IICLE

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TORT LAW UPDATE - 2014

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PRODUCTS LIABILITY

Thomas E. Bailey v. Federal Signal Corporation, 2012 Ill.App.1st, 093312, 982 N.E.2d 776 (September 13, 2012).

Several Chicago firefighters brought a products liability action against a siren manufacturer alleging department sirens were unreasonably dangerous and defective and exposed firefighters to excessive noise. The Appellate Court held that the Plaintiffs in a product liability case were not required to prove a feasible alternative design in order to support a design-defects claim based on risk-utility theory. The Court outlined the background and elements of a product liability action, noting that a Plaintiff must plead and prove the following elements to prevail in a strict liability action: (1) That the injury complained of resulted from a condition of the product; (2) That the condition was unreasonably dangerous; and (3) That it existed at the time the product left the manufacturer's control.

A product can be found to be unreasonably dangerous based on proof of any one of three conditions: (1) Manufacturing defect; (2) A design defect; or (3) Inadequate warnings. Under a design defect theory of strict products liability, Courts apply the consumer-expectation test as well as the risk-utility test. Under the consumer-expectation test, a Plaintiff succeeds by proving that the product did not perform as an ordinary consumer would expect when using it in an intended or reasonably foreseeable manner. Under the risk-utility test, a Plaintiff succeeds by proving that the magnitude of danger outweighs the utility of the product as designed. Those two tests are not theories of liability, but are methods of proof by which a Plaintiff may demonstrate that the element of unreasonable danger is met. Under the consumer-expectation test, a Plaintiff can prove that the product is dangerous to an extent beyond that which would be complicated by an ordinary consumer, an objective standard based on the average, normal or ordinary expectations of the reasonable person.

Noting that the consumer-expectation test did not account for the fact that consumers may not be aware of what to expect regarding the safety of certain products, the Supreme Court adopted a second alternative test for design defect cases known as the risk-utility test (Lamkin

v. Towner, 138 Ill.2d 510, 528, 150 Ill.Dec. 562, 563 N.E.2d 449 (1999)). Under the risk-utility test a Plaintiff must demonstrate that the magnitude of the danger outweighs the utility of the product as designed. A non-exhaustive list of factors used to balance risk against utility include (1) Availability of alternative designs; (2) The design did not conform to design standards in the industry; (3) The utility of the product to the user and public as a whole; (4) Safety aspects of the product including the likelihood of injury; (5) Manufacturer's ability to eliminate unsafe character of the product.

The Court held that a Plaintiff is not required to prove a feasible alternative design to maintain a claim in strict liability. The Court relied on expert testimony that it would be reasonable and possible to make sirens that would not have emitted sounds in the direction of the truck or vehicle where firefighters would be located. The Court held that, based on prior decisions stating actual physical testing and demonstration of an alternative design is not an essential element, evidence of a "feasible alternative design" is not necessarily required in order to prove a design-defect products liability claim. The Plaintiff's expert offered opinions based on scientific data, manuals and reports and a computer model. The Court rejected Defendant's claim that the Plaintiff was required to prove a feasible alternative design and demonstrate that design in order to meet their burden of proof.

Bowles v. Owens Illinois, Inc., 2013 Ill.App.4th, 121072, 375 Ill.Dec. 211, 998 N.E.2d 1267 (October 11, 2013).

In an asbestos exposure case the Court held that the Plaintiff must satisfy the frequency, regularity, and proximity test requiring proof that the injured worker was exposed to the Defendant's asbestos through evidence that (1) He regularly worked in an area where the Defendant's asbestos was frequently used and (2) The injured worker did, in fact, work sufficiently close to the area so as to come into contact with the Defendant's product. The Court applied the test announced by the Supreme Court in Thacker v. U.N.R. Industries, Inc., 151 Ill.2d 343, 177 Ill.Dec. 379, 603 N.E.2d 449 (1992). The Court concluded that the Plaintiff must adduce evidence that the Defendant's asbestos was put to frequent use in the facility at issue in the proximity where the Defendant regularly worked. The Plaintiff cannot meet that burden until it can point to sufficient evidence showing that the Defendant's product

was actually inhaled by the decedent based on the frequency and location of its use.

In the case at issue, proof that the decedent was exposed to the products at issue was speculative and conjectural. There was no evidence the decedent worked around any of the Defendant's products with sufficient frequency, regularity, and proximity to create a genuine issue of material facts.

This case contains an excellent assessment of the proof required to establish causal connection between the injury and the product at issue.

GOVERNMENTAL TORT IMMUNITY

Hascall v. Williams, 213 Ill.App.4th 121131, 375 Ill.Dec. 112, 998 N.E.2d 1168 (September 18, 2013).

The Plaintiff brought an action against a School Principal, School District Superintendent, and School District Board of Education alleging that Defendant's failure to respond appropriately to incidents of student bullying violated the School Code, constituted fraud and intentional infliction of emotional distress, and resulted in retaliation.

The Court noted that the Tort Immunity Act adopted the general principle that local government units are liable in tort but limited that liability with an extensive list of immunities based on specific government functions. The government entity bears the burden of properly raising and proving one of those immunities. Citing Section 2-201 of the Act, the Court noted that public employees serving in positions involving the determination of policy or the exercise of discretion are not liable for injury resulting from their acts or omissions when acting in the exercise of such discretion "even though abused" (745 ILCS 10/2-201 (West 2010).

The Plaintiff claimed that the Defendants were not exercising discretion but, rather, were executing ministerial acts mandated by Board policy "to act in response to bullying incidents" without regard to the exercise of discretion. Notwithstanding requirements in the School Code that School Districts "create and maintain a policy on bullying" (105 ILCS 5/27-23.7(d) West 2010), and although the School Board at issue established such a policy, the Court noted that neither the Statute nor the policy at issue mandated a particular response to a specific set of circumstances. "The determination of

whether bullying has occurred and the appropriate consequences and remedial action are discretionary acts under these facts."

The Court went on to conclude that the wilful and wanton exception to the immunities at issue was also inapplicable. The Court cited that exception: "A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes wilful and wanton conduct (745 ILCS 10/2-202 West 2010)". The Court concluded that the Defendants were not executing or enforcing any law. Furthermore, the Court noted that no exception for wilful and wanton conduct was included in Section 2-101.

