Dear Friends,
Enclosed is the summer edition of our *Quarterly Review of Recent Decisions*, edited by our partners, Rex Linder and Mark Hansen. We trust that you will find this helpful in your day-to-day handling of claims.

I would like to take this opportunity to let you know about some developments at the firm.

Firm Continues to Grow
Since the beginning of the year, we have bolstered our capabilities firmwide in tort litigation, as well as in areas such as professional liability, workers' compensation, healthcare, and commercial litigation by adding 11 attorneys – Syed Ahmad, Tony Ashenhurst, Anne Mergen, Jessica Sarff, Seth TeBeest, and Seth Uphoff in Peoria; Ben Ford in Champaign; Katie Mailey in Springfield; Jenna Ewing in Rockford; and Susannah Price and Mallory Sanzeri in Chicago. We also have a number of new associates starting in September.


Syed Ahmad


Tony Ashenhurst


Jenna Ewing


Ben Ford


Katie Mailey


Anne Mergen


Susannah Price


Mallory Sanzeri


Jessica Sarff


Seth TeBeest


Seth Uphoff

New Champaign Office
The firm has had an office in Urbana, IL for more than 35 years. In January, we completed the relocation of this office to a building known as "M2" located at 301 N. Neil Street in Champaign. This new 12,700 s.f. space includes offices for 21 lawyers, a group of centrally located conference rooms, and state-of-the-art technology to accommodate the needs of our clients. Please feel free to contact me or our Champaign office Managing Partner, Bruce Bonds, if there is any way we can assist you in that area.

Claims Handling Seminars
I hope you had a chance to attend the programs at one of our 32nd Annual Claims Handling Seminars. In addition to our regular Casualty & Property and Workers' Compensation tracks, and the Governmental track that we added last year, we added a Professional Liability track this year. In May, we held a seminars in Bloomington and Itasca, IL. More than 280 claims professionals attended presentations on a wide range of topics, including New Emotional Distress Damages, Understanding Reptile Theory Tactics, Insurance and Construction Coverage Issues, and CyberSecurity. You can find materials from the 2017 seminar and past seminars on the "Resources" page at www.heylroyster.com. Please do not hesitate to contact me if you have comments or suggestions for next year's Claims Handling Seminars.

Best Place to Work

We are proud to say that in 2017 Heyl Royster was recognized as one of the *Best Places to Work in Illinois*. Our firm was one of 25 organizations, and the only law firm, recognized in the Medium Companies (100-499 employees) category. The Best Places to Work Award is based on a statewide survey conducted by the Best Companies Group. It is designed to identify, recognize, and honor the best places of employment in Illinois, benefiting the state's economy, workforce, and businesses. The award is a testament to our great people and validates the respect we have for our clients and the firm's lawyers and staff.

Best Places to Work in IL 2017
A workplace analysis and competition

As the Chair of the firm's Casualty/Tort Litigation Practice, I wanted to assure you that we continue to invest in the systems, security, personnel, and capabilities of the firm to the benefit of our insurance company clients. This publication and our seminars are just a couple of examples of the value-added content that we have to offer to the insurance industry. If there is a way we can partner with you to enhance our service delivery and relationship, please do not hesitate to let me know.

HEYL ROYSTER

Very truly yours,

HEYL, ROYSTER, VOELKER & ALLEN, P.C.

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AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Summer 2017

INSURANCE

Negligence Claim Against an Insurance Agent Accrues When Claim is Denied and Not When Policy is Issued

American Family brought a declaratory judgment complaint seeking a determination it did not have a duty to defend the insured's son under its homeowners policy where the underlying complaint sought damages for defamation, invasion of privacy and infliction of emotional distress as a result of alleged bullying. The insured brought a counterclaim against American Family and its agent. The insured had a homeowners' policy with Travelers for many years which included intentional acts. However, the American Family policy did not afford that coverage, although the insureds claimed they requested it. The trial court dismissed the Counterclaim because it was filed about four years after the American Family policy was issued in violation of the two-year statute of limitations.

The first district reversed. A cause of action for negligence by an insurance agent accrues at the time coverage is denied. As coverage was denied on August 20, 2014, and the Third Party Complaint was filed September 22, 2015, it was within two years of accrual and not time-barred. *American Family Mut. Ins. Co. v. Krop*, 2017 IL App (1st) 161071.

