Dear Friends,

Happy New Year and welcome to the latest issue of our *Quarterly Review* newsletter, edited by our partner Rex Linder and covering recent Illinois state and federal court decisions of interest to insurers. I'd like to take this opportunity to update you on some developments at the firm.


Keith Hill


Tyler Robinson

New Partners

On January 1, the firm announced two new partners Keith Hill (Edwardsville) and Tyler Robinson (Springfield). Keith has handled numerous cases in state and federal court involving toxic torts, product liability, premises liability, professional liability, automobile accidents, employment law, and civil rights defense. He has handled appeals before the Fourth and Fifth District Appellate Courts and the Court of Appeals for the Seventh Circuit.

Tyler is a member of the firm's Healthcare and Medical Malpractice Defense Practices. He advises hospitals, physician practices, long-term care facilities, and other healthcare organizations on complex statutory and regulatory matters. He also defends physicians in medical malpractice cases. Congratulations to Keith and Tyler!

Attorneys Who Joined the Firm in 2017

In 2017, the firm bolstered our capabilities firmwide in casualty/tort litigation, as well as in areas such as professional liability, workers' compensation, healthcare, and commercial litigation with 16 new attorneys – ranging from first-year attorneys to seasoned veterans. I reported to you on a number of these new attorneys in the Summer edition of *Quarterly Review*. Since then:


Bryan Vayr


Richard Sikes


Jordan Emmert


Patricia Hall


Andrew Wilt


Brian Connolly

- Bryan Vayr joined our Champaign office. Bryan focuses his practice on complex civil rights, governmental defense, and professional liability defense. Prior to joining Heyl Royster, he worked in the Champaign County States Attorney's Office; for a Chicago-based firm specializing in complex litigation; and with the Land of Lincoln Legal Assistance Foundation.
- In Chicago, we added Richard Sikes, an experienced trial and appellate attorney. Rich has represented railroads in serious liability claims such as multi-million dollar property damage cases, railroad and grade-crossing fatalities, and FELA cases. He has appeared before Illinois appellate courts in more than two dozen cases and argued cases in the Illinois Supreme Court. Rich began his career as a Cook County Assistant State's Attorney, where he prosecuted 49 felony jury cases to verdict, including several capital cases.
- Jordan Emmert, Patricia Hall, and Andrew Wilt joined the firm's Rockford office. Jordan focuses his practice on civil litigation including civil rights/Section 1983 defense, commercial litigation, and workers' compensation. He received his J.D., *magna cum laude*, from Northern Illinois University College of Law. Patricia focuses her practice on workers' compensation, employment & labor, casualty/tort litigation, and governmental matters. She received her J.D., *cum laude*, from Northern Illinois University College of Law, and she worked for Legal Assistance representing indigent clients before joining Heyl Royster. Andrew focuses his practice in the defense of civil litigation, including casualty matters. Prior to joining Heyl Royster, he was an Assistant State's Attorney with the Ogle County State's Attorney's Office.
- Brian Connolly joined the firm in Edwardsville. Brian concentrates his practice on asbestos defense and commercial litigation. He began his legal career defending agrichemical class actions at a St. Louis law firm, and then practiced civil litigation at another St. Louis firm. Brian has been professionally recognized multiple times as a Rising Star by Missouri and Kansas Super Lawyers.

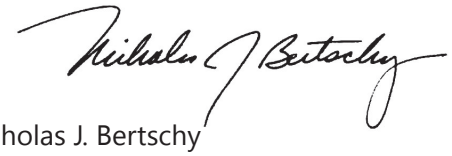
CyberSecurity
In case you didn't know, Heyl Royster has a Cybersecurity and Data Privacy Practice that can provide your insureds' businesses with counseling, project management, and legal services designed to prevent or minimize the destructive effects of a cyber-attack. We have a team of attorneys whose experience and credentials include information privacy, IT and IP, employment law, corporate governance, commercial litigation, and government relations, as well as knowledge that applies to specific industries such as healthcare and financial services. Please feel free to contact me if you'd like to know more, or if you want to explore the possibility of providing risk-reducing training programs for your insureds.

eDiscovery – Here to Stay
The collection of social media accounts has become relevant to even the most modest litigation matters. We now offer X1 Social Discovery™ – the preeminent tool for searching and collecting data from social networks and the internet. We can collect and preserve online information and other electronically stored information (ESI) in a cost-effective manner, strategize about the ESI that is needed to prove the case, and litigate accordingly (*e.g.*, discovery requests and responses, Protective Orders, etc.).

