BRYCE DOWNEY & LENKOV LLC

Insurance Tort Newsletter
May 2013

Bryce Downey and Lenkov Attorneys Obtain Defense Victories in April

Tina Paries obtained a dismissal of claims of negligence and breach of warranty of fitness for a particular use brought against one of our construction clients. The dismissal was based on Plaintiff's failure to file within the applicable statutes of limitations for the respective claims.

Hannah Barnard of our Indiana office successfully tried and defended a real estate broker sued for professional malpractice. Judgment after the trial was entered for the Defendant.

Terrance Kiwala successfully presented a motion for summary judgment on behalf of a distributor of asbestos in a product liability case filed in Madison County Illinois. The motion established the lack of product identification. Right before the motion was to be heard, Plaintiff's counsel agreed to dismiss our client to avoid the expected summary judgment. Trial is scheduled to proceed soon with regard to the remaining defendants.

Rick Warner won summary judgment on behalf of a national pizza chain in a suit resulting from a delivery driver opening his car door into the path of a bicyclist causing injury to the cyclist. The court found that the driver was not the agent of the pizza chain at the time of the collision.

Claims and Litigation Management Alliance (CLM)

Rich Lenkov, chair of the Greater Chicago Chapter, presented a seminar on premises liability at the CLM Annual Conference in San Antonio on April 11, 2013 and a seminar on ethics at the CLM Annual Conference in Chicago on March 7, 2013.

Seventh Circuit Upholds Indiana Indemnification Provision

In *NES Rentals Holdings, Inc. v. Steine Cold Storage, Inc.*, 2013 WL 1395700 (April 8, 2013), the Seventh Circuit Court of Appeals affirmed summary judgment in favor of an equipment lessee in a claim brought by the lessor for contractual indemnification with regard to the lessor's own negligence.

In November 2006, Humberto Menendez was employed by Steine Cold Storage. He was killed while operating a boom lift Steine had rented from NES. The Menendez family sued NES and NES sought indemnification from Steine pursuant an indemnification provision in the equipment lease which read:

> *Indemnity*. Customer [Steine] agrees to indemnify and hold Company [NES] harmless against any and all claims … regardless of whether such injury, damage or loss is caused in whole or in part by negligence, which arise out of, result from or relate to the use, operation, condition or, presence of the equipment except where such injury, damage or loss is cause solely by the Company [NES].

Steine contended that the provision did not expressly state in clear and unequivocal terms that Steine agreed to indemnify NES for NES's own negligence. The magistrate agreed and entered summary judgment in favor of Steine. NES appealed to the Seventh Circuit Court of Appeals.

The Seventh Circuit observed that under Indiana law a party has a "harsh burden" in establishing that an indemnification provision applies to the indemnitee's own negligence. Indemnification is allowed, it is just narrowly construed.

If the party "knowingly and willingly" agrees to the indemnification and the contract states in clear and unequivocal terms that indemnification will be provided for the indemnitee's own negligence, then the indemnification provision will be enforced. According to the court there is a two part analysis. First, there must be clear language that negligence is being identified as the conduct covered by the provision. The parties in this case agreed as much. Second, the contract must state in clear and unequivocal terms that the indemnification applies to the indemnitee's own negligence. In this regard, in order for indemnification to apply, the indemnification must be *explicit* not *implicit*.

NES argued that the language, "except where such injury, damage or losses caused solely by the Company" is an explicit statement in establishing indemnification. The Seventh Circuit disagreed and held that the "except" clause actually created an *implicit* obligation. In short, because the agreement did not expressly state that Steine agreed to indemnify NES for NES's own negligence, the indemnification provision was not enforceable under Indiana law.

Practice Tip:

The NES decision demonstrates that Indiana indemnification provisions are strictly construed. Beyond drawing a distinction between what is "explicit" and what is "implicit," the court reiterates the fact that an indemnification provision must contain express language that the indemnification applies to the indemnitee's own negligence and not negligence in general. It is important to read the specific language of indemnification provisions and determine what is expressly indemnified.

Indiana Court of Appeals Adopts National Rule Regarding Baseball Stadium Screening

In *South Shore Baseball, LLC vs. DeJesus*, 982 N.E.2d 1076 (2013), the Indiana Court of Appeals affirmed summary judgment in favor of a baseball stadium operator in a suit brought by a spectator who was hit in the face by a foul ball at a Gary South Shore Railcats minor league baseball game.

