Ladies and Gentlemen:

It has been said that the only constant is change. Heyl Royster in 2014 is testimony to the truth of that maxim.

This year, our firm has seen a number of changes - all positive - that will help us serve our clients better.


Tobin Taylor


Andy Roth


Steve Ayres


Maura Yusof

New Technology

First, we are in the process of converting to a new accounting software, Acumin, which will allow us to monitor claims and client matters more efficiently. It is a substantial undertaking, and one we believe is well worth the investment and effort.

New Chicago Office

Second, in December our Chicago office is moving to the seventh floor at 33 North Dearborn, across the street from the Daley Center. In addition to Tobin Taylor (our Chicago-office managing partner), Maura Yusof and Steve Ayres, our new Chicago office will include Andy Roth, who rose to partnership in our Rockford office, and who will be joining our Chicago office in January. Dan Cheely, who has been with our firm since 2012, will be retiring the end of December. We wish him well and will miss him. We expect we will have other personnel moves in Chicago as we move into 2015.

New Firm Managing Partner


Tim Bertschy

There has also been a change in the leadership of our firm. Allow me to introduce my successor as Managing Partner, my partner Tim Bertschy. Tim joined the firm in 1977 after graduating from George Washington Law School. Tim joined the firm at the same time that Doug Pomatto (the Managing Partner of our Rockford office) and I did. Tim's work has primarily been in the commercial litigation and governmental law fields, although he has also worked with our insurance clients during his years with our firm. Tim chairs the firm's Governmental and Business & Commercial Litigation Practices. He is a former president of the Illinois State Bar Association and has served in the American Bar Association House of Delegates for more than 15 years. He is a past member of the ABA Board of Governors, representing Illinois and Ohio. He is also a past president of the Illinois Township Attorney's Association, Illinois Equal Justice Coalition, Illinois Equal Justice Foundation, the American Counsel Association, and the Illinois Lawyers Assistance Program. He is currently president of the Central District Chapter of Illinois of the Federal Bar Association and is on the board of the Illinois Bar Foundation. Tim also serves as chair of the United States District Court Advisory Committee on Local Rules (Central District, Illinois). Tim assumed the role of Managing Partner on September 25th. I will be working with Tim, as well as continuing to work on client matters, principally in the insurance coverage field.

HEYL ROYSTER

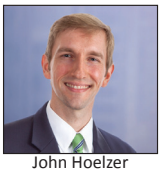
SUITE 600 • 124 S.W. ADAMS STREET • PEORIA, IL 61602 • TEL 309.676.0400 • HEYLROYSTER.COM • PEORIA • SPRINGFIELD • URBANA • ROCKFORD • EDWARDSVILLE • CHICAGO • A CENTURY OF SERVICE AND BEYOND

New Lawyers

Over the course of the past year, we've added six new attorneys – both lateral hires and recent law school graduates.


Nathan Henderson


Keith Hill


John Hoelzer


Kimberly Kovanda


Emily Perkins


Melissa Schoenbein

Two attorneys joined our Edwardsville office as Of Counsel – **Nathan Henderson** and **Keith Hill**. Nathan represents employers in the areas of toxic tort litigation and premises liability actions. His reputation and successful defense of clients has led to his recognition on the Illinois Super Lawyers Rising Stars list for three consecutive years (2012-2014). Keith has tried numerous cases to verdict in state and federal court, and he has handled appeals before the Fourth and Fifth District Appellate Courts and the U.S. Court of Appeals for the Seventh Circuit.

John Hoelzer joined as an associate in our Springfield office. John is a former assistant to the Attorney General of Missouri ('07-'12) as well as a former Special Agent for the Drug Enforcement Administration in Laredo, TX ('12-'14). John defends law enforcement officers and correctional service providers against charges of constitutional rights violations, business owners against claims of negligence involving personal injury and property damage, and healthcare professionals in cases alleging medical malpractice.

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Kim Kovanda (Chicago-Kent College of Law, 2013) joined the firm's Rockford office. She defends clients in toxic tort and asbestos matters, and represents employers in employment, labor, and Workers' Compensation claims.

