

# Insurance/Tort Newsletter

September 2008

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## Is There A Specific Amount Of Time That Triggers Constructive Notice Against Retailers?

In slip/trip and fall cases, both Illinois and Indiana employ a constructive notice standard as a basis for plaintiff's recovery. Both states charge a storekeeper with constructive knowledge of a condition if the substance or condition has existed for such a length of time that in the exercise of ordinary care its presence should have been discovered. See generally Tomczak v. Planetsphere, Inc., 315 Ill. App. 3d 1033, 735 N.E.2d 662 (1<sup>st</sup> Dist. 2000).

The issue of whether there exists a specific "amount of time" in which constructive notice has recently been addressed by the 7<sup>th</sup> Circuit decision Reid v. Kohl's Department Stores, Inc., 2008 WL 4216473, interpreting Illinois law. The Court held that the district court did not err in granting defendant's motion for summary judgment seeking recovery for personal injuries arising out of plaintiff's slip and fall on ice-cream that had spilled on defendant's store floor. The plaintiff failed to establish any reliable time frame that ice cream had been on the floor prior to the slip and fall incident so as to satisfy plaintiff's burden in establishing defendant's constructive notice of the ice cream's presence on the floor. Moreover, the defendant's evidence indicating that ice cream was on the floor at most ten minutes prior to the slip and fall incident was not enough time to give the defendant constructive notice of the ice cream spill under circumstances when very few customers were in the store.

The 7<sup>th</sup> Circuit in Reid relied on the Illinois Appellate Court decision, Hresil v. Sears, Roebuck & Co., 82 Ill.App.3d 1000, 403 N.E.2d 678 (1<sup>st</sup> Dist. 1980), wherein the Appellate Court affirmed directed verdict in favor of the defendant and held that, under certain circumstances, ten minutes was an insufficient period of time to give constructive notice to the operator of the store of the presence of the substance. The Hresil court, similar to the Reid decision, limited its holding to circumstances in which the accident occurred at a time where few shoppers were present at the time of the incident.

By contrast, Indiana courts have not yet addressed this specific issue. The Indiana Appellate Court, in Carmichael v. Kroger Co., 654 N.E.2d 1188 (Ind.Ct.App. 1995), addressed the issue of constructive notice as it applies to a post-accident floor inspection completed by one of the defendant's employees immediately after the plaintiff fell. But even in the Carmichael case, the Appellate Court upheld a jury verdict in favor of the defendant, as opposed to affirming a motion for summary judgment or motion for directed verdict as per the Reid and Hresil case. The Court in Carmichael found no constructive notice on the part of the defendant when the evidence showed that (1) the plaintiff slipped and fell on a broken egg at approximately 2:00 p.m., and (2) a Kroger employee who inspected the floor before he left work at just after 2:00 p.m. observed nothing on the floor.

**Practice Tip:** Defendants in Illinois have a good chance of success at prevailing on a motion for summary judgment or motion for directed verdict on the issue of establishing no constructive notice under circumstances in which the substance was not on the floor for more than ten minutes prior to the incident and when very few customers were in the store. No specific Indiana cases have addressed this issue, but in light of the 7<sup>th</sup> Circuit Reid decision, we may expect to see more cases develop in this area.

## Illinois Holds That Injured Plaintiff May Recover Full Amount Of Medical Bills Even Though Medicare And Medicaid Paid Less Than Face Value

In *Wills v. Foster*, 229 Ill. 2d 393 (2008), the Illinois Supreme Court reversed an appellate court decision that was reported in our July 2007 Newsletter, and established an important rule of law regarding recoverable damages in personal injury actions. The Supreme Court has now ruled held that an injured plaintiff may recover the entire amount of medical bills, even though a substantial part may have been paid by Medicare or Medicaid for less than the full amount.

