Winter 2020

Dear Friends,

Welcome to our Winter 2020 Quarterly Review newsletter, edited by Rex Linder and Mark Hansen, covering recent Illinois state and federal court decisions of interest to insurers, TPAs, corporate counsel, and others dealing with torts and coverage.

Before addressing those decisions we wish to announce the return of Heyl Royster's Claims Handling Seminar. We will change up the format a bit, presenting this year in the fall. To better serve our clients in the Midwest region, in addition to presenting in the Chicago area and Bloomington, Illinois, we are broadening our effort to include another location in another state, St. Louis, Missouri. The dates of the seminars will be later in October and perhaps early November, to be finalized as we firm up venue details. Please watch your email for a forthcoming "Save the Date" announcement.

HEYL ROYSTER

You may recall in our last newsletter we advised we were watching the surprising case of *Raab v. Frank*, in which the Illinois Appellate Court, Second District, allowed contribution – a tort theory – based upon breach of contract. We can now report that appellate decision has been reversed by the Illinois Supreme Court, which found that there was no potential liability in tort of the third-part defendant. Accordingly, the requirement of "joint tortfeasors," which would permit contribution, could not be satisfied. The Illinois Supreme Court confirmed that breach of contract alone – where there is no potential liability in tort – does not a give a basis for contribution. Apparently left undetermined, however, is whether a third-party action in contract for contribution is also available where there exists potential liability in tort of the third-party defendant. Watch for future cases exploring these concepts in further detail.

A significant decision in the area of statute of limitations for wrongful death and survival is *Zayed v. Clark Manor Convalescent Center, Inc*., where the Appellate Court, First District, found that legal disability of the resident [dementia, Alzheimer's and Parkinson's] tolled the statute of limitations *until the death of the resident*, after which the two-year statute first began to run. In such cases it is not the date of the occurrence that starts the running of the statute, but the date the legal disability is lifted.

In keeping with the ending of the NFL season is *Butler v. BRG Sports*, which affirmed dismissal based upon the two-year personal injury statute of limitations where forty-four former professional football players had attempted to sue manufacturers and designers of football helmets for concussion-related injuries. The plaintiffs had filed an action in federal court more than two years earlier for alleged "head problems." The Appellate Court, First District, found that the earlier litigation was proof that the players had sufficient knowledge of their concussion-related claims in the earlier action, but failed to timely bring them.

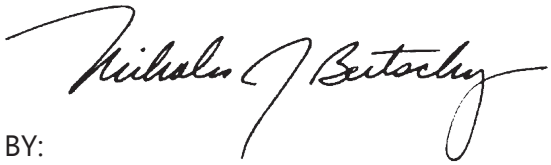
Finally, in the automobile arena, the Fourth District in *Smith v. Hancock* affirmed a summary judgment for the defendant based upon the "unavoidable collision" doctrine, and discussed the situations where that defense arises. The First District in *Ramirez v. City of Chicago* found that a plaintiff must be legally parked to be an intended and permitted user of a street [as a pedestrian]. Because the plaintiff pedestrian was returning to her illegally parked car, the City of Chicago had immunity under the Local Government Tort Immunity Act from her claim that she slipped and fell in a pothole.

Please see our other selected cases on coverage and punitive damages. As always, we recommend that counsel be consulted with respect to how these decisions may apply to your case.

We are thankful for the challenges resulting from the opportunities you provide, and we are grateful for the relationships that develop as a result. Please let us know how we may be of service as we continue forward in 2020. It is our hope to meet and speak with each of you at one of our seminars this fall.

Warmest Regards,

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



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A Regional Law Firm

Quarterly Review Of Recent Decisions

HEYL ROYSTER

Winter 2020

INSURANCE

No Coverage Where Insured Loaned Car To An Unlicensed Driver

Dontea Williams was operating a car owned by Chanel Godfrey that collided with a vehicle operated by Belinda Longmire. Godfrey was insured with Founders while Godfrey's vehicle was insured by United Equitable. Founders denied coverage because Williams was unlicensed at the time of the accident. Its policy excluded claims arising out of the use of the vehicle by any person "without a reasonable belief that the person is entitled to do so." Longmire then sought UM benefits from United Equitable which was denied claiming Godfrey's policy with Founders provided coverage for the incident. The trial court found in favor of Founders holding there was no coverage, and therefore, Longmire was entitled to UM benefits from United Equitable.

