BRYCE DOWNEY & LENKOV LLC

General Liability Update
February 2018

Indiana Court of Appeals Upholds Jury Speculation Regarding Proximate Cause of a Fatal Accident

In *Sandberg Trucking Inc. v. Johnson*, 76 N.E.3d 178 (Ind. Ct. App. 2017), the Indiana Court of Appeals held that a jury was free to infer that an accident would not have occurred if Defendant had acted differently despite the lack of any testimony to that effect.

In *Sandberg*, Defendant's truck driver was traveling southbound on Interstate 65 at approximately 5:00 a.m. when he hit a deer. The truck driver pulled the vehicle over to the shoulder approximately 250 feet south of where the deer remains came to rest in the road. During the next 90 seconds, the driver got out of the truck, checked the front of his vehicle, activated his emergency flashers and started to grab a box of reflective triangles to place behind the truck. Ten seconds later, a southbound vehicle driven by Joshua Horne collided with the rear of Defendant's truck. Horne died as a result of the collision. His passenger, Brittany Johnson, sustained severe injuries but survived.

Johnson brought a negligence suit against Sandberg Trucking and its driver claiming that the driver failed to exercise reasonable care for the safety of other vehicles on I-65 and failed to comply with Section 392.22 of the Federal Motor Carrier Safety Regulations (49 CFR § 392.22).

The jury ultimately awarded damages totaling $7.1 million. The jury determined that Defendant was 30% at fault and Horne was 70% at fault. Defendant appealed arguing that the jury did not have sufficient evidence on which to support their determination that Defendant's acts or omissions were proximate cause of Johnson's injuries. Defendant also argued that the trial court incorrectly concluded that §392.22 established the standard of care for Defendant's driver. The Court of Appeals rejected Defendant's arguments and upheld the verdict.

In upholding the verdict, the Court of Appeals rejected Defendant's argument that the jury was impermissibly allowed to speculate on the issue of whether Defendant's driver was a proximate cause of Johnson's injuries. Plaintiff's case focused on the fact that the driver did not "immediately" activate his emergency flashers in accordance with §392.22. According to the Court of Appeals, even though only 90 seconds had elapsed between the collision and when the driver activated his emergency flashers, the jury still could have concluded that Horne would not have collided with the truck if the emergency flashers had been activated sooner. According to the court, it was enough that the driver could have taken a different action. The logic of the Court of Appeals went like this:

> "…We will not adopt a rule that effectively eliminates the possibility of a verdict in favor of the plaintiff(s) in failure-to–warn cases if the relevant person does not testify that he or she would have done anything differently had he or she been warned of the danger. Put bluntly, it will not be uncommon in such cases for that person to be dead. The jurors should be entitled to infer that things would have played out differently had there been a warning despite the lack of testimony to that effect."

76 N.E.2d at 187.

In addition to finding that a jury can infer negligence without evidence that non-negligent actions would have created a different result, the court also held that §392.22 applied even though the driver was not engaged in interstate commerce. According to the court, I.C. §8-2.1-24-18(a) provides that the Federal Motor Carrier Safety Regulations such as §392.22 applied to intrastate as well as interstate motor carriers and their employees.

Finally, the Court of Appeals held that §392.22 does not impose a standard of care on drivers. Rather, under Indiana law, the unexcused or unjustified violation of a duty dictated by a statute constitutes negligence *per se*. As the court explained, the violation of a statutory duty only creates a presumption of negligence that may be rebutted. As such, the court rejected the notion that §392.22 "limits, expands, or otherwise defines the general duty of care of a motorist," 76 N.E.2d at 188. To that end, the court held that "following §392.22 to the letter should not absolutely shield you from liability any more than failing to follow it should automatically subject you to it." 76 N.E.2d at 188.

Thinking Point:

The decision in *Sandberg* should be alarming to transportation defendants in Indiana. The Court of Appeals acknowledged the lack of any testimony to suggest that a different result would have occurred had Defendant not been negligent, yet the court held that tenuous inference of a different result sufficiently establishes proximate cause.

Illinois Appellate Court Recognizes a New "Old" Privilege

As a welcome and overdue step into the 21st century, the First District Appellate Court in *Selby v. O'Dea*, 2017 IL App (1st) 151572 (December 7, 2017), became the first appellate court in Illinois to recognize the existence of the joint defense counsel/common interest privilege in Illinois. As the court itself noted, this may come as a surprise to those many Illinois attorneys who erroneously believed that this privilege already existed as part of Illinois law. Indeed, the court itself noted its own surprise that this issue had not previously been addressed by the appellate courts of Illinois.

