

# Reed Armstrong Quarterly

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## Evidence

### **The Admissibility of Fault of Settled Defendants (Empty Chair Defense) Depends on Whether there is Sufficient Evidence to Create a Question of Fact on the Issue of Sole Proximate Cause**

*Ready v. United/Goedecke Services, Inc.*, 331 Ill. Dec. 910, 911 N.E. 2d 1140 (Ill. App., 1<sup>st</sup> Dist. 2009)

In our [January 2009 Newsletter](#), we reported the Illinois Supreme Court case of *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 905 N.E. 2d 725 (Nov. 25, 2008), wherein the Illinois Supreme Court held that settled tortfeasors are not to be placed on the verdict form for purposes of apportionment of fault to determine eligibility for severable liability under section 2-1117 of the Illinois Code of Civil Procedure. Upon denial of rehearing, the Supreme Court modified its opinion and remanded the case to the appellate court for a ruling only on the issue of whether the defendant was deprived of presenting a sole proximate cause defense at trial. The Supreme Court noted that the defendant had originally raised the issue in the appellate court, but because the appellate court initially remanded for a new trial, it did not address the issue. Because the Supreme Court's opinion reversed the trial court's order for a new trial, the case was remanded to the appellate court for a ruling on this issue only.

On remand, the 1<sup>st</sup> District addressed the defendant's "contention that it was deprived of a sole proximate cause defense when the circuit court excluded evidence of the conduct of" the settled defendants and also refused to give the defendant's jury instruction on sole proximate cause. The trial court granted plaintiff's motions in limine barring the introduction of any evidence at trial related to the conduct of the settled defendants on the grounds that it was irrelevant because they had settled with the plaintiff prior to trial. In its analysis, the 1<sup>st</sup> District looked to the recent Illinois Supreme Court opinion in *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 910 N.E. 2d 549 (2009) (reported in our [July 2009 Newsletter](#)) and found that case to be instructive. Based on *Nolan*, the court found that the trial court erred in excluding evidence of the settled defendants' conduct. The court stated that the defendant's "denial of liability was sufficient to permit it to present evidence" that the plaintiff's death "was the result of another entity's conduct." The court held that the trial court abused its discretion in excluding the evidence and found that it was not a harmless error and remanded the case to the trial court for a new trial.

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# Freedom of Information Act

## **Rewrite of Freedom of Information Act Makes Records More Readily Available**

### **Public Act 096-542**

Effective January 1, 2010, Public Act 096-542 is a complete rewrite of the Freedom of Information Act. Some of the pertinent changes are as follows: creates a presumption that all records are public records and places a clear and convincing burden of proof on a public body if it asserts that a record is exempt from disclosure, shortens the initial and extended time to respond to a FOIA request from seven business days to five business days, provides the first 50 pages for black and white, letter or legal sized copies are free and caps the charge for remaining pages at 15 cents per page, and requires that if a person requests a document that is maintained in an electronic format, the public body must furnish it in the electronic format specified by the requester. Other changes set forth in Public Act 096-542 can be found at the following link:

<http://www.ilga.gov/legislation/publicacts/96/PDF/096-0542.pdf>

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## **Insurance**

### **Valid Antistacking Clauses of Two Separate Auto Policies Issued to Two Separate Insureds Were Not Applicable to Claims Arising from the Death of a Common Insured.**

*Economy Premier Assurance Co. v. Jackson*, 2009 WL 2184659 (Ill.App. 2d Dist., July 17, 2009)

As a matter of apparent first impression, the Appellate Court Second District recently decided “whether the antistacking clauses of two separate insurance policies issued to two separate insureds apply to claims arising from the death of a common insured.” In this declaratory judgment action, defendants were divorced, lived apart, and were the parents of the decedent, their son who had been a resident of each parent's household. Their son died when the driver of the car in which he was a passenger negligently turned in front of an oncoming vehicle. The car was not owned by either defendant or their relatives. Neither defendant had other auto insurance, nor was either insured under the other's policy. However, their son was an insured under both policies. Each defendant sought to collect UIM proceeds under their respective auto policies as separate claims as next of kin. Each insurer took the position that they were entitled to share liability pursuant to their respective antistacking clauses. That is, instead of each paying the UIM policy limit to its respective insured, they claimed had to pay only a share of a single

policy limit (the limits of each policy were the same) because there had been only one loss (the son's death). Under these facts, the antistacking clauses were held not applicable because the Wrongful Death Act protects the legal rights of next of kin to be compensated for the pecuniary loss sustained by reason of the death of an injured person. It was for this loss, personal to each defendant, that each sought recovery.

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## Judgment

### **Res Judicata Barred Action Re-filed after Voluntary Dismissal Where Initial Complaint Had Been Involuntarily Dismissed *with Leave to Amend* before Plaintiff Voluntarily Dismissed Amended Complaint**

*Kiefer v. Rust-Oleum Corp.*, 2009 WL 2616235 (Ill. App. 1<sup>st</sup> Dist.)

The Appellate Court, First District found that the res judicata requirement of a final adjudication on the merits was satisfied even where the court's order did not specify whether the dismissal was with or without prejudice. In response to plaintiff's first complaint (Kiefer I), the defendant then filed a motion to dismiss arguing that Canadian law applied because the incident occurred and plaintiff resided in Canada. Finding Canadian law applied and that it did not recognize a cause of action based upon strict products liability, the court dismissed the complaint with leave to amend but did not specify if the dismissal was with or without prejudice. Plaintiff filed various amended complaints alleging negligence but voluntarily dismissed his claims without prejudice prior to trial. Plaintiff later filed a second action (Kiefer II) alleging negligence. The trial court granted the defendants' motions to dismiss finding the plaintiff's claims in Kiefer II were barred by the doctrine of *res judicata*.

