Downey & Lenkov LLC

General Liability Newsletter

May 2024

Pre-Judgment Interest Is Not Considered Damages And Is Not Waived If Not Requested By Plaintiffs At Arbitration

The First District Appellate Court has recently clarified whether Plaintiffs are required to request costs, fees, and pre-judgment interest at the time of arbitration, or may seek those at the time of the judgment on the award.

In *Jordan v. Macedo,* 2024 IL App (1st) 230019, Plaintiff received an award following mandatory arbitration in Cook County. Neither Plaintiff nor Defendant rejected the arbitration award. At the hearing on the judgment on award, Plaintiff's counsel requested the inclusion of costs and pre-judgment interest in the order. The circuit court only allowed Plaintiff to enter an order reflecting the actual award of the arbitrators, which did not include costs and pre-judgment interest. However, the court advised Plaintiff to file a separate motion making that request.

Plaintiff subsequently filed a "Motion to Tax Costs and Award Pre-Judgment Interest," arguing her entitlement to costs and fees as the prevailing party, and that she could not have calculated her interest until she received the arbitration award. Defendant objected, arguing that Plaintiff failed to ask for this relief at the arbitration, and further, Plaintiff's recourse would have been to timely reject the arbitration award if she contested her damages.

The circuit court denied Plaintiff's motion, finding that either party had the opportunity to reject the arbitration award and opted not to, and thus the arbitration award stands as the "full amount which would be reduced to a judgment." *Id.*,at ¶10.

On appeal, regarding Plaintiff's post-arbitration requests for costs and fees, the First District Appellate Court held that because Illinois courts view statutory costs and fees as "incidental damages," Plaintiff was required to have submitted any request for costs and fees at arbitration, for the arbitration panel to award as it saw fit. As such, Plaintiff was not entitled to her costs and fees post-arbitration.

Although pre-judgment interest is also statutory, it is not considered "damages," and is not required to be submitted with a Plaintiff's claim for damages at arbitration. "Pre-judgment interest accrues based upon the delay in resolving a case and bears no relationship to a Plaintiff's actual injury. Interest compensates for the use or withholding of money - not physical injury." *Cotton v. Coccaro,* 2023 IL App (1st) 220788, ¶49. Because it is a "ministerial function" for the court and not a modification of an arbitration award, the circuit court erred in denying Plaintiff's request for pre-judgment interest.

The First District reversed the denial of Plaintiff's pre-judgment interest and remanded to the circuit court for entry of an order granting pre-judgment interest, calculated consistent with the 735 ILCS 5/2-1303(c).

Wisonsin Includes Exposure to Asbestos as Basis for Recovery Under Wisconsin Safe Place Statute

In *Lorbiecki v. Pabst Brewing Company,* 2022 App. 723 (WI. Ct. App.), the Wisconsin Court of Appeals considered a case involving the estate of a Plaintiff who died from exposure to asbestos while working at Pabst Brewing Company in the 1970s. In Wisconsin, Plaintiffs typically pursue liability under the Safe Place statute given its standard of proof is generally considered lower than proving negligence. A Plaintiff under the Safe Place statute only needs to prove the existence of an unsafe condition and a Defendant's knowledge of the same.

Although cases under the Safe Place statute typically involve slip and falls or other premises cases, in Lorbiecki, the Wisconsin Court of Appeals considered whether a Plaintiff who worked in removing asbestos could sue under the Safe Place statute.

The Court found that the removal of asbestos from the premises at Pabst, coupled with Pabst's knowledge that asbestos causes cancer, allowed the estate to pursue damages against Pabst under the Safe Place statute. The court also considered procedural issues regarding spoliation and various evidence admitted, but the importance in this case lies in its interpretation of the Safe Place statute.

Further, the court upheld a $4.6 million punitive damages award against Pabst given their knowledge of the cancer-causing nature of asbestos. The expansion of the Safe Place statute to include exposure to dangerous chemicals will likely have implications to establishing liability against premises owners in Wisconsin.

