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REED ARMSTRONG QUARTERLY

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EVIDENCE

Prior Low Back Injuries Were Excluded Where Expert Testimony Was Insufficient to Establish Causal Connection to Claimed Injuries to Coccyx, Sacroiliac Joint, and Piriformis Muscle

Noble v. Earle M. Jorgensen Co., 2013 IL App (5th) 120248

Plaintiff filed suit against a driver and his employer for injuries sustained to her low back and coccyx following a motor vehicle accident. Specifically, she alleged to have injured her coccyx, sacroiliac joint, and piriformis muscle as a result of the accident. Prior to the accident, however, Plaintiff had a history of chronic low back pain, arthritis in the lower back, and pelvic pain. She also suffered a subsequent lower back fracture two years after the accident. At trial, the court granted Plaintiff's motion in limine which barred defendants from mentioning the plaintiff's low back injuries and treatment and subsequent fracture. The court found defendants failed to present a causal connection between the prior injuries to plaintiff's low back and her injuries to the coccyx, sacroiliac joint, and piriformis muscle from the motor vehicle accident. The jury awarded the plaintiff \$576,000 in damages. The defendants appealed.



On appeal, the defendants argued the trial court erred in excluding evidence of plaintiff's prior low back pain and treatment and subsequent back fracture. In particular, defendants maintained that sufficient expert testimony established a causal connection between plaintiff's injuries to her low back and the injuries to her coccyx, sacroiliac joint, and piriformis muscle. However, defendants' expert opined that plaintiff's coccydynia was not caused by the motor vehicle accident but rather developed

afterward. Therefore the appellate court disagreed with defendants, finding that defendant's expert testimony actually established the prior injuries were not causally connected. Plaintiff's medical records prior to the accident contained no reference of injuries to the coccyx, sacroiliac

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joint, and piriformis muscle. Further, plaintiff's primary care physician confirmed she never experienced pain and symptoms in these areas prior to the accident. Therefore, following *Voykin v. Estate of DeBoer*, 192 Ill.2d 49, 733 N.E.2d 1275 (2000), the Court affirmed the trial court's ruling in that defendants failed to present a causal connection between plaintiff's previous injuries to her low back and the injuries to her coccyx, sacroiliac joint, and piriformis muscle from the motor vehicle accident.

Since *Voykin* held a prior injury may be relevant to the question of causation or damages, negation of causation is but one basis for admission. Other bases for admission of prior injuries, such as aggravation of a prior condition, should always be explored. If disability is claimed, a prior injury may be relevant to determine what extent the defendant is responsible for the disability.

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JURISDICTION

French Manufacturer of Helicopter Part with No Direct Contacts to Illinois Had Requisite Minimum Contacts for Specific Personal Jurisdiction

Russell v. SNFA, 2013 IL 113909

The Illinois Supreme Court recently held Illinois had specific personal jurisdiction over a French manufacturer of a helicopter part involved in a fatal crash in Illinois. An executor of a helicopter pilot's estate brought a products liability action against the French manufacturer alleging a failure of its tail-rotor bearing caused the helicopter to spin out of control and crash. The trial court dismissed the suit for lack of jurisdiction, because the manufacturer did not have sufficient contacts with Illinois. The Appellate Court reversed, finding Illinois' exercise of jurisdiction over the French defendant to be proper. The manufacturer appealed.



The Supreme Court affirmed the Appellate Court and found that the manufacturer was subject to specific personal jurisdiction under the Illinois Long Arm Statute. First, the Court found sufficient minimum contacts because the manufacturer purposefully availed itself of the laws of Illinois. Although it had no direct American customers, let alone Illinois customers, the manufacturer custom-made helicopter tail-

rotor bearings specifically for a company whom it knew sold parts and helicopters to Illinois customers. In essence, the helicopter company acted as an Illinois distributor for the manufacturer's tail-rotor bearings. Second, the manufacturer maintained a separate business relationship with a company whose purchasing location was in Rockford, Illinois. Although it never shipped any products directly to Illinois, the manufacturer made three sales trips to the Rockford location and sent numerous sales invoices to Illinois. Finally, litigating the

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case in Illinois was reasonable because the deceased pilot lived and worked in Illinois for an Illinois-based employer, the crash itself occurred in Illinois, and multiple sales of defendant's products were made in Illinois through its distributor over the past 10 years.

