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CIVIL PROCEDURE

Illinois Law Does Not Require a Third-Party Contribution Claim and the underlying Claim to Be Tried Together
Shaw v. St. John's Hospital, 2012 IL App (5th) 110088

A patient brought a medical malpractice action against various physicians and hospitals for their alleged roles in failing to diagnose and treat her for a condition which caused her to become blind. One of the hospitals filed a third-party complaint for contribution against Jersey Community Hospital District. Thereafter, all of the defendants filed a motion to transfer the cause to Jersey County based on improper venue and *forum non conveniens*. The trial court denied the defendants' motions to transfer for improper venue as well as *forum non conveniens*. All defendants appealed.

The defendants argued on appeal that once the third-party claims were filed against Jersey Community Hospital, a public corporation with its principal office in Jersey County, the entire action must be transferred from Madison County to Jersey County based on improper venue and *forum non conveniens*. Specifically, defendants argued that Illinois law requires a third-party contribution claim to be asserted and tried together with the underlying suit. The Illinois Appellate Court for the Fifth District disagreed with the defendants and affirmed the trial court. The Court made clear that Illinois law does not require that contribution actions invariably be tried together with the underlying action. Such a rule would allow defendants to change venue whenever they chose merely by filing a complaint for contribution against a governmental entity located in another county.

Additionally, the Court upheld the trial court's denial based on *forum non conveniens* because a balance of the private and public factors did not favor Jersey County. The plaintiff currently resides in Madison County while the defendants and the relative ease of access to witness, documents, and other evidence are spread throughout many counties including Cook County and St. Louis, Missouri. Madison County also may have some interest in vindicating the rights of its citizens. Thus, the Court affirmed the trial court's denial of defendants' motion to transfer.

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INSURANCE

Two-year Limitation on Uninsured Motorist Claims Does Not Violate Public Policy

Country Preferred Ins. Co. v. Whitehead, 2012 IL 113365

Defendant was involved in an automobile accident with an uninsured motorist in the State of Wisconsin. Her uninsured-motorist insurance policy required that she commence suit, action, or arbitration within two years from the date of the accident. Although the insured filed an uninsured motorist claim months after the accident, she never formally demanded arbitration or named an arbitrator. The only demand made under her insurance policy was filed more than two years after the accident. Country Preferred Insurance Company filed a complaint for declaratory judgment against her, alleging that she was barred from pursuing an uninsured motorist claim because she did not file a request for arbitration within the two-year policy limitation. In response, she filed a motion to

compel arbitration, which the trial court denied. The appellate court reversed, holding that the two-year limitation period in the parties' insurance contract violated Illinois public policy. Country Preferred appealed to the Illinois Supreme Court.

On appeal, the insured's public policy argument was based on the claim that the limitation placed her in a substantially different position than she would have been in had the tortfeasor carried insurance because the applicable Wisconsin statute of limitations for personal injury actions was three years. Thus, she claimed that had the tortfeasor carried insurance, she would have had three years, not two, to assert her claim.

The Supreme Court reversed the appellate court and found that two-year limitation did not violate public policy. First, the two-year contractual limitation was on par with the Illinois' statute of limitations for all personal injury actions. Second, the laws of another state – Wisconsin in this instance – cannot be used to show a violation of *Illinois* public policy. The Court stated the critical question is whether the contractual limitation allows the insured sufficient time to pursue a claim. Since the insured had the same amount of time to properly demand uninsured motorist benefits as to file a personal injury action in Illinois, she had a sufficient amount of time to pursue her claim.

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Anti-Stacking Provision Enforced

State Farm Mutual Automobile Ins. Co. v. McFadden, 2012 IL App (2d) 120272

The defendant was injured in a car accident and made a claim for underinsured motorist benefits from a State Farm policy. She claimed that because she had five separate polices with State Farm, each with a $100,000 limit of liability for underinsured motorist coverage, the total amount from which the tortfeasor's liability limit should be offset to determine whether the tortfeasor was underinsured was $500,000. State Farm filed a declaratory judgment action seeking a determination that that the express anti-stacking language in the policy prohibits the stacking of the policies and argued that the anti-stacking language prohibits the defendant from accumulating more than $100,000 in underinsured motorist coverage to be offset by the tortfeasor's $250,000 policy resulting in no underinsured coverage. The defendant argued that the anti-stacking language in each of the five policies was rendered ambiguous by the policies' proration clauses and declaration sheets.