CGL Policy Did Not Cover Claims Against Insured for Defective Window Installation

Allied issued a commercial general liability policy to a contractor who installed windows in a condominium. The condominium filed suit against the insured alleging breach of an implied warranty of habitability which was eventually settled when the insured assigned the condominium its right to recover insurance proceeds covering the damage. Allied then filed the present declaratory judgment action asserting its policy excluded claims for defective workmanship. The trial court agreed and entered summary judgment for Allied.

The Seventh Circuit affirmed. The measure of damages for breach of an implied warranty of habitability is the cost of repairing the defective conditions, in this case the defectively installed windows. As the policy excluded coverage for the insured's defectively completed work, Allied was not required to indemnify. *Allied Property & Casualty Ins. Co. v. Metro North Condominium Assoc.*, 850 F.3d 844 (7th Cir. 2017).

120-Day Notice Requirement in UM Policy Against Public Policy Under Specific Facts of Case

Plaintiff was a passenger in an auto involved in a hit-and-run accident. The driver had a split insurance policy with one company providing collision coverage and the other providing liability protection. The driver's insurance card displayed both companies, but did not state which issued collision coverage or liability coverage. Although the collision coverage carrier was notified promptly of the accident, the liability/UM carrier was not notified within 120 days as required by the policy. Due to the confusion concerning which carrier provided coverage, the trial court held the 120 day notice violated public policy and plaintiff was entitled to benefits.

The first district affirmed. Whether an insurance provision violates public policy depends upon the particular facts of each case. The general rule is that limitations must be construed in favor of the policyholder and against the insurer. Strict enforcement of the 120 day notice provision in the policy circumvented the purpose of the uninsured motorist statute, and therefore, violated public policy. It noted plaintiff, who is not the policyholder, was an innocent third party. *Smith v. American Heartland Ins. Co.*, 2017 IL App (1st) 161144.

Life Insurer Pays Accidental Death Benefits Where Insured Died from DVT 20 Days after Rupturing Achilles Tendon

Defendant insurer issued a group life insurance policy providing accident death and dismemberment coverage for "bodily injuries … that result directly from an accident and independently of all other causes." Plaintiff's decedent was a 31-year-old who tore an Achilles tendon playing basketball on July 16, 2013. Three days after the accident, he met with an orthopedic surgeon who was going to operate three days later. The day before surgery, decedent called the surgeon's office complaining of swelling in the lower part of his leg and that it was both sensitive and warm to the touch. Four days after his follow up visit, he collapsed at work and died as a result of a deep vein thrombosis (DVT). The trial court granted summary judgment for the carrier holding death was not entirely the result of the Achilles tear, but may have been the result of surgery.

The Seventh Circuit reversed. It felt the rupturing of the tendon may well have caused the blood clot that killed the decedent, and the insurer was required to present some evidence that surgery was the cause. It noted the significant incidence of DVTs following rupture of an Achilles tendon even if there is no surgery. Because the carrier failed to make a plausible showing that surgery, rather than the accident, caused the death, summary judgment should have been entered in favor of the insured. *Prather v. Sun Life & Health Ins. Co. (U.S.)*, 843 F.3d 733 (7th Cir. 2016).

SUBROGATION

Waiver of Subrogation Provision in Construction Contracts Barred Owner's Carriers from Pursuing Subrogation Claims against Contractors They Claimed Caused a Fire

A fire occurred during an expensive renovation project at a casino. The casino received $81,150,000 in insurance payments from three insurers. The insurers filed subrogation claims against various contractors and subcontractors whose negligence they claim caused the fire. Contracts between the casino and contractors contained an explicit waiver of subrogation clause which stated that "The owner and contractor waive all rights against each other and any of their subcontractors …" The trial court entered summary judgment for the defendants holding the waiver of subrogation clause barred the claims.

The first district affirmed. The purpose of waiver of a subrogation provision is to permit parties to a construction contract to exculpate each other from personal liability in the event of property loss or damage during construction. The provision shifts the risk of loss to the insurance company to facilitate timely completion of the project and avoid time-consuming and expensive litigation, regardless of which party is at fault. It held the parties foresaw the potential of a property loss occurring due to fire and chose to impose upon the owner a duty to insure against such loss regardless of fault. *Empress Casino Joliet Corp. v. W.E. O'Neil Construction Co.*, 2016 IL App (1st) 151166.

