BRYCE DOWNEY & LENKOV LLC

General Liability Update
August 2017

Illinois Supreme Court Paves the Way for Employers to Argue Sole Proximate Cause in FELA Cases

In *Wardwell v. Union Pacific Railroad Company*, 2017 IL 120438 (February 17, 2017), the Illinois Supreme Court was faced with the question of whether in a FELA action a defendant may argue that another party's negligent conduct was the sole cause of its employee's injuries.

In *Wardwell*, the trial court held that a railroad defendant could assert the defense that a third party was the sole proximate cause of Plaintiff's injuries and allowed the jury to base its verdict on that defense.

On appeal, a divided appellate court reversed and remanded, holding that FELA does not allow a defendant railroad to argue that another party's negligent conduct was the sole cause of its employee's injuries. The Illinois Supreme Court reversed.

In *Wardwell*, Plaintiff was employed by defendant Union Pacific Railroad Company. While a passenger in a van owned by Union Pacific traveling from a railway yard to one of Union Pacific's trains, the van in which Plaintiff was traveling was rear-ended by a vehicle driven by a non-railroad employee, Erin Behnken. Plaintiff's co-worker, Regina Goodwin, was driving the Union Pacific van at the time of the accident.

Plaintiff brought a lawsuit against Union Pacific under FELA claiming that Ms. Goodwin had negligently cut in front of the other vehicle operated by Ms. Behnken and that this was the cause of the accident. At trial, Union Pacific argued that the sole proximate cause of Plaintiff's injuries was the negligence of Ms. Behnken. Evidence was presented that Ms. Goodwin was in the left lane of traffic on Route 3 when, after letting another vehicle pass her on the right, she activated her right turn signal. She then checked her mirror, confirmed that there was no other vehicle on her right and made a lane change to the right lane. There was no evidence that Ms. Goodwin was speeding or violating any traffic laws.

Approximately 20 seconds later, the Union Pacific van was struck from behind by the vehicle driven by Ms. Behnken. At trial, evidence was presented that Ms. Behnken was drunk at the time of the collision and either "fell asleep or was blacked out" before impact. Ms. Behnken was traveling 10 to 15 miles per hour over the posted speed limit. The jury, after hearing this evidence, returned their verdict in favor of Union Pacific.

The Illinois Supreme Court acknowledged that causation in a FELA action is different from a traditional tort action. The foreseeability or probability of an injury, which is traditionally required in a common law action under the doctrine of proximate cause, does not need to be established in a FELA action. Instead, the test is whether the evidence supports the conclusion that the employer's negligence

played any part, even the slightest, in producing the injury or death for which damages are sought.

Based on the testimony that Goodwin was not violating any traffic laws, had changed lanes as much as 20 seconds before the collision, and Ms. Behnken was intoxicated at the time she rear-ended the Union Pacific van, the Illinois Supreme Court held that any purported negligence on Ms. Goodwin's part, such as not checking her blind spot before changing lanes, did not play any part in causing plaintiff's injuries. On these facts, the court held the jury properly considered the role that Ms. Behnken's negligent conduct played in the accident, and likewise properly concluded that Ms. Goodwin's conduct played no role at all in the accident.

Thinking Point:
While the facts in *Wardwell* fairly clearly demonstrate that the cause of the accident fell exclusively on Ms. Behnken, expect to see a dramatic increase in the number of FELA defendants asserting that the negligence of some third person or entity was the sole proximate cause as an affirmative defense in light of this decision.

Indiana Supreme Court Clarifies Sports Participant Liability Standard

In *Megenity v. Dunn*, 68 N.E.3d 1080 (Ind. 2017), the Indiana Supreme Court held that a participant in a sports activity who engages in conduct which is ordinary in the sport cannot be held liable for injury of another participant unless the conduct was intentional or reckless.

In *Megenity*, Defendant was participating in a karate class and was engaged in a kicking drill. In the drill, Defendant was to perform a maneuver called a "flying kick" and kick a bag held by Plaintiff. To perform a "flying kick," the participant kicks outward with one kick with one foot while the other foot is planted on the ground. Here, however, Defendant mis-performed the maneuver and both feet left the ground. The result was a "jump kick". The additional force caused by Defendant being airborne resulted in Plaintiff being knocked to the ground where she sustained injury.

