BRYCE DOWNEY & LENKOV LLC

General Liability Update
October 2016

Indiana Court Of Appeals Holds Children's Claims Are Not Time Barred As Derivative Claims In A Medical Malpractice Action

In *Anonymous M.D. Lockridge*, 39A01-1509-CT-1498, the Indiana Court of Appeals confronted the issue of whether the medical malpractice claims of minor children for the death of their mother were time barred where the mother's underlying claim is found to be time barred.

Traci Leach died from lung cancer after a radiologist failed to diagnose a tumor on a CT scan. The CT scan occurred on July 6, 2011. Traci learned on August 30, 2012 that she had lung cancer, and she died on July 17, 2014.

On August 27, 2014, Traci's Estate and children filed a complaint with the Indiana Department of Insurance, divulging that the doctors and hospital had acted negligently and that the negligence resulted in Traci's death. The children were under the age of 6 at the time of the alleged malpractice in July, 2011, and at the time that the complaint was filed, under the age of 8.

While the trial court found that the mother's underlying claim was time barred, it ruled that this did not prevent the children from pursuing a derivative claim. A derivative claim may be maintained even if the underlying claim would be timed barred. Indiana Code § 34-18-7-1 of the Medical Malpractice Act states that a medical malpractice claim is time barred unless it is filed within 2 years after the date of the alleged malpractice, except that a minor less than 6 years of age has until the minor's 8th birthday to file.

The doctors and hospital contended that the children's negligence claim was barred by the relevant statute of limitations. Summary judgment had already entered against the Estate because of the statute of limitations.

In Indiana, if the patient's death was caused by the malpractice, then the claim must be filed within 2 years of the occurrence of the malpractice. Here the 2 year period began to run on July 6, 2011, the date on which the alleged negligence occurred, and lapsed by the time the parties filed their complaint on August 27, 2014, unless an exception applied.

The discovery rule creates such an exception. Under this rule, the court must determine the date on which the alleged malpractice occurred, and second, it must determine the "trigger date", which is the date when the claimant had sufficient information that a reasonably diligent person would have discovered the alleged known malpractice. *Booth v. Wiley*, 839 N.E.2d 1168, 1172 (Ind. 2005). If the trigger date occurred more than 2 years beyond the date of malpractice, then the claimant had 2 years after discovery to initiate the claim. If the trigger date is within the 2 years following the malpractice, the action must be initiated within the 2 year limitation unless it was not reasonably possible for the claimant to present a claim in the time remaining after discovery and before the end of the statutory period.

Here, the alleged negligence occurred on July 6, 2011, meaning that the 2 year statute of limitations expired on July 6, 2013. The trigger date was August 30, 2012, when Traci learned that she had lung cancer. With that being the trigger date, the Court found that the 2 year statute of limitations applied and Traci had 10 remaining months in which to file her claim, which was sufficient to file. As such, Traci's claim was barred.

The children's claims presented a wrinkle and posed the question of whether the claims of minor children are derivative and barred simply because the underlying claim is barred. I.C. § 34-18-2-13 defined patient as "including any person having a claim of any kind, whether derivative or otherwise. . . Derivative claims include the

claim of a parent . . . child, relative, attorney or any other representative. . ."

The doctors and hospital argued that because the claim was dismissed as untimely, the derivative claim should also be dismissed. They pointed to the fact that Indiana case law held that a derivative action for a consortium under a wrongful death claim must be filed within the Medical Malpractice Act's 2 year limitation, rather than under the limitations period provided by the statutory scheme in governing wrongful death actions. If the underlying claim is time barred, so must the claims that derive from it.

The Court of Appeals disagreed. While derivative claims will generally fail where the underlying claim fails, the General Assembly has carved out an exclusive exception to the 2 year statute of limitations for children in limited and specific age range. The court found that the tolling provision must apply whether the children are derivative or direct claimants. As such, the tolling provision saved the children's claims despite the fact that the underlying claim had been barred.

