Bryce Downey & Lenkov LLC

General Liability Newsletter

November 2021

Illinois Supreme Court Holds Standard Protective Order is Contrary to HIPAA Privacy Rule

In *Haage v. Zavala*, 21 IL 125918 (9/23/21), the Illinois Supreme Court addressed whether a qualified HIPAA protective order (QPO) may preclude a casualty insurance carrier from maintaining and using protected health information (PHI) regarding a Plaintiff for purposes other than the underlying litigation.

In *Haage*, State Farm Insurance Company was the casualty insurance carrier for two Defendants in two separate motor vehicle lawsuits that happen to have been filed on behalf of Plaintiffs by the same attorney. In both cases, the Plaintiffs submitted QPOs that would have effectively prevented State Farm as the liability carrier from disclosing PHI for any purpose other than the underlying litigation and that would require State Farm to return or destroy the PHI following the litigation.

State Farm intervened in both suits. They objected to the proposed QPO and to have the courts consider the standard Cook County QPO under which insurance carriers such as State Farm would be able to use PHI for all insurance purposes, including claim reporting and evaluation.

The trial courts entered Plaintiffs' QPO and rejected State Farm's proposed orders. State Farm appealed to the appellate court which affirmed the trial court's decision on the grounds that the Privacy Rule of HIPAA preempted any state Insurance Code considerations that State Farm may have asserted and lawfully allowed the trial courts to regulate and limit State Farm's use of the disclosure and retention of the PHI.

On review by the Illinois Supreme Court, State Farm argued that it was not a "covered entity" under HIPAA, and as such, it could not be constrained by the limitations of the Privacy Rule. State Farm also argued that the QPO restriction on its ability to use the PHI for insurance purposes violated its statutory obligations under the Illinois Insurance Code.

The Illinois Supreme Court rejected State Farm's arguments stating that, while State Farm was not a covered entity under HIPAA, it was a recipient of records from covered entities, and as such, its rights and use of the PHI was subject to limitations under any applicable QPO such as the orders entered here.

Further, the court held that, as a general rule, HIPAA and the resulting Privacy Rule preempted any state law regarding the same subject matter (PHI). Further, the court considered State Farm's argument that because the Illinois Insurance Code was more directly related to the obligations of insurance companies, it must take precedent and preempt federal law under the doctrine of reverse preemption. The court rejected the reverse preemption argument because State Farm could not articulate how its retention of PHI was mandated by any particular Insurance Code provision.

Finally, the court also addressed State Farm's argument that the standard QPO utilized in Cook County courts provided a more equitable balance between the protection of privacy interests and the need for disclosure and retention by insurance companies. The court held that the Cook County QPO, which allows insurance companies to use PHI for insurance purposes, violates the Privacy Rule because it does not protect the privacy interest of individuals to the extent required by the Privacy Rule.

The court's ruling was limited to the arguments State Farm made as an insurance company and should not be interpreted as limited to the arguments as limiting defense counsels' right to secure medical records through appropriate HIPAA order.

Practice Tip:
While the Cook County order was not directly the subject of the appeal in *Haage*, the reasoning and holding of the Illinois Supreme Court clearly established that the standard Cook County QPO violates the Privacy Rule. As a result, there will no doubt be thousands of new QPOs submitted in pending Cook County cases.

We have already seen new QPOs submitted in cook county that simply eliminate any insurance company's right to use PHI.

Mandatory Arbitrations Now Required by Circuit Court of Cook County Local Rules

The Circuit Court of Cook County recently enacted "Part 25" as part of its local rules. Part 25 provides that certain commercial and personal injury actions are required to participate in mandatory arbitration. The following highlights the key aspects of Part 25 mandatory arbitrations and the duties of the parties required to participate in such arbitration proceedings.

APPLICATION

Mandatory arbitration is now required in those commercial and personal injury cases assigned to the Law Division of the Circuit Court of Cook County with damages of less than $50,000 and with no retained expert witnesses as defined by Supreme Court Rule 213(f)(3). However, not all cases so qualified are required to participate in mediation.

Rather, certain commercial cases are specifically excluded from the mandatory arbitration requirement. These include claims for purely equitable relief and other types of claims.

Likewise, certain personal injury cases are also specifically excluded from the arbitration requirement. These include asbestos, construction, medical malpractice, nursing home and product liability cases.

All cases referred to mandatory arbitration under Part 25 are assigned either a standard arbitration date or an expedited date. A standard arbitration case will continue before the Circuit Court during the first 120 days following its referral to arbitration, while an expedited case shall continue before the Circuit Court during the first 90 days following its referral to arbitration, following which the cases will be arbitrated.

DOCUMENTS EXCHANGED BEFORE ARBITRATION & SUBMITTED TO ARBITRATOR

The parties are to meet and confer 30 days prior to the arbitration hearing and exchange documents which the parties intend to have presumptively admitted at the arbitration without additional foundation. These include medical records and bills, property repair bills/estimates, wage loss verifications, and witness statements/depositions.

Thereafter, 14 days prior to the hearing the parties are to submit the following documents to the arbitrator:

1. The most current relevant pleadings;
2. Each party's detailed statement of the case including the legal and factual issues;
3. A list of witnesses who are expected to testify;
4. A list of all documents to be offered as evidence at the hearing;
5. Stipulations as to facts or law;
6. Reports, affidavits or summaries having proper foundation; and
7. An itemization of the damages claimed in the complaint and/or counterclaim.

