Downey & Lenkov LLC

General Liability Newsletter

October 2024

Illinois Retailer not Liable for Supernatural Circumstances

The United States District Court for the Northern District of Illinois, Eastern Division affirmed federal precedent regarding the lack of liability to a Plaintiff who is unable to satisfy their burden of proof on causation in *Dotson v. Menard, Inc.*, 2024 U.S. Dist. LEXIS 141504.

In *Dotson*, Plaintiff Valerie Dotson was walking down an aisle of Menard's retail store in Melrose Park, Illinois when, seemingly out of nowhere, two tires flew off a nearby shelf and struck both of Dotson's feet causing injuries. The tires neither rolled nor bounced before contacting her. Plaintiff did not see the tires until the moment they struck her. Plaintiff likened the incident to the horror film, The Exorcist, and felt that the tires waited for her to walk by to shoot off the shelf.

Defendant's employee Ed Robinson was walking about ten to fifteen feet behind Plaintiff at the time of the incident. While Robinson did not see the tires hit Plaintiff, he described seeing a sudden "flash of motion," followed by a boom, and he then observed the tires wobbling on the ground as they came to a rest. During the six years he had worked at Defendant's store, Robinson had not seen or heard of a tire shooting off the shelf. Neither Robinson nor Plaintiff saw anybody near the tire shelf at the time of the incident, which was not captured by any of Defendant's security cameras.

U.S. District Court noted that even though how the tires shot off the shelves was unusual, Plaintiff was a customer, and it was reasonably foreseeable to Defendant that its customers could be injured by merchandise falling off store shelves. There was no doubt that Defendant owed a duty to protect its customers from such an occurrence. The court observed that the problem of the foreseeable injury resulting from unforeseen means speaks to proximate cause.

Proximate cause incorporates "two distinct requirements: cause in fact and legal cause." *Abrams v. City of Chicago,* 211 Ill. 2d 251 (Ill. 2004). "A defendant's conduct is a 'cause in fact' of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury." Id. at 675. That will be the case where, "absent [the defendant's] conduct, the injury would not have occurred." Id. On the other hand, "legal cause" entails an assessment of foreseeability; the question "is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct." *Id.* It is the plaintiff's burden to establish proximate cause with evidence demonstrating "that the defendant's alleged negligence caused the injuries for which the plaintiff seeks to recover." *Rahic v. Satellite Air-Land Motor Serv., Inc.*, 2014 IL App (1st) 132899.

The court indicated that, as described by Plaintiff, how she was struck by the two tires seemed to defy the laws of physics. This posed a problem for Plaintiff because she was tasked with coming forward with evidence from which a reasonable jury could find that Defendant's negligence was a cause-in-fact of this highly unusual occurrence. See, e.g., ***Aalbers v. LaSalle Hotel Props.***, 2022 IL App (1st) 210494 ("[T]he plaintiff must establish with reasonable certainty that the defendant's acts or omissions caused the injury.") While "[t]he plaintiff may establish proximate cause via the presentation of circumstantial, rather than direct, evidence[,] a fact cannot be established through [such] evidence unless the circumstances are so related to each other that it is the only probable, and not merely possible, conclusion that may be drawn." *Id.*

To show that Defendant's negligence caused her injury, Plaintiff offered evidence that she claimed revealed that the tire shelf was in disarray and not displayed or arranged in accordance with Menard's policies. As an initial matter, the court noted that had Defendant's display practices been the cause of the tires striking Plaintiff, one would have expected the tires to have toppled off the shelf as opposed to shooting off the shelf. Even accepting that Defendant was negligent in the manner by which it displayed the tires on the shelf, the court found that Plaintiff still lacked evidence showing that such conduct was the probable, as opposed to the possible, cause of her injury. See, e.g., *Richardson v. Bond Drug Co. of Ill.*, 387 Ill. App. 3d 881, (Ill. App. Ct. 2009) ("When attempting to prove causation, a plaintiff must show circumstances that justify an inference of probability as opposed to a mere possibility.").

The court, however, found that Plaintiff could only speculate that there was a connection between the tires shooting off the shelf and the method by which they were displayed, which did not suffice to create a genuine issue of fact. *Berke v. Manilow*, 2016 IL App (1st) 150397 ("Liability against a defendant cannot be predicated on speculation, surmise, or conjecture."); see also *Austin v. Walgreen Co.*, 885 F.3d 1085, 1089 (7th Cir. 2018) ("Speculation does not defeat summary judgment.").

