# Reed Armstrong Quarterly

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## Asbestos Litigation

**Rule Excluding Evidence of Asbestos Exposures from Products of Non-Parties is Overruled to the Extent that such Exposures are Relevant to the Issue of Sole Proximate Cause**
***Nolan v. Weil-McLain***; 2009 WL 1012147 (Ill., April 16, 2009)

The Illinois Supreme Court recently rejected an unlimited application of the *Lipke* exclusionary rule, overruled several appellate decisions that applied the rule, and concluded that evidence of exposures to other asbestos products was relevant to the defendant's sole proximate cause defense. Under *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498 (1987), the jury can only hear evidence of the plaintiff's exposure to asbestos from the products or equipment of the remaining defendants at trial. The jury is not allowed to hear evidence of the plaintiff's exposure to other asbestos containing products or equipment such as from former defendants that settled or other entities that were never made a party to the suit.

In this case the plaintiff sued multiple defendants alleging that her deceased husband developed mesothelioma from his exposure to asbestos containing products. Weil-McLain was the sole remaining defendant at trial and filed a motion *in limine* seeking "to present evidence that the sole proximate cause of decedent's death was his exposure to asbestos-containing products of nonparty entities." The plaintiff's *Lipke*-based objection was sustained, and defendant was barred from introducing evidence of plaintiff's other exposures. The Appellate Court affirmed judgment entered on a verdict for the plaintiff, and the Illinois Supreme Court allowed Weil-McLain leave to appeal.

The Illinois Supreme Court found that the trial court erred by excluding evidence of other exposures. The Court distinguished *Lipke* where a sole proximate cause dispute by reason of other exposures was not raised. The court explicitly overruled *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill.App.3d 781, 610 N.E.2d 683 (5th Dist., 1993) and *Spain v. Owens-Corning Fiberglass Corp.*, 304 Ill.App.3d 356, 710 N.E.2d 528 (4th Dist., 1999) for improperly extending *Lipke*, and it noted that it had already implicitly overruled these cases in a prior decision. "[T]he single paragraph in *Lipke* from which the exclusionary rule of other-exposure evidence is derived neither suggested nor held that a defendant should be barred from introducing evidence of other potential causes of injury where it pursues a sole proximate cause defense, nor that juries should be deprived of evidence critical to a causation determination." Here, the exclusion eliminated evidence of alternative causes of the injuries and did not allow the defendant to support its defense of sole proximate cause. The Supreme Court reversed the lower courts and remanded the case for a new trial. Justice Kilbride dissented.

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**Second District Declines to Extend Premises Liability for Asbestos Exposure to Persons Exposed off Premises by Transference from Entrants**
***Nelson v. Aurora Equipment Co.*****,** 2009 WL 1537855 (2nd Dist., May 29, 2009)

The Second District recently issued an opinion on an issue of first impression in Illinois. In this case, the Plaintiffs asked the Court "to extend a duty in a premises liability case to a person who did not have contact with the premises but who was allegedly injured by asbestos fibers and dust that escaped from the premises." The decedent's husband and son both worked at Aurora at different times, but the decedent never worked there and had never been to Aurora's premises. The Plaintiffs, the father and son, alleged that they were "regularly exposed to asbestos fibers and dust at Aurora's facility" and that the fibers and dust got on their clothes, which they wore home. Plaintiffs claimed that the decedent was exposed to the asbestos fibers and dust on their clothes by being around them at home and by doing their laundry. They alleged that she developed mesothelioma and colon cancer as a result of the asbestos exposure, which caused her death. Summary judgment on the grounds that defendant owed no duty to the decedent was affirmed on appeal. The holding is limited to the extent that "plaintiffs pursued only one theory, premises liability, which requires that a plaintiff either be an entrant onto the defendant's premises or otherwise have some special relationship with the defendant." The Court held that because no relationship existed between the decedent and Aurora, no duty existed.

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## Civil Procedure

**Proposed Elimination of Liability Limitation on Upon Death of a Defendant**
**Senate Bill 1716**

The Senate passed Senate Bill 1716 on April 23, 2009. As noted in the April 2009 REED ARMSTRONG QUARTERLY, it seeks to amend 735 ILCS 5/13-209 which addresses the death of either a plaintiff or defendant. This Bill seeks to delete a provision limiting the plaintiff's recovery to the proceeds of any liability insurance available to the estate in the event of the death of the defendant. The Bill is now in the House.