SETTLEMENTS

A Party Will Be Estopped from Denying His Lawyer's Authority If He Stands Silently by During Negotiations

Plaintiff law firm filed suit to recover fees and costs from a former client it represented in obtaining relief from a default judgment. The former client sought to negotiate a settlement because the judgment prevented him from closing on an unrelated financial deal. After the refinancing deal was closed, the defendant refused to sign a written settlement agreement claiming his attorneys lacked express authority to agree to mutual releases. The trial court enforced the settlement agreement and ordered defendant to pay his legal bills.

The first district affirmed. When a settlement is made out of court, the client will not be bound by the agreement without proof of express authority. However, where a party stands by silently and lets his attorneys deal with another in a situation where the attorney may

be presumed to have authority, the party is estopped from denying the agent's apparent authority to the third person. Further, a client ratifies the actions of his attorney by not repudiating the acts once he has knowledge of them or by accepting the benefits of those acts. *Condon & Cook, L.L.C. v. Mavrakis*, 2016 IL App (1st) 151923.

DISMISSAL

Res Judicata Bars Suit Based Upon Different Legal Theory from Earlier Dismissal of Case Based Upon Same Incident

Plaintiff fell in the backyard pool area of the defendant's home. She filed suit based upon premises liability, but failed to obtain service for almost one year. Consequently, the case was dismissed for failing to exercise diligence in obtaining service. Suit was refilled alleging negligence in the design and construction of the pool area. The trial court held the case was barred by *res judicata*, and it was dismissed.

The first district affirmed. Even if several theories of recovery can arise out of the same set of facts, there is a single cause of action. *Res judicata* bars not only all matters that were actually decided, but also those which could have been decided in the prior action. Differing claims are considered the same cause of action if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. *Mular v. Ingram*, 2016 IL App (1st) 152750-U.

DAMAGES

Supreme Court Holds Physical Injury or Impact is Necessary to Recover for Negligent Infliction of Emotional Distress

Plaintiff sued the defendant bank and contractors it hired who entered her home without permission during foreclosure proceedings under the belief that it was vacant. She was at home when the incident occurred and alleged multiple theories of recovery including trespass, negligent trespass, nuisance, negligent infliction of emotional distress and intentional infliction of emotional distress. Both emotional distress claims were dismissed, and in interlocutory appeal, the Appellate Court affirmed.

The Supreme Court affirmed dismissal of the counts. To recover for negligent infliction of emotional distress, there must be an allegation of a contemporaneous physical injury or impact. As plaintiff did not include such an allegation, she failed to state a cause of action. The Court also held defendants' conduct was not extreme and outrageous, and the intentional infliction of emotional distress could not be sustained. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041.

Verdict of $21.98 Million to Attorney and $3.96 Million to His Wife Against Taxi Company Affirmed

Plaintiff was severely injured when the taxi in which he was a passenger left a highway cloverleaf at a speed of approximately 30 to 40 mph over the posted limit. The defendant cab company was sued as the apparent principal of the driver. As plaintiff had no recollection of the accident, reconstruction evidence for both sides was properly admitted.

The first district affirmed. Plaintiff had been a successful attorney who suffered a severe brain injury and could not return to his law practice. His wife's testimony indicated there was no question she suffered and will continue to suffer a diminished relationship with her husband. Therefore, the verdict was supported by sufficient evidence, and there was no basis to conclude the amount was excessive or based upon improper motive. *Jacobs v. Yellow Cab Affiliation, Inc.*, 2017 IL App (1st) 151107.

WRONGFUL DEATH

Suicide is an Unforeseeable Independent Intervening Act Destroying Causation of The Tortfeasor's Negligent Conduct

Plaintiff's daughter committed suicide after the defendant advised her over social media of his intent to commit suicide or inflict severe physical harm upon himself. Plaintiff sued the boy as well as his parents alleging the boy had no intention of committing suicide and that the parents were negligent in failing to monitor conversations of their son over social media. The trial court dismissed the complaint.

The first district affirmed. Suicide is an independent intervening cause which breaks the chain of causation between the alleged negligence and death. Nothing in the complaint supported the conclusionary allegation that the death was foreseeable. None of the defendants were alleged to be mental healthcare professionals who had assumed care, custody or control over the decedent. Nor were any of the defendants alleged to have caused a physical injury to decedent which rendered her insane or bereft of reason. *Jane Doe I v. John Doe I*, 2016 IL App (1st) 153272.

