Downey & Lenkov LLC

General Liability Newsletter

June 2023

Illinois Appellate Court Rules Pre-Judgment Interest Statute Constitutional

In our September 2022 GL Newsletter, we reported that the Cook County Illinois Circuit Court ruled that the 2021 statutory amendment allowing for pre-judgment interest to be applied in personal injury lawsuits was unconstitutional. On June 9, 2023, the Illinois Appellate Court First District weighed in and reversed the trial court and ruled that the statute is, in fact, constitutional *Cotton v. Coccaro*, 122-0788 (June 9, 2023), (IL. 1st District). The court rejected all arguments raised by the defendants and held that the amendment was not unconstitutional. The court made the following determinations regarding the six arguments raised by the defendants.

The amendment to 735 ILCS 5/2-1303(c) directs trial courts to award plaintiff's pre-judgment interest at a rate of 6% per annum dating back to the date the lawsuit was filed under certain circumstances. Notably, pre-judgment interest is awarded on the amount that the verdict exceeds the highest settlement offer made by a defendant or defendants within one year of the lawsuit being filed.

1. Right to Jury Trial.

Initially, defendants argued that the imposition of pre-judgment interest violated defendants' right to a jury trial. The appellate court held that while juries are charged with the function of determining liability and damages, pre-judgment interest is not a component of tort damages. In fact, pre-judgment interest has no relationship to the injury at all. The concept of awarding interest is to compensate for the delay in a plaintiff being able to recover compensation for those injuries.

2. Due Process.

The defendants also argued that the imposition of pre-judgment interest amounted to a double recovery for a single injury because under the Illinois Pattern Jury Instructions, juries already assess time value for a plaintiff's injuries because they consider the nature, duration, and extent of the injury.

In response, the appellate court held that the pre-judgment interest statute does not impinge on the fundamental right to trial by jury. It is constitutional and not violative of the due process clause because the purpose for the statute is rationally related to promoting legitimate state interests. Interestingly, the court acknowledged that pre-judgment interest applies to future damages and that juries already adjust their awards for future damages to present cash value. To this end, the court held that the application of pre-judgment interest to future damages is illogical. However, the court held that it is up to the General Assembly, and not the courts, to refine that illogical application of the statute.

3. Special Legislation.

Defendants further argued that by focusing on the award of pre-judgment interest solely to personal injury lawsuits the statute amounted to special legislation. Again, in response, the appellate court held as long as there is a rational basis for the statute that tethers it to a legitimate governmental interest, it is not unconstitutional. In this regard, the court held that the statute promotes settlement and, in turn, eases the burden on court dockets. Both are legitimate state goals. Because personal injury lawsuits make up a large portion of court dockets, it was entirely reasonable for the General Assembly to focus its reform on just personal injury lawsuits.

4. Separation of Powers.

Defendants argued that the statute amounted to the legislature stepping into the factual question of damages, a role clearly belonging to the judiciary. The appellate court wasted no time in pointing out that the General Assembly always has the authority to determine when or how interest is applied in judicial proceedings. Again, there is a notable difference in the determination of damages and the application of interest to any judgment for those damages.

5. Three Readings Requirement.

Under Illinois law, all bills must be read into the record on three different days in each house of the General Assembly. The Defendants pointed out that this had not been done on this case.

Certainly, the procedural deficiency raises legitimate concerns. However, the appellate court noted that once a bill is passed, compliance with procedural requirements of passage are presumed and certification of a bill is not subject to judicial review. In short, the appellate court essentially ruled that once a bill is passed, there is no remedy for violation of the three readings requirement.

6. Retroactive Application.

Defendants argued that, by applying pre-judgment interest to pending lawsuits, the General Assembly was retroactively modifying the rights of defendants.

Here again, the court relied on the fact that protection against pre-judgment interest is not a vested right and held that the General Assembly may apply any law retroactively as long as it does not unconstitutionally interfere with a vested right. The court also noted that the amendment had a built-in window for existing claims under which defendants would have one year from the effective date of the amendment in which to make the predicate settlement offer which would be the benchmark for application of pre-judgment interest.

Practice Tip:
Given the tremendous impact that the pre-judgment interest statute will have on pending and future tort claims, there should be no doubt that Illinois Supreme Court will accept the case for further review. However, readers should be cognizant of the fact that in the last general election, two new justices who were financially backed by Democratic Governor Pritzker obtained seats on the high court. The addition of these two liberal jurists will make success in any further challenge to the statute very difficult.

