The Tyra Law Firm, P.C.

Quarterly Newsletter

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EMPLOYERS SHARE THE MOST BIZARRE LATE-TO-WORK EXCUSES

- I knocked myself out in the shower.
- I was drunk and forgot which Waffle House I parked my car next to.
- I discovered my spouse was having an affair, so I followed him this morning to find out who he was having an affair with.
- Someone robbed the gas station I was at, and I didn't have enough gas to get to another station.
- I had to wait for the judge to set my bail.
- A deer herd that was moving through town made me late.
- I'm not late. I was thinking about work on the way in.
- I dreamed that I got fired.
- I went out to my car to drive to work, and the trunk had been stolen out of it (In this case, the employee had the photo to prove it).

- Courtesy of CareerBuilder.com

BYSTANDER RULE

Ray Clifton v. Ruby McCammack

Indiana Court of Appeals, November 14, 2014

McCammack struck and killed fifty-one-year-old Darryl Clifton while Darryl was riding his moped. Shortly thereafter, Ray Clifton, Darryl's father (with whom Darryl was living), saw "breaking news" on television about a motorbike accident along the route Ray knew Darryl would have been taking. Darryl's name was not disclosed, and there was no video from the scene. Nevertheless, Ray had a "bad feeling" it was Darryl. Ray rushed to the scene. He saw a body under a blanket, and he recognized Darryl's moped and his shoes sticking out from under the blanket.

Ray sued McCammack for negligent infliction of emotional distress under the Indiana Bystander Rule, which includes in relevant part an immediate family member "witnessing either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs." However, the trial court granted summary judgment to McCammack on the basis that the facts did not constitute a "gruesome aftermath of such an event minutes after it occurs."

The Court of Appeals reversed, finding that Ray's arrival on the scene about twenty minutes after Darryl's death satisfied both the temporal and circumstantial prongs of the Bystander Rule, and this satisfied the policy behind the Rule to allow claims where "the plaintiff sustains emotional injuries arising from the shock of experiencing the traumatic event."

KeyPoint: This decision continues the gradual Indiana trend of broadening the Bystander Rule, and its sibling, the Modified Impact Rule. This is probably the most attenuated factual situation in which a family member has recovered for emotional distress under this Rule.

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DRUG STORE'S VICARIOUS LIABILITY FOR IMPROPER PHARMACIST DISCLOSURE

Walgreen Co. v. Abigail E. Hinchy

Indiana Court of Appeals, November 14, 2014

Davion Peterson was in a relationship with Abigail Hinchy who became pregnant with Peterson's child, who was born in May 2010. Since 2009, Peterson had been dating Audra Withers, a pharmacist at Walgreen. At some unknown time, Peterson learned that he had contracted genital herpes. Peterson sent a letter to Withers, informing her about his diagnosis and his child. Hinchy had filled all of her prescriptions at the Walgreen where Withers worked, so Withers looked up Hinchy's prescription profile in the Walgreen computer system.

Three days later, Peterson sent a text message to Hinchy confronting her about the fact that she had not refilled her birth control prescription during the time she got pregnant with Peterson's child. Hinchy contacted Walgreen to see how her prescription information could have been accessed, but was told that there was no way to figure that out. Hinchy took no further action until March 2011, when Hinchy found out that Peterson and Withers were married and Withers was a pharmacist at the Walgreen where Hinchy had prescriptions filled. Hinchy contacted Walgreen about her suspicions that Withers had looked at and disclosed her personal information. Withers admitted that she had accessed Hinchy's prescription profile for personal reasons, but Walgreen could not confirm that she had disclosed the information to a third party.

Hinchy filed a complaint against Walgreen and Withers. Walgreen moved for summary judgment, which was granted in part on the issues of negligent training against Walgreen and invasion of privacy by intrusion against Withers.

A jury found in favor of Hinchy for $1.8 million. Walgreen and Withers were found to be jointly responsible for 80% of the damages, and Peterson was responsible as a non-party for 20%. Walgreen appealed.

The Court of Appeals held that the trial court did not err in denying Walgreen's motion for a directed verdict on the claim for respondeat superior. The Court held that Withers' actions fell within the scope of her employment, since they were of the same general nature as those authorized by Walgreen. Withers was allowed to use the Walgreen computer system to handle customer prescriptions, look up customer information, review prescription histories, etc. So, since Withers' actions in this case were found to be within the scope of her employment, and Withers owed a duty of privacy protection to Hinchy by way of her employment as a pharmacist, Walgreen could therefore be vicariously liable. Since Walgreen could not be both vicariously liable and liable for negligent supervision and retention, the Court did not address the latter issues.

