

# Insurance/Tort Law Newsletter

## May 2011

### INSIDE THIS ISSUE:

Bryce Downey & Lenkov News	1
Recent Firm Seminars	1
Case Law Updates	2 - 7
General Contractor Not Entitled To Coverage Under Subcontractor's Policy	2
Engineering Company Had No Duty Of Care To Suggest Changes To Project Design Which Were Not Required By Its Contract	2
Online Sales Create Personal Jurisdiction	3
Employer Found Liable Based On Negligence Of Employee Is Not Entitled To Have Jury Allocate Fault	4
Federal Preemption Of State Tort Claims, Or Not?	5
A "Disguised" Open And Obvious Hazard Is Still A Compensable Hazard	6
Golf Ball Negligence Dismissed	6
Bryce Downey & Lenkov Case Results	7

Chicago Office:  
200 N. LaSalle Street  
Suite 2700  
Chicago, IL 60601  
Tel: 312.377.1501  
Fax: 312.377.1502

[www.brycedowney.com](http://www.brycedowney.com)

### Bryce Downey & Lenkov News

We are pleased to report that three of our attorneys, **Carol Cesaretti**, **Michael Scully** and **Kelly Gross** were recently named as Illinois Rising Stars by Super Lawyers. Additionally, **Geoff Bryce** was named by his peers as a leading lawyer for Commercial Litigation and Construction Law.

### Recent Firm Seminars

On June 8-10, 2011, **John Wagener** will speak at the Trial Attorneys of America Annual Meeting on the topic of mediation.

On April 14, 2011, **Rich Lenkov**, **Storrs Downey** and **Frank Rowland** were presenters at the Illinois Defense Counsel Spring Symposium. Rich served as a Symposium Chair and presented "Debate: Picking a Jury is a Science and Not Just Pure Luck" and "Retail Liability". Storrs Downey presented "Curbing Litigation Expenses," and Frank Rowland presented "Bad Faith Punitive Damages."

On April 13, 2011, **Rich Lenkov** co-presented a webinar on "Negotiation and Mediation Strategies" for the National Retail & Restaurant Defense Association (NRRDA).

On April 8, 2011, **Geoff Bryce** presented "Basic Construction Insurance Coverage" on behalf of ISBA (Illinois State Bar Association) at Northern Illinois University.

On March 24, 2011, **Rich Lenkov** presented two roundtables at CLM's Annual Conference in New Orleans: "Premises Liability – Shopping for Answers to Effective Retailer Risk Management." and "Difficult Situations, Real-World Solutions: Thorny Issues the Defense Industry Struggles with Every Day."

**Case Law Update****Illinois Appellate Court Finds That General Contractor Not Entitled To Coverage As An Additional Insured Under A Subcontractor's Policy Due To The Absence Of A Direct Contractual Relationship Between The Contractor And The Sub**

*By Terrence J. Madden*

In *Westfield Insurance Company v. FCL Builders*, No. 1-10-0521 (Ill. 1st Dist. 2011), FCL was a general contractor that was hired to work on a construction project. FCL subcontracted out the steel fabrication for the project to Suburban Iron Works. Suburban Iron Works in turn subcontracted out that work to JAK. The contract between JAC and Suburban required that FCL be named as an additional insured under JAK's insurance policies. JAK was insured by Westfield Insurance Company. As a result of a job site accident, FCL was named as a defendant and tendered its defense to Westfield, claiming that it was an additional insured under the policy issued by Westfield to JAK. Westfield denied coverage and filed a declaratory judgment action, claiming that FCL was not entitled to additional insured coverage under the additional insured endorsement of the Westfield policy. The Westfield policy's additional insured endorsement provided that in order to qualify as an additional insured, the party claiming coverage must have had an agreement in writing with Westfield's named insured (JAK) whereby JAK was required to obtain additional insured coverage. Westfield claimed that there was no direct contractual relationship between FCL and JAK and argued that even though JAK was required through its contract with Suburban to name FCL as an additional insured, the contract between JAK and Suburban was not equivalent to a direct contract between FCL and JAK.

The Appellate Court agreed with Westfield's argument, finding that under the Westfield policy, the direct contractual relationship between the party

claiming additional insured coverage and Westfield's insured was required. FCL had argued that since the subcontract between Suburban and JAK incorporated the terms of the contract between FCL and JAK, that was sufficient to establish a contractual relationship between FCL and JAK. The court, however, rejected that argument.