In the resulting lawsuit, Defendant moved for summary judgment arguing that under Indiana law, the "jump kick" he performed was "ordinary behavior" within the sport of karate and he could only be liable if his conduct was intentional or reckless. The trial court agreed and entered summary judgment in favor of Defendant. On appeal, Plaintiff argued that Defendant had the duty to perform the drill in a reasonable and appropriate manner and that the "jump kick" breached that duty. The court of appeals agreed and held that Defendant's conduct is judged by what is reasonable and appropriate in the specific activity within the sport.

On review, the Indiana Supreme Court reversed. According to the court, a sports participant breaches no duty as a matter of law by engaging in conduct that is "ordinary in the sport unless done intentionally or recklessly." In this regard, the court held that "ordinary conduct" looks to the sport generally not to the activity within the sport specifically. Because "jump kicks" and "flying kicks" are both considered ordinary conduct within the sport of karate, Defendant had no liability unless his conduct was intentional or reckless.

With regard to the issue of whether Defendant's conduct was intentional or reckless, the court noted that what is intentional or reckless is largely to be determined by the sport itself. For example, what is considered to be reckless in some sports may not be considered reckless in others. As such, the court noted that there are three elements of sports recklessness. First, a Defendant must intentionally act or intentionally fail to act. Second, Defendant's act or omission must be consciously indifferent to the Plaintiff's safety. Finally, Defendant's particular conduct and his state of mind must fall "totally outside the range of ordinary activity involved in the sport." 68 N.E.3d at 1085.

In *Megenity*, the court observed that even if Defendant's "jump kick" was done intentionally, there was no evidence that he acted with conscious disregard for Plaintiff's safety. As such, the trial court was correct in entering summary judgment in favor of Defendant.

Thinking Point:

Megenity expands the sports participant immunity for "ordinary conduct" to include not only the "ordinary conduct" expected at the time of the incident but "ordinary conduct" in the sport generally. We view the court's interpretation as likely to result in fewer successful lawsuits predicated on sports participant conduct.

Indiana Supreme Court Holds Contract Between Owner and General Contractor Created Duty to Employee of a Sub-Contractor

On April 26, 2017, the Indiana Supreme Court held that a general contractor could be held liable for injuries sustained by an employee of a sub-subcontractor under the general contractor's contract with a property owner.

In *Ryan v. TCI Architects*, 49 S02-1704-CT-253 (April 26, 2017), TCI Architects had contracted with Gander Mountain to remodel a Gander Mountain store in Lafayette, Indiana. Under the agreement, TCI specifically agreed to "assume" responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work" and to designate a safety representative to monitor these safety precautions. In addition, the agreement provided that TCI would "exercise complete and exclusive control over the means, methods, sequences and techniques of construction."

TCI hired Craft Mechanical as a subcontractor and, in turn, Craft hired B.A. Romines Sheet Metal to perform heating and ventilation work on the project. Plaintiff was an employee of Romines. During the project, Plaintiff fell off of a ladder and sustained serious injuries. He sued TCI and Craft alleging that they were liable because they allowed him to work with a ladder that was not tall enough to safely accomplish his work.

Plaintiff filed a motion for summary judgment arguing that TCI and Craft breached their contractual duty to provide him with a safe workplace. TCI moved for summary judgment asserting that, as a general contractor, it had no duty to Plaintiff and that TCI's contract with Gander Mountain did not create a contractual duty to Plaintiff. The trial court denied Plaintiff's motion for summary judgment and granted TCI's motion. The Court of Appeals affirmed.

On review, the Indiana Supreme Court noted that ordinarily, a general contractor does not owe a duty of care to an employee of a subcontractor. However, under the "special duty" exception to this rule, a general contractor may assume such a duty contractually. The court also observed that there were conflicting decisions from the Court of Appeals on the issue of whether an owner-general contractor agreement can create a non-delegable duty of care to an employee of a subcontractor.

Relying solely on its interpretation of the contract, the court held that a general contractor assumes a non-delegable duty of care to employees of a subcontractor and sub-subcontractors when the owner-general contractor agreement imposes the obligation for worksite safety on the general contractor and the general contractor has the obligation to enforce safety precautions and laws. The court also held that the subcontract agreement between TCI and Craft and the sub-subcontract agreement between Craft and Romines did not relieve TCI of its contractually assumed safety obligations because those contracts were not included within the purview of the "four corners" of the contract with Gander Mountain.

