

# Reed Armstrong Quarterly

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## Insurance

**Condition of Coverage Applied to Innocent Co-Insureds for the Concealment, Fraud, and Intentional Acts Committed Solely by One Insured**  
*Aurelius v State Farm Fire and Casualty Company*,  
2008 WL 3166333 (2<sup>nd</sup> Dist. August 5, 2008)

In what may be the first published Illinois Appellate decision to find such a provision unambiguous and enforceable, the Second District has found conditions rendering a State Farm homeowners policy void for the fraud, concealment, or intentional acts causing loss by one insured applicable to all insureds. Previous decisions that have considered various drafting attempts at such provisions to accomplish that result have heretofore found the policy language to be ambiguous and unenforceable. See, e.g., *State Farm v. Miceli*, 164 Ill. App. 3d 874, 518 N.E.2d 357 (1st Dist. 1987). Thus developed the innocent insured rule which holds that such provisions, when found to be ambiguous, only preclude coverage for the guilty insured and not their innocent co-insureds. It has always been an underlying premise of the rule that if the insurance company intended that result, they could have drafted a provision clearly expressing that intent.

In *Aurelius*, the plaintiff's home was substantially damaged by fire. The plaintiff's husband was later convicted of arson with intent to commit insurance fraud. The plaintiff then made a claim under the homeowner's insurance policy issued to her and her husband. State Farm denied the claim on the basis that the fire was intentionally caused by the husband for the purpose of obtaining insurance proceeds and on the basis that the husband intentionally concealed or misrepresented material facts regarding how the fire started. A policy condition regarding intentional acts provided: "If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for this loss." A further condition regarding concealment or fraud provided: "This policy is void as to you and any other insured, if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance either before or after a loss." The trial court's dismissal of plaintiff's declaratory judgment action for coverage on the grounds that she was an innocent insured and the policy language ambiguous was affirmed on appeal because the plain language of the policy does clearly state that coverage will be excluded as to all insureds in the event of some improper behavior by any insured. Denial of coverage was proper.

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**Mold Damage Caused by Covered Event Was Excluded from Coverage**  
*Devore v. American Family Mutual Insurance Company*, 322 Ill. Dec. 490, 891 N.E. 2d 505 (Ill. App., 2<sup>nd</sup> Dist., 2008)

The Second District recently upheld a mold exclusion in a homeowner's insurance policy where the mold at issue was caused by an otherwise covered event. The

insured homeowners sought a declaratory judgment that mold damage to their home was covered under their American Family homeowner's policy because it was caused by the covered event of a pipe burst and resulting water damage. American Family counterclaimed for a declaratory judgment that there was no coverage the mold damage. American Family paid for the replacement of the water damaged portions of the home but not for any services related to mold removal. The homeowner's policy at issue contained a clause excluding coverage for any loss caused by mold. The policy further stated that such "loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." *Id.* at 507. The trial court found that there was mold in the home and that it was caused by the water event, but determined that the mold exclusion provision excluded coverage for damage caused by the mold.

On appeal, the homeowners argued that the trial court refused to recognize a distinction between mold that results from an otherwise covered event and mold that results from some other source or event. The homeowners argued that the mold damage was not a loss excluded under the policy but was damage caused by a covered loss. In construing the policy, the Second District stated that the policy language could not have been any clearer and stated that the policy "clearly and unambiguously excludes coverage for losses that result from mold caused by the water event at the [plaintiff]'s home." *Id.* at 508. The Court noted that there are no Illinois cases addressing whether coverage turns on a distinction between mold caused by a covered event and mold that causes damage independently. The Court rejected the reasoning of the Arizona Court of Appeals, which held that the identical exclusionary clause did not exclude all mold, on the grounds that the Court is obligated to give the language in the policy its plain, ordinary and popular meaning. The Court stated that the clear policy language, without ambiguity, excluded a loss from mold by any cause at any time. Therefore, the Court held that though the water loss was covered, the mold loss was not.

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## **Premises Liability**

### **Snow and Ice Removal Act Applied to Residential Driveways**

***Flight v. American Community Management, Inc.***,

2008 WL 2908921 (1<sup>st</sup> Dist. July 25, 2008)

The First District recently issued an opinion finding that a driveway was sufficiently similar to a sidewalk for purposes of the Snow and Ice Removal Act. 745 ILCS 75/1 et seq. The act precludes liability for mere negligence in the removal of snow or ice from residential property by an owner, lessor, occupant, or person in charge of the property, or by others engaged by such persons. 745 ILCS 75/2. To impose liability, the misconduct must arise to the level of willful or wanton. *Id.* Here, the plaintiff was injured when he slipped and fell on ice in the driveway of his condominium. In this case, the defendant showed that it cleared the last snowfall. The Court affirmed summary judgment for defendant on the basis that plaintiff failed to establish a genuine issue of willful and wanton conduct. As an alternate basis for affirming the trial court, it found

the plaintiff failed to show that the ice upon which he fell was an unnatural accumulation which is a common law requisite for liability in Illinois.

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## Vehicular Negligence

### **Proximate Cause Found Lacking as a Matter of Law**

*Coole v. Central Area Recycling,*

2008 WL 2955553 (4<sup>th</sup> Dist. July 28, 2008)

In late July, the Fourth District affirmed summary judgment for a garbage truck driver and the owners of the truck, holding that the driver's actions were not the proximate cause of the accident alleged in the vehicular negligence wrongful death action against them. The defendants asserted in their answer that the decedent was contributorily negligent for pulling directly into his path from a side road thereby failing to yield to his right-of-way. The trial court had entered summary judgment after discovery was completed and after reviewing the various deposition testimonies. Since review of summary judgment is *de novo*, the appellate court reviewed the same materials before issuing its decision.