Mark Your Calendars for the Annual Claims Handling Seminar
We are finalizing the details for our 33rd Annual Claims Handling Seminar, which will be held on May 3rd at the Westin Hotel in Itasca, IL, and May 10th at the Marriott in Bloomington-Normal. We hope you will join us for an afternoon seminar designed to address the day-to-day needs of professionals handling claims throughout Illinois. There will be three concurrent programs at each seminar – Casualty & Property and Workers' Compensation, as well as a Professional Liability program in Itasca and a Governmental program in Bloomington-Normal. Please let me know if there is a topic that you would like us to cover at these seminars because we always want to address those issues that are top-of-mind for our clients.

Very truly yours,

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



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AN ILLINOIS LAW FIRM

QUARTERLY REVIEW OF RECENT DECISIONS

HEYL ROYSTER

Winter 2017-2018

INSURANCE

Named Driver Exclusion Unenforceable In UIM Claim

Plaintiff was injured while a passenger in a vehicle driven by Evans. Plaintiff made a claim against Evans' insurance carrier receiving the policy limits of $20,000. She then filed a UIM claim with State Farm, her carrier. State Farm denied coverage because Evans was specifically excluded from coverage. The trial court entered summary judgment in favor of the insured plaintiff.

The first district affirmed. The issue was whether the named driver exclusion violated mandatory insurance requirements and public policy where the exclusion barred coverage for the named insured. Evans' vehicle was under-insured, and plaintiff sought to recover for injuries under her own policy. A named driver exclusion that bars liability, uninsured or under-insured coverage for the named insured violated the mandatory insurance requirements and Illinois public policy. Therefore, the exclusion was not enforceable against plaintiff as the named insured. *Thounsavath v. State Farm Mut. Auto. Ins. Co.*, 2017 IL App (1st) 161334.

Property Damage Exclusion Barred Coverage For Insured's Negligent Work

The insured operated a flower shop and lawn care business. One of its employees negligently mixed Roundup instead of Eliminate (a selective broadleaf herbicide) in a lawn sprayer, and a result, severely damaged 26 lawns. Florists' Mutual denied coverage based upon a property damage exclusion where the property had to be repaired or replaced "because 'your work' was incorrectly performed on it." The trial court held the policy was not meant to pay for negligent work performed by an insured and dismissed the complaint.

The second district affirmed. It rejected the insured's reliance upon the Illinois Pesticide Act which was intended to protect persons suffering damage as a result of pesticide application. The insured did not suffer any damage, but rather it caused damage to customers' lawns. Therefore, the insured was not an intended beneficiary of the Act, and its rights were governed by the terms of its insurance contract. *DeMeester's Flower Shop & Greenhouse, Inc. v. Florists' Mut. Ins. Co.*, 2017 IL App (2d) 161001.

No UM Coverage Where There Was No Contact Between Hit-And-Run Vehicle And Insured

The insured and his wife were crossing a street when the wife was struck and seriously injured by a hit-and-run driver. The wife filed a UM claim with Allstate who paid the policy limits of $100,000. The insured husband, who was not hit by the vehicle, also filed a claim alleging post-traumatic stress disorder (PTSD) and its physical manifestations. Allstate denied the claim because he was not physically contacted by the hit-and-run vehicle. Although the husband claimed the physical contact requirement was against public policy, the trial court disagreed and entered summary judgment for Allstate.

