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Illinois Supreme Court holds Looking Elsewhere is Not a Distraction under the Distraction Exception to the Open and Obvious Condition Rule

by Cecil E. Porter, III
Litchfield Cavo LLP, Chicago

In a big win for property owners throughout Illinois, the Illinois Supreme Court, in *Bruns v. City of Centralia*, 2014 IL 116998, held that looking elsewhere is not a distraction under the distraction exception to the open and obvious condition rule. The *Bruns* decision is a well-reasoned decision that provides two excellent results for Illinois property owners. First, it narrows the instances in which the "distraction exception" can be applied. And, second, the decision further clarifies that, for the distraction exception to apply, the property owners must create the distraction, and that self-made distractions are not actionable.

Affirming the judgment of the trial court granting summary judgment to the City of Centralia, the Illinois Supreme Court considered whether the City of Centralia was liable for injuries plaintiff sustained after tripping and falling on an uneven sidewalk. *Bruns v. City of Centralia* 2014 IL 4638864, ¶ 37. The open and obvious rule protects owners and possessors of land against claims that result from potentially dangerous conditions that are "open and obvious." *Bruns*, 2014 IL 116998, ¶ 20. The Restatement (Second) of Torts defines "Obvious" as meaning "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence and judgment." *Id.* ¶ 16. Examples of open and obvious conditions include: fire, height and bodies of water, sidewalk defects, parking lot holes, and power lines. *Id.* ¶ 17. Illinois recognizes two exceptions to the open and obvious condition rule. *Id.* ¶ 20. The first exception—which is known as the "distraction exception"—applies "where the possessor [of land] has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." *Id.* ¶ 20. The second exception, which is known as the "deliberate encounter" exception, applies where "the possessor of land 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 advantage of doing so would outweigh the apparent risk." *Id.* ¶ 20.

In *Bruns*, the plaintiff drove to an eye clinic for a scheduled appointment. *Id.* ¶ 4. Plaintiff had been to this eye clinic at least nine times before in the three months prior to this appointment. Plaintiff, as she had done for her other appointments, chose to park her car on the street in front of the clinic instead of using the clinic's parking lot. Plaintiff then stubbed her toe on a crack in the sidewalk, fell and injured her arm, leg and knee while walking to the clinic entrance. Plaintiff testified she was looking towards the clinic door and steps when she fell. Plaintiff also testified she had noticed

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On the inside

the sidewalk crack each time she went to the clinic and also noticed it on the date she fell. The parties agreed that the crack had been in the sidewalk for several years and had been caused by roots growing from a nearby tree. *Id.* ¶ 5. In fact, the City of Centralia had been contacted at least twice, by clinic employees, about the sidewalk crack. The clinic had even offered to remove the tree at its own expense. The City of Centralia refused to have the tree removed because the tree was 100 years old and considered "historically significant." Plaintiff sued the City of Centralia under various theories of negligence for not maintaining the sidewalk and allowing the sidewalk to remain in a dangerous condition. The City of Centralia argued it was not liable to Plaintiff since the sidewalk crack was an open and obvious condition. *Id.* ¶ 6. Plaintiff agreed that the sidewalk crack was open and obvious, but argued that the distraction exception applied which would allow her to recover against the city. *Id.* ¶ 7. Plaintiff claimed that she was distracted because she was looking up at the clinic door and steps. The trial court granted summary judgment in favor of the City of Centralia finding that "the mere existence of an entrance, and/or steps leading up to it, would provide a universal distraction exception to the open and obvious doctrine." *Id.* ¶ 8. The appellate court reversed concluding that it was reasonably foreseeable that an elderly person (plaintiff was 79 years old at the time of the accident) walking to an eye clinic may be focused on the pathway and steps to the clinic and not the ground underfoot. *Id.* ¶ 9.

The trial court granted summary judgment in favor of the City of Centralia finding that "the mere existence of an entrance, and/or steps leading up to it, would provide a universal distraction exception to the open and obvious doctrine."