Thinking Point:

While a derivative action for a consortium claim under wrongful death must be filed within the Medical Malpractice Act's 2 year limitation period, a child's derivative claim need not be filed within that period if they fall within the narrow provision of I.C.§ 34-18-7-1, which allows the exception for a minor of less than 6 years of age at the time of the alleged malpractice being able to file up to the minor's 8th birthday. This is true even if the underlying claim has been dismissed for being untimely. While it is a very narrow window, this does open up an extended litigation window beyond the statute of limitations and careful consideration to the age of dependent children should be given in evaluating whether malpractice claims of dependent children are time barred.

Indiana Court Of Appeals Holds Employer May Face Negligent Hiring Action Even When Employer Admits That Employee Acted Within the Course and Scope of Employment

In *Sedam v. 2JR Pizza Enterprises LLC*, 39A05-1602-CT-296 (September 27, 2016), Plaintiff was driving a scooter when he was struck by a Pizza Hut delivery driver and was killed. Defendant employer admitted that the accident had occurred during the course and scope of the driver's employment and moved for partial summary judgment as to the issue of negligent hiring only. The lower court granted the motion and Plaintiff appealed.

The issue on appeal was whether a plaintiff may pursue claims against an employer on both the theory of negligent hiring and the theory of *respondeat superior* where the employer has admitted that the employee was acting within the course and scope of his or her employment.

In *Broadstreet v. Hall*, 80 N.E. 145 (Ind. 1907), the Indiana Supreme Court held that it was permissible for the jury to find a business owner was vicariously liable for the negligent acts of his son and could also find him liable for negligently entrusting his son with a horse knowing full well his son's reputation for reckless riding. Under this reasoning, plaintiffs could proceed with a complaint for both *respondeat superior* and negligent hiring.

In *Tindall v. Enderle*, 320 N.E.2d 764 (Ind. Ct. App. 1974), however, the Indiana Court of Appeals concluded that the negligent hiring cause of action "generally arises only when an agent, servant or employee steps beyond the recognized scope of his employment to commit a tortious injury upon a third party." 320 N.E.2d at 767-68. A cause of action for negligent hiring "is of no value where an employer has stipulated that his employee was within the scope of his employment." *Id.* at 786. Therefore, once an employer had admitted the employee was within the scope of his employment, a negligent hiring claim could not proceed.

However, in *Sedam*, the Indiana Court of Appeals held that the Indiana Supreme Court's *Broadstreet* holding was controlling and allowed a plaintiff to pursue both theories of recovery because negligent hiring, retention, or supervision are separate torts that are not derivative of the employee's negligence. The court further held that an employer's admission that the employee was acting within the course and scope of his or her employment should not preclude a plaintiff from arguing both theories of recovery.

The court also noted that the Comparative Fault Act, which was enacted after the *Tindall* decision, allowed for "each person whose fault contributed to the injury bears his or her proportionate share of the total fault contributing to the injury." I.C.§34-51-2-8(b). Therefore, the court held that a jury could additionally find that Pizza Hut negligently hired, retained, or supervised its driver, and assign a certain percentage of fault for the accident directly to Pizza Hut. In addition, the court noted that under the Comparative Fault Act, it would be illogical to disallow a cause of action that could result in the allocation of additional fault to a tortfeasor. As such, in following the *Broadstreet* decision, the court did not limit the tort of negligent hiring and retention to acts committed outside an employee's scope of employment.

Thinking Point:

In light of the *Sedam* decision, defendant employers should be wary of potential claims for negligent hiring, retention, and supervision before they conceded that their employees were acting the course and scope of their employment. The addition of such claims to litigation in which the issue of *respondeat superior* liability is not contested will allow plaintiff's to engage in more intrusive discovery and to possibly present unfavorable evidence regarding an employer's practices which could serve to inflame a jury and prejudice the employer.

Illinois Appellate Court Holds That Expert Witnesses Cannot Offer Opinions Regarding Trip And Fall In The Absence of Supporting Evidence

In *Berke v. Manilow*, 2016 IL App (1st) 150397 (Aug. 23, 2016), the Illinois Appellate Court held that expert witness opinions are not admissible where they are not based on actual or circumstantial evidence.

In *Berke*, Plaintiff allegedly tripped and fell in an apartment building vestibule. No one saw the incident occur and Plaintiff has no memory of how it happened. Plaintiff sued the apartment building owner, claiming the vestibule was improperly designed and maintained. The apartment building moved for summary judgment on the theory that Plaintiff could not establish causation.