Plaintiff was injured in a motor vehicle accident and incurred medical bills totaling \$80,000. Medicare and Medicaid paid \$19,000 in full settlement of the bills. At trial, the jury found in favor of plaintiff and awarded the full amount of the bills, but the court reduced the award to the actual amount paid by Medicare and Medicaid. The Appellate Court affirmed that decision. The Supreme Court reversed, holding that the plaintiff may recover the full amount of the bills if he establishes that the bills were reasonable in amount. Under the procedure mandated by the Supreme Court, the jury is precluded from hearing evidence that any portion of the bills were paid by Medicare or Medicaid. The plaintiff may submit evidence of the entire amount of medical bills, even amounts not paid, provided that Plaintiff lays a foundation showing that the bills were reasonable. The defendant then has the opportunity to attempt to establish that the amounts were unreasonable, and it is then up to the jury to decide what portion of the bills may be recovered.

According to this decision, the full amount of bills that have been paid by Medicare, Medicaid or a private insurer are not necessarily recoverable in full where they have been settled for a reduced sum. To recover the full amount, the plaintiff must prove that the full amount was a reasonable charge. The full amount would then be recoverable, unless the defense presents contrary evidence, in which case the jury would decide the issue. This is the same rule of law that had previously been applied by the Supreme Court to payments by private insurance companies.

## A Party Who Settles A Claim By Mediation Is Not A “Prevailing” Party Entitled To Attorneys’ Fees Under A Construction Contract

The Indiana Supreme Court, in *Reuille v. E.E. Brandenberger Construction, Inc.*, 888 N.E.2d 770 (Ind. 2008), found that a homeowner who settled a claim at mediation was not a “prevailing party” and was therefore not entitled to recover attorneys’ fees under a contract that provided for the recovery of fees by a “prevailing party.”

Appellant, Kirk Reuille, and the appellee, E.E. Brandenberger Construction, Inc. entered into an agreement for the construction of a new home. The contract contained a provision by which the “prevailing party” shall be entitled to reasonable costs and expenses, including attorney fees in “any action in law or in equity, including enforcement of an award from Dispute Resolution, or in any Dispute Resolution.” The term “prevailing party” was not defined in the contract. Reuille, argued that he was entitled to fees as a prevailing party because he received all of the relief he demanded in his complaint and was able to completely repair his home from the proceeds. Conversely, Brandenburger contended that Reuille was not a prevailing party under the contract because he did not receive a judgment. The Indiana Supreme Court unanimously held that in absence of further definition, such a contract permits recovery of fees only when one party or the other wins a judgment.

***Practice tip:*** If a party wishes to seek attorneys’ fees from the proceeds of a settlement pursuant to the terms of a contract, the term “prevailing party” must be expressly defined by the contract to not only include a party who obtains entry of a favorable judgment at trial, but also a party who receives settlement proceeds through mediation or other means of alternative dispute resolution.

## Indiana Holds That Insurer That Denies Coverage On Other Substantive Grounds Is Not Prejudiced By Late Notice

In *Tri-Etch, Inc. v. Cincinnati Insurance Co.*, 891 N.E.2d 563 (Ind. Ct. App. 2008), the Indiana Court of Appeals held that an insurer cannot defeat coverage on the basis of late notice of a claim or suit, if it also raises other coverage defenses that would have been raised even if timely notice had been provided.

Tri-Etch, Inc. provided security/alarm services to a liquor store in Muncie, Indiana. The store was robbed and an employee on duty was removed from the store, beaten, tied to a tree and later died from his injuries. His estate sued Tri-Etch, Inc., claiming that it had been negligent because it had not called the store's general manager within 30 minutes of closing, when it knew that the store's alarm system had not been set. Plaintiff claimed that had that call been made, it would have resulted in an investigation and the injured employee would have been found earlier and could have survived his injuries. Cincinnati Insurance Company provided liability insurance coverage to Tri-Etch, Inc. There was a dispute in the case as to when Tri-Etch provided Cincinnati with notice of both the claim and the subsequent suit. Tri-Etch argued that it provided notice to Cincinnati shortly after the incident and that it notified Cincinnati of the lawsuit when the litigation began in 1999. However, Cincinnati contended that it received no notice of either the incident or the litigation until March, 2004, more than six years after the decedent's death and four years after the suit was filed. Cincinnati argued that the notice was untimely and prejudicial. Under the Cincinnati policy, the insured was required to provide notice of an occurrence "as soon as practicable" and was required to provide notice of a claim or suit immediately.