Thinking Point:

Ryan is a significant case for all contractors in Indiana. Boilerplate language imposing safety responsibility on a contractor creates a non-delegable duty to ensure a safe workplace for all employees within the scope of the work to be performed under the contract. The court did not carve out any exceptions based on whether a contractor actually exercises authority over worksite safety or whether additional contractors or subcontractors had contractual obligations to the contractor of worksite safety.

Illinois Appellate Court Holds Complaint Against an Athletic Trainer for Failure to Evaluate or Treat an Athlete Requires Supporting Physician's Affidavit

Prior to *Williams v. Athletico, Ltd*., 2017 Ill. App. (1st) 161902 (March 21, 2017), no reported Illinois decision held that Section 622 of the Illinois Code of Civil Procedure (735 ILCS 5/2/622) required an affidavit of a healthcare provider to the effect that a claim against an athletic trainer based upon the trainer's failure to evaluate an athlete for signs of injury was meritorious.

Under §622, a complaint sounding in healing art malpractice must include an affidavit of a healthcare professional stating that the claims are meritorious. Where the complaint is against a doctor, physician, nurse, or a hospital, there is little question that § 2-622 applies. It has also been applied to licensed occupational therapists. In a case of first impression, the appellate court in *Williams* concluded that it likewise applies to athletic trainers.

In *Williams*, plaintiff sustained an alleged concussion in the first quarter of a high school football game. Athletico was under contract with plaintiff's school to provide on-site injury care and evaluation for the game. Plaintiff contends the athletic trainer from Athletico should have evaluated plaintiff's concussion but did not, and allowed him to continue to play in the game. As a result, he claims to have sustained Second Impact Syndrome, which occurs when the brain swells rapidly and catastrophically as a result of additional blows to the head following a concussion.

Plaintiff filed a complaint against Athletico and the trainers assigned to the game. Plaintiff did not attach an affidavit pursuant to §622. The defendants moved to dismiss because the affidavit was not attached. The trial court denied the motion but certified the question of whether an affidavit is necessary in claims of this type against athletic trainers.

The appellate court applied the same factors used by the court which found that a §622 affidavit is necessary in actions against licensed occupational therapists. Those factors were:

(1) Whether the standard of care involves procedures not within the grasp of the ordinary lay person;

(2) Whether the activity is inherently one of medical judgments;

(3) The type of evidence that will be necessary to establish the plaintiff's case.

The court concluded that each factor weighed in favor of requiring the §622 affidavit.

The *Williams* court also considered the question of whether the affidavit required should be from another athletic trainer or a physician licensed to practice in medicine in all its branches. Because §622 identifies the specific branches of medical care providers, other than physicians, for which the report must be prepared by a health professional licensed in the same

profession, and because athletic trainers are not identified in this group, the court held that the catchall section requiring an affidavit from a physician licensed to practice medicine "in all its branches" applied.

Thinking Point:
Williams makes clear that the requirement for a §622 affidavit is not limited to conventional medicine, but is to be viewed expansively where the evaluation and/or treatment of individuals involve inherently medical judgments, no matter the training or education of the person providing such treatment.

Illinois Appellate Court Clarifies Liability for Retention of Control by Contractor

Under Section 414 of the Restatement of Torts, applicable in Illinois, more is required than to simply establish that a contractor retained control over work performed by a subcontractor it hires to expose a hiring contractor to liability: It must also be shown that the hiring contractor performed some negligent act within the scope of the control it retained and that this act caused the subcontractor's employee's injuries.

In *Geraci v. Gilbane Building Company, AT&T Services, Inc., and Johnson Controls, Inc.*, 2017 IL App (1st) 133000 (March 14, 2017), Jeffrey Geraci was injured when performing a tie-in to a breaker at an AT&T facility to provide temporary electricity for a welder. For unknown reasons, there was an arc flash of electricity when Mr. Geraci gripped the breaker with his left hand and placed his right hand on the bucket in which the breaker was contained.

He, as well as his co-workers, had performed the same task on multiple occasions on this project prior to his accident and had performed it without any personal protective equipment. Doing this task this way was viewed by all to be a safe practice because the location where the breaker was accessed was not energized. Whatever defect was present in the breaker that caused the arc flash could not have been detected on visual inspection.

