

# REED ARMSTRONG QUARTERLY

JANUARY 2016

Contributors:  
William B. Starnes II  
Jennifer M. Wagner  
Travis M. Pour

## IN THIS ISSUE:

[REED ARMSTRONG.COM](http://REED_ARMSTRONG.COM)

### Asbestos

Common Law Asbestos Action Was Barred by the Exclusivity Provisions of the Workers Compensation Act and Workers Occupational Diseases Act; Exception for Injury "Not Compensable Under the Acts" Did Not Apply Despite Bar of Claims by Statute of Repose.

### Exculpatory Clauses

Exculpatory Clause Did Not Encompass Specific Danger by Which Plaintiff Was Injured.

### Insurance

Illinois Appellate Court, Fifth District Finds a Prospective Declaration of a Nuisance Could Be Considered an "Occurrence" for Insurance Purposes.

An Insurance Producer Generally Tasked with Finding an Insurer Rather than Specific Insurance Coverage Owed No Duty to Verify the Accuracy of the Plaintiff's Insurance Application.

### Premises Liability

Alleged Distraction of Searching for Products to Purchase Created Material Issue of Fact Precluding Summary Judgment for Retailer on Plaintiff's Negligence Claim Arising out of Injury Incurred When "Hit" by Open and Obvious Open Cleaning Machine.

### Spoilation

Neither Complaints nor Lack of Opportunity to Inspect Evidence Gave Rise to a Duty to Preserve Evidence in the Possession and Control of the Defendant.

### Firm News

Reed Armstrong Partner Secures Dismissal of Animal Control Act Count with Prejudice.

Associate Victorious in Defending Appeal.

Associate Obtains Jury Trial Defense Verdict.

# ASBESTOS

## **Common Law Asbestos Action Was Barred by the Exclusivity Provisions of the Workers Compensation Act and Workers Occupational Diseases Act; Exception for Injury "Not Compensable Under the Acts" Did Not Apply Despite Bar of Claims by Statute of Repose.**

***Folta v. Ferro Engineering*, 2015 IL 118070**

Plaintiff was allegedly exposed to asbestos while employed at Defendant's plant. Plaintiff was diagnosed with mesothelioma and



brought suit against Defendant 41 years after the employment. Plaintiff sought relief against Defendant under theories of negligence, premises liability, intentional misconduct and fraud.

Defendant moved to dismiss, arguing that Plaintiff's action was barred by the "exclusivity" provisions of the Illinois Workers Compensation Act and the Workers Occupational Diseases Act ("Acts"). The trial court granted Defendant's motion to dismiss and the Plaintiff appealed. On appeal the appellate court reversed the trial court's opinion, based on an exception to the Acts. Leave to appeal was then granted by the Illinois Supreme Court.

The plaintiff argued that his claim against the employer fell under an exception to the exclusivity provisions for claims that are not compensable under the Act. Plaintiff argued that because the Illinois Workers Compensation Act contains a 25-year statute of repose, the last exposure to asbestos occurred over 40 years after he left

employment with Defendant, and he was unable to seek a remedy under the Acts.

The Court concentrated on Plaintiff's argument that his injury was "not compensable under the Acts." The Court looked at the purpose of the Acts which is to "provide a new framework for recovery by injured employees from their employers, meant to *replace* the common-law rights and liabilities that previously governed employee injuries." The Acts were designed by the state legislature, to be an employee's exclusive remedy if he sustains a compensable injury. The Court determined that whether an injury is "compensable" under the Acts for purposes of the exclusive remedy provisions turns on whether the claimed injury is of the type for which the Acts provide compensation and not on whether a claimant can actually recover under the Acts for that injury. Since there was no ques-

**Whether an injury is "compensable" under the Acts for purposes of the exclusive remedy provisions turns on whether the claimed injury is of the type for which the Acts provide compensation and not on whether a claimant can actually recover under the Acts for that injury.**

tion that Plaintiff's injuries arose out of his employment and because the Acts expressly cover asbestos-related diseases, the court found that Plaintiff's claims were "compensable" and not subject to the exception relied upon by the appellate court. Therefore, the Illinois Supreme Court reversed the appellate court decision and affirmed the trial court's dismissal.

**[Top of the Document](#)**

## EXCULPATORY CLAUSES

### **Exculpatory Clause Did Not Encompass Specific Danger by Which Plaintiff Was Injured.**

***Offord v. Fitness International, LLC*, 2015 IL App (1st) 150879**

Plaintiff filed a complaint against Defendant alleging negligence and willful and wanton conduct, after he suffered a knee injury that occurred while plaintiff was playing basketball at Defendant's facility. Plaintiff alleged he slipped on an accumulation of water that

was the result of a leaking roof and/or skylight and/or window. The Defendants filed a motion to dismiss the negligence claim, asserting the Plaintiff was barred by an affirmative matter: namely, Plaintiff signed a waiver entitled "Assumption of Risk and Waiver

of Liability” when he became a member of Defendant’s facilities. The Plaintiff claimed that he did not sign the waiver; however the trial court found that the plaintiff did sign the waiver and granted Defendant’s motion to dismiss.

