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NEWS AND EVENTS OF INTEREST  
to SmithAmundsen clients.

# Case Reports

UPDATE

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## Mother Could Recover On Claim That Obstetrician's Delay In Delivery Caused Negligent Infliction Of Emotional Distress Without Presenting Expert Testimony

*Thornton v. Garcini*, 2010 Ill. LEXIS 663 (Docket No. 107028, filed April 22, 2010)

In *Thornton v. Garcini*, the Illinois Supreme Court addressed whether expert testimony was required to support a claim of negligent infliction of emotional distress. There, a mother, individually and as special administrator of her deceased infant son's estate, filed suit against her obstetrician, a hospital and its nurses following the death of her infant son, who was born prematurely in a breech position, at approximately 24 weeks. The infant had died during childbirth when he became stuck and the nurses were unable to complete delivery. The suit alleged wrongful death, survival and negligent infliction of emotional distress as a result of the delivery. In the first trial, the jury found in the plaintiff's favor and awarded \$175,000 for her emotional distress, but found in the defendants' favor on the other counts. In post-trial proceedings, the hospital and the nurses entered into a release and satisfaction of judgment, leaving only the obstetrician in the case. The appellate court reversed the judgment entered in the obstetrician's favor and remanded for a new trial. At retrial, the jury again found in the obstetrician's favor on the wrongful death and survival counts, but awarded the plaintiff \$700,000 on her infliction of emotional distress count. The obstetrician argued that the plaintiff had failed to prove negligent infliction of emotional distress with expert testimony, but the trial court denied the obstetrician's post-trial motion for judgment notwithstanding the verdict and further denied his request for a \$175,000 setoff of the settlement paid by the hospital. The appellate court affirmed the trial court and the obstetrician appealed.

The Illinois Supreme Court affirmed, holding that expert testimony was not necessary to support a claim of negligent infliction of emotional distress. The absence of medical testimony went only to the weight of the evidence. While expert testimony can assist the jury, it is not required to prove negligent infliction of emotional distress. Based on personal experience alone, the jury could reasonably find that the circumstances of the case caused emotional distress when the plaintiff testified to her experience of having the deceased infant partially delivered for over an hour while she awaited the obstetrician's arrival, and the father and the plaintiff's mother testified to the plaintiff's depression, inability to eat or sleep, and thoughts of suicide. Furthermore, the obstetrician was not entitled to a \$175,000 setoff when the previous settlement made no allocation among multiple parties, claims and injuries.

## Employer Required To Pay Temporary Total Disability Benefits Even Though Employee Was Later Discharged For Misconduct Unrelated To Injury

In *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, the Illinois Supreme Court addressed whether an employer's obligation to pay temporary total benefits to an employee ends when the employer terminates the employee for misconduct unrelated to the injury. There, a union carpenter was cleared to return to light-duty work after sustaining a work-related injury, but his employer terminated him two years later for defacing company property. The arbitrator ruled that he was not entitled to disability benefits, but the Industrial Commission determined that the carpenter was still entitled to receive benefits because his condition had not stabilized. The trial court affirmed the Commission. The appellate court reversed, holding that the carpenter was not entitled to disability benefits after termination "for cause."

The Illinois Supreme Court reversed. The court held that when an employee, who is entitled to receive workers' compensation as a result of a work-related injury, is later terminated for conduct unrelated to the injury, the employer's obligation to pay temporary total disability benefits continues until the employee's

medical condition has stabilized and he has reached maximum medical improvement. The court rejected the employer's argument that an employer may stop paying total temporary disability if the employee commits a volitional act of misconduct that justifies termination. According to the court, termination was irrelevant to the employee's statutory right to receive benefits because workers' compensation is a statutory remedy, and under the statute the test is whether the employee's medical condition has stabilized and reached maximum medical improvement. The Workers' Compensation Act contains no provision for the denial, suspension or termination of total temporary disability as a result of termination "for cause"; rather, total temporary disability may be suspended or terminated only if the worker does not submit to medical treatment, or fails to cooperate in vocational rehabilitation, or refuses work falling within physical restrictions prescribed by his doctor. Because the Commission found that the carpenter's condition had not stabilized and he had not reached maximum medical improvement, the court reinstated the award of benefits.

*Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 923 N.E.2d 266 (2010)

## Residential Developer's CGL Insurer Owed No Duty To Defend When Defects Alleged By House Buyers Did Not Constitute "Damage To Other Property"

*CMK Development Corp. v. West Bend Mutual Ins. Co.*, 395 Ill. App. 3d 830, 917 N.E.2d 1155 (1st Dist. 2009)

In *CMK Development Corp. v. West Bend Mutual Ins. Co.*, a residential developer filed suit against its CGL insurer for refusing to defend the developer in an arbitration proceeding brought by homeowners to recover for defects in the construction of their house. The complaint in the underlying arbitration listed 58 defects, but the developer claimed that only three defects triggered the carrier's duty to defend: scratches to a bathtub and toilet bowl, water-damaged concrete work, and water-damage to a cork floor. Following arbitration, the developer settled for \$47,500 and argued that the CGL policy covered the defects because the damage could have taken place after closing, thereby creating coverage for damage to the property of others. The trial court agreed and entered judgment in the

developer's favor, finding that the scratches to the bathroom fixtures were covered and awarded the developer \$85,906.60.

The appellate court reversed and held that the insurer did not owe a duty to defend or indemnify the developer. Although the policy did afford liability coverage for damage to other property, the defects alleged by the homeowners in the arbitration complaint did not constitute damage to other property. Courts have recognized as damage to other property a homeowner's furniture, clothing, carpets, upholstery and drapery, but not water damage to parts of the structure or sags, cracks or leaks in the structure. The court explained that coverage for damage to other property is not intended to cover contractual liability when the quality of the

*continued...*

insured's work does not meet the standard for what the purchaser bargained-for. Instead, there must be damage to property other than the structure or building. Here, the CGL policy did not afford coverage when the homeowners sought to recover only for repair or replacement of defective work or the diminished value of the house.

The developer's distinctions between pre-closing and post-closing damage were inconsequential where the damage was to the structure and fixtures that the developer promised to deliver. Allowing coverage for such construction defects in a new house would improperly transform a CGL policy into a performance bond.

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## General Contractor Could Not “Target Tender” Subcontractor’s Insurer When Construction Contract Did Not Require Subcontractor To Provide Primary Insurance And Subcontractor’s Policy Contained Excess “Other Insurance” Clause

*River Village I, LLC v. Central Ins. Co.*, 396 Ill. App. 3d 480, 919 N.E.2d 426 (1st Dist. 2009)

In *River Village I, LLC v. Central Ins. Co.*, a general contractor brought a declaratory action against its subcontractor’s insurer for defense and indemnification in connection with an underlying action brought by an employee of the subcontractor. The contract between the general contractor and the subcontractor required the subcontractor to name the general contractor as an additional insured but did not specify whether the insurance that the subcontractor was required to obtain was primary or excess. The subcontractor’s CGL policy contained an additional insured endorsement with an “other insurance” clause that provided that coverage was excess to any other valid and collectible insurance unless the written contract required that the insurance afforded to the additional insured be primary or primary and noncontributing. When the subcontractor’s employee was injured at the project and filed suit, the general contractor tendered its defense to the subcontractor’s insurer which refused to respond. The general contractor’s insurer settled the underlying action with the worker within its policy limits, but refused to produce its own policy in the declaratory judgment action, insisting that it was irrelevant. The trial court granted the subcontractor’s insurer summary judgment, finding that the subcontractor’s policy remained excess to the general contractor’s own policy. The general contractor then requested the trial

court to reconsider its ruling based on an analysis of its own policy, which the trial court denied. The general contractor appealed.

