

Insurance/Tort Law Newsletter

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INSIDE THIS ISSUE:

News	1
IL Supreme Court Holds That Evidence Of The Decedent's Exposure To Asbestos-Containing Products of Other Manufacturers Was Wrongfully Excluded During Trial	1
IN Appellate Court Holds That "Economic Loss" Doctrine Bars Tort Claim For Damages from Defective Construction	3
IL Appellate Court Extends Recoverable Damages In Actions for "Wrongful Birth"	4
IN Court of Appeals Upholds Trial Court's Ruling That Property Owner Owed No Duty To Injured Subcontractor	5
IL Appellate Court Finds That Tenant Breached Its Duty to Provide Liability Insurance To Landlord Where Coverage Was Provided That Did Not Cover The Landlord For Its Own Negligence	6
IN Allows Into Evidence Discounted Medical Bills Paid	7
IL Appellate Court Refuses to Expand Premises Liability To Parties Who Were Not On Premises But Were Injured By A Condition of The Premises	7

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News

Storrs Downey will be presenting the topic of "Balancing Aggressive Pursuit of Lien Recovery With Associated Litigation Expenses" on August 12, 2009 at the 5th Annual National Workers' Compensation Subrogation Strategies Execu-Summit.

Storrs also recently presented the topic of a comparison between Illinois and Indiana premises liability law to an insurance carrier client.

Illinois Supreme Court Holds That Evidence of the Decedent's Exposure to Asbestos-Containing Products of Other Manufacturers Was Wrongfully Excluded During Trial

In *Nolan v. Weil-McLain*, No. 103137 (April 16, 2009), the Illinois Supreme Court held that in an action seeking damages for injuries and death due to exposure to asbestos-containing products, a defendant who attempts to establish the sole proximate cause defense is entitled to present evidence regarding the exposure of the plaintiff or the decedent to asbestos-containing products of other manufacturers. In so doing, the Supreme Court overruled several Illinois Appellate decisions that had held to the contrary. This is a very important Illinois Supreme Court decision that has ramifications not only for asbestos cases but for other tort cases as well.

Clarence Nolan worked for 38 years as a millwright, plumber, pipefitter and boilermaker. He filed suit against 12 manufacturers of asbestos-containing products, claiming that because of his on-the-job exposure to their products, he developed mesothelioma, a cancerous condition. Clarence died before trial and the action was continued by his wife, as the executor of his estate. Prior to trial, eleven of the defendants settled with Nolan. The trial proceeded solely against Weil-McLean, a manufacturer of boilers that allegedly contained

asbestos products to which Nolan had been exposed over the course of his employment history.

Prior to trial, the plaintiff presented a motion *in limine* to exclude evidence regarding Nolan's exposure to the asbestos-containing products of other manufacturers, including those parties who settled prior to trial. The trial court granted that motion, believing that it was required to do so by prior Appellate Court and Supreme Court decisions. The Appellate Court affirmed the trial court's decision. The Illinois Supreme Court, however, reversed, finding that its prior decisions on this issue had been misinterpreted and that Appellate Court decisions which supported the exclusion of such evidence were erroneous.

In cases involving injuries to asbestos-containing products, plaintiffs face a difficult burden of proving which particular defendant's products caused the injuries, since conditions such as mesothelioma may develop as a result of exposure over many years to various products.

In *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343 (1992), the Illinois Supreme Court addressed the issue of what proof was necessary for a plaintiff to prove causation in asbestos cases. In *Thacker*, the Court held that in order to establish the element of causation in a tort case, causation required proof of both "cause in fact" and "legal cause." In order to establish cause in fact, the Court in *Thacker* stated that there are generally two tests used by courts to determine cause in fact: the traditional "but for" test, under which a defendant's conduct is a cause of an event if the event would not have occurred without it; and the "substantial factor test" where the defendant's conduct is considered a cause of an event, if it was a material element and a substantial factor in bringing the event about. The *Thacker* court further explained that in asbestos injury cases, to meet the "substantial factor" test, the plaintiff must show that the injured worker was exposed to the defendant's asbestos through proof that he regularly worked where the defendant's asbestos was frequently used and the injured worker did in fact work sufficient close to this

area so as to come into contact with the defendant's product.

