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NEWS AND EVENTS OF INTEREST
to SmithAmundsen clients.

Case Reports UPDATE

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Medical Malpractice Caps On Noneconomic Damages Constituted Legislative *Remittitur* That Violated Separation Of Powers Clause In State Constitution

Lebron v. Gottlieb Memorial Hospital, 2010 Ill. LEXIS 26 (Docket Nos. 105741 & 105745, filed Feb. 4, 2010)

In *Lebron v. Gottlieb Memorial Hospital*, a mother filed suit against several health care providers for their treatment of her minor daughter around the time of her birth, alleging that certain acts and omissions negligently caused severe brain injury, cerebral palsy, and other injuries. The plaintiffs, who alleged that the noneconomic damages for disability, disfigurement, and pain and suffering would exceed the statutory caps placed on such damages by legislation enacted in 2005, sought a judicial declaration that the caps violated the separation of powers clause in the Illinois Constitution by permitting the General Assembly to usurp the judiciary's authority to determine whether a *remittitur* is appropriate. The trial court agreed and held the Act was unconstitutional. The defendants appealed directly to the Illinois Supreme Court to rule on the constitutionality of the Act.

The Illinois Supreme Court affirmed, holding that the limitations on noneconomic damages constituted a legislative *remittitur* which violated the separation of powers clause in the Illinois Constitution. The court noted that a trial court has the traditional and inherent power of *remittitur* to correct any excessive jury verdict on a case-by-case basis. In adopting a limitation on noneconomic damages of $500,00 per doctor and $1 million per hospital, the legislature encroached on the judiciary's authority by forcing the court to reduce a jury award to a predetermined limit irrespective of the facts of the case. Because the noneconomic damage limitations could not be severed from other provisions of the Act, the court held that the Act was void in its entirety, but the court noted that the General Assembly was free to reenact any other provision it deemed appropriate.

"Reciprocal Coverage" Clause That Limited Permissive User Coverage In Commercial Trucker's Policy Did Not Violate Motor Vehicle Code Or Public Policy

Zurich American Ins. Co. v. Key Cartage, Inc., 2009 Ill. LEXIS 1926 (Docket No.107472, filed Oct. 29, 2009)

In *Zurich American Ins. Co. v. Key Cartage, Inc.*, the Illinois Supreme Court addressed whether a "reciprocal coverage" provision violated the public policy requiring liability coverage for permissive users of motor vehicles. The coverage dispute arose out of a wrongful death action brought by a motorist's estate against a commercial trucker and his employer, a carrier-for-hire, which had temporarily borrowed the truck from another company. The permissive users of the truck at the time of the accident were insured with the defendant, whereas the truck itself was owned by a company that had a trucker's policy with the plaintiff. The insurer for the permissive users agreed to defend the wrongful death action under a reservation of rights, but claimed that the truck owner's insurer provided primary coverage. The insurer which insured the truck owner filed a declaratory action seeking a determination that it owed no liability coverage to the permissive users based on the "reciprocal coverage" provision in its policy, arguing that the permissive users were not insured because the truck owner did not qualify as an insured under the defendant's policy. The trial court found in the plaintiff's favor, but the appellate court reversed and remanded, holding that the plaintiff was required to insure permissive users and that its "reciprocal coverage" provision violated the public policy set forth in the Financial Responsibility Law.

The Illinois Supreme Court reversed the appellate court and affirmed the trial court, holding that the "reciprocal coverage" provision that limited permissive user coverage did not violate the Financial Responsibility Law or public policy. The truck was being exclusively used in the permissive users' business as provided in the "reciprocal coverage" provision. The provision was clear and unambiguous on the undisputed facts. The provision excluded from liability coverage permissive users of a truck pursuant to operating rights granted by a public authority. The court rejected the defendant's public policy arguments which were based on the Financial Responsibility Law because commercial trucking is regulated under different statutes relating to the Commercial Transportation Law. The court emphasized that only permissive users who have their own liability insurance could be excluded under the "reciprocal coverage" provision. Accordingly, there was no risk that persons injured by commercial truckers would be unable to secure payment of their damages.

