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New Law Permits Damages for Grief in Wrongful Death Cases

As of May 31, 2007, a new law in Illinois allows a jury to award damages in a wrongful death case for grief, sorrow, and/or mental suffering. In the past, juries were specifically instructed that such damages were not allowed and could not be part of their consideration in such cases.

This law took the form of an amendment to Illinois' Wrongful Death Act and will apply to all accidents taking place after the May 31, 2007 effective date. The new law permits damages for the grief, sorrow, and/or mental suffering of the decedent's next of kin. Because the law is so new, there are no "pattern" jury instructions on this issue, leaving the trial judge with the job of deciding which party's language to use (as both sides will likely want to submit proposed instructions on this issue).

The new law will undoubtedly increase potential verdicts in wrongful death cases and settlement values as well. Many speculate that this new addition to the Wrongful Death Act will also create the need for experts in calculating such damages, much like economic experts who calculate future wage losses.

We will be following the cases that apply this new law to see the true effect on jury verdicts and settlement values over the course of the next year and will also follow the trends of trial judges in what instructions are given on this issue to juries.

Certificate of Insurance Not Sufficient to Create Additional Insured Coverage

In the fall of 2003, there was a serious fire in the County Building of Chicago located at 69 West Washington in the downtown area. Massive litigation (over 20 lawsuits for multiple deaths and injuries) followed and, naturally, coverage issues arose. In a recent appellate court decision, *Clarendon America Insurance Co. v. Aargus Security Systems, Inc.*, 1-06-2121 (Ill. App. June 18, 2007), the issue of whether additional insured coverage was provided under both a CGL policy and an excess insurance policy was discussed.

BGK was a security service who obtained a CGL policy with Clarendon. Its policy contained a Blanket Additional Insured endorsement, providing that parties that BGK was contractually required to provide coverage for were additional insureds under the policy. BGK's agent also issued a Certificate of Insurance naming Aargus Security as an additional insured. Both Aargus and BGK had contracted together to provide security services to the 69 W. Washington building. Their contract indicated that BGK was the "sole subcontractor" for Aargus for this building, but did not detail insurance obligations beyond the language, "all insurance that may from time to time be required shall be obtained in such manner as the parties hereto agree."

BGK also had an excess policy issued through Scottsdale Insurance Company as well. When litigation was filed, naming both BGK and Aargus as defendants, Aargus (among others) tendered its defense to Clarendon, claiming that it was covered under the policy as an additional insured.

Clarendon filed a declaratory judgment asking the Court to find that Aargus was not entitled to additional insured coverage and Scottsdale was granted leave to intervene to have the Court make a similar finding with regard to its excess policy. The trial court found that there was no coverage for Aargus under either policy and Aargus appealed.

The Appellate Court affirmed the decision of the trial court, holding that Aargus was not entitled to coverage under either the Clarendon or Scottsdale policies issued to BGK. The Court focused on the language contained within the separate contract between BGK and Aargus as not specifically mentioning an obligation by either to provide insurance to the other. The court held that this contract left the insurance obligations of the parties undecided and the Court would not interpret this to create an obligation of either Scottsdale or Clarendon to provide coverage to Aargus. Even though certificates of insurance existed, which named Aargus as an additional insured, these certificates were not "contracts" and the contract language was controlling.

This case illustrates the general rule that certificates of insurance do not confer or create coverage and that the policy controls, if in conflict with the certificate.

Insurer Liable for Spoliation of Evidence

In 1994, Thomas Jones was driving his vehicle and was struck by a tire that came off of a truck owned by Dave Macios and Sugarloaf Landscape Nursery in Edwardsville, Illinois. Jones died as a result of the injuries sustained when he then collided with a tractor-trailer. Macios was insured by Country Mutual Insurance, who investigated the accident by hiring an expert to find out what caused the tire to come off of the truck. The investigation revealed Macios' mechanic had sent the truck for inspection of the tires by O'Brien Tire only three weeks prior to the accident. O'Brien had replaced all four rear tires, including the one involved in the accident. The expert determined that the accident was the result of loose lug nuts and failure of Macios' driver to conduct a pre-trip inspection.

