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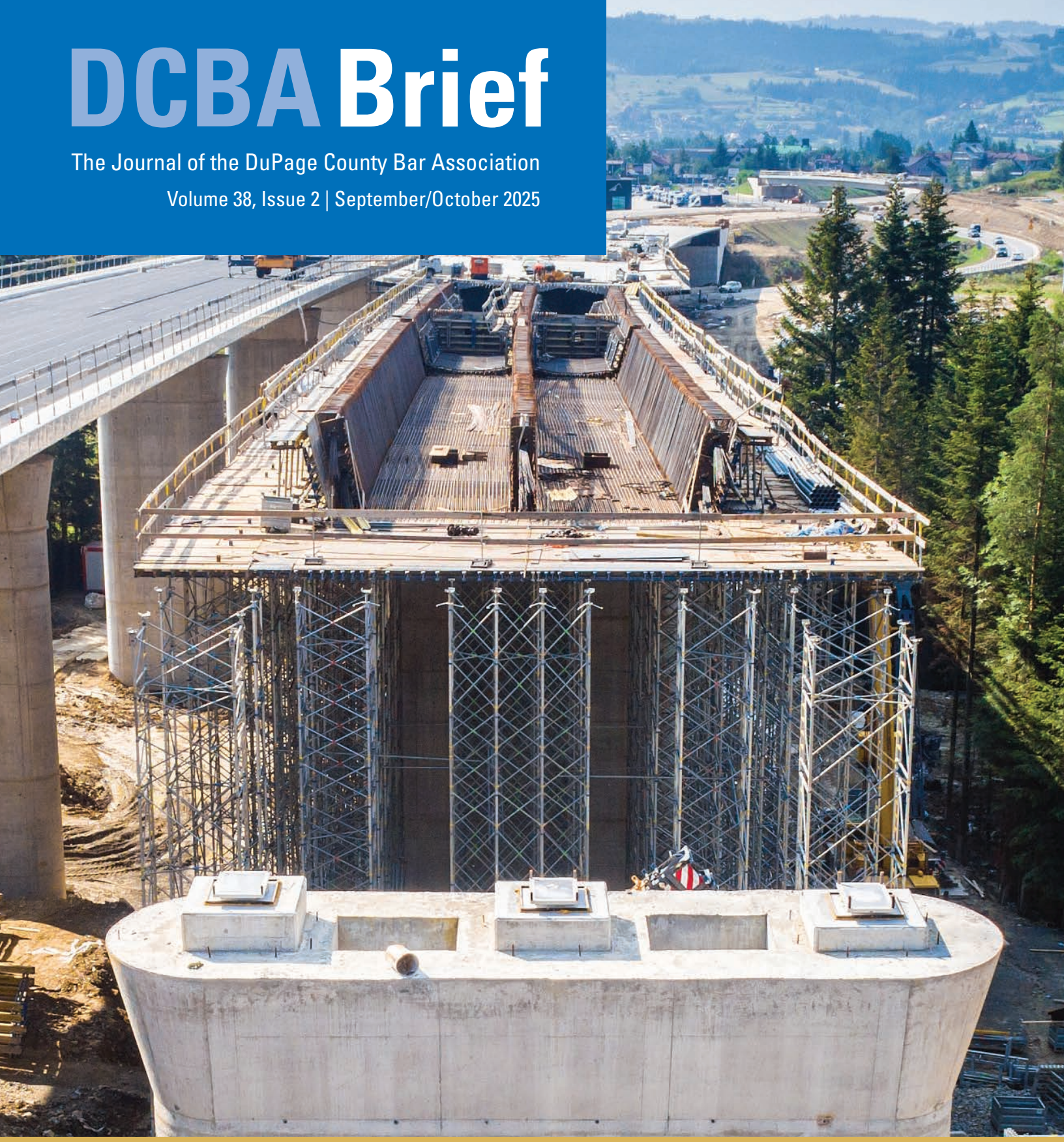

Understanding Construction Negligence: Theories and Strategies

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From the Editor

It's Officially Soup Season!

By Emmet C. Fairfield

Emmet C. Fairfield serves as a clerk for Justice Linda E. Davenport of the Illinois Appellate Court. He previously clerked for Justices Ann B. Jorgensen and Lisa Holder White, was a staff attorney for First and Fourth Districts' research departments, and worked four years an associate attorney at a civil practice firm. He earned his law degree from Northern Illinois University in 2013. He lives in Geneva, Illinois, with his wife and two daughters.

Fall is my favorite season. Sure, we lose several hours of daylight during the season. But fall offers reprieve from the heat and humidity that often make finding shade or air conditioning a priority during the summer. And the crisper air makes it easier to enjoy what I view as the most-superior and most-versatile food: soup. Chicken noodle, tomato basil, French onion, lemon chicken, potato, vegetable beef, minestrone, chowder, chili, gumbo. The options are endless; they're all great. Soup is an appetizer or a meal. It's the best.

Fall also brings new beginnings. A new school year. A new football season. It brings new routines, such as getting your child dressed, fed, and to the bus on time. It also brings beauty—the vibrant hues of fall foliage that we can enjoy before everything turns gray and brown.

In this issue, the editorial board is presenting four articles. **Brian M. Dougherty** (a former editorial board member and editor-in-chief) discusses all things construction negligence. He not only presents an extensive overview of the law; he offers tips and strategies for defending clients who have been sued in the construction context. Associate editor, **Christopher R. Gorman**, wrote about copyright issues—specifically the fair use doctrine—that are emerging in the world of artificial intelligence and large language model training. Christopher wrote a second article, along with his associate **Daniel K. Noonan**. Christopher and Daniel discuss a relatively unfamiliar (at least to me) phenomenon—"First Amendment audits"—which often lead to confrontation. They offer guidance to lawyers representing those finding themselves on either side. And in his article, **Azam Nizamuddin** illustrates how the law regarding students' exercise of their First Amendment rights has evolved yet how doctrinal tensions remain.

In my last column, I urged you all to embrace your inner nerd and write an article for the Brief. I suggested that one way to get a head start is to borrow from your day-to-day work. In that vein, the editorial board will, in the next few months, be presenting a writing workshop to help DCBA members transform their court filings or CLE presentations into articles for the Brief. Several of our members will help you learn not only what the Brief is looking for but will teach you how to turn your brief, memorandum, or other written document into an article. Be on the lookout for details! ☐

Building Community in DuPage

Part 2 of Charles's Installation Speech, June 6, 2025

By Charles G. Wentworth

Charles G. Wentworth is a shareholder at The Law Office of Lofgren & Wentworth, P.C. in Glen Ellyn. A University of Utah J.D. graduate, he previously clerked for Chief Justice John Broderick in New Hampshire. Active in DCBA, his roles included General Counsel, Assistant Treasurer, and chair of several committees. He received the DCBA's Director's Award in 2015 and 2018 and was named Lawyer of the Year in 2019.

I'm sure it has not escaped anyone's attention that the world has become increasingly polarized. As a result, it is way too easy to find ourselves in echo chambers where we only speak and listen to those with whom we already agree. Our thoughts and ideas become more and more inbred as we interact only with those who think and feel and behave exactly as we do and shun those who don't. But there is a solution to this: the DuPage County Bar Association.

You thought I was going to say fishing, didn't you? Well, fishing can also help remedy this problem. Trout don't care whether you are wearing red or blue. But what fishing can help us do to solve this problem, we already have here as a part of this amazing organization.

One defining feature of the church I am a part of is that we do not choose the congregations we attend. Rather, they are chosen for us based on where we live. A few years ago, I read an article extolling the virtues of that particular organizing principle:

"[Attending church geographically] forces us to be kind to those unlike us and to engage charitably with people who disagree with us. In a world where it is possible to interact exclusively with [those] who think exactly like we do—where we get our news from sources we already agree with, where our Facebook friends can be sequestered into groups we share our status updates with and those we don't, where we can socialize with people of similar interests throughout the world and never talk to our next-door neighbor—it's really worthwhile to be forced to work with and love people who are radically different from us."

(*Arriving Where I Started: Disassembling and Reassembling a Testimony*, Boyd J. Petersen, Sunstone Magazine, https://sunstone.org/arriving-where-i-started-disassembling-and-reassembling-a-testimony/ (last visited 6/3/2025).)

Our bar association has that same virtue. Many of you are part of DAWL; others are Justinians. Some may be Federalists, and others have joined the American Constitution Society. But no matter what other affinity bars we join, we are all a part of the DCBA—we all live, work, volunteer, serve, and practice here in this county.

I want you all to think about someone you disagree with. Maybe they vote differently from you. Maybe they litigate rather than putting together deals or writing trusts. Maybe they wear the wrong colors during football season. Invite them to lunch. Buy them a cup of coffee. Drag them to the ARC on a Thursday morning to share a donut. ***Do something to get to know someone different than you in some way—especially in a way that is fundamental to who you are.***

If we are going to survive this polarizing time, it will be because each of us individually can engage with people we disagree with and find ways to trust them. It will be because we are open to (Continued on page 40)

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126 South County Farm Road
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(630) 653-7779

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Articles & Perspectives

Article Editors

Christopher R. Gorman

Christopher R. Gorman is a partner at Robbins Schwartz focusing on commercial, construction, and real estate law in the public sector. He also has extensive experience in labor and employment law and advises clients on board governance and compliance. Chris previously served as in-house counsel for a nonprofit, a charter school management firm, and a state regulatory agency.

Azam Nizamuddin

Azam Nizamuddin is an attorney at Abear Law Offices in Wheaton, Illinois, specializing in family and employment law. He served as a litigator with D'Ancona & Pflaum and Regas, Frezados, and Harp, advising on commercial litigation, real estate, and employment and family law, and has experience as General Counsel and Chief Compliance Officer of Allied Asset Advisors. In 2023, he was appointed to the Illinois Supreme Court Commission on Professionalism and currently serves on the DCBA Board of Directors.

Understanding Construction Negligence:

Theories and Strategies

By Brian M. Dougherty

Negligence cases come in all shapes and sizes, ranging from car accidents, slip and falls, and professional negligence. One area that contains nuanced legal theories is construction negligence.[1] Over the years, Illinois has adopted or relied upon theories set forth in the Restatement (Second) of Torts to crystallize how negligence must be proved. This article will explore these theories, applicable defenses, and what to look out for when representing construction professionals.

Negligence

We all know from law school the basic tenets of a negligence action. To recover, a plaintiff must plead and later prove: (i) a duty owed by defendant to the plaintiff, (ii) a breach of that duty, and (iii) an injury proximately resulting from that breach.[2] While this is simple in practice, the two components of duty and breach have expanded to cover situations involving control over construction sites, job hazards at those sites, and the creation of conditions that may pose a risk of harm to workers and pedestrians.

Contract Equates to Duty

One of the first things that one needs to do when representing a construction professional is to review the applicable contract (if one exists). When allegations of negligence implicate contractual obligations, the scope of the tort duty is determined by the terms of the contract.[3] To understand this, one needs to read *Thompson*.

In *Thompson,* an engineer (WDC) entered into a contract to design certain roadway improvements, including *inter alia*, the replacement of an existing bridge over an interstate. IDOT approved the plans and issued a permit for the work. The bridge, as replaced pursuant to the plans, had a seven-inch high median, which was essentially identical to the median it replaced on the original bridge. Years after construction, a vehicle traveling east on the bridge lost control, struck the median, vaulted into the air,

1. Construction negligence can entail all sorts of work, from new construction to rehabilitation work and everything in between. It also includes premises liability.
2. *Carney v. Union Pacific R. Co.*, 2016 IL 118984, ¶ 26.
3. *Thompson v. Gordon,* 241 Ill.2d 428, 449 (2011); *Eichengreen v. Rollins, Inc.,* 325 Ill. App. 3d 517, 525 (1st Dist. 2001); *Melchers v. Total Electric Construction,* 311 Ill. App. 3d 224, 228 (1st Dist. 1999).

and collided with a westbound vehicle, killing the family in the westbound vehicle. The administrator of the estates of the deceased motorists filed suit against several defendants, including WDC, which designed the replacement bridge. As to WDC, the plaintiff alleged that the engineer's failure to incorporate a safer "Jersey barrier" into the design constituted negligence.

WDC moved for summary judgment and argued that no duty of care was owed, given its contract required only replacing the bridge, as opposed to assigning an obligation to conduct a design analysis to improve the median. The trial court granted summary judgment in favor of WDC, finding that the contract set forth WDC's duties and the scope of work, which did not require the modification or redesign of the median. Accordingly, WDC did not owe the duties allegedly breached.