Appellate decisions subsequent to the Supreme Court's decision in *Thacker* had interpreted the decision as creating a presumption of liability against a defendant where the evidence met the substantial factor test. Thus, prior Appellate Court decisions had held that if a plaintiff met that test, the plaintiff was barred from introducing evidence of the injured worker's exposure to the asbestos products of other manufacturers. The rationale of that approach was that evidence of such prior exposure became irrelevant if the plaintiff established that his or her exposure to the particular defendant's products was a substantial factor in causing his injury or death.

In *Nolan*, the Supreme Court held that the prior Appellate Court decisions applying that rule were wrong and were based upon a misinterpretation of its decision in *Thacker*. According to the Court's decision in *Nolan*, even if the plaintiff's evidence is sufficient to create a question of causation under the substantial factor test with respect to the named defendant's products, that defendant is still entitled to attempt to prove that the sole proximate cause of the plaintiff's injuries or death was in fact exposure to products of other manufacturers. Thus, in this case, the Court concluded that the trial court erred in excluding evidence regarding the details of the decedent's exposure to products of other manufacturers and remanded the case for a new trial.

Practice Tip:

The *Nolan* decision is an extremely important one because it now permits defendants to attempt to "point the finger" at the products of other manufacturers, who may have settled with the plaintiff prior to trial. However, in pursuing such a defense, the defendant would still be required to prove that the sole approximate cause of the worker's injuries were the product or products of other manufacturers. Where the plaintiff presents evidence that the defendant's products were a

“substantial factor” in causing the injuries or death in question, this will still be a difficult burden of proof, but it is one that is now not foreclosed to a defendant. Expert testimony in such cases obviously will continue to be extremely important regarding causation issues.

Indiana Appellate Court Holds That “Economic Loss” Doctrine Bars Tort Claim for Damages from Defective Construction

The economic loss doctrine is a widely litigated defense which prevents a plaintiff from pursuing a defendant in negligence for damages that are solely economic; that is, where there is no personal injury or damage to other property. The rationale behind the doctrine is to maintain the distinction between contract and tort law, and requires a party to seek damages resulting from disappointed expectations in a breach of contract claim.

Indiana has generally recognized the economic loss doctrine, and a recent appellate court decision, *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C. and Thornton Tomasetti Engineers*, 900 N.E.2d 801 (Ind. 2009), indicates that Indiana is moving toward a broader application of the doctrine.

In the late 1990s, Indianapolis-Marion County Public Library (“Library”) began an expansion project for its main facility in Indianapolis, retaining Woolen Molzen and Partners, Inc. (“WMP”) to serve as the architect. WMP thereafter retained Thornton Tomasetti Engineers (“TTE”) to provide structural engineering for the project and also retained Charlier Clark & Linard P.C. (“CCL”) to provide construction observation and reporting services relating to the construction of the parking garage. In February 2004, after completion of the final large concrete pours, the Library discovered major voids in beams and columns and became concerned with the structural integrity of the building. The Library engaged a third party to inspect the parking garage, which found that the garage could be at serious risk for structural failure if construction continued. The Library stopped work on the parking garage, made repairs and

re-commenced work. The Library alleged that it suffered forty to fifty million dollars due to the repairs and construction delays. It sued TTE and CC to recover those damages. It alleged claims for breach of contract, negligence, violation of statutory duties and fraud.

The defendants filed a Motion for Summary Judgment, asking the Court to dismiss the tort claims against them because there was no personal injury or damage that would support a tort claim. The trial court agreed, holding that the economic loss doctrine barred the tort claims. The court found that the economic loss doctrine applied because the alleged damages consisted only of damage to property within the scope of the project itself.

