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OUTRAGEOUS CONDUCT BY CLAIM INVESTIGATOR?



“How are you coming on that Proof of Loss?”

Possibly the most outrageous conduct by a claim investigator in a claim is found in an Alabama case, *Nat'l Sec. Fire & Cas. Co. v. Bowen*, 447 So.2d 133 (Ala. 1983), in which the investigators (1) took the plaintiff out into the woods, held a gun to his head, and threatened to kill him, (2) told the plaintiff he would look good next to his dead brother, (3) threatened to cut off the arms of the plaintiff's two small sons and kill them, (4) bribed witnesses, and (5) obtained an indictment against the plaintiff for arson and false pretenses based upon false evidence. No indication whether the investigators also used the Reid Method.

For the record, we do not endorse using such methods.

(Thanks to the “Coverage Opinions” blog of Philadelphia coverage attorney Randy Maniloff for the tip about the Bowen case.)

ATTORNEY-CLIENT PRIVILEGE

Purdue University v. Michael A. Wartell

Indiana Court of Appeals, March 24, 2014

Indiana University-Purdue University Fort Wayne Chancellor Michael A. Wartell filed a complaint against Purdue's president, France Cordova, alleging harassment and discrimination. Under Purdue's internal complaint process, a complaint is investigated by a Purdue employee who submits a report to a university official, who submits the report to and meets with a three-member panel. Upon request, the complainant and respondent may meet with the official and the panel. Within ten days of that meeting, the official must make a written determination of whether a violation of university policy occurred. Wartell was concerned that those involved in the process reported to Cordova.

To deal with this concern, Purdue's vice president for ethics and compliance wrote a letter to Wartell and Cordova, indicating that the University had offered to proceed with an independent investigator to thoroughly investigate the complaint. Both Wartell and Cordova agreed to the process, and a list of attorneys was presented to them to choose from. Wartell and Cordova agreed to John Trimble, who investigated and prepared his report.

After Trimble prepared his report, Wartell requested a copy of the report and any other document prepared by Trimble from Purdue's public records officer. Wartell's request was denied because the report was deemed prepared by Purdue's legal counsel. According to Wartell, this was the first time he was aware that Trimble was acting as Purdue's attorney, and he would not have spoken to him had he known he was acting in that capacity.

Wartell filed suit to compel Purdue to allow him to inspect or copy Trimble's investigation re-

port. After a hearing, a trial court determined that the principle of equity estops Purdue from asserting attorney-client privilege and the work-product doctrine. Purdue brought an interlocutory appeal, but the Court of Appeals affirmed the trial court.

The Court of Appeals held that although equitable estoppel is not a recognized exception to attorney-client privilege or the work-product doctrine, "equitable estoppel is available if one party, through its representations or course of conduct, knowingly misleads or induces another party to believe and act upon their conduct in good faith and without knowledge of the facts." Since Purdue told Wartell that Trimble was being appointed as an independent investigator and not its legal counsel, Wartell acted upon that belief. Additionally, Trimble never disclosed that he was Purdue's counsel, which the Rules of Professional Conduct would have required him to do. Since all of the facts in the record pointed to Trimble being an independent investigator, the trial court did not abuse its discretion in ruling that Purdue was equitably estopped from asserting attorney-client privilege and the work-product doctrine.

KeyPoint: Equitable estoppel can be used to prevent invoking attorney-client privilege and the work-product doctrine when a party has relied on the fact that a person has not been acting in his capacity as an attorney.

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FIFTH AMENDMENT IN CIVIL CASE

Joseph Hardiman, et al. v. Jason Cozmanoff

Indiana Supreme Court, March 12, 2014

Cozmanoff was charged with multiple crimes, including reckless homicide, as a result of a hit and run incident in which he struck and killed a pedestrian with his car and fled the scene. After criminal charges were filed, the estate of the pedestrian filed a wrongful death lawsuit against Cozmanoff. The estate then served Cozmanoff with written discovery, and noticed his deposition.