Plaintiff responded to the motion for summary judgment with affidavits of three expert witnesses. One expert was an accident reconstructionist who stated that "the natural and probable consequence of an individual encountering a tripping hazard is that he will more likely than not trip and fall" and the fact that Plaintiff was found just beyond the entryway suggests that he had encountered the tripping hazard. The second expert was an architect who testified that "the unreasonabl[y] dangerous threshold and unreasonably dangerous door enclosure system more likely than not caused [Plaintiff] to fall." The third affidavit was from a physician who testified that Plaintiff did not have any acute or chronic medical condition or illness that would cause him to collapse, lose his balance or fall, and as such, his fall most likely would have been the result of falling forward.

The trial court struck the three affidavits stating that a court "cannot utilize expert evidence linking a defect of the property to a fall when there is no admissible evidence linking the defect to the fall."

On appeal, the appellate court noted that expert opinions are only as valid as the basis for the opinions. According to the court:

> "When experts (i) fail to take into consideration a party's actions, (ii) base their opinion on facts not in evidence, (iii) base their opinions on what might have been, and (iv) ignore significant factors, the court will reject the experts' opinions as mere speculation and conjecture."

2016 Ill. App. (1st) 150397 at ¶ 21.

The appellate court held that all three affidavits were inadmissible because they were not based on solid evidence. For example, the accident reconstructionist simply presumed that Plaintiff was facing forward at the time he tripped and was not expecting to encounter the threshold over which it is claimed he tripped. The court also found that the architect's opinion that Plaintiff might have caught his foot on the threshold as the door to the vestibule was closing was speculative as well because there was no evidence establishing that the door closed on Plaintiff as he walked through. Finally, with regard to the physician's opinion that Plaintiff must have fallen because he did not have any known medical condition, the court found this to be speculative as well. Certainly, the doctor would be allowed to testify that Plaintiff had no medical condition. However,

it was pure speculation for the doctor to conclude that he must have tripped.

Having ruled that the trial court was correct in striking the affidavits, the appellate court concluded that Plaintiff had failed to establish proximate cause. Despite the fact that Plaintiff established that the apartment building threshold contained numerous building code and industry standard violations, in the absence of any direct evidence establishing why Plaintiff fell, it could not be inferred that the condition of the vestibule was the proximate cause of the fall.

Based on the lack of direct evidence and admissible opinions from expert witnesses, Plaintiff had failed to come forward with any proof that the condition of the apartment building vestibule caused him to fall and Defendant was entitled to summary judgment.

Thinking Point:

Berke demonstrates the importance of analyzing and attacking expert witness affidavits and testimony. In addition, *Berke* stands for the proposition that the issue of proximate cause can be successfully challenged at the summary judgment stage.

Illinois Supreme Court Holds Six Person Jury Limitation Unconstitutional

In our February 2016 General Liability Update, we reported that a Cook County Circuit Court judge held that the amendment to § 2-1105 of the Illinois Code of Civil Procedure requiring civil jury trials to be tried by a jury of six was unconstitutional.

In *Kakos v. Bauer*, 2016 IL 120377 (Sept. 22, 2016), the Illinois Supreme Court agreed and held that a jury of twelve is required under the 1970 Illinois Constitution.

According to the Illinois Supreme Court, when the issue of the right to jury trial was considered by the 1970 Constitutional Convention, it was envisioned that juries would continue to be twelve person juries and that the right to a jury of twelve should apply to civil as well as criminal trials. Accordingly, the June 2015 amendment to § 2-1105 of the Illinois Code of Civil Procedure was struck by the court as unconstitutional.

Thinking Point:

The impact of twelve person versus six person juries is the subject of some debate. Judge William Gomolinski, the circuit court judge who initially ruled the statute to be unconstitutional, stated the belief that a twelve person jury allows for a more diverse array of panel members on a jury. Others view twelve person juries as reducing the risk that strong overpowering personalities could dominate jury panels potentially making jury verdicts higher in personal injury lawsuits.

It should also be noted that, because the state supreme court held the law unconstitutional, parties who requested jury trials since the enactment of the statute are entitled to have their cases tried by twelve person juries.