The appellate court reversed the trial court, and an appeal was taken to the Illinois Supreme Court. In affirming the trial court, the supreme court held that WDC did not owe the plaintiff a duty to consider and design an improved median.[4] The court reasoned that replacing the bridge deck did not include improving the bridge deck.[5] Rather, the court explained that the scope of the engineer's duty "was circumscribed by the terms of [the engineer's] contract . . . which did not require [the engineer] to consider and design an improved median barrier."[6] As such, the standard of care applicable to WDC was expressly limited to its duty to replace the bridge deck.[7]

Thus, if the allegations impose duties that are not contained in the contract, then one has a really strong argument against whether the alleged legal duties exist. For example, if a plaintiff alleged that a maintenance contractor had a duty to alert a building owner of a design flaw with a roof hatch, but the contract only required the contractor to alert the owner of repairs to broken items on the roof, *Thompson* would provide a good argument. Also, if a plaintiff alleged that a construction engineer failed to warn the owner of a pothole in a crosswalk, but the engineer's contract with the city expressly stated that it does not control the means and methods of the subcontractor's work on city streets, *Thompson* could be used as well. But be careful; don't read *Thompson* so broadly that it results in one exculpating a client from all forms of negligent behavior.[8]

Pleading Negligence

Plaintiffs are not required to plead legal theories in their complaints, but some complaints may cite a statute (*e.g.,* Premises Liability Act) or the applicable Restatement (Section) of Torts upon which the count is based. Even if the legal theory is not cited, it is not difficult to sift through the allegations to see what is at issue based on the type of defendant you are representing. If one is representing a general contractor, then one can expect legal theories based on premises liability, the creation of artificial conditions on the land, and retained control over the plaintiff's employer. If one is representing a subcontractor, one can expect much of the same, the only major difference being whether that subcontractor hired a sub-subcontractor whose employee is the plaintiff. Representing a construction engineer/manager brings up some interesting defense arguments, as we will see. A construction engineer has a contract with the owner, but not direct contracts with any subcontractors. Rather, the subcontractor trades have direct contracts with the owner.

Premises Liability

"[O]rdinary negligence requires proof of only three elements—the existence of a duty, a breach of that duty, and an injury proximately caused by the breach."[9] Premises liability requires proof of those three things plus three additional elements: (i) that there was a *condition* on the property that presented an unreasonable risk of harm, (ii) that the defendant knew or reasonably should have known of the condition and the risk, and

4. *Thompson*, 241 Ill. 2d at 441-42.
5. *Id.*
6. *Id.* at 450.
7. *Id.*
8. For example, if a contractor's lack of due care made a condition worse, a plaintiff may argue that a new unsafe condition was thereby created *(e.g.,* loose gravel from street resurfacing covers a manhole; the "lip" on the manhole cause a bicycle to flip while a pedestrian was riding it. The pedestrian argues that the manhole "lip" was obscured).
9. *Guvenoz v. Target Corp.*, 2015 IL App (1st) 133940, ¶ 89.

About the Author

Brian M. Dougherty is a partner at Gordon Rees Scully Mansukhani, LLP in Chicago where he represents construction professionals in matters involving construction negligence, construction defects, premises liability, professional liability, and product liability. Brian is a former member of the *DCBA Brief's* Editorial Board and was editor-in-chief in 2018-2019.

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(iii) that the defendant could reasonably have expected people on the property would not realize, would not discover, or would fail to protect themselves from the danger.[10] "If it is a landowner's conduct or activity—as opposed to a dangerous condition on the property—that creates the injury-causing hazard, the claim is one of negligence, rather than premises liability."[11]

For a duty to arise under the Premises Liability Act, the defendant must possess and control the real property on which the injury occurred.[12] Generally, therefore, "[o]nly the party in control of the premises can be held liable for a defective or dangerous condition on the premises."[13] A defendant does not owe a duty to a plaintiff if the defendant does not control or intend to control the land.[14] In *Collins v. Mid-America Bag Co.*, the court held that the organizer of a softball game owed no duty under a theory of premises liability to a player who was injured while participating in a game because the organizer did not control the land, where the organizer was a permissive user of the park for his own purposes and, therefore, "was a licensee whose only interest in the land was permission to use the land."[15]

In *Godee v. Illinois Youth Soccer Ass'n*,[16] the plaintiff argued that because the coaches supervised a game on the field, they operated and controlled the entire property, including the area that contained the drainage ditch.[17] The court disagreed, finding that the plaintiff presented no evidence that the coaches maintained the area or physically enclosed it.[18]

In the construction realm, *O'Connell v. Turner Const. Co.*[19] provides a good example of when "control of the premises" does not exist. In *O'Connell*, the plaintiff argued that Turner (the general contractor) "had general responsibility for safety on the project; it was overall in charge of the conduct of the contractors and coordination of activity on the site; it was responsible for coordinating the contractors' work and correcting any unsafe field conditions; it could stop any unsafe conduct on the site and had overall responsibility for grounds and site conditions; it created and enforced the safety program for the project; and it was in charge of deciding where on the site the various trades would be allowed to lay down their job site tools and materials."[20] The court stated that "[p]laintiff does not, however, tie this alleged authority to a right or intent to control the premises, as opposed to the individuals or activities thereon."[21] "In much the same way, use of and/or access to a premises do not alone evidence possession[citations], it cannot be said here that control of people or activities on the premises denotes dominion over the land."[22]

At the pleading stage, it is typically difficult to get a premises liability count dismissed. But keep in mind the following when investigating the matter. First, is there a license agreement between the contractor and owner? If the contractor is merely a licensee, that denotes permission to use the land, and not control. A well-defined agreement plus an affidavit from the contractor would be a basis for a section 2-619(a)(9) motion to dismiss. Second, what was the condition that caused the injury? If the condition is a difference in, for example, pavement elevation (*e.g.*, flooring, sidewalk), you have a de minimis affirmative defense. The de minimis rule recognizes that minor defects are outside the scope of a landowner's duty to maintain the property in a reasonably safe condition, for the purposes for which the property is intended.[23]

The case of *Morris v. Ingersoll Cutting Tool Co.* provides some good reasoning on the de minimis rule:

> "Defendants' duty of care toward Morris was not to maintain their premises in perfect condition, but to avoid creating an unreasonable risk of harm to Morris [Citation.]. We do not conclude that the 1 ½–inch defect here created an unreasonable risk of harm to Morris. *His injury was not reasonably foreseeable, as it occurred in an industrial area used specifically for large semitrailers to*

10. *Garcia v. Goetz,* 2018 IL App (1st) 172204, ¶ 31. (emphasis in original) (quotation marks omitted).
11. *Id.*
12. 740 ILCS 130/2; *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 589 (1st Dist. 2002); see *Esser v. McIntyre,* 169 Ill.2d 292, 302 (1996) (defendant not subject to premises liability where he did not "occupy land with the intent to control it"); *Simpson v. Byron Dragway, Inc.,* 210 Ill. App. 3d 639, 646 (2d Dist. 1991) (defendant race car association not subject to premises liability for race car driver's death when it did not own or control the race track in question); see also W. Keeton, Prosser & Keeton on Torts § 63, at 444 (5th ed.1984) (typical powers associated with control over land are "power to exclude any one, or to direct the use of the land").
13. *Hanna v. Creative Designers Inc.,* 2016 IL App. (1st) 143727, ¶ 22.
14. *Collins v. Mid–America Bag Co.,* 179 Ill. App. 3d 792, 794 (2d Dist. 1989).
15. *Id.* at 794.
16. 327 Ill. App. 3d 695, 697 (2d Dist. 2002).
17. *Id.* at 699.
18. *Id.*; *Esser,* 169 Ill.2d at 302 (defendant did not occupy hotel area with the intent to control; where the area was not enclosed, it was open to anyone, and defendant did not clean and maintain the area).
19. 409 Ill. App. 3d 819 (1st Dist. 2011).
20. *Id.* at 825 (internal quotation marks omitted).
21. *Id.*
22. *Id.*
23. See *Hartung v. Maple Investment And Development Corp.,* 243 Ill. App. 3d 811, 814 (2d Dist. 1993).

> *be loaded with goods. For the same reason, the likelihood of injury was minor, as the area was not for pedestrian use, but was traversed by large, heavy trucks carrying heavy loads.* We also consider the burden of guarding against the injury and the consequences of placing that burden on defendants. Plaintiffs argue that the cost to defendants in repairing a 1 ½–inch defect would be slight. However, requiring defendants to repair *every* 1 ½–inch defect in the loading bay area would create an economic burden similar to that of the shopping center in *Hartung*."[24]

Additionally, if the condition was readily apparent, then you have an "open and obvious" affirmative defense. Conducting an adequate investigation at the outset of the case will help uncover defenses that can then be fleshed out in discovery, which will hopefully set one up for a successful summary judgment motion.

Creating the Condition

As a result of construction, a condition on the land may be created by the work. Take, for example, a concrete contractor that pours a new curb and curb gutter, and the curb gutter creates a "lip" between the gutter and the street pavement, and a pedestrian trips and falls as a result of the "lip." Or, with ongoing construction, equipment and materials are left strewn about a job site, and a worker gets injured. Thus, the condition that is created may be the end result of the construction or the result of ongoing activities.

"It is firmly established in Illinois that a party that creates a dangerous condition will not be relieved of liability because that party does not own or possess the premises upon which the dangerous condition exists."[25] "A party that creates a dangerous condition or is in control of premises on behalf of the owner or possessor is subject to liability, to the same extent as would be the owner or possessor, for injury . . .caused by the dangerous condition."[26] Section 385 of the Restatement (Second) of Torts is one formulation of this rule:

> "One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition *after his work has been accepted by the possessor,* under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others."[27]

While Illinois courts no longer follow the "accepted work" doctrine, if a "contractor carefully carries out the specifications provided him, he is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them."[28] Thus, section 385 could be useful if the injured person was a pedestrian and you are representing a contractor that created the condition based on the owner's specifications.

Section 383 of the Restatement (Second) of Torts states:

> "One who does an act or carries on an activity upon land *on behalf of the possessor* is subject to the same liability, and *enjoys the same freedom from liability*, for physical harm caused thereby to others upon and outside of the land *as though he were the possessor of the land*."[29]

Section 384 of the Restatement (Second) of Torts provides:

> "One who on behalf of the possessor of land erects a structure or *creates any other condition on the land* is subject to the same liability, *and enjoys the same freedom from liability*, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition *while the work is in his charge*."[30]

The key difference between sections 383 and 384, on the one hand, and section 385, on the other hand, is that the former apply while the work is still in the contractor's charge, and the latter applies after the work has been accepted.[31] In cases implicating section 385, critical evidence will be substantial completion certificates, punch lists, and letters of final approval.

24. *Morris v. Ingersoll Cutting Tool Co.*, 2013 IL App (2d) 120760, ¶ 14 (emphasis added).
25. *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 324 (1978).
26. *Id.*, citing Restatement (Second) of Torts §§ 383-87 (1965).
27. Restatement (Second) of Torts § 385 (1965) (emphasis added).
28. *Bitsky v. City of Chicago*, 2023 IL App (1st) 220266, ¶ 44, (internal quotation marks omitted). For an example of where the contractor was following its own plans and not those of the owner, see *Jarosz v. Buona Companies, LLC*, 2022 IL App (1st) 210181. Since the contractor in *Jarosz* was following its own plans, the court analyzed the case under basic negligence principles.
29. Restatement (Second) of Torts § 383 (1965) (emphases added).
30. Restatement (Second) of Torts § 384 (1965) (emphases added).
31. *Gonzalez v. Russell Sorensen Const.*, 2012 UT App 154, ¶ 23, 279 P.3d 422, 429.

“Defending against this theory involves understanding who was in control over the job site; what that control entailed; who was the contractor that created the condition; and whether anyone had the responsibility to review and approve that contractor’s work.

According to the comments to section 384, section 384 applies to independent contractors who “create[ ] any *** artificial condition” on the premises or who “alter[ ] [the land’s] physical condition on behalf of its possessor.”[32] Further, section 384 determines the liability of an independent contractor causing bodily harm “*while he remains in charge and control of the erection or creation*” of the condition.[33]

In *Studer v. Central Illinois Scale Co.*,[34] the appellate court applied sections 383 and 384 of the Restatement. The appellate court stated that “[i]t was sufficient that defendant’s employees, while possessing or controlling the immediate area around the truck scale on behalf of plaintiff and/or Providence Ag, created a potentially dangerous condition by altering the physical nature of the sidewalk and the manhole contained on those premises.”[35] The court emphasized “that defendant’s employees chose to exercise possession or control over the immediate area, near the truck scale’s manhole, by taking on the responsibility of uncovering that manhole.”[36] “By doing so, for purposes of the specialized work fully in their charge, defendant’s employees altered the physical condition of the premises without notice to plaintiff or Providence Ag’s employees.”[37]

Often, plaintiffs will sue multiple parties under this theory because at the outset, there is no clear-cut evidence on which contractor created the condition. In the curb-gutter example, you would have a general paving contractor that hired a concrete contractor to pour the curb; a resident engineer that would review the daily work to ensure it conforms to the contract; and a contractor that supplied road/sidewalk closed signage. Reviewing a city permit that discloses these parties would not necessarily inform a plaintiff on who did what and when. Thus, deposition testimony of the various contractors becomes rather key to one’s defense.

