Judgment For Insurer Citing Doctrine Of *Uberrimae Fidei*

by **Michele T. Bachoon**

Michele T. Bachoon
is a senior associate with Clausen Miller focusing her practice on first-party property matters. Michele is also experienced in the areas of workers' compensation, labor and employment law, premises liability, and general civil litigation. Michele has significant experience representing national companies, municipalities, school boards, and other large employers in workers' compensation disputes. Throughout her career, Michele has handled all aspects of defense from the initial claim report, through mediation and trial, and has consistently obtained favorable results for her clients. Michele has been acknowledged by her peers, having earned an AV® rating from Martindale-Hubbell.
mbachoon@clausen.com

The legal doctrine of *uberrimae fidei* literally means "utmost good faith". This term is common in the insurance industry as the insurance policy, which is a legal contract, is said to be executed in utmost good faith. This means that all parties to an insurance contract must deal in good faith, making a full declaration of all material facts in the insurance proposal.

In *Quintero v. Geico Marine Ins. Co.*, 2020 U.S. App. Lexis 40091, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the U.S. District Court for the Southern District of Florida granting summary judgment to the insurer. This case involves the theft of a vessel and a marine insurance policy that was reinstated after a lapse in insurance coverage due to the insured's refusal to pay the increased premium for the new policy term. After reinstatement of the policy, the insured reported the vessel stolen.

Facts

The Insured owned a 32-foot powerboat which was initially insured by Geico for the policy period of May 5, 2017 to May 5, 2018. Several months prior to the expiration of the policy, on March 13, 2018, Geico sent a renewal package to the insured identifying policy changes and requesting the down payment for the annual premium. The package included an urgent reminder that the policy expired on May 5, 2018 and advising that to avoid a lapse in coverage, payment was required. Notably, the annual premium increased by 25% and the insured was paying his premiums through Geico's automatic payment system.

On May 4, 2018, the day before the policy was to expire, Geico charged the insured's credit card on file for automatic payment, but the charge was denied. The same day the insured called Geico about the attempted charge and increased premium. The insured was advised that Geico debited renewal payments from the card on file. Geico further advised the insured that his card was declined and he was automatically disenrolled from the automatic payment system. The insured questioned the rate change and was advised that there was a rate change for everyone. When the customer service representative refused to lower the premium, the insured complained about the increase and requested a supervisor. The insured was transferred to a supervisor, however, the call went into voicemail. As the insured had updated his address he was sent a new endorsement reflecting the address change. The insured did not make a payment and so his policy was not renewed. On May 10, 2018 Geico sent the insured a "Notice of Policy Expiration" which stated the policy expired May 5, 2018. The insured still did not make a payment nor did he call Geico about the Notice of Policy Expiration.

On May 25, 2018 at 4:58 a.m. the insured's boat and trailer were stolen. At 7:28 a.m. on May 25, 2018, the insured called Geico to "pay for his policy". The customer service representative advised that the policy had expired and inquired if the insured wanted to reinstate the policy. The insured behaved as if he was unaware of the lapse in coverage and agreed he wanted to reinstate the policy. During the call, the insured advised that his boat was not damaged, it was sound and seaworthy; and that he saw the boat every day because it was at his house. The insured then paid the premium due and Geico reinstated the policy. The insured asked if the policy was active right away and was advised that it was reinstated as of May 5, 2018; the date the original policy expired. At 2:43 p.m. the insured reported the stolen boat and trailer to the police and at 6:28 p.m. he reported them stolen to Geico. The insured advised that the boat was stored in his driveway and that he had last seen the boat around 11:30 p.m. to 12:00 a.m. the night before. The insured further advised that he discovered the boat was missing when his wife came home from work just after noon and asked him where the boat was. The insured advised he assumed the boat was there when he went to work in the morning but he did not see it because he had to run to his truck due to heavy rain.

Geico investigated the loss and advised the insured it was waiting for the final police report and requested the insured submit to an examination under oath. The insured refused to be examined under oath and filed a complaint in Florida state court seeking a declaration that Geico breached the policy by failing to cover the loss of the vessel. Geico removed the case to federal court.

After the lawsuit was filed, Geico obtained the final report from the sheriff's office which described video surveillance showing the boat and trailer being towed away just before 5:00 a.m. on May 25, 2018. Geico then denied the claim, and rescinded the policy *ab initio* ("from the beginning"), as the insured was not in possession of the boat when he called to reinstate his expired policy. The misrepresentation that the insured was in possession of the boat and that it was in good condition were material to Geico's agreement to insure the boat after the policy expired and was non-renewed at his request or lack of action.

The lower court concluded that the insured's misrepresentations concerning the status of the boat on May 25, 2018, voided the policy *ab initio* under the doctrine of *uberrimae fidei* because they were material to Geico's calculation of the risk of insuring the vessel.

The insured argued that the policy was never cancelled or non-renewed; however, the lower court found that the policy, Notice of Policy Expiration, and recorded telephone transcripts, indicated the previous policy's term expired on May 5, 2018. The court concluded that the policy was void *ab initio* under the *uberrimae fidei* "regardless of whether it was renewed, cancelled, or expired." The district court granted Geico's motion for summary judgment and denied the insured's motion for partial summary judgment.

Analysis

The Court of Appeals reviews the district court's grant of summary judgment *de novo*. On appeal, the insured argued the district court erred in applying the doctrine of *uberrimae fidei* because (1) his policy was not cancelled, non-renewed, or expired when he spoke to Geico the morning of May 25, 2018, (2) his coverage continued in full force without a lapse, and (3) his May 25, 2018 statements were not material to Geico's decision to insure his boat because Geico reinstated and backdated his policy and did not require a new underwriting process.

The insured argued that as Geico originally backdated the policy, his statements were not material to the issuance of coverage. Geico argued that the renewal was void *ab initio* due to the insured's material misrepresentations in his May 25, 2018 call before Geico reinstated the policy.

The Court of Appeals concluded that the initial policy by its terms expired on May 5, 2018 because the insured did not pay the required premium and he knew the policy would not be renewed. As such, the initial policy did not cover the boat loss that occurred on May 25, 2018 and coverage was not in effect at the time the insured called Geico to reinstate the policy on May 25, 2018 after the boat was stolen. The court found that the insured's boat was uninsured at the time of theft as there was a lapse of coverage.

Marine insurance contracts are governed by federal maritime law. "It is well settled that the marine insurance doctrine of *uberrimae fidei* is

controlling even in the face of contrary state authority. The doctrine requires an insured to "fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk," and "[t]he duty to disclose extends to those material facts not directly inquired into by the insurer." *HIH Marine Servs., Inc. v. Fraser*, 211 F.3d 1359, 1362 (11th Cir. 2000). This disclosure includes all material facts that are "within or ought to be within, the knowledge of one party, and of which the other party has no actual or presumptive knowledge." *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984); see also *HIH Marine*, 211 F.3d at 1363 ("[T]he law has placed the burden of good faith disclosure with the person in the best position to know all the facts: the insured.").

