CM REPORT

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2022 • Vol. 1

Illinois Appellate Court Issues Highly Favorable Decision For Insurance And Defense Industry

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CLAUSEN COVERAGE CARES: *Team CCC Runs For A Great Cause!*

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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FEATURES

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ARTICLES

Illinois Appellate Court, Fourth District, Issues Highly Favorable Decision For Insurance And Defense Industry Regarding The Enforcement Of Arbitration Provisions

by ***Melinda S. Kollross***

The recent published decision in *Mason v. St. Vincent's Home, Inc.*, 2022 IL App (4th) 210458, 2022 Ill. App. LEXIS 43, provides mandatory precedent in Illinois and persuasive precedent elsewhere for the insurance and defense industry to enforce arbitration provisions, especially in a nursing home or long-term care facility context.

Facts

Plaintiff sought to have the decedent admitted to defendants' nursing home on December 11, 2018, and in connection with having her admitted, plaintiff signed numerous documents including an admissions agreement, which listed 12 required documents. Those documents included a contract for services and a power of attorney addendum. The contract for services provided that in the event of the decedent's death, the contract terminated automatically. The contract for services also contained an arbitration clause governed by the Federal Arbitration Act and covered any claim related to the quality of the healthcare services existing or arising between the decedent and defendants. Plaintiff also signed a power of attorney addendum on December 11, 2018, that he had the power of attorney for his mother for healthcare. Decedent was a resident from December 12, 2018, thru the date of her death on October 3, 2019.

Plaintiff brought a wrongful death, negligence, and Nursing Home Care Act (Care Act) action for injuries the decedent allegedly suffered while in the care of defendants at the nursing home. Defendants moved to compel arbitration. The trial court separated the claims, staying proceedings on the wrongful death claim and compelling arbitration on the negligence and Care Act claims.

Plaintiff appealed raising a variety of arguments to invalidate the arbitration clause, but the Appellate Court rejected each one of plaintiff's contentions.

Analysis

Standard of Review

Plaintiff initially argued that the entire trial court decision was subject to *de novo* review, meaning the appellate court could substitute its judgment for the trial court. The Appellate Court rejected that contention, holding that a *de novo* standard of review applied only to contract construction and whether the arbitration provision was unconscionable; the rest of the trial court's decision to compel arbitration could only be reviewed for an abuse of discretion because the trial court came to its conclusion upon a review of evidentiary materials which led it to make certain fact findings supporting arbitration.

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Unconscionability

Plaintiff began his assault on the arbitration clause by claiming it was procedurally and substantively unconscionable. The Appellate Court rejected those claims, first finding that the clause was not procedurally unconscionable because it was in its own section of the contract and clearly labeled "ARBITRATION;" it was not hidden in the contract and used straightforward language that the parties waived the right to a jury trial; and the circumstances of the signing did not suggest coercion or deception. As to substantive unconscionability, the Court found that the clause applied to a whole gamut of claims, such that it could not be considered narrow in scope as plaintiff contended. According to the Court, the only claims exempted from the arbitration provision were ones subject to administrative agency proceedings, so that the provision was not one sided as plaintiff claimed.

Authority to Execute

Plaintiff also, rather desperately, attacked his own authority to execute the contract for his mother, claiming he did not have a power of attorney at the time of execution. But the Appellate Court found that there was sufficient evidence in the record showing that plaintiff did have a valid power of attorney, such that the trial court could not be said to have abused its discretion in holding that plaintiff had the requisite authority to execute the contract containing the arbitration provision.

Contract Termination Upon Death

Plaintiff also sought to invalidate the arbitration clause by arguing that the nursing home contract, which included the arbitration clause, terminated by its own terms upon decedent's death. Plaintiff asserted this had to be the case absent any "survival" language in the contract holding that the arbitration provision remained in effect and applied to claims that had accrued before decedent's death in an action brought after death. The Appellate Court was not impressed with plaintiff's argument. The Court found that *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, 976 N.E.2d 344, was instructive on this point because there, the Illinois Supreme Court explained that a Care Act claim that had accrued prior to a decedent's death and was brought in a Survival action after death was subject to arbitration. While the facts in *Carter* did not suggest the arbitration agreement was part of another contract with a termination upon death clause like the one in this case, the Appellate Court did not find that controlling. Instead, the Court found it significant that, even with a termination upon death clause, the contract including the arbitration provision would still have been valid when the cause of action accrued, and further, that the language of the arbitration clause did not suggest it was inapplicable to claims that accrued before the decedent's death but were brought after death. Thus, plaintiff here was bound to arbitrate the claims brought pursuant to the Survival Act.

Learning Points: Clausen Miller partner **Kathleen Klein** and associate **Vanessa Mannings** won the order compelling arbitration in the trial court. I briefed and argued *Mason* to the Illinois Appellate Court. We are pleased to deliver this important decision to our friends in the insurance and defense industry.

These are my three "takeaways" on *Mason*'s precedential importance:

1. *Mason* directly holds that an arbitration provision in a nursing home contract containing a termination upon death clause requires arbitration of claims brought against the nursing home pursuant to the Survival Act. This answer had been suggested in *Carter*, 2012 IL 113204, 976 N.E.2d 344, but not directly answered. The *Mason* decision now provides that direct answer in favor of arbitration.

2. *Mason* contains an extensive discussion and analysis concerning alleged procedural and substantive unconscionability regarding an arbitration provision in a nursing home admittance/residency contract. The opinion explains and clarifies Illinois law defining acceptable content and procedure for achieving enforceable arbitration provisions, and thus will be useful to those drafting, executing, evaluating, and litigating arbitration provisions in Illinois.

3. *Mason* explains the law concerning the proper standard of review where a trial court makes factual findings in granting a motion to compel arbitration. *Mason* makes clear that where the trial court has considered supporting materials and made factual determinations in granting the motion to compel arbitration, a reviewing court should only review the decision to compel arbitration for an abuse of discretion. ♦

CLAUSEN MILLER WELCOMES ILLINOIS APPELLATE COURT CANDIDATE HONORABLE DEBRA WALKER ON INTERNATIONAL WOMEN'S DAY

On March 8, 2022—International Women's Day—Clausen Miller proudly hosted its former partner and 14-year Cook County Circuit Court Judge **Debra Walker** for a luncheon meet and greet. After a glowing introduction from Clausen Miller President **Dennis Fitzpatrick** and Appellate Practice Group Chair **Melinda Kollross**, both of whom worked with Deb during her 1996-2008 tenure at Clausen Miller, Deb sat down for an informal conversation with the firm's attorneys and support staff. She chatted with the standing-room only crowd about what she looks to bring to the Illinois Appellate Court, First District, including her outstanding qualifications, experience, and aspirations for the bench. Deb fielded questions from many attendees, and shared her perspective on the court and achieving work life balance. Noting her roles as a wife, mother, law firm partner, judge, educator, speaker, representative, and leader of numerous organizations, Deb reiterated the maxim that "women can have it all—just not at the same time." A perfect sentiment for this International Women's Day and Deb's run for the Illinois Appellate Court.

Super Lawyer Appellate - 2022

Melinda S. Kollross

Edward M. Kay

Super Lawyer Insurance Coverage - 2022

Amy R. Paulus

Don R. Sampen

Super Lawyer Civil Litigation - 2022

Kimbley A. Kearney

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Rising Star Civil Litigation - 2022

William C. Dickinson

Melinda S. Kollross
Appellate

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

Edward M. Kay
Appellate

Ed is a Clausen Miller senior partner in the Appellate Practice Group. He is rated AV® Preeminent™ by Martindale-Hubbell and is a Fellow in the prestigious American Academy of Appellate Lawyers. Ed has over 30 years experience in trial monitoring and post-trial/appellate litigation which he regularly brings to bear in significant cases nationwide. Ed has prosecuted over 500 appeals nationwide.

Amy R. Paulus
Insurance Coverage

Amy is the Liability Coverage and Reinsurance Practice Group Leader, a senior shareholder and member of the Board of Directors of Clausen Miller. Amy has built a national reputation in all areas of liability insurance coverage law, professional liability, employment practices, transportation, claims handling issues and best practices, bad faith, excess insurance, intellectual property, cyber losses, and reinsurance matters and arbitrations. Demonstrating her commitment to, and deep understanding of, the insurance industry, Amy is a CPCU (Chartered Property Casualty Underwriter). She is also AV® Preeminent™ rated by Martindale-Hubbell. Her AV® rating is a reflection of her expertise, experience, integrity and overall professional excellence. Amy has earned designations as a Super Lawyer, Leading Lawyer, Top Women Attorneys, and was named a Top Civil Defense Lawyer in Illinois. In addition, Amy is a Fellow of the prestigious Litigation Counsel of America Trial Lawyer Society.

Kimbley A. Kearney
Civil Litigation: Defense

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

Don R. Sampen
Insurance Coverage

Don has over 30 years of trial and appellate experience in various areas, including insurance coverage and commercial litigation. Don is a *magna cum laude* graduate of Northwestern University College of Law, where he was Executive Editor of the *Northwestern Law Review*, and is currently an Adjunct Professor at Loyola University College of Law teaching a course in Insurance Law. Don is also a prolific writer, authoring articles and book chapters in various areas of the law, including antitrust and whistleblower litigation. He also writes a column in the *Chicago Daily Law Bulletin* which appears twice monthly on insurance coverage matters. He has maintained an AV® Preeminent™ rating (highest possible peer review rating for legal ability and ethical standards) with Martindale-Hubbell for 25 years.