One important item to note at the outset is making sure your client was actually at the job site *before* the condition was created. If your contractor only did work *after* the accident occurred, then consider filing a section 2-619(a)(9) motion to dismiss, arguing that no legal duty existed, and support it with an

32. Restatement (Second) Torts § 384 cmts. a, c.
33. *Id.* cmt. g. (emphasis added).
34. 2021 IL App (3d) 200277.
35. *Id.* ¶ 25.
36. *Id.*
37. *Id.*

affidavit from the contractor, plus any contract documents and work orders.[38]

Defending against this theory involves understanding who was in control over the job site; what that control entailed; who was the contractor that created the condition; and whether anyone had the responsibility to review and approve that contractor's work (*e.g.*, resident engineer). It is very important to note that, based on Restatement sections 383 and 384, if the condition is de minimis, then the contractor can use that defense even though it is not the landowner. This is a big deal. Thus, in the example above, if the curb gutter was less than two inches, a de minimis defense is viable. "[I]t is well established that, absent any aggravating factors, a vertical displacement of less than two inches is de minimis."[39] The de minimis rule has not just been applied to sidewalks, but also to parkways and non-sidewalk areas.[40]

Retained Control

One of the most-used theories against a general contractor, construction engineer/manager, or owner is based on section 414 of the Restatement (Second) of Torts. "As a general rule, one who employs an independent contractor is not liable for the acts or omissions of the independent contractor."[41] Section 414 of the Restatement (Second) of Torts — referred to as the "retained control" exception[42] — provides an exception to the general rule:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."[43]

Section 414 is typically invoked by employees who are injured at a job site, and could be invoked by pedestrians as well.

Thus, "the general contractor, by retaining control over the operative details of its subcontractor's work, may become vicariously liable for the subcontractor's negligence; alternatively, even in the absence of such control, the general contractor may be directly liable for not exercising his supervisory control with reasonable care."[44] "[E]ven where the employer or general contractor retains the right to inspect the work done, orders changes to the specifications and plans, and ensures that safety precautions are observed and the work is done in a safe manner, no liability will be imposed on the employer or general contractor unless the evidence shows the employer or general contractor retained control over the incidental aspects of the independent contractor's work."[45] The parties' contract, if one exists, is the best indicator of whether an employer has retained control over the independent contractor's work.[46] The central issue is whether the employer retained control of the independent contractor's work, whether contractual, supervisory, operational, or some combination thereof.[47]

Case law under section 414 is vast, and the analysis is extremely fact-intensive. But as the law states, the first step is the actual contract—what does it provide in terms of retained control? All contracts are different, given who the owner is and the nature of the project. An argument that is often used is that the general contractor controlled the safety of the job in such a way that the subcontractor's employee was not entirely free to do the job as it saw fit. For the retained control exception to apply, a safety program or manual must sufficiently affect a contractor's means and methods of doing its work.[48]

The next step is looking at the supervision of the work. Pervasive supervision and monitoring may impose a duty pursuant to section 414 of the Restatement.[49]

Finally, there is operational control. Here, a court examines "whether the contractor was free to perform the work in its own way, which personnel provided supplies and gave directions to the workers, and whether the employer was present during the incident."[50]

Comment b to section 414 endorses the concept of direct liability for not exercising supervisory control with reasonable care.[51] For example, a court will look at whether the general contractor superintended the entire job, in which case it may be subject to liability for failing to prevent its contractors from doing even

38. This happens more than you think since there can be many involved contractors working at a single site and the exact scope of work of each contractor is not initially known.
39. *St. Martin v. First Hospitality Group, Inc.*, 2014 IL App (2d) 130505, ¶ 14; *Birck v. City of Quincy*, 241 Ill. App. 3d 119, 124 -25 (4th Dist. 1993) (affirming trial court; vertical displacement of 1 7/8 inches was *de minimis*).
40. *Morris*, 2013 IL App (2d) 120760, ¶¶ 15-16.
41. *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 66.
42. *Lee*, 2014 IL App (1st) 130771, ¶ 66.
43. Restatement (Second) of Torts § 414 (1965).
44. *Lee*, 2014 IL App (1st) 130771, ¶ 69 (internal quotation marks omitted).
45. *Id.*
46. *Id.* ¶ 74.
47. *Id.* ¶ 74.
48. *Id.* ¶ 77.
49. *Id.* ¶ 89.
50. *Id.* ¶ 96.
51. *Id.* ¶ 99 (citing Restatement (Second) of Torts § 414, cmt. b (1965)).

the details of the work in a way unreasonably dangerous to others, if it knew or by the exercise of reasonable care should have known the contractors' work was being so done, and had the opportunity to prevent it by exercising the power of control which it retained.[52] A contractor would also be subject to liability if it knew or should have known the contractors have carelessly done their work in such a way as to create a dangerous condition, and failed to exercise reasonable care either to remedy it or by the exercise of its control cause the contractor to remedy it.[53] "The best evidence of this sort of liability is the employer's actual exercise of its discretionary authority to stop its contractor's work."[54] Courts also consider "whether the employer required compliance with extensive safety guidelines, conducted regular safety meetings and regular safety inspections, and whether the employer was required to approve the site safety plan and the minutes of the contractor's safety meetings."[55]

An entire article can be devoted to section 414, and one must be adequately prepared when representing a general contractor or owner. The plaintiff's deposition is crucial to fleshing out control over the plaintiff's work as well as the construction professional's safety program and supervisory role at the job site. Retained control arguments are perfect for summary judgment, but such motions are only as good as their discovery lead-up, so be prepared for a deep dive into the details of the project.[56]

Entrustment

One of the elements under section 414 is entrustment, which was discussed in *O'Connell*.[57] There, the school district hired Turner as construction manager. The school district then hired Waukegan Steel, and it subcontracted its work to Linden Erectors, the plaintiff's employer. The plaintiff was injured on the job site. The plaintiff's third amended complaint claimed negligence against Turner premised on sections 414 and 343 of the Restatement (Second) of Torts. The trial court granted summary judgment to Turner, and the plaintiff appealed. The appellate court affirmed.

Regarding section 414, the court stated that "the prerequisite for applying this section is entrustment of work to an independent contractor by the defendant, absent which section 414 is inapplicable and the issue of control, the focus of plaintiff's appeal here, is never reached."[58] "Stated another way, section 414 governs only those instances where the defendant *entrusts* work to another but retains control over some aspect of the work."[59] The appellate court stated that "plaintiff was employed by Linden, a subcontractor hired by Waukegan Steel, an independent contractor hired by the School District, not Turner."[60] The appellate court further stated that while Turner may have aided the School District in drafting contracts and handling bids, "unless Turner actually selected the contractors or subcontractors, something plaintiff does not claim, it cannot be said that *Turner* entrusted them with the work, absent which section 414 is inapplicable."[61]

Thus, if you represent a construction manager or construction engineer, be alert to whether the "entrustment" element is present. On public projects, the public entity may be contracting directly with the subcontractors, unlike on a private project. One would need to investigate the subcontractor bidding process for the project to see what role the manager or engineer played. If one has favorable facts, this can make summary judgment much easier under section 414, so one does not need to explore the retained control elements. However, it would be wise to attack both entrustment and retained control, just to be safe.

Conclusion

Construction negligence cases not only require an extensive knowledge of the law, but also the nature of the work that was performed and the responsibilities of the owner, general contractor, subcontractors, and engineers. These cases are not just about testimony on the accident itself and the work conditions, but have a transactional aspect to them as well, since one needs to review contracts, safety manuals, safety programs, and the minutes of safety meetings. For practitioners, much investigation and planning need to be done at the outset since some of the defenses will present themselves early on in the case, which can then set your litigation strategy. If not, then keep in mind the various legal theories to see what viable defense avenues can be explored that may set the stage for a winnable summary judgment or a strongly leveraged mediation or pre-trial conference. ☐

52. See Restatement (Second) of Torts § 414, cmt. b (1965).
53. *Id.*
54. *Lee*, 2014 IL App (1st) 130771, ¶ 99.
55. *Id.*
56. Also do not forget about your client's claims for possible indemnification and/or contribution from third-parties or existing defendants in order to share the responsibility for the loss. This makes settling a case more palatable.
57. 409 Ill. App. 3d at 822-23.
58. *Id.* at 822.
59. *Id.* (emphasis added).
60. *Id.* at 823.
61. *Id.* (emphasis in original).

AI Training and the Evolving Fair Use Doctrine: Entrenchment in Market Dynamics and Exceedingly Transformative Uses

By Christopher R. Gorman

From logos to literary works, clients of all types are raising questions about the legal risk of using outputs generated by artificial intelligence (AI) systems. Their concerns are well-founded. On January 29, 2025, the United States Copyright Office (Copyright Office) published the second part of its non-regulatory guidance on the copyrightability of AI-generated outputs.[1] This followed the Copyright Office's initial publication on July 31, 2024, addressing how the Copyright Act of 1976 tackles the issue of digital replicas—from deepfakes to robocall impersonations.[2]

However, until May 2025, the Copyright Office's guidance conspicuously avoided officially addressing another key issue: potential copyright infringement arising from the inputs used by AI developers to train AI systems. These inputs are copyrights incorporated into AI training datasets for generating content. The Copyright Office planned to address this in the third part of its series on AI, which is out for pre-publication but not officially adopted.[3]

Despite the Copyright Office's efforts, Judge William Alsup of the United States District Court for the Northern District of California beat it to the punch, issuing a long-awaited ruling concerning the use of copyrighted books for the training of AI systems, in *Bartz v. Anthropic PBC*.[4]

In the decision, Judge Alsup applied a nuanced fair use analysis under the Copyright Act, holding that Anthropic's use of millions of lawfully acquired copyrighted books to train its AI systems constituted fair use.[5] However, he simultaneously found that Anthropic's use of millions of pirated copies of copyrighted works for the same initial purpose fell outside the scope of fair use, exposing Anthropic to potentially staggering damages of $150,000 per copyrighted work.[6]

In doing so, Judge Alsup found that AI developers had made "exceedingly transformative" use of the legally acquired books, seemingly drawing on the centuries-long development of the fair use doctrine concerning transformative uses. Yet his finding diverged from recent decisions assessing transformative use in increasingly market-based terms rather than on novelty alone.

Just two days later, Judge Vincent Chhabria of the same court reached a similar conclusion in *Kadrey v. Meta Platforms, Inc.*,[7] holding that the use of copyrighted works to train generative AI models could constitute fair use. However, Judge Chhabria's reasoning leaned more heavily on potential market effects, suggesting that different evidentiary showings could sway future rulings.[8]

These two decisions mark a potentially pivotal moment in AI and copyright law, signaling evolving, but competing, judicial approaches to reconciling the fair use doctrine with AI's reliance on massive datasets.

1. U.S. Copyright Office, *Copyright and Artificial Intelligence, Part 2: Copyrightability* (January 2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf.
2. U.S. Copyright Office, *Copyright and Artificial Intelligence, Part 1: Digital Replicas* (July 2024), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf.
3. U.S. Copyright Office, *Copyright and Artificial Intelligence, Part 3: Generative AI Training,* Pre-Publication Version (May 2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf.
4. *Bartz v. Anthropic PBC*, No. C 24-05416 WHA, 2025 WL 1741691, (N.D. Cal. June 23, 2025), available at https://storage.courtlistener.com/recap/gov.uscourts.cand.434709/gov.uscourts.cand.434709.231.0_4.pdf.
5. *Id.* at 30. (finding "[t]he technology at issue was among the most transformative may of us will see in our lifetime")
6. *Id.*
7. *Kadrey v. Meta Platforms, Inc.*, No. 23-cv-03417-VC, 2025 WL 1752484, (N.D. Cal. June 25, 2025), available at https://storage.courtlistener.com/recap/gov.uscourts.cand.415175/gov.uscourts.cand.415175.598.0_1.pdf.
8. *Id.* at 40.