The First District affirmed. It held the policy language was clear and unambiguous denying coverage when a vehicle was operated by an unlicensed person. While an insurer must cover permissive users, it is not against public policy for an insured to exclude certain types of risks such as a vehicle being operated by an unlicensed driver. *United Equitable Ins. Co. v. Longmire*, 2019 IL App (1st) 181998.

UIM Carrier Properly Allowed To Set Off Amounts Received From Tortfeasor's Insurer And Med Pay

The insured's policy provided UM coverage of $100,000. He was involved in two separate auto accidents and settled with each adverse driver's insurer for their respective policy limits of $20,000. His claim then went to UIM arbitration, and it was determined the insured was entitled to $19,000 from the first accident and $25,000 from the second accident. As State Farm earlier paid $1,000 in medical payments, it tendered a check for $4,000 in connection with the second accident. It claimed to owe nothing from the first accident because the amount of the arbitrator's award was less than had been received in settlement. The trial court agreed with State Farm and entered summary judgment in its favor.

The First District affirmed. UIM coverage is intended to place the insured in the same position he would have attained had the tortfeasors carried adequate insurance. It was not intended to permit an insured to recover amounts exceeding that provided by the UIM policy. The insured was awarded $19,000 and $25,000 respectively, the setoffs were properly applied against those amounts. *Gean v. State Farm Mut. Auto. Ins. Co.*, 2019 IL App (1st) 180935.

UM Benefits Denied When Insured Failed To Timely Demand Arbitration

The insured was a driving instructor riding as a passenger when a student driver lost control of the vehicle, striking a brick wall. The insured made a UM claim, but State Farm believed the instructor was entitled to worker's compensation benefits which could exclude coverage. There was no response to State Farm's inquiries to the insured's attorney, and it eventually sent another letter to the insured's attorney stating the file was going to be closed because there had been no response to prior letters. About a month after the contractual two-year limitation to demand arbitration had expired, plaintiff's counsel said he would produce the insured for a recorded statement. State Farm responded that pursuant to the policy, the two-year limitation period to demand arbitration had expired. It then filed

a declaratory judgment action, and the trial court ruled in favor of State Farm.

The First District affirmed. The policy made clear the insured must bring any action against State Farm within two years following the date of the accident. It necessarily follows that any requested information must be submitted within that same time frame. Nothing in any of State Farm's letters signified the two-year limitation period had changed. *State Farm Mut. Auto. Ins. Co. v. Leon*, 2019 IL App (1st) 180655.

Business Owner's Auto Policy Exclusion Applied To Loading Quadriplegic Into Van

While the insured's employees were preparing to load a spastic quadriplegic into a van, the young person fell from the wheelchair, broke his neck, and subsequently died. Country Mutual had issued a business owner's policy which excluded coverage for an accident involving the use of an auto. State Farm filed a declaratory judgment action, and both sides filed summary judgment motions. The trial court held the exclusion did not apply and ruled in favor of the insured.

The Fourth District reversed. Auto exclusions are not unreasonable and should be enforced when applicable. The court concluded the van was not the mere situs of the injury. Rather, a vehicle's use is not limited to operating or driving. It includes entering or leaving the vehicle. *Country Mutual Ins. Co. v. Oehler's Home Care, Inc.*, 2019 IL App (4th) 190080.

Carrier Had Duty To Defend Insured Delivery Service In Suit Filed By Blind Passenger Who Was Injured Walking Into VA Hospital While Being Assisted By Driver

First Chicago filed a declaratory judgment action seeking a determination that it did not have a duty to defend its insured delivery service in a case alleging its driver was negligent in assisting a blind passenger. The passenger walked into a cement pillar while being assisted by the insured's driver. First Chicago claimed the injuries were not caused by an accident "resulting from the ownership, maintenance or use of a covered auto" because the injury was too remote from operation of the vehicle. Both sides moved for summary judgment, and the trial court ruled in favor of First Chicago holding it had no duty to defend.

The First District reversed. To find coverage, there must be a causal connection between the injury and use of the vehicle. However, the court did not consider it remote to the delivery driver-passenger relationship that a driver would assist a disabled passenger to his destination. Assisting a passenger for the last few steps from the delivery vehicle to the destination was rationally connected to and a reasonable consequence of operation of the vehicle. The court ordered summary judgment should be entered in favor of the insured. *First Chicago Ins. Co. v. My Personal Taxi & Livery, Inc.*, 2019 IL App (1st) 190164.