Richter v. College of DuPage, 213 Ill.App.2d 130095 (December 31, 2013).

A pedestrian student brought a negligence action against a public college after she tripped and fell on a sidewalk defect. The Court held that repair of an uneven, broken, or even dangerous sidewalk was discretionary rather than ministerial and, therefore, the school was entitled to immunity. In the case at issue, college personnel made the final determination regarding handling each sidewalk deviation in accordance with established policy. The Court noted that the case at bar stands in contrast to cases in which mandatory compliance with certain regulations or statutes rendered the Act ministerial. The Court paid close attention to the college's policies and maintenance procedures. Whereas college personnel possessed absolute discretion to resolve each sidewalk issue in accordance with the college policies, cases in which the public entity was not entitled to discretionary immunity lacked that type of employee discretion. The Court contrasted the facts of this case to other cases in which an entity had established a program of inspection, placed a sidewalk on a mandatory list for repair, or did not provide for discretion on the part of the worker. The Court specifically noted authority for the proposition that if a street or sidewalk repair is done pursuant to a set of procedures with no room for discretionary decisions it is a ministerial act, but if the workers use their own judgment in performing the repair, it is a discretionary act.

Moore v. City of Chicago Park District, 2012 Illinois 112788, 365 Ill.Dec. 547, 978 N.E.2d 1050 (October 18, 2012).

In Moore, the Plaintiff brought a negligence claim asserting that the Chicago Park District's activity in negligently and carelessly shoveling and plowing snow into mounds on its parking lot and walkways created an unnatural condition for pedestrians to walk upon or step over. The Moore Court addressed the scope of the Park District's immunity under the Recreational Purpose Immunity Statute (745 ILCS 10/3-106). The question was whether an accumulation of snow and ice on Park District property caused by plowing or shoveling was a "condition" of the property within the meaning of the Recreational Use Immunity Act, which immunizes public bodies from liability for injuries where the liability is based on "the existence of a condition on any public property" used for recreational purposes unless the public body is guilty of wilful and wanton conduct proximately causing the injuries. The Court concluded that the existence of snow and ice on Park District recreational property was not an "activity" conducted on the property but rather a "condition" of the property. Therefore, the Park District was immune.

MEDICAL MALPRACTICE

Perkey v. Portes-Jarol, 213 Ill.App.2d 120470, 1 N.E.3d 5, 376 Ill.Dec. 726 (April 17, 2013).

The Administrator of the Estate of decedent brought a medical malpractice action against a physician after decedent died from pancreatic cancer. The Plaintiff claimed that the physician's delay in diagnosing cancer caused the decedent to lose a chance for a cure. Plaintiff's expert testified that the delay caused loss of a chance at cure. He testified that when the cancer was first removed it was Stage IIB giving her a 6% chance of a five year survival. He testified that when she first saw the doctor and should have been diagnosed it was likely Stage IIA and could have been Stage I. If the cancer was at Stage IIA, it was twice as likely to be cured at that time than when she was diagnosed. If it was Stage I, she was 6 times more likely to be cured. If detected earlier, the cancer "would have been at an earlier stage...and therefore her chances for a cure would have been greater".

The Court reached that conclusion even though the expert testified that an earlier treatment protocol would have been the same as it was after actual diagnosis, that the survival rate for pancreatic cancer is poor, pancreatic cancer is most often diagnosed after the disease has metastasized generally precluding any hope for a cure, and if she had pancreatic cancer at the earlier time, there was a greater than 50% likelihood that it would already have metastasized and more likely than not would have resulted in death.

Hemminger v. Lemay, 2014 Il1.App.3d 120392 (January 21, 2014).

The Trial Court granted a Motion for Directed Verdict by the Defendant noting that the Plaintiff failed to present evidence sufficient to establish that Defendant's negligence proximately caused the cancer death of the Plaintiff's decedent on a lost chance of survival theory. The Appellate Court reversed.

The Appellate Court noted that the Plaintiff proceeded under the "lost chance" theory of recovery. That theory refers to the injuries sustained by the Plaintiff whose medical providers are alleged to have deprived the patient of a chance to recover or survive a health problem or when Defendant's conduct has lessened the effectiveness of treatment or increased the risk of an unfavorable outcome. Under such a theory, a Plaintiff is not required to prove that she would have had a greater than 50% chance of survival or recovery, or that "a better result would have been achieved absent the alleged negligence of the doctor". In essence, it is the "lost chance" that is at the center of the case.

Although experts could not testify with certainty the stage of the Plaintiff's cancer at the time the diagnosis should have been made, the expert testified that it could have been diagnosed when it was either at Stage I or at Stage IIB. The Court noted a 80 to 90% survival rate of patients with Stage I cancer and a 58% rate in patients with Stage IIB cancer. When the Plaintiff was diagnosed, her cancer was at Stage IIIB and her 5 year survival rate had dropped to 32%. The expert's testimony supported a reasonable inference that the 6 month delay in diagnosis caused the decedent to lose a 26% chance of survival if her cancer was at Stage IIB, and a 48 to 58% chance of survival if her cancer was at Stage I. The Defendant argued that the expert had failed to connect statistical cancer rates to the patient's particular case, but the Appellate Court

rejected that argument: The Appellate Court noted that the expert's reliance on authoritative survival rate statistics and opinion based on those statistics was sufficient to support her causal connection opinion and to create an appropriate evidentiary inference.

Steele v. Provena Hospitals, 2013 Ill.App.3d 110374, 374 Ill.Dec. 1016, 996 N.E.2d 711 (September 24, 2013).

Following a patient's death from undiagnosed chickenpox, a patient's family brought a wrongful death and medical malpractice action against the emergency room physician and hospital. A jury verdict in favor of the Plaintiff was reversed by the Appellate Court. The Appellate Court held that the Trial Court had abused its discretion in admitting lay testimony from the decedent's family that the rash at issue "looked like chickenpox."

