The Tyra Law Firm, P.C.

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Quarterly Newsletter

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Contact Information

The Tyra Law Firm, P.C.
355 Indiana Avenue, Suite 150
Indianapolis, Indiana 46204
Phone: 317.636.1304
Fax: 317.636.1343
Website: www.tyralaw.net
E-mail: kevin.tyra@tyralaw.net

Moving On

Moving in next to a salon two years ago was a little different but we thought it would work out.

After a prolonged and intractable problem with noise coming from the tenant next to our current offices, The Tyra Law Firm has reached an agreement with its landlord for an early termination of the lease. We will be moving to Suite 119, 9100 Purdue Road, Indianapolis, 46268, also known as the Parkstone Office Center, on the northwest side of Indianapolis.

We anticipate making the move as early as the beginning of July, depending on when the remodeling of the new space is completed. Other than the street address, all other forms of communication (including phones, fax, and e-mail addresses) will remain the same. We will be sending out further notices to everyone when we actually make the move.

DUTY OF LANDOWNER TO PROTECT FROM CRIMINAL ACTS

April Goodwin, Tiffany Randolph, and Javon Washington v. Yeakle's Sports Bar and Grill, Inc.

Indiana Court of Appeals, March 25, 2015

Appellants were at Yeakle's Sports Bar and Grill. Rodney Carter and his wife were also there, and Carter thought he heard Washington say something derogatory about Carter's wife. Carter then shot Washington, and separately and accidentally shot Goodwin and Randolph. The Appellants brought suit against the Bar, claiming it was negligent in providing a safe place for its patrons. The Bar moved for summary judgment, arguing that Carter's criminal acts were unforeseeable as a matter of law, and the Bar therefore did not have a duty to protect the Appellants from being shot. The trial court entered summary judgment in favor of the Bar.

On appeal, the Appellants argued that Carter's criminal acts were foreseeable and the trial court erred in holding that the Bar had no duty to protect them. The Court of Appeals held that the Bar had a duty to protect the Appellants from harm, but notably, did not address the foreseeably of Carter's criminal acts.

The Court held that under the standard set forth by our Supreme Court in *Yost v. Wabash*, the duty owed by landowners to invitees is well-established and that landowners "owe[] the [invitees] a duty to take reasonable precautions to protect them from foreseeable criminal attacks . . . ." The Court also went on to hold that the issue of foreseeability of criminal attacks goes to whether the landowner breached its duty, not whether a duty existed in the first place.

Since the Bar only argued that it did not owe a duty to the Appellants, the Court reversed the trial court's holding.

KeyPoints: (1) Landowners owe a duty to invitees to take reasonable precautions to protect them from foreseeable criminal attacks; and (2) whether or not a criminal attack is foreseeable goes to whether there was a breach of that duty, not whether the duty exists in the first place. The landowner may still argue the criminal attack was not foreseeable because of an absence of prior incidents, to show it did not breach its duty to the plaintiffs.

Elizabeth H. Steele

elizabeth.steele@tyralaw.net

EXPERT FEES

Brian Beckerman v. Nimu Surtani, M.D., et al.

Indiana Court of Appeals, February 13, 2015

Beckerman filed a medical malpractice lawsuit against Dr. Surtani. In support of his claims, Beckerman obtained an affidavit from Dr. Randall Smith, a Pennsylvania physician, which concluded that Dr. Surtani's treatment of Beckerman was negligent.

Dr. Surtani wanted to depose Dr. Smith. Dr. Smith stated his deposition fees were $4,000 up front for up to four hours of testimony, $1,000 per hour after the first four hours, and $400 per hour for his preparation time. Dr. Surtani filed a motion to have the court set a reasonable fee structure for Dr. Smith's deposition. The trial court ordered Dr. Surtani to pay $2,000 to cover two hours of deposition time and two hours of preparation time, which was the equivalent of $500 per hour. The court further ordered that Beckerman would be responsible for any additional fees required by Dr. Smith for his deposition. The court added it would entertain a future motion to reimburse Beckerman for any amounts paid by Becker-

man to Dr. Smith if Beckerman could show an hourly rate above $500 was reasonable. Subsequently, Dr. Surtani paid his $2,000 to Dr. Smith, and Beckerman paid the remaining $2,000 to cover the initial $4,000 fee.

