

REED ARMSTRONG QUARTERLY

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ASBESTOS

Exclusion of Plaintiff's Exposure to Asbestos in Another Employment Was Reversible Error Requiring a New Trial in Plaintiff's FELA Case Against Former Railroad Employer for Asbestos Exposure in the Work Place

Smith v. Illinois Central Railroad Co., 2015 IL App (4th) 140703

Plaintiff, a former railroad employee, filed a complaint against Defendant railroad company for breach of duty to provide employees with a safe place to work under the Federal Employee Liability Act (FELA) stemming from the employee's alleged exposure to asbes-



tos while working for the railroad. At the pretrial conference, plaintiff presented a motion in limine seeking to prohibit defendant from introducing any evidence that plaintiff was "exposed to asbestos dust in any manner other than by virtue of [his] employment by [d]efendant." The motion was granted in the absence of any evidence as to any other exposure being the sole proximate cause of decedent's disease. The ruling prevented defendant from presenting evidence regarding plaintiff's work history at the Union Asbestos & Rubber Company (UNARCO) facility at the Bloomington rail yard. After a trial and jury verdict in plaintiff's favor, the Appellate Court reversed and remanded for a new trial reasoning the courts have been clear that it is the plaintiff's burden to prove that the defendant's product is the proximate cause of the alleged harm and that

the defendant is entitled to introduce evidence to show otherwise. "Based on our supreme court's opinions in *Leonardi* and

Defendant was not required to show UNARCO was the sole proximate cause; it should have been allowed to show the exposure at UNARCO was to blame.

Nolan, defendant in this case did not have to prove anything. We find plaintiff's argument defendant had no-proximate-

cause defense because he had no expert witnesses disclosed on causation is simply incorrect as a matter of law." It held Defendant was not required to show UNARCO was the sole proximate cause; rather the plaintiff had the burden of establishing defendant was a proximate cause of his asbestosis. Defendant should have been allowed to show the exposure at UNARCO was to blame should the jury find plaintiff had asbestosis. "[O]nce the jury found plaintiff had asbestosis, it could only conclude the asbestosis was caused by plaintiff's exposure to asbestos while working for defendant." Consequently, the court found the trial court's error was partially egregious, and the error was clearly not harmless.

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INSURANCE

Policy Unambiguously Precluded Stacking of Separate Vehicle UIM Coverages Listed in the Declarations

Nationwide Agribusiness Insurance Co. v. Dugan, 2015 WL 4452430 (7th Cir., 2015)

Defendants claimed more than \$200,000 in damages following a motor vehicle accident with a third party and settled with the third party's insurer for its policy limits. The Defendants then sought underinsured motorist (UIM) benefits pursuant to an insurance policy issued to them by the Plaintiff. The policy provided defendants with \$100,000 in UIM coverage for each of four cars listed in policy. The Defend-

ants made a demand on Plaintiff for the payment of \$400,000, the aggregate limit of the four UIM coverage limits listed on the declarations page. The Plaintiff denied payment on the grounds that the express language in the policy precluded stacking of the coverages, and the Defendants were not entitled to any UIM coverage because the \$100,000 limits were set-off by the settlement with the third-party. Defendant claimed that the anti-

PREMISES LIABILITY

The Open and Obvious Rule Still Precludes Liability When No Exceptions Are Established

Bujnowski v. Birchland, Inc., 2015 IL App (2d) 140578

stacking language in the policy is ambiguous. The parties filed cross declaratory judgment actions. The District Court (S.D. Ill., Reagan, J.) granted Plaintiff's motion for summary judgment and this appeal followed. The Appellate Court affirmed holding the policy unambiguously prohibits stacking. Although defendant paid separate UIM premiums for each car, coverage was explicitly limited to the highest limit of any of the four UIM vehicle coverages in the policy. Thus, defendant was not enti-

Plaintiff broke his neck after diving off a pier in a lake at defendant's resort. He sued for negligence alleging that the defendant had no employees monitoring the area, failed to supervise or train customers properly on the use of the area, and failed to warn them of the dangers of using the area. The defendant filed a motion for summary judgment, contending that it did not owe plaintiff a duty because the danger of diving into water is open and obvious. Summary judgment for defendant was affirmed on appeal because "possessors of land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious." The risk encountered by the Plaintiff was open and obvious. While the existence of an open and obvious condition does not automatically bar the imposition of a duty, plaintiff failed to present any evidence supporting an exception to the open and obvious rule. The court noted that no published premises liability negligence case has imposed a duty on a defendant when the dangerous condition was found to be open and obvious and an exception to the rule (such as the dis-



traction or deliberate encounter exceptions) had not been established. Under these circumstances it declined the invitation to impose such a duty by taking into consideration the magnitude of the burden of guarding against the injury, and the consequences of placing that burden upon the defendant.