Background on Copyright and Transformative Use

The concept of "transformative use" is deeply rooted in centuries-old concepts of copyright, having its roots in the principle of abridgement established by English courts of the eighteenth century, long before the modern-day concept of "fair use" had been introduced.[9]

In the United States, related principles evolved through foundational legal texts, beginning with article I, section 8, clause 8 of the United States Constitution,[10] which empowers Congress "[t]o promote the Progress of Science and useful Arts" by granting authors exclusive rights for limited times. The first federal Copyright Act of 1790 codified this framework, balancing authors' exclusive rights with the public interest in learning and innovation.

Eventually, U.S. Supreme Court Associate Justice Joseph Story, writing for the Circuit Court of the District of Massachusetts, first articulated what would ultimately result in today's "fair use" doctrine under the Copyright Act. In *Folsom v. Marsh*,[11] the circuit court was asked to resolve a dispute involving a republication of the writings of George Washington that had been originally compiled and published by the plaintiff. Justice Story evaluated whether the republication of such letters by the defendants was "fair" or an act of "piracy." In doing so, the court examined factors such as the purpose of the use, the nature of the original work, the amount used, and the effect on the market for the original. Ultimately, Justice Story found that while the infringer's work was meritorious, their copying of Washington's writings in their entirety—rather than "abbreviated or select passages…taken from particular letters"—destroyed the rights of, and potential economic benefit to, the original author.[12]

Justice Story's opinion in *Folsom* ultimately led to the codification of a "fair use doctrine" in section 107 of the Copyright Act of 1976.[13] In Public Act 94-553, Congress set forth that "the fair use of a copyrighted work" is not otherwise an infringement under the Copyright Act.[14] As originally adopted, Congress established four factors to be considered in determining whether a use is a fair use:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.[15]

About the Author

Christopher R. Gorman is a partner at Robbins Schwartz focusing on commercial, construction, and real estate law in the public sector. He also has extensive experience in labor and employment law and advises clients on board governance and compliance. Chris previously served as in-house counsel for a nonprofit, a charter school management firm, and a state regulatory agency.

9. Roberts, Harry W. Jr. (1942) The Law on Abridgment of Copyrighted Literary Material," Kentucky Law Journal: Vol. 30: Iss. 3, Article 3 (citing *Gyles v.* Wilcox, 2 Atk. 141, 26 Eng. Rep. 489 (1741))(available at: https://uknowledge.uky.edu/klj/vol30/iss3/3).
10. U.S. Const. art. I, § 8, cl. 8.
11. 9 F. Cas. 342 (C.C.D. Mass. 1841).
12. *Id.* at 347-49.
13. 17 U.S.C. § 107.
14. P.A. 94-553 (Oct. 19, 1976).
15. 17 U.S.C. § 107.

While the four factors of section 107 have remained unchanged since Congress first enacted them, the concept of "transformative use" traces its modern formulation to Judge Pierre Leval's 1990 Harvard Law Review article, *Toward a Fair Use Standard*.[16]

In his article, Judge Leval advanced a new framework for fair use, arguing that fair use should turn primarily on whether the secondary use is "transformative," meaning it adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.[17]

Judge Leval's framework gained traction in the United States Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc*.[18] In *Campbell*, the Court held that 2 Live Crew's parody of Roy Orbison's '"Oh, Pretty Woman'" constituted transformative fair use, emphasizing that 2 Live Crew's use of many otherwise protected elements of Orbinson's song "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright" despite the impact on the potential market and commercial value of Orbison's work.[19]

Mass Digitization as a Transformative Use: Google Books

The transformative use doctrine faced a significant test when Google's Library Project launched in 2004. Google partnered with major research libraries to digitize over 20 million books, offering only small "snippets" to users while storing full-text copies for search indexing and research purposes. Google did not obtain permission from copyright holders to scan or index these works, and copyright holders challenged the practice as copyright infringement as an unauthorized reproduction of their works in *Authors Guild v. Google, Inc*.[20]

The district court held that Google's use was fair use, emphasizing the transformative nature of Google's digitization, noting that the purpose of copying the work was not to read the works but to allow users to search, index, and locate relevant books.[21] Google's system added significant value by facilitating new research methods and enabling computational analysis of language, known as "text mining."[22]

Incidentally, Judge Leval affirmed the district court opinion on behalf of the United States Court of Appeals for the Second Circuit.[23] He found Google's use to be "highly transformative" by focusing on the different function served by Google's full-text copying of otherwise copyrighted work, from the function that the authors intended, namely facilitating searchability and text mining.[24] Importantly, the court found under a fair use analysis that the wholesale copying of millions of original works posed no significant market harm, as Google's snippets and safeguards did not substitute for the original works, but provided an enormous public benefit.[25]

Judicial Retrenchment from Focusing on Transformative Use

Despite the expansive approach in the Google case, prior and subsequent decisions have attempted to implement the transformative use doctrine as imagined by Judge Leval. In *American Geophysical Union v. Texaco*, the United States Court of Appeals for the Second Circuit rejected a fair use argument that relied on the transformative use of photocopying journal articles as transformative use where the copies were largely intended for researchers' internal use as library reference material.[26]

Even where such use furthered broader research and innovation, the Second Circuit found that mere duplication intended for such purposes was not a transformative use.[27] In its opinion, the court specifically found such use was neither transformative nor excused where licensing markets existed.[28]

Similarly, in *Andy Warhol Foundation v. Goldsmith*, the United States Supreme Court stressed that context and intention, not just aesthetic novelty, were the key to deciding whether the first factor of the fair use doctrine established a permissible,

16. 103 Harv. L. Rev. 1105 (1990)
17. *Id.* at 1110-1116.
18. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)
19. *Id.* at 579.
20. *Authors Guild v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).
21. *Id.* at 291-92.
22. *Id.* at 287.
23. *Authors Guild v. Google, Inc.*, 804 F. 3d 202 (2d cir. 2015).
24. *Id.* at 216-17.
25. *Id.* at 224-25.
26. *American Geophysical Union v. Texaco, Inc.*, 60 F. 3d 913 (2d Cir. 1994).
27. *Id.* at 923.
28. *Id.* at 931-32.

> **“Legal practitioners advising clients in AI development must navigate a shifting terrain, where fair use defenses hinge on a complex interplay of transformative purpose, market effects, and the provenance of training data.**

non-infringing use of copyrighted work based on transformative use.[29] Of particular concern to the court was the commercial nature of the work and the potential market substitution caused by the infringing work.[30]

Similarly, in *Thomson Reuters Enterprise v. Ross Intelligence, Inc.*, the United States District Court of Delaware considered whether AI developer Ross's use of Westlaw headnotes to train an AI legal research tool constituted fair use under the developing commercial focus of the transformative use doctrine.[31] The court rejected a fair use defense, finding Ross used the copyrighted headnotes for the same functional purpose for which they had been created—legal research—and failed to meet the threshold for transformative use given the clear market implications.[32]

Transformative Use in AI Turns a Corner

Against this backdrop, Judge Alsup in *Bartz* once again revisited the transformative use doctrine in the context of AI training.[33] At issue was whether the use of millions of copyrighted books by AI developer Anthropic, including those authored by the plaintiffs, constituted fair use for purposes of training large language models (LLMs) consisting of various versions of authors' books—both pirated and lawfully acquired—to train Anthropic's AI chatbot, Claude.

As in cases like *Texaco* and *Ross,* the initial copying of such works was almost entirely non-expressive when copied for purposes of amassing a library of content. However, Anthropic's use was arguably transformative at the output stage when Claude responded to user prompts based on its LLM training but without reproducing the authors' works.[34]

Several factors were at issue with respect to Anthropic's use of the authors' works. First, Anthropic admittedly pirated millions of books. Intent on building a library of all books in the world,

29. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 408 (2023).
30. *Id.* at 532-33, 550.
31. *Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence, Inc.*, 765 F. Supp. 3d 382 (D. Del. 2025).
32. *Id.* at 397-98, 400.
33. *Supra* note 4.
34. *Id.* at 11-14.

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Anthropic later bought books, removed the pages from their bindings, and scanned what was left. While Anthropic repeatedly copied the works in various datasets, the AI developer established safeguards to ensure that the output from Claude never resulted in the reproduction or redistribution of an author's works.

Judge Alsup ultimately granted summary judgment in favor of Anthropic with respect to the use of lawfully acquired works, finding the use to be "exceedingly transformative."[35] He reasoned that while the initial copying was non-expressive, the end use—an AI model generating outputs in response to user prompts—transformed the original works' function. Importantly, Judge Alsup found that the safeguards Anthropic implemented prevented the model from replicating the authors' works, mitigating concerns of market substitution.

In applying the fair use analysis, Judge Alsup found only the second factor of the fair use analysis—that the authors' works had been selected for training *because of* their expressive content—to weigh in favor of the authors despite the obvious disruption to the licensing rights of the authors.[36] Although the authors' works were copied in their entirety, Judge Alsup held that the copies used to train Anthropic's LLMs did not displace demand for the authors' works but merely constituted a format change, therefore favoring the fourth factor of fair use.

However, Judge Alsup distinguished between lawfully obtained and pirated copies.[37] While he deferred the question of liability for pirated works to later proceedings, his analysis suggested that lawful acquisition remains a significant factor in fair use determinations, even when the functional use of the material remains identical.[38]

Two days later, in *Kadrey v. Meta Platforms, Inc.*, writing for the same court, Judge Chhabria reached the same conclusion as to AI developers' use of copyrighted material for training LLMs but with a different emphasis.[39] As in *Bartz*, a class of authors challenged Meta's use of their copyrighted works to train generative AI. Unlike Judge Alsup, Judge Chhabria focused primarily on the lack of evidence of market harm presented in the case rather than any "exceedingly transformative" use made by Meta's copying. Ultimately, he suggested that stronger evidence of market dilution may have changed his mind.[40]

The decisions in *Bartz* and *Kadrey* illuminate the judiciary's pivotal role in shaping the fair use doctrine for AI training data. While both cases affirm that transformative use can shield AI developers from liability when training with copyrighted works, the divergent focus of a single court on lawful acquisition versus market harm underscores lingering doctrinal tensions.

With appeals likely and further cases pending, the legal landscape for AI training data remains unsettled. However, these recent decisions underscore the pivotal role of the judiciary in deciding whether emerging AI technologies can assure that uses of AI training models will constitute transformative uses for lawfully acquired content or whether there remains a continuing place for considerations of market harm.

For now, legal practitioners advising clients in AI development must navigate a shifting terrain, where fair use defenses hinge on a complex interplay of transformative purpose, market effects, and the provenance of training data. □

35. *Id.* at 9.
36. *Id.* at 24.
37. *Id.* at 31-32.
38. *Id.* at 27-30.
39. *Supra* note 7.
40. *Id.* at 39-40.

From Armbands to Pronouns:
The Evolving Legacy of *Tinker v. Des Moines* in Illinois Student Protest Jurisprudence

By Azam Nizamuddin

The right of students to engage in political expression within the public school environment remains one of the most tested and evolving aspects of First Amendment jurisprudence. Since the U.S. Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*,[1] courts have sought to balance student speech rights with the need for schools to maintain discipline and order.

In *Tinker*, the Court famously declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] Yet, in practice, the contours of those rights remain fluid, particularly as cultural and political debates enter the classroom. Today's controversies—ranging from gender identity to walkout protests—test *Tinker*'s resilience and adaptability.

This article reviews how courts, particularly in Illinois and the United States Court of Appeals for the Seventh Circuit, have applied *Tinker* to modern student protest cases. Key recent decisions—including *Beathard v. Lyons*,[3] and the Seventh Circuit's guidance in *Nuxoll v. Indian Prairie School District No.204*[4] and *Zamecnik v. Indian Prairie School District No.204*[5]—illustrate the doctrinal tension between students' expressive rights and school authority. Also considered are persuasive decisions from other jurisdictions, such as *Jacob v. Sonnabend*[6] and *B.B. v. Capistrano Unified School District*,[7] which have influenced courts facing similar claims.

Recent Application of the *Tinker* Framework in Primary and Secondary School

In *Tinker*, the U.S. Supreme Court invalidated the suspension of students who wore black armbands to protest the Vietnam War, holding that public school students possess First Amendment rights unless their speech "materially and substantially interfere[s]" with school operations or "impinge[s] upon the rights of other students."[8] The Court rejected mere discomfort or anticipated disagreement as a basis for censorship, emphasizing the high value of political expression even in school settings.

The *Tinker* standard has since been narrowed by decisions in *Bethel School District v. Fraser*[9] (offensive speech), *Hazelwood School District No. 403 v. Kuhlmeier*[10] (school-sponsored speech), and *Morse v. Frederick*[11] (promotion of illegal activity). However, *Tinker* remains the principal test for non-school-sponsored student speech in public schools.

