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Wells v. Endicott, 2013 IL App (5th) 110570

On May 31, 2013, Reed Armstrong attorneys Steve Mudge and Tara English, who were appointed Special Assistant Attorneys General to represent Sophia Rawlings, a child welfare specialist for the Illinois Department of Children and Family Services, secured an appellate victory when the Fifth District affirmed the trial court’s order dismissing the plaintiff’s claims against defendant Rawlings with prejudice.

After a three year old boy, Joseph Schoolfield, died from injuries he sustained when he was severely beaten by his mother’s paramour, the boy’s biological father, Matthew Wells, brought suit against Joseph’s mother, her paramour, the paramour’s parents, the Director of the Department of Children and Family Services, and Sophia Rawlings, a child welfare specialist for the department. In the count directed against Defendant Rawlings, Plaintiff attempted to state a cause of action under 42 U.S.C. Section 1983, alleging that Rawlings violated Joseph Schoolfield’s substantive due process rights under the Fourteenth Amendment by allowing him to remain in the custody of his mother, and by failing to intervene to protect him from his mother’s paramour. Citing King v. East St. Louis School District 198, 496 F.3d 812, 817 (7th Cir. 2007), the Fifth District recited the controlling law that the Due Process Clause of the Fourteenth Amendment generally does not impose upon the State a duty to protect individuals from harm by private actors; however, there are two exceptions: (1) The constitution imposes a duty upon the State to protect individuals with whom it has a “special relationship” by virtue of the State’s custody over the individual; and (2) The substantive component of the Due Process Clause imposes upon the State a duty to protect individuals against dangers the State itself creates under the State Created Danger Doctrine. Relying on Deshaney v. the Winnebago County Department of Social Services, 489 U.S. 189, 109 S. Court 998 (1989), the Fifth District held that a State’s failure to protect an individual from violence committed by a private actor does not constitute a Due Process Clause violation. Id.

Plaintiffs argued that even if the Due Process Clause imposed no affirmative obligation on the State to provide the general public with adequate protective services, a duty rose with respect to Joseph Schoolfield because the State knew the boy faced a danger of abuse by his mother’s paramour and therefore temporarily removed him from his mother’s custody, before returning him to her. Plaintiffs suggest that, having taken Joseph into custody once, the Department of Children and Family Services and Sophia Rawlings owed him a rudimentary duty of safe keeping. Citing Deshaney, the Court found that “the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter.” Id., at 281. Because Joseph Schoolfield was not in State custody when his mother’s paramour abused him, the protections of the Due Process Clause were not triggered.
EMPLOYER’S LIABILITY

In Wrongful Death Claim Alleging Defendant's Employee Caused Motor Vehicle Collision While Driving to a Jobsite, Employer’s Liability Could Not Be Predicated on the "Traveling Employee" Doctrine Applied in Workers Compensation Cases.

Pister v. Matrix Service Industrial Contractors, 2013 IL App (4th) 120781

In the early morning of April 13, 2009, a vehicle driven by Brian Stultz crossed the center line and struck an oncoming vehicle driven by Jeffrey Pister, killing both men. Mr. Stultz was travelling from Ohio toward a construction site in Champaign, Illinois to begin a new job for his employer, Matrix Service Industrial Contractors, Inc. (“Matrix”). Jeffrey Pister’s widow, Tisha Pister, filed a complaint against Stultz’s estate and Matrix in Champaign County. Pister dropped the claim against the Stultz’s estate, but maintained her action against Matrix, asserting that Matrix was liable for her husband’s death under two theories, one of which was the “travelling employee” doctrine.

Matrix moved for summary judgment, which the trial court granted in part holding that Pister’s travelling employee claim presented no genuine issue of material fact because that doctrine only applies in worker’s compensation cases. Under the travelling employee doctrine, injuries to employees whose duties require them to travel away from home are considered compensable (that is, to arise out of and in the course of his employment) if their conduct was reasonable and anticipated by the employer.

The Appellate Court, Third District, affirmed summary judgment on the “travelling employee doctrine” because it only applies in the no-fault context of worker’s compensation, not to tort claims.

