REED ARMSTRONG QUARTERLY

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CHOICE OF LAW

Conflicting Indiana Law Applied in Illinois Lawsuit by Illinois Residents against Variously Domiciled Defendants Arising out of Indiana Motor Vehicle Accident.

Denton v. Universal AM-CAN, Ltd., 2015 IL App (1st) 132905

Illinois resident Plaintiffs filed a lawsuit in Illinois for an accident that occurred on an interstate highway in Indiana. On defendants' motion for application of Indiana law, the trial court addressed the issue of whether Illinois or Indiana law should be applied to the issues of liability and damages in the case. On appeal, the Appellate Court conducted a choice-of-law-analysis to determine which jurisdiction (Illinois or Indiana) had the most significant relationship to the occurrence and parties. The first step in conducting a choice-of-law analysis is to determine whether there is an actual conflict of law between Illinois and Indiana. The court found a conflict which would affect the outcome of the case in their different approaches for allocating fault among joint tortfeasors. Thus, the court continued its analysis to see which jurisdiction had the most significant relationship to the occurrence.

The court first noted "there is a legal presumption that the local law of the state where the injury occurred applies in determining the rights and liabilities of the parties unless Illinois has a more significant relationship to the conflict." The court next looked to multiple factors in determining which jurisdiction had the most significant relationship. The first factor, the location the injury occurred, favored Indiana. Second, the place where the conduct causing the injury occurred also favored Indiana. Third, the domicile, residence, place of incorporation and place of business of the parties was a wash and did not weigh in favor of Illinois or Indiana because the parties had varying residences, places of incorporation, and places of business. Finally, the court took into account the policy considerations when determining which State had the most significant relationship. The court acknowledged that while Illinois has interest in compensating its residents for injuries, that interest does not outweigh the interests of Indiana to maintain safe highways or to protect persons and businesses from being apportioned greater cost in negligence actions. Therefore, the court determined that Indiana had more significant contacts to the present action than Illinois. Thus, Indiana law applied to issues of liability and damages in the case.

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INSURANCE

The Illinois Supreme Court Construed the Term "Insurance Producer" in 735 ILCS 5/2-2201 as Including Captive Agents of Insurance Companies and Held Insurance Companies Can Be Vicariously Liable for Captive Agents Who Breach a Duty of Ordinary Care in the Procurement and Placement of Insurance Coverage.

Skaperdas v. Country Casualty Insurance Company, 2015 IL 117021

The plaintiff requested his Country Casualty insurance agent (a captive agent) to add his fiancée to his automobile policy as a named insured. The agent prepared the policy, which identified the driver as a "female 30-64". However, the policy named only the plaintiff as the insured. When his fiancée's son was injured by an underinsured motorist, the plaintiff attempted to obtain underinsured motorist benefits under the policy; however, the claim was denied because neither the fiancée nor her son was listed as a named insured. The plaintiff sued the agent and Country Casualty; in two of the counts, he alleged the agent was negligent in that he breached his duty under 735 ILCS 5/2-2201, and that Country Casualty was liable under the theory of *respondeat superior*. The agent moved to dismiss under Section 2-619 on the basis that, as a captive agent, he had no duty to the insured under Section 2-2201. The circuit court granted the motion to dismiss, but the appellate court reversed.

The Supreme Court affirmed the appellate court's decision to impose a duty on the agent. The agent argued on appeal that Section 2-2201 only imposes a duty of ordinary care on insurance brokers to procure a specific type or amount of coverage; because captive agents owe their duty to the company, they do not fall under the definition of "insurance producer" set forth in Section 2-2201. The term "insurance producer" is not defined in the statute, nor had it been defined in the case law. The court observed that insurance law distinguishes between insurance brokers and insurance agents, but that Black's Law Dictionary included the term "producer" in definitions of both insurance brokers and agents. The terms of subsection (a) of Section 2-2201, which require ordinary care in the procurement and placement of insurance coverage, could reasonably be applied to brokers as well as agents; this potential for multiple reasonable interpretations rendered the statute ambiguous. The court looked to extrinsic aids for construction of the statute, and noted from the Insurance Code that an "insurance producer" is defined as "a person required to be licensed under the laws of this State to sell, solicit, or negotiate insurance"; this definition would include a captive agent. Because Section 2-2201 explicitly referred to the Insurance Code, and because Section 2-2201 was enacted prior to the relevant definition in the Insurance Code, the court found that the Insurance Code definition could properly be applied to aid in the construction of Section 2-2201.

Additionally, the court noted that prior case law had established that a captive agent may owe a duty to the insured under certain circumstances (see *Talbot v. Country Life Insurance Co.*, 8 Ill. App. 3d 1062, 1065 (1973); *Bovan v. American Family Life Insurance Co.*, 386 Ill. App. 3d 933, 940-4 (2008)). The court indicated that including captive agents under the term "insurance producers" was in accord with the decisions in *Talbot* and *Bovan*; specifically, no duty would attach to captive agents until a specific type and/or amount of coverage was actually requested by the insured/proposed insured. At that point, the captive agent would be required to exercise ordinary care. A vague request by the insured to make sure he was "covered" would not suffice to trigger the captive agent's duty.