The court noted that it was equally possible that the tires shot off the shelf due to some defect attributable to the manufacturer. See, e.g., *Richardson*, 901 N.E.2d at 977 ("The existence of one fact cannot be inferred when a contrary fact can be inferred with equal certainty from the same set of facts.").

Finally, the court observed that, to the extent that Defendant's display practices were the but-for cause of Plaintiff's injuries, she still could not establish that it was foreseeable to Defendant that its conduct would cause the tires to shoot off the shelf. Plaintiff did not contend that Defendant should have known that the tires it displayed were at risk of autonomously propelling themselves forward. Moreover, Robinson testified that, in his six years of working at Defendant's store, he was not aware of any other incident where tires shot off the shelves. There was simply no evidence suggesting that Defendant should have foreseen that its stocking practices could have resulted in this extremely unusual accident.

In short, the court concluded that Plaintiff failed to come forward with sufficient evidence to create an issue of fact as to Defendant's responsibility for the tires flying off the shelf. Since Plaintiff failed to meet her burden of showing that Defendant's negligence proximately caused her injury, Defendant was entitled to summary judgment.

Construction Negligence in Illinois: Control Necessary to Establish A General Contractor's Duty of Care for its Subcontractor's Acts

The Illinois Appellate Court of the Second District recently found in favor of a general contractor after a subcontractor's employee was injured while performing work at a job site, *Neisendorf v. Abbey Paving & Sealcoating Co., Inc.*, 2024 IL App (2d) 230209. Plaintiff sued a general contractor alleging premises liability and negligence arising from the general contractor's control of the McHenry County Government Center during storm sewer work involving plaintiff's employer. Ultimately, the Court affirmed Kane County trial court's granting of summary judgment to the general contractor, reasoning that the general contractor did not retain the required amount of control over the "operative" details of plaintiff's employer's work, nor did it have notice of the subject dangerous condition.

The court analyzed plaintiff's claim under Section 414 of the Restatement (Second) of Torts, which applies to claims of construction negligence and dictates the "retained control exception" to the general rules of agency relationships with independent contractors. The court provided that the "retained control exception" operates under the reasoning that where a general contractor retains control over the "operative details" of the work of a subcontractor (or its employees), it should exercise that control with reasonable care. Whether a general contractor has retained sufficient control of the work is a fact-specific inquiry that starts with the operative contracts between any relevant parties.

In other words, general contractors may become vicariously liable for a subcontractor's negligence if the general contractor retains control over the operative details of the work. Alternatively, the general contractor may still be directly liable for injuries, even without retaining operative control, if the general contractor has retained some form of supervisory control of the job site. This direct liability must arise from more than a general contractor's right to inspect work, order changes to specifications, and ensure safety precautions are observed. It is only where the general contractor retained control over the "incidental aspects" of the subcontractor's work that it may be directly liable for its supervisory efforts.

Applying these considerations to plaintiff's lawsuit, the court's analysis was frustrated by the lack of a written contract between the general contractor and plaintiff's employer. The general contractor's contract with McHenry County stated that the general contractor was "solely responsible for and have control over" the means, methods, sequences, procedures and coordination of the work. While the contract also stated that the general contractor was responsible for supervision of safety programs and "shall provide reasonable protection to prevent" injuries to individuals on site, the court observed that the general contractor was not required to designate a safety director or take any certain safety procedures by the contract with McHenry County.

Those findings led the court to conclude that the control retained by the *general* contractor was the type of general control granted under the standard construction contract and did not create any right for the general contractor to dictate the operative details of plaintiff's employer's work. Moreover, the court provided that even where the general contractor has the right to order work stoppages, such is not sufficient without further control of how the work is performed. The court reasoned that creating such a duty would operate to penalize a general contractor's efforts to promote safety. Thus, Illinois courts will look for a detailed safety plan that affects the subcontractors' means and methods as proof of retained control.

The *Neisendorf* decision reminds us of the fact-specific, high bar to establish a general contractor's liability for general job-site safety.

Wisconsin Court Of Appeals Rules That Homeowners are Not Third-Party Beneficiaries of Contracts Between General Contractors and Subcontractors

In *Brekken v. Hegland*, (Wisconsin Circuit court no. 2020cv104), the court held that a homeowner who claimed damages relating to work completed by a subcontractor cannot allege breach of contract given a lack of privity. Brekken, the homeowner, retained a general contractor (Gordon) who retained Hegland as a subcontractor. Over the course of the construction, there were several instances in which Hegland performed substandard work. Hegland provided the framing and carpentry at the home. Brekken sued Hegland for its failure to complete the work in accordance with Hegland's agreement to have all "change orders" agreed by both Brekken and Gordon, as general contractor.