On appeal, the appellate court did not find the trial court’s finding that plaintiff signed the waiver to be against the manifest weight of the evidence, but reversed based upon plaintiff’s argument that the injury he suffered was not one contemplated by the waiver. In Illinois, exculpatory clauses must put the plaintiff on notice of the range of dangers for which risks

exculpatory clauses  
... must be clear, explicit, and unequivocal with reference to the type of activity, circumstance, or situation encompassed.

are being assumed; the language must be clear, explicit, and unequivocal with reference to the type of activity, circumstance, or situation encompassed. The

most important aspect of the scope of an exculpatory clause is defined by the foreseeability of the specific danger in question. The exculpatory clause in question was extremely broad. It covered use of the facilities, services, equipment or premises, but it did not mention defects from the *building* itself. The Court distinguished condensation on the court caused by a defective roof verses condensation on the court from perspiration or a spilled beverage. The Court concluded that at the time the Plaintiff signed the waiver he could not have foreseen that he would be injured due to a leaking roof.

[Top of the Document](#)

## INSURANCE

**Illinois Appellate Court, Fifth District Finds a Prospective Declaration of a Nuisance Could Be Considered an "Occurrence" for Insurance Purposes.**

[Country Mutual Insurance Company v. Bible Pork, Inc., 2015 IL App \(5<sup>th</sup>\) 140211](#)

The plaintiff insurer brought a declaratory judgment action regarding whether it had a duty to defend the defendant insured in an underlying lawsuit; the plaintiffs in the underlying suit sought to have the insured declared a public and private nuisance prior to its becoming operational. The underlying suit alleged that the insured would be a source of “disagreeable noises, odors, dust particles, surface water contamination, and loss of property values” in seeking its declaration of a nuisance, and also sought “such other relief as deemed appropriate”. Country Mutual denied that it had a duty to defend under both the CGL farm policy, as well as the insured’s umbrella policy, stating that: 1) the complaint did not seek relief for property damage or bodily injury; 2) no bodily injury or property damage occurred during the policy period,

so there was no “occurrence”; and 3) “pollutants” were excluded from coverage. The trial court granted summary judgment to the insured and ordered Country Mutual to reimburse the insured for its attorney’s fees, for a total award in excess of \$2 million.

The appellate court affirmed. The court first examined the request for “such other relief as deemed appropriate” and noted that the duty to defend is triggered when a complaint potentially falls within a policy’s coverage. In comparing the complaint to the relevant terms of the policies at issue, the court held that a request for “such other relief” constituted a prayer for damages, and that the complaint thus sought damages such that the duty to defend was triggered. Relying on a First District case that interpreted New York law, the court held that the plaintiffs in the

underlying suit could have requested money damages as well as injunctive relief; further, the court referenced an Illinois supreme court decision which held that “damages” in the context of a CGL policy included compensatory damages as well as money expended in complying with an injunction. In addition, the court noted the statements of counsel for the plaintiffs in the underlying suit, which involved counsel’s assertions that some plaintiffs may opt for injunctive relief while others might opt for monetary damages if their claims were successful.

The court next disagreed with Country Mutual that there was no “occurrence”. Noting that the focus of the inquiry is whether the injury is expected or intended, the court then relied on the within-cited *Erie Exchange* case and analogized that holding to the present

situation: where an insured is operating pursuant to a government permit, it cannot expect or intend to cause injury. The court stated that because the insured in the instant case had been granted government approval to operate, and stating that the facts in *Erie Exchange* were very similar, it held that an “occurrence” had taken place.

Finally, the court held that the pollution exclusion was ambiguous and further held that such an exclusion pertains only to “traditional” sources of pollution. The underlying complaint’s allegations of “noises”, “smells”, and “odors” were deemed not to fall into the “traditional” pollutant category. The court cited the Fourth District case of *Hilltop View*, which also involved a large hog

farming operation, as support for this conclusion.

Justice Moore dissented, stating that a comparison of the underlying complaint to the relevant policy provisions clearly established that those plaintiffs sought relief that was prospective in nature, and that no extant bodily injury or property damage was ever alleged. Further, Justice Moore noted that the majority cited no case law in support of its conclusion that a prospective declaration of a nuisance could be considered an “occurrence” for insurance purposes. Specifically, he observed that the cases cited by the majority actually involved complaints that did, in fact, allege injuries that had already occurred and which clearly fell within the coverage provisions of

Justice Moore dissented, noting plaintiffs sought relief that was prospective in nature, and that no extant bodily injury or property damage was ever alleged.

those policies at issue. He concluded by stating that the fundamental problem in the instant case was the fact that the complaint never alleged property damage or bodily injury, and so he would have reversed the trial court.

