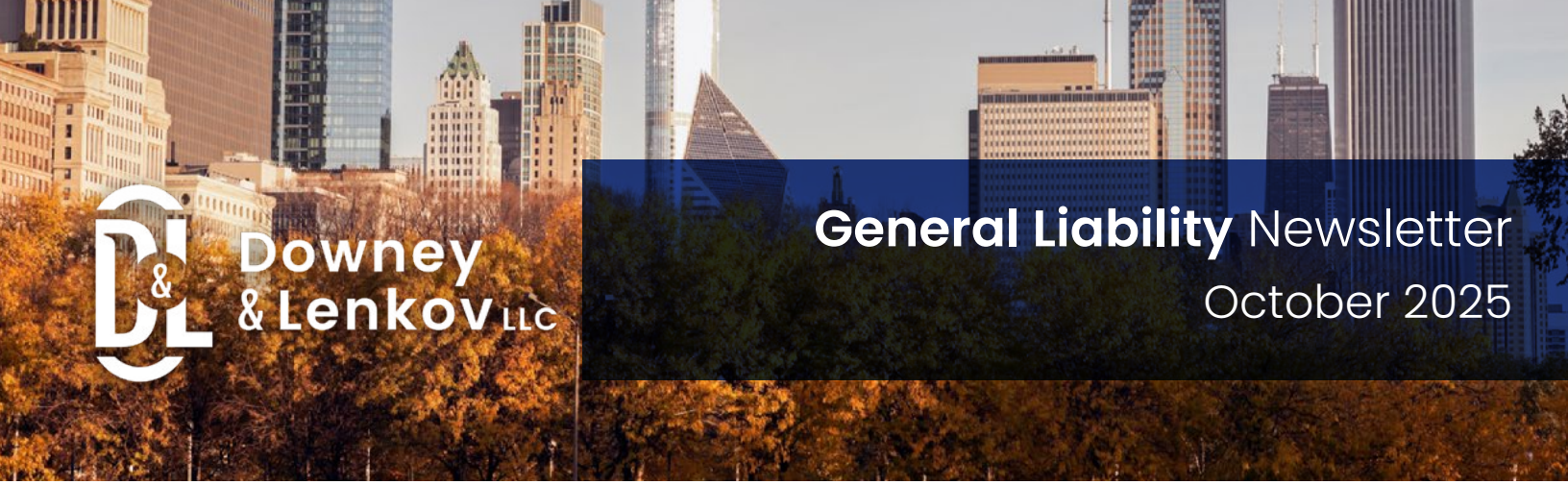


Downey & Lenkov LLC

# General Liability Newsletter

October 2025

## U.S. District Court for Northern Illinois Finds Three Minutes is Insufficient for Constructive Notice

In *Reyes v. Walmart Inc.*, 2025 U.S. Dist. LEXIS 110758, Plaintiff filed a lawsuit over an alleged slip-and-fall at a Walmart located in Niles, Illinois. The fall occurred just three to four steps from the cash register. Nobody, including Plaintiff and her husband, ever actually saw the alleged liquid. Plaintiff claimed that she only felt it after she fell. None of Walmart's employees reported seeing liquid on the floor, and Plaintiff did not see them cleaning anything off the floor.


Central to the case was a three-minute surveillance video in which Plaintiff's fall was captured. The video was grainy and shot from a far distance. As such, the video does not show any liquid on the floor. However, it did show approximately twelve customers walking over the area where Plaintiff fell without incident. It also shows two employees cautiously approaching and inspecting the area about fifteen seconds after the fall. There was nothing captured that showed the formation of a liquid.

Walmart's policy required its employees to walk through the store every hour to an hour and a half to inspect their floors. Cashier employees were also responsible for inspecting the area on a daily basis. Their policy also called for more employees to be present when foot traffic was higher.

