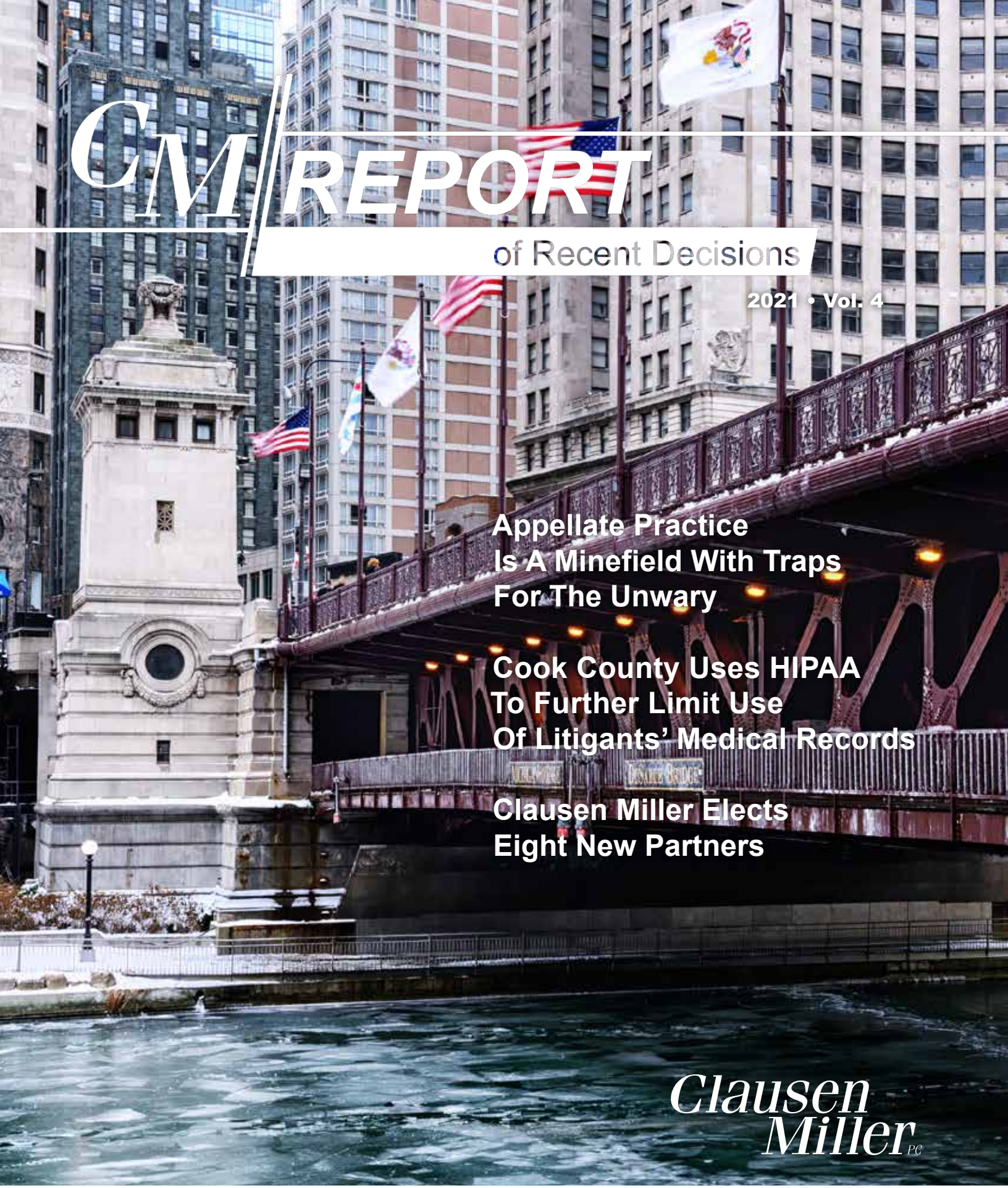

CM REPORT

of Recent Decisions

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Appellate Practice Is A Minefield With Traps For The Unwary

Cook County Uses HIPAA To Further Limit Use Of Litigants' Medical Records

Clausen Miller Elects Eight New Partners

Clausen Miller P.C.

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

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No Chance For A Non-IPI Instruction On The Lost Chance Doctrine In Medical Malpractice Actions After *Gretencord-Szobar v. Kokoszka*, 2021 IL App (3d) 200015 and *Bailey v. Mercy Hospital and Medical Ctr.*, 2021 IL 126748

by ***Melinda S. Kollross***

In *Gretencord-Szobar*, 2021 IL App (3d) 200015, this author defended a medical malpractice defense verdict in the Illinois Appellate Court, Third District, against plaintiff's argument that a new trial should have been ordered because the trial court refused to give a non-IPI jury instruction explaining the lost chance doctrine to the jury. During the pendency of the *Gretencord-Szobar* appeal, our opponent sought to cite the appellate decision in *Bailey v. Mercy Hospital and Medical Ctr.*, 2020 IL App. (1st) 182702, as supplemental authority to reverse the trial court's decision because the First District in *Bailey* had approved giving such a non-IPI instruction explaining the lost chance doctrine for a jury. We took the position that the First District wrongly decided *Bailey* because the current body of Illinois precedent established that no such additional instruction was necessary where a jury had been properly instructed on proximate cause pursuant to IPI Civil No. 15.01. The Third District in *Gretencard-Szobar* agreed with our position and affirmed the defense verdict. The Illinois Supreme Court has now affirmatively concurred in *Bailey*, holding that no such non-IPI instruction explaining the lost chance doctrine is necessary and should not be given in any Illinois medical malpractice trial.

Bailey Facts

Plaintiff brought a medical malpractice action contending that plaintiff's decedent died of toxic shock syndrome and sepsis caused by a retained tampon, which could have been treated by antibiotics if timely diagnosed by defendants. Defendants contended that decedent died of acute viral myocarditis, which could not be treated with antibiotics. Plaintiff had requested that the jury be instructed with a non-IPI instruction stating that:

> *"If you decide or if you find that the plaintiff has proven that a negligent delay in the diagnosis and treatment of sepsis in [decedent] lessened the effectiveness of the medical services which she received, you may consider such delay one of the proximate causes of her claimed injuries and death."*

As courts have explained, this non-IPI instruction embodies a concept that enters into the proximate cause analysis in medical malpractice cases when a plaintiff alleges a defendant's negligent delay in diagnosis or treatment has

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

lessened the effectiveness of treatment. It's called the "lost chance" doctrine.

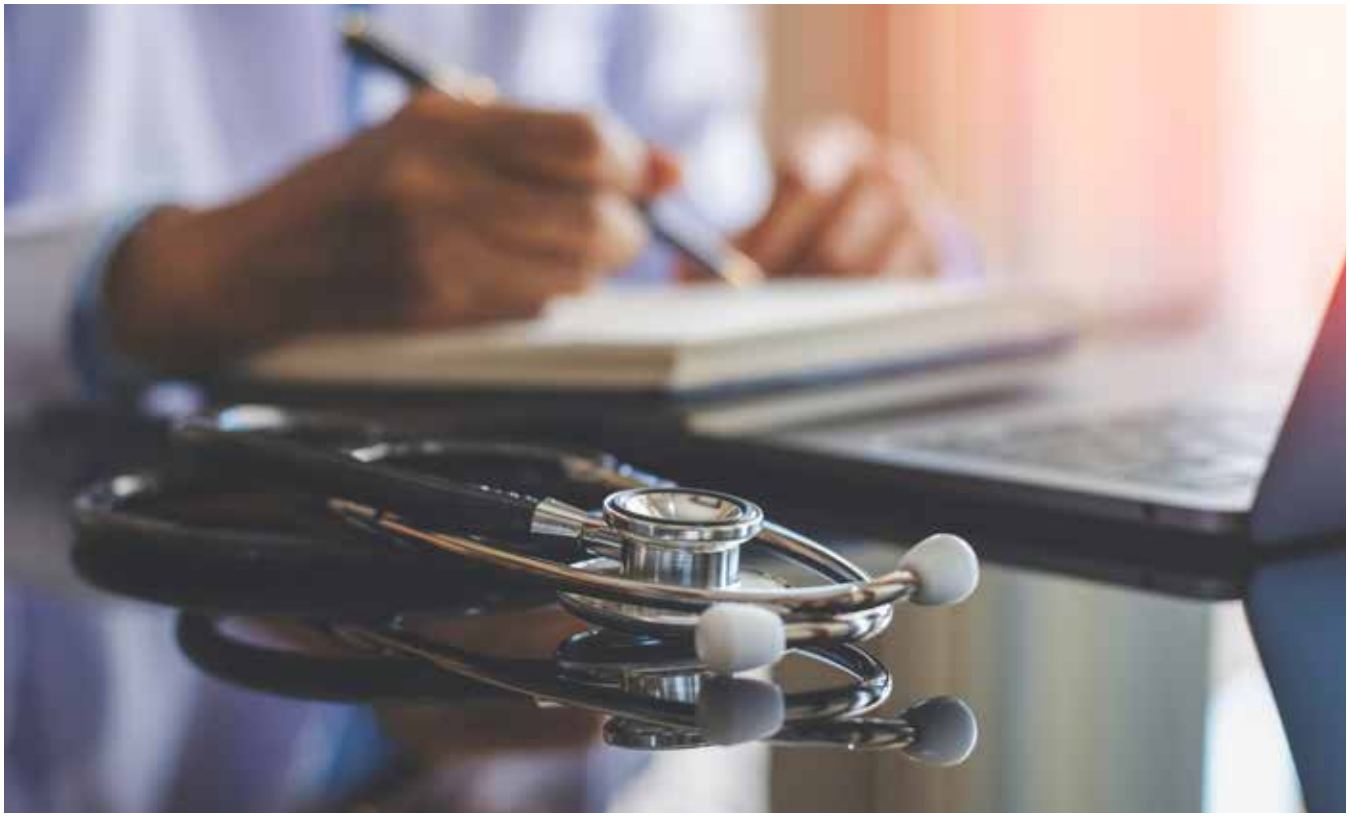
The trial court denied this non-IPI instruction, and the jury returned a verdict for defendants. The Appellate Court reversed the defense verdict, holding that the non-IPI instruction tendered by plaintiff should have been given to the jury. The Appellate Court acknowledged the precedent opposing such an instruction, but nonetheless ruled that the non-IPI instruction had to be given stating that otherwise a plaintiff would never be able to explain a lost chance theory to a jury.

The Illinois Supreme Court granted review. It reversed the Appellate Court and affirmed the trial court's decision refusing to give the non-IPI instruction.

The Illinois Supreme Court's Ruling

The Supreme Court ruled that until the First District's decision in *Bailey*, Illinois precedent uniformly held that no such non-IPI instruction explaining the lost chance doctrine was necessary where a jury was otherwise properly instructed on proximate cause by using IPI Civil No. 15.01. The Supreme Court specifically noted the Third District's decision in *Gretencord-Szobar* as rightfully declining to follow the First District's *Bailey* decision in reliance upon the uniform precedent rejecting the use of such a non-IPI instruction explaining the lost chance doctrine. According to the Supreme Court, when a jury is instructed on proximate cause through IPI Civil No. 15.01, the lost chance doctrine, as a form of proximate cause, is encompassed within the instruction given to the jury, and the circuit court's refusal to give a separate nonpattern instruction on loss of chance does not deny the plaintiff a fair trial.

Learning Point: *Bailey* teaches that even though a non-IPI instruction may accurately state the law, that does not *ipso facto* mean that the non-IPI instruction must be given to a jury where there is already an IPI instruction that completely and accurately covers the point. IPI Civil 15.01 completely and accurately stated the law on proximate causation, and thus an additional non-IPI instruction on the lost chance doctrine, while accurately stating the law, was unnecessary and not required to ensure a fair trial.



Clausen Miller Elects Eight New Partners


Patrick L. Breen


Djordje Caran


Charles W. Deutsch


Ramy P. Elmasri


Thomas J. Moody


Michael J. Raudebaugh


Nicholas W. Travis


Kelly M. Vogt

Clausen Miller congratulates **Patrick Breen**, **Djordje Caran**, **Charles Deutsch**, **Ramy Elmasri**, **Thomas Moody**, **Michael Raudebaugh**, **Nicholas Travis** and **Kelly Vogt** on their election to Income Partner. The Firm appreciates their efforts and contributions to the Firm and its clients.