Emily Perkins (Northern Illinois University College of Law, 2014) and **Melissa Schoenbein** (Southern Illinois University School of Law, 2013, *cum laude*) joined our Peoria office. Emily, who received a B.S. in Business Administration from Illinois State University and an MBA from Bradley University, was a winner of The National Law Review's 2014 Law Student Writing Competition. Melissa worked as a judicial clerk for U.S. District Court Judge Michael Mihm before joining the firm.

We pledge to continually look to change and grow the firm in ways that benefit our clients. We hope you find this issue of the Quarterly Review of interest. We'd also like extend our best wishes to you for the holiday season and for a happy and healthy 2015!

Very truly yours,

HEYL, ROYSTER, VOELKER & ALLEN

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AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Fall 2014

INSURANCE

Targeted Tender Doctrine Allows Insured With Multiple Policies To Select Which Insurer Should Defend

A subcontractor's employee was injured at a construction site. He sued the general contractor that was insured by Cincinnati as well as two subcontractors. As a result of the lawsuit, multiple policies were triggered. Erie insured one subcontractor, and AMCO insured another. The general contractor made a targeted tender of its defense to AMCO which was accepted. At a mediation, the case could settle for $1.5 million, AMCO attempted to get Cincinnati and the other contractor's carrier to contribute equally with it. They refused. AMCO eventually settled the case for $1.45 million. It subsequently filed a declaratory judgment action seeking to compel Cincinnati to contribute to the settlement. The trial court dismissed the complaint on the basis of the Targeted Tender Doctrine.

The First District affirmed. The Targeted Tender Doctrine allows an insured covered by multiple policies to select or target which insurer should defend it with regard to a specific claim. Illinois courts have consistently held that an insured has a right to choose or knowingly forego an insurer's participation in a claim. When an insured designates one carrier to defend, the duty to defend falls solely on the selected insurer. That insurer may not in turn seek equitable contribution from other insurers who might have applicable coverage. *AMCO Ins. Co. v. Cincinnati Ins. Co.*, 2014 IL App (1st) 122856.

CGL Policy Terms Unambiguously Limited Exposure To The Occurrence Limit Rather Than Aggregate Limit

Bituminous issued two CGL policies covering various companies involved with an oil and gas well which exploded causing injuries and deaths to oil well workers. One policy had an occurrence limit of $1 million and a general aggregate of $2 million while the other policy had a $500,000 occurrence limit and $1 million general aggregate limit. Bituminous filed an interpleader action seeking an order that it deposit the occurrence limit for each policy so that the injured workers could establish among themselves the respective rights to the funds. The trial court held the policy was ambiguous and ordered Bituminous to deposit the aggregate limits of both policies.

The Fifth District reversed. If the words in a policy are susceptible to more than one reasonable interpretation, the court must consider them ambiguous and construe them strictly against the insurer who drafted the policy. However, a contract is not rendered ambiguous merely because the parties disagree on its meaning. The policy stated that the occurrence limit is the most the company will pay for bodily injury "arising out of any one occurrence." As the parties agreed the injuries resulted from one occurrence, the unambiguous language of the policies limited exposure to the occurrence limit. *Bituminous Casualty Corp. v. Iles*, 2013 IL App (5th) 120485.

No Statutory Or Public Policy Requirement To Provide UIM Coverage In An Umbrella Policy

Plaintiff was a passenger in a vehicle owned by the defendant's insured that was involved in an auto accident with an underinsured driver. She received $100,000 from the adverse driver's insurance carrier and UM benefits of $150,000 from her driver's carrier. However, she sued her driver's umbrella insurer for additional UIM benefits. The umbrella policy provided UIM coverage for the named insured and family members which did not include plaintiff. The trial court dismissed the complaint with prejudice.

The First District affirmed. In Illinois, umbrella policies and primary auto policies are distinct. Under the Illinois Insurance Code, carriers may provide UM and UIM coverage, but they are not required to so do. There is no statutory or public policy requirement obligating a carrier to provide UIM coverage under an umbrella policy. *Pang v. Farmers Insurance Group*, 2014 IL App (1st) 123204-U.

