Summer 2019

Dear Friends,

Welcome to our Summer 2019 *Quarterly Review* newsletter, edited by our partners Rex Linder and Mark Hansen, covering recent Illinois state and federal court decisions of interest to insurers.

There are a number of interesting cases on coverage, good faith settlement, and service. However, in the area of Contribution, typically requiring the involvement of a joint-tortfeasor, there is the surprising case of *Raab v. Frank*, which allowed contribution – a tort theory – based upon *breach of contract!* The Appellate Court, Second District, held that although breach of contract is a non-tort theory, it was not determinative of whether the parties could be "subject to liability in tort" for contribution. The court held that it should look instead to whether the injury for which contribution in tort is the same injury for which the defendant was liable. This seems to be one of those cases where the exception eviscerates the rule, and we will watch this carefully going forward.

We were pleased to see the Illinois Supreme Court's decision in *Palm v. Holocker,* re-affirming the appellate court decisions upholding physician–patient privilege *of the defendant,* and confirming that the plaintiff may not waive the defendant's privilege by attempting to put the defendant's medical condition at issue. Only where the defendant chooses to put his or her medical condition in issue does it become relevant and discoverable. Such limited cases might involve an Act of God defense, such as heart attack, stroke, or other sudden and unexpected disabling condition.

In the area of Premises Liability, the federal Seventh Circuit, applying Illinois law, found that *courts can determine if a condition is open and obvious as a matter of law*, potentially resulting in summary judgment. In *McCarty v. Menard,* a piece of wood, part of a display sign over which the plaintiff fell, was determined as a matter of law to be open and obvious. Further, the court determined there is no duty to continuously monitor safety conditions in premises liability cases. Yet another premises case held that the failure to comply with a building code was not shown to be the proximate cause of the alleged injury. In *Barclay v. Yoakum*, the Appellate Court, Second District, affirmed summary judgment even where plaintiff's building code expert had opined that the walkway rail from which plaintiff's decedent fell was eight inches below the 42-inch building code requirement. Nevertheless, the court held that there was no evidence that the alleged violation/deficiency was the cause of the decedent's fall, and plaintiff's survival and wrongful death claims were dismissed! Note also that *permissive use* can become a question of fact, potentially turning a trespasser into a licensee under the Premises Liability Act, where the landowner continues to tolerate trespassers, showing indicia of consent. *Epple v. LQ Management, LLC*.

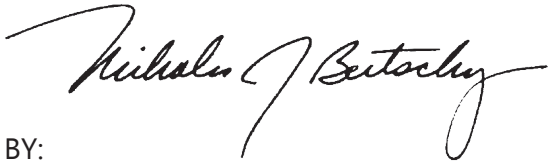
We hope you will find these, and the other cases Rex and Mark highlighted, useful in your case handling. We are always eager to assist in dealing with these fact patterns or your unique case facts.

It is truly gratifying when our clients inquire if we can provide service in new geographic areas. In our last two *Quarterly Review* newsletters we were excited to advise you of the opening of our new Offices in St. Louis, MO and Jackson, MS. We have been so pleased to partner with you in those regions! We are now receiving regular requests for representation in the State of Iowa – in which we are fully engaged and are available to handle your cases. Should you have a need for counsel in Iowa, we would be grateful if you would think of Heyl Royster.

We look forward to serving you throughout the remainder of 2019 and into 2020. If there is anything we can do to help, please do not hesitate to let us know.

Very Truly yours,

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



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A Regional Law Firm

Quarterly Review Of Recent Decisions

HEYL ROYSTER

Summer 2019

INSURANCE

Intoxication Exclusion In Supplemental Insurance Policy Enforced

While driving a rental car, the driver was involved in a vehicle that killed a man and injured his wife. He was found to have had marijuana, cocaine, and opiates in his system at the time of the accident and was convicted of aggravated driving under the influence of drugs. At the time of rental, he had purchased "full coverage" which included a surety bond of $100,000 from the rental company and supplemental liability protection for excess insurance of $900,000. The policy contained an exclusion if the insured was under the influence of alcohol or drugs at the time of the accident. The trial court held the exclusion was unenforceable as against public policy, and therefore, the supplemental coverage of $900,000 was available.

