



R E P O R T E R

VOLUME 33

GENERAL TORTS

JULY 2005

DUTY OF CARE

General Contractor Had No Duty Of Care To Injured Employee Of Sub-Contractor

In *Downs v. Steel and Craft Builders, Inc.*, 2005 WL 1492077 (2nd Dist., June 22, 2005), the plaintiff, Richard Downs, an employee of an independent contractor, was seriously injured when a trench collapsed at a construction site. The plaintiff sued the defendant, Steel and Craft Builders, Inc., the general contractor of the site, alleging common law negligence. The circuit court granted summary judgment in favor of the defendant and the plaintiff appealed.

At the time of the accident, the plaintiff was an employee of P & M Water and Sewer, Inc., which was hired by the defendant to work at various stages of the construction job. Pursuant to the contract, the defendant could order work to start or stop, order changes to the plans and approve the workmen, subcontractors, or material suppliers hired by P & M. Otherwise, the defendant placed the burden and the responsibility of completing the work on P & M. *Downs*, 2005 WL 1492077 at *1.

On the day of the accident, the owner of the defendant was at the construction site, but he did not observe the accident or the work being done by P & M, nor did he instruct P & M on the work. He did not direct, supervise, or participate in the work, the means, or the methods of P & M. He frequently visited the site to look only at the work's progress and he observed no safety violations. He relied on the subcontractors for safety, providing them with no classes, inspectors or equipment.

The appellate court initially noted that

in a negligence action, a plaintiff must present sufficient evidence to establish that the defendant owed a duty to the plaintiff. The existence of a duty is a question of law to be decided by the court and if no duty exists there is no recovery. The plaintiff presented three bases for the existence of a duty of care: (1) defendant's contractual right to control and actual retention of control under Section 414 of the Restatement (Second) of Torts; (2) the applicable safety regulations; and (3) defendant's status as possessor of the land under Section 343 of the Restatement (Second) of Torts. *Downs*, 2005 WL 1492077 at *2.

The plaintiff argued that the defendant owed him a duty of care pursuant to Section 414 of the Restatement (Second) of Torts, because the defendant retained control of certain aspects of the work performed by P & M. Generally, one who employs an independent contractor is not liable for the latter's acts or omissions. In Illinois, a recognized exception to this rule is found in Section 414 of the Restatement (Second) of Torts, which states: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Comment c to Section 414 explains the "retained control" concept: "In order for the [exception] to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress * * * or to prescribe alterations and deviations.

Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." *Downs*, 2005 WL 1492077 at *2-3.

The appellate court advised that the best indicator of whether a contractor has retained control over the subcontractor's work is the parties' contract, if one exists. When interpreting a contract, the court must consider the entire document to give effect to the parties' intent as determined by the plain and ordinary meaning of the language of the contract. The question in this case was whether the contract between the defendant general contractor and P & M evidenced an intent by the defendant to retain any control over safety at the construction site.

Generally, in a construction negligence case involving a contract between a defendant general contractor and an independent contractor that employed the plaintiff, summary judgment is improperly granted to a general contractor that had agreed to retain control over safety at a construction site (see, *Moorehead v. Mustang Construction Co.*, 354 Ill. App.3d 456 (3rd Dist. 2004), or where a general contractor goes to great lengths to control safety at the construction site even though an independent contractor contracts to control its own work. (see, *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App.3d 1051 (1st Dist. 2000); and *Brooks v. Midwest Grain Products of Illinois, Inc.*, 311 Ill. App.3d 871 (3rd Dist. 2000).

Alternatively, summary judgment in favor of the general contractor is appro-

appropriate where an independent contractor is contractually responsible for jobsite safety and the defendant general contractor takes no active role in ensuring safety (see, *Steuri v. Prudential Insurance Co. of America*, 282 Ill.App.3d 753 (1st Dist. 1996); and *Fris v. Personal Products Co.*, 255 Ill.App.3d 916 (3rd Dist. 1994)), or where the general contractor reserves the general right of supervision over the independent contractor but does not retain control over the incidental aspects of the independent contractor's work. (*Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835 (1st Dist. 1999). *Downs*, 2005 WL 1492077 at *3.