The Court also relied on a statement in a hospital's consent form that the Plaintiff did not act in reliance upon the conduct of the hospital or its agents. The release form at issue stated "I acknowledge...that the employment or agency status of physicians who treat me is not relevant to my selection of Provena Health for my care." The Court held that absent contrary evidence, that language constituted a clear disclaimer of the patient's reliance on the hospital for her medical care. That language, taken in conjunction with additional acknowledgements in the form that most of the providers are independent contractors who function independently of the hospital and that "any questions that I have had have been satisfactorily answered", constituted definitive indicators that the patient was not relying on the hospital or on the employee status of any of her treaters in seeking emergency care.

Buck v. Charletta, 213 Ill.App.1st, 122144, 373 Ill.Dec. 576, 994 N.E.2d 61.

The husband of a patient who died from lung cancer filed a wrongful death malpractice case against a radiologist alleging negligence in the manner of reporting findings concerning an MRI. After the decedent complained of flank pain her orthopedic surgeon ordered an MRI which was read by the Defendant Radiologist. The radiologist prepared and approved a final MRI report detailing an abnormal finding in the patient's lungs which included the possibility of a malignant lung tumor. The report

recommended that follow-up chest radiographs be taken and correlated with original x-rays. The records indicate no such follow-ups were done and the patient's cancer went undiagnosed. A year later another radiological study disclosed the incidental finding of a lung tumor, and that radiologist communicated the clinically significant information back to the ordering physician immediately and directly.

The orthopedist testified that he had received the Defendant's original x-ray report, noted the abnormal findings, and appreciated its clinical significance. The Plaintiff noted numerous contradictions, entries in the medical record, and testimony suggesting a question of fact as to whether the orthopedist actually received and read the report. Additionally, the Plaintiff adduced testimony from expert witnesses of what reasonably well-qualified physicians would have done if in the position of the orthopedist and radiologist. Specifically, experts testified that the radiologist's failure to communicate the results directly to the orthopedist so as to assure his receipt and understanding and the findings of that report violated the applicable standard of care and resulted in a one year delay in diagnosis. The Court held that that type of evidence could have permitted a jury to conclude that there was a communications failure that allowed the information in the radiologist's report to fall between the cracks to the detriment of the patient who was ultimately deprived of a full year of oncological treatment. The Court concluded that the orthopedist's testimony that he received and read the radiologist's report, and so informed the patient, did not visciate the Plaintiff's theory of causation but, rather, simply confirmed the presence a fact question. The question of whether the physician's subsequent treatment of the patient would have been the same had he been accurately informed is not resolved by the treating physician's testimony alone but is a question of fact for the jury.

Pontiac National Bank v. Vales, 213 Ill.App.4th 111088, 373 Ill.Dec. 157, 993 N.E.2d 463 (August 19, 2013).

The Estate of a 3 year old patient brought a wrongful death action against Defendant physicians and a jury returned a verdict in favor of the Defendant. The Appellate Court reversed the Trial Court noting: (1) The Trial Court abused its discretion in allowing defense counsel to cross-examine Plaintiff's expert regarding

income he had earned from expert testimony in the 8 year period before trial, (2) Permitting an inquiry into the expert's earnings in a manner causing unfair prejudice, (3) Allowing defense counsel to use a United States Bureau of Labor Statistics publication to contrast the estimated mean annual wages for a family physician and the annual earnings of the estate's expert witness during cross-examination.

MEDICAL MALPRACTICE: WRONGFUL BIRTH

Williams v. Rosner, 214 Ill.App.1st 120378 (February 26, 2014).

THE COURT'S OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS AND UNTIL RELEASED IS SUBJECT TO REVISION OR WITHDRAWAL.

The Plaintiff brought an action to recover damages including the extraordinary expenses they would incur in raising a daughter who was born with sickle cell disease following an unsuccessful sterilization procedure.

In November 2005 the Plaintiff elected to undergo a tubal ligation in an effort to achieve permanent sterility. Complications with anesthesia required the procedure to be canceled and Plaintiff subsequently elected to undergo a mini laparotomy and tubal ligation procedure. The surgeon left one of the fallopian tubes and one of the ovaries intact and the Plaintiff subsequently became pregnant and delivered a child. During cesarean section it was determined that the fallopian tube and ovary had not been removed.

The Plaintiff alleged that she and her husband were carriers of the sickle cell trait, had a son afflicted with sickle cell disease, and specifically instructed and informed Dr. Rosner that they desired permanent sterility to avoid conceiving another child with that condition.

Defendant moved to dismiss Plaintiff's Complaint stating that there is no Illinois authority permitting parents to file wrongful pregnancy actions to recover extraordinary expenses associated with raising a child born with a genetic disorder or abnormality following an unsuccessful sterilization procedure. The Defendant noted that Plaintiffs in unsuccessful sterilization procedure claims generally are limited to recovering damages for the cost of the unsuccessful operation, pain and suffering, medical complications caused by the pregnancy, cost of the child's delivery, lost wages, and loss of consortium. Defendant also argued that extraordinary expenses could not be covered because while the negligently performed

sterilization procedure undoubtedly resulted in a pregnancy, it was not the cause of the child's genetic defect. After denying the Defendant's Motion to Dismiss, the Trial Court certified the following question for interlocutory review:

> Whether a Plaintiff in an action for wrongful pregnancy may recover the extraordinary expenses of raising a child afflicted with sickle cell disease when the Defendant physician knew (1) that the Plaintiff and her husband were carriers of sickle cell trait, and (2) that Plaintiff had previously conceived a child with sickle cell disease, and (3) that the Plaintiff desired sterilization to avoid giving birth to another child afflicted with sickle cell disease.

In the Appellate Court the Plaintiff argued that the foreseeable consequence of the Defendant's negligence was the birth of a child with a serious hereditary disease and where that consequence in fact results, the Defendant should be held liable for extraordinary medical expenses that the parents will incur in raising the child to the age of majority because those damages proximately flow from the Defendant's negligence.

