

Insurance/Tort Law Newsletter

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News/Events

Storrs Downey presented *Terminating Injured or Disabled Problem Employees* at REBEX 2009 on October 23, 2009.

Storrs Downey presented *Balancing Aggressive Pursuit of Lien Recovery with Associated Litigation Expenses* at the 5th Annual National Workers' Compensation Subrogation Strategies Executive Summit in Uncasville, CT, on August 12, 2009.

Rich Lenkov presented *Litigation 101* to Celina Insurance on September 2, 2009. The seminar focused on the life of a litigated case from the complaint through trial.

If you would like this or any of our seminars presented free of charge to your team, please contact sdowney@brycedowney.com.

Save the Date

A "must-attend" conference will be presented on March 25 & 26, 2010, at a location to be determined. This is the first seminar co-presented by the Illinois Association of Defense Counsel and the Illinois Insurance Association. This two-day seminar and networking event will present a variety of interesting topics. Please circle the dates on your calendar to make sure you attend what promises to be an excellent event. Please check our website, as well as this newsletter, for updated information about this seminar.

Illinois Supreme Court Holds That Expert Testimony Not Needed To Support A Claim For Negligent Infliction Of Emotional Distress And Also Holds That Defendant Forfeited His Right To A Setoff Of Amounts Paid By Settling Defendants Because He Had Not Pleaded His Right To A Setoff

In *Thornton v. Garcini*, No. 107028 (October 29, 2009), the Illinois Supreme Court addressed a tragic situation. Plaintiff's infant son died during the

course of delivery at Silver Cross Hospital. The baby was born prematurely and in a breech position and his head became stuck inside of his mother with the rest of his body outside of her body. The nurses at the hospital were unable to complete the delivery of the dead infant and called the defendant physician, who was not present in the hospital. The physician advised the nurses not to attempt to remove the baby's body from his mother's body but to wait for him to arrive at the hospital. The defendant physician arrived at the hospital one hour and ten minutes later and completed the delivery of the dead baby.

Plaintiff brought an action against the hospital, the nurses and the physician, alleging negligent infliction of emotional distress, intentional infliction of emotional distress as well as medical negligence claims. At the initial trial, the jury found in favor of the defendant physician and the nurses on the medical negligence and intentional infliction of emotional distress claims. However, the jury found against the hospital on the intentional infliction of emotional distress claim. The jury awarded damages in the amount of \$175,000. While post-trial motions were pending, the hospital and the nurses entered into a settlement agreement with the plaintiff and obtained a release of all claims upon payment of the \$175,000 damage award. The plaintiff then appealed the judgment in favor of the defendant physician, which was reversed on appeal.

A second trial was then held on the claim against the doctor. The only claim submitted to the jury on the retrial was plaintiff's claim for negligent infliction of emotional distress. The evidence at the second trial was that the doctor was informed of the partial delivery of the plaintiff's baby, but before driving to the hospital to complete the delivery of the dead infant, he first took a shower. The jury found in favor of the plaintiff and awarded damages of \$700,000. During the trial, plaintiff testified about the emotional distress she experienced during the one hour and ten minutes while she waited for the physician to arrive at the hospital to complete the delivery.

Plaintiff filed a post-trial motion, claiming that plaintiff had not proven a claim for negligent

infliction of emotional distress because she had not presented any expert testimony that her emotional distress was due to the alleged delay of the defendant in arriving at the hospital as opposed to the distress experienced as a result of the death of her infant. Defendant also claimed that he was entitled to a setoff in the amount of \$175,000, which the codefendants had paid in settlement and that after the codefendants settled for the amount of the prior judgment, the plaintiff was not permitted to recover any additional sums pursuant to the "single recovery rule."

The Supreme Court rejected the defendant's claim that expert testimony is needed to support a claim of negligent infliction of emotional distress. The court concluded that a jury can decide such a claim based upon the plaintiff's own testimony as to the nature, extent and cause of the claimed emotional distress. It is up for the jury to determine whether there is a basis for the claim, but expert testimony is not required.

On the issue of the defendant's right to a setoff, the Supreme Court recognized that where some defendants settle with the plaintiff, the non-settling defendants are generally entitled to a setoff of the amounts paid in settlement. However, the court also held that the non-settling defendant is required to plead its right to a setoff prior to trial. Here, the defendant physician never affirmatively pleaded his right to a set off and accordingly forfeited that right.