Prior to the expert issuing his report, Country Mutual sent a letter to Macios, telling him to retain the tires in a safe place, and Macios did not replace these tires on the truck or use it for several months. He asked his adjustor several times whether he could fix the truck to be able to use it in his business, but was told to wait. (Country Mutual denied this claim). In December of 1994, Macios repaired the truck, allegedly under the approval of Country Mutual. At this point, the crucial outer wheel assembly was discarded by the repair shop as Macios re-used the old tire which had not been damaged.

Jones' widow sued Macios and Country Mutual in February of 1995 and by December of that year, the case was settled for $475,000. At that point, Country Mutual sent Macios a letter telling him the litigation was "at an end and he need no longer concern himself with [the suit]". Jones then filed suit in August of 1995 against O'Brien Tires and its insurer, Ohio Casualty. The case was settled in 1998 for $1.45 million. Prior to the settlement, O'Brien and Ohio Casualty filed a third-party claim against Macios and Country Mutual, alleging negligent spoliation of evidence because of the loss of the wheels. At trial in 2004, the jury returned a verdict of $475,000 for O'Brien and Ohio Casualty. The Defendants appealed this verdict.

In general, to win a claim for negligent spoliation of evidence, a party has to show that there was a duty to preserve the evidence that was breached and as a result, the other party suffered damages. Here, Country Mutual argued it had no duty to Ohio Casualty or O'Brien to preserve the tires. However, the appellate court felt that Country Mutual voluntarily assumed the duty when it kept instructing its insured on how to handle the tires. This duty would then extend to any party that may need the evidence in future litigation due to the reasonable foreseeability that future litigation would occur (as evidenced by their own expert report). The Court concluded that it was negligent for Country Mutual to advise their insured to fix his truck and/or not follow-up on the alleged letter sent instructing Macios on how to store these tires to ensure it was complied with.

The Court specifically pointed-out that this missing piece of evidence need only be critical, not the sole piece of evidence available to meet the causation prong of their evaluation. Ohio Casualty also argued, in a cross-appeal, the jury should not have been allowed to fix damages as they saw fit and that the amount should have been fixed by the court at the $1.45 million settlement amount. This argument was rejected by the appellate court, which found that there could be many factors resulting in a lower settlement amount and this determination was properly left to the trier of fact.

The decision was 2-1 in the appellate court, with a written dissent noting the many problems created by extending the voluntary assumption of such a duty to the insurance companies who really have no control over the property of their insureds. The dissent also pointed out the seemingly illogical conclusion that could be reached by the majority opinion: an insurance company could avoid liability by advising their insured not to preserve evidence, but would be assuming liability by advising them to preserve evidence. The dissent took exception to what it called a "limitless duty" to preserve the evidence for Ohio Casualty.

BryceDowney has provided numerous seminars to its clients on this very area of law and counseled on the complex decisions involved in preservation of evidence. Given this new opinion of the appellate court, it is clear that there is still room for argument as to this nebulous and evolving area of law.

Jones v. O'Brien Tire and Battery Service Center, Inc., et .al., v. Macios and Country Mutual Insurance Company, 5-04-0294 (Ill. App. June 4, 2007).

Update on Forum non Conveniens Motions

Where a case proceeds is a significant factor both in determining value of an injury and strategy for presenting a case to a jury. Forum non conveniens motions have had a recent surge from defendants wishing to transfer a case from the venue in which it was filed to what they argue is the more appropriate venue.

In June of this year, a Cook County, Illinois case was appealed on this very issue. The underlying case involved a motor vehicle accident between a truck and a car in which the driver of the car was killed. *Smith v. Jewel Food Stores, Inc., et. al.*, 1-05-3254 (Ill. App. June 18, 2007). Plaintiff was the estate administrator for the deceased, who had lived in Kendall County. The accident occurred in Kendall County. The decedent was stopped behind a cement truck that was, in turn, stopped behind a school bus. The decedent was struck from the rear by a Jewel Food truck operated by Defendant Peter DeSuno. DeSuno was a resident of Will county, which is adjacent to Kendall. The cement truck operator, a witness to the accident, was a resident of Kendall County. All other witnesses at the scene were residents of either Kendall or Will Counties. Only one physician lived outside of these counties, in DuPage. Jewel maintained its corporate headquarters in Cook County, where Plaintiff chose to file her suit. The truck involved in this accident was also serviced in Cook County and housed there after the accident.