The appellate court affirmed, holding that the subcontractor’s insurer had no duty to defend or indemnify the general contractor. The court acknowledged that under the targeted tender doctrine, an insured can select which of multiple, concurrent insurers will defend and indemnify. However, when the insurers do not stand in the same position with respect to coverage because one is primary and the other is excess, the insured cannot target tender to impose a duty to defend on the insurer with an excess “other insurance” clause. Here, the general contractor’s attempted target tender failed because its policy was “valid and collectible insurance” in accordance with the “other insurance” clause in the additional insured endorsement in the subcontractor’s policy and the construction contract. Without a contract specifically requiring that the insurance be primary, the subcontractor’s policy remained excess and the general contractor’s own policy was primary. The court upheld the trial court’s refusal to reconsider its ruling, concluding that the general contractor had refused to produce its own policy despite three opportunities to do so before the trial court granted summary judgment.

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# Homeowner's Insurer Owed No Duty To Defend Parents Against Allegations That They Provided Alcohol To Intoxicated Minor Based On Exclusion For Criminal Acts

*Allstate Ins. Co. v. Greer*, 396 Ill. App. 3d 1037, 921 N.E.2d 793 (3d Dist. 2009)

In *Allstate Ins. Co. v. Greer*, a homeowner's insurer filed a declaratory action seeking a determination that it did not have to defend an underlying suit which alleged that the insureds had negligently and willfully supplied alcohol, causing a 17-year old to become intoxicated and impaired while driving and leading to his death in an automobile accident. The insurer denied liability coverage under an exclusion barring liability coverage for bodily injury or property damage resulting from a criminal act or omission. The insurer relied on the fact that the insureds' adult son had been found guilty of a misdemeanor for willfully supplying alcohol to a minor. The trial court granted the insurer summary judgment and the parents appealed.

The appellate court affirmed, holding that the policy afforded no liability coverage to the insureds because the exclusion for criminal acts was valid and enforceable. The complaint alleged that the parents were liable for having supplied alcohol to a minor, which clearly described criminal conduct, and the plain language of the policy excluded "intentional or criminal acts" or omissions regardless of whether the insureds were charged with or convicted of a crime. The court disagreed with the insureds' argument that the Drug or Alcohol Impaired Minor Responsibility Act established a public policy that prohibited a general criminal act exclusion in a policy of insurance.

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# General Contractor Liable Where It Retained And Exercised Detailed Supervision Over Safety Affecting Means And Methods Of Masonry Subcontractor's Work

In *Diaz v. Legat Architects, Inc.*, a general contractor entered into a contract with a subcontractor to perform masonry work at a high school construction project. The plaintiff was injured while working on the project as a laborer for a masonry subcontractor when he fell from a scaffold that was inadequately braced. The plaintiff and his wife filed a negligence action against the general contractor for bodily injuries and lost consortium. The trial court denied the general contractor's motions for directed verdict and for judgment notwithstanding the verdict, and the jury returned verdicts in the plaintiff's favor on which the trial court entered the judgment from which the general contractor appealed.

The appellate court affirmed, holding that there was sufficient evidence that the general contractor retained a right of supervision such that the plaintiff's employer was not entirely free to do the masonry work in its own way. Under section 414 of the Restatement (Second) of Torts, a general contractor who entrusts work to an independent contractor remains subject to direct

liability when the general contractor retains some degree of control over the manner in which the independent contractor's work is done. Here, the provisions of the contract between the general contractor, the owner and the architect required the general contractor to initiate, maintain and supervise all safety precautions and programs, retain a "competent superintendent" and assume sole responsibility for "all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the contract." Even though the masonry subcontractor was responsible for the safety of its employees, it had to follow the general contractor's safety directions and the construction superintendent testified that he walked the site to prevent accidents. The general contractor was on notice of a safety hazard when, on the day of the accident, the superintendent twice failed to discover that the scaffolding was not adequately braced. Accordingly, the trial court did not err in denying the general contractor's motions for directed verdict and for judgment notwithstanding the verdict.

*Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 920 N.E.2d 582 (1st Dist. 2009)

## Regular Use Exclusion In Police Officer's Personal Auto Policy Barred Uninsured Motorist Coverage For Patrol Car Injury

*Ryan v. State Farm Mutual Automobile Ins. Co.*, 397 Ill. App. 3d 48, 921 N.E.2d 458 (1st Dist. 2009)

In *Ryan v. State Farm Mutual Automobile Ins. Co.*, a city police officer filed suit against his insurer for injuries he sustained in a collision with an uninsured motorist while the officer was operating a randomly-assigned patrol car. The officer made an uninsured motorist claim under his personal auto policy. When his insurer denied the claim based on the "regular use" exclusion, the officer filed a declaratory action for a determination of the parties' rights under the policy. The officer argued that the vehicle that he was using at the time of the accident was not available for his regular use because the vehicle came from a pool of 20 to 25 vehicles and he used the vehicle only once, on the day of the collision. The trial court granted summary judgment in the insurer's favor and the officer appealed.

The appellate court affirmed. Even if the particular vehicle that the officer had been using had not been assigned to him before the collision, the vehicle came from a pool of vehicles furnished or available for his regular use. The exclusion did not depend on actual use but on availability. The court determined that the regular use exclusion was unambiguous and did not contravene public policy. The court reasoned that daily or frequent use of a patrol car, often in risky driving situations, substantially increased the risk of accident, and the insurer could not have contemplated extending coverage for any patrol car that the officer drove without an additional premium.

## Surgeon's Financial Incentive Was Admissible For Limited And Specific Purpose To Show Procedures Were Unnecessary And A Deviation From Standard Of Care

In *Martinez v. Elias*, a carpenter filed a medical malpractice action, alleging that an orthopedic surgeon and his clinic performed unnecessary surgery on his lower spine. The plaintiff was 42 years old with a history of degenerative disc disease at multiple levels of his lumbar spine. The defendant recommended a discogram, an outpatient diagnostic procedure in which dye is injected into a disc space to identify which disc is the source of pain. The defendant eventually performed the procedure and diagnosed herniated discs at multiple levels. The defendant later performed an endoscopic discectomy, an outpatient surgical procedure in which degenerated, nonfunctioning disc material is removed. Following this procedure, the plaintiff began to experience pain radiating down his right leg for the first time. Prior to trial, the judge denied the defendant's motion *in limine* and allowed the patient to present evidence of financial motive to suggest that the procedures were unnecessary and a deviation from the standard of care. The jury returned a verdict in the patient's favor for \$500,000, including an award of \$155,000 in future medical expenses. The trial court entered judgment on the verdict, but reduced the award for future medical expenses by

\$100,000. The defendants appealed and the plaintiff cross-appealed.

The appellate court affirmed and remanded with instructions to the trial court to vacate the \$100,000 *remittitur* and to reinstate the jury's award for future medical expenses. Although the defendants argued that evidence of motive was not relevant because motive is not an element of medical malpractice, the court held that the evidence was relevant for the limited and specific purpose of showing that the surgical procedures were unnecessary, which was an injury in itself. The court concluded that the admission of a financial motive was not error when the plaintiff presented expert testimony that spinal surgeons should not perform and interpret discograms and endoscopic procedures for their potential surgical patients because the presence of financial incentive, regardless of whether it actually motivated the surgeon, destroys the guarantee of objectivity. The court further held that the plaintiff was entitled to recover damages not only for the itemized cost of future spinal surgery at \$55,000, but also other surgical-related expenses which the jury had determined to be \$100,000 yet had not been specifically itemized.

