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Wet Clothes after Slip and Fall in Store Was Insufficient to Create Genuine Issue as to Whether Liquid on Floor Caused Fall and Whether Store had Constructive Notice of a Dangerous Condition

Richardson v. Bond Drug Co., 901 N.E.2d 973 (Ill. App., 1st Dist., 2009).

The First District recently affirmed summary judgment in favor of the defendant, Bond Drug Company of Illinois, d/b/a Walgreens, in a slip and fall case. The plaintiff alleged that the defendant's employees were negligent by allowing the floor to become wet and slippery with an unknown liquid, failing to warn customers of the dangerous condition, failing to maintain a safe store, and creating visual diversions that prevented the plaintiff from observing the dangerous condition thereby causing him to slip and fall and sustain injuries. In deposition, the plaintiff admitted that he did not know why he fell or the cause of the fall but just assumed that the floor had been wet because his clothes were wet after he fell. The store manager admitted the plaintiff's knees were wet after the fall but also testified that it was snowing that day and the plaintiff's shoes could have been wet and slippery. The court noted that there was no clarity as to what caused the floor to be wet, and there was no evidence or testimony that there was an accumulation of liquid on the floor before he fell or evidence suggesting how long any liquid might have been on the floor that should have been discovered in the exercise of ordinary care. The court held that under these circumstances, liability could not attach to the defendant. Since the evidence and testimony in the case did not establish any degree of likelihood that the liquid was on the floor before the plaintiff's fall, the plaintiff failed to present a sufficient showing of a causal link between his injuries and the defendant's conduct. The court affirmed summary judgment because such speculation as to the cause of the plaintiff's fall did not create a genuine issue of material fact on that element of the cause of action.

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Civil Procedure

Public Act 095-1033, Attorneys May Now Issue Subpoenas

Public Act 095-1033 amends Section 2-1101 of the Code of Civil Procedure by allowing an attorney admitted to practice in the State of Illinois to issue subpoenas on behalf of the court for witnesses and to counties in a pending action. This pending legislation was reported in a previous Newsletter as House Bill 4119. This Bill was signed into law and made Public Act 095-1033 on February 19, 2009. This amendment will take effect on June 1, 2009.

Senate Bill 0184, Proposal for Pre-Judgment Interest

Senator William R. Haine introduced Senate Bill 0184 to the Senate on February 3, 2009. This Bill seeks to amend the Code of Civil Procedure by providing for pre-judgment interest in all actions at law and arbitration for monetary damages. This Bill provides that pre-judgment interest must be awarded from the date the defendant is given written notice of the claim for damages or the date the action or arbitration is filed, whichever is earlier, until the award or judgment is entered. Under this Bill, a defendant can avoid paying pre-judgment interest by making a written settlement offer any time after the defendant answers the complaint, but not later than 120 days after filing an answer. If the plaintiff does not accept that offer and the plaintiff's award or judgment against the defendant is less than or equal to that offer, no pre-judgment interest can be awarded against that defendant. This provision would not apply to local governmental units, schools, small claims actions or claims for punitive damages.

The status of this Bill can be tracked by clicking on the following link:

<http://www.ilga.gov/legislation/billstatus.asp?DocNum=0184&GAID=10&GA=96&DocTypeID=SB&LegID=40656&SessionID=76>

Senate Bill 1716, Proposed Elimination of Liability Limitation upon Death of a Defendant

Senator Don Harmon introduced Senate Bill 1716 to the Senate on February 19, 2009. This Bill seeks to amend 735 ILCS 5/13-209, which addresses the death of either a plaintiff or defendant. The Bill seeks to delete a provision limiting the plaintiff's recovery to proceeds of any liability insurance available to the estate in the event of the death of the defendant.

