ILLINOIS TORT CASE LAW UPDATE

Jeffrey Bach*

I. SUBSTANTIVE LAW

A. Governmental Liability

1. Coleman v. East Joliet Fire Protection District, *2016 IL 117952*

The administrator of decedent's estate filed a claim for wrongful death and survival, alleging willful and wanton conduct by fire protection districts, the ambulance crew, and the county, among others, in responding to an emergency call.[1] The evidence showed that decedent called 911 complaining that she could not breathe, and needed an ambulance.[2] Since decedent was located in an unincorporated area, the 911 operator transferred her call to an emergency medical dispatcher, but failed to properly communicate the nature of decedent's complaint to the dispatcher.[3] By the time the dispatcher tried to communicate with decedent, she was unresponsive.[4] Thereafter, an ambulance crew went to check on her but was not able to do a forced entry to decedent's residence.[5] Decedent subsequently died of cardiac arrest prior to receiving medical attention.[6] The Circuit Court granted summary judgment to the Defendant, finding that the public duty rule provided that local government entities owed no duty to individual members of the general public to provide adequate government services.[7] The Appellate Court affirmed.[8]

The Supreme Court overturned the Circuit Court and Appellate Court, holding that the public duty rule and its special duty exception were abolished,

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1. Coleman v. East Joliet Fire Protection District, 2016 IL 117952, ¶ 12.
2. *Id.* at ¶ 6.
3. *Id*.
4. *Id*. at ¶ 7.
5. *Id*.
6. *Id*. at ¶ 11.
7. *Id*. at ¶ 15.
8. *Id*.

abrogating a long line of cases.[9] Justice Kilbride wrote the lead opinion and was joined by Justice Burke, stating that public duty rule was no longer viable based on the interplay between the public duty rule and the *Tort Immunity Act*.[10] Specifically, Justice Kilbride found that it was time to abandon the public duty rule for three reasons: "(1) the jurisprudence has been muddled and inconsistent in the recognition of the public duty rule and its special duty exception; (2) application of the public duty rule is incompatible with the legislature's grant of limited immunity in cases of willful and wanton conduct; and (3) determination of public policy is primarily a legislative function and the legislature's enactment of statutory immunities has rendered the public duty rule obsolete."[11] Justice Freeman and Justice Theis concurred with opinion.[12] Justices Thomas, Garman and Karmeier dissented.[13]

Until this case, governmental entities that provided services to the public, like police and fire protection, did not owe a duty to individuals; rather they owed a duty to the public at large. This prevented individuals from successfully suing the entities for breaching a public duty. The removal of the public duty rule will allow practitioners to sue the entities directly in cases with similar facts as those alleged in *Coleman*. As Justice Kilbride noted, however, governmental entities are still entitled to the protections provided by the *Tort Immunity Act*.[14]

2. In re Estate of Stewart, *2016 IL App. (2d) 151117*

Mother of student who collapsed and died after suffering an asthma attack at school brought action against teacher and school district alleging willful and wanton conduct.[15] The evidence showed the teacher had failed to immediately call 911 when student began suffering asthma attack, which was contrary to Board of Education policy.[16] The evidence further showed that teacher did not call 911 for approximately seven-twenty minutes after student began having the asthma attack.[17] Jury verdict was entered in favor of

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9. *Id*. at ¶ 61.
10. *Id*. at ¶ 52.
11. *Id*. at ¶ 54.
12. *Id*. at ¶¶ 66–78.
13. *Id*. at ¶¶ 79–100.
14. *Id*. at ¶ 61.
15. *In re* Estate of Stewart, 2016 IL App. (2d) 151117, ¶¶ 1–2.
16. *Id*.
17. *Id*. at ¶ 3.

decedent's estate.[18] On appeal, the Appellate Court held that the teacher's failure to immediately call 911 was willful and wanton conduct and as a result, the teacher could not assert immunity for her actions pursuant to the *Local Governmental and Governmental Employees Tort Immunity Act*.[19]

The holding in this case indicates that the practitioner should attempt to obtain any Board of Education policies and procedures to be followed when a student may require medical treatment. Any case of this kind is going to be fact dependent by nature, but the violation of a Board of Education policy or procedure should allow a case to be decided by the jury, as opposed to dismissal on summary judgment

3. Burns v. City of Chicago, *2016 IL App. (1st) 151925*

Plaintiff was injured when he tripped and fell on raised sensory tiles on city sidewalk.[20] He brought an action against Defendant for negligence, failure to inspect, failure to repair, failure to warn, and *res ipsa loquitur*.[21] The Circuit Court dismissed the failure to warn claim and granted Defendant summary judgment on the remaining claims.[22] Appellate Court noted that the sensory tiles were raised less than two inches above the sidewalk and found that the difference was *de minimis*.[23] It further found that the Defendant was immune from liability under the *Local Governmental and Governmental Employees Tort Immunity Act*.[24] Finally, it found that the sensory tiles were an open and obvious condition.[25]

Experienced attorneys recognize that slip and fall cases are difficult to prevail on. When the added challenge of suing a governmental entity is included, it is fair to consider if such cases are worth pursuing, absent significant damages or facts that would tend to be viewed by a jury as willful and wanton conduct.

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18. *Id*.
19. *Id*. at ¶ 108.
20. Burns v. City of Chicago, 2016 IL App. (1st) 151925, ¶ 20.
21. *Id*. at ¶¶ 8–10.
22. *Id*. at ¶ 1.
23. *Id*. at ¶ 24.
24. *Id*. at ¶ 30.
25. *Id*. at ¶¶ 50–52.

4. Barr v. Cunningham, *2016 IL App. (1st) 150437*

Plaintiff sustained an eye injury while playing floor hockey during physical education class.[26] Case proceeded to trial, and the Circuit Court granted teacher's and District's motion for directed verdict on the basis that the teacher's conduct was not willful and wanton.[27] The Appellate Court reviewed prior case law and evidence in this case, which showed that eye protection was available for student's use.[28] It reversed, finding that the jury should determine if the teacher's conduct was willful and wanton.[29]

When a Plaintiff's attorney accepts any case, one of the first considerations should be whether the case can make it to a jury. This case can be cited by a practitioner at the summary judgment stage of the proceedings in similar fact patterns.

5. Smart v. City of Chicago*, 2013 IL App. (1st) 120901*

Bicyclist brought negligence action against Defendant, arguing that the city had left the street in an unsafe condition during a resurfacing project and that as a result, the bicyclist had fallen and suffered injuries.[30] After jury trial, the court entered judgment in favor of the bicyclist.[31] The Appellate Court affirmed, holding that the bicyclist was entitled to pursue a general negligence claim, and was not required to prove the elements of a premises liability claim.[32] Specifically, it noted the cyclist did not have to prove that the city knew or should have known about the dangerous condition and the risk posed by the condition because the city was directly responsible for completing and overseeing the resurfacing activities.[33]

This case is very significant in that the Appellate Court confirmed that a plaintiff can proceed under a general negligence theory in what has traditionally been thought of as a premises liability claim. As indicated above, the main issue was notice. If plaintiff was required to proceed under a

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26. Barr v. Cunningham, 2016 IL App. (1st) 150437, ¶ 3.

27. *Id*. at ¶ 12.

28. *Id*. at ¶ 9.

29. *Id*. at ¶ 31.

30. Smart v. City of Chicago, 2013 IL App. (1st) 120901, ¶ 14.

31. *Id*. at ¶ 24.

32. *Id*. at ¶ 47.

33. *Id*. at ¶ 57.

premises liability theory of negligence, he or she would have to prove that defendant knew of or should have known of the dangerous condition. Removing this requirement makes the plaintiff's attorney's job that much easier.

6. Lacey v. Perrin*, 2015 IL App. (2d) 141114*

Defendant police officer's vehicle struck vehicle in which Plaintiff was riding as a passenger.[34] Case proceeded to trial and the jury returned a verdict for Plaintiff.[35] However, the jury also answered in the affirmative two special interrogatories, which asked whether Defendant was in execution and enforcement of the law at the time of the accident and whether Defendant was en route to assist another officer at the time of the accident.[36] The trial court entered judgment in favor of defendants, based on the answers to the special interrogatories.[37] The Appellate Court affirmed, and discussed whether officer's conduct rose to the level of willful and wanton.[38] It also discussed evidentiary issues regarding hearsay, and whether Plaintiff's motion to file a third amended complaint should have been denied.[39]

Defense attorneys should pay particular attention to this case, as it highlights the importance of the use of special interrogatories to be certain that a jury verdict is consistent with principles of the law.

7. Negron v. City of Chicago*, 2016 IL App. (1st) 143432*

Plaintiff was injured when she tripped and fell on a sidewalk in Defendant city.[40] At the time of her fall, there was an outdoor celebration going on across the street.[41] Defendant moved for summary judgment arguing that the condition was open and obvious.[42] Plaintiff countered that the

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34. Lacey v. Perrin, 2015 IL App. (2d) 141114, ¶ 3.

35. *Id*. at ¶ 31.

36. *Id*. at ¶ 32.

37. *Id*.

38. *Id*. at ¶¶ 45, 86.