Indiana Supreme Court Adheres to Availability of Third-Party Spoliation Claims in Only the Narrowest of Cases

In our last General Liability newsletter, we reported on the Indiana Court of Appeals decision in *Safeco Insurance v. Blue Sky Innovation Group Inc.*, in which the court held that an insurance company sufficiently pleaded a third-party spoliation claim against a property restoration company following that company's destruction of potential evidence of the cause and origin of a fire.

On April 2, 2024, the Indiana Supreme Court reversed the Court of Appeals holding that a third-party claim for spoliation exists in Indiana only in narrow circumstances where such a relationship occurs between the claimant and the third-party such that the third-party should be held responsible for the failure to preserve evidence. 23S-CT-272 (April 2, 2024).

In *Safeco*, Michaelis was hired by Safeco to restore property that was destroyed in a fire. Safeco maintained it orally instructed Michaelis to preserve the kitchen. In turn, Michaelis sealed off the kitchen and constructed a protective structure over the location of the presumed origin of the fire.

Ultimately, however, Michaelis destroyed the kitchen and the appliance considered to be the cause of the fire before any of the litigants' fire experts examined them.

Safeco filed an action against Michaelis claiming that Michaelis' destruction of the appliance resulted in liability to Safeco for the fire damage.

Recognizing that third-party complaints for spoliation have historically been recognized in Indiana in only narrow circumstances, the Indiana Supreme Court reiterated the view that the duty to preserve evidence may be assumed voluntarily or imposed by statute, regulation, contract, or other circumstances. *However*, the court emphasized that there needed to be a special relationship between the parties in order for that duty to exist.

Safeco argued that a special relationship existed because Michaelis knew there was a need to preserve the appliance as was verbally communicated to Michaelis. While this certainly sounds compelling, the court focused on the fact that this form of communication was not enough. Instead, the specific need to preserve the evidence because of potential litigation needed to be conveyed to Michaelis as well. The court noted that mere knowledge of the relevance of litigation is not enough to establish a duty to preserve evidence.

The court also considered implications of public policy and held that public policy weighed in favor of Michaelis. According to the court, it is against public policy and not reasonable to expect a third-party to preserve potential evidence for an unknown period of time based on nothing more than a request to do so.

The *Safeco* decision reinvigorates an old twist to third-party spoliation claims in Indiana. By focusing on the relationship of the parties rather than on categorical sources of a duty, (statute, regulation, contracts, or other circumstances), the court has fortified a key barrier to bring the third-party claims of spoliation.

Municipal Liability Limited is Where a Bicycle Rider was Not an Intended and Permitted User

In *Alave v. City of Chicago,* 2023 IL 128602, the Illinois Supreme Court held that an individual who was riding a bike near a Divvy station when he hit a pothole was not an intended and permitted user of the road on which he was riding and therefore the city did not owe a duty of care to him.

In a very detailed and fact-specific analysis, the Illinois Supreme Court took into consideration many factors of the area near the pothole, including signs, the nature of the property, physical manifestations, markings, whether the traffic lanes were to be used by bicycle riders, etc. Under section 302(a)(1), under the Illinois Tort Immunity Act, the City would have only owed a duty of care to Plaintiff if he was both an intended and permitted user of the street where the pothole was located; neither party denied Plaintiff was a permitted user, but given the fact that neither roadway near the Divvy station would allow for bicycle riders, in addition to many other factors, the court found that Plaintiff was not an intended user of the roadway and could have walked the Divvy bike back to the station on the sidewalk.

The court held that the determination of whether an individual as an intendent user is significantly narrower whether he/she is a permitted user. The importance of this case lies not in the fact-specific analysis engaged in by the court, but whether when defending a municipal entity, a Defendant can establish that the duty of care does not arise based on a determination that the Plaintiff is not an intended use given all the facts. Though the circumstances of the injury seemed to make clear that Plaintiff was reasonably using the road, without a specific finding that the City intended Plaintiff to use the road for the specific purpose it was being used at the time of the occurrence, liability could not be established.

7th Circuit Applies Rigorous Standard for Constructive Notice in Illinois Premises Liability Cases

In a recent decision, *Reyna Cruz v. Costo Wholesale Corp.,* 2024 U.S. Dist. LEXIS 68959, the 7th Circuit grappled with the standards for constructive notice in premises liability cases.