The case arose from a class action suit against State Farm and its subrogation attorney, alleging that both engaged in a scheme to unlawfully subject subrogation defendants to default judgments via misuse of legal procedures relating primarily to service of process. The defendants had raised the joint defense privilege in objecting to discovery requests.

In affirming the trial court's ruling that the privilege should exist in Illinois, the Appellate Court made a noteworthy finding: That the privilege (first pronounced nearly 150 years ago) has never been rejected by any federal and state court wherein it was asserted. There was virtually no legislative or judicial precedent holding that the privilege did not exist. In addition, the court found support in the Restatement (Third) of the Law Governing Lawyers.

The court concluded that the privilege applies in Illinois and protects from disclosure statements made to further the parties' common interest, pursuant to a common-interest agreement: (1) by the attorney for one party to the other party's attorney; (2) by one party to the other party's attorney; (3) by one party to its own attorney, if in the presence of the other party's lawyer; and, (4) from one party to another, with counsel present.

The court noted that the common interests involved need not be 100% aligned. Even communications between "unsteady bedfellows" could be privileged.

Although holding that a joint defense privilege existed in the case before it, the court did caution that several related issues were not being decided. These include such questions as whether the privilege extends beyond actual

litigation to the threat of litigation and whether a written or advance agreement is required.

Thinking Point:
Although the Illinois Supreme Court has yet to rule on whether this privilege exists, it is likely that it follow both the Restatement and the overwhelming weight of authority in confirming that the joint defense privilege exists in Illinois law. However, until that occurs, caution should be exercised. Although the opinion does not per se require a formal written joint defense agreement, it remains a good idea to create one if otherwise non-privileged communications between parties are sought or even contemplated.

Indiana Court of Appeals Holds that Chiropractors are not Qualified to Provide Expert Opinions Regarding Medical Causation in Complex Medical Cases

In *Totton v. Bukofchan, D.C.*, 80 N.E.3d 891 (Ind. Ct. App. 2017), the Indiana Court of Appeals held that non-physician healthcare providers are not qualified to offer expert witness evidence regarding medical causation.

In *Totton*, a patient brought a medical malpractice claim against his chiropractor claiming that the care provided did not meet the applicable standard of care and caused injury to Plaintiff's back. A medical review panel composed of three chiropractors found that the Defendant-chiropractor met the applicable standard of care and did not cause Plaintiff's injuries.

Before the trial court, the Defendant-chiropractor moved for summary judgment relying on the report of the medical review panel. In response, Plaintiff proffered an affidavit of his own chiropractor who concluded that the Defendant-chiropractor did not meet the applicable standard of care and caused Plaintiff's injuries. The trial court granted summary judgment in favor of the Defendant on the grounds that the Plaintiff's chiropractor was not qualified to give opinions with regard to medical causation. Plaintiff appealed.

On appeal, Plaintiff argued that his chiropractor expert witness was qualified under Indiana Evidence Rule 702 to offer his opinions regarding Defendant's causation of Plaintiff's injuries. According to Plaintiff, his expert's knowledge, experience, training and education qualified him to offer expert opinions with regard to the issue of medical causation.

In response, Defendant conceded that Plaintiff's expert was qualified under Evidence Rule 702 to offer an opinion regarding the standard of care for a chiropractor. However, Defendant argued that Plaintiff's expert was not qualified under Rule 702 to render an opinion with regard to medical causation because, under Indiana law, non-physician healthcare providers are not qualified to offer expert opinions regarding medical causation.

The court of appeals noted that the prohibition regarding non-physician healthcare providers from qualifying as expert witnesses with regard to medical causation is not absolute. Where the issue of causation is not a complex issue, non-physician healthcare providers may qualify to offer expert opinions. However, in *Totton's* case, the medical history was complex and, as such, medical causation was a complex issue.

What is good for the goose is also good for the gander. Accordingly, the court noted that if a chiropractor is not qualified to render an opinion regarding medical causation then the three chiropractors sitting on the medical review panel were also not qualified to render expert opinions on medical causation. The prohibition of such unqualified opinions under Evidence Rule 702 trumped the Medical Malpractice Act's provision that the "report of the expert opinion reached by the medical review panel is admissible as evidence in any action subsequently brought by

the claimant in a court of law." I.C. §34-18-10-23.

Having determined that the issue of causation could not be resolved through the opinions of expert witnesses on either side, the court ruled that summary judgment was not appropriate.