Underlying Complaint Properly Alleged Property Damage And An Occurrence Triggering Duty To Defend

Lloyd's insured was a general contractor. During construction, a wall adjoining two structures collapsed. The building owner's insurance paid over $1.8 million for repairs, demolition, and other expenses arising from the collapse. It then sued the general contractor pursuant to its subrogation rights. The complaint alleged that as a result of Lloyd's insured's negligence, its insured "suffered losses including, but not limited to, damage to real and personal property." The trial court held the allegation of the underlying complaint sufficiently alleged property damage, but did not allege an "occurrence" under the policy.

The First District reversed. It agreed that a CGL policy was not intended to pay costs associated with repairing or replacing an insured's defective work. There is no occurrence when a subcontractor's defective workmanship necessitates removing or repairing work. However, if the damage extends to other people

or things that were not part of the contractor's work product, there is an "occurrence." Consequently, the underlying complaint sufficiently alleged an occurrence. With respect to the damage claim, although admittedly vague, the allegation was adequate to allege damage to the owner's property. Therefore, there was a duty to defend. However, the court made clear it was not making a ruling on whether Lloyd's would need to indemnify the insured. *Certain Underwriters at Lloyd's London v. Metropolitan Builders, Inc.*, 2019 IL App (1st) 190517.

LIMITATIONS

Statute Of Limitations Bars Football Players' Claims For Defective Helmet

Forty-four former professional football players sued the manufacturers and designers of football helmets they wore during their playing careers. They alleged the defendants knew about the dangerous effects of repetitively sustaining concussions and head traumas and that they misrepresented that the players would be protected. The players claimed to suffer from significant neurological disorders after sustaining numerous concussions throughout their careers. The trial court held the case was time-barred by the two-year statute of limitations for personal injury actions.

The First District affirmed. It noted the current suit was filed more than two years after the plaintiffs had filed a similar action against the NFL in federal court for alleged "head problems" caused by playing football. Filing the federal court case established the plaintiffs had sufficient knowledge of the neurological injuries at that time. Therefore, they could have raised it in the prior suit. *Butler v. BRG Sports, LLC*, 2019 IL App (1st) 180362.

Wrongful Death And Survival Claims Filed Within Two Years Of Death Of Legally Disabled Person Was Timely

Plaintiff's decedent was a resident of a convalescent center who fell and suffered a hip fracture which caused or contributed to his death 18 months later. He fell on March 4, 2014 and died September 25, 2015. He was at the convalescent center because he suffered dementia, Parkinson's disease, and Alzheimer's placing him under a legal disability. The estate filed suit on July 20, 2017, more than three years after the incident which caused the injury. The trial court dismissed the case holding the statute of limitations began to run at the time of the original injury.

The First District reversed. It held that a disabling condition during a person's lifetime suspends the time limitation for filing a tort claim. It is upon the person's death that the two-year limitation period begins to run for that person's legal representative to file suit. As a disabled person's estate has the same rights to sue as the disabled person, the personal representative of the deceased acquires the same statutory period to bring the action. The statute begins to run when the disability was removed which was two years from the date of death of the disabled person. *Zayed v. Clark Manor Convalescent Center, Inc.*, 2019 IL App (1st) 181552.

ATHLETICS

School District Not Liable For Injuries Sustained During Cheerleading Practice

The minor plaintiff was a sixth grade student injured at cheerleading practice. It was alleged the school district was guilty of wilful and wanton misconduct for allowing her to practice an inherently dangerous cheerleading maneuver without close adult supervision. When tossed into the air while practicing on thin gymnastic mats, it was contended there were inadequate spotters and no observation by a supervising adult. Testimony established that the mats were still under warranty and were IHSA compliant for cheerleading practice. There was no evidence the mats were in disrepair or improperly positioned. The trial court held plaintiff did not produce

evidence of wilful and wanton misconduct, necessary for recovery against a school district.

The Third District affirmed. Undisputed facts were that the defendant took safety precautions, the mats were sufficient, and there was adequate adult supervision. There was no genuine issue of material fact that the injuries did not result from wilful and wanton conduct by the school. *Biancorosso v. Troy Community Consolidated School District No. 30C*, 2019 IL App (3d) 180613.

