

# Reed Armstrong Quarterly

January 2010

[ReedArmstrong.com](http://ReedArmstrong.com)

Contributors: William B. Starnes II  
Tori L. Walls

## IN THIS ISSUE:

### [Evidence](#)

Expert Testimony Is Not Required to Support a Claim for Negligent Infliction of Emotional Distress.

### [Insurance](#)

Underlying Complaint Alleging that Fraudulent Misrepresentations in the Sale of a Home As to Its Condition Resulted in Damages of an Economic Nature Did Not Invoke Coverage or the Duty to Defend Under a Home Owners Policy Providing Coverage for "Property Damage" Caused by an "Occurrence."

### [Negligence](#)

Bridge Deck "Replacement" Contract Requirement to Employ "The Degree of Skill and Diligence Normally Employed by Professional Engineers" in Performing that Work Was Sufficient to Impose Duty to Consider or Design an Improved Median Barrier from that Formerly in Place.

### [Premises Liability](#)

Even if Dangerous Condition of Treadmill Was Open and Obvious to Child, Traditional Duty Analysis Was Still Required and Summary Judgment Was Reversed Where Evidence Did Not Compel the Conclusion that Defendants Owed No Duty As a Matter of Law.

### [Workers Compensation](#)

Injury Sustained by Fitness Supervisor Was Compensable Though Incurred after He Agreed to Play Team Sport at Work so that His Employer's Sponsored League Game Could Be Played Notwithstanding Voluntary Recreation Exclusion.

## Evidence

### **Expert Testimony Is Not Required to Support a Claim for Negligent Infliction of Emotional Distress.**

*Thornton v. Garcini*, 2009 WL 3471065 (Ill. 2009).

In this case, the plaintiff's son was born prematurely in a breech position. The evidence showed that the nurses called the doctor at his home and advised him when the plaintiff was having contractions. The baby partially delivered 35 minutes later without the doctor present. During the birthing process, his head became stuck in his mother's vagina while the rest of his body was outside her body. The doctor was informed by telephone call and told the nurses not to deliver the baby unless it could be done easily because of the risk of decapitation. The nurses were unable to complete the delivery and the baby passed away while still stuck in his mother's body. The evidence showed that after the doctor was informed of the partial delivery, he took a shower and then drove to the hospital and delivered the dead baby. The Plaintiff waited for an hour and ten minutes with her dead baby partially delivered until the doctor showed up and completed the delivery. She sued the hospital, nurses and the doctor for wrongful death, survival claims and for negligent infliction of emotional distress. The plaintiff testified about her emotional state from lying in the hospital bed for over an hour with her dead baby partially delivered. She testified that she was depressed and had trouble sleeping and eating. She also testified to having suicidal thoughts. There was no expert testimony offered on the issue of emotional distress.

The doctor appealed judgment on a jury verdict for negligent infliction of emotional distress arguing that there was no expert testimony offered to establish that her emotional distress was caused by the delay in delivering the deceased baby. The Court held that the absence of medical testimony does not preclude recovery for emotional distress. "Rather, '[t]he existence or non existence of medical testimony goes to the weight of the evidence but does not prevent this issue from being submitted to the jury.'" Quoting *Clark v. Owens-Brockway Class Container, Inc.*, 297 Ill. App. 3d 694 (1998). The Court held that "based on personal experience alone, the jury could reasonably find that the circumstances of this case caused plaintiff emotional distress" and held that expert testimony is not necessary to support a claim for negligent infliction of emotional distress, overruling portions of *Hiscott v. Peters*, 324 Ill. App. 3d 114 (2001). Here, the Court found there was sufficient evidence in the record for the jury to decide whether and the extent plaintiff suffered emotional distress.

[Top of the Document](#)

## Insurance

### **Underlying Complaint Alleging that Fraudulent Misrepresentations in the Sale of a Home As to Its Condition Resulted in Damages of an Economic Nature Did Not Invoke Coverage or the Duty to Defend Under a Home Owners Policy Providing Coverage for “Property Damage” Caused by an “Occurrence.”**

*Rock v. State Farm Fire and Casualty Company*, 2009 WL 3417902 (Ill. App., 3d Dist., 2009)

Plaintiffs brought a declaratory judgment action seeking a determination that State Farm had a duty under their homeowner’s policy to defend and indemnify them against a suit brought by a third party over the plaintiffs’ alleged misrepresentations in connection with the sale of the plaintiffs’ property. In the underlying case, the evidence showed that the plaintiffs sold their home to a third party buyer. After the sale, the buyer brought a suit against the plaintiffs alleging that they fraudulently misrepresented that the home had no moisture or water problems, no flood damage, no mold damage and no foundation problems. The buyers alleged damages for loss of their bargain, loss of the value of the property, loss of use of the property, cost of remediation and emotional distress and anguish. Before a decision was rendered in the declaratory judgment action, a verdict was entered against the plaintiffs in the underlying suit. In its response to the declaratory judgment complaint, State Farm admitted that the homeowner’s policy was in effect at the pertinent time and that it had denied the plaintiffs’ request for a defense in the underlying lawsuit stating as grounds that the underlying complaint did not contain allegations of an occurrence that caused property damage. The pertinent section of the policy provided that State Farm would provide a defense “if a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence.” The policy defined “occurrence” as “an accident, including exposure conditions, that results in bodily injury or property damage.” “Property damage” was defined as “physical damage to or destruction of tangible property, including loss of use of this property.”

