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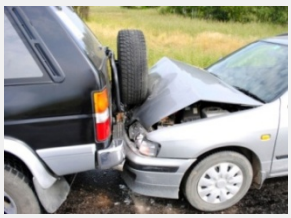
INSURANCE

Insurer Was Not Required to Submit the Issue of Setoff to UIM Arbitration Panel

Berrey v. Travelers Indem. Co. of America, --- F.Supp.2d ----, 2013 WL 124131 (C.D. Ill., 2013).

This case held an insurer was not required to submit the issue of setoff to an arbitration panel in order to deduct $100,000 paid by the tortfeasor's insurer from the arbitration award on a claim for underinsured motorist (UIM) benefits since the policy only authorized the panel to determine the amount of damages the insured was legally entitled to recover from the tortfeasor. Plaintiff suffered injuries in an automobile accident while operating a vehicle for her employer. The at-fault driver's insurer tendered its policy limits of $100,000. Thereafter, Plaintiff submitted a claim for (UIM) benefits to her employer's insurer, Travelers. Both parties agreed to resolve the claim through a binding arbitration hearing. The arbitrators awarded the plaintiff $310,000 in damages. Pursuant to its policy, Travelers paid plaintiff $210,000 after setting off $100,000 for the amount of coverage provided by the at-fault driver's policy. Plaintiff filed suit against Travelers to recover the $100,000 setoff.



On cross motions for summary judgment, Plaintiff argued that Travelers could not claim a setoff of $100,000 because it never submitted the issue to the arbitrators at the hearing. She relied on *Zimmerman v. Illinois Farmers Ins. Co.*, 317 Ill.App.3d 360 (2nd Dist. 2000), which held that where the arbitrator ordered "payment" of a particular amount, the defendant could not unilaterally set off the plaintiff's recovery from that award. The language of the arbitration provision in *Zimmerman* stated that the arbitrator shall determine the amount of "payment" under the applicable policy. Defendant countered that the plaintiff's total damages awarded were subject to a setoff, and it was not required to present the setoff issue to the arbitrators.

The trial court granted Travelers' motion for summary judgment and denied plaintiff's motion. It distinguished *Zimmerman* on the grounds that the arbitration provision in this case did not require the arbitrators to determine the amount of "payment" on the UIM claim. Instead, it merely authorized the panel to determine the amount of damages Plaintiff was legally entitled to recover under the policy. Accordingly, the insurer was not required to submit the issue of setoff to the arbitration panel.

Insurer Was Not Obliged to Pay the Aggregate Policy Limit where Porch Collapse Constituted One Occurrence

Ware v. First Specialty Insurance Corporation, 2013 IL App (1st) 113340

The Illinois Appellate Court for the First District recently held that injuries and deaths sustained as a result of a porch collapse constituted a single occurrence for insurance

coverage purposes even though some injuries and deaths did not manifest until days or weeks after the collapse. Twelve individuals were killed and another 29 injured after a three-story porch collapsed at an apartment building. Plaintiffs brought a declaratory judgment action against the building's insurer seeking a ruling that the porch collapse constituted more than one occurrence under the applicable insurance policy. If so, Plaintiffs believed the insurer would be liable for the aggregate limit of the applicable insurance policy rather than simply the occurrence limit. The trial court granted summary judgment for the insurer, finding the collapse to be but one occurrence.

On appeal, Plaintiffs argued that the porch collapse constituted more than one occurrence because many of the injuries and deaths did not manifest until days or weeks after the collapse. Both parties, however, agreed that there were no intervening acts or circumstances that caused or contributed to the injuries and deaths suffered by the plaintiffs. The applicable policy language defined an "occurrence" as an accident or continued and repeated exposure to substantially the same general harmful condition. The policy also defined "bodily injury" as an injury or death sustained by a person at any time.

Based on this language, the Appellate Court for the First District held that the plaintiffs' injuries arose out of a single occurrence. The fact that many of the injuries did not manifest until days or weeks after the occurrence had no merit where the policy defined bodily injury to occur *at any time*. Further, plaintiffs conceded that all of their injuries were caused directly and solely by a single incident – the porch collapse – instead of multiple incidents. Therefore, the Court affirmed the trial court's grant of summary judgment in favor of the insurer.