The Second District reversed. The court considered an important distinction when considering public policy was that the present case involved a supplemental or excess policy. The financial responsibility law did not mandate excess or supplemental coverage must be obtained. Further, no Illinois statute precludes an intoxication exclusion in an excess or supplemental liability policy. Exposure was limited to only the $100,000 bond. *Crowley v. Empire Fire & Marine Ins. Co.*, 2019 IL App (2d) 180752.

Permissive User Not Entitled To Coverage Under Insured's Umbrella Policy

A friend was driving the insured's vehicle when involved in a collision. The insured had an umbrella policy which the plaintiffs in the underlying case sought to apply to their claims. State Farm filed a declaratory judgment action taking the position that the permissive user was not an insured under its policy. The trial court agreed and entered summary judgment for State Farm.

The Second District affirmed. Pursuant to the clear policy language, State Farm was only obligated to defend a claim or suit "brought against an insured…" No one alleged the insured was negligent or liable, and therefore, the permissive user was not an insured under the policy. *State Farm Mut. Auto. Ins. Co. v. Murphy*, 2019 IL App (2d) 180154.

Merely Providing Notice Of UIM Claim Insufficient When Policy Requires Written Arbitration Demand

In 2010, plaintiff was injured in a vehicle collision. She eventually settled with the other driver for the policy limits of $25,000. In 2013, she filed suit against her insurance company seeking UIM benefits. The insurer moved to dismiss the complaint because it was not timely filed within the two-year requirement of the policy. The insured claimed that a letter of representation sent in 2011 was adequate to put the insurer on notice of a potential UIM claim. The trial court disagreed and dismissed the complaint.

The Third District affirmed. It rejected plaintiff's claim that a written demand for arbitration is not required unless there is an ongoing dispute as to whether UIM benefits are available. The court held the policy required a written demand for arbitration when the insurer and insured have not reached an agreement on the amount of damages regardless of whether the other driver is uninsured or under-insured. A written demand for arbitration begins the process of reaching an accord pertaining to the extent of damages the insurer

will be required to pay. *Maier v. CC Services, Inc.*, 2019 IL App (3d) 170640.

Duty To Defend Under CGL Policy When Underlying Complaint Alleges Faulty Workmanship Caused Damage To Other Property

Acuity filed a declaratory judgment action seeking a determination it had no duty to defend the carpentry subcontractor in a lawsuit filed by a condominium association. The underlying complaint alleged the subcontractor's faulty workmanship allowed water to infiltrate the building causing damage. Cincinnati, who had coverage for the subcontractor, settled claims. It then intervened in the present declaratory judgment action seeking contribution from Acuity because there was a successor CGL policy. The trial court ruled in favor of Acuity, holding the underlying complaint did not allege damages caused by an occurrence, but rather sought coverage for faulty workmanship.

The First District reversed. Where a defect is no more than the natural or ordinary consequence of faulty workmanship, there is no coverage. However, where the alleged defective workmanship caused damage to something other than the specific work, it constitutes an occurrence under a CGL policy. The underlying complaint alleged water damage throughout the building caused damage to other property, and consequently, there was a duty to defend. The case was remanded to allow Cincinnati to present evidence as to the exact amount of contribution it should receive. *Acuity Ins. Co. v. 950 West Huron Condominium Ass'n.*, 2019 IL App (1st) 180743.