EVIDENCE

Defense Summary Judgment When Plaintiff's Testimony is Inadmissible under the Dead Man's Act and No Other Proof of Negligence is Available

Defendant's decedent rear-ended plaintiff's vehicle. Defendant subsequently passed away from unrelated causes. There were no other witnesses to the accident, and plaintiff would not be permitted to testify because of the Dead Man's Act. Consequently, the trial court entered a defense summary judgment.

The second district affirmed. The purpose of the Act is to avoid allowing testimony that cannot be rebutted because the only other witness was deceased. The fact that the answer stated defendant could not admit or deny whether plaintiff's vehicle was stopped prior to the collision had no evidentiary significance. *Peacock v. Waldeck*, 2016 IL App (2d) 151043.

IMMUNITY

School District, Teachers and Coaches Immune from Liability to Student Who Was Bullying Victim

Plaintiffs filed a lawsuit on behalf of themselves and their minor daughter for injuries the daughter allegedly sustained as a result of school bullying. They relied upon a statute that mandated each Illinois school district create and maintain a policy on bullying and to communicate that policy to students and parents on an annual basis. The defendant school district had such a policy which plaintiffs claimed created a duty. They also alleged wilful and wanton misconduct. The trial court dismissed the case against the school district, its teachers and coaches.

The first district affirmed. It held the policy did not create an enforceable contract right, but was merely hortatory and conveyed no specific promises. It also held the Tort Immunity Act immunized the defendants in the exercise of discretionary actions. Teachers and school administrators must balance various interests which compete for the time and resources of the school district, including the interests of student safety. *Mulvey v. Carl Sandburg High School*, 2016 IL App (1st) 151615.

Immunity Protected Gym Teacher Who Allegedly Took Insufficient Safety Precautions for Students.

Plaintiff was a 15 year old high school sophomore playing floor hockey with 11 other students in a physical education class. They used plastic hockey sticks and a "squishy" safety ball and were required to comply with rules prohibiting high sticking, checking, slashing, or tripping. However, the teacher did not require students to wear safety goggles which were available. Plaintiff was struck in the eye by a ball causing permanent damage. At trial, because of immunity protection for teachers, plaintiff was required to establish the defendant was guilty of wilful and wanton misconduct. The trial court felt evidence was lacking and directed a defense verdict at the end of plaintiff's evidence. However, the Appellate Court reversed holding a fact question existed as to whether the teacher should have required the use of goggles.

The Supreme Court reversed the Appellate Court and reinstated the trial court's directed verdict. School employees who exercise some precautions to protect students from injury, even if those precautions were insufficient, were not guilty of wilful and wanton misconduct. It felt the

defendant, at most, took insufficient safety precautions which did not establish a conscious disregard for her students' safety. *Barr v. Cunningham*, 2017 IL 120751.

AUTOMOBILES

Defense Verdict Affirmed Following Rear-End Collision

The defendant's car rear-ended a car in front of him which was pushed into plaintiff's car. At the scene, plaintiff made no complaints of pain or discomfort to either the investigating police or the defendant. However, the next day he went to an urgent care center with discomfort in his left ankle. He subsequently had an ankle surgical procedure. At trial, the defendant admitted negligence and challenged only damages. The jury returned a defense verdict.

The first district affirmed. Even though the defendant presented no experts, the verdict was not against the manifest weight of the evidence. Defendant and the police both testified that plaintiff was in no observable pain of discomfort and made no complaints of left foot or ankle discomfort at the accident scene. *Larkin v. George*, 2016 IL App (1st) 152209.

PREMISES LIABILITY

Snow and Ice Removal Act Does Not Immunize for Injuries Caused By Icy Sidewalks Resulting From Negligent Failure to Maintain Premises

Plaintiff slipped and fell while walking on the sidewalk outside of her condominium. She brought a negligence action against the condominium management company and the condominium association alleging negligent condition of the premises created an unnatural accumulation of ice. Based upon the Snow and Ice Removal Act (745 ILCS 75/0.01), the trial court granted summary judgment to the defendants. However, the Appellate Court reversed.

The Supreme Court affirmed the Appellate Court holding landowners owe a duty of reasonable care to prevent unnatural accumulations of ice or snow where they had actual or constructive knowledge of the dangerous condition. Nothing in the Act evidenced an intent to immunize liability for falls on accumulations of ice that result due to circumstances unrelated to negligent snow and ice removal efforts. Plaintiffs believe the ice that caused her to fall ran off from a downspout and collected on the sidewalk where it would freeze instead of draining into the parking lot. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394.