Arbitration Award Exceeding Twice the Insurer's Offer Did Not Establish Unreasonable or Vexatious Conduct

O'Connor v. Country Mutual Insurance Company, 2013 IL App (3d) 110870

Plaintiff filed suit against her automobile insurer under section 155 of the Insurance Code for unreasonable and vexatious failure to settle her UIM claim. Prior to arbitration on the UIM claim, her insurer offered $40,000 to settle the claim. The arbitrators awarded plaintiff $213,295 in damages prior to any setoffs. Plaintiff argued that, given the award was more than two times her insurer's previous offer, it failed to properly evaluate her claim. At trial, the insurer presented evidence that Plaintiff's claim was evaluated on its merits. The trial court found that the insurer engaged in good faith settlement negotiations and did not intentionally delay the settlement process.

On appeal, Plaintiff argued that its insurer's conduct in settling the claim was vexatious and unreasonable, because the arbitration award was substantially greater than the last settlement offer. The Illinois Appellate Court for the Third District, however, affirmed the trial court's finding of no section 155 violation. It found that the insurer presented ample evidence that it used

an arbitration award of more than twice the amount of the insurer's offer does not in itself establish unreasonable or vexatious conduct

reasonable standards for settlement of her claim. In particular, the Court stated that in the settlement of an underinsured motorist claim, an arbitration award of more than twice the amount of the insurer's offer does not in itself establish unreasonable or vexatious conduct.

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NEGLIGENCE

Animal Control Act Does Not Impose Strict Liability.

Hayes v. Adams, 2013 IL App (2d) 120681

As a matter of first impression the Second District Appellate Court of Illinois held the Animal Control Act removes the common law requirement of establishing an owner's negligence but does not impose strict liability solely based on legal ownership.

Plaintiff brought suit against a dog's legal owner after the dog bit her on the thumb. Prior to the bite, the dog's owner dropped it off at a veterinary practice for a surgical procedure. The bite occurred after a veterinary assistant lost control of the dog while taking it for a walk before surgery.

The trial court granted summary judgment for the dog owner. It found that she did not have care or dominion over the dog at the time of the injury, and could not be held strictly liable based only on her ownership of the dog.

In affirming summary judgment, the Appellate Court discussed the purpose of the Animal Control Act to remove the common law requirement of proving a dog owner's negligence in order to recover for injuries caused by a dog. The purpose was to encourage tight control of animals to protect the public from harm. Yet, the Court specifically noted that the Act does not impose strict liability for mere ownership of the dog. Therefore, the owner could not be held liable for Plaintiff's injury after she relinquished care, custody, and control of the dog to the veterinary clinic. To do so would impose liability as a pure penalty for dog ownership which was not the intent of the statute.

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TORTS

Inferences of Retaliation and Pretext for Discharge Did Not Arise from List of Complaints.

Teruggi v. CIT Group/Capital Finance, Inc., --- F.3d ----, 2013 WL 628324 (7th Cir., 2013).

The plaintiff claimed common law retaliatory discharge and age and disability discrimination in violation of the Illinois Human Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. He chose the direct method of proof which requires "a convincing mosaic" of circumstantial evidence. He adduced the following facts.

He was injured at work in 2002. In 2005, his supervisor and a human resources member encouraged him to file a workers' compensation claim to resolve medical payment issues. His supervisor made

separate inconsiderate comments when he described plaintiff as "OLD" in a 2006 memo and in 2009 when he stated at a meeting that the plaintiff was "back on drugs." In 2007, plaintiff informed his supervisor that he planned to work until he was 70 years old, and he received a workers' compensation settlement that year. In 2008, the defendant interviewed and wished to hire an outside person for a senior position but was required to post it internally first. The plaintiff was interviewed for the position, but the defendant hired the outside candidate. Plaintiff required and was granted certain accommodations at work as a direct result of his injury, including permission to transfer files to his home computer and permission to transfer internal email to his personal email account. His his company email account was monitored for over a year. In January 2009, the plaintiff sent confidential and proprietary information regarding one of the defendant's suppliers to defendant's employees in New York, though it had not been requested. After an internal investigation, the defendant determined that the plaintiff had violated its code of conduct regarding confidential information, and he was discharged.