The status of this Bill can be tracked by clicking on the following link:

<http://www.ilga.gov/legislation/billstatus.asp?DocNum=1716&GAID=10&GA=96&DocTypeID=SB&LegID=44423&SessionID=76>

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Insurance

Tenant is not an "Insured" under Landlord's Liability Policy

Hacker v. Shelter Insurance Company, 902 N.E.2d 188 (Ill. App., 5th Dist., 2009).

The 5th District recently decided the issue of whether a landlord's liability insurance company has a duty to defend a tenant in a suit brought by a third party seeking

damages for injuries allegedly caused by the tenant's negligence. In this declaratory judgment action, the plaintiff rented an apartment from Truman Burk. Shelter Insurance Company issued an "Apartment Owners/Rental Dwelling Insurance Policy" to Burk. The policy stated that it would pay on behalf of the insured all sums that the insured became legally obligated to pay as damages as a result of bodily injury or property damage caused by an occurrence arising from the ownership, maintenance or use of the insured premises. The policy also defined "insured" as either the named insured, the named insured's spouse, any person acting as a real estate manager for the insured and any employee of the insured acting within the scope of his employment. Burk was the only named insured on the policy.

The plaintiff's parents came to visit and during that visit, her mother fell down the stairs of the apartment. The mother filed suit against Burk who then filed a third party complaint for contribution against the plaintiff/tenant. The plaintiff argued that she was an additional insured under the Shelter policy issued to Burk and tendered her defense to Shelter. Shelter declined to defend arguing that the plaintiff was not an insured under the policy terms. The trial court held that she was an insured and granted the plaintiff's motion for summary judgment, but the Illinois Appellate Court, 5th District reversed. In its discussion, the 5th District stated that although the policy covers claims for bodily injury that occur at the insured premises arising from use of the insured premises, the policy only provides coverage for the named insured or anyone who qualifies as an "insured" under the policy. Because the plaintiff was not a named insured and because she did not fit any definition of an "insured" under the policy, Shelter owed her no defense. The Court noted that the policy's definition of an "insured" did not include Burk's tenants.

Although the Plaintiff argued that she was an additional insured as a matter of law, the Court rejected her argument. The Court noted that it is routine practice for tenants to obtain their own renter's insurance policy to cover their liability losses to third parties. The Court further stated that "to hold that a tenant is an additional insured under her landlord's liability insurance as a matter of law would require owners of large multiunit leased structures to secure adequate liability insurance not only for themselves but for perhaps hundreds or thousands of tenants, depending upon the size of the building. The premium for that liability insurance coverage would likely be cost-prohibitive considering the magnitude of the potential risk covered by the policy." Therefore, the Court held that the tenant was not an additional insured and Shelter owed no duty to defend. Justice Donovan wrote a dissenting opinion.

Higher Aggregate Limit Applied where Insurer Failed to Prove Hypothermic Deaths Resulted from One Occurrence Rather than Separate Occurrences
Addison Ins. Co. v. Fay, --- N.E.2d ----, 2009 WL 153859 (Ill. 2009).

The Illinois Supreme Court recently reversed the 3rd District's holding that two boys' deaths constituted one occurrence for purposes of the property owner's liability

insurance policy. In this case, two young boys died after falling into an excavation pit and succumbing to hypothermia. The property owner's insurance company filed a declaratory judgment action against the estates of the two boys seeking a declaration that the boys' deaths constituted a single occurrence under the policy. The policy had a "General Aggregate Limit" of \$2 million and an "Each Occurrence" limit of \$1 million. The question was whether the estates were entitled to \$1 million or \$2 million.

