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NEWSLETTERS

Job Site Accidents Can Lead To Negligent Spoliation Of Evidence

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When an accident occurs on a job site, all attention turns to the injured worker. Only later do people begin to think about the job site condition or construction equipment which may have caused the accident. That is when owners and contractors start asking whether there is any obligation to preserve the evidence the injured worker may later need to support his claim.

Late last year the Illinois Supreme Court addressed this issue. In *Martin v. Keeley & Sons, Inc.*, 212 Ill. 113 270, 212 LEXIS 1501 (2012), three construction workers were injured when a concrete I-beam used to support the bridge deck on which they were standing collapsed and caused the three workmen to fall into a creek. Shortly after the accident, the contractor destroyed the beam by breaking up the concrete portion of the beam with a hydraulic hammer. The workers brought a claim of negligent spoliation of evidence against the contractor on the ground that the workers were unable to prove their claims against the manufacturer of the beam and the manufacturer of the bearing assembly that supported the beam, due to the contractor's destruction of the critical evidence. The issue before the Court was whether the contractor had a duty to preserve the I-beam involved in the accident.

As a general rule, under Illinois law, there is no duty to preserve evidence unless (1) there is an agreement, contract, statute, special circumstance or undertaking which has given rise to a duty to preserve evidence on the part of the defendant and (2) the plaintiff is able to show that "a reasonable person in the defendant's position should have seen that the evidence was material to a potential civil action." *Boyd v. Traveler's Insurance Co.*, 166 Ill.2d 188, 652 N.E.2d 267 (1995).

In *Boyd*, the plaintiff was working inside a van belonging to his employer when a portable propane heater exploded and injured the plaintiff. Shortly after the explosion, a claims adjuster and another employee of the company's workers compensation insurer paid a visit to the plaintiff's home. The insurance employees took possession of the heater, telling the plaintiff's wife that they needed it to investigate her husband's workers compensation claim. They also said that they would inspect and test the heater to determine the cause of the explosion. The claims adjuster took the heater to the insurance office and placed it in a closet where it was lost and never tested. The plaintiff and his wife filed a Complaint against the workers compensation insurer for negligent spoliation of evidence, claiming that the loss of the heater prejudiced their product liability action against the manufacturer.

RELATED PEOPLE

Bradley B. Falkof
Of Counsel (Retired)

P 312-214-8304
brad.falkof@btlaw.com

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The Illinois Supreme Court held that the plaintiff's Complaint satisfied the two-prong duty analysis in that the insurer's employees had removed the property from the plaintiff's home, took it into their possession for the purpose of investigating the claim and knew that the heater was evidence for use in future litigation.

By contrast, in the recent *Martin v. Keeley* case, the Court found that the contractor did not demonstrate an intent to preserve the I-beam as evidence or even acknowledge the significance of the I-beam as evidence in potential future litigation. The contractor never removed the I-beam from the position in the creek where it fell, nor did it relocate the beam to a place where it would be protected from loss or destruction. As a result, the Court held that the contractor could not be held responsible for the loss of the evidence.

Another case which sheds some light on this issue is *Dardeen v. Kuhling*, 213 Ill.2d 329 (2004). In that case, the issue before the Illinois Supreme Court was whether a homeowner's insurer had a duty to instruct the homeowner to preserve evidence which could be relevant to a potential personal injury claim by someone injured on the homeowner's property. The plaintiff in that case fell in a hole on the brick sidewalk outside the homeowner's house. When the homeowner called her insurer, she mentioned that several bricks sticking up on the sidewalk made the sidewalk uneven. She asked her insurance carrier whether she could remove those bricks before someone else got hurt. After the insurer stated that it was okay, the homeowner removed between 25 and 50 bricks from the area on the sidewalk. Nearly one year later, the plaintiff filed a premises liability Complaint against the homeowner, as well as a negligent spoliation of evidence claim against both the homeowner and her insurance carrier. The plaintiff argued that the hole in the brick sidewalk was material evidence to his premises liability claim and that the insurer had a duty to preserve that evidence once its agent heard about the accident from the homeowner.

The Illinois Supreme Court affirmed the decision of the trial court finding that the insurer had no duty to preserve the sidewalk even if it was foreseeable that the evidence was material for potential civil action. Again, the court found that the insurer had never agreed to preserve the sidewalk, never possessed the evidence at issue, and never segregated it for the plaintiff's benefit.

These cases reflect a significant issue for any owner or contractor who is made aware of an accident on a job site and undertakes to preserve or assist in the preservation of evidence. While there may be no liability under Illinois law for negligent spoliation if there is no agreement with the injured party to preserve evidence and no steps are taken by the owner or contractor to preserve the evidence, the evidence may be essential to proving your claims down the road. Moreover, once an agreement is reached with the injured party to preserve evidence, and the contractor or owner takes steps to preserve the evidence, the owner or contractor must be sure to undertake this obligation in a manner so that the evidence can later be used by the injured party to support his or her claim.

For more information, contact Bradley B. Falkof at (312) 214-8304 or by e-mail at brad.falkof@btlaw.com.