39. *Id*. at ¶¶ 52, 81.

40. Negron v. City of Chicago, 2016 IL App. (1st) 143432, ¶¶ 5–6.

41. *Id*. at ¶ 4.

42. *Id*. at ¶ 6.

distraction exception applied.[43] Trial court granted Defendant's motion for summary judgment, and Appellate Court affirmed.[44]

Similar to *Burns*, premises liability cases are difficult enough for plaintiffs to prevail without having to navigate the *Tort Immunity Act* as well.

8. Lorenc v. Forest Preserve District of Will County*, 2016 IL App. (3d) 150424*

Bicyclist was killed after a volunteer trail monitor had allegedly stepped into his path during event at the forest preserve administered by Defendant.[45] Estate brought action for wrongful death and survival.[46] Evidence showed that Defendant had encouraged participants to take all available safety precautions, including wearing a helmet, but that at the time of the accident, decedent was not wearing a helmet.[47] The Circuit Court granted Defendant's motion to dismiss on the basis that Plaintiff did not prove willful and wanton conduct on the part of Defendant.[48] The Appellate Court agreed that the volunteer's actions were incompetent, but held that the alleged conduct was not willful and wanton as would be required to defeat immunity defense and that the alleged conduct, if proven, was an exercise of discretion entitling Defendant to immunity.[49]

This case illustrates the difficulty of meeting a higher burden of proof than a simple breach of the duty of care, as the court agreed that the volunteer's actions were ill advised, but did not rise to the level required to sustain willful and wanton conduct.

B. Insurance

1. Pekin Insurance Company v. CSR Roofing Contractors, Inc.*, 2015 IL App. (1st) 142473*

Insurance company brought declaratory judgment action against its insured contractor, alleging that it had no duty to defend the contractor in a personal

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43. *Id.*

44. *Id.* at ¶ 2.

45. Lorenc v. Forest Preserve District of Will Cty., 2016 IL App. (3d) 150424, ¶ 5.

46. *Id.* at ¶¶ 3, 6.

47. *Id.* at ¶ 7.

48. *Id.* at ¶ 12.

49. *Id.* at ¶ 21.

injury action brought by an employee of the contractor's subcontractor.[50] The Circuit Court granted judgment on the pleadings for insurance company.[51] The Appellate Court noted that the insurance policy's additional insured endorsement entitled contractor to coverage if, at the time of the accident, the subcontractor's acts occurred as contractor's agent and within the scope of its authority as the agent.[52] It further noted that the employee's complaint contained allegations suggesting that the contractor could be subject to vicarious liability.[53] Finally, the Appellate Court indicated that the test to determine whether an insurer is obligated to defend its insured is to compare the allegations in the underlying complaint with the relevant provisions of the insurance policy and if the facts alleged in the complaint could potentially fall within the language of the policy, the court will find that the insurer has a duty to defend.[54] The court reversed and remanded the case to the trial court.[55]

This case helps give the practitioner a relatively clear test as to what he or she should look for in determining if an insurance company has a duty to defend. Specifically, compare the allegations in the complaint and the terms of the policy.

2. Cabrera v. ESI Consultants, Ltd.*, 2015 IL App. (1st) 140933*

Worker was injured while working on a construction project on city bridge.[56] Worker sued city, project engineering consultant hired by city, and consultant's subcontractor for negligence.[57] The trial court granted city, consultant, and contractor summary judgment.[58] The Appellate Court held that the consultant's and subcontractor's contracts did not establish a duty to maintain worksite cleanliness and to perform safety reviews such that the worker could establish a claim for negligence.[59] It further held that the city

50. Pekin Insurance Company v. CSR Roofing Contractors, Inc., 2015 IL App. (1st) 142473, ¶ 1.

51. *Id*.

52. *Id*. at ¶ 27.

53. *Id*. at ¶ 50.

54. *Id*. at ¶ 41.

55. *Id*. at ¶ 57.

56. Cabrera v. ESI Consultants, Ltd., 2015 IL App. (1st) 140933, ¶ 1.

57. *Id*.

58. *Id*.

59. *Id*. at ¶ 107.

was immune from liability under the *Tort Immunity Act*, so it affirmed the trial court.[60]

In any negligence case, one must determine what duty of care was violated before determining if negligence occurred. Here, the court looked to the contract to determine if a duty of care existed, and found that it did not.

3. Amco Insurance Company v. Erie Insurance Exchange*, 2016 IL App. (1st) 142660*

This case centered on an insurance dispute involving two subcontractors of a general contractor.[61] Worker sued for personal injury.[62] At issue was whether the carpentry subcontractor's insurer could make a contribution claim against the concrete subcontractor's policy.[63] The Circuit Court entered summary judgment in favor of the concrete subcontractor's insurer.[64] The Appellate Court held that the general contractor's delay in giving notice to the concrete subcontractor's insurer barred coverage.[65]

All practitioners should be aware that a delay in giving notice of a claim to an insurance company could result in coverage being barred.

4. Memberselect Insurance Company v. Luz*, 2016 IL App. (1st) 141947*

Insurance company brought declaratory judgment action against insured, asserting that limitations period had run on claim for underinsured motorist coverage.[66] The insurance policy contained a clause stating that all underinsured motorist claims must be commenced within three years after the date of the accident.[67] The attorney for the insured had sent a letter to insurance company approximately two months after accident asking for arbitration.[68] The parties had no additional communication until the three-year period had passed.[69] The Circuit Court entered summary judgment in favor

60. *Id*. at ¶ 125.

61. Amco Insurance Company v. Erie Insurance Exchange, 2016 IL App. (1st) 142660, ¶ 1.

62. *Id*. at ¶ 4.

63. *Id*. at ¶ 10.

64. *Id*. at ¶ 12.

65. *Id*. at ¶ 24.

66. Memberselect Insurance Co. v. Luz, 2016 IL App. (1st) 141947, ¶ 13.

67. *Id*. at ¶ 1.

68. *Id*. at ¶ 6.

69. *Id*. at ¶ 1.

of insurer.[70] The Appellate Court reversed, finding that the request for arbitration was a proper demand within the limitation period and it was not necessary that the insured select an arbitrator to commence arbitration.[71]

This case illustrates that a letter requesting arbitration is sufficient to place the insurance company on notice for time limited claims. The better course for practitioners is to specifically reference the language in the policy and ask for acknowledgment from the insurance company.

5. State Farm Mutual Automobile Insurance Company v. Burke*, 2016 IL App. (2d) 150462*

Driver and passengers were injured in an automobile accident.[72] Driver's vehicle was a company vehicle, and was insured by the company, which was located in Michigan, as well as by driver personally.[73] The other driver was uninsured.[74] Company's policy contained a Michigan uninsured motorist endorsement while the driver's policy provided uninsured motorist coverage pursuant to the requirements of Illinois law.[75] Dispute arose as to which company would provide primary uninsured motorist coverage.[76] The Circuit Court entered summary judgment in favor of company's insurer.[77] The Appellate Court reversed, finding that the Illinois statutory requirements of uninsured motorist coverage did not apply to the policy delivered in Michigan, the choice of Michigan law of uninsured motorist coverage was enforceable, but the commercial insurer waived policy defenses by granting coverage.[78]

This case is relevant to any company or employee that has operations in more than one state. Plaintiffs' attorneys should be aware that Illinois courts will not extend our statutory requirements to insurance policies issued in other states absent a compelling reason otherwise.

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70. *Id*. at ¶ 16.

71. *Id*. at ¶ 2.

72. State Farm Mutual Automobile Ins. Co. v. Burke, 2016 IL App. (2d) 150462, ¶ 3.

73. *Id*. at ¶ 4.

74. *Id*. at ¶ 3.

75. *Id*. at ¶ 4.

76. *Id*. at ¶ 1.

77. *Id*. at ¶ 18.

78. *Id*. at ¶ 50.

6. Acuity v. Decker*, 2015 IL App. (2d) 150192*

Employee was injured in an automobile accident while working for his employer.[79] Employee received worker's compensation benefits from Plaintiff, which was employer's insurance carrier.[80] Employee subsequently settled his claim against the third party tortfeasor for the full policy limits and paid Plaintiff the portion of the settlement required for satisfaction of the worker's compensation lien.[81] Employee then made a claim for underinsured motorist benefits with Plaintiff.[82] Plaintiff filed a declaratory judgment contending that it was entitled to a set off for the entire amount it paid to employee on the worker's compensation claim plus the entire amount that employee receive from the third-party tortfeasor.[83] The trial court granted employee's motion for summary judgment.[84] The Appellate Court held that Plaintiff was not entitled to a set off against the amount of underinsured motorist coverage that employee received from tortfeasor's insurer and that the employee's claim for lost wages, past medical expenses, and future medical expenses was not precluded based on the employee's receipt of worker's compensation benefits.[85]

This case gives Plaintiff's attorneys more ways to recover in an automobile accident case that is also a worker's compensation case. It may seem counter intuitive to be able to recover from one insurance company in two ways, but this case illustrates how it can be done.