On appeal, the Appellate Court framed the issue as "whether the involuntary dismissal of the strict liability claims and subsequent voluntary dismissal of his negligence claims in Keifer I barred the re-filing of his negligence claims in Kiefer II under the doctrine of *res judicata*." In its analysis, the Court looked to the Illinois Supreme Court's decision in *Hudson v. City of Chicago*, 228 Ill.2d 462 (2008), (reported in our [April 2008 newsletter](#)) which set forth three requirements that must be satisfied for *res judicata* to apply; a final judgment on the merits, an identity of cause of action and identical parties or their privies. It was undisputed that the second and third requirements were met but the parties disputed whether there was a final judgment on the merits. Plaintiff claimed the trial court erred because there was no final adjudication on the merits of his voluntarily dismissed negligence claims in Kiefer I. The defendants claimed that the court's "involuntary dismissal of the strict products liability claims in Keifer I was a final adjudication on the merits for purposes of *res judicata* and that *res judicata* bars" the negligence claims. The Appellate Court agreed with the Defendants and found the claims in Keifer II were barred based on *res judicata* relying on the *Hudson* holding that "where a plaintiff asserts multiple claims arising from the same set of operative facts

in a single action and one of those claims is dismissed on the merits, the doctrine of *res judicata* will bar the plaintiff from refiling not only those claims that were dismissed on the merits as part of the original action but also any claims that could have been determined as part of that action.”

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## Strict Liability

### Position of Control Satisfies Ownership Element of Animal Control Act

*Beggs v. Griffith*, 2009 WL 2622685 (Ill. App. 5<sup>th</sup> Dist.)

In a recent case dealing with the Animal Control Act, the 5<sup>th</sup> District held that the defendant exercised the requisite control under the Act to be held liable for the plaintiff’s injuries and found that the evidence showed a lack of provocation. In this case, the defendant listed his home and acreage for sale. The defendant used to raise horses on the property but had ceased doing so many years prior. In the recent years past, the defendant had allowed a friend to pasture his horses on the property. The friend paid for and installed an electric fence as well as paid for and maintained his own horses. The defendant had no active involvement with the horses. On the day of the accident, the plaintiff and her husband were at the property for an inspection as potential buyers. The defendant answered questions about the property, but was not present when the plaintiff, her husband and the realtor took a tour of the barn. As the plaintiff entered the barn, three horses followed her inside and walked past her. Immediately after passing her, the horses got spooked for some reason and came running back towards her and knocked her down, injuring her wrist. The plaintiff sued the defendant under the Animal Control Act alleging that the defendant maintained some control of the horses so as to trigger liability under the Act. The jury returned a verdict in favor of the plaintiff. On appeal, the defendant argued that the plaintiff failed to “present a *prima facie* case pursuant to the Animal Control Act” because she did not prove that he was an “owner” of the horse under the Act and she did not prove that the horse acted “without provocation.”

The 5<sup>th</sup> District looked to the Animal Control Act and its definition of “owner” and noted that the definition of “owner” is “broader than actual ownership of the animal but requires a position of some control” like an owner would retain. The court further noted that the focal point in determining the requisite control “is the precise moment of the accident at issue-not whether or not the keeper or harborer maintained control at some other time.” The Court ultimately held that the defendant did maintain the requisite control to be deemed an “owner” for purposes of the Act because he was in legal possession of the property, he was present at the property and answered questions about the property at the time of the incident (although not present in the barn), and he maintained the ability to control the horses at the time of the incident, but did not. Further, the court held that by soliciting the plaintiff as a potential buyer, he was “instrumental in placing her in proximity with the very animals that harmed her.” The

court also held that the evidence heard at trial sufficiently established a lack of provocation because there was no evidence that any provocation had occurred and stated “the jury certainly cannot be allowed to speculate on provocation where no such evidence exists.”

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## **Workers Compensation**

*Smith v. Thornton High School*; 17 ILWCLB 133 (Ill. W.C. Comm. 2009)

The claimant, a teacher, was entering the school building when she struck her foot on the doorsill, lost her balance and fell. She then sought worker’s compensation benefits. The Commission found that the act of walking through a doorway at work, without other evidence of a defect or anything unusual about the door or doorsill, does not constitute an increased risk to the claimant. The Commission found that the claimant failed to establish a risk incidental to her employment which caused her to fall or increased the effects of her fall. Therefore, her injury was not compensable under the Worker’s Compensation Act.

*Makowski v. Runge Paper Co.*; 17 ILWCLB 121 (Ill. W.C. Comm. 2009)

The claimant alleged she suffered a shoulder disability while working as a customer service representative. Her job consisted of cradling her phone between her shoulder and her ear to take down customer information and she had to extend her arms to reach her keyboard. The Commission awarded her temporary total disability, medical expenses, and permanent partial disability benefits. The Commission found that evidence that an employee must cradle her phone and extend her arms to reach the keyboard, along with a doctor’s testimony, constituted convincing evidence of a repetitive shoulder injury.

*Selburg v. Peoria Ear, Nose & Throat*; 17 ILWCLB 122 (Ill. W.C. Comm. 2009)

The claimant claimed she suffered from carpal tunnel syndrome as a result of her repetitive work activities. In repetitive trauma cases, the Commission requires that the claimant provide medical evidence of a causal connection between the accident and the injury. The claimant has the burden of proving that her work activities caused or aggravated the medically diagnosed condition. The Commission held that the claimant failed to meet her burden in this case because there was no testimony from a doctor that there was a causal connection between her work activities and the carpal tunnel syndrome, therefore, she was denied benefits.

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