Evidence and Practice Tips

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The Employer May Gamble: A Workers' Compensation Lien Waived After a Verdict Discharges the Employer's Contribution Liability

LaFever v. Kemlite Co., 1998 Ill. LEXIS 1925 (December 31, 1998)

With respect to this issue, the facts are straightforward. The plaintiff, an employee of Banner Western Disposal, a trash collection company, brought suit against a premises owner, Kemlite Company, for injuries sustained while working on Kemlite's premises. Kemlite filed a contribution claim against Banner, the plaintiff's employer. The jury awarded the plaintiff damages and found Banner liable for contribution. The verdict for the plaintiff was $1,122,261.21. The jury apportioned liability as follows: plaintiff, 5%; Kemlite, 75%; and Banner, 20%. After reduction for the plaintiff's comparative negligence, the circuit court entered judgment awarding plaintiff $1,066,148.15. Banner's worker's compensation lien was $222,267.02. Banner's liability for contribution on Kemlite's claim was $224,452.24.

Following the entry of judgment, Banner waived its workers' compensation lien by a motion. The Court then, over plaintiff's objection, dismissed Kemlite's third-party claim against Banner and thus reduced the judgment against Kemlite by the amount of the workers' compensation lien to $843,881.13.

In a case of first impression, the Supreme Court held that the employer may waive its workers' compensation lien at any time during the litigation, even after judgment in favor of the plaintiff and after judgment against the employer on the contribution claim. In so doing, the Supreme Court reversed the decision of the Appellate Court. While clearly the employer gambled on the outcome, the Supreme Court found no fault with the employer's tactics. The Court noted that practical difficulties would exist in any other holding. The Court reasoned that if an employer could no longer waive its lien after verdict, there was no point in the litigation where the employer's ability to waive its lien could be precluded.

Note also that there is no liability on the part of the employer/third-party defendant to pay the plaintiff's attorney 25% under these circumstances since the employer has waived its lien, and therefore, it has not been "reimbursed."

Standard of Contributory Negligence for Mentally Disturbed Person Who Commits Suicide

Hobart v. Shin, 1998 Ill. LEXIS 1914 (December 17, 1998)

The Supreme Court held that a decedent's contributory negligence may be raised as a defense in a wrongful death suit brought against a physician whose patient committed suicide while under mental health treatment.

The defendant, a family practice physician, was employed at a student health facility at the University of Illinois-Chicago. The plaintiff's decedent, a 27-year-old student at the University, sought treatment from him as a primary care physician. Over the course of several months, the defendant doctor treated the plaintiff's decedent for depression and anxiety and conferred with her treating psychiatrist. The plaintiff committed suicide by taking an overdose of prescription medication. On the visits to the defendant shortly before her suicide, plaintiff's decedent showed no signs of depression and no active or passive suicidal tendencies. Two

days before her suicide, the plaintiff's decedent became severely depressed, and her mother urged her to contact her doctors, but she refused because she did not want to be hospitalized again.

At trial, the defendant claimed that the plaintiff's decedent was contributorily negligent and offered IPI Civil 3d Nos. B10.03 and 10.02. These instructions were given by the Court and read as follows:

> It was the duty of the decedent, before and at the time of the occurrence, to use ordinary care for her own safety. A decedent is contributorily negligent if (1) she fails to use ordinary care for her own safety and (2) her failure to use such ordinary care is a proximate cause of the injury. See IPI Civil 3d No. B10.03.
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> When I used the words 'ordinary care,' I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide. See IPI Civil 3d No. 10.02.

The plaintiff contended that the jury should have been instructed that the plaintiff's decedent's contributory negligence should be viewed in light of her mental condition at the time of the occurrence and tendered the following instruction:

> It was the duty of the plaintiff's decedent before and at the time of the occurrence to use that degree of care that she was capable of exercising in light of her mental condition at the time of the occurrence. The plaintiff's decedent is contributorily negligent if (1) she failed to use that degree of care that she was capable of exercising in light of her mental condition at the time of the occurrence and (2) her failure to use such care was a proximate cause of her death.

The Supreme Court held that the standard IPI instructions were properly given. The Court reasoned that the IPI instructions included the phrase "under circumstances similar to those shown by the evidence" which allowed the jury to evaluate the decedent's contributory negligence, if any, based upon the particular circumstances of the case. The majority relied upon a California intermediate Appellate Court opinion in *De Martini v. Alexander Sanitarium, Inc.*, 192 Cal. App. 2d 442, 13 Cal. Rptr. 564 (1st Dist. 1961).

Justice Freeman authored a partial concurrence and partial dissent in which Justices Bilandic and McMorrow joined. The dissenting opinion reasoned that the California Court in *De Martini* approved the use of an instruction which told the jury that it should "visualize a person in a similar condition when ascertaining what acts or omissions would be negligent and what would not be." The dissent found some further support in an opinion of the New Jersey Supreme Court in *Cowan v. Doering*, 111 N.J. 451, 545 A.2d 159 (1988). In *Cowan*, the New Jersey Supreme Court reasoned that a mentally disturbed plaintiff was not capable of adhering to a reasonable person's standard of self-care. Therefore, the plaintiff should only be responsible for the consequences of conduct that is unreasonable in light of the plaintiff's capacity.

Necessity of Raising in a Post-Trial Motion Issues Concerning the Pre-Trial Entry of Summary Judgment as to Part of a Cause of Action in Order to Preserve that Issue for Review

Mohn v. Posegate, 1998 Ill. LEXIS 1912 (December 17, 1998)

The plaintiff filed a multi-count professional negligence action against his physician. The defendants obtained summary judgment as to some counts. The plaintiff moved to reconsider the grant of summary judgment as to those counts, and that motion was denied. The case proceeded to jury trial against one of the defendants and resulted in a verdict in favor of the defendant and against the plaintiff. The plaintiff's post-trial motion did not raise as error the pre-trial grant of summary judgment on those counts upon which judgment had been entered in favor of the defendant. The post-trial motion was denied in all respects. Plaintiff then

appealed and claimed on appeal that the trial court erred by granting the motion for summary judgment. Defendant argued that plaintiff had waived his argument by failing to raise it in the post-trial motion.