Plaintiff alleged that several exceptions to the economic loss doctrine applied to save its claims. Namely, Plaintiff alleged that the economic loss doctrine applied only to construction activities, not design claims where the designer failed to fulfill certain professional duties. Plaintiff further asserted that the claims should stand because Plaintiff was not in privity with Defendants. The appellate court dismissed these arguments, holding that contract law controls where there is no personal injury or damage to other property, stating “if there is no privity, the economic loss doctrine applies and a third party’s claim against a professional is not favored absent a risk of imminent danger or personal injury.”

The Library also argued that the economic loss doctrine should not apply because there was a risk of danger or personal injury from the unsafe garage. The court rejected this argument, holding that an actual injury, accident or damage was necessary to uphold a claim.

The Library also argued that the economic loss doctrine did not apply because of an exception to the doctrine for claims relating to negligent misrepresentation. The Court found that the Library did not sue on a negligent misrepresentation theory and therefore such a theory could not be used to

sustain the claim. Finally, the Library claimed that the economic loss doctrine did not apply because services, as opposed to tangible property, were supplied. The court also rejected that argument, holding that there was no basis for a “services only” exception to the doctrine.

Illinois courts have reached similar results. In *2314 Lincoln Park West Condominium Assoc. v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346 (Ill. 1990) the court held that solely economic losses are only recoverable under contract law. The case also held that the economic loss doctrine applies even when there is no contract between the parties that provides a basis for recovery in contract. *Lincoln Park West* also recognized the exception to the economic loss rule that allows recovery if the defendant is in the “business of supplying information for the guidance of others in their business transactions.” This exception was not raised in the *Library* case and may be another avenue to be explored in Indiana law.

Practice Tip:

The *Indianapolis-Marion County Public Library* case suggests that Indiana is moving towards a broader application of the economic loss doctrine, preventing plaintiffs from suing in tort for damages that result from a breach of contract. When faced with such claims, parties and their insurers should consider whether the economic loss doctrine provides a defense.

Illinois Appellate Court Extends Recoverable Damages in Actions for “Wrongful Birth”

In 1987 in the case of *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230 (1987), the Illinois Supreme Court recognized a cause of action for “wrongful birth.” A “wrongful birth” action permits the parents of a child who is born disabled or with disabilities to recover the costs associated with treating those disabilities. Parents must prove that due to defendant’s negligence they did not know of the risk of giving birth to a disabled child, and that had they known of that risk, they would not have decided to

have the child. In *Siemieniec*, the Supreme Court only addressed whether those types of damages are recoverable in the case of a minor child.

In *Clark v. Children’s Memorial Hospital*, 907 N.E.2d 49 (1st Dist. 2009), the Appellate Court for the First District held that in wrongful birth cases, parents could recover the cost of caring for their disabled child even after the child reached the age of majority.

The evidence in the case was that plaintiffs’ first son was born with Angelman’s Syndrome, a disorder which causes seizures, behavioral disorders, and mental retardation. Prior to the birth of their second son, the plaintiffs had been informed by their physicians that genetic testing indicated that their first son did not suffer from that disorder. That information, however, was incorrect, as DNA tests had been done which confirmed that plaintiff’s first son did indeed suffer from Angelman’s Syndrome. Plaintiffs alleged that as a result of being advised that their first son did not suffer from Angelman’s Syndrome, they decided to have another child, who was also born with the same condition. Plaintiffs therefore sued for “wrongful birth,” seeking to recover the damages that they would incur in caring for their disabled child during the course of both his minority and his majority.

Defendants argued that since no Illinois statute requires parents to support a child beyond the age of majority, the expenses incurred by the parents to care for a disabled adult child are voluntarily incurred and should not be recoverable. The Appellate court, however, noted that the Illinois Marriage and Dissolution of Marriage Act, permits a court to order parents to provide support of an unemancipated, disabled adult child. Although this case did not involve such a proceeding, the Appellate Court found that the legislative intent provided it with guidance. The Appellate Court concluded that there was no reason why parents of a disabled adult child should be precluded from recovering damages for the support of a disabled adult child caused by “wrongful birth.”