The court further found that under *uberrimae fidei*, an insured's material misrepresentation to an insurer renders a marine insurance policy void *ab initio*. *See AIG Centennial Ins. Co. v. O'Neill*, 782 F.3d 1296, 1303 (11th Cir. 2015). The policy is void even if the insured's misrepresentation was the result of "mistake, accident, or forgetfulness," or the insurer did not inquire about the particular material fact the insured failed to disclose. *HIH Marine*, 211 F.3d at 1362-63. As such, even if the insured was not aware of the stolen boat, the fact that it was not in his possession at the time he "renewed" his policy, made the policy void at the onset.

The court stated that the insured was correct that the doctrine of *uberrimae fidei* applies only when an insurer issues a policy, not when the policy is already in full force. Here, the policy was not in effect at the time the insured made the material misrepresentation because it had expired without renewal. Therefore, the insured's statements were material to Geico reinstating the policy. The boat was missing when the insured called to reinstate the policy and the insured had a duty to disclose that fact. Whether the insured was actually aware of the theft was irrelevant as the theft was a fact that should have been within his knowledge.

An insured's possession of the subject property is clearly material to the insurer's risk in insuring it, and the Eleventh Circuit Court of Appeals agreed with the district court's commonsense observation that "insuring a stolen Vessel is akin to insuring a loss." Accordingly, the district court properly applied the doctrine of *uberrimae fidei* and correctly held insured's renewal policy was void *ab initio*.

Learning Point: While *Quintero* involved a marine policy and federal maritime law, the doctrine of good faith applies in all insurance contracts. When examining the materiality of a statement, the court will ask whether a particular fact could possibly influence the mind of a prudent and intelligent insurer in determining whether they would accept the risk. If a policy expires and there is a lapse in coverage, regardless of whether it is termed renewal, reinstatement or is back dated to the date of expiration of the old policy, any statements made by the insured must be made in good faith. Insurance companies should consider re-evaluating a risk following any lapse in coverage to avoid the pitfall of insuring an already damaged risk. ♦

Burden On Insureds To Prove Exception To Exclusion In Property Policy

by ***Don R. Sampen***

A common and near-universal rule of insurance coverage is that the insured has the burden of proving that a claim or loss falls within the scope of a policy's insuring agreement, while the insurer has the burden of establishing the applicability of a policy's exclusion from coverage. If the exclusion in question contains an exception, the question then arises of whose burden it is to prove that the exception applies. The question is not a new one in many jurisdictions. A recent appellate court decision, however, appears to have decided for the first time in Illinois that the burden falls on the insured.

Such was the holding in *Wells v. State Farm Fire & Casualty Insurance Co.*, 2021 IL App (5th) 190460, where the court addressed the issue in the context of a property insurance policy. Ultimately, the court determined that, because the insureds failed to meet their burden, the insurer, State Farm, had no obligation to provide coverage for damage caused by frozen plumbing.

Facts

State Farm's property policy covered a warehouse building located in Marion, Illinois, owned by the insureds, members of the Wells family. The heating system at one time included a furnace and a heat pump. But on at least three occasions prior to the incident giving rise to the coverage dispute, the building's water pipes burst while the furnace and heat pump were both in operation. One of the insureds testified that these incidents led him to believe that the furnace was a dangerous way to prevent freezing in cold weather.

In 2010, the building's heat pump was stolen and never replaced, even though State Farm paid the replacement costs for the pump. No evidence existed that the insureds did anything thereafter to repair or replace the building's heating system.

In February of 2011, during a period of below freezing weather, the insureds cordoned off a 400 square foot area where the building's water pipes were exposed and set up three space heaters to prevent the pipes from freezing. Nonetheless, a few days later the pipes burst, and the insureds submitted a claim to State Farm for the loss.

The State Farm policy generally covered damage to the building due to accidental loss. It contained an exclusion, however, for loss caused by water leaking from plumbing caused by freezing "unless . . . you do your best to maintain heat in the building." Based on the exclusion, State Farm denied coverage, and the insureds filed this suit for breach of contract, bad faith and other remedies.

Following a bench trial, the trial court concluded that the exclusion applied and entered judgment for State Farm. The insureds appealed.

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

Analysis

In an opinion by Justice Mark M. Boie, the Fifth District affirmed. The appellate court initially addressed the burden of proof. While the trial court placed the burden on State Farm to establish that the insureds had not done their "best," the Fifth District said that was error.

Observing that the "do your best" language actually served as an exception to the no-coverage-for-leakage exclusion, the Fifth District said that no Illinois state court had actually decided the allocation of the burden in these circumstances. The court then relied on a Seventh Circuit case, *Santa's Best Craft, LLC v. St. Paul Fire & Marine Insurance Co.*, 611 F.3d 339 (7th Cir. 2010), and several out of state cases in defining the "majority view" that the insured has the burden of proving up an exception to an exclusion.

The Fifth District then turned to the meaning of the "do your best" language itself and found again that no Illinois case had interpreted the language. Out of state case law, however, had construed the phrase as requiring the insured to use "reasonable efforts" to comply with the policy's requirement. The Court applied a "manifest weight of the evidence" standard in evaluating the correctness of the trial court's findings.

Ultimately, the Fifth District agreed with the trial court that the insureds had not used their "reasonable" or "best" efforts. The Appellate Court relied on evidence that the insureds knew the heating system in the building was inadequate; they made no effort to repair it even though they had years to do so before the pipes froze in 2011; and the insureds' own expert could not determine whether the space heaters overloaded the building's circuits, causing the breaker to trip during freezing weather.

In addition, the Fifth District Appellate Court found that the space heaters were not sufficient to heat the whole building; they should not have been used more than a day or two; and even if all three were working at the time of the freezing temperatures, they may not have been sufficient to keep the pipes from freezing in any event.

The Court therefore affirmed the judgment in favor of State Farm.

Learning Point: In Illinois, as in most other jurisdictions, the insured has the burden to prove up an exception to an exclusion. ♦

Florida Court of Appeals Dismisses Bad Faith Lawsuit For Failure To Comply With The Civil Remedy Notice Specificity Requirements

by ***Michael H. Scott***

In Florida, a policyholder may not assert a statutory bad faith lawsuit against its Insurer under § 624.155, Fla. Stat. without first filing a Civil Remedy Notice ("CRN") with the Florida Department of Financial Services (the "Department"). To comply with the statute's requirements, the CRN must include specified information with specificity.

In *Julien v. United Property and Casualty Insurance Company*, 2021 Fla. App. LEXIS 3131, Florida's Fourth District Court of Appeals upheld the trial court's dismissal of the Insured, Junior Julien ("Julien")'s, bad faith action against his Insurer due to a deficient CRN.

Facts

The issue before the Court in *Julien* was whether the CRN's broad allegations citing to the entire policy, 14 statutory provisions, and 21 provisions of the Florida Administrative Code complied with the statute's specificity requirements. Furthermore, as the "specific policy language" relevant to the violation, the Insured referenced and reprinted the entire policy.