***Practice Tip:***

The outcome in this case was based upon the rather unique language of the Westfield additional insured endorsement which required a direct contractual relationship between the party claiming coverage and the named insured as a condition of coverage. Most standard additional insured endorsements do require that there be a written requirement by which the named insured is required to name others as an additional insured under its policies, but the typical additional insured endorsement does not require a contractual relationship directly between the party claiming additional insured coverage and the named insured. Generally, any written agreement requiring additional insured coverage even though between other parties would suffice. Thus, in evaluating additional insured coverage, the specific language of the additional insured endorsement that controls must be carefully scrutinized to determine whether the party claiming coverage is actually entitled to coverage as an additional insured.

**Illinois Supreme Court Holds That Engineering Company Had No Duty Of Care To Suggest Changes To Project Design Which Were Not Required By Its Contract**

*By Terrence J. Madden*

In *Thompson v. Gordon*, No. 110066 (Ill. January 21, 2011), the Illinois Supreme Court affirmed the entry of summary judgment in favor of an engineering company that had been sued as a result of a motor vehicle accident resulting in multiple deaths.

The plaintiff in the case alleged that the accident was caused because a roadway was designed with a

median strip and should have been designed with a "Jersey barrier" to prevent cars from crossing into adjoining traffic. The engineering company had not designed the roadway and claimed that its engineering contract did not require it to suggest design changes, but only required it to provide engineering services with respect to the existing design. The Illinois Supreme Court agreed with that argument, finding that the engineering company's duty of care was defined by its contract. Therefore, even though the plaintiff's attorney provided the affidavit of an expert to the effect that the engineering company was under a duty of care to suggest design changes, the Supreme Court found that that affidavit did not create a question of fact because the engineering company's duty was defined by its contract.

***Practice Tip:***

While *Thompson* was based on existing law, it is nevertheless a very significant decision with respect to claims based on allegedly negligent design or construction. In defending design or construction professionals, the defendant's duty may be circumscribed and liability limited by the scope of services as defined by contract.

**Online Sales Create Personal Jurisdiction**

*By John T. Wagener*

The Court of Appeals for the Seventh Circuit held that an internet provider of a product (cigarettes) may be subject to a state court's jurisdiction under that state's long-arm statute. In *Illinois v. Hemi Group, LLC*, 622 F. 3d 754 (7th Cir. 2010) the State of Illinois claimed that Hemi evaded Illinois tax regulations and restrictions on sales to minors by selling cigarettes to Illinois residents over the internet. Hemi moved to dismiss for lack of personal jurisdiction, and there was no dispute that Hemi was not an Illinois resident, was not organized or incorporated under Illinois law, had no employees or

agents in Illinois, did no banking in Illinois, and had not advertised in print media in Illinois.

Nevertheless, the District Court denied the motion to dismiss, and the Seventh Circuit affirmed, finding:

We find that Hemi's contacts with Illinois were sufficient to satisfy due process. Hemi maintained commercial websites through which customers could purchase cigarettes, calculate their shipping charges using their zip codes, and create accounts. Hemi stated that it would ship to any state in the country except New York . . . Hemi stood ready and willing to do business with Illinois residents (citation omitted) and Hemi, in fact knowingly did business with Illinois residents. In light of this Hemi's argument that it did not purposely avail itself of doing business in Illinois rings particularly hollow.

Under the Hemi decision, the required nexus to exercise personal jurisdiction is created by having an interactive website and agreeing to ship product to another state. This lowers the threshold of "minimum contacts" with a state to claim personal jurisdiction over an internet retailer.

A subsequent case from the United States District Court for the Northern District of Illinois relied upon Hemi and shows that the ability to make a sale is likely the critical factor. In *Poulsen Roser A/S v. Jackson & Perkins Wholesale, Inc.*, 2010 WL 3419460, (N.D. Ill. 2010), the Court was dealing with trademark infringement claims arising out of the defendant's website. The central issue was whether the mere operation of a website accessible within the forum state satisfied the requirements for the exercise of personal jurisdiction over a non-resident litigant.

The District Court dismissed the case on jurisdictional grounds, specifically noting that the plaintiff presented evidence that "merely establishes

that [some of the Corporate Defendants] advertise their products on the Internet and have the ability to sell products in Illinois through dealers . . . There is no indication, however, of whether or how a customer can order products to be shipped to Illinois via the Internet.” Poulsen at pp. 6-7. Consistent with the ruling in Hemi, this language indicates that had there been a showing, however slight, of an actual sale or other interaction by an Illinois resident accomplished through the defendant’s website, that personal jurisdiction would have been deemed proper.