Defendants moved to transfer this matter to Kendall County based upon forum non conveniens, arguing that all factors pointed to Kendall County. The trial court granted the motion without further evidence or discovery on the issue.

The appellate court affirmed this decision, going through an extensive analysis of this type of motion. It indicated that although a plaintiff's choice of forum will generally be accorded deference, in this case, that deference was properly limited. That Court focused on the "private and public interest factors" involved in the case. Public factors pointed to the local nature of the controversy, fairness of imposing the costs to a foreign jurisdiction and the court docket, which is much more congested in Cook County. Private factors weighing in favor of the transfer included the convenience to the parties, witnesses, and evidence at issue in the case. Plaintiff insisted that the location of the truck in Cook County weighed in her favor, but the Court indicated that no one had explained why jurors would need to see this truck, and the accident site would be more helpful to view in person than the remains of a truck, shifting the balance to Kendall County.

The appellate court was quick to point out differences from other recent decisions denying the transfer, such as *Langenhorst v. Norfolk Southern Ry Co.*, 219 Ill. 2d 430 (2006) and *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 159 (2005). It specifically indicated that where a transfer was requested to a forum that was adjacent, inconvenience would be less likely to be found. They pointed again to the need to afford the trial court latitude in deciding these motions as it is in the best position to determine the many public and private factors at issue in the transfer request.

Conflicting "Other Insurance" Provisions in Policies Result in Pro-Rata Splitting on Liability

Often times, construction injury cases result in coverage disputes because of the numerous underlying contracts between general contractors and subcontractors. These contracts often require that one party name the other as an "additional insured" on a policy of insurance. As a party in Illinois is allowed to "target-tender" their defense to any applicable policy of insurance, under *Cincinnati Insurance*, *et. seq.*, the question then becomes whether a given policy is primary or excess for a given loss.

The appellate court recently faced this issue in the case of *Ohio Casualty Insurance Company v. Oak Builders, Inc.* 1-05-2279 (Ill. App. June 1, 2007). In the underlying case to this declaratory judgment, Dave Huerta sustained an injury while working at a construction site run by Oak Builders. He was working for JAZ Construction, who had a contract with Oak Builders and who provided additional insured coverage to Oak Builders under a policy with Ohio Casualty. Oak Builders also had a CGL policy of their own through American Family Insurance. When notice of the suit was received, Oak Builders tendered their defense to Ohio Casualty under the additional insure provision and filed a third-party claim against JAZ Construction.

Ohio Casualty rejected the tender and filed a declaratory judgment seeking a declaration that Oak Builders was not covered under the policy, and even if it was, it was only an additional insured for excess coverage (not primary). Oak Builders argued that it was an additional insured for primary coverage purposes under the Ohio Casualty policy and was owed a defense in the underlying suit. The trial court agreed that the policy applied, but that it was only excess, not primary coverage that would be afforded to Oak Builders.

Oak Builders appealed and the appellate court reversed and remanded the case. The court looked to the "other insurance" clauses of the American Family policy and Ohio Casualty policy and found that both were "excess clauses. Both were drafted to convey an intent to be "excess" to any other available insurance policies, which, to the Court, was incompatible and thus mutually repugnant. In effect, they would cancel each other out and both policies would be held to provide primary coverage on a pro rata basis. The court explained further, if each policy was given full effect, no primary coverage would be afforded to Oak Builders, unless one policy was read before the other and there was no reason to give full effect to one policy over the other.

American Family was not a party to this case, and it is not clear from the court's discussion how its coverage was involved. Under prior case decisions, the coverage of its policy would not be relevant unless the insured had targeted its coverage as well as that of Ohio Casualty.

Family Responsibility Discrimination

As more and more of the population is concerned with some type of family care giving responsibility, be it of children or parents, etc., this area is ripe for employment discrimination claims. The Equal Employment Opportunity Commission (EEOC) recently issued guidance on these types of claims to the public. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (May 23, 2007).* A summary of their findings is contained herein.