Mr. Geraci sued Gilbane Building Company which was the general contractor on the project that hired plaintiff's employer, along with AT&T, the owner of the building, and Johnson Controls, AT&T's building manager. AT&T and Johnson Controls settled with the Plaintiff, while Gilbane moved for summary judgment. Summary judgment was granted in favor of Gilbane and Geraci appealed.

On appeal, the appellate court held that, even though there was a question of fact as to whether Gilbane retained power or control over the work of Plaintiff's employer which could potentially give rise to liability on its part to Mr. Geraci, more was required to expose Gilbane to liability. Under Section 414 of the Restatement, Plaintiff had the burden of showing there was a factual basis for a finding that Gilbane negligently breached a duty within the scope of the control it retained and that its breach proximately caused Mr. Geraci's injuries. According to the court, merely showing that control of the work was retained by Gilbane was not enough to sustain this burden, and the court noted that even though Gilbane complied with the terms of its contract with Mr. Geraci's employer in terms of its exercise of the control retained, it could still be found liable if it knew that the means and methods used by Mr. Geraci's employer were unreasonably dangerous and Gilbane failed to exercise its authority to stop the work or direct that it be performed in a safe manner.

However, the court found that there was no such evidence in the record. The manner in which Mr. Geraci was accessing the breaker without protective equipment was the manner in which all employees on the job performed the work and was viewed as safe because the access point was de-energized. Even if Gilbane had observed Mr. Geraci performing this task in the manner in which he did when injured, it would have no reason to believe the practice was unsafe nor would it have any reason to stop

the work. Accordingly, the appellate court affirmed summary judgment in favor of Gilbane.

Thinking Point:
The *Geraci* decision makes clear that in analyzing the issue of retention of control in terms of exposure for injuries to a hired contractor's employee, it is important to focus not only on the contract documents and the issue of whether control was, in fact, sufficiently retained, but also the separate question of whether, if so, the such retained control was exercised non-negligently and likewise whether proximate cause has been established.

Indiana Jury Awards Verdict of 264 Times Plaintiff's Medicals

In *Sutton v. Brincko*, 64D02-1506-CT-5335 (May 24, 2017), a Porter County, Indiana jury awarded Plaintiff $2.75 million with medical expenses claimed of only $10,397.

In *Sutton*, 23 year old Plaintiff was driving east on Lincolnway in Valparaiso when he stopped in the left lane and was prepared to make a turn. Defendant, Dr. Bruce Brincko, was traveling directly behind Plaintiff and rear-ended Plaintiff.

Plaintiff filed suit against Defendant in the Porter Superior Court in Valparaiso, Indiana, which has historically been a conservative jurisdiction. Prior to trial, Defendant offered $80,000.

Plaintiff claimed that he suffered an annular tear and herniated disc due to the crash. He underwent chiropractic treatment, physical therapy and two epidural injections.

At trial, Defendant admitted liability but argued against causation of the herniated disc. Defendant also introduced evidence of a private investigator who took photographs of Plaintiff engaging in physical activities after the accident. Defendant also highlighted that Plaintiff was given no impairment rating or restrictions and had not missed any work as a result of his claimed injuries. After a 3 day trial, the jury deliberated for 1.5 hours and awarded $2.75 million to Plaintiff.

Thinking Point:
Sutton demonstrates that in evaluating jury verdict analysis for clients, we can no longer be certain that our conservative jurisdictions will remain conservative going forward into the future. We will have to continue to monitor the monthly verdicts and adjust for the changing jurisdictions. We can also expect more Plaintiff attorneys to want to try matters in Porter County, Indiana.

Supreme Court Limits Illinois Snow & Ice Removal Act

The key provision of the Illinois Ice and Snow Removal Act provides:

> Any owner, lessor, occupant or other person in charge of any **residential** property, or any agent of or other person engaged by such party, who removes or attempts to remove snow and ice from sidewalks abutting the property shall not be liable for any personal injuries allegedly caused by the snowy or icy condition of the sidewalk…unless the alleged misconduct was willful or wanton. 745 ILCS 75/2.

In the case of *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394 (2016), the Illinois Supreme Court gave the statutory language a very strict construction and limited it to liability for falls on accumulations of ice and snow that are due solely to negligent snow and ice removal efforts. Specifically, the Illinois Supreme Court

refused rather emphatically to extend the immunity provided by the statute to snow and ice/related falls caused by natural accumulations which would otherwise potentially support an action of negligence against a property owner and/or manager.

