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State Court Docket Watch: Berry v. City of Chicago

Topics: State Courts

In *Berry v. City of Chicago*,[1] the Illinois Supreme Court held that plaintiffs alleging an increased risk of injury as a result of a defendant's negligence cannot recover medical monitoring damages in the absence of a present physical injury. The court's decision to reject a recovery based on the mere possibility of future harm adhered to the traditional tort law requirement that a claimant must demonstrate an existing injury.

Berry involved a proposed class action against the City of Chicago on behalf of all city residents who resided in an area where the city had replaced water mains or meters between 2008 and the present.[2] The named plaintiffs asserted that the city negligently performed construction work to modernize

and replace hundreds of miles of water lines made of lead, and negligently failed to warn residents about the risks of lead exposure related to such work. The action sought the establishment of "a trust fund . . . to pay for the medical monitoring" of all class members to diagnose potential incidences of lead poisoning.[3]

The trial court dismissed the plaintiffs' complaint for failure to state a valid cause of action, but a mid-level appellate court reversed the decision.[4] The city appealed to the Illinois Supreme Court, which granted review and reversed the mid-level appellate court.

The state high court explained that the "plaintiffs' allegation that they require 'diagnostic medical testing' is simply another way of saying they have been subjected to an increased risk of harm."[5] The court determined that Illinois common law makes clear that "in a negligence action, an increased risk of harm is not an injury."[6] Accordingly, the court concluded that a "plaintiff who suffers bodily harm caused by a negligent defendant may recover for an increased risk of future harm as an element of damages, but the plaintiff may not recover solely for the defendant's creation of an increased risk of harm."[7]

In rejecting the availability of a medical monitoring remedy without a physical injury, the Illinois Supreme Court aligned itself with the approach followed in many other states.[8] The court recognized that "there are practical reasons for requiring a showing of actual or realized harm before permitting recovery in tort."[9] "Among other things," the court explained, a present physical injury requirement "establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability."[10] The U.S. Supreme Court and other state high courts have similarly expressed these policy rationales in rejecting medical monitoring claims by the unimpaired.[11]

Note from the Editor:

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[1] No. 124999, 2020 IL 124999 (Ill. Sept. 24, 2020).

[2] *See id.* at *1.

[3] *Id.* at *3 (quoting complaint).

[4] *Id.* at *1.

[5] *Id.* at *7.

[6] *Id.* (citing Restatement (Third) of Torts, Liability for Physical & Emotional Harm § 4, cmt. c (2010)).

[7] *Id.*

[8] States are divided on whether a claimant can recover medical monitoring damages in the absence of a present physical injury. Of the states in which a state appellate court has decided the issue as a matter of common law, a slim majority have rejected such claims. In most states, however, neither a state appellate court nor the legislative branch has decided the availability of medical monitoring absent a present physical injury. *See* Mark A. Behrens & Christopher E. Appel, *American Law Institute Proposes Controversial Medical Monitoring Rule in Final Part of Torts Restatement*, IADC Defense Counsel Journal, Nov. 2020, *available at* https://www.iadclaw.org/defensecounseljournal/american-law-institute-proposes-controversial-medical-monitoring-rule-in-final-part-of-torts-reinstatement/ (discussing courts' treatment of medical monitoring claims by plaintiffs without a present physical injury and including a 50-state case law survey).

[9] *Berry*, 2020 IL 124999, at *7.

[10] *Id.*

[11] *See id.* (citing *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), and *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013)); *see generally* Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 WAKE FOREST L. Rev. 1057 (1999).

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