Patrick L. Breen is an experienced trial lawyer, having tried cases in state and federal courts and before the Illinois Court of Claims and the Illinois Civil Service Commission. His litigation practice deals mainly with product liability, premises liability, commercial, employment, construction, insurance coverage and trucking litigation.

Djordje (George) Caran is a partner in the firm's New York Office. George defends property owners, commercial clients, contractors and other entities in claims made by third parties. His focus is on defending catastrophic and complex injury cases and he has extensive trial experience, tried to conclusion and verdict multiple cases, in various venues, that involved both jury trials and bench trials.

Charles W. Deutsch is a partner with Clausen Miller based in the firm's Chicago, Illinois office. His practice focuses on defending insurers in first-party insurance matters. Prior to joining Clausen Miller, Charles' practice included representing healthcare providers in medical malpractice litigation and carriers in third-party insurance coverage matters. He has spent his career representing insureds and insurers.

Ramy P. Elmasri has spent his entire legal career fighting on behalf of insurers and their insureds. He understands the needs of insurance carriers for high quality, effective and expedient resolution of their cases. He is rated AV® Preeminent™ Peer Review Rated by Martindale Hubbell, has been named a Rising Star by Super Lawyers and has extensive state and federal court litigation, trial and appellate experience.

Thomas J. Moody is a partner out of the firm's Tampa office and is located in Pensacola. Tom focuses his practice on civil litigation defense, with an emphasis on first party property disputes. Tom also has extensive experience successfully representing civil defendants in matters including insurer bad faith, commercial premises liability, professional liability and malpractice, governmental entity liability, pre-suit coverage analysis, admiralty and maritime claims, wrongful death claims, and personal injury claims.

Michael J. Raudebaugh focuses his practice in the area of first party property litigation. He has spent his entire legal career litigating civil disputes in the State of Florida, representing insurers in both state and federal court. Michael's extensive litigation experience has also given him the opportunity to represent businesses and individuals on both the plaintiff and defense sides, with a particular emphasis on contractual and real estate disputes.

Nicholas W. Travis is partner in the firm's Tampa office that focuses his practice in the areas of professional liability, first-party property litigation and extra-contractual claims. Nick has extensive experience in counseling clients across a broad range of sectors in compliance matters in addition to developing litigation strategies designed to mitigate liability exposure.

Kelly M. Vogt is a partner in our Tampa office and is located in Naples, where she focuses her practice on first party property matters. Experienced in the areas of third party liability, appellate law, general civil litigation, and professional liability defense, Kelly handles all aspects of litigation from case inception through completion and has achieved many favorable outcomes and opinions for her clients. Kelly has been acknowledged by her peers, having earned an AV® Preeminent™ rating from Martindale-Hubbell.

CLAUSEN MILLER WINS COVID-19 BUSINESS INTERRUPTION COVERAGE CASE

Clausen Miller posted another victory on behalf of our client in a first-party property case in Illinois. CM partners **Margaret Fahey** and **Charles Deutsch** briefed a compelling Motion to Dismiss, with associate **Brannon Simmons** providing key assistance in tracking down the latest breaking decisions for inclusion in the briefs. Maggie argued the Motion to Dismiss, convincing a Kane County judge to dismiss the insured's complaint seeking coverage for COVID-19 related business interruption losses with prejudice. After lengthy oral argument, Judge Busch ruled from the bench and found that there was no coverage under the Policy based on the exclusions for contamination and loss of use, as well as finding that plaintiff's allegations of direct physical loss or damage to property from the presence of the virus was "hyperbole and argument," not facts. We are pleased we could notch another victory for a valued client. For more information, please contact **Dennis Fitzpatrick** (**dfitzpatrick@clausen.com**) or Maggie Fahey (**mfahey@clausen.com**).

VAN DUSEN WINS MOTION TO DISMISS FOR CLAIMS RELATED TO DECEASED DOG

CM partner **Matthew Van Dusen** convinced a New York trial court to dismiss, pre-answer, plaintiff's claims of Negligent Infliction of Emotional Distress, Loss of Companionship, Conversion, Negligence Per Se and Trespass to Chattel with respect to a deceased family dog. *James Vaughan, et al., v. Ulster County Cerebral Palsy Assc., Inc. et al.*, Index No. EF2020-2572.

Plaintiffs, a family, sued their non-profit defendant neighbors related to the accidental loss of their family dog, seeking damages far in excess of what New York law provides under negligence principles. Wild bears allegedly entered the defendants' dumpster and removed rubber gloves which were ultimately ingested by plaintiffs' dog, resulting in his death. Plaintiff's Negligent Infliction of Emotional Distress and Loss of Companionship claims were based upon the theory that the dog was a family member. They claimed Trespass to Chattel based upon the alleged theft of the dog's life. The family's Negligence Per Se and Trespass to Chattel claims were predicated upon unspecified New York Department of Conservation Regulations. Plaintiffs sought $100,000 for emotional distress, $50,000 for loss of companionship, $50,000 for conversion, $50,000 for negligence per se and $50,000 for trespass to chattel.

With respect to Negligent Infliction of Emotional Distress, the court, relying upon *Jason v. Parks*, 224 A.D.2d 494, 638 N.Y.S.2d 170 (2d Dep't 1996). and *Fowler v. Town of Ticonderoga*, 131 A.D.2d 919, 516 N.Y.S.2d 368 (3d Dep't 1987), held that "pet owners cannot recover for emotional distress upon an alleged or malicious destruction of a dog, which is deemed to be personal property." The court rejected the Loss of Companionship claim based upon *Wilborne v. Stanley*, No. 50989/2018, 2018 N.Y. Misc. LEXIS 7640 (N.Y. Sup. Ct., Dutchess Cty., Oct. 19, 2018), which held that "New York does not recognized the loss of companionship of a pet."

The court also rejected Plaintiffs' spurious Conversion claim, finding that Plaintiffs had not sufficiently pled

that the defendants had unauthorized possession of the dog or interfered with the possession of the dog. The Trespass to Chattel claim fared no better. Relying upon *Buckeye Pipeline Co. v. Congel-Hazard, Inc.*, 41 A.D.2d 590, 340 N.Y.2d 263 (4th Dep't 1973), the court found that Plaintiffs failed to alleged the defendants acted with the intention or knowledge of interfering with the property and that such interference is substantially the result. Finally, the court dismissed Plaintiffs' Negligence Per Se claim finding that Plaintiffs failed to allege any specific regulation that defendants violated.

Learning Point: New York does not recognize Loss of Companionship and Negligent Inflection of Emotional Distress claims with respect to lost animals. Conversion and Trespass to Chattel claims associated with loss of animals must be specifically pled based upon controlling authority. Negligence Per Se claims must be predicated upon specific regulations and properly pled.

KOLLROSS WINS LIABILITY COVERAGE CASE IN LOUISIANA APPELLATE COURT

CM Appellate Practice Group Chair **Melinda Kollross** recently obtained affirmance of summary judgment for the defendant insurer from the Louisiana Appellate Court, First Circuit. Melinda was initially retained to assist trial counsel in preparing a motion for summary judgment seeking a declaration of no coverage under a CGL policy for the drowning death of a 5 year-old at the insured premises. The property included the individually named husband and wife's residence, as well as the husband's septic tank installation, servicing and repair business, which was not named as a defendant. The drowning allegedly occurred during a pool party for customers/friends and their children. The husband and wife did not have homeowner's insurance in force at the time of the accident.

Melinda worked with trial counsel to prepare a compelling motion for summary judgment arguing that: (1) neither husband nor wife met the requirements for status as insureds under the CGL policy because neither was engaged in any business activity at the time of the drowning; and (2) a Classification Limitation Endorsement (CLE) in the policy limited coverage to operations involving septic tank system installation, servicing, or repair, and it was uncontested that no such operations were happening around the swimming pool at the time of the drowning. The trial court agreed and entered summary judgment for the insurer on both grounds.

Following the trial court win, Melinda assumed primary responsibility for defending the appeal. She briefed and orally argued the matter before the appellate tribunal (via Zoom). The Appellate Court affirmed the lower court's entry of summary judgment on both grounds, concluding that the husband and wife were not engaged in busines activities at the time of the drowning and thus did not qualify as insureds under the CGL policy, and that the CLE barred coverage in any event as there was no septic tank installation, servicing or repair going on near the pool at the time of the accident.

This case reinforces the wisdom of retaining appellate counsel to assist with dipositive motion briefing. As we often say, the best way to win on appeal is to win at the trial court. Doing so with a fully developed and properly preserved record on appeal greatly increases the chance of success on appeal.

The Seventh Circuit Warns That Appellate Practice Is A Minefield With Traps For The Unwary

by ***Melinda S. Kollross***

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

The Seventh Circuit's decision in *Association of American Physicians and Surgeons, Inc. v. American Board of Medical Specialties*, 15 4th 831 (7th Cir. 2021), is not remarkable for its ruling on the merits of the dispute. The Court affirmed the dismissal of a complaint alleging restraint of trade because it failed to meet the *Iqbal/Twombly* pleading standard. The decision, however, presented unusual procedural circumstances that enabled the Court to admonish litigants about the minefield of appellate practice.

Facts - The Problem

Consider this hypothetical scenario. A federal district court enters a minute order granting a party summary judgment for the reasons to be stated in a memorandum opinion and Federal Rule of Civil Procedure 58 judgment to follow. But the district court doesn't enter its memorandum opinion and Rule 58 judgment immediately, or even shortly thereafter, but waits until 180 days pass to enter that opinion and judgment. The losing litigant will be shocked to learn that it no longer has any right to appeal the summary judgment as its time to appeal has elapsed, even though the district court just entered its memorandum opinion and judgment explaining the reasons for granting summary judgment. The reason: Federal Rule of Appellate Procedure 4(a)(7)(A)(ii) which provides that a judgment is deemed entered for purposes of triggering the 30-day notice of appeal period from the earlier of the entry of a proper Rule 58 judgment or 150 days after a dispositive order is entered on the civil docket. In the scenario above, the summary judgment was deemed entered 150 days after the court's minute order entry—even without any explanatory memorandum opinion and judgment. The 30-day deadline to file a notice of appeal began at that time and not any time later when the court finally issued its opinion and judgment.

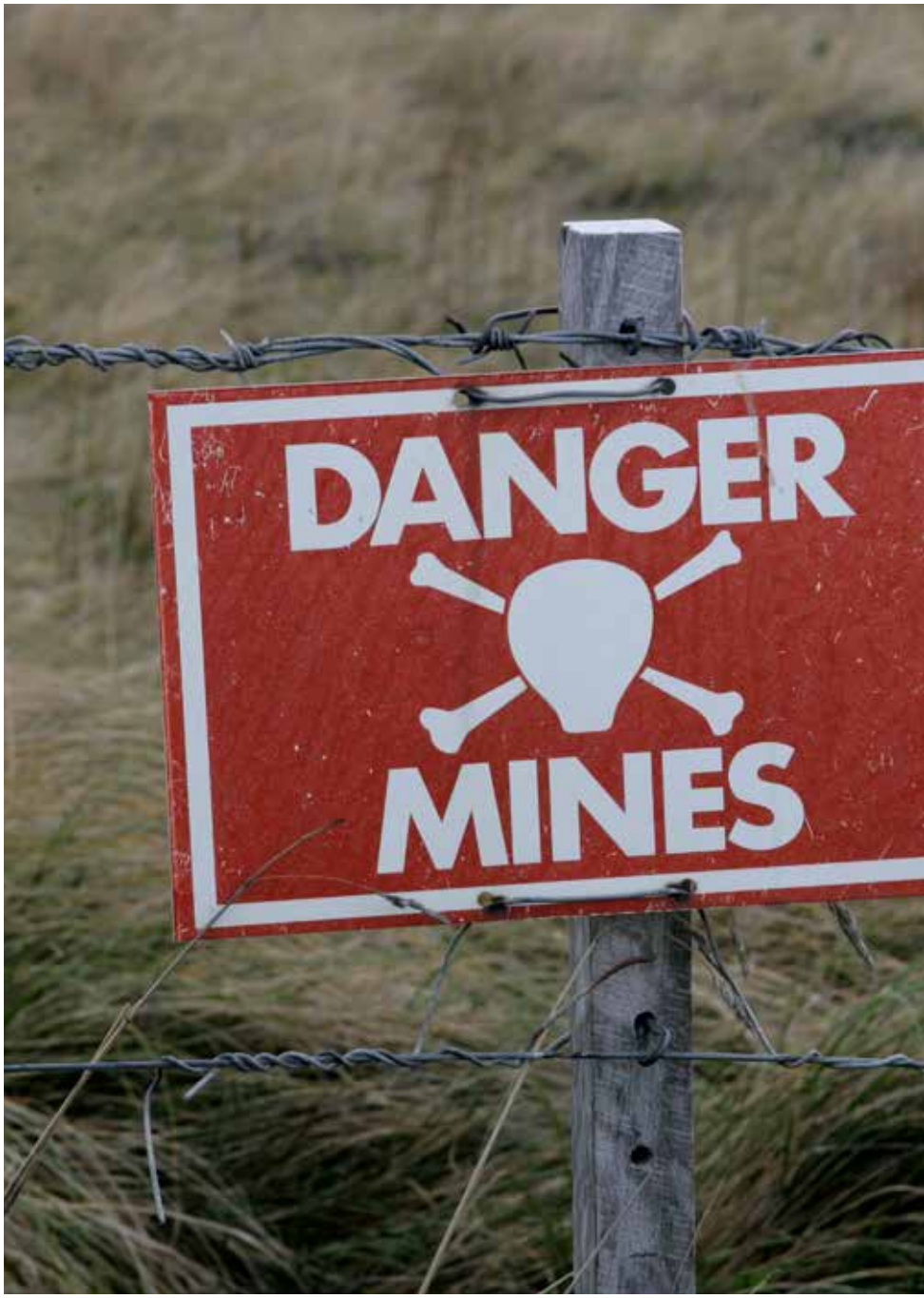
Analysis - Disaster Averted In *American Board*

