

# REED ARMSTRONG QUARTERLY

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## Damages

### **Trial Court Abused its Discretion in Failing to Remit Punitive Damages Award by a Sufficient Amount**

*Slovinski v. Elliot*, 237 Ill.2d 51, 2010 WL 1493843 (April 15, 2010)

Plaintiff alleged his former employer's CEO made defamatory comments about his job performance to customers during a meeting after plaintiff's termination. Specifically, the plaintiff alleged the CEO told the customers that the plaintiff "was not doing his job," "came in late and left early," "was sneaking off to do workouts," and was chasing after women. After failing to respond to discovery requests, a default judgment was entered against the CEO and a jury trial was held to determine the amount of damages. The only testimony adduced at the trial was that of the plaintiff and his wife. The plaintiff's testimony addressed his damaged reputation in the telecommunications industry and resulting reduction in income; emotional distress in explaining to his wife that the statements were untrue; and lost time away from his family because he was forced to take jobs out of town. The plaintiff admitted that his firing a few months before the statements were made was unrelated to the defamatory statements. The plaintiff testified that a customer called him several months after the statements were made and told him about the statements. The plaintiff testified that the statements were untrue. There was no further evidence about the defendant's conduct and no evidence regarding the defendant's finances. The Court noted "the evidence presented at the hearing regarding defendant's conduct was minimal." The jury returned a verdict for the plaintiff for \$81,600 for emotional distress and \$2 million in punitive damages. The trial court denied defendant's motion to remit the compensatory award but granted the motion to remit the punitive award and remitted the punitive damages award to \$1 million. The Appellate Court upheld the emotional distress award but reduced the punitive damage award to \$81,600, which matched the compensatory award. The Illinois Supreme Court affirmed the Appellate Court's remittitur reasoning "there was no evidence presented to the jury that defendant had an intentional, premeditated scheme to harm plaintiff." The Court further stated that "the most that may be said on this record ... is that defendant's defamatory statements were made with a reckless disregard for plaintiff's rights," which "places defendant's conduct on the low end of the scale for punitive damages, far below those cases involving a defendant's deliberate attempt to harm another person."

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### **\$100,000 Damages Finding for Wrongful Death of 34-Year-Old Mother Survived by 30-Year-Old Spouse and Two Minors, and Reduced by 50 Percent for Contributory Negligence, Was Not Manifestly Inadequate or Contrary to Evidence.**

*Dobyns v. Chung*, 399 Ill. App. 3d 272, 926 N.E. 2d 847 (5<sup>th</sup> Dist., 2010)

Plaintiff brought an action for wrongful death alleging the defendant doctor prescribed inappropriate types and amounts of medications and failed to provide adequate warnings regarding the medications. The doctor testified at trial that the plaintiff came to him with

complaints of back pain and he prescribed Percocet, which she continued to take over a 2 ½ year period. She also took other narcotic painkillers that he prescribed at various times during that time period and the doctor testified that he monitored her over that time period and that he never felt like she was abusing the medications. The doctor agreed that the decedent died from respiratory arrest and that the combination of drugs in her system contributed to her death, but he thought she had taken more than the prescribed dosage. The pathologist testified that the cause of the decedent's death was "acute intoxication with multiple medications" which was caused by the decedent "taking more medication than she should have." Several other witnesses testified regarding the decedent's activities and the problems various family members had after she passed and the effect her passing had on them. The decedent was 34 years of age at the time of her death and survived by her 28 year old husband and two minor children. The jury found in favor of the plaintiffs and found total damages in the amount of \$100,000 but reduced that amount by 50%, finding that the decedent was contributorily negligent. The trial court denied the plaintiff's post trial motion asking for an additur, a new trial on damages, or an entirely new trial.