7. Safeway Insurance Company v. Hadary*, 2016 IL App. (1st) 132554-B*

Insureds were involved in an auto accident.[86] At the time of the accident, the other driver was driving a rental car, but had declined additional coverage through the rental car agency.[87] Insureds recovered policy limits of other driver's primary insurance and attempted to make an underinsured motorist

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79. Acuity v. Decker, 2015 IL App. (2d) 150192, ¶ 1.

80. *Id*.

81. *Id*.

82. *Id*.

83. *Id*.

84. *Id*.

85. *Id*. at ¶¶ 29–30.

86. Safeway Ins. Co. v. Hadary, 2016 IL App. (1st) 132554-B, ¶ 6.

87. *Id*.

claim against their own insurance.[88] Their insurance denied liability, on the basis that the rental car company also provided insurance even if the other driver declined additional coverage.[89] However, the rental car company's insurance specifically stated that it was not to be primary.[90] The trial court granted summary judgment in favor of insurer, finding the insureds had not exhausted all insurance coverage.[91] The Appellate Court reversed, finding that it would contravene public policy and deny the insureds the economic value of the underinsured motorist coverage if such coverage did not apply in this situation.[92]

The practitioner should be aware of this case when asserting a claim for underinsured motorist benefits. The rule appears to be that a claimant must only exhaust all primary insurance coverage.

8. Bushmester v. Steve Spiess Construction, Inc.*, 2016 IL App. (3d) 140794*

Worker filed suit against general contractor for injury sustained while he was an employee of subcontractor.[93] The case proceeded to jury trial and verdict was entered in favor of employee.[94] Subcontractor and contractor then engaged in litigation to determine what, if any, set-off the employer was entitled to.[95] The primary issue at trial and on appeal was whether or not a claim for a *Kotecki* set-off is an affirmative defense that must be raised prior to trial.[96] The trial court held that the *Kotecki* set-off could be raised at any time and the Appellate Court affirmed.[97]

Attorneys who represent corporations in insurance disputes should be aware that a *Kotecki* set off can be raised at any time prior to trial.

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88. *Id*. at ¶ 7.

89. *Id*. at ¶ 8.

90. *Id*. at ¶ 10.

91. *Id*. at ¶ 13.

92. *Id*. at ¶ 21.

93. Bushmester v. Steve Spiess Constr. Inc., 2016 IL App. (3d) 140794, ¶ 3.

94. *Id*. at ¶¶ 4–5.

95. *Id*. at ¶¶ 6–7.

96. *Id*. at ¶ 9.

97. *Id*. at ¶ 11.

9. Destefano v. Farmers Automobile Insurance Association*, 2016 IL App. (5th) 150325*

Plaintiff was injured as she was riding a motorcycle down her driveway and was struck by a postal carrier.[98] The United States made a payment of approximately $50,000 to settle claims against it, including failure to enforce rules for delivering parcels on private property.[99] Plaintiffs made a claim against their underinsured coverage, which then asked for a set-off for the amount paid by the United States.[100] Trial court ruled in favor of Plaintiffs, and Appellate Court affirmed, finding that the payment was not made on behalf of the worker.[101]

In a case such as this one, to make sure that a client does not have to set off any amounts recovered from his or her own insurance, the language used in the release may become important to determine why the payment was made in exchange for the release.

10. Brennan v. Travelers Home and Marine Insurance Company*, 2016 IL App. (1st) 152830*

Plaintiffs were driving wife's mother's car, which was insured by Defendant.[102] After mother's death, Plaintiffs continued to drive the car and pay the insurance premiums.[103] Plaintiffs were involved in an accident and Defendant refused to pay the claim.[104] Circuit Court dismissed the complaint, finding that the policy terminated when Plaintiff's mother died.[105] Plaintiffs then tried to amend the complaint after the dismissal, but the trial court refused.[106] The Appellate Court affirmed.[107]

Since a deceased person cannot be party to a contract, it is important to advise clients to obtain their own insurance policy as soon as possible after the decedent's death.

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98. Destefano v. Farmers Automobile Ins. Ass'n, 2016 IL App. (5th) 150325, ¶ 1.

99. *Id*. at ¶ 2.

100. *Id*.

101. *Id*. at ¶¶ 3, 10.

102. Brennan v. Travelers Home and Marine Ins. Co., 2016 IL App. (1st) 152830, ¶¶ 4–5.

103. *Id*. at ¶ 4.

104. *Id*. at ¶ 5.

105. *Id*. at ¶ 6.

106. *Id*. at ¶ 7.

107. *Id*. at ¶ 16.

11. Country Mutual Insurance Company v. Dahms*, 2016 IL App. (1st) 141392*

This case involved a coverage dispute.[108] In the underlying incident, a taxi driver alleged that pedestrian's briefcase made contact with the windshield of the cab, damaging it.[109] The taxi driver then left his car and pursued the pedestrian on foot, a scuffle ensued, ending with the pedestrian knocking the taxi driver unconscious with his briefcase.[110] Pedestrian's insurance company brought declaratory judgment action asserting that it had no duty to defend or indemnify pedestrian in battery action brought against him.[111] The Circuit Court ruled that the insurer was obligated to pay for pedestrian's defense but only after he filed an answer and affirmative defenses in the underlying action.[112] The Appellate Court held that potential coverage existed even though there was exclusion for criminal acts, but that the duty to defend ended when the pedestrian was convicted of aggravated battery.[113]

Again, the practitioner should always review the language of the insurance policy in question to determine if there might be coverage for intentional acts.

12. Allstate Insurance Company v. Mack*, 2016 IL App. (1st) 141171*

Insurance company filed declaratory judgment action against insured alleging that insured breached policy by failing to sign HIPAA forms and that such breach prevented the insured from recovering underinsured motorist benefits.[114] The Circuit Court granted summary judgment for the insurer, and the Appellate Court affirmed.[115]

Cooperating with a party's own insurance company is often times in the best interest of everyone involved. If an attorney is going to recommend that a client not cooperate, he or she should be sure to review the terms of the policy first.

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108. Country Mutual Ins. Co. v. Dahms, 2016 IL App. (1st) 141392, ¶ 1.

109. *Id*. at ¶ 8.

110. *Id*.

111. *Id*. at ¶ 13.

112. *Id*. at ¶ 26.

113. *Id*. at ¶¶ 59, 79.

114. Allstate Ins. Co. v. Mack, 2016 IL App. (1st) 141171, ¶ 1.

115. *Id*.

13. Goldstein v. Grinnel Select Insurance Company*, 2016 IL App. (1st) 140317*

Decedent was killed while operating a riding lawn mower on the road.[116] At the time of his death, decedent was covered by two automobile insurance policies.[117] The insurance policy at issue in this case contained an exclusion for owned vehicles that applied to underinsured motorist coverage.[118] His estate brought action for declaratory judgment against automobile insurer alleging that the policy exclusion for an owned vehicle was unenforceable in the context of underinsured motorist coverage and that the riding lawn mower was not a motor vehicle under the terms of the policy.[119] The Circuit Court granted summary judgment in favor of insurer.[120] The Appellate Court held that as a matter of first impression, the owned vehicle exclusion of the underinsured motorist coverage was enforceable and a riding mower was a vehicle under the vehicle code and thus, the owned vehicle exclusion applied.[121]

Practitioners should be prepared to be creative in framing their cases to an insurance company after reviewing the terms of the policy to determine what might be excluded from coverage.

14. Pekin Insurance Company v. Martin Cement Company*, 2015 IL App. (3d) 140290*

Subcontractor's insurance company sought declaratory relief against contractor seeking to establish that it did not have a duty to indemnify or defend the contractor in an action brought by an employee of the subcontractor who was injured at a construction site where work was performed by the contractor and subcontractor.[122] Trial court granted summary judgment in favor of insurer.[123] The Appellate Court held that the third-party complaint filed by the construction company against the

116. Goldstein v. Grinnel Select Ins. Co., 2016 IL App. (1st) 140317, ¶ 3.

117. *Id*.

118. *Id*. at ¶ 4.

119. *Id*. at ¶ 1.

120. *Id*. at ¶ 6.

121. *Id*. at ¶¶ 27, 35.

122. Pekin Ins. Co. v. Martin Cement Co., 2015 IL App. (3d) 140290, ¶ 3.

123. *Id*. at ¶ 9.

subcontractor in the underlying action brought by the injured employee alleged sufficient facts concerning subcontractor's actions that it could result in vicarious liability of the contractor.[124] Since the Appellate Court found that liability could be imposed, it reversed and remanded.[125]

This is another case which illustrates that the duty to defend is triggered if the complaint alleges facts that could bring it within the terms of the insurance policy.

15. Safe Auto Insurance Company v. Fry*, 2015 IL App. (1st) 141713*

Declaratory judgment action brought by auto insurance company against driver and passenger for determination that auto policy provided no uninsured motorist coverage for passenger since driver was driving the car with an expired license and lacked reasonable belief that he was entitled to use the vehicle.[126] Circuit Court granted summary judgment in favor of the insurer.[127] The Appellate Court held that the passenger could not be excluded from the uninsured motorist coverage just because the driver lacked reason to believe that he was entitled to use the vehicle.[128]

In similar fact situations, attorneys should argue that the court should not look to the conduct of the person driving the vehicle to the detriment of the innocent passenger.