Analysis

The Court held the plain language of Fla. Stat. § 624.155(3)(b) instructs the policyholder to "state with specificity" information in the notice; to specify "language of the statute, which the authorized insurer allegedly violated;" and to "[r]eference . . . specific policy language that is relevant to the violation, if any."

In evaluating the Insured's CRN, the Court held that despite citing the various statutory and policy provisions, the Insured did not substantially comply with the CRN specificity standard that an insured "state with specificity" the policy language and the statutory provisions at issue. The Court held this lack of compliance was more than a mere technical defect. As the CRN was deficient and the Insurer raised the specificity argument in its response to the CRN, the Insured's bad faith lawsuit was properly dismissed.

The Court rejected the Insured's argument that the notice was sufficient because the Department did not return the notice. However, the Court held that it must independently review the notice even if the Department has made a specific determination about its legality because a state court may not defer to an administrative agency's interpretation of a state statute but must interpret the statute *de novo* (Art. V, § 21, Fla. Const.).

Although the instant case was properly dismissed, the Court indicated there are exceptions to the specificity requirements. The United States District Court for the Middle District

Michael H. Scott
is a senior associate with Clausen Miller, practicing insurance defense in Florida since 2015, with a focus on first-party property insurance and worker's compensation defense. Michael has substantial experience representing Florida's largest homeowner's property insurance companies, defending municipalities and national companies in high exposure worker's compensation cases.
mscott@clausen.com

of Florida recently held that the failure to strictly comply with this specificity standard will not foreclose a statutory bad faith action where the defect is a purely technical defect, the insured substantially complies with the specificity standard, the insurer received actual fair notice in furtherance of the statute's notice requirement, and the insurer is not prejudiced by the technical defect. *See Pin-Pon Corp. v. Landmark Am. Ins. Co.*, 2020 U.S. District LEXIS 212941. Further, *Pin-Pon* held that failure to comply with the statutory requirements may be waived if not raised in the insurer's response to the CRN.

Learning Point: In Clausen Miller's 2020 Report of Recent Decisions, Vol. 4, we highlighted the CRN requirement in bad faith lawsuits, and noted that any bad-faith lawsuit may be subject to dismissal if the CRN lacks the information required by the Department and Florida law as a precondition for bringing a bad faith lawsuit. **https://www.clausen.com/wp-content/uploads/2021/01/CMRpt2020vol4.pdf**.

Julien demonstrates how broad reference to the policy, statutory provisions, and the Florida Administrative Code may not satisfy the CRN specificity requirement. The case also highlights the importance of raising the insured's failure to comply with the statutory requirements in the CRN response, or the insurer risks waiving the defense. ♦

Florida Courts: Insurer's Request For Appraisal Does Not Toll Civil Remedy Notice Cure Period

by ***Anna P. Jiménez***

Florida's Fourth District Court of Appeals joined other Florida appellate courts in determining that a bad faith action cannot be dismissed on the grounds that appraisal was awarded and paid because the insurer's request for appraisal did not toll the 60-day cure period reflected in §624.155 of Florida Statutes for a Civil Remedy Notice ("CRN"). *Zaleski v. State Farm Fla. Ins. Co.*, No. 4D19-2478, 2021 LEXIS 2712 (Fla. 4th DCA, 2021).

A CRN is a condition precedent to bringing a bad faith lawsuit under §624.155 of Florida Statutes. The statute requires that a claimant must file a notice with the Florida Department of Financial Service. Once the notice is filed, the insurer can cure the alleged bad faith by paying what is requested in the CRN. If the insurer does not cure, then the policyholder has the right to file a bad faith lawsuit in the future.

Facts

The Insureds reported a water supply line claim to State Farm ("Insurer"). The Insurer inspected, acknowledged coverage, and tendered payment to the Insureds. Shortly thereafter, the Insureds filed a CRN alleging bad faith. Specifically, the Insureds alleged that the Insurer performed a cursory inspection and provided a "low-ball" estimate and requested that the Insurer provide additional payment. In response and exactly one month after the filing of the CRN, the Insurer invoked appraisal pursuant to the policy and approximately three months thereafter, paid the appraisal award.

The Insureds responded by filing a bad faith lawsuit against the Insurer. The Insurer defended by stating that appraisal and the timely payment of the appraisal award cured the Insureds' Civil Remedy Notice, thus obviating their right to a bad faith lawsuit pursuant to the Civil Remedy Notice statute. Further, the Insurer argued that the CRN's lack of requisite specificity precluded the Insurer from an opportunity to cure. The lower court sided with the Insurer and granted summary judgment. This appeal followed.

Analysis

The Fourth DCA examined two issues: (1) whether appraisal—and timely payment of the appraisal award—tolled the 60-day cure period reflected in section §624.155 of Florida Statutes; and (2) whether the Insureds' CRN lacked the requisite specificity to provide the Insurer with an opportunity to cure. It answered both in the negative.

First, the Appellate Court found that the lower court's reliance on the Florida Supreme Court case *Talat Enterprises, Inc. v. Aetna Casualty & Surety Co.*, 753 So. 2d 1278 (Fla. 2000), was misplaced as *Talat* did not

Anna P. Jiménez
is an associate with Clausen Miller based in the firm's Tampa, FL office. Anna focuses her practice in the area of first-party property disputes. Prior to joining Clausen Miller, Anna gained experience in first-party litigation in a medium-sized South Florida firm. Anna also worked in the area of worker's compensation defense in West Palm Beach where she represented carriers and third party administrators.
ajimenez@clausen.com

address tolling of the CRN 60-day cure period when appraisal is invoked. It then discussed a Second DCA case, *Fortune v. Protective Ins. Co.*, 302 So. 3d 485 (Fla. 2d DCA 2020). In *Fortune*, the court held that invocation of the appraisal process did not toll the 60-day CRN cure period until appraisal was completed. In doing so, the court stated that:

> Even if a policy requires the mediation or appraisal process to occur prior to suit being filed, an appraisal is not a condition precedent to the insurer fulfilling its obligation to fairly evaluate the claim and to either deny coverage or to offer an appropriate amount based on that fair evaluation. *Id.* at 490 (Fla. 2d DCA 2020) (quoting *Landers v. State Farm Fla. Ins. Co.*, 234 So. 3d 856, 859-60 (Fla. 5th DCA).

Following *Fortune*, the Fourth DCA agreed that the plain language in section §624.155(3)(d) of Florida Statutes does *not* toll the CRN cure period until an appraisal is completed because the appraisal award is not a condition precedent to the Insurer's obligation to pay the fair amount due under the policy.