ARBITRATION

Court Abused Its Discretion In Barring Carrier From Introducing Evidence At Trial After Adjuster Failed To Appear At Arbitration

USAA filed a subrogation action to recover $5,079.62 it paid to its insured following an auto accident with the defendant. At the mandatory arbitration, USAA failed to comply with defendant's request to produce its adjuster. The arbitration panel denied the defendant's request for a bad faith finding and found instead that the parties had participated in good faith issuing an award in favor of USAA. The defendant rejected the award and requested a hearing in circuit court. She subsequently moved to bar USAA from presenting evidence and testimony as a sanction for the failure to produce the adjuster. The trial court granted defendant's motion which resulted in a directed defense verdict.

The First District reversed. The arbitration panel found that all parties had participated in the hearing in good faith. The circuit court's severe sanction of barring evidence extended to other issues in the case unrelated to the absence of the adjuster at the arbitration. Further, the amount in controversy was undisputed, and therefore, the absence of the adjuster did not create any prejudice. *United Services Auto Assn. v. Selina*, 2019 IL App (1st) 182275.

CONTRIBUTION

Absent Potential Liability In Tort, A Breach Of Contract Claim Does Not Support A Third Party Contribution Action

Plaintiff was a deputy sheriff whose squad car collided with a cow owned by the defendant. The defendant filed a third party contribution action against his neighbors, asserting the cow got out of a fence the neighbors failed to maintain. The defendant settled with plaintiff for $225,000 and pursued the contribution claim based upon three theories, one of which was breach of contract. The trial court granted summary judgment for the third party defendants. The Appellate Court affirmed dismissal of the Fence Act claim but reversed dismissal of summary judgment on both the negligence and breach of contract claim.

The Supreme Court held that a non-owner or non-keeper of livestock is not liable in tort for damages caused by a neighbor's animal. The Animals Running Act is not a source of duty for non-owners. Therefore, the third party defendants did not have potential liability in tort and could not be subject to liability. There must be basis for liability to the original plaintiff. *Raab v. Frank*, 2019 IL 124641.

DAMAGES

Punitive Damage Award Affirmed For Wilful And Wanton Hiring Of Employee

Plaintiffs were awarded $19.155 million plus $35 million in punitive damages following a jury trial for injuries sustained in a rear-end vehicle accident. The jury found all defendants were negligent and that the trucking company was negligent in hiring and retaining its semi-truck driver. The driver had been convicted of nine traffic-related offenses in seven years prior to applying for employment. Also, his license was suspended at the time of the accident. The trial court denied defendant's motion for judgment notwithstanding the verdict.

The First District affirmed. The jury was presented with extensive evidence regarding the driver's

history prior to applying for employment. Despite that history, he was hired even though doing so violated its own company policies. They then retained him after he continued to violate company policies and specifically neglected to monitor his commercial driver's license or motor vehicle record after he was hired. Consequently, there was extensive evidence supporting the punitive damage award. *Denton v. Universal Am-Can, Ltd.*, 2019 IL App (1st) 181525.

AUTOMOBILE

Defense Summary Judgment Affirmed Based Upon "Unavoidable Collision"

Plaintiff's vehicle was struck from behind as she slowed while approaching an intersection with cross traffic. Her vehicle was pushed into the intersection where she was struck by defendant's vehicle on a preferential highway. Plaintiff alleged the defendant was negligent in failing to reduce speed to avoid the accident. The defendant moved for summary judgment based upon the "unavoidable collision" theory. The trial court agreed and entered summary judgment.

The Fourth District affirmed. An unavoidable collision normally occurs when a motorist is confronted with a sudden swerve into his right-of-way by an approaching vehicle and the driver lacks sufficient time to react. Plaintiff could not present any facts showing the defendant could have avoided the accident if he had driven slower, kept a better lookout, or taken other evasive action. S*mith v. Hancock*, 2019 IL App (4th) 180704.

IMMUNITY

Plaintiff Must Be Legally Parked To Be An "Intended User" Of Street

After dropping her child off at her parents' home, plaintiff was returning to her street-parked car when she slipped and fell in a pothole. The pothole was approximately five feet long. Her car had been parked with its back one-third in a no-parking zone. Consequently, the trial court held she was not an "intended and permitted user" of the street pursuant to the Local Government Tort Immunity Act.

