

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION UPDATE "WE'VE GOT YOU COVERED!"

A Newsletter for Employers and Claims Professionals

December 2020

A WORD FROM THE PRACTICE CHAIR

So much to unpack at year's end! Where to begin? I am not sure my words can do justice to the times we have been living in, nor can they express how we all feel as we wrap up 2020. The uniqueness of this Holiday Season leaves me reflecting quite a bit. It is a time when you would like nothing more than to wrap yourself up in the spirit of the holiday, but realize that means something much different than say one year ago. How do we put to words what we are all feeling, what we have all been through, and what we are all facing in 2021. I would like to think after ten months of living and working through a pandemic we can all consider ourselves veterans of the experience. I am grateful I had my family, friends, and firm to get me through all of the rough patches and turn my focus to the silver linings found along the way. I was able to spend more quality time at home with my family. Focus turned to what was important and not superficial. We all learned how to do our jobs better and more productively because we were no longer in and out of courtrooms as we virtually moved into a new legal world. We realized change is not always a bad thing and every attorney at Heyl Royster understood that change needed to be embraced in order to make good on our promise to you: advocate for our clients and exceed their needs in an effective and efficient manner like we have been doing for over 100 years. The pandemic did not stop us from this goal in 2020, and we look forward to jumping into 2021 with fervor and once again proving ourselves to you, our valued client. On behalf of the Heyl Royster Family we want to wish you all a safe and wonderful Holiday Season.

I have been contacted a great deal recently regarding the COVID vaccine and how to answer the question of whether or not it can be made mandatory by an employer. The Heyl Royster Employment Law Practice just sent out a great article on this issue and how to address it. [Click here](#) to read it.

I also want to provide an update from the Commission. Chairman Brennan announced late last week that the shutdown of in person services, other than for emergency purposes, will continue for the month of January 2021. The COVID numbers are such, around the State of Illinois, that the Chairman felt the best decision at this time would be to continue the emergency shutdown. We will have updates for you sometime in January as to what the following months will look like. Please understand the Heyl Royster Workers' Compensation Practice Group is well-versed in the current procedures, emergency and otherwise, and are ready and fully capable of moving claims forward on your behalf even during this Commission mandated shutdown.

One of my firm's newest associates, Ms. Lu Harmening, who works out of our Rockford office, prepared and wrote this month's newsletter. It is on a subject matter we don't typically discuss: Supreme Court Rules, and, to be specific, Supreme Court Rule 23. When attorneys prepare arguments, both oral and written, we often look to case law to cite and use in support of those arguments. I know you have seen us discuss new case law in this newsletter. There are some Court decisions that have been issued which

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are identified as Rule 23 Orders. What makes these decisions unique is that they cannot be cited or used to support arguments. Rule 23 decisions or orders would simply impact that case and that case alone. These decisions offered no precedential value. That is no more, and that is a good thing! Beginning January 1, 2021, the Supreme Court is changing Rule 23, which will allow us to begin using and citing those decisions for our arguments in the future. The article here will give you a bit more history of the Rule and why this change will help your Heyl Royster attorney do a better job for you in the future when crafting helpful arguments to support our positions.

I understand not much is going to change for you entering into 2021 from a work perspective. I know the pandemic and all of the nuances that go with it will not simply disappear at midnight on December 31. I know the vaccine is now in the picture and that makes for a bright tomorrow for all of us. But, in the meantime, please remember we are still here for you. We can fill those needs by talking on the phone, exchanging emails, and holding virtual conference calls. If you need to set up a conference on a virtual platform in order to assist your Team then I invite you to call or email me and let's discuss what you need and then get it set and on the books. We have been doing this since the Spring/Summer of 2020, and I am sure we will continue in 2021. Yes, I would rather jump in my car, walk through your door and present in your conference room. But, until that day comes, we have the ability to take care of your immediate needs and keep you moving forward in 2021.



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PREVIOUS NON-PRECEDENTIAL 23(B) DECISIONS CAN BE CITED AS PERSUASIVE SOURCE BEGINNING IN 2021

By: Lu Harmening, Rockford Office

Many times in researching issues or preparing legal memorandums, we find an appellate court case referred to as a Rule 23(b) order right on point only to realize that it is not binding on the forum. Even worse, we are forbidden to cite it even for informative value. Says who? Supreme Court Rule 23(e).

Rule 23 Then...

Illinois Supreme Court Rule 23(e), enacted in 1994, mandated that case dispositions under Rule 23(b) were "not precedential and may not be cited by any party except to support contentions of double jeopardy, res judicata, collateral estoppel, or law of the case."

The rationale was three-fold: (1) lengthy opinions from the state appellate court, making legal researchers read through many opinions and many pages of opinions through the case books in order to locate the essence of a single point of law, ultimately driving up the cost of the litigation expenses of the client; (2) many of the "avalanche of opinions" were redundant, making legal research unnecessarily burdensome, difficult, and costly by the publication of multiple opinions expounding the same point of law; and (3) many of the opinions published lacked precedential value when they were merely settling a controversy between the parties without offering guidance for a future conduct.

A recent change to Illinois Supreme Court Rule 23 will now allow citation to unpublished Rule 23 (b) orders entered on or after January 1, 2021, for persuasive purposes.

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Rule 23 Now...

Much has changed since 1994, and the rationale that once supported Rule 23(e) has become obsolete.

First, text-searchable electronic research databases that typically include both published opinion and Rule 23(b) orders are available in Illinois case law, making it much easier to search a point of law relatively quickly. Second, many parties, lawyers, and judges started to recognize that many Rule 23(b) orders are NOT redundant nor lacking precedential value. Actually, many of them are directly on point to their cases. Third, forbidding citation to non-precedential decisions deprives parties of gaining benefit from a substantial, relevant body of case law in support of their arguments.