Subcontractor's Insurer May Be Required To Defend Owner And General Contractor Even Though Underlying Complaint Did Not Allege Subcontractor's Negligence

A subcontractor's employee was injured working on a project for State Farm under a subcontract with Core Construction. The subcontract required the injured employee's employer to name Core and State Farm as additional insureds. When the employee was injured, he filed suit which Core tendered to the subcontractor. Zurich declined coverage on the basis that the employee's complaint did not allege negligence of the subcontractor. The trial court agreed and granted judgment on the pleadings for Zurich.

The Fourth District reversed. When an employer is not alleged to have been negligent, the trial court must construe the underlying complaint within the context of immunity provided by the Workers Compensation Act. The contract provided the subcontractor was responsible for the safety and supervision of its employees. Therefore, it is possible it failed to provide a safe, suitable and proper work site for its employee. The silence in the underlying complaint as to the employer's possible negligence was not a basis for Zurich to refuse to defend Core. *Core Constr. Services of Illinois v. Zurich American Ins. Co.*, 2019 IL App (4th) 180411.

SERVICE OF PROCESS

Default Judgment Vacated When Summons Did Not Properly Identify The Defendant

Plaintiff was injured when he fell on property owned by the defendant trust. Summons was served in North Carolina upon "Queen's Park" by leaving it and the complaint with president of the trust. Either through neglect or otherwise, no response was made to the complaint, and the court entered a default judgment for $699,032. The defendant then moved to vacate the judgment on the basis that the summons did not properly identify the trust, and therefore, any judgment was void *abinitio*. The trial court agreed, and the judgment was vacated.

The First District affirmed. Illinois Supreme Court Rule 101(a) requires that the summons "clearly identify the date it is issued and shall be directed to each defendant." Minor misspellings or the inclusion or exclusion of initials are correctable

misnomers, and therefore, not fatal. However, the present summons did not even indicate that the defendant was a trust, and therefore, it was not validly served. *Studentowicz v. Queen's Park Oval Asset Holding Trust,* 2019 IL App (1st) 181182.

SETTLEMENT

Third Party Defendant's Settlement With Plaintiff Not Made In Good Faith

Plaintiff was a freight conductor who injured his back attempting to board a moving train. He filed an FELA suit against his employer who in turn filed a third party complaint seeking contribution from plaintiff's treating orthopedic surgeon. The basis of the third party complaint was that the surgeon over-treated plaintiff and significantly aggravated his back injuries. The surgeon's charges for both his personal services and his surgical facilities was nearly $1.25 million. The surgeon then settled with plaintiff for $25,000 which he paid out of his own money rather than his malpractice insurance which had limits of $1 million. The trial court held the settlement was in good faith and dismissed the third party contribution action.

The First District reversed. In determining whether a settlement is in good faith, courts are to be on guard for evidence of collusion, unfair dealing, or wrongful conduct by the settling parties. The court is to look at the totality of the circumstances. Illinois Central estimated that the claim, including liens for medical bills, future earnings and loss of tension benefits would be over $3.5 million. The surgeon paid $25,000 and did not dispute the amount of his insurance coverage. It noted the surgeon could easily recoup the $25,000 he paid, provided plaintiff could recover at least that much from the railroad. *Ross v. Illinois Central Railroad Co.*, 2019 IL App (1st) 181579.

CONTRIBUTION

Contribution Claim Based Upon Non-Tort Contract Theory Allowed Where It Seeks Contribution For The Same Injuries

Plaintiff was a deputy sheriff whose squad car collided with a cow owned by the defendant. The defendant filed a third party contribution complaint against his neighbors asserting that the cow got out of a fence the neighbor 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. Other theories based upon the Fence Act and Running At Large Act were dismissed.

The Second District held, *inter alia*, that the defendant could pursue the contribution claim based upon breach of contract. Although breach of contract is a non-tort theory, it was not determinative as to whether the parties could be "subject to liability in tort" for contribution. The court should look to whether the injury for which contribution is sought is the same injury for which the defendant was liable. In this case, settlement made by the defendant was for the same injury for which he sought contribution. *Raab v. Frank*, 2019 IL App (2d) 171040.