The facts of the case merit a brief description. Plaintiff's testimony, substantiated by others, is that Plaintiff fell in an area which permitted standing water on the sidewalk which admittedly could freeze and cause an icy condition. In granting summary judgment, the trial court recognized a split of authority among the appellate districts. The Fourth District upheld that the Act limited immunity from liability to claims specifically arising out of negligent ice and snow removal. Conversely, the Fourth District construed the immunity more broadly to include non-liability for claims arising from a defective condition on the property.

The court noted specifically that the Plaintiff's theory of the case as alleged was not that the Defendants negligently undertook efforts to remove a natural accumulation of snow from the sidewalk and thereby caused an unnatural accumulation. It noted, "Rather, Plaintiff's theory is that the ice formed on the sidewalk in an unnatural way due to an otherwise defective condition of the property, and that Defendants were negligent in failing to make reasonable efforts to maintain the property to eliminate that danger…" Id. at ¶ 35.

The Supreme Court's holding was that the statute was to be strictly construed and that it was contrary to the Illinois common law. Applying strict construction principles, the court held that, in essence, the statute referenced no removal only, and thus should only be permitted to immunize persons involved in snow removal efforts. Other potentially negligent actions relating to the landscape (i.e., natural accumulations not caused by shoveling) fell outside the protection of the Act. Accordingly, the owner's liability was not terminated by the statute.

Thinking Point:

It is important to note that the statute itself relates only to residential property. While it is being held to apply to multiple unit apartments, condominiums and like buildings, it clearly does not relate to commercial property in any way. The court did not deliberate what activities are covered by the Act. For example, if snow were piled next to a curb by the shoveler, it is very possible that immunity would exist. If snow were piled in a known low spot, adjacent to a sidewalk, and melted snow causing ice to form on the sidewalk, it is very likely that immunity would be substantially questioned. Each case must be examined carefully on its own facts to determine whether a dispositive motion based on *Murphy-Hylton* is meritorious.

Recent Seminars

- On **8/16/17**, **Jeff Kehl** presented, "Discretionary Immunity Under Indiana Tort Claims Act and Illinois Tort Immunity Act" to PMA Insurance Group

- On **7/17/17, Storrs Downey** and **Jeff Kehl** presented, "The Future of Crop Evaluations: Potential & Pitfalls Of Using Drone Technology In Crop Loss Claims" to Berkley Agribusiness Risk Specialists in Des Moines, IA.

- On **7/10/17**, **Storrs Downey** and **Jeff Kehl** presented "Illinois Workers' Compensation Liens & Third Party Liability" to PMA Insurance Group.

- On **2/16/17**, **Storrs Downey** presented "Recent Developments with DOL & NLRB" to the Illinois Manufacturers' Association at Ditka's Restaurant in Oakbrook Terrace.

- On **2/14/17**, **Storrs Downey** presented "Religious & Disability Discrimination & Accommodations In Today's Ever-Evolving Workplace" to the National

Association of Security Companies (NASCO) in Fort Lauderdale, FL.

- On **1/26/17**, **Storrs Downey** presented "Approaching LGBT Issues in Today's Workplace: Heightened Focus on Sexual Orientation, Gender Identity and Gender Expression Discrimination Claims" at the American Conference Institute's 25th National Conference on Employment Practices Liability Insurance in New York, NY. Click Here for more info.

Recent Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics in various practice areas. If you would like a recording of any of our prior webinars, please email Marketing Director, Stuart Fisher at sfisher@bdlfirm.com.

Upcoming Seminars

On **9/28/17**, **Storrs Downey** will present "Labor and Employment: Sex, Drugs, Religion and the Impact of POTUS" at the 2017 Employers' Fall Summit hosted by Encore Unlimited at Pinstripes in Oak Brook, IL.

BDL Is Growing!

BDL welcomes Renee Day. Renee handles workers' compensation and general liability claims out of the firm's Indiana office. Renee earned her JD from the Thomas M. Cooley Law School.

BDL welcomes Kyle Lawrence. Kyle handles workers' compensation, general litigation defense, medical malpractice defense out of the firm's Indiana office. Kyle earned his JD from the Indiana Maurer School of Law.

BDL welcomes Julia Alcaraz. Julia handles workers' compensation and earned her JD from The John Marshall Law School.

