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A Monthly Legal Newsletter from

Querrey & Harrow

February 2012

Editors: Terrence Guolee and Ghazal Sharifi

Liability Update: The Lure of The Rails – A Costly Attractive Nuisance

By: **Stacey McGlynn Atkins** - Chicago, Illinois

Indiana Law Update: Third-Party Spoliation Revisited

By: **Teresa Mysliwy** – Merrillville, Indiana

Liability Update: Revisiting the Open and Obvious Doctrine and Deliberate Encounter Exception

By: **Brad Schneiderman** – Chicago, Illinois

Recent Case Successes

- **Flynn Obtains Summary Judgment for Village**
- **Johnston Obtains Not Guilty Verdict**

News/Community Involvement

- **Q&H Elects Kevin J. Caplis as Managing Shareholder**
- **Q&H Elects Irwin, Holbrook and Begley to Shareholder**
- **Q&H Welcomes Gregory Frezados**
- **Keleher Published in Creighton Law Review**

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Q&H Elects Kevin J. Caplis as Managing Shareholder

Q&H is proud to announce that **Kevin J. Caplis** of our Chicago office was elected as the firm's Managing Shareholder on February 10, 2012.

Kevin is an accomplished trial attorney with extensive experience in numerous areas of civil litigation including product and premises liability, construction, insurance coverage (including excess and reinsurance), and professional liability involving accountants, architects and attorneys. He is a frequent lecturer at legal seminars for attorneys and insurance personnel, and has been published in law reviews, legal publications and law manuals.

Since 1986 Kevin has been distinguished as AV® Preeminent™ Peer Review Rated by Martindale-Hubbell and evaluates other attorneys for that directory. Kevin also has been listed in the May 2005, February 2008, February 2009 issues of Chicago magazine as an Illinois SuperLawyer, a title given only to 5% of the attorneys in Illinois and is recognized as a Leading Lawyer in various areas of law including construction litigation and insurance law.

Since joining the law firm in 1973, Kevin has worked with numerous corporations, governmental agencies, and insurance companies defending civil litigation. He has presented seminars dealing with numerous topics, including construction litigation, premises liability, construction contracts, insurance agreements and policies, damages and tort law updates.

Kevin has also been active in various bar organizations and served as an officer and as President for the Trial Lawyers Club of Chicago. He is active in civic groups and is the elected Vice President and Commissioner of the Burr Ridge Park District in Burr Ridge, Illinois.

Liability Update: The Lure of The Rails – A Costly Attractive Nuisance

By: Stacey McGlynn Atkins – Chicago, Illinois office

Dominic Choate, a 12-year old boy, made three unsuccessful attempts to jump onto a slow-moving train in July of 2003, ultimately resulting in the amputation of his left leg below his knee. The negligence lawsuit *Dominic Choate v. Indiana Harbor Belt RR Co., et al*., No. 1-10-0209 (June 2011), alleged that Indiana Harbor RR. Co. (IHB), the railroad company that owned the right of way where Choate decided to climb a low-hanging ladder on the moving train, owed a duty to prevent children from trespassing onto the property and to warn them of the track's danger. Specifically, the suit alleged that IHB was aware that children were regularly crossing the tracks and, despite this knowledge, IHB failed to take steps necessary to deter children from doing so. In response, the defense stated that it did not owe such a duty and that, as a 12-year-old, Choate was old enough to be aware of the dangers posed by the tracks. A Cook County jury found in favor of Choate and against IHB, but did find Choate was 40% responsible for his own injuries. A $6.5 million verdict was entered, which was then reduced to $3.9 million after allowing for Choate's contributory negligence.

IHB appealed, renewing its argument that Choate was aware of the dangers associated with climbing aboard a moving train and, therefore, IHB did not owe a duty to warn or protect Choate from the obvious danger. In its appeal, IHB highlighted the fact that the jury found Choate partly responsible. IHB argued that this was evidence that he was also aware of the actual danger posed.

On review, the Illinois Appellate Court primarily relied upon the supreme court's 1955 decision in *Kahn v. James Burton Co*., 5 Ill. 2d 614 (1955), which rejected the "attractive nuisance" doctrine as it applies to children, holding that liability of landowners upon whose land a child is injured is determined with reference to the customary rules of negligence, except:

> where the owner or possessor knows, or should know, that young children habitually frequent the vicinity of dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children.