Indiana Supreme Court Finds Conflicting UIM Policy Provisions To Be Ambiguous

There can sometimes be conflicting provisions in an insurance policy which render the policy ambiguous. This was recently addressed by the Indiana Supreme Court in *State Farm Mutual Auto Insurance Co. v. Jakubowicz,* 56 N.E.3d 617 (Ind. 2016).

In that case, an insured was involved in an automobile accident in 2007 which resulted in substantial injuries to her and her family. In 2008, the insured filed a lawsuit against the party who caused the accident seeking medical and property damage payments. In 2009, the insured informed the insurer that the party who caused the accident would not have sufficient insurance to cover her damages and that she intended to pursue an underinsured motorist (UIM) claim against the insurer. However, the insured did not file the UIM claim against her insurer until 2011.

The insurer sought judgment on the UIM claim because the policy contained a provision requiring the insured to file such a claim within three years of the accident and, as a result of the insured having filed the claim four years after the accident, it was untimely. On the other hand, the insured argued that the terms in the policy governing UIM claims were ambiguous. Specifically, although the

provision did in fact require that the insured file the claim within three years, that same provision stated that the claim could only be filed if the insured had fully complied with all other provisions of the policy. One such other provision conditioned the insurer's UIM payment obligations on the fact that all other underlying insurance coverages be exhausted. The insured thus argued that because the other party's insurance did not exhaust until 2011, there is no way she could have filed the UIM claim within the three year period.

The Indiana Supreme Court agreed with the insured and held that the policy was ambiguous because it contained conflicting provisions:

> [T]he policy could have just stated that suit must be brought within three (3) years. The policy also could have called for exhaustion of the policy limits prior to filing a UIM claim against State Farm without a limitation on the time to do so. Instead, the policy contained a limitation period as well as additional conditions. Those conditions . . . conflict with the three (3) year limitation period.

56 N. E. 3d at 622

Because ambiguous insurance policies are construed against the insurer, the Court then confirmed that the insurer was not entitled to judgment.

Thinking Point:

The Court's holding demonstrates the importance of reviewing policy provisions to determine whether there are any conflicting terms. The failure to do so could result in the waiver of certain rights under the policy and/or incurring additional litigation costs.

Illinois Appellate Court Upholds Order Striking Healthcare Provider's Lien For Minor's Medical Expenses

In *Manago v. County of Cook*, 2016 IL App (1st) 121365 (June 30, 2016), the Illinois Appellate Court was asked to consider whether a lien for medical expenses under the Healthcare Services Act applies to a judgment on behalf of a minor plaintiff. After careful consideration of both of the provisions of the Healthcare Services Act and the Illinois Family Expense Statute, the appellate court held that the lien did not attach to the judgment.

In *Manago*, a net judgment of $200,000.00 was entered in favor of a minor plaintiff. In underlying proceedings, the trial court ruled that the medical expenses for treatment of the minor were not part of that judgment.

Plaintiff filed a petition to strike the Healthcare Services Act lien asserted by Cook County for treatment the minor received at the Cook County Hospital. Plaintiff argued that a medical care provider cannot assert a lien against a judgment for a minor that does not include medical expenses and that medical expenses incurred by a minor belong to the minor's parents, not the minor.

In ruling that the lien asserted by the County was extinguished, the trial court held that the County could not recover its lien because it had not appeared at trial to protect its lien interest.

On appeal, the Illinois Appellate Court held that a Healthcare Services Act lien of a healthcare provider or a healthcare professional is valid even when the lienholder does not intervene. According to the court, the lien only comes into existence when a recovery is made. Before that, a healthcare provider or professional has no standing to participate in the underlying proceedings. As such, it was improper for the trial court to extinguish the lien on the grounds that the County did not intervene in the underlying proceedings.

However, the appellate court went on to consider whether the lien could be enforced against the minor's judgment. In this regard, the court held that, under the Illinois Family Expense Statute, parents are responsible for the medical expenses of their children. As such, while the parents have not assigned their cause of action for medical expenses to the minor, the lien does not attach to any recovery that could be made by the minor. In addition, the appellate court noted that the lien could not attach to the judgment in this case because the judgment did not include any amounts for medical expenses.