After reviewing the evidence, the appellate court determined that in this case, the defendant neither controlled nor was responsible for the safety measures employed at the construction site. The rights retained by the defendant to schedule and to stop work, to order changes and to approve hiring were general rights of supervision and not a retention of control over the incidental aspects of the work done by P & M.

Even though the appellate court concluded that the contract did not grant the defendant sufficient control over P & M's work to create a duty to the plaintiff, its analysis of Section 414 did not end there. The court found that it is possible that a duty to a subcontractor's employee may be created by the contractor's actions undertaken in the absence of an agreement. As support for this, the appellate court pointed to a recent First District decision in which the contractor and subcontractor had not agreed on the scope of the contractor's control over the subcontractor's work. (See, *Bieruta v. Klein Creek Corp.*, 331 Ill.App.3d 269 (1st Dist. 2002). *Downs*, 2005 WL 1492077 at *4.

Based on the ruling in *Bieruta*, the appellate court noted that in this case, the defendant, by its conduct, could have created a duty to the plaintiff by exercising control over P & M's work. However, the facts indicated that the defendant did not control the subcontractor's work. There was no evidence that the defendant exerted control over the construction site, other than by telling the independent contractors where to work and when. Nothing indicated that that the defendant

directed the "operative details" of the excavation or that P & M was not free to perform the work in its own way. Furthermore, even if it was assumed that the conditions and methods used were dangerous and led to the plaintiff's injuries, there was no evidence that the defendant knew or had notice that P & M employed a hazardous method in dangerous conditions at the time of the accident. Therefore, the appellate court determined that the defendant controlled not the "incidental aspects" of the independent contractor's work, but rather only the desired ends. Therefore, the appellate court found that summary judgment in favor of the defendant was appropriate as to this issue.

The next argument submitted by the plaintiff that was addressed by the appellate court was whether a general contractor may delegate its responsibilities under the OSHA and the CSA to an independent contractor for the purposes of avoiding liability in a private cause of action for injuries sustained by an employee of the independent contractor. The appellate court noted that this was a question of first impression. *Downs*, 2005 WL 1492077 at *5.

The OSHA creates a government program to enforce compliance with federal occupational safety and health standards by employers in the private sector. 29 U.S.C. Sections 651, 654 (2000). The OSHA explicitly declares that it shall not be construed to supersede, to enlarge, to diminish, or to affect in any manner "the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries * * * of employees arising out of, or in the course of, employment." 29 U.S.C. Section 653(b)(4) (2000).

The appellate court noted that based on its prior Section 414 analysis, the defendant could not be held liable under the plaintiff's theories, as governed by Illinois law. Therefore, liability in this case would result only from affecting the defendant's right to contract away private liability for injuries, or from enlarging the defendant's liabilities to the plaintiff under Section 414, by declaring that, via the OSHA, that the defendant retained control of the work of P & M. The appellate court

determined that doing so would "create an exception that would swallow the rule, because no matter what steps the defendant would take to shield itself from liability, the OSHA inevitably would pierce the defendant's armor, striking a fatal blow that otherwise would be blocked under the theories advanced by plaintiff." For these reasons, the appellate court affirmed summary judgment on this issue as well. *Downs*, 2005 WL 1492077 at 5-6.

The appellate court next looked to the CSA. The CSA predates the OSHA and it provides occupational safety and health protections only to employees who work on federal, federally financed, or federally assisted construction projects. Under the CSA, to the extent that a subcontractor agrees to perform a certain task, the general contractor and that subcontractor are deemed to have joint responsibility with respect to that task. 29 C.F.R. Section 1926.16(c) (2004). The plaintiff relied on this section for his proposition that the defendant has a nondelegable duty under the CSA.

The appellate court stated that while maintaining employee safety at the workplace is an important public policy, in this case the defendant did not volunteer to abide by any safety regulations, nor did the defendant volunteer to ensure compliance with the applicable regulations. Instead, the defendant shifted the responsibility for compliance to P & M by actually and contractually avoiding control over the work of P & M. For these reasons, the appellate court affirmed summary judgment on this issue. *Downs*, 2005 WL 1492077 at *6-7.

