



TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Common carrier's duty to passengers versus the natural accumulation rule

By John J. Holevas, WilliamsMcCarthy LLP

In a 5-2 decision, the Illinois Supreme Court, in *Krywin v. Chicago Transit Authority*, held that a common carrier's duty to provide its passengers with a safe place to alight does not trump the natural accumulation rule. In *Krywin*, the plaintiff was injured while alighting from one of the CTA's trains onto a stationary platform. The train had stopped at an elevated train station and, as the plaintiff exited, she slipped on snow and ice on the platform sustaining a leg injury. Plaintiff alleged that the CTA had a duty to exercise ordinary care in the operations of its trains and in maintenance of the train station

platform. The CTA argued that as a matter of law, they had no duty to remove a natural accumulation of snow and ice and it had no duty to warn of such an accumulation. It was undisputed that the plaintiff presented no evidence that there was any unnatural accumulation of ice or snow on the platform. Plaintiff argued that the CTA had a duty to remove natural accumulations of snow and ice from its platforms so as to provide a safe method of ingress and egress from its trains. The trial court allowed the case to go to the jury

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Fiduciary duty revisited

By John B. Kincaid

The Trial Bar has noticed an uptick in fiduciary duty judgments rendered in a variety of areas. The newest entry comes from the Second District in *Prignano v. Prignano*, 2010 WL 3180093 (Second District, 08-09-10). Louis Prignano defended a fiduciary duty breach claim initiated by the widow of his brother, George, who charged him successfully with misuse of his roles as (1) executor of George's estate, (2) trustee of George's trust and (3) partner and co-owner of two family businesses. The Second District affirmed trial Judge Thomas Dudgeon's award of \$615,324 in compensatory damages and \$165,324 in prejudgment interest.

The drama unfolds as the brothers were co-owners in Sunrise Corporation and Rainbow Installations and partners in the 710 Building Partnership. When these home building,

HVAC contractor, and land development units reached a successful state in 1985, the brothers discussed, but did not sign, a buy/sell arrangement with insurance broker Kenney who eventually sold them three (3) life insurance policies each in the total amount of \$610,000. George died abruptly in 2000 whereupon Louis, the fiduciary, approached Nancy, his brother's widow, and suggested that they execute a buy/sell agreement on a form originally recommended and furnished by Kenny (15) years before. Nancy agreed, so Louis asked his secretary, Vanessa, to back date the buy/sell agreement and sign the deceased brother's name as if he had signed during his lifetime.

When an insurance claim was made by Louis

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Common carrier's duty to passengers versus the natural accumulation rule

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and the plaintiff was awarded a verdict of approximately \$400,000. The appellate court reversed finding that the natural accumulation rule barred plaintiff's recovery.

The Supreme Court noted that the primary issue on appeal was whether the CTA breached its duty to provide plaintiff with a safe place to alight from the train when it stopped the train in front of a natural accumulation of snow and ice. The court acknowledged that as a common carrier, the CTA owed its passengers the highest degree of care consistent with the practical operation of its conveyances. The court ultimately

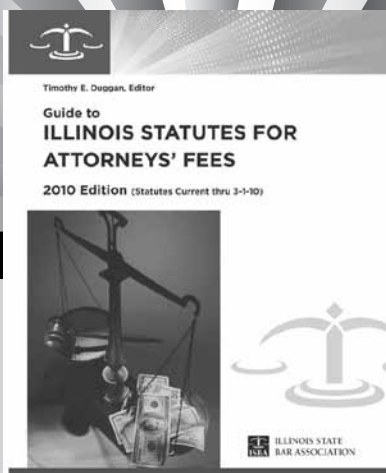
determined that the natural accumulation rule prevails over the CTA's duty to provide its passengers with a safe place to alight. The court found that the consequences of imposing such a duty on the CTA to inspect every platform every time a train was to discharge or take on passengers would bring the transit system to a standstill.