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"possessors of land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious."

| COVERAGE AND LIMITS OF LIABILITY (In Dollars) | | | | | |
|---|---------------|---------------|-----------------|------------------------|---------------|
| Coverage is provided where a premium or limit of liability is shown for coverage. | | | | | |
| VEHICLE | BODILY INJURY | | PROPERTY DAMAGE | UNDERINSURED MOTORISTS | |
| | EACH PERSON | EACH ACCIDENT | EACH ACCIDENT | EACH PERSON | EACH ACCIDENT |
| 2 | 100 000 | 300 000 | 100 000 | * 100 000 | 300 000 |
| 5 | 100 000 | 300 000 | 100 000 | * 100 000 | 300 000 |
| 6 | 100 000 | 300 000 | 100 000 | * 100 000 | 300 000 |
| 4 | 100 000 | 300 000 | 100 000 | * 100 000 | 300 000 |

| PREMIUMS (In Dollars) | | | | |
|-----------------------|---------------|-----------------|------------------|------------------------|
| VEHICLE | BODILY INJURY | PROPERTY DAMAGE | MEDICAL PAYMENTS | UNDERINSURED MOTORISTS |
| | 2 | 297 28 | 198 78 | 27 06 |
| 5 | 234 16 | 189 54 | 40 50 | * 19 72 |
| 5 | 234 16 | 189 54 | 40 50 | * 19 72 |
| 4 | 274 34 | 176 42 | 39 06 | * 19 72 |

itled to any UIM coverage because the highest coverage of the four cars was \$100,000 and plaintiff was entitled to set off the \$100,000 settlement with the third party against any UIM obligation it had under policy.

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RESPONDEAT SUPERIOR

Logistics Provider Was Vicariously Liable for Wrongful Death Where Jury's Finding of Agency Relationship Was Upheld Under Conflicting Evidence

***McHale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625**

Plaintiff's decedent was killed after being struck by a semi tractor-trailer while standing on the side of the road next to her disabled vehicle. The truck in question was driven by Kleppe, who was, admittedly, an employee of Kiswani and W.D. Trucking. Kiswani had a contract with Transfreight, a logistics provider, whereby Kiswani would fulfill the pick-up and transportation of Toyota auto parts from Toyota facilities, as specified in Transfreight's contract with Toyota. Kiswani/Kleppe admitted their liability for the accident. The jury returned a verdict of \$8 million, and specifically found that Kiswani and Kleppe were agents of Transfreight. Thus Transfreight was held liable for the negligence of Kiswani/Kleppe.

Transfreight argued that the jury's determination of the existence of an agency relationship between Transfreight and Kiswani/Kleppe was against the manifest weight of the evidence. The determination of whether an agency relationship exists, as distinct from an independent contractor relationship, is made considering the right to control or direct the work, the supply of materials, the right to hire or fire, and the character of any supervision.

The court observed that the jury received conflicting testimony from multiple witnesses regarding whether an agency relationship existed. Different experts testified in contradiction to one another

about whether Kleppe became an agent of Transfreight under the applicable federal regulations. The contract between Kiswani and Transfreight stated that Kiswani had sole and exclusive control over its drivers. Kleppe testified that he drove for Kiswani and was paid by W.D. He further testified that his instructions on what to pick up at the Toyota cross-dock came from Kiswani, and that he was able to pick his own routes and decide when and where to stop for fuel. Kleppe never had contact with anyone at Transfreight. Additionally, the Transfreight-Kiswani contract specified that Kiswani would supply necessary equipment at its expense. Further, Kiswani's representative testified that it had the sole responsibility for hiring and firing drivers.