The status of this Bill can be tracked by clicking on the following link: http://www.ilga.gov/legislation/billstatus.asp?DocNum=1716&GAID=10&GA=96&DocTypeID=SB&LegID=44423&SessionID=76

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## Joint And Several Liability

**Successive Tortfeasors are not Jointly and Severally Liable where Initial Injuries and Aggravated Injuries can be Roughly Apportioned**
***Sakellariadis v. Campbell and Walters*****,** 2009 WL 1531832 (1st Dist. 2009)

The plaintiff was involved in two separate auto accidents three months apart. The trial court found that each defendant was negligent, and a trial was held on the issue of damages. There was testimony regarding the injuries and treatment following each accident from the plaintiff and her treating physicians. The plaintiff testified that it was the second accident that "really killed me." After the jury instruction conference and over the objection of the defendants, the trial court tendered the verdict form proposed by the plaintiff requiring the "jurors to assign monetary amounts and percentages of responsibility to each defendant in 14 categories of past and/or future injuries." While the jury was deliberating but before it reached a verdict, the plaintiff entered into a settlement agreement with the defendant involved in the first accident for $150,000. The jury returned an itemized verdict of $518,000 that assessed 50% of the fault to each defendant and the trial court entered judgment on the verdict against the non-settling defendant for 50% of the verdict. On appeal plaintiff argued that she should have received the entire jury verdict deducting only the $150,000 for the prior settlement. Plaintiff argued that "each defendant was jointly and severally liable for the entire verdict" and maintained that the "defendants were successive or joint tortfeasors who caused her indivisible injuries."

The Court employed the following legal principles. Damages are to be apportioned among two or more causes in two circumstances: when each injury is distinct from the other injuries or when there is a reasonable way of deciding each tortfeasor's contribution to a single harm. RESTATEMENT (SECOND) OF TORTS § 433A(1). The Restatement recognizes that one tortfeasor should not be held liable for the distinct harm caused by another tortfeasor simply because it is difficult to apportion damages where it is possible to fairly apportion damages based on a rough estimate. "[I]f the injuries can be apportioned among multiple tortfeasors, then the tortfeasors are not jointly and severally liable." *Gertz v. Campbell*, 55 Ill.2d 84, 302 N.E 2d 40 (1973). One injured twice in the same part of the body does not change two injuries to one. Negligent aggravation of a prior injury that was also caused by another's negligence is a separate and distinct tort, and the two injuries are separate and distinct.

The trial court's decision to award the plaintiff 50% of the verdict was affirmed. Testimony of treating physicians indicated that the second accident aggravated the injuries sustained in the first accident permitting the jury to fairly apportion the damages by rough estimate. Because the injuries were divisible, the defendants were not jointly and severally liable to the plaintiff.

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## Workers Compensation

**Employer's Cessation of Payment for Medical Treatment in Reliance on Medical Opinions was not Unreasonable or Vexatious**
***Treadway v. Munch's Supply Co.***, 17 ILWCLB (Ill. W.C. Comm. 2009)

The claimant was working as a truck driver for his employer when he injured his right ankle and right knee. He was initially diagnosed with a right knee and right ankle sprain but was later diagnosed with complex regional pain syndrome (CRPS) in the right ankle. Several doctors either diagnosed CRPS or consented to the diagnosis and the claimant had the clinical signs of the condition, such as swelling, color changes, hair loss and temperature changes. The employer stopped paying for the claimant's treatment, based upon the testimony of two examining doctors. Pursuant to Section 8(a) of the Workers Compensation Act, the arbitrator ordered the employer to pay for the reasonable and necessary medical care prescribed by the claimant's treating physician, including all follow up visits, medication for the CRPS and knee surgery. The arbitrator also found that the employer's decision to stop paying for the claimant's condition and treatment was vexatious and unreasonable.

The employer based its decision to stop paying on the report of two examining doctors. One doctor suggested the claimant was shaving his foot and using a device to make his ankle swell. The other doctor noted the clinical signs of CRPS but did not have the background to comment on whether the claimant suffered from CRPS or not. The arbitrator found that the employer's decision to terminate medical benefits based on those two reports was not objectively reasonable under the facts of this case. The Commission vacated the award of penalties finding that the employer was not unreasonable or vexatious in relying on the opinions of the examining doctors. The Commission also found that the opinions of the examining doctors were not objectively unreasonable.

