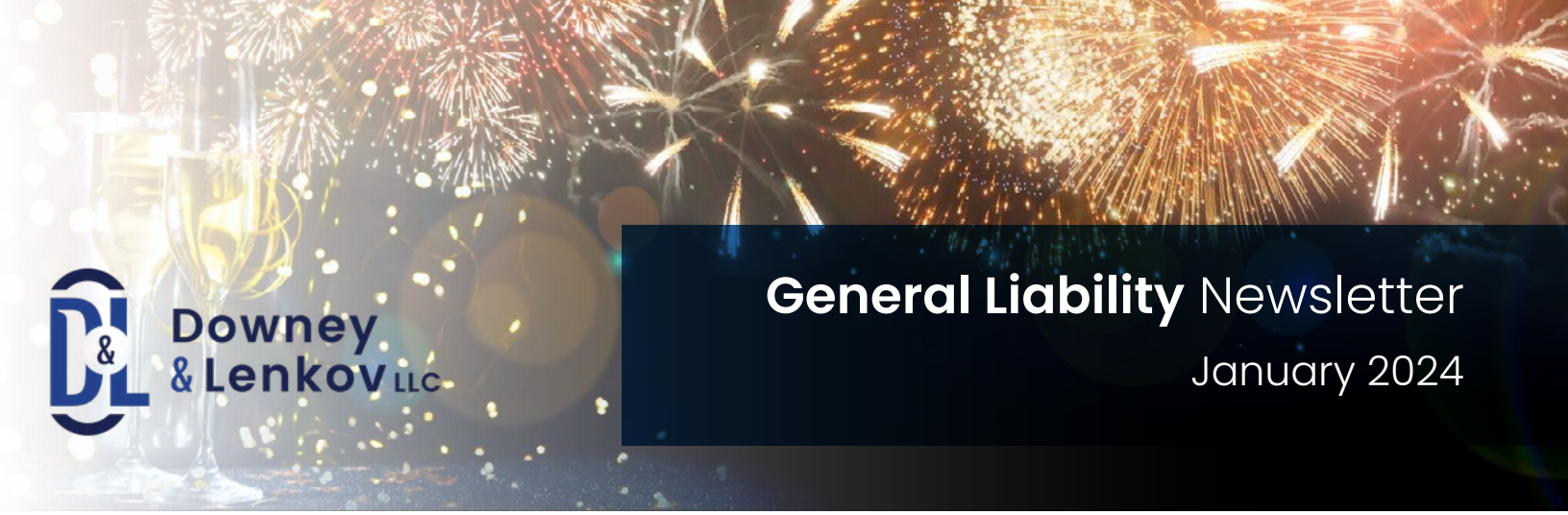


Downey & Lenkov LLC

General Liability Newsletter

January 2024

Tortious Interference: It's Not Always About False Statements

The Illinois Appellate Court recently addressed the issue of when tortious interference is actionable *Grako v. Bill Walsh Chevrolet-Cadillac, Inc.*, 2023 IL App (3d) 220324 ¶ 53 (10/13/23). The court specifically focused on the third element of a tortious interference cause of action: "the intentional and unjustified interference by the Defendant that induced or caused a breach or termination of the 'expectancy'" and what is required to prove it.

Plaintiff, a former at-will employee of a full-service insurer, filed suit against Bill Walsh Chevrolet Cadillac, Inc., an independent contractor for the insurer by whom she was employed. After Plaintiff filed for bankruptcy and returned her vehicle to the dealership alleged that Defendant improperly leveraged their status as a client of her former employer, Ramza Insurance, to cause her termination.

The Circuit Court granted summary judgment in favor of Defendant on various grounds including no direct evidence that Defendant requested Plaintiff's termination or provided false information to Ramza insurance agents.

The Appellate Court reversed the circuit court's ruling.

The Circuit Court had relied on *Calabro v. Northern Trust Corp.*, which established that a party is not liable for tortious interference as a result of merely providing truthful information. The Appellate Court disagreed with the lower court's reliance on *Calabro* and stated that it mischaracterized the issue. Here, Plaintiff's claim was not based on information that was provided to her employer, but rather that Defendant leveraged his personal ties and influence over Ramza Insurance to get her fired. Thus, proof of falsity was not a requirement of her claim. The Appellate Court concluded that Plaintiff proved the allegation of coercion by providing text messages from Defendant memorializing his threat to pull his business if she was employed at Ramza Insurance.

The Appellate Court further reasoned that although Defendant's animosity towards Plaintiff would be a legitimate reason to refuse continued business with Ramza Insurance, they might have taken it a step further by applying financial pressure on Ramza Insurance to secure Plaintiff's termination.

