BRYCE DOWNEY & LENKOV LLC

General Liability Update
August 2015

Tina Paries Argues Before Illinois Supreme Court

On May 19, 2015, Bryce Downey & Lenkov partner, **Tina Paries**, argued before the Illinois Supreme Court in a case involving the issue of whether the Chicago Condominium Conversion Ordinance creates a private right of action and whether such a right of action requires a false statement or a false statement of material fact.

At the trial court level, Plaintiff brought a cause of action for construction defect, fraud, and breach of fiduciary duty against the Defendant developer. Plaintiff also brought a claim under the Chicago Condominium Conversion Ordinance which prohibits a developer from making false statements to prospective purchasers in connection with the advertisement or sale of a condominium unit.

The trial court dismissed the construction defect, fraud, and breach of fiduciary duty claims pursuant to the four-year construction statute of limitations. With regard to the ordinance claim, the trial court stated that, like a claim for fraud, the claim must be plead with greater particularity.

On appeal, the Illinois appellate court held that the fraudulent concealment exception applied to the construction defect, fraud, and breach of fiduciary duty claims such that they were not barred by the statute of limitations. As a matter of first impression, the appellate court held that a private right of action exists under the Chicago Condominium Conversion Ordinance and that the ordinance only requires the allegation of a false statement and not allegations of a false statement of material fact. Under the appellate court analysis, the claim did not have to be pled with particularity.

Before the Illinois Supreme Court, Tina argued that the claims were, in fact, time barred and that there was no private right of action under the ordinance.

A decision from the Illinois Supreme Court is expected this Fall

Illinois Now Limits Juries to Six Persons in Civil Cases

Effective June 1, 2015, Illinois now limits all civil trials to six person juries. Section 2-1105 of the Illinois Code of Civil Procedures also now states that if alternate jurors are requested, an additional fee established by the county will be charged for each alternate juror. In any suit in which a 12 person jury had been requested prior to June 1, 2015, the case will still proceed with a 12 person jury.

Illinois Appellate Court Holds Fitness Center Exculpatory Clause Does Not Preclude Suit Based on Unexpected Injury

In *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, the Illinois Appellate Court held that a typical provision in a fitness center membership agreement did not insulate the fitness center when a patron was injured by a falling mirror.

In *Hawkins*, Plaintiff was at a fitness club working out with weights when a nearby mirror fell from the wall and struck him. Hawkins sued the fitness club alleging it negligently failed to secure the mirror or warn patrons about it and failed to cordon off the area around it.

Defendant, Capital Fitness, obtained summary judgment on the basis of an exculpatory clause in its membership agreement. That clause stated: "[M]ember acknowledges that exercise, tanning and use of the equipment and facilities naturally involves the risk of injury. Member engages in all exercises and uses all facilities and services at such person's own risk."

On appeal, the appellate court held that the trial court erred in concluding that the risk of a mirror falling on a patron ordinarily accompanied the use of a fitness facility. While Plaintiff and Defendant did not need to specifically foresee the precise incident at the time that Plaintiff signed the membership agreement in order for the exculpatory clause to be effective, a broad exculpatory clause did not cover every conceivable claim. The application of the exculpatory clause to a mirror falling off a wall was a fact question that precluded summary judgment.

Thinking Point:

Exculpatory clauses must be narrowly tailored to the expected activities. Broad, boilerplate language, intended to cover all possible activities, will likely not provide protection for liability from an otherwise unforeseen occurrence.

Indiana Supreme Court Reverses Court of Appeals Ruling that Product Liability Suit Against Indiana Manufacturer Did Not Belong in Indiana

In our July 2014 Newsletter, we reported on the Indiana Court of Appeals decision in *DePuy Orthopedics v. Brown*, 10 N.E.3d 587 (Ind. Ct. App. 2014), in which the court held that a products liability suit brought against an Indiana company responsible for manufacturing and selling prosthetic hip implants did not belong in Indiana under the *forum non conveniens* provision of Trial Rule 4.4(C).

On April 24, 2015, the Indiana Supreme Court reversed the Court of Appeals and held that the Indiana was the proper forum for the case. Beyond the fact that the Court of Appeals was overturned, the case is interesting because of the different ways in which the two courts viewed the critical facts.