PRIVILEGE

A Defendant's Medical Records Are Privileged When The Defense Does Not Put His Medical Condition In Issue

The defendant's vehicle struck the pedestrian plaintiff who was crossing at an intersection. Plaintiff submitted interrogatories, two of which sought the names of health care providers who had treated the defendant. The defendant's attorney objected, claiming the information was privileged. However, the court held the attorney in contempt for not answering the interrogatories. He appealed, and the Appellate Court, Third District, reversed holding the information was privileged because defendant's medical condition was not an issue in the case.

The Illinois Supreme Court affirmed. The physician-patient privilege exists to encourage disclosure between a doctor and patient and to protect the patient from invasions of

privacy. A plaintiff may not waive a defendant's privilege by attempting to put the defendant's medical condition at issue. It would be inappropriate to allow a plaintiff to put defendant's medical condition at issue simply by making an allegation in a pleading. In civil cases, only the patient may put his or her medical condition at issue. *Palm v. Holocker*, 2018 IL 123152.

PRODUCT LIABILITY

Manufacturer Adequately Warned Contractor Of The Slippery Nature Of Roofing When It Became Wet And Therefore Owed No Duty To Injured Workman

Plaintiff was a maintenance electrician hired to service the outfield scoreboard of U.S. Cellular Field. He slipped on a wet area of a PVC membrane which covered the outfield roof and suffered career-ending nerve damage. He sued the manufacturer of the roofing material, the contractor who installed it, and the White Sox. The manufacturer enclosed a caution sign with warranty materials stating that the roof could be slippery when ice, snow, or wetness exist. The trial court entered summary judgment for all three defendants.

The First District affirmed summary judgment for the product manufacturer holding it adequately warned the contractor, its immediate vendee, that the PVC membranes were slippery when wet, which presented a danger to workers walking on the roof. It instructed the contractor to forward the warning materials to the building owner. It is difficult to conceive of what else the manufacturer, with no direct contact with the operator or owner, could have done to discharge its duty to warn. However, it felt a fact question existed as to the contractor and White Sox concerning their knowledge of the slippery condition of the roof. *Zahumensky v. Chicago White Sox, Ltd.*, 2019 IL App (1st) 172878.

Judges, Not Juries, Should Determine If Preemption Applies To Failure To Warn Drug Claim

Fosamax is a drug to treat and prevent osteoporosis in post-menopausal women. When the FDA first approved its sale in 1995, the Fosamax label did not warn of the then speculative risk of atypical femoral fractures associated with the drugs. In 2011, the FDA ordered Merck to add a warning. A class action was filed on behalf of over 500 individuals who took Fosamax and suffered atypical femoral fractures between 1999 and 2010. It alleged Merck breached state common law duties to warn. Merck defended, stating if it tried to change the label prior to 2010, the FDA would have rejected the attempt. The trial court agreed with the preemption argument and granted summary judgment, but the Third District reversed.

The Supreme Court reversed the appellate court, holding preemption applied. The appellate court took the position that whether preemption should apply would be a fact question for the jury. The Supreme Court held that judges, rather than lay juries, were better equipped to evaluate the nature and scope of the FDA determination and better suited to interpret agency decisions in light of governing statutes and regulations. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019).

Summary Judgment Proper For Pharmacy Under Learned Intermediary Doctrine

Plaintiff was prescribed and took Reglan for six years and developed severe movement disorders called tardive dyskinesia and dystonia for which there are no known cures. Plaintiff developed extensive disabilities and was unable to work. The prescribing doctor admitted he was unaware of the risk the patient might develop these problems and settled for his insurance policy limits. Plaintiff pursued the case against the pharmacy asserting it had a duty to advise plaintiff Reglan should be taken no longer than 12 weeks. Based on the Learned Intermediary Doctrine, the trial court entered summary judgment for the pharmacy.