Indiana Court of Appeals Holds Dram Shop Statute Does Not Pre-exempt Common Law Negligence

In *WEOC, Inc. v. Niebauer*, 22A-CT-1863 (3/15/23), the Indiana Court of Appeals held that defendant restaurants could be sued for violation of the Indiana Dram Shop Act (I.C. §7.1-5-10-15.5 as well as common law negligence by serving a patron knowing that the patron was intoxicated.

In *WEOC,* a patron named Adair was overserved alcohol at Wings and at El Cantarito's. He then left in a drunken state and caused a motor vehicle accident resulting in the death of a third party.

The decedent's estate filed a lawsuit against Adair, Wings and El Cantarito's. Count II of the Complaint sought to impose liability on the defendants pursuant to the Dram Shop Statute which allows liability where the defendants knew that Adair was intoxicated when they furnished him alcohol. In Count III, the

Estate alleged that they "knew or should have known" that Adair was visibly intoxicated and that they violated their common law duties by failing to exercise reasonable care in allowing him to drive away from their premises knowing that he was intoxicated.

Both defendants filed motions to dismiss Count III, arguing that liability under common law would be precluded by the Dram Shop Statute which provides:

"A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

(1) The person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished to a person who was visibly intoxicated at the time the alcoholic beverage was furnished; and

(2) The intoxication of the person to whom the alcoholic beverage was furnished is the approximate cause of the death, injury, or damage or less than in the complaint."

In upholding the denial of the motions, the Court of Appeals held it was too premature to determine whether the Estate could prove a set of facts that they were entitled to relief under the two counts against the restaurants. According to the court, the common law negligence claim falls squarely within the scope of the Dram Shop Act, but the Dram Shop Act merely provides a defense to the liability in the absence of actual knowledge of visible intoxication. Accordingly, while the claim that the defendants "should have known" that Adair was visibly intoxicated would be barred by the Dram Shop Act, but the negligence claim predicated on the actual knowledge of his visible intoxication stated the causes of action on which relief could be granted.

In a similar vein, the court held that it would be premature to rule on whether the bars could avoid liability to third parties in actions that may have gone beyond the fact that the Defendants furnished alcohol, i.e., the actions of Adair driving his automobile.

Practice Tip:
Following the reasoning of *Niebauer*, the Dram Shop Act's limitation on liability is only an immunity against any claim other than one based on knowingly providing alcohol to a tortfeasor. It does not otherwise preempt common law liability as it does in illinois and other jurisdictions.

Indiana Court Of Appeals Upholds Strict Requirements for Standard-of-Care Affidavits In Medical Malpractice Cases

In *Korakis v. Memorial Hospital of South Bend*, 22A-CT-867 (11/3/22), the Indiana Court of Appeals held that, in response to a motion for summary judgment in a medical malpractice case, a plaintiff must submit affidavits or expert testimony that establish: (1) the applicable standard of care required by Indiana law; (2) how the defendant breached that standard of care; and (3) that defendant doctors' negligence was a proximate cause of the injuries complained of.

In *Korakis*, plaintiff's affidavit contained a lot of pertinent information but failed to identify what the standard of care was for each of the defendant doctors, and in one instance, how the affiant was qualified to offer an opinion regarding the standard of care.

Plaintiff went to the emergency room after a motor vehicle accident. She complained of pain in her left arm and hand. X-rays were taken by the emergency physician, Dr. Halperin. A week later, she returned complaining of continued pain. She was then seen by Dr. Messmer, a D.O., who ordered additional x-rays and referred her to physical therapy. After several months of ongoing pain, she returned to Dr. Messmer, who finally determined that she had suffered a fracture of her left elbow.

Plaintiff sued Dr. Halprin and Dr. Messmer alleging that their care and treatment and their failure to timely diagnose a fractured elbow fell below the standard of care.

Following a favorable decision for the defendants before the medical review panel, the defendants moved for summary judgment. In response, plaintiff submitted the affidavit of Dr. Kemmler, an orthopedic physician. Of particular importance to the Court of Appeals' decision, the affidavit of Dr. Kemmler noted the failure of all the physicians to diagnose the fractured elbow and that the treatment by Dr. Messmer fell below the standard of care.