HEARINGS

Each arbitration hearing will be held during a 4 hour allotted period, which timeframe will include a pre-hearing conference to discuss exhibits and the issues to be arbitrated.

THE AWARD

Following the arbitration, the arbitrator will issue an award by 5:00 p.m. on the second business day following the conclusion of the hearing.

REJECTION OF THE AWARD

Either party may reject the award so long as they do so within 14 calendar days after receiving the notice of the award. To reject the award, the rejecting party must complete a rejection form and file it with the Clerk's office accompanied by a $750.00 rejection fee.

If the party rejecting the award fails to obtain a better result at trial, that party shall pay the other party's reasonable legal fees in preparing for and participating in the arbitration.

PARTY ACTING IN BAD FAITH

If a party willfully refuses to attend or to participate in the arbitration, or has otherwise acted in bad faith, that party may be sanctioned up to $1,000.00 by the Supervising Judge of the mandatory arbitration program.

ARBITRATION ALREADY REQUIRED FOR MUNICIPAL LEVEL CASES

Mandatory arbitrations are already required in Cook County for Municipal level cases valued at $30,000.00 or less under Part 18 of the local rules of the Circuit Court. There are many similarities between the arbitration requirements under both Part 18 and Part 25.

For example, both hearings are of limited duration (Part 25 arbitrations are 4 hours or less while Part 18 arbitrations are 2 hours or less), and both contain provisions for rejecting the award (Part 25 arbitration awards must be rejected within 14 days accompanied by payment of $750.00, while Part 18 arbitration awards must be rejected within 30 days accompanied by payment of $200.00.) Likewise, the Rules of Evidence are relaxed and certain documents, including medical records and lost wages information, are deemed presumptively admissible in both arbitrations proceedings.

However, there are also differences. The key such difference is that a Part 18 mandatory arbitration does not contain a fee-shifting provision, whereas a Part 25 mandatory arbitration does, which requires the payment of an opponent's costs and legal expenses incurred in the arbitration should the result obtained at a subsequent trial be less favorable to the party who rejected the Part 25 arbitration award than the arbitration award itself.

Practice Tip:
Key takeaways from the new Part 25 mandatory arbitration program include the following: the arbitration requirement only applies to smaller level commercial and personal injury claims (less than $50,000.00 in value) in which the parties have not and will not secure retained expert witnesses as defined by Illinois Supreme Court Rule 213(f)(3).

The procedure allows the parties to secure an independent arbitrator's assessment of their case's value (or lack thereof) following an expedited trial in which the Rules of Evidence are substantially relaxed and the parties are neither required nor expected to complete all discovery in advance of the arbitration.

The parties are incentivized to accept the award of the arbitrator by virtue of the $750.00 rejection fee they must pay in the event they elect to reject the award. They are further incentivized to accept the award by virtue of the requirement that they pay their opponent's legal expenses associated with the arbitration should they fail to secure a better result at trial.

Indiana Court Finds Subcontractor Had Duty to Defend and Indemnify

In *Roadsafe Holdings, Inc. v. Walsh Construction, Co.*, 164 N.E.3d 726 (Ind. Ct. App. 2021), a general contractor retained a subcontractor to perform work in connection with the construction of a traffic exchange, which included providing a safe traffic pattern through the work zone. Under the parties' contract, the subcontractor was required to (i) indemnify the general contractor for liability in the event the subcontractor was negligent; and (ii) procure insurance that named the general contractor as an additional insured. With regard to the latter, the subcontractor procured such a policy naming the general contractor as an additional insured, but the policy also contained a self-insured retention endorsement under which the subcontractor would be responsible for defense costs up to $500,000.

During construction, a motorist was injured and filed a lawsuit against the general contractor alleging that the general contractor was negligent in creating an unsafe traffic pattern. The general contractor tendered the lawsuit to the subcontractor and the subcontractor's insurance company, seeking a defense and indemnification for the claim. The insurance company denied it was obligated to provide coverage to the general contractor until the subcontractor had satisfied the self-insured retention amount and the subcontractor denied it was obligated to indemnify the general contractor until there was an adjudication that the subcontractor was negligent. The subcontractor did not defend the general contractor and did not file a declaratory judgment action seeking a determination with respect to its defense or indemnity obligations.

The general contractor filed a third-party complaint against the subcontractor in the lawsuit for breach of the parties' contract. The general contractor then settled with the motorist and sought to recover that amount, as well as its attorneys' fees, costs and pre-judgment interest against the subcontractor. The court ultimately entered judgment against the subcontractor and awarded the general contractor all of its damages.

After applying the standard typically reserved for insurance companies that deny coverage, the Indiana Court of Appeals affirmed the trial court's decision that the subcontractor was estopped from asserting it had no duty to indemnify the general contractor because the subcontractor did not protect its interest by either filing a declaratory judgment action for a determination of its obligations under the self-insured retention endorsement or defending the general contractor under a reservation of rights. As such, the subcontractor was not only obligated to pay the general contractor for the settlement with the motorist and the general contractor's attorneys' fees to defend itself in connection with that claim, but was also obligated to pay the general contractor's attorneys' fees to pursue coverage with the subcontractor's insurance company, third-party complaint and for pre-judgment interest on all of these amounts.