The First District affirmed. The Learned Intermediary Doctrine obligates drug manufacturers to warn only physicians about the potential risks of a drug. Physicians are then required to use their medical judgment to determine which warnings to provide to a patient to whom the drug is prescribed. The doctor acts as an intermediary of the information for the benefit of the patient. The pharmacist generally has no independent duty to warn a consumer about the potential dangers of a prescribed drug. *Urbaniak v. American Drug Stores, LLC, d/b/a Osco Drug #3086*, 2019 IL App (1st) 180248.

Manufacturer Had Duty To Warn When Its Product Required Incorporation Of Asbestos By U.S. Navy To Properly Function

The defendant equipment manufacturer's product required asbestos insulation to function as intended, but delivered much of the equipment to the Navy without asbestos. The Navy later added asbestos to the equipment. The defendant moved for summary judgment, raising the "bare-metal defense" that it should not be liable for harms caused by later added third party parts. The trial court granted summary judgment, but the Third Circuit reversed adopting a foreseeability approach.

In a 6-3 decision, the U.S. Supreme Court affirmed the Appellate Court. A manufacturer that supplies a product which requires incorporation of a part that the manufacturer knows or has reason to know is likely to make the integrated product dangerous, has an obligation to warn. Requiring a product manufacturer to warn when its product requires incorporation of a part that makes it dangerous in its intended use is especially appropriate in the context of maritime law. *Air & Liquid Systems Corp. v. DeVries,* 139 S. Ct. 986 (2019).

PREMISES LIABILITY

Piece Of Wood That Was Part Of A Display Sign Over Which Plaintiff Fell Was Open And Obvious

Plaintiff and a friend went to Menard's to purchase plywood-like sheets. Plaintiff selected the proper size by looking at display signs identifying the board's thickness. After having moved a few pieces, he tripped and fell over a display sign injuring himself. Menard filed a motion for summary judgment claiming the sign was an open and obvious danger. The trial court agreed and entered summary judgment for the defense.

The Seventh Circuit affirmed. Whether a hazardous condition is open and obvious is an objective inquiry. Courts can determine if a condition is open and obvious as a matter of law where there are no material disputes concerning the condition's physical nature. The court determined the sign was open and obvious noting plaintiff testified at his deposition he found the proper board by looking at display signs identifying the thickness. The court also noted that there is no duty of continuously monitoring safety conditions in premises liability cases. *McCarty v. Menard, Inc.*, 924 F.3d 460 (7th Cir. 2019).

Summary Judgment Affirmed Where Plaintiff Could Not Establish Railing Height Was The Cause Of Decedent's Fall

Plaintiff's decedent fell from a second story walkway of an apartment building owned by the defendants. Wrongful death and survival claims were filed against the property owner. There were no witnesses to the accident, but witnesses testified that decedent was apparently intoxicated earlier. Plaintiff's expert witness said that the walkway railing was eight inches below the 42-inch height the building code required at the time of the fall and two inches below the 36-inch height the code required when the building was constructed. Defendants moved for summary judgment on the basis that there was insufficient evidence as to whether the railing height was the cause of decedent's fall.

The Second District affirmed. Witnesses had testified that decedent had been warned about his practice of sitting on the railing, and it is quite

possible he sat on it and fell. While proximate cause can be established through circumstantial evidence that cannot be done unless the circumstances are so related to each other that it is the only probable, and not merely possible, conclusion that may be drawn. *Barclay v. Yoakum,* 2019 IL App (2d) 170962.

Summary Judgment Proper For Condo Association And Snow Removal Contractor Where Plaintiff Could Not Establish His Fall Was Caused By An Unnatural Accumulation Of Ice

Plaintiff slipped on ice on a sidewalk outside of his town home and sought damages from the homeowners association and a snow removal contractor. There had been light snow the day before and the day of the incident, but no accumulation according to weather records. The contractor was required to plow when there was more than two inches of snow. The trial court entered summary judgment for both defendants because plaintiff could not establish the ice which caused him to fall was the result of an unnatural accumulation.