Accordingly, the Illinois Supreme Court Rules Committee made a proposal to repeal Supreme Court Rule 23 (Disposition of Cases in the Appellate Court) in its **entirety**, requiring all written opinions by the appellate court to be published. After receiving the public comments and conducting a public hearing, the Supreme Court amended Rule 23, which took effect on November 20, 2020.

But instead of taking a dramatic approach as the Rule Committee suggested, it only changed the subsection (e), allowing a non-precedential Rule 23(b) order, entered on or after January 1, 2021, to be cited for persuasive purposes. This mirrors the current practice of the federal judiciary as reflected in Federal Rule of Appellate Procedure 32.1.

Indeed, before this amendment, some appellate courts observed that a party can use an unpublished opinion to support the reasoning and logic of an argument as long as it is not cited as "authority." *Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367, 374 (4th Dist. 2005); *People v. Matous*, 381 Ill. App. 3d 918, 926 (3d Dist. 2008) (Carter, J. concurring);

Midwest Medical Records Ass'n, Inc. v. Brown, 2018 IL App (1st) 163230, ¶ 29.

Although citation of the Rule 23(b) order is only persuasive, not binding, because the current Rule 23(e) permits parties to cite Rule 23(b) on or after January 1, 2021, we, as practitioners, have a bigger bank to research case law for our client, finding the strength and weakness of the case we are handling, and predicting the patterns and points of distinction that influence future decision-making.



Lu Harmening, Rockford Office

Before coming to Heyl Royster, Lu graduated from Northwest University of Politics and Law in Xi'an, China, where she earned a Bachelor's Degree in Law and a Master's Degree in Civil and Commercial Law. She started practicing law in 2009 in China. In 2020, Lu graduated *Summa Cum Laude* from Northern Illinois University College of Law, ranking 2nd in her class. While in law school, Lu was on the board of Law Review and involved in the International Law Society. Lu also participated as table counsel for Northern Illinois University College of Law in the 2020 Jessup International Law Moot Court Competition. She recently passed the Illinois Bar and will be sworn in on January 14, 2021.

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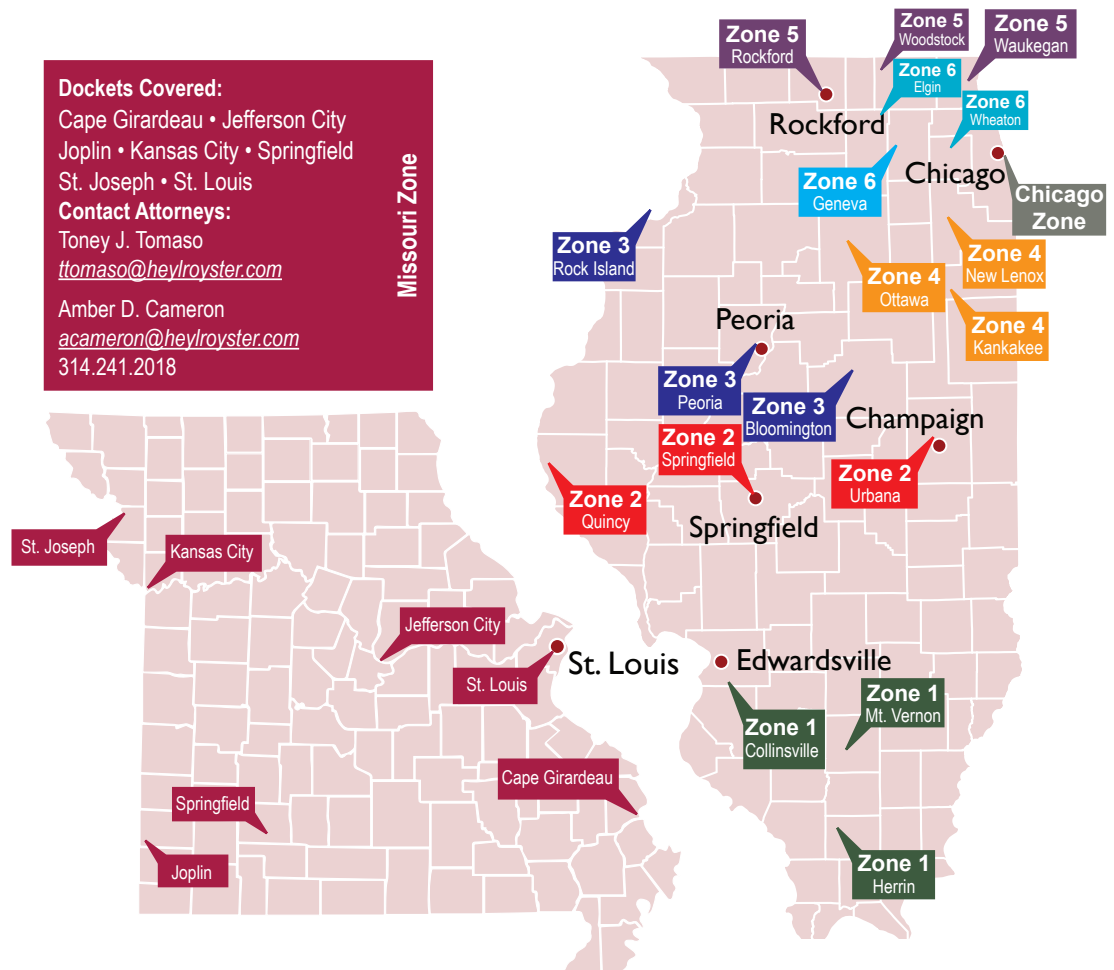
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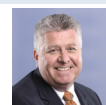
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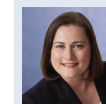
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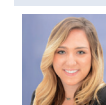
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