The first district affirmed. Under the unambiguous language of the Allstate policy, an insured must have been physically contacted by the hit-and-run vehicle. The court noted one of the primary purposes of the physical contact requirement is to prevent fraud. However, while fraud was not an issue in the present case, the policy's express requirement was that there be physical contact. As the husband was not struck by the vehicle, he

could not recover. *Allstate Fire & Cas. Ins. Co. v. Bochenek*, 2017 IL App (1st) 170277.

Insurer's Summary Judgment Based On Permissive User Exclusion Vacated

The insured's 15-year-old son possessed a valid Illinois learners' permit. The insured watched his son parallel park his van across the street. The son accidentally pushed the gas pedal instead of the brake, hit the car in front of him pinning a person between cars. Founder's sought a declaratory judgment that it had no duty to defend the personal injury claim because the policy excluded damages caused by a person who did not have a reasonable belief he was entitled to use the vehicle. The learners' permit statute is restricted to situations where the minor is under the direct supervision of an adult instructor or parent "who is occupying a seat beside the driver." The trial court held the son could not have a reasonable belief that he was entitled to operate the vehicle because the insured was not seated next to him.

The first district reversed. It held a fact question existed as to whether the son, a valid permit-holder, reasonably believed he was allowed to practice parallel parking while his father supervised him from outside the vehicle. Consequently, summary judgment was not appropriate, and the case was remanded for further proceedings. *Founders Ins. Co. v. Sheikh***,** 2017 IL App (1st) 170176.

Additional Insured Entitled To Defense Even Though Original Complaint Did Not Allege Negligence On Its Part

A carpenter working for ACC was injured on a development project owned by Lexington. He filed suit against Lexington who tendered the defense to Pekin claiming it was an additional insured under the policy issued to ACC. Pekin denied coverage because the additional insured endorsement excluded coverage for liability due to negligence of the additional insured and applied only to vicarious liability. Pekin filed the present declaratory judgment action asserting the allegations of the original complaint alleged negligence only against Lexington. Facing cross-motions for summary judgment, the court ruled against Pekin holding it had a duty to defend.

The first district affirmed. It noted there was no reason for the carpenter to allege negligence against his employer because it was immune under the Workers' Compensation Act. Therefore, the possibility existed that the owner could be found vicariously liable triggering a duty of Pekin to defend. The duty to defend is much broader than the duty to indemnify. *Pekin Ins. Co. v. Lexington Station, LLC*, 2017 IL App (1st) 163284.

Insureds' Son's Arson Did Not Void Parents' Coverage Under Fire Policy

Plaintiffs had a homeowner's policy which excluded coverage for an intentional loss caused by any insured. Plaintiffs' son set fire to the house where he lived with his parents and was considered an insured under the policy definitions. Consequently, Metropolitan denied the claim. Plaintiffs filed suit claiming the exclusion violated coverage mandated by the Illinois Standard Fire Policy. The trial court agreed and entered judgment for $235,000.

The Seventh Circuit affirmed. In the event of a conflict between an insurance policy and the Standard Fire Policy, the latter controls. Under the Metropolitan policy, an intentional loss caused by any insured suspended coverage for all insureds, even those who were innocent of any wrongdoing. However, the Standard Fire Policy suspends coverage only if the "hazard is increased by any means within the control or knowledge of the insured." Therefore, under the Illinois Standard Fire Policy, the son's arson suspended coverage only as to him, and any attempt to proscribe recovery by the parents was invalid and unlawful. *Streit v.*

Metropolitan Cas. Ins. Co., 863 F.3d 770 (7th Cir. 2017).

CGL Carrier Required To Defend Painting Contractor For Damages Caused By Alleged Failure To Apply Adequate Sealant To Building Exterior

A condominium association sued Westfield's insured painting contractor for water damage sustained by failing to apply an adequate coat of sealant to the exterior of the building. Damages included cracking of the exterior concrete walls, interior walls and ceilings, floors, interior drywall, and furniture within the units. Westfield declined coverage asserting damages as a result of a construction defect did not constitute an "accident" or "occurrence." It then filed the present declaratory judgment action, and both parties moved for summary judgment. The trial court ruled in favor of the insured painting contractor.