William C. Dickinson
Civil Litigation: Defense

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

CM APPELLATE PRACTICE GROUP CHAIR MELINDA KOLLROSS DISCUSSES U.S. SUPREME COURT PRACTICE AT DUPAGE COUNTY BAR ASSOCIATION 2022 MEGA MEETING

Shareholder **Melinda Kollross**, Chair of Clausen Miller's Appellate Group, was one of three panelists presenting at the 2022 DuPage County Bar Association (DCBA) CBA Mega Meeting on Friday, March 4, 2022 (via Zoom). She was part of a distinguished panel addressing written advocacy before the United States Supreme Court.

Webinar One

Procedures, Practice Pointers, & Winning Strategies When Your Case is Headed to the U.S. Supreme Court—Joel Bertocchi, Akerman LLP, Lawrence Ebner, Atlantic Legal Foundation, and **Melinda Kollross**, Clausen Miller P.C.

This program consisted of a panel of three U.S. Supreme Court practitioners discussing a wide range of topics for pursuing an appeal before the nation's highest court. The panel discussions included both procedural topics of rules and guidelines for filings so that participants are able to navigate through the complex process for filings, as well as strategic topics such as when to file and when not to file in certain steps in the process. Participants were given the opportunity to have their questions answered from practitioners with decades of experience before the Court. (1.5 MCLE Credits)

CARL M. PERRI NAMED MANAGING PARTNER OF CLAUSEN MILLER'S NEW YORK AND NEW JERSEY OFFICES

Clausen Miller P.C. is pleased to announce that shareholder **Carl M. Perri** has been named Managing Partner of the firm's New York and New Jersey offices, and will oversee the Firm's day-to-day operations at these offices.

"Carl is a consummate law-firm leader, an accomplished member of our Firm's management team, and a highly skilled director in all firm operations", noted Clausen Miller President **Dennis Fitzpatrick**. Mr. Fitzpatrick stated that "more important than all these qualities, Carl is a deeply dedicated, respected, and valued teammate in our Clausen Miller Family." Mr. Fitzpatrick thanked the outgoing Managing Partner **Tyler Lory** for his commitment and accomplishments while Mr. Lory ran the New York and New Jersey Offices these past years.

Mr. Perri has held various leadership positions at Clausen Miller throughout his long career at the Firm. Mr. Perri currently serves as a Member of the Firm's Board of Directors and has served on all major Firm management committees.

In addition to his new managerial duties, Mr. Perri will continue to focus his law practice on all aspects of professional liability and casualty defense litigation, where he has gained a reputation as one of the most outstanding advocates in the insurance and defense industries. Carl is well-known to his clients as a talented litigator, trusted advisor, and caring friend.

Mr. Perri commented: "I am honored and humbled to succeed Tyler Lory as Managing Partner of Clausen Miller's New York and New Jersey offices. I am excited to build on Tyler's record of accomplishments for our New York and New Jersey offices, as well as our Firm as a whole."

About Clausen Miller P.C.

Clausen Miller is an insurance and defense law firm recognized as one of the top 10 Insurance Practice firms in the nation. Clausen Miller has offices in Chicago, Illinois; New York, New York; Orange County and San Francisco, California; Florham Park, New Jersey; Michigan City, Indiana; Appleton, Wisconsin; Stamford, Connecticut; Tampa, Florida; and London, England with affiliates located in Belgium, France, and Italy. Clausen Miller represents large commercial and personal lines insurance carriers, including reinsurers, throughout the United States and in Europe. Clausen Miller's attorneys generally practice in all areas of Insurance Coverage, all areas of Professional Liability and Casualty Defense, Subrogation, and Appeals.

MELINDA KOLLROSS COVID-19 ARTICLE PUBLISHED IN *LAW360*

CM Appellate Practice Group Chair **Melinda Kollross** recently published an article in *Law360* entitled "ILL COVID Rulings Correctly Adopt Physical Loss Standard." For a copy of the article, please contact Melinda at **mkollross@clausen.com** or go to **https://www.linkedin.com/feed/update/urn:li:activity:6915765207998808064/**.

CLAUSEN COVERAGE CARES: *TEAM CCC RUNS FOR A GREAT CAUSE!*

On February 27, 2022, Clausen's **Liability Coverage Group** kicked off its Clausen Coverage Cares initiative by supporting the No Frills Fun Run in Elmhurst, Illinois. The No Frills run is a grass roots charity (**www.nofrillsfunrun.org**) which raises money for local families to assist with healthcare costs or other extenuating circumstances. In its 11th year, the group pays out 100% of the proceeds (with "no frills") to the recipients. This year's event included over 500 registered runners and a post-race party to benefit three Elmhurst families. **Team Clausen Coverage Cares** proudly sported thirteen participants, including three CM partners, who walked or jogged a combined total of over 50 miles (in the snow)! It was a beautiful morning to make a difference in the lives of others—as a team.

Clausen Miller's liability coverage group is committed to donating time and talent to improve our communities, one small step at a time. If you or your colleagues would like to partner with Clausen Coverage Cares for a future event, please contact our Team Leaders **Amy Paulus** (**apaulus@clausen.com** /312-606-7848) or **Michelle Valencic** (**mvalencic@clausen.com**/312-606-7905). Clausen Coverage Cares welcomes the opportunity to partner with clients and business associates to advance charitable goals that are important to you. Join us!

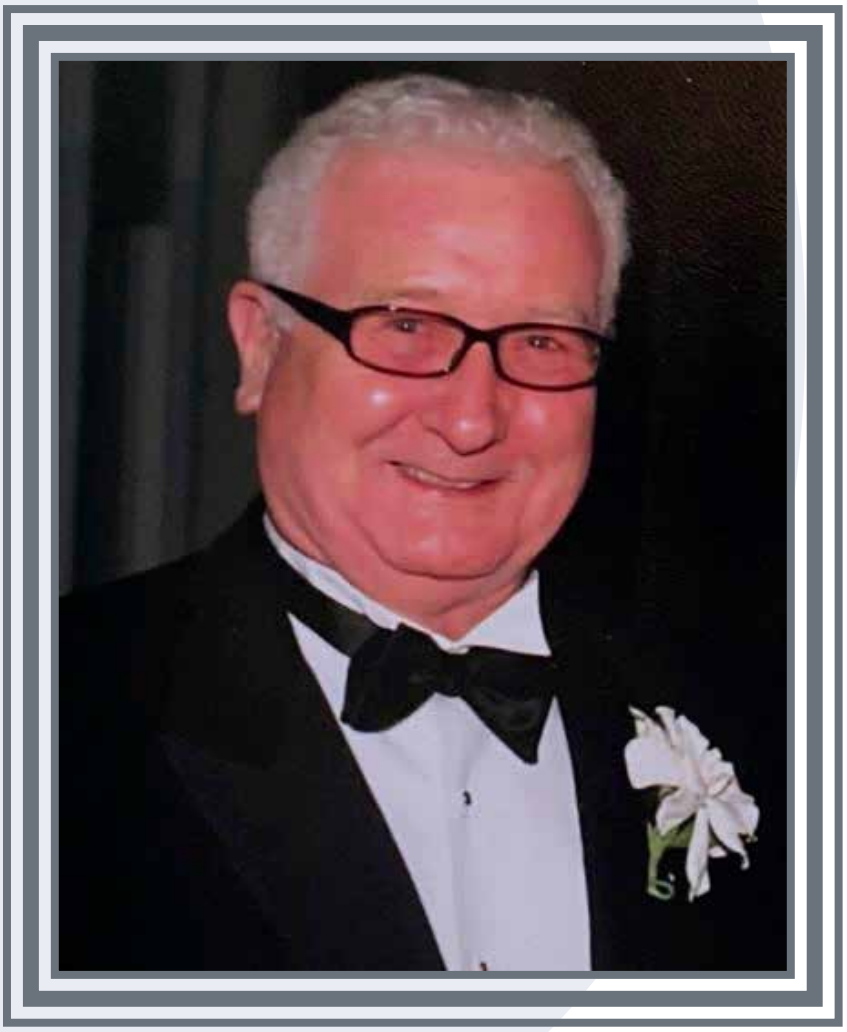
In Memoriam

James O. Nolan

1939 - 2022

The Firm is saddened to advise of the passing of James O. Nolan, Partner and Past President of Clausen Miller. Jim worked at Clausen Miller for 40 years (1967 - 2006), helping it grow from its Chicago roots into a nationally-recognized law firm. Jim will be fondly remembered for his devotion to family and friends, love of travel, master storytelling and joyful work as a lawyer. He taught many Clausen Miller attorneys a strict adherence to punctuality. As one CM partner recalls, "I think Jim had his watch set 10 minutes fast, as he was fond of saying..."if you're always early, you're never late"!

As always, Jim's words and deeds continue to bring a smile to many here at Clausen Miller.