On May 23, 2009, Plaintiff was attending a Railcat game. She had attended numerous Railcat games before and was aware of the risk of foul balls leaving the field of play and entering the stands. There was also a warning on the back of her ticket advising her of the risk batted balls entering the stands. In addition, there were warning signs posted at each aisle of the seating area and a public address announcement regarding the risk of baseballs entering the stands.

The second batter of the game hit a pop-up foul ball that went back in the stands toward Plaintiff and struck her in the face.

Plaintiff sued the stadium operator on the theory of premises liability and failure to provide protective screening continuously from first base to third base. The operator filed a motion for summary judgment which the trial court denied. The operator was granted leave to pursue an interlocutory appeal.

On appeal, the operator argued that the facts were undisputed and precluded a finding that it should have expected that DeJesus would fail to discover or realize a danger of being hit by a foul ball. It also argued that the potential for a foul ball entering the stands did not involve an unreasonable risk of harm to invitees. As such, the operator claimed that it was entitled to summary judgment on Plaintiff's premises liability claim.

The Appellate Court agreed, noting that scores of other jurisdictions have observed that foul balls are common and part of the game and spectators are expected to appreciate and accept that risk. Some courts have even taken judicial notice of the risks to spectators that are inherent in a baseball game. According to the court, premises liability is not based upon what Plaintiff subjectively incurred, but whether the operator should have expected Plaintiff would be oblivious to the danger and failed to protect herself.

Here, the undisputed facts established Plaintiff was a baseball fan who was aware of the risk that a foul ball would be hit into the stands and Plaintiff knew of the warnings posted on the ticket, on signs, and announced over the public address system. It was, therefore, reasonable for the operator to believe that Plaintiff would realize the risk of being struck by a foul ball and take appropriate precautions.

In addition, the court found that no actual or constructive knowledge that an unreasonable risk of danger existed to support a claim of premises liability. According to the court, as found by courts of other jurisdictions, the risk of getting hit by a foul ball at a baseball game it is not an unreasonable risk of harm.

Turning to the general theory of negligence for failure to install protective a screen, the court noted that there was no evidence that generally accepted standards for the construction and operation of a baseball stadium would require continuous screening from 1st base to 3rd base. It also observed that other jurisdictions had applied a limited duty rule under which a baseball stadium operator has no liability where it provides screening behind home plate sufficient to meet ordinary demand for protective seating. The Indiana Court of Appeals made the point of expressly adopting this limited duty rule. In turn, it found that there was no evidence that there was not protective seating behind home plate or that Plaintiff would not have been able to sit there on this particular day. As such, under the limited duty rule, the operator was entitled to summary judgment.

Practice Tip:

This case offers two unique points when dealing with injuries occurring in sports facilities, and, in particular, baseball stadiums. First, in facilities in which national pastimes are conducted, it is good practice to consult case law from other jurisdictions involving the same activity. Consider this, not only in baseball cases, but in concert or assembly settings where issues of liability for festival or similar seating are involved. Second, watch the game and look out for foul balls.

Illinois Court Holds Pollution Exclusion Bars Coverage for Village of Crestwood

The breadth of the "absolute pollution exclusion" was recently again addressed by the Illinois Appellate Court for the First District in *The Village of Crestwood v. Ironshore Specialty Ins. Co.*, 2013 IL App (1st) 120112 (Feb. 22, 2013). There, the Village of Crestwood and its former long-standing mayor, Chester Stranczek, sought a declaration that its insurers had a duty to defend and indemnify them with respect to 25 individual and class action lawsuits in which the Village and mayor were accused of knowingly and routinely mixing contaminated water into the public water supply in order to cut municipal expenses.

Specifically, various residents of Crestwood had filed suit alleging that in 1985 or 1986, the Illinois Environmental Protection Agency notified the Village that a groundwater well the Village was using to supply tap water to the community was contaminated with a solvent used in the dry cleaning industry. According to the residents, although the agency informed the Village it could no longer use the affected well and the Village responded that it would stop distributing water from the well, the Village subsequently began to routinely mix polluted well water with treated Lake Michigan water and then supplied the polluted combination as the community's tap water. The residents alleged that this practice continued for at least two decades.