Practice Tip:
The Court's holding demonstrates that an insured can be subject to the same requirements as an insurance company when it comes to defending and indemnifying another party. Parties who have insurance policies with a self-insured retention should be cautious when determining their obligations to defend or indemnify another party and the next course of action might be to file defend under a reservation of rights, file a summary judgment motion or a declaratory judgment action.

Pretrial Interest Bill Signed Into Law - Effective 7/1/21

On May 28, Illinois Governor JB Pritzker signed Senate Bill 72 into law, providing pre-judgment interest to plaintiffs in personal injury and wrongful death lawsuits in Illinois.

New law highlights:

- Interest at the rate of 6% accrues on all damages, including pain and suffering (but not punitive damages) from the date suit is filed
- The interest applies only to the amount of any verdict in excess of the last settlement offer before the verdict
- The law does not apply to lawsuits filed against the state, local units of government, school districts or any other municipal governmental entities
- The law goes into effect on July 1, 2021

Gov. Pritzker previously vetoed HB3360, the bill that would impose 9% prejudgment interest per year on future money damages in personal injury actions. Under that bill, interest would begin accruing on the date the claim arose, not when suit was filed. HB3360 also applied interest to the entire verdict, not the amount by which the verdict exceeded the last offer.

The new law raises many questions including whether a typical Comprehensive General Liability Policy will cover the pre-judgment interest. In fact, in cook county there is a suit challenging the constitutionality of the new law.

Tort Immunity: Drunk Driver May Not Maintain Personal Injury Action Against Police Officer Who Didn't Arrest Him

In *Rodriguez v. Village of Park Forest*, 2021 IL App (1st) 201269-U (8/19/21), the Illinois Appellate Court for the First District held that a police officer and his employing Village had absolute immunity from liability to a drunk driver who was allowed to leave the scene of a minor motor vehicle accident and who subsequently sustained serious injuries in a single car accident.

In *Rodriguez*, Village of Park Forest Police Officer Kessler investigated a minor vehicle collision involving Plaintiff, Mr. Rodriguez, and another driver. Despite the fact that the other driver noted that Mr. Rodriguez smelled of alcohol, slurred his speech, and had trouble standing, Officer Kessler did not perform any further investigation into whether Mr. Rodriguez was intoxicated. Instead, after providing both drivers with accident reporting information, he allowed Mr. Rodriguez to leave the scene.

Within minutes, Mr. Rodriguez was involved in a single-car accident in which he drove his vehicle off the roadway and was injured.

Mr. Rodriguez sued Officer Kessler and The Village of Park Forest, claiming that Officer Kessler was negligent by not conducting any investigation into whether Mr. Rodriguez was intoxicated. Plaintiff maintained that if Officer Kessler had properly investigated Mr. Rodriguez's condition at the first traffic stop, Mr. Rodriguez would have been arrested and not have been involved in the second and more severe accident.

In upholding summary judgment in favor of Officer Kessler and The Village of Park Forest, the appellate court noted that the facts of the case and the allegations contained within Plaintiff's Complaint placed the claim clearly within the absolute immunity set forth in Sections 4-102 and 4-107 of the Tort Immunity Act which precludes liability for the failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. Plaintiff argued that Section 2-202 of the Act, under which only a qualified immunity exists for acts or omissions in the execution or enforcement of any law, was more applicable and that Officer Kessler's actions were willful and wanton given Mr. Rodriguez's obvious state of intoxication.

The appellate court noted that Plaintiff's theory was really that Officer Kessler failed to properly investigate and arrest Plaintiff and it was not failure to enforce a law, it was a failure to investigate whether a law had been broken. As such, in Sections 4-102 and 4-107 of the Tort Immunity Act barred any recovery.

Beyond the application of the Tort Immunity Act, the court noted that under Illinois Law, a Plaintiff who intentionally engages in illegal acts does not have the right to recover for injuries resulting from those acts. Here, Mr. Rodriguez's self-inflicted state of intoxication and desire to operate his motor vehicle was clearly an intentional and illegal act that would otherwise include liability.

Practice Tip:
Rodriguez highlights the importance of carefully examining the alleged conduct to see if there are any absolute immunities that apply.

Indiana Court of Appeals Holds Exclusive Remedy Doctrine Bars Civil Suit Even When WC Claim is Denied

In *Allen v. Smithfield Foods*, 21 A-CT-416 (8/30/21), the Indiana Court of Appeals held that an employee's exclusive remedy under the Worker's Compensation Act precluded the employee from suing her employer even though the

employer denied the claim and invoked Plaintiff's fault as a complete defense to having to pay worker's compensation benefits.

In *Allen*, the Plaintiff was injured at work and filed a worker's compensation claim. Her employer denied the claim asserting the statutory defense of Plaintiff's fault precluded its liability for worker's compensation benefits.

The employee then filed a civil suit against the employer. In turn, the employer moved to dismiss the civil suit for lack of subject matter jurisdiction, asserting that the Exclusive Remedy Doctrine of the Indiana Worker's Compensation Act precluded her from bringing a direct civil suit against it.

The employee argued that her employer waived the Exclusive Remedy Doctrine by asserting her fault as a defense to her worker's compensation claim. The trial court disagreed and dismissed the suit.

On appeal, the Court of Appeals affirmed the trial court, holding that even though the employer had asserted Plaintiff's fault as barring her recovery in the worker's compensation claim, Plaintiff could still prevail in those proceedings either before the Commission or through the appellate process. As such, her worker's compensation claim was still viable and her civil suit had to be barred by the Exclusive Remedy Doctrine.