***Practice Tip:***

What the courts are now saying is that questions about personal jurisdiction involving internet contacts should be carefully evaluated in order to prevent a party from being hauled into a particular jurisdiction simply because it operates a website that is accessible in the forum state regardless of whether the site is “interactive.” However, the opinions do suggest that only slight interaction is required in order for personal jurisdiction to be properly exercised.

For companies and entrepreneurs conducting business through a website, a careful evaluation of your online presence and whether it exposes you to an unreasonable risk of establishing the “minimum contacts” necessary for the exercise of personal jurisdiction, forcing you to litigate in some distant, inconvenient jurisdiction, is recommended.

**Employer That Is Found Vicariously Liable Based Upon The Negligence Of Its Employee Is Not Entitled To Have The Jury Allocate Fault Among The Employer And Its Employee**

*By Terrence J. Madden*

The case of *Spurell v. C.H. Robinson Worldwide, Inc.*, No. 3-09-0830 (Ill. 3rd Dist. 2011), involved a wrongful death action arising from a collision between a truck carrying potatoes and other vehicles. The potato truck was being driven by Dean Henry,

whose negligence allegedly caused the accident. Henry was employed by C.H. Robinson. At trial, Henry admitted liability and the jury also found against CHR, based solely on its vicarious liability for the negligence of its driver, Henry. The jury returned a verdict for the Plaintiffs in excess of \$25,000,000.

Among the issues raised by CHR on appeal was that the trial court allegedly erred by not including Henry’s name on the verdict form for the purposes of allocating fault between CHR and Henry. Under Illinois law, a defendant found less than 25% at fault, is only severally liable, whereas a party whose fault exceeds 25% is subject to joint and several liability. Here, CHR wanted the driver’s fault to be included on the verdict form so that its own liability might have been found to be less than 25%.

The Appellate Court, however, held that apportionment of fault was appropriate only in situations where the tortfeasors’ liability was capable of being legally apportioned. The Appellate Court found that since CHR was vicariously liable, as a matter of law it was responsible for the driver’s entire fault. Therefore, there was no basis for an apportionment of the damages.

***Practice Tip:***

In order to reduce potential liability, tort defendants will want their liability to be only several as opposed to joint and several. The importance of this case is that it establishes that where an employer’s liability is solely derivative or vicarious, it cannot have its fault reduced because of the percentage fault of its employee. Those insuring and defending employer’s charged with vicarious liability should be aware that the potential fault of such parties will not be subject to reduction or apportionment as a result of the fault of a negligent employee whose negligence is the basis for the judgment against the employer.

**Federal Preemption Of State Tort Claims, Or Not?**

By John T. Wagener

The United States Supreme Court issued two opinions on the issue of federal preemption this past February. In *Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068 (2011), the Court held that the federal vaccine injury compensation statute (National Childhood Vaccine Injury Act, “NCVIA”), expressly preempted common law state tort suits seeking damages for defectively designed vaccines. In *Williamson v. Mazda Motors*, No. 114 S.Ct. 2431 (2011), the court held that compliance with certain Federal Motor Vehicle Safety Standards (“FMVSS”), which allowed manufacturers to employ a lap-only restraint system for the middle seating position in the back row, did not insulate the manufacturers from state tort suits claiming that the lack of a shoulder restraint system constituted a defect. The seemingly at odds decisions can be reconciled when the Court’s analysis is reviewed.

The *Bruesewitz* court noted that the NCVIA expressly “preempts all design defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects.” The NCVIA established a no-fault compensation program for individuals who suffer serious adverse side effects from FDA approved childhood vaccines. It was enacted as a substitute for court litigation in order to promote vaccine development and to encourage parents to have children vaccinated.

NCVIA’s preemption provision states “[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” 42 USC ¶300(aa)-22(b)(1). Thus, the Court held that so long as the vaccine was properly labeled and manufactured, a

design defect claim based upon the inclusion of a hazardous component would be preempted. On the other hand, a side-effect suit alleging a manufacturing defect or failure to comply with federally mandated warnings or labeling requirements would not be precluded. Right after issuing the *Bruesewitz* split decision, the Court unanimously held in *Williamson* that a FMVSS pertaining to seat belts did not either expressly or impliedly preempt a California tort suit against *Mazda* for failing to install rear seat lap-and-shoulder safety belts. The court went to great lengths to distinguish its earlier and frequently cited holding in *Geier v. American Honda*, 529 U.S. 861 (2000), that an earlier version of the same FMVSS impliedly preempted common law damage claims based on the failure to install air bags. The Court held that the lap belt vs. lap-and-shoulder belt choice in *Williamson*, was “not a significant objective of federal regulations,” unlike the seat belt vs. airbag choice in *Geier*.