Illinois Appellate Court Upholds Close Scrutiny of Expert Opinions at Summary Judgment Stage

In *Gray v. Carlton Midway Corporation*, 2023 IL App (1st) 221636-U (November 17, 2023), the Illinois Appellate Court upheld a Cook County Circuit Court's determination at the ***summary judgment stage*** that Plaintiff's expert's opinions regarding the unnatural state of ice on which Plaintiff fell was not an abuse of discretion.

In *Gray*, Plaintiff slipped on ice while walking across a parking lot. In response to Defendant's motion for summary judgment, Plaintiff proffered the opinions of a professional engineer who opined that the ice was created through improper piling of snow.

Defendant challenged the sufficiency of the expert's opinions and the lower court agreed noting:

> "There is nothing in the CV or his affidavit that give him the qualifications to render opinions on issues concerning the allegedly improper piling of snow from plowing activities, [or that] the manner in which the snow was cleared caused unnaturally accumulations of snow piles to melt, trickle down into the parking lot, form unnatural puddles and refreeze into hardened ice.
>
> The difficulty is that there is no evidence of any measurements taken of the exact pitch of the parking lot, there is no evidence of where the storm drains should have been placed, there is no evidence as to how the snow piles were accumulated incorrectly, there is no showing of any defect on the surface of the parking lot which caused the unnatural accumulation of snow or ice, and there is no evidence to support the failure to properly remove snow and ice or salt the parking lot."

On appeal, the Appellate Court agreed with the trial court's assessment that Plaintiff's expert was relying entirely on his qualifications as an engineer but nothing to back his opinions. As such, the Appellate court held that the trial court properly excluded his opinions in determining that Plaintiff had not created a genuine issue of material fact on whether the ice was a natural accumulation.

Employers May Face Sanctions for Employees' Failure to Preserve Texts

In *Miramontes v. Peraton, Inc.,* No. 3:21-CV-3019-B, 2023 WL 3855603 at *6 (N.D. Tex. June 6, 2023), a federal district court for the N.D. Texas, Dallas Division, addressed if an employer can be deemed liable for an employee's failure to preserve business-related texts received on the employee's personal cell phone. The court held that whether an employer is required to preserve such texts depends on the case's specific circumstances. The court affirmed that an employer may face punishment for an employee's failure to do so with the severity of the punishment dependent on the specific circumstances.

Plaintiff alleged that he was selected for a reduction in force due to his age. Peraton acquired the company where Plaintiff had been employed for over twenty-five years. Peraton initiated layoffs in a process that was internally referred to as "Project Falcon." Plaintiff was one of the employees laid off in the first round of layoffs. He claimed that his supervisor told him twice that he was not being laid off due to his age.

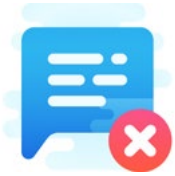
Plaintiff's counsel sent a letter pre-suit that included a settlement demand and insisted that Peraton preserve all documents regarding Plaintiff's claims, including any text messages. The company issued a litigation hold letter to its employees. The communication to Peraton's employees did not mention the need to preserve any text messages on employees' personal devices.

Plaintiff filed suit alleging that he was laid off by Peraton due to his age. A manager from Peraton, Victor Stemberger, admitted during his deposition that he was involved in the decision to terminate Plaintiff. He admitted that "immediately" after receiving the demand letter and before suit was filed, he sent "one or two" text messages on his personal phone to another manager allegedly involved in selecting Plaintiff to be laid off by Peraton. Mr. Stemberger deleted and could not produce the texts because no one at the company told him to save text messages.

Peraton filed a motion for summary judgment premised on the argument that Plaintiff's layoff was not a pretext for discrimination. Plaintiff filed a motion for sanctions, claiming that Peraton failed to preserve text messages that were critical to his claim. Plaintiff argued that the failure to preserve the texts warranted entry of judgment in his favor.

The court considered the following factors when rendering its decision: whether Peraton controlled the texts and had a duty to preserve them; whether the texts were intentionally destroyed by Peraton; whether Peraton acted in bad faith; and whether Peraton's failure to preserve the text messages prejudiced Plaintiff's claim.

Peraton argued that it did not control the text messages because it did not provide the managers with their cell phones, the texts were on their personal devices, and no policy signed by the managers gave the company the right to obtain the messages.



The court held in favor of Plaintiff on each of the five factors, stating that because employees regularly conduct business on their cell phones, Peraton had control over the text messages and destruction of the same. The court determined that the messages were intentionally destroyed despite Peraton receiving a litigation hold letter requiring it to preserve such information. The court denied Peraton's motion for summary judgment as a sanction for its failure to preserve the text messages.