MAJOR VICTORY IN NORTH DAKOTA HIGHLIGHTS IMPORTANCE OF EMBEDDED APPELLATE COUNSEL AT TRIAL

Working closely with the insurer, insured, and defense trial counsel, Clausen Miller appellate attorneys helped secure a big win in the North Dakota Supreme Court. *Simmons v. Cudd*, 2022 ND 20, 2022 N.D. LEXIS 18.

In 2011, an oil worker sustained serious injuries during pipe removal operations at an oil well. He sued several defendants including Cudd Pressure Control Inc., charged with safely lowering pipe to the ground. The worker claimed that Cudd's equipment was unsafe. Cudd responded that the pipe was undersized from excessive wear in the well.

Cudd's opponents claimed that Cudd spoliated its equipment used to lower the pipe. Cudd denied the accusations. Prior to trial, the district court ruled that Cudd had intentionally spoliated the equipment. As trial neared, Cudd's insurer retained Clausen Miller to assist with the defense effort as appellate trial monitoring counsel. Clausen appellate attorney **Paul Esposito** worked closely with defense counsel both before and at the three-week trial heavily focusing on spoliation. Following the jury's adverse verdict, Cudd took an appeal.

Clausen's appellate brief for Cudd focused on the district court's errors in finding and sanctioning Cudd for spoliation. Cudd argued that its opponent failed to prove the elements of spoliation. Following, oral argument, a unamimous North Dakota Supreme Court agreed with Cudd. It found no proof that Cudd had changed its equipment after a legal duty to preserve it arose. The Supreme Court also ruled that because no spoliation occurred, the district court erred by instructing the jury as to it. As that error may have prejudiced the allocation of fault, the Court remanded the case for a new trial as to fault.

Both insurer and insured are thrilled with the result!

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Illinois Supreme Court Rules On Illinois Workers' Compensation Immunity Issue

by ***Melinda S. Kollross***

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In *Munoz v. Bulley & Andrews, LLC*, 2022 IL 127067, the Illinois Supreme Court ruled that the immunity provisions of the Illinois Workers' Compensation Act do not extend beyond an injured worker's direct employer, "under the facts of this case".

Facts

Bulley & Andrews, LLC (Bulley & Andrews) is the sole owner of Bulley Concrete. Although a wholly owned subsidiary of Bulley & Andrews, Bulley Concrete operated as a separate corporation, distinct from Bulley & Andrews. Each company had separate tax I.D. numbers, different presidents, and different workers.

Bulley & Andrews contracted with a project owner to serve as general contractor for a construction project in downtown Chicago. Under the contract, Bulley & Andrews agreed to purchase insurance that would protect Bulley & Andrews from claims which could arise out of Bulley & Andrews' operations under the contract and for which Bulley & Andrews could be legally liable whether such operations were by Bulley & Andrews or by a subcontractor. Bulley & Andrews used Bulley Concrete and its employees for the project's concrete work as well as other subcontractors.

During the time of the project, Bulley Concrete was an insured under a workers' compensation policy. Bulley & Andrews and other subsidiaries and affiliates of the company were insured under the same policy. Bulley & Andrews paid the premiums for the insurance.

Plaintiff was employed as worker by Bulley Concrete. He was hurt on the project and filed a workers' compensation claim against Bulley Concrete for his medical bills and was also paid temporary disability benefits. Plaintiff then brought a personal injury action against the general contractor on the project, Bulley & Andrews, seeking damages for its failure to insure that all project work was performed safely. The trial court dismissed plaintiff's action holding that the action was barred by the exclusivity provisions of the Workers' Compensation Act because Bulley & Andrews was legally obligated under the project contract to pay for the workers' compensation insurance and benefits that plaintiff received. The Appellate Court affirmed, but the Illinois Supreme Court in a unanimous decision reversed and remanded for further proceedings on plaintiff's action.

Analysis

The Supreme Court ruled that the statutory language used in the Workers' Compensation Act was clear and unambiguous: Workers' Compensation Act immunity from an action for damages was conferred only on the immediate employer of

an injured worker, regardless of who paid benefits or the premiums for the workers' compensation coverage. In this case, it was undisputed that Bulley & Andrews was not plaintiff's immediate employer. Thus, plaintiff was not barred from suing Bulley & Andrews by Workers' Compensation Act immunity.

Moreover, the fact that plaintiff's immediate employer, Bulley Concrete, was a subsidiary of Bulley and Andrews was irrelevant according to the Court. If a parent and a subsidiary are operated as two separate and distinct companies, then only the company who is the immediate employer gets immunity. Under the facts of this case, that company was Bulley Concrete and not Bulley & Andrews.

The Supreme Court further addressed and rejected the appellate court conclusion that its past decision in *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196 (2008), created a new test for immunity based on whether an entity paid compensation benefits to an injured worker pursuant to a preexisting legal obligation. *Ioerger* held that an employee could not sue a joint venture, which was contractually required to reimburse the workers' compensation insurance premiums paid by one of its constituent entities which happened to be the direct employer. According to the Court, *Ioerger* did not abrogate prior Illinois Supreme Court decisional law holding that Workers' Compensation Act immunity did not hinge on the payment of benefits, but only upon the identity of the injured worker's immediate employer. Further, the Court found Bulley & Andrews did not have any preexisting legal obligation to pay benefits because its agreement with the project owner did not provide for Bulley & Andrews to provide workers' compensation insurance for Bulley Concrete. According to the Court, its decision in *Ioerger* was limited to the facts of that case.

Learning Point: Although the Supreme Court's decision here seems straightforward, the Court couched its holding by stating that it was reaching its decision "under the facts of this case". Under the facts of this case, Bulley & Andrews and Bulley Concrete were distinct companies; Bulley & Andrews was not in a joint venture with Bulley Concrete; there was no agency relationship between Bulley & Andrews and Bulley Concrete, and there was no written contract between Bulley & Andrews and Bulley Concrete that required Bulley & Andrews to provide workers' compensation insurance or benefits to Bulley Concrete employees. What all this means is that like *Ioerger*, *Bulley & Andrews* should be viewed in the context of its own facts, and with different facts in another case to distinguish *Bulley & Andrews*, there might be a different result. ♦

Insurers Remain Undefeated In Federal And State Appellate Tribunals On COVID-19 Business Interruption Claims

by ***Melinda S. Kollross***

The body of federal and state appellate precedent keeps growing, with these appellate tribunals unanimously holding that there is no property insurance business interruption coverage for losses arising from the COVID-19 pandemic.

STATE COURTS

Gavrildes Mgmt. Co. v. Michigan Ins. Co., No. 354418 (Mich. App. 2-1-22)

Policyholder attorneys complain that the federal courts should postpone ruling on these COVID-19 coverage cases until the state courts have their say. Well, as we have been reporting, the state courts have and continue to have their say ruling, like the federal circuits, that there is no coverage for these losses.

In *Gavrildes*, the Michigan Court of Appeals issued a published opinion holding that two restaurants were not entitled to lost business income coverage arising from closure orders issued to stem the spread of COVID-19 because the closure orders did not cause any physical loss or damage to the insured's premises. According to the Court, the word "physical" necessarily required some manner of tangible and measurable effect on the premises, and the closure orders had no such effect on the insured's premises. The Court found moreover that the "period of restoration" meant that the policy expected the loss or damage to be amenable to physical remediation—either by making tangible alterations or repairs to the premises, or by replacing the premises altogether. No alteration to, or replacement of, the insured's premises would have permitted the restaurants to reopen because the closure orders had kept the insured's premises closed.

Additionally, the Court ruled that an exclusion barring payment for loss or damage caused by or resulting from any virus, bacterium or other microorganism that could induce physical distress, illness or disease was clear and unambiguous and barred the entirety of the insured's claim.

Sweet Berry Cafe, Inc. v. Society Ins., Inc., 2022 Ill. App. (2d) 2100881

The Illinois Appellate Court recently added its voice to the growing number of appellate tribunals holding that an insured's pandemic related losses are not covered in a published opinion issued on 3-15-22. In *Sweet Berry*, the Court rejected the insured cafe's contention that loss of use sufficed for it to obtain reimbursement of business income losses. According to the Court, although the policy did not define the operative

policy language "physical loss of or damage to", the plain meaning of those words requires a physical alteration or substantial dispossession, not merely loss of use to trigger coverage for lost business income. The Court cited the Illinois Supreme Court's decision in *Travelers Ins. Co. v. Eljer Mfg. Inc.*, 197 Ill. 2d 278 (2001), concerning what constitutes a "physical" injury to tangible property. *Eljer* held that tangible property does not experience physical injury if that property suffers intangible damage, such as diminution in value. The Appellate Court further rejected the insured's claim that coverage existed because the policy did not contain a virus exclusion. The insured reasoned that since the policy did not exclude losses from a virus, then it had to cover losses from a virus. But the Court rejected this specious claim, holding that the absence of an exclusion could not create any coverage that did not exist in the first place.

Sweet Berry made two other notable points.