In *DePuy Orthopedics, Inc. v. Brown,* 49S02-1504-CT-225 (April 24, 2015), 19 plaintiffs brought a product liability suit against DePuy Orthopedics, a hip implant manufacturer with its principle place of business, offices, a manufacturing facility and warehouses all located in Kosciusko County, Indiana. The plaintiffs were from Virginia and Mississippi who had had hip prosthetics implanted between 2007 and 2009. The lawsuit was filed in Marion County, Indiana in 2012 following a product recall from DePuy in August 2010. DePuy moved to dismiss pursuant to Trial Rule 4.4(c), the *forum non conveniens* provision that allows a trial court to transfer or dismiss a cause of action that should more appropriately had been brought in another venue.

Before the trial court, DePuy pointed out that all the acts alleged by the plaintiffs took place outside of Indiana and that the key witnesses and evidence were beyond the subpoena power of Indiana courts. It also pointed out that it had submitted a stipulation that it would submit to the personal jurisdiction of Virginia and Mississippi and would waive any statute of limitations defenses available in those states.

The plaintiffs asserted that video depositions could always cure any lack of the subpoena power that an Indiana court may have and that the plaintiffs wanted an earlier trial date than they would have received in either Virginia or Mississippi.

After the trial court denied DePuy's motion to dismiss, DePuy appealed as of right. The appellate court reversed, holding that the trial court abused its discretion in denying the motion. Reviewing the facts of record in conjunction with the four elements of Trial Rule 4.4(C), the court found that Indiana was not a proper forum for this action.

The appellate court observed that all of the plaintiffs lived in either Virginia or Mississippi. DePuy, being a corporation conducting business nationally, would likely face inconvenience no matter where it was sued. However, because most of the witnesses were in Virginia or Mississippi, the inconvenience caused by litigating in Indiana weighed against the case proceeding in Indiana.

As far as the consideration of choice of law, the appellate court reasoned that because Virginia and Mississippi product liability law was notably different from the product liability law in Indiana, it was appropriate for these suits to be heard in the home states of the applicable law.

The appellate court also found it significant that there was no evidence that Virginia or Mississippi were inadequate forums for these claims to be heard and that a federal multi-district litigation panel had already been in place to hear similar claims in Ohio with the intent of transferring claims to the jurisdictions under which the claims arose.

The Supreme Court viewed the procedural and evidentiary fabric of the case quite differently. The court noted that DePuy was an Indiana corporation with its principle place of business in Indiana and it was the sole entity responsible for the design and manufacturer of the hip prosthetics. Indiana had a "manifest interest" in hearing disputes involving its citizens.

The court also noted that the plaintiffs' choice of suing DePuy in its home state warranted some deference.

With regard to the issue of convenience to the parties and the ability to conduct discovery, the court observed that 17 depositions had already been taken in Indiana, a point not referenced by the Court of Appeals.

Finally, while the case required consideration of the laws of Virginia and Mississippi, the Supreme Court concluded that Indiana courts were capable of interpreting and applying the laws of these jurisdictions.

Acknowledging that there was "ample evidence supporting venue in Virginia or Mississippi," the Supreme Court held that the evidence did not allow it to conclude that the trial court abused its discretion in denying DePuy's motion in the first place.

Thinking Point:

We previously commented that, when faced with claims brought by non-resident plaintiffs, it is important to look at such issues as the national presence of the defendant and the substantive law that would be applicable in the states in which the injuries occurred. After the Indiana Supreme Court's decision, it is clear that these factors will not outweigh the significance of a defendant's Indiana citizenship in determining the proper venue.

Indiana Court of Appeals Holds Municipal Decision Not to Repair Pothole to Be Immunized Discretionary Act

In *City of Beech Grove v. Beloat*, 49A02-1409-CT-605 (2015), the Indiana Court of Appeals held that the decision not to make "piecemeal repairs" to a particular stretch of road in light of plan to repave the road constituted an exercise of discretion that was immunized under the discretionary function immunity of IC Section 34-13-3-3 (7).

Plaintiff was injured when she stepped in a pothole in that portion of the road that the City was intending to repair. The record suggested that the City had not made any repairs to the road because it was planning to completely reconstruct that portion of the road.

The City moved for summary judgment, arguing that its decision not to fill the pothole in deference to its plan to repave the whole section of road was a discretionary act entitled to immunity under the discretionary function immunity of the Indiana Tort Claims Act.

