CM REPORT

of Recent Decisions

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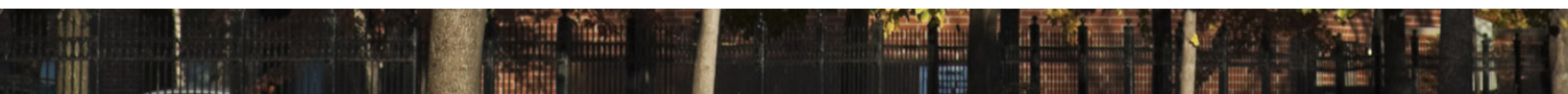
The Minuses Win: A Physician's Limited Liability For An IME Examination

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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TransUnion LLC v. Ramirez: SCOTUS Puts A Lid On Class Actions Brought In Federal Court To Merely Redress Statutory Violations Without Class Members Suffering Any Concrete Harm

by ***Melinda S. Kollross***

The United States Supreme Court's decision in *TransUnion LLC v. Ramirez*, ___ U.S. ___, 114 S. Ct. 2190 (2021), is significant to the insurance and defense bar as it may represent a formidable obstacle for class action plaintiffs' lawyers to overcome in bringing statutory private right of actions for damages, costs, and attorney's fees when class members have suffered at best only theoretical instead of concrete harms from a defendant's violation of a statute. The Court issued a 5-4 split decision with Justice Kavanaugh authoring the majority opinion joined by Justices Roberts, Alito, Gorsuch and Barrett, and Justice Thomas dissenting with Justices Kagan, Breyer, and Sotomayor joining in his dissent.

Facts

Ramirez involved the Federal Fair Credit Reporting Act, which creates a cause of action for consumers to sue and recover compensatory and punitive damages and attorney's fees for certain violations of the Act. The case arose when TransUnion wrongly and erroneously added a terrorist/drug trafficking alert to the credit reports of certain consumers. Defendant Ramirez was one such consumer who wrongly had an alert placed on his credit report that he might be a terrorist, drug trafficker or other criminal. Ramirez discovered the error when he could not purchase an auto on credit, and he filed a class action lawsuit against TransUnion for violating the Act. A class of 8,165 members was certified, but only 1,853 members of the class including Ramirez had the damaging credit reports disseminated by TransUnion to potential creditors. The remaining 6,332 class members had wrong alerts in their individual credit files, but that wrong information had not been disseminated to any third parties.

The case proceeded to trial where the jury returned a verdict for the class plaintiffs awarding each class member $984.22 in statutory damages and $6, 353.08 in punitive damages for a total award of more than $60 million. The Ninth Circuit in a split decision affirmed but reduced the punitive damages. A dissenting Ninth Circuit judge argued that only the 1,853 class members whose reports were disseminated by TransUnion to third parties had standing under Article III of the United States Constitution to sue and recover damages.

Decision

The Supreme Court agreed that the 1,853 class members whose reports were disseminated to third parties suffered concrete harm and thus had Article III standing to pursue damages in a private action under the Act. As to the other 6,332 class members who merely had

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wrong information in their credit files that was not disclosed to any third party, the Court held they had suffered no concrete harm and therefore lacked the necessary standing to bring a private right of action under the Act.

The Court further ruled that none of the 8,165 class members except for the named plaintiff Ramirez could recover damages because of TransUnion's violation of the Act's formatting requirements for disclosure of credit information. The class claimed that TransUnion's mailings of credit reports to them were "formatted incorrectly and deprived them of their right to receive information in the format required by statute". But the Court ruled that except for the named plaintiff Ramirez, there was no showing that any other class member opened the mailings they received from TransUnion or had relied on the information sent in any way. According to the Court, "without evidence of harm caused by the format of the mailings", these violations were mere procedural, statutory violations divorced from concrete harm which could not support Article III standing.

The Court emphasized that merely because a statute grants a person a statutory right and authorizes that person to sue to vindicate that right does not by itself satisfy the injury in fact requirement of Article III standing. Even where a defendant violates a statute, a plaintiff could not bring suit to recover damages for that statutory violation unless the plaintiff could show that he/she was "concretely harmed" by the statutory violation. In simple words, the Supreme Court said: "No concrete harm, no standing".

Learning Points: Justice Thomas' dissenting opinion shows just how much of an impact *Ramirez* might have in future class action litigation involving statutory right of actions. Justice Thomas' dissent indicates that the days might be over when class plaintiffs' lawyers can sue for just procedural, statutory violations, pocketing millions of dollars in attorney's fees without showing that each individual class member has suffered a specific concrete harm. In describing the majority opinion, Justice Thomas stated:

> *This approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is inherently insufficient to support standing." (Emphasis in original)*

One litigation area where *Ramirez* type arguments should be analyzed and made is in defending class action lawsuits now being bought in federal court in Illinois claiming violations of the Illinois Biometric Information Privacy Act. (BIPA) My colleagues Brian Riordan and Alexander Brinson of our Technology & Cyber Group recently provided our friends in the insurance and business community with an update on standing to sue issues involving the Illinois Biometric Information Privacy Act prior to the release of the *Ramirez* decision. They showed that in decisions issued prior to *Ramirez*, courts had allowed plaintiffs to file BIPA claims in federal court, and to find standing for those claims, if plaintiffs could "craft" allegations that BIPA violations caused personal and particularized harm. Certainly, the *Ramirez* analysis and decision might now prove to be an additional defense "arrow in the quiver" to defeat future actions under BIPA, where, despite "crafty" allegations, only procedural, statutory violations are being alleged without the necessary concrete harm *Ramirez* now requires.

CLAUSEN MILLER P.C. ANNOUNCES THE RETIREMENT OF ITS FLORIDA MANAGING PARTNER, ANNE E. KEVLIN

The Clausen Miller family sends its warmest congratulations and best wishes to shareholder **Anne E. Kevlin** on her retirement, which is effective October 29, 2021.

We thank Anne for her invaluable contributions, especially for her leadership in helping firm President **Dennis D. Fitzpatrick** launch our Florida practice. We are grateful for her efforts expanding and cultivating our presence across the Sunshine State, which now includes Tampa, Orlando, Miami, Pensacola, Naples, Sarasota, Boca Raton, and West Palm Beach.

We will certainly miss Anne's scholarship, mentoring, and good counsel.