Thinking Point:

Totton presents three important points for medical malpractice defendants. First, even though the Medical Malpractice Act provides that the determinations made by a medical review panel are admissible evidence in any subsequent trial, that admissibility is limited by Rule 702 which limits the admissibility of non-physician healthcare provider opinions with regard to the issue of medical causation. Second, it is important to consider whether the issue of medical causation is important to consider and argue that the issue of medical causation is complex when a plaintiff seeks to proffer a non-physician healthcare professional as an expert witness.

Finally, the prohibition with regard to non-physician healthcare provider opinions regarding medical causation should be used as much as possible in motions *in limine* and related evidentiary arguments to limit the opinions of any non-physician healthcare professional. In this regard, every effort should be made to re-cast as many of the opinions of the proffered non-physician healthcare professional as being relevant and therefore inadmissible on the issue of medical causation.

Doctor Convinces Illinois Appellate Court that Trial Court Made Bad Evidentiary Rulings but $8 Million Medical Malpractice Verdict Upheld

In *Arient v. Alhaj-Hussein*, 2017 IL App (1st) 162369 (December 1, 2017), the First District Appellate Court upheld an almost $8 million medical malpractice verdict against the defendant medical providers despite agreeing with the defendants that the trial judge made multiple evidentiary errors which ultimately prejudiced the defendants.

In October 2012, Kathy Arient visited Dr. Yasser Alhaj-Hussein on referral from her primary care physician for pain management related to chronic abdominal pain. To treat the pain, Dr. Alhaj-Hussein performed a celiac plexus block by injecting absolute alcohol into Arient's lower back. Following the procedure, Arient experienced numbness in both legs and was taken to a hospital where it was determined that she experienced a vasospasm, resulting in paraplegia.

On December 19, 2012, Kathy Arient, and her husband, Terry Arient, filed suit against Dr. Alhaj-Hussein, Illinois Anesthesia and Pain Associates, and Orland Park Surgical Center. In late-June 2014, Kathy Arient suffered a stroke and died. Following his wife's death, Terry Arient amended the complaint to include a wrongful death count.

The Amended Complaint alleged, among other things, that Dr. Alhaj-Hussein and the other defendants were negligent for performing the injection without first trying more conservative treatment, failing to properly place the injection and failing to possess proper surgical privileges that would have allowed Dr. Alhaj-Hussein to use absolute alcohol on a patient. Prior to trial, numerous motions in *limine* were brought by both sides, but key to the appellate court's decision were two: (1) defendants' motion in

limine to bar the plaintiff's expert witness from testifying regarding Dr. Alhaj-Hussein's surgical privileges; and, (2) plaintiff's motion in *limine* to bar defendants from making reference to Kathy Arient's history of smoking. The trial judge denied the defendants' motion in *limine* but granted the plaintiff's. Following a week-and-a-half trial, the jury found in favor of Kathy Arient's estate and awarded $7,884,761.00 in a general verdict. Defendants appealed.

On appeal, Dr. Alhaj-Hussein claimed the trial judge erred when she allowed the plaintiff to question Dr. Alhaj-Hussein's medical privileges and barred the defendants from making any reference to Kathy Arient's history of smoking. Specifically, Dr. Alhaj-Hussein argued that it was improper for the trial judge to allow the plaintiff to question the defendant on his purported lack of surgical privileges to perform the procedure because it was based on an erroneous application of state law. Dr. Alhaj-Hussein also contended that evidence of Kathy Arient's history of smoking was relevant and should have been allowed to have been presented to the jury.

The appellate court actually agreed with Dr. Alhaj-Hussein's arguments and found that the trial judge erred. However, despite these errors, the court affirmed the trial court judgment.

The appellate court explained that its decision hinged on the fact that the jury returned a general verdict even though Plaintiff alleged 5 different theories of liability. The appellate court explained that the trial judge instructed the jury that the plaintiff claimed that Dr. Alhaj-Hussein was negligent in one or more of five disjunctively asserted acts or omissions, proximately resulting in Kathy Arient's injury and death. Although the evidentiary errors noted were prejudicial and directly affected three of the five allegations of negligence, the errors did not directly impact the remaining two allegations of negligence (injecting absolute alcohol into an artery and failing to place the spinal needles in the proper location).

When addressing the exclusion of evidence of Kathy Arient's history of smoking, the court went on to explain that the defendants never asserted that Kathy Arient's smoking was the sole proximate cause of her death. While the defendants did argue that that smoking was relevant to Dr. Alhaj-Hussein's election to perform a celiac plexus block as opposed to other treatment modalities, they never argued that they were prepared to present evidence that Kathy Arient's smoking was the sole proximate cause of the vasospasm, which resulted in paraplegia or that smoking was the sole proximate cause of the stroke which led to her death. Simply put, the court found that there was no evidence in the record to support a conclusion that the defendants pursued, or intended to pursue, a sole proximate cause defense based upon Kathy Arient's smoking.