The Court reviews in detail Illinois law regarding wrongful birth. The Appellate Court notes three different birth-related medical negligence tort claims recognized in Illinois. The first type, "wrongful birth" claims, are suits brought by parents who allege that they would not have conceived a child or carried their child to term but for the negligence of the doctor who administered neonatal testing or genetic testing and failed to counsel them of the likelihood of giving birth to a physically or mentally impaired child. The premise of such an action is that prudent medical care would have detected the risk of congenital or hereditary disorder, either prior to conception or during pregnancy, and that as a result of negligence, the parents were foreclosed from making an informed decision whether to conceive a potentially handicapped child or, in the alternative, to terminate the same. Plaintiffs who succeed in wrongful birth claims are entitled to recover extraordinary damages including the medical, institutional, and educational expenses that are necessary to properly manage and treat their child

(Williams v. University of Chicago Hospital, 179 Ill.2d 80, 84-85, 227 Ill.Dec. 793, 688 N.E.2d 130 (1997). Siemieniec v. Lutheran General Hospital, 117 Ill.2d 230, 111 Ill.Dec. 302, 512 N.E.2d 691).

"Wrongful life" claims are corresponding actions brought by a parent or guardian on behalf of the minor child claiming that as a result of negligent screening, testing and consultation, the parents of the Plaintiff were not adequately advised and informed of the risks associated with childbirth. The essence of a wrongful life action is the child's claim that medical professional's breach of the standard of care precluded an informed parental decision by his parents to avoid his conception or birth and but for that negligence, the child would not have been born to experience the pain and suffering attributable to his infliction.

Courts in Illinois have repeatedly rejected wrongful life actions on public policy grounds based on the assertion that human life as a matter of law is always preferable to non-life and therefore have been reluctant to find that the infant has suffered a legally cognizable injury by being born with a defect (Siemieniec, 117 Ill.2d at 236). Given the public policy favoring life over non-life, Plaintiffs who have filed such actions have been precluded from recovering both general and extraordinary damages (Goldberg v. Ruskin, 113 Ill.2d 482, 101 Ill.Dec. 818, 499 N.E.2d 406 (1986)).

Wrongful pregnancy or wrongful conception claims involve actions by parents following negligently performed sterilization procedures. Plaintiffs in such actions have historically been limited to general damages including costs associated with the unsuccessful operation (Cockrum v. Baumgartner, 95 Ill.2d 193, 69 Ill.Dec. 168, 447, 385 (1983)). In Williams v. University of Chicago Hospitals, 179 Ill.2d 80, 227 Ill.Dec. 793, 688 N.E.2d 130, the Plaintiffs of a child with ADHD sought to recover general damages as well as the extraordinary expenses associated with raising a special needs child. In Williams, the Court concluded that the allegations of the Plaintiff's Complaint were insufficient to establish that the provider proximately caused the injury in question. The Court emphasized that a key element of proximate cause was foreseeability and rejected the Plaintiff's argument that knowledge of a first child with ADHD was enough in itself to make the birth of another child a foreseeable consequence. Accordingly, a second child with ADHD was an unforeseeable consequence and as a result the Court

concluded that parents were not entitled to recover extraordinary expenses.

Relying on the language of Williams, the Appellate Court agreed that the Plaintiff in a negligence action may recover those damages which are foreseeable and a likely consequence of negligence, and if the evidence establishes that the birth of a diseased child is a foreseeable consequence of a negligently performed sterilization procedure, the Plaintiff should be able to obtain an award of extraordinary damages:

> "Here, based on the allegations in Plaintiff's Complaint, one can conclude that Plaintiff's injury, the birth of a second child afflicted with sickle cell disease, was of such a character that an ordinarily prudent person should have foreseen it to be a likely consequence of a negligently performed tubal ligation procedure."

PREMISES LIABILITY

Gareste v. Booth, 213 Ill.App.1st 121, 845 (December 9, 2013).

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORT. UNTIL RELEASE, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

The Plaintiff brought an action against a building owner where a stairwell was located and an independent contractor that built the stairwell at issue. After a verdict in favor of the pedestrian, the construction company and the property owner appealed. The Appellate Court held that a cause of action for negligent construction is not dependent on the contractor's possession or control of the building and further is not dependent upon an injured party's status as a business invitee, as is the case in a premises liability action against an owner/operator of a business. The contractor argued that it was entitled to normal premises liability defenses and jury instructions and was subject to liability only to the same extent as an owner or possessor of land.

Noting that the contractor had completed the building at issue several years before the injury and had no further ties with the building, its liability was not the same as the premises owner. The Court rejected the argument that the contractor owed no duty to a trespasser except to refrain from wilful and wanton misconduct, and held that

the duty of a contractor is the duty of ordinary negligence. Regardless of the Plaintiff's status as a trespasser, a contractor's duty is to exercise reasonable care in construction of the building and to avoid foreseeable injury.

Bruns v. City of Centralia, 2013 Ill.App.(5th), 130094, 374 Ill.Dec. 874, 996 N.E.2d 321 (September 23, 2013). Leave to appeal allowed 3 N.E.3d 794, January 29, 2014.

A pedestrian sought damages from the City for personal injuries sustained after tripping over a raised section of the public sidewalk. The Circuit Court granted summary judgment and the Appellate Court reversed.

The Plaintiff, an 80 year old woman who had been a patient of an adjacent eye clinic for many years was being treated for various eye problems. As she approached the entryway to an eye clinic, she was looking toward the door of the clinic. She fell in a crack in the sidewalk and severely injured her shoulder and arm.

The public works foreman testified that the sidewalk was a danger to pedestrians and was a hazard at the time of the fall. He also acknowledged that not all pedestrians look down while they are walking. He further acknowledged the general duty of the City to use reasonable care to keep its sidewalks in good repair. He testified that the City was aware of the condition of this particular sidewalk and it was unacceptable for the City not to have remedied the defect. The Court determined that the sidewalk defect was open and obvious as a matter of law and that the distraction exception was inapplicable and entered summary judgment in favor of the City.

The Appellate Court affirmed that any party that owns, controls, or maintains property has a duty to maintain the premises in a reasonably safe condition and that dangerous conditions must be removed or corrected or users of the premises must be provided adequate warning. Property owners are not expected to foresee an injury from an open and obvious danger, but the "distraction" exception to that rule provides that where there is a reason to expect a Plaintiff's attention may be distracted so that circumstances require him or her to focus on some other condition, the property owner owes a duty of reasonable care to protect them in spite of the open and obvious nature of the danger. The Court found that it is reasonable to foresee that a patron of an adjacent building may look up while walking toward the entrance to see how

much farther he or she needs to go before reaching steps. The Court focused on the foreseeability of the injury and noted "it is of no consequence whether or not a jury will consider Plaintiff contributorily negligent for looking toward the entrance to the clinic". The Court found the evidence presented a question of fact as to whether or not the City breached its duty of reasonable care in light of the circumstances surrounding the injury and the condition of the premises.