American Board involved a near appellate disaster because the district court failed to immediately issue its opinion upon ruling on a motion to dismiss. On September 30, 2017, the district court granted the dismissal motion for the reasons to be stated in a memorandum opinion to follow. But, unlike our hypothetical scenario, that memorandum opinion was issued within the 150-day time period—75 days later on December 13, 2017—so an appellate disaster was averted. But the fact that the opinion did not immediately accompany the dismissal order and was issued so long after gave the Seventh Circuit the

opportunity to warn litigants about this trap waiting for the unwary in the appellate minefield:

> *"Under Federal Rule of Appellate Procedure 4(a)(7)(A)(ii), judgment is deemed to be entered 'on the earlier of the Rule 58 judgment or 150 days after a dispositive order is entered on the civil docket.' (Citation omitted) Those 150 days start running when the district court actually dismisses the case— here, September 30—not when it later issues its reasoned opinion. If the opinion does not follow for more than 180 days—150 days plus the ordinary 30 days for an appeal—the appeal may be barred, 'spell[ing] disaster for a litigant not versed in the appellate rules.'"*

Learning Point: This appellate decision again illustrates the reasons why appellate counsel should be retained at the time of any dispositive ruling—if not before. Protecting appellate rights through the filing of a timely notice of appeal is no simple matter—and trained appellate counsel are best suited to ensure that the rights to appeal are protected. This author has governed her appellate practice by a simple rule: let an appellate tribunal say your appeal is too early rather than too late. In this scenario where a decision is made, but the opinion is to come later, a notice of appeal should be immediately filed, with request made to the appellate tribunal to stay briefing until the trial court issues its opinion explaining its judgment. And in fact, the Seventh Circuit has ruled this is the proper course of action to be taken in these circumstances. *Walker v. Weatherspoon*, 900 F.3d 354, 356 (7th Cir. 2018) ("[T]he loser may file a notice of appeal and ask the court of appeals to defer briefing until the district court has released its opinion.") ♦



California Appellate Court Rules COVID-19 Death Suit May Proceed Against Widow's Employer

by ***Melinda S. Kollross***

A California appellate court recently ruled that plaintiff's employer must face a lawsuit alleging that plaintiff contracted COVID-19 at work and infected her husband, causing his death. *See's Candies, Inc. v. Superior Court*, 2021 Cal. App. LEXIS 1076; 2021 WL 6015641 (2d Dist.).

Facts

Plaintiffs Matilde Ek and her three daughters sued Mrs. Ek's employer, See's Candies, asserting general negligence and premises liability in connection with the death of her husband from COVID-19. Mrs. Ek alleged that she contracted COVID-19 while working in close proximity to other workers at defendant's candy assembly plant. According to her complaint, See's was "aware of the highly dangerous, contagious and transmissible nature of [COVID-19], particularly where people are working and interacting in close proximity to each other" but "failed to put known, appropriate and necessary safety mitigation measures in place." Plaintiff allegedly contracted a COVID-19 infection at work in March 2020. She convalesced at her home where she resided with her husband (Mr. Ek), and one of their daughters (Karla). Within a few days, both Mr. Ek and Karla became sick with COVID-19. Mr. Ek, after struggling with the illness, died on April 20. 2020.

Defendants filed a demurrer contending that plaintiffs' claims were preempted by the Worker's Compensation Act exclusivity provisions. Specifically, defendants argued plaintiffs' claims are barred by the "derivative injury doctrine" (*see Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1000 [68 Cal. Rptr. 2d 476, 945 P.2d 781] (*Snyder*)), under which "the WCA's exclusivity provisions preempt not only those causes of action premised on a compensable workplace injury, but also those causes of action premised on injuries collateral to or derivative of such an injury." Among other things, this doctrine preempts third party claims "based on the physical injury or disability of the spouse," such as loss of consortium or emotional distress. The doctrine applied, defendants argued, because plaintiffs could not state a claim against defendants for Mr. Ek's death without alleging an injury to an employee, namely Mrs. Ek's workplace infection with COVID-19.

The trial court overruled the demurrer. It found that any injury to Mrs. Ek was "irrelevant" to plaintiffs' claims because that was not the injury sued upon. Rather, it was Mr. Ek's exposure to the COVID-19 brought home by Mrs. Ek that plaintiffs claim caused plaintiffs' injury.

The trial court continued: "Mrs. Ek did not have to become ill herself for Plaintiffs' injury to occur, and, so, contrary to Defendants' position, Plaintiffs do not allege that their injuries would not have existed in the absence of the workplace injury to Mrs. Ek. Accordingly, Plaintiffs'

claimed injuries are not collateral to nor derivative of Mrs. Ek's becoming ill with COVID-19. Were Plaintiffs alleging that their injuries stemmed from Mrs. Ek's illness, say, because they lost income or missed out on Mrs. Ek's companionship while she was sick with the COVID-19 she contracted at work, a different outcome would result."

Analysis

The Court of Appeal denied writ relief, stating that regardless of whether Mrs. Ek sustained a workplace injury for purposes of the Worker's Compensation Act, the derivative injury doctrine did not apply to extend workers' compensation exclusivity to plaintiffs' wrongful death claim because that claim did not seek damages for losses arising from a disabling or lethal injury to the employee. The Court opined that case law cannot be read to extend the derivative injury doctrine to any injury for which an employee injury was a but-for cause because logical or legal dependence of another person's injuries on an employee's injuries is not equivalent to causal dependence.

The court explained their reasoning as follows. Assuming arguendo that Mrs. Ek's workplace infection constitutes an injury for purposes of the WCA, we reject defendants' efforts to apply the derivative injury doctrine to any injury causally linked to an employee injury. Defendants' interpretation is inconsistent with the language of *Snyder*, which establishes that the fact an employee's injury is the biological cause of a nonemployee's injury does not thereby make the nonemployee's claim derivative of the employee's injury.

Further, *Snyder*'s discussion of prior case law applying the derivative injury doctrine does not support applying the doctrine based solely on causation. *Snyder* approved of cases applying the doctrine to claims by family members for losses stemming from an employee's disabling or lethal injury, such as wrongful death, loss of consortium, or emotional distress from witnessing a workplace accident. In contrast, the Supreme Court called into question a case applying the derivative injury doctrine outside these contexts based on causation alone.

Defendants' interpretation of the derivative injury doctrine would lead to anomalous results, shielding employers from civil liability in contexts the drafters of the WCA could not have intended. Although the breadth of the derivative injury doctrine presents serious policy considerations, *Snyder* recognizes that such policy considerations are within the province of the Legislature and should not be judicially addressed by expansion of the derivative injury doctrine.

Because the parties framed this writ exclusively to address the applicability of the WCA, the Court did not decide whether defendants owed Mr. Ek a duty of care or whether plaintiffs can demonstrate that Mr. or Mrs. Ek contracted COVID-19 because of any negligence in defendants' workplace, as opposed to another source during the COVID-19 pandemic.

Learning Point: Reuters reported that *See's Candies*, "appears to mark the first time a lawsuit will be allowed to potentially hold a company responsible for the COVID-19-related death of an employee's family member." We expect to see many more such lawsuits in the coming months, along with a rise in personal injury/wrongful death actions arising out of COVID-19 generally. These casualty matters will likely represent the second wave of COVID-19 litigation, following the thousands of lawsuits filed in 2020 and 2021 seeking first-party property insurance coverage for COVID-19 business interruption losses. ♦

Cook County Uses HIPAA To Further Limit Discovery And Use Of Litigants' Medical Records

by ***Kathleen M. Klein***

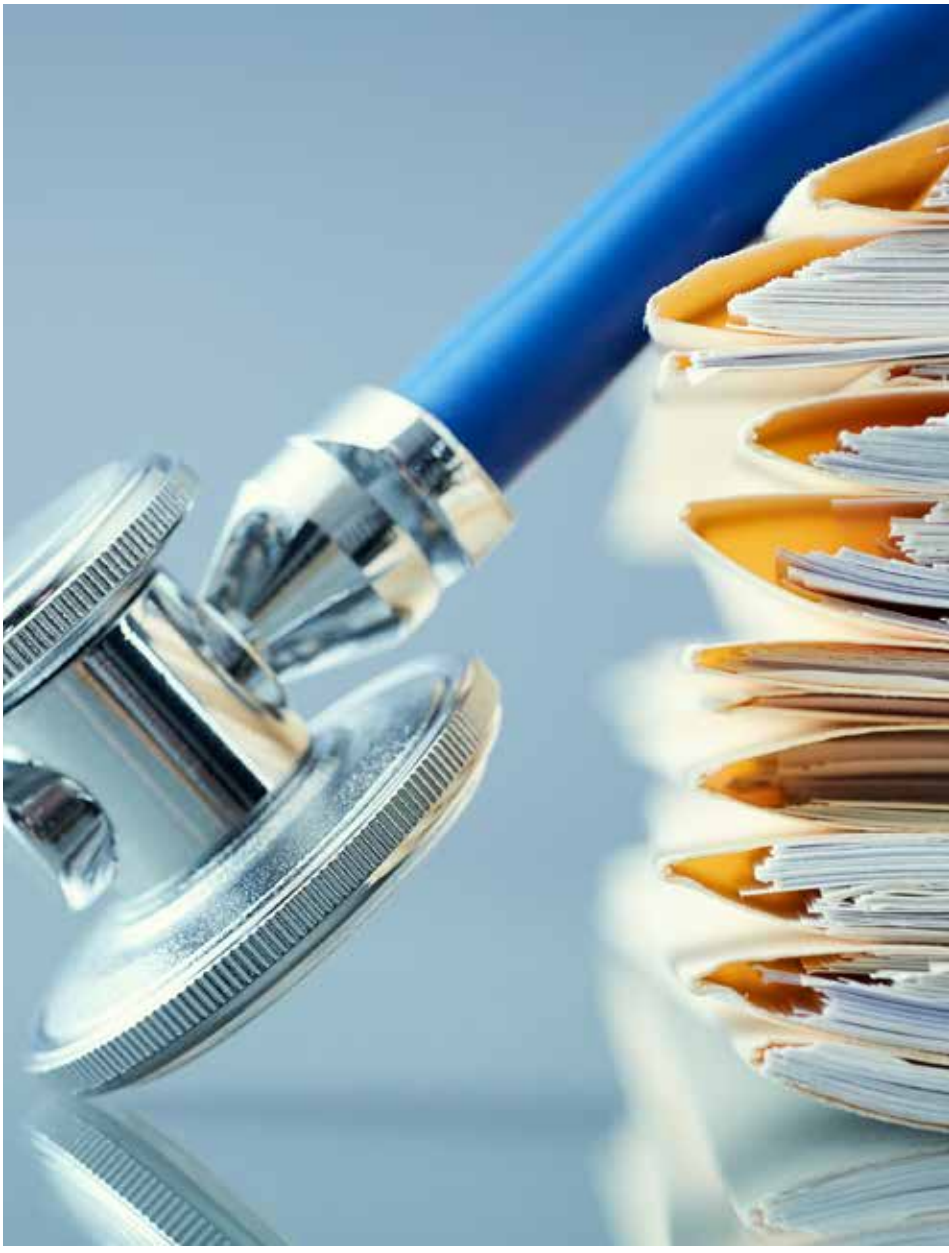
Kathleen M. Klein
is a partner in the Chicago office of Clausen Miller P.C. She specializes in litigation, including the defense of medical malpractice, professional liability, broker/dealer/investment advisor malpractice, premises liability, products liability, and personal injury matters. Kathleen also defends clients in the healthcare, financial, construction, insurance, clinical laboratory, and hospitality industries. She works in arbitration and mediation forums, at state and local administrative hearings, and before FINRA (the Financial Industry Regulatory Authority) and the EEOC.
kklein@clausen.com

On November 5, 2021, Cook County courts amended the standard HIPAA order used in cases throughout its divisions. The order is known as the HIPAA Qualified Protective Order ("QPO"), and it governs litigants' ability to get an injured plaintiff's medical records from treating physicians. Counsel for plaintiffs and defendants have long disagreed on the proper scope of the QPO, with plaintiffs arguing to limit record disclosure, and defendants arguing to allow wider discovery. The amendment to the QPO was inspired by the Illinois Supreme Court's decision in *Haage v. Zavala*, in which the Illinois Supreme Court ruled that a proper QPO must require records to be destroyed or returned at the close of a case.

