The Tyra Law Firm, P.C.

Quarterly Newsletter

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Inside this issue:

Collusion Between Plaintiff and Insured	2
Evidence of *Possible* Causation	2
Medicaid/Medicare Write-Offs	3
Negligent Hiring and Respondeat Superior	4
Service of Process on Secretary of State	4
Social Guests and "Furnishing" Alcohol	5
Verdict for a Defaulting Defendant	6
Prior Misconduct	7

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Congratulations to Elizabeth & Mike!

Elizabeth Steele and Mike Schmitt married in a beautiful ceremony and reception in Indianapolis on October 8, 2016.

Mike is a Purdue graduate (Industrial Engineering) and manager with UPS in Indianapolis.

As you have probably noticed in communications since then with Elizabeth, she now goes by Elizabeth Schmitt.

COLLUSION BETWEEN PLAINTIFF AND INSURED

Thomas A. Carpenter v. Lovell's Lounge and Grill, et al.
Indiana Court of Appeals, September 8, 2016

Carpenter was assaulted at Lovell's Lounge and Grill by Jerry Johnson, who was later convicted of assault. Carpenter filed suit against Johnson and Lovell's. Lovell's tendered the claim to its carrier, Cincinnati Specialty Underwriters (CSU), which denied coverage under its assault and battery exclusion.

Carpenter then amended his Complaint to allege that Johnson "negligently came into physical contact with Carpenter, accidently causing him serious bodily injury." Eventually, Carpenter and Lovell's Lounge agreed to a Consent Judgment for $1,125,000, of which the first $7,000 recovered from CSU would be paid by Carpenter to Lovell's Lounge. The Consent Judgment stipulated that Johnson was an agent or employee of Lovell's Lounge, even though he only occasionally received free beer for doing handywork around the lounge. The Consent Judgment further provided that Carpenter would not execute the judgment directly against Lovell's Lounge, but only against CSU.

In proceedings supplemental after entry of the Consent Judgment, the trial court rejected the attempt by Carpenter to enforce the Consent Judgment against CSU, holding that the Consent Judgment was procured through collusion.

The Court of Appeals affirmed. The Court explained that when the insurer had not already filed a declaratory judgment action regarding coverage for the underlying claim, the insurer has the burden of proving by clear and convincing evidence that the Consent Judgment was procured by bad faith or collusion. An agreement "becomes collusive when the purpose is to injure the interests of an absent or nonparticipating party, such as an insurer or nonsettling defendant. Among the indicators of bad faith and collusion are unreasonableness, misrepresentation, concealment, secretiveness, lack of serious negotiations on damages, attempts to affect the insurance coverage, profit to the insured, and attempt to harm the interest of the insurer."

KeyPoints: It is not that uncommon to see a claimant and an insured collude to try to bring a clearly-excluded claim within the scope of the liability policy. Fortunately, it is also not uncommon that the courts will see through the ruse and reject these efforts. The case also points out that when the insurer does not file a dec action challenging coverage until after the underlying claim is resolved, the standard the insurer has to meet will be higher.

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EVIDENCE OF *POSSIBLE* CAUSATION

State Farm Mut. Auto. Ins. Co. v. Sean Woodgett
Indiana Court of Appeals, September 20, 2016

Sean Woodgett brought an action arising out of an automobile collision against an uninsured motorist, Timmie Storms, and State Farm pursuant to his uninsured motorist coverage. During the trial, Woodgett filed a motion in limine seeking to preclude State Farm from introducing any evidence relating to a subsequent collision in which he was involved for the purpose of establishing an intervening cause of Woodgett's alleged head injury. During the depositions of Woodgett's treating providers, neither physician discussed the subsequent collision. Additionally, during Woodgett's deposition, he testified that the subsequent collision was minor, that he was not injured, and did not go to the hospital following that collision. State Farm argued that Woodgett admitted that his head pain got worse following the subsequent collision, that he did not tell his doctors about the second collision, and that the treating providers testified that minor injuries can cause the type of headache that Woodgett experienced. Woodgett's counsel argued that State Farm had the opportunity to conduct a Trial Rule 35 exam. State Farm responded that it did not have the burden of proof as to causation.

The trial court granted Woodgett's motion in limine. The court found that there was no medical evidence that directly spoke to an injury that

Woodgett suffered as a result of the second collision, the jury would have to speculate as to an injury caused by the subsequent collision, and, relying on the holding in *Daub v. Daub*, expert medical testimony was required because head injuries are not within a lay person's understanding. The jury returned a verdict in favor of Woodgett and State Farm appealed.

