

Insurance/Tort Law Newsletter

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News/Events

Terry Madden was recently successful in representing one of our insurance company clients in a hearing before the Illinois Department of Insurance. Our client issued a Worker's Compensation insurance policy to a trucking company. At the conclusion of the policy period, the insurer conducted an audit of the insured's books and records and determined that it was entitled to collect an additional premium based upon amounts paid to truck drivers who drove for the company. The insured filed a complaint against our client with the Illinois Department of Insurance, claiming that the additional premium was improper since the truck drivers for whom an additional premium was charged were actually independent contractors. Terry successfully argued on behalf of our client that under the terms of the insurance policy, the assessment of additional premiums was proper regardless of whether the truck drivers were employees or independent contractors, since their services for the insured raised the potential for Worker's Compensation actions being filed against the insured.

Evidence Challenging Medical Necessity Barred In Indiana

In a potentially far reaching decision, the Indiana Supreme Court recently held that a defendant is precluded from presenting any evidence challenging the necessity of treatment rendered to a plaintiff by his chosen medical providers. *Sibbing v. Cave*, 922 N.E.2d 594 (Ind. App. 2010).

The defendant attempted to present deposition testimony from its medical expert that a nerve conduction study and multiple medical visits conducted over a one month period, and all provided more than four weeks after an auto collision, were unnecessary. The trial court sustained plaintiff's objection, precluding such

medical opinion testimony, and both the Appellate and Supreme Courts affirmed this ruling.

The *Sibbing* court acknowledged the long-standing rule that plaintiff must establish that medical expenses are both “reasonable and necessary” but noted that the few prior appellate court decisions which had addressed the “necessary” component had not provided any detailed analysis of same.

In taking on this issue, the Court stated that “the nature and extent of the claimed medical treatment must be necessary.” The court found that a plaintiff still must establish a causal link between one’s injury and associated medical care and a defendant could present evidence challenging whether such treatment was necessitated by the accident. However, in citing favorably from the Appellate Court decision in *Whitaker v. Kruse*, 495 N.E.2d 223 (Ind. App. 1986), the court held any challenge as to the extent and appropriateness of particular care is not admissible.

Further, a plaintiff will be entitled to recover for unnecessary medical treatment which is related to the accident. The defendant may not “dispute the medical judgment of plaintiff’s medical providers in choosing to administer the questioned studies and treatment.” 922 N.E.2d at 604.

This decision could result in absurd and outlandish jury verdicts, such as when an individual treats for long unnecessary periods of time with a medical mill or undergoes low back surgery for no more than a minor low back strain. Under *Sibbing*, the defendant would be barred from presenting evidence that such surgery was not medically warranted or necessary.

Practice Pointer:

It is hoped that future Indiana court decisions will carve out exceptions to the *Sibbing* decision, but in the meantime an even greater emphasis on the medical causation defense will need to be employed.

Illinois Supreme Court Holds That In Certain Circumstances A Court May Consider Facts Beyond Those Pleaded In the Complaint To Determine The Duty To Defend

The well-established and long-standing rule in Illinois is that in assessing whether an insurer has a duty to defend a particular complaint, the court should look solely to the factual allegations of the Complaint to determine whether or not it alleges a claim that is covered or potentially covered. In *Pekin Insurance Company v. Wilson*, No. 108799 (Ill. May 20, 2010), however, the Illinois Supreme Court held that in certain circumstances a court should consider facts in addition to those pleaded in the Plaintiff’s own complaint to determine whether the insurer is under a duty to defend.

The *Pekin* case arose from a situation in which the underlying Plaintiff, Johnson, claimed that he was beaten by Jack Wilson, a Pekin insured, with a pipe. Johnson’s Complaint alleged causes of action for assault, battery, intentional infliction of severe emotional distress and negligence. Wilson filed an answer to the Johnson complaint in which he alleged that he was acting in self defense when he hit Wilson with the pipe. Pekin, Wilson’s insurer, filed a declaratory judgment action, claiming that the allegations of the Johnson Complaint involved an intentional act, excluded by the intentional act exclusion of its policy. It argued that the negligence claim in the Johnson Complaint was simply a restatement of the allegations of intentional conduct and were not sufficient to trigger the duty to defend. The trial court agreed with Pekin and granted judgment on the pleadings in its favor. The Illinois Appellate Court reversed that decision and the Illinois Supreme Court affirmed.