Walmart filed a motion for summary judgment on both counts of Plaintiff's complaint: Premises Liability (Count I) and Negligence (Count II). For the premises liability claim, Walmart first argued that because there was no evidence of liquid on the floor, Plaintiff could not establish proximate cause. However, based on Plaintiff's testimony that she felt liquid after she fell, the Court found that there was enough circumstantial evidence for Plaintiff to refute this argument.

The second argument of premises liability was that Walmart did not have actual or constructive notice of the alleged spill. Plaintiff only argued that Walmart had constructive notice of the alleged spill. Plaintiff asserted that the liquid was present for a sufficient amount of time for Walmart's employees to have discovered it. Based on the three-minute video, Plaintiff argued that the liquid would have been present for at least three minutes. She also argued that this was a heavily trafficked area, which heightened Walmart's duty to inspect the area.

The court rejected Plaintiff's contention that three minutes was long enough for Walmart to have had constructive notice of the liquid. Accordingly, the court granted Walmart's motion for summary judgment on the premises liability claim.

With regard to the negligence claim, the court found that Walmart had not breached its duty owed to Plaintiff. Although a duty was owed to Plaintiff, there was only limited circumstantial evidence that there was even a liquid present for Walmart to have cleaned up. There was also no evidence of any issues with Walmart's inspection policy to show a breach. As such, Walmart was entitled to summary judgment on this claim as well.

Federal courts in the Seventh Circuit have consistently held that the presence of a hazardous substance on a floor for less than ten minutes is seldom long enough for the landowner to be considered to have constructive notice of its existence. The three-minute window in Reyes is certainly one of the shortest.

## Journey South from Illinois to Indiana For Your Litigation

While verdicts in parts of Indiana, including Northwest Indiana, can be quite liberal, statewide verdicts have historically been more conservative than verdicts in similar cases before juries in Cook County, Illinois or Chicago Federal Courts. As such, where available, defendants should strongly consider seeking to transfer a filed civil suit from Illinois to Indiana.

*Thomas v. Illinois Central Railroad*, No. 23 C 13311, is a recent example of where and how such a transfer can be accomplished. There, the U.S. District Court for the Northern District of Illinois granted Defendant's motion to transfer the matter to the Northern District of Indiana based on an analysis of which forum had the most significant connection with the parties and the claim.

A district court may transfer a civil case to another court "for the convenience of parties and witnesses" and "in the interest of justice," if venue would be proper in the proposed location.

28 U.S.C.A. § 1404(a). This court has discretion in deciding whether to transfer venue and may consider the following private interest factors:

1. the Plaintiff's choice of forum;
2. the situs of material events;
3. the convenience of the parties; and
4. the convenience of the witnesses. *Gueorguiev v. Max Rave, LLC*, 526 F. Supp. 2d 853, 856-57 (N.D. Ill. 2007).

The court is also to consider public interest factors, including the court's familiarity with the relevant law and the efficient administration of justice. *Moore v. Motor Coach Industries, Inc.*, 487 F. Supp. 2d 1003, 1006 (N.D. Ill. 2007).

Regarding private interest factors, the Plaintiff's choice of forum is generally afforded deference and all the more so when it is the Plaintiff's home state. *Gueorguiev*, at 857. However, a Defendant may offset that deference if it provides a strong showing on the other factors. *Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 979 (7th Cir. 2010).

In *Thomas*, Plaintiff, an Indiana resident, was a railroad truck worker who hurt his back while moving a rail roller at a railroad yard in Gary, Indiana. Noting that the Plaintiff was not a resident of Illinois, there was a "substantially reduced" deference related to his preferred venue for his lawsuit.

Beyond this, other than the Defendant's corporate headquarters being located in Illinois, all other factors (Plaintiff's residency, the accident location, the work location of three witnesses and the equipment involved in the incident) were located in Indiana.

At the onset of a new lawsuit filed in federal court or even following removal of a state court claim to federal court, Defendant should make an initial evaluation on whether the case can be transferred to a more suitable venue in another state.