Practice Tip:
The Court of Appeals' decision leaves open the question of whether this would be the same result if Plaintiff had exhausted all avenues within the worker's compensation arena and still lost.

Illinois Appellate Court Examines Evidence Regarding Existence of Crosswalk in Dismissing Case Against City

Tina Turner (not that one) was walking across an alley in Granite City, Illinois, when she stepped in a pothole and was injured. She sued the City for the creation of a dangerous condition.

In *Turner v. City of Granite City*, 2021 IL App (5th) 20029-U (9/7/21), the Illinois Court of Appeals for the Fifth District held that a local ordinance that prohibited crossing anywhere but within a crosswalk meant that Ms. Turner was not an intended and permitted user of the roadway.

Section 3-102 of the Illinois Tort Immunity Act provides that municipalities only owe a duty of care to intended and permitted users of municipal property. With regard to roadways, Illinois case law clearly establishes that pedestrians are intended and permitted users of crosswalks and as such, they may maintain actions against municipalities for defects in the roadway.

However, where, as here, the pedestrian crosses the roadway in an area that is not a crosswalk and the area is not contemplated by the municipality as being used by pedestrians, there is no duty to pedestrians with regard to the condition of the roadway.

In determining that there was no duty on the part of Granite City to protect Plaintiff from the pothole, the court held that the surrounding circumstances such as nearby crosswalks, aerial photographs of the area, and an ordinance that prohibited pedestrians from walking anywhere but in the crosswalks so firmly established that Plaintiff was not an intended user of the roadway at the location of the pothole that the city's motion to dismiss was properly granted.

Practice Tip:
While a point could be made that a fact question exists regarding whether a particular area of a street was not intended for pedestrian use as a crosswalk, *Turner* stands for the proposition that the fact question may be answered as early on as a motion to dismiss.

Indiana Supreme Court Views Mitigation of Damages Defense with a Practical Eye

In *Renner v. Shepard-Bazant*, 21 S-CT-138 (8/31/21), the Indiana Supreme Court examined the affirmative defense of mitigation of damages, and in the process, opened the door for a Defendant to succeed with the defense with minimal evidentiary support.

In *Renner*, a teenage Plaintiff was rear-ended in a minor motor vehicle accident. The day after the accident, she began experiencing headaches and other minor symptoms suggesting that she may have hurt her head. Plaintiff was familiar with head injuries, having experienced two concussions prior to the accident.

Plaintiff was examined by a physician and was advised not to subject herself to noisy or stimulating environments. Nevertheless, within the four days following the accident, she attended her high school prom and went on a group trip to Great America where she rode roller coasters.

Subsequently, she experienced two more concussions in unrelated incidents. She ultimately sued the Defendant, claiming that the motor vehicle accident caused her behavioral issues,

memory issues, and poor academic performance. Despite her claim for $600,000 in damages, the trial court, in a bench trial, only awarded $132,000 on the ground that Defendant proved that Plaintiff failed to mitigate her damages.

On appeal, the Court of Appeals held that the Defendant did not meet its burden of establishing that Plaintiff had suffered separate harm from the head injuries after the accident or from her failure to follow healthcare providers' advice. As such, the Court of Appeals ruled that the case should be remanded to the trial court with instructions to re-evaluate Plaintiff's damages.

On further appeal, the Indiana Supreme Court reversed the Court of Appeals ruling with regard to the failure to mitigate damages. The court noted that failure to mitigate damages is an affirmative defense that may reduce damages that Plaintiff can recover after liability has been found. The Court identified the two elements for the affirmative defense. First, a Defendant has the obligation to establish that the Plaintiff did not exercise reasonable care in complying with post-injury treatment, and second, that the failure to exercise reasonable care caused the Plaintiff to suffer harm attributable beyond the Defendant's negligence.

The supreme court noted that with regard to the failure to follow medical advice, a Defendant must prove discreet and identifiable harm from that failure alone. However, this does not mean that a Defendant must prescribe a specific "numeric value" to the incurred or prolonged injury. In fact, establishing that a Plaintiff's damages are based upon continuing symptoms attributable to failure to follow physician's advice is enough.

In *Renner*, the court noted that Plaintiff's post-accident behavior was sufficient to support the contention that she failed to exercise reasonable care. She went to prom and Great America despite her physician's advice to avoid stimulating and noisy environments. In addition, the medical evidence established that the roller coaster rides at Great America could have exacerbated her symptoms resulting in a slower and longer recovery.

In addition, the Defendant argued that the evidence supported his contention that Plaintiff's behavior and poor academic performance were caused by her post-accident concussions. Indeed, the medical evidence showed that Plaintiff suffered two concussions after the accident and that these concussions would have aggravated her existing symptoms and escalated her symptomatology.

Based upon a practical consideration of all this evidence, the court held that Defendant sufficiently established that Plaintiff failed to mitigate her damages and that her failure resulted in some of the complaints for which she sought recovery.

However, beyond its consideration of the failure to mitigate damages, the supreme court also held that the trial court failed to apply the "Eggshell Skull Rule" properly. In Indiana, the "Eggshell Skull Rule" means that a Defendant takes his victim as he finds him and, because the evidence established that each concussion aggravates the effect of all prior concussions, Defendant was not excused from liability even though Plaintiff had experienced two concussions prior to the motor vehicle accident.