Clausen Miller is also pleased to announce that moving forward, Mr. Fitzpatrick will expand his current supervisory role in Florida to include the day-to-day management of our Florida offices. If you have questions about how Clausen Miller may be of service to you in Florida, please feel free to call Dennis at (312) 606-7473, send him an email at dfitzpatrick@clausen.com, or reach out to any one of our twenty Florida-based partners and associates.

Clausen Miller P.C. is a national law firm with offices in Chicago, New York, California, New Jersey, Indiana, Wisconsin, Connecticut and Florida that has proudly counseled the insurance industry since 1936. Clausen Miller LLP is based in London, England, and together with Clausen Miller P.C. and affiliates in Brussels, Paris, and Rome, forms Clausen Miller International.

CM Welcomes New Attorneys Nationwide

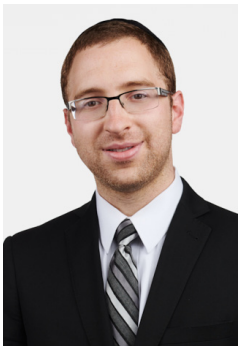
New Attorneys Join CM Offices in 2021


Veronica Abraham


Douglas M. Allen

(pic not yet available)
Melissa Burghardt


Douglas M. Cohen


Jordan E. Gottheim


Dayana Hernandez

(pic not yet available)
Brad A. Leventhal


Tony Pagán, Jr.


James G. Papadakis

(pic not yet available)
Brannon J. Simmons

(pic not yet available)
Irene Thaler


Michael R. Tucker


Brian A. Villar


Eli B. Vine


Max Wessels


Cary C. Woods

Seventh Circuit Rules A Partnership Made Up Of At Least One Stateless Citizen Is Itself Stateless And Cannot Be Sued In Federal Court Based Upon Diversity Jurisdiction

by ***Melinda S. Kollross***

In *Page v. Democratic National Committee*, 2 F.4th 630 (7th Cir. 2021), the Seventh Circuit issued a subject matter jurisdiction ruling regarding diversity jurisdiction that could affect cases being currently prosecuted/defended in federal court, especially within the courts of the Seventh Circuit, and additionally within the First, Second, Third, and Fifth Circuits. This case also illustrates the need for appellate lawyers to be vigilant in preparing complete and correct jurisdictional statements at the beginning of each appeal.

Facts

Page served as a foreign policy advisor to the 2016 Trump campaign. Page sued the Democratic National Committee, the law firm of Perkins Coie, and two Perkins Coie partners for defamation based on news stories published in 2016. Page sued in Illinois federal district court alleging diversity jurisdiction. The district court dismissed the suit upon personal jurisdiction grounds finding insufficient contacts to show jurisdiction in Illinois. Page appealed to the United States Court of Appeals for the Seventh Circuit, but as is the practice of the Seventh Circuit, the court meticulously reviewed the grounds for both district court and appellate jurisdiction. The Court of Appeals found there was no diversity subject matter jurisdiction in the district court and ordered that Page's lawsuit be dismissed from federal court.

Ruling

The court based its jurisdictional ruling upon the status of the law firm Perkins Coie, and the partners of that firm. The determination whether a law firm destroys diversity jurisdiction involves analyzing the citizenship of every partner to that law firm. Partnerships—be they law firm, accounting, consulting, or other entities—are citizens of every state in which individual partners are citizens. Further, if partners are just domiciled abroad, and not established foreign citizens, then such partners are not citizens for diversity purposes because they are not domiciled in any state, nor would they be considered foreign citizens. They are considered "stateless".

In *Page*, Perkins Coie had three partners who were U.S. citizens domiciled in China. They were not defendants in the *Page* matter, but nonetheless, because of their "stateless" status, the Seventh Circuit questioned whether those three partners who were stateless rendered the law firm Perkins Coie stateless, destroying diversity jurisdiction. The Seventh Circuit determined that Perkins Coie (as a named defendant) took on the stateless

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status of its individual partners in China destroying diversity jurisdiction and depriving the federal district court of the power to hear the case.

The Seventh Circuit found that while the Supreme Court has not squarely confronted the question it decided, prior cases indicated that it would agree with the Seventh Circuit. The Seventh Circuit further found that the First, Second, Third, and Fifth Circuits have confronted the precise question and have all held that a partnership made up of at least one stateless citizen is itself stateless and cannot be sued in diversity.

Learning Points: Two points are plain from the Seventh Circuit's decision.

First, everyone who is presently prosecuting/defending any trial or appellate proceeding involving a partnership based on diversity jurisdiction should double check where the individual partners are located to make sure that diversity does indeed exist under the analysis set forth in the *Page* decision as well as the decisions from the First, Second, Third and Fifth Circuits relied upon by the Page court.

Second, *Page* illustrates the reason why the Federal Rules of Appellate Procedure (FRAP) require appellate lawyers to provide a Court of Appeals with a full jurisdictional statement describing **both** district court and appellate jurisdiction. FRAP requires this statement at the latest when the initial appellant's brief is filed. Some federal circuits, like the Seventh Circuit, want this jurisdictional statement much earlier, in the initial stages of an appeal, and then again when the appellant's brief is filed. Federal appellate jurists expect appellate attorneys to verify that there was in fact district court subject matter jurisdiction over the case. If there was no such district court subject matter jurisdiction, then there is no reason to proceed with the time and expense of an appeal. It would be waste of resources for the court, as well as for counsel and the counsel's client to fully brief and argue the matter when, at the end of the day, the case will have to be dismissed for lack of subject matter jurisdiction, as happened in *Page*. ♦

Gone But Not Forgotten: Court Limits Emotional Distress Recovery For Lost Personal Property

by ***Paul V. Esposito***

We collect stuff. Lots of stuff. Whether we collect on purpose, or collect on impulse, we collect all the same. We've collected so much that now there's a movement of minimalists urging us to rid ourselves of most of it. Maybe that's a good thing, maybe not—you be the judge.

Getting rid of stuff can be difficult. What can be even worse is when someone steals or damages it. That can create certain feelings, none of them good. Are those bad feelings for the loss of personal property compensable? The Montana Supreme Court recently provided its answer. *Childress v. Costco Whsle. Corp.*, 2021 Mont. LEXIS 639.

Facts

Randall and Claudia Childress took their vehicle to a Costco tire center for routine work. With the work completed, a Costco employee turned over the keys—except not to the Childresses. A man posing as their son drove away with the vehicle. The Childresses later found it, but not so its contents, including a handgun and ammunition, documents containing their home address, and the keys to their home.