No duty would attach to captive agents until a specific type and/or amount of coverage was actually requested.

Because it was clear, from the reference in the new policy to a female driver who was not a named insured, that the plaintiff had actually requested specific coverage, the agent could be found to have a duty, and Country Casualty, as the principal, could be found liable under the theory of *respondeat superior*.

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Consolidation of a Civil Action in Which There Was No Duty to Defend with Another Civil Action Arising out of the Same Event but in Which There Was a Duty to Defend Required Insurer to Defend Both Actions.

Farmers Automobile Insurance Ass'n v. Neumann, 2015 IL App (3d) 140026

This case arose from two consolidated civil actions. In the first action, Neumann was sued by a police officer (Bitner) for personal injuries after striking Bitner with his car. Bitner alleged that the accident was intentional. Farmers rejected Neumann's tender on the grounds that intentional acts were not covered by his policy, and thereafter filed a declaratory judgment action regarding its duty to defend. In the meantime, a second action was filed against Neumann by CCMSI, in its subrogation action to recover amounts paid to Bitner under workers' compensation. Farmers accepted the defense of the CCMSI action under a reservation of rights. Neumann moved to consolidate the Bitner and CCMSI actions, and the court granted the motion. The two cases were subsumed under the Bitner case number. Neumann then moved for summary judgment in the declaratory judgment action on the basis that Farmers had a duty to defend both actions, given that they were now consolidated. Farmers filed its own motion for summary judgment, and the trial court granted summary judgment to Farmers.

On appeal, Neumann argued that the consolidated action was equivalent to a single lawsuit with several causes of action. The appellate court analyzed the three forms of consolidation: 1) where one cause proceeds to trial while the others are stayed; 2) where several cases involve the same event generally, and they proceed to a joint trial, but retain separate docket entries, verdicts, and judgments; and 3) where several actions are pending that could have been brought as one action, and they are merged into one action, in which they lose their individual identities and are disposed of in one suit.

Consolidation of several actions that could have been brought as one action are merged into one action in which they lose their individual identities and are disposed of in one suit.

Considering that the cases at bar involved the same injury to the same person, and they were subsumed under the earlier-filed case number, the court found that the consolidation at issue fell into the third category. The actions were to be treated as one suit; therefore, according to the relevant case law, Farmers had a duty to defend the Bitner action as well as the CCMSI action. If one theory of recovery falls within the policy's coverage, then the insurer has a duty to defend the entire lawsuit, even if the other theories of recovery do not fall within the coverage provisions.

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SETTLEMENT

Undisclosed Death of Plaintiff Rendered Settlement Invalid.

Robison v. Orthotic and Prosthetic Lab, Inc., 2015 IL App (5th) 140079

The plaintiff in this matter filed a products liability action against the defendant in 2008. On January 20, 2013, the plaintiff died; at that time, no suggestion of death was filed with the court, and no representative was substituted as the plaintiff in the matter. In September 2013, counsel for the deceased plaintiff entered into settlement negotiations with the attorneys for the defendant. During the negotiations, counsel for the deceased plaintiff did not disclose the fact of the plaintiff's death to counsel for the defendant. The two sides reached an agreement in principle, and defendant's counsel forwarded a settlement agreement to counsel for the deceased plaintiff. After the agreement was forwarded, defendant's counsel was first informed that the plaintiff had died, and that his personal representative would shortly be substituted as the plaintiff. At that point, defendant's counsel refused to consent to the party substitution and objected to the settlement as being invalid. Counsel for the deceased plaintiff filed a motion for substitution of plaintiff, as well as a motion to enforce settlement. The court granted both motions.

The appellate court vacated the trial court's orders. The court noted first that the attorney-client relationship is terminated by the death of the client, and the attorney's authority to act is therefore terminated. Any authority to continue must come from the decedent's personal representative.

The attorney-client relationship is terminated by the death of the client, and the attorney's authority to act is therefore terminated. Any authority to continue must come from the decedent's personal representative.

The deceased plaintiff's counsel acknowledged that he did not reveal the news of his client's death to the defendant's attorney prior to the settlement agreement in principle being reached, and he also acknowledged that the plaintiff's death adversely impacted the value of the case. The appellate court was troubled by plaintiff's counsel's lack of professional judgment, as well as the intentional misrepresentations he had made to the defendant's counsel; therefore, the settlement greement was invalid. The court opined that the plaintiff's counsel had seriously violated Illinois Rule of Professional Conduct 8.4; additionally, the court was troubled by the fact that the defendant's counsel did not report plaintiff's counsel's actions to the Attorney Registration & Disciplinary Commission (ARDC) as was his duty under Illinois Rule of Professional Conduct 8.3. Therefore, the court forwarded a copy of the opinion to the ARDC for further proceedings against both attorneys.