The First District affirmed summary judgment for the city. Plaintiff must be legally parked to be an intended and permitted user of a street. The court noted that an ordinance violation did not automatically preclude plaintiff from being an intended and permitted user of government property. *Ramirez v. City of Chicago,* 2019 IL App (1st) 180841.

City And Police Immune From Liability To Person Injured By Man Fleeing Traffic Stop

Plaintiff was a passenger in a vehicle struck by another vehicle operated by a man who had fled the scene of a traffic stop effectuated by Chicago police officers. He filed suit against the City and three officers involved with the traffic stop and apprehension of the fleeing driver. The City and officers relied upon a provision of the Tort Immunity Act that immunizes public entities and their employees from liability for injuries afflicted by escaped or escaping prisoners. Plaintiff asserted the driver was not an escaping prisoner following a traffic stop, and therefore, immunity did not apply. The trial judge disagreed and entered summary judgment for the defense.

The First District affirmed. Had the legislature intended the term "custody" to be so restrictive as to include only imprisonment, it would have used the term "imprisonment." When an automobile is apprehended for a traffic stop, police have a valid right to detain passengers and the driver. As the Tort Immunity Act is not limited to situations involving formal arrest or imprisonment, plaintiff's injuries caused by an escaping prisoner is subject to the Tort Immunity Act. *Townsend v. Anderson*, 2019 IL App (1st) 180771.

PREMISES LIABILITY

Lease Protected Lessee And Ten-Year Construction Statute Of Repose Protected Landlord From Plaintiff Who Fell Leaving Food Pantry In Church Basement

Plaintiff fell and was injured after crossing the threshold of a doorway from a food bank located in a church basement. He was carrying a box of food which he obtained from the pantry. The pantry was the lessee of the church. The lease provided the church would maintain the property. Evidence established that the church was constructed in 1911 and the last time the door/threshold was worked upon was 2003. The trial court ruled that the pantry had no duty to maintain the premises pursuant to the lease. Further, the ten-year Construction Statute of Repose protected the church.

The First District affirmed. The pantry did not have a duty of care since plaintiff's injury occurred in a shared, common area of the property, maintained and controlled by the church as the landlord. Further, as the incident occurred in 2015 and the last work on the threshold was in 2003, the church was protected by the ten-year construction statute of limitations. *Graham v. Lakeview Pantry,* 2019 IL App (1st) 182003.

Summary Judgment Proper Where Plaintiff Cannot Establish The Defendant's Actual Or Constructive Knowledge Of The Dangerous Condition

Plaintiff slipped, fell, and was seriously injured while roller skating at the defendant's rink. The Complaint alleged plaintiff fell because she rolled over a piece of hard candy. However, in her deposition, she could not state how large the candy was, how long it had been on the floor, where it came from or how it got there. She never saw the candy before or after she fell, but felt that she "rolled over something." The trial court entered summary judgment for the defendant. Even if there had been a piece of candy which caused plaintiff to fall, there was no evidence the defendant had constructive notice of its presence.

The First District affirmed. Plaintiff's testimony failed to establish either the presence of the dangerous condition on the rink floor or that the alleged candy caused her injury. Further, even if plaintiff could establish the candy was on the floor, there was no evidence that it remained there for a sufficient amount of time to impute knowledge to the defendants. *Haslett v. United Skates of America, Inc.*, 2019 IL App (1st) 181337.

Tavern Adequately Warned Of Danger Presented By Heater Mounted On Wall In Beer Garden

After drinking eight beers, plaintiff went outside defendant's tavern into a beer garden area for a smoke. He got too close to a heater, and his shirt caught fire. A sign over the heater read: "Heater is hot. We are not responsible for your silly ass getting too close!!" The trial court entered summary judgment for the tavern because plaintiff admitted he was fully aware of the notice and voluntarily undertook his own action of getting too close to the heater.

The Third District affirmed. There is no duty to protect against a danger where a landowner has already provided a clear and legible warning. In this case, plaintiff conceded he saw and understood the sign. Further, the danger presented by the heater was open and obvious. *Smith v. The Purple Frog, Inc.*, 2019 IL App (3d) 180132.