Little League President's Alleged Statements That Parent/Volunteer "Abused" Players, Coaches, And Umpires Could Be Innocently Construed And Were Not Defamatory *Per Se*

Green v. Roger, 234 Ill. 2d 478, 917 N.E.2d 450 (2009)

In *Green v. Roger*, the plaintiff was a dentist, attorney, and father who was involved in a local little league program, serving as a team manager, coach, and director at various times. When he applied for a coaching position in the league which included his son's team, he was not selected. In an email, the board president indicated that the board had decided not to assign him to a coaching position because of a long pattern of behavior which was inconsistent with what the board believed was acceptable for a coach. However, the president stated that he would be able to assist his son's team as a volunteer during practices and before games. The board also offered to place his son on the team he specified. After the board refused to allow him to coach the following season, he filed suit, alleging that the board president made false and defamatory statements regarding his "abuse" of players, coaches, and umpires. The trial court found that the complaint failed to state a cause of action but allowed the plaintiff a chance to replead. Instead, the plaintiff filed a motion to reconsider which the trial court denied. The appellate court reversed, holding that the statement that the plaintiff "exhibited a long pattern of misconduct with children" constituted defamation *per se* because it imputed

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a lack of ability and prejudiced the plaintiff in his dental and legal professions. In the court's view, these professions require a high level of moral character and allegations of abuse to children would lower the public's perception of plaintiff's character. The defendant appealed.

The Illinois Supreme Court reversed the appellate court and affirmed the trial court. It held that the plaintiff's claims were too vague when the claims were pled on "information and belief" without setting forth the facts on which the belief was based. Although the complaint did not need to set forth the exact defamatory words used, it did need to plead the substance of the statements with sufficient precision to permit review of their defamatory content. The court noted that even if the complaint satisfied the pleading standard, it should have been dismissed when the allegedly defamatory statements were capable of innocent construction. Under the innocent construction rule, the court must consider the statements in context and give the words their natural and obvious meaning. Because the primary definition of "abuse" is to "to reproach coarsely" and the primary definition of "misconduct" is "mismanagement," the allegedly defamatory statements were capable of an innocent construction that did not relate to physical or sexual abuse. If the board president intended to accuse the plaintiff of physical or sexual abuse, he would not have offered the plaintiff a chance to volunteer for his son's team.

Attorney Who Issued Press Release Accusing Another Attorney Of Forging Affidavit To Extort Settlement Not Entitled To Summary Judgment On Defense Of Fair Report Privilege Against Defamation

***Missner v. Clifford*, 393 Ill. App. 3d 751, 914 N.E.2d 540 (1st Dist. 2009)**

In *Missner v. Clifford*, one attorney sued another after the latter's law firm issued a press release to two publications accusing the former of forging the signature of an ex-FBI agent, creating a false affidavit, making intentional false statements, and attempting to extort settlement of a lawsuit. The plaintiff alleged that these statements were defamation *per se* because they indicated that he lacked integrity in the discharge of his professional duties. The defendant filed a motion for summary judgment claiming that he did not publish the statements or cause them to be published. In the alternative, he filed a motion to dismiss arguing that the fair report privilege protected the publication because it was a fair abridgement of the contents of a filed complaint. The plaintiff countered that under the self-conferral exception, the fair report privilege did not shield the defendant from liability where the defendant conferred the privilege on himself by making the original defamatory statement and then reporting on it. The trial court granted summary judgment, finding that the defendant did not make the original defamatory statements in the complaint so the self-conferral exception to the privilege did not apply.

