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CONTRIBUTION

Contractual Contribution Provision Requiring Payment of Attorney Fees Was at Odds with the Contribution Act and Unenforceable Because It Violated the Public Policy That Encourages Settlement

***Sandlin v. Harrah's Illinois Corp.*, 2016 IL App (3d) 150018**

Hotel guest slipped and fell on a wet floor outside of his hotel room shower and was injured. Plaintiff brought suit against hotel owner, the architect, and two other parties involved in the construction of the hotel. All defendants filed counterclaims against each other. All defendants eventually settled with the plaintiff, each settlement was found to be in good-faith by the court, and plaintiff's complaint was dismissed with prejudice. All counterclaims were also dismissed with prejudice pursuant to the settlements except the hotel owner's counter-claim against the architect for "contractual indemnification or contribution," including attorney fees, pursuant to an "indemnification provision." As to that claim the trial court granted summary judgment in favor of the architect pursuant to the Contribution Act in light of the good faith settlements.

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On appeal the court found the self-titled "indemnification provision" was in reality a contractual contribution provision because an indemnification clause of that nature in a construction contract would have been void pursuant to the Indemnification Act. Following *Pierre Condominium Ass'n v. Lincoln Park West Associates, LLC.*, 378 Ill. App. 3d 770 (1st Dist., 2007) the court held "to the extent that … [the provision] provides a contractual right to contribution that is independent of the Contribution Act, that provision is at odds with the Contribution Act and violates the public policy that encourages settlement." Thus, summary judgment against the Hotel owner on its counterclaim was affirmed.

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ECONOMIC LOSS DOCTRINE

Plaintiff Could Not Sue in Tort for Negligent Construction of Unfinished Condominium Units for Causing Hardwood Floors Installed by Another After Construction to Bow or Arc up over Time

***Hecktman v. Pacific Indem. Co.*, 2016 IL App (1st) 151459**

Plaintiffs purchased three combined condominium units as shell units with no interior finishes then contracted to have hardwood floors installed in the units. After the floors were installed they started to bow upward preventing doors to open. Plaintiffs filed a complaint alleging negligent construction of the building caused the damage to their hardwood floors. The trial court granted the defendants motion to dismiss pursuant to the economic loss doctrine articulated in *Moorman.*

The economic loss or *Moorman* doctrine provides that a "plaintiff cannot recover for solely economic loss" under a tort theory of negligence. One exception to the *Moorman* doctrine is "where the plaintiff sustained damage (i.e. personal injury or property damage) resulting from a sudden or dangerous occurrence. On appeal the plaintiffs argued they suffered damage to other property, because they are seeking to recover costs of repair for their hardwood floors, rather than the cost to repair to the defective construction. The court noted that for the plaintiffs to suc-

the plaintiffs failed to allege a sudden, dangerous or calamitous event in that they alleged the hardwood floors became deformed over time.

ceed they must establish (1) that they sustained damage to property; and (2)that the damage was caused by a sudden, dangerous or calamitous event. In this case the Court found the plaintiffs failed to allege a sudden, dangerous or calamitous event in that they alleged the hardwood floors became deformed over time. As such, the plaintiffs did not avail themselves of the exception and dismissal ruling was affirmed.

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PREMISES LIABILITY

Summary Judgment for Owner of Above Ground Pool Was Affirmed in Wrongful Death Action by Parent of Toddler Who Drowned While Attending Garage Sale with His Parents

Perez v. Heffron, 2016 IL App (2d) 160015

A 34-month-old boy attended Defendant's yard sale with his parents, sister and niece. Defendant placed items were for sale in the front yard. A walkway led to the backyard that had an aboveground pool. Defendant deliberately placed a clothes rack in front of the deck stairs leading to the pool in order to prevent yard-sale patrons from going onto the deck. The 34-month-old child's father called to the others to let them know he was leaving the child in their care. However, they did not

hear the father and did not know that the child was no longer with his father. When the father asked where his son was, the father, his sister and the Defendant ran to the backyard where the child had drowned. A subsequent police investigation found that the pool gate did not have a functioning latch.

Summary judgment for the defendant on plaintiff's wrongful death claim was affirmed on appeal on the grounds that "owners and occupiers of land are not ordinarily required to foresee and protect against injuries resulting from dangerous conditions that are open and obvious." This is determined by an objective standard, for "a condition is 'open and obvious' where a reasonable person exercising ordinary perception, intelligence, and judgment would recognize both the condition and the risk involved." In the case of a child too immature to appreciate the risk, the accompanying parent has the primary duty to supervise and protect the child against obvious risks. A parent's failure to do so "is not foreseeable and the law does not require a landowner to anticipate negligence on the parent's part and guard against it."