The First District affirmed. Landowners owe no duty to remove natural accumulations of snow and ice. It would be unrealistic to expect property owners to keep all areas where people may walk clear from ice and snow at all times during the winter months. A plaintiff must establish that the unnatural accumulation was caused by the property owner. In the present case, the only evidence was that there was a thin dusting of snow covering a patch of ice, and there was no evidence that it was an unnatural accumulation caused by either the homeowners association or the contractor. *Kasper v. McGill Management, Inc.*, 2019 IL App (1st) 181204.

Circumstantial Evidence That Wetness Had Been Present For One Hour And Forty Minutes Sufficient To Create Fact Question Concerning Defendant's Constructive Knowledge

While leaving defendant's bar and restaurant, plaintiff slipped and fell on a patch of wet concrete, suffering a broken leg requiring multiple surgeries. In his deposition, plaintiff testified that he was able to see the area where he eventually fell for one hour and 40 minutes and saw no one spill or otherwise create the wetness. Weather outside was clear. The defendant moved for summary judgment on the basis that plaintiff failed to present any evidence of constructive notice, and the judge agreed granting summary judgment.

The First District reversed. Generally, the issue of constructive notice is a fact question for jury determination. Plaintiff testified that he had a view of the bar's entryway from where he sat for one hour and 40 minutes. That created sufficient circumstantial evidence to raise a question of whether the defendant should have had constructive notice of the dangerous condition. *Heider v. DJG Pizza, Inc.*, 2019 IL App (1st) 181173.

Defense Summary Judgment Reversed As Fact Question Existed As To Whether Permissive Use Exception Applied To Trespassing Plaintiff

Plaintiff fell and was injured on a walkway owned by the defendant hotel as she attempted to walk from a parking lot to her place of work. The complaint alleged the driveway where she walked was in a neglected and broken state. The defense moved for summary judgment on the basis that plaintiff was a trespasser to whom it did not owe a duty of reasonable care. Rather, the only duty owed to a trespasser is to refrain from wilful and wanton misconduct. The trial court agreed and entered summary judgment.

The First District reversed. There was deposition testimony that numerous pedestrians used the driveway area daily, particularly during commuting hours. Where a landowner's continued toleration of trespassers exists, it may amount to permission to make use of the land so, that the plaintiff would not be a trespasser, but rather becomes a licensee. Consequently, a fact question existed as to whether the

defendant's tolerance of pedestrian use of the driveway amounted to consent under the Permissive Use Exception. *Epple v. LQ Management, LLC*, 2019 IL App (1st) 180853.

RAILROADS

FELA Award Is Subject To Tax Withholding Based Upon Recent U.S. Supreme Court Decision

Plaintiff was a railroad freight conductor who was injured at work and filed an FELA claim. A jury awarded him $821,000 including $310,000 for past and future lost wages. After the verdict, the railroad sought a setoff claiming plaintiff owed taxes on the lost wages. The trial court denied the motion holding that an FELA claim was similar to a personal injury judgment not subject to income tax. The railroad appealed, but the trial court holding was affirmed.

Subsequent to the original case, the U.S. Supreme Court in *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893 (2019) held that lost wages constituted compensation subject to withholding tax. Consequently, the U.S. Supreme Court entered a supervisory order requiring the First District to consider the effect of *Loos.* Based upon the decision, the Court concluded plaintiff's lost wages were taxable compensation. The case was remanded to the trial court for further proceedings. *Munoz v. Norfolk Southern Railway Co.*, 2019 IL App (1st) 171009.