Morris v. Ingersoll Cutting Tool Company, 213 Ill.App.2d 120760, 2013 WL 5173868 (September 16, 2013).

The Plaintiff brought a negligence suit against property owners when he tripped on a walkway defect at Defendant's loading dock. The surface defect consisted of a 1-1/2 inch crack near a work surface. The Plaintiff argued that aggravating factors removed the case from the normal "De minimis rule".

The Appellate Court noted that liability generally attaches to sidewalk defects approaching 2 inches in height and that the De minimis rule generally precludes negligent claims on lesser defects. That rule, however, is not a mathematical formula and the Defendant's duty must be examined with respect to foreseeability, likelihood of injury, and magnitude of burden. The Court held that given the nature of the work space, injury from tripping on an uneven work surface was not foreseeable because it occurred in an area where large semi trailers were loaded and unloaded. Requiring every Defendant to repair every 1-1/2 inch defect in every loading bay would create an economic burden similar to that of a shopping center noted in other precedents.

Vallog v. City of Chicago.

A pedestrian filed a negligence Complaint against the City of Chicago after she fractured her foot when she tripped on the street. The Trial Court granted the City summary judgment. The Appellate Court affirmed finding that where there is no dispute about the physical nature of the condition, whether the danger is open and obvious is a question of law. The Court also considered whether the deliberate encounter exception applied. That exception arises when a landowner has reason to expect the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages

of doing so outweigh the risk. The Court found that the deliberate encounter exception did not apply because if Plaintiff had taken notice of the gap in the street she would have readily appreciated the slight risk of crossing the gap and would have been able to cross without incident.

Smart v. City of Chicago, 213 Ill.App.1st 120901, October 9, 2013.

THE OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED IT IS SUBJECT TO REVISION OR WITHDRAWAL.

A bicyclist brought a negligence action against the City alleging that the City had left a street in an unsafe condition during a resurfacing project and as a result a bicyclist had fallen and suffered injuries. The Appellate Court affirmed entry of judgment in favor of the bicyclist, holding that the Plaintiff was entitled to pursue a general negligence claim and was not required to prove the elements of a premises liability claim. The City's activities in removing the surface of the street, milling the street in multiple directions, and leaving exposed structures above the milled surface, and in creating a trench into which the Plaintiff's wheel lodged, constituted "activities", rather than "conditions". The Court rejected the City's contention that the landowner must be contemporaneously performing some activity at the time of the injury in order for negligence rather than premises liability principles to apply. Rather, under circumstances where a landowner's conduct in creating an unsafe condition precedes the injury, a Plaintiff may pursue a negligence claim, a premises liability claim, or both.

INSURANCE COVERAGE

Interstate Banker's Casualty Company v. Hernandez, 2013 Ill.App. (1st) 123035, 2 N.E.3d 353, December 18, 2013. The Supreme Court has granted leave to appeal.

An insured motorist and his subrogated automobile insurance carrier brought a negligence action for physical damage sustained in an accident. The Circuit Court granted a Motion to Dismiss finding that the action was barred by the Statute requiring binding arbitration of physical damage subrogation claims between insurers (143.24 of the Illinois Insurance Code, 215 ILCS 5/143.24(d)). That Section of the Code required insurers to arbitrate property

damage claims worth less than $2,500.00. The Court concluded that subrogation actions evolved into common law actions at law with an attendant right to a jury trial by the time of the adoption of the 1970's Constitution. That right to jury trial was thereafter constitutionally protected. Additionally, the Court noted that the Complaint in the case alleged property damage due to negligence and included an action by the property owner. The actions were based on negligence and "this is typically a question...that carriers a right to a jury trial". The Court concluded that Section 143.24(d) is unconstitutional because it eliminates the right to trial by jury and actions to which that right has historically attached.

Illinois Emcasco Insurance Company v. Waukegan Steel Sales, Inc., 213 Ill.App.1st 120 735, 374 Ill.Dec. 800, 996 N.E.2d 294 (September 13, 2013).

A subcontractor's liability insurer brought a declaratory judgment action against a contractor and additional insured on the subcontractor's policy, seeking a declaration that it had no duty to defend the contractor in an underlying personal injury action filed by an employee of the subcontractor. The Court held that if the Complaint alleges any reasonable facts within or potentially within policy coverage, the insurer is obligated to defend even if the allegations are groundless, false, or fraudulent.

Burchan v. Westside Mutual Insurance Company, 211 Ill.App.2d 10, 1035, 356 Ill.Dec. 357, 961 N.E.2d 453 (2011).

A workers' compensation claimant brought a declaratory judgment action against his employer's insurance company seeking a declaration that uninsured motorist coverage was not precluded under policy limitations by payments the claimant received under the Workers' Compensation Act. The uninsured motorist coverage policy provided that the UM insurer would not pay for any element of loss if the claimant is entitled to receive payment for the same element of loss under any workers' compensation policy. The Plaintiff sought damages under the uninsured motorist coverage for (1) disfigurement, (2) loss of a normal life experienced and reasonably certain to be experienced in the future, (3) increased risk of future harm resulting from the injuries, (4) pain and suffering experienced and reasonably certain to be experienced in the future, (5) the reasonable expense of medical care received and the present

cash value of treatment reasonably certain to be received in the future, (6) the value of earnings and benefits lost and the present cash value of those reasonably certain to be lost in the future and (7) the reasonable expense of necessary help required as a result of the injuries. The Circuit Court found Plaintiff was entitled to uninsured motorist arbitration on the issues of disfigurement, loss of a normal life, increased risk of harm, pain and suffering, and discounted medical expenses, and loss of earnings in excess of the amount actually paid in his workers' compensation claim.