After Costco denied liability, the Childresses sued it in federal court for negligent infliction of emotional distress, bailment, and negligence. They proceeded to trial on the latter two theories. Randall, a Vietnam vet, suffered from PTSD that he thought was behind him. But the theft aggravated his condition, "causing him stress, paranoia, sleeplessness, fear, adverse appetite, irritability, anger, lack of intimacy, and anxiety for which Randall received 17 treatments." Claudia suffered from "stress, sleeplessness, fear, and nightmares" because of the theft.

Costco moved to bar emotional distress damages, arguing that Montana law disallows them as "parasitic" to (an element of) claims of loss of personal property. But the district court allowed recovery for past and future mental, physical and emotional pain and suffering. A jury awarded over $62,000 in "unspecified, non-property damages" on the Childresses' negligence claims. On appeal, the Ninth Circuit asked Montana's high court to decide whether state law allows emotional distress damages for personal property loss or damage.

Analysis

Surveying the law, the Montana Supreme Court answered "no." In Montana, a claim for emotional distress foreseeably arising out of negligent or intentional conduct exists when the distress is so severe that no reasonable person could bear it. A few other claims allow for emotional-distress parasitic damages without proof of the heightened standard applied to a stand-alone

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claim. They involve: (1) disrupting the quiet use and enjoyment of real property, (2) discrimination and civil rights violations, (3) bad faith and insurance fraud under the state unfair trade practices statute, and (4) wrongful death. The Court recognized the "nearly universal" bar against emotional injury damages when a loss is purely economic. Concerns over fraudulent claims, a flood of litigation, and virtually unlimited liability support the prohibition.

Interestingly, the Court had earlier carved out an exception to the no-damages rule for the loss of use and enjoyment of real property. A realtor sold a parcel that had been committed to adjacent landowners. The Court reasoned that real property is unique, and the landowners had developed "a subjective relationship with the property on a 'personal identity' level." They had plans to build their retirement home on the land.

That "subjective relationship/personal identity" analysis became for the Court the critical distinction between real property and the Childresses' property. The Childresses lost a handgun, ammunition, a house key, and documents containing their home address. Those were fungible items valuable because of their utility, not heirlooms having intrinsic value intertwined with the family dynamic. So although the Court had never explicitly barred parasitic emotional distress damages for property loss, it refused to award them here.

Learning Point: *Childress* is probably not the end of the story as to the award of emotional-distress damages for personal property loss or damage. The Childresses waived an argument that the damages to the enjoyment of their home qualified their loss for real-property treatment.

On a broader level, *Childress* does not seem to foreclose all parasitic damages for personal property losses. What about the theft of a great-grandmother's wedding ring lovingly passed down through the generations? Or a car accident that negligently killed a family dog treated as a family member? The decision appears to leave wiggle room for those losses.

Whether from Montana or elsewhere, expect to hear more about emotional distress damages for personal property loss. ♦

Florida Court Denies Insured's Motion To Compel Appraisal For Two Reasons

by ***Michael H. Scott***

On August 27, 2021, the United States Court of Appeals for the 11th Circuit affirmed the United States District Court for the Middle District of Florida's decision that denied the plaintiff policyholder, SB Holdings I, LLC ("SB Holdings") motion to compel appraisal and instead allowed the property insurance claim dispute against the insurer, Indian Harbor Insurance Company ("Indian Harbor") to proceed to trial. *SB Holdings I, LLC v. Indian Harbor Ins. Co.*, 2021 U.S. App. LEXIS 25862 (11th Cir. Aug. 27, 2021).

Facts/Analysis

The 11th Circuit affirmed the denial of plaintiff's motion to compel an appraisal for two reasons.

1. The motion to compel was premature because the insurer completely disputed that Hurricane Irma caused the claimed damage.

Here, after investigating SB Holdings' insurance claim and inspecting the damaged premises, Indian Harbor advised SB Holdings that it was "denying coverage for multiple reasons-including on the grounds that the reported damages 'were not the result of Hurricane Irma.'" The Court found that Indian Harbor's $100,000.00 payment was issued "pursuant to the wind-driven rain additional coverage sub-limit of $100,000.", and that Indian Harbor was "denying coverage [for the hurricane claim] for multiple reasons—including on the grounds that the reported damages "were not the result of hurricane Irma." *SB Holdings v. Indian Harbor Inc. Co.*, 2021 U.S. App. LEXIS 25862, at *3.

The 11th Circuit concluded that compelling an appraisal would have been inappropriate because the denial on causation grounds was an issue for the court rather than an appraisal panel.

2. The motion to compel was premature because the parties had not resolved whether the policyholder satisfied the Policy's post-loss obligations in judicial proceedings.

"Regardless of whether there was a covered loss", Indian Harbor defended on the grounds that SB Holdings failed to comply with its post-loss obligations under the policy. The 11th Circuit held this defense was a coverage question for the court, not an amount-of-loss question that would have required an appraisal. *See State Farm Fla. Ins. Co. v. Fernandez*, 211 So. 3d 1094, 1095 (Fla. Dist. Ct. App. 2017) ("It is well-settled in Florida that all post-loss obligations must be satisfied before a trial court can exercise its discretion to compel appraisal.")

As a result, the 11th Circuit held that until judicial proceedings resolved whether SB Holdings adequately satisfied its post-loss obligations and whether insurance coverage existed under the Policy, rather than merely the amount of the loss, any request to compel an appraisal was premature.

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Learning Points: In cases where Insurers deny coverage of a claim and dispute whether the policyholder satisfies the Policy's post-loss obligations, Florida precedent provides that a request to compel an appraisal is premature until judicial proceedings resolve whether the policyholder satisfies the Policy's post-loss obligations.

The issue of whether the policyholder complied with post-loss obligations under the Policy, including timely notice of the loss and cooperation with the insurer's investigation, presents a coverage question for the court, and not an amount-of-loss question for an appraisal panel. ♦

Federal Appellate Courts Rule For Insurers On COVID-19 Business Interruption Claims

by ***Melinda S. Kollross***

To date, four separate Federal Circuits have issued 7 decisions all holding for insurers on COVID-19 business interruption claims. A body of precedent is being built that can now be cited by the insurance industry at both the trial and appellate level in both state and federal court.

Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141 (8th Cir. 7-2-2021)

The Eighth Circuit was the first to rule that property policies did not cover business losses suffered during the pandemic, in a case controlled by Iowa law. The Court, applying Minnesota law, which the Court found similar to Iowa law, rejected the insured's argument that the policy's disjunctive definition of "loss" as "physical loss" or "physical damage" created an ambiguity, and further rejected the contention defining physical loss to include "lost operations or inability to use the business". According to the Court, the policy terms were plain and unambiguous. Nothing short of some tangible alteration to the property will trigger coverage.

Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co., __ Fed. Appx. __, 2021 WL 3870697 (11th Cir. 8-31-2021)

The Eleventh Circuit was the next court to rule that business income losses were not covered in the absence of physical loss of or damage to property. Applying Georgia law, the Eleventh Circuit held that Georgia courts made it clear that "direct physical loss or damage," meant that there must be "an actual change in insured property" that either makes the property "unsatisfactory for future use" or requires "that repairs be made." According to the Eleventh Circuit, the closure order did not damage or change the property in a way that required its repair or precluded its future use for dental procedures. Although the Eleventh Circuit issued *Gilreath* as an "unpublished decision", it may still be cited to other courts pursuant to Federal Rule of Appellate Procedure 32.1(a).

Santo's Italian Café LLC v. Acuity Ins. Co., 2021 U.S. App. LEXIS 28720 (6th Cir. 9-22-2021)

The Sixth Circuit applied Ohio law in holding that a pandemic-triggered government order, barring in person dining at a restaurant, did not constitute direct physical loss of or damage to property. The Court refused the insured's invitation to construe "any loss of use to be a physical loss of property", and rejected the insured's contention that the policy was ambiguous, stating that the policy unambiguously and plainly referred to the direct physical loss of property and not "the inability to use property".

In re: Zurich American Ins. Co., No. 21-302 (6th Cir. 9-29-2021)

The Sixth Circuit immediately put its decision in *Santo's* to work summarily vacating a District Court decision that was one of the most widely cited by policyholders trying to obtain coverage for their pandemic related business interruption losses. In *Henderson Road Restaurant Systems Inc. v. Zurich American Ins. Co.*, No. 20-1239 (N.D. Ohio 1-19-21), the district court granted the insured summary judgment on its claim for business income losses holding that the insured suffered a direct physical loss of and damage to property because of it being shut down due to the COVID-19 pandemic. The district court certified the case for immediate appeal under 28 U.S.C. 1292(b). The Sixth Circuit, following its decision in *Santo's*, granted the immediate appeal and vacated the entirety of the district court's order granting the insured summary judgment. The Court stated that a pandemic-triggered government order, barring in-person dining at a restaurant, did not qualify as direct physical loss of or damage to the property under Ohio law.

Mudpie, Inc. v. Travelers Casualty Ins. Co. of Am., 2021 U.S. App. LEXIS 29624 (9th Cir. 10-1-2021)

The Ninth Circuit issued a published opinion, and applying California law, held that California law clearly required that for business interruption losses to be covered, there had to be a distinct, demonstrable, physical alteration of the property. The insured contended that direct physical loss of or damage to property did not require actual damage but only that the property was no longer suitable for its intended purpose. The Ninth Circuit rejected this contention as having no basis under California law or the unambiguous language of the policy. The Ninth Circuit further ruled that the virus exclusion barred the entirety of the insured's claim. That exclusion barred payments "for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Applying California's efficient proximate cause rule, the Court concluded that the efficient cause of the insured's losses was the virus, and not just the closure order. The insured in fact had not alleged that the efficient cause of its losses was anything but the virus.

Selane Products v. Continental Casualty Co., 2021 U.S. App. LEXIS 29633 (9th Cir. 10-1-2021)

The Ninth Circuit immediately applied its *Mudpie* ruling disposing of two other appeals on October 1 in favor of insurers issuing two unpublished but still citable decisions. In *Selane*, the Ninth Circuit cited directly to *Mudpie*, holding that the direct physical loss of or damage policy language required an insured to allege a physical alteration of its insured property under California law. But the insured did not allege that COVID-19 was present on its property to cause any damage. Additionally, while the insured alleged that the stay-at home orders caused it to suspend its operations, it did not plausibly allege that the stay-at-home orders caused its property to sustain any physical alterations. Thus, there was no coverage for its business income claims.

Chattanooga Professional Baseball LLC v. National Casualty Co., 2021 U.S. App. LEXIS 29632 (9th Cir. 10-1-2021)

In *Chattanooga*, the Ninth Circuit found a virus exclusion, which was identical to the one in *Mudpie*, dispositive of the insured's claims. The insured had ballparks in 10 states—California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas, Virginia, and West Virginia. California, Oregon, and West Virginia were efficient proximate cause jurisdictions. Idaho, Indiana, Maryland, Tennessee, and South Carolina had either applied or been persuaded by the efficient proximate cause analysis. The two remaining states, Texas and Virginia, used other methods to determine causation. Regardless of the method, the Ninth Circuit ruled that under each state's rule of law, the result was the same: the virus was the cause of the insured's losses and thus the exclusion barred the insured's claim. Finally, the Court rejected the insured's regulatory estoppel arguments against enforcing the virus exclusion holding that the insured conceded that only one state (West Virginia) recognized such a doctrine, and its jurisprudence did not support the insured

Practice Pointer: In this author's opinion, the Sixth Circuit's *Santo's* decision is by far the most important, as the Court there articulated a crucial policy argument which goes to the

very heart of why all these insured COVID-19 business interruption claims should be rejected by the courts. The Sixth Circuit stated:

> *The singular challenges facing restaurants, bars, and other hospitality services over the last eighteen months are not lost on us. Staying in business through a once-in-a-century pandemic (let us hope) that has prompted all kinds of new government regulations, including prohibitions on many in-person services, has to be trying. Sure, state and federal loans and grants have offered some support for entities that suffered government-created losses of this sort, and surely that aid has allowed some companies to survive. But that truth provides little solace to those that did not.*
>
> *That leaves a hard reality about insurance. It is not a general safety net for all dangers. If risk is not having money when you need it, insurance is one answer to perilous events that could prompt a sudden drop in revenue. Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for. That is why courts must honor the coverage the parties did—and did not—provide for in their written contracts of insurance.*

This policy argument should be featured prominently in all future COVID-19 business interruption briefing. ♦

Boundaries: The Court Limits School District Liability For Shootings

by ***Paul V. Esposito***

Irish playwright George Bernard Shaw famously said, "Youth is wasted on the young." We can think back to those carefree teenage days, wishing we had the chance to re-live them. But in truth, the teenage years can be mighty difficult. Remember those failed teenage romances and unrequited loves? Another playwright—this one speaking Elizabethan English—devoted an entire work to a teenage romance gone tragic.