Auto Insurance Policies Cannot Exclude The Only Named Insured

The insured struck a lady and her four-year-old son with her car seriously injuring the mother and killing the son. The auto policy purported to exclude the insured, who was the only named insured, from coverage. The carrier filed a declaratory judgment action seeking a declaration it owed no duty to defend the underlying personal injury and wrongful death suit. The insurance carrier for the plaintiffs in the underlying case filed a counterclaim. Faced with opposing summary judgment motions, the trial court ruled in favor of the auto carrier. The Appellate Court reversed.

The Illinois Supreme Court noted that when a provision in an insurance policy conflicts with a statute, the provision will be void against public policy. By statute, a liability policy must insure the "person named therein." As the insured was the only person named, the statute mandated that the policy cover her. *American Access Casualty Co. v. Reyes*, 2013 IL 115601 (12/19/13).

Carrier Successfully Defends Claim That It Was Guilty Of Bad Faith In Failing To Settle Within Policy Limits

The defendant issued an auto policy having $20,000 liability limits. After the insured was involved in an accident, the carrier defended her. Plaintiff's counsel made a settlement demand for the $20,000 policy limit which was rejected. A jury subsequently found the insured 60% at fault and plaintiff 40% at fault awarding a net verdict of $47,951.15. The insured assigned her rights under the policy to plaintiff. Plaintiff then filed the present case and alleged in the complaint that there was a workers' compensation lien of $74,000 with medical expenses in excess of $23,000 that created the probability that there would be a verdict in excess of the policy limits. The trial court disagreed noting the carrier could have felt it had an excellent chance of winning the underlying case and dismissed the bad faith case.

The First District affirmed. In order to state a cause of action for bad faith, plaintiff must allege facts establishing a reasonable probability of an excess verdict as opposed to a mere possibility. The fact that an insurance company was unsuccessful in a trial does not establish its defense was made in bad faith. *Powell v. American Service Ins. Co.*, 2014 IL App (1st) 123643.

Preliminary Steps To Change Beneficiary Did Not Constitute Substantial Compliance With Life Insurance Policy Requirements

The decedent worked as a pharmacist for SuperValu. He died of a heart attack and was survived by a wife of three years and three children. As part of his employment benefits, Minnesota Life had an insurance policy with death benefits of $415,000. Its terms stated that if a policyholder failed to designate a beneficiary at the date of death, the proceeds would pass to the policyholder's spouse. Shortly after the death, the children found a change of beneficiary form that was completed by their father more than a year before his death but never submitted to Minnesota Life. Defendant then submitted a claim for the policy proceeds, and Minnesota Life filed the present interpleader action asking the court to determine the appropriate beneficiary. The trial court entered summary judgment in favor of the wife.

The Seventh Circuit affirmed. The Court noted that exact compliance with insurance policy terms is not required in Illinois as long as there is substantial compliance. However, it held decedent did not substantially comply with the policy requirements as he had 15 months before his death to return the completed form, but never did so. *Minnesota Life Ins. Co. v. Kagan*, 724 F.3d 843 (7th Cir. 2013).

SERVICE OF PROCESS

Default Judgment Vacated As Service Of Process Through The Secretary Of State For An Illinois Resident Did Not Create Personal Jurisdiction

Plaintiff was injured in a chain of rear-end collisions. She sued three drivers, eventually settling with two of them. Service upon the third defendant was unsuccessfully attempted on six occasions. Plaintiff then obtained an order permitting service through the Secretary of State, a procedure available for cases against non-residents. A default judgment was entered, and eventually the court awarded $199,998.32 in damages. Plaintiff then filed a citation to discover assets personally obtaining service on the defendant at his place of employment. Defendant filed a motion to vacate which was denied.

The First District reversed. Although plaintiff made six attempts to serve the defendant at his residence, she did not dispute that the defendant's business address was in the phone book and could easily have been obtained. It concluded plaintiff did not conduct a diligent inquiry into the defendant's whereabouts prior to requesting service by special order of the court. As service through the Secretary of State by special order of the court was improper, there was no jurisdiction over the defendant, and the judgment was void. *Sutton v. Ekong*, 2013 IL App (1st) 121975.