The issue before the Supreme Court was when, if ever, a court may consider allegations beyond those set forth in the Plaintiff’s own Complaint in assessing the duty to defend. As to the case before it, the Illinois Supreme Court concluded that the negligence claim of the Johnson Complaint was not sufficient to avoid the application of the intentional act exclusion because it was nothing more than a restatement of the intentional act claim with a

different label. However, the Supreme Court further concluded that the allegations of Wilson's counterclaim, in which he raised the issue of self defense, were sufficient to trigger Pekin's duty to defend. Although the Pekin policy included an intentional act exclusion, the exclusion also included an exception where the insured was acting in self defense. The Supreme Court concluded that it was proper for a court to consider allegations beyond the facts pleaded in the Plaintiff's own Complaint, to assess coverage. The Court noted that the situation involved an unusual and compelling situation in which a plaintiff would virtually never plead allegations sufficient to fall within the exception to the exclusion. A plaintiff, for example, could not be expected to ever plead that the defendant was acting in self defense at the time of an alleged assault. Unless a court considers facts beyond those pleaded in a plaintiff's own complaint, the Supreme Court noted that this coverage would become virtually illusory.

Practice Pointer:

The *Pekin* case does not abolish the general rule that the duty to defend is generally determined by looking to the allegations of the Complaint itself. However, in certain unusual and compelling circumstances, a court may consider allegations beyond those pleaded in the Plaintiff's Complaint in determining whether an insurer is under a duty to defend. Those situations are generally those in which the facts that would trigger coverage are of a nature that the plaintiff would have no reason or incentive to plead them in a complaint.

Illinois Appellate Court Holds That Plaintiff's Settlement With Alleged Principal Bars Claim Against Principal Despite Attempt To Preserve Claim In Settlement Documents

While driving a furniture delivery truck owned by his employer, the driver crossed the center line, striking the plaintiff's vehicle. The plaintiff brought suit against the driver, his employer, and the furniture company, Harlem, for whom the delivery was being made pursuant to contract. The employer's insurer settled with the plaintiff within the limits of coverage

in exchange for a covenant not to enforce judgment against the employer or driver. Harlem then moved for summary judgment, arguing that any vicarious liability on its part was extinguished by the settlement. The trial court granted the motion, and in *Gibbs v. Top Gun Delivery*, 2010 WL 1033052 (Ill. 1st Dist. 2010) the First District Appellate court affirmed. The court first found that any liability on the part of Harlem was based upon *respondeat superior*, and not on any fault of its own. Recognizing that Harlem had a potential third party cause of action against the employer and its driver for indemnity, the court found that the settlement between the plaintiff and the employer and its driver must extinguish Harlem's vicarious liability. Otherwise, the court held, the employer's and driver's personal assets would be at risk following the conclusion of the case, depriving them of the benefit of their covenant with the plaintiff.

Indiana Appellate Court Recognizes Cause of Action for Third-Party Spoliation Of Evidence

Although Indiana courts have held that first party spoliation of evidence is not recognized as an independent cause of action, third-party spoliation claims are available. First party spoliation occurs when a party to a tort case fails to preserve evidence. Third party spoliation occurs when a non-party loses or destroys evidence. In *Howard Regional Health System v. Gordon*, 2010 WL 1524870 (Ind. App. April 16, 2010) a medical malpractice action was brought against the hospital, health center and doctor who delivered Ms. Gordon's baby via cesarean section. When the hospital responded to an evidence request by affidavit, stating some of the evidence of her treatment in the hours leading up to the C-section was missing, Gordon filed a spoliation claim.

The trial court granted partial summary judgment for Gordon on the spoliation claim, finding that the hospital had a duty imposed by statute to maintain its medical records (Ind. Code §16-39-7-1), and breached that duty. Affirming the lower court, the appellate court held that violation of the code section was negligence *per se*, affording

Gordon a private cause of action. Denying the hospital's claim that the sanctions authorized by the code for violations thereof amounted to an administrative remedy, the court instead held that those sanctions would be "wholly ineffectual" to remedy the harm suffered by Gordon if the loss of records made it impossible to bring or prove her malpractice action. *Id.* at 6-7.

In this case, even though the hospital was a defendant in the malpractice case, its loss of the evidence amounted to third party spoliation because the missing evidence made it impossible for the plaintiff to prove her action against other parties. Indiana has refused to recognize a cause of action for first party spoliation of evidence because in such cases the trial court can enter appropriate sanctions against the responsible party, including a default judgment. Those sanctions are not available against a third party, who is not before the court, which is why an independent cause of action is recognized in those cases.

Illinois Appellate Court Holds That Employee Exclusion Bars Additional Insured Coverage

James McHugh Construction Company was named as an additional insured under liability policies of two of its subcontractors. After two McHugh employees filed suits against the subcontractors, the subs filed contribution actions against McHugh. McHugh tendered its defense of those claims to the general liability insurers of the subcontractors, claiming that it was entitled to coverage as an additional insured under each of the policies. Zurich, the insurer, filed a declaratory judgment action, claiming that McHugh's additional insured coverage did not apply to the contribution claims because they were barred by the employee exclusion, as both of the underlying plaintiffs were McHugh employees. The trial court granted Zurich's motion for judgment on the pleadings and the Appellate Court affirmed.