The key to *Williamson* is that whenever the government gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is not always an “obstacle” to a comprehensive and uniform federal regulatory scheme, and such claims will not always be preempted.

With this means to manufacturers in the pharmaceutical, chemical, pesticide and other federally regulated industries is that compliance with federal regulations may preempt tort suits under the correct circumstances. However, if the regulations provide choices or options to achieve compliance, adherence to minimum design standards will not necessarily provide preemptive protection.

**A “Disguised” Open And Obvious Hazard Is Still A Compensable Hazard**

*By Barry C. Brotine*

In *Alqadhi v. Standard Parking, Inc.*, 938 N.E.2d 584 (Ill. App. 1st Dist. 2010), the Illinois Appellate Court reversed an order granting summary judgment in favor of a defendant because the plaintiff’s expert created a question of fact for the jury as to whether a 3/4th-inch raise in concrete on a ramp was an open and obvious condition.

The plaintiff tripped and fell over a 3/4th-inch rise in concrete on a wheelchair-accessible ramp in the defendant’s parking garage. The ramp complied with the Americans with Disabilities Act of 1990. The plaintiff was not wheelchair-bound and was merely walking down the ramp.

In moving for summary judgment, the defendant argued that the condition was open and obvious, which would negate any duty it owed the plaintiff. It stated that the ramp was smooth and free from defects and the area was well lit. The defendant also argued that summary judgment should be granted under the de minimus rule, which states that minor sidewalk defects are generally not actionable.

The plaintiff countered the defendant’s summary judgment with her own testimony that she was unable to appreciate the difference in the elevation height. She testified that the lighting conditions around the ramp were low and dark and that the low lighting created the illusion of walking on a flat surface.

The plaintiff also presented an affidavit of a registered professional engineer who convinced the court that because the defendant’s ramp lacked contrast paint, the ramp “disguised” the change in vertical elevation, creating an impermissible tripping hazard that was not open and obvious.

The court gave substantial weight to the plaintiff’s expert’s contention that while the ramp would have been safe for a wheelchair-bound person, the lack of

contrast paint created a tripping risk for a walking person.

Based upon the plaintiff and her expert’s contentions that the impaired visibility concealed an otherwise minor defect, the court ruled there were sufficient facts to negate the application of the open and obvious doctrine and the de minimus rule.

***Practice Tip:***

Even if a ramp or other structure complies with a federal or state statute’s requirements, it may contain hazards actionable by both disabled and nondisabled individuals.

**Golf Ball Negligence Dismissed In DuPage County**

*By Barry C. Brotine*

Slicers and hookers can breathe a bit easier this summer...if your errant golf ball hits that slow mover down the green, you won’t wind up in a legal hazard. Recently, DuPage County Judge John Elsner dismissed a lawsuit filed by a woman who was hit in the head by an errant golf shot. Judge Elsner said the contention that a golfer is negligent and liable when a shot veers off course "is simply not the law in Illinois."

In the DuPage case, the plaintiff struck with the golf ball was not a golfer. Instead, her home abuts the golf course and she was gardening when an errant shot hit her in the head. It was known that the plaintiff’s yard was previously struck by up to ten errant golf balls prior to this incident. The plaintiff’s knowingly purchasing a home that abutted a golf course and had on many previous occasions known that errant hit golf balls have entered her yard, certainly made it easier for Judge Elsner to dismiss the case.

Judge Elsner’s ruling was correct. The Illinois Appellate Court in *Heiden v. Cummings*, 337 Ill. App. 3d 584 (Ill. 2nd Dist. 2003), held that the mere

fact that a person is struck by a golf ball driven by a golfer does not equate negligence on the part of the golfer who hit the ball. Indeed, for any liability to result from an errant shot, there must be both the existence of a recognizable harm and a basis for concluding that the harm flowing from the action of that risk was reasonable preventable. Of course, since even the best professional golfers cannot avoid an occasional 'hook' or slice', it cannot be said that the risk of a mishit golf ball is a fully preventable occurrence...even with all the tedious practice that most of our weekends require!