The appellate court reversed the trial court's finding that the fair report privilege shielded the attorney from liability for the allegedly defamatory statement and remanded for further proceedings. The court explained that the fair report privilege is an exception to the general rule that the re-publisher of defamatory material bears the same degree of liability for defamation as the original publisher. The privilege protects the publication of defamatory matter in a report of an official action or proceeding that deals with a matter of public concern if the report is a fair abridgement. However, under the self-conferral exception, one cannot confer the privilege upon himself by making the original defamatory statement and then reporting on it. Because a genuine issue of material fact existed whether the defendant was responsible for publication of the statement, summary judgment in his favor was improper.

Misrepresentations By Sellers In Real Estate Disclosure Form Did Not Constitute "Occurrence" Or Cause "Property Damage" To House

***Rock v. State Farm Fire & Casualty Co.*, 395 Ill. App. 3d 145, 917 N.E.2d 610 (3d Dist. 2009)**

In *Rock v. State Farm Fire & Casualty Co.*, the insureds brought a declaratory judgment action alleging that their homeowners insurer owed a duty to defend them in the underlying suit brought by the purchasers of their home. In the underlying suit, the purchasers alleged that the insureds had misrepresented the condition of the house in a real estate disclosure form by stating that there were no water or foundation problems. In denying liability coverage, the insurer claimed that the underlying complaint did not allege an "occurrence" that caused "property damage" as defined in the policy. The insureds argued that the underlying complaint did allege property damage caused by water leaking into the house. The trial court entered judgment in the insureds' favor and found that the insurer owed a duty to defend on the reasoning that the underlying complaint alleged that the misrepresentations caused property damage in the form of loss of use and the cost of remediation.

The appellate court reversed and entered judgment in the insurer's favor. It held that the misrepresentations alleged in the complaint did not constitute an "occurrence" that caused "property damage" to the house. The court did not need to determine whether the alleged misrepresentations constituted an "occurrence" under the policy when the underlying complaint did not allege that the misrepresentations caused physical damage to or destruction of tangible property. The complaint alleged that the insureds made misrepresentations about past and/or existing facts but did not refer to any physical damage to the property after the misrepresentations were made in the disclosure form before closing. The purchasers' claim for damages due to loss of use of the house was not "property damage" in the absence of physical injury as required by the policy.

Doctor Could Appeal Excess Verdict Even Though Plaintiff Agreed To Release Doctor From Personal Liability In Exchange For Assignment Of Bad Faith Claim

***Dienstag v. Margolies*, 396 Ill. App. 3d 25, 919 N.E.2d 17 (1st Dist. 2009)**

In *Dienstag v. Margolies*, a patient and her husband sued a gynecologist for medical malpractice stemming from a belated diagnosis of breast cancer. After two abnormal findings in her left breast, which were classified as "probably benign," the patient returned to see her gynecologist complaining of breast tenderness and enlargement. The gynecologist examined her but did not feel a dominant lump and asked her to return in six months. When the patient returned there was a palpable lump which was found to be malignant. The patient had a modified radical mastectomy to remove her left breast. At trial, the jury returned a verdict in the plaintiffs' favor totaling $5,950,000. The gynecologist filed a motion seeking judgment notwithstanding the verdict or a new trial. He also sought *remittitur* of the verdict to $1 million, the limits of his professional liability insurance policy. The trial court denied the gynecologist's motion for judgment notwithstanding the verdict or a new trial but granted in part his motion for *remittitur* and entered judgment on the verdict in the amount of $5,450,000. The defendant appealed.

The appellate court affirmed. The plaintiffs argued that the appeal was moot because they had entered into an assignment and forbearance agreement with the defendant whereby the gynecologist assigned his claim against his insurance carrier for "bad-faith refusal to settle" to the plaintiffs in exchange for them agreeing not to hold him personally liable in excess of the $1 million policy limits. The court rejected the plaintiffs' argument that there was no longer a "live controversy" between the parties to the appeal. The court noted that it was in the gynecologist's interest to seek reversal or reduction of the judgment since he could face financial liability from his insurance carrier if it was required to pay the entire judgment. Furthermore, there was nothing in the assignment and forbearance agreement that required him to drop the appeal. Turning to the merits, the court held that the verdict was not contrary to the manifest weight of the evidence as the defendant should have referred the plaintiff to a surgeon based on the mammogram reports and the damages, as remitted, did not need further reduction.