The Plaintiff, a Costco shopper, was injured after she slipped on a small drop of smoothie in the food court area. There were no witnesses to the moment of Plaintiff's fall, though it was captured on internal surveillance cameras. Costco employees aided Plaintiff and reported that there were five drops of Costco fruit smoothie on the floor where Plaintiff slipped and fell. Costco produced 28 minutes of surveillance video prior to Plaintiff's fall, and no one was seen spilling a smoothie. No liquid was visible on the floor in the video, but the parties disputed whether a few drops of the smoothie would be visible from the camera angle.

The Court identified the proper Illinois standard to prove negligence in a premises liability matter, but it only grappled with the 3rd prong of that analysis which is whether the business had constructive notice of the substance. To prove that constructive notice exists, Plaintiff must prove that (1) the substance was on the floor for a sufficient amount of time such that it would have been discovered in the exercise of ordinary care; and (2) the substance she slipped on was part of a pattern of conduct or a recurring incident by Costco.

Defendant, Costco, moved for summary judgment. The 7th Circuit found that Plaintiff failed to prove that Costco had constructive notice that a dangerous substance was on the floor. Plaintiff offered no evidence as to the length of time the substance had been on the floor at the time of her fall. Plaintiff argued that because the 28-minute surveillance video showed no one dropping a smoothie in the location of her fall, she established that someone spilled a smoothie in that spot more than 28 minutes before she slipped. The Court found this reasoning speculative and without merit.

Plaintiff also provided no evidence that Costco's hourly floor walks were insufficient to monitor for spills or that customers had been injured from spills in the food court area. The Court found that no evidence would convince a jury that Costco demonstrated a "pattern of dangerous conditions or a current incident which was not attended to within a reasonable period of time." *Id.* at 4. The Court found that Plaintiff did not prove that Costco had constructive notice of the substance on the floor and granted Costco's motion for summary judgment.

The Court in *Cruz* renewed the rigorous standard that is required when determining whether a Defendant was afforded constructive notice.

Proximate Cause Need Not be Established by an Expert In a Medical Negligence Case Where the Negligence is Obvious

In *Nicole Thompson v. Joseph LaSpisa*, 2023 IL App (1st) 211448, the court considered a case where a motion for summary judgment had been granted because Plaintiff had not offered expert testimony with respect to the proximate cause of her injuries. Ms. Thompson underwent oral surgery by Defendant and attempted to contact his office when there were severe side effects including inflammation and difficulty breathing. Defendant's office did not respond to Plaintiff, there was a delay of approximately 18 hours before she finally went to the emergency room and, as a result, her post-operative infection was exacerbated significantly.

The circuit court found, without this issue being raised by Defendant, that Plaintiff's failure to offer expert testimony with respect to the cause of her injuries being related to the delay was sufficient to grant summary judgment for Defendant. Although Plaintiff had offered expert testimony with respect to the standard of care and how the standard of care had been violated by Defendant's failure to respond to requests, the appellate court found that expert testimony was not necessary with respect to damages that were caused as a result of the delay.

The appellate court recognized that there are dozens of cases in Illinois that mis-state the standard concerning whether expert testimony is necessary in medical negligence cases. Although the court recognized that expert testimony in medical negligence cases is generally required, where conduct is so grossly negligent that a layman could appreciate that negligence, no expert testimony was necessary. The court used the example of leaving a sponge inside of a surgical patient as the basis of such a ruling.

The court found that Plaintiff's argument that her infection became significantly worse, that her pain was exacerbated, and otherwise that the intensity of her symptoms had increased dramatically over the 18-hour period between when she first requested direction from Defendant and Defendant finally advised her to go to the emergency room did not require expert testimony to that effect. The court recognized that although the circumstances under which causation of damages *do not* require expert testimony are rare, given the facts in this case, Plaintiff need not demonstrate proximate cause by way of an expert. This case is important because it demonstrates that in circumstances where defense counsel may assume expert testimony is necessary, where proximate cause of damages is obvious, no expert testimony needs to be provided.

