

Insurance/Tort Newsletter

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December 2008

ANNOUNCEMENTS

We are pleased to announce the addition of **John Wagener** as a partner in our general liability practice area. John has tried numerous products liability and other types of tort litigation matters during his career.

We shall be opening an office in Northwest Indiana in early 2009. We will provide more details in the near future. Please contact Storrs W. Downey at sdowney@brycedowney.com with any questions on same.

PREMISES LIABILITY ARTICLE

We are pleased to announce the pending publication of our comprehensive article on Illinois and Indiana premises liability law.

If you would like a copy of same or are interested in a seminar on this topic or other tort defense topics, please contact Storrs W. Downey.

CASE RESULTS

On December 17, after a 2 week jury trial, **Terry Madden** obtained a not guilty verdict in a medical malpractice action against a psychiatrist, whose negligence allegedly resulted in the suicide death of a 20 year old female college student, who was a star on the Purdue Women's Volleyball team. The plaintiff had requested from the jury 10 million dollars in damages. No settlement offer was made.

Plaintiff's expert witness claimed that as a result of the reduction of her antipsychotic drugs by our client, the patient became psychotic and killed herself by stabbing herself in the neck. Terry argued that his client's diagnosis was correct and that the reduction of the patient's antipsychotic medications did not cause the suicide because such drugs are not anti-suicide drugs. The jury deliberated 4 hours before returning a verdict in favor of our client.

In a premises liability case brought in Indianapolis in which plaintiff claimed in excess of \$100,000 in specials, **Storrs Downey** obtained a voluntarily dismissal with prejudice against our client after filing a Motion for Summary Judgment.

DEFENDANTS PRECLUDED FROM PRESENTING POTENTIAL FAULT OF SETTLING PARTIES TO JURY IN ILLINOIS

In a new Illinois Supreme Court decision with far ranging implications, it was held in Ready v. United/Goedecke Services, Inc., No. 103474 (Ill. 11/25/08), that when a Defendant settles with a Plaintiff, the remaining Defendant tortfeasors at trial shall not be allowed to have the jury apportion or apply any percentage of fault towards the settling party. Prior to Ready, a jury could accord fault to a former Defendant which had settled and when the Defendant was found over 76% at fault for the subject incident, settling defendants would only be liable for their percentage of fault under 25%. As a result of Ready, a tortfeasor can now be faced with 100% of the liability instead of its proportionate share, where it would have been otherwise been liable for under 25%.

In Ready, a power plant employee for Midwest Generation, LLC, was killed when scaffolding on a construction project in Joliet, Illinois fell upon him. Plaintiff's estate filed a lawsuit against the general contractor, BMW Constructors, Inc., and the scaffolding contractor, United/Goedecke Services, Inc. Both Defendants filed third-party complaints for contribution against the employer, Midwest. A settlement for \$1.113 million was reached by the Plaintiff with BMW and Midwest Generation, LLC. The case proceeded to trial against United. The trial court denied United's request to include on the verdict form the settling parties for purposes of apportioning their fault. A jury entered a verdict for \$14.23 million against it, which was reduced 35% by the amount of fault accorded to the decedent worker. United was held jointly and severally liable for the entire net verdict of \$7 million.

United argued both at trial and on appeal that it might have been found less than 25% at fault and therefore only severally liable for its share of liability; if the settling parties had been included on the verdict form.

The appellate court accepted this argument and awarded a new trial on the issue of apportionment at fault. The Supreme Court reversed the lower court and reinstated the trial court's original decision.

As stated by the Illinois Supreme Court, "the central issue in this appeal is whether settled tortfeasors are co-defendants sued by the Plaintiff within the meaning of Section 2-1117" of the Illinois Code of Civil Procedure. The Court found that the statute was ambiguous in its definition of who is a defendant. The Court determined that a settling defendant is not a "defendant sued" within Section 2-1117 or to whom fault could be accorded.

Although not addressed by the Court, an apparent implication of the Ready decision is that the remaining Defendants will not be allowed to argue that the sole proximate cause of an accident was the result of a settling party. It is hard to conceive how the Court intended that circumstance but that is a reasonable interpretation of Ready. Future court decisions and the Illinois legislative will need to address this possible unintended consequence of the court's decision.