Kahn, 5 Ill. 2d at 625.

After *Kahn*, the supreme court clarified the duty imposed upon a landowner to children, holding that a duty is imposed only if he "knows or should know that children frequent the premises *and* if the cause of the child's injury was a *dangerous* condition on the premises." *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 326 (1978) The *Corcoran* court defined "dangerous condition" to be "one which is likely to cause injury to the general class of children who, by reason of their immaturity, might be incapable of appreciating the risk involved." *Corcoran*, 73 Il.2d at 326.

In affirming the Choate jury verdict, the Illinois Appellate Court held that whether children of the plaintiff's age and experience would have foreseeably been unable to appreciate the risk of jumping aboard a moving train was a question of fact for the jury to decide. Turning to post-*Kahn* decisions in its analysis, the court held that the danger of jumping aboard a slow-moving train should not be presumed to be fully understood and appreciated by all children as a matter of law but, rather, should be individually assessed as questions of fact. Further, it held that plaintiff had submitted sufficient evidence to the jury that he did not fully understand the risk and that Choate's contributory negligence did not completely bar his claims. Choate had presented evidence that he had made two unsuccessful attempts to board the train, which was moving so slowly he could outrun it, without injury, and that he had seen his friend make the same unsuccessful attempts without injury. Therefore, the Court ruled, there was not enough evidence to warrant overturning the trial court's verity, and the decision was left to stand.

The lesson here is that landowners, both private and commercial, should never presume that any invitee or trespasser, regardless of age, can fully understand dangerous conditions on the premises. Accordingly, landowners are best served by taking extra precautions that persons, particularly children, are adequately warned of the dangerous condition of premises via signage, and deterred from entering the premises via fully-encompassing fencing. The costs incurred by preventive measures greatly outweigh the costs of injury.

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***Stacey Atkins**, an associate in our Chicago office, concentrates her practice in municipal liability and employment litigation. Ms. Atkins has been selected for inclusion in 2012 and 2011 Illinois Rising Stars, a list published by Illinois Super Lawyers magazine. Prior to joining Querrey & Harrow, she worked with a local litigation firm concentrating her efforts in litigation of municipal employment and labor matters, personal injury and professional negligence litigation.*

If you have any questions regarding this article, please contact Stacey at 312-540-7656 or via satkins@querrey.com.

Q&H Elects Irwin, Holbrook and Begley to Shareholder

Querrey & Harrow is proud to announce the election of **Jonathan Irwin**, **Shannon Holbrook** and **Brian Begley** to the position of Shareholders in the firm.

Jonathan Irwin works in our Chicago office. Mr. Irwin previously managed the firm's Lake County office. Prior to his return, he worked at a suburban law firm where he handled class action/mass tort litigation in both state and federal courts on a national basis. He is an experienced trial lawyer and has defended over 90 cases to jury verdict. Jon has an excellent track record, having obtained either defense verdicts or verdicts below the plaintiff's demand in more than 80% of the cases tried.

Mr. Irwin concentrates his practice in commercial, product liability, premises liability, and construction litigation including construction defect claims. Previously, he defended automobile and premises liability claims, as well as represented corporations in breach of contract litigation and corporate buy-out issues.

Shannon Holbrook concentrates his practice in health care liability where he has significant experience in the defense of medical malpractice claims against hospitals, physicians, and other health care professionals. Mr. Holbrook's experience also includes the defense of premises liability and other personal injury matters, as well as counseling hospitals and other professionals in the health care industry in the prevention of claims against them and medical charting issues. Shannon has also been involved in a number of state and federal appellate court decisions involving medical malpractice, personal injury, premises liability, and other professional liability claims.

Brian Begley concentrates his practice in municipal and premises liability. Mr. Begley previously served as an Assistant State's Attorney in the Cook County State's Attorney's Office, where he tried numerous cases in the traffic and narcotics divisions. Mr. Begley also served in the Civil Actions Bureau, representing Cook County in complex building and zoning matters.