The Appellate Court noted that under a workers' compensation claim the Plaintiff would not automatically be entitled to receive payment for disfigurement. The Court noted that a workers' compensation award under Sections (b), (e) or (f) of the Workers' Compensation Act (820 ILCS 305/8(c)) would negate a disfigurement award. Because he was not automatically entitled to receive payment for disfigurement, and would not be entitled to that payment in the case of permanent partial disability or permanent total disability, those damages can be sought in arbitration.

Because disability as contemplated in the Workers' Compensation Act is equivalent to "elements of loss" included in "loss of a normal life", the Plaintiff could not seek compensation for loss of a normal life under underinsured motorist coverage. The Court further held that the claimant who had received medical benefits under the Workers' Compensation Act could not subsequently seek compensation from the insurer under uninsured motorist coverage for the difference between billed medical expenses and negotiated amount paid: "Because Plaintiff is entitled to receive payment for medical expenses under workers' compensation, he may not claim any medical expenses in arbitration and the Trial Court erred in ruling otherwise."

The Plaintiff claimed that because workers' compensation only paid temporary total disability benefits in the amount of 2/3 of his "average weekly wage", the Plaintiff lost 1/3 of his average weekly wage as well as overtime and bonus because those amounts are excluded from average weekly wage. The Court held that "regardless of the dollar amount, Plaintiff is receiving payment for lost earnings under the Act and he thus may not seek such damages in arbitration".

Phoenix Insurance Company v. Rosen, 242 Ill.2d 48, 350 Ill.Dec. 847, 949 N.E.2d 639 (2011).

Following arbitration of an insured's claim for underinsured motorist coverage an insurer filed an action rejecting the arbitration award and demanding a jury trial citing the so-called *trial de novo provision*. That provision of the policy allowed either party to demand the right to a trial if the arbitration amount exceeded the minimum limit for bodily injury liability.

The claimant was awarded $382,500.00 subject to reduction by all applicable set-offs. The insurance company filed a Complaint rejecting the arbitration award and demanding a jury trial. The Defendant filed an Answer in which he asserted the Affirmative Defense that the *trial de novo provision* was invalid and unenforceable as against public policy and further filed a Counterclaim asking the Court to enforce the arbitration award. The Trial Court granted the insurance company's Motion to Strike the Affirmative Defense and Counterclaim. The Appellate Court reversed citing previous cases in which Courts rejected enforcement of the *trial de novo* clause. The Court found that the *de novo* provision unfairly and unequivocally favors the insurer over the insured and, therefore, violated the public policy considerations in support of arbitration.

The Supreme Court reviewed at length the policies in favor of and opposed to the *trial de novo provisions* and prior cases interpreting them. The Court noted that its power to declare a private contract invalid on public policy grounds was exercised sparingly. It also concluded that legislative action respecting uninsured/underinsured motorist coverage reflected an approval of the use of *trial de novo provisions*, concluding "It is the public policy of Illinois that such provisions must be included." The Court held that *trial de novo provisions* do not violate public policy as unconscionable and expressly overruled decisions to the contrary.

Klingelhoets v. Charlton-Perrin, 213 Ill.App.1st, 112412, 368 Ill.Dec. 291, 983 N.E.2d 1095, January 10, 2013.

A pedestrian was struck by a motorist while walking across the street. The motorist admitted liability but disputed damages. The Circuit Court entered judgment on a verdict in the amount of $713,602.00.

The Appellate Court affirmed the Trial Court's decision. It specifically held that the Trial Court did not abuse its discretion in allowing the pedestrian to testify that she did not continue with physical therapy because she could not afford the cost. The Plaintiff testified that she could not continue to see her physical therapist after the accident because the therapy was expensive. During closing arguments, Plaintiff's counsel noted that the therapy was costly. The Defendant insisted that those statements were unduly prejudicial because they improperly evidenced the wealth or poverty of the parties.

In finding that the evidence and arguments of counsel were not improper, the Court cited Vanoosting v. Sellars, 212 Ill.App.5th, 110365, 361 Ill.Dec. 248, 970 N.E.2d 614. The Plaintiff filed a Motion in Limine seeking to introduce evidence that she did not have medical insurance as the explanation for the Defendant's claim that she sought little or no medical treatment in the last 3 years. The Trial Court denied that Motion. A jury returned a verdict but did not award her anything for future pain and suffering. The Appellate Court discussed the principles of relevant evidence and unfair prejudice and concluded that evidence the Plaintiff sought to introduce regarding her financial position and lack of medical insurance should have been admitted and the Trial Court has committed reversible error.

The Court concluded that the evidence in question relates directly to a contested point, namely the extent of the Plaintiff's injuries and whether her failure to obtain medical care is relevant to the nature of those injuries or some other factor.

WORKERS' COMPENSATION

Benture-Newberg-Perini, Stone and Webster v. Illinois Workers' Compensation Commission, 213 Ill. 115728, 213 WL 6698421 (2013).

Petitioner was a member of the Pipefitter's Local Union. He took a position with an employer in Cordova, Illinois, about 200 miles away. He was expected to work 7 days a week, 12 hours a day. Due to the distance, he and a co-worker elected to stay at a local hotel. While driving from the hotel to the jobsite, the Petitioner was involved in an automobile accident. The employee testified that the employer wanted him to stay within an hour's drive of the plant. The employer did not direct employees where to stay

or require them to relocate closer to the plant. Employer did receive a benefit from having employees close to the plant but did not direct employees on where to live or what route to take.

An Arbitrator found the Petitioner failed to establish a compensable accident and that the Petitioner was not a traveling employee. The Commission reversed, finding that the Petitioner's injury arose out of the employment since the exigencies of the job required the method of travel and that the Petitioner was a traveling employee. The Circuit Court reversed the Commission. The Appellate Court reversed the Circuit Court.

The Supreme Court found that the Petitioner failed to establish that he sustained an accidental injury that arose out of and in the course of employment with the employer and he was not a traveling employee. The Petitioner was not a permanent employee and was not working for the employer on a long term exclusive basis. He was not required to travel out of his Union's territory. The decision to stay in a hotel rather than drive daily was the decision of the Petitioner. Petitioner was hired to work at one specific jobsite and not to travel from site to site. The travel involved was from a temporary residence to a jobsite. The Petitioner was not reimbursed for travel expenses and the employer did not make any travel or living arrangements. The Court found that the decision of the Commission was against the manifest weight of the evidence. It also noted that the Commission's decision raised serious policy concerns that it would not be fair to compensate an employee who relocated closer to a jobsite but not compensate an employee who permanently lived near the work.

