

Insurance/Tort Newsletter

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Employer Still Obligated to Pay Statutory Fees When "Selling" or "Assigning" A Workers' Compensation Lien

The 1st District Appellate Court in Illinois recently held that an employer that was named as a third-party defendant in a personal injury action brought by its injured employee was still required to pay statutory attorney fees and expenses to an employee under section 5(b) of the Workers' Compensation Act despite the fact that it assigned its workers' compensation lien to the direct defendants in exchange for dismissing the third-party claims against the employer. *Evans v. Doherty Construction, Inc. et al*, 2008 WL 1868911 (1st Dist. 2008). This case precludes employers from avoiding their statutory obligation by selling, rather than waiving, a workers' compensation lien.

In the *Evans* case, the plaintiff suffered a work-related accident and brought suit against various defendants for personal injuries arising from the incident. Plaintiff's employer, Atash, paid workers' compensation benefits in the amount of \$152,000 to plaintiff and asserted a lien pursuant to Section 5(b) of the Workers' Compensation Act against any proceeds collected by the plaintiff. 820 ILCS 305/5(b) (West 2006). Prior to trial, the defendants reached a settlement with Atash in which they agreed to purchase its workers' compensation lien for \$90,000 and dismiss the third-party claims against Atash. The defendants then settled with the plaintiff for \$650,000, from which the amount of the lien was to be subtracted. The plaintiff then moved for an order requiring Atash to pay its statutory 25% share of the \$90,000 settlement received by Atash and a pro rata share of the expenses of the plaintiff associated with that settlement. Plaintiff claimed that Atash had received "reimbursement" for its lien. Atash argued that it merely sold its lien rights and had not received reimbursement for its lien.

The plain purpose of Section 5(b) of the Workers' Compensation Act is to require the employer to contribute to the necessary costs of the employee's recovery where the employer is to receive reimbursement for compensation made to the employee. Section 5(b) requires an employer to pay, out of any reimbursement received from the employee, its *pro rata* share of the employee's costs and expenses and, unless otherwise agreed, 25% of the gross amount of the reimbursement as fees to the employee's attorney. The employer in the *Evans* case was ordered to pay its *pro rata* share of the expenses that were calculated to be \$67,500 and its statutory 25% attorney fees amounting to \$22,500.

Employer Atash's assertion that the amount it received from defendants was not "reimbursement" under the Act on the basis that it was received for a lien assignment, was rejected by the Court, which found that receiving a repayment or compensation for monies spent still qualifies as "reimbursement" under Section 5(b). Furthermore, the fact that the employer was dismissed from the action before the remaining defendants obtained settlement with the plaintiff also did not affect the employer's statutory obligation to pay attorney fees and expenses to the plaintiff, as the Act provided no such time limitation.

No other Illinois Appellate District has yet adopted the findings of the First District but the Court's decision is consistent with the statutory language and intent and will likely be followed.

To avoid the possible circumstances in *Evans* an employer might be able to agree with the defendants to receive back up to a certain amount of its lien depending upon the ultimate settlement or amount paid out by the defendants.

U.S. Supreme Court Concludes that 42 U.S.C. § 1981 Encompasses Employment-Related Retaliation Claims

A terminated African-American employee sued his former employer, alleging that the employer dismissed him because he is black and because he complained to managers that a black co-employee was also dismissed for race-based reasons. The employee filed suit charging that his employer's actions violated both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, the latter of which gives "[a]ll persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens." The U.S. Supreme Court granted certiorari and in a 7-2 decision, held that retaliation actions are encompassed by Section 1981 retaliation, that viable employment-related actions exist in the form of claims by individuals who suffer retaliation for having tried to help others and that cognizable section 1981 retaliation claims include employment actions. *CBOCSWEST, INC. v. Humphries*, __ S.Ct. __ 2008 WL 2167860.

The Court rested its conclusion in significant part upon *stare decisis* principles, ultimately rejecting the employer's argument that "retaliation" is not expressly included in Section 1981's plain text. The Court concluded that there is no need to include explicit retaliation language when *stare decisis* considerations strongly support the Court's view that section 1981 encompasses retaliation claims. The Court explained it has long interpreted Sections 1981 and 1982 alike since they were enacted together, have common language, and serve the same purpose of providing African American citizens the same legal rights as enjoyed by other citizens. The Court further recognized that the Federal Courts of Appeal have uniformly interpreted section 1981 as encompassing retaliation actions.