The Seventh Circuit affirmed. Although CGL policies are not intended to serve as performance bonds, damage to something other than the project itself can constitute an "occurrence" under a policy. The underlying Complaint sought to recover damages to other portions of the building, not just the exterior, which it was allegedly coated with insufficient sealant. It also noted negligently performed work or defective work could also constitute an "occurrence." Therefore, a duty to defend existed. The court also held that the condominium association did not have standing to assert a claim for damage to personal property of individual condominium owners. *Westfield Ins. Co. v. National Decorating Service, Inc.*, 863 F.3d 690 (7th Cir. 2017).

Duty To Defend Additional Insured Even Though Policy Limited Coverage To Vicarious Liability

Pekin sought a declaration that it did not have a duty to defend an additional insured in a construction accident personal injury case. It issued a CGL policy to the general contractor. A contractor's employee was injured and sued the building owner and its real estate management company. Pekin claimed it did not have a duty to defend because its policy limited coverage to vicarious liability of the additional insured. Facing opposing summary judgment motions, the trial court entered summary judgment for the owner holding Pekin had a duty to defend.

The first district affirmed. The underlying complaint alleged the defendants were liable because of conduct they took "by and through their agents" and that they "participated in coordinating the work being done" and failed "to properly control and supervise the work" of plaintiff's employer. Therefore, the potential existed for the owner to be vicariously liable as a result of the negligence of the injured worker's employer. *Pekin Ins. Co. v. Centex Homes*, 2017 IL App (1st) 153601.

Carrier Did Not Prove Prejudice When Insured Failed To Appear At Mandatory Arbitration

An auto carrier sought a declaration that it had no duty to provide coverage in connection with a motor vehicle accident because its insured breached the cooperation clause of the policy in failing to appear at a mandatory arbitration held in the underlying personal injury claim. As a result, she was debarred from rejecting an unfavorable arbitration award. Direct Auto alleged the insured was informed of the arbitration but failed to attend, and therefore, it was prejudiced because it could not present a defense at the arbitration and was unable to reject the unfavorable award. The trial court entered judgment for the insureds because Direct Auto failed to show substantial prejudice.

The first district affirmed. The cooperation clause of an auto insurance policy is designed to prevent collusion between the injured party and the insured.

However, substantial prejudice to an insured does not automatically flow from the issuance of a debarring order preventing rejection of an unfavorable award. An insurer is required to demonstrate actual, substantial prejudice from an insured's breach of the cooperation clause. The trial court's decision that the insured's testimony would likely not have helped the defense at the arbitration would not be overturned. *Direct Auto Ins. Co. v. Reed*, 2017 IL App (1st) 162263.

Claim Against Insurance Brokers Accrued When Insureds Received Policies Which Clearly Stated Coverage Limits And Therefore Suit Was Time Barred

Plaintiffs were two businesses who sued their insurance brokers for failing to procure sufficient coverage on property that was destroyed in a fire. When an earlier policy was not renewed by the carrier, the brokers obtained new coverage from two different carriers, but the policy limits were lower. The new carriers sent a copy of their respective policies directly to the insureds which included a declaration page which unambiguously stated the applicable limits. Plaintiff filed suit within two years of the fire, but more than two years after receiving the policies. Consequently, the brokers moved for summary judgment based upon the two-year limitation applicable to claims against insurance agents and brokers under 735 ILCS 5/13-214.4. Plaintiff responded claiming the discovery rule should apply and that they did not learn of the lower limits until after the fire. The defendants obtained summary judgment.

The third district affirmed. Plaintiffs were required to file suit within two years of the time they knew or should have known of an injury that was wrongfully caused. The plaintiffs should have known of the alleged deficient coverage limits upon receiving the policies where there was no claim of ambiguity in the declaration of coverage limits. *RVP, LLC v. Advantage Ins. Services, Inc.*, 2017 IL App (3d) 160276.