On appeal, the plaintiff argued that the damages were "manifestly inadequate and contrary to the evidence." The court noted that "the issue of damages is particularly within the discretion of the jury, and courts are reluctant to interfere with the jury's exercise of its discretion." The court noted that in a wrongful death case, the jury is left to decide the amount of damages based on a number of factors, including the decedent's past contributions, future contributions, loss of future instruction, etc. The court noted that Illinois Pattern Jury Instructions provide definitions for loss of society and that it is left to the jury to assign an amount for loss of society. Although defense counsel stated in closing argument that a million dollars would a fair verdict in the event of liability, the Appellate Court rightly noted that "cannot, as a matter of law, impact our analysis." The Court noted that the plaintiff did not cite to any Illinois cases that found wrongful death damages to be inadequate as a matter of law, but rather cited to other verdicts in similar cases. However, the Court noted that "it is impossible to measure the propriety of damages awards under the Wrongful Death Act by comparison with other wrongful death cases...because the propriety of those awards is not subject to exact mathematical computation and cannot be measured by comparison with other verdicts." In affirming the trial court's denial of an additur and new trial, the Court stated "it is not within our province to substitute our judgment for that of the jury to determine the monetary value of the loss of society in this case."

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## Insurance

### **Drivers without a Valid License Lack Reasonable Belief of Being Entitled to Operate a Motor Vehicle and Are Subject to Valid and Enforceable Entitlement Exclusion**

*Founders Insurance Co. v Munoz*, 2010 WL 1999659 (Ill., May 20, 2010)

The Illinois Supreme Court recently held that the entitlement exclusion, which precludes liability coverage when the person driving the vehicle does not have a reasonable belief of being entitled to do so, does not violate Illinois public policy and is applicable to drivers who lack a valid drivers license. The Court further held that the exclusion applies equally to a named insured and anyone using the vehicle with the insured's permission. This case arose from six underlying cases where the trial courts ruled that the coverage exclusion was applicable to drivers who did not have a valid drivers license, either because they never obtained a license or because it was suspended. The appellate court found the exclusion ambiguous in five of the cases and reversed the trial court's no coverage ruling. In the sixth case, the appellate court affirmed the trial court's ruling, but on different grounds.

The Illinois Supreme Court framed the issues as "whether the coverage exclusion unambiguously applies to drivers without a valid license," and, if so, "whether such an exclusion contravenes Illinois public policy." Founders argued that a person without a valid license cannot have a reasonable belief that he is entitled to drive, simply because he owns the vehicle or was given permission to drive the vehicle by the owner. Allstate responded that the term "entitled" refers only "to entitlement based on ownership of the vehicle or permission from the owner."

Although the dictionary definition of "entitle" could connote ownership or permission, the policy, when read as a whole, did not support the connotation argued by Allstate. The Court rejected Allstate's interpretation of the word "entitle" because "unless the person qualifies as an "insured person", the coverage exclusions never come into play because the person is not covered by the policy in the first instance." Therefore, "entitled" could not mean ownership or permission because the issue of whether a person had a reasonable belief that he was entitled to use the vehicle only arises after the issue of permission or ownership has already been decided. The "average, ordinary, normal, reasonable person for whom these policies were written would understand that the exclusion applies to unlicensed drivers." Illinois law is clear that no person shall drive a motor vehicle unless he has a valid driver's license. As a matter of law, without a valid driver's license, "a person cannot have a reasonable belief that he or she is entitled to drive" even if "he owned the car or was given the keys." The Court also found that the exclusion does not violate Illinois public policy, and insurers "may limit their risk by excluding insureds and permissive users alike who lack the most basic requirement for driving in this state: a valid license."

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**Trial Court Erred by Not Considering Insured's Underlying Counterclaim Alleging Tort Plaintiff Was the Aggressor and that Insured Was Defending Himself in Ruling there Was No Duty to Defend Intentional Tort Action Where Intentional Act Exclusion of Policy Contained Self-Defense Exception**

*Pekin Insurance Co. v. Wilson*, 2010 WL 1999669 (Ill., May 20, 2010)