16. Auto-Owners Insurance Company v. Konow*, 2016 IL App. (2d) 150823*

Underlying litigation involved an auto accident.[129] After case was settled, Defendant brought negligent misrepresentation action against Plaintiff's attorney alleging that he had made false statements regarding whether all claims had been settled.[130] Circuit Court entered judgment in favor of Defendant.[131] Appellate Court reversed, finding that Plaintiff's

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124. *Id*. at ¶ 14.

125. *Id*. at ¶¶ 15–18

126. Safe Auto Ins. Co. v. Fry, 2015 IL App. (1st) 141713, ¶ 1.

127. *Id*. at ¶ 6.

128. *Id*. at ¶ 31.

129. Auto-Owners Ins. Co. v. Konow, 2016 IL App. (2d) 150823, ¶ 1.

130. *Id*.

131. *Id*.

attorney owed no duty to Defendant to communicate accurate information about lien claims to be paid from the settlement of the action.[132]

17. Auto-Owners Insurance Company v. Konow*, 2016 IL App. (2d) 150860*

This is the companion case to the above case, alleging negligent misrepresentation. In this action, Auto-Owners had both a property damage and medical payments coverage claim against the proceeds of the law suit.[133] Auto-Owners accepted a check meant to reimburse them for their medical payments coverage, but Plaintiff had written on the check "payment in full."[134] The Circuit Court found the acceptance of the check was not an accord and satisfaction and entered judgment in favor of Auto-Owners for the full amount of its property damage claim.[135] The Appellate Court Affirmed.[136]

It's rare that one case spawns two appeals within one year. In the first case, the court held that a Plaintiff's attorney owes no duty Defendant to communicate accurate information regarding lien claims. The second case appears to stand for the proposition that to claim accord and satisfaction, the actions of each party must make their intentions clear.

18. Skolnik v. Allied Property and Casualty Insurance Company*, 2015 IL App. (1st) 142438*

A young woman died of methadone intoxication at the home of policy holder.[137] Complaint was filed against policy holder alleging negligence for failing to request emergency medical assistance, among other things. Insurer filed declaratory judgment alleging that it was not obligated to defend insured on the basis of a controlled substance exclusion in the homeowner's policy.[138] Trial court entered summary judgment in favor of insurer.[139] Appellate Court reversed, finding that the allegation that homeowner was negligent for failing to request emergency medical assistance was not excluded under the

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132. *Id*. at ¶ 16.

133. *Id*. at ¶ 16.

134. *Id*. at ¶ 4.

135. *Id*. at ¶ 16.

136. *Id*. at ¶ 17.

137. Skolnik v. Allied Property and Casualty Ins. Co., 2015 IL App. (1st) 142438, ¶ 2.

138. *Id*. at ¶ 2.

139. *Id*. at ¶ 19.

controlled substances exclusion, so the insurer had a duty to defend.[140] It went on to note that where the underlying complaint alleges facts within or potentially within the scope of coverage, insurer has a duty to defend even if the allegations are groundless, false, or fraudulent, or the probability of recovery is minimal.[141]

The proposition that an insurer has a duty to defend against groundless, false, or fraudulent allegations indicates just how broad the duty to defend is. If a practitioner wishes to trigger the duty to defend, it should be certain that all potential causes of action are plead, even if the probability of recovery is low.

C. Malpractice

1. Yarborough v. Northwestern Memorial Hospital*, 2016 IL App. (1st) 141585*

Plaintiffs brought medical malpractice case against hospital stemming from premature birth of their daughter.[142] Trial court certified question to the Appellate Court regarding apparent agency.[143] Appellate Court held that the hospital could be held vicariously liable under the doctrine of apparent agency for the acts of the employees of an unrelated, independent clinic.[144] It further held that the doctrine of apparent authority is not limited to the four walls of the hospital and the parents were not required to name the clinic as a Defendant.[145] It went on to note that the issue of whether the clinic and the hospital held themselves out as agent and principal was a question of fact.

2. Hammer v. Barth*, 2016 IL App. (1st) 143066*

Plaintiff brought wrongful death action against hospital and others, alleging hospital was vicariously liable for doctor's negligence based on theories of agency.[146] Circuit Court granted summary judgment for

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140. *Id.* at ¶ 17.

141. *Id. at* ¶ 25.

142. Yarborough v. Nw. Mem'l Hosp., 2016 IL App. (1st) 141585, ¶ 1.

143. *Id.*

144. *Id.* at ¶ 32.

145. *Id.* at ¶ 46.

146. Hammer v. Barth, 2016 IL App. (1st) 143066, ¶ 1.

hospital.[147] The Appellate Court held that the professional service agreement and bylaws did not allow hospital to control the doctor's work such that Plaintiff could establish a principal-agent relationship based on actual agency.[148] However, it further held that a genuine issue of material fact existed as to whether hospital held itself out as a provider authority can exist if a provider does not make the relationship between itself and those who treat plaintiff clear.

3. Gulino v. Zurawski*, 2015 IL App. (1st) 131587*

Very fact driven medical malpractice case. Circuit Court entered judgment on jury verdict for physicians and against medical center, nurse, and employer.[149] Medical Center subsequently reached settlement, and nurse and employer appealed.[150] Appellate Court discussed whether expert was sufficiently qualified to testify regarding standard of care and whether the testimony was sufficient to establish the breach of the standard of care.[151] The court further discussed whether the defense expert was entitled to testify to certain matters and whether limiting that testimony was prejudicial.[152] In the end, the Appellate Court affirmed the trial court.[153]

Expert witnesses are one of the highest dollar items in medical malpractice cases, so it is imperative to be certain that his or her testimony will be allowed at trial for purposes for which it was offered.

4. Mizyed v. Palos Community Hospita*l, 2016 IL App. (1st) 142790*

Plaintiff brought medical malpractice action against hospital and doctor.[154] Hospital asserted that consent form signed by patient prevented patient from recovery and the doctor was not hospital's agent or employee.[155] Circuit Court granted summary judgment to hospital.[156] Appellate Court

147. *Id.*

148. *Id*. at ¶ 6.

149. Gulino v. Zurawski, 2015 IL App. (1st) 131587, ¶ 1.

150. *Id*.

151. *Id.* at ¶ 65.

152. *Id.* at ¶ 83.

153. *Id.* at ¶ 90.

154. Mizyed v. Palos Cmty. Hosp., 2016 IL App. (1st) 142790, ¶ 1.

155. *Id.* at ¶ 28.

156. *Id.* at ¶ 1.

affirmed, finding that the fact that Plaintiff had only limited proficiency in English did not preclude hospital's reliance on consent form and the Plaintiff knew or should have known that doctor was not hospital's agent or employee.[157]

Attorneys should be aware that a client's limited understanding of the English language may not be a bar to a hospital asserting immunity based on a signed consent form.

5. Terra Foundation for American Art v. DLA Piper, LLP*, 2016 IL App. (1st) 153285*

Former clients brought legal malpractice action against law firm alleging negligence in connection with real estate sale.[158] Law firm filed motion to dismiss, arguing that the claim was filed after the statute of repose had elapsed.[159] Trial court granted Defendant's motion to dismiss.[160] Appellate Court held that the statute of repose began to run when the clients executed the first amendment to the purchase agreement and that the transactional context of the claim did not affect when the statute of repose began to run.[161] It further agreed with the trial court that Plaintiff should not have been allowed to amend its complaint because any amendment would not have cured the defects.[162]

6. Rodi v. Horstman*, 2015 IL App. (1st) 142787*

Owner of construction company brought legal malpractice action against former attorney who handled her appeal in a separate action against a financial services provider and its attorney after the appeal was dismissed.[163] The court granted summary judgment for the appellate attorney and discussed issues including the statute of limitations for legal malpractice action and *respondeat superior* and whether the same statute of limitations applied to claims brought under that theory.[164]

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157. *Id.* at ¶ 42.

158. Terra Found. for Am. Art v. DLA Piper, LLP, 2016 IL App. (1st) 153285, ¶ 1.

159. *Id.* at ¶ 23.

160. *Id.* at ¶ 43.

161. *Id.* at ¶ 33.

162. *Id.* at ¶ 58.

163. Rodi v. Horstman, 2015 IL App. (1st) 142787, ¶ 1.

164. *Id.* at ¶ 29.

These case gives a better understanding of when the statutes of limitation and repose begin to run. Proper calculation of statutes of limitation and repose is essential to ensure that a case is not pursued frivolously.

7. Heisterkamp v. Pacheco*, 2016 IL App. (2d) 150229*

Father brought malpractice action against psychologist who diagnosed him with obsessive-compulsive personality disorder as a court appointed expert in dissolution proceedings in which father lost custody of his children.[165] The Circuit Court dismissed the action, and Appellate Court affirmed, finding that psychologist had absolute immunity from suit.[166]

8. Davidson v. Gurewitz*, 2015 IL App. (2d) 150171*

Father filed legal malpractice case against attorney who had acted as a child representative in his divorce case.[167] The Circuit Court granted Defendant's motion to dismiss.[168] Appellate Court held that the attorney had common law immunity because the alleged malfeasance occurred within the course of his court appointed duties.[169]

Practitioners should be aware that the court gives great deference to court appointed experts who are sued for actions that occurred in the course of their duties as court appointed experts.