All of the defendants moved for summary judgment on the grounds that the affidavit did not set forth opinions regarding what the standard of care was for Dr. Messmer or Dr. Halprin. In fact, Dr. Halprin pointed out that the affidavit contained no statement that Dr. Halprin had breached any standard of care at all.

The trial court agreed with both defendants and granted summary judgment. On appeal, the Court of Appeals reiterated the longstanding requirement that any evidence in response to a motion for summary judgment brought by a healthcare provider must establish: (1) the applicable standard of care; (2) how the defendant doctor breached that standard of care; and (3) that the defendant doctor's negligence was the proximate cause of the injury complained of.

The appellate court held that Dr. Kemmler's affidavit failed to establish what the standard of care was for any physician. As such, it did create a genuine issue of material fact on that point. Further, Dr. Kemmler, as an orthopedic physician, did not demonstrate that he had familiarity with the standard of care for a D.O. such as Dr. Messmer, or an emergency room physician such as Dr. Halprin. Finally, the Court of Appeals noted that the affidavit was completely silent on whether Dr. Halprin's actions breached the standard of care for any physician.

In light of plaintiff's failure to come forward with evidence establishing the three key elements necessary to defeat a motion for summary judgment, the Court of Appeals affirmed the summary judgment in favor of the doctors.

Practice Tip:
Korakis demonstrates the value of carefully reviewing all affidavits submitted in response to a motion for summary judgment to determine if they meet the required threshold.

Illinois Appellate Court Clarifies the Extent to Which Toxicologist May Opine On Alcohol Impairment

In *Walker v. Steward*, 2023 IL App. (1st) 221056-U (March 22, 2023), the Illinois Appellate Court held that a toxicology expert may opine with regard to blood alcohol levels and the effect of alcohol consumption generally but may not testify with regard to a party's actual intoxication or impairment without corroborating evidence.

In *Walker*, the trial court barred the defendant's toxicology expert from testifying at trial regarding alcohol consumption and impairment because the toxicologist had not considered any corroborating evidence to the effect that the Plaintiff exhibited signs of actual intoxication or impairment.

On appeal, the appellate court held that the trial court abused its discretion by restricting the toxicologist from testifying with regard to Plaintiff's blood alcohol level and the clinical effect that blood alcohol level would have on persons generally. According to the appellate court, the expert could be properly barred from testifying that the Plaintiff

was actually intoxicated or impaired in the absence of any evidence such as erratic behavior. However, the appellate court held that the trial court should not have barred the toxicologist from testifying with regard to the Plaintiff's blood alcohol level at the time of the accident and the effects of equivalent alcohol consumption generally.

Practice Tip:
The appellate court's decision in *Walker* leaves open the notion that a toxicologist would be able to testify that, in addition to blood alcohol level and the clinical effects of alcohol consumption generally, certain behaviors exhibited by a party corroborate a medical or scientific opinion that the party was, in fact, intoxicated or impaired.

Indiana Court of Appeals Upholds Awards of Pre-Judgment Interest On UIM Verdict Based On Recoverable Policy Limits

In *Wormoor v. State Farm Mutual Auto Insurance Company*, 21A-CT-2612 (2/10/23), the Indiana Court of Appeals held that a trial court properly exercised its discretion in awarding pre-judgment interest under the Tort Pre-Judgment Statute (TPJS) to the net judgment (reduced to the recoverable policy limits in an underinsured motorist case).

In *Wormoor*, Plaintiff was injured in an automobile accident with a third-party tortfeasor. As luck would have it, the tortfeasor only had $25,000 in auto liability insurance coverage. As such, Plaintiff looked to her own underinsured motorist coverage of $100,000 and med pay coverage of $10,000 to satisfy her damages for injuries she sustained in the accident.

Before the suit was ever filed, the UIM carrier, State Farm, offered Plaintiff $7,831.48 towards her medical expenses. In addition, the tortfeasor's carrier offered the full $25,000 of its policy limits. Plaintiff sued both the tortfeasor and State Farm to recover under both policies. Prior to the suit, Plaintiff settled with the tortfeasor for $25,000.

Plaintiff and State Farm entered into a pre-trial stipulation under which the parties stipulated that if the verdict exceeded $110,000, the court was to reduce the verdict to $67,168.52 which represented a reduction of $10,000 under the med pay coverage, $25,000 for the settlement with the tortfeasor, and $7,831.48 for the advance made by State Farm.