A commercial general liability insurer brought a declaratory judgment action against its named insured seeking a determination that it did not owe the insured a duty to defend an

underlying lawsuit for assault, battery, and intentional infliction of emotional distress. The injured person then filed an amended complaint in the underlying suit alleging acts of negligence against the insured. The underlying plaintiff alleged that the insured brandished a steel pipe, struck him with it, yelled expletives and cut him with a knife at the insured's place of business (which was covered by the policy) and that more than one year later, the insured approached him at a Walmart, showed him what appeared to be the handle of a gun and told him that he could "end it right now." The negligence allegations were that the insured "failed to adequately use tools of his employment in a safe manner...failed to use tools for their intended purpose, causing physical harm." The policy at issue provided bodily injury coverage with the standard exclusion for intentional acts, but the policy stated that the exclusion did not apply to "bodily injury resulting from the use of reasonable force to protect persons or property (the self defense exception)." The policy also limited the coverage for bodily injury to occurrences "arising out of...the ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises." The insurer filed an amended declaratory judgment action based on the amended complaint and then the insured filed an answer to the amended complaint in the underlying suit with a counterclaim alleging that the plaintiff was the aggressor and that he was defending himself.

On summary judgment, the trial court declared that Pekin had no duty to defend. The appellate court found that the allegations in the underlying complaint were inconsistent with negligence, such that there was no genuine issue with regard to the negligence counts. However, with regard to the intentional tort counts, the appellate court reversed the trial court's finding of no duty to defend because the trial court should also have considered whether the insured's counterclaim triggered the self-defense exception in the policy.

On appeal to the Illinois Supreme Court, Pekin argued that the "question of Pekin's duty to defend cannot, as the appellate court found, include consideration of the insured's own pleadings raising this exception", relying on *Zurich Ins. Co. v. Raymark Industries Inc.*, 118 Ill. 2d 23 (1987). The Court, disagreed with Pekin's limited interpretation of *Zurich* holding an examination of the counterclaim was necessary to determine whether there was a genuine issue of material fact as to whether Pekin owed a duty to defend because the policy "excepted self-defense from its intentional-act exclusion." It agreed with the appellate court "where coverage depends upon whether an insured was acting in self-defense, it is crucial for the court to consider all the evidence presented before entering a declaratory judgment, since it is unlikely that the plaintiff in the underlying lawsuit will plead facts to show that the insured acted in self-defense." The Court affirmed the Appellate Court's reversal of summary judgment holding the trial court erred in not considering the insured's underlying counterclaim on the duty to defend.

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### **Tender of Policy Limits to Court Does Not Absolve Duty to Defend**

*American Service Insurance Co. v. China Ocean Shipping Co.*,  
2010 WL 2487945 (1<sup>st</sup> Dist., June 16, 2010)

A multivehicle accident resulted in the death of eight people and injuries to many others. A total of 12 underlying personal injury actions were consolidated into this one action. The plaintiff insurance company filed an interpleader action seeking to pay its entire liability policy limit to the court for equitable distribution for the underlying claims. The interpleader action also sought a declaration from the court that after their limits were paid, it had no further duties under the policy, including the duty to defend its insureds, based on specific policy language that "the company will not defend any suit after it has paid the applicable limit of its liability for the accident which is the basis of the lawsuit." The trial court entered an order finding that even though it released the funds, it did not relieve itself of any duty to its insureds under the policy, including the obligation to defend.

On appeal, the court affirmed the trial court's ruling that plaintiff's deposit of the insurance policy limits with the court did not relieve it of its duty to defend, noting that "Illinois cases have consistently held that an insurer cannot discharge its duty to defend by simply depositing policy limits with the court." Although the plaintiff delivered a check to the court, it had not yet paid anything to anyone and was not legally required to pay since there was no settlement or judgment. The court noted "strong public policy arguments against allowing insurers to discharge their duty to defend by paying policy limits and then leaving the insured to fend for himself."