[Top of the Document](#)

### **An Insurance Producer Generally Tasked with Finding an Insurer Rather than Specific Insurance Coverage Owed No Duty to Verify the Accuracy of the Plaintiff's Insurance Application.**

**Office Furnishings Ltd. v. A.F. Crissie & Company Ltd. et al.**, 2015 IL App (1st) 141724

In 1993, plaintiff leased a warehouse and office space in a building. In 2001, Plaintiff made an insurance property damage claim for a loss resulting from water damage. In 2002, the insurance company did not renew coverage on plaintiff’s policy because it had paid out more in claims that it received in premiums. The plaintiff then had Defendant seek replacement coverage from other insurance companies through the ACORD application.

Defendant submitted the ACORD application with 8 insurance companies. Seven of the companies denied ability to issue a policy to the Plaintiff, but American Family was willing. Defendant recommended the Plaintiff obtain coverage with American Family. Plaintiff

filled out an application with American Family. The application indicated that the roof was 5 years old and had no problems, but neither party claims to have entered that information.

Plaintiff experienced a warehouse roof leak that caused more than a million dollars in damaged property. Plaintiff sought coverage from American Family, but

American Family denied the claim on the basis that the application contained misstatements about the age and prior condition of the roof. Plaintiff then sued the Defendant for professional negligence because (1) Defendant failed to ensure that plaintiff understood the questions on the American Family application; (2) Defendant failed to ensure that plaintiff understood that the coverage could be denied if the answers on the application are not correct; and (3) Defendant failed to ensure that the information on the application filed accurately reflected the information provided. The jury found in favor of the plaintiff.

Defendant filed a motion for judgment notwithstanding the verdict arguing that the verdict reflected

**AMERICAN FAMILY DENIED THE CLAIM ON THE BASIS THAT THE APPLICATION CONTAINED MISSTATEMENTS ABOUT THE AGE AND PRIOR CONDITION OF THE ROOF.**

an improper imposition of a duty upon Defendant. The trial court granted the motion finding that defendant had no duty to verify the application, because Defendant's duty was only to procure the insurance.

The Illinois Appellate Court affirmed the trial court's motion ruling on plaintiff's appeal noting the Defendant who found coverage for Plaintiff was not asked to find

specific coverage but was generally tasked with finding an insurer. The Court looked to the case *Skaperdas v. Country Casualty Insurance Co.* The *Skaperdas* case states that where there is such a vague request, the insurance broker is not liable for a lack of specific coverage. The Appellate court held that in order to find a duty to provide specific coverage, the insured must make

a request for that specific coverage; a general request to make sure the insured is covered is insufficient to create such a duty. Imposing such a duty would have been improper where the evidence showed that Defendant did not know the age of the roof and could not have known whether Plaintiff answered that question accurately.

[Top of the Document](#)

## PREMISES LIABILITY

### **Alleged Distraction of Searching for Products to Purchase Created Material Issue of Fact Precluding Summary Judgment for Retailer on Plaintiff's Negligence Claim Arising out of Injury Incurred When "Hit" by Open and Obvious Open Cleaning Machine.**

**Bulduk v. Walgreen Co.**, 2015 IL App (1<sup>st</sup>) 150166

Plaintiff alleged that she was injured inside a Walgreen store when an industrial cleaning machine, which had been left in the middle of an aisle, fell and struck her back. Additionally, Plaintiff alleged that she had initially walked around the machine, but that she had been distracted while searching for cosmetics at the time that the machine fell. The trial court granted summary judgment to Walgreen on Plaintiff's negligence, negligent spoliation of evidence (regarding alleged destruction of surveillance tapes), and *res ipsa loquitur* counts.

The appellate court reversed the grant of summary judgment on the negligence count. The court observed that the cleaning machine was owned and operated by alleged independent contractors who cleaned the Walgreen store; however, the court further observed that a business owes a duty to its invitees to exercise reasonable care to keep the premises in a reasonably safe condition. While the presence of the cleaning machine

was open and obvious, the court found that the plaintiff's allegations of the distraction exception presented a genuine issue of material fact, such that summary

Plaintiff alleged that she had initially walked around the machine, but that she had been distracted while searching for cosmetics.

judgment was not appropriate. It was reasonably foreseeable that a customer in a store would be distracted while searching for items to purchase; it also imposed only a slight burden on Walgreen to clear the floor of the cleaning machines, as it was undisputed that Walgreen was aware the machine was being used on that day.