The Court also considered the 2019 amendment to §624.155 of Florida Statutes. The amendment reinforces the position that seeking appraisal is not a cure to an insurer's failure to attempt to timely settle a claim in good faith. Specifically, the amendment states that: "[a] notice required under this subsection may not be filed within 60 days after appraisal is invoked by any party in a residential property insurance claim." Fla. Stat. §626.155(3)(f). Therefore, the *Fortune* court reasoned that the amendment affects the time when an insured can file a CRN but does *not* treat an appraisal or payment of an appraisal award as a cure for any violation alleged in the CRN.

Consistent with *Fortune*, the Fourth DCA here held that invocation of the appraisal process and payment of the appraisal award after the cure period expired did *not* cure, as a matter of law, a bad faith claim. Although the Insurer paid the appraisal award six days *after* it was entered, it did so over two months after the CRN's 60-day cure expired. Notably, the concurring opinion made a crucial distinction regarding the tolling of the 60-day cure period: §624.155 tolls the 60-day cure period if the insurer requests appraisal *before* the CRN is filed. However, if the insured files the CRN *before* the insurer invokes appraisal, no tolling occurs.

Turning to the second issue regarding the Insureds' alleged lack of specificity in the CRN, the Appellate Court evaluated section §624.155 of the Florida Statutes, which mandates that a CRN must set forth "the facts and circumstances giving rise to the violation." §624.155(3)(b)(2). The Court concluded that the subject CRN sufficiently put the Insurer on notice because the Insureds provided the specific statutory language, described the facts and circumstances leading to the submission of the CRN, and provided the Insurer with a copy of the estimate prior to filing the CRN.

Learning Point: Invoking appraisal and timely paying the appraisal does not toll the 60-day CRN cure period reflected in §624.155 of Florida Statutes. ♦

First Take: Duty To Defend COVID-19 Claim Under CGL Policy

by ***Amy R. Paulus***

On February 22, 2021, the U.S. District Court for the Northern District of Illinois held that a commercial general liability ("CGL") insurer has a duty to defend McDonald's against claims brought by employees allegedly exposed to coronavirus on the job. This is the first finding of a duty to defend a COVID-19 claim in the third-party liability context.

Facts

In August 2020, McDonald's and its franchisees ("McDonald's") filed a declaratory judgment action seeking defense and indemnity under CGL policies issued by Austin Mutual Insurance Company ("Austin Mutual") for claims brought by McDonald's employees. The employees' lawsuit alleges that McDonald's is liable for nuisance and negligence due to its decision to remain open during the COVID-19 pandemic without enhanced health and safety standards for its employees. At least three of the plaintiffs allegedly contracted COVID-19. The employees' lawsuit seeks injunctive relief requiring McDonald's to provide its employees with sufficient personal protective equipment, supply hand sanitizer, require customers to wear face masks, monitor employee COVID-19 infections, and provide its employees with accurate information about COVID-19.

Analysis

Austin Mutual moved to dismiss McDonald's declaratory judgment complaint on the grounds that the employees' complaint did not seek damages because of bodily injury where "the nature of [McDonald's] expenditure is not to remedy bodily injury to third-persons." McDonald's responded that COVID-19 and SARS-CoV-2 are bodily injuries, without which McDonald's would not sustain the damages associated with injunctive relief. McDonald's further argued that any money spent to comply with the injunctive relief constituted damages "'because of' exposure to [COVID-19 and SARS-CoV-2]."

Judge Charles Kocoras held that the mandatory injunction sought in the employees' suit constituted "damages" because it would require McDonald's "to expend money to remediate the continuous and ongoing exposure to [COVID-19 and SARS-CoV-2]." In addition, Judge Kocoras reasoned that "because of" requires only "but for" causation, and that but for the employees' contracting COVID-19, McDonald's would not face the costs of complying with a mandatory injunction.

The court rejected Austin Mutual's argument that CGL policies are only meant to cover damages paid to a third-party, stating that the argument is "untethered to any language in the policy," and contrary to Seventh Circuit precedent in *Cincinnati Ins. Co. v. H.D. Smith*, LLC, 829 F.3d 771, 774 (7th Cir. 2016) (state's costs to address the opioid epidemic were because of bodily injury even though state did not sustain bodily injury).

Of note, the court highlighted the lack of a virus exclusion in the CGL

Amy R. Paulus
is the Liability Coverage and Reinsurance Practice Group Leader and member of the Board of Directors of Clausen Miller P.C. She 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, and deep understanding of, the insurance industry, Amy is a CPCU (Chartered Property Casualty Underwriter). She is also AV® Preeminent™ rated by Martindale-Hubbell. Her AV® rating is a reflection of her expertise, experience, integrity and overall professional excellence.
apaulus@clausen.com

policies at issue, suggesting that the exclusion may preclude coverage for similar third-party claims. Also, the court did not reach Austin Mutual's argument that the employer's liability exclusion applied, concluding the argument was waived.

Learning Point: This ruling is significant because it recognizes a potential for COVID-19 claims to implicate a duty to defend under CGL policies. Further, the court relied on the Seventh Circuit's extremely broad reading of "because of bodily injury" from the governmental entity opioid claim context, arguably a much different analysis. Finally, this ruling may be viewed as limited by its particular facts, and it remains to be seen if the court will ultimately determine whether coverage for the employees' claims actually exists under the policies at issue. ♦

Coming Attractions: Florida Changes Its Summary Judgment Standard

by ***Paul V. Esposito***

Back when we could still go to movies, getting there early was advisable. It allowed time to get popcorn, candy, a drink, and then find a good seat before the previews started. Hollywood's teasers, previews let us know what's heading our way.

Without the Hollywood style, the legal system also gives advance notice of what's coming. In Florida, it's a big change governing summary judgment motions. Coincidentally, the change arose out of a case involving a video. *Wilsonart, LLC v. Lopez*, 2020 Fla. LEXIS 2144.

Facts

Samuel Rosario was driving his freightliner in the center lane of a three-lane road. As Rosario prepared to stop at a light, Jon Lopez's pickup struck the rear of Rosario's truck, pushing it into a vehicle. Lopez died from injuries sustained.

Lopez's estate brought suit. A witness testified that Rosario was partially in the right lane and suddenly swerved prior to the accident from the center lane to the left lane. But Rosario's dash-cam showed that he was in the center lane and gradually stopping when an impact forced his truck to veer left and strike a car in front of it.

Based on the video, the trial court granted summary judgment to Rosario. Though finding the video evidence compelling, the court of appeal reversed because the trial court improperly weighed competing evidence. But it certified to the Supreme Court a question as to whether the summary judgment standard should be modified where unaltered video evidence completely refutes an opponent's story.

Analysis

The Supreme Court answered "no" for purposes of the case. But it announced a change to Florida Rule of Civil Procedure 1.510. Effective May 1, 2021, the rule reads that Florida courts must apply "the federal summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)." Under current Florida case law, summary judgment must be denied if a record raises "the slightest doubt that material issues could be present." But under the adopted federal standard, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" If a record so blatantly contradicts a party's story that no reasonable jury could believe it, a court should not accept it.