Federal courts, including those in Illinois and Indiana, follow Federal Rule of Civil Procedure 37(e) regarding the imposition of sanctions when a party fails to preserve electronically stored information (ESI) where such ESI is relevant to impending litigation. Federal Rule of Civil Procedure 37(e) authorizes courts to issue sanctions for spoliation of ESI where four conditions are met: (1) the ESI at issue should have been preserved in the anticipation or conduct of litigation; (2) the ESI is lost; (3) the loss is due to a party's failure to take reasonable steps to preserve it; and (4) the ESI cannot be restored or replaced through additional discovery.

Once those four conditions are satisfied, the court must determine if (1) the non-offending party has been prejudiced from the loss of ESI and/or (2) the offending party acted with the intent to deprive another party of the information's use in the litigation. If the court determines that the non-offending party has been prejudiced, Rule 37(e)(1) allows the court to "order measures no greater than necessary to cure the prejudice." If the offending party acted with intent, Rule 37(e)(2) allows the court to (a) presume that the lost information was unfavorable to the party, (b) instruct the jury that it may or must presume the information was unfavorable to the party, or (c) dismiss the action or enter a default judgment.

Illinois Contractor Not Liable When Following Engineer's Specifications

The Illinois Appellate Court First District reaffirmed Illinois Supreme Court precedent regarding the lack of liability for various contractors to third parties when adhering to engineering specifications in ***Bitsky v. City of Chicago***, et. al., 2023 IL App (1st) 220266.

In *Bitsky*, Plaintiffs were walking down a sidewalk in Chicago when Plaintiff Thomas Bitsky stumbled and fell forward into Plaintiff, Lisa Bitsky, who fell and sustained left leg injuries requiring surgery.

The area of the accident was part of a 2011 water restoration project the City of Chicago undertook to replace and restore underground water mains and construct sidewalks that comply with ADA requirements. The City's Department of Transportation (CDOT) hired an architect to prepare ADA design standards (CDOT standards) for contractors to use when constructing ADA sidewalks and sidewalk ramps.

The City also hired an engineering consultant, CTR, on the project, who was responsible for developing design and construction drawings and identifying corners that needed restoration to bring the sidewalks into compliance with ADA and CDOT standards. A general contractor, Reliable, was hired and in turn subcontracted with another company, Sanchez, to build ADA compliant curbs and sidewalks. Sanchez verbally subcontracted the concrete work to yet another company, Precision.

Plaintiffs sued the City, CTR, Reliable, Sanchez and Precision for negligence in constructing the sidewalk. After settling with the City and CTR, Plaintiffs proceeded against the contractors, who all filed Motions for Summary Judgment alleging that they followed the plans and specifications provided by the City and CTR when installing the sidewalk and therefore owed no legal duty to Plaintiffs.

The trial court granted summary judgment for the defendant contractors, finding that because they followed the requirements of their contracts and the plans, specifications, and instructions the City and CTR provided them, they had no duty to Plaintiffs, specifically citing to the Illinois Supreme Court's decision in *Hunt v. Blasius*, 74 Ill. 2d 203 (1978). Further, the trial court noted that the City and CTR inspected and approved the defendant contractors' work.

Plaintiffs argued on appeal that a material question of fact existed as to whether defendant contractors deviated from the plans when they constructed the sidewalk and that the trial court erred in relying on Hunt and instead should have applied traditional negligence factors. The First District affirmed the trial court's ruling that Hunt controlled and that the defendant contractors had no duty to Plaintiffs where they followed the City's plans, specifications and instructions.

The First District relied heavily on the Supreme Court's holding in Hunt that, ""[a]n independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he [or she] has merely contracted to follow. If the contractor performs the specifications provided to it "carefully," the contractor is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them."

The First District observed that in Bitsky, as in Hunt, defendant contractors presented uncontroverted evidence of having followed the City's and CTR's plans, specifications, and instructions. Although Plaintiffs' expert issued a report that the elevated sidewalk did not meet CDOT ADA standards, as the trial court noted, the City and CTR inspected the area and approved all of the work as compliant with CDOT and ADA standards.

The First District noted that nothing in the record suggested that the plans the City and CTR provided to defendant contractors were "obviously dangerous." Although Plaintiffs asserted that the elevated sidewalk was "unreasonably dangerous," they did not argue that the plans and specifications were so obviously dangerous that no competent contractor would follow them. Accordingly, the First District affirmed the trial court's entry of summary judgment on behalf of the defendant contractors.

Illinois Supreme Court Revisits and Reverses Position on CGL Coverage Analysis in Construction Cases

The Illinois Supreme Court recently issued its opinion in A*cuity v. M/I Homes of Chi., LLC*, 2023 IL 129087, taking a full about-face from Illinois precedent on the issue of whether CGL coverage for "property" damage" caused by an "occurrence" can be found if the only damage alleged to have occurred is to the construction project itself.