In a stinging dissent, Justice Freeman, joined by Justice Kilbride, challenged the majority's holding, noting that it disregarded the local governmental Tort Immunity Act, which codified the natural accumulation rule but specifically excluded the CTA from

the protection under the Tort Immunity Act. Moreover, the dissent pointed to an inconsistency in the majority's decision with the court's adoption of the principal stated in Restatement (Second) of Torts, Section 343. In noting cases from both the Alaska and Michigan Supreme Courts, which have held that the "mere fact" that "snow and ice conditions prevail for many months throughout various locations in Alaska/Michigan" was not "in and of itself sufficient rationale for the insulation of the possessor of land from liability to its business invitee." ■

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Fiduciary duty revisited

Continued from page 1

against North American for the \$500,000 policy written on George's life, the company declined because of evidence that George was a smoker. Louis then enlists the testimony of widow, Nancy, to satisfy the insurance company's initial curiosity about smoking habits so that the agreement to exchange the business for insurance proceeds could progress. Unfortunately for Nancy, Louis also received the proceeds of all three (3) policies on George's life but never delivered the cash to Nancy. Louis retained full ownership of all three (3) business entities in addition to all insurance proceeds. At the outset, Nancy was assured by Louis that the insurance claim may take several years and, thus, she waited in vain for the fruits of the buy/sell agreement. Nancy learned from Louis' sister, in a chance meeting at a bowling alley, that her brother had pocketed the insurance proceeds.

Although the Court held that the fraudulent ante-dated buy/sell agreement was void, it found that the document was material evidence of an oral agreement between Louis and Nancy to exchange her interest in the business for the insurance proceeds. This brief recitation of facts should whet the reader's appetite for the back story as to how Louis' role as estate executor was triggered by Louis' failure to pay out the insurance proceeds.

Although the case contains a treasure trove of rulings valuable to the civil practitioner, the Court singled out Louis' role as a multiple fiduciary in ordering Louis to deliver the insurance proceeds to Nancy. First, the Court found Louis violated his fiduciary duty as executor to carry out the provisions of the will, reasoning that although the will gave Louis the "assets of Sunrise Homes," it did not give Louis the stock in Sunrise, thus leaving those assets to be distributed to the residuary legatees (Nancy and her children). (Under the will, Louis compounded the felony by failing as trustee of the children's trusts to secure the *res* of their trusts).

Next, the Court affirms the finding that Louis' fiduciary duty as corporate officer of Rainbow and Sunrise and as partner of the 710 Building Partnership to "exercise the highest degree of honesty with good faith in the handling of business assets, thereby

prohibiting enhancement of his personal interests at the expense of the enterprise" was violated.

Tangentially, the Court held that Louis breached both his oral agreement with his brother to create the buy/sell agreement and the later oral agreement between Louis and Nancy, post death, to exchange the businesses for insurance proceeds. The Court also affirmed the trial court's finding that the Louis-Nancy agreement was derivative of the Louis-George oral buy/sell agreement thereby obviating Louis' defense that the Nancy-Louis oral agreement was not filed timely. Discussing the Relation Back Doctrine (735 ILCS §5/2-616(b)), the Court found that the "sufficiently close relationship test may not have been met due to the lapse of time," but under the discovery rule, Nancy's claim did not accrue until the encounter with Louis' sister in the bowling alley.

The case also stands for current rulings on hearsay, interpretation of the Dead Man's Act (735 ILCS 8-201) and the duty of a beneficiary to object to the premature closing of an estate and set off. Although the trial court found that Nancy could prevail on her unjust enrichment claim, the Appellate Court reversed that finding because that equitable remedy is not available to a litigant who prevails at law for breach of contract. The Court's award of prejudgment interest entered after the judgment on an Amended Complaint was sustained on two bases: (1) The Interest Act, 815 ILCS 205/2 and (2) Equitable considerations permitting the interest claim to be filed even after judgment as supported by *Kehoe v. Wildman, et al.*, 387 Ill.App.3d 454, 473 (2008).