The Cook County amendments to the QPO, however, arguably went beyond the scope of the *Haage* holding. The new QPO, as it exists now, includes a bar on "any and all" records subpoenas, substantively limiting requests to a 5-year period prior to the incident, and to the 'part of the body' at issue. The QPO imposes other requirements on defendants that will increase the logistical burden and cost of records subpoenas, including requiring the requestor to provide copies to all other parties within 7 days of receipt. It is unclear whether the requesting defendant will bear the entire cost of obtaining records alone, or whether cost-sharing with other parties—who now get their records from the requesting defendant—will be permitted.

The order requires return or destruction of all records within 60 days of the close of the case. This prohibits parties, counsel, *and the parties' insurers* from using PHI for any purpose other than the litigation in which the order was entered. This poses a significant challenge for insurers who routinely include Protected Health Information, records, or bills in their permanent files or statistical reporting. The insurer in *Haage* raised similar issues, which the Court found unconvincing, noting in particular that an insurer could place in its file a copy of the QPO requiring record destruction, to justify the absence of medical records or bills from its file. The order further requires, at the close of the case, that affidavits be provided certifying that all records were returned or destroyed within 60 days. Thus, counsel will be required to attest to destruction of records by its insurer and all its retained experts.

There are a wide variety of potential implications of the QPO that have yet to be explored. For example, are treating physician deponents permitted to answer questions at



deposition about treatment provided more than five years prior to the care at issue? Does the court have the ability or authority to waive or expand the time frame? Are there "good cause" exceptions for inability to certify destruction, for example, a physician who ceases to practice and can no longer be located? What are the implications for technology within attorney or insurer offices, including systemwide backups of files containing medical records?

There has been significant pushback on the order from portions of the legal community, and we expect the court to amend the new HIPAA order in the coming months. It is unlikely the court will completely drop the time frame limitation or the destruction requirement, but it is yet to be determined what alterations may mean for parties' ability to obtain records about a plaintiff and their medical conditions. In the meantime, we expect motion practice and disagreements between plaintiff and defense attorneys as these new requirements are put into practice. Counsel should abide by the notice deadlines in the new order, evaluate individual case facts for any necessary case-by-case requests for enlargement of the scope of subpoenas, and preserve objections to these limitations for further review by the courts. As each case presents unique challenges, so too the application of the new QPO will vary from case to case, and the courts will have to address these issues on the fly. ♦

Federal And State Appellate Tribunals Continue To Rule For Insurers On COVID-19 Business Interruption Claims

by ***Melinda S. Kollross***

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 Volume 3 of our 2021 CM Report, I reported on a growing body of federal appellate precedent holding that first-party property policies do not cover COVID-19 business interruption losses. That body of federal appellate precedent keeps growing, as discussed below. And significantly, the state reviewing courts have begun speaking on the issue too and, following the federal precedent, these state reviewing courts are likewise holding that there is no coverage for these pandemic related losses.

Dakota Girls, LLC v. Philadelphia Indem. Ins. Co., 2021 U.S. App. LEXIS 33002 (6th Cir. 2021)

The insureds operated preschools. The insureds conceded that *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021), resolved issues against it on business income due to lack of property damage. The insureds argued, however, that a communicable disease endorsement was triggered simply when there was a shutdown order in response to a communicable disease found somewhere, and not necessarily at its premises. Applying Ohio law and predicting how the Ohio Supreme Court might rule, the Sixth Circuit disagreed with the insureds, holding that the policy had a definite legal meaning—that coverage is triggered only by a shutdown order that stemmed from an actual illness caused by a communicable disease at the insured's preschools.

The Sixth Circuit further ruled that although it was sympathetic to the plight of the insureds, that sympathy did not enable it to rewrite the policy and give the insured coverage to which it was not entitled:

> Like the *Santo's* court, we appreciate the 'singular challenges' that COVID-19 has caused for businesses like Dakota Girls. *Santo's Italian Café*, 15 F.4th at 407. But those challenges do not give us license to rewrite the plain terms of an insurance policy to confer upon the [insureds] a form of coverage for which they never contracted.

Inns-by-the-Sea v. California Mutual Ins. Co., 71 Cal. App. 5th 688 (Cal. App. 2021)

As the court noted, this appeal presented an issue of first impression for a California appellate court: does a commercial property insurance policy provide coverage for a business's lost income due to the COVID-19 pandemic? The California Appellate Court ruled there was no such coverage because the was no direct physical loss of property.

According to the Appellate Court, the words "direct" and "physical" preclude the argument that coverage arises in

a situation where the loss incurred by the policyholder stems solely from an inability to use the physical premises to generate income, without any other physical impact to the property. Accordingly, the mere loss of use, without any other physical impact to property is not sufficient to trigger the business income coverage terms of the policy. This conclusion was buttressed by the policy's reference to the "period of restoration" and its focus on repairing, rebuilding, or replacing property. This policy language assumes physical alteration of the property and not just loss of use.

Bridal Expressions LLC v. Owners Ins. Co., 2021 U.S. App. LEXIS 35676 (6th Cir. 2021)

This Sixth Circuit decision relied upon *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021), in holding that the insured failed to show any physical loss of or damage to property enabling it to obtain loss of business income coverage. According to the Court, the insured's bridal shop had not been tangibly destroyed, whether in part or in full. And the insured had not been tangibly or concretely deprived of any of it. Put another way, a direct physical alteration of the property was needed to show damage to it, and some form of complete destruction or dispossession was needed to show loss of the property, and none of this existed here.

The Court further ruled that the insured's allegation that the presence of COVID altered the structure of the Bridal Shop's air, space and property was too conclusory to allow it to proceed further. For this theory to have traction, the complaint would need to allege that coronavirus was present in the shop and materially altered specific property at the time. If that were the theory of coverage, moreover, the complaint presumably would seek coverage for replacing that property and only for the time that property was damaged or lost, but nothing like this was alleged by the insured.

Nail Nook, Inc. v. Hiscox Ins. Co., 2021 Ohio 4211 (Ohio App. 8th Dist. 2021)

This decision by the Ohio Court of Appeals for the Eighth District in *Nail Nook* was the first Ohio state reviewing court decision to rule on an insured's claim for business interruption coverage arising out of the pandemic. The court made two rulings. First, it held that the policy's virus exclusion excluding losses from any virus, bacterium or other microorganism that induces or can induce physical distress, illness or disease barred all coverage under the policy for any claim by the insured. And secondly, the Court of Appeals ruled that even assuming all the allegations in Nail Nook's complaint were true, Nail Nook did not have a valid claim for coverage because it could not prove direct physical loss of or damage to property required for business income coverage under the policy.

Finally, the Ohio Court of Appeals cited to the Sixth Circuit's decision in *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021), finding the Sixth Circuit's policy argument most persuasive in justifying the denial of coverage:

> 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.

Sanzo Enterprises v. Erie Ins. Exchange, 2021 Ohio 4268 (Ohio App. 5th Dist. 2021)

Five days after *Nail Nook*, the Ohio Court of Appeals for the Fifth District ruled in favor of an insurer on a claim for business income losses arising from the pandemic. The *Sanzo* Court relied upon the burgeoning federal precedent in holding that the plain and ordinary meaning of the phrase "direct physical loss of or damage to" unambiguously required a tangible and structural damage to the property to trigger the income loss provisions of the policy. According to the Court, the policy as a whole supported that conclusion. The Court found that the use of the words "repair, rebuild, restore, and replace" supported the determination that a mere loss of use, without any physical or tangible impact to the property, was not sufficient to trigger the income loss coverage. The Court stated that "[a]n intangible loss cannot be repaired, rebuilt, restored, or replaced".

Finally, echoing the policy argument made by the Sixth Circuit in *Santo's Italian Cafe*, the Court held that although it was unfortunate that these insured businesses suffered such losses because of the pandemic, the policies could not be construed in the manner that the insureds wanted to find coverage because it was contrary to the "plain and ordinary meaning" of the policy terms.

Sandy Point Dental v. The Cincinnati Ins. Co., 2021 U.S. App. LEXIS 36399 (7th Cir. 2021)

The Seventh Circuit in a flurry of 4 separate opinions issued on 12-10-21 all found in favor of various insurers that there was no coverage for any of the economic losses businesses have suffered because of the pandemic.

Sandy Point Dental was the lead insured with two others (The Bend Hotel Development Company and TJBC, Inc.) where the Seventh Circuit ruled that the insureds' economic losses were not covered under the plain terms of the property policies. Applying Illinois law, the Court found that the policies were replete with textual clues that reinforce the conclusion that "direct physical loss" requires a physical alteration to property. The Court noted, for example, that the policies provided coverage for losses sustained during a "period of restoration," which is defined by reference to "[t]he date [by which] the property … should be repaired, rebuilt, or replaced." Without a physical alteration to property, there would be nothing to repair, rebuild, or replace. The Seventh Circuit stated that given this clear meaning of the policy terms, it was "no surprise" that the "overwhelming majority of the courts" have adopted this view that economic losses arising from mere loss of use did not fall within the ambit of policy coverage.

Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co., 2021 U.S. App. LEXIS 36396 (7th Cir. 2021)

Crescent Plaza followed *Sandy Point Dental* in holding that the insured failed to show any physical loss or damage to property to trigger the lost income provision because there was no showing that the insured's property underwent any physical alterations. But the Court here went further and then addressed the applicability of the microorganism exclusion in the Zurich policy.

The exclusion barred coverage for losses "directly or indirectly arising out of or relating to: mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health." The Court held that the COVID-19 virus qualified as a microorganism under the terms of the exclusion and provided an independent basis to hold that all of the insured's claims were barred under the Zurich policy. In so holding, the Court soundly rejected all of the insured's arguments against the applicability of the exclusion: it was not ambiguous; it could not be considered mere surplusage because of other exclusions in the policy; and the addition of a communicable disease exclusion in later policies was not an admission that this exclusion did not bar losses due to COVID-19.

Bradley Hotel Corp. v. Aspen Specialty Ins. Co., 2021 U.S. App. LEXIS 36398 (7th Cir. 2021)

Bradley Hotel followed *Sandy Point Dental* in holding that the insured failed to show any physical loss or damage to property to trigger the lost income provision because there was no showing that the insured's property underwent any physical alterations. Like *Crescent Plaza* though, the Court went further and addressed the loss of use exclusion and an ordinance and law exclusion, finding that they each provided independent grounds to hold that the entirety of the insured's claim was barred.