The Village tendered these claims to its insurers in accordance with commercial general liability policies it had purchased during that time. The insurers, however, denied they had an obligation to defendant and/or indemnify the Village based on the "absolute pollution exclusion" which is typically applied as written if an injury or damage arises out of the discharge of pollutants. The trial court agreed that the exclusion applied and granted judgment in favor of the insurers.

On appeal, the Village argued that the exclusion should be limited to claims alleging "traditional environmental pollution" where an "active polluter" – i.e., the dry cleaner – would be solely accountable for environmental cleanup costs. According to the Village, because it was merely the "passive, negligent distributor of a product," the exclusion should not apply. The Appellate Court, however, disagreed. The court, relying on long-standing Illinois law, held there was no dispute that the chemicals in the Crestwood water supply were pollutants as defined under the policy and that the "Village's knowing contamination of the Crestwood water supply with chemical-laden groundwater and subsequent distribution of that contaminated combination to the community is a textbook example of 'traditional environmental pollution." Accordingly, the court found that the pollution exclusion applied and affirmed the trial court's decision to deny coverage.

Practice Tip:

This case demonstrates the importance of not only knowing the terms of your policy but also knowing how the courts in your jurisdiction interpret such terms.

Illinois Tort Immunity for Failure to Initially Provide Traffic Control Measures Did Not Apply to Removal of Traffic Control Devices

In *Martinelli v. City of Chicago*, 2013 IL App (1st) 113040 (April 25, 2013), the court held that Section 3-104 of the Illinois Tort Immunity Act, which immunizes a municipality from liability for the failure to initially provide traffic control measures, did not immunize the City of Chicago from liability based on the removal of temporary traffic control devices used during a road construction project.

On February 2, 2002, Donald Martinelli was working for SBC, a telecommunications company, assisting City workers who were excavating a water line in Milwaukee Avenue. Martinelli and another SBC employee were there to locate existing SBC communication lines from within a manhole near the site of the excavation. Because of the heavy traffic on Milwaukee, the City implemented layers of safety barriers using large trucks and flagmen to usher vehicles safely away from the site. The traffic pattern was rerouted so that southbound traffic was forced to go into northbound traffic lanes.

Around midday, the City employees left on a lunchbreak, taking the trucks and flagmen to a nearby fast food restaurant, and leaving the SBT employees exposed to vehicular traffic. During this break, Oscar Soto was driving southbound on Milwaukee Avenue and as he approached the site, he dropped a pack of cigarettes and lost control of the car as he attempted to pick them up. His vehicle pinned Martinelli to the bumper of his truck causing traumatic amputation of his left leg.

Martinelli sued the City for failing to properly block traffic from the site, failing to set up a temporary traffic control zone, failing to use flagmen and barricades, and failing to create a buffer zone between traffic and the site. The jury ultimately awarded Martinelli $6,952,000 in damages and the trial court denied the City's motion for a judgment notwithstanding the verdict and the City appealed.

The City argued that it should have been afforded absolute immunity under Section 3-104 of the Tort Immunity Act which immunizes the failure to provide traffic control measures. The court rejected this contention because the statute applies to the failure to *initially* provide such measures, not to the *removal* of temporary traffic control barriers and warnings. Beyond this, the City was not being sued for simply failing to protect others. The Plaintiff alleged that the City affirmatively created the danger by rerouting traffic into oncoming traffic.

Practice Tip:

In analyzing the possible application of §3-104, or any statutory tort immunity, carefully assess whether the conduct alleged clearly matches up with the conduct that is immunized.

Indiana Supreme Court Rules Minor Child to be under the "Care" of Hotel for Purposes of Insurance Coverage

The Indiana Supreme Court has held that the molestation of a minor child by a hotel employee is not covered under the hotel's insurance policy which contained an exclusion for any act of molestation of any person while "in the care, custody or control of the insured."

In *Holiday Hospitality Franchising Inc. v. Amco Insurance Company*, 983 N.E.2d 574 (Ind. 2013), a minor child staying at a motel operated by Holiday Hospitality Franchising was molested by a hotel employee who entered the child's locked room at night.