DAMAGES

Very Low Verdict In Rear-End Collision Case Affirmed

Plaintiff's vehicle was rear-ended by a vehicle operated by the defendant. Plaintiff was taken by ambulance to a hospital where she did not tell medical personnel about prior back, neck and shoulder pain. She eventually incurred medical expenses of $29,331.88. At trial, the defendant admitted negligence, and the jury returned a verdict of $1,000 for reasonable medical expenses, zero dollars for loss of normal life and zero dollars for pain and suffering.

The first district affirmed. The mere fact that a verdict is less than the claimed damages does not mean the award was inadequate since the jury is free to determine the credibility of witnesses and assess the weight to be accorded their testimony. Plaintiff did not provide the emergency department physicians with the history of prior problems. Further, her complaints were primarily subjective. In cases where evidence of injury is primarily subjective and not accompanied by objective symptoms, a jury may choose to disbelieve plaintiff's testimony about pain. *DiFranco v. Kusar*, 2017 IL App (1st) 160533.

ARBITRATION

Interest Accrues On Arbitration Award From The Date Of Its Entry

Plaintiff was a passenger in a car struck by a vehicle whose driver's insurer was insolvent. Consequently, she sought UM benefits from her driver's insurance policy with Allstate. Following arbitration, the arbitrator awarded plaintiff $16,000. Four months later, plaintiff filed a complaint seeking entry of judgment on the award plus post-award interest. She relied upon the interest statute which provided: "Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment

until satisfied…" The trial court dismissed the complaint.

The first district reversed. Even though the statute refers to "judgment," it held interest should accrue from the date of the arbitrator's award. The case was remanded with instructions for the court to enter judgment for post-award, pre-judgment interest from the date of the award calculated pursuant to the statute. *Shackelford v. Allstate Fire & Cas. Ins. Co.*, 2017 IL App (1st) 162607.

EVIDENCE

Defense Summary Judgment Proper Where Dead Man's Act Prevented Plaintiff From Testifying About Accident

Plaintiff was hired by the defendant's decedent to provide caretaker services. As she got out of the decedent's car, she stepped on a mat that had been placed on the floor and claimed the mat slipped. During pendency of the case, defendant's decedent died. The defendant then moved for summary judgment because the Dead Man's Act barred plaintiff from testifying about the fall, and therefore, there was no admissible evidence to prove her case. The trial court agreed.

The second district affirmed. The Act precludes an adverse party from testifying as to any conversation or "any event which took place in the presence of the deceased…" Consequently, plaintiff was properly barred from testifying about the facts of the accident. As liability cannot be predicated upon speculation, surmise or conjecture, summary judgment was appropriate. *Spencer v. Wayne*, 2017 IL App (2d) 160801.

LIENS

Health Care Services Lien Act Attaches To Minor's Judgment Even Though There Was No Award For Medical Expenses

A 12-year-old boy was injured "elevator surfing" on the roof of an elevator owned by the Chicago Housing Authority. Through his mother, he filed a negligence claim against the housing authority and two other defendants. The complaint sought recovery of personal injury damages and that his mother incurred obligations of medical care and expenses. During pendency of the case, Stroger Hospital filed a lien notice for the minor's unpaid medical bills of $79,572.53. Following a bench trial, the trial court declined to award any medical expenses citing the mother's failure to prove she was obligated to pay the hospital bill. The minor plaintiff, who was then an adult, received an award of $200,000 after a reduction of 50% for comparative fault. The trial court extinguished the hospital's lien which was affirmed by the first district.

The Supreme Court reversed. It rejected plaintiff's claim that it would be unfair to subject a minor's tort recovery to a health care provider's lien even though the minor is barred from obtaining those damages from the tortfeasor. The language of the Lien Act is unambiguous. The age of the injured person is not a factor in determining whether a lien attaches. Rather, it applies to any assets constituting the plaintiff's recovery. Nothing in the Act precludes the lien from attaching to a damage award recovered on behalf of a minor or limits the lien's application to sums earmarked for medical expenses. *Manago v. County of Cook*, 2017 IL 121078.