The loss of use exclusion barred coverage for "loss or damage caused by or resulting from . . . [d]elay, loss of use or loss of market," indicating that a mere loss of use cannot be the cause of a policyholder's losses. The Court rejected the insured's argument that applying the loss of use exclusion rendered the policy's coverage for direct physical loss or damage superfluous. The insured's argument was flawed because the exclusion was triggered only when, as here, loss of use was the alleged cause of loss—not when it was the result of a covered cause of loss. The ordinance or law exclusion in the Aspen policy also barred "loss or damage caused directly or indirectly by . . . enforcement of or compliance with any ordinance or law . . . [r]egulating the construction, use or repair of any property." According to the Court, the closure orders issued to stem the spread of the virus qualified as an "ordinance or law" within the meaning of the exclusion, barring the insured's claim.

Mashallah Inc. and Ranalli's Park Ridge, LLC v. West Bend Mut. Ins. Co., 2021 U.S. App. LEXIS 36400 (7th Cir. 2021)

The Court here affirmed a district court's dismissal of the insureds' actions for business income losses due to the pandemic based upon a virus exclusion barring losses arising from any virus that can induce physical

distress, illness, or disease. The Court found that the district court was correct in ruling based on the virus exclusion alone, rejecting the insureds' arguments that Illinois law required a court to resolve the scope of an insurance policy's coverage before addressing the applicability of potentially relevant exclusions. As to the exclusion itself, the Court ruled it was unambiguous, clearly precluding insurance coverage for losses and expenses allegedly caused by the COVID-19 pandemic and government orders issued to stem its tide.

Additionally, the Court rejected the insureds' arguments that they were entitled to premium rebates, claiming they had reduced insurance risks because of the COVID-19 closure orders. The Seventh Circuit agreed with the district court that the insurer was not guilty of any unjust enrichment in not giving such a rebate because no misconduct on the insurer's part was reasonably alleged and because a valid insurance contract governed the parties' relationship.

Goodwill Indus. of Central OK v. Philadelphia Indem. Ins. Co., No. 21-6045 (10th Cir. 2021)

On 12-21-21, the Tenth Circuit issued a decision in line with the prior decisions of the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits holding that there was no insurance coverage from the losses an insured suffered because of pandemic closure orders.

Applying Oklahoma law, the Tenth Circuit ruled that the insured was not entitled to any lost business income coverage because its losses did not stem from any physical alteration or tangible dispossession of insured property. The Court found that the policy's "Period of Restoration" requirements demonstrated that only a physical alteration or tangible dispossession could trigger the lost business income coverage provision of the policy. According to the Court, the "Period of Restoration" clause provided coverage until property is repaired, rebuilt, or replaced or until the insured resumes business elsewhere. The Court concluded that this policy language presumed a physical alteration of the property, and not just mere loss of use. The Court stated, "after suspending business due to COVID restrictions, [the insured] had nothing to repair, rebuild, or replace before it could resume operations" because nothing "physical" happened to its property.

The Tenth Circuit also ruled that in any event, the entirety of the insured's coverage claim was barred by a virus exclusion barring payment for loss or damage caused by or resulting from any virus, bacterium or other microorganism that can induce physical distress, illness, or disease. The Court found that the virus exclusion was valid, enforceable, and barred coverage both under its plain language and under the efficient proximate cause doctrine.

10012 Holdings, Inc. D/B/A Guy Hepner v. Sentinel Ins. Co., Ltd., No. 21-80 (2d Cir. 2021)

On 12-27-21, the Second Circuit added its name to the growing list of federal and state appellate tribunals finding that there is no first-party property coverage for business income losses arising from closure orders issued to stem the spread of COVID-19 during this pandemic.

As the Second Circuit put it, the "central question" to be answered under New York law was whether the policy provided coverage for the insured's financial losses even though the insured did not allege its closure resulted from physical damage to its property or the adjoining property of its neighbors. The Second Circuit found that the decision by the New York Supreme Court, First Department in *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4 (App. Div. 1st Dep't 2002), provided a simple, straightforward answer to the question. Business closures did not constitute physical loss or damage to property, and the Second Circuit found that "all New York courts applying New York law" have ruled that way. The Second Circuit stated: "We therefore hold, in accord with *Roundabout Theatre* and every New York state court to have decided the issue, that under New York law the terms 'direct physical loss' and 'physical damage' in the Business Income and Extra Expense provisions do not extend to mere loss of use of a premises, where there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's property."

The Second Circuit also rejected the insured's claim for coverage under the policy's civil authority provision. To recover under this provision, the insured had to show that the closure orders resulted from a risk of direct physical loss to property in the vicinity of the insured's property. The insured could not show this as matter of law because the closure orders were issued because of the risk COVID-19 posed to humans, and not out of any risk of direct physical

loss of property. Additionally, the civil authority provision contemplated that the orders prohibiting access to the insured's premises were prompted by risk of harm to neighboring premises. But the insured did not allege this, alleging instead that the closure was the direct result of the risk of COVID-19 at its property.

Indiana Repertory Theatre Inc. v. The Cincinnati Casualty Co., 21A-PL-628 (Ind. App. 2022)

The Indiana Court of Appeals rang in the New Year by issuing an opinion on 1-4-22 supporting the position taken by insurers that closure orders issued to stop the spread of the COVID-19 virus did not cause physical loss or damage under a property policy.

The Court found the New York decision in *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002), persuasive. According to the Court, the *Roundabout* business had to close because of damage at a nearby construction site, and not because of any damage to the *Roundabout* business property. The New York Court thus held that there was no lost business income coverage because the *Roundabout* insured's closure did not result from any physical loss or damage to its own property. The Indiana Court of Appeals found that the same reasoning applied in this case, as the insured had to close because of the pandemic and not because of any physical loss or damage to any of its property.

The Court further found that the insured's interpretation of "physical loss or physical damage" was unreasonable because it parsed and dichotomized the policy language. According to the Court, the insured did not consider the whole policy, as it did not reconcile its interpretation of "physical loss or physical damage" with the "period of restoration" provision of the policy, which outlines the time when coverage begins and ends based on when the covered premises is "repaired, rebuilt or replaced" or the "business is resumed at a new permanent location." Without physical alteration or impact to the insured's premises, there could be no period of restoration.

Finally, echoing the policy reasons advanced by other tribunals for upholding orders denying coverage, the Court noted the plight the insured faced from the pandemic and others like the insured worldwide who faced similar dire business consequences. Yet the Court ruled that it could not let its sympathies for the insured cause it to "ignore well-established principles of insurance contract interpretation and add provisions in the Policy that do not exist".

Terry Black's Barbecue L.L.C. v. State Automobile Mutual Ins. Co., No. 21-50078 (5th Cir. 2022)

The Fifth Circuit continued to build on this favorable precedent in the New Year with a decision issued on 1-5-22, following the lead of every Federal and State appellate tribunal to date in holding that there was no first-party property coverage for the business income losses this insured sustained because of the pandemic.

Applying Texas law, the Fifth Circuit held that the insured was not entitled to any coverage for lost business income/extra expense because it did not show that it sustained any loss of or damage to property at its premises. According to the Court, prior Texas decisional law construing these words "physical loss or damage" showed that those terms were understood to mean distinct, demonstrable physical alteration and destruction. Nothing of that nature, however, occurred to the insured's property. The Court further found that the nature of the policy itself, a commercial property policy, supported its conclusion. The business income/extra expense provision covered business interruption that was caused by loss or damage to the commercial property. The insured's claimed loss however was not about its property, but about its inability to provide dine-in services because of the closure orders issued to stem the spread of the virus. This economic loss, however, did not have any tangible effect on the property itself.

The Court also held that no coverage was owed under a restaurant extension endorsement providing coverage for the suspension of operations at the described premises due to a civil authority order resulting from the actual or alleged exposure of the

described premises to a contagious or infectious disease. According to the Court, the closure orders had to result from the insured's actual or alleged exposure to a contagious disease for this provision to apply. The Court held that this provision did not apply because the orders were not caused, even tangentially, by the insured's alleged or actual exposure to a contagious disease. The closure orders resulted instead from the global pandemic and the need to take measures to contain and prevent the spread of COVID-19.

Learning Point: In my previous summary of appellate decisions, I recommended that the policy argument articulated by the Sixth Circuit in *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021), be included in all future briefing as that policy argument goes to the very heart of why all these COVID-19 business interruption claims should be rejected by the courts. The decisions in *Dakota Girls* by another panel of the Sixth Circuit, *Nail Nook* by the Eighth District Ohio Appellate Court, *Sanzo* by the Fifth District Ohio Appellate Court, and *Indiana Repertory Theatre* by the Indiana Court of Appeals prove the wisdom of this advice, as these appellate tribunals found that policy argument crucial to their decisions. Thus, in future briefing, not only should the *Santo's* policy argument be featured prominently, but these subsequent decisions should be cited showing the growing acceptance of this policy argument by other panels of appellate jurists for rejecting these pandemic related claims for business interruption coverage. ♦

Illinois Supreme Court Permits Fetal Wrongful Death Claims Against Physicians Where The Death Resulted From A Subsequent Lawful Abortion

by ***Scott R. Shinkan***

Scott R. Shinkan
is a skilled trial lawyer focused on defending insured and self-insured clients in state and federal court litigation in Illinois and Wisconsin. He has represented physicians practicing in many branches of medicine, including obstetrics and gynecology, orthopaedic surgery, emergency medicine, internal medicine, and numerous other specialties and interdisciplinary fields. Scott has assisted with successfully defending physicians at trial and through other forms of alternative dispute resolution with exposures well into the millions.
sshinkan@clausen.com

The Illinois Supreme Court held in *Thomas v. Khory, M.D. et al.*, 2021 IL 126074, that section 2.2 of the Wrongful Death Act, 740 ILCS 180/2.2, does not bar parents from pursuing a wrongful death claim against a physician when the alleged malpractice resulted in a non-viable fetus that died as a result of a subsequent lawful abortion.

Facts

The defendant physicians performed an elective surgery on the plaintiff pregnant mother, administering medications that allegedly resulted in irreversible injury to the fetus. After the alleged injury, another physician informed the parents that the fetus would not survive to term and recommended that the pregnancy be terminated. The parents accepted, and a consensual abortion was performed. The parents filed suit and alleged that the abortion would not have occurred but for the defendants' negligence that caused injury to the fetus, and that the negligence ultimately caused the death of the fetus.

Defendants moved to dismiss, arguing that sec. 2.2 of the Wrongful Death Act, 740 ILCS 180/2.2, barred plaintiffs' claim as a matter of law, and further, that the consensual abortion was a "superseding cause" as a matter of law for which they could not be held liable. Sec. 2.2 states in pertinent part:

> . . . [¶2] There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given. . . .
>
> [¶3] There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus based on the alleged misconduct of the physician or medical institution where the defendant did not know and, under the applicable standard of good medical care, had no medical reason to know of the pregnancy of the mother of the fetus.

Analysis

The Court held that sec. 2.2 of the Wrongful Death Act did not bar the lawsuit. The Court noted that the second paragraph said nothing about barring a wrongful death action against "another" physician, *i.e.*, a physician who injures a fetus during a procedure entirely separate from an abortion, and it said nothing about an abortion being a superseding cause. Further, if the second paragraph applied to physicians

in all circumstances, it would unfairly, and possibly unconstitutionally, favor physicians over other persons. For example, it would not bar a lawsuit against a truck driver who caused injury to a fetus in an auto accident, where the mother had a subsequent lawful, consensual abortion to save her own life. Finally, the Court cited legislative history that the second paragraph was added to protect physicians performing lawful abortions—not to protect doctors who allegedly injure a fetus during a procedure, causing a subsequent abortion.