Reversing the Fifth District, the Illinois Supreme Court held that, for the distraction exception to apply to the open and obvious condition rule, there must be evidence that the plaintiff was actually distracted. Here, the only evidence Plaintiff was distracted was Plaintiff's testimony that she was looking at the door and the steps of the clinic instead of the crack in the sidewalk. *Id.* ¶ 22. The court noted that, in other cases where the distraction exception had been applied, some evidence existed that something else was present that prevented the plaintiff from appreciating what otherwise would have been an open and obvious risk. *Id.* ¶ 28. Courts had applied the distraction exception when there was evidence showing something was blocking the plaintiff's view, the plaintiff was looking in a different direction because of safety reasons, or the plaintiff was focused on carrying something for the defendants. *Id.* ¶ 24-29. The court noted that, in each case where the distraction exception had been applied, the distraction was reasonably foreseeable to the defendant. *Id.* ¶ 29. Here, the Plaintiff conceded that the only distraction was that she was looking elsewhere and not at the ground. The court found that the distraction of looking elsewhere was a self-made distraction. There was nothing the City of Centralia did that caused the Plaintiff to be focused on the clinic door and steps instead of the sidewalk crack. *Id.* ¶ 31.

The court, after finding that the distraction exception did not apply to the open and obvious condition rule, continued with its duty factor analysis and found Plaintiff's fall was not reasonably foreseeable because the City of Centralia was not ordinarily required to foresee injuries from open and obvious conditions. *Id.* ¶ 35-36. It further found the second duty factor, the likelihood of injury, should be given little weight because the Plaintiff, having encountered a potentially dangerous condition, should have appreciated and avoided the risk. The court further found that—for the third and fourth duty factors, which are: (a) the magnitude of guarding against the injury and (b) the consequences of placing that burden on the defendant—the consequences of imposing a burden of repairing

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sidewalks on the City of Centralia was great because there were miles of sidewalk to maintain. *Id.* ¶ 35-37. For these reasons, the court reversed the appellate court and affirmed the trial court's judgment granting summary judgment in favor of the City of Centralia. *Id.* ¶ 37.

The Illinois Supreme Court's decision in *Bruns* will be useful in defending against negligence and premises liability claims where the alleged property defect is open and obvious and the distraction is self-made. Moreover, lawyers should seek to develop evidence that the plaintiff should have avoided the condition that caused the accidental injuries, and that the defendant property owner did not cause or create the distraction which caused the plaintiff to not avoid the open and obvious condition.

Recent Trends in Mass Toxic Torts

by Erica S. Longfield
Swanson, Martin & Bell, LLP, Chicago

Introduction

A recent study performed by the U.S. Chamber of Commerce, Institute for Legal Reform (ILR), found that nearly 100 U.S. Manufacturers in the past four decades went out of business due to mass tort litigation. Asbestos litigation alone is believed to have caused over 70 companies, including at least five Illinois-based corporations, to file for bankruptcy. Mealey's, *Asbestos Bankruptcy Report, Where Are They Now, Part Seven: An Update on Developments in Asbestos-Related Bankruptcy Cases*, July, 2014, at 19-22.

It is not shocking to hear of jury verdict awards in these cases ranging in the tens of millions of dollars for ill or deceased claimants, nor is it surprising to learn that companies are spending millions of dollars settling cases and/or in defending against these lawsuits. The projected total cost of asbestos litigation, including future claims, is estimated to reach over $260 billion. Rand Institute for Civil Justice, *Asbestos Litigation Costs and Compensation,* 2002, at 77.

Over the years, mass toxic tort litigation has grown more ubiquitous due to media and advertising, but the media focuses less time covering the destruction these lawsuits cause American businesses. Are more companies doomed to follow the footsteps of fallen bankrupt companies ahead of them, or have the tides started to turn for defendants in mass toxic tort litigation?

Asbestos Litigation Trends on a Local Level

According to the ILR, Illinois has one of the worst lawsuit climates in the country, ranking at 46th out of 50 states. Institute for Legal Reform, *2012 State Liability Systems Survey, Lawsuit Climate, Ranking the States,* 2012, at 7. As rated by the ILR, the state is also home to two of the least fair and reasonable legal climates in the country—Cook and Madison Counties. *2012 Sate. Liability Syst. Survey,* at 9.

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Madison County, Illinois is often colloquially described as a "judicial hellhole". American Tort Reform Association, *Bringing Justice to Judicial Hellholes,* 2002, at 3. It accounts for more than 25 percent of the nation's asbestos lawsuits but is only comprised of .09 percent of the nation's population. Lisa A. Rickard, *Denial Can't Mask Illinois' Poor Lawsuit Climate*, (September 15, 2014) http://www.instituteforlegalreform.com/resource/denial-cant-mask-illinois-s-poor-lawsuit-climate/ (last checked Oct. 18, 2014). In 2013, 1678 new asbestos cases were filed, up from 1563 in 2012 and 953 in 2011. Heather Isringhausen Gvillo, *Madison County asbestos docket sets another record in '13; New York firm files most cases.* (March 6, 2014), http://madisonrecord.com/issues/302-asbestos/263245-madison-county-asbestos-docket-sets-another-record-in-13-new-york-firm-files-most-cases (last checked Oct. 19, 2014). This year is on track to reach approximately 1335 cases with 890 new asbestos lawsuits filed as of September 1, 2014. E-Mail from Dina R. Burch, Madison County Deputy Circuit Clerk, to Marcy C. Cameron, Swanson, Martin & Bell, LLP (Sept. 26, 2014, 11:39 CST).