Thinking Point:

The decision in *Managa* may prove to be helpful in attempts to resolve personal injury claims involving minors by highlighting the fact that Healthcare Services Act liens do not attach to recoveries made by minors. In addition, in the absence of any assignment of the parents' right to recover medical expenses to the minor, an argument can be made that such medical expenses are not admissible as evidence of the minor's damages.

Illinois Court Of Appeals Holds Tenant Not Responsible For Injury To Invitee

In *Hanna v. Creative Designers*, 2016 IL App (1st) 143727 (Sept. 15, 2016), the Illinois Appellate Court held that a tenant, who did not exercise control over the maintenance and condition of improvements within the building which the tenant occupied, was not liable for injuries sustained by an invitee.

In *Hanna*, Plaintiff was working as a stylist at Creative Designers, a beauty salon located in premises owned by Luther Village. Creative leased the premises from Luther under a lease agreement that placed the responsibility for the inspection, repair, and maintenance of the property on Luther.

The salon was equipped with countertops that folded up and down. Plaintiff was hurt when one of the countertops that had been folded up fell on her head. She sued Creative and others on the theory of "premises liability".

Creative moved for summary judgment on the theory that, while it was a tenant, Luther Village, as landlord, retained control over the inspection, repair, and maintenance of the premises, including the folding countertops. The trial court agreed and granted summary judgment in favor of Creative.

On appeal, the appellate court noted that while a tenant would normally be responsible for premises under its control, a landlord still has sole liability where it has expressly agreed to keep the premises in good repair and had assumed the contractual obligation under the lease to inspect and maintain the premises. In this regard, Creative was occupying the premises but this occupation did not amount to the possession or control necessary to impose liability. Instead, the contractual assumption of that responsibility meant that the responsibility remained with Luther as the landlord.

Thinking Point:

Hanna demonstrates the importance of looking closely at lease agreements to determine who, if any, assumed the specific responsibility to maintain and repair the premises. If a landlord has retained that obligation, a tenant is in the position of arguing that it did not have sufficient possession or control of the property for it to have premises liability to an invitee.

Illinois Appellate Court Re-Addresses Distraction Exception To Open And Obvious Doctrine

In our July 2016 General Liability Update, we noted that the Illinois Supreme Court remanded a premises liability case to the Illinois Appellate Court in light of Supreme Court's decision in *Bruns v. City of Centralia*.

After careful consideration of the supreme court's decision in *Bruns*, the Illinois Appellate Court in *Bulduk v. Walgreen Company*, 2015 IL App (1st) 150166-B (August 29, 2016), held that the trial court's entry of summary judgment on the premises liability claim was erroneous.

In *Bruns v. City of Centralia*, 2014 IL 116998, 21 N.E.3d 684 (Ill. 2014), the Illinois Supreme Court held that the distraction exception to the open and obvious doctrine does not apply unless there is evidence from which a court could infer that the Plaintiff was actually distracted. In *Bruns*, Plaintiff was looking at the door and walkway to a clinic when she stubbed her foot on an elevated crack in the sidewalk and fell. Plaintiff had noticed the defect before and had noticed it on the date of the incident. Plaintiff stated that she was not looking at the crack at the time that she fell because she was "looking elsewhere."

The Illinois Supreme Court held that the property owner was entitled to summary judgment under the open and obvious doctrine because Plaintiff had noted the dangerousness of the condition but had failed to identify any circumstances which actually required her to divert her attention.

In *Bulduk*, Plaintiff was in the cosmetic aisle at a Walgreen store. She had passed by and was aware of the presence of a commercial floor cleaning machine being operated by a third party. While she was reaching for a product on the shelf, the machine somehow struck her in the back. Walgreen was granted summary judgment on the theory that the machine was an open and obvious condition that had been observed by Plaintiff. Plaintiff appealed arguing that, while the open and obvious doctrine precludes liability where the risk posed by the condition on premises is one that should be recognized and appreciated by invitees, the distraction exception to that doctrine would still allow for liability where it is to be reasonably expected that the invitee's attention and appreciation for the risk is momentarily diverted by some distraction.