Nevertheless, the jury was also presented with evidence that Transfreight did have the right to control Kiswani's actions. Specifically, the Toyota-Transfreight contract stated that Transfreight had exclusive control over the manner in which its subcontractors performed, and that such people were employees or subcontractors of Transfreight. In addition, Transfreight determined the route and time windows; Kiswani was required to report its drivers' progress to Transfreight at regular intervals; Kiswani was required to report any abnormal events during driving to Transfreight; and Transfreight required reporting of

monthly performance indicators to determine how often deliveries were made on time.

The jury's finding of agency was not against the manifest weight of the evidence. Conflicting evidence and testimony had been presented to the jury, and it was the jury's responsibility to sort through the evidence.

The court concluded that the jury's finding of agency was not against the manifest weight of the evidence. Conflicting evidence and testimony had been presented to the jury, and it was the jury's responsibility to sort through the evidence. They had been instructed on the law of agency, and they had an opportunity to evaluate the credibility of the witnesses. Ultimately, the jury resolved the conflicts in Plaintiff's favor, and there was credible evidence to support the result.

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SUBJECT MATTER JURISDICTION

Circuit Court Lacked Subject Matter Jurisdiction over Workers' Compensation Fraud Claim Raised Before a Final Decision as to Compensation Benefits Where the Fraud Claim Depended on Issues of Fact Related to the Worker's Alleged Accident and Injury

***ABF Freight System, Inc. v. Fretts*, 2015 IL App (3d) 130663**

Plaintiff had employed Fretts, who alleged he sustained two workers' compensation shoulder injuries in 2009; Plaintiff became obligated to pay TTD and to accommodate restrictions imposed by Fretts' doctors as a result. In 2011, Plaintiff received information that Fretts was driving for another company, and surveillance revealed him lifting weights at a gym. In 2012, prior to a final decision on the workers' compensation claims, Plaintiff filed a motion with the workers' compensation arbitrator alleging that Fretts had committed fraud and knowingly misrepresented the extent of his injuries to secure workers' compensation benefits. Shortly after filing this motion, Plaintiff also filed a complaint in the circuit court, alleging that Fretts had committed workers' compensation fraud, made material misrepresentations to secure insurance benefits, and fraudulently obtained TTD benefits. The workers' compensation arbitrator ruled on the motion presented to her, and after making findings of fact, concluded that Fretts had not committed fraud. The arbitrator's decision was not appealed to the Commission appellate panel. Subsequently, the circuit court dismissed Plaintiff's complaint, finding that it was barred by collateral estoppel.

The Third District affirmed the dismissal, but it determined that the circuit court lacked juris-

diction to hear the matter in the first instance. Although the Workers' Compensation Act does not expressly divest circuit courts of their original jurisdiction, the Illinois Supreme Court has held that the circuit courts have no original jurisdiction over matters involving a determination of workers' compensation benefits. The appellate courts have interpreted the holding to preclude jurisdiction over workers' compensation fraud claims that are dependent on factual issues, in-

the circuit courts have no original jurisdiction over matters involving a determination of workers' compensation benefits.

cluding such issues as the details of the accident, the nature and extent of the injury, and so forth. Therefore, the dispositive question is whether the case involves issues of fact related to the workers' compensation accident, or whether it involves issues of law that are better resolved by the circuit court. Because this case involved Fretts' representations of the nature and extent of his injuries, as well as his statements to his doctors, it involved factual issues such that the circuit court was divested of original jurisdiction. The court also stated that if the allegations of fraud had arisen after a final decision was rendered as to workers' compensation benefits, then the circuit court would have been the appropriate forum, as the workers' compensation arbitrator cannot re-open a case due to alleged fraud after it is closed.

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Premises Liability Claim Was Precluded by the Exclusive Remedy Provision of the Workers' Compensation Act Since Plaintiff Was Found to Be a Borrowed Employee

***Reichling v. Touchette Regional Hospital, Inc.*, 2015 IL App (5th) 140412**

Plaintiff was a registered nurse employed by a temporary staffing agency, who sustained an injury while performing her job duties as a temporary nurse at Touchette. She filed and settled a workers' compensation claim for that injury, in which the temporary agency was identified as her

employer. Plaintiff then filed a complaint against Touchette for premises liability. The circuit court granted summary judgment to Touchette, finding that Plaintiff was a borrowed employee, and as such, her premises liability claim was precluded by the exclusive remedy provision of the Workers'

Compensation Act.