Increased lung cancer filings are on the rise as plaintiffs' firms approach a "max out" point on potential mesothelioma lawsuits. The incidence of mesothelioma diagnosis in Americans appears to be decreasing with an average of 3,000 new cases each year. American Cancer Society**,** *What are the key statistics about malignant mesothelioma,* (Dec. 19, 2013), http://www.cancer.org/cancer/malignantmesothelioma/detailedguide/malignant-mesothelioma-key-statistics, (last visited Oct. 19, 2014). Yet the American Lung Association indicates lung cancer diagnoses are on the rise with numbers estimated to reach 224,210 in 2014. American Lung Association, *Lung Cancer Fact Sheet,* http://www.lung.org/lung-disease/lung-cancer/resources/facts-figures/lung-cancer-fact-sheet.html, (last visited Oct. 19, 2014). Even though the Centers for Disease Control credits up to 90 percent of lung cancers as caused by smoking, plaintiffs' experts regularly attribute this disease to asbestos exposure. Centers for Disease Control and Prevention, *What are the Risk Factors,* http://www.cdc.gov/cancer/lung/basic_info/risk_factors.htm (last visited Oct. 19, 2014).

National Attention of Mass Toxic Tort Litigation

These "hellish" trends have garnered national attention by media and judges alike. Forbes Magazine in a recent article criticized New York Congresswoman Carolyn McCarthy's lung cancer lawsuit. Daniel Fisher, *Chain-Smoking Congresswoman's Asbestos Suit Shows New Trend*, (November 26, 2013), http://www.forbes.com/sites/danielfisher/2013/11/26/chain-smoking-congresswomans-asbestos-suit-shows-new-trend/ (last visited Oct. 15, 2014). Despite McCarthy being a heavy cigarette smoker (over 40 years), she alleged take-home exposure to asbestos from her father and brothers who worked on Navy ships and in utilities. In his article, Fisher criticizes the recent movement of plaintiffs' firms filing questionable asbestos claims on behalf of cigarette smokers. The continuation of this trend will deplete bankruptcy trusts established for true victims of asbestos exposure and will ignite a new onslaught of litigation.

A January 10, 2014 decision by Bankruptcy Judge George R. Hodges in *In re Garlock Sealing Technologies, LLC* shed light on some plaintiffs' deceitful practices and is one of the most significant rulings in recent years. 504 B.R. 71 (W.D.N.C. 2014). In the decision, Judge Hodges details the long standing practice of plaintiffs' attorneys routinely withholding evidence of their clients' exposures to bankrupt companies' products in an attempt to maximize recovery. In 15 cases reviewed by the Court, Garlock proved that "exposure evidence was withheld in *each and every one* of them." *In re Garlock,* 504 B.R. 71 at 84. These findings supported Judge Hodges' ruling that $125 million was sufficient to place in trust for present and future mesothelioma claims against Garlock, compared to the $1-$1.3 billion estimated by plaintiffs' firms. *Id.* at 74 and 97.

In similar fashion, the United States Court of Appeals for the Fourth Circuit recently ruled that plaintiffs' lawyers must reveal the contents of "privileged and confidential" documents that could hold new information

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about their wrongdoing in the epic Chevron oil pollution case. *Chevron Corp. v. Page (In re Naranjo),* 2014 U.S. App. LEXIS 18293, at *36 (4th Cir. Sept. 24, 2014). Earlier this year, the United States District Court Southern District of New York found that plaintiffs' attorneys engaged in misconduct in that case, including fraud, bribery and coercion. *Chevron Corp. v. Donzinger,* 974 F. Supp. 2d 362, 384 (S.D. N. Y. 2014).

Furthering Change

These three cases are mere illustrations of tactics being taken by plaintiff's counsel to promulgate lawsuits which, in reality, seemingly have no scientific connection to the claims being made. From Congresswoman McCarthy's lung cancer suit seemingly masquerading as an asbestos case to myriad other asbestos cases where the claims are brought against viable companies where their bankrupt counterparts are the real tortfeasors, the state legislature and judiciary need to discourage questionable claims against asbestos trusts, protect businesses from abusive lawsuits and ensure that legitimate victims are being compensated. This transformation is best facilitated when supported by a legal triad consisting of the judiciary, legislature and local attorneys.