The Court found it significant that its decision was consistent with the overwhelming weight of decisions nationwide, noting specifically that "all published federal appellate court decisions have ruled in the insurance companies' favor". Finally, echoing the policy concerns raised by other appellate tribunals, the Court stated that while it was sympathetic to the plight of insureds such as Sweet Berry, it could and would not create coverage where none existed: "We are not unsympathetic to the immense challenges facing restaurants and other hospitality-service providers during the present pandemic. However, we must construe the contract into which the parties entered and hold them to their agreement."

Lee d/b/a Evanston Grill v. State Farm Fire and Casualty Co., 2022 IL App (1st) 210105

In *Lee d/b/a Evanston Grill v. State Farm Fire and Casualty Co.*, 2022 IL App (1st) 210105, the Illinois Appellate Court, First District added its name to the growing body of appellate precedent holding that there is no first-party property coverage for an insured's COVID-19 pandemic related economic losses.

In reaching its conclusion, the Court found persuasive the Seventh Circuit's decision in *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327, 329 (7th Cir. 2021), which construed the identical policy language of direct physical loss to covered property. Based upon *Sandy Point Dental*, which looked to the Illinois Supreme Court's decision in *Travelers Ins. Co. v. Eljer Mfg. Inc.*, 197 Ill. 2d 278 (2001) for guidance, *Lee* held as a matter of Illinois law that to trigger coverage, the insured must suffer physical alteration of its property, and not just economic losses.

The *Lee* Court further held that even if the insured could show such a physical alteration, the virus exclusion in the policy operated to bar all coverage. The virus exclusion excluded "any coverage for any loss" from a "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease". The Court found that the insured's claim fell directly within the virus exclusion and described as "unavailing" the insured's contention that its losses arose from the closure orders and not the virus.

FEDERAL CIRCUITS

Second Circuit:

Rye Ridge Corp. v. Cincinnati Ins. Co., 2022 U.S. App. LEXIS 1009, 2022 WL 120782 (2d Cir. 2022)

Kim-Chee LLC v. Phila. Indem. Ins. Co., 2022 U.S. App. LEXIS 2655, 2022 WL 258569 (2d Cir. 2022)

Deer Mt. Inn LLC v. Union Ins. Co., 2022 U.S. App. LEXIS 5355, 2022 WL 598976 (2d Cir. 2022)

SA Hospitality Group, LLC v. Hartford Fire Ins. Co., 2022 U.S. App. LEXIS 7139 (2d Cir. 2022)

Following on the heels of its published opinion in *10012 Holdings, Inc. d/b/a Guy Hepner v. Sentinel Ins. Co., Ltd.*, 21 F.4th 216 (2d Cir. 2021), the Second Circuit issued four Summary Orders to start off 2022 in *Rye Ridge*, *Kim-Chee*, *Deer Mt. Inn,* and *SA Hospitality* all ruling in favor of insurers and holding that there was no first-party property coverage for any pandemic related business income losses suffered by insureds.

In *Rye Ridge*, the Second Circuit found its previous decision in *10012 Holdings* dispositive that mere loss of use of the premises due to a closure order did not constitute physical loss or damage under the policy as those terms have been applied under New York law.

In *Kim-Chee*, the Second Circuit likewise found its *10012 Holdings* decision controlling that the insured

was not entitled to coverage for mere loss of possession or access, and also holding that any closure due to the risk of possible human infection did not qualify as a risk of direct physical loss. The Court also found unavailing the contention that the virus was everywhere on the insured's premises, finding that the virus's inability to physically alter or persistently contaminate property differentiated it from radiation, chemicals, dust, gas, asbestos, and other contaminants whose presence could trigger coverage. Finally, the Court rejected the contention that the absence of a virus exclusion meant that losses due to the virus were covered ruling that the absence of an exclusion cannot create coverage.

In *Deer Mt. Inn*, the Second Circuit once again relied upon *10012 Holdings*, as well as the decisions in *Rye Ridge* and *Kim-Chee*, in holding that there was no coverage without actual physical loss or damage to the insured's property. More importantly, the Second Circuit also warned future insureds that the Court would not lightly deviate from the controlling precedent in *10012 Holdings* and its progeny, stating: "'It is a longstanding rule of our Circuit that a three-judge panel is bound by a prior panel's decision until it is overruled either by this Court sitting *en banc* or by the Supreme Court.'"

In *SA Hospitality*, the Second Circuit relied once more upon *10012 Holdings* to summarily dispose of an insured's claim for coverage. The insured even conceded that *10012 Holdings* was dispositive but argued that *10012 Holdings* was wrongly decided, and it asked the panel hearing its case to revisit the issue anew and come to a different conclusion. The Second Circuit panel in *SA Hospitality* ruled that even assuming arguendo *10012 Holdings* was wrongly decided—which it was not—the *SA Hospitality* panel could not revisit the issue decided in *10012 Holdings*. Echoing the admonition given in *Deer Mt. Inn*, the *SA Hospitality* Second Circuit panel stated that *10012 Holdings* was binding until it is overruled by the Second Circuit sitting *en banc* or by the Supreme Court.

Fourth Circuit:

Uncork and Create LLC v. The Cincinnati Ins. Co., No. 21-1311 (4th Cir. 3-7-22)

In *Uncork and Create*, the Fourth Circuit added its voice to the unanimous body of federal appellate precedent, holding in a published opinion that under West Virginia law, policy language requiring a "physical loss" or "physical damage" unambiguously covered only losses caused by, or relating to, material destruction or material harm to the insured property. Because the insured did not suffer such a physical loss or damage resulting from the pandemic or the government closure order, it was not entitled to coverage. In so ruling the Fourth Circuit found it significant that its decision was consistent with the unanimous decisions by other Circuits, which have applied various states' laws to similar insurance claims and policy provisions. And, while the Court was sympathetic to the insured's plight, it refused to create coverage where none existed:

> And although we, like the district court, recognize that Uncork and other businesses suffered severe losses during the period that the closure order was in effect, we conclude that under the unambiguous terms of the policy, coverage is not available for Uncork's loss of business income and related expenses absent material destruction or material harm to the covered property.

Fifth Circuit:

Aggie Invs., L.L.C. v. Cont'l Cas. Co., 2022 U.S. App. LEXIS 2411, 2022 WL 257439 (5th Cir. 2022)

Like the Second Circuit, the Fifth Circuit issued a summary order in *Aggie*, giving short shrift to the insured's arguments for coverage because its previous decision in *Terry Black's Barbecue L.L.C. v. State Automobile Mutual Ins. Co.*, 22 F.4th 50 (5th Cir. 2022), was dispositive of the case in favor of the insurer. According to the Court, *Terry Black's Barbecue* rejected the argument that direct physical loss of property could reasonably be interpreted to cover a loss of use of property. *Terry Black's Barbecue* held that direct physical loss meant only one thing: a tangible alteration or deprivation of property. Since the *Aggie* insured always had ownership of, access to, and the ability to use the entirety of its property throughout the pandemic, it was not entitled to coverage.

Q Clothier New Orleans, LLC v. Twin City Fire Ins. Co., 2022 U.S. App. LEXIS 7565, --- F.4th --- (5th Cir. 2022)

In *Q Clothier New Orleans, LLC v. Twin City Fire Ins. Co.*, 2022 U.S. App. LEXIS 7565, --- F.4th --- (5th Cir. 2022), the Fifth Circuit followed its own prior precedential decision in *Terry Black's Barbecue, L.L.C. v. State Auto. Mut.*

Ins. Co., 22 F.4th 450 (5th Cir. 2022), in ruling for the insurer on COVID-19 pandemic related business loss claims. *Q Clothier* involved Louisiana law, but the Fifth Circuit found Texas law, which it had applied in *Terry Black's*, similar on the operative issues to Louisiana law. Accordingly, the Fifth Circuit opined that consistent with its decision in *Terry Black's*, and the decisions of the unanimous appellate tribunals nationwide, the insured's business income losses caused by civil authority orders closing nonessential businesses in response to the COVID-19 pandemic did not fall within the meaning of direct physical loss of or damage to property so as to trigger coverage under defendant's policy.

Sixth Circuit:

Estes v. Cincinnati Ins. Co., 23 F.4th 695 (6th Cir. 2022)

Applying Kentucky law to a claim made by a dental office insured, the Sixth Circuit held in a published opinion that the Kentucky Supreme Court would agree that to obtain coverage under a first-party property policy for lost business income, the insured had to show that there was a physical alteration or deprivation of the insured property.

According to the Court, the phrase physical loss would convey to the average person that a property owner has been tangibly deprived of the property or that the property has been tangibly destroyed. "If, for example, a thief stole the '[f]urniture' from Estes's dental offices, a person might say that Estes suffered a 'physical loss' of the furniture or if a fire completely destroyed one of Estes's dental offices, a person might say that Estes suffered a 'physical loss' of the building and its contents." But the Court held that the average person would not say that the insured suffered a physical loss because of the pandemic; COVID-19 did not destroy the insured's dental offices, and the government shutdown orders did not dispossess the insured of them for a single day.

Brown Jug, Inc. v. Cincinnati Ins. Co., 2022 U.S. App. LEXIS 4836, 2022 WL 538221 (6th Cir. 2022)

In another published decision, the Sixth Circuit, applying Michigan law, found the Michigan Court of Appeal's decision in *Gavrildes Mgmt. Co.* persuasive. Together with *Gavrildes*, the Court applied its previous decisions in *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645 (6th Cir. 2021), and *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir.), in holding that several restaurant insureds were not entitled to coverage under their property policies for their pandemic related business income losses.