The Indiana Appeals Court initially discussed the general rules that apply to a late notice defense. The Court explained that a two-part test is applied. First, the Court inquires as to whether the insured notified the insurer with a "reasonable" amount of time. Second, the Court must determine whether the insurer suffered prejudice as a result of the delay. If notice was not tendered in a reasonable period of time, there is a rebuttable presumption that the insured was prejudiced. The Appellate Court then considered how the merits of a late notice defense may be effected if the insurer also raises other policy defenses. Cincinnati denied coverage, not only on the basis of late notice, but also on the basis that the claim and suit did not arise from an "occurrence." The Indiana Appeals Court held that where the insurer denies on grounds in addition to late notice and where the evidence is that the insurer would have denied coverage even if timely notice had been provided, it cannot prove prejudice by reason of late notice. Accordingly, the court held that the late notice defense was without merit.

***Practice Tip:*** The lesson to be learned from this decision is an insurer carrier that denies coverage on the basis of both late notice and other policy defenses will be unable to establish that it was prejudiced by late notice, if the evidence is that it would have raised the other policy defenses regardless of when it was notified. Thus, an insurer should evaluate the relative strengths of its policy defenses before pleading them, and if it has a strong late-notice defense, it may consider limiting its coverage defenses to solely the late-notice issue and not raising other potential policy defenses.

## Illinois Courts Split On Whether Expert Testimony Is Needed To Support A Claim For Negligent Emotional Distress

In *Thornton v. Garcini*, 2008 WL 2132001 (Ill. 3d Dist, May 16, 2008), the Illinois Appellate Court for the Third District considered the issue of whether a Plaintiff seeking damages for emotional distress is required to present expert testimony to support that claim. The Illinois Appellate Courts for the Second and Fifth Districts had split on that issue, with the Second District holding that expert testimony is required but the Fifth District holding that it is not. In this case, the Appellate Court for the Third District held that a party seeking damages for the negligent infliction of emotional distress is not required to present expert testimony to establish that claim.

Until the Illinois Supreme Court resolves the conflict between the Appellate Courts on this issue, in any case in which damages are sought for negligent infliction of emotional distress, the defense should challenge any such claim if there is no expert testimony offered in support.

## Subcontractor That Has Completed Its Work May Be Liable to Employee Of Other Subcontractor Who Is Injured Because Of Defects In Work in Indiana.

In *Briesacher v. Specialized Restoration and Construction, Inc.*, 888 N.E.2d 188 (Ind. Ct. App. 2008), the Indiana Appellate Court reversed summary judgment in favor of a masonry subcontractor whose work was allegedly performed incorrectly and resulted in an injury to another subcontractor's employee.

Taylor & Bartholomew Construction, Inc. ("T & B") agreed to construct permanent concrete foundations, curbs, slabs, etc. for AMG Resources Corporation. T & B hired Lemmons Masonry as a subcontractor to perform that work. Lemmons Masonry's duties included installation of rebar at the top deck of the walls of the building. Plaintiff, Timothy Briesacher, an employee of subcontractor Wilson Ironworks, went to the jobsite to set beams in place and lay decking for the roof of the structure. As the plaintiff and his coworkers began to spread the decking, they realized that the rebar, set by Lemmons Masonry, was incorrectly placed and prevented them from being able to lay the decking. They decided to bend the rebar up to allow clearance to lay the decking. Briesacher straddled the wall and began scooting across the walls, bending the rebar as he progressed. In doing so, he grabbed another bar that had been set by Lemmons Masonry for support. The bar broke, and the plaintiff fell to the ground and sustained injuries.

Lemmons Masonry filed a motion for summary judgment, arguing that it did not owe the plaintiff a duty and therefore there was no basis for a claim of negligence. The Appellate Court concluded that Lemmons Masonry could have reasonably foreseen that a worker performing work upon the walls it had built could be subject to injury if the walls were not built properly. The Court relied on testimony of plaintiff's expert witness, who opined that the plaintiff did what any journeyman ironworker would have done in similar circumstances.