## Wisconsin Court rules that structural defects, which have been unchanged since installation, are barred by the statute of repose

In *Larimore v. Midland*, 2025 Wisc., App. Lexis 761, the Wisconsin Court of Appeals, District 4, considered a case in which a Plaintiff slipped on ice at the rear of a commercial building. The facts established that Plaintiff fell due to ice that had collected underneath a downspout at the rear of the building. That downspout had been unchanged since it was installed during the construction of the building. Plaintiff alleged liability under a negligence theory, as well as under the Wisconsin Safe Place Statute. Liability under the Wisconsin Safe Place Statute is a higher standard of care and applies to "public buildings." Liability under the Safe Place Statute relates to a failure to repair, construct or maintain a public building to render it safe. The Safe Place Statute focuses on "unsafe conditions."

In a long and detailed opinion, the court considered whether the seven-year statute of repose in Wisconsin would bar liability if the downspout was considered a structural defect and determined that Wisconsin law required such a result. That is, under Wisconsin law, where a condition has been installed on a building from its inception, that condition causes an injury, and more than seven years have passed without the condition being changed or modified in any way, the statute of repose bars liability for that "structural defect." Crucial to the court's consideration was that the downspout in question had not been changed in any way since the time of its installation, when the building was originally constructed.

With respect to Plaintiff's negligence claim, the court determined that those allegations could proceed, although the condition itself was considered a structural defect. The court recognized that Plaintiff had alleged a failure to inspect and ameliorate the ice that had gathered below the downspout by either sanding or salting that area. The court held that the allegations of failure to inspect and ameliorate constituted a proper allegation of a failure to repair, construct or maintain under the Wisconsin Safe Place Statute.

Overall, the detailed analysis laid out by the court establishes the technical but important differences between allegations under a negligence claim, as well as those under the Wisconsin Safe Place Statute.

## Illinois Appellate Court Finds Fact Questions Preclude Summary Judgment on the Issue of Whether an Employer is a Borrowing Employer under the Workers' Compensation Act's Exclusive Remedy Provision

In *Tolbert v. Odum Concrete Products, Inc.*, 2025 IL App (5th) 230548-U, the Illinois Appellate Court was asked to review whether a contractor who hires a cement truck operator from a defendant is a borrowing employer under the Workers' Compensation Act. Such that the actions of the operator as a co-employee preclude direct liability for the operator and his principle. After analyzing the facts of record and the established judicial considerations of that very question, the court held that the existence of fact questions precluded summary judgment.

The underlying facts in *Tolbert* are hardly straightforward. Tolbert was an employee of Millstone, a contractor hired to grind and remove a roadway.

The grinding operation involved 3 pieces of machinery. First, there was a grinding machine that would crush and cut the concrete. Second, there was a water tank truck that would dispense water onto the working bits of the grinding machine to lubricate and cool the equipment. The process would create concrete slurry. Third, a cement truck moved side-by-side with the grinder and the slurry would be moved into the tank on the cement truck. In a perfect world, the grinder and cement truck worked in tandem. The cement truck would move forward and backward whenever the grinder moved forward and backward.

Millstone contracted Ready Mix to provide cement trucks and operators. On one particular occasion, Ready Mix sent its operator, Roy Rodgers, to the Millstone jobsite. On that occasion, the grinder and Rodgers fell out of sync and Rodgers struck and injured Tolbert. Rodgers had been taking direction from the Millstone foreman before and during the day and it was the foreman who sent Rodgers home after the incident.

Tolbert sued Odum, Ready Mix and Rodgers on the theory that Rodgers was negligent in his operation of the cement truck. Ready Mix filed a third-party complaint against Millstone as the employer of Tolbert. Millstone responded by asserting that it was Tolbert's employer, had paid his workers' compensation benefits, and that its liability was limited to the extent of its workers' compensation exposure. Millstone, after all, paid Ready Mix for the cost of the use of the cement truck and Rodger's time.