In Arizona, a teenage romance went horrific. It probably wasn't the first; it likely won't be the last. But it had a connection to a school. So it gave the state Supreme Court an opportunity to define the limits of school district liability for the failure to provide a better ending to a rocky situation. *Dinsmoor v. City of Phoenix*, 2021 Ariz. LEXIS 279.

Facts

High school sophomores Matthew and Ana were dating until Matthew broke it off to start dating Raven. When Matthew and Raven later broke up, he became violent with her. Matthew and Ana then resumed dating. During the two relationships, Matthew tried to turn the girls against each other. When Ana and Raven eventually decided to compare notes, they realized that Matthew, who watched them talk, was the real problem. Quite livid, Ana yelled at him about it.

The next day Matthew texted Ana that "we'll take care [of] it when she's walking home from the bus." Ana warned Raven, even telling her that Matthew had a gun. Raven reported the matter to the school vice-principal, who spoke separately with the girls. Ana was worried for Raven but not herself. A school security officer brought into the situation saw Matthew's texts but did not believe they were threatening. Ana told him that she did not feel threatened; Raven expressed her fear of harm. The officer devised a safety plan for Raven, but not for Ana.

Because Matthew was not at school the next day, the officer did not speak to him. Ana told the vice-principal and security officer that she was going to a friend's house after school that day to meet Matthew. Both were uneasy but took no action. After Ana arrived, Matthew shot and killed her, and then himself.

Ana's mother sued the school district, city, vice-principal, and security officer for negligence. The trial court granted summary judgment to defendants on the ground that they lacked a duty to protect Ana under the facts. The court of appeals reversed as to all defendants except the city. It found that a special relationship exists between a school and its students.

Analysis

The Arizona Supreme Court reinstated summary judgment for the school district. Everyone agreed that the school-student relationship is a

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special relationship imposing an affirmative duty to protect students from unreasonable risks of harm. It flows from a school's traditional role as a custodian partly acting in a parental role, and opening its premises to a public population. The parties' disagreement concerned time-and-place limitations on that duty. The district contended that the duty only covered a student while attending school during school hours or participating in off-campus, school sponsored activities. Ana's mother argued that a duty exists whenever and wherever a school learns of an unreasonable risk while the school had custody and control over a student.

The Supreme Court recognized that a school district's liability is not limitless but instead is "'bounded by geography and time.'" A duty only exists while a school is serving in its roles as custodian, landowner, and quasi-parent. Once a student safely leaves a school's custody and control, the special relationship ends, as does a school's affirmative duty. The Court found support for its rule from cases in other jurisdictions.

The Court ruled that the district did not owe an affirmative duty to protect Ana. Matthew aimed his text messages at Raven, not Ana. The Court rejected the mother's argument that a duty arose because during school hours Ana reported her plan to meet Matthew. That argument did not consider whether the risk of harm to Ana arose within the scope of the student-school special relationship. The Court found that at worst, Matthew's texts only threatened harm to Raven, not Ana. Ana told school authorities that Matthew did not pose a threat to her. Because there was no evidence that Matthew posed a threat to Ana before she left school to meet him, the school did not owe a duty to protect Ana.

Learning Point: *Dinsmoor* provides an easily applied test for determining whether a special relationship exists that would impose a duty to protect students. But the Supreme Court cautioned that it was not drawing a bright-line. A school district might remain subject to liability even when its supervision and control had ended for the day (*e.g.*, dismissals into crime scenes or severe weather, or early dismissals when crossing guards are absent). Limited exceptions aside, the test should protect a district from liability for tragic events way out of its control to prevent. ♦

The Minuses Win: A Physician's Limited Liability For An IME Examination

by ***Paul V. Esposito***

If you're lucky, an answer is obvious. But for life's thornier problems, an answer may not be so obvious—or not obvious at all. That's why they're thorny. So in figuring out an answer, we analyze competing considerations, sometimes even listing them in plus-and-minus columns to see which wins.

Recently, that's essentially what the Utah Supreme Court did. Its thorny problem concerned the potential liability of a physician hired to perform an IME. The Court's analysis is interesting. *Kirk v. Anderson*, 2021 Utah LEXIS 97.

Facts

A driver rear-ended Jeremy Kirk at a stoplight. Jeremy went to a hospital complaining of left-side pain. Because he had been on the job, Jeremy filed a worker's compensation claim. It resulted in his meeting Dr. Mark Anderson, hired by a third-party administrator to conduct an IME.

Dr. Anderson concluded that Jeremy suffered a transient cervical strain, with all other complaints and symptoms secondary to pre-existing conditions. The doctor reported that Jeremy: (1) could return to work with only the limitation of his pre-existing arthritis, (2) had reached maximal medical improvement within three days of the accident, (3) should be released from care without restriction, and (4) did not qualify for an impairment rating. Dr. Anderson informed Jeremy that he performed an IME, there was no doctor-patient relationship, he was not giving medical advice, and he would not become Jeremy's treating physician. Following the report, the administrator denied various work comp benefits.

Jeremy appealed to the Labor Commission. Finding that the accident caused an ACL tear, aggravation of spinal degeneration, temporary cervical whiplash, and a mild concussion, the Commission ordered payments.

Jeremy sued Dr. Anderson for negligent and reckless conduct; he sued the administrator for vicarious liability. Jeremy alleged delays in payments of medical expenses and comp benefits, prolonged aggravation and emotional distress, and needed to hire experts to rebut the IME. The district court dismissed the action because Dr. Anderson did not owe him a duty.

Analysis

The Utah Supreme Court agreed. It rejected Jeremy's argument that Dr. Anderson owed a duty of care arising out of a "special relationship" existing in the worker's comp context. A physician-patient relationship only exists if there is a "patient." In a work comp context, a physician performing an IME does not have a patient. Rather, a physician conducting an IME is gathering information used for employment and financial decisions. Besides, Dr. Anderson's disclaimer of

a doctor-patient relationship evidenced his intent to only serve the interests of his employer—the administrator.

The thornier issue was whether, even absent a doctor-patient relationship, Dr. Anderson owed a duty arising out of his own affirmative conduct. The Court concluded that even though the law does not always bar a non-patient's recovery from a physician, it barred a recovery here. In evaluating duty in unintentional tort actions, a court must consider: (1) whether a physician's conduct was an affirmative act or merely an omission, (2) the legal relationship of the parties, (3) the foreseeability or likelihood of injuries, (4) the public policy as to who can best bear the loss, and (5) general policy considerations. The Court treated the first three as "plus" factors supporting a duty, the latter two as "minus" factors negating it.