The order amending Rule 1.510 elaborated on the Supreme Court's rationale. The goals of the federal and Florida rules are identical: to eliminate meaningless disputes and so provide a just, speedy, and inexpensive resolution of cases. The language of the two rules

Paul V. Esposito
is a partner with Clausen Miller P.C. who was previously an Illinois assistant attorney general. He continues to research, write, and argue in federal and state courts all over the country, a personal passion to him. Paul has worked closely with some of the country's best trial lawyers, against some of the country's best trial lawyers. Whatever the issues, the goal always remains the same: win first at trial, and from there, win on appeal.
pesposito@clausen.com

is substantively the same. But Florida courts have not applied the Florida rule like the federal rule. Unlike the federal courts, Florida courts have not recognized the similarity between motions for directed verdict and motions for summary judgment. The amended order establishes that the inquiry under each motion should be the same.

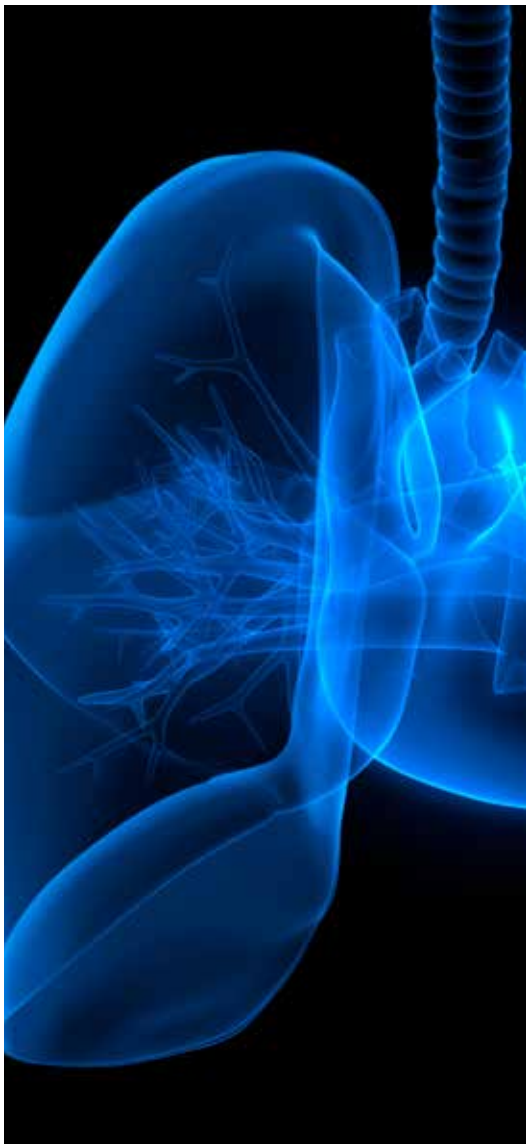
The amendment also changes the burden of persuasion. In Florida, a movant for summary judgment will no longer need to conclusively disprove an opponent's case. If the parties had ample time for discovery, a non-movant should be able to offer evidence on its elements of proof—and so create a genuine issue of fact. If a non-movant fails, the moving party should not be forced to disprove what a non-movant cannot prove.

The amendment also requires that a non-movant's story must have enough meat on the bone to warrant a trial. Evidence that is merely colorable and not significantly probative will not suffice. There must be more than a "metaphysical doubt as to the material facts."

Learning Point: The new rule makes Florida the 39th state to adopt the federal summary judgment standard. And though the rule is technically still in the comment stage, a reversion back to the old standard is unlikely. The amended rule should provide welcome relief from Florida's overly-strict standard. It will better serve the goal of improving the efficiency of the courts and reducing the expense of litigation. While the court system still encourages trials, the amended rule will discourage needless ones. Everyone will benefit. This attraction can't come soon enough. ♦

Change Of Course: Massachusetts Adopts But-For Causation—Mostly

by ***Paul V. Esposito***



More than two things—death and taxes—are certain in life. There's at least a third certainty: the law's *uncertainty* about the proper standard governing proximate causation in tort cases. The concept creates confusion wherever it goes. It has mystified commentators, judges, and litigators for decades. It has now changed how the Restatement of Torts views the issue. That's significant because the Restatement has strongly influenced states in formulating their standards. States like Massachusetts, which recently jumped on board the Restatement's updated approach. *Doull v. Foster*, 2021 Mass. LEXIS 145.

Facts

Laura Doull needed nurse practitioner Anna Foster's help regarding perimenopausal symptoms. Foster prescribed a topical medication but did not tell Doull that it could possibly cause blood clots. Almost three years later, Doull saw Foster three times complaining of shortness of breath. Foster examined Doull each time. Foster diagnosed Doull as suffering from a combination of effects from her long-standing allergies and asthma. Foster's supervising doctor, Richard Miller, did not examine Doull.

Not long after Foster's examinations, Doull suffered a seizure-like event. Doctors found a pulmonary embolism. They diagnosed her as having CTEPH, a rare disease in which increased pulmonary artery pressures cause heart failure. Doull had chronic blood clots. Surgery to remove them failed, as did further treatment. A few years after surgery, she died from CTEPH complications.

Prior to death Doull sued Foster and Miller for negligently failing to (1) get Doull's informed consent about the medication, (2) diagnose the embolism sooner, and (3) supervise Doull. Her expert supported the allegations. Defendants' expert testified that there was no evidence that the medication increased the risk of clotting. He disagreed that earlier diagnosis would have prevented CTEPH because it had been ongoing for months. Doull's outcome would have been the same even with an earlier diagnosis.

A jury answered special questions finding: (1) defendants obtained inform consent; (2) Foster negligently failed to diagnose the embolism, but this did not cause Doull's injury or death; and (3) Miller negligently failed to supervise Foster, but it did not harm Doull.

After the trial court denied plaintiffs' post-trial motion, the Supreme Judicial Court took the case.

Analysis

The primary issue—one splitting the Court—involved causation. The majority held that in most negligence cases, but-for causation is the standard to prove a factual cause. ***Absent the allegedly negligent conduct, an injury would not have occurred***. The standard is designed to connect

conduct to outcome. Most courts nationwide and the Restatement require but-for causation in most cases to prove cause-in-fact.

The majority recognizes that rare exceptions exist. The classic example involves two negligently caused forest fires that merge to destroy property. Either one was sufficient to independently cause the damage, so neither is a but-for cause of harm. To avoid unfairness, a different standard was needed for the exceptions. The first two Restatements devised it: if multiple causal forces are involved, each sufficient to cause harm, then either can be a "substantial factor" in causing injury. This test is highly workable in toxic tort and asbestos cases where it is difficult, if not impossible, to determine which defendant's exposure caused harm.

To the majority, the problem is that the first two Restatements merged the but-for and substantial-factor standards in a confusing way. It resulted in the latter being applied in negligence cases generally, not just in exceptional cases where multiple ***sufficient*** causes are present. But to be a "substantial factor" in the general case, a defendant's conduct still needs to be a "but for" cause. So where multiple ***potential*** causes are involved, but-for causation remains the appropriate test. In those cases, juries can assess each alleged cause to determine if it was needed to bring about the harm.