On appeal from the trial court’s finding that the duty to defend had been triggered based upon allegations that costs of remediation and loss of use of the property had been caused by water leaking into the home, the appellate court noted a comparison of the allegations in the underlying complaint with the relevant provisions of the policy was required to determine whether the facts alleged fall within, or potentially within, the policy’s coverage thereby giving rise to a duty to defend. Here, the precise question in this regard was “whether the underlying complaint alleges facts of an occurrence that caused property damage.” State Farm argued that the lawsuit merely alleged misrepresentations that were not an occurrence as defined in the policy. State Farm further argued that the alleged misrepresentations did not cause property damage. The Court agreed in both respects holding the Court held that the only acts alleged to have caused injury were the misrepresentations that even plaintiffs did not argue constituted an

occurrence. Further, the Court held that the allegation of preexisting damage at the time of the sale precluded a finding of physical damage caused by plaintiffs' alleged acts. "The complaint does not and cannot allege that the ... misrepresentations caused the preexisting damage." Therefore, State Farm had no duty to defend.

[Top of the Document](#)

## Negligence

### **Bridge Deck "Replacement" Contract Requirement to Employ "The Degree of Skill and Diligence Normally Employed by Professional Engineers" in Performing that Work Was Sufficient to Impose Duty to Consider or Design an Improved Median Barrier from that Formerly in Place.**

*Thompson v. Gordon*, 2009 WL 3969619 (Ill. App., 2d Dist., 2009)

In this case, the plaintiff's husband and daughter were killed when an oncoming vehicle struck the center median on a bridge deck, became airborne, and struck their vehicle. The plaintiff brought suit against the defendants "for what she alleged was the defendants' negligence in designing the bridge deck without considering or designing a median barrier that would have prevented the eastbound vehicle from becoming airborne and causing the accident." During discovery, the plaintiff submitted an affidavit from an engineering expert stating that it was his opinion that defendants failed to properly consider and analyze all of the available data in designing the bridge deck and that had "the design work on the bridge deck been performed within the standard of care, more probably than not a barrier would have been designed that would have prevented the accident." The trial court granted summary judgment in favor of the defendants on the grounds that the contract, which controlled the defendant's duties on the project, "did not call for an assessment of the sufficiency of the median barrier" and "did not require the defendants to modify or redesign the road surface or the raised median." The trial court also relied on the language of the contract and found that "the duties actually laid out in the contract, performed with the requisite care, did not include the study or design of a median barrier."

The issue on appeal was whether the defendants owed a duty to consider or design an improved median barrier. The court noted that when a defendant is accused of negligence due to its failure to perform an act allegedly required by a contractual obligation, the existence of duty will be determined by the terms of the contract, and the scope of the defendant's duty will not be extended beyond those terms. Therefore, the court had to interpret the defendant's contractual obligations to determine whether and to what extent a duty was owed. The plaintiff argued that the language imposed a duty on the defendants to consider and design an improved median barrier while the defendants argued that the contract's plain language required them to submit design plans for a "replacement", which to the defendants meant a re-creation of the bridge deck as it had

existed and not a new design. The court noted that there are competing definitions of the word “replacement.” However, looking at the contract as a whole, the court found that in other parts of the contract, it states that there will be “roadway improvements” near the bridge. The court stated that the contract’s use of the words “improvements” in one section and “replacement” in another section supports the defendant’s argument that “replacement” meant that it would submit plans to rebuild the bridge deck and median as it already existed and not improve it’s design. However, there was also language that obligated the defendant to do that work with “the degree of skill and diligence normally employed by professional engineers.” After determining the duty the defendants owed, the court then looked to whether the plaintiffs presented any evidence that the defendants breached their duty. The court concluded that the plaintiff had presented evidence of breach of the duty through the affidavit of the engineer she submitted, such that summary judgment in favor of the defendants was not proper.

[Top of the Document](#)

## **Premises Liability**

**Even if Dangerous Condition of Treadmill Was Open and Obvious to Child, Traditional Duty Analysis Was Still Required and Summary Judgment Was Reversed Where Evidence Did Not Compel the Conclusion that Defendants Owed No Duty As a Matter of Law.**

*Qureshi v. Ahmed*, 2009 WL 3161767 (Ill. App., 1<sup>st</sup> Dist., 2009).