Ultimately, the appellate court said that while it was inclined to agree with Dr. Alhaj-Hussein that the totality of the errors warranted a new trial, it could not grant such relief because the Illinois Supreme Court's "general verdict rule." Under that rule, general verdicts cannot be overturned in cases where the evidence supports at least one of multiple theories of liability. Here, given the jury's general verdict, and the fact that the defendants did not submit special interrogatories, there was no way to know upon on which of the 5 alleged acts of negligence the jury based its verdict. As such, the verdict could not be set aside.

Thinking Point:

Arient stands of a couple different propositions that should be considered. First, even a series of egregious evidentiary rulings will not justify a new trial if the errors do not affect other unrelated theories of liability. Second, if there are multiple claims, a verdict form that requires a jury to indicate the claims on which liability exist should be used if errors at trial are to be preserved.

Injured Employee Intervention in Illinois Employer Subrogation Action

An Illinois Appellate Court decision overturned the trial court and held that an injured worker had a right to intervene in the civil subrogation action brought by her employer and/or workers' compensation carrier to recover its paid workers' compensation benefits. *A&R Janitorial v. Pepper Construction Co., et al.*, 2017 IL App (1st) 170385 (December 27, 2017).

The employer in *A&R* filed a subrogation civil action to recover its workers' compensation lien. After untimely filing her own action, the injured worker sought to intervene into the employer's civil suit. The trial court denied this request to intervene finding the prior dismissal of her own civil suit barred her from intervening in her employer's subrogation action.

In a case of first impression, the Illinois First District Appellate Court acknowledged that while the workers' compensation lien statute, 820 ILCS 305/5(b), did not recognize such right of intervention by the injured worker, a separate Illinois Statute, Section 2-408, provided a discretionary, permissive right of a party to intervene in a civil action when the interests of the intervenor may not be adequately protected by the injured plaintiff(s).

In the instant case, the workers' compensation lienholder sought not only recovery of its workers' compensation payment but the injured worker's pain and suffering, despite the lienholder not being entitled to recover this latter element of damages.

The court found that the subrogation lienholder might not be incentivized to seek the maximum potential in damages because of this limitation. It is unclear why the employer chose to include a claim for pain and suffering as part of its damages package. Without such a claim, the employee likely would have been precluded from intervening.

Thinking Point:
There are some advantages to having the injured worker actively involved in the civil litigation. His deposition testimony will typically be necessary even at an early settlement stage and certainly critical at the trial stage. Further, if the workers' compensation case has not been settled, potential recovery of pain and suffering damages could be used to offset some future workers' compensation payment obligations.

Seventh Circuit: Parents Responsible for Watching Their Children!

Recently, the Seventh Circuit Court of Appeals affirmed summary judgment in favor of Starbucks in a premises liability case after a child's in-store finger injury required amputation. In *Roh v. Starbucks Corp.*, No. 16-4033, 2018 U.S. App. LEXIS 2713 (7th Cir. Feb. 2, 2018), the Court of Appeals held that Starbucks did not owe the child a legal duty since he was under his parents' supervision at the time of the incident.

In February 2013, Beebe and Lucas Roh were at a Starbucks in Chicago, with their sons, five-year-old Alexander and three-year-old Marcus. While at the Starbucks, a wood and metal freestanding stanchion (an upright post with a heavy concrete base forming a barrier to direct customers in line) fell onto Marcus' left middle finger, requiring amputation. Neither Beebe nor Lucas saw what caused the stanchion to fall, but the evidence apparently established that the boys most likely caused the stanchion to fall as they were playing on it immediately before the incident.

Following the incident, Beebe filed suit against Starbucks alleging negligence by failing to safely maintain its premises, failing to adequately secure the stanchion, failing to properly inspect the stanchion to ensure its stability, failing to warn patrons of the potential

danger posed by the stanchion, and failing realize that minor patrons would not appreciate the risk posed by the unsecured stanchion.

Starbucks moved for summary judgment, which the trial court granted. In granting summary judgment, the trial court concluded that under Illinois law, Marcus' parents Beebe and Lucas, not Starbucks, bore the responsibility to protect Marcus from the obvious danger posed by playing on the unsecured stanchions. The parents' appeal followed.