The trial court's judgment in favor of State Farm was affirmed on appeal where the Second District Appellate Court rejected the plaintiff's reading of the policy and found no ambiguity in the policy language. It held the proration clause does not introduce ambiguity into the clear language of the anti-stacking provision. Although defendant paid a separate premium for each of the five policies and the declarations sheets for each policy reflected a separate premium amount thereby leaving open the question of stacking, each policy's anti-stacking provision clarified that "regardless of the number of policies involved…vehicles insured, [or] premiums paid," the total limit available from all policies "shall not exceed the limit of liability of the single policy providing the highest limit of liability." The Court noted that pursuant to Supreme Court precedent, any assumption the defendant may have made about stacking based upon a reading of the declarations sheets alone was

rebutted by the anti-stacking provisions in each policy.

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Employer's Policy Is Excess Where an Employee's Personal Automobile Policy Provides Primary Coverage

Vedder v. Continental W. Ins. Co., 2012 IL App (5th) 110583

The Illinois Appellate Court for the 5th District found that an ambulance service's business automobile insurance policy was excess to coverage provided by a personal automobile insurance policy. An ambulance service volunteer struck a motorcycle while driving her personally owned automobile. At the time of the collision, she was acting as a volunteer for the ambulance service. The volunteer and her insurance company filed a declaratory judgment to determine whether the ambulance service's business policy or the volunteer's personal insurance policy provided primary coverage for the accident and who had a duty to defend whom. The ambulance service's other insurance clause explicitly stated that it was excess for any covered auto the service did not own. Both insurers filed motions for summary judgment, but the trial court determined that the volunteer's personal automobile policy provided primary coverage while the ambulance service policy provided excess coverage for the accident. The volunteer and her insurance company appealed.

On appeal, the volunteer and her insurer argued that her selective and targeted tender to the ambulance service's insurer, its delay in seeking declaratory judgment as to its duty to defend, and its reliance on the "other insurance" clause of its policy precluded it from claiming excess coverage and denying its duty to defend the volunteer. The Illinois Appellate Court for the Fifth District disagreed, however, finding that the ambulance service's explicit policy language, coupled with public policy and industry custom and practice, established that the volunteer's policy was primary and the ambulance service's was excess. The volunteer's targeted tender to the ambulance service's insurer was invalid and ineffective because the principle of horizontal exhaustion does not allow an insured to target tender to an excess insurer and the volunteer did not pay a premium or bargain for coverage under the excess policy. Further, a delay of seven months in seeking declaratory judgment on its duty to defend the volunteer was not unreasonable, and an excess insurer can, in fact, rely on an "other insurance" clause to escape its duty to defend. An excess insurer has no obligation to defend or indemnify until the limits of the primary policy are exhausted. Thus, the Appellate Court affirmed the trial court's determination as to excess and primary coverage.

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PREMISES LIABILITY

The Deliberate Encounter Exception to Open and Obvious Doctrine Does Not Apply Where Plaintiff Did Not Notice the Condition before Her Injury

Ballog v. The City of Chicago, 2012 IL App (1st) 112429

The First District recently affirmed a trial court's entry of summary judgment in favor of the defendant, finding that a gap on the surface of a street constituted an open and obvious condition and that the deliberate encounter exception to the open and obvious rule did not apply. Plaintiff injured her foot

when she tripped as she stepped from a portion of the street that had been excavated, refilled with concrete, but not resurfaced. On appeal, the plaintiff argued there were two material issues of fact; whether the gap in the street constituted and open and obvious condition and whether the deliberate encounter exception applied. The Court found that the gap in the street was patently visible and that the physical nature of the condition where she fell did not differ from the condition that she was able to safely traverse on the opposite side of the street. As such, the Court concluded that the condition of the street was open and obvious as a matter of law such that the City owed plaintiff no duty. The Court stated there was no reason to discuss the deliberate encounter exception because the evidence established the plaintiff did not see or notice the open and obvious condition and could not have deliberately encountered it.