The majority recognized that there need not be only one but-for cause. There can be many factual causes of injury, even within a single case. Under the but-for test the focus remains on whether, absent a defendant's conduct, the harm would have occurred.

The Restatement (Third) of Torts, which has abandoned substantial factor causation in favor of but-for causation, supports the majority's opinion. The Restatement found that the substantial-factor test has not "withstood the test of time, as it has proved confusing and been misused." The word "substantial" can mistakenly impose a more demanding standard than but-for causation. At the same time, it can cause juries to altogether skip the necessary analysis of establishing factual cause. And it wrongly allows juries to conflate the concepts of factual and legal cause, the latter involving policy considerations irrelevant to a cause-in-fact analysis.

The majority concluded that the substantial-factor test is best recognized as the exception to the rule, to be used only in the exceptional cases.

Learning Point: The *Doull* majority opinion is worth extended study—and worth citing in cases where the proximate cause standard comes into play. Too often, courts have treated the but-for and substantial-factor tests as interchangeable regardless of circumstances. *Doull* explains the limits of each test, and so promotes their proper application. It will focus fact-finders on a major purpose of the causation element: establishing a factual connection between a defendant's conduct and a plaintiff's outcome. ♦

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ARBITRATION

NON-SIGNATORY BARRED FROM ENFORCING ARBITRATION PROVISION

Doe I v. Carmel Operator, LLC, 160 N.E.3d 518 (Ind.)

Following alleged sexual abuse, guardian sued nursing home and company hired to perform background checks on home's potential employees. ***Held:*** Company may not force arbitration of claim pursuant to agreement between home and guardian. Company neither signed agreement nor acted as home's agent to attain intended third-party beneficiary status. Equitable estoppel was unavailable because company did not know about, rely on, or suffer prejudice from its reliance on arbitration agreement.

LACK OF REASONABLE NOTICE OF ARBITRATION REQUIREMENT DOOMS AWARD

Kauders v. Uber Techs., Inc., 159 N.E.3d 1033 (Mass.)

After being denied ride, Uber customer sued to avoid arbitration award. ***Held:*** Customer contract did not provide reasonable notice of arbitration requirement or ability to reasonably manifest assent. Reasonable users may not understand that registration process for rides created a contractual relationship. The online interface between Uber and customers did not require customers to read the terms and conditions, which lacked prominence. The registration process did not invite customers to affirmatively acknowledge their agreement to Uber's terms and conditions.

ASSIGNMENT

POLICYHOLDER'S ASSIGNMENT INVALID WHERE PREVIOUSLY ASSIGNED SAME RIGHTS

Bruno v. Harford Ins. Co., 2021 U.S. Dist. LEXIS 11709 (M.D. Fla.)

Plaintiffs initiated breach of contract action against defendant alleging policyholder assigned to plaintiffs certain rights with respect to insurance claim. Defendant moved to dismiss, arguing plaintiffs lacked standing because the policyholder previously made a valid assignment of the same allegedly assigned rights. ***Held:*** An assignor cannot assign rights and then later assign those same rights again. A right once assigned can no longer be enforced or transferred by any party other than the assignee.

CIVIL PROCEDURE

PROPOSAL FOR SETTLEMENT UNENFORCEABLE WHEN SERVED EARLIER THAN NINETY DAYS AFTER PLAINTIFF ADDED TO ACTION

Arizone v. Homeowners Choice Prop. & Cas. Ins. Co., 2021 Fla. App. LEXIS 3793 (Fla. App.)

In March 2016, plaintiff Arizone filed breach of contract suit against defendant. In August, an amended complaint was filed adding plaintiff Simon to action. Following defense verdict, trial court awarded defendant fees and costs based on separate August 2016 proposals for settlement served individually upon plaintiffs. ***Held:*** Reversed in part. Critical date for whether proposal for settlement served on Simon was timely was date Simon commenced action, which was August 2016. Thus, proposal for settlement was premature, violating express ninety-day requirement set forth in procedural rules, and unenforceable.

CONTRACT LAW

AMBIGUOUS TERM RESOLVED AGAINST DRAFTER

C & H Shoreline, LLC v. Lorraine Rubino et al., AC 43197 (Conn. App.)

Plaintiff sued defendants for breach of contract due to failure to pay for services rendered. Parties' agreement contained provision providing no action relating to subject matter of agreement could be brought more than one year after "claiming party" knew or should have known of the action. Trial court found action was time barred by provision. Plaintiff appealed. ***Held:*** Affirmed. The one-year limitation provision was ambiguous and applying the *contra proferentem* rule, the ambiguity must be resolved against plaintiff, the undisputed drafter of the agreement.

CONTRACT AMBIGUITY LEFT FOR ULTIMATE FACT FINDER

Joann Anderson v. Town of Bloomfield et al., AC 42905 (Conn. App.)

Plaintiff sued defendant for installing allegedly defective roof pursuant to Town residential rehabilitation program. The Town acted on behalf of the plaintiff to secure appropriate contractors to do the work and entered into all necessary contracts. Defendant installed the roof and was paid by Town. Plaintiff noticed water entering her home. Plaintiff alleged she was a third-party beneficiary of the contract but trial court dismissed action. ***Held:*** Reversed.

The contract was ambiguous as to whether defendant and Town intended plaintiff to be a third-party beneficiary, and therefore presented a question for the ultimate fact finder.

DAMAGES

CORPORATE PUNITIVE DAMAGES REQUIRE CLEAR, CONVINCING EVIDENCE

Morgan v. J-M Mfg. Co., Inc., 60 Cal. App. 5th 1078 (Cal. App.)

Plaintiff sued corporate defendant following exposure to asbestos at construction jobsites in the 1970s and 1980s. Trial court denied defendant directed verdict as to punitive damages. Defendant argued plaintiff failed to prove defendant acted with the requisite fraud, malice or oppression to support punitive damages. Jury awarded $15 million in punitive damages. ***Held:*** Reversed. Defendant's large company status does not relax plaintiff's burden of proof. Plaintiff was required to present clear and convincing evidence that defendant's officers, directors or managing agents with responsibility for corporate policy had the requisite state of mind.

EMPLOYMENT LAW

PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT DOCTRINE

Helen Sieranski v. TJC Esq, A Professional Servs. Corp., AC 43272 (Conn. App.)

Plaintiff paralegal's employer asked her to prepare an affidavit stating something that was untrue regarding a litigation matter. She drafted the affidavit but refused to sign it because she knew it was false and defendant terminated her employment. Plaintiff sued for wrongful termination but trial court struck action. ***Held:*** Reversed. The public policy exception to the at-will employment doctrine protects against termination for refusing to assist in submitting false statements to a court.