The trial court denied the City's motion for summary judgment, finding that maintenance of the roadway was ministerial not discretionary. The Court of Appeals reversed. According to the court, the decision to withhold making the repairs was a policy-oriented decision subject to immunity because the incident occurred while the City was at the planning stage of a larger project and because the injury did not occur because of "operational" activities.

Thinking Point:

Under *Beech Grove*, municipalities appear to have the opportunity to claim discretionary immunity for inaction during the planning stage of further redevelopment or large scale projects.

Self-Critical Analysis Privilege Rejected by Illinois Supreme Court

In *Harris v. One Hope United, Inc.* 2015 IL 117200 (2015), the Illinois Supreme Court held that a family counseling organization could not assert a self-critical analysis privilege with regard to its investigation following the death of a child to whom it had provided counseling.

One Hope had contracted with the Illinois Department of Children and Family Services to work with troubled families. A 7-month old child of such a family died while the family participated in a program conducted by One Hope. The child had been removed from the family home and placed with a relative. After counseling through One Hope, the child was returned home. She died while unattended in a bathtub.

Following the incident, One Hope conducted an extensive investigation into its own conduct in an effort to ensure that similar conduct did not occur in the future.

The program had been implemented to consider whether services were provided in a professional manner and whether there were any "gaps in service."

A lawsuit was filed on behalf of the deceased child for abuse and neglect and claimed that One Hope should have allowed the child to remain in the relative's home. Discovery revealed the existence of the internal review process utilized by One Hope. However, One Hope refused to produce the reports from that investigation. One Hope asserted the self-critical analysis privilege. The trial court refused to apply the privilege and the issue of whether such a privilege should apply was appealed.

The Appellate Court held that to allow such a privilege would constitute judicial legislation. The court also found that the Illinois Child Death Review Team Act required information regarding the death of children to be shared with all pertinent parties. The court rejected the application of the Medical Studies Act and the deliberative process privilege.

On appeal, the Illinois Supreme Court agreed that the Illinois Medical Studies Act does not apply to One Hope because it is not a medical provider as defined in the Act.

The court held that the Child Death Review Team Act allows for the disclosure to certain entities but not the general public. The limitation on the extent to which disclosure could be made, however, did not justify the application of the self-critical analysis privilege. Moreover, the Act applies to the Death Review Team, which is part of the DCFS, not to One Hope.

The court held that for either the Medical Studies Act or the Child Death Review Team Act to apply, it would take legislative action by the Illinois General Assembly, not by the court.

Turning to the application of the self-critical analysis, the court noted that it is a permissive privilege under the federal system and not part of the federal rules of evidence. It is not necessarily recognized as applicable in all instances.

In order for the privilege to apply, the information sought to be protected must result from a critical self-analysis. The public must have a strong interest in preserving the freedom information sought to be protected and the information must be of a type that would be curtailed if discovery were to be allowed. Finally, the documents prepared as a result of the analysis must have been prepared with the expectation that they would be kept confidential and that the documents were, in fact, kept confidential.

Here, the court determined that the public interest in the freedom information with regard to the care of the infant, like all matters that relate to the protection of public health and human life far outweighed any interest that One Hope had in using its analysis to foster a more professional environment in the future.

Thinking Point:

While the court refused to acknowledge the existence of a self-critical analysis privilege, the extent to which it did undertake an evaluation of the privilege and the ultimate balancing of the public versus private interest suggests that, in the right setting, the assertion of the privilege could be raised successfully. Until then, in the absence of any legislative creation of a statutory self-critical analysis privilege, non-medical entities should understand that reports regarding post- incident evaluations may be discoverable.

Illinois Appellate Court Bolsters Open and Obvious Doctrine

In our March 2015 newsletter, we reported on the Illinois Supreme Court decision in *Bruns v. City of Centralia*, 2014 IL 116998 (2014), in which the court held that in order for the distraction exception to the Open and Obvious Doctrine to apply, the distraction must be real and not theoretical.

In *Lucasey v. Plattner*, 2015 IL App (4th) 140512 (2015), the Illinois Appellate Court held that the distraction exception to the open and obvious doctrine did not apply where the plaintiff knew of the existence of a hazard.

In *Lucasey*, Plaintiff was conducting an appraisal of Defendants' house. In the process of measuring the exterior dimensions with a tape measure, Plaintiff noted the existence of a retaining wall with a 5-1/2 foot drop off. Despite the presence of heavy snow, Plaintiff was able to appreciate the potential danger of stepping off of the retaining wall.