With respect to a non-settling party's right to a set off, the Supreme Court noted that pursuant to Section 2-608 of the Code of Civil Procedure, the non-settling party is required to assert its right to a set off by way of counterclaim against the plaintiff. Thus, in all cases where co-defendants have reached a settlement with the plaintiff, such a counterclaim must be asserted prior to trial in order to preserve the non-settling defendant's right to a set off.

Lastly, the Supreme Court also held that the physician had waived his right to assert the "single recovery" rule because he had not raised that in

pleadings, by way of motion for a directed verdict or at the conference on jury instructions.

Practice Pointer: If you are a defendant and are claiming a setoff as a result of a settlement by codefendants or on any other basis, that right must be pleaded before trial by way of counterclaim or it will be forfeited.

Insurer May Be Bound By Pretrial Settlement Between The Insured And The Plaintiff That Is Made Without Its Consent, Even Though The Insurer Is Providing The Insured With A Defense To The Suit

In *Swedishamerican Hospital v. Illinois State Medical Inter-Insurance Exchange*, No. 2-08-0136, (Sept. 18, 2009), the Illinois Court of Appeals for the Second District held that an insurer may be bound by a pretrial settlement made by an insured that the insurer is defending, even though the settlement is made without the insurer's consent.

Illinois State Medical Inter-Insurance Exchange insured Dr. Bruce Hecht, who was sued for negligence in performing a cardiac biopsy of a child, which allegedly resulted in disabling and disfiguring spastic quadriplegia. The hospital where Dr. Hecht practiced was also named as a defendant. Dr. Hecht tendered his defense to ISMIE, which accepted and defended Dr. Hecht without a reservation of rights under its policy, which had \$1,000,000 liability limits.

Prior to trial, Dr. Hecht, through his personal counsel, requested that ISMIE settle the case on his behalf because of his concern that he would lose the case and that a verdict would greatly exceed his policy limits. Counsel for the co-defendant hospital also requested that ISMIE participate in a settlement package by contributing its policy limits. The evidence in the case indicated that ISMIE had conducted one-day focus groups, all of which ended in verdicts against Dr. Hecht with an average verdict of \$20,000,000. The evidence also indicated that ISMIE's claims manager thought that the chances of winning the case before a jury was 50/50 at best and

that there were problems with the defense of Dr. Hecht, including the fact that he was a "loose cannon".

ISMIE refused to make any settlement offer on behalf of Dr. Hecht because its Physician's Review Committee had reviewed the case and concluded that there was no malpractice. Subsequently, the hospital made a settlement with the plaintiff for the payment of \$5,000,000, which included a settlement of all of the claims against both the hospital and Dr. Hecht. Dr. Hecht then assigned his rights against ISMIE to the hospital. The hospital sued ISMIE for the limits of its policy, claiming the ISMIE breached its duty to exercise good faith in settling the case. ISMIE moved to dismiss the Complaint, claiming that the settlement made by Dr. Hecht was voluntary and that any claim against ISMIE was precluded by a "no action" clause of the policy, which precluded the insured from filing any suit against the insurer until the insured's liability had been determined by a jury or a verdict. ISMIE also contended that the settlement was a voluntary settlement and violated its right to control the defense and litigation of the suit. ISMIE argued that since it was providing Dr. Hecht with a defense and since there was no verdict against Dr. Hecht either within or above the policy limits, there was no basis for a finding that it breached any duty to the insured.

The trial court agreed with ISMIE and dismissed the action, but the Appellate Court for the Second District reversed. In reversing, the Appellate Court stated that an insurer is under a duty to exercise "good faith" in responding to settlement demands. To prove an action for bad faith, the plaintiff must allege that the duty to settle arose, that the insurer breached the duty and that the breach caused injury to the insured. The duty of an insurer arises when there is a reasonable probability of recovery in excess of policy limits and there is a reasonable likelihood of a finding of liability against the insured.

The Appellate Court concluded that if the duty to settle arises, it is no defense that the insured settles

the case before trial, and that an insured is not required to sit and wait for an adverse judgment to be entered against him in excess of the policy limits where the insurer is under a duty to settle. The Appellate Court rejected ISMIE's claim that the "no action clause" of the policy prevailed, concluding that it would be unfair to enforce a "no-action clause" against an insured where the insurer has breached its duty to settle the case.