Prior to joining Querrey & Harrow, Ltd., Mr. Begley also served as an Associate at another local law firm where his concentration included representation of municipal entities and local school districts, including local police and fire commissions. Mr. Begley has also served as an Administrative Hearing Officer where he adjudicated local municipal code violations.

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Q&H Welcomes Gregory Frezados

Q&H welcomes **Gregory A. Frezados** to the firm as "Of Counsel." Mr. Frezados focuses his practice on estate planning, trust and philanthropy law.

Greg structures his clients' estate plans and lifetime gift strategies in a manner which will best achieve their personal, family, business and philanthropic goals, while reducing federal and state estate taxes. His practice encompasses all areas of estate, gift, privately held business succession, generation-skipping and income tax planning. He works with clients to structure charitable gifts such as charitable remainder trusts, charitable lead trusts, private foundations, supporting organizations, charitable gift annuities and conservation restrictions. Greg also represents tax exempt, charitable organizations, assisting them to incorporate and obtain tax-exempt status and advising them on issues such as domestic and foreign charitable activity, endowment investment policies, political activity and lobbying restrictions, intermediate sanctions, private foundation excise taxes and the structuring and administration of planned giving programs.

Indiana Law Update: Third-Party Spoliation Revisited

By: Teresa Mysliwy - Merrillville, Indiana office

Indiana has not recognized a tort of first-party spoliation of evidence – spoliation committed by a party to the principal litigation since 2005. However spoliation in that instance may be used as an inference at trial that the spoliated evidence was unfavorable to the party that destroyed it.

In 2006, the Indiana Supreme Court first examined the tort of third-party spoliation in *Glotzbach v. Froman*, 854 N.E.2d 337 (Ind. 2006). The court stated that absent an independent tort, contract, agreement, or special relationship imposing a duty to the particular claimant, a cause of action for negligent or intentional spoliation of evidence "is not and ought not be recognized in Indiana."

In *Glotzbach*, the Supreme Court also distinguished the case of *Thompson v. Owensby*, 704 N.E.2d 134 (Ind. App. 1998). *Thompson* permitted a plaintiff's action against the defendant's liability insurer for failing to preserve evidence that the insurance company had collected after litigation ensued. The *Thompson* court reasoned that the relationship between the carrier and a third-party claimant could warrant recognition of a duty if the carrier knew or should have known of the likelihood of litigation and the claimant's need for the evidence to pursue the litigation.

Subsequently, in 2008, the Indiana Court of Appeals concluded that a third- party insurer had no duty to the claimant to preserve evidence when no lawsuit had been filed, the relevance of the evidence could not have been anticipated and the insurer never had possession of the evidence. *American National Property & Cas. Co. v. Wilmoth*, 893 N.E.2d 1068 (Ind. App. 2008).

In August of 2011, the Court of Appeals revisited the issue of third-party spoliation in *Kelley v. Patel and Indiana Ins,*, 953 N.E.2d 505 (Ind. App. 2011). In *Kelly*, a long-term resident of the Economy Inn in Lafayette, Indiana owned by Patel died in a fire at the motel in 2006. The resident's estate filed suit against Patel in tort, and also against Indiana Insurance for spoliating evidence.

Indiana Insurance hired a cause and origin expert, who was unable to determine the cause or origin of the fire. The expert merely noted what appliances were present in the area of greatest fire damage. He could not rule out appliance wiring, although the structural wiring in the room was ruled out.

Four weeks after the expert's visit, he returned to the motel to find that all of the appliances had been removed from the room. It was believed that Patel removed the appliances and gutted the room for reconstruction. It was also noted that the Indiana Insurance Company representative never advised Patel to retain the appliances.

The estate claimed that Indiana Insurance Company's failure to advise Patel that the evidence should be preserved constituted spoliation, and further, that the carrier was on notice of the importance of the appliances as evidence in foreseeable litigation, but took no steps to preserve them.

Flynn Obtains Summary Judgment for Village

Chicago office shareholder **David Flynn** recently obtained summary judgment for a south-suburban village. In the case, the plaintiff sued the driver of an automobile and the defendant village following being struck near an intersection by the automobile. Among other claims, the plaintiff alleged that the village was negligent and guilty of willful and wanton misconduct for failing to maintain overhead lights near the intersection. Through application of the Illinois Tort Immunity Act and other defenses, David obtained summary judgment for the village and the dismissal of all counts against the client.

