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Supreme Court Watch

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Can a Named Driver Exclusion Be Used to Deny Coverage to the Named Insured?

***Thounsavath v. State Farm Mutual Automobile Insurance Co.*, No. 122558, 1st Dist. No. 1-16-1334**

The plaintiff (Insured) was a passenger in a car driven by Clinton Evans. *Thounsavath v. State Farm Mutual Automobile Insurance Co.*, 2017 IL App (1st) 161334, ¶ 4. The Insured was injured in an accident and filed an underinsured motorist claim with State Farm (Insurer). *Thounsavath*, 2017 IL App (1st) 161334, ¶ 5. The Insurer denied coverage because of a named driver exclusion for Mr. Evans. *Id*. The Insured filed a declaratory judgment action, seeking an order that the driver exclusion endorsement violated section 143a-2 of the Illinois Insurance Code (215 ILCS 5/143a-2) and violated Illinois public policy. *Id*. ¶ 1. The Insurer filed a counterclaim for declaratory judgment that the Insured was not entitled to underinsured coverage under her policy. *Id*. The circuit court denied the Insurer's motion for summary judgment and granted the Insured's motion for summary judgment. *Id*. The Insurer appealed. *Id*.

Reviewing the case *de novo*, the Illinois Appellate Court First District affirmed. *Id*. ¶¶ 10, 36. The First District first addressed Illinois's mandatory insurance statutory scheme. Under 625 ILCS 5/7-317(b)(2), motor vehicle insurance "[s]hall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." *Id*. ¶ 16. The First District explained that liability insurance is required "to protect the public by securing payment of their damages." *Id*. ¶ 17 (citing *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 57 (2011)). Illinois Insurance Code Section 143a-2, which requires insurance policies to include uninsured and underinsured motorist coverage, is necessary "so that the policyholder is placed in substantially the same position he would occupy if he were injured or killed in an accident where the party at fault carried the minimum liability coverage." *Id*. (citing *Phoenix Ins. Co.*, 242 Ill. 2d at 57). Although parties are free to contract, their agreement may not be contrary to public policy. *Id*. ¶ 19.

The First District noted that while named driver exclusions are permitted in Illinois, there are cases in which Illinois courts have refused to enforce such exclusions. *Id*. ¶¶ 22, 24. The First District pointed to *Barnes v. Powell*, 49 Ill. 2d 449 (1971), which held that an injured insured was entitled to uninsured motorist coverage under her own policy where she was a passenger in her vehicle, which was driven by an uninsured individual. *Id*. ¶ 24. Moreover, in *Rockford Mutual Insurance Co. v. Economy & Casualty Co.*, 217 Ill. App. 3d 181 (1st Dist. 1991), the First District held that decedent's mother could recover under the uninsured motorist coverage in her own policy where the named driver exclusion rendered the vehicle uninsured. *Id*. ¶ 25. Finally, in *Doxtater v. State Farm Mutual Automobile Insurance Co.*, 8 Ill. App. 3d 547, 552 (1st Dist. 1972), the First District held that Section 143a requires "insurance companies to provide uninsured motor vehicle coverage for 'insureds' regardless of whether, at the time of injury, the insureds occupied or operated the vehicle declared in the subject policy." *Id*. ¶ 26.

Turning to the facts of the case, the First District articulated the issue before it as, "whether the named driver exclusion violates our mandatory insurance requirements and public policy where the exclusion bars coverage for the

named insured." *Id*. ¶ 28. The First District looked to *American Access Casualty Company v. Reyes*, 2013 IL 115601 to guide its decision. *Id*. In *Reyes*, the defendant was the named insured and was excluded from the policy if she operated the vehicle. *Id*. ¶ 29. After an accident, the defendant's insurance company sought a declaration that it owed no liability coverage to the defendant based on the named driver exclusion. *Id*. ¶ 30. The Illinois Supreme Court held that under the plain language of Section 7-317(b)(2), the named insured could not be excluded from coverage. *Id*. ¶ 32. The Supreme Court also found that the interest in protecting the driving public outweighed an individual's desire to obtain a lower premium by agreeing to the exclusion. *Id*. ¶ 33.

In light of *Reyes*, *Barnes* and its progeny, the First District held that "a named driver exclusion in an insured's policy that bars liability, uninsured, or underinsured coverage for the named insured violates Illinois's mandatory insurance requirements and Illinois public policy." *Id*. ¶ 34.