A long line of Illinois Appellate Court cases stemming from the Illinois Supreme Court's 2001 decision in *Traveler's Insurance Co. v. Eljer Manufacturing* (finding that ""physical injury" does not include intangible damage to property, such as economic loss"), routinely held that the CGL insuring agreement's initial grant of coverage for "property damage" is not met if the only property allegedly damaged is the contractor's own work/the project itself. The same line of cases also held that such damage to the building or project itself was not caused by an "occurrence" or accident as defined by the CGL policy, because it was the natural consequence of faulty workmanship.

The court in *M/I Homes of Chi., LLC* rejected these prior decisions for having inserted considerations extraneous to the policy language itself in their coverage analysis.

> "We hold that the parties' premise—that there could be no 'property damage' caused by an 'occurrence' under the policy unless the underlying complaint alleged property damage to something beyond the townhome construction project—is erroneous; it is not grounded in the language of the initial

> grant of coverage in the insuring agreement. To the extent that prior appellate court cases relied upon considerations outside the scope of the insuring agreement's express language, that analysis, which is not tied to the language of the policy, should no longer be relied upon."

Noting that these prior courts ignored the fact that their way of analyzing faulty construction in the context of "property damage" caused by an "occurrence" made the policy exclusions for "property damage" to "your product" and "your work" superfluous, the court in *M/I Homes of Chi., LLC* recognized that its reversal on the analysis that is to be applied to the CGL policy's basic insuring agreement may not ultimately result in a different outcome on coverage. After holding that the allegations in the underlying complaint sufficiently fell within the initial grant of coverage requirement that there be "property damage" caused by an "occurrence", the court remanded the case to the circuit court for further consideration of whether the exclusions in the CGL policy barred coverage and thus the duty to defend.

Is the Indiana Supreme Court Poised to Eliminate Third-Party Spoliation Liability?

This past Fall, the Indiana Supreme Court heard arguments in a case involving the spoliation of evidence leading to the prospect that liability for spoliation may be eliminated or limited. As of this writing, the court has not issued its opinion, and it is a good time to examine just where liability for spoliation currently exists.

How Indiana defines "Spoliation."

Indiana follows most states in defining spoliation as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usually a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible." *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000). In turn, Indiana recognizes that there are two classes of spoliation: First-party spoliation and third-party spoliation. First-party spoliation is spoliation by the (or a) tortfeasor in the underlying tort action. *Howard Reg'l Health Sys. v. Gordon,* 952 N.E.2d 182, 188 (Ind. 2011). Third-party spoliation is, of course, spoliation of evidence by a non-party. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 350 (Ind. 2005).

Indiana's treatment of first-party spoliation.

Unlike most states, there is no independent tort claim for spoliation by a first-party Defendant. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005). In most instances, the remedy is a jury instruction advising the jury that the destruction creates an adverse inference against offending party. However -- and this is no small point -- first-party spoliation also means that this adverse inference can be applied at the summary judgment stage to preclude summary judgment for a Defendant.

For example, in *Golden Corral v. Lenert,* 127 N.E.3d 1205 (Ind. Ct. App. 2019), Plaintiff ingested undercooked chicken and immediately put the restaurant on notice. Plaintiff formally requested Defendant on notice to preserve the uneaten chicken served to Plaintiff and the temperature logs for the oven in which the chicken was baked.

The court held that Defendant had a duty to preserve evidence when it knew or should have known litigation is possible, if not probable. With knowledge that Plaintiff claimed he got sick from eating undercooked chicken, a prudent person would know that the temperature logs for the oven would be material evidence and should have been preserved. However, it was not so reasonable to expect Defendant to search for and preserve the uneaten chicken.

In *Griffin v. Menard, Inc.,* 159 N.E.3d 587 (Ind. Ct. App. 2020), the Indiana Court of Appeals reversed summary judgment in favor of hardware retailer Menard on Plaintiff's premises liability claim but held that no inference under the doctrine of spoliation existed where the retailer did not capture a video of the incident. Menard maintained a video surveillance system within its store. However, that system did not capture Plaintiff being struck by the box. The court noted that a party raising a claim for spoliation must prove that (1) there was duty to preserve the evidence, and (2) the alleged spoliator either *negligently* or intentionally destroyed, mutilated, altered or concealed the evidence.

Plaintiff had not established either element. According to the court, Menard designated evidence that there was no camera in the store that could have captured the video of the incident. As such, Menard "cannot have sought to wrongfully conceal that of which did not exist." Id. at 596.

The touchstone of first-party liability remains the existence of facts that establish that it was reasonable for the offending party to know that the subject evidence would be important to an eventual lawsuit. This means that the offending party must be aware of any incident causing injury and an assessment that the subject evidence might somehow be important. The absence of evidence on either point will, more often than not, destroy (ok, pun intended) a claim for spoliation.