For the plaintiff to prevail, he must prove that defendant breached a duty thereby proximately causing an injury. Plaintiff argued there was sufficient evidence of a breach of duty or negligence for the case to go to a jury in the form of excessive speed, failure to keep a proper lookout and failure to brake. The truck driver admitted he traveled as high as five miles per hour in excess of the speed limit, and such constituted *prima facie* evidence of negligence. However, proximate cause is a separate and independent element that the plaintiff must prove. Plaintiff must prove the two elements of proximate cause: it consists of cause in fact and legal cause. Cause in fact exists when it appears reasonably certain that a defendant's actions were a cause of the injury. That is, but for defendant's conduct the injury would not have occurred. Legal cause evaluates from the standpoint of a reasonable person the foreseeability of an injury as the result of his conduct. While proximate cause is normally a question of fact for the jury, if the facts do not sufficiently demonstrate both cause in fact and legal cause, the court can determine the lack of proximate cause as a matter of law.

A review of the testimony and evidence at the close of discovery revealed nothing from which to infer that the truck driver could have avoided the accident had he driven slower, kept a better lookout, or braked and analogized the case to a line of unavoidable collision cases. The Court found that based on the evidence, the decedent pulled out in front of the truck driver who did not have adequate time to avoid the crash in spite of any negligence and that a reasonable jury could not find that the truck driver's negligence was a substantial factor in causing the collision.

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## Workers Compensation

### **Borrowing Employer Has Burden of Proving Waiver of Statutory Right of Reimbursement**

*Surestaff, Inc. v. Open Kitchens, Inc.*,  
2008 WL 2908868 (1<sup>st</sup> Dist. July 25, 2008)

In an apparent case of first impression, the First District recently held that a borrowing employer has the burden of proving the existence of an agreement by the loaning employer to waive its statutory right to reimbursement for worker's compensation benefits paid by the loaning employer. In this case, the plaintiff and defendant entered into an agreement pursuant to which the plaintiff provided temporary labor to the defendant. A temporary employee then had a fatal accident while working for the defendant. Accordingly, the plaintiff paid worker's compensation benefits on behalf of the decedent. Plaintiff then sought reimbursement of its worker's compensation payout from defendant pursuant to the Workers Compensation Act. A representative from the defendant testified that plaintiff agreed to pay all the worker's compensation benefits in the event a temporary employee was injured while working for the defendant. The plaintiff, however, denied making this agreement. The Court held that defendant, the borrowing employer, had the burden of proving that the plaintiff, the loaning employer, had agreed to waive its right to reimbursement of worker's compensation payouts. The While prior case law does not specify which party bears the burden, the Court upheld the Circuit Court's placement of the burden on the defendant who claimed such an agreement existed finding no prejudice committed.

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## Firm News

### **5<sup>th</sup> District Publishes Rule 23 Order Upholding Trial Court's Admission of Vehicle Photographs without Expert Opinion**

*Ellen Fronabarger v. Edith Burns*, (No. 5-07-0433)(5<sup>th</sup> District Rule 23 Order issued August 19, 2008, Motion to Publish Granted September 29, 2008)

Reed Armstrong attorney Dominique N. Seymoure recently argued before the 5<sup>th</sup> District Appellate Court in the case of *Ellen Fronabarger v. Edith Burns*. Following oral arguments, the 5<sup>th</sup> District issued a Rule 23 Order affirming the judgment of the trial court entered on the jury verdict in favor of the plaintiff in the amount of \$3,141.00 after a two-day jury trial. The Appellate Court found the trial court did not abuse its discretion in admitting after crash vehicle photographs absent expert testimony on the correlation between vehicular damage and the plaintiff's injuries. It again rejected the notion that such photographs are always inadmissible or that expert testimony is always necessary, citing its decision in *Jackson v. Sieb*, 372 Ill. App. 3d 1061 (5<sup>th</sup> Dist., 2007)(in which Reed Armstrong also represented the defendant-appellee). The trial court has to determine whether the photographs make the resulting injury to the plaintiff more or less probable and whether the nature of the damage to the vehicles and the injury to the

plaintiff are such that a lay person can readily assess their relationship, if any, without expert interpretation. The Court stated that in this case, it could not state that the trial court abused its discretion by admitting the photographs without expert testimony. The jury could have assessed the relationship between the damage to the vehicles and the injury to the plaintiff without the aid of an expert.

Further, the trial court did not abuse its discretion in allowing defendant's medical expert to rely on the photographs in rendering her opinions. The Court held that the defendant laid a proper foundation for the expert testimony, which included testimony regarding the expert's medical education and board certifications, her experience in treating patients injured in automobile accidents, her review of the photographs and medical records and her independent medical examination of the plaintiff. The testimony established that the expert based her opinions on her observation and experience as a doctor who treats patients injured in automobile accidents and the Court noted that Illinois case law is replete with physicians who have testified, based on observation and experience, regarding their opinion of whether the claimant was injured.

On September 29, 2008, the Appellate Court, Fifth District granted defendant's Motion to Publish the opinion, but as of the date of this Newsletter, an official citation is not yet available. Publication was urged on the basis that litigants and scholars continue to posit that expert testimony is required before photographs depicting vehicular damage are admissible citing the contrary position of the First District and distinguishing *Jackson* on its specific facts.

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