In *Beathard v. Lyons*, a former football coach at Illinois State University was terminated for replacing a university athletic department poster supporting the Black Lives Matter movement with his own poster that read "All Lives Matter To Our Lord & Savior Jesus Christ."[12]

The United States District Court found "that Plaintiff's actions were [not] taken in furtherance of his official job duties."

1. 393 U.S. 503 (1969).
2. *Id.* at 506.
3. 620 F.Supp.3d 775 (N.D.Ill. 2022).
4. 523 F.3d 668 (7th Cir. 2008).
5. 636 F.3d 874 (7th Cir. 2011).
6. 37 F.4th 412 (7th Cir. 2022).
7. 2024 WL 1121819 (C.D. Cal. 2024).
8. *Tinker,* 393 U.S. at 509.
9. 478 U.S. 675 (1986).
10. 484 U.S. 260 (1988).
11. 551 U.S. 393 (2007).
12. *Beathard*, 620 F.Supp.3d at 778-79.

ISU did not pay him to decorate his door, and they had an Anti-Harassment and Non-Discrimination Policy stating that "each member of the University Community enjoys the right to free speech. … [S]tudents … and staff have a responsibility to respect others and show tolerance for opinions that differ from their own".[13] Therefore, the coach's private speech was protected by the First Amendment.

Additionally, in the defendant's memorandum in support of their motion to dismiss, the defendants stated that the coach's speech "played a substantial part in" his termination. This satisfied the parts needed to show a violation in the First Amendment right to free speech—"(1) an employee's speech was constitutionally protected, and (2) that the employee's protected speech was a motivating factor for the employer's retaliatory action."[14]

Nuxoll addressed whether a high school could prohibit a student from wearing a T-shirt reading "Be Happy, Not Gay" in response to the "Day of Silence," an LGBTQ+ awareness initiative.[15] The Seventh Circuit, in an opinion by Judge Richard Posner, applied a modified version of *Tinker*, holding that school officials could restrict speech if they reasonably predicted it would cause a material disruption.[16]

The school district based its ban on a school policy proscribing " 'derogatory comments,' oral or written, 'that refer to race, ethnicity, religion, gender, sexual orientation, or disability.' "[17] The school deemed "Be Happy, Not Gay" a derogatory comment on a particular sexual orientation.[18] The student argued that the First Amendment allowed him to say anything negative about any group (in or out of school) if they are not "fighting words" that would provoke a violent reaction and hence a breach of the peace. "The Supreme Court has placed fighting words outside the protection of the First Amendment."[19]

The Seventh Circuit held that the student was likely to succeed on the merits of his claim that the school would violate his speech rights by preventing him from wearing T-shirt with the slogan "Be Happy, Not Gay."[20] The court stopped short of endorsing an outright ban, requiring that schools show more than speculative apprehension of disruption. Judge Posner's analysis introduced a nuanced, anticipatory version of *Tinker*—allowing preemptive restrictions where the speech's likely effect is objectively foreseeable and sufficiently disruptive.[21] The court reversed and sent the case back to the district court.

Three years later, the same school district was again before the court in *Zamecnik*, defending its prohibition on the same slogan.[22] The district court granted summary judgment in favor of the students and entered a permanent injunction.[23] The school district appealed arguing that the grant of summary judgment

13. *Id.* at 782.
14. *Id. at 781-82.*
15. Nuxoll, 523 F. 3d at 670.
16. *Id.* at 673.
17. *Id.* at 670.
18. *Id.*
19. *Id.*
20. *Id.* at 673.
21. *Id.* at 673-75.
22. Zamecnik, 636 F. 3d at 875.
23. *Id.* at 878.

About the Author

Azam Nizamuddin, attorney at Abear Law Offices in Wheaton, Illinois, specializes in family and employment law. He previously litigated at D'Ancona & Pflaum and Regas, Frezados, and Harp, and served as General Counsel and Chief Compliance Officer for Allied Asset Advisors. In 2023, he was appointed to the Illinois Supreme Court Commission on Professionalism and currently serves on the DCBA Board of Directors.

was premature. But the Seventh Circuit agreed with the district court which ruled that the school district was unable to show the level specific disruption as required by the *Tinker* holding. This time around, the Seventh Circuit found the ban unconstitutional, holding that the phrase "Be Happy, Not Gay" was protected by the First Amendment and had not caused any documented disruption at the school.[24]

The court reaffirmed that the *Tinker* standard requires concrete evidence—not merely student complaints or administrative unease—to justify censorship. The decision confirmed that discomfort or disagreement with a message does not constitute invasion of the rights of others.[25] In reaching its decision, the Seventh Circuit determined that the school was unable to provide facts demonstrating disruption by the wearing of the shirt. The court also emphasized that if a school allows for advocacy for the rights of homosexual students, they cannot suppress criticism of it.[26]

In *Jacob v. Sonnabend*, a Wisconsin federal court considered a school's refusal to allow two students to wear T-shirts depicting firearms.[27] In one case, a middle school student (N.J.) was sent to the office of the associate principal, David Sonnabend, where he was told he could not wear clothes depicting firearms. He wore a sweatshirt over it and was not disciplined. At a different school, a high school student (A.L.) wore a T-shirt with the logo of a gun-rights organization featuring a firearm and the text of the constitution's guarantee to the right to bear arms on the back. He was sent to the principal, Beth Kaminski, where he was told the shirt violated the school's dress code, zipped up the jacket, and was not disciplined.[28]

Both schools had dress code policies that did not explicitly ban wearing clothes with firearms on them but instead required students to wear appropriate attire that will not disrupt learning and will maintain a positive atmosphere. Both schools viewed clothing depicting firearms as "inappropriate", so they were prohibited.[29] N.J. and A.L. sued Sonnabend and Kaminski in the U.S. District Court for the Eastern District of Wisconsin "seeking declaratory and injunctive relief enjoining the enforcement of the policies barring clothing that depicts firearms."[30]

Sonnabend and Kaminski submitted a report from Professor Brad J. Bushman a professor of communication at Ohio State University, in which he discusses the "weapons effect," a theory that the image of a firearm can have the effect of priming or activating" aggressiveness. The judge ruled in their favor despite the plaintiffs challenging the theory's reliability.

The district judge ruled that A.L.'s shirt expressed "a positive attitude toward firearms and the right to possess them," disagreeing with Sonnabend and Kaminski's argument that wearing a shirt showcasing support for the right to bear arms was not protected by the First Amendment. Further, the judge declined to apply the standard articulated in *Tinker* for evaluating restrictions on student speech. Instead, the court looked to *Muller v. Jefferson Lighthouse School*[31] and *Kuhlmeier.*[32]

The Seventh Circuit held that the high school student's shirt with the message favoring the right to bear arms is constitutionally protected speech and not expressive conduct. The court also held that a student's First Amendment challenge to dress code and enforcement was governed by *Tinker* rather than the standard applicable to student speech in non-public forum, rejecting the standard in *Muller* and reversing the district court.[33]

24. *Id.* at 879-80.
25. *Id.* at 876-877.
26. *Id.* at 876.
27. Jacob, 37 F.4th at 416.
28. *Id.* at 416-18.
29. *Id.* at 418.
30. *Id.*
31. 98 F.3d 1530 (7th Cir. 1996).
32. 484 U.S. 260.
33. 37 F.4th at 425.

> **“Indeed, much—perhaps most—of the speech that is protected in high grades’ may be regulated in elementary schools.**

In *B.B.*, a recent case from California, a first-grade student (B.B.) made a drawing that had the phrase “Black Lives Matter” printed on it in black marker.[34] B.B. added “any life” in a lighter color marker under it and gave it to another student (M.C.), whose mother complained to the school after she saw it. The principal, Jesus Becerra, told B.B. the drawing was “inappropriate” and “racist” and that she couldn’t draw anymore.[35] Her teachers then told her she wasn’t allowed to play at recess for the next two weeks. A year later, Chelsea, B.B.’s mother, found out about this incident while talking to another parent and filed a complaint.

The district court, relying on Seventh Circuit precedent, recognized “elementary schools ‘are more about learning to sit still and be polite, rather than robust debate.’[Citation.] To fulfill that mission, elementary schools require significant latitude to discipline student speech. Indeed, ‘much—perhaps most—of the speech that is protected in high grades’ may be regulated in elementary schools.”[36]

The plaintiff’s complaint originally had seven causes of action, and three of them were dismissed at the pleadings stage. The remaining causes of action were (1) violation of the First Amendment against Becerra, (2) retaliation in violation of the First Amendment against Becerra and Victa, (3) intentional infliction of emotional distress against Becerra and Victa, and (4) negligent supervision against CUSD. The court concluded that the drawing was not protected by the First Amendment and granted the school district’s motion for summary judgment on all First Amendment claims.[37] Essentially, the court ruled that greater deference must be given to the school at the elementary school level, stating: “[y]ounger students may be more sensitive than older students, so their educational experience may be more affected when they receive messages based on a protected characteristic. Relatedly, first graders are impressionable. If other students join in on the insults, the disruption could metastasize, affecting the learning opportunities of even more students.”[38]

Tinker in the University Context—and Litigation at Higher Levels

Although *Tinker* arose in K–12 context, its “substantial disruption” standard remains influential in university protest cases.

34. B.B., 2024 WL 1121819, *1.
35. *Id.*
36. *Id.* at 4.
37. *Id.* at 5.
38. *Id.* at 4.

As with Seventh Circuit *Tinker*-based jurisprudence, courts reviewing encampments have generally required specific demonstration of educational disruption or safety risk—not abstract objections.

Moreover, while no Supreme Court ruling yet directly addresses encampments on public university grounds, federal court litigation addressing disciplinary policies, university governance, and Title VI implications suggests expanding judicial willingness to apply *Tinker* like scrutiny to higher education expressive conduct disputes.[39]

In the 2023–2025 academic years, a surge in pro-Palestinian student protests, including encampments and building occupations at public universities, precipitated significant legal conflict, administrative discipline, and federal involvement. In April 2024, students established an encampment on Columbia University's Morningside campus (including Hamilton Hall and Butler Library) in solidarity with Gaza; their demands included divestment from Israeli-linked corporations and policy reforms.[40] The university called in NYPD officers to clear the encampment, resulting in over 100 arrests and numerous interim disciplinary suspensions.[41] Some students faced multi-semester suspensions or expulsions.[42]

In February 2025, three graduate students filed suit in New York federal court, identifying more than 30 violations of university protocols—specifically arguing that Columbia bypassed required disciplinary procedures and unlawfully punished protest-related speech.[43] Plaintiffs also appealed to the U.S. Department of Education, alleging violations of Title VI and civil rights statutes.[44]

These events triggered heightened federal scrutiny. The Justice Department launched investigations into whether Columbia may have violated civil rights obligations by failing to protect Jewish students from harassment during protest activity. This culminated in a $200-plus million federal settlement with the Trump administration in July 2025 in exchange for reinstatement of suspended funding, disciplinary reforms, and policy changes addressing antisemitism and protest governance.[45] The university, while denying wrongdoing, agreed to impose sanctions on dozens of pro-Palestinian protest-engaged students, including expulsions and revocations of degrees.[46]

Broader Litigation Across Public Universities

Similar encampments occurred at institutions such as University of Pennsylvania, UCLA, UC Irvine, UC Davis, and University of Virginia. Students were suspended or arrested, often prompting lawsuits and civil liberties challenges. At UCLA, Jewish students obtained preliminary injunctions after protesters barred access to campus spaces, raising civil rights claims.[47]

These cases have raised two overarching legal issues:

1. **Is the university liable for encampments constituted by non-violent political speech or expressive conduct?** Courts frequently emphasize that

39. See Zamecnik, 636 F.3d 874.
40. https://www.thefire.org/research-learn/2024-student-encampment-protests.
41. Stevens, S.T. & Honeycutt, N., 2024 Student Encampment Protests: How did the student encampment protests impact the state of free expression on America's college campuses? (2024), https://www.nytimes.com/live/2024/04/18/nyregion/columbia-university-protests.
42. https://www.insidehighered.com/news/government/politics-elections/2025/07/22/columbia-expels-suspends-student-protesters.
43. https://www.pacermonitor.com/public/case/57002170/CurranGroome_et_al_v_Columbia_University
44. https://www.ed.gov/media/document/columbia-university-3-complaint-and-notification-letter-107905.pdf.
45. Singh, Kanishka and Ward, Jasper, Columbia University to pay over $200 million to resolve Trump probes (July 23, 2025), https://www.reuters.com/world/us/columbia-university-pay-over-200-million-resolve-trump-probes-2025-07-23/.
46. *Id.*
47. Watson, Julie, UCLA reaches $6 million settlement with Jewish students, professor over campus protests (Aug. 1, 2025). https://firstamendment.mtsu.edu/post/ucla-reaches-6-million-settlement-with-jewish-students-professor-over-campus-protests/.

protests, even involving encampments, are protected by the First Amendment unless there is evidence of substantial disruption—not merely participant numbers or ideological offense.