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NEGLIGENCE

Franchisees Have a Duty to Properly Train Employees Where Policy Creates Foreseeable Risk of Injury

Reynolds v. Jimmy John's Enterprises, LLC, 2013 IL App (4th) 120139

A motorcyclist filed suit against a Jimmy John's franchisee for injuries sustained when its delivery driver failed to yield to traffic and collided with his motorcycle. He alleged direct liability against the franchisee for negligent training and supervision of its employees. Specifically, his complaint pleaded facts suggesting the franchisee's drivers regularly violated traffic laws to facilitate its "freaky fast" policy of delivering sandwiches within 15 minutes of ordering. The trial court dismissed the motorcyclist's case with prejudice without stating a basis or reasoning for its decision.

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The motorcyclist appealed.

On appeal, he argued his amended complaint adequately asserted counts of direct liability against the franchisee for negligent training and supervision. The Appellate Court agreed, reversing the trial court's dismissal of his amended complaint with prejudice. Both counts alleged facts contending the franchisee was negligent for failing to instruct its employees how to make rapid deliveries in a safe and reasonable manner. He further alleged the franchisee instructed and encouraged drivers to expedite delivery, but provided no training on how to safely and properly deliver sandwiches thereby creating a foreseeable risk of injury to members of the public. Thus, the complaint pleaded sufficient facts to raise a question under Illinois negligence principles whether the franchisee's delivery policy created a duty to the public to properly supervise its employees in making "freaky fast" deliveries.

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PROXIMATE CAUSE

Automobile Accident Did Not Proximately Cause Driver's Death

Lough v. BNSF Ry. Co., 2013 IL App (3d) 120305

The plaintiff filed Wrongful Death and Survival Act claims against the defendant on the basis of an auto accident that occurred in 2007, 22 months before the decedent's death. The decedent had a history of COPD, depression, memory problems, low back and neck pain, and degenerative disc disease dating back to 1979. After the accident, the

decedent complained of increased pain, and the plaintiff testified that the decedent was no longer able to ride motorcycles and did not want to leave the house. In 2009, the decedent passed away. The causes of death listed on his death certificate were congestive heart failure and COPD / emphysema.

The decedent's treating physician testified that the 2007 auto accident, more probably than not, did not cause the decedent's death. A pain management physician who treated the decedent testified that it was impossible to determine how much more pain the decedent experienced after the 2007 accident, and stated that he had no quarrel with the causes of death listed on the death certificate. The trial court granted summary judgment to the defendants on the Wrongful Death counts, stating that the defendants' actions were not the proximate cause of the decedent's death.

On appeal, the plaintiff asserted that the instant case was a classic "eggshell skull" case, and further argued that the 2007 accident caused a dormant disease to manifest itself within the decedent. The appellate court noted that evidence of proximate cause cannot be speculative or contingent; rather, there must be a reasonable certainty that a causal connection exists. In the instant case, the decedent's primary care physician, as well as his pain management physician, both testified to the effect that the 2007 accident did not cause

the decedent's death. Further, the causes of death listed on the death certificate were conditions for which the decedent had been treating for years prior to the accident.

The plaintiff argued that sufficient circumstantial evidence of causation existed. The appellate court disagreed, noting that circumstantial evidence can only support proximate cause when the evidence is such that the conclusion as to cause is more probable, rather than merely possible. There was simply no evidence in the record to

Circumstantial evidence [alone] can only support proximate cause when the evidence is such that the conclusion as to cause is more probable, rather than merely possible.

establish that the 2007 accident "more probably than not" caused the decedent's death. The trial court's grant of summary judgment was affirmed.

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TORTS

Plaintiff Stated Claim for Spoliation of Event Data Recorder Based on Alleged Request to Preserve Taxi

Kilburg v. Mohiuddin, 2013 IL App (1st) 113408

The plaintiff was injured in an auto accident when the taxi in which she was riding left the road and struck a tree. The taxi driver, Mohiuddin, asserted that the taxi suddenly accelerated on its own, causing the accident. The taxi bore the insignia of Checker Taxi, and the operator of Checker Taxis in Chicago was Wolley. The owner of the taxi, Zante, paid a fee to operate the taxi as a

Checker taxi. The taxi was initially towed to a police impound lot; two days later, it was towed to a storage lot that was leased by Taxi Medallion. The rent on the lot was paid by Taxi Association.