The EEOC found that there was a sharp increase in the number of mothers working outside the home in the past 35 years. These women, in addition to working, also shouldered primary care giving responsibilities. The study indicated that women of color were faced with more pronounced burdens in this regard than white women working outside the home. As more and more of the "Baby Boomer" generation age and are in need of long-term care options, they are also being cared for by working women.

One of the primary claims under this form of discrimination is for unlawful disparate treatment and retaliation under Title VII of the Civil Rights Act. This can include claims for sex-based disparate treatment of female caregivers (where a similarly situated male is hired over a female care giver), pregnancy discrimination, gender based assumptions on future care giving (for work assignments or hiring where a negative assumption is made about a female caregiver), discrimination against male caregivers (as in a situation where women are routinely given family leave, but males are not), discrimination against women of color, caregiver stereotyping under the ADA (where a candidate is not hired due to having to care for a disabled child), hostile work environment (as in the case of a woman subjected to hostility over having a child), and the classic retaliation charge (as in a person testifying in a claim brought by a pregnant woman and this person is disciplined).

The EEOC cautions employers to take these types of claims seriously and to train their employees to know what kinds of comments and actions are appropriate. All policies should be evaluated to ensure equal application to men and women and to avoid disparate application. Employers should also recognize the importance of family and care-giving responsibilities and the need to perform job duties by focusing on objective qualifications and performance of the individual and reducing speculation and subjective judgments. Most importantly, a system should be in place to report, investigate, and remediate any perceived disparate treatment in a prompt and fair manner.

Given the availability for punitive damages awards and the award of attorney fees to a prevailing plaintiff, these types of claims should not be ignored. One recent case involving a pregnancy discrimination claim in Ohio resulted in a $2.1 million verdict and the potential for $840,000 in attorney fees.

Insurer Entitled to Recover Defense Costs Consists Upon Finding That its Coverage Did Not Apply

In General Agents Ins. Co. of America v. Midwest Sporting Goods Co., 828 N.E.2d 1092 (Ill. 2005), the Illinois Supreme Court held an insurer that defended under reservation of rights is not entitled to recover defense costs that it paid, if it is successful in establishing in a declaratory judgment action that there was no coverage. In S*teadfast Insurance Company v. Care-*

mark, *Inc.*, 1-06-1221 (Ill. App. May 22, 2007), the appellate court addressed a slightly different situation and held that where an insurer does not voluntarily defend under reservation, but provides a defense only because ordered to do so by an order of the trial court that is later reversed, it is entitled to reimbursement.

Caremark was an administrator of prescription drug benefits for certain national health plans. It was named in multiple suits that alleged consumer fraud and conspiracy with drug companies to prefer certain higher-priced drugs in exchange for "kick-backs". Caremark tendered these suits to Steadfast, who had issued a managed care professional liability policy to Caremark. Steadfast denied coverage, claiming that the complaint failed to fall under "negligent acts, errors or omissions", the coverage provided to Caremark under the policy. It did not defend under a reservation of rights, but instead filed a declaratory judgment action to resolve this issue. The circuit court found in favor of Caremark and entered an order requiring Steadfast to provide a defense in the underlying actions.

Steadfast appealed this ruling, but the trial court had refused to delay enforcement of the order pending the appeal, so Steadfast was also obligated to provide the defense in the underlying litigation while the appeal went forward. The Appellate court reversed the decision and found that the factual allegations in the underlying complaint did not trigger coverage. Because Caremark had also sought attorney fees in the declaratory judgment, the case was remanded on that issue alone. The circuit court then denied Caremark's claim for the attorney fees.

Steadfast then filed a motion for restitution of the $964,000 it had expended in defending the underlying suits for Caremark, arguing that since the appellate court found that no coverage applied, these amounts were paid in error on Caremark's behalf. The circuit court denied this motion and a motion to reconsider same, as well as Steadfast's motion for leave to file a second amended complaint to include a count for these fees under an unjust enrichment theory.

Steadfast appealed this ruling as well. The appellate court agreed that the money had been paid in error and that the policy's lack of a provision about recovery of these costs did not prevent restitution, as Steadfast had filed a declaratory judgment and did not undertake a defense under a reservation of rights. The court stated that the only duty to defend Caremark arose under the erroneous order of the circuit court. However, because Steadfast did not include a count for unjust enrichment in their complaint, the appellate court found that the circuit court was unable to order restitution (as technically, Steadfast was seeking a remedy they were not entitled to under the existing pleadings). So, they affirmed this portion of the decision.