D. Negligence

1. Peacock v. Waldeck*, 2016 IL App. (2d) 151043:*

Plaintiff and Defendant were involved in a rear-end accident.[170] Plaintiff filed suit and Defendant answered, admitting that she struck the rear end of Plaintiff's vehicle.[171] Defendant died of unrelated causes, and special administrator moved for summary judgment.[172] The court granted the motion,

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165. Heisterkamp v. Pacheco, 2016 IL App. (2d) 150229, ¶ 2.

166. *Id.* at ¶ 11.

167. Davidson v. Gurewitz, 2015 IL App. (2d) 150171, ¶ 1.

168. *Id.* at ¶ 11.

169. *Id.* at ¶ 13.

170. Peacock v. Waldeck, 2016 IL App. (2d) 151043, ¶ 1.

171. *Id.* at ¶ 2.

172. *Id.* at ¶ 1.

finding the Plaintiff could not produce any evidence that was not barred by the Dead Man's Act.[173] The Appellate Court affirmed, finding that the Defendant's answer did not lead to a presumption of negligence.[174]

This case illustrates how important it is to move a case to trial as quickly as possible in this situation. Although many times there are witnesses to an accident, if there are not, it may make sense to proceed at an expedited pace to be safe.

2. Bulduk v. Walgreen Company*, 2015 IL App. (1st) 150166*

Plaintiff was injured when she was shopping at Walgreens and a cleaning machine that was left in the aisle fell and struck her lower back.[175] Plaintiff filed a complaint alleging negligence and negligent spoliation of evidence because Walgreens destroyed the security tape.[176] Circuit Court granted summary judgment in favor of Defendant.[177] The Appellate Court held that a genuine issue of material fact existed as to whether the cleaning machine presented an open and obvious danger but agreed that the store's destruction of the surveillance tape did not cause the customer to be unable to prove her negligence claim and thus the store was not liable for negligent spoliation of evidence.[178]

Often times, a practitioner's goal is to be able to survive a motion for summary judgment. In that regard, this case is helpful as the court found that whether the machine was an open and obvious danger was presented a genuine issue of material fact.

3. Claro v. DeLong*, 2016 IL App. (5th) 150557*

This is a rear end auto accident case.[179] Prior to trial, Defendant admitted liability and a jury trial was held on the issue of damages only.[180] Plaintiff testified that he did not immediately seek medical attention, but in the weeks

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173. *Id.*

174. *Id.* at ¶ 9.

175. Bulduk v. Walgreen Co., 2015 IL App. (1st) 150166, ¶ 5.

176. *Id.*

177. *Id.* at ¶ 9.

178. *Id.* at ¶¶ 11, 18.

179. Claro v. DeLong, 2016 IL App. (5th) 150557, ¶ 3.

180. *Id.* at ¶ 2.

following the accident he was sore and aching in his right shoulder.[181] Plaintiff was eventually diagnosed with a herniated disc, which was causing the shoulder problems.[182] At trial, jury returned a verdict for Defendant, finding the Plaintiff's shoulder complaints were not related.[183] Appellate Court reversed, finding that the jury verdict was contrary to the manifest weight of the evidence because it was not uncommon for Plaintiff to wait to seek medical attention and Defendant offered no contrary medical opinion testimony.[184]

This case illustrates how important it is for defense counsel to send plaintiff for an independent medical examination if it wants to contest liability for plaintiff's injuries at trial.

4. Offord v. Fitness International, LLC*, 2015 IL App. (1st) 150879*

Health club patron brought a negligence action against the health club alleging that he slipped on an accumulation of water as a result of a leaking roof while he was playing basketball on the gymnasium floor.[185] Health club moved for summary judgment on the basis that Plaintiff signed a waiver of liability.[186] Trial court granted the motion for summary judgment.[187] Appellate Court held that it was not reasonably foreseeable that the patron would have been injured slipping on water alleged to have been the result of a leaky roof and thus the claim was not precluded by the waiver of liability Plaintiff signed.[188]

In cases where a client has signed a waiver of liability, it still makes sense to review the facts of the case and the language of the waiver to determine if the conduct that led to injury is specifically addressed in the waiver.

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181. *Id.* at ¶ 6.

182. *Id.* at ¶ 15.

183. *Id.* at ¶ 18.

184. *Id.* at ¶¶ 21, 25, 27.

185. Offord v. Fitness Int'l, 2015 IL App. (1st) 150879, ¶ 5.

186. *Id.* at ¶ 1.

187. *Id.* at ¶ 13.

188. *Id.* at ¶ 21.

5. Hernandez v. Walgreen Company*, 2015 IL App. (1st) 142990*

Estate of individual who died from methadone intoxication brought wrongful death action against Defendants, alleging they had breached their duty of care by dispensing methadone prescriptions in quantities and timeframes that were not appropriate.[189] Defendant brought motion for summary judgment on the basis that it did not have a duty to monitor the patient's methadone prescription history.[190] Trial court granted summary judgment to Defendants.[191] Appellate Court held that the pharmacies did not have a duty to monitor the patient's methadone prescription history, to attempt to determine whether such use was excessive, or to communicate a corresponding warning to the prescribing physician or patient, so it affirmed the trial court.[192]

With prescription drug abuse appearing to be a growing problem, defense counsel can cite to this case for the proposition that a pharmacy does not have a duty to monitor an individual patient's prescription history for overuse.

6. Libolt v. Wiener Circle, Inc.*, 2016 IL App. (1st) 150118*

Plaintiff was in line at a hot dog restaurant Chicago that is well-known for the banter between its employees and the customers.[193] As Plaintiff was waiting to order, an unruly individual was shoved into her, causing her to fall and break her arm.[194] Defendant filed motion for summary judgment arguing that it owed no duty to Plaintiff and the trial court granted motion.[195] Appellate Court held that it was reasonably foreseeable that the restaurant's gimmick of engaging patrons in banter including vulgar insults made it reasonably foreseeable that injury could occur and the restaurant had a duty to warn.[196] It further held that a fact issue remained as to whether the actions of the restaurant staff were the proximate cause of Plaintiff's injuries.[197]

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189. Hernandez v. Walgreen Co., 2015 IL App. (1st) 142990, ¶ 3.

190. *Id.* at ¶ 7.

191. *Id.* at ¶ 15.

192. *Id.* at ¶ 50.

193. Libolt v. Wiener Circle, Inc., 2016 IL App. (1st) 150118, ¶ 3.

194. *Id.* at ¶¶ 4–5.

195. *Id.* at ¶ 20.

196. *Id.* at ¶ 33.

197. *Id.* at ¶ 38.

This case emphasizes the importance of foreseeability in establishing negligence. From the defense perspective, if a business is well known for acting in a way that could cause unruly behavior, it may be best to consider if the risks are worth benefits.

7. Murphy-Hilton v. Lieberman Management Services, Inc*., 2015 IL App. (1st) 142804*

Pedestrian fell while walking on the sidewalk outside her condominium.[198] She brought an action against the management company and condominium alleging that their negligent maintenance of the property created an unnatural accumulation of ice, which caused her to fall.[199] Circuit Court entered summary judgment for Defendants on the basis that the *Snow and Ice Removal Act* provided immunity.[200] Appellate Court reversed, finding that Plaintiff's complaint did not allege negligence due to snow or ice removal but alleged that the Defendants negligently maintained or constructed their premises, so the *Snow and Ice Removal Act* did not apply.[201]

8. Reed v. Country Place Apartments Moweaqua I, LLP*, 2016 IL App. (5th) 150170*

Visitor to apartment complex was injured when he slipped on snow and ice outside of complex.[202] Plaintiff sued building owner alleging that it negligently maintained the gutter system which allowed an unnatural accumulation of ice and snow.[203] Plaintiff also sued the contractor who was responsible for removing snow and ice. Trial court granted summary judgment.[204] Appellate Court found that owner was not entitled to immunity under the *Snow and Ice Removal Act*.[205] It further found that a genuine issue of material fact existed as to whether the owner negligently maintained the gutter system.[206] It affirmed the grant of summary judgment in favor of the

198. Murphy-Hilton v. Lieberman Mgmt. Servs., Inc., 2015 IL App. (1st) 142804, ¶ 1.

199. *Id.*

200. *Id.*

201. *Id.* at ¶ 32.

202. Reed v. Country Place Apartments Moweaqua, 2016 IL App. (5th) 150170, ¶ 3.

203. *Id.* at ¶ 4.

204. *Id.* at ¶ 5.

205. *Id.* at ¶ 6.

206. *Id.* at ¶ 26.

contractor finding that it did have immunity under the *Snow and Ice Removal Act*.[207]

These cases emphasize that an attorney can avoid having the Snow and Ice Removal Act asserted against his client if he or she alleges that a design defect in the property itself caused the accumulation, not removal operations.