The Court of Appeals held that the rule in *Daub* concerns a plaintiff's burden of proof and not the relevancy standard applicable to the admission of evidence a defendant wishes to present. The applicable test is: "whether it is possible that plaintiff's claimed damages resulted from a condition or event unrelated to the defendant's negligence, where a logical nexus or causal relationship between the conditions or events exist." The Court of Appeals of Indiana concluded that the trial court abused its discretion when it excluded evidence of the subsequent collision and that the error was inconsistent with substantial justice. The cause was reversed and remanded.

KeyPoint: Evidence that a plaintiff's damages were caused by an event or condition unrelated to defendant's negligence (such as a subsequent collision) is admissible if: 1) a possibility exists that plaintiff's damages resulted from that event or condition, and 2) there is a logical connection between the damages and the event or condition.

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MEDICAID/MEDICARE WRITE-OFFS

Mary K. Patchett v. Ashley N. Lee
Indiana Supreme Court, October 21, 2016

Ashley Lee was injured in an automobile accident and brought a negligence action against Mary Patchett. Prior to trial, Lee filed a Motion in Limine as to discounted payments made by a state-sponsored health insurance program that fully satisfied her medical bills. Patchett objected, but the trial court granted Lee's motion. Patchett filed an interlocutory appeal. The Court of Appeals accepted jurisdiction and affirmed. Patchett then sought transfer. The Indiana Supreme Court granted transfer and reversed.

It has been Indiana law since 2009 under *Stanley v. Walker* that the defense in a personal-injury suit could present evidence to the jury of reductions the claimant's health-insurance company had made to the claimant's medical bills. However, the Indiana Court of Appeals decision in *Patchett v. Lee* held that the same reductions by Medicare or Medicaid (or as it is known in Indiana, HIP) were not admissible, on the theory that health insurance companies negotiate their reductions with the health-care providers, but Medicare/Medicaid simply imposed their reductions.

The Indiana Supreme Court eliminated the distinction made by the Indiana Court of Appeals and established the same rule allowing admissibility of the reductions by Medicare/Medicaid as with health insurance carriers. The Court expressly held that the principles set forth in *Stanley*, which permit the admission of both the amounts billed and those accepted by medical providers, also apply to government benefits such as Medicare and Medicaid. The Court determined that the reductions are relevant, probative evidence of the reasonable value of medical services provided.

KeyPoint: This case significantly impacts cases in which a claimant's medical bills were covered by Medicare or Medicaid. Additionally, amounts paid in full satisfaction of medical expenses by any other third-parties, such as workers' compensation insurance carriers and the like, should also be admissible at trial.

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NEGLIGENT HIRING AND RESPONDEAT SUPERIOR

Dale Sedam, et al. v. 2JR Pizza Enterprises, et al.
Indiana Court of Appeals, September 27, 2016

On August 24, 2012, Amanda Parker, a delivery driver for Pizza Hut, was driving northbound on State Road 62 to make a delivery. David Hamblin was operating a scooter in the lane ahead of Parker. Parker collided with the rear of the scooter, causing Hamblin to fall on the roadway. A vehicle operated by Ralph Bliton then ran over Hamblin, who died days later from his injuries.

Hamblin's estate filed a wrongful death lawsuit against Parker, Pizza Hut, and Bliton. The complaint was later amended to include an allegation against Pizza Hut for negligent hiring, training, supervision, and retention of Parker. Pizza Hut and Parker filed a motion for partial summary judgment, arguing that because Pizza Hut admitted that Parker was acting in the scope of her employment at the time of the accident that Pizza Hut could only be held liable on a theory of respondeat superior. The trial court granted the motion, and the Estate appealed.

The Court of Appeals reversed the trial court's decision, holding that the Estate could move forward with both the theory of negligent hiring and the theory of respondeat superior. The Court held that although the majority of jurisdictions do not allow pursuit of both causes of action, some jurisdictions do follow the reasoning set forth in a 1907 Indiana Supreme Court case supporting the Estate's position.

The Court held that the Estate could move forward with both causes of action, and that holding so was consistent with Indiana's Comparative Fault Act. By being able to assert negligent hiring, a jury could apportion a certain percentage of fault to Pizza Hut directly if it found that it proximately caused the accident. This is consistent with the premise of the Comparative Fault Act, which allows allocation of fault to any party who may have caused or contributed to the incident.

KeyPoint: Even if an employer admits that an employee was within the scope of his employment at the time of the incident, that does not preclude a Plaintiff from also bringing a cause of action for negligent hiring.

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SERVICE OF PROCESS ON SECRETARY OF STATE

Jordache White, et al. v. George Reimer
Indiana Court of Appeals, September 8, 2016

While Jordache White was operating a semi as an employee of American Transport, he was involved in an accident with George Reimer in Indiana. Reimer filed a personal injury suit in Indiana against White and American Transport. White is not an Indiana resident and American Transport is not an Indiana company.