It is not always enough that state trial courts require full disclosure of trust claims as part of their case management orders, rather, a mechanism is needed to enforce this requirement.

From the judiciary standpoint, Former Delaware Supreme Court Judge Peggy Ableman urges all trial court judges overseeing asbestos cases to read the Garlock decision, which details how many plaintiffs present substantial exposure to bankruptcy trusts but not to the defendants in the litigation. Peggy L. Ableman, *The Garlock Decision Should be Required Reading for All Trial Court Judges in Asbestos Cases* (June 30, 2014), http://www.mccarter.com/files/Uploads/Documents/Ableman_GarlockDecision_AJTA.pdf (last visited Oct. 15, 2014). It is not always enough that state trial courts require full disclosure of trust claims as part of their case management orders, rather, a mechanism is needed to enforce this requirement. Judge Ableman's article suggests the judiciary is one such mechanism. Her article is important because it places accountability on local judges to stand up to legal system abuse. She calls upon her former colleagues "to institute procedures to identify the scope and real-world impact of fraudulent asbestos claiming upon the integrity of the judicial process."

And to that end, many states are proposing rules that would mandate greater transparency for trust claims. In 2012 and 2013, Ohio and Oklahoma were the first states to enact legislation requiring plaintiffs to file and disclose trust claims before proceeding to trial. Institute for Legal Reform, *The New Lawsuit Ecosystem, Trends, Targets and Players*, (October, 2013), at 41, http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf (last visited Oct. 19, 2014).

Here in Illinois, defense attorneys engaged in mass toxic tort litigation can bring local attention to these national issues. The Furthering Asbestos Claim Transparency (FACT) Act, H.R. 982 is one such proposed legislation that is being considered that would begin to right these disturbing national trends. This bipartisan federal legislation would require asbestos personal injury settlement trusts to disclose information on their claims on a quarterly basis, allowing trusts and businesses to identify and contest questionable claims.

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No matter whether you represent plaintiffs or defendants, in mass tort cases or otherwise, attorneys can generally agree that these sorts of tactics undermine the legal institution, are a blight on the profession, and causes the judiciary to play detective when attorneys and outside experts engage in this sort of chicanery. It is all attorneys' and judges' responsibility to protect the courts from these bad acts by a few and, by bolstering awareness of current trends, attorneys can further attempt to protect the integrity of the courts.

The Bright Side of *Ferro v Folta*: Using Conflicts Law to Bar Civil Actions Arising From Injuries Subject to Another State's Workers' Compensation Statute

by N. Drew Kemp
HeplerBroom LLC, Edwardsville

On June 27, 2014, the Appellate Court of Illinois, First District, held that a plaintiff's common-law negligence action against her decedent's employer was not barred by the exclusive remedy provision of Illinois' workers' compensation statutes (820 ILCS 305/1 *et seq.* and 820 ILCS 310/1 *et seq*.) because her worker's compensation claim would have been non-compensable as untimely under the statutes' repose provisions. *Folta v. Ferro Eng'g*, 2014 IL App (1st) 123219, appeal allowed (Sept. 24, 2014), appeal pending (Sept. 2014, No. 118070).

The Decedent was allegedly exposed to asbestos at a plant owned by defendant Ferro Engineering ("Ferro") from 1966 to 1970. *Folta*, 2014 IL App (1st) 123219, ¶ 1. Decedent was not diagnosed with mesothelioma until forty-one years after he left Ferro's employ. *Id*. It was not disputed that Decedent's injury was accidental and arose from and was received during the course of his employment. *Id*. ¶ 28. By the time he was diagnosed, however, any claim Decedent's estate could have made against Ferro under Illinois's workers' compensation acts was barred by the applicable statutes of repose. The Plaintiff argued that the trial court erred in dismissing her common law negligence action as being outside the workers' compensation and Workers' Occupational Diseases Act pursuant to the exclusive remedy provisions.

All 50 states have enacted workers' compensation statutes and each of these statutes contains some type of exclusive remedy provision. That is, an employer is required only to furnish compensation mandated by the workers' compensation statute and is released from all other liability whatsoever. Typically, a workers' compensation statute covers only accidental injuries and occupational diseases arising out of and in the course of an employee's employment. There are exceptions, however; intentional injuries, defamation, violations of civil rights, *etc.* do not fall within the purview of a workers' compensation act even though those injuries may arguably occur within the scope and course of employment. Indeed, no competent lawyer would consider filing a work comp claim on behalf of a client who suffered discrimination at work based on a protected classification within the Americans with Disabilities Act or a state equivalent.