Practice Tip: One important impact of Ready, is that it will likely cause Defendants to rethink their position on whether to settle when other Defendants settle out of the case, even in those circumstances where the non-settling Defendant's fault would likely have been under 25%.

ILLINOIS SUPREME COURT CLARIFIES APPLICATION OF THE “RISK - UTILITY TEST” IN STRICT LIABILITY ACTIONS INVOLVING ALLEGEDLY DEFECTIVE DESIGN

In *Mikolajczyk v. Ford Motor Company*, No.104983 (Oct. 17, 2008) the Illinois Supreme Court, in a very lengthy decision, clarified the alternative grounds for liability in a strict liability case based upon allegedly defective design. The Supreme Court held that in such cases, at the request of either Plaintiff or the Defendant, the jury should be instructed on both the “Consumer Expectation Test” and the “Risk-Utility Test,” in determining whether a product’s design was defective.

The facts of the case were that after drinking two pints of gin, William Timberlake was involved in a motor vehicle accident when his Cadillac rear-ended a Ford Escort that was stopped at a red light. The unfortunate driver of the Ford suffered severe brain trauma resulting in his death several days later. His estate sued Ford Motor Company, claiming that the design of the Escort was defective because the car was designed in a manner such that the driver’s seat would collapse in the event of a rear-end collision. Plaintiff contended that the seat should have been rigid, not susceptible to collapse. The Plaintiff contended that the decedent sustained his brain injury when his seat collapsed and he struck his head on the rear seat of the vehicle.

At the trial court level, the Ford asked the Court to instruct the jury on the basis of the “Risk-Utility Test.” Under that Test, a jury is instructed that in determining whether a product is defectively designed, the jury should consider the evidence of risks posed by the design, benefits of the design and alternative designs that were feasible. The trial court rejected that request, and instructed the jury solely based upon the “Consumer Expectation Test.” Under that Test, a product is considered unreasonably dangerous if it fails to perform as safely as an ordinary consumer would expect when used in its intended manner. The Risk-Utility Test also asks whether the alleged injuries could have been avoided by the adoption of a more reasonable alternative design.

At trial, the jury returned a verdict in favor of the Plaintiff for \$27,000,000. The Appellate Court generally affirmed the verdict but remanded for reconsideration and a remittitur of the \$25,000,000 that had been awarded to the surviving spouse for loss of society, which the Appellate Court found to be excessive. On further appeal, the Illinois Supreme Court held that in a product liability case based upon an allegedly defective design, the Defendant is entitled to have the jury instructed as to the elements of Risk Utility Test, if such an instruction is requested. The Illinois Supreme Court concluded that in such instances, the jury should be given an “integrated” instruction in which the jury would be instructed on both the Consumer Expectation and Risk-Utility Test.

The significance of this decision is that the application of the Consumer Expectation Test and the Risk-Utility Test may produce different results. For example, a product may function in a way that would not be reasonably expected by an ordinary consumer and thus could be unreasonably dangerous according to that test. However, the same product may be considered safe under the Risk-Utility Test, if there is no better feasible alternative designs or if the design has safety advantages in some cases. For example, Ford contended in this case that in certain types of collisions a collapsing seat is safer than a rigid seat and that in some cases a rigid seat is more dangerous than a collapsing seat.

Based upon the Supreme Court’s decision, in defective design cases the jury must be instructed as to the elements of both tests, if such an instruction is requested. The Illinois Supreme Court in *Mikolajczyk*, however, rejected the Defendant’s argument that only the Risk-Utility Test should be applicable in defective design cases.

Practice Tip: This case establishes a very significant new rule of law for strict liability defective design cases. Presently, there are no pattern Illinois Jury Instructions incorporating the Supreme Court’s decision. Presumably, such instructions will be forthcoming shortly from the Illinois Supreme Court. In any case proceeding to trial based upon an allegedly defective product design, the Defendant will almost certainly want to have the jury instructed on the Risk-Utility Test because it generally would present a greater chance of a favorable verdict than the Consumer Expectations Test.