In a detailed opinion, the Wisconsin Court of Appeals held that although the home was being built for Brekken to live in and that Hegland was retained by a general contractor hired by Brekken, Brekken could not sue Hegland directly for damages related to the work that Hegland did on the home. The state of Wisconsin had not previously considered whether a homeowner, in this circumstance, could be considered a third-party beneficiary of the contract between the general contractor and a subcontractor. Although the home was being built for Brekken, the court held that Brekken was not an intended beneficiary of the contract between the general contractor and the subcontractor, as evidenced by the fact that Brekken did not pay Hegland directly. The court also held that there was no implied contract between the homeowner and Hegland and that additional writings outside of the written contract between the general contractor and subcontractor constituted amendments to that contract, thereby creating a contractual relationship between Brekken and Hegland.

As a result, although it may seem intuitive that a homeowner in Wisconsin would be a third-party beneficiary of a contract between a homebuilder general contractor and a subcontractor, who provides services and materials in building that home unless there is a specific contractual relationship between a homeowner and the subcontractor, the homeowner will not be able to sue the subcontractor for damages related to that work.

Production and Inspection of Cell Phones During Discovery

The Indiana Supreme Court heard oral arguments in June 2024 on a case that will have implications for the production and inspection of cell phones during discovery in civil cases. *Jennings v. Smiley,* 24S-CT-186, is a run-of-the-mill motor vehicle accident case in which Jennings (Plaintiff-Appellant) sought to procure and inspect a forensic copy of Smiley's (Defendant-Appellee) cell phone to prove they were engaged in distracted driving, and therefore negligent. The trial court denied the request after previously granting it, largely due to privacy concerns and the search's intrusive nature relative to the case's needs. The jury returned with a defense verdict, assigning Jennings 90% fault. After the Court of Appeals affirmed the trial court, the Indiana Supreme Court granted transfer and requested oral arguments.

At oral arguments, the Indiana Supreme Court appeared poised to adopt a new rule by which the inspection of physical cell phones and their forensic copies may be accomplished during discovery; signaling that the existing rules of discovery are likely inadequate to weigh the privacy concerns against the needs of the case and/or the nature of any request.

While the Court was skeptical of the framework proposed by Jennings to address this issue, it appeared to have been contemplated by Texas courts in recent decisions on similar issues. The Court's main concern with such requests was that either party could use the existing discovery rules as moving targets to either justify increasingly intrusive searches or to foreclose reasonable requests for production because prior searches turned up unfavorable evidence.

Ultimately, the Court appeared to view the Appellant's request to search the Appellee's phone as reasonable due to its limited nature. It was, however, unsatisfied with either party's responses as to which privacy interests are implicated by discovery requests for the inspection of cell phones and what considerations must be given to those interests to prevent overly intrusive inspections. As such, any new rule will likely be limited to requests for physical inspections of phones--rather than talk, text, and even data records--and address when legitimate privacy interests arise and how they might be protected while respecting the discretionary role of trial courts in the discovery process.

General Arbitration Clauses Apply Broadly, Even to Different Areas of Law

In *Mogan v. Kellermeyer Godfryt Hart*, 2024 IL App (1st) 232226-U, the Illinois Appellate Court held that general arbitration agreements are broadly applicable, even to claims in different areas of law. In this case, Defendants, an architecture firm, and its employees entered into a building restoration contract with a condominium association to repair the condominium's exterior. The contract contained a general arbitration provision compelling arbitration for "any claim... arising out of or related to this agreement...."

Plaintiff filed a shareholder's derivative suit on behalf of the association's ownership claiming damages arising out of a $6.1 million special assessment after allegedly unnecessary repairs. Defendants moved to compel arbitration and dismiss or stay legal proceedings. The circuit court granted Defendants' motion.

Plaintiff appealed, arguing 1) there was no valid arbitration contract; 2) if there was, the contract was unconscionable; and 3) the issues were outside the scope of arbitration. The appellate court easily decided that an agreement existed and was not substantively or procedurally unconscionable. This was in large part because Plaintiff filed a derivative suit on behalf of the Association, not in his personal capacity, and there was no evidence that arbitration was prohibitively expensive or otherwise unconscionable for the Association.

The bulk of the opinion focused on whether a general arbitration clause bound such diverse claims as breach of fiduciary duty, professional negligence, negligent misrepresentation, civil conspiracy, and unjust enrichment. The Court clarified that these "generic" or "general" arbitration clauses should be construed broadly, considering the context of the contract. Any dispute that arguably arises under the contract can and should be bound by these general clauses. Under the contract at issue, Defendants agreed to contract with various parties to facilitate the repair and restoration of the condominium building.