The Court also rejected the employer's argument that applying section 1981 to employment-related retaliation actions would create an overlap with Title VII, allegedly allowing a retaliation plaintiff to circumvent Title VII's detailed administrative and procedural mechanisms and thereby undermine their effectiveness.

Employers will now need to be even more aware and careful of the potential legal ramifications of the disciplinary actions they take against minority employees, as they affect not only the disciplined employee, but other minority employees adversely affected by such actions.

An Insurer Need Not Prove Common Law Fraud Element of Reasonable Reliance and Resulting Prejudice When It Denies Coverage On the Basis of a "Concealment or Fraud" Exclusionary Clause

In a recent Illinois Supreme Court decision, the insurer, State Farm, denied coverage for plaintiff's fire loss claim, relying on an exclusionary clause in the plaintiff's homeowner's policy which voids the policy when the insured intentionally conceals or misrepresents a material fact relating to the insurance. *Barth v. State Farm Fire and Cas. Co.*, 2008 WL 733897(Ill. 2008). Plaintiff filed a complaint against State Farm in the circuit court of Sangamon County seeking damages after the denial of coverage. The plaintiff was unsuccessful at the trial court level. On appeal, he complained that the common law fraud elements should have been included when the jury was instructed on the exclusionary clause at issue. The appellate court rejected his argument, as did the Illinois Supreme Court.

The Supreme Court in *Barth* held that the insurer was not required to prove the common law fraud element of reasonable reliance and resulting prejudice. As a basis for its holding, the Court relied on the following factors: the policy's exclusionary cause did not attempt to define common law fraud, the term "fraud" was used only in the title and not in the text of the exclusionary clause, and nothing in the text of the exclusionary clause purported to rely on common law fraud definitions.

The Supreme Court also held that the circuit court judge did not have to recuse himself merely because he also had State Farm insurance. The verdict for the insurer was upheld as it was not against the manifest weight of the evidence.

Agreement to Indemnify Another From “Any And All Claims” Provides Indemnification for Indemnitee’s Own Negligence

In the Illinois Supreme Court decision *Buenz v. Frontline Transportation Co. et al.*, 227 Ill.2d 302, 882 N.E.2d 525 (2008), the widower of a passenger who died as a result of a multiple-vehicle collision involving a tractor-trailer, brought a wrongful death action alleging negligence against the owner of the trailer and the carrier that was operating the trailer at the time of the accident. The owner, Cosco, filed a counterclaim against the carrier, Frontline, seeking declaration that Frontline was obligated to indemnify Cosco under an “equipment interchange agreement.” The Court in *Buenz* held that the equipment interchange agreement provided indemnification for the owner’s negligence, overruling the Illinois appellate court decision *Karsner v. Lechters Illinois, Inc.*, 331 Ill.App.3d 474, 771 N.E.2d 606 (3rd Dist. 2002).

The equipment interchange agreement at issue provided that the carrier indemnify the trailer owner of “any and all claims ... arising out of ... the possession, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of [owner].” The Court found that the contract contained no limiting language to suggest that the indemnity provided was not intended to cover claims resulting from Cosco’s own negligence. As such, the Court found that the express language of the interchange agreement entered into between Frontline and Cosco clearly and explicitly provided indemnification for Cosco’s own negligence pursuant to the rest of the contract terms. The Court further emphasized that it is not simply the use of the phrase “any and all” that determines whether a particular contract provides indemnification for an indemnitee’s own negligence, but rather, the phrase must be read in the context of the entire contract, and if the contract warrants it, the use of the phrase “any and all” may indicate that the parties intended an indemnitee be indemnified, even for the indemnitee’s own negligence.

The Court in *Buenz* acknowledged that the Construction Contract Indemnification for Negligence Act voids any agreement in a construction contract to indemnify or hold harmless a person from that person’s own negligence, but the Court noted that the statute did not apply to the facts of the case since it did not involve a construction project. Accordingly, the Court held that without the existence of a statutory provision to the contrary, contracts that clearly and explicitly provide indemnity against one’s own negligence are valid and enforceable.