Dr. Smith's deposition took about one hour and forty minutes. Subsequently, even though Dr. Smith had provided Beckerman with supporting testimony, Beckerman dismissed his complaint against Dr. Surtani with prejudice. However, Beckerman still moved to obtain reimbursement of the $2,000 he had paid to Dr. Smith, and provided evidence that $1,000 per hour was a reasonable fee for a doctor's deposition. The trial court denied Beckerman's motion. The Court of Appeals affirmed the trial court.

Indiana Rule of Trial Procedure 26(B)(4) provides that a party seeking expert discovery must pay a reasonable fee to the expert for responding to the request. The trial court is permitted to order the party seeking discovery to reimburse the other party a fair portion of fees and expenses incurred in obtaining the requested expert opinions. The fact that Dr. Smith had already provided an affidavit made it clear that Dr. Smith's deposition was for Dr. Surtani's benefit. Therefore, Dr. Surtani was obligated to pay a reasonable fee to Dr. Smith.

What constitutes a reasonable fee, though, is a separate issue. Beckerman claimed the $2,000 for which he was seeking reimbursement was for costs incurred by Dr. Smith in preparing for his deposition. But, there was no evidence in the record that Dr. Smith spent any time preparing for his deposition, and especially no evidence he spent five hours doing so (which would equal the $2,000 at $400 per hour). Notably, the trial court had ruled that Dr. Surtani had no obligation to pay for Dr. Smith's time preparing for this deposition. The Court of Appeals did not address whether the deposing party is obligated to pay for the expert's preparation time, because there was no evidence in the record regarding Dr. Smith's preparation time. However, the Court seemed to imply that the deposing party could be obligated to pay for the expert's preparation time.

The Court of Appeals stated the real issue was not whether Beckerman was entitled to reimbursement, but whether $4,000 for a deposition that lasted one hour and forty minutes was reasonable. And because the trial court found Dr. Surtani was obligated to pay $2,000, the Court of Appeals found the trial court did not abuse its discretion in denying Beckerman's request for reimbursement.

KeyPoint: If there is a dispute over an opposing expert's fees for providing testimony, deposing counsel can challenge the amount of those fees by asking the trial court to determine what is reasonable. The deposing party may also be responsible for the expert's preparation time, but only to the extent it is "reasonable."

Jerry M. Padgett

jerry.padgett@tyralaw.net

FINANCIAL RESPONSIBILITY

Indiana Bureau of Motor Vehicles v. Jennifer M. Gurtner

Indiana Court of Appeals, February 26, 2015

Jennifer Gurtner was driving a vehicle owned by her husband when she struck a deer. The car was damaged and Gurtner reported the incident to the police. After the accident, the BMV notified Gurtner that she had to provide proof of financial responsibility at the time of the accident. Gurtner and her husband thought they had paid for auto insurance on all of their vehicles, but because of a mistake on the part of their insurance agent, the vehicle involved in the accident had been dropped from the coverage. Since Gurtner could not provide proof of financial responsibility, the BMV suspended Gurtner's license for ninety days.

Gurtner filed a petition for judicial review, seeking to challenge the suspension. The trial court

held a hearing and granted the petition, ordering that the BMV dismiss the suspension of Gurtner's license. The BMV appealed the order.

On appeal, the Court first reviewed the plain language of the statute and held that it required the BMV to suspend Gurtner's license, regardless of fault, because she could not provide proof of financial responsibility at the time of the accident. Gurtner admitted that the statute requires that her license be suspended, but she argued that the BMV denied her due process by failing to provide for administrative review.