In another aspect of its decision, the Appellate Court also held that the parents had pleaded a valid cause of action for emotional distress in caring for their disabled child. Under Illinois law, to recover for a claim of negligent infliction of emotional distress as a result of an injury to another party, the evidence must show that the party seeking recovery was in the “zone of physical danger” that resulted in the injuries to the other person. In this case, the plaintiffs had alleged that as a result of the injury to their child, they were subject to “hitting, biting and physical trauma” while caring for their son. The Appellate Court held that this was sufficient for the plaintiffs to properly plead a cause of action for negligent infliction of emotional distress.

Practice Tip:

“Wrongful Birth” cases are rare, but the damage potential they present is enormous, making it particularly important that they be vigorously defended and reasonable settlement possibilities pursued.

Indiana Court of Appeals Upholds Trial Court’s Ruling That Property Owner Owed No Duty to Injured Subcontractor

In *Smith v. King*, the Indiana Court of Appeals, 902 N.E.2d 878 (Ind. Ct. App. 2009), held that the project owners did not breach any duty to an injured subcontractor, nor did they assume a duty by nailing a plywood sheet against an opening in the floor. Accordingly, the grant of summary judgment in favor of the project owners was affirmed.

In early 2000, Gerhard and Christine King began construction of a new residence. Gerhard King acted as a general contractor on the project and hired various subcontractors to perform most of the work. Initially, Gerhard visited the project on a daily basis, but this changed to “every other day or every third day” as the construction progressed. The Kings hired Jeffrey Harbrecht to perform the framing and carpentry work, and hired Lake Heating and Ventilating to perform the heating and air conditioning work. Plaintiff, Kenneth Smith, was the owner of Lake Heating and Ventilating.

In June of 2000, Harbrecht had not yet completed the stairs from the residence’s first floor to the basement, leaving an open hole in the floor. Gerhard was concerned about the open hole and nailed a plywood sheet over the opening. In mid-to late-June of 2000, Gerhard instructed Smith to begin installation of the heating and air conditioning system. Smith was told they would not need a key as the residence because the house was not secured yet. When Smith and his employee went to the house, they discovered that the doors were locked and had to climb through an open soffit above a kitchen wall to enter the house. Smith and his employee had to leave shortly thereafter due to a rainstorm. They returned a week later and Smith observed a four-by-eight piece of plywood “lying up against the opening” to the basement. Smith and his employee climbed down a ladder to go into the basement. Smith and his employee returned to the house on July 5, 2000. Smith was using a tape measure over his head and was walking “sideways” when he stepped over the uncovered stairway opening and fell into the basement. The plywood sheet was not in place at the time and Smith sustained severe injuries as a result of the fall.

Smith filed suit against the Kings and Harbrecht for negligence. The Kings moved for Summary Judgment, alleging that as either the owners of the property or the general contractor, they owed no duty to Smith and were not vicariously liable for Harbrecht’s negligence. The trial court entered summary judgment for the Kings, agreeing that the Kings did not owe a duty to Smith either as property owners or as general contractor. Further, the trial court found that the Kings were not vicariously liable for Harbrecht’s negligence, and that the Kings had not assumed a duty to Smith. Smith appealed the trial court’s entry of summary judgment.

The Appellate Court affirmed the trial court’s ruling that as landowners the Kings had no duty to furnish a safe place to work to a subcontractor, *citing Merrill v. Knauf Fiber Glass*, 771 N.E.2d 1258 (Ind. Ct. App. 2002). However, the Kings did owe a duty to keep the property in a reasonably safe condition for Smith and his employees.

Restatement (Second) of Torts §343 (1965). The Kings had a duty to Smith and his employees if they knew of, or in the exercise of reasonable care, would have discovered a dangerous condition and also realized that it involved an unreasonable risk of harm to Smith that Smith probably would not discover. However, Smith's deposition testimony established that he visited the job site before the day he was injured and accessed the basement by using a ladder to descend into the basement through the same hole he fell through the next day. The Appellate Court found that the Kings owed no duty to Smith, as the danger was known and obvious to Smith. Specifically, the evidence did not support a reasonable inference that the Kings should have anticipated that Smith would fall through the hole while measuring over his head.