The Court also found that the Commission's finding that the injuries arose out of an in the course of employment was against the manifest weight of the evidence. Because it was Petitioner's choice to stay at a motel and because there was no evidence that the employer required its workers to live within a specific travel distance, the accident was not work-related.

Kertis v. Illinois Workers' Compensation Commission, 372 Ill.Dec. 378, 991 N.E.2d 868 (2nd Dist. 2013).

Petitioner worked as a branch manager for a bank. One branch was located in Hoffman Estates and the other in St. Charles. Petitioner was required to travel between the two branches regularly. Occasionally the Petitioner would make the trip several times a day. The employer did not provide

parking at St. Charles so the employee had to park in a municipal lot located about a block from the St. Charles office. The Petitioner sustained an injury when he stepped in a pothole at the parking lot. The Arbitrator and Commission found that the Petitioner failed to prove an accident that arose out of and in the course of his employment. The Circuit Court affirmed.

The Appellate Court reversed, finding that since the Petitioner was a traveling employee, he sustained a compensable accident. The job duties required him to travel between the two offices, travel was an essential part of the job, and the question outlined by the Court was whether the Petitioner's conduct was reasonable and foreseeable. The Court found that Petitioner's actions were reasonable and foreseeable since the Petitioner was required to travel between the two offices and because the employer did not provide parking. Accordingly, as a traveling employee, it was reasonable and foreseeable for Petitioner to park in the public lot located close to the office.

Accolade v. Illinois Workers' Compensation Commission, 371 Ill.Dec. 713 990 N.E.2d 901 (3rd Dist. 2013).

A caregiver was helping a resident in the shower when she felt something "pop" in her neck. She was holding the resident with one hand and reached with her other hand for a soap dish. An accident report stated the Petitioner felt something pop when giving the resident a shower. Petitioner's manager indicated the Petitioner was turning her head and felt something pop. The manager stated that the Petitioner was not lifting at the time of the accident. The Appellate Court affirmed the Commission's decision that the work was reasonably anticipated, and was therefore a risk associated with the job.

Village of Villa Park v. Illinois Workers' Compensation Commission, 2013 Ill.App.2d, 130038 WC, 2013 WL 6867380 (2d Dist. 2013).

Petitioner was working as a community service officer. He sustained an accident when he was walking down a staircase at the back of the building. Petitioner's right knee gave out causing him to fall down the stairs. Petitioner had a prior injury to his knee. He sustained injuries to his right knee and lower back. Petitioner used

the back stairs two to four times per day. The stairs were not open to the general public.

The Arbitrator found the Petitioner did not establish an accidental injury that arose out of and in the course of his employment. The Commission reversed the decision of the Arbitrator and found that Petitioner sustained a compensable accident and that his back condition was causally related to the accident. The Circuit Court confirmed the decision of the Commission.

The Appellate Court found that the decision of the Commission was not against the manifest weight of the evidence. The Court found that Petitioner "continuously" used the stairway for personal comfort and to complete his work activities. The Court noted that employer was aware that Petitioner sustained a prior injury to his knee and still required him to traverse the stairway multiple times per day. Thus, the risk of the employment was the frequent use of the stairs where he had an injury to his knee. Accordingly, the Court found that Petitioner sustained an accidental injury that arose out of and in the course of his employment.

LIENS

Jako v. Fraczek, 2012 Ill.App.1st 103665, 966 N.E.2d 1121 (March 9, 2012).

The Health Care Services Lien Act does not require a patient to file a separate Complaint or initiate a separate lawsuit against a health care provider and obtain personal service of process in order to adjudicate a lien. In a personal injury action, the hospital notified the Plaintiff's lawyer and the Defendant's insured that it was asserting a health care lien. The Plaintiff filed a Motion to Adjudicate. The health care providers made no reply to the Motion to Adjudicate and the liens were reduced to zero. Subsequently, the hospital filed a separate action to adjudicate its liens anew on the grounds that it had not received proper notice in the previous case.

The health care provider argued that the Trial Court originally had erred by permitting notice by certified mail. The Court determined that the action respecting adjudication of the lien was by nature an in rem proceeding and that it was the property, not the owner of the property, that is within the jurisdiction of the Court. Personal service of process on the health care provider was unnecessary and certified mail was appropriate notice.

WRONGFUL DEATH

The Estate of Perry C. Powell v. John C. Wunsch, PC, 2013 Ill.App. 1st, 121854.

The decedent had two children, one of whom was disabled. Decedent died and his next of kin hired the Defendant law firm to prosecute a malpractice wrongful death and survival claim. Subsequently, the law firm was able to retain two recoveries: one for $5,000, and the other for $118,091.34. The disabled adult's guardian was his sister, who also received $118, 091.34 as part of the same settlement. The funds were deposited into a joint bank account in both the sister and the disabled adult's name.

Approximately three years later the mother filed a petition to remove the sister as the disabled adult's guardian. A public guardian was appointed and filed a complaint alleging that the Defendant law firm was negligent in not distributing the settlement through the probate court. The Defendant law firm argued they did not owe a duty to disabled adult and that even if a duty was owed the breach of that duty was not the proximate cause of Plaintiff's damages.

The Appellate Court held that the law firm did owe a duty to the decedent's next of kin in the underlying wrongful death action and specifically that the settlement proceeds should have been distributed in accordance with the Wrongful Death Act. A guardian should have been appointed to receive the wrongful death proceeds in the second action.

Lough v. BNSF Railway Company, 2013 Ill.App.3d, 120305.