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PROXIMATE CAUSE

Plaintiff Failed to Establish *Prima Facie* Case of Premises Liability Where Circumstantial Evidence Allowed Equally Probable Inferences as to Premises-Related and Premises-Unrelated Causes of Fall

***Berke v. Manilow*, 2016 IL App (1st) 150397**

Plaintiff fell in the vestibule of an apartment building while exiting the building and suffered spinal injuries that rendered him quadriplegic. He filed a lawsuit against the building owner and the management company claiming that the vestibule area was improperly designed and maintained and was a direct and proximate cause of his injuries. There were no witnesses of the fall, and the plaintiff could not recall the incident. After considering 3 expert affidavits submitted on behalf of the plaintiff, the trial court

granted defendants' motion for summary judgment on the grounds that plaintiff failed to establish a *prima facie* case of premises liability with sufficient evidence of the cause of his fall.

There were no witnesses of the fall, and the plaintiff could not recall the incident.

The plaintiff submitted three expert affidavits in support of his theory. The first two experts opined the vestibule was unreasonably dangerous based on the physical characteristics. Based on that conclusion and the position in which the plaintiff was found, they further opined that it was more likely than not that the plaintiff had tripped and fell as a result of the vestibule's unreasonably dangerous characteristics. The appellate court held that the first two experts' opinions concerning the cause of the plaintiff's fall was speculative and therefore inadmissible.

The third expert was a doctor who opined, based on a review of medical records, that no acute medical condition caused plaintiff's fall and that the abrasions to his legs and face were "more likely the result of a prone forward fall resulting from a trip." The appellate court held that, while the doctor could opine that the fall was not caused by a medical condition, it was inadmissible speculation for him to opine that his fall was caused by a trip.

Finally, the appellate court considered whether—after the expert affidavits had been stricken—the remaining evidence was sufficient to establish that the plaintiff had tripped on the raised threshold of the vestibule. The appellate court noted that causation can be established with circumstantial evidence where the "facts and circumstances, in the light of ordinary experience, reasonably suggest that the defendant's negligence operated to produce the injury." But "where the proven facts demonstrate that the nonexistence of the fact to be inferred appears to be just as probable as its existence, then the conclusion is a matter of speculation, conjecture, and guess and the trier of fact cannot be permitted to make that inference." Turning to the plaintiff's evidence of the unreasonably high threshold, the position in which he was found, the abrasions on his legs and face, the fact that there had been a prior fall in the vestibule, and the absence of any other explanation for the fall, the court held "although a trier of fact could infer that [the plaintiff] tripped over the threshold or was propelled forward by the door, it is equally likely that a jury could conclude that he fell for reasons unrelated to the condition of the premises." As either conclusion was just as likely, the plaintiff had failed to establish the element of proximate cause, and summary judgment in favor of the defendant was affirmed.

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TRIAL BY JURY

Illinois Supreme Court Finds Act Amending Statute to Reduce the Size of a Civil Jury to 6 Persons Is Facially Unconstitutional

***Kakos v. Butler*, 2016 IL 120377**

Plaintiffs alleged medical negligence and loss of consortium in multiple counts of their complaint. Defendants moved for a 12 person jury and sought a declaration that Public Act 98-1132—which limits civil juries to 6 persons and increases the daily payment to each juror—is unconstitutional. The Circuit Court granted the motion and found the Act was facially invalid under Ill. Const. 1970, art. I, § 13. First the Court considered whether federal precedent under the U.S. Constitution would prevail due to the simi-