9. Bogenberger v. Pi Kappa Alpha Corporation, Inc.*, 2016 IL App. (1st) 150128*

Father of deceased fraternity pledge brought wrongful death and survival action against local chapter of fraternity, national organization of fraternity, local chapter members and others after his son died in a mandatory fraternity event.[208] Father eventually filed five amended complaints, and the judge granted Defendants' motion to dismiss on the final one.[209] Appellate Court held that the father had sufficiently alleged a duty on which a cause of action for common law negligence could be based on, that the allegations sufficiently stated negligence claim against fraternity member, the allegations were sufficient to state a cause of action against the local chapter of the fraternity but that they were insufficient to state a cause of action against the national fraternity.[210]

Formulating how the defendant was negligent, specifically what duty was owed to plaintiff and how that duty was breached is very important in cases where one is asking the court to impose liability for an unusual fact pattern.

10. Schade v. Clausius*, 2016 IL App. (1st) 143162*

Plaintiff filed a negligence complaint against Defendant boat owners after she was injured while slipping on a swim platform as a guest of boat owners.[211] Trial court granted Defendants' motion for summary judgment.[212] Appellate Court affirmed, finding that the wet nature of the swim platform on the boat was open and obvious, the boat owners did not have a duty to warn guests about the dangers of standing on a crowded swim platform that could

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207. *Id.* at ¶ 27.

208. Bogenberger v. Pi Kappa Alpha Corp., 2016 IL App. (1st) 150128, ¶ 1.

209. *Id.* at ¶¶ 7, 12.

210. *Id.* at ¶ 47.

211. Schade v. Clausius, 2016 IL App. (1st) 143162, ¶ 1.

212. *Id.*

become wet, and distraction exception to the open and obvious rule did not apply.[213]

This case can be cited by defense attorneys in situations where a guest sues a host for negligence.

E. Products Liability

1. M.M. v. Glaxosmithkline, LLC, *2016 IL App. (1st) 151909*

Products liability action where the issue was whether the court had personal jurisdiction over the Defendant.[214] Circuit Court found that it did have personal jurisdiction based on facts of case.[215] Appellate Court held that the Defendant purposely availed itself of the privilege of conducting business in Illinois and that Plaintiffs made *prima facie* showing that their claims directly arose from or related to the company's activities in Illinois.[216] Finally, it found that it was reasonable to require Defendant to litigate in Illinois as was required for the exercise of personal jurisdiction to comport with due process.[217]

One of the challenges in a products liability case against a large corporate defendant is ensuring that the State of Illinois has personal jurisdiction over the defendant. This case, and cases like it, are helpful to find fact patterns that could be used to exert.

F. Miscellaneous Actions

1. Locasto v. City of Chicago*, 2016 IL App. (1st) 151369*

Plaintiff brought tort action against Defendant alleging that he was injured while training to be a paramedic for Defendant.[218] Specifically, that the training staff intentionally injured him during training by forcing him to engage in regular physical exercise with minimal water breaks that resulted in dehydration and acute kidney failure.[219] While the case was pending,

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213. *Id.* at ¶¶ 33, 44.

214. *M.M. v. Glaxosmithkline, LLC,* 2016 IL App. (1st) 151909, ¶ 1.

215. *Id.* at ¶ 2.

216. *Id.* at ¶ 49.

217. *Id.* at ¶ 78.

218. Locasto v. City of Chicago, 2016 IL App. (1st) 151369, ¶ 1.

219. *Id.*

Plaintiff filed a worker's compensation case and was awarded compensation for his injuries.[220] Defendant moved for summary judgment on the basis of the exclusivity provision of the *Workers Compensation Act*.[221] Trial court granted the motion for summary judgment and Appellate Court affirmed.[222]

Counsel should always be aware of the exclusivity provision of the *Workers Compensation Act* when bringing suit against a plaintiff's employer, as it can operate as a full bar to recovery.

2. Doe v. Sanchez*, 2016 IL App. (2d) 150554*

Mother brought action against school bus driver and private contractor that employed the driver for battery, assault, and other claims based on school bus driver allegedly touching her daughter inappropriately.[223] Trial court certified two questions to the Appellate Court: first, does a privately contracted provider of busing services owe the same elevated duty of a common carrier when providing the services and second, if so, does the higher standard require that the private contractor be held vicariously liable for their employees' intentional torts which occurred outside the scope of their employment.[224] The Appellate Court held that a private contractor providing student busing services owes the highest duty to the students that it transports and it may be liable for intentional acts of its employees even if it is outside the scope of their employment.[225]

This case gives a plaintiff's attorney guidance on the standard of care that a private carrier will be held in the context of school busing case. Any time the court holds that a potential defendant owes the highest duty of care to potential plaintiffs, it is worth noting when analyzing prospective cases.

3. Hoy v. Great Lakes Retail Services, Inc.*, 2016 IL App. (1st) 150877*

Auto accident case where the main issue was *respondeat superior*.[226] Evidence showed that Defendant had finished his shift at a job site and was returning to employer's headquarters to have a discussion with business

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220. *Id.*

221. *Id.* at ¶ 2.

222. *Id.*

223. Doe v. Sanchez, 2016 IL App. (2d) 150554, ¶ 2.

224. *Id.* at ¶ 16, 17.

225. *Id.* at ¶ 35, 56.

226. Hoy v. Great Lakes Retail Servs., 2016 IL App. (1st) 150877, ¶ 1.

owner.[227] Business owner testified that he could not remember the purpose of the meeting, but believed it was about a personal matter.[228] Circuit Court entered summary judgment for the employer, finding that the employee was not acting within the scope of his employment at the time of the accident.[229] Appellate Court affirmed, finding that employee's travel was not for the employer's purposes.[230]

This case reminds the practitioner that just because an employee was meeting with a superior at his company, *respondeat superior* does not automatically apply. A further analysis, including the purpose of the meeting, must be conducted to avoid spending resources on a cases like this.

4. Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App. (2d) 150067*

Nursing home resident brought action against doctor who prescribed drugs used on resident for medical battery and civil conspiracy.[231] Specifically, Plaintiff's complaint alleged that Defendant doctor failed to obtain his consent before administering medications, and in light of the lack of consent, constituted an unwanted touching.[232] The civil conspiracy count alleged that the doctor formed an agreement with the nursing home to prescribe and administer medications for the purpose of chemically restraining the patient.[233] Trial court granted Defendant's motion to dismiss.[234] The Appellate Court held that a certificate of merit was not required in this matter, and the resident had sufficiently plead his case for civil conspiracy and medical battery so it remanded to the trial court.[235]

A savvy practitioner should expect that nursing home litigation should increase in frequency as more and more elderly people are forced into nursing homes. It is always wise to be aware of fact patterns that could lead to liability, or at least survive a summary judgment motion. Not needing to file a certificate of merit is also a big advantage over the alternative.

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227. *Id*.

228. *Id*.

229. *Id*. at ¶ 19.

230. *Id*. at ¶ 43.

231. Fiala v. Bickford Senior Living Group, LLC, 2015 IL App. (2d) 150067, ¶ 4.

232. *Id*. at ¶ 10.

233. *Id*. at ¶ 11.

234. *Id*. at ¶ 15.

235. *Id*. at ¶ 74.

II. PROCEDURAL LAW

A. General Procedure

1. Bowman v. Ottney*, 2015 IL 119000*

Plaintiff filed suit for medical malpractice and judge made substantive rulings on substantial issues.[236] Plaintiff then voluntarily dismissed her complaint and subsequently refiled suit. The second case was assigned to the same judge who presided over the earlier proceedings, and Plaintiff immediately moved for substitution of Judge.[237] Circuit Court denied the motion and Appellate Court affirmed.[238] Supreme Court held that Plaintiff was not entitled to a substitution of Judge.[239] Justice Kilbride dissented, writing that the code of civil procedure grants all civil litigants a right to one substitution of judge without cause as a matter of right.[240]

This case provides guidance as to when a party can move for substitution of judge. The court seemed to emphasize the judge who plaintiff was attempting to substitute out had made substantive rulings, so it is fair to wonder if the result would have been different if no substantive rulings had been made before plaintiff dismissed her suit.

B. EVIDENCE

1. Klaine v. Southern Illinois Hospital Services*, 2016 IL 118217*

Plaintiffs filed medical malpractice lawsuit against doctor and hospital based on negligent credentialing.[241] Plaintiffs sought discovery of the doctor's applications for staff privileges, information reported to the National Practitioner Data Bank, and raw data regarding treatment and procedures performed by doctor.[242] Defendants refused to provide the discovery.[243] Circuit Court held Defendant in contempt for failing to produce the requested

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236. Bowman v. Ottney, 2015 IL 119000, ¶ 1.

237. *Id*.

238. *Id*.

239. *Id*.

240. *Id*. at ¶ 34

241. Klaine v. S. Illinois Hosp. Servs., 2016 IL 118217, ¶ 3.

242. *Id*. at ¶¶ 5, 11.

243. *Id*. at ¶ 25.

information.[244] Appellate Court affirmed.[245] Supreme Court held that the doctor's applications for staff privileges were not privileged in their entirety, the information reported to the National Practitioner Data Bank was not privileged, and that physician-patient privilege did not apply to raw data regarding treatment and procedures performed by Defendant doctor.[246]

This case clarifies what information is discoverable in a medical malpractice case. The holding seemed to be that information that was general in nature is discoverable, but that greater scrutiny had to be applied to the release of more specific information.