The last 10 years have seen the fiduciary duty tested on several fronts. The Supreme Court last visited the issue of fiduciary duty in *Neade v. Portes*, 193 Ill.2d 433, 739 N.E.2d 496 (2000) when it determined that in a medical negligence case, a patient did not have an independent cause of action against his physician for breach of fiduciary duty. Quickly stating that previous cases have recognized a fiduciary relationship between a physician and his patient (*Witherell v. Weimer*, 118 Ill.2d 321), Illinois courts have never recognized a cause of action for breach of fiduciary duty against a physician. As in legal malpractice

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claims, courts have dismissed breach of fiduciary duty claims where they are merely duplicative of the basic malpractice cause of action sounding in negligence, i.e., *Majumdar v. Lurie*, 274 Ill.App.3d 267, thereby resisting the temptation to create a new cause of action. The *Neade* court distinguished the many cases where breach of fiduciary duty claims were not duplicative of traditional negligence claims. Parenthetically, in *Coughlin v. Se Rine*, 154 Ill.App.3d 510, where the court did permit a fiduciary recovery against an attorney but in that case, there was no defense argument that it was a duplication of a negligence count.

It is well known and recognized that partners owe a fiduciary duty to each other as do corporate officers. This was last tested in the First District case of *1515 N. Wells, LP v. 1513 N. Wells, LLC*, 392 Ill.App.3d 863, 913 N.E.2d 1 (2009). In a limited partnership setting, the general partner defended a breach of fiduciary duty charge by pointing out that the limited partner had contracted away or waived that duty in the partnership agreement. The First District judiciary had no trouble ruling that a partner may not eliminate or reduce a partner's fiduciary duty in a partnership agreement, citing Section 103(b) (3) of the Uniform Partnership Act, 805 ILCS 206/103(b)(3). Bottom line: The general partner's award of a construction contract to a third person which personally benefitted the general partner at the expense of the limited partnership held to be ample evidence of fiduciary duty breach.

Both Federal and State courts uniformly uphold the principle that fiduciary duty may arise either from (1) a particular relationship (attorney-client) or (2) special circumstances of the parties' relationship, i.e., where one justifiably places trust in another so that the latter gains superiority and influence over the former. Factors creating the special relationship can include: Disparity in age, degree of kinship, education and business experience and the extent to which the subservient party entrusted his will to the dominant party. *Chow v. University of Chicago*, 254 F.3d 1347, 1362 (7th Cir., 2001) (Research assistant stated cause of action against professor and university for breach of fiduciary duty in failing to give proper credit to student for her invention and patent).

We also know that as an equitable claim, a fiduciary duty litigant has no right to a jury trial. *Prodromos v. Evern Securities*, 389 Ill. App.3d 157, 906 N.E.2d 599 (1st Dist., 2009).

The First District reversed dismissal of a fiduciary duty breach in *Davis v. Dyson*, 387 Ill.App.3d 676, 900 N.E.2d 698, 712 (1st Dist., 2009) holding that a condo unit owner states a cause of action against a condo board for failure to procure insurance to protect the association against fraud.

The Third District affirmed a sizeable judgment against a local bank by the trustee of a trust being administered by the bank's trust department. *NC Illinois Trust v. First Illinois Bancorp*, 323 Ill.App.3d 254, 752 N.E.2d 1167, 1173 (3rd Dist., 2001). The Appellate Court dismissed the bank's defense that it relied upon the advice of its outside attorney in selling a family business and affirmed a judgment for compensatory and punitive damages. Accordingly, the case holds that it becomes the fiduciary burden to prove that by clear and convincing evidence that it acted in good faith. The bank was soundly criticized for using entrusted funds to satisfy the settlement of a federal lawsuit charging it with violating securities laws.