Conductor's Claim Of Retaliatory Discharge For Filing Personal Injury Claim Rejected

Plaintiff was a conductor for defendant's railroad who received multiple suspensions for violating safety standards and other work rules. The final chapter came when he sustained an injury in a vehicle collision while not wearing a seatbelt, contrary to company regulations. After the railroad investigated the incident, plaintiff was terminated. He then brought the present federal lawsuit claiming he was discharged in retaliation for filing a personal injury claim. The trial court entered summary judgment for the railroad.

The Seventh Circuit affirmed. The Federal Railway Safety Act prohibits a railroad from discharging or otherwise discriminating against any employee who notifies it of a work-related injury or illness. The court noted that plaintiff did not produce any direct or circumstantial evidence that his termination was the result of reporting the injury. Rather, the evidence showed he repeatedly violated the company's work and safety rules and was fired for accumulating so many violations. *Holloway v. Soo Line Railroad Co.*, 916 F. 3d 641 (7th Cir. 2019).

Summary Judgment For Railroad When Conductor Has No Medical Testimony Establishing A Broken Switch Caused The Injury

Plaintiff was a train conductor who claimed to have been injured throwing a switch which he said was defective, causing a long-term elbow injury, eventually diagnosed as medial and lateral epicondylitis. His treating doctor testified that he knew very little about plaintiff's job and that it would be speculation to say throwing a switch could cause the injury. Consequently, the trial court entered summary judgment for the railroad.

The Seventh Circuit affirmed. Plaintiff's treating doctor admitted he did not know whether throwing the switch would have caused the injury. Plaintiff needed expert testimony that the incident caused his disability because causation is a necessary element of every FELA claim. *Kopplin v. Wisconsin Central Ltd.*, 914 F. 3d 1099 (7th Cir. 2019).

Res Ipsa Loquitur Did Not Apply Where Plaintiff Could Not Establish Railroad Had Exclusive Control Of Hydraulic Rail Drill

Plaintiff was a railroad employee injured when a hydraulic rail drill malfunctioned, spraying him with hot oil. His FELA claim was based on *res ipsa loquitur*. Deposition testimony established that he used the drill throughout the day, attaching

it to the rail, pushing a lever to start the drilling, pushing the lever to stop the drill and retract it, and then detach it from the rail. He drilled five to six holes including the last one and had not noticed any leaking hydraulic fluid or other malfunction. Consequently, the trial court held the railroad did not have exclusive control of the drill at the time of the accident and entered judgment for the defendant.

The Seventh Circuit affirmed. It acknowledged that FELA requires a lower threshold for submitting matters to a jury because it is a remedial statute. However, it is not permissible for a jury to infer negligence by an employer any time an accident occurs. Otherwise, in every FELA case, the railroad would be assumed to have complete control over everything in the workplace regardless of the plaintiff's contributory negligence. *Ruark v. Union Pacific Railroad Co.*, 916 F. 3d 619 (7th Cir. 2019).

Summary Judgment Under FELA Affirmed Where Contractor's Employee Could Not Establish His Employer Was Subservient To Defendant Railroad

Plaintiff was an employee of a contractor retained by the railroad to perform various cleaning and other activities on its locomotive cabs. After cleaning a locomotive's toilet drain pipe, plaintiff attempted to disconnect the hose and found it was stuck. He pulled hard to free it injuring his neck. Plaintiff claimed that his employer was a servant of the railroad making him a "subservant" entitling him to recovery under FELA. The trial court disagreed and entered summary judgment for the railroad.

The First District affirmed. An employee of a non-FELA entity may recover under the statute if the plaintiff is a borrowed servant, plaintiff works for two employers simultaneously or plaintiff's employer was a servant of the railroad. It was not enough for plaintiff to merely show that his employer was the railroad's agent, or that he was acting to fulfill the railroad's obligations. The fact the railroad had generalized oversight of his employer, without physical control or the right to exercise physical control of his daily work, was insufficient. *Atlas v. Union Pacific Railroad Co.*, 2019 IL App (1st) 181474.

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

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