EVIDENCE

Allowing Jury to Examine Exemplar Ladder Used as Demonstrative Evidence During Product Liability Defense Expert’s Testimony Where It Had not Been Admitted in Evidence Was Reversible Error.

Baugh v. Cuprum S.A. de C.V., --- F.3d ---- 2013 WL 4875003 (7th Cir. 2013)

Plaintiff filed suit against a ladder manufacturer after a ladder he was using to clean his gutters buckled and collapsed. Plaintiff alleged that the severe brain injuries he suffered were caused by the ladder manufacturer’s defective design and negligence.

Before trial, defense counsel informed plaintiff’s attorney that he intended to use an exemplar of the same ladder at issue at trial for demonstrative purposes only and never admitted the ladder into evidence. During jury deliberations the jury asked the judge if they could view the ladder. Over plaintiff’s counsel’s objection the Judge allowed the ladder to be taken into the jury room with the instruction that the jury may examine the ladder, but they cannot try to reconstruct the occurrence. Approximately three hours after the ladder was taken into the jury room the jury returned a verdict for the ladder manufacturer and this appeal ensued.

On appeal, the Court stated the general rule is that materials not admitted into evidence should not be sent back to the jury room to be used for jury deliberations. The Court noted “labeling an exhibit ‘demonstrative’
signifies that the exhibit is not itself evidence – the exhibit is instead a persuasive, pedagogical tool created and used by a party as part of the adversarial process to persuade the jury.” Thus, the Court held that when the term ‘demonstrative exhibit’ is used it indicates that the exhibits will not be admitted as substantive evidence and should not go back to the jury to use during deliberations.

Reversal was required because the error was not harmless for two reasons. One, the plaintiff’s counsel believed that the ladder would never be sent back to the jury room, so plaintiff’s counsel did not get a chance to respond to the ladder use as substantive evidence. Secondly, the jury deliberations had spanned three days, and three hours after the jury was allowed to examine and step on the ladder they came to a verdict, indicating the ladder may have had some effect on the jury’s decision.

**IMMUNITY**

*Ambulance Driver and Employer Had Statutory Immunity from Negligence Action by Motorist Who Turned Left in Front of Ambulance on a Nonemergency Run.*

*Wilkins v. Williams*, 2013 IL 114310

The plaintiff’s car collided with an ambulance at the height of rush hour traffic near Chicago. At the time of the accident, the ambulance was travelling on a non-emergency basis to a nursing home without its lights or siren on.

The plaintiff sustained serious brain injuries as a result of the accident and filed a negligence suit against the ambulance driver and her employer. The trial court granted defendants summary judgment, holding that the EMS Act granted them immunity. The Appellate Court, First District, reversed. It held that the EMS Act was silent about whether immunity extends to actions brought by third parties and concluded the Act could not extend immunity in third party cases because such immunity would render meaningless the duty of care contained in the Vehicle Code.

The Supreme Court reversed, holding that the Act’s plain meaning grants immunity with respect to all potential claimants, including third parties. The Act states in pertinent part: “[a]ny person …who in good faith provides…non-emergency medical services…in the normal course of providing those services shall not be civilly liable as a result of their acts or omissions in providing such services unless such acts or omissions…constitute willful and wanton misconduct.” 210 ILCS 50/3.150(a) (West 2006). As the Act’s language shows, its grant of immunity is not predicated on what type of party is bringing suit. Therefore, whether the party bringing suit is a patient or a third party (e.g., another driver) is immaterial.

Next, the Court harmonized the Vehicle Code with the EMS Act. As a preliminary matter, the Court observed that whether there is a duty of care and whether immunity will extend are separate issues. The Court also observed that the Vehicle Code applies to all “Authorized Emergency Vehicles,” (e.g., police cars) while the EMS Act only applies to “[a]ny person, agency or governmental body…who in good faith provides emergency or nonemergency medical services.” (emphasis added). Thus, the EMS Act is much narrower, preventing the two acts from contradicting each other. Further, the duty of care imposed by the Vehicle Code still places a duty on those who provide emergency and nonemergency medical services to the extent those services involve willful or wanton misconduct. Thus, the Vehicle Code and the EMS Act can be harmonized into a consistent statutory scheme.
INSURANCE

Chain Hardware Store Operator Was Covered under Personal Injury Plaintiff’s Automobile Policy and Was Owed a Defense for Action Alleging Plaintiff Was Injured on the Operator’s Store Premises While Its Employee Was Loading Bricks into Her Car.