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On the other hand, an injury resulting from the breach of an employer's duty to provide a safe work place does fall within most (if not all) workers' compensation acts. This claim was precisely the claim Decedent's estate made against Ferro when Plaintiff filed her common-law action in the Circuit Court of Cook County. In response, Ferro filed a motion to dismiss and argued that Plaintiff's claims were barred by the exclusive remedy provision of the Illinois Workers' Compensation Act and the corresponding provision within the Workers' Occupational Diseases Act (*see Handley v. Unarco Industries, Inc.*, 124 Ill. App. 3d 56, 70 (4th Dist. 1984)). The trial court granted Ferro's motion to dismiss and Plaintiff appealed. The First District Appellate Court disagreed with Ferro, reversed the trial court's decision and remanded the case. The First District Appellate Court reasoned that common law suits in Illinois against employers are generally permitted for injuries that were not compensable under the Act. The Court also admitted that this was a case of first impression in Illinois, and that other states like Montana and Pennsylvania have similar case law and those cases are "persuasive as to their result." *Ferro* at ¶ 43.

Indeed, some states, like Illinois, hold that when a particular accidental injury is not compensable (as opposed to covered) under the provisions of the workers' compensation law, it is thereby excluded from the realm of workers' compensation altogether and the plaintiff is free to bring a civil action against her employer.

In general, although an injury may fall within the purview of workers' compensation, traditional affirmative defenses are available in most workers' compensation statutes. Namely, statutes of limitation and repose are typically included within the act itself. Indeed, Illinois' Workers' Compensation Act contains a 25-year statute of repose provision (820 ILCS 310/6(c)) and the Illinois Workers' Occupational Disease Act contains a 3-year statute of repose (820 ILCS 305/1(f)). As such, Plaintiff argued that since her workers' compensation claim would have been barred by these limitations, her claims were "not compensable" and therefore were not subject to the acts' exclusivity provisions. The Appellate Court agreed, but only because of the way in which Illinois defines the scope of its exclusivity provision.

In *Meerbrey v. Marshall Field & Co., Inc.*, the Illinois Supreme Court explained that, despite the advent of workers' compensation, an injured employee may still bring a common-law action against his employer if he can prove *any* of the following exceptions: (1) the injury was not accidental; (2) the injury did not arise from his employment; (3) the injury was not received during the course of employment; or (4) the injury is "not compensable under the Act." 139 Ill. 2d 455, 467 (1990). It is the inclusion of this last exception that differs widely across the United States. Indeed, some states, like Illinois, hold that when a particular accidental injury is not *compensable* (as opposed to *covered*) under the provisions of the workers' compensation law, it is thereby excluded from the realm of workers' compensation altogether and the plaintiff is free to bring a civil action against her employer. *See*, *e.g.*, *Errand v. Cascade Steel Rolling Mills*, 888 P.2d 544 (Or. 1995) (because plaintiff was unable to collect workers' compensation benefits for a pre-existing condition, the Oregon Supreme Court held that he could bring a civil action because the exclusivity remedy provision protected an employer from liability only when the employer owed benefits under the act); *McCarthy v. DSHS*, 759 P.2d 351 (Wash. 1998) (Washington Supreme Court permited employee plaintiff to sue his employer for a disease not covered under the "basic provisions of

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the act"); *Gidley v. W.R. Grace & Co.*, 717 P.2d 21 (Mont. 1986) (Montana Supreme Court held that, where an employee was not eligible for compensation under the then-Montana occupational disease act because the period of limitations expired before he became aware of his injury, the employee was not subject to the act's exclusivity provision); *Tooey v. AK Steel Corp.*, 81 A.3d 851, 855 (Pa. 2013) (Pennsylvania Supreme Court held that work comp claims for occupational disease which manifested outside the 300-week period prescribed by the act did not fall within the purview of the act, and, therefore, the exclusivity provision did not preclude injured employees from filing a common law claim).

On the other hand, several other states hold that the fact that a worker's claim for compensation under the act may be limited or barred by some provision within the statute, and, accordingly, such prohibitions prohibit the injured party from bringing a civil action for damages. Indeed, Missouri diverges from Illinois here. In *Combs v. City of Maryville*, the Missouri Court of Appeals, Western District held:

> The *exception* clause does not mean "not compensated for", and can refer only to those employments specifically excluded from coverage under the Act, those where the employee sustains a non-accidental injury on the job, or those where the injury was suffered while not engaged in the course of his employment, or the like.