larity of the constitution provisions, or whether they differed in any substantial manner requiring it to give the state constitution language effect notwithstanding federal decisions. It noted federal decisions that found the U.S. Constitution does not protect the jury size aspect of the right to trial by jury with the provision that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. In contrast, the 1970 Illinois Constitution provides: "The right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. 1970, art. I, § 13. The phrase "as heretofore enjoyed" has long been interpreted by the Court to mean "the right of a trial by jury as it existed under the common law and as enjoyed at the time of the adoption of the respective Illinois constitutions." *Kalos* ¶ 14 quoting *People v. Lobb*, 17 Ill.2d 287, 298 (1059). The Court cited several cases decided before the adoption of the 1970 Constitution where this right was understood to include a jury of 12. Thus it found "the right to a 12–person jury was 'heretofore enjoyed' at the time the 1970 Constitution was drafted." *Kalos* at ¶ 21. It also cited ample evidence in the form of transcripts from the 1970 Constitutional Convention that the delegates did not believe the legislature theretofore possessed the authority to decrease the size of a civil jury. Thus the amendatory act was held facially invalid because "no set of circumstances exist under which it would be valid." *Id.* at ¶ 29. Because the legislature reduced the jury size to offset the cost of increasing juror pay, pay provision of the act could not be severed from the unconstitutional provision, and the amendatory act was thus invalidated in its entirety.

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"The right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. 1970, art. I, § 13.

WILLFUL AND WANTON CONDUCT

Evidence Was Sufficient for the Jury to Find Teacher's Response to Student's Collapse Was Willful and Wanton

In Re Estate of Stewart, 2016 IL App (2d) 151117

The mother of a student who collapsed and died after suffering a fatal asthma attack at school brought an action against the teacher and school district, alleging willful and wanton conduct. Plaintiff alleged that the teacher, as an agent of the school district, "acted willfully and wantonly in responding to [the student's] collapse", and additionally alleged that the District's other agents "acted willfully and wantonly, particularly with regard to training [the teacher]." The District moved for summary judgment, arguing it was immune from liability under Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-108(a)) and the School Code (105 ILCS 5/24-24), but the trial court denied this motion on the grounds that "a question of fact remained as to whether the agents acted willfully and wantonly." Both of those sections provide immunity against negligence but not against willful and wanton conduct.

At trial by jury, evidence was presented that in the presence of the defendant-teacher during class, the student collapsed and died from an asthma attack. School policy dictated that the teacher should call the nurse if a student suffered a "serious" health episode, but the teacher should call 911 if a student suffered a life-and-death episode. The teacher initially sent for a nurse and remained by

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the student's side. The jury returned a verdict in favor of the student's estate in the amount of $2.5 million.

The District appealed arguing the evidence did not support a willful and wanton finding. Specifically, the District suggested that while the teacher's response to student's collapse may have been misguided, "he demonstrated care rather than 'utter indifference,' and, therefore, cannot have acted willfully and wantonly." The court surmised that the jury found this contention implausible, stating that "most reasonable people would view a young person's thud-like collapse and struggle for breath and consciousness as a medical emergency." Thus it disagreed, stating that the jury was not limited to consideration of the teacher's initial response of sending for a nurse and remaining by the student's side. Rather, the jury may have determined that the teacher's subsequent indecisiveness of "waiting 7 to 20 minutes to call or have someone call 911" was willful and wanton. "The jury could have reasonably found that [the teacher's] subsequent inaction was so out of balance with the danger posed to [the student] that it amounted to willful and wanton conduct."

the jury was not limited to consideration of the teacher's initial response ... [but] may have determined that the teacher's subsequent indecisiveness ... was willful and wanton.

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WORKERS COMPENSATION

Illinois Supreme Court Holds Employer's Gross Amount of Reimbursement out of Third Party Tort Claim Includes the Value of Future Medical Care for Purposes of Calculating Statutory Attorney Fees

***Bayer v. Panduit Corp.*, 2016 IL 119553**

Bayer is a quadriplegic due to a fall at a job site. He filed a workers' compensation claim against his employer, Area Erectors, the claim was accepted, and he reached a settlement agreement with Area Erectors. While his claim was pending, Bayer filed suit against Panduit and two other companies, alleging that their negligence caused his injuries. Ultimately, a jury found Panduit liable in the amount of $64 million. Pursuant to Section 5(b) of the Workers' Compensation Act, the trial court ordered reimbursement of Area Erectors' statutory lien for the amounts already paid to Bayer for his workers' compensation claim; further, the court suspended Area Erectors' future medical payments to Bayer, as such were covered by the verdict amount. Additionally, the trial court ordered Area Erectors to pay the statutory 25% fee to Bayer's attorneys for procuring the proceeds out of which Area Erectors was reimbursed. The court ordered that the figure for the 25% fee computation included not only the amount already paid by Area Erectors for the workers' compensation claim, but also included the value of the future medical payments that Area Erectors would have paid, were it not for the suspension of payments enabled by the verdict proceeds. Area Erectors appealed the calculation of the 25% fee, arguing that the value of the future medical payments should not have been included in the base calculation; the appellate court agreed and reversed the trial court.