Holiday Hospitality was an additional insured under a policy issued to Holiday Inn Express by Amco Insurance Company. The policy contained an expressed disclaimer of coverage for bodily injury when the injury arouse out of the intentional conduct. It also disclaimed coverage for any act of molestation or abuse arising from "[t]he actual or threaten abuse or molestation by anyone of any person while in the care, custody, or control of the insured."

When the minor child's mother brought suit claiming battery, negligent hiring, negligent retention and supervision and negligent inflation of emotional distress under agency and vicarious liability theories, Holiday Hospitality moved for summary judgment based the exclusion for molestation. The trial court granted the motion but the court of appeals reversed, finding that a fact question existed as to whether the child was in the "care, custody or control" of Holiday Inn Express at the time of the incident.

On appeal, the Indiana Supreme Court, ruled that the contract language was not ambiguous and that the disjunctive terms "care" "custody" and "control" should be construed in light of their usual and common meaning. In this regard, the court determined that "care" meant "[t]he function of watching, guarding, or overseeing." While the court determined that the issue of whether the child was in the custody or control of the hotel could not be determined at the summary judgment level, it could be determine that the child was in the "care" of the hotel as a matter of law. According to the court, it was undisputed that the child was molested by the employee while a child was a guest, staying in a room rented to the child's mother. It was undisputed that the child was in the guest room, behind a locked door with an electronic key provided by the hotel. That gave the minor child the status as a guest and the hotel owed him a duty of care by law. In short, the court determined that analogizing "duty of care" and "care" to be the appropriate analysis for a determination of what is meant by "care" under the policy.

Practice Tip:

In evaluating the application of exclusions for intentional conduct, always look to the plain meaning of terms describing "excluded conduct."

Illinois Court Holds Lack of Markings at Crosswalk Key to Summary Judgment Against Pedestrian

In *Dunet v. Simmons*, 2013 IL App (1st) 120603 (April 25, 2013), the Illinois Court of Appeals affirmed summary judgment in favor of the Village of Oak Lawn and Exelon Corporation (ComEd) in a suit brought on behalf of a pedestrian who was killed when

she was struck by a car while walking across a busy street.

In the evening of November 9, 2001, Joan Orth was walking across 95th Street in Oak Lawn at the intersection of 95th and Kenton. As she entered into the path of westbound traffic, she was struck by a car driven by Clarence Simmons and died as a result of her injuries.

The intersection did not have a designated crosswalk marked on the pavement, nor were there curb cuts or signs suggesting that the Village of Oak Lawn intended for pedestrians to cross at the intersection. Designated crosswalks existed two blocks away. Due to an equipment failure, the street lights in the area were not working that night.

Orth's estate sued Simmons, the Village of Oak Lawn and ComEd. The Plaintiff claimed that the Village was liable for allowing the streetlights to be inoperable, failing to maintain the streetlights, and creating a hazardous condition due to the lack of illumination. The Plaintiff alleged that ComEd caused the streetlight equipment failure and failed to restore electricity to the repairs system that caused the lack of illumination.

Both the Village and ComEd moved for summary judgment asserting that Orth was not an intended and permitted user of the roadway, and as such, the Village did not owe her a duty to exercise reasonable care in maintaining the roadway under §3-102 of the Tort Immunity Act. They also argued that the lack of lighting only created an opportunity for the accident to occur, it was not a proximate cause of the collision. The circuit court entered summary judgment for both defendants on all issues and the Plaintiff appealed.

On appeal, the Plaintiff argued that, by definition, a crosswalk existed at the intersection under §1-113(a) of the Motor Vehicle Code which defines a crosswalk as the extension of the lateral lines of sidewalks abutting a roadway even if the crosswalk is not marked on the pavement. From this, Plaintiff maintained that Orth was an intended and permitted user of the roadway and, as such, the Village had a duty to exercise ordinary care for her safety while in the roadway.

In rejecting the Plaintiff's contention, the court of appeals explained that Illinois courts have consistently held that pedestrians who walk in unmarked crosswalks may be *permitted* users of the roadway, but that does not mean they are intended users also, as required under §3-102. Pedestrians who walk outside of marked crosswalks or other areas *intended* for pedestrian use are not intended users of the roadway.