609 S.W.2d 475, 478 (Mo. Ct. App. 1980); *see also Akins v. Drummond Co., Inc.*, 628 So. 2d 591 (Ala. 1993) (Claim brought by wife of deceased coal miner under Alabama Coal Mine Safety Law was barred by the exclusivity provision of Workers' Compensation Act, even though heart attack was not compensable "injury" under the Act); *McGuire v. Lorillard Tobacco Co.*, 2012-CA-000845-MR, 2014 WL 585626 (Ky. Ct. App. Feb. 14, 2014), *reh'g denied* ("the fact that a remedy for a work-related injury is unavailable under the [Kentucky] Workers' Compensation Act does not authorize bringing a civil action for damages"); *Green v. Wyman-Gordon Co.*, 422 Mass. 551 (1996) (Plaintiff actions for infliction of emotional distress, among others were barred by the Massachusetts workers' compensation statute but still subject to the statute's exclusivity bar).

Thus, given the divergent treatment of this issue in states around the country, an employer's motion to dismiss in a civil suit for an on-the-job injury can be granted in one state and denied in another, depending on how that state interprets its own exclusive remedy provision.

But this does not mean that employers have no options in states, like Illinois, where courts do not respect the repose provisions of the Act. In those states which interpret its exclusive remedy clause narrowly—like Illinois, Oregon, Washington, Montana, and Pennsylvania (among others)—attorneys representing the employer should move to apply another state's law when facing a civil claim for breach of the duty to provide a safe workplace by a current or former employee. In general, if the difference between two state's laws is material and directly affects the outcome of the case—that is, whether the exclusivity provision from either state provides for a dismissal—then a court may entertain a choice of law analysis.

The majority of states follow the "most significant relationship test," as set forth in Section 145 of the Restatement (Second) of Conflicts of Law. However, a more specific Restatement provisions exists which directly applies to issues involving two states' workers' compensation statutes. Specifically, Section 184 of the Restatement (Second) Conflict of Laws provides:

> Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which
> (a) the plaintiff has obtained an award for the injury, or

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> (b) the plaintiff could obtain an award for the injury, if this is the state (1) where the injury occurred, or (2) where employment is principally located, or (3) where the employer supervised the employee's activities from a place of business in the state, or (4) whose local law governs the contract of employment under the rules of §§ 187-188 and 196.

Restatement (Second) of Conflict of Laws § 184 (1971). If the work injury occurred in a foreign state, or if the employment was "principally located" in the foreign state (or numbers 3 or 4 apply) *and* the foreign state's exclusive remedy provision is broadly-interpreted (like Missouri, Alabama, Kentucky, or Massachusetts, to name a few), then the forum court could grant a motion to apply foreign law under Section 184 of the Restatement and dismiss the plaintiff's claim. Such a result occurred in *Mendez v. Atl. Painting Co., Inc.*, 404 Ill. App. 3d 648 (1st Dist. 2010).

In general, if the difference between two state's laws is material and directly affects the outcome of the case—that is, whether the exclusivity provision from either state provides for a dismissal—then a court may entertain a choice of law analysis.

In *Mendez*, a contractor, Atlantic, agreed to paint and clean a bridge in Kentucky for the Commonwealth of Kentucky. 404 Ill. App. 3d at 649. In turn, Atlantic entered into a subcontract with Eagle, who would perform some of the painting work on the job. *Id*. An employee of the subcontractor fell to his death from a platform while painting part of the bridge. *Id*. An arbitrator awarded the Employee's estate workers' compensation benefits. The employee's estate then sued Atlantic in a circuit court in Illinois. *Id*. at 650. But, unlike Illinois, Kentucky's Workers' Compensation Act provides immunity for contractors (like Atlantic), where the contractor's subcontractor paid a workers' compensation claim for injuries to an employee of the subcontractor. See Ky. Rev. Stat. Ann. § 342.690. Based on this Kentucky provision, Atlantic moved for summary judgment, arguing that Kentucky law applied and the Act provided immunity to Atlantic. The trial court agreed and granted Atlantic summary judgment. On appeal, the worker's estate argued that "the trial court should have applied Illinois substantive law to [the] case because Illinois has a more significant relationship with this dispute and, therefore, section 145 of the Restatement (Second) of Conflicts of Laws requires application of Illinois law." *Id*. at 652. In response, the First District, instead held that: "we find that Section 184 of the Restatement applies more closely to the facts of this case." *Id*. It then went on to affirm the trial court's decision. *Id*. at 658.

