

# Reed Armstrong Quarterly~July, 2008

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## Evidence

**Medical Expense Recovery is not Limited by Amounts Accepted as Full Payment**  
*Wills v. Foster*, 2008 WL 2446696 (Ill., Docket No. 104538, June 19, 2008)

The Illinois Supreme Court has decided that Illinois Courts will apply the reasonable value approach in determining the amount of medical bills a plaintiff is entitled to submit to the jury and recover. The reasonable value approach establishes that a plaintiff is entitled to recover the reasonable value of medical services and does not distinguish between whether a plaintiff has private insurance or is covered by a government program, such as Medicaid or Medicare. In clarifying its opinion in *Arthur v. Catour*, 216 Ill. 2d 72, 833 N.E.2d 847, 295 Ill. Dec. 641 (2005), the Court stated several reasons for following the reasonable value approach. First, the Court discussed the policy considerations behind the collateral source rule, stating that it held in *Arthur* “that the wrongdoer should not benefit from the expenditures made by the injured party

or take advantage of contracts or *other relations* that may exist between the injured party and third persons.” The Court stated that another relationship between an injured plaintiff and a third party could be a relationship with the government that allows the plaintiff’s medical expenses to be paid because of factors such as age or income, which is collateral to the tortfeasor.

Second, the Court stated that Section 920A of the RESTATEMENT (SECOND) OF TORTS supports the reasonable value approach because it allows all injured plaintiffs to recover the reasonable value of medical expenses and does not distinguish between those who have private insurance, those whose expenses are paid by the government, or those who receive their treatment on a gratuitous basis. Third, the Court stated that the deficiency of the benefit-of-the-bargain approach is that it discriminates between plaintiffs because only those plaintiffs whose expenses are covered by Medicaid may not seek to recover the entire billed amount of medical expenses, while all other injured plaintiffs can seek the entire billed amount. Finally, the Court noted that the vast majority of courts that have considered this issue employ the reasonable value approach. Following its reasoning in *Arthur*, the Court stated that a plaintiff may place the entire billed amount into evidence, provided that the plaintiff establishes the proper foundational requirements to show the bill’s reasonableness, thereby overruling *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 392 N.E.2d 1, 29 Ill.Dec. 444 (1979).

The Court also addressed the question of whether a defendant may introduce evidence of the paid amount to assist the jury in determining the reasonable value of medical bills. The Court held that defendants are free to cross-examine any witnesses a plaintiff might call to establish reasonableness and the defense is free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of services. However, the Court held that defendants cannot introduce evidence that the plaintiff’s bills were settled for a lesser amount because to do so would undermine the collateral source rule.

The impact of this opinion is that regardless of whether the amount of bills paid by either an insurance company or a government program is less than the actual billed amount, the plaintiff is allowed to admit the entire billed amount as evidence of medical bills incurred as long as the plaintiff lays the proper foundation for their admittance. In order to lay that foundation, the plaintiff must present evidence that the billed amount was reasonable, usual and customary for such services.

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## **Insurance**

### **Exclusion for Material Misrepresentation by Homeowner Precluded Coverage without Proof of Reasonable Reliance, Prejudice or Loss**

***Barth v. State Farm Fire & Casualty Company***, 228 Ill.2d 163, 886 N.E.2d 976, 319 Ill. Dec. 852 (2008).

The Illinois Supreme Court recently held that State Farm did not have to prove the common law fraud elements of reasonable reliance and prejudice or injury to invoke the material misrepresentation exclusionary clause in their policy. In this case, a fire destroyed the plaintiff’s

home and he filed a fire loss claim with his insurer, State Farm. State Farm denied the claim under an exclusion in the policy voiding coverage if the insured intentionally concealed or misrepresented a material fact impacting coverage. The primary issue before the Court was whether the exclusionary clause on misrepresentation requires the insurer to prove the common law fraud elements of reasonable reliance and prejudice or injury before it can deny coverage under the exclusionary clause, even though the policy does not expressly include those elements. In the trial below, the jury was instructed on the materiality requirement as set forth in the policy exclusion. The plaintiff argued that the jury should have also been instructed that State Farm must have both reasonably relied on the misrepresentations and, as a result, suffered prejudice or injury to prevail under the exclusionary clause of the policy. The Court stated that the exclusionary provision did not include express references to “fraud” and held that since the exclusion at issue was not based on common law fraud, State Farm was not required to prove the common law fraud elements of reasonable reliance and injury or prejudice in order to deny coverage.