BDL welcomes Chase Gruszka. Chase handles workers' compensation and earned his JD from The John Marshall Law School.

BDL welcomes Emily Schlecte. Emily handles workers' compensation and general liability and earned her JD from The John Marshall Law School.

BDL welcomes Jessica Jackler. Jessica handles employment & labor claims and earned her JD from Suffolk University Law School.

Jeff Kehl Obtains Favorable Verdict for Client in Dental Malpractice Case

Jeff Kehl recently defended a dental malpractice case to verdict on **1/31/17** in LaPorte County Indiana Circuit Court.

The plaintiff claimed that the fitting of his dentures was negligent and that he was not fully informed of the risk. The defense argued that the plaintiff was fully informed and went ahead with dentures rather than implants anyway.

The plaintiff's pre-trial settlement demand was $125,000.00. The settlement offer before and during trial was $10,000.00. The trial court barred certain plaintiff's expert testimony. The

jury rendered a verdict for the plaintiff in the amount of $2,500.00.

Jeff Kehl Successfully Defends $25M Case Involving Trade Show Accident

Jeff Kehl successfully defended a case involving a construction trade show accident to verdict on **3/23/17** in the Cook County Circuit Court Law Division.

The Plaintiff claimed that he suffered a career-ending back injury when he slipped on a dislodged carpet tile while dismantling a display booth, and asked the jury to award $25,000,000. Plaintiff sued the owner and general contractor for the trade show who, in turn, sued Plaintiff's employer alleging that the employer failed to properly train and instruct the Plaintiff.

Jeff argued to the jury that the employer did not fail to properly train and instruct the Plaintiff. He made no offer in response to the Plaintiff's claim of $25,000,000.

The trial lasted three weeks and the jury deliberated for less than two hours before finding Jeff's client and the other parties not guilty and awarding the Plaintiff $0.

Rich Lenkov Secures Verdict for Retail Chain Store

Rich Lenkov secured a successful verdict from a Lake County Illinois jury for a long-time Bryce Downey and Lenkov retail client. Plaintiff, a 60 year old male, alleged that the retailer was negligent in failing to properly warn him of a slippery substance in the aisle of their Vernon Hills, Illinois store. He had knee and shoulder surgeries and presented $85,000 in damages to the jury.

The retailer denied liability, presenting 3 employees who testified about several warning devices. The retailer also denied causation, in large part based on Plaintiff's extensive prior medical history.

Following a four day trial, Plaintiff asked the jury for $225,000. After a 90 minute deliberation, the jury found for Plaintiff on liability, but awarded him only $1,033.00 in damages.

Chris Puckelwartz Wins Summary Judgment in Three Premises Liability Cases

Bryce Downey & Lenkov's Chris Puckelwartz is on a roll having recently secured summary judgment in three federal premises liability cases.

In the first case, Plaintiff alleged that she slipped in a retail store on a foreign substance that she believed to be vomit. Plaintiff alleged that the store was negligent in failing to discover and remove the vomit prior to her fall. Defendant moved for summary judgment arguing that Plaintiff was unable to establish that the store had actual or constructive notice of the substance. Plaintiff argued that the substance had been present for an extended period of time based upon its smell and appearance and that the store should have discovered it in that length of time.

In granting summary judgment for the store, the United States District Court for the Northern District of Illinois found Plaintiff's argument to be too speculative and contradicted by the testimony of the store's employee who testified that he inspected the area only 10 minutes prior to the incident.

In the second case, Plaintiff claimed that she slipped on juice in the juice aisle of a retail store. Plaintiff and her daughter testified that Plaintiff slipped on a pink liquid but they did not know the source of the liquid, how long it was present, and when the area was last inspected.

The United States District Court for the Northern District of Illinois granted summary judgment in favor of the store on the basis that Plaintiff was unable to establish that the store had actual or constructive notice of the presence of the pink substance.

Finally, in another case involving a trip and fall in a retail store, Chris obtained summary judgment on the basis that Plaintiff was unable to establish that the store had actual or constructive notice of the presence of a shopping basket on the floor of the store. Plaintiff argued that the store must have known of the presence of the basket because it was near a checkout register, no customers were in the area of the basket, and the basket was related to the store's operation. The United States District Court for the Northern District of Illinois rejected Plaintiff's argument and granted summary judgment on the basis that Plaintiffs' evidence was too speculative to support an inference of actual or constructive notice.