Court May Consider Facts Beyond Those Stated In The Complaint In Determining Duty To Defend Issues

Plaintiff, Caroline Cogtella, brought suit in Cook County, Illinois for personal injuries that she allegedly sustained as a result of her exposure to undiffused fluorescent lighting in the building where she worked. Among the defendants that were sued was Holabird & Root, the architect for the building, which had selected the type of lighting to be installed. Metrick Electric Company was the electrical subcontractor for the project, but it was not sued by Ms. Cogtella. However, a third-party action was filed by DePaul University, which was also a defendant in the suit, against Metrick, claiming that plaintiff’s alleged injuries were due to Metrick’s actions in installing the lighting.

Metrick was insured by American Economy Insurance Company. Holabird & Root, DePaul and the general contractor for the building were all named as additional insureds under Metrick’s policy. The additional insured coverage extended to liability “arising out of” Metrick’s work.

As the personal injury suit progressed, Holabird tendered its defense to American Economy, claiming that it was entitled to coverage under the additional insured endorsement of Metrick’s policy. American Economy denied coverage, claiming that plaintiff’s complaint did not allege any involvement by Metrick. Holabird claimed, however, that the court should also consider the allegations of the third-party complaint that had been filed against Metrick in determining whether there was a duty to defend plaintiff’s complaint. The trial court agreed and granted summary judgment in favor of Holabird. The Illinois Appellate Court affirmed in *American Economy Insurance Company v. Holabird & Root*, WL 919690 (1st District 2008). In addressing the issue, the Appellate Court stated that in resolving coverage issues, courts generally first look at the allegations of the complaint that is directed against the party seeking coverage. However, the appellate court found that a trial court should be able to consider all of the relevant facts contained in the pleadings, including a third-party complaint, to determine whether there is a duty to defend. According to the appellate court, a trial court “need not wear judicial blinders” in addressing the duty to defend.

Court May Consider ... *continued*

In the context of additional insured coverage issues, this decision is significant because claims against additional insured parties often do not allege the type of involvement or wrongdoing by the named insured that is often a prerequisite to coverage for the additional insured. Although many decisions have held that the failure to allege any wrongdoing or involvement by the named insured is fatal to an additional insured's claim for coverage, this decision would modify that result if there are other pleadings on file that do allege facts that would trigger coverage for the additional insured.

Improper Exclusion Of Evidence Of Plaintiff's Intoxication At Time Of Accident Results In Reversal Of 26 Million Dollar Verdict.

Plaintiff, Margaret Petraski was severely injured in an intersectional collision with a Cook County Sheriff's police officer. The officer was responding to an emergency, driving east bound at 75 miles per hour, with her emergency lights and siren allegedly on. She drove through a red light at the intersection and collided with the plaintiff's car, which was going west on the same street and which was in the process of making a left hand turn. Plaintiff's expert testified that plaintiff was turning on a left turn arrow. The jury found for plaintiff and awarded damages in excess of 26 million dollars.

The trial court excluded any evidence of plaintiff's alleged intoxication at the time, finding that the evidence regarding her alleged intoxication was too speculative to be admissible. Defendant's expert pharmacologist, James O'Donnell, was prepared to testify that a blood sample taken one and a half hour after the accident showed a blood alcohol level of .08, which is the statutory presumptive level of intoxication in Illinois. O'Donnell further would have testified that based on retrograde extrapolation, plaintiff's alcohol level at the time of the accident would have been from .116 to .120. O'Donnell further opined in his deposition that such a blood level would have impaired plaintiff's depth perception, peripheral vision and ability to judge speeds. He admitted that he could not opine that plaintiff's intoxication contributed to the accident, but testified that the overwhelming majority of drivers would have had impaired abilities to drive with that level of intoxication.

Defendant appealed the judgment, claiming that the evidence of plaintiff's intoxication was relevant and should have been admitted. Plaintiff argued that evidence of intoxication was properly excluded because there was no evidence that it caused an impairment of functions that contributed to the accident. In *Petraski v. Theodos*, No.1-06-2914 (1st Dist, March 3, 2008), the Illinois appellate court held that the evidence was improperly excluded and therefore reversed the verdict and remanded the case for a new trial. The court stated that evidence of alcohol consumption alone is inadmissible absent other evidence of intoxication, but noted that under Illinois law a level of .08 or more creates a presumption that the person is driving under the influence of alcohol. The court reasoned that the evidence might have explained why plaintiff turned in front of an oncoming police vehicle with its emergency flashers and siren operating.