Plaintiff’s minor, a 10-year-old girl, injured her hands when she slipped and fell while operating a treadmill at her parents’ friend’s house. The plaintiffs filed suit against the defendants alleging that the defendants owed the child a duty to protect her from harm and that the treadmill posed an unreasonable risk of harm. The plaintiffs further alleged that “the lack of adult supervision, failure to provide instruction, and failure to secure the treadmill from the use of curious children breached their duty and led” to the child’s injuries. The defendants argued that there was no genuine issue of material fact as to the element of duty. The trial court granted the defendant’s motion for summary judgment on the grounds that the treadmill was an open and obvious danger.

Under Illinois case law, a duty, “which would not be imposed in ordinary negligence, will be imposed upon the owner or occupier of land only if such person knows or should know that children frequent the premises and if the cause of the child’s injury was a dangerous condition at the premises.” However, the law does not impose a duty to remedy conditions posing obvious risks that children would in general be expected to appreciate and avoid.

Because the precise danger posed by a treadmill was not articulated in the record, the Appellate Court found it could not assess whether such a danger would be open and obvious to a child and ruled summary judgment had therefore been inappropriate.

Furthermore, even if the danger was open and obvious, the court must still apply the four traditional factors in a duty analysis: reasonable likelihood of injury, reasonable foreseeability of injury, magnitude of defendant's burden of guarding against the injury, and consequences of placing that burden on the defendant. The court stated that the evidence showed that the defendants did believe that injuries to children were likely and that they would not appreciate the risk because they usually kept the key away from the treadmill and did not allow their own young daughter to use the treadmill unsupervised. The court stated that the fact that they had rules regarding their own daughter's use of the treadmill showed that injuries from use of the treadmill were foreseeable. The court also stated that the magnitude of the burden of imposing a duty on the defendants is slight and the consequences of the burden is slight because it would simply cause them an inconvenience to keep the key in a place inaccessible to children. Therefore, the court held that the trial court erred in granting summary judgment because it could not be concluded as a matter of law that the defendants owned no duty to the child.

[Top of the Document](#)

## Workers Compensation

**Injury Sustained by Fitness Supervisor Was Compensable Though Incurred after He Agreed to Play Team Sport at Work so that His Employer's Sponsored League Game Could Be Played Notwithstanding Voluntary Recreation Exclusion.**

*Elmhurst Park District v. Illinois Worker's Compensation Commission*, 2009 WL 3297586 (Ill. App., 1<sup>st</sup> Dist., 2009).

The First District recently held that a worker's compensation claimant's participation in a team game was not "recreational" within the meaning of the exclusion of worker's compensation benefits for an injury incurred while participating in a voluntary recreational activity. The claimant worked at a fitness facility operated by the plaintiff. The claimant injured his leg while playing a wallyball game at the fitness facility during his work shift and he sought worker's compensation benefits for his injury. The plaintiff asserted that the claimant was not entitled to benefits based on §11 of the Worker's Compensation Act, which precludes recovery for accidental injuries incurred while participating in "voluntary recreational programs" unless the employee was ordered or assigned by the employer to participate in the activity. The arbitrator awarded benefits and found that the injury arose out of and in the course of his employment. The Illinois Worker's Compensation Commission and the trial court affirmed the arbitrator's award.

The evidence showed that the claimant was hired as a fitness supervisor, which included the job of promoting and implementing programs and classes for the members. On the day of his injury and during his shift, an off-duty co-worker asked him to play wallyball. The game was part of the facility's wallyball league. After being asked several

times, he agreed to play to help out because the team needed an additional person to play. During the game, he injured his leg. He was not reprimanded for his participation in the game while he was on duty and testified that he had played while on shift on three other occasions. He was never told that he had to participate in the game by his employer, but he thought it was part of his job to participate to promote the league. The claimant's supervisor testified that although the facility "encouraged its employees to participate in sports leagues on their own time, it had a policy prohibiting employees from playing while they were on duty." The arbitrator found that the game was not "recreational" but was incidental to his employment. Therefore, the arbitrator found the exclusion did not apply.

To determine whether the exclusion in §11 precluded the claimant from recovering here, the appellate court looked to the legislature's intent by the use of the word "recreational" and noted that although the Act provides several examples of activities that may be considered recreational, it does not specifically define the term. Therefore, the court looked to the ordinary dictionary definition of "recreation." The court stated that it could "envision circumstances under which participation in a game of wallyball would constitute a recreational activity and therefore fall within the voluntary-recreational activity exclusion." However, the court stated that this was not one of those cases because recreation is inherent in the claimant's position as a fitness supervisor, so it had to consider why he agreed to play the game that day. Because he initially declined to play but only agreed to play after he was told that the league game could not be played unless he participated, the court found that it was not for recreation but to accommodate the customers. Therefore, the exclusion for recreation did not apply and he was entitled to worker's compensation benefits.

[Top of the Document](#)