The plaintiff's last argument was that the defendant owed him a duty of care pursuant to Section 343 of the Restatement (Second) of Torts, because the defendant possessed the land where the plaintiff was injured. Section 343 subjects a possessor of land to liability for physical harm caused to invitees by a condition on the land that the possessor, who failed to exercise reasonable care to protect such invitees, knew or should have known involved an unreasonable risk of harm to the invitees, who did not discover the danger or who failed to protect themselves against it.

The appellate court noted that a pos-

essor of land is not liable for injuries caused by open and obvious dangers, unless the injured party was distracted from those dangers by focusing on some other condition or hazard. (See, *Clifford v. Wharton Business Group, LLC*, 353 Ill.App.3d 34 (1st Dist. 2004)). In this case, the danger of a cave-in was open and obvious, evidenced by the fact that the plaintiff discussed ways to avoid it before the incident took place. Furthermore, even though the plaintiff was focused on installing pipes, he was never distracted from the danger of a cave-in so as to warrant imposing a duty under Section 343. For these reasons, summary judgment in favor of the defendant was warranted as to this issue as well. *Downs*, 2005 WL 1492077 at *7-8. As a result, the circuit court's granting of summary judgment for the defendant was upheld in its entirety.

The Distraction Exception to the Open And Obvious Defense

In *Sandoval v. City of Chicago*, 2005 WL 1322782 (1st Dist., June 3, 2005), the plaintiff, Catalina Sandoval, was caring for her neighbor's young son when she tripped and fell due to a crater-like defect in the sidewalk in front of her home causing her to become injured. The plaintiff and child were outside when the plaintiff lost sight of the child. The plaintiff became "concerned" that the child wandered toward her yard and was "afraid" he would attempt to descend the stairs to her house. The plaintiff then began walking toward her yard when her foot became wedged in the sidewalk defect. The plaintiff sued the City of Chicago for negligence.

The plaintiff admitted that the sidewalk defect had been in the same location in front of her home for four years before her accident, she walked past it "millions of times" and was aware of the defect at the time of her fall. The defect was in a five by six foot square of sidewalk with most of the concrete missing and the dirt underneath was exposed with some concrete protruding through the surface. The plaintiff contacted her alderman about the defect less than a year before her accident. The plaintiff admitted that at the time of her accident, nothing obstructed her view of the sidewalk where she fell, she saw

nothing unusual about her surroundings and nothing was distracting her.

The City moved for summary judgment, stating that it did not owe the plaintiff a duty of care because the condition of the sidewalk was open and obvious. The plaintiff responded by arguing that the City caused the defect when it removed a tree and she asserted that the distraction exception applied to impose a duty. The trial court granted the City's motion and in doing so held that the plaintiff presented no evidence that the City created the defect, that it was aware of the defect or that the City should have reasonably foreseen that the plaintiff would become distracted and fail to appreciate the defect. During a motion for rehearing, the court clarified that its ruling was based on the fact that the defect was open and obvious and there was no evidence that the plaintiff was distracted or any evidence that the City should have reasonably foreseen that the plaintiff would have become distracted. *Sandoval*, 2005 WL 1322782 at *1-2.

The appellate court noted that in order to sustain her cause for negligence, the plaintiff was required to establish that the defendant owed her a duty of care by showing that she and the defendant stood in such a relationship to one another that the law imposed an obligation on the defendant of reasonable conduct for the benefit of the plaintiff. The factors to consider when determining whether such a duty exists are: (1) the foreseeability that defendant's conduct will result in injury to another; (2) the likelihood of injury; (3) the magnitude of guarding against it; and (4) the consequences of placing that burden on the defendant. See, *Bonner v. City of Chicago*, 334 Ill.App.3d 481 (1st Dist. 2002). *Sandoval*, 2005 WL 1322782 at *2-3.