The Sixth Circuit's opinion here focused on the failures of the insureds to properly allege any physical loss or damage. According to the Court, the complaints did not credibly allege that the presence of COVID-19 in any way caused direct physical loss of or damage to any insured property, or that the virus physically and directly altered property by its mere presence. Moreover, although one of the insured's complaints specifically alleged that COVID-19 caused physical loss and damage by, among other things, destroying, distorting, corrupting, attaching to, and physically altering property, the complaint made clear that this damage only had occurred because the insured had to take remediation measures, such as cleaning and reconfiguring spaces, to reduce the threat of COVID-19. But the Court ruled that these are precisely the types of losses that are not tangible, physical losses, but economic losses not covered under the policy.

System Optics, Inc. v. Twin City Fire Ins. Co., 2022 U.S. App. LEXIS 5731 (6th Cir. 2022)

System Optics involved Ohio law, and while the Ohio Supreme Court has yet to rule on these pandemic related property policy issues, the Sixth Circuit found it could deal with this insured's claim in summary fashion given the decision of the Ohio Court of Appeals in *Sanzo Enters., LLC v. Erie Ins. Exch.*, --- N.E.3d ---, 2021 WL 5816448 (Ohio Ct. App. Dec. 7, 2021) and its own prior decision in *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021). According to the Court, these decisions teach that direct physical loss of or damage to property means what it says—tangible destruction, in whole or part, or tangible or concrete deprivation—and thereby excludes mere loss of use. So here, the fact that the insured could not make full use of its medical clinic was irrelevant absent any showing that the closure orders physically destroyed the clinic or otherwise tangibly deprived the insured of its property.

Goodwood Brewing v. United Fire Group, 2022 U.S. App. LEXIS 5794 (6th Cir. 2022)

Goodwood Brewing involved Kentucky law and the Sixth Circuit here found

its prior decision in *Estes v. Cincinnati Ins. Co.*, 23 F.4th 695 (6th Cir. 2022), virtually indistinguishable, allowing it to deal with this insured's claim in summary fashion as well. Applying *Estes*, the Court held that COVID-19 and Kentucky's shutdown orders caused only intangible or economic harms that were not covered under the insured's property policy.

Ninth Circuit:

Baker v. Oregon Mut. Ins. Co., 2022 U.S. App. LEXIS 6769 (9th Cir. 2022)

The Ninth Circuit summarily disposed of this insured appeal in a 3-paragraph order by holding that the appeal was controlled by California law, and the California appellate decision in *Inns-by-the-Sea v. California Mutual Ins. Co.*, 71 Cal. App. 5th 688, 286 Cal. Rptr. 3d 576 (2021), was dispositive: "In *Inns-by-the Sea*, the Court of Appeals held that the commercial property insurance policy language at issue does not cover loss of business income caused by COVID-related closure orders."

Eleventh Circuit:

Ascent Hosp. Mgmt. Co., LLC v. Employers Ins. Co., 2022 U.S. App. LEXIS 1161, 2022 WL 130722 (11th Cir. 2022)

The Eleventh Circuit in *Ascent* faced a pandemic related property claim governed by New York law, and finding New York clear, the Court here too determined that it could deal with the insured's appeal in summary fashion. According to the Court, New York courts have consistently interpreted *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4 (N.Y. App. Div. 2002), to require the rejection of claims for pandemic-related lost profits under insurance provisions like the one at issue here. This is so, the Court found, because policy language providing coverage for direct physical loss or damage unambiguously required some form of actual, physical damage to the insured property to trigger loss of business income and extra expense coverage. In this case, the insured could not show any such physical damage or loss and thus there was no coverage.

Appellate Update:

Inns-by-the-Sea v. California Mutual Ins. Co., 2021 Cal. App. LEXIS 956 (Cal. App. 2021)

We reported on this California appellate decision favorable to the insurance industry in Vol. 4 of our 2021 *CM Report*. The insured subsequently sought review by the California Supreme Court, and on 3-9-22, the California Supreme Court denied the insured's petition for review.

Although the California Supreme Court's denial of review does not have precedential value and is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the court of appeal, it does not follow that such a denial is without significance as to the views of the Supreme Court. In *Di Genova v. State Board of Education*, 57 Cal. 2d 167, 177 (1962), the California Supreme Court stated: "The order of this court denying a petition for a transfer . . . after . . . decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion." (quoting *Cole v. Rush*, 45 Cal 2d 345, 351, fn. 3 (1955)). *See also*, 16 Cal. Jur. Courts § 318.

Learning Points: Based upon my analysis of these appellate decisions, as well as others I have reported on in past issues of the CM Report, I have these "appellate recommendations" for our friends in the insurance and defense industry for appeals going forward involving these property policy pandemic related claims:

—Stress the public policy considerations advanced in cases such as *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021), and *Sweet Berry* against creating insurance coverage not contemplated by the parties for the economic losses suffered by some insureds during the pandemic.

—Stress the unanimous body of federal and state appellate precedent that is being developed regarding these pandemic related property insurance claims. The Fourth Circuit found this unanimous body of appellate precedent significant to its decision in *Uncork and Create*, as did the Illinois Appellate Court in *Sweet Berry*.

—Stress the admonition given by the Second Circuit in *Deer Mt. Inn* that once a court decision is made, future panels in that Circuit will not lightly disregard the prior decision merely because three different judges might be deciding another case. Although not all appellate tribunals might have as explicit a rule as the Second Circuit—that a three-judge panel should be bound by a prior panel's decision until it is overruled either by the Court of Appeals *en banc* or by the Supreme Court—the admonition is sound and bears repeating. ♦

COVID's Impact On Civil Jury Attitudes And Procedures

*by **Eli B. Vine** and **Kathleen M. Klein***

Introduction

As the COVID-19 pandemic began, the majority of courthouses across the country had to significantly alter their operations. Many courts initially limited their proceedings to only the most essential and time sensitive matters, and closed whole divisions temporarily. Some, if not most, suspended speedy trial rules and paused all civil jury trials. As time has gone on, jurisdictions have slowly resumed some of their normal court operations, including in person jury trials. Now that courthouses have begun to hold jury trials again, the next big question is what impact COVID will have on juries and their verdicts.

Analysis

Jurors, like everyone else, are not immune from the deep impact of COVID. There are common themes in post-COVID jurors that could cause them to be more likely to find for the plaintiff, award higher damages, or generally support and accept pro-plaintiff attitudes. The main characteristics of such jurors include those who have: 1) experienced more overall impact and/or disruption to their lives, including personal, professional, and/or financial; 2) personally contracted significantly symptomatic COVID, or have a family member, friend or close co-worker who has experienced the same; 3) expressed greater concern that they or someone they care about will contract the virus; 4) expressed concern about their immediate financial stability as a result of the COVID pandemic; and 5) greater fears about their health applicable to the experience of sitting for jury duty.

Many, if not all, of these themes are concerns we have all shared during the course of the pandemic. However, each person's experience with COVID is unique. These concerns are a moving target, as is the pandemic, with its new variants, ever-changing protocols, and shifting public opinion; thus, these concerns and opinions must be discussed anew with each potential juror during *voir dire*, and the nature and delivery of effective *voir dire* questions on these topics must change with the times.

Another big question is how these COVID concerns play out in different types of cases. Different impact can be expected across personal injury, medical malpractice, product liability, or toxic torts, respectively. Medical malpractice lawsuits will likely see the biggest change. Rehabilitated public perception of our Healthcare Heroes cuts against some jurors' preexisting suspicion of healthcare delivery systems and personnel. Personal contacts with healthcare professionals, as well as media coverage over the past two years, may in some cases humanize the defendant physician and illustrate the massive weight on his or her shoulders. We expect more prospective jurors will have a more positive baseline opinion

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of physicians, healthcare providers and/or facilities because of their efforts on the frontlines to battle COVID. The signs posted at hospitals, nursing homes and medical centers stating "heroes work here" offer support to medical providers and their staff in a difficult pandemic environment, but also generally have affected the public's perception for the better.

Unfortunately, but predictably, it is not all positive. The pandemic seems to have brought about changes in public opinion that will likely be relevant to personal injury actions. Statistics have shown that a substantial percentage of individuals have a more negative opinion of large corporations and corporate executives since the start of the pandemic. This is likely due to many factors, ranging from the financial recession to perceptions that corporations abused governmental relief like PPP loans, to the disproportionate job losses sustained amongst low paid employees. Further, when looking at changes in public perception as to corporations, one must look at the size of the corporation. Certainly, jurors will likely have more negative bias toward larger corporations versus small family run operations, as has long been true.

Bias against pharmaceutical companies will likely also be particularly heightened. Media coverage of price-gouging pharmaceutical executives and pharma "scam artists," coupled with political complaints and campaign promises about pricing, drove anti-pharma sentiment pre-COVID. Recent media projects like "Dopesick," a drama centered on the opioid crisis, continue along these themes. Now coupled with inequalities in COVID vaccine distribution, testing kit failures, testing shortages, and other logistical challenges during the pandemic—and contrasted against massive private sector profit over COVID tests and drugs— will likely further diminish pharmaceutical companies' reputations in the courts. Certainly, in Blue state jurisdictions, inequality in test and treatment distribution and pricing may have increased juror hostility, while in Red states, increased anti-vax sentiment may prove equally challenging to these corporate defendants.