While on the upper level of the property, Plaintiff hooked his tape measure onto a nearby deck and carefully made his way toward the edge of the retaining wall to measure that distance. Despite his precaution, he fell off the retaining wall and was injured.

Defendants succeeded in obtaining summary judgment at the trial court level on the ground that the hazard posed by the retaining wall was an open and obvious condition. On appeal, Plaintiff argued that he was distracted by the task of having to measure the back of the defendant's house, which affected his ability to appreciate the open and obvious nature of the condition posed by the retaining wall.

Emphasizing that the open and obvious doctrine assumes that people encountering potentially dangerous conditions will appreciate and avoid risks, the court held that Plaintiff was not distracted in the sense that he failed to appreciate the hazard or forgot to protect himself against the hazard. In fact, the court noted that he was actively looking for the drop off when he fell and he was just simply unable to see it because of the presence of snow. According to the court, Plaintiff's inability to actually see the drop off did not constitute a distraction when it was clear that Plaintiff appreciated the existence of the drop off.

The court also rejected the application of the deliberate encounter exception to the open and obvious doctrine. That exception states that a duty to protect against an open and obvious condition will exist when the landowner has reason to expect that the invitee will proceed to encounter the known or obvious danger because the advantages of encountering the hazard greatly outweigh the apparent risk. Usually, this exception will apply when there is some economic compulsion, such as where a worker is compelled to encounter a dangerous condition as part of their employment.

According to the appellate court, the deliberate encounter exception would not apply because it was not reasonably foreseeable that taking measurements of the exterior dimension of the house could only be accomplished by falling off the retaining wall. The court noted that common sense suggested the plaintiff could easily have taken some small precautions to avoid the risk of falling, such as brushing snow off the top of the retaining wall so that the edge of it was more visible.

Thinking Point:

Lucasey represents a continuing trend among appellate courts to restrict the application of the distraction and deliberate encounter exceptions to the open and obvious doctrine.

Indiana Appellate Court Affirms Summary Judgment in Favor of Pig

In *Gruber v. YMCA of Greater Indianapolis*, 49A02-1410-CT-713 (June 5, 2015), the Indiana Court of Appeals held that Indiana case law holding owners of domestic animals liable for injuries caused by their animals only when it is established that the owners had notice of their dangerous propensities, applied to a domesticated pig kept at a YMCA camp.

According to the court, there was no sound basis to distinguish a domesticated pig from cats or dogs as Plaintiff suggested. As such, the trial court properly entered summary judgment in favor of the YMCA.

Thinking Point:

While the owner of any domesticated animal is protected from liability in unforeseen bites, the court has not defined what is a " domesticated animal."

Recent Seminars

- On **2/24/15**, **Justin Nestor** and **Kirsten Kaiser Kus** presented "Strategies and Tactics for Defending Indiana Workers' Compensation Claims."

- On **3/24/15, Justin Nestor** and **Kirsten Kaiser Kus** presented "Workers' Compensation Claims: Initial Investigation Strategies" at the Beyond Safety and Reliability Expo in Merrillville, Indiana.

- On **3/27/15**, **Rich Lenkov**, **Sean Downing**, CVS Caremark Director of Litigation, and **Natalie Troilo**, Dick's Sporting Goods Claims Manager, presented "What the Movies Can Teach You About Defending Workers' Compensation Claims" at the CLM 2015 Annual Conference in Palm Desert, CA.

- On **4/13/15**, **Rich Lenkov** presented "10 Things To Know About Workers' Compensation In Mediated Settlements" for ADR Systems mediations.

- On **5/8/15**, **Rich Lenkov**, **Michael Kelley**, HUB International New England Senior Vice President, Director of Claim Operations, and **Eric Spalsbury**, Stanley Steemer International, Inc. Director, Risk Management, presented "Negotiation Skills That Every Workers' Compensation Professional Needs To Know" at the CLM 2015 Insurance Fraud & Workers' Compensation Conference in Boston, MA.

- On **5/27/15**, **Daniel Cooper** presented "Attorney Induced Disability Syndrome" webinar for CEU Institute.

- On **6/2/15**, **Michael Milstein** presented "Trial & Appellate Procedures" at the Advanced Workers' Compensation conference in Naperville, IL.

- On **6/9/15**, **Rich Lenkov** presented "Workers' Compensation Fraud: What You Can Do About It" at the SEAK 35th Annual National Workers' Compensation and Occupational Medicine Conference in Chicago.