The Supreme Court held that a party need not raise in a post-trial motion any issue concerning the pre-trial entry of summary judgment as to part of a cause of action in order to preserve the issue for review. The Court saw no more reason to require the filing of a post-trial motion following the entry of summary judgment as to one or more issues in a case, prior to trial of the case upon the remaining undetermined issues, than there is to require the filing of a post-trial motion following an order of the Court granting a motion for directed verdict.

Open and Obvious Danger Doctrine is Not a *Per Se* Bar to Finding a Duty on the Part of a Landowner to Protect Against Injuries From Diving Into a Body of Water

Jackson v. TLC Associates, Inc., 1998 Ill. LEXIS 1924 (December 31, 1998)

The facts are not well developed in this opinion and are derived by the Court from the record on the defendant's motion for summary judgment.

The plaintiff, a 19-year-old adult experienced swimmer, was rendered a quadriplegic after he dove into the water of a man-made pond from the shoreline. The plaintiff had been to the public bathing beach on previous occasions and had seen an employee of the owner of the pond dive into the lake from the shoreline.

After the plaintiff died from the complications related to his injuries, the administrator of his estate brought suit upon the theory that the injuries were caused when the plaintiff's decedent hit his head on a submerged section of plastic pipe used by the owner of the pond to adjust the level of the water. At times, the pipe was in the water and at other times it was on the grass on the shoreline. A witness described the pipe as being in the water in the area where the plaintiff made his dive at the time of the dive.

The defendant moved for summary judgment arguing that there was no duty to prevent an adult from diving into the water and no duty to warn him of the risk attendant to making such a dive because the danger of diving into water is open and obvious. The trial court agreed and granted summary judgment in favor of the defendant. The Appellate Court affirmed. The Supreme Court reversed.

The Supreme Court reasoned that a genuine issue of fact existed as to how the plaintiff's decedent sustained his injuries. The Court noted that the plaintiff's decedent undoubtedly hit his head on something when he dove into the lake, and a dispute existed as to exactly what it was that he hit.

The Court found that while Illinois law still holds that persons who own, occupy or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. Obvious dangers include fire, height and bodies of water (*Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995); *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996), (the existence of an open and obvious danger was not *per se* a bar to finding that a defendant who owned, occupied or controlled land had a duty to exercise reasonable care.) The Supreme Court held that in assessing whether a duty is owed, the Court must still apply the traditional duty analysis to the particular facts of the case, and the Court should consider factors such as the likelihood of injury, the reasonable foreseeability of the injury, the magnitude of guarding against the injury, and the consequences of placing the burden upon the defendant.

This decision, written without dissent, is difficult to square with the Court's decisions in *Mt. Zion State Bank & Trust* and *Bucheleres*. In *Bucheleres*, the plaintiff was injured when diving at a Lake Michigan beach, and the Court found no duty to warn of the open and obvious danger. In *Mt. Zion State Bank & Trust*, the Court held that there was no duty on the part of a landowner to protect against or warn of the obvious danger of drowning in a swimming pool.

Supreme Court Formally Adopts the "Deliberate Encounter" Exception to the Open and Obvious Danger Doctrine

LaFever v. Kemlite Co., 1998 Ill. LEXIS 1925 (December 31, 1998)

Although a premises owner is not ordinarily liable for injuries caused by an open and obvious hazard, the Supreme Court held that a "deliberate encounter" exception applies such that a duty exists on the part of the possessor of land when the possessor "has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Restatement (Second) of Torts §343A, Comment *f*, at 220 (1965).

The opinion in *LaFever* was filed on the same date, December 31, 1998, as the opinion in *Jackson*, discussed above. Considered together, these two opinions show the continuing confused state of the law of premises liability concerning "open and obvious" hazards. The courts continue to struggle in an attempt to fashion clearly defined and predictable rules for the guidance of the public and counsel in making determinations about the extent of the duty owed by property owners.

The plaintiff, an employee of a trash collection contractor, slipped and hurt his back while walking on refuse. The plaintiff knew that the refuse was slippery from prior encounters with it. The evidence at trial indicated that the premises owner also was aware that the refuse was slippery. The premises owner argued that the condition was open and obvious.

The majority, in reliance upon Comment *f* to §343A of the Restatement found that since the premises owner could have reasonably anticipated the plaintiff's deliberate encounter with the dangerous condition (since he was required to encounter it in the course of his employment, and therefore, had an "economic compulsion" to do so), that a traditional duty analysis was warranted despite the open and obvious nature of the danger. The Court then found it easy to decide that the likelihood of the plaintiff's injury and the slight burden on the premises owner to guard against it were factors that, on balance, supported the imposition of a duty upon the premises owner.

About the Author

Stephen J. Heine is a partner in the Peoria firm of *Heyl, Royster, Voelker & Allen*. He has tried cases in the areas of construction, first party property claims, railroad, products liability, professional liability, trucking and automobile. Mr. Heine received his B.S. from Illinois State University in 1978 and his J.D. from Southern Illinois University in 1981. He is a member of several organizations, including the IDC, DRI, National Association of Railroad Trial Counsel, Illinois Appellate Lawyers Association and Peoria County, Illinois State and American Bar Associations. Mr. Heine is also a past Editor in Chief of the *IDC Quarterly*.