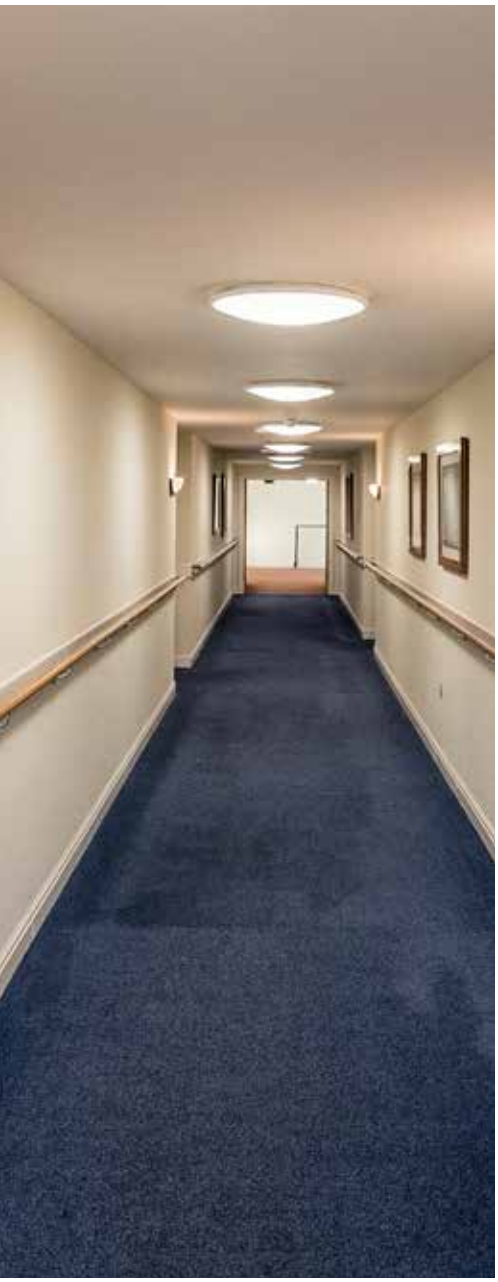
Learning Points: The Illinois Supreme Court overruled a longstanding opinion, *Light v. Proctor Community Hospital*, 182 Ill.App.3d 583 (1989), which has been utilized by defendants for decades to bar claims against physicians for fetal injury where there was a subsequent abortion. *Light* is no longer good law.

Plaintiffs in these circumstances must still adequately plead and prove causation. Plaintiffs must establish that the defendants' negligence caused the fetus to suffer a concrete injury prior to the abortion, not merely an increased risk of harm. The Thomas dissent noted that it would have found the pleading to be insufficient on causation. This leaves open the possibility of motion to dismiss for failure to plead a concrete injury and causation. Defendants should likewise consider whether the 2-622 report of reviewing healthcare physician required by Illinois law is sufficient.

Finally, the Court did not believe that the legislature intended abortion to be a superseding cause as a matter of law in all instances where a physician tortiously injures a fetus in a separate medical procedure. However, the Court did not hold that abortion is not a superseding cause in these circumstances. Abortion as a superseding cause should be raised at all stages, and if the case proceeds to trial, a sole proximate cause jury instruction should be considered. ♦

Seventh Circuit Finds A Private Cause Of Action Under FNHRA. Will SCOTUS Grant *Certiorari*?

by ***Scott R. Shinkan***



Nursing homes and insurers beware: the Seventh Circuit recently held in *Talevski v. Health & Hosp. Corp.*, 6 F.4th 713 (7th Cir. 2021), that residents and their families can pursue claims for monetary damages under 42 U.S.C. § 1983 and the Federal Nursing Home Amendments Act of 1987 ("FNHRA"), 42 U.S.C. § 1396r. This will undoubtedly impact nursing home litigation in Indiana, Illinois, and Wisconsin, the states that comprise the Seventh Circuit. Plaintiffs in these three States, and perhaps nationwide, now have a means to use the federal courts as an end-around to important state laws, like statutory caps on damages or the availability of full attorneys' fee awards. The owner of the nursing home, Health and Hospital Corporation of Marion County ("HHC") filed a petition for certiorari with the Supreme Court of the United States in late November 2021, seeking reversal of the Seventh Circuit's decision in *Talevski*. The petition remains pending.

Facts

Plaintiff filed a sec. 1983 complaint for monetary damages in federal court on behalf of her disabled husband accusing his nursing home of violations of these sections of FNHRA.

FNHRA provides comprehensive guidance to the states on the regulation and operation of nursing homes, and in return, the states receive Medicaid funding. There are two directives to nursing homes that are at issue in *Talevski*. First, "a nursing facility must protect and promote the rights of each resident, including . . . [t]he right to be free from physical or chemical restraints" subject to certain circumstances. 42 U.S.C. § 1396r(c)(1)(A)(ii). Second, a nursing facility "must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless [certain criteria are met]." 42 U.S.C. § 1396r(c)(2).

Analysis

The Decision

The Seventh Circuit reversed the decision of the Northern District of Indiana and effectively overruled federal case law in Illinois, Indiana, and Wisconsin by determining that FNHRA created private rights enforceable under sec. 1983. The Court utilized a balancing test to conclude that Congress intended these rights under FNHRA to benefit nursing home residents; that the rights they protect fall within the judiciary's interpretive competence (*i.e.*, "it does not take a medical review board to determine whether" rights to be free from chemical restraints or involuntary transfer have been violated); and that the rights are mandatory rather than precatory. The Court then held that these rights under FNHRA were presumptively enforceable under sec.

1983, and that the nursing home failed to rebut the presumption.

Petition for Writ of Certiorari

HHC petitioned the Supreme Court of the Untied States for a *writ of certiorari* to review the Seventh Circuit's opinion. *See* 2021 U.S. S. CT. BRIEFS LEXIS 4083. In asking the Supreme Court to accept the petition, HHC argued that nursing facility residents and their families should not be permitted to use sec. 1983 and FNHRA as a means of "second guessing garden-variety treatment and transfer decisions made by physicians and nursing facility administrators." HHC argued that third-parties should not be permitted to sue for monetary damages under Spending Clause legislation unless Congress has expressly authorized it, and that right is not explicit in FNHRA.

HHC raised several important policy concerns in its petition. First, it argued that FNHRA and sec. 1983 can be used by plaintiffs to circumvent important state law, such as those damages caps in medical malpractice cases. Indiana has capped damages at $1.8M (I.C. § 34-18-14-3), and Wisconsin has a cap on noneconomic damages at $750,000 (Wis. Stat. § 893.555). Indiana also has a cap on recovery of attorneys' fees at 32% (I.C. § 34-18-18-1). Filing suit pursuant to FNHRA and sec. 1983 arguably allows plaintiffs uncapped damages and virtually no limit on attorneys' fee awards. HHC also argued that private rights under FNHRA threatens the quality of care in nursing facilities, which arguably will cause rapidly increasing liability insurance rates against a backdrop of chronic underfunding.

Learning Points: *Talevski* likely will not be the end of the story. HHC noted in its Petition to the Supreme Court that three Justices, Thomas, J., Alito, J., and Gorsuch, J., concluded that "this Court made a mess of the issue" in a dissent of a denial of cert. in a prior case. 2021 U.S. S. CT. BRIEFS LEXIS 4083 at p. 17. While difficult to predict, it is likely that the Supreme Court will eventually reconsider or clarify the issue of the private rights of action under Spending Clause statutes like FNHRA.

Until then, we can expect an onslaught of federal litigation in states like Indiana, Wisconsin, and others with damages caps or other limitations not found in federal law. Arguably this was not anticipated by the states, nursing homes, or their liability insurers. If plaintiffs can craft a plausible argument that their rights under FNHRA were violated, they may be able to circumvent state statutory caps on damages and attorneys' fee awards. It is likely they will attempt these lawsuits in jurisdictions outside of the Seventh Circuit, so panel counsel throughout the country will need to be prepared to distinguish the Seventh Circuit's opinion.

There are several other enumerated rights in FNHRA besides chemical restraints and involuntary transfer, but those were not raised by the plaintiff in *Talevski*. Nursing homes must be prepared for federal lawsuits based upon all the provisions of FNHRA, and panel counsel should evaluate each complaint to see whether any such violations are arguably distinguishable based on the balancing test set forth in *Talevski*.

Talevski also has an impact on what nursing homes may have thought of as purely administrative issues. In the past, facilities faced appeals that were handled at administrative hearings. Now, the facility must consider that it may also need to defend a lawsuit for damages, which may also be expensive in terms of defense costs, awards of attorneys' fees, and potential future impact on insurance premium payments.

The nursing home in *Talevski* was owned by a government entity, so arguably the case may only apply to those government-owned nursing homes. The distinction should be raised by private nursing homes once new federal suits are filed.

The impact that *Talevski* will have on doctors that practice in nursing homes is unclear. Doctors make the decisions on chemical restraints and transfers, and they are usually independent contractors of the facilities. There is nothing in *Talevski* or FNHRA that grants a private federal cause of action against those doctors, and plaintiffs typically prefer to pursue lawsuits against the facility only for various reasons. But the nursing homes will be forced to react to private federal lawsuits that in effect are second-guessing the decisions by those doctors, which may impact their relationship with the facility and the way they practice medicine. ♦

Pain-killer: Oklahoma Limits Public Nuisance Liability

by ***Paul V. Esposito***

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

Some adages can use refinement. There's the one about the only certainties in life being death and taxes. Right with them is pain, which for most people comes sooner than the other two. It can be so cruelly relentless that its victims will do most anything to rid themselves of it.

Like taking opioids, then taking more. The overuse of prescription opioids has caused its own pain—the pain of addiction. And for many governments and health care providers, it has caused enormous financial pain they can't get on top of.

State and municipal governments are fighting back, hoping to recoup millions spent in services for the addicted. But as Oklahoma recently learned, the road to financial relief is not an easy one. *State ex rel. Hunter v. Johnson & Johnson*, 2021 OK LEXIS 60.

Facts

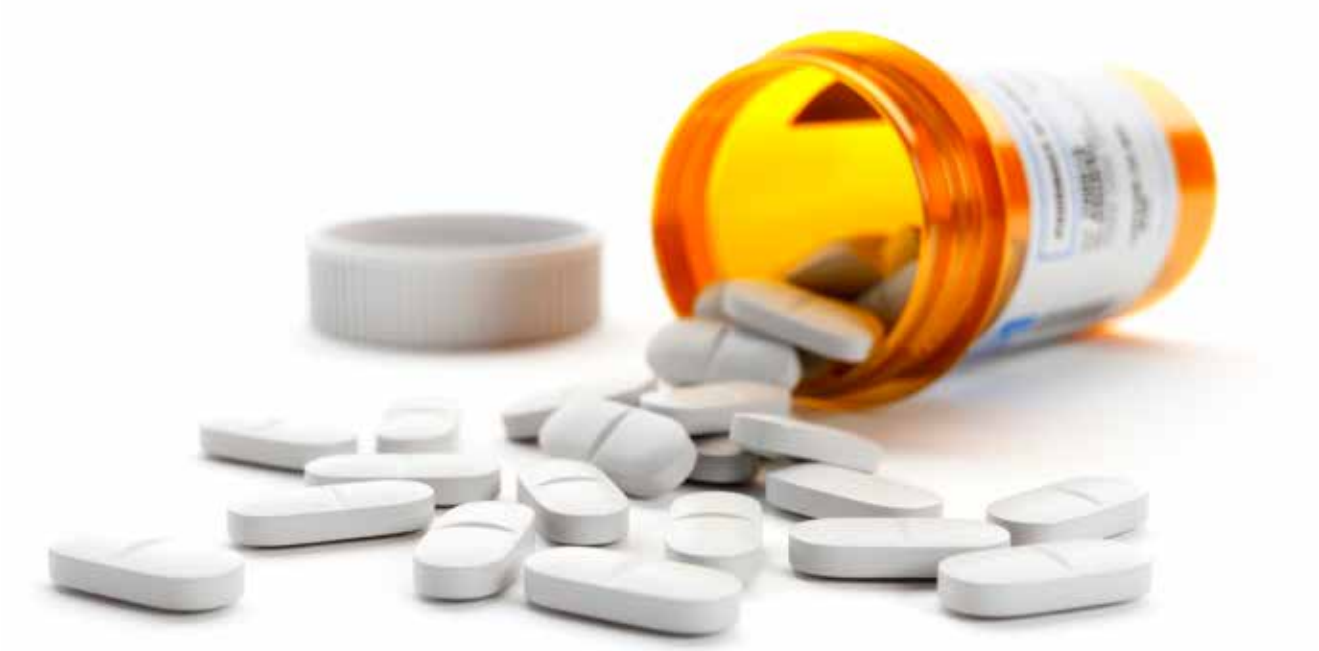
From the mid-1990s until 2015, J&J marketed a number of prescription opioid medications in Oklahoma. Although J&J only had a 3% market share, it was enough to attract the attention of Mike Hunter, the state's attorney general. He filed suit against J&J and two other manufacturers for deceptive marketing of opioids in Oklahoma. The state settled with the two others and dismissed all claims against J&J except one. The state contended that J&J's failure to warn of the dangers of opioids and its active promotion of them violated Oklahoma's public nuisance statute.