2. Klesowitch v. Smith*, 2015 IL App. (1st) 150414*

Auto accident case that proceeded to jury trial.[247] Prior to trial, court granted summary judgment on the issue of Defendant's negligence.[248] At trial, court allowed Plaintiff to admit into evidence medical bills that were discounted and paid by insurance.[249] Following trial, court entered jury verdict in favor of Plaintiff for full amount of the medical bills.[250] Appellate Court reversed, finding that Plaintiff failed to provide foundation for the reasonableness of the full amount of the medical bills and that the discounted medical bills should not have been admitted into evidence without expert testimony.[251] Court also held that Defendant could still argue that Plaintiff was contributorily negligent despite the summary judgment ruling on Defendant's negligence.[252]

Laying a foundation for the entry of medical bills is crucial in a personal injury case. This case emphasizes that expert testimony is required to establish the reasonableness of the charges where plaintiff's bills were not paid in full.

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244. *Id*.

245. *Id*. at ¶ 27.

246. *Id*. at ¶ 42

247. Klesowitch v. Smith, 2015 IL App. (1st) 150414, ¶ 1.

248. *Id*.

249. *Id*.

250. *Id*.

251. *Id*. at ¶ 45.

252. *Id*. at ¶ 28.

3. Marquez v. Martorina Family, LLC*, 2016 IL App. (1st) 153233*

Subcontractor's employee entered into worker's compensation agreement with subcontractor, then brought a negligence action against general contractor and property owner arising out of workplace accident.[253] General contractor argued that worker was judicially estopped from bringing suit, because general contractor's name was on the settlement contract.[254] Circuit Court granted summary judgment to general contractor and property owner, finding that the worker was barred by the exclusivity provision of the *Workers Compensation Act*.[255] Appellate Court reversed, noting that though the settlement contract listed the general contractor in its caption and stated that it released general contractor from worker's compensation liability, employee never claimed he was acting as general contractor's employee in the contract.[256] It found that there was a genuine issue of material fact as to whether the Plaintiff was a borrowed employee at the time of the accident and remanded to the trial court.[257]

This case highlights the importance of clarity in drafting a worker's compensation contract. It is possible that the parties intended to release the general contractor from all liability, but without a specific declaration of such, the court would not assume that to be the case.

4. Stuckey v. Renaissance at Midway*, 2015 IL App. (1st) 143111*

Patient brought action against the owners of a long-term care facility for negligence after he was assaulted by his roommate while they resided in the dementia unit.[258] Patient moved to compel discovery of facility records relating to roommate.[259] Facility objected to disclosure on the basis that it was protected by the *Mental Health and Developmental Disabilities Confidentiality Act*.[260] Circuit Court ordered Defendant to turn over the records.[261] The Appellate Court held that the long-term care facility records,

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253. Marquez v. Martorina Family, LLC, 2016 IL App. (1st) 153233, ¶¶ 2, 3.

254. *Id*. at ¶ 17.

255. *Id*. at ¶ 9.

256. *Id*. at ¶ 20.

257. *Id*. at ¶ 21.

258. Stuckey v. Renaissance at Midway, 2015 IL App. (1st) 143111, ¶ 4.

259. *Id*. at ¶ 7.

260. *Id*. at ¶ 8.

261. *Id*. at ¶ 10.

including patient information forms, nurse's notes, care plans, and social service progress notes constituted records or communications under the act.[262] Thus, Plaintiff had to prove that the disclosure was authorized by the act.[263]

By putting the burden on the Plaintiff to prove that the discovery sought was authorized by the *Mental Health and Developmental Disabilities Confidentiality Act,* the court drew a bright line as to the standard for future disclosures.

5. Combs v. Schmidt*, 2015 IL App. (2d) 131053*

Estate brought action alleging spoliation of evidence against landlord and landlord's insurer after tenants died in house fire.[264] Circuit Court initially granted summary judgment to landlord and insurer. Appellate Court reversed and remanded.[265] On remand, Circuit Court certified questions regarding whether complaints made to the Defendant about the evidence at issue is the functional equivalent of request to preserve evidence to be assessed in determining if special circumstances exist to satisfy the relationship prong of a duty to preserve evidence and whether a Plaintiff's opportunity to inspect the evidence at issue, or lack thereof, is a factor to be assessed in determining if special circumstances exist.[266] Appellate Court held that a Plaintiff's opportunity to inspect evidence is not to be used in determining if special circumstances exist to satisfy the relationship prong of a duty to preserve evidence and Plaintiff's complaints about evidence can never provide such clear knowledge to form the basis of a duty to preserve evidence and is not the functional equivalent of a request to preserve evidence.[267]

A practitioner asking a person or entity to preserve evidence should do so in the clearest language possible to remove any possibility that ambiguous language will relieve the defendant of its duty to preserve evidence.

6. Wofford v. Tracy*, 2015 IL App. (2d) 141220*

Tenants sustained personal injuries during house fire and subsequently brought an action against landlord, landlord's insurer, insurance investigator

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262. *Id*. at ¶ 17.

263. *Id*. at ¶ 28.

264. Combs v. Schmidt, 2015 IL App. (2d) 131053, ¶ 2.

265. *Id*.

266. *Id*. at ¶ 5.

267. *Id*. at ¶ 20.

and its employee, and insurer's fire damage remover for negligence, spoliation, conspiracy, conversion and *res ipsa loquitur* based on spoliation.[268] Circuit Court dismissed complaint.[269] Appellate Court affirmed, holding that the two-year limitations period for personal injury claims and not the five-year limitation period for injury to property applied to the spoliation claims, that the tenants failed to sufficiently plead a duty to preserve evidence, and failed to sufficiently alleged voluntarily undertaking by Defendants.[270]

Taken in combination with the *Combs* case above, the court appears to be making clear that a Plaintiff will not be given the benefit of the doubt when he or she alleges spoliation of evidence.

C. Limitations

1. Folta v. Ferro Engineering*, 2015 IL 118070*

Employee who was diagnosed with mesothelioma forty-one years after leaving employer brought suit against the employer.[271] Circuit Court dismissed on the basis of the exclusivity provision of the *Workers' Compensation Act*.[272] Appellate Court reversed and remanded, finding that because the statute of limitations had run on the workers' compensation claim, it was not a compensable injury under the act and therefore Plaintiff was not barred from suing the employer directly.[273] The Supreme Court held that the injury that the employee claimed was compensable under the *Workers' Compensation and Workers' Occupational Diseases Acts* even though no compensation was available because of each act's statute of repose.[274] Thus, the employee's action was barred by the exclusive exclusivity provisions of the act.[275] Justice Freeman and Kilbride dissented, stating they would have upheld the Appellate Court, finding that claims for occupational disease which manifested outside of the limitation of the statute of repose did not fall within

268. Wofford v. Tracy, 2015 IL App. (2d) 141220, ¶ 1.

269. *Id*.

270. *Id*. at ¶ 8.

271. Folta v. Ferro Eng'g, 2015 IL 118070, ¶ 3.

272. *Id*. at ¶ 6.

273. *Id*. at ¶ 7.

274. *Id*. at ¶ 32.

275. *Id*. at ¶ 4.

the *Workers' Compensation Act* and would not be barred by the exclusivity provision of the act.[276]

This case clarifies under what circumstances an injury that is not compensable under the Workers Compensation Act is still barred by the exclusivity provisions of the Act. The practitioner should be aware that claims that would have been compensable under the Act do not fall outside of the exclusivity provision.

2. Horn v. Goodman*, 2015 IL App. (3d) 150339*

Plaintiff filed complaint against priest and church alleging assault and battery, negligence, and intentional infliction of emotional distress based on alleged sexual abuse.[277] The complaint alleged the Plaintiff had repressed and suppressed memories of the abuse before he turned 18 and did not recognize that sexual abuse was wrong or harmful until approximately one year before the complaint was filed.[278] Defendant filed a motion to dismiss on the basis that the statute of limitations had expired, which was granted.[279] The Appellate Court held that the two-year limitations applied, but the allegations in Plaintiff's complaint were sufficient to invoke the discovery rule, so it remanded to the trial court.[280]

If the practitioner intends to invoke the discovery rule, he or she should plead the facts entitling their client to avail him or herself of that rule.

3. Zlatev v. Millette*, 2015 IL App. (1st) 143173*

Plaintiff filed fourth amended complaint against a new Defendant.[281] Amended complaint alleged new Defendant was the perpetrator along with the two originally named defendants that had struck him with a brick during a fight.[282] Defendant moved to dismiss the complaint alleging Plaintiff failed to file it within the two-year statute of limitations.[283] The Circuit Court denied the motion and certified two questions for the Appellate Court:

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276. *Id*. at ¶ 57.

277. Horn v. Goodman, 2015 IL App. (3d) 150339, ¶¶ 1, 2.

278. *Id*. at ¶ 6.

279. *Id*. at ¶ 5

280. *Id*. at ¶ 15.