Practice Tip:
The ruling in *Renner* firmly establishes that the defense of failure to mitigate damages is viable when the evidence establishes that a plaintiff did not comply with medical treatment recommendations and there is at least some evidence that this failure to comply compounded or caused Plaintiff's claimed injury. The affirmative defense of mitigation of damages should always be pleaded.

E-Filing Error Spoils Plaintiff's Effort to Have Medical Malpractice Case Heard in Pro-Plaintiff County

In *Miller v. Thom*, 2021 IL App (4th) 200414 (9/15/21), the Appellate Court for the Fourth District of Illinois held that a Plaintiff may not use the forum non-conveniens procedure of Supreme Court Rule 187 to transfer a case which she erroneously filed in an unpreferred county.

In *Miller*, Plaintiff originally filed a medical malpractice case in Madison County, Illinois. It was dismissed because Plaintiff did not include the requisite affidavit of merit. She then prepared a complaint to be filed in nearby St. Clair County but she erroneously electronically filed it in Sangamon County.

After the Defendants appeared and filed their renewed motion to dismiss, Plaintiff moved to transfer the case to St. Clair County under the doctrine of forum non-conveniens. Plaintiff argues that Sangamon County was not a proper venue under Section 2-101 of the Illinois Code of Civil Procedure because none of the parties had any ties to that county.

The Circuit Court of Sangamon County agreed with Plaintiff's position and entered an order transferring the case to St. Clair County. On Defendants' appeal, the appellate court reversed, holding that the doctrine of forum non-conveniens addressed in Supreme Court 187 is intended to protect the interest of Defendants, not Plaintiffs. Because Plaintiff had the first opportunity to select a venue but unwisely selected Sangamon County, she could not use Rule 187 to transfer the case to the county that she originally intended to file her claim.

Practice Tip:
Miller demonstrates the lack of judicial forgiveness for e-fling errors.

Indiana Supreme Court Upholds Summary Judgment for Retailer on Issue of Notice of Defective Condition

In our December 2020 General Liability Newsletter, we reported on the Indiana Court of Appeals decision in *Griffin v. Menard, Inc.*, in which the Court of Appeals reversed summary judgment on behalf of hardware retailer Menards. In *Griffin*, the Plaintiff was injured when he pulled a box containing a vanity sink from a shelf and the bottom of the box broke open, causing the sink to fall on him. Menards moved for summary judgment on the theory that it did not have actual or constructive notice that the box was defective. Menards designated as supporting evidence the affidavit of its store manager that stated that Menards had a store policy of viewing and adjusting merchandise on all shelves every eight days. Because Menards was not aware of the condition of the box, Menards asserted that it did not have actual reconstructive notice that the box was defective. The trial court agreed with Menards and granted its motion for summary judgment.

On appeal, the Court of Appeals reversed, finding that a fact question existed as to whether Menards actually had constructive notice regarding the defective condition of the box. According to the Court of Appeals, the evidence designated by the Plaintiff included the deposition testimony of the store manager in which he admitted that store employees do not always follow the store policy regarding viewing and adjusting merchandise. Because Menards could not establish that it did not have actual or constructive notice, the Court of Appeals held that summary judgment was inappropriate.

The Indiana Supreme Court in *Griffin v. Menard, Inc.*, 20A-CT-310 (October 19, 2021), held otherwise. According to the court, there was simply no evidence that Menards had actual or constructive notice that the box was defective. The Indiana summary judgment standard recognizes that a plaintiff has the ultimate burden of establishing all elements of tort liability, including actual or constructive notice in premises liability cases such as this. At the summary judgment stage, Menards had the initial burden of producing evidence that suggested that it did not have actual constructive notice and it met this burden with the submission of the store manager's affidavit as well as Plaintiff's own deposition testimony that he had not noticed anything wrong with the box. Having met this initial burden of production, it was still Plaintiff's burden of persuasion to produce evidence that called into question whether Menards had actual or constructive notice of the defect.

The court held that the Plaintiff did not meet its burden of production with the submission of the affidavit and deposition of the store manager to the effect that employees did not always follow the store policy regarding viewing and straightening merchandise. According to the court, Menards did not have a duty to establish a policy regarding examination of the merchandise, and as such, no inference could be made that it had actual or constructive knowledge simply because it may not have followed the policy in
this instance.

In addition, the court found in Plaintiff's own deposition testimony that he examined the box and did not notice anything wrong with it, establishing that there was nothing about the box that would have put Menards on notice that there was a problem.

Because Plaintiff was unable to come forward with evidence to rebut Menards assertion that it did not have actual or constructive notice, it was appropriate for the trial court to enter summary judgment on behalf of Menards.

The Indiana Supreme Court also addressed the argument that the doctrine of *Res Ipsa Loquitur* resurrected Plaintiff's premises liability claim. The court acknowledged that the doctrine of *res ipsa loquitur* will create an inference of negligence when two elements are met:

1. the injuring instrumentality is managed by or under the control of the defendant; and
2. the incident is the type that does not ordinarily happen if the defendant had exercised proper care.

The court acknowledged that the application of *res ipsa loquitur* in several premises liability cases had been questioned. While the court refused to hold that the doctrine could never apply, it held that in premises liability cases, *res ipsa loquitur* liability would only exist if there is premises liability in the first place. In addition, the court pointed out that it is difficult, if not impossible, for a plaintiff to establish exclusive control due to the defective instrumentality being accessible to customers. Because Menards could not be liable for premises liability, it could not be liable under *res ipsa loquitur*.