Reimer served the Summons and Complaint by certified mail to the Illinois address White gave the state police at the accident scene; another person signed for the Summons and Complaint at that address.

Reimer attempted service of the Summons and Complaint on American Transport at the Missouri address White gave for the company at the accident scene, but it was returned as undeliverable. Reimer served the Indiana Secretary of State, which was also unable to accomplish service on American Transport at its Missouri address.

Reimer then obtained a default judgment against White and American Transport for $750,000. Reimer continued to try, unsuccessfully, to locate American Transport. Eventually he determined that American Transport was insured by Canal Insurance, and instituted proceedings supplemental against Canal. White and Canal filed a motion to set aside the default judgment, which the trial court denied.

The Court of Appeals affirmed, observing that under Indiana Trial Rule 4.4(B)(2), a non-

resident shall be deemed to have appointed the Secretary of State as his agent for service of process for damage resulting from an act or omission done within the state. Reimer complied with the rule, and this was binding on White and American Transport (and by extension, their liability carrier, Canal), who caused damage while operating within the state, even though they may not have had actual notice of the suit against them until after the default was entered.

KeyPoints: This is one example of how a defendant may be deemed to have been served with the Summons and Complaint without ever having seen it, and how the Indiana courts are often quite strict about setting aside default judgments.

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SOCIAL GUESTS AND "FURNISHING" ALCOHOL

F. John Rogers, et al. v. Angela Martin, et al.
Indiana Supreme Court, October 26, 2016

Angela Martin and Brian Brothers co-hosted a party at their home. They provided a keg of beer for the party, paid for by a debit card Martin and Brothers both used for household expenses. As the party was winding down, Angela Martin went upstairs to bed. A short time later, Brothers went to the basement to tell two guests, Jerry Chambers and Paul Michalik, that it was time to go. They got into a fistfight. Brothers woke up Martin, and asked Martin to help get Chambers and Michalik to leave.

Martin saw Michalik lying on the basement floor with his eyes closed. Martin asked if Michalik was okay, and Chambers and Brothers checked his pulse and confirmed that he was breathing. Martin went back to bed, telling Brothers to take Michalik to the hospital if he thought he might have alcohol poisoning. Soon after that, police arrived, finding Michalik dead outside the home.

Michalik's estate and Chambers' bankruptcy trustee filed suit against Martin and Brothers, claiming that Martin was liable on two theories: (1) she negligently caused Michalik's injuries; and (2) she caused Michalik's and Chambers' injuries by furnishing alcohol to a visibly intoxicated Brothers, who later assaulted the victims. Martin filed a motion for summary judgment on both counts, which the trial court granted. The Court of Appeals reversed, finding a fact question as to whether Martin "furnished" beer to Brothers, and finding that Martin, as a social host, owed Michalik a duty to render aid.

The Supreme Court first noted that Indiana case law has been murky regarding a homeowner's duty to render aid. In order to determine whether a duty exists, foreseeability must be analyzed. In the duty context, foreseeability is a general determination of the broad type of plaintiff and the broad type of harm, so the specific facts of the occurrence are not considered. Using this foreseeability analysis, Martin did not owe a duty to the victims to take precautions to prevent the co-host of the party from fighting a guest. The Court said that hosts of parties do not routinely physically fight guests, so it is not reasonably foreseeable for a homeowner to take precautions to avoid this situation.

However, the Court did hold that Martin had a duty to protect Michalik after she found him lying unconscious on the floor. A homeowner should reasonably expect that a guest who is injured on the premises could suffer an exacerbation of those injuries. As a result, Martin owed a duty to protect Michalik from further injury after she found him unconscious. Because a duty was owed, and fact questions still remained on breach and proximate cause, summary judgment was improper.

Turning to the issue of "furnishing" alcohol to Brothers, Indiana's Dram Shop Act defines "furnish" relatively broadly using words such as "sell" and "provide," but those words both involve a transfer of possession. Since Martin and Brothers jointly possessed the same alcohol, they could not "furnish" it to each other. There was no dispute that possession of the alcohol was never transferred. Brothers ordered the keg and picked it up,

paying for it using a bank account of comingled funds. Martin and Brothers therefore jointly possessed and acquired it simultaneously, so Martin, as a matter of law, could not "furnish" the alcohol to Brothers. The Court affirmed the trial court's grant of summary judgment on this issue.

KeyPoints: (1) A duty analysis involves an evaluation of "foreseeability," which requires an evaluation of the broad type of plaintiff and the broad type of harm, disregarding the specific facts of the case; (2) Homeowners have a duty to prevent the exacerbation of injuries that their social guests may sustain on the premises; and (3) Under Indiana's Dram Shop Act, alcohol cannot be "furnished" to someone who already had possession of it.