As to the reasonable foreseeability of injury element, Illinois law holds that persons or entities who own or control land are not required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. See, *Buchelers v. Chicago Park District*, 171 Ill.2d 435 (1996). "Open and obvious" conditions include those where the condition and risk are apparent to, and would be recognized

by, a reasonable person exercising ordinary perception, intelligence and judgment in visiting an area. Therefore, the determination of whether a condition is open and obvious depends not on plaintiff's subjective knowledge but, rather, on the objective knowledge of a reasonable person confronted with the same condition. This is because property owners are entitled to the expectation that those who enter upon their property will exercise reasonable care for their own safety. See, *Bonner*, 334 Ill.App.3d 481; *Buchelers v. Chicago Park District*, 171 Ill.2d 435 (1996).

In this matter, the plaintiff argued that an exception to the open and obvious rule applied – the distraction exception. Under the "distraction exception," a defendant-property owner can be found to owe a duty of care, despite an open and obvious condition, if he has reason to expect that the plaintiff-invitee's attention might be distracted so that she would not discover, or may forget that she had previously discovered, the obvious condition. The appellate court noted that cases applying this exception involve situations in which the injured plaintiff was distracted from the open and obvious condition because circumstances required that she focus her attention on some other condition or hazard.

Under the distraction exception, the defendant is not required to anticipate the specific plaintiff's own negligence or make her premises injury-proof. However, if it is reasonable for the defendant to anticipate injury to an invitee who is otherwise exercising general care for her safety but may reasonably be expected to be distracted to an obvious condition on the premises, then a duty is owed. *Sandoval*, 2005 WL 1322782 at *3-4.

The appellate court reviewed the record, which contained photographs of the defect, and noted that the defect was clearly a condition of open and obvious danger. The large five-by-six-foot section of the sidewalk was missing most of its concrete surface, and the dirt underneath was exposed. While the dirt comprised a level surface, a big chunk of concrete remained, sticking upright some three to four inches from the dirt. The appellate court went on to note that being confronted with these

circumstances, any reasonable person exercising ordinary care in visiting this area would recognize and appreciate the risk involved in traversing this portion of the sidewalk and, specifically, the changes in elevation. Therefore, the court found that the condition was undeniably open and obvious. *Sandoval*, 2005 WL 1322782 at *4.

The appellate court next analyzed whether the distraction exception would apply. The plaintiff testified that this particular sidewalk defect had existed right outside of her own home for some four years prior to the accident. She stated that she had walked by it “millions of times,” she knew it was there on the day of the accident, she was fully aware of the missing concrete, of the exposed dirt, and most importantly, of the elevated “island” in this slab of sidewalk. In addition to agreeing that the condition was open and obvious, the plaintiff specifically admitted that at the precise time of the accident, nothing obstructed her view of the sidewalk, nothing was unusual about her surroundings and, significantly, nothing was distracting her. Based on this testimony alone, appellate court found it to be clear that plaintiff failed to present evidence to show she was distracted at the time of her fall and the City could not have reasonably foreseen that the plaintiff would be distracted as she walked on the sidewalk. *Sandoval*, 2005 WL 1322782 at *5.

The appellate court went on to note that primarily, in those instances where Illinois courts have applied the distraction exception to impose a duty upon a landowner, it is clear that the landowner created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff’s attention from the open and obvious condition and, thus, was charged with reasonable foreseeability that an injury might occur. In contrast, the occurrence in this case falls within the line of cases that reinforces that when a plaintiff’s attention is diverted by her own independent acts for which the defendant has no direct responsibility, the distraction exception does not apply. See, *Prostran v. City of Chicago*, 349 Ill.App.3d 81 (1st Dist. 2004); *Bonner v. City of Chicago*, 334 Ill.App.3d 481 (1st Dist. 2002); and *Richardson v. Vaughn*, 251 Ill.App.3d 403

(2nd Dist. 993).

The appellate court found that the City was in no way responsible for, contributed to, or created this situation, which began when plaintiff brought the child outside to the parkway. Accordingly, it found that the City owed no duty to the plaintiff to warn or otherwise safeguard her from potential harm posed by the open and obvious sidewalk defect in front of her home, where her injury resulted not from a distraction that could be reasonably anticipated by the City but, instead, was the result of her own inattentiveness in not looking forward where she was walking. *Sandoval*, 2005 WL 1322782 at *6-7. Therefore, the entry of summary judgment was affirmed.