Illinois Appellate Court Affirms Denial of Uninsured Motorist Coverage Based on Excluded Driver Provision

In *Safeway Insurance Company v. Jafar Al-Rafei*, 2024 IL App (1st) 231391 (March 27, 2024), the Illinois Appellate Court for the First District held that a passenger in a vehicle driven by his daughter was not entitled to uninsured motorist coverage under his policy when he specifically excluded his daughter from coverage under the policy.

In *Safeway*, Jafar Al-Rafei was a passenger in the vehicle driven by his daughter Waed Al-Rafei. The vehicle was struck by an uninsured motorist and Jafar sought to have the uninsured motorist coverage under his policy with Safeway picking up the defense and indemnification of Waed in the suit he filed against her and the uninsured motorist.

Safeway filed a Declaratory Judgment action pointing out that Jafar Al-Rafei had expressly excluded his daughters, including Waed, from any claim arising from accident which occurred while the motor vehicle subject to the policy was being operated by Waed.

The trial court granted Safeway's Motion for Summary Judgment on its declaratory judgment action. The Appellate Court affirmed noting that "neither mandatory insurance law nor public policy compels us to find in favor of an Insured who seeks coverage, after explicitly excluding a specific driver in his automobile insurance policy and subsequently allowing her to drive his vehicle insured under the policy." *Id.* ¶ 22.

Firm **News**

Welcome to the Team

Please join us in welcoming our new attorneys, Kristin Lechowicz, Rachell Horebenko, David Ryan, Donn LaHaie, and Matthew Hobson.

Illinois

Kristin focuses her practice on workers' compensation defense. Her experience representing both employees and employers in workers' compensation claims gives her a unique perspective on strategizing and resolving claims.

Rachell is a highly experienced attorney with a focus in Workers Compensation and General Liability. Rachell started her own practice, specializing in real estate, estate planning, and corporate law, in which she gained extensive experience. Rachell has practiced Transactional law for the last 20 years.

David is a highly respected lawyer with over 30 years of experience in handling complex and valuable cases across the nation. He specializes in defending clients in personal injury, transportation, medical malpractice, legal malpractice, construction defect, and insurance coverage cases.

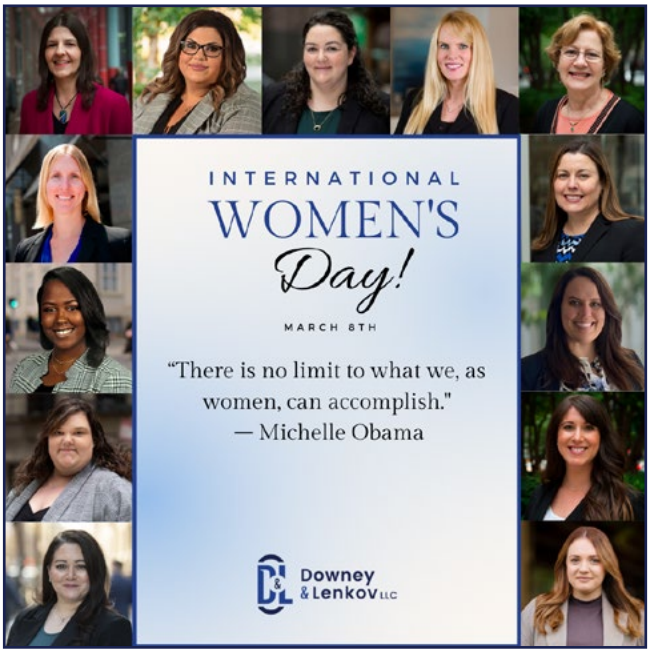
Donn returns to the firm as a seasoned attorney concentrating in workers' compensation. Over the last 20 years, he has successfully resolved hundreds of complex workers' compensation claims involving thirdparty action claims, product liability, automobile accidents, construction disputes, slip and falls and other catastrophic incidents.