The jury entered a verdict of $1,050,000. Per the stipulation, the court reduced the verdict to $67,168.52. Plaintiff then moved for pre-judgment interest pursuant to the Tort Prejudgment Interest Statute which allows trial courts to award pre-judgment interest based upon the peculiar facts and litigation history of the case. Plaintiff argued that the interest should be calculated based on the general verdict of $1,050,000. State Farm argued that interest would have to be predicated on the $67,168.52 as this was the net verdict recognized by the stipulation entered into by both parties.

Exercising its discretion as allowed under the statute, the trial court agreed with State Farm and held that the stipulation represented the bargained position of the parties and that the ultimate verdict was, in fact, reduced to $67,168.52. As such, interest would be based on that amount and not the general verdict.

On appeal to the Court of Appeals, Plaintiff argued that while the award of interest was left to the trial court's discretion, the stipulation of policy limits did not have anything to do with the award of interest under the statute. The appellate court disagreed, noting that the effect of the stipulation was to cap any verdict to $67,168.52. In fact, as the court noted, the reduction of the jury's verdict to the significantly lower amount occurred not only by stipulation but also by operation of law, and that it was entirely at the trial court's discretion to base pre-judgment interest on the net verdict.

Practice Tip:
Obviously, the pre-trial stipulated calculation of the reduced verdict carried a great deal of weight in both the trial court and the appellate court's determination of which verdict would be used to calculate pre-judgment interest. While this decision may lead some plaintiffs to hesitate in entering into stipulations regarding reductions to verdicts, the fact remains that the decision provides a solid argument for reducing the basis for the pre-judgment interest to the recoverable policy limits.

Perhaps more interesting is the fact that the imposition of pre-judgment interest on top of the net verdict meant that the carrier was obligated to pay more than the recoverable policy limits.

Illinois Appellate Court Considers the Duty of Care for a Rooming House

In *Pan v. King*, 2022 IL App (1st) 2011482, the First District Appellate Court of Illinois considered whether the owner of a rooming house (i.e multi-tenant rental residence) had a duty of care to prevent an attack on one of its residents.

Plaintiff filed a 3-count complaint, alleging negligence, premises liability, and breach of the implied warranty of habitability.

The main issue in the case is whether the rooming house had a duty of care to prevent the attack on plaintiff by a co-resident. The court stated that a duty of care is a question of law. Generally, there is no duty for a landlord to protect residents of its building from another. This general rule is excepted if there is a special relationship between a

defendant and a plaintiff. The court indicated that its inquiry surrounded whether there was in fact a special relationship between the rooming house owner and the plaintiff and whether the attack was foreseeable.

The court held that the key fact was the control of the premises where the attack took place. The court stated that reasonable precautions should be taken by all entities to protect against assaults which are reasonably anticipated in areas they control.

In this case, the decisive factor was the fact that the attack took place in a shared kitchen; plaintiff had no way to lock the attacker out of the kitchen or otherwise retreat to a secure area. The court determined that the rooming house owner was akin to an innkeeper in that respect. The court found it instructive that plaintiff was 1) a long-term resident, and 2) injured in a common area. In light of case law that dated back almost 80 years, the court determined that the rooming house owner was similar enough to an innkeeper that a special relationship and the attendant duty of care existed.

As a result, the Appellate Court held that the trial court should not have dismissed the case with prejudice. The court held that a duty of care did exist between the rooming house owner and the plaintiff, therefore plaintiff could plead that the duty of care was violated. Ultimately, the court held that while the plaintiff may re-plead his complaint in light of this recognized duty of care, he had not included any facts in the complaint indicating that the attack itself was foreseeable. The court held that in order for plaintiff's complaint to ultimately survive, he would need to plead some facts indicating that the individual who attacked him had a propensity for physical violence that was known to the rooming house owner.

The First District Appellate Court appears to have expanded the duty of care. In light of the fact that there were common areas in the rooming house that the plaintiff did not control or otherwise have a safe retreat to, the plaintiff could allege that the defendants were similar enough to an innkeeper such that a duty of care existed.

Practice Tip:
When considering whether a landlord has a duty of care to a tenant, it is best to scrutinize the nature of the unit and the exact rental relationship to determine whether in fact the tenant enjoys the type of privacy and option to retreat that usually prevents such a duty of care to protect against the acts of third-party criminals from attacking.