In addressing the due process argument, the Court first noted that driving a motor vehicle is not a fundamental right, but that the US Supreme Court has held that a driver may still bring a claim of lack of due process for the temporary taking of driving privileges. Under the relevant Indiana statutes, Gurtner would be allowed a documentary review, but not a hearing. Even if Gurtner were allowed a hearing under relevant statutes, the Court held that the BMV could not disregard the plain language of the statute that required it suspend Gurtner's license. Gurtner's only argument at a hearing, therefore, was that the statute is unfair, but that does not give the BMV reason to disregard the relevant statutory language.

The Court went on to point out that even though the BMV suspended Gurtner's license before her petition for judicial review could be heard, Gurtner failed to request any stay of the suspension of her license. Nor did she request a hardship license. If Gurtner had requested a hardship license, she would have had a forum and opportunity to present her claim – via the request for the hardship license. Therefore, since a statutory method was available for Gurtner to present her claim – despite the fact that she did not avail herself of it – it cannot be said that she was denied due process. As a result, the Court reversed the trial court's order.

<u>KeyPoints</u>: (1) License suspension for lack of financial responsibility does not take into account whether driver or insurer was at fault for the lack of coverage; and (2) hearing for a hardship license provides a statutory method to present claim as to reason for lack of insurance coverage.

Elizabeth H. Steele

elizabeth.steele@tyralaw.net

INDEMNITY CLAUSES

In re: Indiana State Fair Litigation

Indiana Court of Appeals, March 30, 2015

For approximately twenty years, the Indiana State Fair Commission ("ISFC") used equipment leased from Mid-America Sound ("Mid-America") to produce outdoor concerts for the Indiana State Fair. For the last ten years of their business relationship, Mid-America delivered the leased equipment to ISFC before the Indiana State Fair. Then, after the fair had concluded, Mid-America picked up the equipment, signed multiple contracts for the leased equipment, and submitted the contracts to ISFC. ISFC would audit each contract to confirm it reflected their agreement, and subsequently issued payment to Mid-America. ISFC had one official certify the invoice for the contract accorded with the contract, and then it was approved by ISFC's executive director.

In 2003, Mid-America began using a lease contract that included indemnification language. The front of the contract identified the leased equipment and amount due. The reverse of the contract included various contract terms, which contained indemnification language in two different sections.

In 2009, ISFC adopted a sole source agreement that allowed ISFC to accept equipment and services from Mid-America without having to go through the bidding process. In 2011, ISFC asked Mid-America to send a letter explaining the services it would provide in 2011. This letter also referred to the long-term relationship between the parties and their prior course of dealing.

In 2011, ISFC sent Mid-America its standard terms and conditions that it provided in all contracts. This document included language requiring Mid-America to indemnify ISFC but that ISFC would not provide indemnification to Mid-America. However, there was no evidence that Mid-America ever received this document or that any subsequent agreement between the parties included these terms.

On August 31, 2011, during an outdoor concert at the Indiana State Fair, a stage collapsed and injured and killed several people. After the fair, Mid-America submitted its invoices to ISFC that contained the same indemnification language as in previous years. ISFC certified the invoice documents, and the executive director gave them special scrutiny because of the stage collapse, but still approved them.

Subsequently, multiple lawsuits were filed against ISFC and/or Mid-America. In response to these lawsuits, Mid-America asserted cross-claims or third-party claims seeking indemnification from ISFC. ISFC moved for summary judgment on the issue of whether it was required to indemnify Mid-America, and the trial court granted the motion for summary judgment. However, the Court of Appeals reversed and remanded.

Under Indiana law, while one party may contractually agree to indemnify another party for the other party's own negligence, the language must be clear and unequivocal.

ISFC first argued to the Court of Appeals that summary judgment was not appropriate because Mid-America was trying to retroactively apply contractual language from documents that were not submitted until after the fair had concluded. The Court found that the parties' previous course of dealing created a genuine issue of fact as to whether the application of the indemnification language was retroactive.