SETTLEMENTS & RELEASES

Settlement Found To Be In Good Faith Barring Third Party Contribution Action

The minor plaintiff suffered a severe brain injury when the vehicle in which he was riding was struck by a car driven by a drunk driver that had first collided with a concrete construction barrier. The drunk driver's auto carrier paid its policy limits of $20,000. Plaintiff then sued a construction company that was working in the area which then filed a third party complaint against the drunk driver. The trial court dismissed the third party claim finding the settlement was made in good faith because there was no evidence of wrongful conduct, collusion or fraud, and the full policy limit had been tendered.

The First District affirmed. Whether a settlement satisfies the good faith requirement of the Contribution Act is left to the discretion of the trial court based upon a consideration of the totality of the circumstances. The drunk driver had no assets available aside from the minimal insurance limits, she was unemployed and had a chronic and sometimes disabling medical disease. While it is likely the damages would far surpass the available insurance limit, the trial court recognized that plaintiff would be unable to recover any amount above the insurance limit. Consequently, dismissal of the Complaint was not an abuse of discretion. *Miranda v. Walsh Group Ltd.*, 2013 IL App (1st) 122674.

Exculpatory Release Protected Fitness Center And Its Instructor

Plaintiff severely injured her wrist after falling from a riser during a personal training session at the defendant's fitness center. The membership agreement plaintiff signed provided the center and its employees "will not be liable in lawsuits including negligence lawsuits brought against them by members or their guests." Plaintiff claimed the release should not apply to dangerous equipment or faulty instruction. The trial court disagreed and entered summary judgment for the defendant.

The First District affirmed. The release included injuries caused by bad equipment. Also that a member could be injured during a personal training session due to inadequate or faulty instruction. Not all advice is good, even when professionally given. *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442.

DAMAGES

Wrongful Death Plaintiff's Verdict Awarding Damages to Decedent's Parents and Siblings Vacated when Post-Judgment Discovery Established She was Survived by Husband

Decedent was killed when defendant's truck struck her on the Indiana toll way. Her father filed a wrongful death suit, and a jury awarded $4.25 million damages to her parents and eight siblings. After judgment and

over plaintiff's objection, the Court allowed additional discovery which revealed decedent was survived by a husband whom she married by proxy in her native Mali. The Court then vacated the judgment and dismissed the case.

The First District affirmed. It determined it was appropriate for the Court to allow post-judgment discovery when the judge became aware of the possibility decedent was married at the time of her death. When a decedent is survived by a spouse and no children, the spouse is the only person entitled to recover under the Wrongful Death Act. *Bangaly v. Baggiani*, 2014 IL App (1st) 123760.

IMMUNITY

City Owed No Duty To Pedestrian Who Crossed Street Outside Of Crosswalk

Plaintiff was injured when he stepped into a pothole while crossing a city street. The pothole was about 5 inches outside of the crosswalk. The trial court held in favor of the City stating it owed no duty to plaintiff even though he was an intended user inside the crosswalk because the defect was outside of the crosswalk.

The First District affirmed. It was well-settled law that a municipality owes no duty to a pedestrian who crosses a public street outside of a crosswalk. It rejected plaintiff's argument that he was partially within the crosswalk at the time of the injury, and therefore, the City owed a duty even though the pothole was outside the crosswalk. *Swain v. City of Chicago*, 2014 IL App (1st) 122769.

AUTOMOBILES

Jury Finds Neither Driver At Fault For Crash That Was The Result Of Ice And Snow Which Killed Three People

On the way home from a funeral, the auto in which three passengers were riding skidded and crossed the center line. An approaching semi swerved to the right in an attempt to avoid the collision but hit the passenger side of the car. The estates of the deceased passengers sued their driver, the semi driver and his employer. Although there was a disagreement as to how slippery was the highway surface, evidence showed both drivers were traveling below the posted speed limit. Plaintiff submitted a jury instruction that at least one of the drivers had to be negligent, and therefore liable for the deaths. The trial court refused the instruction, and the jury returned a verdict in favor of all defendants.

The First District affirmed. There was a substantial amount of disputed evidence as to whether either driver was going too fast for conditions or whether the truck driver should have swerved off the road. Therefore, it fell within the province of the jury to determine the negligence, if any, of the defendants. *Egan v. McCullough,* 2013 IL App (1st) 122475.