Illinois Legislative Update

The Illinois House of Representatives has presented a proposed bill to the Illinois State Senate amending the law on punitive damages to extend same to wrongful death claims under the Illinois Wrongful Death Act. Illinois House Bill 0219.

At present, punitive damages are not recoverable on wrongful death cases.

We will continue to monitor and further report on this pending proposed legislation.

Firm **News**

Jeff Kehl Secures Dismissal Of Healthcare Facility's Direct Claim For Unpaid Medical Bills

Recently, Jeff Kehl secured a dismissal of direct action by a healthcare facility that claimed that the defendant workers' compensation insurance carrier failed to pay the facility's surgical charges. Downey & Lenkov, on behalf of the carrier, argued that through a 2019 amendment of 820 ILCS 305/8.2, the Illinois General Assembly prohibited healthcare providers in the workers' compensation arena from filing direct suits for anything other than accrued interest on improperly denied claims for payment through the workers' compensation process.

Jeanne Hoffmann Prevails on Summary Judgment Before Seventh Circuit Court

Jeanne Hoffmann secured a Motion for Summary Judgment in the US District Court in Southern Indiana on behalf of her client. This case involves coverage of a workers' compensation policy for an Indiana insured while their employee was injured on a job site in Kentucky. The Court found that the insured workers' compensation policy only provided coverage in one state (Indiana) and therefore was not responsible for coverage in Kentucky.

On appeal, the insured argued that the policy at issue provided for additional workers' compensation insurance coverage for "Other States". The Court of Appeals affirmed the judgment of the District Court and found that the insured did not provide requisite notice for the employee to work in another state.

ACS Selects NIU Chapter President Felix L. Mitchell As 2023 class of Next Generation Leaders (NGL)

We are pleased to announce that our law clerk Felix L. Mitchell has been selected by the American Constitution Society (ACS) as its 2023 class of Next Generation Leaders(NGL).

NGLs are recent and forthcoming law school graduates who have demonstrated special leadership in their work with ACS's student chapters, and who have the interest, skills, and ability to remain vital members of the ACS community for years to come. As an ACS NGL, Felix plans to spearhead the development of the BIPOC law student pipeline, voter rights initiatives, and reproductive rights protections.

Felix graduated from Northern Illinois University College of Law this past May.

Margery Newman & Samuel Levine To Be Recognized At ISBA Awards Recognition Reception

We are proud to announce that Income Member Margery Newman and Of Counsel Samuel Levine will be recognized at the Illinois State Bar Association Member Appreciation and Recognition Reception!

Income Member Margery Newman will receive the 2021-2022 ISBA Newsletter Editor Service Award for five years of service as Editor of the Construction Law newsletter.

Samuel will receive the 2021-2022 ISBA CLE Distinguished Service Award. Congratulations on your well-deserved recognition!

Upcoming **Events**

Ryan A. Danahey will present "Defending a Failure to Procure Claim - The Best Offense," at the Professional Liability Defense Federation (PLDF) Annual Meeting in Denver, Co.
For more information or to register, **click here**.

Management & Professional Liability Alliance™

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The independent law firms of MPLA have extensive experience in handling all types of defense litigation including employment and all professional lines. MPLA firms practice in multiple states including Illinois, Indiana, and Wisconsin amongst several others.

They offer complimentary webinars and actively participate in regional and national conferences. For more information, please contact Storrs Downey and visit the website at https://www.mplalliance.org/.

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@dl-firm.com.

Downey & Lenkov Attorneys Selected to Super Lawyers & Leading Lawyers

8 attorneys at Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their field across both Illinois and Indiana. 10 attorneys have also been selected to Leading Lawyers' 2023 rankings.

Super Lawyers recognizes attorneys who exhibit excellence in their practice based on professional achievement and peer recognition. Leading Lawyers provides rankings of the most respected and experienced attorneys nationwide. No more than 5% of all attorneys in each state are selected for either distinction.

Rich Lenkov, Margery Newman, Brian Rosenblatt, Jessica Jackler and Samuel Levine have been selected to both exclusive lists. Please join us in congratulating our selected attorneys!

Read the full article here.

Newsletter **Contributors**

Jefferey E. Kehl, Storrs W. Downey, Ryan A. Danahey, and Jeanne Hoffmann contributed to this newsletter.

View more information on our
General Liability practice.
Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Construction Law
- Professional Liability
- Workers' Compensation
- Entertainment Law
- Labor & Employment Law