***Practice Tip:***

If a property abuts a golf course, baseball field, or other activity that may have errant projectiles, the injury resulting may not be compensable in court. Also, there are no mulligans in court, so be careful and try your best to stay on the fairway this summer.

### **Bryce Downey & Lenkov Case Results**

**Geoff Bryce** and **Barry Brotine** obtained a summary judgment on behalf of construction subcontractor on a breach of contract and contribution claims filed by the higher tier general contractor in Cook County. The court found there was no breach of contract based on the client's full compliance with the contract by its adding the general contractor as an additional insured. Among other reasons, the contribution claim was dismissed based on the Briseno decision and mutual exculpation rule precluding the general contractor from receiving a double recovery from its subcontractor.

**John Wagener** successfully tendered the defense of his client, a major clothing retailer, in a sidewalk trip and fall case to a strip mall operator and its insurance carrier. The tender was successful even though the client was not named as an additional insured under the applicable policy nor did the operative lease require that designation. After successful negotiations with the landlord's insurance carrier, it agreed to accept the retailer's tender and provide a

defense. Since part of the Common Area Maintenance ("CAM") charge was used to pay for the strip mall's common area CGL insurance, the insurance carrier agreed that the retailer should be given additional insured status as a benefit of having indirectly contributed to the premium payments.

In another case involving a different retailer, after settling the matter on behalf of the client with the plaintiff, John was able to recoup from plaintiff 50% of the settlement payment and post-tender attorneys' fees without needing to resort to a declaratory judgment.

**Christopher Puckelwartz** settled a commercial premises/liability slip and fall case at mediation for \$10,000 on a claim involving a \$250,000 initial settlement demand and over \$425,000 in claimed specials. The plaintiff slipped on ice cream on the floor and alleged her resultant low back fusion was due to her fall. Chris relied upon the constructive notice defense (including an independent eyewitnesses' testimony that another customer at site (created the condition seconds before the fall).

**Storrs Downey** and **Barry Brotine** were successful in getting plaintiff to voluntary dismiss with prejudice a case involving a workers' compensation fall from 20 feet from an order picker that was brought by a staffing firm. During our initial investigation, we learned that the staffing firm possibly forged a signature. After a few discussions with the plaintiff's counsel as to the amount of depositions required for the plaintiff to prove up its case and its heavy burden to prove the staffing contract was authentic, we were able to convince the plaintiff's counsel to voluntarily dismiss the case with prejudice before written discovery occurred.

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, 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:

- |   |                                       |  |
|---|---------------------------------------|--|
| <a href="#">Business Litigation</a>                                       | <a href="#">Construction</a>          | <a href="#">Medical Malpractice</a>    |
| <a href="#">Business Transactions/<br/>Counseling</a>                     | <a href="#">Employment and Labor</a>  | <a href="#">Professional Liability</a> |
| <a href="#">Corporate/LLC/Partnership<br/>Organization and Governance</a> | <a href="#">Insurance Coverage</a>    | <a href="#">Real Estate</a>            |
|   | <a href="#">Insurance Litigation</a>  | <a href="#">Workers' Compensation</a>  |
|   | <a href="#">Intellectual Property</a> |  |

*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](mailto:sdowney@brycedowney.com)) or Terrence J. Madden ([tmadden@brycedowney.com](mailto:tmadden@brycedowney.com)) at 312.377.1501 or any member of our General Liability team. © Copyright 2011 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.*

<p><b>Chicago Office:</b>                  200 N. LaSalle Street                  Suite 2700                  Chicago, IL 60601                  Tel: 312.377.1501                  Fax: 312.377.1502</p>	<p><b>Indiana Office:</b>                  2646 W. Lincoln Hwy                  Suite B                  Merrillville, IN 46410                  Tel: 219.756.8100                  Fax: 219.756.5100</p>	<p><b>BRYCE DOWNEY &amp; LENKOV</b></p>	<p><b>Memphis Office:</b>                  1922 Exeter, Suite 5                  Germantown, TN 38138                  Tel: 901.753.5537                  Fax: 901.732.6555</p>	<p><b>Atlanta Office:</b>                  P.O. Box 800022                  Roswell, GA 30075-0001                  Tel: 770.642.9359                  Fax: 678.352.0489</p>
---	---	---	---	--