The day after the taxi was moved to the storage lot, the plaintiff's attorney sent a demand letter to Mohiuddin and Zante,

requesting that they preserve the taxi as evidence. Four days later, the plaintiff filed her complaint and served said complaint on Mohiuddin and Zante. Two days after the complaint was filed, the plaintiff obtained an emergency court order requiring Mohiuddin and Zante to preserve the taxi as evidence. The plaintiff inspected the taxi one month after the demand letter was sent, at which time it was discovered that the event data recorder was missing. The plaintiff proceeded to allege spoliation of evidence as to Mohiuddin, Zante, Wolley, Taxi Medallion, and Taxi Association, further alleging that she was unable to sustain a products liability lawsuit as to the defective taxi without the data recorder. The trial court dismissed the plaintiff's spoliation counts with prejudice.

The appellate court affirmed in part and reversed in part. The dispositive issue was which entities received a request to preserve the taxi. The plaintiff did not allege that any contract, agreement, or statute required any of the defendants to preserve the taxi; rather, she argued that a special circumstance existed as to Mohiuddin and Zante. The court agreed; Mohiuddin and Zante had received a request to preserve the taxi within hours of it being moved from the police

impound lot to the storage lot. Once the request to preserve evidence was received, the duty was triggered. The plaintiff had alleged that the event data recorder was still present when the taxi was taken from the police impound lot; therefore, even though a period of hours elapsed during which Mohiuddin and Zante had no duty to preserve evidence, the court held that it was for the trier of fact to determine whether the data recorder was removed during the period in which they did have a duty. The court reiterated that, for a special circumstance to exist, a request for preservation was of paramount importance.

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As to Wolley, Taxi Medallion, and Taxi Association, the court affirmed the trial court. There was no evidence that any of these entities received copies of the demand letter, complaint, or court order to preserve the taxi.

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WORKERS' COMPENSATION

Gradually Decreasing Wage Differential Award was Erroneous

United Airlines, Inc. v. Illinois Workers' Compensation Com'n, 2013 IL App (1st) 121136WC

The workers' compensation claimant sustained injuries in his job as a ramp service worker. When he filed his claim, he was a union member at the top of the ramp service worker pay scale.



Permanent restrictions prevented him from returning to his position as a ramp service worker, so he accepted a position with the employer as a station operations representative (SOR). Under the union contract, the claimant had to start work at the bottom of the SOR pay scale but was eligible for annual wage increases pursuant to a step pay scale.

A labor relations analyst testified for the employer at the arbitration hearing. After studying the step pay scale in place at the time of the hearing, and after considering possible changes to the union contracts applicable to the claimant's current and prior positions, the analyst concluded that the claimant would be earning more in his position as a SOR in 2018, eight years past the hearing date. The analyst further noted that the claimant would be receiving annual raises in the interim, and that these raises were fairly predictable in terms of amount. The employer argued that the arbitrator should award a wage differential pursuant to Section 8(d)(1), but that the award should decrease annually in proportion to the shrinking difference in pay between the claimant's current and former positions. The employer further argued that the award should terminate at the point at which the claimant would be earning more as a SOR than he would have been as a ramp service worker. The arbitrator agreed and ordered a gradually decreasing wage differential award that was scheduled to terminate in 2018.

On review, the Commission reversed the arbitrator's decision and awarded the claimant a set amount per week that would continue for the duration of his disability. On appeal to the circuit court, the Commission was reversed and the arbitrator's award reinstated.

On further appeal, the appellate court noted at the outset that Section 8(d)(1) does not

Uncommon Event Requirement for Compensable Mental-Mental Injury Is Determined Objectively from the Workforce as a Whole

Diaz v. Illinois Workers' Compensation Com'n, 2013 IL App (2d) 120294WC

The claimant, a police officer, filed a workers' compensation claim for post-traumatic stress disorder (PTSD) that allegedly resulted from being approached in

provide for varying amounts of payment and therefore agreed with the Commission that the wage differential amount must be calculated as of the date of the hearing. It noted that the arbitration hearing has been held to be the only opportunity for both parties to present evidence of future earning capacity, as well as the severity and likely duration of the injury. Although such a limitation could result in imperfect awards, the legislature has not provided an alternative. No prior holding had determined that multiple awards could be given for multiple future dates; rather, the arbitrator can consider evidence beyond wages to make a determination of long-term earning capacity at the time of the hearing, and then determine the correct, set amount of the wage differential.

A section 8(d)(1) wage differential award must be for a set amount considering evidence of future earning capacity as well as the severity and likely duration of the injury.