This is where the case gets interesting. Ready Mix argued that under the exclusive remedy provision of the Workers' Compensation Act, Tolbert could not maintain a direct action against Rodgers because Rodgers was a borrowed employee of Millstone. The trial court agreed. Utilizing the developing criteria for determining whether a loaning or borrowing employer is protected by the exclusive remedy provision of the Act, the appellate court concluded that questions of fact regarding the control over Rodgers' work precluded summary judgment.

The Illinois Workers' Compensation Act is intended to provide financial protection to workers for accidental injuries arising out of and in the course of employment. The Act imposes liability on an employer without fault but prohibits the employee from bringing a common-law suit against the employer. Id. Section 5(a) of the Act sets out this exclusive remedy:

> *No common law or statutory right to recover damages from the employer *** for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act ***.*

820 ILCS 305/5(a).

The Act provides protection to workers for accidental workplace injuries by imposing liability on the employer without fault on the employer. In exchange, the injured employee relinquishes any common law or statutory right to recover damages from the employer or co-employees for work-related injuries. This exclusive remedy provision is part of the *quid pro quo* under which an employer assumes liability without fault but is relieved of the prospect of large verdicts for damages.

Not only does the exclusive remedy doctrine apply to direct, general employers, it also applies to *borrowing* employers as well. Following a long line of Illinois cases, the court in *Holten v. Syncreon North America, Inc.*, 2019 IL App (2d) 180537, reaffirmed that the Act "specifically incorporates the borrowed-employee doctrine and extends the immunity of the exclusive-remedy provision to borrowing and loaning employers." Id. at ¶ 28.

The linchpin of Ready Mix's argument was that Rodgers was a co-employee of Tolbert because Millstone was the borrowing employer. In determining whether an employer is a borrowing employer under the Act, Illinois courts have consistently looked at who undertook to direct the employee's work, whether the employee worked the same hours as the hours for other employees of the borrowing employer, whether the employee received instruction from the borrowing employer's foreman and was assisted by the borrowing employer's employees, whether the loaning employer's supervisors were present, whether the borrowing employer could start and stop the employee's work and whether the loaning employer relinquished control of its equipment.

In *Tolbert*, the trial court concluded that most of these factors weighed in favor of Millstone being considered the borrowing employer and, therefore, no direct cause of action could be maintained against Rodgers. Because Ready Mix's liability was predicated on Rodgers' negligence only, Ready Mix could not be liable.

The appellate court determined that the case was not so factually clear-cut. The appellate court considered additional facts that precluded summary judgment, including evidence that

1. Rodgers was acting in accordance with the directions given to him by Ready Mix and utilizing the cement truck to fulfill Ready Mix's obligations to Millstone;

2. He could have stopped the work and told Millstone to request a new driver if there was a safety issue;

3. He adhered to Ready Mix's policies while operating the vehicle;

4. His adherence to Millstone's directions during the grinding operation was not an expression of control but merely a coordinated effort;

5. He was paid by Ready Mix for his work on the day of the incident;

6. The record was silent as to whether Millstone had the ability to dismiss him from working on the operation;

7. There was no contract regarding his work on the grinding operation, so the record was silent as to any control that Millstone was given over him during the operation;

8. Odum and Ready Mix had the right to send any cement truck operator, as there were no terms governing which operators would be sent and whether there was a restriction on Odum's and Ready Mix's ability to substitute;

9. Rodgers had not even worked for Millstone for a few hours when the plaintiff was injured, so his length of employment was very brief; and

10. The safety director of Millstone classified Ready Mix and Odum as hired haulers, not subcontractors.

Because of these additional facts, the status of Millstone as the borrowing employer could not be resolved at the summary judgment stage and that the questions need to be resolved by a factfinder at trial and not on a review of a cold appellate record.

# Firm **News**

## Jessica Jackler Secures Dismissal With Prejudice on Defamation and Wrongful Discharge Case

Income Member Jessica Jackler recently secured a dismissal with prejudice from the Will County Circuit Court of a complaint alleging defamation and wrongful discharge by a former employee.