Plaintiff relied "on the same evidence for his discrimination and retaliatory discharge claims. That evidence [was] no more convincing for the latter than it is for the former." Id at *6. The plaintiff's discrete bits of evidence spanned nearly four years, and included unconnected workplace decisions, some of which had no bearing on his termination. Plaintiff failed to show pretext amounting to an outright lie as the reason for his termination. Insofar as plaintiff claimed retaliatory discharge for filing the workers' compensation claim in particular, plaintiff failed to show a temporal relationship in that the termination occurred several years after he filed his claim, and 18 months after his claim was settled. The U.S. Seventh Circuit Court of Appeals affirmed summary judgment against the plaintiff on the discrimination claims and the common law retaliatory discharge claim finding reasonable inferences of retaliation and pretext for the stated discharge decision did not arise on "an amorphous litany of complaints about a myriad of workplace decisions." Id at *5.

inferences of retaliation and pretext … did not arise on "an amorphous litany of complaints about a myriad of workplace decisions."

Termination of Whistle Blower Did Not Establish Breach of Contract Element of Tortious Interference with Contract

McArdle v. Peoria School Dist. No. 150, 705 F.3d 751 (7th Cir., 2013).

A contract permitting termination with payment of severance was not breached as required to establish claim for tortious interference with contract though the school district terminated middle school principal on recommendation of her superior after the principal had reported superior's alleged misconduct to police and district officials.

A middle school principal alleged violation of her First Amendment rights by her employer, as well as breach of contract and tortious interference with contract. She was employed under a two-year contract which gave the school district the option of terminating her without cause after one year as long as she received her salary for the second year. Shortly after beginning work, the plaintiff noted discrepancies in her predecessor's handling of school funds, as well as the improper admission of non-resident students. The plaintiff's predecessor had become her superior, and the plaintiff confronted her superior about the discoveries of impropriety that she had made. Near the end of the school year, the plaintiff was informed by the board that they were going to terminate her contract one year early. The plaintiff responded by filing a police report regarding the misuse of school funds, and she also informed the board of her discoveries. At a meeting of the school board to determine the plaintiff's fate, her superior stated that the plaintiff should be terminated. The board adopted the recommendation, and the plaintiff was terminated from her employment.

a two-year contract … gave the school district the option of terminating her without cause after one year as long as she received her salary for the second year.

The appellate court affirmed summary judgment for all defendants. Her constitutional claims failed because speech by a public employee is only protected when made in the employee's capacity as a private citizen. The plaintiff's claim for breach of contract also failed because the school board had the right, pursuant to the contract, to terminate the plaintiff after one year for any reason at all, provided that she still received her second year's salary. In addition, because a necessary element of a claim of tortious interference with contract is an actual breach, the plaintiff's tortious interference claim against her superior also failed.

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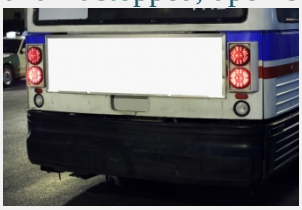
WORKERS' COMPENSATION

Psychological Injury was Compensable though Not Immediately Manifest

Chicago Transit Authority v. Illinois Workers' Compensation Commission, 2013 IL App (1st) 120253WC

Sufficient evidence supported a reasonable inference that the claimant bus driver suffered sudden, severe emotional shock which caused a compensable psychological injury even if it did not manifest itself immediately and the claimant failed to seek professional treatment for two months. The Petitioner was a bus driver who was involved in an accident with a pedestrian. The Petitioner was driving away from a bus stop when another pedestrian chased the bus until it stopped; upon exiting, the Petitioner saw a man lying in the road. She reported the incident and returned to the bus garage, where she learned that the man had died. She became shaken up, and her supervisor told her to see "comp psych". A short time later, after a safety hearing, the Petitioner was terminated.



The Petitioner attempted to deal with depression on her own following the accident for two months, but then sought professional help. She informed her therapist that she was depressed due to the death of a person. Her therapist's unrebutted testimony stated that the Petitioner was suffering from high levels of anxiety and depression, which made her unable to work.