No Liability Against Tollway Authority For Alleged Inadequate Maintenance of Median Separating Traffic

Five consolidated cases arising from two car head-on collisions on the tollway involving multiple deaths and personal injuries. Plaintiffs contended the Tollway Authority had a duty to add guard rails or maintain the shape and slope of medians differently to prevent a drive over. The trial court dismissed the complaints holding the Tollway Authority had no duty to maintain the grassy median but certified its ruling for interlocutory appeal.

The Second District affirmed. The defendant had a duty to maintain only the traveled portion of the highway in a reasonably safe condition, regardless of the foreseeability of a driver veering from the road. The grassy median need not be maintained as a safe way for driving. It rejected the argument that the defendant voluntarily undertook to properly maintain the median. If the defendant had no duty to spend money on the median to prevent crossover collisions, it was under no duty under a lesser obligation to make ordinary repairs to prevent crossover collisions. *Rommel v. Illinois State Toll Highway Auth.*, 2013 IL App (2d) 120273.

Summary Judgment Against Plaintiff Bus Passengers Affirmed Where There Was No Evidence Of Negligence

Plaintiff husband and wife had just boarded a CTA bus and were walking down the aisle to find a seat. A taxi suddenly pulled in front of the bus, and the bus driver had to brake suddenly. As a result, both plaintiffs fell down sustaining injury. The trial court reviewed a video of the accident as well as deposition testimony and held that the bus driver had to brake to avoid colliding with the taxi, and the bus company and driver should not be liable.

The First District affirmed. Although common carriers must exercise the highest degree of care consistent with the practical operation of the conveyance, they are not an insurer of the absolute safety of a passenger. It concluded reasonable minds could not believe that braking to avoid an imminent collision with a darting vehicle was an unreasonable thing to do. There was no evidence to indicate the bus driver's speed or attention created the need to suddenly apply the brakes, but rather it was the taxi that caused the accident. *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463.

PRODUCT LIABILITY

UCC Four-Year Limitation Barred Claim Seeking Payment For Sale Of Goods

Plaintiff was an importer of electronics who sold goods to the defendant. They had a business relationship from 2003 through November 9, 2004 when the final transaction occurred. Payment was due within 60 days, no later than 1/8/05. Suit was filed 3/6/09 claiming the defendant owed $8,185,302.24. The District Court held the alleged breach of contract occurred no later than 1/8/05, and therefore, the suit was untimely and barred by the four-year statute of limitations of the Uniform Commercial Code.

The Seventh Circuit affirmed. The UCC requires that a breach of contract for a sale "must be commenced within four years after the cause of action has accrued." Once the party is apprised of a breach, the statute of limitations begins to run. Plaintiff knew that defendant owed it money for goods yet failed to take any action until more than four years placing the claim outside of limitations of the UCC. *Apex Digital, Inc. v. Sears Roebuck & Co.*, 735 F.3d 962 (7th Cir. 2013).

PREMISES LIABILITY

Residential Condominium Association And Its Management Company Immune From Liability For Improper Removal Of Snow/Ice Patch Caused By Defective Awning.

Plaintiff was a resident of a condominium whose common areas were owned and maintained by the defendants. She slipped and fell in a common area on a patch of ice that had formed because water dripped from an overhead awning and froze on the walkway. The defendants raised the Residential Snow Removal Act which eliminates liability for injuries resulting from snow or ice removal efforts on sidewalks abutting residential property unless their conduct was willful or wanton. Plaintiff argued that liability should attach because the patch was the result of water dripping from an awning. Evidence indicated the defendants hired a snow removal company and also monitored snow removal efforts. The trial court agreed with the defense and entered summary judgment.

The Second District affirmed. Properties may have many defects that promote an unnatural accumulation of snow or ice and an owner can avoid liability if it clears or neutralizes the accumulations before they cause an injury. Plaintiff alleged the ultimate cause was a defect in the awning while the more immediate

cause was a lapse in defendants' snow and ice removal efforts. As Plaintiff attributed her fall to the consequences of the failed snow and ice removal, activity, the Act applied to her claim. *Ryan v. Glen Ellyn Rain Tree Condominium Asso.*, 2014 IL App (2d) 130682.