In order to determine whether the incident constituted one or two occurrences under the policy, the Court stated that it must construe the policy by applying the facts of the case. The Court also looked to its opinion in *Nicor, Inc. v. Associated Electric & Gas Insurance Services, Ltd.*, 223 Ill.2d 407, 860 N.E.2d 280 (2006), where it held that the "cause theory", which requires a court to look at the cause or causes of the damage, represents the law in Illinois to determine the number of occurrences. The *Nicor* court further refined the theory by concluding "where each asserted loss is the result of a separate and intervening human act, whether negligent or intentional, or each act increased the insured's exposure to liability, Illinois law will deem each such loss to have arisen from a separate occurrence." However, in this case, the Court reasoned that focusing on the sole negligent omission of failing to secure the excavation pit would allow separate injuries occurring days or even weeks apart to be considered as one occurrence. This could leave purchasers of insurance, such as the property owner in this case, unprotected by their insurance policy and liable for any amount above the per occurrence limit. Therefore, the Court applied a "time and space" test, which would effectively limit what would otherwise potentially be an unlimited bundling of injuries into a single occurrence where, as here, there was one ongoing negligent omission. Under the time and space test and the facts of this case, the Court found that the evidence showed that the boys did not become trapped in the pit simultaneously. Further, investigators could not determine how closely in time the boys became trapped or how closely in time they died. Therefore, the insurance company could not meet its burden of proving that the boys' injuries and deaths were so closely linked in time and space that they should be deemed to be a single event. Consequently, the Court held that the deaths constituted two separate occurrences and the estates were entitled to the \$2 million dollar aggregate policy limit.

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Firm News

Partner Steve Mudge is Acknowledged as Leading Lawyer in Personal Injury Defense

Reed Armstrong partner Stephen C. Mudge has been selected as a member of the Leading Lawyers Network Advisory Board based upon his reputation, professional ethics, and knowledge in the areas of Personal Injury Defense as well as Class Action/Mass Tort Defense in Illinois as listed in the *Leading Lawyers Network Magazine*, January 2009.

Reed Armstrong Senior Partners Again Recognized by their Peers

For the second consecutive year, Reed Armstrong partners Steve Mudge and Marty Morrissey have been selected by their peers as Super Lawyers in the area of General Personal Injury Defense as listed in *Illinois Super Lawyers 2009*. *Super Lawyers* magazine (www.superlawyers.com) is published nationwide and designates those attorneys in each state that have received the highest recognition and professional achievement as acknowledged by their peers.

Reed Armstrong Associate Secures Dismissal in Wrongful Death Case

The Circuit Court of Fayette County, Illinois, recently dismissed a wrongful death action based upon a motion drafted and presented by Reed Armstrong Associate Stephen M. Szewczyk. The children of a certain family were babysitting a young child who exited the house without anyone's knowledge and walked into a pond located on adjacent property and drowned. The child's parents settled their wrongful death claim against the babysitting household for a significant sum. The parents also sued the owners of the pond for wrongful death. The pond owners argued that the settlement and release executed by the parents and the babysitting household applied equally to them because both households had acted jointly in the excavation and operation of the pond and such cooperative action created an association. The pond owners asserted that the settlement and release specifically applied to partnerships and associations and, therefore, applied to them and released them from liability.

Fifth District Affirms Setoff Granted to Reed Armstrong Client

Reed Armstrong associate, Tori L. Cox, successfully briefed, argued and defended an appeal by a wrongful death plaintiff who sought reversal of a setoff granted by the Madison County Circuit Court. In the case of *Edgar v. Medstar Ambulance Inc.*, plaintiff brought her wrongful death suit against BJC Home Medical Equipment on a theory of negligence and against Medstar on a theory of willful and wanton conduct. BJC settled for \$40,000 before trial. After trial, the jury awarded plaintiff \$60,000 against Medstar. Medstar then moved the court to setoff the verdict by the \$40,000 previously paid by BJC pursuant to the Joint Tortfeasor Contribution Act. In accordance with Supreme Court precedent in *Ziarko v. Soo Line R. R.*, 161 Ill. 2d 276 (1994), the Appellate Court, Fifth District affirmed in an unpublished Rule 23 order. The determinative fact was that plaintiff's allegations, proofs, and arguments regarding defendant's willful and wanton conduct were not based on intentional acts but, rather, recklessness.

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