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## **Premises Liability**

### **Distraction Exception to Rule that Property Owners Have No Duty Regarding Open and Obvious Dangers Was Inapplicable.**

*Hope v. Hope*, 398 Ill. App. 3d 216, 924 N.E. 2d 581 (4<sup>th</sup> Dist. 2010)

Defendants' adult daughter brought a suit against her parents alleging they were negligent regarding mud on their porch stairs, on which she slipped and fell, causing injuries. The plaintiff came to her parents' home for a visit. When the plaintiff first arrived, her mother was outside gardening and had been wiping mud from her shoes on the first of four concrete steps leading up to the front porch. The mother warned plaintiff about the mud on the first step before she climbed the steps and entered the house. The plaintiff then climbed the stairs and entered the house without incident. While plaintiff was in the house eating, doing homework and watching television, her mother continued with the gardening and wiped mud from her shoes on three of the four steps. Later in the day, the plaintiff's friend came over to visit and told the plaintiff's mother "that she should clean the steps before someone got hurt." Plaintiff testified she heard him give this warning. The plaintiff's mother testified that she forgot to clean the steps. When plaintiff's father arrived home, he also told the mother to clean the steps, which he testified she did, but later had wiped more mud on them. When leaving the house later in the evening, the plaintiff slipped and fell on the steps and injured herself. She admitted she was "talking and not paying attention when she was walking down the steps" and "she forgot there was mud on the steps." The defendants moved for summary judgment, arguing that the mud was open and

obvious and that the plaintiff could not prove all the required elements of a premises liability claim. The trial court granted summary judgment without stating the basis for the ruling.

On appeal, the plaintiff did not argue that the condition of the steps was not open and obvious; rather her argument was that the distraction exception applied. The distraction exception applies “if the property owner has reason to expect that the invitee’s attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered or will fail to protect himself against it.” However, the Court found that the distraction exception did not apply to the facts of this case. The plaintiff asserted that “she was distracted by the common, everyday activities of eating, studying, watching television and sleeping.” Plaintiff “made no argument as to how defendants would have reason to expect these ordinary activities by plaintiff would have distracted her to the point plaintiff would not discover obvious danger, would forget the muddy condition of the steps, or would fail to protect herself as required for the distraction exception to be applicable, particularly where she was warned of the danger by two different people and observed the mud on the steps herself.” The Court held that the “defendants would not reasonably foresee that eating, studying, watching television and sleeping would create a distraction leading to injury” reasoning that “... if such mundane activities, undertaken at a different location than the place of injury, were sufficient to invoke the distraction exception, then the distraction exception would almost completely subsume the open-and-obvious doctrine.”

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## **Firm News**

### **Partner Participates in Trial Demonstration Seminar Sponsored by the Foundation of the American Board of Trial Advocates**

On May 21, 2010, Reed Armstrong Partner Martin K. Morrissey participated in Masters in Trial, an 8.4-hour Continuing Legal Education seminar in Oklahoma City featuring a trial demonstration from opening statement to jury deliberation. Mr. Morrissey conducted the cross examination of the plaintiff’s expert witness.

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. The following link provides more information about ABOTA. <http://abota.org/>

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## And The Defense Wins

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On January 7, 2010, in a case of directed liability defended by DRI member [William B. Starnes II](#) of **Reed, Armstrong, Gorman, Mudge & Morrissey** in Edwardsville, Illinois, a Madison County, Illinois, jury only awarded the plaintiff \$5,795.56 (\$3,995.56 in medical expenses, \$900 for pain and suffering, and \$900 for loss of normal life).

In *Pate v. Dieu*, the plaintiff alleged \$17,000 in medical expenses, past and future wage loss and future medical expense. The plaintiff was a passenger in a SUV driven by the defendant while pulling a trailer that swayed so severely that the SUV flipped onto its roof, slid down the interstate, and rolled twice down an embankment.

Before the accident, the plaintiff underwent three successive lumbar surgeries (discectomy and fusions). At trial, medical evidence was conflicting as to whether the plaintiff sustained a permanent or temporary exacerbation of her chronic low back condition and to what extent treatment was related to the accident, as opposed to the prior condition.

A motion to setoff the judgment to \$-0- for prior medical payments paid on behalf of defendant to plaintiff's medical providers was granted recently.

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