Summary Judgment Affirmed When Plaintiff Cannot Establish Defective Staircase Caused Her Fall

Plaintiff was injured when she fell down a staircase leading from the defendant's bedroom to the first floor of his house. She had used the staircase over a hundred times before that night. In her deposition, she said she does not know what caused her fall. Plaintiff 's expert said the stairway had multiple defects in violation of building codes, one of which was the failure to have a handrail. The trial court entered summary judgment for the defendant because plaintiff could not establish proximate cause.

The Third District affirmed. Proximate cause is an essential element of a negligence claim. None of the testimony and affidavits addressed the issue of what caused plaintiff to fall. It also noted the lack of a handrail in violation of the building code did not create an issue of material fact. Violating an ordinance, by itself, does not establish proximate cause. *Vertin v. Mau*, 2014 IL App (3d) 130246.

Realtor Not Liable To Potential Purchaser For Injuries Sustained When Stairs In Listed Property Collapsed

During the showing of a property, plaintiff was injured while walking down a basement staircase that collapsed. He sued multiple defendants including the realtor alleging the listing agreement created a contractual duty to inspect the property for safety hazards. The agreement required the realtor to be responsible for cleaning sinks, appliances, floors, windows and other things. The trial court held the agreement created no interest in the ownership, operation, maintenance or control of the premises and entered summary judgment for the realtor.

The Third District affirmed. It agreed the listing agreement did not incorporate language expanding the realtor's contractual duty to conduct its own safety inspections to protect people on the property. It acquired no proprietary interest in the property through the contract. Further, there was no evidence that the realtor had actual knowledge the staircase was unstable. *Hart v. Century 21 Windsor Realty*, 2014 IL App (3d) 130667.

***De Minimis* Rule Protected Hotel From Liability To Customer Who Fell On Sidewalk Approaching The Entrance**

Plaintiff was attending a seminar at the defendant hotel. He went outside to smoke a cigarette. As he returned, he tripped over uneven slabs of concrete a couple feet away from the main entrance injuring his knee. Plaintiff's brother measured the height difference between the slabs at 1½ - 1¾ inches. Defendant's expert measured the height difference at under an inch. The trial court held the hotel did not owe plaintiff a duty of care because the sidewalk defect was *de minimis*.

The Second District affirmed. It is common knowledge that sidewalks are constructed in slabs because they must be allowed to expand and contract with changes in temperature. Numerous cases hold that, absent aggravating circumstances, a vertical displacement of less than two inches is *de minimis*. It was undisputed the height variation between the concrete slabs was less than two inches, and therefore, the defect was not actionable. *St. Martin v. First Hospitality Group, Inc.*, 2014 IL App (2d) 130505.

Restaurant Had No Duty To Protect Plaintiff From Theft Of His iPhone

Plaintiff was a customer at defendant's Burger King Restaurant when his iPhone was stolen by four other customers. He alleged the defendant was negligent in not providing "manned security" in the restaurant. The trial court dismissed the Complaint holding defendant owed no duty to protect plaintiff from the theft of his iPhone.

The First District affirmed. A landowner has no duty to protect others from criminal activities of third persons unless a special relationship exists between them. No legal duty based on a "special relationship" exists between a business invitee and a property owner. Therefore, the case was properly dismissed. *Lewis v. Heartland Food Corporation*, 2014 IL App (1st) 123303.

CONSTRUCTION

Four-Year Construction Statute Of Limitations Applied To Temporary Furnace And Ventilation System Which Caused Fire During Building's Construction

Plaintiff filed a subrogation suit after it paid $67,208.97 in damages to its insured, a general contractor who was building a commercial property. The defendant had installed two temporary hanging furnaces and a ventilation system to heat the building while the permanent floor was being installed. A fire occurred on February 1, 2008 which originated in one of the furnaces. Plaintiff filed suit on May 18, 2012. The defendant moved to dismiss the case asserting the four-year limitation of 735 ILCS 5/13-214(a) barred the case. Plaintiff argued that because the heating/ventilation system was temporary, it did not constitute an "improvement to real property" as required by the statute. The trial court dismissed the Complaint.