Indiana's treatment of third-party spoliation. Carriers need to be concerned.

As in most states, Indiana follows the rule that a third-party may be liable for an independent claim of spoliation of evidence if there is an independent tort, a contract or agreement, or special relationship imposing a duty to a particular claimant. *Murphy v. Target Products*, 580 N.E.2d 687, 690 (Ind. Ct. App. 1991). As observed in *Gribben v. Wal-Mart Stores*, Inc., 824 N.E.2d 349, 355 (Ind. 2005). "[i] t may well be that the fairness and integrity of outcome and the deterrence of evidence destruction may require an additional tort remedy when evidence is destroyed or impaired by persons that are not parties to litigation and thus not subject to existing remedies and deterrence."

Indiana recognizes that a third-party has a duty to preserve evidence where: (1) it is in possession of the evidence; (2)

it knows the evidence is relevant to litigation; and (3) there is something else from which the law would impose an obligation to retain possession of the evidence. Typically, that "something else" can take the form of a contractual obligation, a voluntary assumption of possession for the purpose of retaining it as evidence, or even just having a role in the pre-litigation process. Indiana courts will often find that "something else" from the claim investigation process itself.

For example, in *Thompson ex rel. Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998), a landlord's insurance carrier took possession of a broken dog lead after dog attacked a Plaintiff-child. The carrier lost the dog lead and Plaintiff brought a spoliation claim. All three elements of duty present: (1) The carrier had possession of the dog lead; (2) The carrier knew the dog lead was relevant to litigation (why else would it take possession?); and (3) The carrier's role in the claim process warranted an obligation to retain possession. According to the court:

> A liability carrier like the Insurance Company is in a unique position among tort litigants. Using its experience, a carrier is able to adopt business practices that lead to the resolution of claims at the lowest possible cost to the carrier. The claims-resolution practices thus benefit the carrier and its shareholders and can benefit third-party claimants and insureds so long as the carrier uses responsible, efficient practices. It is reasonable for the law to require that claims resolution practices be responsible because the carrier has the unique experience and ability to structure its practices to avoid harm. *If a carrier intentionally or negligently engages in a claims-resolution practice that breaches the standard of care established by law, a third-party claimant is justified in seeking to hold the carrier liable for damages arising from the breach.*

704 N.E.2d at 139-40.

On the other hand, the facts of the case and even public policy can exonerate a carrier for the destruction or loss of evidence in the claim investigation process. In *American Nat'l Property & Cas. Co. v. Wilmoth*, 893 N.E.2d 1068 (Ind. Ct. App. 2008), the insured's premises were destroyed by fire. Firefighters moved a couch onto the lawn where it sat for weeks. The insured eventually disposed of the couch. Plaintiff's fire expert determined the couch to have been part of the origin of the fire. Plaintiff sued the *carrier* for spoliation. The Court of Appeals noted that the carrier never had possession of the couch and, because there was nothing to suggest that the couch was at fault, it was not foreseeable that the loss of the couch would interfere with any future claim.

A big point for finding no liability rested in consideration of public policy. Per the court: "To find a duty in this case would require insurers to preserve any potentially relevant evidence available after any potentially covered event. Retention and safekeeping of that amount of physical evidence would be a practical impossibility in most situations." Id. at 1073.

The Safeco decision.

Earlier this year, in *Safeco Ins. Co. v. Blue Sky Innovation Group*, 211 N.E.3d 564 (Ind. Ct. App. 2023) (*transfer granted* September 28, 2023), the Indiana Court of Appeals took up the issue of whether a carrier's contractor can be sued by the carrier for destroying evidence.

Safeco's insured experienced a house fire that resulted in over $500,000 of damage. The fire started in the kitchen. Safeco retained Michaelis to perform restoration of the house. Michaelis was specifically instructed to preserve the kitchen area until after all potential parties had the opportunity to participate in a scene inspection to determine the cause of the fire. Michaelis allegedly understood the direction and even cordoned off and covered the kitchen area. Before those inspections could take place, Michaelis demolished the kitchen area making it impossible for anyone to inspect and determine the cause of the fire.

Safeco sued Michaelis claiming that Michaelis' spoliation of evidence also destroyed Safeco's ability to prove its product liability claim against the manufacturer of the suspected kitchen appliance.

Michaelis moved to dismiss under Rule 12(B)(6) for failure to state a cause of action on which relief may be granted. Even though Indiana is a notice-pleading jurisdiction a Plaintiff only needs to plead the basic elements of a tort claim. The trial court agreed that Safeco had failed to state a cause of action for spoliation.

The Court of Appeals – noting that the appeal was only with regard to a motion to dismiss – reversed and held that Safeco had adequately pleaded a cause of action for spoliation.