The ruling was issued after a detailed oral argument was presented to the court, which included legal reasons such as failure to state and claim and other affirmative matters warranting dismissal with prejudice. Because the ruling was with prejudice, the plaintiff cannot refile or amend the complaint.

## Storrs Downey Successfully Defended an Employment Case Before the ICRC

Capital Member Storrs Downey successfully defended an employment case before the Indiana Civil Rights Commission (ICRC). Based on the evidence Storrs presented, and the lack of such evidence submitted by the complainant, the ICRC found that the complainant was not disabled under the law, he was not terminated based on an alleged disability and he was not denied a reasonable accommodation by the employer.

The ICRC further found that the complainant could perform essential job functions, and reasonable accommodation was provided by the employer despite not requesting the same. Furthermore, they found that he was terminated due to specific noted job misconduct, and he failed to present evidence of similarly situated non-disabled employees who were likewise insubordinate and not terminated.

## Congratulations to both Jessica and Storrs!

## Downey & Lenkov Attorneys Recognized as Best Lawyers®

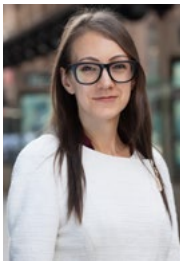
We are pleased to announce that four Downey & Lenkov attorneys have been recognized in the 2026 edition of The Best Lawyers in America®.

- Capital Members Kirsten Kaiser Kus and Michael Milstein received this accolade for **Workers' Compensation Law –Employers.**
- Of Counsel Werner Sabo received this accolade for **Construction Law and Litigation.**
- Income Member Timothy Furman has been selected for the **2026 Best Lawyers: Ones to Watch in America list for Workers' Compensation – Employers.**

2026 RECOGNIZED BY Best Lawyers®

## Welcome to the Team

Please welcome our new Illinois Associate Zoe Arthurson-McColl.



Zoe concentrates her practice in workers' compensation and general liability matters. She is a dedicated attorney who is committed to defending her clients' interests and has achieved favorable results through effective courtroom advocacy and strategic negotiation. She handles all aspects of litigation, including trial, oral arguments and appellate work.

## Kirsten Kaiser Kus Recognized as Influential Women of the Year

Congratulations to Capital Member Kirsten Kaiser Kus! She was recognized as Influential Woman of the Year in Law at the Northwest Indiana Influential Women Association Annual Awards Banquet.

This honor highlights her leadership and contributions alongside more than 1,000 community leaders celebrating the bright future of women in business and law.


## Downey & Lenkov Co-Sponsored AWWC Illinois Event

Downey & Lenkov was proud to co-sponsor the Alliance of Women in Workers' Compensation Illinois Chapter's event on 9/17/25 featuring bestselling author and entrepreneur Jess Ekstrom. Jess shared insights on staying motivated by reconnecting with purpose, sparking creativity and sustaining energy over the long term.

Alliance of Women
IN WORKERS' COMPENSATION

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

Bidders, get ready! USLI's #OctoberTogether Auction goes live Tuesday, October 7.

Downey & Lenkov is proud to once again support this important cause. This year we are auctioning "Accessories for a Cozy Home" — the perfect way to treat yourself or gift as a little luxury. 100% of proceeds benefit Breastcancer.org, a nonprofit dedicated to supporting women and their families through breast cancer diagnoses.. Keep an eye out for basket #5! Learn more here.

## 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 Ryan Danahey 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

## Newsletter Contributors

Storrs Downey, Jeffrey Kehl, Ryan Danahey and Benjamin DiBlasi contributed to this newsletter.

View more information on our **Labor & Employment practice.**

- Business Law
- Condominium Law
- Construction Law
- Entertainment Law
- General Liability
- Healthcare Law
- Insurance Law
- Intellectual Property
- Products Liability
- Professional Liability
- Real Estate
- Transportation Law
- Workers' Compensation

## Office locations:

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

Downey & Lenkov LLC