On appeal, Marcus' parents claimed that Starbucks had a duty to prevent Marcus' injury because neither the parents, nor Marcus were aware of the *specific danger* posed by the stanchions. *Roh*, at *10-11. The parents' primary argument in this regard was that the district court erred because they could not have anticipated that the stanchions might fall, and as a consequence, there was at least a question of fact as to whether the danger posed by the stanchions was "hidden," such that Starbucks was liable for Marcus' injury. *Id.* at 11.

The Seventh Circuit was unpersuaded by the parents' argument. Under Illinois law, despite foreseeability of harm to a child, "a landowner's duty may be abrogated if the child is accompanied by a parent as '[t]he responsibility for a child's safety lies primarily with its parents, whose duty it is to see that his behavior does not involve danger to himself.'" *Roh,* at *9, *quoting Driscoll v. C. Rasmussen Corp.*, 219 N.E.2d 483, 486 (Ill. 1966). If "the child was injured due to an obvious danger while under the supervision of his or her parent, 'or when the parents knew of the existence of the dangerous condition that caused the child's injury,'" there is no duty. *Id. quoting Harlin v. Sears Roebuck & Co.*, 860 N.E.2d 479, 486 (Ill. App. Ct. 2006).

In affirming summary judgment, the Seventh Circuit pointed to the fact that both Beebe and Lucas admitted to having observed the stanchions when they entered Starbucks. *Roh*, at *12. Despite Beebe's argument that the Rohs could not have seen the particular incident (i.e. the stanchion falling on Marcus' hand), it was enough for the Court that any parent could foresee that a child hanging from the ropes connecting the stanchions or otherwise playing on and around them could be injured in some way. *Id.*

Simply put: the parents need not to have seen the particular accident that befell the child. It was enough that the parents saw the stanchions, which were plainly very heavy and that any parent could foresee that a child hanging from the rope connecting the stanchions or otherwise playing on and around them could be injured.

Thinking Point:

The Seventh Circuit's decision in Roh reinforces well-settled Illinois law in a premises liability context. Despite a minor plaintiff with serious injuries, defendant landowners are well-served moving for summary judgment when there is evidence that parents are present at the scene of an injury and failed to properly supervise their children.

Illinois Appellate Court Upholds Use of Internal Safety Rules as Evidence of Negligence

In the oft-quoted case of *Morton v. City of Chicago*, 286 Ill.App.3d 444 (1st Dist. 1997), the Illinois Court of Appeals held that "[t]he violation of self-imposed rules or internal guidelines *** does not normally impose a legal duty, let alone constitute evidence of negligence or beyond that, willful and wanton conduct." *Id.* at 454.

Recently, in *Hoffman v. Northeast Illinois Regional Commuter Railroad Corporation*, 2017 IL App (1st) 170537 (December 29, 2017), the Appellate Court for the First District focused on the word "alone" and read the *Morton* decision as meaning that a violation of an internal rule, by itself, did not constitute proof of willful and wanton conduct. Based on this reading, the court held that a violation of an internal safety rule could still constitute "some evidence" of

negligence, and a jury should be allowed to consider it along with other evidence in reaching its determination of negligence.

In *Hoffman*, Plaintiff was walking along a street-level train platform when he was knocked to the ground by a ticket agent. The ticket agent was in the process of helping a homeless man off of the ground when he stepped backward and into the Plaintiff.

At trial, over the objection of Defendant, the court allowed the Plaintiff to introduce evidence of an internal Metra internal safety rule which read: "Elevated Places, Stairs, Doors, and Elevators: The following requirements when walking on an elevated place, walking on stairs, using a door or riding elevators: Rule Number 1, when walking on engines, cars, scaffolds, or other elevated places, (A) look before you step in any direction."

The crux of Plaintiff's case was that the ticket agent violated this internal rule by not looking when he stepped backward and into the Plaintiff. The jury ultimately found the Defendant to be 50% at fault. Defendant appealed the verdict arguing that the trial court erred in allowing evidence of the internal safety rule as evidence of negligence. In reaching its decision that the trial court did not abuse its discretion in allowing evidence of the internal safety regulation, the court held that the evidence of the violation of the safety regulation was permissible as long as it was not the only evidence given to the jury. The appellate court decision does not cite the other evidence of negligence relied upon by Plaintiff.

The court also held that, even if the trial court had abused its discretion, admission of the evidence of violation of the internal safety rule did not warrant a new trial because it could not find that the admission affected of the outcome of the trial.