Plaintiffs may themselves be viewed in a more sympathetic light. Most jurors understand the negative impact the pandemic has had on employment, financial stability, and the job market over the past two years. This may factor into their perception of a particular Plaintiff's character, and assumptions about their financial security, which are excluded from discussion at trial but certainly cannot be excluded from jurors' minds. Many jurors may understand that a Plaintiff in a particular action is out of work and looking for money and may in fact be more sympathetic to this than ever before.

Further, the aftermath of COVID has left potential jurors in a heightened emotional state. This becomes problematic when considering that jurors in a heightened state of emotion have less analytical and cognitive resources available to devote to analyzing case evidence and applying it to the jury instructions given by the Judge. In these situations, jurors will often be left to make "gut decisions" that ignore both case evidence and application of the law as provided in the instructions, leading to decisions made with their hearts and not their heads. In fact, this is precisely the trend in tactics in recent years. This overreliance on emotion risks increased pandemic-era verdicts, because jurors may feel more empathy and sympathy for Plaintiffs who have been injured. The flip side is that in some cases, COVID verdicts may decrease because jurors may view the suffering of the Plaintiff as relatively insignificant compared to the suffering others have experienced during the pandemic. Given these conflicting views, one will likely have to tread lightly, and conduct analysis as always on a case-by-case basis. *Voir dire* of jurors to illuminate these attitudes will be more important than ever.

Factors that can drive up COVID verdicts on corporate defendants and that will likely be substantially impacted by the COVID pandemic include: Juror vulnerability, fear, volatility, and polarization; rising costs and uncertainty of the future; more millennials on juries; bad testimony or misidentification of corporate representatives; and anti-corporate bias that values "profits over safety." The importance of a likeable and relatable corporate representative is even more important, and the time they must take away from their professional duties to sit at counsel table from jury selection to verdict is even longer.

Finally, the jury pool composition may be impacted. High risk groups, such as the elderly, may be more likely to be dismissed due to health concerns. Therefore, one may presume most juries at least while the pandemic continues will likely have a lower average mean age. Anecdotal evidence indicates some trouble securing and

paneling jurors. *Voir dire* is taking longer due to jurors' distaste for sitting in a courtroom for weeks with others they don't know.

The logistical issues caused or exacerbated by the pandemic also provide both challenges and opportunities. In high volume jurisdictions like Cook County, cases can be expected to last longer until the backlog has cleared. For example, from the first quarter of 2018 to the first quarter of 2020, Law Division pending caseloads rose approximately 11%. However, less resolved cases and relatively consistent numbers of filings in COVID times resulted in a 21% increase in pending cases from the second quarter of 2020 to the third quarter of 2021 (the most recent data reported).[1]

These delays in the scheduling of civil jury trials around the country are a double-edged sword. They have given attorneys and claim examiners time to re-examine the thoughts and feelings of the public and/or their potential jury pools. They have been used as a bargaining chip in efforts to settle matters given the delays Plaintiffs faced in getting their day in court. However, we have seen the effects in Cook County in increased wait times for available trial judge assignments, posing scheduling issues for all parties, attorneys, and experts trying to plan for trial. The jury selection process itself is taking longer, when courts and counsel must navigate not only jurors' attitudes and objections toward the case facts, but their fears and reservations toward their very physical presence in a public courtroom. The rise of remote proceedings—even, in some cases, remote jury selection—has created efficiency, but arguably decreased effectiveness of questioning and juror engagement. Remote proceedings have also made the development of across-the-aisle camaraderie with opposing or co-party counsel that much more difficult, and risk entrenchment of a more adversarial style of litigation.

Learning Point: The case management process has changed, likely permanently, to include remote proceedings. This can provide cost or time savings to counsel and clients, but removes opportunities to build civility and positive working relationships that help smooth the litigation process and foster resolutions. In Cook County, the procedural changes have meant the death of in-person case management altogether, for better or for worse. Counsel must find alternative ways to develop productive relationships with judges and lawyers alike.

Additionally, given these significant changes in both public perception and opinion, the pre-pandemic case analysis, strategy, and risk assessment must be adjusted. As always, the importance of *voir dire* cannot be overstated. Counsel must ask questions that will uncover the above attitudes and biases, and determine how those will affect not only their perception of the facts of the case, but their participation in jury service as a whole. ♦

1 https://www.illinoiscourts.gov/courts/circuit-court/illinois-circuit-court-statistical-reports/

BIPA Claim Accrual Update

by ***Alexander J. Brinson*** *and* ***Mitchel D. Torrence***

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Introduction

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

Illinois law generally provides that a "cause of action 'accrues' when facts exist that authorize the bringing of a cause of action." A question has arisen as to whether a claim under the Act accrues when a person's biometric data is first collected or if a claim accrues each time biometric data is stored in violation of the Act. Recent decisions under the Act are beginning to shed light on the question.

Facts

An Illinois appellate court concluded that claims brought under Sections 15(a), (b), and (e) of BIPA are subject to a five-year statute of limitations, while BIPA claims brought under Sections 15(c) and (d) are subject to a one-year statute of limitations. *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563. A petition for leave to appeal to the Illinois Supreme Court was allowed following the *Tims* decision; however, the Illinois Supreme Court has not yet issued an opinion. Three recent decisions analyze when a claim under the Act accrues for purposes of the applicable statute of limitations.

Analysis

In *Watson v. Legacy Healthcare Fin. Servs., LLC*, 2021 IL App (1st) 210279, a certified nursing assistant was required by his employer to scan his fingerprint and/or handprint in order to clock-in and clock-out of work each day. The trial court granted defendants' motion to dismiss, holding that the "plaintiff's claim accrued with the initial scan on December 27, 2012" and was time-barred by the five-year statute of limitations. The appellate court reversed, finding that "the plain language of the statute establishes that it applies to each and every capture and use of plaintiff's fingerprint or hand scan. Almost every substantive section of the Act supports this finding."

In *Cothron v. White Castle Sys.*, 20 F.4th 1156 (7th Cir. 2021), the Seventh Circuit analyzed a claim brought by the manager of a White Castle restaurant alleging that she was required to scan her fingerprint to access the restaurant's computer system. White Castle moved for judgment on the pleadings, arguing that a claim accrued the first time the manager scanned her fingerprint into the system after BIPA took effect in 2008, and her suit was therefore untimely under even the longest possible statute of limitations. Upon interlocutory appeal, the Seventh Circuit stated that, "[w]hether a claim accrues only once or repeatedly is an important and recurring question of Illinois law implicating state accrual principles as applied to this novel state statute. It requires authoritative

guidance that only the state's highest court can provide." Thus, the Seventh Circuit stayed proceedings while the matter is under consideration by the Illinois Supreme Court.

Most recently, in *Rogers v. BNSF Ry. Co.*, 2022 U.S. Dist. LEXIS 45578 (N.D. Ill. 2022), a truck driver alleged that he is required to scan his fingerprint to gain entry into defendant BNSF's railyards. BNSF moved for summary judgment on plaintiff's claims, arguing in part that the claims are untimely under a five-year statute of limitations running from when plaintiff first scanned his fingerprint into the system. The district court denied BNSF's motion, holding "[t]he clock for [plaintiff's] BIPA claims reset upon each violation, meaning his claim in the present case is timely, as BNSF is claimed to have continued to scan his fingerprints dozens of times within the five years preceding this suit."

Learning Point: The case law surrounding BIPA is continuing to progress. BIPA cases concerning accrual present the theme that a new claim accrues each time biometric data is collected in violation of the Act. Courts thus far have consistently rejected the first-in-time or "one-and-done" theory of accrual. Although we await guidance from the Illinois Supreme Court in *Tims*, defendants still have substantial grounds to seek dismissal and resolution of BIPA claims, including arguments related to accrual. Clausen Miller's Technology & Cyber Group has the resources and expertise to defend these cases and counsel clients on BIPA-related issues. ♦

ATTORNEY MISCONDUCT

STATEWIDE BAR COUNSEL HAS ABSOLUTE IMMUNITY IN REVIEWING ATTORNEY MISCONDUCT COMPLAINTS

Carter v. Bowler, AC 43670 (Conn. App.)

Plaintiff sued the Statewide Grievance Committee's statewide bar counsel for alleged deprivation of his state and federal due process rights. Plaintiff had filed two grievance complaints with the committee against an attorney, which defendant dismissed without referring to a grievance panel because the complaints did not allege facts that, if true, would violate attorney conduct rules. The trial court granted defendant's motion to dismiss on absolute immunity grounds. ***Held:*** Affirmed. Defendant's actions reviewing the attorney misconduct complaints were quasi-judicial and, therefore, immune. The bar counsel acts as an arm of the Court and it is sound public policy to recognize its freedom of expression in reviewing such complaints.