ILLINOIS SNOW AND ICE REMOVAL ACT AFFORDS IMMUNITY TO SERVICES WHO HAVE CONTRACTUALLY AGREED TO REMOVE SNOW AND ICE

Plaintiff was injured when he fell on a patch of ice at his former condominium complex in Palos Hills, Illinois. He sued the Homeowner's Association, the Condominium Association and Servicon, alleging that each of them had been negligent in removing snow from the premises, causing several large patches of ice to accumulate on the walkway, causing his injuries. Servicon, the company hired to remove the snow, moved to dismiss the action, claiming that it was afforded immunity by the Snow and Ice Removal Act. The trial court agreed and dismissed the case. Plaintiff appealed, claiming that the Snow and Ice Removal Act does not apply to parties who have contractually agreed to remove snow and ice.

In *Divis v. Woods Edge Homeowner's Association*, No. 1-08-0411 (1st Dist, October 28, 2008), the Illinois Appellate Court affirmed the decision of the trial court. The Appellate Court held that the Snow and Ice Removal Act applies even to parties who had agreed by contract to remove snow and ice. The statute provides that any owner, lessor, occupant or any other person engaged by any such party, who removes or attempts to remove snow or ice from sidewalks is not liable for personal injuries allegedly caused by snowy or icy conditions resulting from their actions, unless there has been willful or wanton misconduct. The Appellate Court found that the language of the Act was clear and that it therefore applied to those who had voluntarily assumed the duty to remove snow and ice. The Court also found that even though the Plaintiff had alleged in his Complaint that his fall was the result of "incomplete and improper" snow removal, those allegations did not amount to willful or wanton conduct but were exactly the type of conduct that the legislature wanted to provide immunity for.

Practice Tip: In any case involving injuries caused by a slip or fall on ice in Illinois, the Snow and Ice Removal Act should be reviewed to determine if it affords complete immunity from the claim.

SECURITY SERVICE HELD NOT LIABLE FOR SHOOTING DEATHS OF EMPLOYEES

Vance Uniform Protection Services was hired by Navistar to provide security services at its Melrose Park, Illinois, plant. On February 5, 2001, a former, discharged employee entered an unlocked door of a gate guardhouse station, gained access to the premises and shot numerous occupants, killing four and wounding others before killing himself. The estates of five of the victims sued the security service, claiming that it had been negligent in its security measures and was therefore liable for the decedent's deaths.

In *Aidroos v. Vance Uniform Protection Services, et al.*, No. 1-06-2009 (1st Dist., October 31, 2008), the Illinois Appellate Court affirmed the entry of summary judgment in favor of the security service.

The general rule that applies to this type of situation is that a party holds no duty of care to protect another from the criminal acts of third persons. There are, however, exceptions to that rule, one of those exceptions being in those situations where a party has voluntarily or contractually assumed a duty to protect another from harmful acts of a third party. In this case, the Plaintiffs contended that in entering into a contract to provide security services, the guard service had voluntarily assumed a duty to protect employees from criminal acts of third persons. The Appellate Court found that the security services' contract specifically stated that it did not guarantee the personal safety of persons on site. Moreover, the orders given to the service by Navistar established that the extent of the service's undertaking was limited to providing unarmed security officers who were to maintain a presence and to report episodes of fire, theft, sabotage, vandalism or horseplay. The security service had no responsibility for the design of guardhouses, or of the video monitoring or building key card access systems at the facility. The security service was required to observe employees or visitors and not allow them to bring in harmful items, but the court concluded that the undertaking of that responsibility did not create by implication a broader duty to protect Navistar's employees from criminal acts.

A critical factor in this case was that the guards on site were not armed and therefore were not in a position to protect occupants from criminal acts.

Practice Tip: As this case demonstrates, the liability of a guard service for criminal acts of a third party is dependent upon the scope of the duties assumed by contract. Absent a clear undertaking to protect persons from criminal acts of third parties, a security service is not liable simply because it is generally providing security services.