The Court ruled that assuming that all "plus" factors existed, the fifth factor was an overwhelming "minus." First, imposing a duty would chill the involvement of experts if injured persons could sue experts for opinions that delayed proceedings. Second, experts provide vital services in the administration of health care and worker's comp benefits that the prospect of suit should not disrupt. An independent examiner provides unbiased opinion regarding the need for treatment, while a treating physician provides unbiased treatment. As for the prospect of delays, an IME is just a step in a legal process that provides its own remedy for delays. Finally, because a medical examiner has a contractual relationship with an employer, imposing a duty to the injured person can create problems, and even put an examiner in a conflict of interests.

Learning Point: *Kirk* is good news for independent medical examiners and those who retain them. It is not a complete pass from liability. A doctor who injures an examinee (say by overstretching a body joint) is subject to liability even absent a physician-patient relationship. The Court left open the possibility that an examiner might owe limited duties not implicated by the facts here. And it did not decide whether an independent medical examiner is an agent of an insurer. But if an examiner acts in good faith and within the standard of care, no liability should attach regardless of the examiner's conclusions. ♦

ARBITRATION

FLORIDA UPHOLDS ARBITRATION PROVISION IN CONTRACT

Gordon v. DOS of Crystal River Alf, LLC, 2021 Fla. App. LEXIS 10085 (Fla. App.)

Plaintiff brought wrongful death action against assisted living facility where decedent lived. Trial court held that decedent's authorized agent and power of attorney entered into a valid arbitration agreement written broadly enough to include a wrongful death claim. ***Held:*** Order compelling arbitration affirmed. ***Further held:*** Attorneys' fee provision in arbitration agreement violated public policy and should be stricken. This provision was severable from arbitration agreement, which was otherwise enforceable.

AUTO INSURANCE

INSURED'S FAILURE TO COMPLY WITH EUO IS MATERIAL BREACH OF POLICY

Safeco Ins. Co. v. Barthelemy, 2021 Fla. App. LEXIS 10582 (Fla. App.)

Insured filed claim with insurer seeking coverage for injuries sustained in auto accident. Insured refused to submit to examination under oath (EUO) and insurer denied coverage. Insured sued insurer for declaratory relief, seeking coverage for policy limits. ***Held:*** Judgment in favor of insured reversed and case remanded for new trial. Insurer was substantially prejudiced because jury was not instructed that without EUO, insurer could not investigate insurance fraud.

COVERAGE DENIED UNDER FLORIDA NO-FAULT LAW

Geico Gen. Ins. Co. v. Hialeah Diagnostics, Inc., 2021 Fla. App. LEXIS 12404 (Fla. App.)

Trial court granted summary judgment allowing payment of personal injury protection to health provider for treatment of injured individual who was not an insured of auto insurer. ***Held:*** Reversed. Insurer did not have to pay benefits to injured passenger of vehicle that collided with second vehicle, when health provider failed to establish that the operator of that second vehicle, the tortfeasor, was a named insured under policy.

CIVIL PROCEDURE

REASONABLE DILIGENCE OR NO CONTINUANCE

Braganza v. Albertson's LLC, 67 Cal. App.5th 144 (Cal. Ct. App.)

Plaintiff sued defendant following grocery store slip and fall. Trial court granted defense motion for summary judgment after denying plaintiff's request for continuance to allow further discovery necessary to oppose the motion. Plaintiff claimed expert needed to conduct coefficient of friction test and needed time to prepare declaration in opposition. ***Held:*** Affirmed. Plaintiff's counsel's submission did not address all grounds for defendant's motion, nor did counsel explain why plaintiff waited so long to seek the discovery needed to oppose the motion. Some affirmative showing was necessary explaining the failure despite plaintiff's diligence.

CLAIM FOR ATTORNEY'S FEES MUST BE PLEAD OR CLAIM IS WAIVED

Lenahan v. Lenahan, 2021 Fla. App. LEXIS 11821 (Fla. App.)

Trial court issued order awarding attorney's fees to defendant and plaintiff appealed. ***Held:*** Reversed. Failure to plead entitlement to attorney's fees results in waiver of such claim unless opponent had notice of claim and either agreed to claim or failed to object to failure to plead entitlement to such fees.

PRO SE STATUS NOT REASONABLE EXCUSE FOR DEFAULT

126 Henry Street v. Cater, 2021 NY Slip Op 04689 (N.Y. App. Div. 2d Dep't)

Plaintiff failed to appear for scheduled conferences and court responded by granting default judgment in defense favor. Plaintiff then unsuccessfully sought to vacate the default by offering her pro se status and lack of knowledge as purported reasonable excuses for the default. ***Held:*** Supreme Court did not improvidently exercise its discretion in determining no reasonable excuse was offered. Neither the fact plaintiff was proceeding pro se nor claim she was unfamiliar with discovery process constituted reasonable excuses for failing to appear at the conferences.

ONSLAUGHT OF FRIVOLOUS MOTIONS FORFEITS FREE ACCESS TO COURT

Citimortgage, Inc. v. Weaver, 2021 NY Slip Op 04904, ¶ 2 (N.Y. App. Div. 2d Dep't)

Defendant in a foreclosure action filed numerous frivolous motions and the plaintiff bank sought relief. The trial court enjoined defendant from filing any additional papers in this action without prior court approval. ***Held:*** Affirmed. In light of the numerous frivolous motions filed by defendant, Supreme Court had properly concluded defendant had forfeited the right to free access to the courts by abusing the judicial process.

DAMAGES

REGARDLESS OF INSURANCE, MEDICAL BILLS ADMISSIBLE TO PROVE DAMAGES

Qaadir v. Figueroa, 67 Cal.App.5th 790 (Cal. Ct. App.)

Following traffic accident, plaintiff sought medical treatment from lien providers. Plaintiff's insurance was not accepted and at time of trial, more than $800,000 in medical bills were unpaid. Defendant moved in limine to exclude evidence of unpaid bills and motion was denied. Defendant appealed. ***Held:*** Evidence of full amounts billed for services obtained on lien are admissible to prove past and future medical damages, even if a plaintiff sought treatment outside his insurance plan. However, the plaintiff must prove that the full amount of the bills from the lien providers was actually incurred or, in other words, that the plaintiff is liable for those amounts.

MEDICAL CERTAINTY REQUIRED FOR FUTURE MEDICAL EXPENSES

Fan v. Benak, AC 43898 (Conn. App.)