Next, ISFC argued the indemnification language was unconscionable, and was something Mid-America slipped in to their agreements in 2003. The Court disagreed. It pointed to the fact that the indemnification language was the same size type as the other contractual terms, and even included a heading in bold type. As such, the Court found the entry of summary judgment based on unconscionability was in error.

Likewise, the Court rejected the ISFC argument that it never knowingly and willingly agreed to indemnify Mid-America. The Court pointed to the ample evidence of ISFC's review process to show ISFC reviewed and certified each invoice that was provided by Mid-America. The Court declined to hold that Mid-America had any obligation to show it had explained the indemnification language to ISFC.

The Court also found there was a genuine issue of material fact as to ISFC's argument that it did not knowingly and willingly indemnify Mid-America because the invoice at issue was not signed and because the sole source letter does not reflect any indemnification language. As ISFC had paid the invoice even though it was not signed, there was an issue of fact as to whether it had assented to the terms. And as noted earlier, the sole source agreement from 2009 encompassed the parties' course of dealing up to that point, which included multiple agreements containing indemnification language.

In addition, ISFC argued the Indiana Tort Claims Act precluded enforcement of the indemnification language against the ISFC because it is a governmental entity. However, the Court found the Indiana Tort Claims Act inapplicable, as it only applies to tort claims. Here, however, the claim was based on a contractual provision, and not a tort-related issue.

KeyPoint: This case highlights not only the fact that indemnification language in contracts must be carefully worded to be enforceable, but also the importance of the manner in which the contract is executed. For instance, the party who wishes to seek indemnification should make sure the contract is actually signed before the parties perform their contractual duties. The party seeking indemnification should also ensure its indemnity language is at a minimum clearly set forth under headings that denote its existence. Furthermore, if there is a pattern of review and/or approval of the contract by a company executive for the other party, it will be less likely they will be able to avoid its duty to indemnify by claiming it was unaware of the language.

Jerry M. Padgett

jerry.padgett@tyralaw.net

"SPECIAL RELATIONSHIP" BETWEEN AGENT AND INSURED

Indiana Restorative Dentistry, P.C. v. The Laven Insurance Agency, Inc. and ProAssurance Indemnity Co., Inc. f/k/a The Medical Assurance Co., Inc.

Indiana Supreme Court, March 12, 2015

Indiana Restorative Dentistry (IRD) was insured under a policy issued by ProAssurance and procured through Laven. In October 2009, a fire destroyed the entire IRD office. The value of the lost office contents was $704,394.35, but the policy limits for office contents was only $204,371. IRD sued ProAssurance and Laven in tort and contract, hoping to recover the approximately $500,000 shortfall.

IRD alleged that Laven breached its duty to advise IRD of adequate coverage due to the "special relationship" it had with IRD. IRD also alleged breach of contract for Laven's failure to procure full coverage of the office contents. Finally, IRD alleged that ProAssurance was vicariously liable for Laven's omissions. All parties moved for summary judgment, and the trial court granted only ProAssurance's motion, finding that it was not vicariously liable for the alleged acts or omissions by Laven. The trial court also held that Laven had no "special relationship" with IRD, and no contractual duty to provide insurance that would fully cover IRD's losses.

IRD appealed the partial summary judgment order in favor of Laven, and the Court of Appeals reversed on all three claims. Both Laven and ProAssurance petitioned for transfer, but the Supreme Court only granted Laven's petition. Therefore, the only question addressed by the Supreme Court was whether genuine issues of material fact existed regarding Laven's duty to advise and contractual duty to procure full coverage.