While *Folta v. Ferro Engineering* and *Meerbrey* seem to hold that "non-compensable" claims for compensation under Illinois work comp means that the employee is free to sue her employer in circuit court, this is not necessarily a death knell to an employer's defense, irrespective of how the Illinois Supreme Court decides *Folta* on appeal. Though the opinion is in conflict with other states that interpret their exclusivity provision differently, employers should move for application of another state's substantive law, if appropriate, and seek to gain the benefits of that state's exclusivity provision.

What Does Your Electronic Communications Policy Say? #VoluntaryUndertaking

by Patrick W. Stufflebeam
HeplerBroom, LLC, Edwardsville

The case of *Regions Bank v. Joyce Meyer Ministries, Inc*., 2014 IL App (5th) 130193 arises out of a horrific set of facts, but raises serious questions for employers who provide their employees with electronic devices and develop a policy where they reserve the right to (and actually do) monitor communications on those devices.

This case involves Chris Coleman's murder of his wife and two children. The decedents' estates sued Coleman's employer, Joyce Meyer Ministries ("JMM"), alleging theories of negligent undertaking and negligent retention of an employee. The basis for the claim was the estates' argument that JMM failed to investigate death threats that Coleman sent himself as well as other threats he sent to the decedents and his employer, all of which he sent from his JMM-provided computer. This article focuses on the Fifth District's treatment of the negligent undertaking claim.

This case came before the appellate court after the trial court dismissed the plaintiff's complaint with prejudice pursuant to 735 ILCS 5/2-615, finding the complaint did not sufficiently plead that JMM undertook a duty to protect the decedents from a third party.

As a general principal in Illinois, a person has no affirmative duty to protect another from harmful or criminal acts by a third person unless the parties are in a "special relationship." Exceptions to this general principle include, *inter alia*, when there is negligence in the performance of a voluntary undertaking. *Petersen v. U.S. Reduction Co.*, 267 Ill. App. 3d 775, 779 (1st Dist. 1994). Traditionally, in Illinois, this exception has been narrowly construed and the duty imposed is limited by the extent of the undertaking. *See*, *e.g.*, *Wakulich v. Mraz*, 203 Ill. 2d 223, 242-43 (2003); *Pippin v. Chicago Hous. Auth.*, 78 Ill. 2d 204, 209 (1979).

In defining what constitutes a "voluntary undertaking," Illinois recognizes Sections 323 and 324A of the Second Restatement of Torts. *Regions Bank*, 2014 IL App (5th) 130193, ¶ 10. Section 323 of the Restatement provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). Additionally, Section 324A of the Restatement provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965).

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A plaintiff may allege nonfeasance or misfeasance in the performance of a voluntary undertaking. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 996 (1st Dist. 2005). In the case of "nonfeasance," a plaintiff must allege facts that: (a) the defendant voluntarily undertook to render services necessary for the protection of another person or took charge of another person's protection; (b) the defendant failed to exercise reasonable care in that it wholly failed to perform the undertaking; and (c) the harm was suffered because of the other person's reliance on the defendant's undertaking. *See*, *e.g.*, *Bourgonje*, 362 Ill. App. 3d at 996.

In the case of "misfeasance," a plaintiff must allege facts that: (a) the defendant voluntarily undertook to render services necessary for the protection of another person or took charge of another person's protection; (b) the defendant negligently performed the undertaking; and (c) the defendant's negligence increased the risk of the harm to the other person or that the plaintiff suffered harm due to his reliance on the undertaking. *See*, *e.g.*, *Wakulich*, 203 Ill. 2d at 244-46; *Doe-3 v. White*, 409 Ill. App. 3d 1087, 1097-99 (4th Dist. 2011).

> [T]he appellate court noted that "[i]n order to satisfy the foreseeability component, it is not necessary that a defendant must have foreseen the precise nature of the harm or the exact manner of occurrence; it is sufficient if, at the time of the defendant's action or inaction, some harm could have been reasonably foreseen."

In this case, the plaintiff alleged JMM had an electronic communication policy that prohibited its employees from sending inappropriate, obscene, harassing, or abusive images, language, and materials through its electronic system. *Regions Bank*, 2014 IL App (5th) 130193, ¶ 15. In its electronic communication policy, JMM reserved the right to monitor and inspect communications sent, received, and stored on its electronic communications system and equipment, and JMM "management" had the sole discretion to take disciplinary action against violators of the policy. *Id.* The complaint further alleged that over a six-month period, Coleman wrote harassing notes and death threats that he directed to himself, the decedents, and JMM using his JMM-issued computer. *Id.* The complaint further alleged that JMM was aware that the death threats had been delivered to decedents using JMM equipment. *Id.*

Based on this series of facts, the decedents' estates argued that JMM voluntarily undertook to provide security services for the protection and safety of the decedents by monitoring and inspecting electronic messages sent from its electronic system to decedents, failing to take disciplinary action against Coleman, stationing security at the decedents' home, installing a security alarm at the decedents' home, and informing local authorities of the threats made against the decedents. *Id.* ¶ 16. The plaintiff alleged JMM failed to perform, or negligently performed, these undertakings that increased the risk of danger to the decedents. *Id.* ¶ 18.