This case does not establish new law, but is valuable in explaining the rules governing the admission of drinking and intoxication. Where there is evidence of a blood level of .08 or higher, the applicable statute creates a presumption that the person was driving under the influence, and this is enough by itself to render the evidence admissible. Levels between .05 and .08 do not give rise to that presumption but may be considered by the jury if there is other evidence, such as erratic driving, that the driver was under the influence of alcohol. Levels less than .05 support a presumption that the driver was not under the influence.

Woman Cannot Sue For Wrongful Death of Voluntarily Aborted Fetus

In a recent case before the Illinois Supreme Court, a woman injured in a motor vehicle collision filed a lawsuit under the Wrongful Death Act against the defendant for the death of her unborn fetus as a result of her decision to abort the fetus following the accident. *Williams v. Manchester*, 2008 WL 879036 (Ill. 2008). The defendant moved for summary judgment, arguing that the accident was not the cause of the fetus' death; rather, the defendant contended that the baby's death was the result of the plaintiff's voluntary decision to terminate her pregnancy.

Woman Cannot Sue ... *continued*

At the hospital following the accident, the physicians informed the plaintiff that she did not suffer a spontaneous abortion as a result of the collision and the baby was not injured. Plaintiff had a viable pregnancy that could have gone to term; however, the physicians informed the plaintiff that she, herself, suffered a broken hip and pelvis and that her treatment might be a threat to the baby as a result of medications administered to the plaintiff and from radiation exposure. The plaintiff, therefore, decided to terminate the pregnancy.

The trial court entered summary judgment in favor of defendant, but a divided panel of the appellate court reversed. The Illinois Supreme Court reversed the appellate court's ruling, finding that the appeals court majority failed to apprehend the statutory nature of a Wrongful Death action. The Court stated that to pursue a Wrongful Death action, the plaintiff must prove that the decedent had sustained an injury that he or she could have pursued, had death not occurred. The Court concluded that the record did not establish that threshold requirement because the evidence was that the fetus was not injured in the collision. The defendant's alleged negligence did not cause any injury or death to the fetus, as required by the Wrongful Death Act. The plaintiff's termination of her pregnancy was the actual cause of the baby's death.

"Workplace Bullying" in Indiana

The Indiana Supreme Court recently affirmed the trial court's ruling to allow expert testimony characterizing defendant's conduct as "workplace bullying" and to deny the defendant's tendered jury instruction that the phrase "workplace bullying" was irrelevant to the plaintiff's claims. *Raess, M.D. v. Doescher*, 883 N.E.2d 790 (Ind. 2008).

In *Raess*, plaintiff perfusionist (the person who operates the heart/lung machine during open heart surgeries) brought an action against defendant heart surgeon Doescher, seeking compensatory and punitive damages for assault, intentional infliction of emotional distress, and tortious interference with employment following a verbal altercation at St. Francis Hospital in Beech Grove, Indiana. The jury trial resulted in a verdict against the defendant and an award of \$325,000 in damages. Defendant appealed the decision and the Court of Appeals reversed and remanded for a new trial, finding that the defendant was unfairly prejudiced by plaintiff's expert testimony characterizing the outburst as "workplace bullying" and by the refusal of defendant's related jury instruction.

The Court held that the trial court did not abuse its discretion in refusing to tender defendant's instruction on workplace bullying, which told the jury the phrase was irrelevant to the plaintiff's claims. The basis for the majority's finding was that the phrase "workplace bullying" was like any other general term used to characterize a person's behavior and was appropriate for the jury to consider whether defendant assaulted plaintiff or committed intentional infliction of emotional distress.

The *Raess* decision stops short of defining the term "workplace bullying" and leaves open questions about whether the term is prejudicial or not. With the *Raess* decision, we could potentially see an increased usage of the term "workplace bullying" by plaintiffs as a means of showing intentional infliction of emotional distress in the employment context.

We have not seen any cases yet in Illinois that have addressed this interesting topic to date.

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