The court noted that Safeco pleaded that Michaelis owed a duty to preserve the evidence: Michaelis was informed of the need to preserve the evidence and took steps to preserve it before ultimately discarding or destroying it. By undertaking to preserve evidence, Michaelis imposed on itself an obligation to retain the evidence.

Review by the Indiana Supreme Court.

In September, the Indiana Supreme Court granted Michaelis's petition to transfer. The court is being asked to either hold that there is no third-party liability for spoliation or hold that such liability is limited to situations in which a "special relationship" exists through agreement or statute. The fact that the court accepted the case for review is intriguing and leads only to speculation on whether it will expand third-party spoliation liability or clarify the cognizable duty under existing Indiana law.

Illinois Exclusive Remedy Bars Action Against Employer

In *Price v. Lunan Roberts*, Inc., Plaintiff filed a complaint against her deceased son's employer whereby her son was murdered by a co-worker, Mr. Thomas. The Illinois Appellate Court ultimately had to rule on the applicability of the Workers' Compensation Act's (WCA) exclusive remedy provision as it related to Plaintiff's claim. Plaintiff argued that the trial court improperly granted summary judgment because a genuine issue of material fact existed about the applicability of the WCA's exclusive remedy provision to her claims. The Appellate Court affirmed the trial court's decision and granted summary judgment in Defendant's favor.

Plaintiff's son, Mr. Price, and his co-worker, Mr. Thomas, were the only two employees working in an Arby's restaurant on the late shift. Surveillance footage identified Mr. Thomas stabbing Mr. Price 27 times with a kitchen knife after a verbal altercation. Mr. Price later died from his injuries. Mr. Price has previously been charged with unlawful use of a knife and assault for threatening to kill relatives with a kitchen knife.

Plaintiff alleged that Defendant was liable for her son's death for negligent hiring, retention, and supervision of their employees. Defendant filed a motion to dismiss and motion for summary judgment arguing that they are not liable because Plaintiff's exclusive remedy was under the WCA.

The WCA generally serves as the exclusive remedy for a person who is injured during the course of employment. However, when the injury to an employee results from a personal conflict between employees unrelated to their work, the WCA may not be a bar to a civil suit.

The record reflected that a third person was in touch with both Mr. Price and Mr. Thomas regarding the sale of drugs, locations for pickup, and price. Mr. Thomas told police that Mr. Price "knows what he did and needed to be dealt with." Plaintiff argued that Mr. Price and Mr. Thomas had a relationship outside of work which formed the basis for the altercation between the two resulting in Mr. Price's death. Plaintiff claimed that their personal relationship was substantial enough to overcome the exclusive remedy provision of the WCA.

The Appellate Court disagreed and indicated that all evidence Plaintiff brought forward was speculative at best. There were no facts in the records that the murder was the result of a personal dispute between the two. The fact that Mr. Price and Mr. Thomas had some degree of a personal relationship did not mean that the incident was caused by a purely personal dispute. The Appellate Court determined that Plaintiff supplied no evidence that the dispute was unrelated to the employer's work. In order to find in Plaintiff's favor, the Court would have to speculate on the nature of the dispute which it naturally declined to do. The Appellate Court affirmed the trial court's decision granting summary judgment to Defendants.

The Illinois Exclusive Remedy Doctrine: A Contract Isn't Always Enough To Prevent Reliance On This Doctrine

In Illinois, as in most states, it has long been the rule that the Exclusive Remedy Doctrine limits an injured employee's claim against his employer to a workers' compensation action. In a recent Illinois Appellate Court decision, *Leman v. Volmut*, 221792 (October 26, 2023), IL App. (1st), the Court addressed whether the Defendant was a "borrowing employer" and therefore immune from common law liability for the injuries sustained by a worker. A "borrowing employer" is one who "borrows" an employee for specific work from another company, such as a staffing agency. Thus, the borrowed employee becomes the employee of the company to whom he is loaned and is immune from civil liability if certain criteria are met.

Plaintiff filed a negligence action against several Defendants, including INTREN, LLC, for injuries he sustained after his employer, PINTO, had loaned him to INTREN for certain work. INTREN sought dismissal based on the exclusive remedy provision in the Workers' Compensation Act (820 ILCS 305/5(a) (West 2020)). INTREN argued that it was immune from common law liability for Plaintiff's injuries as he was a borrowing employee. Although the PINTO and INTREN Master Service Agreement (MSA) contained an acknowledgment by PINTO that its employees and agents were not employees of INTREN but were independent contractors. The circuit court ultimately granted summary judgment in favor of INTREN based on the exclusive remedy provision.

