

Insurance/Tort Law Newsletter

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News from Bryce Downey & Lenkov

Storrs Downey has recently joined the Defense Trial Counsel of Indiana; www.dtci.org. The Defense Trial Counsel of Indiana is an association of Indiana lawyers who defend clients in civil litigation. They provide a forum for their members to associate and exchange ideas and they advocate for their members and their clients and provide a voice of reason in government, the courts, the legal profession, and the community at large.

Storrs was recently invited to join the prestigious Council on Litigation Management, www.litmgmt.org. The Council is a nonpartisan alliance comprised of thousands of insurance companies, corporations, Corporate Counsel, Litigation and Risk Managers, claims professionals and attorneys. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows. He is also a member of the CLM EPLI committee.

Rich Lenkov has joined the CLM (Council on Litigation Management) Premises Liability Committee.

Rich was awarded the 2010 President's Award by the Illinois Association of Defense Trial Counsel in appreciation for his service and commitment to the defense bar.

Recent Firm Seminars

Rich presented a seminar sponsored by the Council on Litigation Management on "Selection, Use and Management of Expert Witnesses."

Geoff Bryce was a featured presenter at SOICA (Society of Illinois Construction Attorneys). He presented "New Additional Insured Endorsement/ New Title Insurance Endorsement."

Storrs presented “Expert Retention & Usage” and “The Mediation Process” at separate seminars for CLM.

Case Law Update

Insurance Policy To Be Interpreted In Accordance With The Law Where The Corporation Is Incorporated And Insurance Policy Was Procured And Delivered

By Terrence J. Madden

Most CGL policies do not contain a choice of law provision specifying what state’s law should apply to coverage disputes. Illinois courts have traditionally applied the “most significant contacts test,” which sets forth a variety of factors to be considered in determining what state law governs.

In *Liberty Mutual Fire Insurance Company v. Woodfield Mall*, No. 1-09-1905 (Ill. 1st Dist. 2010), the Illinois Appellate Court for the 1st District considered what state’s law should apply to determine whether the policy provided coverage for an accident that occurred at the Woodfield Mall in suburban Chicago. The case arose from the death of a heating and air-conditioning technician who was sent to the Mall to service air conditioning equipment located in the laboratory of a LensCrafters’ store within the Mall. In investigating the reason for the malfunctioning air conditioning equipment, the technician accessed equipment located on the roof of the Mall and as he was climbing back inside the building, he fell to a concrete floor, sustaining fatal injuries. His surviving spouse sued the Mall alleging that the Mall was negligent in a variety of respects regarding the construction of a fixed ladder permitting access by workers to the roof of the building. The Mall tendered its defense to Liberty Mutual, which provided insurance coverage to LensCrafters. The Mall was named as an additional insured under LensCrafters’ policy but only for liabilities arising out of the work of LensCrafters or arising out of premises or property owned or rented to

LensCrafters. In the suit against the Mall, the Plaintiffs alleged only negligence directly against the Mall and did not allege any negligence by LensCrafters. In response to the Mall’s tender of defense, Liberty Mutual advised the Mall that it was an additional insured under LensCrafters’ policy, but Liberty Mutual further stated that it could not determine if the particular claim was covered without further investigation. Liberty Mutual subsequently filed a declaratory judgment action, alleging that Ohio law governed the interpretation of the insurance policy and that under Ohio law it was not under a duty to defend the Mall because the suit alleged negligence only by the Mall itself and did not allege liability based upon the Mall’s vicarious liability for negligence of LensCrafters. Liberty Mutual prevailed on cross motions for summary judgment and the Mall appealed.

One of the Mall’s primary arguments on appeal was that the insurance policy should be interpreted in accordance with Illinois law, not Ohio law, because the store where the accident took place was located in Illinois. In addressing this issue, the Appellate Court discussed the various factors that Illinois courts have traditionally considered in applying the “most significant contacts test.” Those factors include (1) the location of the subject matter, (2) the domicile of the insured or of the insurer, (3) the place of the last act to give rise to an enforceable contract, (4) the place of performance, or (5) any other place bearing a rational relationship to the contract. The Mall argued that in similar disputes, Illinois courts have traditionally given greater weight to the location of the insured risk than to other pertinent criteria. In this case, however, the Appellate Court held that in the case of a national chain store with stores in many states, at the time that an insurance policy was procured that covered all of the stores the parties could not have reasonably contemplated that the location of a particular accident would apply to coverage disputes. Rather, the court concluded that the parties would reasonably have believed that all coverage issues would be resolved in accordance with the law of the state where the

insured's primary office was located and where the policy was delivered, which in this case was Ohio.