- On **6/19/15**, **Jessica Rimkus** presented at "An Overview of Orthopedic Workers' Compensation Case Studies" at Hub 51.

- On **7/23/15**, **Storrs Downey** presented "Solving Common Settlement Problems" and "Successful Subrogation" for CEU Institute in Dallas, TX.

Upcoming Seminars

- On **8/26/15**, **Rich Lenkov**, **Justin Nestor** and **Maital Savin** will present at the WCDI Conference on Multi-State Workers' Compensation Laws. For more info, Click Here.

- On **9/17/15**, **Jeanmarie Calcagno** will present to the Illinois Manufacturers' Association on negotiation strategies and causation in Illinois workers' compensation claims. Click Here for more info and to register.

- On **10/29/15**, **Tim Alberts** will present "Effective Statements" in Des Moines, IA for CEU Institute.

Geoff Bryce Elected to SOICA Steering Committee

Geoff Bryce was recently elected to SOICA Steering Committee. This committee membership is limited to attorneys practicing construction law at least ten years, who have made a great impact in the construction industry and demonstrated high ethical and professional standards of practice.

BDL is Growing

We are pleased to announce the addition of three new attorneys to the firm.

Timothy J. Brown

Tim joins our team in Indiana handling general liability and workers' compensation matters. Prior to joining BDL, Tim defended realtors in real estate cases, businesses in personal injury cases, automobile accident cases, premises liability cases and products liability cases.

Tim enjoys spending his free time with his family and is an avid runner. As of this summer, he completed 14 marathons, including an ultra-marathon, and 15 half marathons, finishing around 200 races in the last 6 years.

Matt Alva

Matt handles workers' compensation and general liability matters in our Chicago office. Prior to joining BDL, Matt defended clients in civil litigation matters concerning product and premises liability. Matt previously worked as a public school history teacher in Chicago.

Sadiq Sharrif

Sadiq handles workers' compensation and general liability matters in our Chicago office. Prior to joining BDL, Sadiq represented municipalities, healthcare providers and other insureds in all types of state and federal civil litigation matters. Along with his law degree, Sadiq also earned a Certificate in Litigation and Dispute Resolution.

Indiana Office is Moving

Our Indiana office will be moving into a new location. Our new address will be **833 West Lincoln Highway, Schererville, Indiana**. We expect to complete the move by mid- October. The new office is more than twice the size of our current space in the Crown Point office.

Giving Back

Legal Prep 3 on 3

On **3/7/15**, Teams BDL Ballers and BDL Ball Don't Lie played in the Chicago Legal Prep 3 on 3 Tournament. Ex-Chicago Bear Jerry Azumah co-hosted this event where players, supporters, students and faculty gathered together for fun competition and supported their athletic program. The final game score was a close 15-13!

Chicago Legal Prep Charter Academy is Chicago's first and only legal-themed charter high school. Bryce Downey & Lenkov was proud to sponsor this event and support Chicago Legal Prep. For more info, Click Here

Bob Bramlette Judges 2015 ABA NAAC Competition

AMERICAN BAR ASSOCIATION
Law Student Division

On **4/9/15-4/11/15**, **Bob Bramlette** helped judge the 2015 ABA National Appellate Advocacy Competition. This competition focuses on developing oral advocacy skills with the addition of a realistic appellate advocacy experience. Participants wrote briefs and argued their cases to a mock court.

BDL Attends NRA Show 2015

On **5/19/15**, BDL attended the 2015 National Restaurant Association Show. We represent several foodservice clients and like to stay informed of new developments and changes. BDL learned about hospitality updates and met some characters.

Race Judicata 2015

BDL is proud to sponsor 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.

CowaLUNGa

On **8/1**, Jeff Kehl and Jason Klika participated in the Respiratory Health Association's "CowaLUNGa" to help promote healthy lungs and fight lung disease through research, advocacy and education. Jeff and Jason cycled 65 miles from Gurnee, Illinois to Lake Geneva, Wisconsin. For more info on CowaLUNGa and the RHA, Click Here.

Contributors to the August 2015 General Liability Update

Bryce Downey and Lenkov attorneys who contributed to this update were Storrs Downey, Jeffrey Kehl and Chris Puckelwartz.

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:

- 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:

- 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, Crown Point, IN, 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

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