The Supreme Court held that summary judgment was improper on the issue of Laven's duty to advise, because the question of a "special relationship" is a fact-sensitive one to be decided by the trier of fact. In determining whether a relationship rises to the level of "special," the nature of the relationship must be examined, not merely the length of the relationship. The Supreme Court noted the four factors determining whether a "special relationship" exists, cautioning that they are not exhaustive, and no single factor is dispositive. Those four factors are whether the agent: (1) exercises broad discretion to service the insured's needs; (2) counsels the insured concerning specialized insurance coverage; (3) holds oneself out as a highly-skilled insurance expert, coupled with the insured's reliance upon the expertise; and (4) receives compensation, above the customary premium paid, for the expert advice provided.

The Supreme Court found that the designated evidence did not disprove IRD's claim that Laven had a duty to advise IRD, so summary judgment was improper.

On the issue of the contractual duty to procure full coverage, the Supreme Court found that there was never a meeting of the minds as to full coverage. In all of the communications between the parties, none of the designated evidence

showed that IRD ever requested "full coverage." As a result, the Supreme Court held that summary judgment in favor of Laven was properly granted on this issue.

KeyPoints: (1) Whether or not a "special" relationship exists between an insured and an insurer is based on the nature of the relationship, as articulated in the Court of Appeals' four-factor test; and (2) a meeting of the minds as to the amount of coverage must take place in order for there to be a contractual duty for the agent to procure that specific coverage.

Elizabeth H. Steele

elizabeth.steele@tyralaw.net

VOLUNTEER DOCTRINE

Nick Hunckler v. Air Sorce-1, Inc, et al.

Indiana Court of Appeals, February 3, 2015

Timothy Miller was the president and only employee of Air Sorce-1, a heating and air conditioning business. Miller sold a new furnace to Kelly Brannen. Before the sale, Miller inspected the area in Brannen's home where the furnace would be installed. On October 20, 2010, the new furnace was delivered. Hunckler was living with Brannen, and was home when the furnace was delivered. When Miller arrived, he brought a friend who was going to help move the furnace, but who also had a bad back. Miller asked Hunckler whether he would help him move the furnace to the basement.

Miller and Hunckler prepared to slide the furnace down the stairs. Miller went first and was holding the bottom of the furnace. Hunckler stood at the top of the stairs, and at first grabbed the top sides. But, he decided he needed a better grip, and grabbed the top edges of the furnace, where there were four edges of sheet metal. Hunckler thought Miller had taken a step, even though Miller had not moved, and Hunckler moved forward and fell into the furnace. In the process, Hunckler's hands came into contact with the metal edges, which caused serious injuries to his hands.

Hunckler filed a lawsuit against Air-Sorce 1 and Miller, who subsequently filed a motion for summary judgment. The trial court granted the motion, but the Court of Appeals reversed the decision.

On appeal, Hunckler argued the trial court erred in determining he was a "volunteer" and in therefore applying the volunteer doctrine to his claim. The volunteer doctrine provides that unless there is proof of willful injury, a volunteer cannot recover. Hunckler argued the volunteer doctrine only applied to premises liability cases, and that this was not a premises liability case. Air-Sorce 1 conceded this was not a premises liability case, but argued the volunteer doctrine is not limited solely to premises liability cases.

The Court of Appeals followed a recent approach by other states, and abandoned the volunteer doctrine. As such, it found ordinary principles of negligence apply to situations such as these, and therefore determined there were issues of fact as to duty, breach, causation, and damages.

KeyPoint: The volunteer doctrine is no longer applicable to preclude claims brought by someone who volunteered to participate in the activity in which they sustain an injury. Instead, regular principles of negligence apply to these situations.

Jerry M. Padgett

jerry.padgett@tyralaw.net

Office Field Trip

In April, the firm took in an early-season game at Victory Field (a relatively short walk from the office), with the Triple-A Indianapolis Indians playing the Toledo Mudhens.

Pictured (l-r) are Jan Tyra, Amy Tyra, Elizabeth Steele, Laura Fifty, and Jerry Padgett. Kevin Tyra was the photographer.

The Tyra Law Firm, P.C.

355 Indiana Avenue, Suite 150

Indianapolis, Indiana 46204