The appellate court found the allegations in the complaint were sufficient to establish a duty of care owed by JMM to the decedents under a voluntary-undertaking theory. *Id.* ¶ 19. The appellate court noted that the trial court struggled with the "reasonable foreseeability" component of the duty analysis. *Id.* ¶ 20. Relying on *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 442 (2006), the appellate court noted that "[i]n order to satisfy the foreseeability component, it is not necessary that a defendant must have foreseen the *precise* nature of the harm or the exact manner of occurrence; it is sufficient if, at the time of the defendant's action or inaction, *some* harm could have been reasonably foreseen." *Regions Bank*, 2014 IL App (5th) 130193, ¶ 20.

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Depending on the outcome of this case and whether it is ultimately reviewed by the Illinois Supreme Court, this case is potentially troubling for employers. In today's modern world, electronic devices are ubiquitous in the workplace. Many companies routinely supply their employees with laptops, smartphones, and tablets, just to name a few. In addition, the use of social media permeates our culture. Most external websites are accessible by all forms of modern electronic devices, including by workplace-issued devices. Moreover, it is also commonplace (and a best practice) for companies to enact formal policies governing the use of company-supplied electronic devices. Most of these policies probably contain similar prohibitions against inappropriate and abusive communication on company-issued devices.

This case may present an extreme example of a violation of an electronic communication policy, as the plaintiff alleged JMM undertook duties beyond failing to monitor its electronic communication policy and disciplining violators, such as stationing security at the decedents' home. In the face of harassment or threats originating from a company's electronic devices, however, defense lawyers should be prepared for plaintiffs to argue that *Regions Bank* expands the voluntary undertaking duty. Going forward, in cases presenting similar facts, defense counsel should make it a best practice to request and analyze our clients' policies governing the use of its employer-supplied electronic devices. And, finally, while this case is problematic in a number of ways, it is important to note that the holding of the JMM case should be held in the light of pleading only. The plaintiff still has to prove all allegations.

■ **Cecil E. Porter, III,** an associate attorney with *Litchfield Cavo LLP*, focuses his practice in the areas of construction litigation, toxic tort litigation, commercial litigation, employers' liability, contractual disputes, auto liability, premises liability, and workers' compensation. He has served as first and second chair of jury trials to verdict in private practice and while serving as a prosecutor. He has also served as first chair of many bench trials, arbitration hearings, and workers' compensation appeals. Mr. Porter was listed as one of Illinois' *Super Lawyers* Rising Stars, a select designation only given to 2.5 percent of the total lawyers in Illinois, in 2011, 2012, 2013, and 2014.

■ **Erica S. Longfield** is an associate attorney with *Swanson Martin & Bell, LLP* in Chicago, Illinois. Her practice is focused in the areas of toxic tort litigation, asbestos litigation and products liability, representing the interests of large corporations and insurance carriers in the defense and management of lawsuits in preparation for and at trial.

■ **N. Drew Kemp** is an associate attorney at *HeplerBroom LLC* in Edwardsville, Illinois. Mr. Kemp is a University of Missouri graduate and has been defending companies in toxic tort litigation for a little over a year.

■ **Patrick W. Stufflebeam** is a partner of *HeplerBroom, LLC* in its Edwardsville (Madison County), Illinois office. He concentrates his practice primarily in the areas of toxic tort, product liability, premises liability, and commercial litigation. He is admitted to practice in Illinois, Missouri, and the Southern District of Illinois. He received his J.D. from Saint Louis University School of Law and his B.A. from Western Illinois University. Mr. Stufflebeam is a member of the IDC Board of Directors, DRI, and the Madison County Bar Association.

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This publication was generated by the **IDC Tort Law Committee – Chair: Justin K. Beyer**, *Seyfarth Shaw LLP*, and **Vice Chair: Mandi K. Ferguson**, *HeplerBroom LLC.*

Illinois Association of Defense Trial Counsel, PO Box 588, Rochester, IL 62563-0588, 217-498-2649, **idc@iadtc.org**