The Illinois Appellate Court held that summary judgment was improper because it was reasonably foreseeable that a person would be distracted and not appreciate the risk posed by the cleaning machine. On appeal to the Illinois Supreme Court, the court remanded the case back to the appellate court, for consideration in light of the interim decision in *Bruns*.

On remand, the appellate court held that *Bruns* was distinguishable because Plaintiff was not merely "looking elsewhere." She was looking directly at a product on a shelf that she was intending to purchase. This is the type of conduct that is reasonably foreseeable to a merchant. According to the appellate court, because this conduct raised a question of fact as to whether Plaintiff was actually (as opposed to theoretically) distracted, summary judgment was not proper.

Thinking Point:

The reconsideration of the distraction exception to the open and obvious doctrine in *Bulduk* clouds the issue of what type of distraction is necessary in order for the open and obvious doctrine not to apply.

BREAKING NEWS: Indiana Supreme Court Holds Evidence of Discounted Payment by State Health Care Program Admissible to Prove Reasonable Value of Medical Services

On October 21, 2106, as we were readying this newsletter for publication, the Indiana Supreme Court announced its decision in *Patchett v. Lee*, _____ N.E.3d ____, 29S04-1610-CT-549 (Oct. 21, 2016), holding that the amount actually paid by a state health care program was admissible as evidence of what the reasonable costs were for a plaintiff's medical care in a personal injury suit.

To appreciate the significance of the Indiana Supreme Court's decision, an short explanation of the Indiana Collateral Source Statute and related case law, including the court of appeals decision in *Patchett*, is necessary.

Under the Indiana collateral source statute, IC §34-44-1-2, courts are to allow the admission into evidence of:

> (1) proof of collateral source payments other than payments of life insurance or other death benefits, insurance benefits that the plaintiff or members of the plaintiff's family have paid for directly or payments made by the State or the United States or that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;(2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and (3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

In *Stanley v. Walker*, 906 N.E.2d 852 (2009), the Indiana Supreme Court held that the statute does not bar evidence of discounted amounts paid and accepted in full satisfaction as evidence of

reasonable value of medical services provided to plaintiffs in personal injury actions. To the extent that adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed.

In *Patchett*, health care providers had billed the plaintiff $87,000 for medical care following her car accident, but the state-sponsored health insurance program only paid $12,000 as full satisfaction of the total amount. The Indiana Court of Appeals held that it was proper to exclude evidence of the amount actually paid because the amount did not reflect the true value of the services, only the amount set by governmental regulation and a jury would be confused by the distinction. *Patchett v. Lee*, 46 N.E.3d 476 (Ind. Ct. App. 2015) rehearing denied (2016).

With programs fostered by the Affordable Care Act and similar state insurance programs coming into play, the Court of Appeals' decision created a new wrinkle in application of the collateral source rule. The Court of Appeals never considered the fact that governmental insurance payments might be rationally based on carefully considered evidence of the true value of medical services. Instead, the court presumed the amounts paid were arbitrarily determined.

The Indiana Supreme Court reversed the Court of Appeals and held that juries should be allowed to consider the discounted amount actually paid by a governmental program.

According to the court, "we hold the rationale of *Stanley v. Walker* applies equally to reimbursements by government payers" and "[t]he animating principle in both cases is that the medical provider has agreed to accept the reduced reimbursement as full payment for services rendered. The reduced amount is thus a probative, relevant measure of the reasonable value of the plaintiff's medical care that the factfinder should consider."(Slip Op. p. 1).

Thinking Point:

The decision in *Stanley* meant that Indiana was one of only 3 states to permit a jury to consider discounted payments in determining the reasonable value of medical services claimed as damages in personal injury suits. *Patchett* now makes it clear that payments by governmental payers are admissible as well.

Illinois Supreme Court Holds That Lien Recovery Attorney's Fees are Applicable to Medical Reimbursement

In *Bayer v. Panduit Corporation*, 2016 IL 119553, (September 22, 2016), the Illinois Supreme Court issued what is likely the final ruling on a Illinois Workers' Compensation Act lien issue that has created some controversy over the last several years. The subject is not frequently encountered; however, when it arises it often involves substantial amounts of money. The court held that if future medical expenses that would otherwise be payable to an injured employee are suspended or subject to a credit due to a large jury case award or settlement in a related court action, those "saved" expenses are subject to the 25% attorneys' fee provision of the Illinois Workers' Compensation Act Lien recovery scheme. Put differently, employers and carriers who can suspend workers' compensation medical payments due to the court award must still pay 25% attorney's fees to the lawyers who "saved" them from payment of those expenses.