The Appellate Court concluded that there were genuine issues of material fact regarding the proximate cause of plaintiff's injuries. Lemmons Masonry argued that the proximate cause of plaintiff's injuries was his own negligence in climbing a wall without safety protection, while under the influence of morphine. Plaintiff, on the other hand, designated evidence that there would not have been a need for him to straddle the wall and bend the rebar if it had been installed properly by Lemmons, that he had been able to perform his job without any problems or side effects related to his medication, and that any journeyman ironworker would have done exactly what he did.

***Practice Tip:*** This case demonstrates that a builder or contractor may be liable for injury or damage to a third person long after completion of its work, when it is reasonably foreseeable that a third party may be injured by the work when it is not done properly.

## Court Finding Of Retaliatory Discharge Can Be Costly

A recent Illinois jury verdict reminds us that an employer must remain cautious when deciding to terminate an employee who has incurred an on the job injury. In the case of *Casanova v. American Airlines, Inc.*, 06C-4762 (May 2008), a Federal court for the Northern District of Illinois awarded the Plaintiff \$1,086,000 in damages against his employer, based on the finding that the Plaintiff had been wrongfully terminated because he pursued a worker's compensation claim arising out of his work injury. The Plaintiff was a field service mechanic for American Airlines. He was injured at work on November 11, 2005 and his employer conducted surveillance upon him. The airline conducted a hearing on the surveillance results and terminated Plaintiff because the surveillance footage reportedly showed him exceeding his medical-imposed restrictions and therefore demonstrated his dishonesty and disobedience.

Plaintiff claimed and the jury agreed that he was terminated in retaliation for pursuing his rights under the Illinois Worker's Compensation Act.

Even though it may appear to an employer that the evidence it has gathered demonstrates that an employee has committed fraud associated with some aspect of his worker's compensation claim, justifies terminating the employee, the *Casanova* decision is a reminder to us of the potential pitfalls and risks associated with taking such action. This is particularly true in the situation where the employer seeks to use some aspect of the employee's worker's compensation claim as the basis for terminating the worker's continuing employment status.

### **Court Finding Of Retaliatory Discharge ... *continued***

Generally, an employer is better served and less at risk when it applies a more neutral basis for job termination such as excessive absenteeism, inadequate job performance or reasonable economic necessity to not hold the injured worker's job open and replace him with another employee.

In contrast to the *Casanova* case, summary judgment relief was granted to an employer by the Federal Southern District Court in Indianapolis in *Vail v. Ray Bestos Products Co.*, No. 07-3621 (4/21/08, S.D. Ind). The court held that the employer did not violate the Family Medical Leave Act when it terminated Plaintiff for an honest belief that Plaintiff violated her medical leave. The record revealed Plaintiff was reportedly performing physical labor during the time she claimed she was unable to come work because of migraine headaches.

### **Indiana Limits The Application Of The Defense Of Incurred Risk In Medical Malpractice Cases**

In *Spar v. Cha*, 881 N.E.2d 70 (Ind. Ct. App. 2008), the Indiana Court of Appeals held that the doctrine of incurred risk did not apply to a malpractice claim based on lack of informed consent for a surgical procedure.

Plaintiff, Brenda Spar, sued Dr. Jin Cha for personal injuries sustained during an abdominal laparoscopic procedure. She claimed that Dr. Cha failed to obtain her informed consent and also claimed that he had been negligent in performing the procedure. At trial, Dr. Cha argued that the Plaintiff was aware of the risks of abdominal surgeries because she had numerous prior abdominal surgeries and therefore she incurred the risk of infection when she proceeded with the surgery. The Indiana Court of Appeals, however, held that in an informed consent case, the doctrine of incurred risk simply could not be applied because applying the defense to a malpractice action premised on failure to obtain informed consent would charge the patient with information that a lay person could not be expected to know.

The Appeals Court further held that as to a simple negligence malpractice claim, the doctrine of incurred risk applies only to claims that the patient failed to follow a doctor's instruction. The defense cannot be used to avoid liability for negligent surgical mistakes.

The defense of incurred risk is not recognized in Illinois. The defense of comparative fault does apply in Illinois, but has very limited application to malpractice cases. Comparative fault in Illinois, like incurred risk in Indian, does apply to injuries caused by failure to follow doctor's instructions.

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