2. **What is the role of federal oversight and funding conditions in shaping university protest rules?** Columbia's settlement tied compliance with antisemitism policy demands to retention of federal funding—situating protest governance at the intersection of free speech and funding leverage.

Practical Implications for Illinois Attorneys in All Educational Settings

Attorneys representing students, parents, or school districts in Illinois should consider the following:

- ***Tinker* remains the operative framework** for analyzing independent student expression. Its disruption standard demands evidence—not hypothetical or anticipated emotional responses.
- **Courts increasingly require viewpoint neutrality**, even where speech conflicts with institutional messaging or inclusivity efforts. Double standards in enforcement are constitutionally suspect.
- **Compelled speech claims are gaining traction**, particularly where student conscience or religious belief is implicated. As *Wilson* suggests, such claims are viable under both the free speech and free exercise clauses.
- **Walkouts and protest events**—especially those tied to political or social movements—enjoy broad constitutional protection. Discipline must be tethered to actual disruption or safety concerns.
- **Evidence is everything.** The stronger the record of disruption or pedagogical harm, the more likely a school's restrictions will withstand scrutiny. Courts remain skeptical of pretextual justifications.

Conclusion

More than fifty-five years after *Tinker*, the rights of student protesters remain robust—but not absolute. As social and political movements increasingly shape school culture, the First Amendment continues to be tested in classrooms and hallways. For Illinois attorneys, familiarity with *Tinker*'s progeny—particularly in the Seventh Circuit—remains essential. The current legal climate demands careful legal strategy, meticulous factual development, and a renewed understanding of how free speech evolves in the hands of our youngest citizens. Furthermore, the wave of encampments at public universities—and associated litigation culminating in highstakes federal settlements—demonstrates the persistent vitality of *Tinker's* core standard beyond secondary schools. Whether in high school hallways or college quads, courts remain attentive to the boundary between protected political expression and institutional authority. For attorneys in Illinois and elsewhere, the intersection of student protest, disruption evidence, viewpoint neutrality, and procedural fairness continues to shape constitutional advocacy across educational contexts. □

Advising Clients on First Amendment Audits: Rights and Reactions from Both Views

By Christopher R. Gorman and Daniel K. Noonan

Attorneys advising public bodies and those representing individuals asserting a right to conduct First Amendment audits of the public are familiar with increasingly common encounters in government facilities. An individual—often self-identified as a "First Amendment auditor"—enters publicly accessible spaces. Camera in hand, the individual begins recording without prior notice. A government employee, concerned about the privacy and security of other employees and members of the public, confronts the individual. The individual refuses to identify themselves or explain their purpose, asserting a constitutionally protected right to record in public spaces.

At times, the individual requests public records or challenges the basis for the employee's authority under prevailing law. The employee, unaware of the many nuances of First Amendment protections that apply to the unexpected interaction, escalates the encounter by asking the auditor to leave, demanding they stop recording, and threatening to call law enforcement to intervene.

Soon after, the individual posts an edited video on social media with narration, generating public attention, commentary, potential legal claims, and, of course, subscribers or "likes." Often, such individuals can earn enough views to qualify for the YouTube Partner Program to begin monetizing their interaction.[1]

While some see these encounters as disruptive or opportunistic, First Amendment auditors and their advocates argue that they serve a legitimate public interest—holding government officials accountable in spaces where transparency is paramount. Some may argue that the motivation—if not the encounters themselves—is what the First Amendment was designed to protect.

While reactions vary, legal advocates advising parties on both sides must navigate a nuanced understanding of First Amendment protections, statutory obligations, and the dangerous line between limits on lawful expression and government overreach.

The Constitutional Right to Record in Public

Foundational First Amendment protections are at issue when First Amendment auditors engage in the act of recording in public spaces, given the extension of First Amendment protection of expressive activity to audio and audiovisual recordings. As the Illinois Supreme Court has found, "[a]udio and audiovisual recordings are media of expression commonly used for the preservation and dissemination of information and ideas and thus are included within the free speech and free press guarantees of the First and Fourteenth Amendments."[2]

The Illinois Supreme Court in *Clark* found that an Illinois eavesdropping law criminalizing recording without the consent of all parties involved to be unconstitutional as overly broad by substantially burdening the right to record in public.[3] As the court concluded the "the statute's blanket ban on audio recordings sweeps so broadly that it criminalizes a great deal of wholly innocent conduct, judged in relation to the statute's purpose and its legitimate scope."[4] By criminalizing public recordings along with the private recordings at issue in the case, the law had "severed the link between the eavesdropping statute's means and its ends."[5]

1. See https://www.youtube.com/creators/partner-program (last accessed August 4, 2025).

2. *People v. Clark*, 2014 IL 115776, ¶ 18, 6 N.E.3d 154, 159 (citing *American Civil Liberties Union v. Alvarez*, 679 F.3d 583, 595 (7th Cir.2012)).
3. *Id.* ¶ 22-23.
4. *Id.*
5. *Id.* ¶ 23 (citing *Alvarez*, 679 F.3d at 606).

The Illinois Supreme Court's holding in *Clark* aligns with decades of state and federal caselaw recognizing the right to gather and publish or disseminate information about public officials under the First Amendment as what the Supreme Court of the United States described as "paramount public interest in a free flow of information to the people concerning public officials."[6]

However, the right to record in public is not unlimited. For attorneys representing public bodies and those representing the First Amendment auditors, the boundaries between protected activity and government overreach are often where their clients overstep the line.

Limitations on First Amendment Protections for Public Recording

First Amendment audits, like any expressive activity under their namesake constitutional amendment, can be subject to government regulation depending on where the recording (*i.e.,* expressive activity) takes place. Similarly, the actions that unsuspecting government employees acting in their official capacity can take are limited by the same constitutional protections. However, the nuances are likely to be forgotten, if they were ever understood, by either party in the heat of an encounter. Often, this may stem from a government employee believing the public space in which they work to be less a seat of government than a workplace.

However, traditional forum analysis applies to all government spaces, whether they are places of employment or public parks. Government restrictions on speech (or those imposed by government employees) in spaces controlled by the government require a nuanced forum analysis.

First, if expressive activity is taking place in traditional public forums—those where such activity has been traditionally permitted without restriction—government restrictions have long been held to be subject to the highest level of judicial scrutiny.[7]

However, in *Perry Education Ass'n v. Perry Local Educators Ass'n*, the United States Supreme Court clarified that differing restrictions could be applied depending on the space where expressive activity takes place, giving rise to differing standards for traditional public forums, designated or limited public forums, and nonpublic forums.[8]

6. *Garrison v. Louisiana,* 379 U.S. 64, 77 (1964).
7. See, *e.g., Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (holding streets and parks to have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").
8. *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983); *see also Keister v. Bell*, 879 F.3d 1282, 1288 (11th Cir. 2018) (quoting *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015)). There are several different forums. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679& n.11 (2010).

About the Editors

Christopher R. Gorman is a partner at Robbins Schwartz focusing on commercial, construction, and real estate law in the public sector. He also has extensive experience in labor and employment law and advises clients on board governance and compliance. Chris previously served as in-house counsel for a nonprofit, a charter school management firm, and a state regulatory agency.

Daniel K. Noonan is an associate at Robbins Schwartz, specializing in commercial transactions, local taxation, and real estate. He has extensive experience advising public bodies and units of local government on a wide range of legal and compliance issues, including open meetings, public records, and other constitutional matters.

- Traditional public forums (*e.g.,* sidewalks, parks) allow the broadest protection for speech and recording.
- Designated or limited public forums (*e.g.,* libraries, government lobbies) allow more regulation, so long as restrictions are reasonable, content-neutral, and tied to legitimate purposes such as safety, operational efficiency, or decorum.
- Nonpublic forums (*e.g.,* employee-only areas, secure facilities) can be subject to more stringent access limitations.

Recording for First Amendment audits, and the response from any government employee must be consistent with the standards established by the line of cases that followed *Hague* and *Perry* for each place where an audit might occur—from the lobby of a school district to potentially restricted areas of a correctional facility.

Unsurprisingly, such forum analysis can be lost on government employees and First Amendment auditors in the moment. In a recent case out of Florida, *Sheets v. City of Punta Gorda*, a First Amendment auditor challenged a lower court ruling that upheld an ordinance prohibiting video and sound recording in certain public spaces without the consent of those being recorded.[9]

The auditor had attempted to test the ordinance by wearing a body-worn camera inside a government building where the ordinance restricted recording. Government employees refused their consent, and the auditor was eventually issued a trespass warning.

The court in *Sheets*, while applying the forum analysis, upheld the narrowly tailored restriction in public spaces based on the auditor's failure to demonstrate that the ordinance was unreasonable, further finding that the ordinance was reasonable in light of "its purpose and context." While the

"The United States Supreme Court clarified that differing restrictions could be applied depending on the space where expressive activity takes place, giving rise to differing standards for traditional public forums, designated or limited public forums, and nonpublic forums.

9. *Sheets v. City of Punta Gorda*, 2:19-cv-484-FtM-38MRM (M.D. Fla. February 13, 2024).

United States District Court's opinion in *Sheets* seems to contradict the holding in *Clark*, the former can be distinguished in the same application of the forum analysis supported by cases like *Clark*.

Approaches to "forum analysis" become critical in the light of such audits. In truly public spaces, such as sidewalks or parks, the government's ability to regulate recording is minimal. But in limited public forums—such as libraries, recreation centers, or government lobbies—restrictions tied to operational needs, decorum, and security may be lawful if reasonably tailored.

Beyond Forum Analysis and Dealing with Other Auditor Demands

While filming is the visual centerpiece of the audit that requires an analysis of expressive activity by all parties involved and their counsel, First Amendment auditors are often accompanied by a less dramatic but equally significant legal maneuver—immediate demands for records that, under Illinois law, must be available immediately.[10]

These include:

- A form to file a complaint against the institution or an employee.
- A list of documents or categories of records that the public body must immediately disclose upon request.[11]
- Public Access Counselor training records for the FOIA Officer.[12]
- A display at each administrative or regional office with brief descriptions of the institution, including various details specified by FOIA section 4, and methods for the public to request information and public records.[13]
- An index of notices of denials under FOIA.[14]
- Body camera footage of the "audit" under the Law Enforcement Officer-Worn Body Camera Act.[15] While there are limitations on the disclosure of such footage, an auditor captured on the recording is entitled to such video, with appropriate redactions, as the subject of the encounter with law enforcement.

Moreover, FOIA section 3(b) obligates public bodies to certify records if requested—another procedural detail that may be of interest to First Amendment auditors but unfamiliar to many government employees.[16]

This legal leverage places public bodies in a difficult position. Denial or delay may generate legal exposure or bad publicity, as will any attempt to restrict expressive activity in areas they consider to be subject to customs not suited for public workplaces.

When Rights Collide: Limits on Audit Conduct

Despite auditors' invocation of constitutional principles, their conduct can cross the boundaries of First Amendment protection into unlawful territory. Indeed, several cases demonstrate how the courts balance an auditor's rights against the legitimate needs of public bodies, depending on the forum involved and requests being made.

For example, in *People v. Stiegler*, the defendant recorded video in a police station's parking lot marked with signage prohibiting public access.[17] The appellate court upheld his conviction for criminal trespass to state-supported land, concluding that the presence of "no entry" signs made the space non-public, and the defendant's conduct unlawful.[18] The case serves as a powerful reminder: signage matters, and forum type influences legal outcomes.

Another instructive case is *Lybarger v. Snider*, where two auditors followed a woman and her child to their home and began filming. When police intervened, the auditors filed

10. 5 ILCS 140/3.5; 5 ILCS 140/4.
11. 5 ILCS 140/3.5(a).
12. 5 ILCS 140/3.5(b).
13. 5 ILCS 140/4.
14. 5 ILCS 140/9(b).
15. 50 ILCS 706/10-20(b).
16. 5 ILCS 140/3(b).
17. *People v. Steigler*, 2021 IL App (1st) 200880-U.
18. *Id.* ¶ 22.

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suit alleging violations of their First and Fourth Amendment rights.[19] The court dismissed the suit, holding that the officers had probable cause to intervene, and even if they did not, they were entitled to qualified immunity.[20] The takeaway is twofold: First Amendment protections do not extend to harassment or stalking, and law enforcement can engage with auditors when genuine safety concerns arise.