**Illinois Supreme Court will Decide Whether Uninsured Motorist Coverage Reduction for Workers Compensation Previously Paid is Affected by Attorneys Fees Payable under the Workers Compensation Act.**

***Billy Taylor v. Pekin Insurance Company***, (Ill., Docket No. 105158)

Reed, Armstrong partner Stephen C. Mudge recently argued before the Illinois Supreme Court on behalf of Pekin Insurance Company in the case of *Billy Taylor v. Pekin Insurance Company*. In this case, the plaintiff was injured when he was involved in a car accident with an uninsured motorist. After receiving \$162,588.33 from Pekin Insurance Company pursuant to a workers' compensation policy, the plaintiff was awarded \$250,000.00 in benefits under the uninsured motorist coverage of an automobile policy also provided by Pekin Insurance Company. Pursuant to the provisions of Pekin automobile policy, Pekin delivered a check to the plaintiff in the amount of \$87,412.00, the difference between the arbitrators' award and the amount Pekin had previously paid in workers' compensation benefits. The plaintiff then filed a declaratory judgment action seeking a determination that the amount of the setoff for worker's compensation benefits received should be reduced by the amount of attorney's fees the plaintiff incurred in obtaining the worker's compensation benefits. The trial court dismissed the declaratory judgment action and the 5<sup>th</sup> District reversed, ruling that the setoff for worker's compensation payments should be reduced by \$40,467.00, reflecting the 25% fee plaintiff's attorney could have received under Section 5(b) of the Illinois Worker's Compensation Act if he had recovered a lien from a third-party tortfeasor. *Taylor v. Pekin Ins. Co.*, 376 Ill. App. 3d 834, 876 N.E.2d 1048, 315 Ill. Dec. 458 (5th Dist., 2007). Justice Donovan wrote a dissenting opinion. The Illinois Supreme Court accepted Pekin's Petition for Leave to Appeal and oral arguments were heard on May 15, 2008. The Court has not yet rendered its opinion in this case.

The oral argument can be viewed at the following link, Docket No. 105158:

[http://www.state.il.us/court/Media/On\\_Demand.asp](http://www.state.il.us/court/Media/On_Demand.asp)

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## Premises Liability

**5<sup>th</sup> District Finds Duty to Minor with Regard to Open and Obvious Condition**  
*Grant v. South Roxana Dad's Club*, \_\_\_ Ill. App. 3d \_\_\_, 886 N.E.2d 543, 319 Ill. Dec. 780 (5<sup>TH</sup> Dist., 2008)

On April 10, the Illinois Appellate Court, 5<sup>th</sup> District issued its opinion on the certified question of what duty, if any, a landowner has to an eight-year-old minor on its property with respect to an open and obvious condition (a four foot high dirt pile) on its property, when it has notice that the minor has engaged in an activity involving that condition (riding a bicycle on the dirt pile), that has a risk of injury to the minor. The majority held that the landowner owed a duty of reasonable care to the minor under the facts of this case. Foreseeability was the cornerstone of the court's analysis. The Court stated that the focus of its inquiry must be on the defendant/landowner and whether the defendant/landowner could reasonably have foreseen an injury to the minor. The court concluded that the injury to the minor was foreseeable in this case because the landowner had seen the minor riding his bicycle on the dirt pile on previous occasions and had readily acknowledged that he anticipated the risk of injury to the child.

The Court's next inquiry into the duty analysis was the likelihood of injury to the minor. Here, because the landowner knew the minor had been riding his bicycle on the dirt pile, the landowner knew that the eight-year-old child did not appreciate the risk. Therefore, the Court found the open and obvious defense was ineffectual. The Court further noted that the expense of remedying the situation by spreading the dirt was slight. Therefore, the Court ultimately found that the defendant/landowner owed a duty to the minor in this case.

In a well-reasoned dissent, Justice Spomer asserted that the majority's decision contradicted well-established precedent of our Illinois Supreme Court. Specifically, it conflicts with the established legal propositions that "if a reasonable child should appreciate the risk, injury to the child is not foreseeable, a dangerous condition does not exist, and there is no duty." Id at 319 Ill. Dec. 789. That is, there exists no duty to remedy a condition when a landowner or occupier would expect children to appreciate and avoid its obvious risks. Moreover, precedent has only established two specific exceptions to the open and obvious danger bar of legal duty: the "distraction exception" and the "deliberate encounter exception." Neither exception was raised by the parties or considered by the Court. Applying this objective test, as a matter of law, the obvious risk "of falling from a height" was one that the minor could reasonably be expected to understand and appreciate. Thus where the condition is open and obvious and neither exception is established, the landowner's knowledge of the child's presence and encounter with the condition should be irrelevant.

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## **Firm News**

### **Trenton Galetti Associates with Reed Armstrong**

**Edwardsville, July 1, 2008:** Trenton A. Galetti, J.D., has accepted an associate position with Reed Armstrong Gorman Mudge & Morrissey, P.C. After attaining his Juris Doctorate degree in 2003 at the John Marshall Law School in Chicago, Illinois, Trenton was admitted to the Illinois Bar in 2003 and worked in Chicago in civil insurance defense and subrogation litigation. He moved to St. Clair County in 2006 where he continued to practice litigation in the areas of personal injury, subrogation, real estate, commercial, business, employment discrimination, contracts, and construction.

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