Cutting Tree Limb 20 to 25 Feet Above Ground Presented An Open And Obvious Condition Shielding Landowner From Liability

Plaintiff and another person went to the defendant's home intending to cut a tree limb which they feared could fall and damage the insured's roof. Although the homeowner initially requested they not cut the tree limb because it was too dangerous, he eventually acquiesced and helped them. Plaintiff leaned the ladder against the limb intended to be cut, and the limb hit the ladder as it fell after being cut, resulting in serious injuries to plaintiff. The trial court held the act of cutting the limb presented an open and obvious danger and entered summary judgment for the defendant.

The Second District affirmed. The court noted that the open and obvious rule applies to both premises liability cases and ordinary negligence. Although the defendant had a duty to protect plaintiff, he did not have a duty to protect plaintiff from an open and obvious condition. The court noted it could not understand how any reasonable person could not have appreciated the open and obvious danger of tying two ladders together and placing the ladders against a tree limb which was the very limb he was attempting to cut down. Therefore, the defense summary judgment was proper. *K. M. Lee v. Y. R. Lee*, 2019 IL App (2d) 180923.

Tavern Owner Not Liable When Assault On Customer Was Not Foreseeable

Plaintiff's decedent was patronizing the defendant's tavern when he was stabbed in the neck by an unknown assailant and died. Decedent and the assailant exchanged words inside the tavern, and the assailant left. Decedent then walked outside where the incident occurred. The whole event lasted a matter of seconds. The defendant moved for summary judgment contending the attack was unforeseeable. In response, plaintiff submitted evidence of 20 prior incidents during the previous five years. The trial entered summary judgment for the defense.

The First District affirmed. There is no duty on landowners to protect others from criminal attacks by third parties on their property unless the circumstances such as prior incidents give the owner knowledge of the danger. The question is whether the criminal activity was reasonably foreseeable. The court held the record established the crime was not foreseeable. Rather, it was a sudden, unforeseeable, and targeted murder. *Witcher v. 1104 Madison St. Restaurant*, 2019 IL App (1st) 181641.

RAILROAD

Supreme Court Holds Railroad Can File Counterclaim For Property Damage In Employee's FELA Claim

A conductor and locomotive engineer filed an FELA claim after a train they were operating struck another train that was stationery on the same track. The defendant railroad filed a counterclaim alleging plaintiffs failed to exercise ordinary care and were negligent which led to the crash, and sought damages over $1 million. The trial court granted plaintiff's motion to dismiss the counterclaim finding a state common law counterclaim brought by a common carrier against an employee constituted a "device" under FELA because it would reduce or effectively eliminate a damages award for the employee. The Appellate Court affirmed dismissal.

In a 4-2 decision, the Illinois Supreme Court reversed. It held counterclaims are not prohibited by the FELA which voids any "rule, regulation or device" to the effect of preventing employees from pursuing a claim. Employers have a right to sue employees for negligence. The plain language of the statute, federal court decisions, and Congress' silence does not prohibit a railroad employer from filing a counterclaim for property damages against its employees. *Ammons v. Canadian National Railway Co.,* 2019 IL 124454.

No Liability Under FELA For Death Of Employee Killed In Auto Crash During Snowstorm On Way To Work

A machine operator employed by BNSF was called and told to come to work the following morning for a predicted heavy snowstorm. Leaving home under darkness and in heavy snow, his car skidded and struck a snow plow. He subsequently died from his injuries. His widow filed an FELA action asserting her husband was on duty when he was killed and acting within the scope of his employment. BNSF took the position he was merely commuting to work and that there was no negligence on its part that contributed to cause the accident. The trial court held the employee was not acting within the scope of his employment at the time of the accident, and therefore, FELA did not apply.

The Seventh Circuit affirmed summary judgment for BNSF. However, it felt a fact question existed as to whether he was within the scope of his employment, because a union contract provided that employees called after release from duty will begin at the time called. It felt a decision that BNSF would be negligent by asking its employee to drive while it was still dark would have far-reaching implications. Taken to the extreme, it would mean that employers in a snowy, rainy, or icy region would be negligent whenever they required their employees to drive in bad weather. Therefore, FELA did not apply. *Guerrero v. BNSF Railway Co.*, No. 19-1187, 2019 U.S. App. LEXIS 24244 (7th Cir. Aug. 14, 2019).

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

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