Cozmanoff had to choose between potentially implicating himself in his criminal case by providing sworn testimony in the civil case as opposed to refusing to provide the discovery responses in the civil case but risk the inference he was negligent as a result of this refusal. To avoid this situation, Cozmanoff moved to stay the civil case pending the outcome of the criminal case. The trial court granted a limited stay of written discovery, but still ordered Cozmanoff to answer the civil complaint within 30 days. After both parties moved for an interlocutory appeal, the Court of Appeals reversed the stay of discovery and affirmed the order to file the answer. The Indiana Supreme Court accepted transfer.

The Indiana Supreme Court found the trial court did not abuse its discretion in granting the stay of discovery. As the Court noted, if Cozmanoff asserted his 5th Amendment right to certain questions during a deposition in the civil case, but not to other questions, the prosecutor in the criminal case could decipher Cozmanoff's defense strategy to the criminal case. The Supreme Court further noted that the trial court had already said it had the authority to revisit the stay on discovery at a later date if it found the criminal case was lingering and creating undue delays of the civil case.

In addition, the Supreme Court upheld the trial

court's decision to order Cozmanoff to file an answer to the civil complaint. In support, the Supreme Court pointed to case law from other jurisdictions that had handled this type of situation in a similar manner, and therefore found no reason to say the trial court's decision constituted an abuse of discretion.

KeyPoint: Someone who is facing criminal charges and has been sued in civil court as a result of the criminal act can get a temporary reprieve from the civil case by obtaining a stay on discovery. However, this limited stay does not prevent the civil case from moving forward in other ways, such as requiring the defendant to respond to pleadings.

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FRIVOLOUS SUBRO CLAIM

State Farm a/s/o Burkhart v. H. H. Niswander

Indiana Court of Appeals, April 9, 2014

State Farm's subrogor, Kenneth Burkhart, parked his pickup truck in his garage. Shortly thereafter, he noticed smoke emanating from his garage. Fire spread from the engine compartment, and eventually caused extensive damage in the garage and house.

According to Burkhart, the last people under the hood of his pickup truck were employees in H.H. Niswander's dealership service department, who had performed an oil change on his truck about one week before the fire.

Two weeks after the fire, and ten months before State Farm filed a subro action, State Farm's origin and cause investigators concluded that the fire originated in the ignition as a result of oil leaking from the valve cover/gasket on the passenger's side

engine onto hot surfaces of the manifold.

More than two years after the fire, one of the State Farm origin and cause investigators testified that “I do not believe that the oil change in question had anything to do with the fire,” and that he did not believe that anything the dealership did caused or led to the cause of the fire. The investigator concluded it was due to a manufacturing defect.

On H.H. Niswander’s motion, the court dismissed the case, observing that State Farm “knew, prior to the filing of this suit, that [State Farm’s] experts were of the opinion that [H.H. Niswander] did not cause the fire.” The trial court also ordered State Farm to pay H.H. Niswander’s attorney fees.

The Court of Appeals affirmed both the dismissal and the award of attorney fees. The Court observed that despite having an adverse expert opinion long before filing suit, State Farm filed suit anyway, and did not voluntarily dismiss throughout extensive litigation and discovery, including two motions to compel against State Farm. The award of attorney fees was therefore appropriate.

KeyPoint: This decision highlights the importance of having appropriate supports, whether in a subro claim or otherwise, for your theory against any particular defendant; and conversely for the defendant, to consider a petition for attorney fees where such supports are obviously lacking.

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NEGLIGENCE CLAIMS NOT BARRED BY A RELEASE

*Jason Kramer, et ux. v. Catholic Charities of the Diocese of
Fort Wayne-South Bend, Inc.*

Indiana Court of Appeals, March 28, 2014

An unmarried and pregnant woman contacted Catholic Charities to arrange the adoption of her unborn child. She told Catholic Charities that one of two men was the father of the child, but she would not identify either of the men. The woman met the Kramers and she determined she wanted them to adopt her baby. She gave birth to the child on May 1, and on May 2, she signed the paperwork agreeing to the adoption. On May 2, the Kramers and an adoption specialist with Catholic Charities signed a release, indicating that they understood that the placement was at-risk and subject to termination, and that the father of the child may possess and/or exercise certain legal rights. On May 3, the Kramers took the baby home.