Practice Tip:
The *Griffin* decision will prove to be a very valuable precedent for retailers faced with premises liability claims.

Firm **News**

Thank You, Geoff Bryce

Following Bryce Downey & Lenkov's 20th anniversary, former Managing Capital Member Geoff Bryce is retiring.

Geoff founded the firm with Storrs Downey in 2001, with a focus on mentorship and building strong relationships. Geoff served as Managing Capital Member for 19 years and in addition to his construction and commercial work, Geoff's practice encompassed business transactions, toxic tort and products liability cases. He is a recognized leader in the construction industry, serving as President of the Society of Illinois Construction Attorneys and has been named as a leading practitioner by Super Lawyers and Leading Lawyers.

Post-retirement, Geoff is looking forward to new adventures and spending more time with his family.

We cannot thank Geoff enough for his time and dedication to the firm. Please join us in sending Geoff well wishes in his next chapter.

Bryce Downey & Lenkov Names Two New Income Members

We are pleased to announce that Tim Furman and Emily Schlecte have been elected to Income Members.

Tim ("TJ") Furman joined the firm in 2016 and is an active speaker in the legal community, including presentations for Lorman Education Services, National Business Institute and other nationally recognized conferences. He also has been selected to Super Lawyer's Rising Stars list for the last three years.

Emily Schlecte joined the firm in 2017 and is especially noted for her thoroughness, due diligence and achieving positive results in the most cost-efficient manner for her clients. Emily also secured two consecutive zero workers' compensation awards in less than a month, which are very difficult to come by in Illinois.

Both Tim and Emily embody firm culture and values with a client-focused approach and commitment to their communities.

Bryce Downey & Lenkov Participates in CVLS Race Judicata® 2021

Bryce Downey & Lenkov was proud to participate in Chicago Volunteer Legal Services' (CVLS) Race Judicata® 2021 on 9/23. Race Judicata is a 5K Run/Walk benefiting CVLS' mission to coordinate, support and promote voluntary pro bono legal representation serving the city's working poor.

Of counsel Werner Sabo placed second place in his age group at 32:45! Thank you to everyone who stopped by our tent & a big thanks to Chicago Volunteer Legal Services for another fun and safe Race Judicata!

Learn more about CVLS and Race Judicata.

Jeff Kehl Wins Appeal in Indiana Dram Shop Case

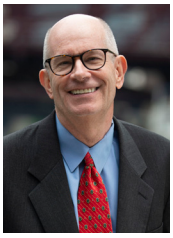
This past summer, Jeff Kehl secured a summary judgment on behalf of an Indiana bar in a lawsuit brought by a patron who alleged that a drunk patron had physically assaulted her.

Plaintiff did not file a response to the motion for summary judgment within 30 days as required by Indiana law. The trial court struck Plaintiff's response to the motion for summary judgment and granted summary judgment for the bar based upon the evidence presented.

Plaintiff appealed, arguing that her attorney had been exposed to COVID-19 in the last year and the court's application of the 30 day rule for responding to motions for summary judgment resulted in a denial of her access to courts.

The Indiana Court of Appeals rejected the Plaintiff's argument finding that the COVID-19 based restrictions on court activity had expired three months prior to the bar filing its motion for summary judgment. The court also disagreed with the Plaintiff's claim that her access to courts had been denied. According to the court, this was not a case of access being denied but rather a case of access being squandered.

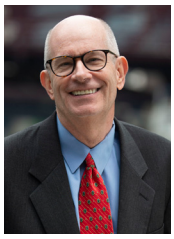
Storrs Downey & Jessica Jackler Secure Summary Judgment in Retaliatory Discharge Case



Storrs Downey and Jessica Jackler recently secured summary judgment in an Illinois retaliatory discharge case. A former employee alleged retaliatory discharge due to a disputed pre-termination work-related injury and a post-termination workers' compensation claim.

More than two years after the case filing and following significant discovery and motion practice, the judge granted summary judgment. This is a significant victory for the employer because summary judgment is only granted under limited circumstances and requires a high threshold showing as it disposes of the entire case prior to trial.

Storrs Downey & Jessica Jackler Secure Dismissal in IDHR Discrimination & Retaliation Claims



Storrs Downey and Jessica Jackler were successful in recently securing a dismissal of an Illinois Department of Human Rights (IDHR) charge claiming disability discrimination and retaliation following an evidentiary hearing by the investigator. The IDHR's detailed dismissal order cited the evidence and testimony presented by the employer throughout the IDHR's investigation and fact finding conference as reasons for the dismissals.

Jeff Kehl Secures Summary Judgment in Medical Malpractice Case

Income member Jeff Kehl secured summary judgment in an Indiana medical malpractice case where a doctor was charged with failing to diagnose a thyroid condition. Jeff argued that the statute of limitations runs from the date on which the patient "knew something was wrong," not on the date on which a correct diagnosis was made. The judge agreed and granted summary judgment.

Bryce Downey & Lenkov Turns 20!

This year, we celebrate our firm's 20th anniversary! A lot has changed from our humble beginnings to the firm we are today, but our values & culture are the same. We remain committed to community, inclusiveness & the footprint we leave behind. Thank you for your confidence in our firm. We hope to continue another 20 years of exceptional service & proven results.