The Court also found that the damages awarded were not excessive. While Walgreen argued that Hinchy did not have a physical injury, did not lose wages, and did not offer any testimony supporting her claim of emotional distress, the Court found that Walgreen was just asking the Court to reweigh the evidence. As a result, the $1.8 million award stands.

KeyPoints: (1) Respondeat superior will apply when an employee is engaging in actions that are of the same general nature as his employment; (2) Pharmacists owe a duty of confidentiality to customers; and (3) improper disclosure of medical information can carry a hefty price tag.

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EMPLOYERS' DUTY TO THIRD PARTIES

Alfredo Rodriguez v. United States Steel Corp.

Indiana Court of Appeals, December 31, 2014

Dana Faught was employed by U.S. Steel, working approximately eleven-hour shifts, five or six days a week for the past three years. Faught was scheduled to only work eight hour shifts, but his supervisor allowed him to make his own hours. On his way home around 6 a.m. one day, he crossed the center line and collided head on with Miriam Rodriguez. Alfredo Rodriguez filed suit against Faught and U.S. Steel as Miriam's permanent guardian. Rodriguez alleged that U.S. Steel acted negligently when it "allowed and/or permitted Faught to drive an automobile on his commute" after it permitted Faught "to work long and excessive hours on consecutive days," without any policy or training to combat employee fatigue, when it should have known that that schedule would make him unable to safely drive home. U.S. Steel moved for summary judgment, arguing that it did not owe Miriam a duty, and even if it did, it did not breach that duty and was not the proximate cause of Miriam's injuries. The trial court granted the motion for summary judgment and Rodriguez appealed.

Rodriguez argued that U.S. Steel owed third-party motorists a duty when it allowed employees to work long hours for several days. The Court of Appeals found that U.S. Steel did not owe a duty to Miriam in this case. The Court used the factors out-

lined in *Webb v. Jarvis* for its analysis since this particular duty has not been articulated under Indiana law. First, there was no direct relationship between U.S. Steel and Miriam. Faught worked long hours but got a consistent amount of sleep and was able to take breaks if he ever got fatigued. U.S. Steel therefore had no reason to know that Faught was fatigued in a way that he could endanger third-party motorists. As far as foreseeability, since it is not to be narrowly applied, the Court found that it is foreseeable that a fatigued employee could cause injuries to a third-party motorist.

Finally, the Court found that the public policy factor weighed heavily in favor of U.S. Steel. The Court reasoned that Faught was in the best position to prevent injury to Miriam, as he was the one who would know if he was too fatigued to drive, not U.S. Steel. Faught was also the one who controlled when and how long he worked and when and how long he slept. Requiring an employer to determine when an employee was too fatigued to drive home would place too substantial a burden on that employer, the Court found. So, weighing the three *Webb v. Jarvis* factors, the Court of Appeals found that summary judgment was properly entered in favor of U.S. Steel.

KeyPoints: (1) When a duty is not articulated under Indiana law, courts will use the factors outlined in *Webb v. Jarvis* to determine whether a duty exists; and (2) employers do not owe a duty to third-party motorists for actions taken by fatigued employee drivers after work.

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EMPLOYMENT-RELATED EXCLUSION

Peerless Indem. Ins. Co. v. Moshe & Stimson, LLP, et al.

Indiana Court of Appeals, December 30, 2014

Sarah Moshe and Justin Stimson are siblings who owned a law firm together. Sarah decided to leave the firm, and when she told Justin, he refused to dissolve the partnership, seized control of the firm's assets, refused to pay Sarah her regular income, refused to turn over client files and certain person property of Sarah, and "began making 'accusations about [Sarah's] personal integrity and her professional competence.'" Sarah filed suit against Justin for defamation.

Justin then made a claim under the firm's insurance policy with Peerless for defense and indemnification. Peerless sought a declaratory judgment that it did not have to defend or indemnify Justin, arguing that since the allegations in Sarah's complaint were employment-related practices, they were excluded from coverage under the policy's relevant exclusionary clause. Justin responded that Sarah had been a partner at the firm, not an employee, so the alleged defamation was not employment-related. The trial court ultimately granted Justin's motion to dismiss and ordered Peerless to indemnify and defend Justin in the lawsuit against his sister. The trial court reasoned that because Sarah and Justin were partners and not employees of the firm, and because Sarah no longer was with the firm, the exclusion did not apply.

The Court of Appeals reversed the trial court's decision. The Court reasoned that whether or not Sarah was an employee of the firm was a red herring and the real issue was whether Justin's alleged actions were "employment-related." Since Justin's actions were related to Sarah's job, they fell under the employment-related exclusion in the insurance policy. Additionally, the Court noted that the policy was intended to protect the firm against suits from third parties, not suits brought between the siblings. Since the determination was made that the policy unambiguously excluded coverage, the trial court was reversed and summary judgment was issued in favor of Peerless on the issue of coverage.