IMMUNITY

City's Decision When To Repair Sidewalks Is Discretionary Entitling It To Immunity

Plaintiff sued Danville for injuries sustained when she tripped and fell on a city sidewalk. She alleged her fall was caused by the City's failure to repair an uneven seam between two slabs of concrete. In her deposition, the public works director said that she was aware of the uneven concrete but that the policy regarding repair was undertaken on a case-by-case basis

using numerous factors developed over multiple years in consultation with other city departments and personnel. Consequently, the trial court entered summary judgment holding the City was immune.

The fourth district affirmed. A municipality or public employee "is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." The acts or omissions alleged by plaintiff constituted discretionary acts. The fact that the City had actual notice of the dangerous condition did not negate the immunity afforded under the Act. *Monson v. City of Danville,* 2017 IL App (4th) 160593.

PRODUCT LIABILITY

Failure To Warn Claim Not Preempted When Surgical Device Manufacturer Omits Material Information Regarding Risks

Plaintiffs filed strict liability and negligence claims for failure to warn against the manufacturer of an implantable apparatus used in spinal fusion surgeries. The device was subject to regulation by the Food and Drug Administration. The complaint alleged the manufacturer promoted off-label uses of the device through advertising and royalty payments to spine surgeons for research, training and consulting. It was claimed the manufacturer inadequately warned the FDA of known adverse side effects and placed a "misbranded" device into commerce without warning of its adverse effects. The trial court dismissed the complaint holding the failure to warn claims were both expressly and impliedly preempted by FDA regulations.

The first district reversed. Branding may occur under federal requirements where advertising is misleading due to a failure to reveal pertinent facts regarding the risks or consequences of the device's usage. A failure to warn claim is not expressly or impliedly preempted if it asserts that the manufacturer misbranded its product by omitting material information regarding risks of off-label uses. *Norabuena v. Medtronic, Inc.,* 2017 IL App (1st) 162928.

Used Car Sold "As Is" Was Sufficient To Disclaim Implied Warranty Of Merchantability

Plaintiff purchased a used car from the defendant which broke down and was inoperable a few days later. Plaintiff signed a "Buyer's Guide" which had in large bold capital letters "AS IS – NO WARRANTY." The trial court awarded plaintiff $1,500.

The third district reversed. Unless excluded or modified, the Uniform Commercial Code provides that goods sold will be of merchantable quality. However, defendant's use of the term "AS IS" was sufficient to disclaim the implied warranty of merchantability. Therefore, plaintiff had no basis upon which to recover under an implied warranty theory. *Boyd v. Steve's Key City Auto*, 2017 IL App (3d) 160614.

PREMISES LIABILITY

Deteriorated Condition Of Catch Basin Was Sufficient To Create Fact Question As To The Defendant's Constructive Knowledge Of The Danger

Plaintiff was injured when she stepped on a catch basin in the defendant's back yard and the lid gave way. Photos showed the top of the lid was rusted, and the circumference was worn and deteriorated. Also, the concrete surrounding the catch basis had deteriorated with two large cracks and a thinner crack. The defendant testified he regularly inspected and maintained his back yard during the 22 years that had elapsed between the time he purchased the property and plaintiff's injury. The trial court granted the defendant summary judgment because plaintiff was unable to prove actual or constructive knowledge of the danger.

The first district reversed. Property owners have a duty to exercise ordinary care in maintaining their

property in a reasonably safe condition. If, in the exercise or ordinary care, the owner should have discovered a dangerous condition, constructive notice can exist. Here, there was sufficient evidence that a jury could conclude the deteriorated condition of the catch basin existed for a sufficient amount of time that the defendant should have been aware of it. *Nguyen v. Lam*, 2017 IL App (1st) 161272.

ATHLETICS & RECREATION

Plaintiff Must Attach Report Of Reviewing Health Professional In Suit Against Licensed Athletic Trainer Providing On-Site Injury Evaluation

During the first quarter of a high school football game, plaintiffs' son had a violent collision with another player. He continued to play until during the fourth quarter when he appeared dazed. The complaint against the licensed athletic trainer hired by the high school was that he was negligent in failing to assess the boy for symptoms of head trauma following the initial blow, and as a result, he suffered subsequent brain bleeds leading to disability. Defendants moved to dismiss the case for plaintiffs' failure to attach a Report of a Reviewing Health Professional as required by 735 ILCS 5/2-622 because the complaint alleged healing art malpractice. The trial court disagreed but certified for interlocutory appeal the issue of whether the case required a report.