The Court rejected the argument that an MSA is dispositive in the matter but rather is only one component of the analysis. The court held that INTREN, as the borrowing employer, possessed and exercised the right to control Plaintiff's work, which barred Plaintiff's action against it. In relying upon the court's earlier decision in A.*J. Johnson Paving Co*.. it made the following determinations regarding how to determine the right to control an employer: (1) whether the alleged borrowing employer had the right to direct and control the manner in which the employee performed his work; and (2) whether there was an express or implied contract of hire between the employee and the alleged borrowing employer.

In *Leman*, Plaintiff's supervisors testified that he clocked in and out at the same time as direct-hire employees, received instruction and direction from INTREN, and was assisted in his work by INTREN employees. None of PINTO's supervisors were on the INTREN job site on the date of Plaintiff's injury. It was INTREN which dictated Plaintiff's working hours.

The court also considered the fact that PINTO provided Plaintiff with his work tools, but ultimately reasoned that because INTREN provided replacements for those tools, when necessary, this demonstrated INTREN had control over Plaintiff. Additionally, it was INTREN that provided Plaintiff with safety training, and when he was not performing work specifically contracted between PINTO and INTREN, INTREN assigned Plaintiff to perform other general labor duties. On the date Plaintiff was injured, he was working on a general labor assignment from INTREN.

Illinois Appellate Court Holds Open & Obvious Doctrine Does Not Preclude Liability to 4-Year-Old

In *Yersich v. City of Chicago*, 2023 IL App (1st) 220598-U (November 16, 2023), the Illinois Appellate Court held that the Cook County Circuit Court erroneously entered summary judgment in favor of the City based on the City's assertion that a four-year-old child was old enough to appreciate the open and obvious hazard posed by a pothole in a crosswalk. Four-year-old Gregory Yersich was riding his scooter as his mother and siblings walked with him. As he approached a crosswalk, the front wheels of his scooter landed in a pothole, and he fell forward, breaking his arm in two places. In the resulting lawsuit, the City of Chicago moved for summary judgment claiming that the hazard posed by the pothole was open and obvious and that it owed young Gregory no duty.

The trial court examined the photographs of the pothole and noted that potholes are a "fact of life in Chicago". The court held that Gregory's mother had a duty to protect Gregory from an open and obvious condition and her failure to do so absolved the City from liability.

On appeal, the Appellate Court was asked to determine whether the fact that a pothole might be open and obvious to a supervising parent means that the City owed no duty to a four-year-old child.

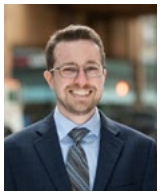
The Appellate Court noted that in prior cases open and obvious conditions will often absolve landowners of liability to children but only when those hazards are capable of being recognized by children "at large". For example, fire, heights, and bodies of water are often viewed as transparently involving open and obvious hazards. Here, however, potholes do not fall into the same category of blatant hazards and, certainly, a four-year-old child is not old enough to appreciate the hazard posed by a pothole (even if they are a fact of life).

Finding that questions of fact exist based on the depth of the hole and the concomitant risk associated with the hazard posed by that hole, the court held that summary judgment was improperly granted.

Firm **News**

Welcome to the Team

Please join us in welcoming associates Michael Verbic, Melissa Van Ordstrand and Special Counsel Mary Yong to our Chicago office.



Congratulations for Successful Dismissals!

Kristy Singler secured affirmation of dismissal by the Illinois Appellate court on behalf of a private school, its Executive Director, and a highly regarded teacher.

The lawsuit was filed four days before the expiration of the statute of limitations by a twenty-year-old man who claimed that eight years prior his classmate deliberately stabbed him in the eye with a pencil.
It was argued that the defendants were liable for both negligent and willful and wanton conduct as the other student allegedly posed a known danger to his classmates.

The lower court held that the defendants were entitled to immunity under the Illinois School Code and because Plaintiff could not plead or prove notice.

Rich Lenkov secured a dismissal with prejudice by the Cook County Circuit Court in a wrongful death case. Plaintiff was unloading product and fell from a truck liftgate, causing the goods to fall on top of him, unfortunately causing his death.

After opening statements, the case was settled for $5 million. Our retail client contributed nothing, consistent with our position that we merely sold the goods, but didn't deliver them.

Ryan Danahey secured the dismissal with prejudice on an Illinois court action in which plaintiff had alleged negligent misrepresentation against the insured's real estate agent. Purportedly, the client misrepresented the number of units that could be inhabited.

In Ryan's motion to dismiss he established that the information regarding habitable units was legal information and not factual and therefore could not form the basis for a negligent misrepresentation count. Plaintiff could not reasonably rely on those statements as she was equally situated to determine the truth/falsity of the statement, and the proximate cause of the losses plaintiff alleged was a later determination by the City of Chicago (after the sale) that the building had three habitable units instead of four (the City indicated there were 4 habitable units at the time of sale).