KeyPoints: Employment-related exclusion will prevent coverage for suits brought between

partners in a firm in addition to suits brought by third parties, and even extends beyond termination of the partnership. This is a very broad application of the exclusion.

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GENERAL CONTRACTOR LIABILITY

Daniel Lee, et ux. v. GDH, LLC

Indiana Court of Appeals, January 22, 2015

Daniel Lee was injured while working as a plumber at a construction site. GDH was the construction manager for the project. While Lee was working on the project, there was a gas explosion while the gas company was performing an air test to detect leaks in the gas lines. Lee and his wife sued several companies involved in the construction project, and all but GDH were ultimately dismissed. GDH moved for summary judgment, and the court granted the motion. The Court of Appeals affirmed the entry of summary judgment in favor of GDH.

The primary issue in this case was what duty of care GDH, as the construction manager, owed to Lee, who was the employee of an independent contractor. GDH's contract with the owner of the project stated GDH's safety responsibilities were limited to review the safety programs for the various contractors and coordinating them. The contract further provided that GDH would not have direct control over acts or omissions of the contractors, except to the extent it was obligated to stop any work that was unsafe or hazardous. Therefore, the Court found GDH contractually disclaimed any responsibility for the safety of the employees of the contractors, and the contractors were responsible for the safety of their employees.

Lee argued that even if GDH did not contractually assume a duty of care, GDH still gratuitously assumed a duty of care in the course of managing the construction project. However, the Court pointed out that the project owner required the contractors to comply with a safety compliance program, not GDH. Also, Lee's other arguments (*e.g.* GDH was contractually obligated to review the contractors' safety programs, and GDH had a safety coordinator that held weekly safety meetings) were unpersuasive. As to those arguments, the Court stated that a request for a copy of a safety program does not equate to an assumption of an additional duty. Likewise, compliance with a contractual obligation to the owner of the project did not indicate an assumption by GDH of an additional duty of care.

KeyPoint: A general contractor typically will not be responsible for injuries sustained by the employees of independent contractors. However, there are several exceptions to this rule, including a gratuitous assumption of the duty of care. In those instances, it is important to look at exactly what was required of the general contractor by its contract with the project owner.

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KNOWN LOSS DOCTRINE

Thomson. Inc. v. XL Insurance America, Inc., et al.

Indiana Court of Appeals, December 16, 2014

Thomson acquired General Electric's consumer electronics business in 1987, which included factories in Taiwan and Circleville, Ohio. At that time, assessments showed environmental contamination in the form of chlorinated solvents in Taiwan. However, there was no statute at the time authorizing Taiwanese agencies to impose retroactive liability on former owners.

In 2000, Taiwan passed a new statute, giving the environmental authorities the power to impose retroactive liability for environmental contamination. Taiwan issued an order, based on that statute, for cleanup of contaminated groundwater related to the Thomson factory. Thomson notified its carriers of the claim in 2008.

The Ohio Environmental Protection Agency notified Thomson in 1994 of contamination and entered into a Consent Decree, but the Circleville factory was not included in the Decree, even though Thomson was aware of the contamination at Circleville. In 2011, OEPA ordered additional investigation at Circleville, and found contamination there.

In the ensuing coverage litigation, the trial court granted summary judgment to the carriers under the known loss doctrine, which essentially says that "one may not obtain insurance for a loss that had already taken place."

On appeal, the question was what constitutes a "known loss." The carriers argued that these were actual losses at the inception of the policies, even if the insured had no *legal liability*. But the Court of Appeals reversed, finding that there was no "loss" until there was legal liability for the loss, which in each case occurred after the inception of the policy, when the Taiwan government changed its law, and the OEPA conducted further environmental investigation at Circleville.

KeyPoint: This decision significantly narrows the known loss doctrine in Indiana. While the Taiwan portion of the decision is not too surprising, it is remarkable that the Court held that contamination Thomson knew about since 1987 at Circleville was not "known" because it was not included in the first Consent Decree, even though Thomson should have known it was a matter of time before Circleville would be subject to cleanup.

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PREMISES LIABILITY: OUTSIDE DISPLAYS

Sharon Handy v. P.C. Building Materials, Inc.

Indiana Court of Appeals, November 19, 2014

Handy entered P.C. Building Materials' store property while it was open for business. A store employee directed Handy to a display of granite countertops outside the store, which were leaning against the outside wall of the store. Handy moved some of the countertops to take some rough measurements, and then she left the store. The next day, Handy returned to the store to take more precise measurements. However, the store was closed when Handy arrived since it was a Sunday. But, since the granite countertops were still outside, she decided to proceed with taking her measurements. In the process of moving one of the countertops, though, two of the slabs of granite fell over on to Handy's foot, causing an injury to her toe.