Plaintiff sought damages after her vehicle was struck by vehicle driven by defendant's employee. Plaintiff sought future medical expenses, attaching letter from her treating physician, which stated it was more probable than not that plaintiff would require future medical treatment. Trial court granted the damages and defendants appealed. ***Held:*** Letter from treating physician was sufficient evidence to demonstrate future medical expenses were not speculative.

EGGSHELL-SKULL RULE REQUIRES RECALCULATION OF DAMAGES

Renner v. Shepard-Bazant, 2021 Ind. LEXIS 541 (Ind.)

Teen with history of concussions was involved in low-speed rear-end accident. ***Held:*** Trial court improperly lumped all of teen's concussions in awarding reduced damages. Under the eggshell-skull rule, defendant was required to take teen as he found her for damages purposes. There was no evidence that prior concussions independently caused harms teen suffered after the accident. ***Further held:*** By engaging in activities violating post-concussion protocols, teen failed to mitigate her damages.

DEBT COLLECTION

BANK NEED NOT REGISTER AS DEBT COLLECTION AGENCY

Citibank, N.A. v. Yanling Wu, 2021 NY Slip Op 04902 (N.Y. App. Div. 2d Dep't)

Defendant real property owner asserted that, in seeking to foreclose a mortgage on real property, plaintiff bank was required to allege in its complaint that it had obtained a license to act as a "debt collection agency." ***Held:*** A judicial foreclosure action such as the one at bar does not constitute the sort of tactics shocking to the conscience of ordinary people—like phone calls at unreasonable hours and other threatening behavior—that the subject Administrative Code provisions were enacted to address. The bank did not need to be licensed as a debt collection agency.

FIRST-PARTY PROPERTY

WIFE CANNOT RECOVER FOR PROPERTY LOSS CAUSED BY HUSBAND'S ARSON

Kemper Indep. Ins. Co. v. Islami, 959 N.W.2d 912 (Wis.)

While legally separated spouse vacationed, husband set fire to her home where he lived under settlement agreement. ***Held in a split decision:*** Insurer properly declined coverage under "concealment or fraud" provision of homeowner policy, which barred coverage to both insureds when either insured concealed a fact with intent to

deceive, and on which insurer relied. Husband had falsely denied awareness of fire. Though legally separated, insureds were married under the law. The "concealment or fraud" provision did not conflict with the policy's "intentional loss" exclusion applicable to insured committing act causing a loss. Dissent argued coverage was required under statute barring exclusions where loss results from domestic abuse.

GOVERNMENTAL IMMUNITY

IDENTIFIABLE PERSON-IMMINENT HARM EXCEPTION INAPPLICABLE TO VOLUNTEERS

Buehler v. Town of Newtown, AC 43087 (Conn. App.)

Plaintiff sought damages when he fell from referee stand while officiating public high school volleyball match. Trial court found defendants' actions were discretionary and that they had governmental immunity. ***Held:*** Affirmed. Plaintiff's presence was voluntary because he had the option to accept or to deny the refereeing assignment, and, therefore, he was not an identifiable person for purposes of the identifiable person-imminent harm exception to governmental immunity.

LIABILITY INSURANCE COVERAGE

ACTUAL PHYSICAL ILLNESS OR INJURY REQUIRED FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM

Warzecha v. USAA Casualty Ins. Co., AC 43984 (Conn. App.)

Plaintiff was insured under homeowner's policy issued by defendant insurer. Plaintiff was sued for negligent infliction of emotional distress. Defendant denied plaintiff's claim for coverage relating to action because policy excluded claims for mental injuries. Trial court granted defendant summary judgment. ***Held:*** Affirmed. Complaint did not allege plaintiff's actions resulted in actual physical illness or injury, which was required for claim for negligent infliction of emotional distress.

PASSENGER'S FALL FROM MOVING GOLF CART EXCLUDED FROM COVERAGE

Hoppe v. Safeco Ins. Co., 2021 Ind. App. LEXIS 231 (Ind. App.)

While riding in parking lot near insured homeowner's premises, passenger fell off insured's golf cart. ***Held:*** Coverage was barred under insured's homeowner's policy. The accident did not occur at an insured location. Although insured had previously used the lot to drive the cart, he did not have a "right or privilege" arising out of his residence premises to use it. A privilege required the lot owner's knowledge and acceptance of the use. Even if granted, the use had no coverable connection with the insured's residence.

LOSS FROM DEFECTIVE POOL CONSTRUCTION SUBJECT TO COVERAGE

5 Walworth, LLC v. Engerman Contr. Inc., 2021 Wisc. App. LEXIS 401 (Wis. App.)

After defective material and improperly placed rebar in swimming pool required pool's removal, suit followed against general contractor and insurer. ***Held:*** CGL policy potentially required coverage. Under the general contractor's policy, defective workmanship resulting in unintentional damage to property can be a covered occurrence as defined by the policy. Because defective work was performed by a subcontractor, the "your work" provision of the policy was inapplicable.

LEGAL MALPRACTICE

LEGAL MALPRACTICE ACTION REQUIRES ATTORNEY-CLIENT RELATIONSHIP

Idlibi v. Ollennu, AC 42697 (Conn. App.)

Plaintiff sued defendant attorney for legal malpractice, arising out of attorney's conduct during his representation of plaintiff's former spouse in her marital dissolution action against plaintiff. Plaintiff alleged defendant knowingly notarized a fraudulent interrogatory response, counseled the former spouse to provide false testimony, and failed to correct the former spouse's false testimony. ***Held:*** Plaintiff lacked standing to bring a legal malpractice claim against defendant because there was never an attorney-client relationship. ***Further held:*** Negligence and intentional infliction of emotional distress claims were barred by litigation privilege.

MEDICAL MALPRACTICE

OPINION LETTER MUST BE ATTACHED TO COMPLAINT AND DATED BEFORE EXPIRATION OF STATUTE OF LIMITATIONS

Barnes v. Greenwich Hosp., AC 44055 (Conn. App.)

Plaintiff sought damages from her employer physician and hospital for injuries sustained during colonoscopy. Plaintiff failed to attach required opinion letter signed by health care provider to original complaint. Defendants filed motions to dismiss and plaintiff filed amended complaint with opinion letter dated after expiration of applicable statute of limitations. ***Held:*** Plaintiff's failure to attach opinion letter to original complaint, obtain opinion letter prior to filing action, or file amended complaint prior to expiration of statute of limitations was fatal.