In cases outside of Illinois, such as *Bergquist v. Milazzo*,[21] courts have affirmed the right of public officials to restrict access or limit recording in the interest of preserving government functions—particularly when the recording takes place on courthouse grounds or during official proceedings.

Preparing for the Inevitable: Policies and Training

Given the rise in audits across Illinois, those representing public bodies should urge clients to shift from reactive panic to preparing for the inevitable through an understanding of the nuances of First Amendment protections, for all sides.

The first step for counsel representing public bodies is reviewing policies. All public bodies should have clear, accessible guidelines that distinguish between public and non-public areas, and between permissible and impermissible conduct. Areas like staff offices, locker rooms, and conference rooms should be prominently marked and designated as off-limits, and signage should make this plain.

Training is equally critical. All staff—not just administrators—should understand the basics. Even a lower-level employee demanding ID, blocking a camera, or making an angry remark can not only become a public spectacle but can increase the risk that the first amendment auditor has an actionable claim.

Institutions should also audit their online presence and physical postings to ensure they meet FOIA's requirements. Public information such as organizational charts, FOIA officer designations, and complaint procedures must be not only available but readily visible. First Amendment auditors often target institutions that appear to be failing to comply with basic disclosure requirements.

Representing Auditors: Legal Boundaries and Best Practices

Attorneys representing First Amendment auditors should counsel clients on:

- Respecting posted restrictions and understanding forum classifications.
- Avoiding conduct that may constitute harassment or trespass.
- Preparing FOIA requests in accordance with statutory requirements.
- Exercising caution in interactions with staff, emphasizing lawful assertion of rights without provoking confrontations.

The Bottom Line: Accountability Without Abdication

Scrutiny of government is both necessary and expected. The right to record public officials performing public duties in public spaces is not only constitutionally protected but also necessary for an accountable government. But the phenomenon of First Amendment audits, with its spectacle and commercial exploitation risks, overlooks the complex constitutional and practical issues involved.

For Illinois public bodies, the challenge is twofold. They must uphold the constitutionally protected right to expressive activity, even when faced with scrutiny while being recorded in real time. They must also protect staff, maintain operational order, and avoid the pitfalls that could lead to a violation of the First Amendment.

Similarly, auditors must exercise their rights within the bounds of the law. The roadmap is there: *Clark* affirms the right to record, *Stiegler* reminds us of its limits, and cases like *Lybarger* and *Sheets* offer guidance on balancing access with safety and decorum.

For practitioners on both sides, preparation, education, and a thorough grasp of the legal framework are essential to managing these encounters constructively. ☐

19. *Lybarger v. Snider*, 2021 WL 1948435, 2-3 (S.D. Ill.).
20. *Id.* at 6-7.
21. *Bergquist v. Milazzo*, 2021 WL 4439422 (E.D. Mo.).

Law Update

By Editors Raleigh D. Kalbfleisch and Katrina M. Kuhn

Drug-Induced Homicide Offenses Not Deemed Less Serious; Sentencing Court May Not Deviate From a Mandatory Minimum Term
People v. Hoffman, 2025 IL 130344

The defendant was charged with the drug-induced homicide of the victim, who died after the defendant and her boyfriend provided the victim with heroin laced with other substances, including fentanyl.

The State and the defense disagreed as to whether the defendant should be sentenced under the statutory provision that permits a trial court to deviate from the otherwise mandatory minimum prison term when, among other criteria, "the offense involves the use or possession of drugs." 730 ILCS 5/5-4-1(c-1.5) (West 2022). The trial court found that the provision did not apply to drug-induced homicide, which is a Class X felony, and imposed the minimum term of six years in prison.

The appellate court vacated the defendant's sentence and remanded for a new sentencing hearing, holding that drug-induced homicide requires delivery, which itself requires the possession of drugs. One justice specially concurred. She agreed that the statute's plain language supported the majority decision. But she urged the legislature to clarify its intent if it meant this statute should apply broadly to all delivery offenses.

The supreme court allowed the State's petition for leave to appeal and agreed with the trial court that drug-induced homicide was not among the offenses included in the statute. The supreme court held that section 5-4-1(c-1.5) did not allow a sentencing deviation for offenses that include possession in addition to other conduct, including the conduct involved in drug-induced homicide.

Describing the statute as "not a model of clarity in legislative drafting," the supreme court stated that the phrase "involves the use or possession of drugs" was ambiguous. Having found that the legislative history that preceded the statute's passing was of no help to either side, the supreme court then considered the consequences of any given interpretation of the statute. The court found that the defendant's expansive reading of the statute would lead to an absurd result by treating an offender who only possessed drugs similarly to an offender whose actions led to someone's death. Such a reading would also have the effect of returning to society those who weaponize drugs, but would not allow the trial court to do so for defendants who commit an offense in another way. The supreme court urged the Illinois legislature to reconsider the statute's unclear language.

Ban on Unlicensed Public Weapon Carriage in the Aggravated Unlawful Use of a Weapon Statute Not Facially Unconstitutional
People v. Thompson, 2025 IL 129965

The defendant was convicted of the aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (a)(3) (A-5) (2020)) for possessing a handgun in a vehicle on a highway while the gun was uncased, loaded, and immediately accessible. The defendant had a valid Firearm Owner's Identification (FOID) card but had not applied for a concealed carry license (CCL).

The defendant challenged the statute as facially unconstitutional. The defendant argued that the Second Amendment to the United States Constitution was violated by a categorical ban on allowing citizens to carry a handgun in public and by

imposing a "double licensing" procedure that requires both a CCL and a FOID card.

The supreme court upheld the statute's facial constitutionality, affirming the appellate court and circuit court. The supreme court first found that the defendant's constructive possession of the handgun in a vehicle without a CCL violated the statute. The defendant did not dispute that he possessed the gun while it was uncased, loaded, and immediately accessible, and that he lacked a CCL.

The defendant argued that the AUUW statute impermissibly restricted the rights of law-abiding citizens and challenged the requirement of having both a CCL and a FOID card. The supreme court noted that the defendant's case involved concealed carriage and not open carriage, which the defendant had claimed was at issue and which would not involve these provisions of the AUUW statute. Illinois is a state where an applicant for a CCL must be granted one if they have met the requirements for a FOID card (a shall-issue licensing regime) and where the licensing body lacks the discretion to deny the license based on a lack of need or suitability.

The supreme court noted that the United States Supreme Court in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), addressed the "precise issue" in this appeal—whether shall-issue firearm licensing regimes such as that in Illinois comport with the Second Amendment. The supreme court noted that *Bruen* "expressly declared shall-issue licensing regimes facially constitutional under the Second Amendment *because* they neither give officials licensing discretion nor require the applicant to show an atypical need for self-defense[.]" Ordinary citizens are not prevented from exercising their Second Amendment rights to carry a weapon in public. The supreme court found that, given *Bruen*'s express endorsement of shall-issue licensure, it did not need to consider whether modern regulations on firearms were consistent with the Second Amendment's language and its historical traditions.

Appointment of New Special Prosecutor Suitable Only Where Conflict of Interest Exists
People v. Muhammad, 2025 IL 130470

The petitioner alleged he was tortured by Chicago Area 2 detectives while he was interrogated regarding the 1999 death of Damone Mims. The petitioner was found guilty of the first-degree murder of Mims and sentenced to 50 years in prison. The

About the Editors

Raleigh Kalbfleisch is the owner of the Law Office of Raleigh D. Kalbfleisch and an adjunct professor at the University of Illinois School of Law. She graduated from Quinnipiac University School of Law and is a member of the DuPage County Bar Association, serving as a current editor and past editor-in-chief of the *DCBA Brief*.

Katrina Kuhn is a staff attorney in the Second District Office of the State's Attorneys Appellate Prosecutor. She graduated from Northern Illinois University College of Law and is a current member of the *DCBA Brief* Editorial Board.

petitioner then involved the Illinois Torture Inquiry and Relief Commission (TIRC) in his case.

The circuit court denied the petitioner's motion to rescind the appointment of the special prosecutor in his case. The special prosecutor who was appointed had previously served as a supervisor in the Office of the Cook County State's Attorney. On appeal, the petitioner argued his claim should not have been dismissed without an evidentiary hearing. He also argued the circuit court erred by refusing to remove the special prosecutor due to an actual conflict of interest. The appellate court agreed with the petitioner on both points and reversed the circuit court.

The supreme court affirmed the appellate court's ruling that the petitioner was entitled to an evidentiary hearing because the petitioner had raised a claim of a "tortured confession" as defined in the TIRC Act (775 ILCS 40/1 *et seq*.)

As for the appointment of the special prosecutor, the supreme court sided with the circuit court, holding that a new appointment is permissible only if there is an actual conflict of interest. Such a conflict is present only when the prosecutor has an interest in the action, either as a private individual or as an actual party to the action. An appearance of impropriety is insufficient to remove a prosecutor or special prosecutor. For there to have been a conflict of interest, the petitioner had to present evidence that the attorney was actually involved in his prosecution. And the petitioner had not identified any such evidence.

Emergency Exception to Probable Cause Requirement Allowed for Warrantless Entry into Home
People v. Cummins, 2025 IL App (2d) 230516

Police were dispatched to a residence at around 2:30 a.m. in response to a noise complaint. An officer arrived at the home, heard loud noises, and saw lights on inside. Police gained no response to repeated pounding on the doors for more than an hour, and there was no sign of movement inside. A dog was barking inside. Officers learned from a computer check that the defendant's Firearm Owner's Identification (FOID) card was revoked.

Additional officers arrived, and the police discussed whether entry was needed to see if anyone had a medical emergency. One officer saw a cabinet containing firearms in plain view. Officers spoke to a neighbor who identified the defendant's car near the home and said the defendant had a drug conviction, which police confirmed. Police did not attempt to obtain a search warrant. One hour and 16 minutes after arriving at the scene, police entered the residence. Police recovered weapons and ammunition.

The defendant, a convicted felon, moved to suppress that evidence as the fruit of an illegal search. The circuit court granted the defendant's motion, finding that the totality of the information known to the officers at the time of their warrantless entry "did not establish reasonable grounds for the officers to believe that there was an emergency at hand and an immediate need for their assistance for the protection of life or property."

The State moved for reconsideration, and the trial court denied that motion, stating it was "possible there was an individual in the residence who did not want to answer the door, as a resident has the right to do." The court again stated that the officers lacked information to support a warrantless entry "based upon exigent circumstances."

The appellate court reversed, finding that the emergency exception to the warrant requirement applied. Under that exception, (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their aid in protecting life or property; and (2) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be entered or searched. Only the first prong was at issue in this appeal.

The appellate court rejected the defendant's attempt to cast the delay between the police officers' arrival and their entry

into the house as negating reasonable grounds to enter because the officers could have believed no emergency was occurring. The appellate court acknowledged some courts had taken that view. It noted, however, that the United States Supreme Court had resolved that issue in *Brigham City v. Stuart*, 547 U.S. 398 (2006), holding that the matter was viewed under an objective, not a subjective, standard. The appellate court concluded that the trial court made an error of law in holding otherwise.

According to the appellate court, the facts known to the officers at the time showed that the defendant was home at the time. Those facts included the presence of the defendant's car, the loud music and lights, and the lateness of the hour. Some facts showed the defendant could have needed assistance, in that no one responded to the repeated knocking, and the defendant had a history of drug use. Lastly, the appellate court found that the delay between the police's arrival and their entry did not erase the possibility of the need to enter. The appellate court noted in closing that cases involving the Fourth Amendment are highly fact-specific.

Free-Air Sniff by Drug Detection Canine Gives Probable Cause to Search Vehicle Even After Legalization of Cannabis
People v. Hoskins, 2025 IL App (4th) 240991

During a traffic stop, a positive alert by a drug detection dog led to a search of the defendant's truck, and the police discovered methamphetamine. The defendant was charged with possession. The defendant moved to suppress evidence, arguing the search was not supported by probable cause. The defendant argued that cannabis was a legal substance and should not be classified as contraband, for which a canine can alert to a vehicle, giving rise to a search. The defendant also argued that the police officers did not observe any corroborating factors showing the presence of contraband or evidence of criminal activity, such as the observation or odor of any cannabis or other substance in the truck.

The trial court denied the defendant's motion to suppress, noting that in *People v. Mallery*, 2023 IL App (4th) 220528, the appellate court found a positive alert by a dog certified and trained to detect five narcotic substances, including cannabis, was sufficient to establish probable cause.