*Martinez v. Elias*, 397 Ill. App. 460, 922 N.E.2d 457 (1st Dist. 2009)

# Homeowners' Association Was Not Entitled To Immunity As A Result Of Plaintiff's Fall On Driveway When Snow And Ice Removal Act Applied Only To Sidewalks

*Gallagher v. Union Square Condominium Homeowners' Ass'n*, 397 Ill. App. 1007, 922 N.E.2d 1201 (2d Dist. 2010)

In *Gallagher v. Union Square Condominium Homeowners' Ass'n*, a condominium unit owner filed suit against his homeowners' association, a property management agent, and a snow removal contractor after he fell on his driveway following a significant snowfall. The plaintiff alleged that the homeowners' association was responsible for the common areas of the development and that the driveway was included in the common areas. The association retained a property management agent to manage the development, including the common areas. The agent, in turn, entered into a contract with a snow removal company, which plowed a single, narrow path up the middle of the driveway, causing the unnatural formation of a snow mound and ice in front of the garage door. When the plaintiff returned home, he parked his car on the street and used the plowed path to walk to his garage, but slipped and fell. The trial court granted the defendants' motion to dismiss the plaintiff's negligence action based on immunity under the Snow and Ice Removal Act.

The plaintiff appealed.

The appellate court reversed and remanded. It held that the Act does not provide immunity from negligence for injuries sustained on driveways. The Act states that a defendant shall not be liable for personal injuries allegedly caused by the snowy or icy condition of the sidewalk unless the alleged misconduct was willful or wanton. Relying on a dictionary, the court reasoned that a "sidewalk" is generally understood to be "a foot pavement" usually at the side of a street or roadway, whereas a "driveway" is commonly understood to be a surface on which one drives vehicles from the street into a private building. To extend the Act to include driveways would have been to read into the Act an additional term that the legislature did not include. The court concluded that the Act had to be construed strictly and it could not presume that the legislature intended to include a driveway when it expressly chose the term "sidewalk."

# Car Manufacturer Owed Duty To Warn Of Known Hazards Of Trunk Contents Puncturing Fuel Tanks In Rear-End Collisions

In *Jablonski v. Ford Motor Co.*, the decedent was involved in a rear-end collision when a vehicle which was traveling at least 56 miles per hour struck him from behind, crushing the fuel tank in his 1993 Lincoln Town Car and causing a pipe wrench in the trunk to penetrate the fuel tank, gasoline to leak, and a fire to erupt. The decedent died and his wife suffered severe burn injuries. The decedent's wife and his representative alleged that the automobile manufacturer negligently designed the fuel tank system and was liable for punitive damages based on willful and wanton conduct because the manufacturer had long been aware of the potential dangers associated with an aft-of-axle fuel tank design used in the subject vehicle. The jury returned a verdict in the plaintiffs' favor and awarded \$43 million in total damages, of which \$28 million represented compensatory damages and \$15 million represented punitive damages. The manufacturer appealed after the trial court denied its motion for a judgment notwithstanding the verdict or for a new trial.

The appellate court affirmed. First, it held that the jury properly considered the negligent design claims where there was evidence that fuel tanks tended to rupture in rear-end collisions, that the manufacturer was long aware of the hazard

and that it was negligent in continuing to use the design without guarding against the hazard or warning consumers. According to the court, the crucial issue was whether the manufacturer exercised reasonable care in the design and whether the manufacturer should have foreseen that the design would be hazardous. Here, the plaintiffs' experts testified that the manufacturer was negligent in designing the fuel tank because at the time of manufacture a safer and more practical location for the tank would have been forward of the axle and other manufacturers had designed the tank forward of the axle. The plaintiffs also presented evidence that the defendant's own engineers were aware of the potential dangers of an aft-of-axle fuel tank location, including the danger of trunk contents puncturing the tank in a rear-end collision. Further, the jury was properly instructed on the defendant's failure to warn. The court declined the plaintiffs' invitation to recognize a duty to warn consumers of hazards discovered after the product is sold. Instead, the court held that under existing Illinois law the defendant had a continuous duty to warn when it knew or should have known of the hazard of trunk contents puncturing fuel tanks in rear-end collisions at the time that the vehicle left its control.

*Jablonski v. Ford Motor Co.*, 398 Ill. App. 222, 923 N.E.2d 347 (5th Dist. 2010)

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