The court held that the missing evidence was in the possession of Patel and not the insurance company. The standard set forth in the *Glotzbach* case was not met given the facts here. The only allegation was that Indiana Insurance failed to advise Patel to preserve the evidence, not that it affirmatively acted to destroy or conceal evidence.

The court further discussed that since the 1998 *Thompson* decision, no Indiana appellate decision expanded the availability of spoliation causes of action. The court also noted that the estate could seek an adverse inference jury instruction in its case against Patel or seek other sanctions against him. If the damages exceeded Patel's policy limits with Indiana Insurance, this court's opinion did not preclude Patel from seeking damages against Indiana Insurance for failing to advise him to preserve potentially relevant evidence.

* * *

***Teresa Mysliwy**, an associate in our Merrillville, Indiana office, concentrates her practice in subrogation, litigation, and collections. During her legal career, she has handled and/or arbitrated thousands of insurance subrogation disputes. She is also a certified civil mediator in the state of Indiana.*

After receiving her law degree, Ms. Mysliwy worked for 11 years for one of the nation's largest insurance carriers. Prior to joining Querrey & Harrow, Ms. Mysliwy was a partner at a large insurance defense firm, and subsequently, a sole practitioner.

If you have any questions regarding this article, please contact Teresa at 219-738-1820 or via tmysliwy@querrey.com.

Johnston Obtains Not Guilty Verdict

Chicago shareholder **Christopher Johnston** recently obtained a not guilty verdict for his client, a general contractor involved in the construction of a restaurant in Arlington Heights, Illinois. In the case, the plaintiff claimed that in February 2008 he fell, suffering a comminuted fracture of his left elbow. Surgery to repair Plaintiff's elbow required multiple plates and screws and took over 9 hours.

Chris' client acted as general contractor in 2004-2005 to build the restaurant in an existing structure and plaintiff claimed it was negligent in allowing a downspout to be installed with new roof and gutter that discharged water near the rear service entrance to the restaurant. The plaintiff claimed that the downspout caused unnatural accumulations of ice during periods of thawing and freezing in the winter, including the date of the plaintiff's fall.

Among other testimony, Chris' client testified that the plaintiff himself was involved in many of the discussions leading to the eventual placement of the downspout.

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Keleher Published in Creighton Law Review

Chicago office shareholder **Christopher Keleher** was recently published in the *Creighton Law Review*. Chris' article is titled: Judges as Jailers: The Dangerous Disconnect between Courts and Corrections. Additionally, the article was cited by Cook County in its *amicus* brief to the United States Supreme Court in the case *Florence v. Board of Chosen Freeholders* (No. 10-945). The Court in *Florence* will decide whether people arrested for misdemeanors may be strip-searched upon entering a jail, an issue that has divided the lower federal courts of appeal.

Liability Update: Revisiting the Open and Obvious Doctrine and Deliberate Encounter Exception

By: Brad Schneiderman - Chicago, Illinois office.

The Seventh Circuit recently upheld summary judgment in favor of a defendant landowner and held the deliberate-encounter exception to the open-and-obvious doctrine inapplicable. *Swearingen v. Momentive Specialty Chemicals*, No. 2011-2088 (Decided December 7, 2011).

The case involves injuries sustained by Mr. Swearingen, a truck driver, while he was delivering a tank of chemicals to Momentive Specialty Chemicals' facility. While attempting to open the lid for the container, Swearingen hit his head and fell to the floor. Prior to stepping on the back of his truck, Swearingen was aware of the hazard. Yet, he had to open the lid for the chemicals to complete the delivery.

Shortly thereafter, Swearingen filed a lawsuit alleging that Momentive breached its duty to warn him of the risk associated with the hazard. He further alleged that Momentive failed to provide him with a fall-protection harness upon his entry to the premises. Following written and oral discovery, Momentive moved for summary judgment on the basis that it owed no duty to Swearingen because the hazard was open and obvious. In opposition, Swearingen argued Momentive should have reasonably foreseen he would deliberately encounter the hazard, warn him accordingly and provide him with a fall-protection harness to prevent injury. Essentially, Swearingen argued the deliberate-encounter exception to the open-and-obvious doctrine should apply. The trial court found that Momentive had no reason to expect Swearingen would deliberately encounter the hazard and therefore granted summary judgment.