EVIDENCE

Spoilation Of Evidence – As Allegation And As Motion For Sanctions

In *Adams v. Bath and Body Works, Inc.*, 2005 WL 1252266 (1st Dist., May 26, 2005), the plaintiff, Steve Adams, individually and as the special administrator of the estate of his wife, Dixie Adams, filed a three count complaint against defendants Bath & Body Works, Inc. (BBW), Globaltech Industries, Inc. and Sharon Kubasak after he was injured and his wife was killed in a fire in their rented house. The plaintiff alleged that a candle, manufactured by Globaltech and sold by BBW, was the cause of the fire. Ms. Kubasak was the owner of the property.

Each defendant filed cross-claims against the plaintiff for negligently failing to preserve evidence. BBW also filed a third party complaint against Ms. Kubasak’s insurer, State Farm, for negligent spoliation of evidence. The circuit court granted a motion filed by BBW and joined by Globaltech dismissing the plaintiff’s complaint as a discovery sanction pursuant to Supreme Court Rule 219(c) for failing to preserve evidence. The plaintiff appealed the ruling.

The facts revealed that six days after the fire, the plaintiff retained counsel. Though both state and city fire inspectors were unable to pin down the cause of the fire, they were able to determine

that the fire began near a couch located in the living room. Based on comments from one of these inspectors, the plaintiff’s counsel removed two lamps that he believed were the potential cause of the fire. After it was determined that these lamps were not the cause, the plaintiff’s focus shifted to a “Garden Lavender Botanical Candle” that he said was located on an end table near the couch in the living room.

At some point shortly after the fire, Ms. Kubasak hired Action Fire Restoration to clean up the debris and repair the damage. State Farm paid Action Fire for its services. Unbeknownst to the plaintiff, many of his belongings, including the end table and couch, plus the carpet that Ms. Kubasak owned, were removed and destroyed. Also shortly after the fire, State Farm retained Crawford & Company to examine the house and determine the extent of the damage. Crawford, in turn, hired Joe Mazzone to investigate the cause of the fire.

Mr. Mazzone opined that after ruling out the home’s wiring, appliances, and fixtures, he believed one possible cause of the fire was a candle placed on the end table. Mr. Mazzone also stated that he and Donald Hitchcock, a fire investigator with the Illinois State Fire Marshall’s office, both agreed that the place where the fire started was the table. Because the end table, couch, and carpet had been destroyed, however, there was no physical evidence that would either support or refute the plaintiff’s statement as to the candle’s location. *Adams*, 2005 WL 1252266 at *1-2.

In the circuit court’s order granting BBW’s motion to dismiss, the court found two separate grounds on which to dispose of the plaintiff’s claims: (1) the plaintiff and his counsel had the opportunity and the responsibility to preserve relevant evidence and failed to do so and framed their theory of the case only after allowing relevant evidence over which they had control to be destroyed (see, *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188 (1995), and (2) the plaintiff had offered no competent expert witness opinion testimony to present at trial with respect to cause and origin. The court found that the disposition of the plaintiff’s claims had the practical effect of mooting out the other claims

among and between the parties. *Adams*, 2005 WL 1252266 at *2.

The appellate court began its analysis by citing to a recent Illinois Supreme Court case, *Dardeen v. Kuehling*, 213 Ill.2d 329 (2004), which addressed spoliation of evidence and discussed the two leading spoliation of evidence cases, *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188 (1995) and *Shimanovsky v. General Motors Corp.*, 181 Ill.2d 112 (1998). Reciting the duty element for a spoliation claim it had outlined in *Boyd*, the court stated: “The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute, or other special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.”

The appellate court stressed that the leading Illinois Supreme Court spoliation of evidence cases demonstrate that there are two available remedies: a claim for negligent spoliation of evidence as discussed in *Boyd* and dismissal as a sanction under Rule 219(c) as discussed in *Shimanovsky*. These are separate and distinct remedies. In other words, when a party is confronted with the loss or destruction of relevant, material evidence at the hands of an opponent, the party may either (1) seek dismissal of his opponent’s complaint under Rule 219(c), or (2) bring a claim for negligent spoliation of evidence. The mode of relief most appropriate will depend upon the opponent’s culpability in the destruction of the evidence. *Adams*, 2005 WL 1252266 at *3-5.