**Claimant's Varied Work Activities Defeated Repetitive Stress Claim**
***Holyfield v. Hart, Schaffner & Marx***, 17 ILWCLB 62 (Ill. W.C.Comm. 2009)

The claimant sought treatment for pain in both knees that she claimed had progressively worsened for 1-½ years. She ultimately underwent surgery on both knees. She claimed her work activities, which included packaging and extensive walking, caused or aggravated her knee condition. The Commission affirmed the arbitrator's decision denying benefits because the claimant failed to prove her condition was work related. The Commission considered that her job involved some kneeling and squatting, but also noted that her work activities were varied. The Commission ruled that the claimant failed to prove that her work activities were sufficiently repetitive or strenuous to have increased the risk of aggravation or acceleration of the degenerative condition in her knees.

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## Firm News

### Partner Coordinates Trial Demonstration Seminar Sponsored by the Foundation of the American Board of Trial Advocates

On April 24, 2009, Reed Armstrong Partner Martin K. Morrissey coordinated *Masters in Trial*, a 7- hour Continuing Legal Education seminar featuring a trial demonstration from opening statement to jury deliberation. The Honorable G. Patrick Murphy, United States District Court for the Southern District of Illinois, fulfilled the roll of presiding Judge; the seminar featured elite plaintiff and defense trial lawyers from around the country; and real-time jury deliberations were broadcast live into the seminar room. The seminar was sponsored by the Foundation of the American Board of Trial Advocates (ABOTA). Mr. Morrissey serves on the ABOTA National Board of Directors and is a past president of the Missouri / Southern Illinois Chapter of the organization. ABOTA is an organization of accomplished civil trial attorneys from both the plaintiff's and the defense bars. Founded in 1959 ABOTA strives to elevate the standards of integrity, honor and courtesy in the legal profession and preserve the right to jury trial in our civil justice system.

### Reed Armstrong Promotes Michael Hobin and Dominique Seymoure to Partner

Dedicated client service and consistent achievement have merited Reed Armstrong attorneys Michael Hobin and Dominique Seymoure promotions to partnership. Both have been associated with Reed, Armstrong, Gorman, Mudge & Morrissey, P.C., since graduating from law school: Michael in 2000 and Dominique in 2001.

For the law firm, Michael Hobin has worked on a wide range of cases, including automobile, dram shop, subrogation, products liability, workers' compensation, premise, criminal, traffic and toxic tort related cases. He has tried personal injury cases to verdict in Madison County, St. Clair County, Fayette County, Marion County and Jersey County, Illinois. Michael attained a B.S. in political science from Bradley in 1992 where he played NCAA Division I soccer. In 1994, he graduated from Illinois State University with a M.S. in history. After teaching government, history and sociology at a college preparatory school from 1994-97, Michael headed to law school. He graduated from the Southern Illinois University School of Law in May 2000. He was admitted to the Illinois bar in November 2000 and admitted to practice generally before the United States District Court for the Southern District of Illinois in January 2001. Michael is a member of the American Bar Association, Illinois State Bar Association, Madison County Bar Association and the legal fraternity of Phi Delta Phi.

Dominique Seymoure achieved a Bachelor of Arts degree in Microbiology with a minor in Chemistry from Southern Illinois University at Carbondale in 1998. At Southern Illinois University School of Law, she was a member of the Moot Court Board-

Appellate Division, Phi Kappa Phi Honor Society, and the legal fraternity of Phi Delta Phi. As a member of the Moot Court Board she competed in the ABA Moot Court Competition in Houston, Texas where her team advanced to the semi-final round of the regional competition and placed second in the brief competition. She was subsequently nominated to the Order of Barristers. Dominique graduated magna cum laude from the SIU School of Law in 2001. She was admitted to the Illinois bar in November 2001 and was admitted to practice generally before the United States District Court for the Southern District of Illinois in July 2002. For the firm, Dominique has tried more than 10 cases to jury verdict and has worked on a variety of cases including general liability, automobile, products liability, premises liability, insurance coverage issues, copyright infringement, and asbestos related cases. Dominique is currently a member of the American Bar Association, Illinois State Bar Association, Madison County Bar Association and the legal fraternity of Phi Delta Phi.

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