The Second District affirmed. Although the ventilation system was not a permanent part of the building, its temporary nature was not dispositive of the issue of whether it constituted an "improvement" to real estate. In this case, the system was necessary to complete construction of the building. It served no purpose other than to enable the installation of the flooring. Therefore, it was an integral part of the entire operation. *Firemen's Fund Ins. Co. v. Rockford Heating & Air-Conditioning, Inc.*, 2014 IL App. (2d) 130566.

DRAM SHOP

Illinois Guaranty Fund Gets Setoff From Statutory Dram Shop Limit Rather Than Jury Verdict

Eighteen-year-old boy was killed in a head-on collision with a vehicle driven by an intoxicated person. His parents received $26,550 from the drunk driver's insurance carrier and $80,000 from their own insurance carrier. They subsequently filed a dram shop suit. While it was pending, the dram shop's insurance carrier was declared insolvent, and the Illinois Guaranty Fund assumed the defense. The issue was whether the $106,550 should be set off from a potential jury verdict or from the statutory dram shop limit of $130,338.51. The Fifth District held the setoff should be applied against the jury verdict.

The Supreme Court reversed and held the setoff should be applied against the statutory limit. The Fund's obligation cannot be expanded by a jury verdict. It can only be reduced by other insurance. *Rogers v. Imeri*, 2013 IL 115860.

RAILROADS

Defense Summary Judgment Affirmed Where Experts' Relied Upon Amateurs' Reconstruction Of Crossing Accident

Plaintiff's decedent was killed when her car was struck by defendant's train at a railroad crossing. Plaintiff contended the railroad crossing gates, warning lights and locomotive horn all were less than required under applicable federal safety regulations. Decedent's three grown children visited the accident scene some days after the occurrence and timed the interval between the horn of approaching locomotives was first heard and when the warning lights began flashing. Plaintiff's two expert witnesses relied upon the children's findings, which were inconsistent with each other, in venturing their opinions that the defendant was negligent. The trial court entered summary judgment for the railroad holding the findings of the amateur testers was an inadequate foundation under *Daubert* for the experts to base their opinions pursuant to *Daubert*.

The Seventh Circuit affirmed. An engineer's training and experience does not make him abler than a

juror to evaluate the consistence of lay testimony. For an expert to offer such an evaluation is to wrap the lay witness in the expert's prestige and authority – "A disreputable tactic that the plaintiff's lawyer should not have countenanced." *Nunez v. BNSF Railway Co.*, 730 F.3d 681 (7th Cir. 2013).

Plaintiff's Verdict Taken Away As Approaching Train Presented Open And Obvious Danger To Pedestrian Crossing Tracks

Plaintiff's decedent was a 79-year-old man who had reasonably good hearing and wore glasses only for reading. He attempted to cross the tracks at a Metra station. As the train approached, the engineer sounded his horn. Also, the engine had a flashing light on its front. Plaintiff obtained a verdict, and the trial court denied defendant's post-trial motion for judgment notwithstanding the verdict. The Appellate Court originally affirmed the verdict. Thereafter, the Illinois Supreme Court issued *Choate v. Indiana Harbor Belt R.R. Co*., 2012 IL 112948 which a railroad owed no duty to a 12-year-old boy injured when he fell while attempting to jump on a moving train. Exercising its supervisory authority, the Supreme Court directed the Court to review its previous order affirming the jury verdict.

The First District reversed its earlier decision and held the railroad owed no duty to the pedestrian crossing the railroad tracks. The evidence showed that decedent could have remained out of the way of the oncoming train had he stopped when he heard the train's horn and should have been able to see it approaching before traversing the crosswalk. It also noted the tracks in front of a moving train constituted an area of danger, and decedent should have realized the risk of entering the area. As the danger presented by the train was open and obvious, the defendant owed no duty. *McDonald v. Northeast Illinois Regional Commuter R.R. Corp.*, 2013 IL App (1st) 102766-B.

We recommend the entire opinion be read and counsel consulted concerning the effect these decisions may have upon your claims —

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