CERTIFICATE OF INSURANCE THAT CONFLICTS WITH INSURANCE POLICY DOES NOT PROVIDE ADDITIONAL INSURED COVERAGE

In *United Stationers Supply Company v. Zurich American Insurance Company*, No. 1-07-2779 (1st Dist., September 30, 2008), the Illinois Appellate Court addressed a common situation - a Certificate of Insurance was issued that showed that United Stationers Supply Company was an additional insured under a CGL policy issued by Zurich to its named insured, but the actual insurance policy did not provide United Stationers with additional insured coverage. Thus, the case involved a conflict between insurance coverage as represented by a Certificate of Insurance and the coverage actually afforded pursuant to the terms of the policy itself.

United Stationers hired D.C. Taylor Company to replace the roof of a building. The construction contract required Taylor to obtain specified types of insurance, including Workers' Compensation insurance, contractual liability insurance, automobile liability insurance and hazardous materials liability insurance. The contract did not require Taylor to obtain or have CGL Insurance coverage. However, the construction contract included a provision requiring United Stationers to be named as an additional insured on a primary and non-contributory basis, but did not specify on what types of insurance policies.

An employee of United Stationers was injured during the construction project. That employee sued Taylor. Taylor filed a contribution claim against United Stationers. United Stationers tendered its defense to the contribution claim to Zurich, the CGL insurer for Taylor. United Stationers claimed that a Certificate of Insurance had been issued to it, which stated that it was insured on a primary and non-contributory basis under a CGL policy issued by Zurich to Taylor. Zurich countered that the Certificate expressly stated that it did not confer rights upon the Certificate holder and did not alter or amend coverage afforded by the policies that were described. Further, the Certificate stated that it was subject to all terms, exclusions and conditions of the actual insurance policies.

In the trial court, *Zurich* obtained summary judgment in its favor on the basis that no matter what the Certificate of Insurance said, under the CGL policy itself United Stationers was simply not an additional insured and was not entitled to coverage. The Appellate Court affirmed that decision. In doing so, the Appellate Court noted that there are two lines of authority regarding conflicts between Certificates of Insurance and insurance policies. Where a Certificate states that a party is entitled to coverage, whether or not the Certificate confers any rights depends upon whether the Certificate expressly states that it is subject to all the terms and conditions of the policy. In cases where the Certificate does not contain such language, it is sufficient to establish coverage, even if under the actual terms of the insurance policy, there would be no coverage. On the other hand, if the Certificate contains the appropriate disclaimer language, the Certificate will not confer any substantive rights.

In this case, the Appellate Court concluded that United Stationers was not an actual additional insured under the Taylor policy and the statement to that effect in the Certificate of Insurance was erroneous. Further, because the Certificate expressly stated that it did not confer substantive rights and substantive rights were governed by the actual terms of the insurance policy, the court concluded that the Certificate did not confer standing upon the additional insured as an insured under the CGL policy.

The Court also addressed the provision of the subcontract agreement that required that United Stationers be named as an additional insured on a primary and non-contributory basis. The Appellate Court noted that that contractual language did not specify under what types of insurance policies United Stationers was to be added as an additional insured. Because the contract did not require any CGL coverage for Taylor, the Appellate Court concluded that the language did not require United Stationers to be included as an additional insured under a CGL policy.

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Practice Tip: This is an important decision because it discusses the situation that often arises where there is a conflict between coverage described in a Certificate of Insurance and the actual coverage that is available under the terms of the policy itself. In this case, the Certificate of Insurance contained the standard language, found in most ACCORD Certificates of Insurance forms, that advises that substantive rights are governed by the terms of the insurance policy itself. Absent such language, however, a Certificate of Insurance may well confer status upon a party as an additional insured, even if the policy language itself would not result in additional insured coverage being available.

BryceDowney is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations every day while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Memphis and Atlanta and attorneys licensed in multiple states, BryceDowney is able to serve its clients' needs with a regional concentration while maintaining a national practice.

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*The attorneys at BryceDowney constantly strive to keep you updated regarding the latest developments in **Tort and Insurance Coverage law in Illinois and Indiana**. If you would like more information on any of the topics discussed above, or have any questions regarding these issues or any aspect of **Illinois and Indiana General Liability or Insurance Coverage law**, please contact **Storrs W. Downey** at (312)377.1501 or sdowney@brycedowney.com, or any member of our **General Liability Team**. © Copyright 2008 by BryceDowney, LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.*