The Arbitrator found that the Petitioner's condition of ill-being was causally connected to the death of the pedestrian based on the "mental-mental" type of emotional shock. A majority of the Commission affirmed, and the circuit court confirmed the Commission.

the sudden and severe shock of watching a person dying in the street was compensable as a mental-mental injury, even though the Petitioner did not immediately seek professional help.

The appellate court affirmed. The court stated that, for an injury to be compensable as a mental-mental psychological injury, the injury must stem from "a sudden, severe emotional shock traceable to a definite time, place, and cause which causes psychological injury or harm. . . though no physical trauma or injury was sustained." In the instant case, the court referred to the Illinois Supreme Court decision in *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556 (1976), to support its decision that the sudden and severe shock of watching a person dying in the street was compensable as a mental-mental injury, even though the Petitioner did not immediately seek professional help. The court specifically rejected the Respondent's argument that the symptoms must manifest themselves immediately to be compensable. Additionally, the Petitioner's therapist presented unrebutted testimony that her symptoms dated back to the time of the accident. Accordingly, the court affirmed the prior decision.

Employee Was Entitled to Prospective Cosmetic Medical Care for Small Indentation in Her Forehead

Dye v. Illinois Workers' Compensation Comm'n, 2012 IL App (3d) 110907WC

An employee who sustained a small indentation in her forehead from being struck by a steel cylinder on her temple was entitled to prospective cosmetic medical care since section 8(a) does not require disfigurement to be "serious and permanent."

The Petitioner filed an application for benefits after she was struck in the forehead by a small steel cylinder at work. Petitioner was seen in the emergency room, where an

abrasion was noted on her forehead. Two years later, the Petitioner was seen by several physicians who noted the presence of an indentation in her forehead in the area struck by the cylinder. Petitioner applied for benefits under Section 8(a) of the Act, contending that she had not had an indentation prior to her injury, and that she wanted prospective medical benefits in the form of cosmetic surgery to repair her forehead to its prior state. The arbitrator denied the prospective medical benefits, and the Commission affirmed that decision. The circuit court confirmed the Commission.

section 8(a) does not require disfigurement to be "serious and permanent."

The appellate court reversed and remanded. The Respondent argued that it was unclear whether the Petitioner suffered from an observable disfigurement. Relying on the Illinois Supreme Court's definition of "disfigurement" in *Superior Mining Co. v. Industrial Comm'n*, 309 Ill. 339, 340 (1923), the court held that any effect that impairs the beauty of a person or deforms in some manner constitutes a disfigurement for which the employer bears the burden of correcting. Specifically, the court noted that during the hearing, the arbitrator was asked to take notice of the Petitioner's forehead. After a short pause, the arbitrator asked if the Petitioner was proposing correction to "this indentation." The court found this statement, combined with the observations of three physicians, sufficient as proof that the indentation in the Petitioner's forehead was readily observable, contrary to the Respondent's argument. The court did uphold the denial of penalties, however, as it was reasonable for the Respondent to withhold medical treatment given the uncertainty surrounding the issue at bar.

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FIRM NEWS

Jennifer M. Wagner Associates with Reed Armstrong

Jennifer M. Wagner joined Reed Armstrong in January 2013. Jennifer graduated cum laude in 2011 from Southern Illinois University School of Law and was admitted to the Illinois Bar in November 2011.

During law school, Jennifer was a member of the Journal of Legal Medicine and published an article concerning the need for hospitals to comply more fully with the Americans with Disabilities Act as it applies to hearing-impaired patients. She also worked in the Southern Illinois University Civil Practice Clinic, providing free legal assistance to senior citizens in the thirteen southernmost counties in Illinois. While enrolled in the clinic as a student, Jennifer received the Howard Eisenberg Client Service Award for outstanding service to the clinic clientele.

Jennifer was born in Saint Louis, Missouri, in 1981. She graduated from Edwardsville High School in 1999. Jennifer then attended Washington University in Saint Louis, earning a Bachelor of Arts degree in biology in 2003.

Jennifer was admitted to practice before the United States Court of Appeals for the Seventh Circuit in May 2012 and presented oral argument to the Court in November 2012. She is a member of the Illinois State Bar Association and the Madison County Bar Association.

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