Commonplace Distractions Do Not Avoid the Open and Obvious Rule.

Plaintiff was walking on a sidewalk near an intersection when he fell into a hole sustaining injury. After incurring over $100,000 in medical bills, he sued the property owner and a contractor working at the site. In his deposition, plaintiff claimed he heard skidding tires and turned to look behind him causing him to step off the sidewalk into the parkway under construction when he fell. The trial court entered summary judgment for the defendants on the basis that the hole was an open and obvious condition.

The first district affirmed. Where the condition and risk are apparent to a reasonable person, exercising ordinary perception and intelligence, there is no duty. Where no dispute exists as to the nature of the condition, the existence of a duty is a question of law rather than fact. Plaintiff testified he was aware of the condition of the parkway including rocks and holes. The court rejected the distraction exception holding the braking sound behind him was a commonplace and not special circumstance. Further, there is no evidence that the defendants contributed to cause the alleged distraction. *Peters v. R. Carlson & Sons, Inc.*, 2016 IL App (1st) 153539.

Store Entitled to Summary Judgment When Plaintiff Cannot Establish Defendant Knew or Should Have Known of Presence of Small Rocks in Parking Lot Causing Her to Fall

Plaintiff was injured when she slipped on two small rocks in the parking lot of defendant's store. She suffered a fracture and torn ligaments requiring three surgeries. Plaintiff claimed the rocks must have come from a planter maintained by the defendant or from decorative rocks it sold in 40-pound bags. The trial court granted a defense summary judgment holding the fall caused by two rocks was not enough to support an inference of negligence on the defendant's part.

The seventh circuit affirmed. The defendant can only be liable if the plaintiff can establish the substance was placed by the negligence of the defendant or the defendant had actual or constructive knowledge of the substance. Speculation or conjecture regarding the cause of the injury is insufficient. There was no direct or circumstantial evidence to indicate it was more likely that a Menard employee, rather than some third party, was responsible for the two rocks in the parking lot. Even if there is proof the foreign substance was related to the defendant's business, but no further evidence was offered, the evidence was insufficient to support an inference of negligence. *Piotrowski v. Menard, Inc.,* 842 F.3d 1035 (7th Cir. 2016).

Landowner had No Duty to Protect 12-Year-Old Operating Dirt Bike in a Field Containing Tall Corn

Plaintiff was a 12-year-old boy operating a dirt bike that collided with an ATV driven by another minor on his grandmother's property. The accident occurred in a cornfield. Plaintiff sued his grandmother alleging she had a duty to maintain the property in a safe condition and warn of dangers. The trial court granted the defendant summary judgment holding the danger posed by standing corn was open and obvious.

The third district affirmed. It rejected plaintiff's argument that the defendant had a duty to protect him from the dangerous condition of the impaired visibility caused by mature corn. Landowners have no duty to remedy conditions that are obvious risks which children would be expected to appreciate and avoid. Operating a dirt bike in an area with diminished visibility due to tall corn was an open and obvious danger plaintiff should have appreciated. Consequently, there was no duty to protect plaintiff from the open and obvious danger. *Farrell v. Farrell*, 2016 IL App (3d) 160220.

CONSTRUCTION

Summary Judgment Affirmed for Construction Manager and General Contractor Where They Did Not Control Activities of Subcontractor's Surveyor

Plaintiff was injured when several sheets of drywall fell on him at a hospital construction site. He was employed as a surveyor by a subcontractor. He sued the construction manager and general contractor alleging various acts of negligence. The trial court entered a defense summary judgment holding plaintiff failed to raise a question of material fact that they had control over his work method.

The first district affirmed. The best indicator of whether a defendant retained control sufficient to trigger liability is the parties' contract. Also, the custom and practice at the job site is relevant. Neither the contract nor custom and practice established the defendants had control over the work performed by plaintiff. *Snow v. Power Construction Co., LLC*, 2017 IL App (1st) 151226.