Indiana

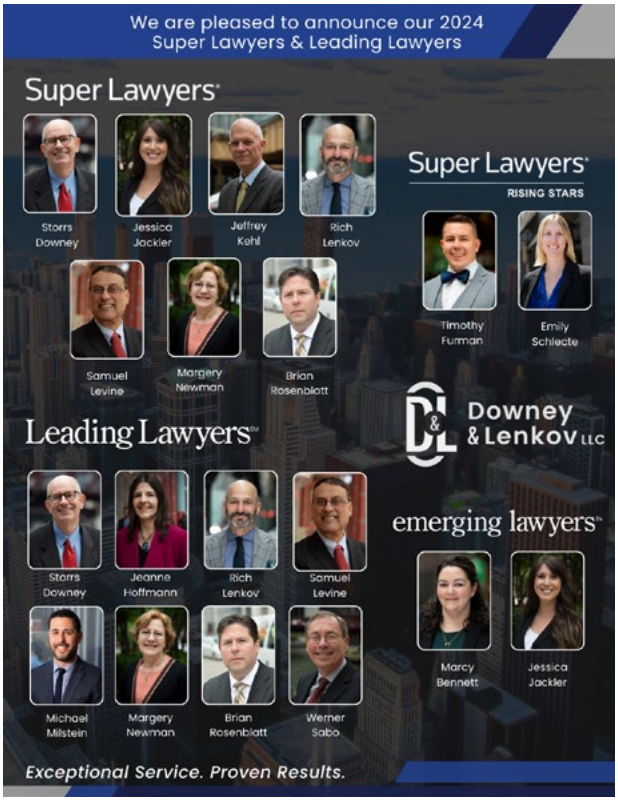
Mat concentrates his practice in workers' compensation and general liability. He is a dedicated attorney who provides unique strategies and effective counsel to his clients.

Downey & Lenkov Celebrates International Women's Day

We celebrated the remarkable women of Downey & Lenkov, acknowledging their invaluable contributions of intelligence, resilience, and unwavering determination to our firm.



Downey & Lenkov Attorneys Selected to Super Lawyers and Leading Lawyers



Nine attorneys at Downey & Lenkov have been recognized by Super Lawyers® as leading practitioners in their fields. Ten attorneys have also been selected for Leading Lawyers' 2024 rankings.

Capital Members Rich Lenkov and Storrs Downey; Income Members Margery Newman and Brian Rosenblatt; Associate Jessica Jacker; and Of Counsel Samuel Levine have been selected on both esteemed lists.

Read the full article here.

Upcoming **Webinar**

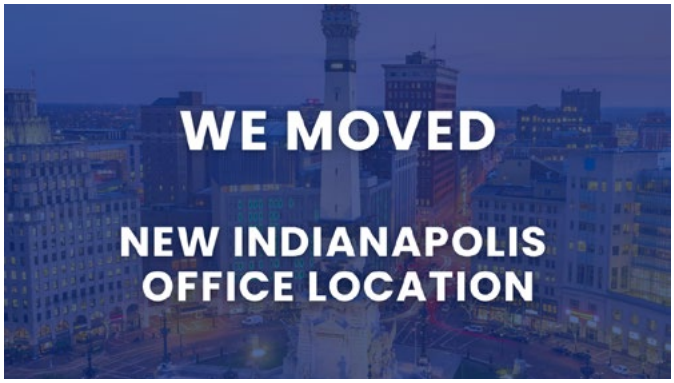
Premises Liability
7/16/2024 2:00 PM - 3:00 PM CST
Panelist: Ryan Danahey

REGISTER NOW

Professional Liability Defense Federation Annual Meeting

Come to Atlanta on September 25-27 for the 2024 PLDF Annual Meeting. There will be lively discussions of developments in professional negligence claims and fantastic networking! For more information visit pdlf.org/events.

New Indianapolis Office Location



Our Indianapolis office has moved! We have relocated to Regus Parkwood Crossing at 550 E 96th St, Indianapolis IN 46240 effective 6/1/24. Our service, phone number and fax number remain the same.

Thank you for your continued confidence in our firm. We are always available to assist with your claims.

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

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/.

Downey & Lenkov LLC

Newsletter **Contributors**

Jeffrey E. Kehl, Ryan Danhey, Mary Yong, and Taylor Young 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

Who We Are

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, resultsoriented 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. Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent

Offices located in:

- **Chicago, IL**
- **Crown Point, IN**
- **Indianapolis, IN**
- **Milwaukee, WL**