Swearingen appealed, requesting the Seventh Circuit to determine whether the deliberate-encounter exception applied. Judge Jane Magnus-Stinson delivered the opinion for the Seventh Circuit. The opinion began by referencing applicable Illinois case law that established for a plaintiff to prevail under a negligence claim, he/she must prove the existence of a duty of care owed by the defendant to the plaintiff, breach of that duty, and an injury proximately caused by that breach. *See Thompson v. Gordon*, 948 N.E.2d 39, 45 (Ill. 2011). The question of duty is one of law while the question of breach is one of fact. Thus, whether a duty is owed is for the court to decide.

Analysis of duty begins with the nature of the relationship between a plaintiff and defendant. In the instant matter, both parties agreed that Swearingen was a business invitee of Momentive. Generally, a landowner owes a business invitee the duty of exercising ordinary and reasonable care to see that its premises is reasonably safe for use. However, if a hazard is open and obvious, the landowner does not owe the business invitee the duty of exercising ordinary and reasonable care. In situations where a hazard is open and obvious, the deliberate-encounter exception revives the general duty a landowner owes to a business invitee because the landowner should have expected the business invitee would encounter the hazard.

In the instant matter, the court applied the above analysis and concluded that the hazard was open and obvious, and that the deliberate-encounter exception did not apply. Swearingen provided no evidence to support his claim that Momentive should have known he would encounter the hazard upon mounting his truck. Conversely, Swearingen's own supervisor testified that he trained the plaintiff on how to properly open a dome lid, instructing him to maintain "three points of contact" with the truck at all times.

After finding that the deliberate-encounter exception did not apply, the court went on to analyze the "four-factor duty inquiry," which had been previously used by the Illinois Supreme Court regardless of whether a condition was open-and-obvious. The test measures the reasonable foreseeability of injury and the likelihood of injury versus the magnitude of burden guarding against injury and

the consequences of placing that burden on a landowner. In applying this four-factor inquiry test, the appellate court found that Swearingen's injury was not reasonably foreseeable. That determination was supported by the evidence which showed Swearingen ignored his training when he climbed on top of his truck and failed to maintain three points of contact. Further, with Momentive having no prior knowledge of this type of activity, the burden placed on it to prevent such conduct was substantial. The appellate court therefore concluded that Momentive had no legal duty to Swearingen.

The analysis used by the Seventh Circuit in *Swearingen* illuminates use of the deliberate-encounter exception to the open and obvious doctrine. In trying to argue for application of the exception, a plaintiff must point to some evidence in the record that the defendant had reason to expect the deliberate encounter of a hazard on its premises. It is also noteworthy that the case suggests that to survive summary judgment, a plaintiff may utilize the four-factor duty inquiry test as an alternative to the deliberate-encounter exception. From a defense perspective, any evidence of prior knowledge of an invitee's encounter with a hazard may negate summary judgment. Therefore, it is all the more critical that any witnesses you present on behalf of the defendant are prepped for such questioning.

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Brad Schneiderman, *an associate in our Chicago office, concentrates his practice in medical malpractice and health care liability and has experience representing hospitals, physicians and other health care professionals.*

Mr. Schneiderman is a member of the Associates of the Legal Aid Society, an organization whose mission is to provide equal access to justice for all citizens regardless of income. He also serves as a coach for a youth basketball league.

If you have any questions regarding this article, please contact Brad at 312-540-7672 or via bschneiderman@querrey.com.

SEMINARS

Frezados to Speak to Art Collectors on Property Rights
Union League Club - Chicago, Illinois
March 7, 2012

On Wednesday, March 7th, at 5:00pm at the Union League Club, **Gregory Fezados** will speak to an audience of art collectors. The event will be sponsored by the Royal Bank of Canada and is titled: "The Future of an Enduring Asset: Succession Strategies for Your Art Collection."

A limited number of invitations remain. If you would like to invite a client or contact, who is the owner of an art collection or an art gallery, please contact Greg at gfrezados@querrey.com or 312-540-7686.