Handy sued P.C. Building Materials for negligence, and P.C. Building Materials ultimately moved for summary judgment on the grounds that Handy was a trespasser at the time of the incident, or at most was a licensee, and therefore there was no breach of any duty owed to Handy. The trial court granted the motion, but the Court of Appeals found there were genuine issues of material fact that remained for the trier of fact to determine, and reversed.

At issue was the status of Handy while on P.C. Building Materials' premises, and the corresponding duty of care. The trial court found Handy was a trespasser, and that even applying a heightened level of care owed to a licensee, the countertops did not constitute a latent defect that Handy would not have discovered. However, the Court of Appeals determined that Handy was not a trespasser based on the designated facts. The lack

of express verbal permission from P.C. Building Materials to enter the premises did not establish Handy was a trespasser. Simply because the store was closed when Handy entered the property is not dispositive as to her status, especially since P.C. Building Materials left the granite outside for the purpose of attracting business. Otherwise it should have moved the granite inside the store while it was closed.

As such, the Court found Handy was, at a minimum, a licensee with the privilege to enter the store's premises. The question then was whether Handy was an invitee, for which an even higher duty of care would have been owed to her. Based on the designated evidence, the Court was unable to determine as a matter of law whether Handy was invited to be on the store's premises, or was there by permission. For that reason, summary judgment was not appropriate.

P.C Building Materials also argued that, regardless of Handy's status, there was no breach of whatever duty was owed to Handy. However, the Court found reasonable people could differ as to whether the countertops posed a known or obvious danger to Handy. And, if Handy was an invitee as opposed to a licensee, there was a genuine issue of material fact as to whether there was a breach of that duty.

KeyPoint: A retail store that leaves merchandise on display outside the store's premises beyond business hours is still subject to liability for any injuries that may occur when customers inspect the merchandise.

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SCOPE OF THE MED MAL ACT

Preferred Prof. Ins. Co. v. Crystal West, et al.

Indiana Court of Appeals, December 16, 2014

Crystal West was seriously injured in a workplace accident when Michael, a co-worker, struck a cherry-picker truck West was riding, which caused her to fall 29 feet. At the time of the incident, Michael was taking narcotic pain medication for a back injury.

The Wests filed a lawsuit for declaratory judgment against Preferred Professional Insurance Company ("PPIC"), Hills Insurance Company ("Hills"), the Indiana Department of Insurance ("IDOI"), and the Patient's Compensation Fund ("PCF"), which sought a declaration that the Indiana Medical Malpractice Act ("MMA") did not apply to their claims of negligence against Michael's health care providers.

The Wests and PCF filed a motion for summary judgment seeking a determination that the MMA was not applicable to the Wests' case. PPIC and Hills filed cross motions for summary judgment arguing that the claims did fall under the MMA. The trial court granted summary judgment in favor of the Wests and PCF, and found the claims constituted common law claims for negligence, not medical malpractice. The Indiana Court of Appeals affirmed.

The test for MMA applicability is whether the claim is based on the health care provider's behavior or practices while acting in his capacity as a provider of medical services. The Court noted, however, that even under these guidelines the courts have struggled with the distinction between what does and does not fall under the MMA. A claim for ordinary negligence is one where the issues are capable of resolution without application of the standard of care in the local medical community.

As to this case, the Wests argued Michael's nurse did not provide proper precautions and warnings to Michael regarding his narcotics because she was not properly trained. Also, the Wests claimed the doctor's office's policies with regard to filing telephone messages were inadequate and improper.

The Court of Appeals found there was no exercise of professional medical judgment in the way that the doctor's office filed its telephone messages, and that this constituted a general negligence claim. As to the failure to provide proper warnings, the

Court stated this case was on the periphery of medical malpractice, turning on how the MMA defines a "patient," which is someone who receives or should have received health care from a health care provider. Consequently, the Court ultimately concluded that the MMA does not cover claims by third parties who have no relationship to the doctor or medical provider. The Court analogized it to a prior appellate decision in which a patient at a mental health facility shot and killed a third party. The decedent's estate's negligence claim against the facility was found to be a general negligence claim because the decedent was not a "patient" under the MMA's definition.

KeyPoint: A third party's negligence claim based on an action or inaction between a patient and a health care provider will likely fall outside the scope of the MMA, as the third party would not constitute a "patient" for the MMA to apply.

Also, the determination that the MMA does not apply is extremely significant to a plaintiff's claim. There is no cap on the recovery of damages for a general negligence claim. However, the MMA statutorily caps a plaintiff's recovery for a medical malpractice claim. Qualified health care providers are only responsible for the first $250,000 in damages, and the PCF pays any excess, not to exceed $1 million, for a total maximum recovery of $1.25 million.

A petition to transfer is pending before the Indiana Supreme Court.

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