DeVore Radunsky LLC

ATTORNEYS AT LAW

DEVORE RADUNSKY NEWS
JANUARY-FEBRUARY 2015

I. SIGNIFICANT "DR" NEWS & EVENTS

DeVore Radunsky Prevails on Issue of "Reasonable and Necessary" Medical Treatment & Bills

On January 29, 2015, Troy Radunsky successfully argued that DeVore Radunsky's insured client was not required to admit the reasonableness and necessity of the plaintiff's medical care and bills. The Cook County trial court agreed with our position and denied the Plaintiff's Motion to Strike the Defendants Objections to the Plaintiff's Request to Admit Facts and Deem Admitted.

The plaintiff had tendered 12 requests to admit facts to our insured client, a 15 year old boy. The requests sought admissions regarding a variety of issues to establish the amount of damages, including the reasonableness and necessity of the plaintiff's medical care and bills.

Despite the body of case law tilted in favor of the plaintiff, we at DeVore Radunsky held firm in our belief that the requests were improper under the facts presented. Essentially, the plaintiff sought to shift its burden of proof regarding the necessity and cost of medical treatment to a 15 year old, merely because his defense was funded by an insurance carrier.

Instead of acquiescing to the plaintiff's tactics, consistent with Supreme Court Rule 216, DeVore Radunsky objected to every request based on the fact that (a) our client was a 15 year old boy and not an expert; (b) that "reasonable inquiries" had been made in good faith to the insured's insurance company to find an answer; and (c) the requests called for "legal conclusions". Hence, the requests were incapable of being answered.

After filing our objections, the plaintiff moved to have all the objections stricken and the objections deem admitted. The plaintiff supported his position with several cases, which held that requests to admit regarding the reasonableness and necessity of the plaintiff's treatment and medical bills were proper. DeVore Radunsky distinguished the plaintiff's case law and successfully argued that the requests were improper. Further, we argued that the requests unfairly shifted the burden of proof onto the defendant and forced a party defendant to speculate whether the plaintiff's medical bills and treatment was reasonable.

Most importantly, we took the position that based on applicable Supreme Court case law the standard for the admissibility of medical bills is "the reasonable value of services", not whether the charge is "fair" or "reasonable", which the plaintiff maintained was the legal standard. We argued that determining "reasonable value" is the subject of great debate and not subject matter which a lay witness should be forced to respond to in a request to admit. The court embraced all our arguments.

The court agreed with our argument that the plaintiff's requests required expert opinions, not lay witness opinion. Additionally, the court adopted our argument that it would be unreasonable to expect the defendant to incur expensive litigation fees by hiring an expert to refute the plaintiff's requests.

This victory is particularly significant because there is a large body of adverse Illinois case law, including Supreme Court decisions, regarding this issue. Illinois Courts have predominately sided with plaintiffs and routinely grant plaintiff's motions on this issue. Consequently, defendants are almost always forced to admit the reasonableness and necessity of the plaintiff's medical bills and treatment. Prior to attacking plaintiff's requests, we performed thorough research and determined that there was a strong likelihood that our judge would fairly evaluate our position, as opposed to brushing us aside.

DeVore Radunsky will continue to aggressively defend its clients and fight against what we feel are the plaintiff's impermissible attempts to unfairly shift the burden of proof onto the defendants.

II. STATE & FEDERAL COURT CASE LAW UPDATES

Construction Law

Gomez v. Bovis Lend Lease (2013 Ill App (1st) 130568)

The First District Appellate Court affirmed entry of summary judgment in favor of a subcontractor and against a construction manager. The Appellate Court held that the subcontract was ambiguous regarding the subcontractor's duties, but the undisputed extrinsic evidence established that the subcontractor had no duty to provide support for the infill areas. The plaintiff filed suit against the construction manager and the subcontractor in relation to injuries he allegedly sustained when he fell through a plywood board that covered an "infill". The subcontractor provided designs and support for the infill areas.

The appellant construction manager argued: (1) the contract unambiguously required the subcontractor to provide support to the infill areas; (2) even if the contract was ambiguous, using extrinsic evidence to interpret the contract created genuine issues of material fact; and (3) the affidavit of their expert witness on proximate cause creates genuine issues of material fact. Relying on basic principles of contract law the court held that:

- A contract is ambiguous if it is subject to more than one reasonable interpretation. If a contract is unambiguous on its face, extrinsic evidence may not be used to interpret it. But, extrinsic evidence may be used to aid in interpreting an ambiguous contract. Id. The mere fact that the parties disagree over the contract's interpretation does not suffice to establish ambiguity.

- Ambiguity exists when the contract provisions can reasonably be read in more than one way. Ambiguity arises here because the subcontractor's duty, if any, regarding infills is open to differing interpretation. The contract's only reference to infills, the exclusion of infill plywood boards, offers no guidance.

- The use of extrinsic evidence turns on the nature of the facts considered in resolving the ambiguity. If determination of the parties' intent requires resorting to facts in dispute, then

> the contract must be construed by the trier of fact. But if the parties' intent can be determined solely from facts not in dispute, then the court can decide the issue as a matter of law.