The issue in the case, *McHugh Construction Company v. Zurich American Insurance Company*, No. 1-09-2135 (Ill. 1st Dist. April 13, 2010), was whether the employee exclusion applied only to claims against the named insured or applied to claims

against all insureds. McHugh argued that the term "the insured" in the employee exclusion applied only to claims against the named insured but not to claims against other insureds. McHugh argued that the term "the insured" was not defined in the policy and was therefore potentially ambiguous and should be construed in favor of coverage. The Appellate Court rejected that contention, finding that the term "the insured" was clear even though it was not defined in the policy. The term refers to any party seeking coverage.

Practice Pointer:

In any case in which a party is claiming coverage as an additional insured, the insurer should consider the possible application of the employee exclusion to such claims.

Illinois Appellate Court Holds That "Contact Sports Exception" to Negligence Claims Does Not Apply to Spectators

In *Pickel v. Springfield Stallions*, 2010 WL 1205959 (Ill. 4th Dist. 2010) the Illinois Appellate Court for the Fourth District drew a distinction between participants and spectators in establishing the duty owed at sporting events involving contact sports. Plaintiff, a spectator at an indoor football game, brought a negligence action against the club and league after being injured when a player ran out of bounds, cleared a separating wall and collided with her. The trial court granted the defendants' motion to dismiss, citing the Illinois "contact sports exception," whereby participants in a contact can recover only for willful and wanton conduct. The appellate court reversed. The court first recognized the distinction between the willful and wanton standard in contact sports and the duty in full-contact sports, such as hockey and football, wherein breach of a duty exists only if a participant intentionally injures a co-participant or engages in conduct outside the range of ordinary activity in the sport. The court held that those duties apply to participants who understand the likelihood of contact and voluntarily undertake that risk but were not applicable to spectators. The court also noted that, unlike a videographer who assumes the risk of

contact by standing on the sidelines, the plaintiff had no reason to expect contact from a player.

Illinois Appellate Court Holds That Release In Club Membership Agreement Bars Negligence Claim But Not Claim For Willful and Wanton Misconduct

The plaintiff was a member of the defendant tennis club, and was injured when she ran to the back of the court, ran into a retaining curtain, and tripped and fell on an exercise ladder lying beneath and behind the curtain. Because the plaintiff had executed a membership agreement that contained a release clause, the trial court dismissed the plaintiff's negligence claim, finding the waiver clear and enforceable. The trial court also granted summary judgment on the plaintiff's claim of willful and wanton misconduct, finding no evidence the club knew the ladder was on the ground behind the curtain or that it posed a danger. In *Oelze v. Score Sports Venture*, 2010 WL 1235404 (Ill. 1st Dist. 2010), the First District Appellate Court upheld the dismissal of the negligence claim, but reversed on the willful and wanton claim. The court noted that willful and wanton conduct exists when a party fails, after knowledge of an impending danger, to exercise ordinary care to prevent the danger, or fails to discover the danger through recklessness or carelessness when it could have been discovered through ordinary care. The court held that whether defendant was guilty of willful and wanton negligence presented a question of fact for the jury, defeating summary judgment.

Illinois Appellate Court Rejects "Act of God" Defense By Motorist Who Claimed That Accident Was Caused by Heart Attack

In *Evans v. Brown*, 2010 WL 1206870 (Ill. 4th Dist. 2010), the decedent, Lynn Romann, lost control of his vehicle, crossed over into oncoming traffic and struck a car that then struck plaintiff's car, causing injuries. Witnesses testified that after the accident Romann claimed that he "went to sleep" or "blacked out, fell asleep" just prior to the accident. He died that night. Medical testimony established that Romann had a heart attack a week prior to his death, and that just prior to the accident he likely suffered a sudden change in cardiac rate or rhythm output, caused by the earlier heart attack. The other injured motorist sued Romann's estate. The estate was granted summary judgment, on the basis that Romann's condition was created by an "Act of God". On appeal to the Fourth District, the plaintiff contended that summary judgment was not appropriate because she had established a *prima facie* case of negligence and that Romann's statement that he "fell asleep" created a genuine issue of material fact. The appellate court agreed and reversed the lower court. The court held that a genuine issue of material fact precluded summary judgment because the evidence supported a possible finding that Romann experienced symptoms that were present prior to the accident.

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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 2010 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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