Legal Malpractice Insurer Owed No Duty To Defend Attorney Against Allegations That Attorney Breached Fiduciary Duty Under ERISA

***Ill. State Bar Ass'n Mutual Ins. Co. v. Mondo*, 392 Ill. App. 3d 1032, 911 N.E.2d 1144 (1st Dist. 2009)**

In *Ill. State Bar Ass'n Mutual Ins. Co. v. Mondo*, a professional liability insurer filed a declaratory judgment action against its insured, an attorney, seeking a determination that it had no duty to defend him in an underlying federal action which alleged that the insured's acts and omissions breached a fiduciary duty under ERISA and that the allegations fell within the "dishonest, fraudulent, or intentional act" and ERISA exclusions. The trial court granted the insured's motion for summary judgment, finding that the insurer had a duty to defend him pursuant to the terms and conditions of the professional liability insurance policy.

The appellate court reversed and remanded. The court held that the nature of the underlying complaint related to the insured's performance of duties concerning his role as an insurance expert rather than as an attorney. Furthermore, the factual allegations in the underlying federal action pertained to the insured's failure to disclose information as part of a scheme to mislead and defraud the insurance trust. The allegations were not based upon negligence or potential negligence, but even if they did, the policy excluded each cause of action as they all arose out of the insured's relationship with the insurance trust as an insurance expert and not as an attorney. Accordingly, the insurer did not have a duty to defend its insured in the underlying action.

Driver Breached Notice Provision By Not Reporting Fatal Hit-And-Run Accident Involving Pedestrian For 5 Years

***American Standard Ins. Co. v. Slifer*, 395 Ill. App. 3d 1056, 919 N.E.2d 372 (4th Dist. 2009)**

In *American Standard Ins. Co. v. Slifer*, the insured struck a pedestrian with his vehicle in a fatal hit-and-run accident. The insured did not notify anyone of the accident until nearly five years later when he confessed to the police. The insured had an automobile insurance policy that required him to promptly notify the insurer of any accidents or losses. When the decedent's estate representative sued the insured for wrongful death, the insurer filed a declaratory judgment action and asserted that it was not obligated to defend or indemnify the driver because he materially breached the notice provisions of the policy. The trial court granted summary judgment in the insurer's favor and the estate representative appealed.

The appellate court affirmed. The court held that the policy clearly obligated the insured to give prompt notification of the accident, and he failed to do so by waiting for nearly five years before reporting the accident. Although the estate representative argued that the notice provision was ambiguous because it appeared before the section of the policy entitled "Agreement," the words used in the provision were not susceptible to more than one meaning. The plain language of the notice provision was unambiguous, directing the insured to promptly notify the insurer in the event of accident or loss. Moreover, the notice provision was not merely advisory where mandatory language was used in the provision. By failing to report the accident for nearly five years, the insured materially breached the notice provision.

Plaintiff Allowed Leave To File Second Healthcare Professional Report After Expiration Of 90-Day Extension Period When Plaintiff Had Demonstrated Meritorious Claim

***Cookson v. Price*, 393 Ill. App. 3d 549, 914 N.E.2d 279 (3d Dist. 2009)**

In *Cookson v. Price*, a patient filed a medical malpractice action against a physical therapist assistant and his employer. The plaintiff alleged that the assistant placed an interferential current device on his knee and left him unattended for 40 minutes, resulting in further injury to his knee and necessitating surgery. Because the statute of limitations was about to run, the patient's attorney filed an affidavit for a 90-day extension of time to file a section 2-622 health care professional

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consultant report. Within that extension of time, the plaintiff's attorney filed a report written by a board-certified physician in physical medicine and rehabilitation who concluded that the patient's action was reasonable and meritorious. The defendants filed a motion to dismiss, arguing that the report was not authored by a health professional within the same school of physical therapist assistant as required by section 2-622, and that as the statute of limitations had run and the plaintiff has been allowed the one and only 90-day extension, the plaintiff should not be permitted to file additional or supplemental reports. The trial court granted the defendants' motion and held that the defect in the initial report could not be cured by amendment or a further extension of time. The plaintiff appealed.