The Appellate Court also found that Gerhard King, in his role as general contractor, did not have a duty to assure Smith a safe workplace, citing the general rule that a general contractor owes no duty and is not liable for the negligence of an independent contractor.

Finally, the Appellate Court upheld the trial court's ruling that King did not assume a duty to Smith when he covered the hole with plywood. To assume such a duty, King would have had to perform activities such as holding regular safety meetings or inspection of the job site on a daily basis, which he had not done.

Practice Tip:

In defending a personal injury claim of a subcontractor, carefully consider whether the property owner is also the general contractor. Depending on the facts, the property owner/general contractor may not owe a duty to the injured subcontractor, such that summary judgment is proper.

Illinois Appellate Court Finds That Tenant Breached Its Duty To Provide Liability Insurance to Landlord Where Coverage Was Provided That Did Not Cover The Landlord For Its Own Negligence

Leases and other commercial agreements frequently require one party to obtain insurance coverage for another. If the coverage provided is not as broad as is required by contract, the providing party may be liable for breach of contract. The critical consideration in such cases is precisely what type of insurance coverage was required by contract.

This issue was examined recently by the Illinois Appellate Court in *Clarendon American Insurance Company v. Prime Group Realty Services*, 389 Ill. App. 3d 724, 907 N.E.2d 6 (Ill. 1st Dist. 2009). In that case, Ala Carte Entertainment leased space from Prime Group in which it operated a restaurant. The lease agreement required Ala Carte to obtain comprehensive general liability insurance naming the landlord as an additional insured. Further, the lease required that "all losses shall be payable notwithstanding any act or negligence of tenant or landlord . . ." Pursuant to the lease agreement, Ala Carte did procure CGL coverage naming Prime Group as an additional insured. However, the policy contained an endorsement that excluded coverage to an additional insured for "its own acts or omissions."

An employee of Ala Carte was injured while attempting to repair a rooftop heating/air conditioning unit. The employee sued Prime Group for his injuries. Clarendon American Insurance Company, which provided the CGL coverage under which Prime Group was an additional insured, filed a declaratory judgment, claiming that its policy did not apply because Prime Group was sued for its own negligence. Prime Group then sued Ala Carte for breach of contract, claiming that if the coverage did not cover Prime Group for its own negligence, Ala Carte had not obtained the type of coverage that it was required to obtain pursuant to the lease agreement.

The trial court granted summary judgment in favor of both Ala Carte and Clarendon in consolidated actions, and Prime Group appealed.

On appeal, the Appellate Court held that the critical issue was what type of insurance coverage was

required by the lease agreement. Focusing on the language of the lease that required coverage that would cover “all losses notwithstanding any act or negligence of tenant or landlord,” the court concluded that the required coverage must extend to claims of negligence by either the landlord or the tenant and that by procuring coverage which did not cover the landlord for its own negligence, Ala Carte had breached its contractual duties to Prime Group. Accordingly, the Appellate Court reversed the entry of summary judgment in favor of Ala Carte and remanded with directions that the court enter summary judgment in favor of the landlord and against Ala Carte.

Practice Tip:

This case illustrates the care that must be exercised when one party is required to obtain insurance coverage for another. In that situation, the party under the duty to procure insurance coverage must make sure that it obtains insurance coverage that complies with its contractual obligations. If it fails to do so, it may be found liable for breach of contract, which would require it to cover the damages that should have been covered by the required insurance coverage.

Indiana Allows Into Evidence Discounted Medical Bills Paid

The Indiana Supreme Court has recently held that the amount of paid medical bills, may now be introduced into evidence, *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009). For the first time such evidence may be offered and used to show the reasonableness of the medical bills which the plaintiff incurred.

At trial, plaintiff offered in medical bills totaling \$11,570. At the conclusion of plaintiff’s testimony, defendant sought to offer in the discounted, actual total of \$6,820 in bills paid by plaintiff’s insurance carrier. The plaintiff objected on the grounds that the evidence on discounted bills violated the Indiana collateral source statute, Ind. Code §34-44-1-2. The trial court sustained plaintiff’s objection, holding that this statute barred introduction of anything flowing

from an insurance benefit paid for by the plaintiff. The Appellate Court affirmed.