A dismissal under Rule 219(c) requires conduct that is deliberate, contumacious or evidences an unwarranted disregard of the court’s authority and should be employed only “as a last resort and after all the court’s other enforcement powers have failed to advance the litigation.” See, *Shimanovsky*, 181 Ill.2d at 123. A claim for negligent spoliation of evidence requires mere negligence, the failure to foresee that the destroyed evidence was

material to a potential civil action. See, *Boyd*, 166 Ill.2d at 195.

The appellate court rejected the defendants’ reliance on those cases that held “that negligent or inadvertent destruction or alteration of evidence may result in a harsh sanction, including dismissal, when a party is disadvantaged by the loss.” The court reiterated that only where a party’s conduct can be characterized as “deliberate, contumacious or an unwarranted disregard of the court’s authority” that the drastic sanction of dismissal is justified, and, even then, only “as a last resort and after all the court’s other enforcement powers have failed to advance the litigation.”

In those instances where evidence is destroyed due to mere negligence, a prejudiced litigant can seek redress by bringing a claim for negligent spoliation of evidence against the responsible party. The question in this case was whether the plaintiff’s conduct leading to the destruction of the end table, couch, and carpet was sanctionable and, if so, whether the circuit court’s sanction of dismissal was appropriate. *Adams*, 2005 WL 1252266 at *4-5.

Even where evidence is destroyed, altered, or lost, a defendant is not automatically entitled to a specific sanction. See, *Stringer v. Packaging Corp. of America*, 351 Ill.App.3d 1135 (4th Dist. 2004). Illinois Supreme Court Rule 219(c) instead grants the circuit court the discretion to impose a sanction, including dismissal of the cause of action, upon any party who unreasonably refuses to comply with any discovery rule or any order entered pursuant to such rule. When determining an appropriate sanction, a trial court is to consider the following: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party’s objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. See, *Boatmen’s National Bank of Belleville v. Martin*, 155 Ill.2d 305 (1993).

When preparing a just order, the circuit court is to remember that the purpose of a sanction is not merely to punish

the dilatory party, but to effectuate the goals of discovery. A just order is one that is “commensurate with the seriousness of the violation” and “ensures both the accomplishment of discovery and a trial on the merits.” Because an order to dismiss with prejudice is a drastic sanction, it should be invoked “only in those cases where the party’s actions show a deliberate, contumacious, or unwarranted disregard of the court’s authority”; employed only “as a last resort and after all the court’s other enforcement powers have failed to advance the litigation.” *Adams*, 2005 WL 1252266 at *6.

In this case, the plaintiff’s conduct, though potentially negligent, could not be characterized as deliberate, contumacious, or an unwarranted disregard of the court’s authority. The plaintiff did not engage in any “knowing and willful defiance of the discovery rules or the trial court’s authority” as the destruction of the end table, couch and carpet occurred long before plaintiff filed his lawsuit. The carpet belonged to Ms. Kubasak, and it was questionable whether the plaintiff could have compelled her to preserve it. Furthermore, even if he could have preserved this evidence, the plaintiff had no knowledge that it might have been relevant and material. Finally, the plaintiff played no role in, nor had any notice of, the destruction of the evidence that the defendants claim was essential to their defense.

Though a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence, the appellate court determined that the defendants offered no “reasonable measures” that the plaintiff could have, but failed, to undertake to protect the evidence, short of treating the second floor of the house owned by Ms. Kubasak like a crime scene. The appellate court could not find and the parties did not cite to any case, either in Illinois or elsewhere, which has required such action. *Adams*, 2005 WL 1252266 at *7. Therefore, the appellate court reversed the dismissal of the plaintiff’s complaint.

STANDARD OF CARE

Common Carrier vs. Private Carrier

In *Browne v. SCR Medical Transportation Services, Inc.*, 356 Ill.App3d 642, 826 N.E.2d 1030 (1st Dist., March 30, 2005), the plaintiff Aisha Browne was sexually assaulted by Robert Britton, an employee of defendant SCR Medical Transportation Services, Inc. The plaintiff was a disabled person with cerebral palsy. SCR was a medical transport company that entered into a contract with the Chicago Transit Authority (CTA) to transport disabled persons who were unable to use the CTA's mainline services.