The court affirmed the trial court's grant of summary judgment as to the negligent spoliation claim. Walgreen testified

that it turned over all videos portraying the plaintiff to its insurer, and the only relevant video was that showing the plaintiff entering and exiting the store. Walgreen testified that no surveillance footage was taken of the area in which the accident happened, and this testimony was unrebutted. Finally, due to the court's decision on the negligence count, it did not address the disposition of the *res ipsa loquitur* count.

[Top of the Document](#)



## SPOLIATION

### **Neither Complaints nor Lack of Opportunity to Inspect Evidence Gave Rise to a Duty to Preserve Evidence in the Possession and Control of the Defendant.**

*Combs v. Schmidt*, 2015 IL App (2d) 131053

While this case was remanded after appeal for further proceedings in the trial court, the Illinois Supreme Court decided *Martin v. Keeley & Sons, Inc.*, addressing the same issues. While remanded to the trial court the defendants took the position that the *Martin* decision was inconsistent with the appellate court's decision. The Trial Court felt that the law-of-the-case doctrine required it to follow the appellate court decision.

The case was then taken on appeal for the second time on the same issue: whether 'special circumstances' exist to satisfy the relationship prong of a duty to preserve evidence. In light of the *Martin* decision, the appellate court held that it did not. The

court noted that in general there is no general duty to preserve evidence. To establish a duty to preserve evidence, a plaintiff must satisfy a two-prong test. First, under the relationship prong, the plaintiff must show that there is some "agreement,

under the relationship prong, the plaintiff must show that there is some "agreement, contract, statute, special circumstance, or voluntary undertaking sufficient to justify the imposition of a duty to preserve the evidence."

contract, statute, special circumstance, or voluntary undertaking sufficient to justify the imposition of a duty to preserve the evidence." Second, under the foreseeability prong, the plaintiff must show that a reasonable person would have foreseen that the evidence was relevant to a potential civil action.

Following *Martin* decision, the appellate court that mere complaints about the evidence coupled with the defendant's possession and control are not sufficient to create a duty to preserve evidence, nor does such a duty arise out of possession control coupled with a lack of an opportunity for the plaintiff to inspect the evidence.

[Top of the Document](#)

## FIRM NEWS

### **Reed Armstrong Partner Secures Dismissal of Animal Control Act Count with Prejudice.**

*Weiss v. Campbell*, 2015 WL 8530512, Case No. 15-cv-542-JPG-DGW (S.D. Ill. December 11, 2015).

The Plaintiff alleged injuries caused when her car collided with a horse that had come onto the roadway and subsequently laid down in the road. She alleged several counts, including one count under the Animals Running at Large Act and one count under the Animal Control Act.



Pursuant to the defendant's Rule 12(b)(6) motion to dismiss filed by Reed Armstrong partner **William B. Starnes II**, the court dismissed the count under the Animal Control Act with prejudice. The

court observed that the Animal Control Act pertains to attacks perpetrated by dogs or other animals on persons who are lawfully within a given area, while the Animals Running at Large Act pertains to livestock which are not properly contained by their owners and wander about. In reviewing the relevant decisions in Illinois, the court noted several Illinois appellate cases that examined the interplay between the two Acts. It was clear from the within-cited *McQueen*, *Zears*, and *Abadie* decisions that, when the Animals Running at Large Act applies, the Animal Control Act does not apply. This is so because the Animal Control Act, which was enacted after the Animals Running at Large Act, did not alter the application of the Running at Large Act; rather, it simply eliminated the common law requirement that an owner know of an animal's dangerous propensity. There-

fore, as the *McQueen* court observed, the Animal Control Act is inapplicable when a domestic animal is simply running at large, as the Animals Running at Large Act still applies. According to the *Zears* court, the Animals Running at Large Act can be considered an exception to the Animal Control Act, even if the Animal Control Act's statutory requirements are

technically satisfied, when the damage is caused because an animal was simply wandering around. Because the federal court determined that the Illinois appellate decisions were correct, and because there was no indication that the Illinois supreme court would rule differently, the Defendant's Rule 12(b)(6) motion was granted.

### **Associate Victorious in Defending Appeal**



Details about Associate **Tori Walls'** appellate victory are available at the following hyperlink:

[Biggs vs. Wyatt](#); Madison County No. 10-L-956

### **Associate Obtains Jury Trial Defense Verdict**



Details about Associate **Joshua N. Severit's** jury trial victory are available at the following hyperlink:

[Rear-end Auto/Whiplash](#)

[Top of the Document](#)



## **REED ARMSTRONG MUDGE & MORRISSEY PC**

ATTORNEYS AT LAW

115 North Buchanan, P.O. Box 368  
Edwardsville, IL 62025

T: 618-656-0257

F: 618-692-4416

[info@reedarmstrong.com](mailto:info@reedarmstrong.com)

[REED ARMSTRONG.COM](http://REEDARMSTRONG.COM)