After concluding that Ohio law applied, the Appellate Court further concluded that under Ohio law, there was no duty to defend the complaint against the Mall because the complaint alleged only direct negligence by the Mall and did not allege any vicarious liability based upon any negligence by the named insured, LensCrafters.

Practice Tip

This is a very important decision with respect to the issue of what state's law applies to coverage disputes. In many instances, that determination may be dispositive in resolving coverage issues. In cases where the named insured is a national chain store, or has operations in multiple states, in accordance with this decision the location of the insured's primary headquarters and the location where the insurance policy was obtained and delivered will likely determine what state's substantive law should be applied to coverage disputes. This determination could be particularly important in "targeted tender" disputes. Illinois is one of only one or two states that permit an insured that may be covered by multiple policies to select what policies should apply to a particular claim. An insurer that is so targeted may be able to defeat a "targeted tender" by establishing that the law of a state other than Illinois applies to that issue.

Ready II: Proximate Cause Defense Alive And Well

By Frank C. Rowland

As most know, in late 2008, the Illinois Supreme Court issued its opinion in what has become known as *Ready I*, 232 Ill. 2d 369 (2008). (We addressed this decision at length in our December 2008 newsletter). In that decision, the Supreme Court held that only tortfeasors that were before the court at trial could be put on the verdict form and have fault allocated against them for purposes of determining whether a

defendant was subject to joint and several liability or only several liability. Stated conversely, the fault of settling defendants and unnamed parties cannot be allocated by a jury in a tort case. That portion of the Court's holding puts substantial pressure on those remaining parties who choose not to settle. The overall fault of a potentially high-liability defendant will not be included in the overall fault allocations among lower-level defendants who choose to go to trial.

In addition to that holding, *Ready I* contained several passages which led some to conclude that the trial defendants were not even entitled to present evidence of the activities of non-trial parties to establish "sole proximate cause" defense. If that were true, not only would a defendant choosing to go to trial not have the ability to incorporate the fault of non-trial parties, but could potentially not even introduce evidence that the accident was caused by someone other than that defendant.

The Supreme Court granted rehearing on this very question, and thereafter issued its opinion in *Ready v. United/Goedecke Services Division*, 2010 WL 4126244, (Ill. 2010).

In *Ready II*, the Supreme Court in October 2010 held that the "sole proximate cause" defense was alive and well. The Supreme Court succinctly stated: "A Defendant has the right not only to rebut evidence tending to show that Defendant's acts are negligent and the proximate cause of claimed injuries, but also has the right to endeavor to establish by competent evidence conduct of a third person, or some other factor as the sole proximate cause of Plaintiff's injuries." *Id* at p. 4.

Thus, a defendant can continue to seek a sole proximate cause jury instruction and introduce appropriate evidence that "It is a complete defense if the plaintiff's damages were caused solely by someone other than a particular defendant."

The Supreme Court further added that sole proximate cause did not need to be pleaded by defendants as an affirmative defense.

Practice Tip

It is incumbent upon any defendant desirous of asserting the defense to present as much evidence as is possible during trial to support the issuance of the instruction. Evidence-gathering should commence early in the discovery phase of the case. Counsel should ensure that testimony implicating others is brought up during the deposition of its controlled witnesses. Moreover, deposition preparation and examination of all witnesses should be undertaken to elicit testimony showing both control and fault of all persons and entities who might be targets of a sole proximate argument, whether they are then parties to the litigation or not.

Settling Defendant May Assign Its Counteroffer Claim Against Plaintiff's Employee To The Plaintiff As Part of Settlement

By Barry C. Brotine

In *Mondschein v. Power Construction Company*, 936 N.E.2d 1101 (Ill. App. 1st Dist., 2010), the Illinois Appellate Court held that a defendant general contractor properly assigned its contribution claim to the plaintiff as partial consideration for settlement and that the plaintiff could seek such contribution in a third-party claim against his own employer.

In May of 2003, Power Construction Company was the general contractor in charge of building a new building at Loyola University's Chicago campus. Power entered into a subcontract with Waukegan Steel Sales for performance of all the iron work. In turn, Waukegan subcontracted with Joliet Steel for the performance of the steel work.

The subcontract between Waukegan and Joliet had an indemnity clause in which Joliet agreed to indemnify and hold harmless the general contractor "from and

against all claims, damages, losses, and expenses" arising or resulting from the subcontractors work. The subcontract also required Joliet to purchase CGL insurance naming Power as an additional insured with limits of \$1 million per occurrence.