The plaintiff filed suit against SCR alleging that SCR, as a common carrier, owed her a heightened standard of care. SCR filed a motion for summary judgment arguing that because SCR was not a common carrier it owed its customers an ordinary standard of care and was not liable for the intentional criminal acts of its employees. The circuit court granted SCR's motion for summary judgment and the plaintiff appealed. On appeal, the plaintiff argued that the circuit court erred in granting summary judgment because there was a question of fact as to whether SCR was a common carrier and whether SCR should have known that Britton was unfit to transport disabled individuals. The appellate court first analyzed the distinction between common carriers and private carriers. *Browne*, 826 N.E.2d at 1032-1033.

In Illinois, a common carrier is "one who undertakes for the public to transport from place to place such persons or goods of such persons as choose to employ him for hire." *Illinois Highway Transportation Company v. Hantel*, 323 Ill.App. 364 (3rd Dist. 1944). The test to distinguish a common carrier from a private carrier is whether the carrier serves all of the public alike. A common carrier is "one who undertakes for hire to carry all persons indifferently who may apply for passage, so long as there is room and there is no legal excuse for refuse." A private carrier "undertakes by special agreement, in a particular instance only, to transport persons or property from one place to another either gratuitously or for hire." *Jane Doe v. Rockdale School District No.*

84, 287 Ill.App.3d 791 (3rd Dist. 1997). A private carrier "makes no profession to carry all who apply for carriage" and "is not bound to serve every person who may apply. *Rockdale School District No. 84*, 287 Ill.App3d at 794. *Browne*, 826 N.E.2d at 1034.

At the time of the assault by Britton on the plaintiff, SCR did not serve all of the general public. SCR served only those individuals who met its eligibility requirements. SCR could also decline to serve anyone based on numerous factors such as location and availability of medical transport vans. Because SCR made no profession to carry all who apply for carriage and was not bound to serve every person who applied, the appellate court determined that SCR was not a common carrier at the time of the assaults. *Browne*, 826 N.E.2d at 1035.

The plaintiff next argued that because of SCR's contractual relationship with the CTA, SCR stepped into the shoes of the CTA for the purpose of providing service to disabled members of the general public and became a common carrier. The plaintiff also argued that because the CTA was a common carrier and had to comply with the requirements of the ADA, SCR also had to comply with the ADA and owed its passengers the highest standard of care. Finally, the plaintiff argued that the SCR became a common carrier based on its agency relationship with the CTA.

The appellate court noted that the plaintiff could not cite to any relevant authority to support her contentions and the court's research of case law nationwide failed to uncover any such support. The court could not find any basis for finding that SCR's contract with the CTA or the requirements of the ADA could transform SCR into a common carrier. SCR contracted to serve only those individuals who were unable to use the CTA's mainline service and SCR only did so at its discretion. These are not characteristics of a common carrier. *Browne*, 826 N.E.2d at 1035.

The plaintiff also argued that a question of fact existed as to whether SCR owed her a heightened level of care because it knew she was disabled. The plaintiff relied on Illinois Pattern Jury Instructions, Civil, No. 100.08 (4th ed.

1995). The instruction provides: "When a carrier is aware that a passenger is mentally or physically disabled so that the hazards of travel are increased as to her, it is the duty of the carrier to provide that additional care which the circumstances reasonably require. The failure of the defendant to fulfill this duty is negligence." In response to this argument, the appellate court stated that the notes to the instruction provide: "This instruction shall be used***to define the duty underlying the issue of negligence when the defendant is a common carrier." Since it was clear that the instruction only applies to common carriers, and the appellate court found SCR was not a common carrier, the court rejected the plaintiff's argument. *Browne*, 826 N.E.2d at 1036. For these reasons, the circuit court's entry of summary judgment for the defendant was upheld.

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William J. Cremer

Cremer, Kopon, Shaughnessy & Spina at:
180 N. LaSalle Street, Suite 3300
Chicago, Illinois 60601
Telephone (312) 726-3800