The Court held that all of Plaintiff's claims (breach of the architectural standard of care, improper pay, misrepresentation of the necessity of repair, unnecessary repair) arose out of or related to this work. Although Plaintiff argued the claims were outside the scope of the arbitration provision because they were tort rather than contract claims, this distinction was not dispositive. Even though the claims were in a different area of law, they still related to services performed under the contract and were therefore within the scope of the contract's general arbitration provision.

Therefore, for general arbitration clauses, the primary inquiry is whether the claims arise out of and are "significantly related" to the contract. If the party seeking arbitration can meet this low bar, the case can appropriately be resolved through arbitration.

Firm **News**

Jessica Jackler Named Income Member

Since joining as an associate, Jessica has demonstrated exceptional dedication and expertise in the defenses and evaluation of employment claims and various issues facing employers, consistently providing clients with cost-effective and practical strategies to mitigate employment litigation risks.

Her work in drafting employment handbooks, policies, and agreements, along with her guidance in personnel management and compliance, has been invaluable. Beyond her professional accomplishments, Jessica enjoys spending time with her family, cooking, and traveling.

Jessica embodies firm culture, values and commitment to securing the best results for our clients.
Please join us in congratulating Jessica on a well-deserved advancement!

Kirsten Kaiser Kus & Werner Sabo Have Been Recognized in the 2025 Edition of The Best Lawyers in America

We are pleased to announce that Capital Member Kirsten Kaiser Kus and Of Counsel Werner Sabo have been recognized in the 2025 edition of The Best Lawyers in America®.

Kirsten has received this accolade for her work in Workers' Compensation Law –Employers.

Werner has received this accolade for his work in Construction Law and Litigation.

The Best Lawyers in America® recognizes individual lawyers with the highest overall feedback from their peers for a specific practice area and geographic region. The methodology is designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues.

Please join us in congratulating Kirsten & Werner!

Welcome to the Team

Please join us in welcoming our new Of Counsel Jennifer Murphy and Associate Jacquelyn Pearce.

With over 30 years of experience, Jennifer specializes in labor and employment law. Her extensive background in employment and commercial litigation includes providing advice and representing employers in various forums such as federal and state courts, the EEOC, the Illinois Department of Human Rights, the Illinois Human Rights Commission, and the United States and Illinois Departments of Labor.

Jacquelyn specializes in insurance defense litigation focusing on defending premises liability, construction, transportation and auto claims and employment matters. Jacquelyn is a determined and insightful litigator who has a keen ear for the concerns and needs of her clients, empowering them to make fully informed decisions regarding direction and strategy.

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

Downey & Lenkov is proud to participate in USLI's October Together—Stronger Together Silent Auction benefiting Breastcancer.org.

October Together is a month of fundraisers and events where all proceeds benefit Breastcancer.org, a non-profit organization that helps women and their families by providing expert medical information about breast health and breast cancer, as well as peer support through their large online community.

The silent auction features a variety of items donated by companies. This year, Downey & Lenkov donated "Get Cooking - Italian theme".

Downey & Lenkov Tee Up Support as Proud Sponsors of Multiple Golf Outings

Downey & Lenkov proudly sponsored a hole for Kids' Chance of Indiana, a fundraiser dedicated to empowering the children of Indiana workers who have faced serious or fatal injuries in work-related accidents by providing them with essential college and vocational scholarships.

Downey & Lenkov sponsored a foursome at La Rabida's 30th Annual Golf Classic. La Rabida Children's Hospital treats children with chronic or complex needs. More than 250 golfers hit the links to support their patients and families. Capital Member Jeanne Hoffman and Special Counsel Bob Bramlette were both in attendance.

Downey & Lenkov proudly sponsored NIU College of Law's 19th Annual Golf Outing at River Heights Golf Course in DeKalb. Proceeds from the outing will be used for scholarships and other related alumni programs.

Downey & Lenkov was proud to sponsor a hole at the annual Valparaiso Pop Warner Golf Outing. Funds from this outing are used to make sure the football and cheer athletes have safe equipment and also provides financial registration assistance to those athletes in need as every child deserves an opportunity to play sports.

