Keep The Defense Wins Coming!

Please send 250–500 word summaries of your "wins," including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in "And the Defense Wins," and it may take several weeks for *The Voice* to publish your win.

Matthew J. Kelly

DRI member Matthew J. Kelly, of **Roemer Wallens Gold & Mineaux LLP**, in Albany, New York, recently achieved a defense win on behalf of his client. On February 3, 2017, the plaintiff, an expert skier, suffered serious leg injury resulting in multiple surgical procedures while skiing on a double black diamond trail at Hunter Mountain, Hunter, New York. He contended that he fell because of hidden ice and then slid downhill into a wooden fence that was on the trail, causing the significant leg injury, disabling him for a substantial period of time.

The plaintiff retained a ski expert, who routinely testified on behalf of plaintiffs in ski cases. That expert contended that the wooden fence was not off the trail but rather was on the trail, and therefore, it was an obstacle to the skier, and further, it was not necessary for the operation of the ski area and resulted in an enhanced risk above and beyond the normal risk of downhill skiing. He also contended that the fence itself was improper in that any fence should be made of a flexible fencing to allow skiers to avoid collision with sturdy objects.

The defense brought a motion for summary judgment based on the fact that the wooden fence was necessary to maintain snow on the trail, and as such, it was a man-made object that was incidental to the provision or maintenance of the ski facility as protected under the New York Safety in Skiing statute. The defense also contended that the claimed flexible fencing suggested by the plaintiff would not have resulted in a better outcome for the plaintiff because the area on the opposite side of the fence quickly sloped downhill and had substantial rocks and trees. The defense argued that collision with any one of those would have been far worse and also contended that the plaintiff's expert relied on a catchall term of "industry standards" as opposed to any enacted rule or regulation. The lower court agreed with the defense and found that the opinion was insufficient to set forth a question of fact, and the plaintiff's expert's opinion—that a "flesh friendly fence" would have resulted in less severe injury and the subject fence was not on the ski trail—was speculation.

On February 18, 2020, the Supreme Court, Greene County, New York, granted summary judgment and dismissed the complaint. The case name is *Schmall v. Peak Resorts, Inc*. Mr. Kelly represented Peak Resorts, Inc.

Upcoming DRI Elections

Four **Director Elected Nationally** seats on the DRI Board of Directors, plus the offices of **Second Vice President** and **Secretary–Treasurer**, will be filled at the 2020 Annual Summit in Washington, D.C., October 21–24. To be considered for any position, a DRI member must first file a Declaration of Candidacy form. For more information, please contact **Nancy Parz** at DRI headquarters: nparz@dri.org or **312.698.6224**. **Declarations are due by July 1, 2020. This deadline is not being postponed.**