The Illinois Supreme Court reversed the appellate court and held that the amount of recovery on which the 25% fee is based includes the value of future medical payments. The court observed that the purpose of Section 5(b) is to prevent a double recovery for the

> ... if the action against such other person is brought by the injured employee ... then from the amount received by such employee ... there shall be paid to the employer the amount of compensation paid *or to be paid by him* to such employee ... including amounts paid *or to be paid* pursuant to paragraph (a) of Section 8 of this Act.
>
> ... where the services of an attorney at law of the employee ... have resulted in or substantially contributed to the procurement ... of the proceeds out of which the employer is reimbursed, then ... the employer shall pay such attorney 25% of the gross amount of such reimbursement.
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> 820 ILCS 305/5(b) (emphasis added).

injured employee. Further, Section 5(b) specifically states that the employer is to be reimbursed, from the judgment/settlement proceeds, that amount paid or to be paid, including amounts paid or to be paid under Section 8(a) of the Act.

The court rejected several arguments advanced by Area Erectors, including the argument that the value of the future medical payments was too speculative to permit imposition of the 25% statutory attorney's fee. The court aptly noted that Area Erectors did not raise any calculation objections as barriers to its acceptance of reimbursement for future medical payments from Bayer's judgment. Area Erectors cannot have it both ways, and if calculation problems do not prevent it from deriving a benefit from Bayer's judgment, then calculation problems cannot allow it to avoid paying its share of attorney's fees.

Area Erectors benefitted from the judgment, not only by way of the recovery of payments already made to Bayer, but by the fact that its obligation to make future medical payments was suspended by virtue of the size of the judgment. Thus, allowing Area Erectors to reap a benefit without compensating the attorneys who procured the judgment would result in unjust enrichment. Nothing in Section 5(b) precludes inclusion of future medical payments in the calculation of the "gross amount" of reimbursement contemplated by the statute. The court rejected the argument that Area Erectors had not been "reimbursed" for future medical payments; while Area

the reimbursement contemplated in Section 5(b) includes "future compensation payments the employer is relieved from making by reason of the third-party recovery."

Erectors had not been reimbursed in the traditional sense (i.e., for payments already made), the court had previously noted in *Zuber v. Illinois Power Co.* that the reimbursement contemplated in Section 5(b) includes "future compensation payments the employer is relieved from making by reason of the third-party recovery." Suspension of payments simply streamlines the reimbursement process by relieving the employee of the necessity of generating separate reimbursement checks every time he receives a future payment from the employer; the employer's obligations under the Act remain unchanged.

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FIRM NEWS

Summary Judgment Secured by Reed Armstrong Affirmed

Watson v. Marberry, 2016 IL App (5th) 150223-U

In July 2015, we reported that Reed Armstrong partner **Michael C. Hobin** secured summary judgment in favor of a campsite tenant who plaintiff alleged was negligent in allowing the codefendant to be present unsupervised at the leased campsite with his dog, which led to the dog injuring the plaintiff. It was undisputed that on the day of plaintiff's injury, the codefendant was present at the campsite with his dog but the campsite tenant was not. Further, under the lease, the tenant agreed to abide by the ordinances and rules pertaining to the campground which required tenants to keep dogs on leashes, and the lease also stated guests of the tenants were to be accompanied by the tenants at all times. Also, there was no dispute that the tenant did not know of the dog's dangerous propensities. Reed Armstrong argued under these undisputed facts the tenant was not liable because she did not meet the statutory definition of an owner under the Animal Control Act (510 ILCS 5/16 (West 2006)) in that she did not harbor or exercise control over the dog one way or another. Madison

County Circuit Court Judge Dennis Ruth agreed, and finding the Act not applicable he reasoned, "to recover under a common law negligence cause of action for a dog bite the Plaintiff must show that "the animal had a mischievous propensity to commit such injuries and that the owner had knowledge of the propensity." Plaintiff appealed and Reed Armstrong Associate **Tara English** defended the appeal. The Fifth District Appellate Court of Illinois held:

> The circuit court was correct in granting summary judgment in favor of the defendant on the plaintiff's claim for common law negligence in causing her injuries from a dog attack, as the record clearly establishes that the defendant did not own the dog, was not present at the time of the attack, and had no knowledge of the dog's dangerous propensities.

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