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LAW UPDATE & NEWS

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ILLINOIS SUPREME COURT DEFINES "DISTRACTION" IN OPEN AND OBVIOUS CASES

In *Burns v. City of Centralia,* 2014 IL 116998, the Illinois Supreme Court considered the application of the distraction exception to the open and obvious rule after the 79 year old plaintiff stubbed her toe in the crack on a sidewalk, causing her to injure her arm, leg and knee.

At the time of the fall, plaintiff was looking "towards the door and the steps" of an eye clinic where she was going for an appointment. Plaintiff had "definitely" noticed the defect in the sidewalk every time she went to the clinic and was sure she noticed it on the day of the incident. The defect in the sidewalk developed over a period of several years from roots from a nearby tree causing the sidewalk to crack and become uneven.

Plaintiff sued the City alleging a negligent failure to maintain the sidewalk, failure to inspect and repair the sidewalk and permitting the sidewalk to remain in a dangerous condition. The City filed a motion for summary judgment arguing the defect was open and obvious. Plaintiff argued that labeling the defect as "open and obvious" would not necessarily bar recovery because the City should have reasonably foreseen that a pedestrian, like plaintiff, could become distracted and fail to protect herself against the dangerous condition. After confirming that the only distraction present in this case was the fact the plaintiff was looking at the door, the trial court granted the City's summary judgment motion, finding the sidewalk defect was open and obvious as a matter of law.

In rejecting plaintiff's argument that the distraction exception applied, the trial court opined that "the mere existence of an entrance, and/or steps leading up to it, would provide a universal distraction exception to the open and obvious doctrine." On appeal, the case was remanded to the trial court because the appellate court found the City had a duty to remedy the sidewalk defect, but whether the City breached that duty was a question of fact for the jury. The Illinois Supreme Court allowed the City's petition for leave to appeal.

Noting that the only issue before the Court was whether the City owed a duty to the plaintiff, the Court stated that under the Local Governmental and Governmental Employees Tort Immunity Act, which codifies common law, the City has the duty to exercise ordinary care to maintain its property in a reasonably safe condition. Under common law, a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious. Under §343A of the Restatement (Second) of Torts, a "possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition whose danger is known or obvious to them." Obvious means that "both the condition and the risks are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence and judgment."

Illinois Courts have found that conditions, including sidewalk defects, may constitute

open and obvious dangers. However, the existence of an open and obvious danger is not an automatic or *per se* bar to the finding of a legal duty, as the exceptions to the open and obvious rule should be considered. There are two such exceptions: the distraction exception and the deliberate encounter exception.

The exception at issue in this case was the distraction exception, which applies where the possessor of land has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious or will forget what he discovered or fail to protect himself against it.

The City argued that the fact plaintiff fixed her attention on the door of the clinic does not constitute a distraction. Plaintiff argued that this case was a classic example of the distraction exception because people do not ordinarily look downward when they walk and the City should have anticipated that a person approaching the clinic would look at the door and steps.

The Court found that, although the record supported that plaintiff was looking at the door and steps, rather than looking at the defective sidewalk, the mere fact of looking elsewhere does not constitute a distraction. Plaintiff failed to identify any circumstance, much less a circumstance that was reasonably foreseeable by the City, which required her to divert her attention from the open and obvious sidewalk defect or otherwise prevented her from avoiding the sidewalk defect.

The issue was not whether the plaintiff was looking elsewhere, but *why* she was looking elsewhere. Plaintiff did not focus her attention on the door and steps of the clinic to avoid another potential hazard or because some other task required her attention. To the extent that looking elsewhere could, itself, be deemed a distraction, then it is, at most, a self-made distraction.

In the absence of evidence of actual distraction, the court disagreed with plaintiff that it was objectively reasonable for the City to expect that a pedestrian, generally exercising reasonable care for her own safety, would look elsewhere and fail to avoid the risk of injury from an open and obvious sidewalk defect. Plaintiff's position is contrary to the very essence of the open and obvious rule: because the risks are obvious, the defendant "could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition."

A holding that simply looking elsewhere constitutes a legal distraction would upend the open and obvious rule and the distraction exception would swallow the rule. Ultimately, the court found the City had no duty to repair the sidewalk, reversed the judgment of the appellate court and affirmed the judgment of the trial court granting summary judgment for the City.

For further information, contact **Kelly Purkey** at 312.558.3906 or kpurkey@mckenna-law.com

COULD RENTAL CAR COMPANY'S LIABILITY BE WITHOUT LIMITATION?

In an interesting decision by the Illinois First District Appellate Court, Enterprise Rent-a-Car was held liable without limitation for an accident when their customer defaulted. *Nelson v. Artley*, 2014 IL App (1st) 121681.

This case arises out of an auto accident where Artley was driving a vehicle rented from Enterprise by Suzanne Haney. Plaintiff filed a negligence complaint against Artley alleging he was at fault for an auto accident causing injuries. Thereafter, the Circuit Court entered a default judgment of $600,000 in favor of the plaintiff.