After a bench trial, the district court ruled that J&J violated the statute by conducting "false, misleading, and dangerous marketing campaigns" about prescription opioids. It ordered J&J to pay $465 million, the one-year amount needed to fund the state's abatement program. The court did not give J&J a credit for the state's settlements with the other manufacturers. Nor did the court apportion damages based on J&J's market share. Instead, it held J&J responsible to abate all harms done by all opioids, not just those sold by J&J.

In a split decision, Oklahoma's Supreme Court ruled that the district court took the public nuisance statute too far.

Analysis

The majority traced public nuisance law from its criminal-law roots to its evolution into a common law tort. Public nuisance involves conduct performed at an actor's location that harms the public, *e.g.*, creating excessive noises, emitting foul odors, obstructing public travel and navigation. Like other states, Oklahoma has codified the common law, limited to conditions that damage or annoy most or all members of a community, though not always



equally. Importantly, the statute only covers criminal or property-based conduct. The Supreme Court had never applied it to the manufacture or marketing of lawful products.

It refused to make an exception for prescription opioids. Public nuisance and product liability present two distinct claims not intended to overlap. Nuisance law is "fundamentally ill-suited to resolve claims against product manufacturers."

The court offered three reasons. First, product manufacture and distribution rarely violate a public right. Doing so requires more than aggregating the private rights of many injured people. A public right is a right to a public good shared by the public at large, *e.g.*, clean water. But despite its claim that J&J had interfered with an alleged public right of health, the state was not seeking damages for a communal injury. Allowing a public nuisance suit against products lawfully sold would be too expansive.

Second, a manufacture lacks control over a product once sold. J&J lacked control over wholesale distribution, government regulation, physician prescription, pharmacists' dispensing, and patient misuse. And it certainly lacked control over its competitors' products. Because manufacturers lack post-sale control, they cannot abate a nuisance—the remedy sought by the state against J&J. Even if J&J paid for the state's abatement plan, it could not abate the problem because the problem is not the opioids themselves. The problem is their distribution and use.

Third, creating public nuisance liability would make manufacturers perpetually liable for their products. Public nuisance statutes can sidestep statutes of limitations, which can make manufacturers liable for distribution of products decades earlier.

In the end, the Court feared that extending public nuisance law to lawful products would create a monster allowing nuisance law to swallow up tort law. "[W]ill a sugar manufacturer or a fast food industry be liable for obesity, will an alcohol manufacturer be liable for psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution." Under the *J&J* decision, not in Oklahoma.

Learning Point: The *J&J* decision is certainly welcome news for a variety of manufacturers of legal products. But it's also good for society as a whole. Left unchecked, nuisance law can be so far reaching that unexpected defendants can be hit. If a car manufacturer may be held liable under public nuisance law for creating a health hazard, what about a car user? May a state sue parents for feeding their children foods that contribute to the obesity problem? Nuisance law can become a problem far more painful than anyone ever imagined. The Oklahoma Supreme Court wisely let traditional tort law govern tort damages. Here's hoping that other states follow the Court's lead. ♦

COLLATERAL SOURCE

UNINSURED MOTORIST PAYMENTS ARE NOT COLLATERAL SOURCES TO BE DEDUCTED FROM JURY VERDICT

Ellison v. Willoughby, 2021 Fla. App. LEXIS 13832 (Fla. App.)

Defendant unsuccessfully requested that trial court set off $4 million in settlement proceeds against $30 million jury verdict under set off statute. ***Held:*** Affirmed. Purpose of set off statute is to prevent windfall to plaintiff by way of double recovery. ***Further held:*** Insurer's settlement proceeds did not fall within statutory definition of "collateral sources" under collateral source statutory provision.

DAMAGES

STATE'S SETTLEMENT WITH CIGARETTE MANUFACTURER DOES NOT PRECLUDE PRIVATE SUIT FOR PUNITIVE DAMAGES

Laramie v. Philip Morris USA Inc., 173 N.E.3d 731 (Mass.)

Wife of deceased smoker brought wrongful death action seeking punitive damages. ***Held:*** Claim not barred by Massachusetts' settlement of its own claim against manufacturer for recovery of smoking-related costs paid by State. Claim preclusion requires an identity or privity of parties in the two actions. State law authorized punitive damages to punish for harm caused to personal interests of a party. Settlement agreement did not cover private actions for individual injuries. The two suits raised different causes of action seeking different remedies.

EMPLOYMENT DISCRIMINATION

LEGITIMATE NON-DISCRIMINATORY REASONS FOR DISCHARGE ARE NOT PRETEXT FOR ILLEGAL DISCRIMINATORY BIAS

City of Hartford Police Dep't v. Commiss. on Human Rights & Opport., AC 43420 (Conn. App.)

Plaintiff's Vietnamese employee asserted illegal discriminatory practices following termination of his job as a probationary police officer. The employee claimed that, after he indicated he would file a grievance because a sergeant questioned his ancestry and language skills, other sergeants began complaining about his performance, leading to his termination. The trial court and commission both held the evidence gave rise to an inference of discrimination. ***Held:*** Reversed. There was insufficient evidence to support a causal connection between the sergeant's remarks and the decision to terminate or the sergeant playing any role in the termination decision.

PLAINTIFF STATES CLAIM BY ALLEGING HE WAS DENIED EMPLOYMENT BECAUSE OF CONVICTION

Sassi v. Mobile Life Support Servs., Inc., 37 N.Y.3d 236 (N.Y.)

Trial court ruled that plaintiff did not adequately allege that defendant, plaintiff's former employer, violated the antidiscrimination statutes based on the denial of his application for employment following the completion of his criminal sentence. ***Held:*** Reversed. Plaintiff's allegation that, after he completed his sentence, he applied for reemployment in position he previously held, and defendant denied application solely due to his conviction, was sufficient to state a claim.

EVIDENCE

EXPERT'S TESTIMONY MUST BE RELEVANT TO CASE FACTS

People v. Powell, 2021 NY Slip Op 06424 (N.Y.)

At criminal trial, defendant sought to have expert on false confessions testify on his behalf, but trial court refused to allow it. ***Held:*** Trial court did not abuse its discretion in precluding defendant's proffered expert on false confessions as it would not have aided the jury. Although the expert was an impressively credentialed researcher, she did not explain how her testimony was at all relevant to the circumstances presented by defendant's interrogation.

DENIAL OF *FRYE* HEARING REVERSIBLE ERROR

People v. Wortham, 2021 NY Slip Op 06530 (N.Y.)

Defendant sought to challenge evidence derived from forensic statistical tool via *Frye* hearing but trial court denied the request. ***Held:*** Trial court abused its discretion in denying motion for *Frye* hearing with respect to admissibility of evidence derived from forensic statistical tool. Moreover, error was not harmless as that was strongest evidence tying defendant to contraband and evidence of guilt was not overwhelming without the DNA evidence.

FIRST-PARTY PROPERTY

APPRAISAL PREMATURE FOR SUPPLEMENTAL CLAIM REQUIRING SEPARATE COVERAGE DETERMINATION

Am. Coastal Ins. Co. v. Ironwood, Inc., 2021 Fla. App. LEXIS 14274 (Fla. App.)

Insurer issued payments for roof repairs caused by Hurricane Irma. Insured filed additional claims for damage to doors and windows but did not provide documentation requested by insurer and invoked appraisal before insurer made coverage determination. ***Held:*** Where insurer reasonably disputes insured's compliance with policy's post-loss conditions, question of fact is created that must be resolved by trial court before compelling appraisal.

LODESTAR AMOUNT MUST BE SUPPORTED BY EVIDENCE HOURS BILLED WERE REASONABLE

Citizens Prop. Ins. Corp. v. Casanas, 2021 Fla. App. LEXIS 14270 (Fla. App.)

Insureds sued homeowners' insurer for underpayment of alleged damage to their roof during Hurricane Irma. Matter settled without significant litigation activities. Trial court concluded lodestar was $70,800 and added a 1.8 multiplier for a total fee of $127,440, which was nearly five times the amount of parties' $35,000 settlement. ***Held:*** Reversed. Multiplier should not be awarded if there is no evidence that the relevant market required a contingency fee multiplier to obtain competent counsel.

SEWAGE BACK UP ALSO EXCLUDED UNDER WATER-BACKUP EXCLUSION

AKC, Inc. v. United Spec. Ins. Co., 2021 Ohio LEXIS 1973 (Ohio)

Commercial policy excluded coverage for "water that backs up or overflows from a sewer, drain, or sump." ***Held in a split decision:*** Water backing up from sewer will contain sewage, and average person would understand it. Exclusion was not ambiguous. Insured could have purchased endorsement to remove exclusion. Dissent contends exclusion was ambiguous.

INSURANCE LITIGATION

INSURER NOT ENTITLED TO IMMUNITY DEFENSE UNDER TORT CLAIMS ACT

Berry v. Commerce Ins. Co., 2021 Mass. LEXIS 587 (Mass.)

Police officer injured fellow officer by recklessly driving pick-up truck while returning from lunch break during firearms exercise. ***Held:*** Insurer not entitled to immunity under Tort Claims Act on grounds that driver within scope of employment. Erratic driving was outside officer's duties. His conduct was not motivated to serve employer. Different considerations apply under workers' compensation statute

LIABILITY INSURANCE COVERAGE

UNINSURED-PREMISES EXCLUSION BARS COVERAGE FOR MISREPRESENTATION CLAIM INVOLVING INSURED'S FORMER PREMISES

Norfolk & Dedham Mut. Fire Ins. Co. v. Norton, 2021 Mass. App. LEXIS 125 (Mass. App.)

Insureds sued for misrepresentations as to sale of former home sought coverage under homeowners' policy covering current home. ***Held:*** Uninsured-premises exclusion barred coverage arising out of uninsured properties. At time of flooding giving rise to claim, insureds no longer owned the property. Fact insurer covered new home did not entitle insureds to defense and indemnity.

NO HOMEOWNER'S COVERAGE WHERE INSURED'S DAUGHTER'S DEATH DID NOT RESULT FROM ACCIDENT

Dostal v. Strand, 2021 Wisc. App. LEXIS 937 (Wisc. App.)

Mother sued father's insurance carrier for coverage due to their infant daughter's death while under father's care. Father claimed death was caused by accidental fall. Medical examiner found death was caused by blunt force trauma. Jury in criminal trial rejected argument that insured's actions were accidental and convicted him of second-degree reckless homicide, finding he was aware his conduct created unreasonable and substantial risk of harm to daughter. ***Held:*** Policy did not provide coverage as infant's bodily injuries and death did not result from an occurrence.

LIMITATIONS OF ACTIONS

FORMER PATIENT'S MEDICAL MALPRACTICE SUIT BARRED BY STATUTE OF REPOSE

Blackford v. Welborn Clinic, 172 N.E.3d 1219 (Ind.)

Former patient filed action for misdiagnosis more than five years after clinic—a business trust—surrendered authority to conduct business. ***Held:*** Business Trust Act provision allowing trust to prosecute and defend claims filed within five years after trust surrendered authority operates as statute of repose. Although clinic failed to timely advise patient of misdiagnosis, clinic did not actively conceal misdiagnosis. Equitable tolling ended when physician-patient relationship ended—date clinic surrendered its authority.

EMTALA DOES NOT PREEMPT TRIAL COURT RULES

Miller v. Patel, 174 N.E.3d 10 (Ind.)

After hospital release, grandmother's mentally ill grandson shot her husband. ***Held:*** Federal Emergency Medical Treatment and Labor Act does not preempt adding new claim after EMTALA's two-year limitations period expired. There was no express preemption. State rules did not impose an obstacle to Congress's objectives. Federal and state provisions on raising new claims were nearly identical. Federal law did not occupy entire regulatory field as to emergency care and treatment.

NEGLIGENCE

APARTMENT OWNER'S FAILURE TO CHECK UPDATED WEATHER REPORT CREATED QUESTION OF FACT IN SLIP-AND-FALL CASE

Aberdeen Apts. II, LLC v. Miller, 2021 Ind. App. LEXIS 352 (Ind. App.)

Tenant's girlfriend slipped on icy sidewalk in apartment complex. ***Held:*** Owner failed to establish lack of constructive knowledge of ice. Owner's employees failed to use technology to get updated weather report in winter months. They offered no evidence of industry standards as to needed frequency of weather monitoring.

STORE OWNER NOT LIABLE FOR INJURY CAUSED BY DEFECTIVE BOX

Griffin v. Menard, Inc., 2021 Ind. LEXIS 636 (Ind.)