The Insurer appealed. The Insurer first argues that named driver exclusions are permitted in Illinois and are supported by public policy. In *St. Paul Fire & Marine Insurance Company v. Smith*, 337 Ill. App. 3d 1054 (1st Dist. 2003), the Insurer explains, the First District noted that exclusions allow drivers with family members having poor driving records to purchase affordable insurance. *Smith*, 337 Ill. App. 3d at 1061-62. Moreover, exclusions deter insured drivers from letting unfit excluded drivers drive their vehicles, which keeps these drivers off the road. *Id*. The Insurer argues that the Insured knew that liability would not be paid if Mr. Evans operated a vehicle. The Insured agreed to the named driver exclusion and understood that the endorsement would be effective as to the general public. Therefore, the Insurer argues, the Insured cannot now object to the endorsement being applied to herself.

Second, the Insurer distinguishes the *Reyes* decision. *Reyes* dealt with liability coverage, which is specifically addressed by Section 7-317(b)(2), and addressed the narrow issue of whether the sole named insured and owner can be excluded from coverage. *Reyes*, 2013 IL 115601, ¶ 34. Here, however, the issue is underinsured coverage, which is not addressed by Section 7-317(b)(2), and the Insured was covered by her policy. Moreover, the Insurer argues, *Reyes* does not hold that there is a public policy of protecting named insureds at a higher level than the general public. The Insured was free to enter into this contract with the Insurer and the general public is not harmed by it. The Insured chose to get in the car with Mr. Evans despite her knowledge of the exclusion.

Third, the Insurer argues that the named driver exclusion does not violate the uninsured or underinsured motorist statutes. The First District's reliance on *Doxtater*, the Insurer argues, was improper because *Doxtater* was effectively overruled when Section 143a was amended to apply uninsured coverage only if the vehicle involved in the accident is described in the policy. Moreover, the Insurer again argues that it is against public policy to give the Insured special status by not applying an exclusion to the Insured that would be applied to the general public.

Finally, the Insurer argues that *Barnes* does not support the First District's holding. *Barnes* dealt with whether a driver would be considered uninsured because of a member of the household exclusion under liability coverage. *Barnes* does not address named driver exclusions, which are specifically authorized under Illinois law.

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If Policy and Discretion are Involved, Is a Public Employee, and Therefore a Public Entity, Always Immune from Liability?

***Monson v. City of Danville*, No. 122486, 4th Dist. No. 4-16-0593**

The plaintiff (Plaintiff) tripped and fell onto a sidewalk maintained by the defendant (City). *Monson v. City of Danville*, 2017 IL App (4th) 160593, ¶ 1. The Plaintiff sued the City alleging that the City failed to repair an uneven seam between two slabs of concrete. *Monson*, 2017 IL App (4th) 160593, ¶ 7. The City moved for summary judgment and attached depositions from the superintendent of downtown services ("Superintendent") and the public works director ("Director"). *Id*. ¶ 8. The superintendent testified that she walked the City sidewalks, identified areas that she thought required repair, and then toured sites with the City engineer who would determine what repairs to recommend. *Id*. ¶¶ 9, 12. The director testified that decisions to repair part of a sidewalk are made on a case-by-case basis and that numerous factors are considered before making that decision. *Id*. ¶ 11. The director inspected every slab of sidewalk and used his discretion to make the final decision regarding whether to repair each slab. *Id*. ¶ 12. The director and superintendent testified that they would have inspected the piece of sidewalk on which the plaintiff tripped. *Id*. ¶¶ 9, 12. Relying on *Richter v. College of Du Page*, 2013 IL App (2d) 130095, the circuit court found that the City was immune under sections 2-109 and 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act ("Act") and granted the City's motion for summary judgment. *Monson*, 2017 IL App (4th) 160593, ¶ 13. The plaintiff appealed. *Id*. ¶ 14.

Reviewing the case *de novo*, the Illinois Appellate Court Fourth District affirmed. *Id*. ¶¶ 3, 37. The Fourth District first discussed the applicable sections of the Act. *Id*. ¶¶ 19-20. Section 2-109 states that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109. Section 2-201 states: "[e]xcept as otherwise provide by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201.