Plaintiff then initiated a citation proceeding against Enterprise in regards to the default judgment against Artley. Enterprise argued that it bore total financial responsibility of only $100,000 per occurrence under the rental agreement, the Illinois Vehicle Code

and relevant case law. Enterprise had already paid $75,000 and argued that it could only be held responsible for the remaining $25,000. Plaintiff argued that Enterprise's financial responsibility was not limited to $100,000 per occurrence and that Enterprise's certificate of self insurance retained risk of loss for third-party claims of up to $2 million per occurrence. The Circuit Court granted plaintiff's petition but limited the amount to the $25,000 asked for by Enterprise. Plaintiff appealed.

Enterprise relied on *Fellhauer v. Alhorn*, 361 Ill. App. 3d 792 (2005) which held that the financial responsibility of a self-insured rental car company was limited to $100,000 per occurrence. The Appellate Court looked at Section 9-101 of the Code which deals with proof of financial responsibility for rental companies. The court indicated that the purpose of the section was to provide the public with protection from negligent drivers of rental vehicles who are without insurance. The court made it clear that the Code only sets forth minimum requirements, and does not limit a company's responsibility if one of its vehicles is involved in an accident. The court also reviewed Section 7-502 of the Code which allows proof of financial responsibility by filing a certificate of self-insurance.

The Appellate Court determined that rental car companies should not be treated any differently than any other self-insured entity. If the company exempts itself from the insurance requirement of Section 7 of the Code by obtaining a certificate of self-insurance, it must assume the risk of having to pay all judgments entered against it.

The Court concluded that a self-insured rental car company's minimum responsibility to pay judgments is not limited to $100,000 per occurrence or any other amount. The Court went on to say that it was interpreting the financial responsibility statute in a manner consistent with the underlying legislative purpose that the financial responsibility requirements were meant to provide protection from negligent drivers of rental cars without insurance. As such, the case was reversed and remanded.
Stay tuned, as of November the Illinois Supreme Court has decided to hear this matter and a decision should come down in the first part of 2015.

For further information, contact **Paul Steinhofer** at 312.558.3985 or psteinhofer@mckenna-law.com

NEW ILLINOIS LAWS REGARDING JURIES AND LIMITATIONS ON ASBESTOS ACTIONS TO TAKE EFFECT IN JUNE 2015

Public Act 98-1132 reduces the number of jurors for a law division civil case from 12 to 6 starting in June, 2015. However, if a party filed and paid for a 12 man jury demand before June, 2015, they will still be entitled to a 12 man jury upon proof of payment. The Act also provides that if alternate jurors are requested, an additional fee for each juror is to be charged that will be established by each county.

Public Act 98-1131, effective June 1, 2015, removes the 10 year statute of repose for causes of action related to exposure to asbestos only.

TRIALS AND CASE DISPOSITIONS

Julie Ramson obtained a verdict in favor of her client after a 2 ½ week long trial in a 10 year old **medical malpractice** case. The plaintiff claimed that the cardiac ablation procedure her doctor performed to try and stabilize the plaintiff's rapid heart rate caused him to have low oxygen levels leading to brain damage and his death 7 years later. Julie showed that the plaintiff, who had already been in the hospital for a month from a coronary artery bypass surgery before the ablation was performed, had been having mucous plugs and low oxygen prior to the ablation and his cause of death was actually cerebral vascular disease. The jury returned their verdict in

less than an hour. Dawn Ehrenberg assisted with the trial.

McKenna attorneys were recently asked to lift an **injunction** entered 34 years ago that was preventing a building from being used as a theater. The client had purchased the building and land from a bank with the intent to fully renovate the structure and use it for restaurants and a performing arts center. The title policy revealed the existence of the 1980 injunction, but neither the title company nor the owners had a copy of the order itself. McKenna attorneys **Dawn Ehrenberg** and **Andrew Bratzel** determined that the court file with the injunction order was destroyed, so they did not have the injunction order or the reasons why it was granted. Knowing that they had only one shot at lifting the injunction, they researched the property and press records to help determine why the injunction was placed on the building. Research showed there had been numerous building code violations due to a parade of owners who did not maintain the building, but the building was not seen as a gathering place for gang members or general riff-raff. Dawn and Andrew reached out to the Chicago Deputy Corporation Counsel for buildings, showed that the old violations had been corrected, and got her support for their motion to lift the injunction. The court granted the motion and lifted the injunction. The client can now finalize his plans to make the building a thriving restaurant and entertainment venue.

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In November the IDC Young Lawyers Division hosted a seminar at John Marshall Law School entitled "Finding and Ensuring Success in Your First Position." The purpose of this event was to provide the students with some advice as to finding their first job after law school and a survey of what they would expect in a civil litigation/ attorney general/ judicial clerk, job setting**. Alex Sweis** was the speaker on behalf of the civil litigation practice area. He gave the attendees some job and interview strategies and an insight into what their first year of work would be like at an insurance defense firm.

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