281. Zlatev v. Millette, 2015 IL App. (1st) 143173, ¶ 13.

282. *Id*.

283. *Id*. at ¶ 14.

1. Does an amended complaint against a new Defendant filed after the expiration of the statute of limitations relate back to the date of the original complaint as a case of mistaken identity where allegations against the new Defendant are the same as the allegations against originally named Defendants who remain parties in interest and Defendants?

2. Does the Plaintiff's lack of knowledge regarding the identity of a potentially culpable party constitute mistaken identity under the relation back statute?[284]

The Appellate Court held that when deciding whether the relation back doctrine applies, the relevant question is whether the newly added party knew or should have known that the Plaintiff made a mistake in failing to name him or her as a Defendant in the initial complaint.[285] It further held that a Plaintiff's lack of knowledge regarding the party's involvement in the wrongdoing giving rise to his or her cause of action may constitute a mistake concerning the identity of the proper party under the relation back doctrine.[286]

This case gives victims of intentional torts more tools to use to discover the true identities of their attackers and gives them some leeway with regard to the statute of limitations on filing actions against the same.

4. Lawler v. University of Chicago Medical Center*, 2016 IL App. (1st) 143189*

Plaintiff initially brought medical malpractice action.[287] After Plaintiff's death, the executor of her estate was substituted as party Plaintiff and additional counts of wrongful death were added.[288] Defense counsel filed a motion to dismiss on the basis that the wrongful death claims were added after the statute of limitations.[289] Circuit Court granted the motion.[290] Appellate Court held that as a matter of first impression, a lawsuit for wrongful death of

284. *Id*. at ¶¶ 1, 3.

285. *Id*. at ¶ 2.

286. *Id*. at ¶ 51.

287. Lawler v. Univ. of Chi. Med. Ctr., 2016 IL App. (1st) 143189, ¶ 3.

288. *Id*. at ¶ 5.

289. *Id*. at ¶ 8.

290. *Id*.

a patient related back to the original medical malpractice claim filed by Plaintiff.[291]

A medical malpractice claim that subsequently morphs into a wrongful death claim relates back to the original lawsuit for purposes of the statute of limitation.

5. Copes v. Northeast Illinois Regional Commuter Railroad Corporation*, 2015 IL App. (1st) 150432*

Passenger brought personal injury action against Defendant, which operated a commuter railroad line (the METRA).[292] Defendant argued that the action was untimely because it was filed beyond one year and a provision of the *Regional Transportation Authority Act* specifies a one-year statute of limitations for actions brought against entities organized under the act.[293] Trial court granted Defendant's motion to dismiss.[294] Appellate Court held that as a matter of first impression, the one-year statute of limitations applied to Plaintiff's action, rather than the general two-year limitations period applicable to personal injury suits.[295]

When suing entities organized under the *Regional Transportation Authorities* Act, practitioners should be aware that a one year statute of limitations exists.

6. Skridla v. General Motors Company*, 2015 IL App. (2d) 141168*

Estate of motorist, who was killed by a rear end accident, brought personal injury action and spoliation of evidence claims against driver and driver's auto insurance.[296] Circuit Court dismissed spoliation of evidence claims.[297] Appellate Court held that the two-year limitations period applied to derivative spoliation action brought by estate and that the two-year statute limitations time period began to run when the vehicle of the driver who rear-ended the motorist was sold for salvage.[298]

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291. *Id*. at ¶ 48.

292. Copes v. Ne. Ill. Reg'l Commuter R.R. Corp., 2015 IL App. (1st) 150432, ¶ 1.

293. *Id*. at ¶ 4.

294. *Id*. at ¶ 8.

295. *Id*. at ¶ 33.

296. Skridla v. General Motors Co., 2015 IL App. (2d) 141168, ¶ 1.

297. *Id*. at ¶ 3.

298. *Id*. at ¶ 17.

This case clarifies that the statute of limitation for a derivative spoliation of evidence claim is two years, and that the two year period begins when the evidence was allegedly spoiled.

F. Trial Issues

1. Sondag v. Pneumo Abex Corporation*, 2016 IL App. (4th) 140918*

Plaintiff was a former plasterer who brought a products liability action against manufacturer of asbestos-containing products after he developed asbestosis.[299] Case proceeded to jury trial, and a jury verdict was entered in favor of Plaintiff.[300] Appellate Court reversed, noting that the plaster presented no evidence of physical harm resulting from inhalation of asbestos dust.[301] Although he had presented testimony that his wife and daughter had seen him out of breath, he had no pulmonary symptoms as his pulmonary function tests were excellent and only had abnormal lung x-rays.[302]

The practitioner should be advised that evidence of permanent injury is necessary in any tort action, and that it is not enough to prove that Plaintiff suffers from a disease if there are no symptoms.

G. Miscellaneous

1. Miller v. Sarah Bush Lincoln Health Center*, 2016 IL App. (4th) 150728*

Medical malpractice case.[303] Following jury verdict in favor of Plaintiff, Circuit Court reduced jury verdict by amount that had been written off by medical providers.[304] Appellate Court held that the statute permitting reduction in the amount of recovery for benefits provided for medical charges only allows a verdict to be reduced by the amount paid to the medical providers or paid to Plaintiff directly.[305]

Another case which illustrates the importance knowing when Defendant is entitled a reduction for medical bills that have been written off by providers.

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299. Sondag v. Pneumo Abex Corp., 2016 IL App. (4th) 140918, ¶ 5.

300. *Id*. at ¶ 1.

301. *Id*. at ¶ 32.

302. *Id*. at ¶ 30.

303. Miller v. Sarah Bush Lincoln Health Ctr., 2016 IL App. (4th) 150728, ¶ 1.

304. *Id*.

305. *Id*. at ¶ 16.

2. Managо v. County of Cook*, 2016 IL App. (1st) 121365*

Minor was injured in an accident, and parents sued for damages.[306] After Plaintiffs prevailed at a bench trial, they moved to strike the hospital's lien against the judgment.[307] The Circuit Court granted Plaintiff's motion to strike, finding that the hospital had not intervened to protect its lien at trial.[308] The Appellate Court found that the technical deficiencies in the hospital's lien did not defeat the lien and that the hospital was not required to intervene in the lawsuit.[309] However, it further found that the lien could not be enforced against the minor because the parents brought suit under the family expenses statute, and pursuant to that statute only the parents could recover for the minor child's expenses.[310] Since they had not assigned the cause of action to the child, the lien was unenforceable.[311]

Since a minor cannot sue directly, any recovery for medical bills actually paid accrues to the parents directly. In this matter, since the lien only applied to the minor, it was invalid. Counsel for medical providers should know this case very well to avoid the same thing happening to their clients.

3. McKim v. Southern Illinois Hospital Services*, 2016 IL App. (5th) 140405*

Automobile accident case where Plaintiff filed petition to adjudicate liens.[312] The issue at trial was whether Medicare, Medicare Part D, and Medicaid were health care providers under the Healthcare Services Lien Act which would count towards the forty percent cap.[313] The trial court held that they were and apportioned the settlement proceeds on that basis.[314] The Appellate Court reversed, finding that Medicare, Medicare Part D, and Medicaid were not health care providers under the Healthcare Services Lien

306. Managо v. Cty. of Cook, 2016 IL App. (1st) 121365, ¶ 3.

307. *Id*. at ¶ 7.

308. *Id*. at ¶ 13.

309. *Id*. at ¶ 25.

310. *Id*. at ¶ 29.

311. *Id*. at ¶ 35.

312. McKim v. S. Ill. Hosp. Servs., 2016 IL App. (5th) 140405, ¶ 5.

313. *Id*. at ¶ 3.

314. *Id*. at ¶ 7.

Act and that any amounts owed to them should not count towards the forty percent cap.[315]

Although it might seem intuitive that Medicare is not a medical provider in that they function more as an insurance company, the law surrounding the Healthcare Services Lien Act is unsettled, and each case adds to the practitioner's understanding of how a court would interpret it.

4. Pinske v. Allstate Property and Casualty Insurance Company*, 2015 IL App. (1st) 150537*

Plaintiff was involved in an auto accident and subsequently agreed to mediate her claim with Defendant.[316] The mediation agreement included a high-low agreement that limited the amount plaintiff could recover.[317] After binding mediation, Plaintiff was awarded the maximum amount pursuant to the high-low agreement.[318] Defendant paid the award, but refused to pay interest.[319] Trial court granted Defendant's motion to dismiss.[320] The Appellate Court held that the high-low agreement was a settlement agreement and since the amount of the award was predetermined, no interest would accrue on the judgment because the award was not determined by actual adjudication as is required for interest to accrue under statue.[321]

Judgment interest only accrues on judgments that are the result of actual adjudication, so plaintiff's counsel has one less tool at his or her disposal to force the defendant to pay in a timely manner.

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315. *Id*. at ¶ 29.

316. Pinske v. Allstate Property and Casualty Ins. Co., 2015 IL App. (1st) 150537, ¶ 1.

317. *Id*. at ¶ 2.

318. *Id*.

319. *Id*.

320. *Id*. at ¶ 3.

321. *Id*. at ¶ 4.