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VERDICT FOR A DEFAULTING DEFENDANT

William Brandon, Jr. et ux. v. Buddy & Pal's III, Inc., et al.
Indiana Court of Appeals, October 14, 2016

William Brandon, Jr. and his wife, Sarah, went to the bar Buddy & Pal's Place in Schererville for a birthday party. Brandon got into an argument with another guest at the party, Thomas Walker. Brandon told Walker "I'll 'F' you up, punk," and a Buddy & Pal's employee broke up the argument. Walker and two women were escorted out of the bar and did not cause any trouble on the way out. As Walker came back in to look for his phone, Brandon stood in his way and tried to provoke a fight. Walker punched Brandon and Brandon returned the punch, slipping and falling and cutting his hand on a beer bottle.

Brandon and his wife filed suit against both Buddy & Pal's and Walker. Walker never filed an answer, so Brandon filed a Motion for Default. The court found Walker in default and set the matter for a damages hearing "at a later date." Walker filed a letter with the court, disagreeing with the claims against him and disagreeing with the default. A damages hearing was never held, and Brandon never requested one.

Three years later, the case went to trial. After the jury was selected, Walker appeared in court pro se because he had received a summons from Brandon to testify as a witness. Brandon did not object to Walker being a defendant. Throughout the trial, Walker represented himself, gave an opening and closing, cross-examined witnesses, and participated in the final-instructions conference.

During closing, Brandon's counsel argued for apportioning 80-85% of the fault to Buddy & Pal's, and 15-20% of the fault to Walker. The jury found that Brandon was 100% at fault. Brandon filed a motion to correct error request a new trial. The judge denied Brandon's motion, citing waiver of the issue, and Brandon appealed, arguing that Walker's liability was established by default and that a new trial should be granted on damages only.

The Court of Appeals upheld the denial. Brandon did not object to Walker participating in the trial, and agreed to the jury instructions that fault could be apportioned among the three parties. Brandon did not raise the issue of Walker's default until after the trial did not turn out his way and the jury had been excused, and the Court found that was too late. The Court also noted that default for failing to answer a complaint is a technical default, but does not entitle the non-defaulting party to a judgment by default as a matter of right, and that judgment was never entered in this case because the issue of damages was left open. The trial court therefore did not abuse its discretion in denying Brandon's motion to correct error.

KeyPoints: (1) Default judgments are not final judgments until the issue of damages is decided; (2) prior defaults can be waived by not objecting to the defaulted party's participation in trial; (3) do not go to birthday parties in Schererville bars.

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PRIOR MISCONDUCT

Danny Sims v. Andrew Pappas, et ux.
Indiana Court of Appeals, October13, 2016

Andrew and Melissa Pappas brought an action against Danny Sims arising out of an automobile collision alleging negligence, recklessness, and willful and wanton misconduct in connection with the automobile collision. Sims had pled guilty to operating while intoxicated. Sims also admitted fault for the collision and to being intoxicated at the time of the collision. During the trial on compensatory damages and loss of consortium, Sims objected to the admission of evidence about two decades-old convictions of alcohol-related offenses. The objection was overruled. The jury returned a verdict and judgment was entered in favor of Pappas and his wife. The majority of the damages awarded were compensatory. Sims appealed.

Sims argued that the evidence was inadmissible under Indiana Evidence Rules 403 (exclusion of relevant evidence if probative value is substantially outweighed) and 609(b) (impeachment by evidence of previous conviction and limit on using evidence after 10 years).

The Court of Appeals concluded that the trial court erroneously admitted evidence of Sims' prior alcohol-related convictions from 1983 and 1996, and the error was not harmless. In doing so, it clarified that it was not making a determination that evidence of decades-old, alcohol-related offenses can never be admissible in civil actions for damages arising out of motor vehicle collisions, but that, in the instant case, in light of Sims' admissions of fault and intoxication, the evidence presented at trial of the circumstances of the accident, and the inferences made by plaintiffs' counsel that Sims was not punished properly for those prior convictions, the prejudicial effect of the prior convictions outweighed any probative value of the evidence. Therefore, the court reversed the judgment on the verdict, and the cause was remanded for retrial.

KeyPoint: There is no "bright-line rule" concerning when prior misconduct becomes too old to have any probative value. In cases with similar facts, wherein a defendant with prior alcohol-related offenses does not admit fault and intoxication, a court may find that evidence of prior alcohol-related offenses are admissible on the issue of punitive damages, despite the limit on using evidence after 10 years under Indiana Evidence Rule 609.

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The Firm represented at the Schmitt reception

Pictured left to right: Steve King, Christie King, Adam Tyra, Amy Tyra, Jan Tyra, Kevin Tyra, and our former legal assistant, Laura Fifty.

In response to the first question that probably came to your mind: Yes, the reception had an open bar.

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