Kristy Singler defended a wrongful death case involving a special needs 50-year-old adult who died after choking on food in a specialized care facility in Cook County, Illinois. She drafted an excellent motion for summary judgment on behalf of two of the nurses at the facility.

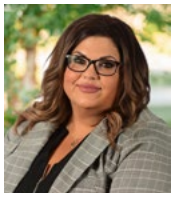
Instead of trying to fight her motion, Plaintiff's counsel chose to settle with a codefendant for $2,000,000 and then dismissed with prejudice our clients from the lawsuit without any payment by them.

Downey & Lenkov has Been Named in the 2024 Best Law Firms® Ranking

We're excited to share that Downey & Lenkov has been named in the 2024 Best Law Firms® rankings by Best Lawyers®. This year, we were selected as Tier 1 in Construction Law both nationally and regionally. Additionally, we've been ranked nationally and regionally for Construction Litigation and Workers' Compensation.

We appreciate the recognition and are thankful for the support! To view details about our rankings, visit our profile here: Downey & Lenkov LLC - United States Firm | Best Law Firms.

Kirsten Kaiser Kus Recognized as One of the 2024 "Lawyer of the Year"



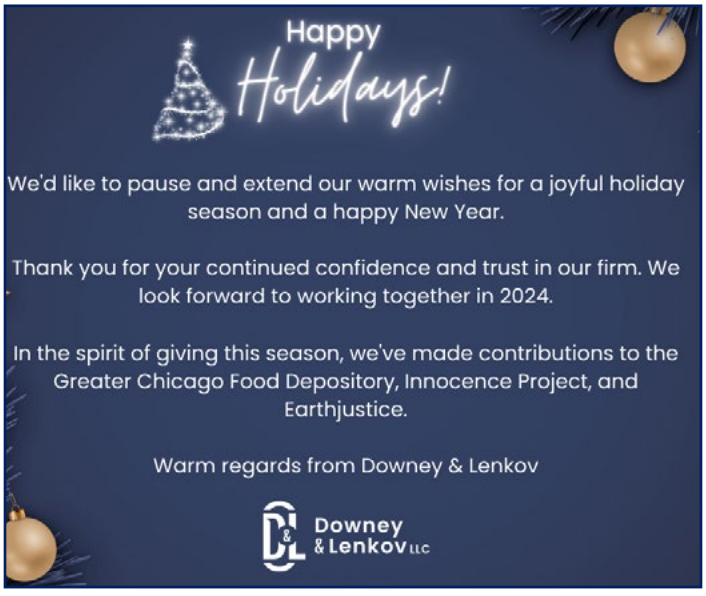
We are pleased to announce that Kirsten Kaiser Kus is again a recipient of the Best Lawyers® award. In addition to receiving the Best Lawyers® designation, she was also named their 2024 "Lawyer of the Year". She has received this accolade for her work in Worker's Compensation Law – Employers. Only a single lawyer in each practice area and community is honored with this prestigious award.

Best Lawyers® in America's "Lawyer of the Year" recognizes individual lawyers with the highest overall feedback from their peers for a specific practice area and geographic region. The methodology is designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues.

Congratulations to Kirsten!

Tis the Season

Holidays are all about good company, great food, and exciting games! Downey & Lenkov had a fantastic time at Flight Club, playing darts and indulging in delicious food at the annual holiday party.



Upcoming **Webinars**

Examples of Employer Do's & Don'ts

1/24/2024 1:00 PM - 2:00 PM CST

Jessica Jackler and Ryan Danahey


REGISTER NOW

IL, IN and WI Workers' Compensation Liens & Subrogation Recovery: There's More Than Meets the Eye!

2/20/2024 1:00 PM - 02:00 PM CST

Storrs Downey and Ryan Danahey


REGISTER NOW

Downey & Lenkov Participates in USLI's October Stronger Together Auction

We are proud to have participated in USLI's October Together—Stronger Together Silent Auction benefiting Breastcancer.org. They were able to raise $500,000 this year!

October Together is a month of fundraisers and events where all proceeds benefit Breastcancer.org, a non-profit organization that helps women and their families by providing expert medical information about breast health and breast cancer, as well as peer support through their large online community.

Management & Professional Liability Alliance™

Management & Professional Liability Alliance™

We are a proud co-originating firm of the Management & Professional Liability Alliance (MPLA) which consists of independent law firms which share a commitment to excellence, affordable representation, and integrity in the representation of management and professionals.

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/.

Newsletter **Contributors**

Jefferey E. Kehl, Storrs W. Downey, Jeanne Hoffmann, Kirsty Singler, Timothy Furman, Christopher Puckelwartz and Arielle Zamora contributed to this newsletter.

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
- Workers' Compensation

Downey & Lenkov LLC