The appellant construction manager argued that the contract's "integration clause" precluded the court from using extrinsic evidence to interpret the contract. A court may not use extrinsic evidence to interpret a facially unambiguous contract if the contract contains an integration clause. Yet, a court may consider extrinsic evidence to interpret an ambiguous contract that contains an integration clause. The Appellate court held that the contract was ambiguous and, therefore, the integration clause could not prevent consideration of extrinsic evidence.

Ultimately, the Appellate Court determined that it was proper to consider the subcontractor's extrinsic evidence regarding "prior dealings" to establish that the subcontractor had no duty to provide designs, nor any support to the infill areas.

Insurance Coverage - Misrepresentations and Rescission

Illinois State Bar Association Mutual Insurance Company v. Brooks, 2014 IL App (1st) 132608

The First District Appellate Court reversed a trial court order rescinding a policy issued in 2009, based upon misrepresentations in an application submitted in 2007 for the initial policy. The Court reasoned that a misrepresentation in an initial application does not justify rescission of a renewal policy, if the insured made no misrepresentation in the renewal application and neither the renewal policy nor the application for renewal policy incorporated the 2007 application.

The Illinois Insurance Code does not make a misrepresentation in one application nullify all subsequent contracts between the parties. 215 ILCS 5/154 (West 2006). Accordingly, the Appellate Court refused to add language to the Code to make one misrepresentation defeat all subsequent insurance contracts, when the insured made no misrepresentations in its applications for the subsequent insurance.

Expert Witnesses

Stuhlmacher v. Home Depot U.S.A., No. 14-2018 (Dec. 17, 2014) N.D. Ind., Hammond Div.

A recent case from the Seventh Circuit of the Northern District of Indiana addressed the admissibility of expert testimony concerning opinions relative to causation. The plaintiff filed suit in the district court to recover damages related to personal injuries arising out of a fall from an allegedly defective ladder. The Seventh Circuit Court of Appeals held that the trial court erred by excluding testimony of plaintiff's expert because the expert's testimony regarding causation did not align with plaintiff's testimony that described condition of ladder immediately prior to his fall. Thus, the trial court found that the plaintiff failed to prove a causal link between the alleged defect and the fall.

The Seventh Circuit observed that the testimony of the plaintiff and his expert could be reconciled. Accordingly, the trial court improperly removed the issue of causation when because: (1) jury could have believed expert's theory of accident and found that plaintiff's testimony indicating that ladder

suddenly shifted to left merely reflected his incomplete memory of event as it happened; and (2) jury could still find that defect described by expert was actual cause of accident.

III. ILLINOIS LEGLISLATIVE UPDATES

Construction Statute of Repose - Public Act 098-1131

Public Act 098-1131 (formerly Senate Bill 2221) eliminates claims for asbestos-related injury from the construction statute of repose. This new law takes effect June 1, 2015.

The Illinois Defense Counsel of Trial Lawyers is researching the constitutionality of the new law. There is Illinois Supreme Court authority for the proposition that once an action is time-barred, the legislature cannot revive the action without violating the Illinois Constitution. We will continue to track this issue and provide any relevant updates.

Civil Trial Juries – Public Act 098-1132

Public Act 98-1132 becomes effective on June 1, 2015. It reduces the number of jurors in all civil cases from twelve to six and increases the minimum payment for jury service to $25 for the first day and $50 for each subsequent day. In addition, for all cases filed prior to the effective date of June 1, 2015, a party that has already demanded and paid for a jury of twelve, will still be entitled to a twelve-person jury. The legislation was supported by the Illinois Trial Lawyers Association (ITLA) and puts Illinois in line with the federal guidelines and the majority of the other states.

According to the ITLA position paper, Illinois had not updated its juror payment statute for 40 years. Illinois' current pay rate for jurors is the lowest among all 50 states. The law increases juror pay from a range of $4 to $10 per day to $25 for the first day, and $50 for every subsequent day of service.

This pay increase is funded in two ways - by reducing civil jury sizes from 12 people to six and by eliminating compensation for jurors' travel expenses. Parties that wish to request alternate jurors will be required to pay for them to offset their cost. For cases filed prior to the June 1 effective date, parties that have already paid for a 12-person jury may request one with proof of payment. The law does not eliminate the requirement that juries provide unanimous decisions, nor does it change jury sizes in criminal trials.

This change in the law is significant. Smaller juries require smaller jury pools, so fewer citizens get those pesky summonses. Six-member juries can be seated more quickly, and their deliberations are shorter. They reach consensus more easily and deadlock less often. They're more efficient, in other words. But there's a trade-off. Larger juries are more diverse, which means they're more likely to reflect the views of the broader community. The quality of their deliberations is higher; the debate is more rigorous and they have a better collective recall of the testimony.

A greater number of jurors reduces the likelihood of a single juror dominating the discussion and increases the odds of a dissenting juror having an ally. Moreover, larger juries have a moderating effect on the size of jury awards. Thus, the reduction from a twelve person jury to a six person jury may dramatically increase the number of settlements throughout Illinois and particularly in plaintiff-friendly venues, such as Cook County.