According to the court "[t]he issue here concerned whether it was negligent for a person to take a step back, as a homeless man stood up, without first looking backward. This is not rocket science or brain surgery or a matter upon which a jury might feel that the expertise contained in the industry rule was crucial or dispositive." At ¶ 50. As such, the court could not find that the introduction of the evidence of the internal safety rule affected the outcome reached by the jury.

Thinking Point:
For over twenty years, *Morton v. City of Chicago*, stood for the proposition that internal safety rules did not create a legal duty and did not constitute evidence of negligence, "let alone" willful and wanton conduct. Despite its insistence that its ruling is entirely consistent with *Morton*, the Appellate Court has now made internal safety rules fair game as evidence of duty and evidence of negligence.

Indiana Court of Appeals Holds that a Nurse Practitioner Could Testify With Regard to Medical Causation

In *Aillones v. Minton*, 77 N.E.3d 196 (Ind. Ct. App. 2017), the Indiana Court of Appeals held that a nurse practitioner was qualified to testify as an expert witness in a negligence action with regard to whether a driver's injuries were consistent with injuries from an automobile accident.

According to the Court of Appeals, in a negligence action, there was no blanket rule preventing a nurse from acting as an expert witness. In addition, because the nurse practitioner was licensed and board certified to practice as a nurse practitioner and had treated more than 100 patients who had been injured in automobile accidents, it was entirely permissible to allow her to testify as an expert witness.

The court drew support from provisions of the Indiana Administrative Code regarding the functions of nurse practitioners. Several provisions within the Indiana Administrative Code regarding nurse practitioners reference

the fact that it is anticipated that nurse practitioners will assess normal and abnormal findings obtained from the history, physical examination, and laboratory results for a patient. As such, while nurse practitioners do not possess the same level of training and education as a licensed medical doctor, they do have enough training and experience to assess causation.

The court made it clear that it drew a distinction between witnesses who are allowed to offer evidence regarding medical causation in medical malpractice actions versus claims in simple tort actions. In making this distinction, the court made it clear that its decision should not be interpreted as holding that nurse practitioners can offer expert testify in medical malpractice actions.

Thinking Point:
Aillones expands the potential pool of medical causation expert witnesses but that expansion applies only to simple tort actions. As noted in the *Totton* case (elsewhere in this newsletter), the pool of expert witnesses regarding causation in medical malpractice cases is still limited to qualified healthcare providers.

Illinois Appellate Court: Plaintiff Who Fails to Timely Disclose a Necessary Expert Allowed to Voluntarily Dismiss Original Action, Refile it, and Disclose the Expert in the Refiled Action

In *Freeman v. Crays*, 2018 IL App (2d) 170169, (January 26, 2018), the Second District Appellate Court ruled a Plaintiff who failed to timely disclose the appropriate expert to support her medical malpractice claim may seek to cure her mistake by voluntarily dismissing her lawsuit, refiling the lawsuit, and then disclosing the proper expert in the second lawsuit. The Court went so far as to state that allowing the disclosure of the proper expert in the second lawsuit would be proper even if the failure to do so in the original action was the result of poor lawyering, so long as the lawyer had otherwise been reasonably compliant with discovery orders entered in the first case.

In Plaintiff's original lawsuit for failure to diagnose a cardiac condition, a cardiologist was not disclosed as an expert witness on Plaintiff's behalf. Just prior to trial in the first case, the Defendant doctor moved to exclude Dr. Brown, Plaintiff's family practitioner, from offering any opinions as to the standard of care for a cardiologist or as to any treatment that a cardiologist would have recommended for Terrance. The court granted the motion, finding that Dr. Brown, as a family practitioner, was not qualified to testify as to causation without additional qualified testimony of a cardiologist because he was not a cardiologist and because each of his opinions as to a deviation of the standard of care by Defendant required testimony of a cardiologist.

The next day, Plaintiff moved to voluntarily dismiss her complaint without prejudice. Thereafter, she refiled her Complaint on March 22, 2016. When it was revealed that Plaintiff intended to disclose an expert witness in the field of cardiology, Defendant filed a Motion to Adopt the Discovery Orders and *in limine* rulings from the original case. This included a request that the trial court bar additional expert witness disclosures pursuant to Illinois Supreme Court Rule 219(e).

The trial court agreed with Defendant and barred the cardiologist. In support of its opinion, the court concluded that Plaintiff was attempting to cure the evidentiary gap created by the adverse rulings with regard to Dr. Brown and therefore the disclosure of the cardiologist was barred.

Thereafter, the Defendant doctor moved for summary judgment, arguing that the lack of any expert testimony on proximate cause rendered

Plaintiff unable to prove an essential element of her case. The court agreed and granted Defendant's Motion for Summary Judgment. The case was thereafter appealed.