The Fifth District affirmed the circuit court. The court noted that the definition of a loaning employer is given in the Workers' Compensation Act itself; however, to establish whether an employee was a "borrowed employee", a two-prong test must be employed. The first prong asks whether "the alleged borrowing employer had the right to direct and control the manner in which the employee performed the work"; the second prong asks "whether there was an express or implied contract of hire between the employee and the alleged borrowing employer".

The court noted the following undisputed facts: Plaintiff was required to work the same hours as Touchette's employees; Plaintiff was required to follow Touchette's doctors' orders and to assist Touchette's other nurses; Touchette determined Plaintiff's schedule and the department in which she would work; Plaintiff did not call the temporary agency to get permission to perform her job duties at Touchette; Touchette's supervisors had authority to supervise Plaintiff's work and to write her up for violations; and Touchette had the right to order Plaintiff to leave and to prevent her from returning if it found she had behaved negligently or unprofessionally. These facts satisfied the first prong of the "borrowed employee" test. Additionally, Plaintiff had impliedly consented to the "borrowed employee" relationship; not only had she consented to the assignment of temporary jobs for over two years prior to the accident, but she also signed a "Memo of Understanding" on Touchette's letterhead, acknowledging that she had re-

ceived information and materials related to her work, and she further signed Touchette's job description for a registered nurse, which was written on its letter-

One is a "borrowed employee" if "the alleged borrowing employer had the right to direct and control the manner in which the employee performed the work", and "there was an express or implied contract of hire between the employee and the alleged borrowing employer."

head. These facts satisfied the second prong of the "borrowed employee" test.

The fact that an employee is paid by the loaning employer is of no consequence to the "borrowed employee" analysis; the loaning employer is merely a conduit through which the employee is paid. The dispositive issue is control. Further, the fact that the temporary agency agreed to indemnify Touchette for workers' compensation liability is also irrelevant, as the Workers' Compensation Act states that loaning and borrowing employers are jointly and severally liable for the payment of workers' compensation benefits.

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Exclusive Remedy Dismissal Was Erroneous Where Action Was Brought Against a Member of Plaintiff's Employer, an LLC, because Member Had No Legal Obligation to Pay Workers Compensation Benefits Owed by the LLC

Burge v. Exelon Generation Co., LLC, 2015 IL App (2d) 141090

Plaintiff filed a complaint in circuit court to recover for injuries he incurred at work due to unsafe conditions at the facility. Plaintiff was employed by a limited liability company (LLC), and he brought the suit against the sole member of that LLC. The defendant member provided an affidavit that the LLC employer was self-insured and that through the LLC Agreement, defendant paid the workers' compensation benefits of any/all of the LLC's employees, including plaintiff, on a reimbursement basis. After the reimbursement, defendant invoked the "exclusive remedy" provision of the Workers' Compensation Act to dismiss Plaintiff's complaint. The trial court granted dismissal.

The appellate court reversed and remanded. The court noted that Section 1(a)(3) of the Act states that an employer is obligated to pay workers' compensation benefits for its immediate employees, as well as for employees of any contractor that it hires, unless the contractor has insured its employees. Defendant argued that the employer was its contractor, and that Defendant was actually the true employer, as it had paid the workers' compensation benefits. In support, Defendant presented an affidavit from the individual in charge of workers' compensation, who averred that Defendant had paid the bills pursuant to Section 1(a)(3). In later briefing, Defendant clarified that Plaintiff's employer was self-insured, but that it

had reimbursed the employer for the workers' compensation benefits paid to Plaintiff, and that it should thus enjoy immunity under the Act. Defendant further argued that it was actually the employer's agent, and that the relationship between the two should be regarded as a joint venture.

The appellate court examined the LLC agreement and found that Defendant maintained nearly total control and authority over the employer, and in no way could Defendant be considered the employer's agent; rather, the exact opposite appeared to be true. The court then noted the principle of "active-participant liability" articulated by the Supreme Court in *Forsythe*, in which a parent company can be held liable in tort for conditions on the subsidiary's

property if the parent exercised control and dictated conditions at

Under the LLC agreement Defendant maintained nearly total control and authority over the employer, and in no way could Defendant be considered the employer's agent; rather, the exact opposite appeared to be true.

the facility; further, the parent would not enjoy immunity under

Section 5(a) of the Act, as it was the subsidiary who paid the workers' compensation benefits, not the parent. In short, the parent cannot have its cake and eat it too, by piercing its own corporate veil. Finally, the court rejected Defendant's argument that it was a joint venture noting no agreement to pay workers' compensation benefits existed between Defendant and the employer. Immunity under Section 5(a) applies to those who bear the burden of furnishing workers' compensation benefits, such that those employers should not also have to answer in tort. Ultimately, because Defendant had no legal obligation to reimburse the employer for Plaintiff's workers' compensation benefits, it could not invoke the protection of Section 5(a).