In overturning the lower court decision, the Supreme Court noted that “the proper measure of medical expenses in Indiana is the reasonable value of such expenses” and not the actual charge. There are various ways defendant may establish the reasonableness of such bills including eliciting testimony from witnesses as to the reasonable value of services and pursuant to the result in *Stanley* also introducing evidence as to the discounted amounts of medical bills.

In Illinois, a plaintiff may offer evidence of the total billed amount of bills and the defendant may then challenge the reasonableness of the billed amount. *Arthur v. Catour*, 833 N.E.2d 847 (Ill. 2005). Evidence of discounted bills is not admissible.

Practice Tip:

In defending a personal case in Indiana it is important to obtain full documentation not only of the total medical bills but also the actual discounted amount of the medical bills paid.

Illinois Appellate Court Refuses To Expand Premises Liability To Parties Who Were Not On Premises But Were Injured By A Condition Of the Premises

In *Nelson v. Aurora Equipment Company*, No. 2-08-0186 (Ill. App. May 29, 2009), a case of first impression in Illinois, the Plaintiff asked the Appellate Court to extend duty in a premises liability case to a person who did not have contact with the premises, but who was allegedly injured by asbestos fibers and dust that escaped from the premises. The deceased Plaintiff’s husband and son worked for Defendant, which allegedly exposed both of them to asbestos fibers in its steel manufacturing operation. Plaintiff’s estate claimed that asbestos fibers and dust in their clothing was inhaled by the decedent. She contracted mesothelioma and colon cancer, which caused her death. Throughout its opinion, the Court appeared

to express some surprise that Plaintiff’s only theory against Aurora was a cause of action for premises liability. The Court did consider itself as being constrained to decide the case under premises liability principals. The Appellate Court affirmed an order of the trial court granting summary judgment to Defendant, which found that no duty existed between Aurora and the deceased Plaintiff. The opinion dealt with an analysis of whether a duty existed on the part of Aurora to the decedent under the facts alleged.

The materials before the Court made it clear that general premises liability concepts did not fit the case, as the decedent was not an entrant on Defendants land. Further, Assuming Plaintiff came into contact with asbestos fibers, those fibers and dust were no longer a condition on Defendant’s premises.

In affirming the trial court’s finding that there was no duty, the Appellate Court stated that a duty analysis must necessarily start with whether or not there was a special relationship between Plaintiff and Defendant. In this case, Plaintiff argued that if four factors were present, a relationship between Plaintiff

and Defendant need not be found in order for a cause of action to be stated. Those four factors are foreseeability, likelihood of injury, magnitude of guarding against the injury and the consequences of placing the burden upon the Defendant. The Appellate Court firmly rejected Plaintiff’s argument that a prior relationship was no longer a factor of a duty analysis. Plaintiff conceded that the decedent had no relationship with Aurora’s premises. The Court noted that under these circumstances, it could not rewrite the law of premises liability. The Court stated that in this case, Plaintiff pursued only a premises liability theory, which required that Plaintiff either be an entrant onto Defendant’s premises or otherwise have some special relationship with Defendant.

Practice Tip:

It should be carefully noted that this case involved only the issue of premises liability. The Court’s opinion clearly left open the possibility that other causes of action might be alleged by Plaintiff which could, if proved, entitle her to recovery.

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients’ expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Merrillville, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov LLC is able to serve its clients’ needs with a regional concentration while maintaining a national practice. Our practice areas include:

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The attorneys at Bryce Downey & Lenkov constantly strive to keep you updated regarding the latest developments in Insurance and Tort law in Illinois, Indiana and other states. If you would like more information on any of the topics discussed above or have any questions regarding these issues, please contact Storrs W. Downey (sdowney@brycedowney.com) or Terrence J. Madden (tmadden@brycedowney.com) at 312.377.1501 or any member of our General Liability team. © Copyright 2009 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.

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