On appeal, Plaintiff raised two issues: (1) Whether the trial court abused its discretion by barring Dr. Brown, her family practitioner expert, from offering any opinions regarding the proximate cause of Terrance's death; and (2) whether the trial court misapplied Rule 219(e) by barring her from disclosing an expert cardiologist in the refiled action.

With regard to the first issue, the court concluded that barring a family practitioner from offering expert testimony regarding the cause of Terrance's death was proper because such testimony was within the province of a cardiologist, not a family practitioner.

The court further with Plaintiff that she had essentially been a compliant litigant in the first litigation who simply failed to anticipate the trial court's ruling that Dr. Brown lacked the requisite knowledge to render opinions on the issue of proximate causation. According to the court, this was at worst a consequence of Plaintiff's poor legal judgment, not an abuse of the discovery process.

Therefore, the court held that the trial court abused its discretion by barring Plaintiff from offering expert opinion testimony in the refiled action.

Thinking Point:

Freeman sets a dangerous precedent because it provides a Plaintiff with an escape route should the Plaintiff disclose the wrong type of expert, even if expert discovery has been closed. Under the circumstances, the Plaintiff can simply voluntarily dismiss the original action, refile it, point to the original action where her improper expert was barred, and say Defendant cannot be surprised by his expert in the refiled action because the order barring the improper expert clarified what type of expert was necessary. This opinion provides yet another expansion of the interpretation of voluntary dismissals in Illinois that skew this rule in favor of Plaintiffs.

Firm News

BDL Leading Lawyers 2018

We are proud to announce Geoff Bryce, Storrs Downey, Rich Lenkov, Jeanne Hoffmann, Margery Newman, Werner Sabo, James Zahn, Brian Rosenblatt, Terry Kiwala, and James McConkey have been selected as Leading Lawyers for 2018. In addition, Michael Milstein has been selected as Emerging Lawyer for 2018.

Leading Lawyers are recommended by their peers to be among the top lawyers in their areas of practice. Less than 5% of all lawyers licensed in each state receive this distinction. Emerging Lawyers have been identified by their peers to be among the top lawyers age 40 or younger unless they have practiced for no more than 10 years. Less than 2% of all lawyers licensed in each state receive this distinction.

BDL Super Lawyers 2018

We are proud to announce Rich Lenkov, Margery Newman, Jeanmarie Calcagno, and Brian Rosenblatt have been selected as Super Lawyers for 2018. The Super Lawyers designation is given to no more than 5% of lawyers in Illinois.

In addition, Michael Milstein, Kirsten L. Kaiser Kus and Renée Day were selected to Rising Stars. Rising Stars is an exclusive list, recognizing no more than 2.5% of lawyers in Illinois.

BDL Announces New Income Members

We are proud to announce Michael Milstein and Kirsten Kaiser Kus have been elected as Income Members.

Michael Milstein (Chicago) joined the firm in 2011 and concentrates his practice in workers' compensation. For the last four years, Michael

was named a Rising Star by Super Lawyers and an Emerging Lawyer by Leading Lawyers. His clients include retailers, staffing agencies, construction-related firms, trucking companies, manufacturers and insurance companies. Kirsten Kaiser Kus (Schererville) joined the firm in 2014 and concentrates her practice in workers' compensation, general liability and criminal defense. This year, Kirsten was named a Rising Star by Super Lawyers. Kirsten represents a wide range of clients including construction based companies, manufacturers, retail establishments, governmental agencies, casinos and insurance companies.

Both Michael and Kirsten embody firm culture and values with a client-focused approach and commitment to their communities. We are thrilled to welcome Michael and Kirsten as Income Members.

Joe Eichberger Wins Summary Judgment for Water Park

In a case of first impression Joe Eichberger won summary judgment on a unique theory of liability pleaded by the plaintiff against a water park. Joe successfully argued before the Kane County Circuit Court that a water park is not a common carrier and is, therefore, not held to a higher standard of care for its patrons with regard to the operation of its rides. Instead, water park operators are responsible for exercising ordinary care toward patrons.

Upcoming Seminars

- On **2/23/18-2/24/18**, Jeanne Hoffmann and Geoff Bryce will attend the 36th Annual CAI Illinois Condo-HOA Conference & Expo at the Donald E. Stephens Convention Center in Rosemont, IL. Be sure to stop by our booth! For more information or to register, click here.
- On **4/18/18**, Storrs Downey will present at the Society of Chartered Property and Casualty Underwriters (CPCU) Monthly Meeting in Downers Grove, IL.