AUTO INSURANCE

PER-PERSON LIMIT PRECLUDES RECOVERY FOR BYSTANDER'S PTSD

Liberty Mut. Ins. Co. v. Correia, 2022 Mass. App. LEXIS 5 (Mass. App.)

Wife witnessing husband's motorcycle accident sought $500,000 "per accident" coverage because of her PTSD. ***Held:*** Policy's $250,000 "per person" coverage applied. Emotional distress caused by another person's injuries is not separate bodily injury under policy. Studies showing that emotional distress causes brain changes did not change law interpreting "bodily injury" under policy.

CIVIL PROCEDURE

MINIMUM CONTACTS WITH STATE REQUIRED FOR SPECIFIC JURISDICTION UNDER LONG-ARM STATUTE

Robinson Helicopter Co. v. Gangapersaud, 2022 Fla. App. LEXIS 19 (Fla. App.)

Trial court denied California based helicopter manufacturer's motion to dismiss for lack of personal jurisdiction. ***Held:*** Reversed. In products liability actions, defendant's transmission of goods permits the exercise of jurisdiction only where defendant can be said to have targeted the forum.

PREVAILING PARTY ALLOWED FEES WITHOUT ADJUDICATION ON MERITS

Catamaran B.Y. Inc. v. Giordano, 2022 Fla. App. LEXIS 191 (Fla. App.)

Trial court denied defense motion for attorney fees after opposing party voluntarily dismissed case. ***Held:*** Reversed. When a plaintiff voluntarily dismisses an action, defendant is considered the prevailing party.

CONTRACTS

COVID-19 PANDEMIC EXCUSES CONTRACT PERFORMANCE

JN Contemp. Art LLC v. Phillips Auctioneers LLC, 2022 U.S. App. LEXIS 7652 (2d Cir.)

Auction house invoked force majeure clause to terminate its agreement to sell multi-million dollar painting on behalf of seller, citing pandemic. ***Held:*** Dismissal of seller's complaint upheld because COVID-19 pandemic and governor's orders restricting how nonessential businesses could conduct their affairs during pandemic constituted circumstances beyond reasonable control, excusing performance.

DAMAGES

MAN ALLOWED EMOTIONAL DISTRESS RECOVERY FOLLOWING HOME FIRE

Ceres Solutions Coop., Inc. v. Estate of Bradley, 2022 Ind. LEXIS (Ind. App.)

Following home explosion and fire, man saw burned son and covered body of deceased wife. ***Held:*** Man was bystander entitled to recover emotional distress damages. Though arriving home after explosion, man saw ongoing fire which produced event. He did not learn about incident before reaching scene, which looked as it did immediately after incident. Man saw son's burned body, and fire officials prevented his seeing removal of wife's body.

FIRST-PARTY PROPERTY

POSSIBLE INNOCENT MISREPRESENTATION THWARTS SUMMARY JUDGMENT

Vargas v. Safepoint Ins. Co., 2022 Fla. App. LEXIS 188 (Fla. App.)

Trial court granted summary judgment to insurer based on insured's violation of Concealment or Fraud provision in policy. ***Held:*** Reversed. Insured argued her misstatement was innocent and not intentional, which court found involved genuine issue of material fact.

INSURED CANNOT SUE FOR POLICY BREACH BASED ON DISAGREEMENT WITH INITIAL ESTIMATE

People's Trust Ins. Co. v. Chen, 2022 Fla. App. LEXIS 203 (Fla. App.)

Trial court granted summary judgment to insured who argued insurer breached homeowner's policy by failing to agree to repair insureds' home to pre-loss condition. ***Held:*** Reversed. Policy states that upon receipt of appraisal award, insurer must have opportunity to continue repairs based upon scope outlined in appraisal award.

DENIED SUPPLEMENTAL CLAIM CAN'T BE COMPELLED TO APPRAISAL

Heritage Prop. & Cas. Ins. Co. v. Veranda I at Heritage Links Ass'n, 2022 Fla. App. LEXIS 1340 (Fla. App.)

A condominium complex insured submitted a claim for roof damages and, sometime later, a supplemental claim that added claims for replacement of all of the complex's windows and doors. The insured sought to compel appraisal. The insurer agreed to pay the roof replacement claim but wholly denied coverage for the supplemental claim. The trial court entered an order compelling appraisal. ***Held:*** Denial of supplemental claim for windows and doors was separate from initial roof claim and exclusively a judicial question because it involved a coverage challenge.

APPRAISAL PROVISION APPLIES TO MITIGATION SERVICES

First Call 24/7, Inc. v. Citizens Prop. Ins. Corp., 47 Fla. L. Weekly 478 (Fla. App.)

Insureds suffered hurricane damage covered by homeowner's policy and assigned insurance benefits to emergency mitigation service.

Insurer disagreed with valuation of mitigation services and invoked appraisal. Mitigation service did not participate and filed suit for breach of contract instead. Insurer asserted it was entitled to resolve the claim via appraisal and was awarded summary judgment. ***Held:*** Affirmed. The appraisal policy language encompassed emergency mitigation services.

INSURED BREACHED POLICY BY REFUSING TO AUTHORIZE WORK AND USING OWN CONTRACTOR

People's Tr. Ins. Co. v. First Call 24/7, Inc., 2022 Fla. App. LEXIS 1618 (Fla. App.)

Insured suffered water damage to home. Insurer requested that insured complete work authorization so that its preferred contractor could commence restoration services. Insured did not authorize work and instead used another company to complete repairs. Insurer refused to pay. ***Held:*** Once the right to repair was invoked the insured was required by the "Duties After Loss" policy provision to execute all work authorizations to allow entry to the property and allow insurer to complete repairs.

INSURER CHECK TO BOTH ASSIGNEE AND INSURED ACCEPTABLE

Expert Inspections, LLC v. United Prop. & Cas. Ins. Co., 2022 Fla. App. LEXIS 88 (Fla. App.)

Following receipt of invoice for remediation services and Assignment of Benefits ("AOB") contract, insurer paid invoice amount to both assignee and insured. Assignee sued for breach of contract and bad faith, arguing the AOB agreement required check be made out to assignee alone, not both assignee and insured. ***Held:*** "It was not unreasonable for the insurance company to make the check payable to both the insured and the assignee, particularly since the AOB agreement did not assign all of the insured's interest in the insurance policy to the assignee." The court also noted the assignee could have cashed the check simply by having the insured endorse it.

INSURER ENTITLED TO USE DESIRED REPAIR CONTRACTOR

People's Trust Ins. Co. v. Tosar, 2021 Fla. App. LEXIS 15605 (Fla. App.)

Insurer exercised its right to repair pursuant to policy and insureds provided competing repair estimate. Insurer invoked appraisal and following award, filed motion to compel its right to repair and to compel payment of deductible. Trial court denied motion and ordered insurer to pay appraisal award. ***Held:*** Reversed. Policy endorsement obligated insured to authorize insurer's selected contractor to perform appraisal award repairs and to pay hurricane deductible.

GAMBLING

FANTASY SPORTS CONTESTS NOT GAMES OF CHANCE

White v. Cuomo, 2022 N.Y. LEXIS 393, 2022 NY Slip Op 01954 (N.Y.)

Legislation regarding fantasy sports was challenged as violative of constitutional prohibition on gambling. ***Held:*** Interactive fantasy sport contests are not games of chance and, therefore, do not fall within New York's constitutional prohibition on gambling. The legislature's determination of the skill issue was supported by considerable evidence demonstrating game outcome was predominantly dependent upon skill.

JUDGMENT

AFFIDAVIT OF MERIT REQUIRED FOR MOTION TO OPEN JUDGMENT

Karanda v. Bradford, AC 43749 (Conn. App.)

Defendant was granted a judgment of nonsuit on the bases that plaintiff had failed to comply with a substantial portion of discovery requests and had not attended her court-ordered deposition in her negligence action. Plaintiff filed a motion to open the judgment, which was denied. ***Held:*** Affirmed. Plaintiff did not attach the statutorily required affidavit demonstrating a good cause of action and that a good defense existed at the time of judgment. Plaintiff's subsequent affidavit was untimely.

LABOR LAW

"TRAINED AND COMPETENT OPERATOR" REQUIREMENT CANNOT SERVE AS BASIS FOR LABOR LAW CLAIM

Toussaint v. Port Auth. of New York, 2022 N.Y. LEXIS 391, 2022 NY Slip Op 01955 (N.Y.)

Injured worker brought Labor Law claim based on "trained and competent operator" requirement within New York regulation. ***Held:*** Plaintiff must allege defendant violated an Industrial Code regulation setting forth a specific standard of conduct that was not simply a recitation of common-law safety principles, and the operator requirement was general—it lacked a specific requirement or standard of conduct. The additional direction that trained and competent individuals must also be "designated" did not transform the provision to a specific, positive command.

LEGAL MALPRACTICE

EXPERT WITNESS REQUIRED TO PROVE LEGAL MALPRACTICE CLAIM

Gottesman v. Kratter, 2022 Conn. App. LEXIS 101 (Conn. App.)

Defense was granted summary judgment because plaintiff failed to disclose expert supporting legal malpractice claim. ***Held:*** Affirmed. To prevail in legal malpractice claim, plaintiff must furnish expert testimony to establish both: (1) the standard of care against which the attorney's conduct should be evaluated; and (2) causation.