On appeal, the defendant argued his counsel was ineffective for not arguing in the suppression motion that the free-air sniff by the drug detection dog constituted an unlawful search because the dog was trained to detect cannabis, which was legal to possess. Affirming the trial court, the appellate court noted that a free-air sniff by a drug detection dog during a lawful traffic stop is not a search under the Fourth Amendment, citing *People v. Caballes*, 221 Ill. 2d 282 (2006). An Illinois citizen over the age of 21 may use or possess up to 30 grams of cannabis. Two exceptions to this proposition exist: (1) a person may not possess cannabis in a vehicle unless it is inaccessible and also kept in a sealed, odor-proof container while in a vehicle and (2) a driver may not drive or be in actual physical control of a vehicle if the driver (a) is under the influence of a drug or combination of drugs that renders the person incapable of safely driving or (b) has a tetrahydrocannabinol concentration in their blood or bodily substance within two hours of driving.

Furthermore, the appellate court disagreed with the defendant's representation that possessing less than 30 grams of cannabis was presumptively legal. The court pointed to the above criteria to state that if those requirements are violated, the possession of cannabis is not lawful. The defendant did not meet his burden of demonstrating that an unlawful search occurred, in light of *Mallery*.

Evidence Admissible, Except Dependency on a Propensity Inference, For Defendant Not Contesting Intent
People v. Smart, 2025 IL 130127

The case presented an evidentiary question: when a defendant denies the commission of a charged crime and does not present any evidence or argument that his acts were accidental,

incidental, or inadvertent, may the State introduce evidence of other misconduct to prove intent? The Cook County circuit court permitted the State to introduce evidence of prior uncharged acts of misconduct to prove that the defendant intended his contact with the victim, even though the defendant denied that he made any contact with the victim and did not present any evidence to contest intent.

The Illinois Supreme Court found that the defendant's decision not to contest intent, under the facts of this case, did not affect the admissibility of evidence because the defendant was charged with a specific-intent crime and intent was at issue regardless of the evidence or argument presented by the defendant. The court determined, however, that the evidence's relevancy depended on a propensity inference. Thus, the trial court erred when it permitted the State to present evidence of the defendant's prior acts of misconduct because the evidence did not meet the statutory criteria for admissibility of propensity evidence. Unlike the appellate court, the supreme court concluded the error did not require reversal. The court instead found the error was a harmless evidentiary error, which does not require reversal.

Issues of Material Fact and Summary Judgment Inappropriate

Palos Community Hospital v. Humana Insurance Co., 2025 IL App (1st) 231917

This was the second appeal in this case. The first appeal involved the denial of a substitution of judge as a matter of right. The supreme court held that the "test the waters" doctrine was not a valid basis to deny a timely filed motion for substitution of judge as a matter of right. The supreme court also concluded that the denial of the substitution rendered void the resulting judgment, which was entered after a full trial on the merits. (The supreme court's opinion is cited at *Palos Community Hospital v. Humana Insurance Co.*, 2021 IL 126008. For a deeper dive into the issue of substitution of a judge as a matter of right, see the following article: *Substitution of Judge As A Matter of Right. What is a substantive ruling?* Illinois State Bar Association, Family Law Newsletter, Volume 65, No. 11 (May 2022).)

In this second appeal, arising from a breach of contract action, Palos Community Hospital (Palos) appealed from the circuit court orders that (1) entered summary judgment in favor of Humana Insurance Company (HIC) upon the parties' cross-motions for summary judgment and (2) denied Palos' motion to reconsider.

Palos claimed that it was underpaid for several years by HIC, an affiliate of Humana, Inc. (Humana), when HIC reimbursed the hospital for medical services provided to patients insured by HIC. Specifically, Palos alleged that HIC underpaid it from 2004 through 2010, by applying lower reimbursement rates under the wrong governing contract. Palos claimed that it was entitled to higher rates of reimbursement under an agreement entered in 2002 between Palos and the ChoiceCare network, a separate entity that is also affiliated with Humana. Palos alleged that HIC's underpayment violated the terms of a third agreement between ChoiceCare and HIC, to which Palos was a third-party beneficiary. HIC maintained—and the trial court agreed—that there was no breach because HIC properly reimbursed Palos at the lower rates called for by a separate, preexisting direct contract with Palos (the Michael Reese contract) that HIC became a party to in the 1990s. The heart of the dispute was whether (and if so, when) HIC became party to the Michael Reese contract.

The appellate court found that fact questions remained as to whether the parties earlier indicated their understanding that HIC was a party to the Michael Reese contract, either through the 1991 amendment or subsequent conduct. The court held that the evidence established that HIC was a party to the Michael Reese contract as of the execution of the 2005 amendment and thereafter, but triable questions of fact remain as to whether HIC previously became a party to the Michael Reese contract. The appellate court reversed the summary judgment and remanded for further proceedings.

Federal Rule of Evidence 701 Restricts Lay Witness Opinions; Vicarious Liability Applies to Private Corporations

Feazell v. Wexford Health Sources, Inc., 140 F. 4th 438 (7th Cir. 2025)

Pontiac Correctional Center inmate sued his doctor and the prison's healthcare contractor, Wexford Health Sources, Inc., alleging that Wexford and the doctor were deliberately indifferent to his medical conditions, in violation of the Eighth Amendment. The district judge initially denied the defendants' motion for summary judgment, and the parties consented to proceed before a magistrate judge. The defendants then moved for reconsideration of the summary judgment decision. The magistrate judge agreed that reconsideration was proper and granted summary judgment for Wexford and partial summary judgment for the doctor. Trial was conducted on the inmate's remaining claim against the doctor. The inmate did not call an expert witness to testify to his medical diagnoses or their causes. Instead, the inmate attempted to provide testimony on these matters himself. The court barred him from doing so, and the jury returned a verdict for the defense. The inmate appealed both the magistrate judge's summary judgment decision and the evidentiary rulings.

The Eighth Amendment's ban on "cruel and unusual punishments" obligates prison officials to provide medical care to prisoners in their custody, and deliberate indifference to a prisoner's objectively serious medical condition violates the amendment. Section 1983 supplies a private right of action to prisoners seeking to enforce their Eighth Amendment rights. Because municipalities are not vicariously liable for constitutional torts committed by their employees, plaintiffs who wish to invoke section 1983 against a municipality must prove that a government policy or custom caused their constitutional deprivation. The rule against vicarious liability extends to private corporations, like Wexford, that act under the color of state law.

As to the claims against Wexford, the inmate contended that Wexford's "Collegial Review" policy of scrutinizing external referrals at weekly meetings both denied him appropriate care in the four years before his winter 2018 hospital admission and delayed his surgical care afterwards. Denying or delaying necessary treatment to an incarcerated person suffering from avoidable pain can violate the Eighth Amendment. The inmate, however, never argued in the district court that Wexford's policy caused him to receive deficient care before his winter 2018 hospitalization. Thus, the Seventh Circuit found that the inmate waived the contention. Commenting briefly on the merits, the Seventh Circuit also concluded the inmate failed to demonstrate a genuine issue of fact that Wexford's policy caused a violation of his Eighth Amendment rights.

The inmate also challenged the magistrate judge's entry of partial summary judgment in favor of the doctor. To survive summary judgment on his prehospitalization claim, the inmate had to establish a genuine issue of material fact that the doctor had subjective knowledge of his medical condition before receiving the results of his medical tests. The inmate failed to come forward with either direct or circumstantial evidence of the doctor's knowledge of his medical condition before his testing. Instead, the inmate offered only his medical records, forwarded from prior institutions, which document his medical condition. But without evidence that the standard of care requires reviewing all of a patient's voluminous medical records or that the doctor regularly did so, the inmate's medical records did not create a genuine issue of material fact as to the doctor's knowledge.

The inmate's final challenge was to evidentiary rulings that barred him from testifying to his medical diagnoses and their effects. Federal Rule of Evidence 701 prohibits lay witnesses from offering opinions based on "scientific, technical, or other specialized knowledge" governed by the expert witness rule. The court ruled that the inmate was not qualified to testify about medical causation or diagnosis, meaning his testimony was properly barred. ☐

Welcome

Welcome to the new DCBA members.

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Nathaniel Doro, Mevorah & Giglio Law Offices; **Alek Giecewicz; Tommy Koniewicz,** Rockman, Videbeck & O'Connor; **Danielle Malaty,** Malaty Law; **Abbie McCarthy,** Office of the Public Defender; **Jaime Olson,** City of Naperville; **Clarissa Palermo,** Mevorah & Giglio Law Offices; **Perla Pedroza; Alec Smith,** U.S. District Court; **Tamar Walker.**

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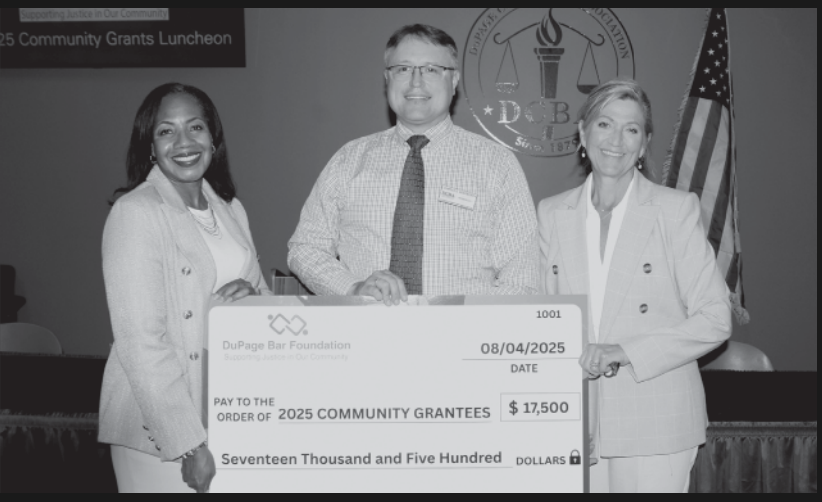
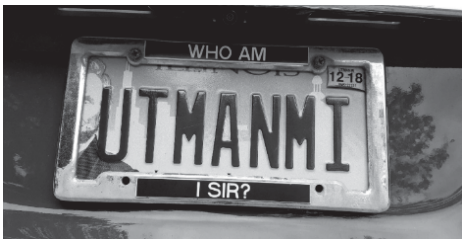


DBF President Louisa Nuckolls, DCBA President Charles Wentworth, Justice Mary Kay O'Brien

President's Message

(Continued from page 3)

finding a solution, even if it isn't everything we want, rather than choosing to continue the fight. It will be because we're able to ask ourselves, when analyzing the problems our communities face, "Is it I?"



As my wife, children, and opposing counsel can attest, I, of course, am ***never*** wrong. And while we should all strive to be so, even I can see that, sometimes, others also have good ideas, too. Those can only be found, though, when we learn to do "what [we were] always going to have to do from the very beginning—sit down and talk!" (*Zygon Inversion*, Doctor Who, 11/7/2015.)

Our board has been asked multiple times recently to comment on things happening outside our county. We have affirmatively decided not to do so. Not because we all agree with what is going on—many of us don't. But even those on the board who disagree with particular policies have not pushed for our association to jump into the fray. We recognize the value that the DCBA has in camaraderie, in friendship, in giving service, and being open and welcoming to all comers. I've heard an LGBTQ member of our community talk about the decision he had to make about whether to move here from Cook County to take a new job. "Ruby-red DuPage? Not likely," he said. (This, of course, was a few years ago.) But he did not follow the instinct that would have kept him from people who were different from him, and our community is much the better for it.

Don't get me wrong. I am not saying that you shouldn't get involved in politics if and when you feel it is important to do so. There is absolutely a role for individuals and organizations to advocate when they think it is necessary and wise. Many people of good faith disagree on many important issues.

But too many people refuse to see "good faith" in those at different points on the political spectrum. They treat every issue as a zero-sum game where their side can only succeed if the other side fails. The antidote for that is to build relationships of trust rather than to constantly throw rocks.

Our board has decided that, at this time, this organization's role is to be a place where we can leave behind at least some of the acrimony that we find in other places to build a community of people who are not defined by the signs in their front yards or the stickers on their bumpers. Where we can find and build community among those whom we might not otherwise choose to associate with because their politics, their religion, or their sports teams are different than ours.

I know that as we all strive to build community. We as an organization will be a source of good in this county, this state, and maybe even this nation. I hope that as other groups see how we keep our community despite our differences, they will come to realize that just because they disagree with others, they need not dispute. That they can see how the measure of our unity is not the degree to which we agree, but the degree to which we are able to get along despite our differences.

I hope you see and experience more of that in the coming year. And I hope that you will join me in making that happen, not just here, but wherever you find yourselves.

And if you want to learn how to do that while fishing, I always have an extra rod, a bobbin, and a vice you can borrow. ☐

DCBA June Unwind

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