The Court however also reversed the lower court's denial of the motion to amend the pleadings to include a count for unjust enrichment. Based upon that ruling, the Court then remanded the case with instructions to continue proceedings "not inconsistent with this opinion". Given the lengthy discussion of the Appellate court on restitution, it is clear that Steadfast, once it is able to amend its pleading, would be entitled to the restitution it sought.

Injured Plaintiff Only Entitled to Recover Amounts of Medical Expenses Paid by Medicare on Medicaid, Not Full Amount of Bill

In July of 2005, the Illinois Supreme Court rendered a decision that allowed plaintiffs to claim the <u>full</u> amount of medical bills (not just the amounts paid by health insurance) as damages in a civil matter. *Arthur v. Catour*, 216 Ill. 2d 72, 833 N.E.2d 847 (Ill. 2005.) Since that time, there has been much discussion of whether this decision was proper, whether the new rule simply allows inflation of damages and whether this new rule will apply to all kinds of third-party payments on medical bills.

The Fourth District Appellate Court recently answered part of this question in *Wills v. Foster*, __N.E.2d ___, 2007 WL 1192144 (Ill. App. April 18, 2007.) In this case, the defendant argued that the Plaintiff's medical bills of $80,163.47 should be reduced because all of the bills were paid by Medicare or Medicaid. Defendant argued that the rule in *Arthur* should not apply because of the key difference in private health insurance and Medicare/Medicaid – payment for coverage. The plaintiff argued that the collateral source rule should apply, as in *Arthur*, to allow the full amount to be claimed as damages.

At the trial court level, the Court sided with the plaintiff, allowing the full $80,163.47 to be introduced as medical expenses. The jury entered a verdict that included an award for this entire amount, among other damages. However, through a post-trial motion filed by the defendant, the court reduced this award to $19,005.50, the amount actually paid by Medicare and Medicaid. The trial court, however, also held that if the medical providers sought to recover the full amount of their charges from the plaintiff within one year of the court's ruling, the plaintiff could ask the court to revise its order.

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On appeal, the court held that the rule in *Arthur* would not apply because of the fact that the plaintiff in *Arthur* was paying for the insurance that made these payments on his behalf, while the plaintiff in *Wills* did not pay for Medicaid or Medicare coverage. It was the lack of this "bargained-for exchange" that caused the Appellate Court to affirm the lower court's decision to reduce the award.

What does this mean for defendants? This is a good case to use to try to reduce the amounts of damages claimed by plaintiffs who received Medicare or Medicaid benefits. Given the extreme difference in billing versus Medicare/Medicaid payments, the change is critical to both settlement and verdicts. It is possible that the same issue may come up in other appellate circuits with different decisions (necessitating the input of the Illinois Supreme Court), but until then, *Wills* is the controlling decision on the issue.

In its opinion the *Wills* court noted that there is a split on this issue among other states that have addressed it. Florida and Idaho have held that Medicare payments are not a collateral source, but North Carolina, South Carolina, Mississippi, Wisconsin and Hawaii have held that they are.

OSHA Policy Invalidated

OSHA has a long-adopted policy of issuing citations to contractors for sub-contractor violations, terming the general contractors, "controlling employers". The Administration's Review Commission (not a judicial body) recently issued a decision that invalidated this process as inconsistent with certain provisions of the United States Code of Federal Regulations. *Secretary of Labor v. Summit Contractors, Inc., OSHRC 03-1672 (2007).* This portion of the Code (29 C.F.R. § 1910.12(a)) talks about duties of a sub-contractor for "his employees". The Review Commission felt that to extend such a duty beyond this direct employment relationship to include the general contractor was not envisioned in the regulation. Thus, OSHA is effectively barred from issuing a citation to a general contractor as a "controlling employer" for a subcontractor's violation. Challenges of prior citations are likely to occur. The decision of the Review Commission can be appealed by the United States Secretary of Labor to the Federal Appellate Court for the Eighth or Eleventh Circuit. What effect this may have on construction litigation has yet to be seen.

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.

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 2007 by BryceDowney, LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.*