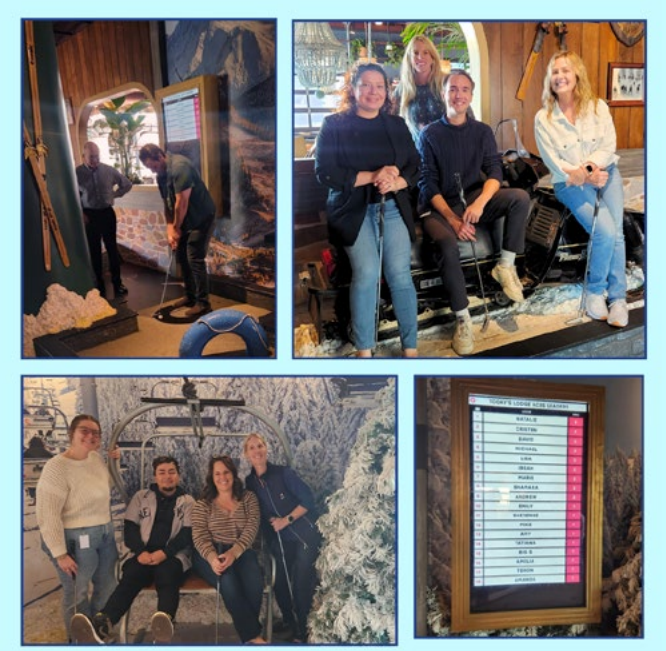
Logan March Passes the Bar!

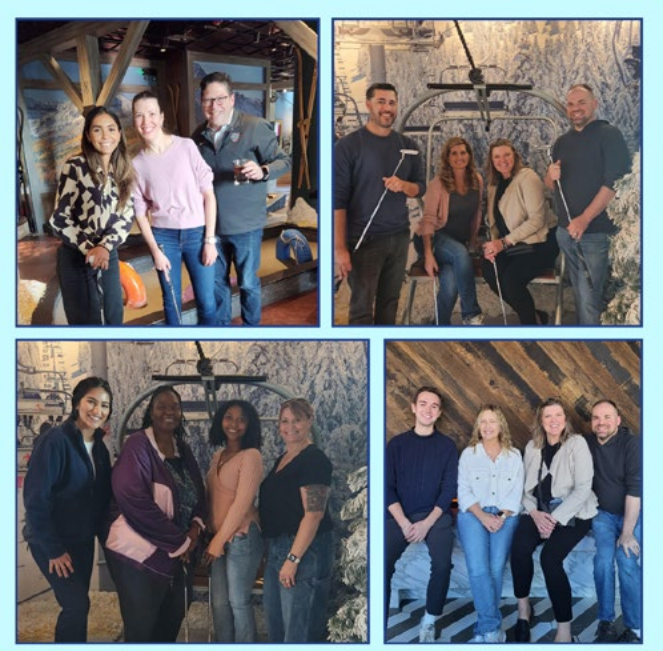
Congratulations Logan March on passing the Illinois Bar exam!

Logan will join the firm as an associate upon his admission to the Illinois Bar in early November.

Downey & Lenkov Fall Outing

Our team took a break from the office for a fun-filled outing at Puttery Chicago. Thanks to everyone who joined in on the fun!





Cutting Edge Continuing Legal Education

If you would like us to come to you for a free seminar, Click here or email Storrs Downey or Jeff Kehl.

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:

- Illinois Employer Liability in Personal Injury Cases: Kotecki Doctrine and Insurance Coverage for Such Claims
- American Conference Institute's National Conference on Employment Practices Liability Insurance
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-Conference
- Employment Practices Liability Insurance ExecuSummit
- National Workers' Compensation and Disability Conference & Expo
- National Workers' Compensation & Disability Conference
- RIMS Annual Conference

Management & Professional Liability Alliance™

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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/.

Newsletter **Contributors**

Jeff Kehl, Christopher Puckelwartz, Ryan Danhey, Frank Swanson, Matthew Hobson and Logan March contributed to this newsletter.

View more information on our **General Liability practice.**
Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Construction Law
- Entertainment Law
- Healthcare Law
- Insurance Law
- Intellectual Property
- Labor & Employment Law
- Products Liability
- Professional Liability
- Real Estate
- Workers' Compensation

Who We Are

Downey & Lenkov LLC is a full-service law firm with offices in Illinois and Indiana. Our expertise spans across several practice areas, providing transactional, regulatory and business solutions for clients across the nation. The firm's continued growth is a result of an aggressive, resultsoriented approach. Unlike larger law firms however, we do not face massive overhead and are able to charge more reasonable rates that both small and larger employers can more readily afford.

We evolve with our clients, representing Fortune 500 and small companies alike in all types of disputes. Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent.

Offices located in:

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

Downey & Lenkov LLC