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TORTS

No Duty to Preserve Evidence Where There Is No Voluntary Undertaking or Special Circumstance

Martin v. Keeley & Sons, Inc., 2012 IL 113270

Construction workers brought suit against various manufacturers and a general contractor for injuries sustained after a broken concrete I-beam fell from a bridge. The general contractor destroyed the beam the day following the accident once OSHA and IDOT inspected the site. The workers asserted a negligent spoliation of evidence claim against the general contractor after it destroyed the I-beam that caused the injuries. Specifically, the workers alleged that the general contractor breached its duty to preserve the beam as evidence in potential litigation. The trial court granted the contractor's motion for summary judgment on the grounds it had no duty to preserve the I-beam. The appellate court reversed, finding that the contractor voluntarily undertook a duty to preserve the I-beam once it preserved the beam that same day to allow OSHA and IDOT an opportunity to inspect the accident site. The general contractor appealed.

The sole issue on appeal was whether the general contractor had a duty to preserve the concrete I-beam involved in the accident. A duty exists only when a plaintiff proves that an agreement, contract, statute, special circumstance, or voluntary undertaking gives rise to a duty to preserve evidence, and a reasonable person should have foreseen that the evidence was material to a potential civil action. The workers argued that the contractor voluntarily undertook a duty to preserve the beam, and special circumstances gave rise to a duty, namely: (1) the contractor's exclusive possession and control of the beam; (2) the contractor's status as the workers' employer; and (3) the contractor's status as a potential litigant.

Reversing the appellate court, the Supreme Court found neither a voluntarily assumption of a duty to preserve the beam, nor special circumstances justifying the imposition of such a duty. There was no evidence of affirmative conduct on the part of the contractor showing its intent to preserve the beam as evidence or even acknowledge the significance of the beam as evidence in potential future litigation. The mere fact that the contractor allowed OSHA and IDOT an opportunity to inspect the beam and accident site was not enough. Further, the possession and control of evidence, alone, the status of the employer-employee relationship, and the status of the

contractor as a potential litigant were not "special circumstances" necessary to impose a duty.

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Consumer Fraud Claim against Insurer Upheld

Burress-Taylor v. American Security Ins. Co., 2012 IL App (1st) 110554

The First District recently reversed the trial court judgment for a defendant insurer that had been entered on the grounds that plaintiff's action was time barred by a one–year contractual limitations provision and that Section 155 of the Illinois Insurance Code preempted plaintiff's Consumer Fraud Act claim. The plaintiff's mortgage on her home included a "forced-place" residential insurance policy through American Security Insurance Company, which is a policy procured by the lender that provided $124,000 in dwelling coverage. The policy contained an "Other Insurance" provision stating that if there is any other insurance on the home, the "forced-place" policy would only apply as excess and would be payable only after all other applicable insurance has been exhausted. It contained a one-year limitation for actions against the company with a provision for tolling between the date proof of loss was filed and the date the claim was denied.

The plaintiff's home was also insured by a second insurance policy through Hanover Fire and Casualty Insurance Company that contained a "Pro Rata Liability" clause which provided $100,000 in dwelling coverage and $15,000 in contents coverage. Both policies covered fire losses. The plaintiff's home was damaged by fire in August 2006 and the plaintiff submitted a claim to Hanover after which Hanover estimated the damage to the property at $127,906.96 and informed the plaintiff that Hanover would pay 44.45% of the loss while the remaining 55.55% was owed from the "forced place" policy, based on the "Pro Rata Liability" clause in the Hanover policy. Hanover issued a check for the 44.45% to plaintiffs. In a letter dated November 30, 2006, Hanover sent a letter to plaintiff denying her request to disburse more funds stating that the shared liability of the two insurance companies was in dispute and that she would be informed when the dispute was resolved. In March 2007, American Security sent plaintiff a letter stating that its policy was an excess policy and stated that "our policy will not respond until all other insurance has been paid."