"PATIENT" INCLUDES THIRD-PARTY INJURED DUE TO PHYSICIAN'S NEGLIGENCE

Cutchin v. Beard, 171 N.E.3d 991 (Ind.)

Mother and child were killed in vehicle accident allegedly caused by doctor's failure to monitor driver's use of prescription medicines. ***Held:*** Husband/father of decedents was patient under medical malpractice statute. Definition of "patient" under statute includes "person having a claim of any kind" resulting from healthcare provider's alleged malpractice.

NEGLIGENCE

ONGOING STORM DOCTRINE REBUTTABLE BY EVIDENCE OF DANGEROUS CONDITION PRIOR TO ONGOING STORM

Belevich v. Renaissance I, LLC, AC 43085 (Conn. App.)

Plaintiffs sued defendants for slip and fall as a result of ice on premises. Trial court granted defendants summary judgment based on ongoing storm doctrine. ***Held:*** Defendants evidenced ongoing storm at time of fall and plaintiffs failed to demonstrate that fall was caused by slippery condition that existed prior to the ongoing storm and that defendants had actual or constructive notice of the allegedly preexisting condition.

PREMISES OWNER NOT LIABLE FOR SHOOTING DURING SHORT-TERM RENTAL

Heath-Latson v. Styller, 169 N.E.2d 155 (Mass.)

Guest was killed during party on short-term rental property. ***Held:*** Owner did not owe duty to take affirmative steps to protect guest from dangerous or unlawful acts of third persons. There is no evidence of prior violence creating foreseeable risk of harm. Nothing in backgrounds of renter and shooter put owner on notice of foreseeable risks. Owner had no control over property during rental.

FALSE ARREST CLAIM CANNOT BE CAST AS NEGLIGENCE ACTION

Danford v. State of New York, 2021 NY Slip Op 04825 (N.Y. App. Div. 4th Dep't)

Plaintiff, who had been arrested and then released, brought false arrest and imprisonment claims against the state more than one year after being released from custody. ***Held:*** False arrest and imprisonment claims were time-barred because not filed until over a year later. ***Further held:*** Plaintiff's contention that his cause of action sounds in negligence is without merit because he must proceed by way of the traditional remedies of false arrest and imprisonment and malicious prosecution in such circumstances.

BENCH TRIAL RESULT OVERTURNED BY DECISIVE EVIDENCE

McDevitt v. State of New York, 2021 NY Slip Op 04795 (N.Y. App. Div. 4th Dep't)

An inmate cooperated with an investigation into a prison guard's relationship with several inmates. The prison guard was later left alone in oversight and allowed inmates to beat the cooperating inmate. The inmate sued defendant alleging it had negligently failed to prevent his attack. A bench trial ruled in defendant's favor. ***Held:*** Reversed. The trial evidence proved decisively that defendant either knew or should have known claimant was at serious risk of attack as a result of his cooperation.

STATUTE OF LIMITATIONS

INDIANA ADOPTS ADVERSE DOMINATION DOCTRINE

City of Marion v. London Witte Group, LLC, 169 N.E.2d 382 (Ind.)

New city administration sued accounting firm and others for corruption-related activities. ***Held:*** Adverse domination doctrine is available to toll limitations statutes in suit by corporation against officers, directors, lawyers, and accountants if corporation is controlled by adverse interests. The rule applies to municipal corporations and co-conspirators. It requires allegation of intentional wrongdoing. Genuine issues of material fact remained as to its applicability.

STATUTE OF REPOSE BARS CLAIMS AGAINST PLUMBER

Szulc v. Siciliano Plbg. & Htg. Co., 171 N.E.3d 1177 (Mass. App.)

After fall in shower caused by seizure, decedent died from hot water burns. ***Held:*** Six-year statute of repose governing actions for negligence in design, planning, construction, or administration of real property improvement barred estate's action. Statutory intent was to protect providers of expertise from unending risks of liability. Plumber designed and installed piping system for seven water heaters and made judgments about maximizing system. Calibrating water temperature was part of same continuous project.

SUBROGATION

INSURER HAS STANDING TO SUE INSURED'S ATTORNEY

Arch Ins. Co. v. Kubicki Draper, LLC, 2021 Fla. App. LEXIS 10567 (Fla. App.)

Trial court granted summary judgment to defendant law firm with respect to legal malpractice action brought against it by insurer under claim it was subrogated to insured's rights under policy. Plaintiff insurer appealed. ***Held:*** Reversed. Insurer has standing through its contractual subrogation provision to maintain malpractice action against insured's counsel where insurer has a duty to defend.

TORTS

PRIVETTE DOCTRINE STILL THE LAW IN CALIFORNIA

Gonzalez v. Mathis, 12 Cal. 5th 29 (Cal.)

Plaintiff window washer sued defendant property owner who hired him to wash skylight. Plaintiff slipped while walking along roof to access skylight, sustaining serious injuries. Defendant moved for summary judgment on ground that under Privette doctrine defendant owed no duty to plaintiff. ***Held:*** California Supreme Court affirms that, under Privette doctrine, when landowner hires independent contractor to perform work on landowner's property, landowner presumptively delegates to contractor duty to ensure safety of its workers, which includes safety despite known hazards on worksite or at property. When this duty is delegated to contractor, landowner or hirer has "no affirmative obligation…to independently assess workplace safety."

WITHDRAWAL OF PRIOR ACTION MAY SUPPORT LATER CLAIM OF MALICIOUS PROSECUTION

Monroe v. Chase, 961 N.W.2d 50 (Wis.)

Following eleventh-hour withdrawal of ex-husband's suit to terminate parental rights, wife brought malicious prosecution against him. ***Held:*** Voluntary withdrawal of a prior lawsuit may support a malicious prosecution action. Whether a withdrawal is evidence of a lack of probable cause will turn on the circumstances of particular case.

UM/UIM INSURANCE

VEHICLE MUST BE REGISTERED OR PRINCIPALLY GARAGED IN CONNECTICUT IN ORDER FOR UNINSURED MOTORIST COVERAGE TO APPLY

Finley v. Western Express, Inc., AC 43361 (Conn. App.)

Plaintiff sought to recover uninsured motorist benefits when tractor-trailer he was operating was struck by unavoidable object. The trial court granted defendants' motion for summary judgment, applying Tennessee law because tractor-trailer was not registered or principally garaged in Connecticut. Plaintiff appealed. ***Held:*** Affirmed. Plaintiff failed to challenge the basis for the trial court's ruling that Tennessee law applied.

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