According to the court, whether pedestrians are intended users is determined by the local governmental entity and is evidenced by pavement markings, signs, and curb cuts and ramps. In this case, the Village had designated pedestrian crosswalks on 95th Street two blocks away with pavement markings and curb cuts. The absence of pavement markings, signs, or curb cuts at the intersection at Kenton established that the Village did not intend the roadway to be used by pedestrians. Because the Plaintiff was not an intended user, she was not owed a duty and summary judgment was appropriate.

Practice Tip:

Village defendants should not assume that a pedestrian injured in an intersection is an intended and permitted user for which liability may exist. Such a location may

make the pedestrian a *permitted* user under state statute or even a local ordinance, but *Dunet* makes it clear that how the intersection in question and other intersections are designed and marked will be important considerations in determining whether the pedestrian is an *intended* user as well.

Illinois' 5th District Softens the Blow of Health Care Liens to Help Plaintiff Realize a Recovery

Under the Health Care Services Lien Act, 770 ILCS 23-1 *et seq*., health care providers are entitled to recover up to 40% of their liens from any settlement, judgment, or verdict obtained by an injured person. The Act further provides that the collective sum of all health care lines shall not exceed 40%. 770 ILCS 23/10(a), (c). When the 40% cap on all liens has been met, the total amount of attorney's fees for the plaintiff under the Attorneys Lien Act, 770 ILCS 5/0.01, cannot exceed 30% of the judgment or settlement. 770 ILCS 23/10(c)(2). The concept behind the Act was to ensure that settlements and verdicts are fairly apportioned among plaintiffs, healthcare providers, and attorneys.

In *Stanton v Rea*, 978 N.E.2d 1146 (Ill.App. 2012), the Fifth District Court of Appeals was faced with a trial court lien adjudication that left the plaintiff with no recovery from the jury verdict. In *Stanton*, Plaintiff was injured in a car accident and incurred medical bills in excess of $4000.00. The jury awarded her $13,506.80 in damages and $3,919.79 in costs. By the time judgment was entered, the costs had risen to $4,501.44. Payment of $14,520.86 was made on behalf of Defendant and Plaintiff filed a petition to reduce the health care liens against the proceeds.

The trial court followed the limitations of the Act and reduced all the health care liens to 40% of the verdict, or $5,806.02. Because the health care liens were capped at 40%, the fees of plaintiff's attorney were reduced to 30%. But, by the time costs were deducted, there was no money left for Plaintiff. Plaintiff filed a motion to reconsider, arguing that the health care providers should have to pay their share of the costs incurred in obtaining the judgment and that the health care liens should not be calculated until after the fees and costs are deducted from the gross recovery. The trial court denied the motion, holding that the common fund doctrine did not apply to health care liens under the Act.

On appeal, the court held that the common fund doctrine did not apply to this case because the issue was the allocation of costs associated with obtaining the verdict, not attorney's fees. According to the court, the issue should be determined by examining the legislative intent behind the limitations the Act imposes on liens.

Noting that the Act limits all health care liens to a total of 40% and attorney's fees to 30% when the health care liens reach 40%, the court opined that the General Assembly intended for plaintiffs to recover at least 30% in the worse case scenario. In order to accomplish what the legislature intended, the court held that the computation of the 40% health care lien recovery should be done after all costs incurred in obtaining the verdict and recovering the proceeds have been deducted. In *Stanton*, that meant deducting the attorney fees and the costs first. The court reasoned that the fees should be deducted first because, unlike health care providers who retain the right to seek recovery of the balance of their bills through other means, the attorney is required to accept the 30% no matter what the original arrangement might have been.

Practice Tip:

Settlement is often difficult because of the prospect of lien adjudication. Advising opposing counsel and mediators of this decision may help get some cases settled. The calculation used by the court puts more money in a plaintiff's pocket without making the defendant spend more.

Contributors to the May 2013 Insurance/Tort Newsletter

Bryce Downey and Lenkov attorneys who contributed to this newsletter were Jeffrey Kehl and Tina Paries.

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Crown Point, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

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Construction
Employment and Labor
Entertainment Law
Insurance Coverage
Insurance Litigation
Intellectual Property
Medical Malpractice
Professional Liability
Real Estate
Transportation
Workers' Compensation

The attorneys at Bryce Downey & Lenkov are committed to keeping you updated regarding the latest developments in workers' compensation 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, please contact Storrs Downey or Jeffrey Kehl at 312.377.1501 or any member of the general litigation team.

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