The plaintiff was an employee of Joliet and was injured while working at the construction site. He filed a workers' compensation claim, which was satisfied, and then brought a civil suit against Power and others. Power filed a third-party complaint for contribution against Joliet. Before trial, the plaintiff settled with Power and the other parties for \$2,673,000.00 and, as additional consideration, Power assigned its contribution claim against Joliet to the plaintiff.

After denying Joliet's motion to dismiss the plaintiff's third party complaint, trial on the contribution claim proceeded and the jury apportioned Joliet at 35% liability.

On appeal, the *Mondschein* court first held that Power's assignment of its contribution claim was valid. It then held that Joliet waived its *Kotecki* cap in the indemnity provision in its subcontract and was then liable in contribution for its full pro rata share of damages proximately caused by its own negligence.

The additional key facts in the case were also that Joliet was required to and did procure insurance coverage for Power, with \$1 million liability limits. The limits of that policy were paid on Power's behalf in its settlement with the plaintiff. On appeal, Joliet argued and the appellate court agreed that because Joliet had procured that \$1 million of insurance coverage for Power, Power could not pursue a contribution claim against Joliet based upon the payment of that amount in settlement to the plaintiff. Accordingly, the Court held that Power could only pursue contribution for the excess portion of the settlement, approximately \$1.7 million that was not funded by the insurance procured by Joliet.

Practice Tip

Construction contracts are notorious for indemnity agreements, *Kotecki* cap waivers, and additional insurance requirement provisions. It is important to thoroughly review every section of these subcontracts and corresponding insurance policies to fully understand the scope of potential civil liabilities that a subcontractor/employer may face as a result of an injured worker.

Employer Vicariously Liable For Employee's Intoxicated Driving

By Christopher M. Puckelwartz

The common law rule in Illinois is that there is no cause of action for injuries arising out of the sale or gift of alcoholic beverages. *Hicks v. Korean Airlines Company*, 936 N.E.2d 1144 (Ill. App.1st Dist. 2010). The Illinois General Assembly has pre-empted the entire field of alcohol-related liability through its passage and amendment of the Dramshop Act. Thus, there is no liability for the sale or gift of alcoholic beverages in Illinois outside of the Dramshop Act.

The Illinois Supreme Court has generally refused to impose liability under either the common law or the Dramshop Act on employers who supply their employees with free alcohol at employer-sponsored events. *Id.* However, in *Hicks*, the Special Administrator of the deceased motorist estate brought an action against an employer whose employee struck the motorist's automobile.

The First District Appellate Court in *Hicks* held that if a provider of alcohol is a business that sells alcohol, liability may attach but only under the Dramshop Act and not under the common law. If the provider is merely a social host, liability will not attach either under the statute or under the common law. The issue in *Hicks* was the employer's potential liability for injuries that arose not as a result of the provision of alcohol but as a result of the encouragement of or assistance in tortious conduct.

In analyzing this issue, the First District reviewed other recent decisions and emphasized the difference between the mere furnishing of alcohol and the negligent independent act of providing alcohol. The court found that an employer cannot be liable where its agents simply failed to take steps to prevent an intoxicated employee from driving home.

In *Hicks*, Plaintiff also asked the court to rule that a jury could find the employer vicariously liable under the theory of respondent superior for its employee's allegedly negligent driving, regardless of who provided the employee with alcohol.

The Appellate Court stated that liability for negligence can arise from acts, omissions or, in the case of respondent superior, their employer-employee relationship so long as the employee's negligence is within the scope of the employment. The Court conducted that the circuit court erred in entering summary judgment in favor of the Defendant employer on this claim. The Dramshop Act broadly pre-empts claims arising from the Defendant's provision of alcohol but does not pre-empt claims based on legal theories independent from the Defendant's provision of alcohol.

Practice Tip

This decision is significant for businesses insofar as it affirms their potential liability for their employees intoxicated driving liability, separate from dramshop actions. Employers should thus be aware that liability may attach to them for an employee's actions in causing injuries while intoxicated based on theories independent of the mere furnishing of alcohol.

Spoilation: Duty To Preserve Evidence Is Not Satisfied By Limited Offer To Inspect

By Stephen R. Niemeyer

The plaintiffs in *Brobbeey v. Enterprise Leasing Company of Chicago*, 935 N.E.2d 1084 (Ill. App. 1st Dist., 2010), were seriously injured when the brakes on a van rented from the defendant failed to engage and the van rolled off a freeway ramp. It was later determined that the model of van had an inherent defect in its suspension, making it the subject of a later recall. After the accident, Enterprise conducted an inspection of the van, and issued a letter to the plaintiffs giving them one week to request preservation of the van. When the plaintiffs did not immediately respond, Enterprise released the van, which was subsequently sold at auction and destroyed.