Storrs Downey Obtains Favorable Decision in Seventh Circuit Court

Storrs Downey successfully convinced the Seventh Circuit Court of Appeals to affirm summary judgment in favor of BDL's client in a suit brought by a former employee who claimed he was retaliated against under the ADA and for filing an OSHA violation complaint.

Contributors to the August 2017 General Liability Update

Bryce Downey and Lenkov attorneys who contributed to this update were Storrs Downey, Jeffrey Kehl, Kirsten Kaiser-Kus, Frank Rowland, and Jim McConkey.

Giving Back

Hustle Up The Hancock

On **2/26/17**, Team BDL participated in Hustle up the Hancock. **This year's event raised over $1,023,000** for lung disease research, advocacy and education.

Polar Plunge

On **3/5/17**, the firm's bravest souls dove into the icy waters of Lake Michigan in support of Special Olympics' annual Polar Plunge. **This year the firm raised more than $1,700!**

BDL's plungers donned Hamilton: An American Musical inspired costumes. **Download our plunge video here!**

Race Judicata 2017

BDL is proud to sponsor this year's wine tent at Race Judicata on **9/14/17**! Each year, Bryce Downey & Lenkov sponsors Chicago Volunteer Legal Services' Race Judicata 5K Race. CVLS is the first and pre-eminent pro bono civil legal aid provider in Chicago. Last year, the race took place on **9/15/16**.

Cutting Edge Legal Education

If You Would Like Us to Come In For A Free Seminar, Click Here Now Or Email Storrs Downey At sdowney@bdlfirm.com

Our attorneys regularly provide free seminars on a wide range of general liability topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Among the national conferences at which we've presented:

- 12th Annual Employment Practices Liability Insurance ExecuSummit
- Claims and Litigation Management Alliance Annual Conference
- CLM 2014 Retail, Restaurant & Hospitality Committee Mini-conference
- National Workers' Compensation and Disability Conference® & Expo
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- 2014 National Workers' Compensation & Disability Conference
- RIMS Annual Conference

Some of our previous seminars include:

- Employment Practices Liability Insurance ExecuSummit
- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace
- Spills, Thrills and Bills: The True Story Behind Illinois and Indiana Premises Liability Law
- Subrogation Basics for Workers' Compensation Professionals
- Employment Law Issues Every Workers' Compensation Professional Needs To Know About

Who We Are

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers committed to delivering services, success and satisfaction. We exceed clients' expectations everyday while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Schererville, Memphis and Atlanta, and attorneys licensed in multiple states, we are able to serve our clients' needs with a regional concentration while maintaining a national practice.

Our attorneys represent small, mid-sized and Fortune 500 companies in all types of disputes. Many of our attorneys are trial bar certified by the federal court and have been named Leading Lawyers, AV Preeminent and were selected to Super Lawyers and Risings Stars lists. Our clients enjoy a handpicked team of attorneys supported by a world-class staff.

Our Practice Areas Include:

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

Disclaimer:

The content of this newsletter has been prepared by Bryce Downey & Lenkov LLC for informational purposes. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. You should not act upon this information without seeking advice from a lawyer licensed in your own state. In considering prior results, please be aware that: (1) each matter is unique and (2) you should not rely on prior results to predict success or results in future matters, which will differ from other cases on the facts and in some cases on the law. Please do not send or disclose to our firm confidential information or sensitive materials without our consent.

Other Newsletters

Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Director Stuart Fisher at sfisher@bdlfirm.com.

General Liability

- Indiana Court Of Appeals Holds Children's Claims Are Not Time Barred As Derivative Claims In A Medical Malpractice Action
- Illinois Supreme Court Holds Six Person Jury Limitation Unconstitutional

Labor & Employment Law

- Medical Marijuana: Colorado Supreme Court Upholds Decision in Favor of Employers
- Seventh Circuit Finds FedEx Drivers Were Employees, Not Independent Contractors

Corporate & Construction

- Will Interest Rates Rise? Economic Slow Down? Time To Talk To Your Banker
- Parties May Be Entitled To A Lien Even If The Project Never Proceeds

Workers' Compensation

- Wage Differential May Not Necessarily Require Wage Loss
- Accident Date Trumps Hearing Date In Wage-Diff Award
- Collateral Source Rule Does Not Apply To Workers' Compensation Cases