This holding arises out of catastrophic work accident wherein an iron worker sustained severe injuries and was rendered a quadriplegic. His attorneys filed suit against a general contractor and others for those injuries. A third party action was filed against the employer. After entering into a good faith settlement with the employee, Bayer, the injured worker proceeded to trial against Panduit and recovered a $64 million dollar verdict. Pursuant to Section 5 of the Workers' Compensation Act, the employer was entitled to invoke various lien recovery and offset procedures. The settlement agreement between the injured employee and the workers' compensation payer provided that workers' compensation benefits would be suspended in terms of future payments until the amount of the huge verdict had been exhausted.

The sole issue before the court was whether the employer had to pay 25% of the value of the future medical costs which the employer/worker's compensation carrier would not have to pay to the employee's attorney. Although not stated in the opinion, it is assumed that the future medical costs for the injured quadriplegic employee were very substantial.

Following the entry of the verdict, the trial court ruled that the 25% statutory attorney's fee would be applicable to future medical costs.

Thus, medical costs which would have been the obligation of the workers' compensation carrier would be paid out of the proceeds of the jury verdict. However, the workers' compensation carrier continued to owe 25% of those amounts to the plaintiff pursuant to the provisions of Section 5 of the Workers' Compensation Act. Somewhat surprisingly, the Illinois Appellate Court for the First District (Cook County) held that the fee provision did not apply to recovery of medical payments, and reversed the trial court.

The Supreme Court held very succinctly that under the plain language of Section 5 of the Act, the employer was obligated to pay the 25% of the gross amount of the compensation payments for which it was able to obtain reimbursement as a result of the jury verdict. The Supreme Court held affirmed the ruling of the trial court holding that the gross amount included the value of future medical expenses. Thus, the employer was obligated to pay the 25% attorney's fee on the future medical expenses incurred by the employee but not paid by the employer.

Thinking Point:

While this issue will typically arise only in catastrophic cases wherein the workers' compensation case has not been fully resolved, the opinion lays to rest any questions as to whether future medical expenses are subject to the 25% statutory attorney's fee. For every $40,000 in medical expenses which are avoided or credited, $10,000 must be paid to the employee's attorney. In calculating the value of a possible lien repayment for future benefits offset by a third party case verdict or resolution, an employer/workers' compensation carrier must necessarily offset and/or reduce its projected saving by the 25% amount indicated by the court.

Recent Seminars

- On **9/28/16**, **Storrs Downey** presented "The Ever Expanding Scope of the ADA: Accommodations, Remote Work, Transgender Issues, Defining Disability in Light of the ADAAA, Intersection of ADA and FMLA and the Interactive Process" at the 12th Annual National Employment Practices Liability Insurance ExecuSummit. Click Here for more info.

Upcoming Seminars

- On **11/2/16**, **Bryce Downey & Lenkov** is once again pleased to be co-hosting with Willis Insurance **"Forecast for 2017".** The seminar will be held at Willis Tower. Presentation will include Bankers' Roundtable Featuring Bankers From: First Community Bank, The Private Bank, West Suburban Bank and Cook County Department of Economic Development. Click Here to RSVP.
- On **1/26/17**, **Storrs Downey** will present "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 and to register

Recent Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics. They include the recent below subjects.

Top 10 Employer Mistakes
Storrs Downey & Maital Savin

Lien Waivers And Protecting Workers' Compensation Liens
Jeff Kehl & Mollie O'Brien

If you would like a recording of any of our prior webinars, please email Marketing Coordinator, Jason Klika at jklika@bdlfirm.com.

BDL Is Growing!