The Defendant's employee struck Plaintiff while Defendant was driving an automobile. Plaintiff died twenty-two months after the accident from congestive heart failure and chronic obstructive pulmonary disease. Plaintiff's heirs sued Defendant for wrongful death and survival. Plaintiff's doctor testified that he believed that there was no connection between the accident and the Plaintiff's death. The Trial Court granted Defendant summary judgment on the wrongful death counts while allowing the survival action to proceed. The Appellate Court affirmed. To defeat a motion for summary judgment in a negligence action, circumstantial evidence must be of

such a nature and so related as to make the conclusion more probable as opposed to merely possible.

LEGAL MALPRACTICE

800 South Wells Commercial, LLC. v. Horwood Marcys and Berk Chartered, 2013 Ill.App.1st, 123660.

Plaintiff filed a lawsuit against a law firm alleging breach of fiduciary duty. Plaintiff did not allege legal malpractice. The suit was filed more than two years after the alleged conduct. The Appellate Court affirmed summary judgment finding that the two year Statute of Limitations for legal malpractice is not limited to legal malpractice claims but also include any claims arising out of the provision of legal services.

NEGLIGENCE

Wilkins v. Williams, 2013 IL 114310, 991 N.E.2d 308 (June 20, 2013).

Plaintiff was a motorist who was making a left turn when she was struck by an ambulance. At the time of the accident, the ambulance was engaged in the non-emergency transport of a patient, and did not have its emergency lights engaged. Plaintiff sued the ambulance driver and the ambulance company. At issue was the interpretation of the *Emergency Medical Services Act* (210 ILCS 50/3.150(a)). The Act provide immunity from civil liability based on provision of emergency or non-emergency medical services in the normal course of conducting one's duties except in the case of willful and wanton conduct. Defendants filed a Motion for Summary Judgment, which was granted. The Appellate Court reversed, holding that the immunity provides in the EMS Act did not extend to third party negligence claims based on the ordinary operation of a motor vehicle. The Supreme Court accepted appeal.

The Supreme Court held that the Immunity Act is not limited to acts toward the patient in an ambulance but also applies to negligence toward third parties. Also, the Court saw no distinction between ambulances operating under lights and siren and those not operating under lights and siren and did not abridge the provisions of the EMS Act conferring immunity.

Choate v. Indiana Harbor Belt Railroad Company, 2012 IL 112948, 980 N.E.2d 58 (September 20, 2012).

Plaintiff was a minor who was injured while attempting to jump aboard a moving freight train. After a jury trial, the Circuit Court entered judgment for the minor and denied the railroad's post-trial motion for a judgment notwithstanding the verdict. The Appellate Court noted a landowner has a duty to exercise reasonable care where: (1) The landowner knew or should have known that children habitually frequent the property, (2) A defective structure or dangerous condition was present on the property, (3) A defective structure or dangerous condition was likely to injure the children because they are incapable based upon age and maturity of appreciating the risk involved, and (4) The expense and inconvenience of remedying the defective structure or dangerous condition was slight when compared to the risk to the children.

The Supreme Court held that a moving train is an obvious danger that any child should recognize. This overruled LaSalle National Bank v. City of Chicago, 132 Ill.App.3d 607, 88 Ill.Dec. 102, 478 N.E.2d 417 (1985); and Engel v. Chicago and Northwestern Transportation Company, 186 Ill.App.3d 522, 134 Ill.Dec. 383, 542 N.E.2d 729 (1989).

Rettig v. Heiser, 2013 Ill.App.4th, 120985, 996 N.E.2d 1220 (October 4, 2013).

Plaintiff filed a negligence action against the driver who struck her vehicle from the rear. The rear driver was driving within the speed limit, it was drizzling, several other vehicles were on the road, and the rear driver had to react in an instant to another car. Defendant filed a Motion for Summary Judgment arguing that she did not breach any duty to Plaintiff. The Trial Court granted the Motion and the Appellate Court held that, as a matter of law, a rear driver in a rear end accident is not precluded from prevailing on a Motion for Summary Judgment.

GOOD SAMARITAN ACT

Homestar Bank and Financial Services v. Emergency Care and Health Organization, Ltd., Docket No. 115526, Opinion filed March 20, 2014.

The Plaintiff, as guardian of the Estate of a disabled person, filed a suit against an emergency room physician for medical malpractice. The Circuit Court concluded that the Defendant was immune from liability pursuant to Section 25 of the Good Samaritan Act (745 ILCS 49/25, West 2010). The Appellate Court reversed the Circuit Court and the Supreme Court affirmed the Appellate Court's decision.

The Defendant was working in the emergency room at the time the Plaintiff was being treated, responded to a code blue, and attempted to intubate the Plaintiff. The Plaintiff suffered severe and permanent brain injury allegedly as a result of Defendant's negligence. The Defendant moved for Summary Judgment asserting that he was immune from liability for negligence. He contended that because he provided emergency care to Anderson and Anderson was not billed for that care, the services provided by the Defendant were covered by the Good Samaritan Act.

The Act in question provides that any person licensed to practice the treatment of human ailments who provides emergency care without a fee shall not be liable for his acts or omissions absent wilful and wanton conduct.

The Plaintiff argued that the Act was inapplicable because the Defendant was doing his job when he treated Plaintiff and he was not providing his services "without fee" as contemplated by the Act. Although Dr. Murphy did not bill the Plaintiff for his services, he still was working under contract with an emergency room staffing service. The Plaintiff argued that just because no discreet bill was sent for Dr. Murphy's services, that did not mean that Dr. Murphy was providing his services "without fee": Dr. Murphy was being paid by his employer.

The Supreme Court reasoned that the primary intent of the Good Samaritan Act governed its interpretation, citing with approval the rationale of the Federal District Court in Henslet v. Provena Hospital, 373 *et seq.* 2nd 802 (ND Ill. 2005). The Court noted that use of the term "fee" in the Act is ambiguous and its definition was broad enough to include both a patient being billed and a doctor being paid. Like the Court in Henslet, the Supreme Court reviewed the legislative purpose behind the Act and concluded that "physicians who respond to emergencies

because they are paid to do so do not share the incentive to act that is at the very heart of the Good Samaritan Statute". The Court concluded that the phrase "without fee" must be read to include both a patient being billed and a doctor being paid, and both refute the assertion that the Samaritan acted "without fee". In essence, the Defendant "responded to the code blue because it was his job to do so" and as a result, the Good Samaritan Act did not apply to him.