Kirsten Kaiser Kus Named a CLM Professional of the Year

We are proud to announce that Kirsten Kaiser Kus was named winner in the Outside Defense Counsel category at the Claims and Litigation Management Alliance's Professionals of the Year Awards on 8/12/21. Kirsten was nominated for her commitment and leadership within the industry, as well as contributions to the success of the firm and her clients. Winners were announced at the CLM Annual Conference in Atlanta.

Chambers USA Names Margery Newman a Leading Construction Lawyer

We are pleased to announce that income member Margery Newman has been recognized by Chambers USA 2021 as a leading lawyer.

Margery was selected as a leading construction attorney in Illinois for her work in construction litigation, contract negotiation, mechanics lien claims and MBE/WBE/DBE certification.

Chambers USA ranks leading lawyers and law firms based on market analysis, industry feedback and client interviews. Their research assesses industry expertise and understanding, technical legal ability, client service, diligence and innovation.

Kirsten Kaiser Kus & Werner Sabo Named to 2022 Best Lawyers in America® List

We are pleased to announce that income member Kirsten Kaiser Kus and of counsel Werner Sabo have been recognized by their peers in the 28th Edition of Best Lawyers in America. This is Kirsten's third consecutive year selected for her work in workers' compensation law. Werner was highlighted for his work in construction litigation. They both rank among the top 5% of private practice attorneys nationwide.

Storrs Downey & Jessica Jackler Co-Author Refresher on Conducting Workplace Investigations for *CLM Magazine*

Capital member Storrs Downey and associate Jessica Jackler recently co-authored an article for the July 2021 issue of *CLM Magazine* titled, "Back To Basics In The Workplace," a refresher for employers on conducting workplace investigations during an important era of #MeToo, civil rights movements and a global pandemic.

Storrs and Jessica highlight the importance of workplace investigations, proactive policies and procedures, confidentiality, witness interviews and provide post-investigation protocols.

Read "Back To Basics In The Workplace."

Rich Lenkov Authors *Business Insurance* Article

Capital member Rich Lenkov's *Business Insurance* article addresses COVID-19 presumptions and the future of other infectious diseases in workers' compensation. Rich examines strategies employers can use to overcome the presumption the infection arose out of and in the course of the employee's employment.

He also discusses permanency, legislation surrounding other severe infectious diseases and workers' compensation benefits for seasonal illnesses.

Read "Tips for Rebutting COVID-19 Presumptions."

Jeanne Hoffmann Presents Women in Law Firm Leadership for Managing Partner Forum

Managing capital member Jeanne Hoffmann presented at Managing Partner Forum's virtual conference series: "Women in Law Firm Leadership: Shattering the Glass Ceiling" on 6/17/21.

Jeanne's panel, "Building a Culture that Empowers Women in Leadership," examined ways to build and maintain a firm culture in which women lawyers thrive. They also discussed empowerment, sponsorship and flexible working arrangements that advance promotions and retention.

View the recording.

Rich Lenkov Presents to NIU's Externship Program

Capital member Rich Lenkov recently gave a lecture to Northern Illinois University College of Law's Externship program on 9/21. Rich discussed the value of appropriate attire, promptness, language and writing skills, adequate research and more.

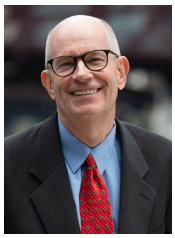
NIU's externship program provides practical and real-world experience for students entering the job market.

Rich is a 1995 NIU College of Law alumni and has served on the Board of Visitors for 13 years.

Storrs Downey Joins WGN Radio's Legal Face-Off

Capital member Storrs Downey discussed Naomi Osaka, mental health conditions in the workplace and more employment news on WGN Radio's Legal Face-Off with capital member Rich Lenkov & Christina Martini on 6/8.

Watch the full interview.



WGN RADIO 720

Margery Newman Joins Govcon Giants Podcast

Income member Margery Newman recently joined the Govcon Giants podcast to discuss high-risk construction contract clauses that primarily impact subcontractors. She highlights scope of work provisions, exclusions and omissions, best practices in contract negotiations, COVID-19's impact on the construction industry and much more.

Listen to the full episode.

GOVCON GIANTS
WINNING CONTRACTS LIKE BOEING!

BDL Sponsors Harriet Tubman Elementary School's Fall Fun Run

Bryce Downey & Lenkov was proud to sponsor Harriet Tubman Elementary School's 15th Annual Fall Fundraiser: Fun Run. The fall fundraiser brings the community together by promoting health and well-being. Funds raised will provide assistance to Harriet Tubman Elementary families in need due to issues related to COVID-19.

Harriet Tubman Elementary is a kindergarten through 8th grade Chicago Public School in the Lakeview neighborhood that serves families from around the city.

Bryce Downey & Lenkov Proud Founding Member of MPLA

Bryce Downey & Lenkov is proud to be a founding member of the Management and Professional Liability Alliance (MPLA). MPLA is a community that offers resources and shared experiences to its members.

Recently, MPLA sponsored the PLDF National Conference in Nashville. Capital member Storrs Downey also attended.

Learn more about Management & Professional Liability Alliance.

Management & Professional Liability Alliance ™

Bryce Downey & Lenkov Sponsors Higher Orbits STEM Education Charity Golf Tournament

Bryce Downey & Lenkov proudly sponsored Higher Orbits' Inaugural Charity Golf Tournament on 9/27. Higher Orbits is a non-profit organization whose mission is to equip and inspire students through spaceflight in hands-on, project-based learning experiences that promote Science, Technology, Engineering, and Math.