Recent Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics in various practice areas. If you would like a recording of any of our prior webinars, please email Marketing Director, Stuart Fisher at sfisher@bdlfirm.com.

Recent Seminars

- On **10/4/17** Cary Schwimmer presented, "Additional Leave as an Accommodation Under the ADA" at the Memphis Bar Association.
- On **12/13/17** Jeff Kehl presented, ""Punitive Damages in Illinois" at an the Illinois Defense Trial Council.
- On **12/28/17** Cary Schwimmer presented, "Firing Employees Who Take the Employer's Stuff to Build a Case" at the Memphis Bar Association.
- On **1/24/18**, Bryce Downey & Lenkov co-hosted "Forecast For 2018" with Willis Towers Watson. Robert Bramlette moderated the bankers' roundtable featuring leaders from Busey Bank, CIBC, West Suburban Bank and Cook County Department of Economic Development. The seminar also included presentations from Geoff Bryce, Jeanne Hoffmann and Margery Newman.

- On **1/30/18**, Storrs Downey moderated "Avoiding Claims of Race, Religion or National Origin Discrimination in the Current Political Climate" at the American Conference Institute: 26th National Conference on Employment Practices Liability Insurance.

- On **2/2/18**, Storrs Downey presented "Identifying, Investigating & Reducing Sexual Harassment In The Workplace" at the Illinois Manufacturers' Association's Small Manufacturers Council Meeting in Oak Brook, IL.

Contributors to the February 2018 General Liability Newsletter

The Bryce Downey & Lenkov attorneys who contributed to this newsletter were Storrs Downey, Jeff Kehl, Frank Rowland, Jim McConkey & Chase Gruszka.

Cutting Edge Legal Education

If You Would Like Us to Come In For A Free Seminar, Click Here Or Email Storrs Downey At sdowney@bdlfirm.com

Our attorneys regularly provide free seminars on a wide range of labor and employment law topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Among the national conference at which we've presented:

- 12th Annual Employment Practices Liability Insurance ExecuSummit
- National Association of Security Companies (NASCO)
- American Conference Institute (ACI)
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-conference
- National Workers' Compensation and Disability Conference® & Expo
- RIMS Annual Conference

Who We Are

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers committed to delivering services, success and satisfaction. We exceed clients' expectations everyday while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Schererville, Memphis and Atlanta, and attorneys licensed in multiple states, we are able to serve our clients' needs with a regional concentration while maintaining a national practice. Our attorneys represent small, mid-sized and Fortune 500 companies in all types of disputes. Many of our attorneys are trial bar certified by the federal court and have been named Leading Lawyers, AV Preeminent and were selected to Super Lawyers and Risings Stars lists. Our clients enjoy a handpicked team of attorneys supported by a world-class staff.

Our Practice Areas Include:

- Business Litigation
- Business Transactions & Counseling
- Corporate/LLC/Partnership Organization and Governance
- Construction
- Employment and Labor
- Counseling & Litigation
- Entertainment Law
- Insurance Coverage
- Insurance Litigation
- Intellectual Property
- Medical Malpractice
- Professional Liability
- Real Estate
- Transportation
- Workers' Compensation

Disclaimer:

The content of this newsletter has been prepared by Bryce Downey & Lenkov LLC for informational purposes. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. You should not act upon this information without seeking advice from a lawyer licensed in your own state. In considering prior results, please be aware that: (1) each matter is unique and (2) you should not rely on prior results to predict success or results in future matters, which will differ from other cases on the facts and in some cases on the law. Please do not send or disclose to our firm confidential information or sensitive materials without our consent.

Other Newsletters

Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Director Stuart Fisher at sfisher@bdlfirm.com.

General Liability

- Indiana Court Of Appeals Holds Children's Claims Are Not Time Barred As Derivative Claims In A Medical Malpractice Action
- Illinois Supreme Court Holds Six Person Jury Limitation Unconstitutional

Labor & Employment Law

- Medical Marijuana: Colorado Supreme Court Upholds Decision in Favor of Employers
- Seventh Circuit Finds FedEx Drivers Were Employees, Not Independent Contractors

Corporate & Construction

- Will Interest Rates Rise? Economic Slow Down? Time To Talk To Your Banker
- Parties May Be Entitled To A Lien Even If The Project Never Proceeds

Workers' Compensation

- Wage Differential May Not Necessarily Require Wage Loss
- Accident Date Trumps Hearing Date In Wage-Diff Award
- Collateral Source Rule Does Not Apply To Workers' Compensation Cases