Summary Judgment Affirmed for General Contractor Where It Did Not Have Notice of Dangerous Activity Injuring Subcontractor's Employee

Plaintiff was an electrician working for a subcontractor who was injured when he put his hands in a live electrical box without using protective gloves. He sued the general contractor contending it retained control over the work of his employer. The contract with the owner required the general contractor to be "responsible for the safety and protection" of the workers of the contractor and subcontractors. The defendant's construction manager, its only employee on the job, did not provide full-time supervision of construction, but was on site twice per week including conducting a required weekly safety meeting. Plaintiff and the defendant each had safety experts supporting their respective positions concerning responsibility for safety. The trial court granted a defense summary judgment.

The first district affirmed. It noted that if retained control by the general contractor was the issue, a fact question would have existed precluding summary judgment. However, it determined there was no evidence in the record raising an issue regarding the contractor's actual or imputed knowledge that plaintiff was not wearing appropriate safety equipment or that there may have been a problem with circuit breakers. Therefore, there was no breach of duty or a proximate cause relationship between the breach and plaintiff's injuries. Gerasi v. Gilbane Building Co., Inc., 2017 IL App (1st) 133000.

EMPLOYERS

Injured Employee Cannot Sue Employer or Its Insurance Carrier for UIM Benefits.

James v. SCR Medical Transportation, Inc., 2016 IL App (1st) 150358. Plaintiff was a van driver employed by the defendant who was injured in a vehicle collision. After receiving the $50,000 limit of the other motorist insurance coverage and $28,608 in settlement of a workers' compensation claim, he sought underinsured motorist benefits from his employer's business auto liability carrier. The claim was denied, and he sued the employer and the insurer. The trial court dismissed the complaint.

The first district affirmed. It rejected plaintiff's argument that he was not suing the employer for injuries, but rather for failing to maintain higher UIM coverage. The claim was to compensate him for his injuries, and therefore, it was barred by the exclusive remedy provisions of the Workers' Compensation Act. It also held plaintiff's apparent dissatisfaction with the amount of compensation he accepted from the other driver and under workers' compensation was not a basis to assert a claim against the employer's auto liability carrier.

RAILROADS

Defense Verdict Affirmed in FELA Case Where Jury Believed Plaintiff Fabricated Claim

Plaintiff was driving a mile-long freight train of two locomotives and 69 empty cars which was ordered to halt briefly on a parallel track to enable a train with a higher priority to pass. Another train, which was also supposed to wait on the parallel track, failed to stop at a red stop signal and collided with plaintiff's train from behind causing the locomotive to lurch forward slightly. The railroad conceded the accident was caused by the negligence of its employees but challenged the accident caused plaintiff's back injury. A biomechanical engineer testified that the forward lurch of the locomotive should have pushed plaintiff backward rather than forward, and the impact would have been too weak to injure him. Evidence was also presented that

days after the accident he told no one he had been injured even though he spent a good deal of time with co-workers. The jury returned a defense verdict.

The seventh circuit affirmed. It was not unreasonable for the jury to believe plaintiff fabricated the claim that he was injured by the lurch. It was entitled to conclude the negligence of the railroad that resulted in the collision had no causal relation to the injuries which they could have believed was the product of pre-existing ailments. *Kelham v. CSX Transportation, Inc.,* 840 F.3d 469 (7th Cir. 2016).

Railroad May Defend Case Claiming Third Party Committed the Only Negligent Conduct Causing Its Employee's Injuries Under FELA

Plaintiff railroad employee was injured while a passenger in a van operated by a co-worker going from one rail yard to another. It was rear ended by another vehicle causing plaintiff severe back injuries making him unable to perform his normal job duties. Plaintiff filed suit under FELA which makes a railroad liable for injury or death "resulting in whole or in part from the negligence of any" of its employees. At trial, the railroad defended the case on the basis that the sole negligence causing the employee's injury was the operator of the other vehicle. The jury returned a not guilty verdict. In a split decision, the fifth district appellate court reversed holding that FELA does not allow a railroad to argue a third party's negligent conduct was a sole cause of the employee's injuries.

The Illinois Supreme Court reversed the Appellate Court. The jury cannot make a determination whether the railroad was at least "in part" a cause of the accident as required under FELA if it is not allowed to consider all circumstances surrounding the accident, including whether another party's negligent conduct was the only negligent conduct causing the accident. Under FELA, an employee cannot recover unless the railroad was at least a part of the cause of plaintiff's injuries.

After considering all the evidence in this case, the jury agreed the railroad was not. *Wardwell v. Union Pacific Railroad Co.*, 2017 IL 120438.

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

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