ABANDONMENT OF DUTIES IS JUSTIFIABLE GROUNDS FOR TERMINATION

Robert Meyers v. Town of Middlefield, AC 42555 (Conn. App.)

Plaintiff town building official was responsible for processing certificate of occupancy applications. Town alleged plaintiff obstructed the issuance of a certificate of occupancy to a company that owned a commercial ski property and voted to terminate him. Plaintiff sued but trial court dismissed action. ***Held:*** Affirmed. Plaintiff constantly interjected new or resolved compliance issues whenever ski company was on verge of being issued certificate, left an inspection against instruction, raised matters outside of his jurisdiction to obstruct the issuance of the certificate, and misplaced paperwork on multiple occasions.

FIRST-PARTY PROPERTY

ORDINANCE AND LAW COVERAGE NOT OWED UNTIL COSTS INCURRED

Sfr Servs. v. Empire Indm. Ins. Co., 2021 U.S. Dist. LEXIS 1768 (M.D. Fla.)

Defendant paid amount determined at court-ordered appraisal in which appraisal panel found roof damage could be repaired utilizing harvested tiles. Following appraisal, plaintiff sued defendant for breach of contract claiming defendant failed to properly indemnify because County permitting authority would not allow harvested tiles. ***Held:*** In accordance with the insurance policy's ordinance and law language, defendant did not owe plaintiff for the increased costs to comply with the ordinance or law until the property is actually repaired or replaced.

LABOR LAW

LABOR LAW CLAIM INVOLVES FORESEEABILITY OF ELEVATION RISK

Goya v. Longwood Housing Dev. Fund Co., 2021 NY Slip Op 01845 (N.Y. App. Div. 1st Dep't)

Plaintiff brought various Labor Law and related claims concerning construction injury. Defendant argued Labor Law § 240(1) claim should be dismissed because malfunction of fire escape ladder was not foreseeable. ***Held:*** A plaintiff in a case involving collapse of a permanent structure must establish the collapse was "foreseeable," not in strict negligence sense, but in sense of foreseeability of exposure to an elevation-related risk. Here, plaintiff's use of permanent fire escape ladder to reach top of sidewalk shed presented foreseeable elevation-related hazard just as if plaintiff had been using an extension ladder.

LEGAL MALPRACTICE

RETROSPECTIVE COMPLAINTS ABOUT FIRM INSUFFICIENT TO STATE LEGAL MALPRACTICE CLAIM

Garr Silpe, P.C. v. Gorman, 2021 NY Slip Op 01944 (N.Y. App. Div. 1st Dep't)

Woman brought counterclaims for legal malpractice against attorney she hired mid-trial, after she had been represented by eight prior law firms, and at times represented herself. Trial court dismissed her claims. ***Held:*** Conclusory allegations that law firm failed to prepare for trial and gather evidence in her matrimonial action did not state a cause of action for legal malpractice. Retrospective complaints about law firm's recommendations and trial are an insufficient basis to show that plaintiff's decisions are actionable. ***Further held:*** Counterclaims also fail to allege facts that would establish that, but for the firm's negligence, she would have obtained a more favorable result.

LIMITATIONS OF ACTIONS

SAVING STATUTE DOES NOT SAVE CLAIM AFTER STATUTE OF LIMITATIONS AND STATUTE OF REPOSE EXPIRED

Wilson v. Durrani, 2020 Ohio LEXIS 2833 (Ohio)

After voluntarily dismissing late-filed medical malpractice claims, plaintiffs refiled them following expiration of statute of repose. ***Held in a split decision:*** Saving statute only extends time to file action otherwise barred by statute of limitations. It does not provide an exception to a statute of repose, which must come from statute of repose itself. Neither of the two existing exceptions to the statute of repose applied.

MEDICAL MALPRACTICE

MALPRACTICE MAY FLOW FROM COURSE OF TREATMENT RECOMMENDED

Flores v. Liu, 60 Cal. App. 5th 278 (Cal. App.)

Plaintiff consulted with defendant doctor for morbid obesity. After full workup, doctor recommended possible surgical options and plaintiff consented to surgery. Plaintiff regained weight and consulted doctor again and had another surgical option. Plaintiff re-gained her weight a third time and consulted doctor about third surgical option. Risks were explained and she consented. After surgery, she experienced abdominal leaking, sepsis and respiratory and renal failures and sued. Jury found for doctor. ***Held:*** Affirmed. Physician may be liable for negligently recommending a course of treatment if (1) the course of the treatment stems from a misdiagnosis of the patient's underlying medical condition, or (2) all reasonable physicians in the relevant medical community would agree that the probable risks of that treatment outweigh its probable benefits. A patient's informed consent to a negligently recommended course of treatment does not negate the physician's liability for negligence in recommending it.

FAILURE TO PERFORM BIOPSY OR REFER TO SPECIALIST SUSTAINS CLAIM

Colon v. Choi, 2021 NY Slip Op 01823 (N.Y. App. Div. 3d Dep't)

Plaintiff sued dermatologist to whom decedent was referred for failing to diagnose and treat decedent with adenocarcinoma of the anus. Trial court denied dermatologist's motion for summary judgment. ***Held:*** Affirmed. Estate's expert opined that dermatologist departed from applicable standard of care by not performing biopsy or referring decedent to specialist for biopsy when decedent's condition did not improve and dermatologist failed to appreciate significance of masses with induration.

SETTLEMENT WITH DOCTOR BARS NEGLIGENT CREDENTIALING SUIT AGAINST HOSPITAL

Walling v. Brenya, 2021 Ohio App. LEXIS 25 (Ohio App.)

Patient sued hospital for negligent credentialing of doctor who failed to diagnose and treat stenosis. ***Held:*** Settlement of claim against doctor prevented recovery for negligent credentialing. Proof of malpractice by trial or stipulation must precede negligent credentialing claim. Although physician testified to not diagnosing stenosis, his settlement during trial denied any wrongdoing and liability.

MUNICIPAL LAW AND CORPORATIONS

SEWER RECONSTRUCTION DEEMED GOVERNMENTAL FUNCTION FOR IMMUNITY PURPOSES

Eikenberry v. Muni. of New Lebanon, 2021 Ohio App. LEXIS 459 (Ohio App.)

Apartment owner's sewer line backed up because of contractor's failure to reinstate lateral connection following rehabilitation of sewer main. ***Held:*** City was engaged in governmental function and so immune from liability. Sewer work is governmental function when involving provision, non-provision, planning, design, construction, or reconstruction of line. It is proprietary if involving maintenance, destruction, operation, and upkeep. Given extent of work, specialized equipment needed, and involvement of highest governmental authorities, project was akin to reconstruction—and so governmental.

NEGLIGENCE

ACCIDENTAL SHOOTING FORESEEABLE WHEN UNSECURED FIREARMS PRESENT

Hernandez v. Jensen, 2021 Cal. App. LEXIS 217 (Cal. App.)