SUMMARY JUDGMENT

Summary Judgment for Defendant Was Affirmed Where Plaintiff Could Not Recall Injury Accident on Defendant's premises, and There Was No Evidence That Defendant Was Negligent or That Injury Was the Result of an Instrumentality under Defendant's Control.

Rahic v. Satellite Air-Land Motor Service, 2014 IL App (1st) 132899

The Plaintiff filed suit for negligence after he suffered a serious head injury while picking up a load of freight from the defendants. Plaintiff had no memory of how he suffered his head injury or how the injury occurred. The Defendants were granted summary judgment on the grounds that the plaintiff was unable to show that the injury was caused by any instrumentality under the defendants' control, or that the defendants failed to exercises ordinary care, because the plaintiff could not show how the injury occurred.

Summary judgment was affirmed on appeal. The Appellate court found that the plaintiff had no memory of what happened, and there were no witnesses to the injury. Mere speculation as to the cause of plaintiff's injury is not a basis to sustain a negligence claim. The plaintiff could not present any eyewitnesses or videotape of how he was injured or evidence that the defendant was in any way responsible, so the court was precluded from finding that there was a question of fact as to whether the defendant caused the plaintiff's injury. The Appellate Court also affirmed dismissal of a *res ipsa loquitur* count since that doctrine cannot be invoked absent evidence that the injury resulted from an instrumentality under defendants' control.

> The plaintiff was unable to show that the injury was caused by any instrumentality under the defendants' control.

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FIRM NEWS

Fifth District Dismisses Plaintiff's Appeal

Kruse v. Budget Truck Rental, LLC, 2015 IL App (5th) 140179-U

On March 23, 2015, the Appellate Court of Illinois, Fifth District dismissed Plaintiff Brittany Kruse's appeal for lack of jurisdiction pursuant to the defendants' motion filed by Reed Armstrong attorneys **Stephen Mudge** (Partner) and **Tara English** (of Counsel). Plaintiff Kruse appealed Judge Matoesian's order denying her motion to reconsider an order transferring the case from Madison County to Montgomery County on *forum non conveniens* grounds. Plaintiff raised two issues on appeal: (1) whether the trial Court erred in denying the motion to reconsider on the basis that the motions to reconsider are not legally recognized motions under Illinois law; and (2) whether the trial Court abused its discretion in granting the motion to transfer venue. On behalf of defendants James Edwards and Maschoff Transport, LLC, Mr. Mudge and Ms. English filed the motion to dismiss the appeal arguing the Appellate Court lacked jurisdiction to hear the appeal because plaintiff's petition for leave to appeal was untimely. Supreme Court Rule 306(a)(2) permits an appeal from an order allowing or denying a *forum non conveniens* motion. Ill.S.Ct.R.306(a)(2). As a prerequisite to invoking appellate jurisdiction, however, the rule requires appellants to file a petition in the Appellate Court within thirty days after the entry

of the order being appealed. Ill.S.Ct.R. 306(c)(1). A motion to reconsider filed in the trial Court does not postpone the time allowed to appeal an interlocutory order. *Odom v. Bowman*, 159 Ill.App.3d 568, 571 (1987). The Fifth District found that the plaintiff's motion to reconsider filed in the trial Court did not postpone the time in which she could appeal, and that they therefore lacked jurisdiction to hear the appeal. Consequently, the Fifth District found the plaintiff's appeal to be untimely. Without considering the merits of the appeal, the Fifth District granted Defendants Edwards and Maschoff's motion to dismiss.

Reed Armstrong Associate Secures Summary Judgment for Landlord/Property Manager

Hofer v. Terra Properties, Madison County Case No. 14-L-111

Associate **Jennifer M. Wagner** secured summary judgment from the Circuit Court in favor of a Reed Armstrong Client after presenting the following facts and argument. The plaintiff alleged that he slipped and fell on black ice on a portion of sidewalk that connected the front porch of his apartment to a front walkway in the apartment complex. He further alleged that the management company had hired a service to spread salt and remove snow, and that the service had spread salt on that portion of his walkway in the past. During his discovery deposition, the plaintiff admitted that it had been drizzling off and on all day, that he did not know when the ice formed, and that he had no evidence that the management company knew about the ice formation on the sidewalk. The defendant filed a motion for summary judgment, arguing as follows: 1) that the written lease placed the responsibility on the tenant to keep the demised portions of the premises clean and sanitary; 2) that the ice was a natural accumulation that the landlord was not under an obligation to remove per the common law; 3) that any prior removal of snow and ice from the demised premises was a gratuitous undertaking and that it was not reasonable to assume the cost of such service was bundled into the rental rate, given that the rent was subsidized through HUD based on the plaintiff's income; 4) that no amount of prior custom can enlarge the duties of the parties as specified in the lease; 5) that no representation had been made to the plaintiff that any ice melt was spread on his sidewalk on the day in question; 6) that no duty may be reasonably placed on a landlord to remove a natural accumulation when the precipitation is continuously falling, and 7) that the plaintiff had admitted at his deposition that he was not paying attention to where he was walking when he left his apartment. The court granted the defendant management company's motion for summary judgment.

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