The Appellate Court ultimately concluded that there was a question of fact as to whether ISMIE had breached its duty to exercise good faith in responding to settlement demands. The court therefore reversed the dismissal of the Complaint against ISMIE and remanded the case for further proceedings.

While there are numerous appellate decision holding that an insurer that breaches its duty to defend may be bound by a settlement between the plaintiff and the insured, this is apparently the first Illinois Appellate Court Decision in which an Appellate Court has concluded that an insurer that is providing its insured with a defense may potentially be bound by a settlement between the insured and the Plaintiff that is made without its consent.

This decision has troubling implications for insurance carriers because it raises the potential that an insurer may be bound by a settlement made by the insured without its consent and directly contrary to its wishes, even though the insurer is providing a full and complete defense. In any case where there is a "reasonable probability" of a verdict in excess of the policy limits and a "reasonable probability" that the insured may be found liable, according to this decision the insured has the right to make a settlement with the Plaintiff contrary to the wishes of the insurer and that settlement may be binding on the insurer, if the trier of fact concludes that the insured acted reasonably in settling the case.

Illinois Supreme Court Holds That Health Care Providers Who Treated A Psychiatric Patient Had No Duty Of Care To The Patient's Wife, Who Was Murdered By The Patient

The Illinois Supreme Court decision in *Tedrick v. Community Resource Center, Inc.*, No. 104861 (September 24, 2009), involved a claim on behalf of the estate of a deceased woman who was murdered by her husband. Suit was filed against a number of health care providers who rendered care to the husband for psychiatric problems. During his care, the man had expressed threats against his wife and expressed his intent to kill her. The wife was never informed of those threats. The patient acted on those threats and murdered his wife. The issue in the case was whether physicians and health care providers owe a duty to third parties, who are injured by their patients. Plaintiff contended that the health care providers had assumed a duty to the wife by undertaking psychiatric treatment of her husband and also alleged that there was a "special relationship" between her and her husband such that those treating her husband were also under a duty of care towards her. The Illinois Supreme Court rejected those contentions, relying upon a line of cases that had previously held that physicians are under no duty of care to third parties. In prior cases, the courts had recognized an exception to that general rule where a "special relationship" exists between the patient and a third party, such as the relationship between a pregnant woman and her unborn child. In that type of case, the courts have concluded that physicians treating an expectant mother are also under a duty of care to her unborn child. The court, however in *Tedrick* held that the relationship of husband and wife did not constitute such a "special relationship."

Illinois Appellate Courts Split On Application of Attorney/Client Privilege to Communications Between Insurance Company and Coverage Counsel

In *Illinois Emcasco Insurance Company v. Nationwide Mutual Insurance Company*, No. 1-08-1625 (August 6, 2009), the Illinois Appellate Court for the First District addressed the issue of whether communications between an insurance company and its retained coverage counsel were privileged communications that could not be discovered by the insured in the context of coverage litigation. Disagreeing with a prior decision from the Appellate Court for the Fourth District, the *Illinois Emcasco* court concluded that where an insurance company retains separate coverage counsel and also retains counsel to represent the insured in underlying litigation, communications between coverage counsel and the insurance company are privileged from disclosure in coverage litigation. However, the holding is subject to the caveat that the privilege extends only to communications regarding coverage issues. If coverage counsel provides advice regarding the handling or settlement of the underlying litigation to the insurance company, such communications become discoverable pursuant to the “common interest” doctrine. That doctrine holds that when an attorney acts for two different parties who have a common interest, communications by the attorney to one party are not privileged from disclosure to the other party.

The Appellate Court’s decision in *Emcasco*, was based upon the Illinois Supreme Court’s 1991 decision, *Waste Management v. International Surplus Lines*, in which the Illinois Supreme Court held that where separate coverage counsel was retained by an insurance company, communications by the attorneys regarding coverage issues are privileged but communications regarding the defense and settlement of the underlying suit may not be privileged.

Practice Pointer:

The lesson to be learned by these decisions is that where separate coverage counsel is retained by an

insurance company, the insurer should be aware that some communications exchanged with coverage counsel may be discovered by the insured in later coverage litigation. For example, if the attorneys express opinions regarding whether an underlying suit should be settled, those communications would very likely become discoverable in subsequent litigation arising from an excess verdict against the insured.