LIABILITY INSURANCE COVERAGE

FIFTH AMENDMENT PRIVILEGE DOES NOT SAVE COVERAGE UNDER HOMEOWNER'S POLICY

Link v. Link, 2022 Wisc. App. LEXIS 75 (Wis. App.)

Women sued after insured posted photos and sexually suggestive and degrading captions. ***Held:*** Insured's assertion of fifth amendment supported insurer's refusal to defend and indemnify. Insured violated policy's concealment and cooperation clauses. Fear of self-incrimination applies only to questioning by state as to criminal matter and does not exempt insured

from contractual duties. Insurer sought germane information and did not need to show prejudice to invoke concealment clause. Cooperation clause applied because insured prejudiced insurer's ability to evaluate case.

NO DUTY TO DEFEND OR INDEMNIFY LANDSCAPE DESIGNER IN LAWSUITS RELATED TO LANDSLIDES

Atain Specialty Ins. Co. v. JKT Assocs., Inc., 2022 U.S. App. LEXIS 6351 (9th Cir.)

Trial court ruled a policy subsidence exclusion precluded coverage for claims asserted against a landscape designer in lawsuits by homeowners. ***Held:*** A landslide is an "earth movement," and the plain terms of the exclusion bar coverage for any claim arising in whole or part from the landslide or any settling or slipping preceding that landslide, regardless of the landslide's cause.

MCS-90 ENDORSEMENT INAPPLICABLE TO INTRASTATE TRIP

Progressive S.E. Ins. Co. v. Brown, 2022 Ind. LEXIS 131 (Ind.)

Following accident during intrastate trip, insurer denied coverage to motor carrier despite carrier's MCS-90 endorsement. ***Held:*** Although MCS-90 endorsement requires insurer to pay judgment against carrier and seek reimbursement from it, endorsement was inapplicable under federal law. Insured was not engaged in interstate commerce. Endorsement was also inapplicable under state law because carrier was not transporting hazardous property.

LIMITATIONS OF ACTIONS

RAILROAD EMPLOYEE'S INJURY CLAIM AGAINST COMMUTER TRANSPORTATION DISTRICT UNTIMELY

Lowe v. NICTD, 177 N.E.3d 796 (Ind.)

Commuter transportation district employee served notice of tort claim on attorney general 263 days after injury, and later filed FELA suit. ***Held:*** Claim untimely for failure to notify NICTD within 180 days of accident. State tort-claim statute applies to FELA actions. NICTD is political subdivision, not state agency to which longer notice period applies. Substantial compliance doctrine is inapplicable to timeliness of notice.

MEDICAL MALPRACTICE

DIFFERENTIAL DIAGNOSIS PROPER IN ESTABLISHING CAUSE OF INJURY

Cockayne v. Bristol Hosp. Inc., 2022 Conn. App. LEXIS 47 (Conn. App.)

Plaintiff was granted judgment based on evidence enema was physically capable of causing perforation to patient's rectum. ***Held:*** Use of differential diagnosis was proper and sufficient to establish plaintiff's theory of causation that defendant's employees caused patient's perforation.

NEGLIGENCE

REASONABLE FORESEEABILITY REQUIRED TO ESTABLISH CAUSATION

Craig Salamone et al. v. Wesleyan Univ., AC 43819 (Conn. App.)

Plaintiffs sued defendant university for alleged sexual assault by student who was also a campus dorm resident advisor. Plaintiffs alleged negligent supervision. Trial court granted defense summary judgment based on lack of reasonable foreseeability of assaults. ***Held:*** Affirmed. It could not be reasonably inferred that university knew or should have known that the student would sexually assault plaintiffs because he had no criminal history, complaints or accusations.

PARENTS OR GUARDIAN OF ABUSED CHILD MAY BRING NIED CLAIM AGAINST CARETAKER

K.G. v. Smith, 178 N.E.3d 300 (Ind.)

School employee sexually abused severely disabled child. ***Held in split decision:*** Though not witnessing abuse, and learning about it over two years later, mother may recover emotional distress damages. Parents or guardians must prove (1) tortfeasor owed duty to them, (2) abuse is irrefutable, (3) abuse would be rarely witnessed by parent or guardian, and (4) abuse severely impacted their mental health. Dissent contends that court adopted minority rule and that any change in law should come from legislature.

TRUCKING CARRIER LIABLE FOR INJURIES TO ITS DRIVER FROM SHIFTING LOAD

Wilkes v. Celadon Group, Inc., 177 N.E.3d 786 (Ind.)

Carrier's driver was injured when cargo loaded by shipper fell as he opened trailer door. ***Held in split decision:*** Carrier, not shipper, owes primary duty to safely load cargo. Shipper is liable if it takes responsibility to load truck and defect is latent or concealed. Though shipper assumed duty to safely load truck, defect was not concealed from driver. He inspected cargo and could have seen lack of securement. Driver was experienced, and shipper did not represent that cargo was secure. Dissent disagrees with rule of law and its applicability to case.

MUNICIPAL SPECIAL DUTY FOR NO-KNOCK SEARCH WARRANTS

Ferreira v. City of Binghamton, 2022 N.Y. LEXIS 392, 2022 NY Slip Op 01953 (N.Y.)

Second Circuit certified question whether New York's special duty requirement applies "to claims of injury inflicted through municipal negligence" or if it applies only to claims premised upon a municipality's negligent "failure to protect the plaintiff from an injury inflicted other than by a municipal employee." ***Held:*** Plaintiffs must establish that a municipality owed them a special duty when they assert a negligence claim based on actions taken by a municipality acting in a governmental capacity. ***Further held:*** Plaintiffs may establish such special duty when a municipality, acting through its police force, plans and executes a no-knock search warrant at a person's home.

LANDOWNER NOT LIABLE FOR INSTALLING OFF-ROAD MAILBOX POST IN RIGHT-OF-WAY

Snay v. Burr, 2021 Ohio LEXIS 2379 (Ohio)

Driver injured after his car hit reinforced mailbox post that was on right-of-way but not on traveled portion of highway. ***Held in split decision:*** Landowner owes no duty to motorist, even though post exceeded postal guidelines and landowner knew it could pose danger. Evidence must focus on whether condition creates danger to traffic on regularly traveled portion of road. Sliding off road because of black ice is neither expected nor normal incident of travel. Dissent argued that genuine issue of fact existed.

NO LIABILITY FOR PATRON'S FALL IN PARKING LOT

Wise v. E. Hall Funeral Home, Inc., 2022 Ohio App. LEXIS 331 (Ohio App.)

While walking through parking lot, patron tripped on dime-sized rock. ***Held:*** No premises liability results where defect is minor or trivial, commonly encountered, normally expected, and not unreasonably dangerous. Rocks on gradually deteriorating asphalt lot are reasonably expected. No attendant circumstances made condition unreasonably dangerous. ***Also held:*** Rock was open and obvious though not seen until after fall. No attendant circumstances prevented observation.

PLEADINGS

PLAINTIFF NOT ALLOWED TO CONFORM TO EVIDENCE WITH AMENDED COMPLAINT ALLEGING NEW AND DIFFERENT FACTS AND DAMAGES

KDM Servs., LLC v. DRVN Enterprises, Inc., AC 44243 (Conn. App.)

Plaintiff sued defendant for breach of a 2014 written contract for de-icing liquid based on alleged failure to pay for services rendered in 2018. Defendant alleged that the 2014 contract was satisfied in full. The trial court rendered judgment for plaintiff, concluding that, although the parties' written contract had expired, defendant breached an implied contract created by their course of dealings over the years. The trial court granted plaintiff leave to file an amended complaint alleging breach of implied contract. ***Held:*** Reversed. The trial court abused its discretion in allowing plaintiff to amend its complaint after trial to conform to the evidence. The amended complaint alleged an entirely new and different fact situation and sought different damages that defendant was not given an opportunity to defend against.

TRIAL PRACTICE

EVIDENTIARY TRANSCRIPTS NEEDED FOR MOTION TO SET ASIDE A VERDICT

Wayne Margarum, Sr. v. Donut Delight, Inc., AC 43696 (Conn. App.)

Plaintiff sued for alleged slip and fall on an accumulation of ice in area maintained and controlled by

defendant. Following defense jury verdict, plaintiff appealed. ***Held:*** Affirmed. The record was inadequate to review plaintiff's claim the trial court erred in denying his motion to set aside the verdict because he failed to provide the evidentiary transcripts from trial.

INCONSISTENT TESTIMONY OF WITNESS IS GROUNDS FOR IMPEACHMENT

Elisabeth M. Corbo v. Christopher J. Savluk, AC 43727 (Conn. App.)

At negligence trial, defense cross-examined plaintiff regarding alleged inconsistencies in the descriptions of her reported symptoms at her visit to a walk-in clinic and, one week later, to a chiropractor. Trial court permitted defendant to introduce into evidence a letter indicating plaintiff retained counsel in the period between her visits to explain why her description of injuries to the chiropractor lacked credibility. The jury returned a defense verdict. ***Held:*** Affirmed. The cross examination and letter both were relevant to defendant's claim that plaintiff lacked credibility and were proper impeachment.

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