Upon further review of the evidence presented as to wages and overtime, the appellate court affirmed the amount set by the Commission (even though the award was only for the existing differential as of the date of the hearing which the appellate court found was not against the manifest weight of the evidence).

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a threatening manner by a citizen who appeared to be armed with a handgun. The citizen eventually retreated into his house, and a standoff ensued. The claimant was



not physically harmed during the altercation. He testified that he felt “wound up” immediately after the incident, but that he reported for work the

following day. Within a few days the claimant began experiencing heart palpitations, anxiety, panic attacks, and flashbacks of the incident. He was found to be unfit to serve as a police officer, and he underwent intensive psychiatric treatment. Eventually, he was able to return to full-duty work.

The arbitrator found that the claimant sustained an injury that arose out of and in the course of his employment, and awarded the claimant 15% loss of the person as a whole. The arbitrator based his decision on *Pathfinder Co. v. Industrial Comm’n*, 62 Ill.2d 556 (1976). The Commission reversed, stating that it read the decision of *General Motors Parts Division v. Industrial Comm’n*, 168 Ill.App.3d 678 (1st Dist. 1988) to provide a more narrow interpretation of *Pathfinder* than the arbitrator used. Specifically, the Commission relied on a partial statement of *General Motors*, to the effect that compensation for mental-mental injuries is “limited to the narrow group of cases in which an employee suffers a sudden, severe emotional shock which results in immediately apparent psychic injury and is precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment.” The circuit court confirmed the Commission.

The appellate court noted that a great deal of confusion persists as to the proper standard for compensation of mental-mental injuries,

and determined that the Commission had inappropriately relied on a statement taken out of context in *General Motors*. The gist of *General Motors* was that the everyday stresses and insults encountered in the workplace could not form the basis for a mental-mental claim; rather, there had to be a sudden and severe emotional or mental shock, traceable to a definite time and place. In other words, the mental injury had to be something distinct from those that every worker faces on a day-to-day basis.

In the instant case, the Commission acknowledged that the claimant’s PTSD resulted from the encounter with the apparently armed citizen. The appellate court noted that if the Commission’s narrow interpretation were allowed to stand, then workers in inherently dangerous professions would never be able to recover compensation for mental-mental injuries, as the Commission based the degree of mental shock on the rigors of the claimant’s particular profession, rather than on the workforce as a whole. Nothing in *Pathfinder* required that a subjective standard in the context of the particular occupation be used, and the court held that if *General Motors* called for such a standard, then it declined to follow that portion of the holding. The court in the instant case held that an objective, reasonable person standard should be applied to mental-mental claims. It was therefore error for the Commission to conclude that the claimant’s encounter was non-compensable due to his special training as a police officer, and he was entitled to benefits.

Nothing in *Pathfinder* required that a subjective standard in the context of the particular occupation be used

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FIRM NEWS

Mr. Martin K. Morrissey Has Been Invited to Join the Claims and Litigation Management Alliance

May 23, 2013

Reed Armstrong Mudge, Morrissey P.C. is pleased to announce that Mr. Martin K. Morrissey has been invited to join the prestigious Claims and Litigation Management Alliance. The CLM is a nonpartisan alliance comprised of thousands of insurance companies, corporations, Corporate Counsel, Litigation and Risk Managers, claims professionals and attorneys. Through education and collaboration the organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows. To learn more about the CLM, please visit www.TheCLM.org.



Two Jury Trial Victories for Partner Michael Hobin

On May 30, 2013, Partner Michael Hobin successfully tried an admitted liability motor vehicle accident case in which plaintiff requested a verdict of \$130,000. The jury returned a verdict of \$4,291.65 for Plaintiff (\$2,132.44 for medical bills and \$2,159.31 for pain and suffering).



On June 19, 2013, he received a defense verdict in a dram shop action seeking recovery for skull fracture, broken ankle and loss of hearing resulting from a barroom brawl. Fuller descriptions of these results may be found at the following links:

[Dram Shop; Barroom Brawl; Skull Fracture](#)

[T-Bone Collision, Headaches, Spine, Emotional Injury](#)

Associate Tori Walls Secures Defense Verdict on Vexatious Refusal Claim

On June 5, 2013, Reed Armstrong Associate Tori Walls secured a defense verdict for Country Mutual Insurance Company in the Third Judicial Circuit Court of Madison County Illinois on a Section 155 claim for vexatious refusal to pay. For a full description of the case, please use the following link:



[Breach of Insurance Contract/Vexatious Refusal](#)

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