*Menard, Inc. v. Country Preferred Insurance Co.*, 2013 IL App (3d) 120340

Ruby Bohlen, and a Menard’s, Inc. employee were loading bricks into Bohlen’s car when Bohlen allegedly tripped and fell over debris. Bohlen filed a premises liability action for her injuries against Menard, claiming that the store was negligent by failing to maintain a safe premises for its customers. At the time of the accident, Bohlen had a Country Preferred insurance policy on her vehicle.

After Bohlen filed suit, Menard requested that Country Preferred defend and indemnify the company. Country denied coverage and refused to defend the suit. Menard then filed this declaratory judgment action seeking a declaration from the court that Country was required to provide a defense. On Menard’s motion for summary judgment, the trial court determined that Menard qualified as an insured (“permissive user”) and held that Country was required to defend Menard in the suit. The Appellate Court, Third District, affirmed.

In reaching its decision, the Appellate Court interpreted Bohlen’s policy, which stated that Country had a duty to defend any insured against a claim or suit covered by the policy. The Appellate Court determined that Menard fell under the policy’s definition for an insured: “anyone using an insured vehicle with your permission or the permission of an adult relative.” As the Appellate Court held, “use” of the vehicle was not limited to driving, but included loading and unloading bricks. The policy also stated it provided coverage for injuries “caused by an accident resulting from the…use of an insured vehicle, including loading and unloading.” Thus, there was coverage and a duty to defend under the policy, because Bohlen alleged that her injuries were caused during the “use” (“loading and unloading”) of her vehicle.

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Costs of Defending and Settling Employee's Common Law Negligence Suit Claiming He Contracted Mesothelioma from Workplace Exposure to Asbestos Were Covered Under Excess Liability Insurance Policy.

*TKK USA, Inc. v. Safety Nat. Cas. Corp.*, 2013 WL 4457317 (7th Cir., 2013)

Plaintiff purchased an excess liability insurance policy from the defendant that provided it “applies only to Loss sustained by the EMPLOYER because of liability imposed upon the EMPLOYER by the Workers Compensation or Employers’ Liability Laws” of Illinois, and [defendant] “agrees to indemnify” [plaintiff] for ‘Loss.’” The issue before the Court was to determine whether the policy covered plaintiff’s costs to defend a case brought under Illinois common law by the wife of a deceased employee of the plaintiff. The employee had died of mesothelioma, and the wife brought a claim against the plaintiff on a theory of negligence. The plaintiff gave the defendant notice of the lawsuit; however, the defendant informed the plaintiff that the policy did not cover the lawsuit because there was a statutory defense to the common law negligence claim.

“Under Illinois law, employees who contract workplace diseases or suffer workplace injuries may recover damages from their employer exclusively via the Illinois Worker’s’ Occupational Diseases Act (“ODA”).” 820 ILCS 310/1. The ODA provides that the “compensation herein provided for shall be the full, complete and only measure of the liability whatso-
ever, at common law or otherwise…” 820 ILCS 310/11. Thus, the Court noted the ODA provides a total bar for common law negligence claims based on a disease acquired in the course of employment. Thus the issue that the court faced was whether a common law claim for negligence falls within the policies “Employers Liability Laws” even if the negligence claim is barred by the ODA. The Court applying the plain and ordinary meaning of the insurance policy terms found that there was nothing in the policy that states that “Employers’ Liability Laws” are limited to statutes, to the exclusion of the common law. Moreover, defendant’s assertion that the ODA bars all common law negligence claims against an employer was not entirely accurate. In Illinois the ODA acts as an affirmative defense against a negligence claim if the employer asserts the ODA as a defense. Therefore, the term “Employers’ Liability Laws” is not to be restricted solely to statutory claims under the ODA.”