Patron injured when bottom of sink box opened because of loose staples. ***Held in a split decision:*** Store lacked actual or constructive notice of problem. Store had no prior notice of defective box or problems with other boxes. It owed no duty to impose certain policies, conduct certain inspections, or keep records of them. Problem would not have appeared during front-facing of boxes. ***Further held:*** Even if *res ipsa loquitor* applied in premises liability cases, patron failed to show store's exclusive control of box. Dissent argued that majority weakened the summary judgment standard.

LANDOWNER OWES NO DUTY TO TRAVELING PUBLIC TO REMOVE VISUAL OBSTRUCTIONS WHOLLY ON LANDOWNER'S PROPERTY

Reece v. Tyson Fresh Meats, Inc., 173 N.E.3d 1031 (Ind.)

Motorcyclist was seriously injured in collision at intersection partially obscured by grass on landowner's property. ***Held:*** Landowner has no duty to passing motorists to remove natural or artificial obstructions on its property. Rule allows for easy application and is logical extension of precedent. It is subject to legislative change and is inapplicable if motorists contact

conditions on land. Concurrence would have imposed a duty for unreasonable visual obstructions.

NEGLIGENCE/ MEDICAL MALPRACTICE

COURT'S INQUIRY ON NATURE OF ACTION LIMITED TO COMPLAINT'S FACTUAL ALLEGATIONS, WHICH COURT MUST ACCEPT AS TRUE

Torres v. Kendall Healthcare Grp., Ltd., 2021 Fla. App. LEXIS 13843 (Fla. App.)

Plaintiff allegedly fell from wheelchair while undergoing diagnostic imaging at defendant's medical facility because attendant failed to properly secure brakes. Trial court dismissed the negligence action, ruling the complaint sounded in medical malpractice and that plaintiff failed to comply with mandatory pre-suit requirements and the malpractice statute of limitations. ***Held:*** Reversed. Dismissal not warranted at this juncture because plaintiff alleged sufficient facts to plead action as one sounding in negligence.

PRIVATE RIGHTS OF ACTION

NO PRIVATE RIGHT OF ACTION FOR COPY CHARGE VIOLATION

Ortiz v. Ciox Health LLC, 2021 NY Slip Op 06425 (N.Y.)

Plaintiff had made a written request to defendant hospital for paper copies of her medical records, asking that, pursuant to Public Health Law § 18(2)(e), the hospital not charge her in excess of $0.75 per page. Nonetheless, she was charged $1.50 per page. She sued and the Second Circuit asked the Court of Appeals whether plaintiff could maintain an action for the violation. ***Held:*** An implied private right of action does not exist for violations of Public Health Law § 18(2)(e). A plenary private right of action would be inconsistent with the statutory scheme surrounding the cap.

PROVISIONAL REMEDIES

IRREPARABLE HARM STANDARD APPLIES TO REQUEST TO ENJOIN ONGOING ADMINISTRATIVE DISCIPLINARY PROCEEDINGS

United Public Serv. Employees Union, Cops Local 062 v. Hamden, AC 43739 (Conn. App.)

Plaintiff union sought to enjoin defendants from proceeding with disciplinary hearing against police officer until completion of a pending criminal prosecution against the officer. The trial court granted plaintiff's application for a temporary injunction after applying a balancing of the equities test. ***Held:*** Reversed. The proper standard for reviewing a request to enjoin ongoing administrative disciplinary proceedings is the standard for adjudicating a temporary injunction. The trial court made no findings as to whether plaintiff would suffer irreparable harm in the absence of injunctive relief.

SUBJECT MATTER JURISDICTION

POSSESSORY INTEREST REQUIRED IN COMMENCING REAL PROPERTY ACTION

Alfred J. Kloiber et al. v. Linda Jellen et al., AC 43382 (Conn. App.)

Plaintiffs sought injunction and damages from defendants for trespass, private nuisance, common-law negligence and statutory negligence in connection with a property dispute between the parties concerning surface water runoff onto real property located directly between the parties' properties. The trial court rendered judgment in defendants' favor. ***Held:*** Affirmed. Plaintiffs never owned, occupied, resided at, or had a possessory interest in, the subject property and, therefore, lacked standing. The action was dismissed for lack of subject matter jurisdiction.

TORTS

MEDICAL PROVIDERS OWE DUTY TO WARN FAMILY OF IMMINENT DANGER FROM FAMILY MEMBER

Coplan v. Miller, 2021 Ind. App. LEXIS 350 (Ind. App.)

After month of agitated behavior and multiple trips to hospital, youth killed his grandfather. ***Held:*** Medical providers owed duty to warn family of imminent danger from troubled youth. Although youth failed to communicate to providers an actual threat, totality of youth's conduct during month provided sufficient evidence of imminent danger to family. Fact family was aware of dangers did not negate providers' duty to take action. ***Further held:*** Though physician's assistant was not included in warning-statute, he owed common law duty to warn family.

AMAZON NOT LIABLE FOR PRODUCT SOLD, ASSEMBLED THROUGH WEBSITE

Wallace v. Tri-State Assembly LLC, 2021 NY Slip Op. 06664 (N.Y. App. Div. 1st Dep't)

Plaintiff's father purchased a bicycle from a China-based company through Amazon. The father elected to have the bicycle assembled by a co-defendant that offers its assembly services on Amazon and was an Amazon-approved service provider. Plaintiff fell because the handlebars loosened while he was riding it. ***Held:*** Amazon could not be held liable for injury caused by the electric bicycle.

TRIAL PRACTICE

NEW TRIAL WHERE PRECLUDED EVIDENCE MAY HAVE AFFECTED OUTCOME

Andrea Ulanoff v. Becker Salon, LLC, et al., AC 42834 (Conn. App.)

Plaintiff sued defendants, a salon and one of its owners, for injuries sustained when she walked into the salon's glass entryway doors. Defendants successfully precluded a photograph of the salon entrance obtained from the salon's website, which depicted the glass doors without any signage or handles. Defendants claimed the photograph, taken after the date of the accident, was irrelevant and unduly prejudicial as it had been photo-shopped to remove signage and door handles. At trial, one of the plaintiff's witnesses was also precluded from testifying as to whether the salon doors had signage or handles prior to plaintiff's accident. ***Held:*** Reversed. The precluded photograph and testimony were relevant as they went to the appearance of the salon's doors, which was central to plaintiff's case. Whether the photograph had been photo-shopped and the extent to which it may have been altered went not to its admissibility but weight.

VENUE

VENUE OPTIONS MORE LIMITED FOR INDIVIDUALLY-OWNED BUSINESSES

Lividini v. Goldstein, 37 N.Y.3d 1047, 176 N.E.3d 690 (N.Y.)

In podiatric malpractice action, defendant successfully moved to change venue from Bronx County because, although he did some work in Bronx County, his residence and the principal office were not located there. ***Held:*** Affirmed. Defendant's actual residence and principal office were in Westchester County and CPLR 503(d) and the venue statute do not deem an individually-owned business a resident of every county where it has an office or transacts business.

UM/UIM

COVERED AUTO IS NOT AN UNINSURED MOTOR VEHICLE

Nash v. Progressive Univ. Ins. Co., 2021 Wisc. App. LEXIS 1040 ((Wisc. App.)

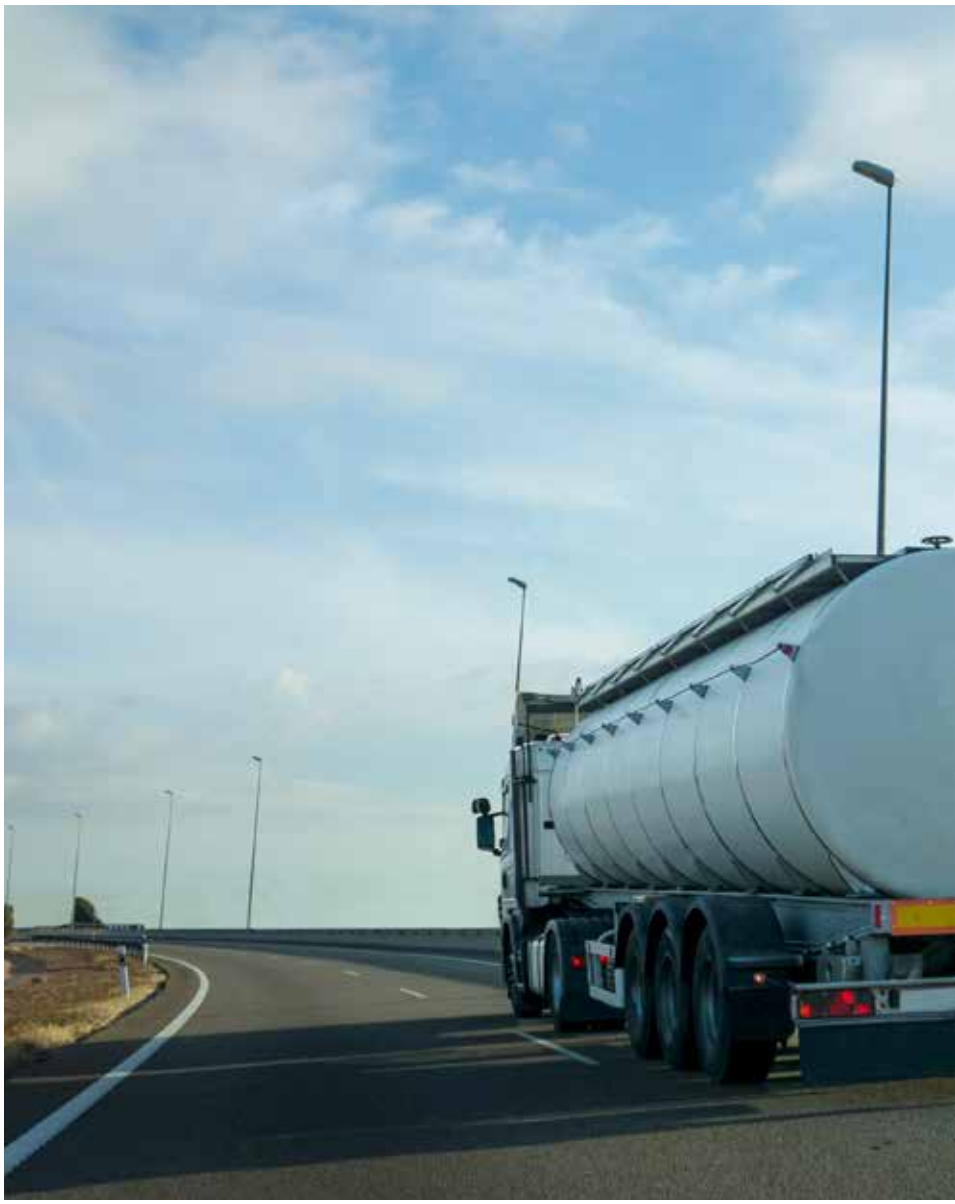
Plaintiff claimed he should be covered under uninsured motorist provision of his car insurance policy because his passenger, who is uninsured, grabbed steering wheel while car was in motion, causing crash. ***Held:*** Affirmed. Uninsured motorist coverage does not apply to covered auto involved in accident.

WORKERS' COMPENSATION

CHAIN OF CAUSATION BETWEEN DECEDENT'S COMPENSABLE INJURIES AND DEATH REQUIRED FOR SURVIVORSHIP BENEFITS

Barbara Orzech v. Giacco Oil Company, et al., AC 43941 (Conn. App.)

Plaintiff's deceased spouse slipped while delivering oil to one of its customers. Spouse filed a Workers' Compensation claim relating to the compensability of a knee replacement surgery but died prior to conclusion of the hearings. Plaintiff filed a claim for survivorship benefits. The commissioner and board determined the deceased spouse had died by suicide due to depression stemming from the work injuries. Defendants appealed, arguing that plaintiff's spouse's consumption of an excessive amount of alcohol and medication prior to his death constituted a superseding cause that broke the chain of causation between the work incident and death. ***Held:*** Decedent's manner of death, a suicide from acute intoxication, was an act not untethered to decedent's compensable injuries or the depression he thereafter developed.



Clausen Miller P.C.

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

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

27285 Las Ramblas
Suite 200
Mission Viejo, CA 92691
Telephone: (949) 260-3100
Facsimile: (949) 260-3190

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

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

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

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

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

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

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

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

marketing@clausen.com
clausen.com

Clausen Miller International:

CMI CLAUSEN MILLER INTERNATIONAL

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

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

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