The first district noted the statute did not define "healing art malpractice." The legislature enacted the Athletic Trainer's Practice Act requiring all those who hold themselves out as athletic trainers must be licensed. The allegation in the complaint that the defendants failed to watch for signs of concussion and assess a player for brain trauma clearly implicated medical judgment. Consequently, a Report of a Reviewing Health Professional was required. The court said the report could be signed by a physician licensed to practice medicine in all its branches. The case was remanded to give plaintiff an opportunity to obtain an appropriate report. *Williams v. Athletico, Ltd.*, 2017 IL App (1st) 161902.

CONSTRUCTION

No Liability Where General Contractor Did Not Retain Control Over Incidental Aspects Of Subcontractor's Work

Plaintiff was an ironworker injured when he slipped and fell while installing iron rebar. He sued the general contractor and others. The general contractor retained a concrete subcontractor who in turn retained plaintiff's employer to do iron work for the concrete pour. In response to the general contractor's summary judgment motion, plaintiff cited various contract provisions which retained general supervisory powers for coordination of the various subcontractors and monitoring progress. The trial court granted summary judgment.

The first district affirmed. The general right to enforce safety does not amount to retained control. The mere existence of a safety program, safety manual or retention of the right to inspect the work and change plans does not create liability. It also noted the contract between the general contractor and the concrete contractor that hired plaintiff's employer, provided that the concrete contractor would provide all labor, material, equipment and supervision of the work. *LePretre v. Lend Lease (US) Construction, Inc.*, 2017 IL App (1st) 162320.

DRAM SHOP

Dram Shop Entitled To Set Off Amount of Plaintiff's Earlier Settlement With Drunk Driver

Plaintiff was injured when a drunk driver crossed into her lane colliding with her vehicle. The other driver earlier became intoxicated at defendant's bar. Plaintiff settled

with the driver for the policy limits of $50,000. The parties then stipulated that plaintiff's damages were $61,151.30. Plaintiff moved to have judgment entered for the full amount of the agreed-upon damages while the defendant dram shop sought a setoff of the earlier settlement. The court agreed with the dram shop and entered judgment for $11,151.30.

The second district affirmed. A plaintiff is entitled to only one recovery for her injuries, regardless of the number of causes of action advanced. If a full setoff was denied, plaintiff would receive a double recovery for the same injury. When plaintiff earlier settled her claim for $50,000, she was compensated for her single indivisible injury, and the defendant dram shop was entitled to set off that amount. *Chuttke v. Fresen*, 2017 IL App (2d) 161018.

RAILROADS

Railroad Entitled To Set Off Advanced Payments Even Though Neither Plaintiff Nor His Attorneys Would Receive Anything From A Judgment

Plaintiff was a conductor who suffered a spinal injury while operating a mechanical track switch lever. The railroad paid him 38 separate advances totaling $75,000 to compensate him for lost time. He then retained attorneys and filed an FELA claim. The jury assessed 75% of the fault to plaintiff and 25% to the railroad resulting in a net judgment of $37,500. Plaintiff's attorneys contended the final judgment should be used to satisfy their fees and costs which were in excess of that amount while the railroad said it was entitled to set off its advances under the Act to satisfy and release the judgment. The trial court ruled in favor of the railroad.

The first district affirmed. Section 55 of FELA allows a carrier to set off any sum it has paid to an injured employee in a subsequent lawsuit against it. Any state laws will be nullified to the extent it stands as an obstacle to the purposes and objectives of FELA. Consequently, an Illinois statute which plaintiff claimed allowed attorneys to recover their fees and disbursements before a setoff would not be applicable. *Andrews v. Norfolk Southern Railroad Corp.*, 2017 IL App (1st) 153007.

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

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