Second, the Fourth District discussed the *Richter* case. *Monson*, 2017 IL App (4th) 160593, ¶¶ 22-26. In *Richter*, a student tripped on a sidewalk slab and sued her college. *Id*. ¶ 23. The college claimed immunity under sections 3-102, 2-109, and 2-201 of the Act. *Id*. Under section 3-102, a public entity is not liable for injury unless the public entity had actual or constructive knowledge that a condition is not reasonably safe and they gain that knowledge in enough time to remedy or protect against the condition. *Id.* ¶ 22. The trial court found that the college was immune and granted summary judgment because the buildings and grounds director had a policy regarding how to handle sidewalk defects and he exercised his discretion in determining whether to fix defects. *Id.* ¶ 24. Because the buildings and grounds director was using his discretion as opposed to performing a ministerial act, the college was immune under sections 2-109, and 2-201. *Id.* ¶ 24. On appeal, the student argued that the college was liable under section 3-102 because there was still a question regarding whether the college had knowledge of and could have repaired the defect. *Id*. ¶ 25. The Second District affirmed summary judgment because the buildings and grounds director exercised his discretion in performing his duties. *Id*. ¶ 26.

Third, the Fourth District summarized the ultimate issue as whether section 2-109 and 2-201 immunities are superseded by the exception to immunity in section 3-102. *Id*. ¶ 28. The Fourth District found that they were not. In *Kennell v. Clayton Township*, 239 Ill. App. 3d 634 (4th Dist. 1992), the Fourth District held that the discretionary acts governed by sections 2-109 and 2-201 were distinct from the ministerial acts governed by section 3-102. *Monson*, 2017

IL App (4th) 160593, ¶ 30. Because these provisions of the Act are mutually exclusive, the absolute immunity under 2-109 and 2-201 cannot be superseded by 3-102. *Id*. Immunity under 2-201 is applicable if injuries resulted from acts performed or omitted by the public entity in determining policy and exercising discretion to execute that policy. *Id*. ¶ 30.

The Fourth District then applied the law to the facts of this case and found that the director used his discretion to implement the City's policy regarding whether to repair a sidewalk. *Id*. ¶¶ 33-34. Therefore, sections 2-109 and 2-201 apply and the City was immune under 2-109 even if the City knew about the deviation and even if the director was negligent in failing to repair that section of sidewalk. *Id*. ¶¶ 34-35. The plaintiff appealed.

The plaintiff first argues that a public entity's duty to maintain its property pursuant to section 3-102 is not subject to discretionary immunity under section 2-109 because maintaining governmental property is a ministerial function. The plaintiff states that, in *Richter*, the Second District conflated the definitions for ministerial and discretionary functions relating to property maintenance and overly expanded local governmental tort immunity. The plaintiff cites to a line of cases including *Chicago v. Seben*, 165 Ill. 371, 378-79 (1897), *Hanrahan v. City of Chicago*, 289 Ill. 400, 405 (1919), and *Johnston v. Chicago*, 258 Ill. 494, 500-1 (1913), for the proposition that, under common law definitions, a local government's duty to keep its property in good repair is a purely ministerial function. Therefore, section 3-102 applies and there is no immunity if the public entity knows of the defect and has sufficient time to repair it.

The plaintiff next argues that the legislature intended to hold public entities liable for dangerous conditions on their properties because section 2-201 begins with the phrase "[e]xcept as otherwise provided by Statute" and because section 2-201 is a general provision. Therefore, the plaintiff argues, where another provision of the Act directly addresses an injury or where another provision is a specific provision, section 2-201 immunity does not apply. The plaintiff cites to *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 232, 234 (2007), and argues that the Illinois Supreme Court held that the exception to immunity in section 3-109, which specifically addresses hazardous recreational activities, superseded immunity under section 2-201 in a case involving hazardous recreational activities. *Murray* also held that section 3-109, a particular provision that relates to only one subject, prevailed because section 2-201 provided for general immunity. *Murray*, 224 Ill. 2d at 233-34. Here, the plaintiff argues, section 3-102 is a specific provision that directly addresses the dangerous condition of the City's sidewalk. Therefore, the exception to immunity in section 3-201 supersedes the general immunity under section 2-201.

About the Author

M. Elizabeth D. Kellett is a partner at *HeplerBroom LLC*. Ms. Kellett is a litigation attorney with a primary emphasis in the defense of complex, multi-party civil cases and class actions, including all aspects of product liability, particularly pharmaceutical drugs and devices. Prior to joining HeplerBroom, Ms. Kellett practiced law in Washington, D.C. and represented institutions of higher learning in administrative hearings and proceedings before the U.S. Department of Education. She also represented insurance and financial corporations and individuals in proceedings before the Securities and Exchange Commission, civil and criminal litigation, and in matters of corporate governance and compliance. Ms. Kellett earned her B.A. from Georgetown University in Washington D.C. in 2002 and her J.D. from Georgetown University Law Center in 2006.

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