The Fourth District found a co-executor guilty of fiduciary breach in *Estate of Long*, 311 Ill.App.3d 959, 726 N.E.2d 187, 190 (4th Dist., 2000) notwithstanding the trial court's contrary finding. In a farm setting, defendant Bruce, a tenant on the decedent's 134-acre farm for 15 years, was held to a fiduciary duty when tenant was able to extract a 15-

year written lease from the ailing owner who could not read or write, finding that the lease was a detriment not only to the decedent but also to his heirs. Holding that mere friendship can ripen into a fiduciary relationship because faith and confidence may be reposed in a dominant party without entrusting financial affairs to that friend. Even though the decedent may have knowledge of planting, harvesting and marketing crops, these are not equivalent to the decedent being on guard when presented with a (15) year written lease. The lease was deemed fraudulent and set aside.

A liability insurance company owes a fiduciary duty to its insured where the policy terms give the insurer an irrevocable power to determine whether policy limits should be offered to compromise a lawsuit. *O'Neill v. Gallant Insurance Co.*, 329 Ill.App.3d 1166, 769 N.E.2d 100, 110 (5th Dist., 2002). Holding that courts must offer vigilant protection to those who find themselves in a position of vulnerability in a fiduciary relationship, the punitive damage award of \$2.3 million was found to be not grossly excessive.

Breach of fiduciary duty may be the only way to protect those who are unable to match wits with a dominant fiduciary. The courts have leveled the playing field with these cited cases decided over the last 10 years. ■

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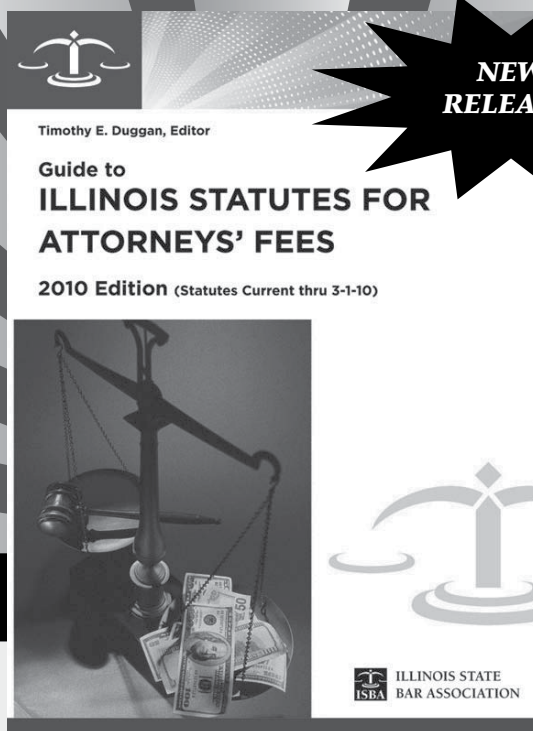
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Friday, 10/1/10 – Chicago, ISBA Regional Office—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section; ISBA Young Lawyers Division and ISBA Civil Practice and Procedure Section. 9-4:45.

Friday, 10/1/10 – Live Webcast—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5.

Tuesday, 10/5/10- Teleseminar—Pre-Mortem Estate and Trust Disputes. 12-1.

Wednesday, 10/6/10- Webinar—Virtual Magic: Presenting with Excellence Over the Phone/Web (INVITE ONLY/ DO NOT PUBLISH). Presented by the ISBA. 12-1.

Wednesday, 10/6/10- Webinar—Conducting Legal Research on Fastcase. *An exclusive member benefit provided by ISBA and ISBA Mutual. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/6/10- Webinar—Virtual Magic: Making Great Legal Presentations Over the Phone/Web (invitation only, don't publicize). Presented by the ISBA. 8-5.

Thursday, 10/7/10- Chicago, ISBA Regional Office—Boot Camp: Decedent's Estate Administration. Presented by the ISBA Trust and Estates Section. 8:50-4:45.