The appellate court reversed and remanded for reinstatement of the amended complaint. The court noted that section 2-622(a)(1) requires that the plaintiff's attorney file an affidavit and health professional's report stating that a reasonable and meritorious cause of action exists. Moreover, in actions against individuals, the report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. Although the plaintiff initially failed to file a report from a health professional with the same license as physical therapist assistant, he should have been allowed the opportunity to establish his case. Amendments should be granted whenever they do not thwart the section's purpose of preventing frivolous suits, even though the version of section 2-622 in effect at the time allowed for only a single 90-day extension of time after expiration of the statute of limitations. The court held that the statute's purpose was furthered by allowing the plaintiff to amend his complaint to include the report authored by a physical therapist assistant.

N.B. As reported in this issue, the Illinois Supreme Court struck down the 2005 medical malpractice amendments in *Lebron v. Gottlieb Memorial Hospital*. Because the 2005 amendments were held inseverable, the version of section 2-622 which allowed for only a single 90-day extension of time at issue in *Cookson* is no longer in effect. This makes curious the Supreme Court's recent decision to grant the defendant's petition for leave to appeal in *Cookson*, pending under Docket No. 109321. We will report on this important decision when it is decided next year by the Supreme Court.

Owner Of Rural Property Abutting Highway Owed Duty Of Care To Motorcyclist For Tree That Fell Into Right-Of-Way

***Eckburg v. Presbytery of Blackhawk*, 396 Ill. App. 3d 164, 918 N.E.2d 1184 (2d Dist. 2009)**

In *Eckburg v. Presbytery of Blackhawk*, a husband, individually and as a personal representative for his deceased wife's estate, filed suit against a church for negligence after a portion of a tree on its property fell and struck his motorcycle, injuring him and killing his wife. The church owned several rotting trees in a densely-wooded area adjacent to a heavily-traveled rural road. The plaintiff alleged that the church had actual notice of the defective trees one week prior to the accident. He argued that the church owed a duty to him and the general public to exercise reasonable care in the inspection and maintenance of trees on its property. The church filed a motion to dismiss, relying on section 363 of the Restatement (Second) of Torts, and arguing that it was not liable as a matter of law because its land was not in an urban area and it did not have notice that the tree was defective. The trial court agreed and held that the pleadings and affirmative matters established that the accident occurred in a rural area and that the church had no notice of the tree's condition.

The appellate court reversed and remanded. In a case of first impression, the court noted the Illinois Supreme Court had never adopted section 363. The comments to section 363 acknowledge that trees pose threats to public highways and that, at the very least, a landowner will be required to take reasonable steps to prevent harm when he is in fact aware that a tree is in a dangerous condition. Furthermore, section 363 did not indicate whether the duty imposed on an urban landowner extends to a rural landowner and did not address how notice would affect the rural property owner's duty. Relying on decisions from other jurisdictions, the appellate court held that traditional negligence analysis should apply, as opposed to the overly simplistic urban/rural distinction. The traditional negligence analysis takes into consideration such factors as the size and type of road and its traffic patterns, the nature of the surrounding land, the condition and location of the tree, the nature of the danger to travelers, and the burden of inspecting and removing the danger. Accordingly, the trial court erred in holding that the fact that the tree was in a rural area was controlling and in dismissing the action without consideration of all relevant factors to determine whether the church owed a duty of care to the plaintiff.

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