Illinois Appellate Court Holds Business Owner Under No Duty To Remove Water Tracked Into Store By Customers On A Rainy Day

In *Reed v. Galaxy Holdings*, 914 N.E.2d 632 (1st Dist.2009), plaintiff, a business invitee, sued for personal injuries she allegedly sustained when she slipped and fell on a puddle of water while entering Defendant’s Laundromat. Applying the Illinois “natural accumulation” rule, the trial court granted summary judgment in Defendant’s favor. The First District affirmed that decision.

Under the natural accumulation rule, property owners and business operators do not have a duty to remove the tracks or residue left inside the building by customers who have walked through natural accumulations outside the building. It is irrelevant whether a natural accumulation remains on the property for an unreasonable length of time. Moreover, since business owners and operators are not liable for failing to remove natural accumulations of water, they also have no duty to warn of such conditions.

In *Reed*, Plaintiff failed to offer any evidence that the puddle of water was anything other than a natural accumulation. Plaintiff admitted that it was raining on the date of the incident and that the water was tracked in from outside. Plaintiff also failed to present evidence establishing that her injury resulted from a defect in design, construction or maintenance of the tile floor or that the premises were not properly illuminated.

There was testimony that it was Defendant’s practice to mop and towel dry the floor and place

cones and additional mats by the entrance way on rainy days. Defendant did not do so on the date of Plaintiff's injury. Plaintiff thus contended that by its own voluntary undertaking, Defendant assumed a duty to take precautions against the natural accumulation of water near the entrance way. The voluntary undertaking doctrine mandates that if a property owner voluntarily assumes a duty to remove a natural accumulation of snow, ice or water, he is held to a standard of ordinary care and will liable if he performs the undertaken duty negligently. However, the Appellate Court held that when the accumulation of water is a natural one, there is no duty to continue a voluntary practice of removing the water. Businesses do not assume liability for natural accumulations by simply adopting a rainy or snowy day maintenance program.

The *Reed* case is supportive in defending natural accumulation cases. It upheld the long standing rule that Defendants will not be held liable for injuries resulting from natural accumulation of ice, snow or water.

Insurer That Breaches Its Duty To Defend May Still Challenge The Reasonableness Of A Settlement Between Its Insured And The Plaintiff

In *Stonecrafters, Inc. v. Wholesale Life Insurance Brokerage, Inc.*, 915 N.E.2d 51 (2d Dist. 2009), Milwaukee Insurance Company insured Wholesale Life Insurance Brokerage. Wholesale Life was sued by Stonecrafters, Inc. for transmitting "junk" faxes. Wholesale Life tendered its defense to Milwaukee Insurance Company, which refused to defend. Wholesale Life then settled with the Plaintiff for \$6,000,000. At a court hearing regarding the reasonableness of the settlement, the trial court found that Wholesale Life was making the settlement based on a reasonable anticipation of liability and that the amount of the settlement was fair and reasonable. Following the settlement, Wholesale Life Insurance assigned its rights against Milwaukee Insurance Company to the Plaintiff, Stonecrafters, Inc., which then attempted to enforce the judgment against Milwaukee. In a citation proceeding to enforce the judgment, the court found that Milwaukee had

breached its duty to defend Wholesale Life Insurance, was therefore barred from asserting any policy defenses and could not challenge the reasonableness of the settlement. On appeal, however, the Illinois Appellate Court for the Second District held that even though Milwaukee had breached its duty to defend, it was not bound by the lower court's express finding that the settlement was reasonable. Following prior Supreme Court decisions, the Appellate Court held that in order to prevent collusion between an insured and an underlying plaintiff in an underlying suit, even where an insurance company has breached its duty to defend, it still has the opportunity to challenge the reasonableness of a settlement between its insured and an underlying plaintiff. The court also stated, in accordance with prior decisions, that in an action to enforce a settlement against an insurance carrier, the burden is on the plaintiff to demonstrate the reasonableness of the settlement. Accordingly, the Appellate Court reversed the judgment against the insurer and remanded for further proceedings, where the plaintiff was under the burden to prove the reasonableness of the settlement.

Practice Pointer: An insurer that breaches its duty to defend will forfeit all policy defenses, and while it may still challenge the reasonableness of a settlement between the plaintiff and its insured, more often than not it will probably not be successful. Prudence dictates that before denying coverage for any suit or claim, the insurer should be absolutely sure of its coverage position. If there is any doubt, the safe course is to defend under reservation of rights or, in Illinois at least, file a declaratory judgment action to resolve the coverage issues.

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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