Thursday, 10/7/10- Teleseminar—Business Torts, Part 1 (July 13 Replay). 12-1.

Friday, 10/7/10- Teleseminar—Business Torts, Part 2 (July 14 Replay). 12-1.

Friday, 10/8/10- Carbondale, Southern Illinois University, Classroom 204—Divorce Basics for Pro Bono Attorneys. Presented by the ISBA Committee on Delivery of Legal Services. 1-4:45. Max 70.

Friday, 10/8/10- Chicago, ISBA Regional Office—Health Care Reform. Presented

by the ISBA Employee Benefits Section; co-sponsored by the ISBA Health Care Section. 9-3.

Monday, 10/11/10- Chicago, ISBA Regional Office—Advanced Worker's Compensation- 2010. Presented by the ISBA Workers' Compensation Section. 9-4:30.

Monday, 10/11/10- Fairview Heights, Four Points Sheraton—Advanced Worker's Compensation- 2010. Presented by the ISBA Workers' Compensation Section. 9-4:30.

Tuesday, 10/12/10- Teleseminar—Basics of Fiduciary Income Tax, Part 1. 12-1.

Wednesday, 10/13/10- Teleseminar—Basics of Fiduciary Income Tax, Part 2.

Thursday, 10/14/10- Webcast—Red Flags from Your Clients' Lives: Pitfalls to Avoid When Drafting Estate Plans. Presented by the ISBA Trust and Estates Section. 12-1. <<http://isba.fastcle.com/store/seminar/seminar.php?seminar=5792>>.

Friday, 10/15/10- Bloomington, Double Tree—Real Estate Update 2010. Presented by the ISBA Real Estate Section. 9-4:45.

Friday, 10/15/10- Springfield, Statehouse Inn—Experts and Litigators on Issues Impacting Children & Custody in Family Law. Presented by the ISBA Family Law Section; co-sponsored by the ISBA Child Law Section. 8:20-5.

Friday, 10/15/10- Chicago, ISBA Regional Office—Meet the Labor and Employment Experts- 2010. Presented by the ISBA Labor and Employment Section. 8:55-12:45.

Monday, 10/18 - Friday, 10/22/10- Chicago, ISBA Regional Office—40 Hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

Tuesday, 10/19/10- Teleseminar—2010 American with Disabilities Act Update. 12-1.

Thursday - Saturday, 10/21/10 -

10/23/10 – Springfield, Hilton Hotel—6th Annual Solo & Small Firm Conference. Presented by the Illinois State Bar Association.

Friday, 10/22/10- Webinar—Advanced Legal Research on Fastcase. *An exclusive member benefit provided by ISBA and ISBA Mutual. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 10/26/10- Teleseminar—Innocent Spouse Defense. 12-1.

Thursday, 10/28/10- Teleseminar—Dangers of Using "Units" in LLC Planning. 12-1.

Thursday, 10/28/10- Chicago, ISBA Regional Office—Raising the Bar by Promoting Greater Diversity in the Judiciary. Presented by the ISBA Committee on Racial and Ethnic Minorities in the Law; co-sponsored by the Standing Committee on Sexual Orientation and Gender Identity; Standing Committee on Women and the Law; and the Diversity Leadership Council. 12:00-1:30.

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Friday, 10/29/10- Bloomington-Normal, Marriot—Bankruptcy Basics from the Experts. Presented by the ISBA Commercial, Banking and Bankruptcy Council. 8:55-4:15.

Friday, 10/29/10- Chicago, ISBA Regional Office—Insurance Law: Commercial Coverage Controversies. Presented by the ISBA Insurance Law Section. 8:30-12:30.

November

Tuesday, 11/2/10- Teleseminar—Maximizing Tax Benefits in Real Estate, Part 1. 12-1.

Wednesday, 11/3/10- Teleseminar—Maximizing Tax Benefits in Real Estate, Part 2. 12-1. ■

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