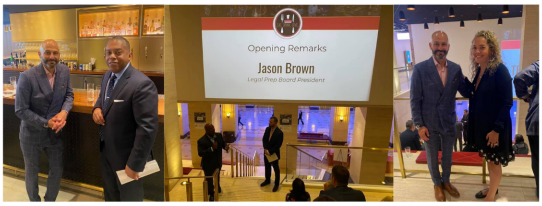
Chicago associate Natalie Christian serves on the Board of Directors

BDL Supports Legal Prep Charter Academy's Eat. Drink. Give. Gala

Capital member Rich Lenkov and income member Juan Anderson enjoyed tastings from Chicago's top chefs in support of Legal Prep Charter Academy's Annual Eat. Drink. Give Gala on 6/10/21. Rich's Legal Face-Off podcast host, Tina Martini of McDermott Will & Emery, also attended.

The annual gala benefited Chicago's first and only legal-themed high school. Legal Prep prepares Chicago's West Side youth for college and inspires students to give back to their community. Rich serves on the Advisory Board.

Learn more about Legal Prep Charter Academy.



BDL Sponsors NIU Law's 16th Annual Golf Outing

Bryce Downey & Lenkov proudly sponsored Northern Illinois University College of Law's 16th Annual Law Golf Outing at River Heights Golf Course on 6/11/21. Proceeds from the event went towards the NIU Law Council's Student Scholarship Fund and other related alumni programs.

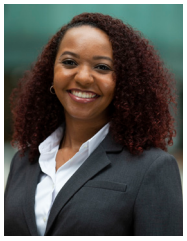
The NIU Alumni Council is comprised of alumni interested in networking and maintaining a strong connection with the school.

Capital member Rich Lenkov is on NIU College of Law's Board of Visitors.

Learn more about NIU Alumni Council.

BDL Is **Growing!**

Please join us in welcoming Megan Dyson, Daniel Flores, Robert Kroeger, Ryan O'Malley and Talia Shambee to the firm. They join us as workers' compensation and general liability associates.



Megan has experience representing clients in a wide range of workers' compensation, personal injury and civil litigations. She brings a unique perspective to the firm as she previously worked for a prominent Petitioner law firm.

Daniel is experienced in handling all aspects of litigation, including occupational and drug-related cases. He previously handled personal injury and civil procedures at another prominent Chicago law firm.

Robert has represented clients in a multitude of complex litigation matters, working with clients to minimize cost and achieve favorable outcomes.

Ryan utilizes his diverse skill set to resolve a variety of complex matters while achieving the best results for his clients in workers' compensation litigation. Prior to joining the firm, Ryan handled divorce and family law matters for a notable Chicagoland law office.

Talia brings a fresh outlook to her cases, previously assisting with pro bono matters throughout all aspects of litigation. Prior to joining Bryce Downey & Lenkov, Talia handled toxic torts for a St. Louis law firm.

Upcoming **Events**

- **12/9/21** – Join Rich Lenkov and Advantage Surveillance's Corey Parker as they discuss strategies to use surveillance & social media to defeat questionable workers' compensation & general liability claims. For more information or to register, click here.

View more information on our **General Liability practice.**

Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Construction Law
- Entertainment Law
- Healthcare Law
- Insurance Law
- Intellectual Property
- Labor & Employment Law
- Products Liability
- Professional Liability
- Real Estate
- Transportation Law
- Workers' Compensation

Who We Are

Bryce Downey & Lenkov LLC is a full-service law firm with offices in Illinois and Indiana. Our expertise spans across several practice areas, providing transactional, regulatory and business solutions for clients across the nation. The firm's continued growth is a result of an aggressive, results-oriented approach. Unlike larger law firms however, we do not face massive overhead and are able to charge more reasonable rates that both small and larger employers can more readily afford.

We evolve with our clients, representing Fortune 500 and small companies alike in all types of disputes. Bryce Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent.

Newsletter **Contributors**

Geoff Bryce, Storrs Downey, Jeff Kehl, Tina Paries and Jim McConkey contributed to this newsletter.

Cutting Edge Continuing Legal Education

If you would like us to come to you for a free seminar, Click here or email Storrs Downey.

Our attorneys provide free seminars on a wide range of general liability topics regularly. We speak to individuals and companies of all sizes. Some national conferences that we've presented at are:

- American Conference Institute's National Conference on Employment Practices Liability Insurance
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-Conference
- Employment Practices Liability Insurance ExecuSummit
- National Workers' Compensation and Disability Conference & Expo
- National Workers' Compensation & Disability Conference
- RIMS Annual Conference

If you would like a copy of our other prior webinars, please email us at mkt@bdlfirm.com.

Previous seminars include:

- Assessing Liability in *Evans v. Walmart*
- Kotecki at 25: The Minefield of Employer Liability in Third Party Tort Actions in Illinois
- Public Entity Claims in Illinois and Indiana
- Exploiting the Internet in Pre-Suit Investigations
- Use of Drones: Ag Cases
- Sexual Harassment in the Workplace: Confronting & Addressing This Growing Problem
- 10 Tricky Employment Termination Questions Answered
- Approaching LGBT Issues in Today's Workplace
- Employment Law Issues Every Workers' Compensation Professional Needs to Know About

If you would like a copy of our other prior webinars, please email us at mkt@bdlfirm.com.