In September 2009, plaintiff filed a class action complaint against Homecomings, American Security and Hanover for breach of contract, deceptive conduct under the Consumer Fraud Act and a declaratory judgment action seeking amounts owed to her under her claims. American Security moved to dismiss the claims arguing that the complaint was time-barred by the one year contractual time limit for filing suit set forth in the endorsement and also argued that Section 155 of the Illinois Insurance Code preempted the plaintiff's claim under the Consumer Fraud Act. The trial court granted the motion to dismiss with prejudice.

On appeal American Security admitted the limitations period was tolled before November 30, 2006 when plaintiff filed her proof of loss but argued that its March 2007 letter was a denial of the plaintiff's claim which triggered the commencement of the remaining limitations period. The First District rejected defendant's arguments holding that the March 2007 letter did not constitute a denial of the plaintiff's claim

and did not trigger the commencement of the remaining limitation period. Nothing in the letter indicates the claim was denied; it simply indicates the status of the claim. Thus the trial court erred in dismissing the plaintiff's complaint on the basis of the one-year limitation period.

The Appellate Court further held the consumer fraud claim was not preempted by Section 155 of the Illinois Insurance Code. More than mere allegations of bad faith or unreasonable and vexatious conduct (which would be preempted) were alleged. More than mere breach of a promise contained within an insurance policy (which cannot support a consumer fraud claim) was alleged. Here, plaintiff also alleged the deceptive act or practice of failing to timely inform the plaintiff that a resolution of its conflict with the other insurer had been reached, and that insurer intended her to rely on its misrepresentations (since it was resolved within the alleged limitations period). Thus the Court held that the consumer fraud claim was separate and independent from the breach of contract claim and that the consumer fraud claim was not based upon the breach of a promise contained within the policy.

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Allegations against School District Fail to State Willful and Wanton Conduct

Leja v. Community Unit School District 300, 2012 IL App (2d) 120156

The Second District recently affirmed a trial court's dismissal finding that the plaintiff's allegations were not sufficient to sustain a cause of action for willful and wanton conduct. The plaintiff was injured in the school gym when a volleyball net crank she was turning struck her in the face. She brought suit against the School District alleging counts based on negligence and willful and wanton conduct. The trial court dismissed the negligence count after determining the school district was immune from liability for negligence based on the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/3-106). The trial court also dismissed the willful and wanton count with prejudice on the basis that the plaintiff failed to plead sufficient facts to sustain a cause of action for willful and wanton conduct. On appeal, the plaintiff argued the trial court erred in that the warning label on the crank was sufficient to put the defendant on notice that there was risk of injury and that instructing the plaintiff to use the crank showed an utter indifference to or conscious disregard for her safety. The plaintiff also alleged the defendant knew the crank was unsafe, dangerous and defective and was aware of prior problems with the crank.

The Second District first looked to the definition of willful and wanton conduct under the Act, which states that if not intentional, the conduct must show "an utter indifference to or conscious disregard for the safety of others." The Court noted that conduct has been found to be willful and wanton where a public entity knew of a dangerous condition yet took no action to correct the condition, where a public entity was aware of prior injuries caused by a dangerous condition but took no action to correct it, and where a public entity intentionally removed a safety feature from recreational property despite the known danger of doing so. Here, other than the existence of a warning label, the plaintiff alleged no other facts that would permit the inference that the defendant knew that instructing the plaintiff to operate the crank would result in her injury or that operation of the crank posed a high risk of injury. The

Court rejected the argument that the existence of a warning label in an of it itself is sufficient to put a defendant on notice that a product poses a high risk of injury and further rejected the argument that instructing a student to use the crank bearing such a warning label shows an utter disregard for her safety.

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FIRM NEWS

Senior Partner Steve Mudge Appointed Fellow of the American College of Trial Lawyers

Senior Partner Steve Mudge was recently appointed a Fellow of the American College of Trial Lawyers at an induction ceremony in New York, NY. The American College of Trial Lawyers is one of the premier legal associations in America. Mr. Mudge is an established trial attorney with 35 years of experience. His practice areas include negligence, insurance coverage law, bad faith claims, class actions, product liability, premises liability, automobile, commercial trucking injuries, construction defects and injury, and employment law. He also serves as a mediator and arbitrator.

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