The plaintiffs filed suit for negligence, strict products liability, and a claim of spoliation. The trial court dismissed the spoliation claim with prejudice, finding the letter issued by Enterprise put the plaintiffs on notice of the necessity to preserve the van. The Appellate Court reversed. The Appellate Court first set forth the recognized two-step analysis in Illinois for establishing a duty to preserve evidence: (1) whether the duty arises by contract, agreement, statute, special circumstance or voluntary undertaking; and (2) whether a reasonable person should have foreseen that the evidence was material to a potential civil action.

The Court then determined that, because the plaintiffs complained prior to and after the accident that the van wobbled and shook when the brakes were applied, that Enterprise preserved the van for its own inspection, and that the plaintiffs did in fact request to inspect the van, special circumstances existed warranting a duty to preserve. The court then found that Enterprise had a duty to exercise reasonable care to preserve the van for potential litigants, which included all plaintiffs injured. The court noted that there was no authority for the proposition that the

letter allowing one week by which to respond created a waiver of a clearly established duty to preserve evidence.

It is important to recognize that a spoliation claim for failure to preserve evidence alleges injury due to an inability to successfully prosecute the underlying claim, and is therefore an independent tortious act apart from the act which caused the personal injury. Illinois courts have thus held that non-settling third party spoliation claims are not affected by settlement of the underlying action, and are not limited to the employer's workers' compensation maximum liability cap as established in *Kotecki v. Cyclops Welding*. See *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 309 Ill.App.3d 707 (5th Dist. 2000); *Anderson v. Mack Trucks, Inc.*, 341 Ill.App.3d 212 (2nd Dist. 2003).

Practice Tip

Although not always the first thought when confronted with an accident, sound precaution dictates that, when in possession of a tangible item that may ultimately be requested as evidence to a potential litigant, preserve that evidence that is within your control. If you are an employer, preserve any evidence relating to an employee's on-the-job injury.

No Recovery For Forgotten Open And Obvious Hazards

By Barry C. Brotine

Can a plaintiff create her own distraction and still recover for injuries caused by an open and obvious condition? Not according to the Illinois Appellate Court's decision in *Lake v. Related Mgmt. Co., L.P.*, 936 N.E.2d 704 (Ill. 4th Dist. 2010).

In *Lake*, the plaintiff sued her apartment complex owner and the management company after her boot became stuck in a one-inch gap in a sidewalk in front of her apartment and she fell. At the time, she

was carrying two bags of groceries in her hands obscuring her vision.

Ms. Lake lived in her apartment for five years prior to her injury. She knew of the one-inch gap in the sidewalk since she moved in and even complained to the defendants about the one-inch gap four years before she fell.

Because of her knowledge and familiarity with the one-inch gap, the defendants filed motions for summary judgment based on the open and obvious doctrine that generally absolves a property owner of a duty to warn of a hazard that is openly visible to an invitee on its property.

The trial court agreed and granted the defendant's motions for summary judgment. Ms. Lake appealed, claiming that the defendants could not be relieved of liability due to the "distraction exception" to the open and obvious rule. The distraction exception applies if there is reason to expect that the invitee's attention may be distracted so that she would not discover or remember there was an open and obvious condition.

The plaintiff in *Lake* knew of the peril presented, voluntarily engaged in conduct that resulted in a

distraction, and created her own distraction. The defendants did not order the plaintiff to carry groceries to or from her apartment, nor did they sell her the groceries that caused her distraction.

The *Lake* Court held that the defendants cannot be held liable for the plaintiff's choice and affirmed the trial court's granting their motions for summary judgment.

Bryce Downey & Lenkov Case Results

We had another very successful year in 2010 in the area of general liability results on behalf of our clients. In addition to being successful on various dispositive motions to dismiss, we obtained voluntary dismissals by plaintiffs on a number of lawsuits without any recoveries by our opponents. Further, the indemnity payments our clients paid in settlement in 2010 were generally substantially lower than the original demands.

We would be happy to provide you with some literature and further information on our case results and approach towards resolving general liability lawsuits.

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:

Business Litigation	Construction	Medical Malpractice
Business Transactions/ Counseling	Employment and Labor	Professional Liability
Corporate/LLC/Partnership Organization and Governance	Insurance Coverage	Real Estate
	Insurance Litigation	Workers' Compensation
	Intellectual Property	

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 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.

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