SUPREME COURT OF ILLINOIS

# Addison Insurance Company v. Fay

Addison Insurance Co. v. Fay, 232 Ill. 2d 446 (2009) · No. 105752 · Decided January 23, 2009

## SUMMARY

The Illinois Supreme Court considered whether the deaths of two boys injured on an insured property constituted one or two occurrences under the property owner's liability insurance policy. Applying a time-and-space test to the insured's ongoing negligent omission, the court held that the insurer failed to prove the injuries were sufficiently linked to constitute a single occurrence. The court reversed the appellate court and affirmed the circuit court, subjecting the claims to the policy's $2 million general aggregate limit.

## CASE DETAILS

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| COURT | Supreme Court of Illinois |
| WRITING FOR THE COURT | Justice Garman; Justice Freeman; Justice Thomas; Justice Kilbride; Justice Karmeier; Justice Burke |
| JURISDICTION | Illinois |
| DECIDED | January 23, 2009 |
| DOCKET | 105752 |
| DISPOSITION | reversed |
| PROCEDURAL POSTURE | Addison brought a declaratory judgment action concerning whether the deaths of two boys constituted one or two occurrences under its insured's liability policy. The circuit court found two occurrences; the appellate court reversed and found one occurrence. The Illinois Supreme Court granted review. |
| STANDARD OF REVIEW | Construction of an insurance policy is reviewed de novo. Where the trial court's factual findings are based solely on depositions, transcripts, or other documentary evidence and the court heard no live testimony, the reviewing court may review the record de novo and is not bound by those findings. |
| PRECEDENTIAL VALUE | published precedential opinion |
| PARTIES | Donna Fay et al., Estates of Justice Carr and Everett Hodgins v. Addison Insurance Company |

## TOPICS

insurance coverage · declaratory relief insurance · contract interpretation · standard of review · appellate procedure

## PRACTICE AREAS

insurance law · insurance coverage · appellate procedure · declaratory judgment

## QUESTIONS PRESENTED

1. What standard of review applies to factual findings based solely on deposition and documentary evidence when the trial court heard no live testimony?
2. Which party bears the burden of proving whether the accident constituted one or two occurrences under the insurance policy?
3. Whether the deaths of Justice Carr and Everett Hodgins constituted one occurrence or two separate occurrences under Parrish's insurance policy.
4. Whether Nicor should be extended to treat Hodgins's alleged rescue attempt as a separate intervening act increasing the insured's liability.

## HOLDINGS

1. When the evidence before the trial court consists of depositions, transcripts, or evidence otherwise documentary in nature, and the trial court heard no live testimony, the reviewing court may review the record de novo and is not bound by the trial court's factual findings.
2. After the insured demonstrates that its claim falls within policy coverage, the insurer bears the burden of proving that a limitation applies; therefore, Addison bore the burden of proving that the two deaths constituted one occurrence subject to the lower per-occurrence limit.
3. Where an insured's negligence consists of an ongoing omission rather than separate affirmative negligent acts, the number of occurrences is determined using a time-and-space test: injuries are one occurrence only if their cause and result are simultaneous or so closely linked in time and space that an average person would consider them one event.
4. The deaths of Carr and Hodgins constituted two separate occurrences, and the claims were subject to the policy's $2 million general aggregate limit rather than the $1 million each-occurrence limit.
5. The court declined to decide whether an injured person's rescue attempt can constitute a separate intervening act under Nicor because the sequence and timing of events were too uncertain to support such a determination.

## KEY QUOTATIONS

> "*Without having heard live testimony, the trial court was in no superior position than any reviewing court to make findings, and so a more deferential standard of review is not warranted.*" (at 5)

> *"Therefore, we hold that Addison bears the burden of proving that the deaths of Carr and Hodgins constitute one occurrence."* (at 6)

> *"Where negligence is the result of an ongoing omission rather than separate affirmative acts, a time and space test effectively limits what would otherwise potentially be a limitless bundling of injuries into a single occurrence."* (at 10)

> *"The substantial uncertainty on this issue persuades us that Addison cannot meet its burden of proving that the two boys' injuries were so closely linked in time and space as to be considered one event."* (at 12)

> *"We therefore reverse the judgment of the appellate court and hold that the deaths of Hodgins and Carr constitute two occurrences under the terms of Addison's insurance policy."* (at 13)

### FACTUAL BACKGROUND

Justice Carr and Everett Hodgins became trapped in wet sand and clay surrounding a water-filled excavation pit on insured Donald Parrish's property while apparently attempting to return home during a storm. Carr was found partially submerged with both legs trapped, while Hodgins was found nearby with one leg trapped; their bodies were physically touching. Hodgins died of hypothermia, and Carr died from drowning secondary to hypothermia, but the medical and investigative evidence could not establish when either boy became trapped or died or how closely the events occurred in time.

### PROCEDURAL HISTORY

The estates of Justice Carr and Everett Hodgins initially sued insured Donald Parrish after the boys died on his property. Addison agreed to settle for the policy limits but disputed whether the $1 million each-occurrence limit or the $2 million general aggregate limit applied. The Will County circuit court found two occurrences. The appellate court reversed, relying on Nicor and Doria. The Illinois Supreme Court reversed the appellate court and affirmed the circuit court.

### DISPOSITION

reversed

### CASES CITED

- Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd., 223 Ill. 2d 407 (2006)
- Doria v. Insurance Co. of North America, 210 N.J. Super. 67, 509 A.2d 220 (1986)
- Marx Transport, Inc. v. Air Express International Corp., 379 Ill. App. 3d 849 (2008)
- Dean Management, Inc. v. TBS Construction, Inc., 339 Ill. App. 3d 263 (2003)
- Clean World Engineering, Ltd. v. MidAmerica Bank, FSB, 341 Ill. App. 3d 992 (2003)
- Bazydlo v. Volant, 164 Ill. 2d 207, 214-15 (1995)
- State Bank of Clinton v. Barnett, 250 Ill. 312, 315 (1911)
- Delasky v. Village of Hinsdale, 109 Ill. App. 3d 976, 980 (1982)
- Wolverine Insurance Co. v. Jockish, 83 Ill. App. 3d 411, 413-14 (1980)

- Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill. 2d 178, 204 (1991)
- Fidelity & Casualty Co. v. Sittig, 181 Ill. 111, 113 (1899)
- Stoneridge Development Co. v. Essex Insurance Co., 382 Ill. App. 3d 731, 749 (2008)
- Village of Hoffman Estates v. Cincinnati Insurance Co., 283 Ill. App. 3d 1011, 1013-14 (1996)
- Reedy Industries, Inc. v. Hartford Insurance Co., 306 Ill. App. 3d 989 (1999)
- Lenkutis v. New York Life Insurance Co., 374 Ill. 136, 140 (1940)
- United Services Automobile Ass’n v. Dare, 357 Ill. App. 3d 955, 963-64 (2005)
- Mason v. Home Insurance Co. of Illinois, 177 Ill. App. 3d 454, 461 (1988)
- Illinois National Insurance Co. v. Szczepkowicz, 185 Ill. App. 3d 1091, 1093 (1989)
- Village of Camp Point v. Continental Casualty Co., 219 Ill. App. 3d 86 (1991)
- Illinois Central R.R. Co. v. Accident & Casualty Co. of Winterthur, 317 Ill. App. 3d 737 (2000)
- Roman Catholic Diocese of Joliet, Inc. v. Lee, 292 Ill. App. 3d 447, 455 (1997)

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