Daughter of elderly couple hired home healthcare aides to assist couple with personal care. Aide reached into closet for oxygen tank and loaded rifle fell and discharged, injuring aide. Intake forms signed by daughter stated she would provide safe environment for aides. Daughter knew father had guns, but did not know rifle was in closet. Jury found daughter negligent. Daughter argued she did not owe duty to aide. ***Held:*** Affirmed. It was foreseeable accidental shooting might occur in home with unsecured, loaded firearm and policy considerations supported imposing duty of care on daughter where she knew firearm was present. General character of an event or harm is required to be foreseeable, not precise nature or manner of occurrence.

NON-PROFIT RELIGIOUS ORGANIZATION NOT LIABLE FOR MEMBER'S SLIP IN PARKING LOT

Henderson v. New Wineskin Ministries Corp., 160 N.E.3d 582 (Ind. App.)

Worshiper fell in snow-covered parking lot while walking from car. ***Held:*** Ministry was not liable for failing to clear lot. By statute, non-profit religious organization only owes duty to (1) warn about actually known hidden dangers, and (2) refrain from actually harming person. Parking lot is included as part of premises. Even if worshiper failed to appreciate fall risk, there was no hidden danger.

NURSING HOME RESIDENT NEED NOT SUE EMPLOYEE TO ESTABLISH HOME'S VICARIOUS LIABILITY

Hogan v. Magnolia Health Sys. 41, LLC, 161 N.E.3d 365 (Ind. App.)

Elderly resident fell when table was negligently pushed against her walker. ***Held:*** Resident's estate was not required to sue negligent employee to establish home's vicarious liability. An injured person may recover from either or both employer and employee, provided person proves employee's negligence.

FALL OFF EDGE OF CEMETERY SIDEWALK NOT ACTIONABLE

Lowrey v. SCI Funeral Svcs., Inc., 2021 Ind. App. LEXIS 5 (Ind. App.)

Parent visiting daughter's internment site slipped off edge of intersecting sidewalks. ***Held:*** Cemetery owner not liable for condition of property. Sidewalk was in pristine condition. Two-inch drop off from sidewalk to ground was open and obvious. Parent knew of condition and simply tried to take shortcut on grass to reach different sidewalk.

FIRST RESPONDERS NOT LIABLE FOR STABBING VICTIMS' TREATMENT DELAYS

Slavin v. Am. Med. Resp. of Mass., Inc., 2021 Mass. App. LEXIS 2 (Mass. App.)

Plaintiff sued city and ambulance service for first responders' failure to timely reach stabbing victims. ***Held:*** Statute barred tort claims against public employees for not preventing or reducing consequences of condition or situation, including violent or tortious conduct of third person, not originally caused by public employer or its agent. Delay in reaching crime scene was not original cause of harm. Plaintiff did not claim that responders provided negligent treatment—an exception allowing recovery.

LITTLE LEAGUER ASSUMED INHERENT RISK OF INJURY FROM METAL CLEATS

Torres v. Loisaida, Inc., 2021 NY Slip Op 01875 (N.Y. App. Div. 1st Dep't)

Thirteen year-old plaintiff was injured when, as he was fielding third base in a baseball game, a baserunner slid into the base and collided with his left shin. Plaintiff had played baseball for seven years. ***Held:*** Recovery for negligent supervision precluded by fact plaintiff voluntarily assumed inherent risks of game. Baserunner's metal cleats did not create enhanced or concealed risk that was not assumed. The little league rules permitted the wearing of such cleats and plaintiff had observed the baserunner wearing the cleats.

SPOLIATION

STORE'S FAILURE TO PRESERVE SURVEILLANCE VIDEO NOT SPOLIATION

Whetstine v. Menard, Inc., 2020 Ind. App. LEXIS 555 (Ind. App.)

Passenger was thrown off motorcycle that hit pallet on exit ramp. ***Held:*** Store did not owe duty to preserve surveillance video showing truck loaded with pallets. Police detective neither told store that it was under investigation nor instructed it to retain video. Passenger did not name store in suit until two years after accident. Store was never on notice that it would be subject of litigation. ***Further held:*** Court did not abuse discretion by denying admission of photo showing store truck stacked with pallets. Passenger could not establish foundation as to time and place of photo.

SUBROGATION

EXCESSIVE REFERENCES TO INSURANCE RESULT IN REMAND FOR A NEW TRIAL

Antoniadis v. Basnight, 2021 Mass. App. LEXIS 17 (Mass. App.)

Judge in subrogation trial informed jury about insurance context of case and allowed defendants to introduce insurance matters. ***Held:*** Evidence about insurance must have probative value outweighing prejudicial effect. Evidence of plaintiff's statements to its insurer made unnecessary reference to insurer. Documents concerning insurer's payments could have been redacted to exclude insurer. ***Further held***: Court erred by not instructing jury on plaintiff's voluntary assumption of duty theory.

TRIAL

ARGUMENT INTENDED TO INFLAME JURY EMOTIONS MERITS REVERSAL

Plascencia v. Deese, 59 Cal. App. 5th 1148 (Cal. App.)

In case arising out of highway fatality, jury awarded plaintiffs $30 million in non-economic damages. Prior to trial, several defendants settled with plaintiff and court did not permit jurors to consider comparative fault of settling defendants. In addition, plaintiffs' counsel made "Golden Rule" arguments asking jury to "imagine" it was their "daughter" and "some guy broke a rule that he knew he couldn't break…and [their] daughter [was] taken away." Plaintiffs' counsel further argued defendant's failure to settle pre-trial was akin to fraud. ***Held:*** Reversed. The trial court erred when it instructed the jury not to consider the comparative fault of the settling defendants. Also plaintiffs' counsel's comments to jury were designed to impugn defense counsel and inflame the jury to award a large verdict.

VICARIOUS LIABILITY

MOTOR VEHICLE DEALERS IMMUNE FROM LIABILITY WHEN LOANED MOTOR VEHICLE IS INVOLVED IN ACCIDENT

Kyle McCall v. Gina Sopneski, AC 42498 (Conn. App.)

Defendant automobile dealership rented motor vehicle to customer. Customer provided dealership with proof of valid auto insurance policy. Plaintiff sued dealership under vicarious liability theory for injuries sustained when his motorcycle was struck by the loaned motor vehicle driven by customer. Trial court granted dealership summary judgment. ***Held:*** Affirmed. Motor vehicle dealers are immune from liability caused by a loaned automobile, so long as the customer has furnished dealer with proof of liability insurance. The essence of the transaction was a loan because motor vehicle was given to customer for temporary use and customer was not charged fee.

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Telephone: (212) 805-3900
Facsimile: (212) 805-3939

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Telephone: (949) 260-3100
Facsimile: (949) 260-3190

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Tampa, FL 33609
Telephone: (813) 509-2578

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

Clausen Miller LLP
34 Lime Street
London EC3M 7AT U.K.
Telephone: 44.20.7645.7970
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Grenier Avocats
9, rue de l'Echelle
75001 Paris, France
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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