An in apparent decision of first impression, the Supreme Court applied the mailbox rule applies to appeals from the Commission to the Circuit Court. The Court construed language in Section 19 (f)(1) which mandates “[a] proceeding for review shall be commenced within 20 days of the receipt of notice of the decision of the Commission. Thus an appeal mailed to the Circuit Court within the 20 day period was timely even though it was not received within the 20 days.

Additionally, the policy states that coverage is available for claims that are “wholly groundless, false, or fraudulent” under “Employers’ Liability Laws.” Thus, this policy language implies that coverage is available under the policy even if a statute is a clear defense to an employee’s common law claim. Therefore, the Court affirmed the district court’s decision that the excess losses that the plaintiff suffered were covered by the defendant’s policy.

An in apparent decision of first impression, the Supreme Court applied the mailbox rule applies to appeals from the Commission to the Circuit Court. The Court construed language in Section 19 (f)(1) which mandates “[a] proceeding for review shall be commenced within 20 days of the receipt of notice of the decision of the Commission. Thus an appeal mailed to the Circuit Court within the 20 day period was timely even though it was not received within the 20 days.

It reasoned that the practice of filing documents by mail has long been widespread, especially in regards to appellate practice. While the mailbox rule does not apply to the filing of new actions, the Supreme Court rejected the notion that Circuit Court review of a Commission decision constituted a “new action” and specifically noted that the role of the Circuit Court in workers’ compensation matters is appellate only. Therefore, a request for summary judgment, under 19(f) is a continuation of the existing action, rather than a new action. Finally, the court noted that the mailbox rule already applied in appeals from the arbitrator to the Commission, and in appeals from the circuit court to the appellate court. Therefore, applying a different rule at the intermediate stage of appeal was illogical, and making the appeal process uniform brought harmony to the workers’ compensation review process. The court concluded that the term “commence” in Section 19(f)(1) was ambiguous. If the legislature intended for a different rule to apply at the intermediate stage, then it needed to expressly state that intention.
**FIRM NEWS**

**Fifth District Appellate Victory**

On May 31, 2013, Reed Armstrong attorneys Steve Mudge and Tara English secured an appellate victory in the Appellate Court of Illinois, Fifth District. For details, use this link: [Duty](#).

**Reed Armstrong Welcomes New Associates**

Travis M. Pour and Mitchell A. Martin joined Reed Armstrong in August 2013, after taking the Illinois Bar Exam. Both graduated from Southern Illinois University School of Law in May 2013.

Travis was raised in Red Bud, Illinois. He attended Purdue University in West Lafayette, Indiana, where he earned his Bachelor of Science degree in Construction Engineering and Management with a Concentration in Mechanical Engineering in 2010. At Purdue University he was awarded the Outstanding Senior Award. In law school he was a member of the Journal of Legal Medicine.

Mitchell was born and raised in Belleville, Illinois. He attended Harding University in Searcy, Arkansas where he earned his Bachelor of Arts in Psychology and Biblical Studies in 2008. In Law school, Mitchell was a member of the Moot Court Board, was nominated to the Order of Barristers, and interned with the United States Attorney’s Office for the Southern District of Illinois. Mitchell graduated cum laude.

**Martin Morrissey Selected to the 2014 Illinois Super Lawyers List**

Martin Morrissey has been selected by his peers for inclusion on the 2014 Illinois Super Lawyers list in the area of General Personal Injury Defense. The listing will appear in the 2014 Illinois Super Lawyers Magazine and in Chicago magazine. Super Lawyers magazine [www.superlawyers.com](http://www.superlawyers.com) is published nationwide and designates those attorneys in each state that have received the highest recognition and professional achievement as acknowledged by their peers.

**Trip and Fall Defense Verdict**

On July 15, 2013, Martin Morrissey received a defense verdict for his client in a trip and fall case, Rodgers v. Paynic Home for Funerals. The following link provides more details: [Trip & Fall; Hip Fracture](#).