BDL welcomes Roslyn Lampkin-Smiley. Roslyn concentrates her practices in Workers' Compensation defense. Prior to practicing law, Roslyn was a critical care and occupational health nurse with some background in FMLA and workers' compensation issues. Roslyn also worked as a legal nurse consultant for insurance companies and defense law firms preparing medical record reviews. After Graduating from Northern Illinois University School of Law, she was active member of Amnesty International and worked with the Illinois Innocence Project. In her free time, enjoys playing golf, spending time at the Shakespeare Theater and spoiling her dog and grandchildren.

Justin Nestor Recognized In The 2017 Edition Of Best Lawyers In America©

Justin Nestor was selected by his peers for inclusion in the 2017 Edition of *The Best Lawyers in America* in the practice area of Workers' Compensation Law - Employers. Justin has been recognized by *Best Lawyers*® since 2015.

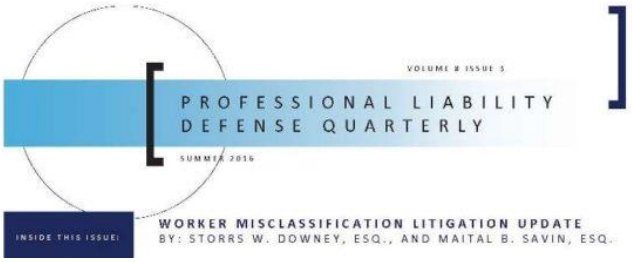
Click Here to learn more about Justin and the 2017 Edition of *The Best Lawyers in America*©.

Annual Trip: Stanford vs Notre Dame Football Game

Geoff Bryce, Terry Kiwala, Kirsten Kus, and Bob Bramlette made their annual trip to Notre Dame to see the Irish take on the Stanford Cardinal. They were joined by executives from Willis Insurance, Trout Glass and Mirror, and Her Closet Boutique. Unfortunately, the Cardinal came from behind to upset the Irish; however, a good time was had by all!

Storrs Downey And Maital Savin Published In Professional Liability Defense Federation's Defense Quarterly

Storrs Downey & Maital Savin's article "Increased Misclassification Litigation Stresses Importance Of Proper Worker Classification" was published in Professional Liability Defense Quarterly's Summer 2016 issue. Click Here to read the full article.



BDL Wins Summary Judgment In Federal Employment Case

Storrs Downey and Maital Savin were successful in having the U.S. District Court for the Northern District of Illinois grant their Motion for Summary Judgment, dismissing the entirety of a federal case brought against one of our clients. The case involved various claims of employment discrimination, including ADA failure to accommodate, discrimination, retaliation and common law retaliatory discharge. The court concluded that the plaintiff failed to establish that he was disabled as defined by the ADA or that there was a causal connection between his OSHA complaint and his discharge.

Contributors to the October 2016 General Liability Update

Bryce Downey and Lenkov attorneys who contributed to this update were Storrs Downey, Jeffrey Kehl, Timothy Brown, Kirsten Kaiser-Kus, Tina Paries, Maital Savin, and Frank Rowland.

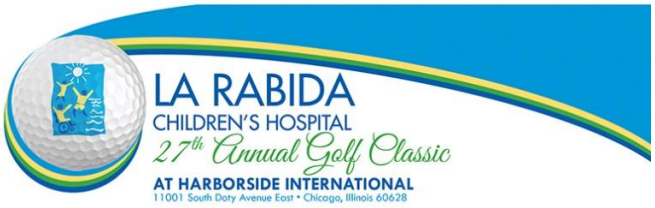
Giving Back

Race Judicata 2016

BDL is proud to have sponsored Race Judicata's wine tent again this year! 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. This year, the race took place on **9/15/16**.

La Rabida Golf Outing

On **8/1/16**, **Tina Paries**, **Alec Miller**, **Terry Kiwala** and **Bob Bramlette** participated in La Rabida Children's Hospital's 27th Annual Golf Classic at Harborside International. The outing supported La Rabida's mission to provide care to children with lifelong medical conditions, regardless of their family's ability to pay. La Rabida currently serves approximately 7,500 children annually who require primary and specialty care for chronic illnesses such as asthma, diabetes and sickle cell disease along with developmental disabilities.



Did You Know?

In addition to General Litigation, we also handle:

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

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 Coordinator Jason Klika at jklika@bdlfirm.com.

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

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:

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