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FIRM NEWS

Reed Armstrong Partners Again Top Rated in Personal Injury Defense



Stephen C. Mudge and **Martin K. Morrissey** have been peer selected by their peers as top rated attorneys in the area of Personal Injury Defense in the Illinois Super Lawyers directory for 2016. (<http://attorneys.superlawyers.com/illinois/>). The selection process includes independent research, peer nominations and peer evaluations. Super Lawyers magazine is published nationwide and designates those attorneys in each state that have received the highest recognition and professional achievement as acknowledged by their peers.

Reed Armstrong Partners Recognized as Premier 100 Trial Attorneys for Illinois



William Starnes and **Dominique Seymoure** have been recognized by the American Academy of Trial Attorneys (AATA) as one of the Premier 100 trial attorneys for Illinois. This designation is extended to trial attorneys that have met stringent qualifications, have shown exemplary representation of their clients, and have been found by the AATA to be recognized by the bench and bar as leading trial attorneys.

The following links illustrate trial activities this quarter at Reed Armstrong:

[T-Bone Collision, Tailbone Angulation](#)

[Automobile Injury, Improper Trailer Loading](#)



William Starnes



Michael Hobin

Reed Armstrong Associate Obtains Summary Judgment for Third Party Defendant Excavator

Andrews v. Altered Grounds v. Edwards, Madison County Case No. 12-AR-678

The plaintiff filed suit against Altered Grounds, claiming they had improperly landscaped his property and that he was entitled to damages. Altered Grounds filed a third-party complaint for contribution against Calvin Edwards, who had been hired to excavate portions of the property, claiming that he had performed his work improperly. Using a combination of written discovery responses from the plaintiff and Altered Grounds, as well as a sworn affidavit from Mr. Edwards in support, Reed



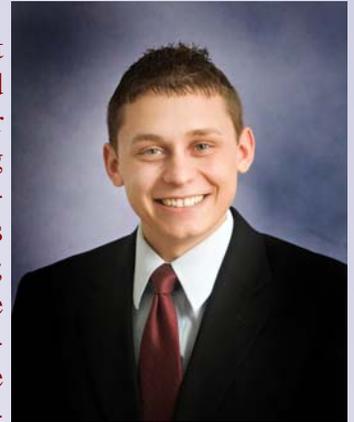
Armstrong Associate **Jennifer Wagner**, counsel for Mr. Edwards, moved for summary judgment on the third-party complaint, stating that: 1) Altered Grounds admitted it had no communications with Mr. Edwards; 2) Altered Grounds admitted that it did not coordinate its work with that of Mr. Edwards; 3) Mr. Edwards was forced to leave the job site prior to completion of his work due to an equipment breakdown, and when he returned, the area intended for excavation had been landscaped in his absence; and 4) the plaintiff, who served as his own general con-

tractor, had no dispute with Mr. Edwards' work and did not consider that work to have been performed improperly. The court granted summary judgment in Mr. Edwards' favor on the third-party complaint.

Reed Armstrong Associate Obtains Summary Judgment for Driver

Bridges v. Kries & Jaraysa, 15-AR-296, St. Clair County, IL

Plaintiff Bridges filed suit against defendants David Kries and Fidaa Jaraysa for personal injuries following a three-car rear-end collision. Defendant Kries was the lead/first vehicle; Plaintiff Bridges was the middle vehicle; and Defendant Jaraysa was the rear vehicle. On Kries behalf, Reed Armstrong Associate **Joshua Severit** moved for summary judgment. He was at a complete stop for 15-30 seconds before the Plaintiff struck the rear of the his vehicle. Plaintiff himself testified he did not believe defendant Kries in any way caused or contributed to the accident. The Court found as a matter of law Kries was not negligent.



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