On May 25, a family services supervisor with Catholic Charities contacted the Indiana State Health Department to determine if anyone claiming to be the baby’s father had registered with the putative father registry. The administrator of the putative father registry executed an affidavit stating that no one had registered and no paternity determination was on file regarding the baby. On June 1, the family services supervisor contacted the Health Department a second time to check the putative father registry. The administrator of the putative father registry discovered that on April 27, someone had registered as the baby’s father. The baby’s mother confirmed that he was most likely the baby’s father. The Kramers filed a petition to adopt the baby, but the father filed a motion to contest the adoption. He later proved his paternity and requested custody. On December 23, the trial court granted custody of the baby to the father.

The Kramers filed a complaint against Catholic Charities. The Kramers argued that Catholic Charities was negligent when it failed to check the putative father registry before placing the baby with them. Catholic Charities moved for summary judgment, alleging that the Kramers signed a release. The trial court granted summary judgment in favor of Catholic Charities.

The Court of Appeals reversed and remanded. The Kramers presented evidence that Catholic Charities had a policy of checking the putative father registry twice before placing a child with a pre-adoptive family, and it did not do so before placing this baby with the Kramers. The Court held that since the release did not explicitly release Catholic Charities for its own negligence, the release did not bar the Kramers' claims in this case.

KeyPoint: A release will not bar a subsequent claim for negligence if the release does not specifically state that it covers negligence.

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PIERCING THE CORPORATE VEIL

Country Contractors, Inc., et al. v. A Westside Storage of Indianapolis, Inc.

Indiana Court of Appeals, February 12, 2014

Country Contractors contracted to provide excavation services for A Westside Storage ("Westside"). Subsequently, Country Contractors sub-contracted most of the work, and eventually left the worksite without finishing the job.

Westside filed suit against Country Contractors and its two shareholders ("the Songers") for breach of contract. After a bench trial, the trial court entered judgment against Country Contractors, as well as against the Songers personally, for breach of contract and slander of title. Country Contractors and the Songers appealed, arguing the trial court improperly pierced the corporate veil. The Indiana Court of Appeals reversed and found insufficient evidence to pierce Country Contractors' corporate veil, but found there was sufficient evidence that Country Contractors slandered Westside's title.

To pierce the corporate veil (that is, to hold the shareholders of a corporation personally liable for the acts or debts of the corporation), there are several factors to consider. The primary factor the trial court relied upon was an undercapitalization of the corporation in relation to the risk taken by the corporation. The trial court also cited an absence of corporate records and a disregard for corporate formalities. However, the Court of Appeals noted that the fraud or injustice claimed by the injured party must be caused by or result from the misuse of the corporate form. Here, the Court found the Songers did not use the corporate form as an instrumentality to engage in misconduct for their own benefit. The Court of Appeals stated that Country Contractors' dwindling capital was not due to anything other than a decline in the economy, and therefore was not undercapitalized. Further, the fact that Country Contractors operated from one bank account, or that they kept bare bones corporate records, did not establish a causal connection between the corporation's record keeping and any claimed injustice.

The Court found there was sufficient evidence for the claim for slander of title, which requires false and malicious statement about the ownership of land that causes the landowner to suffer a pecuniary loss. Essentially, a mechanic's lien was filed by one of Country Contractor's subcontractors against Westside's property because Country Contractors had failed to pay one of the subcontractor's invoices. However, Country Contractors then filed its own lien claim against Westside's property for the same amount as the subcontractor. But, this lien claim was for work that Country Contractors did not perform and for an invoice Country Contractors itself had not paid. As such, the filing of an invalid claim was sufficient to support the finding of slander of title.

KeyPoint: Just because a corporation may be more of a family-run operation does not necessarily mean it is disregarding the corporate form to injure someone else. This requires a thorough examination of the harm being claimed by the plaintiff compared to the manner in which the corporate form is allegedly being disregarded.

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SOVEREIGN IMMUNITY

Veolia Water Indianapolis, LLC, et al. v. National Trust Ins. Co., et al.

Indiana Supreme Court, February 6, 2014

A fire occurred at a Texas Roadhouse restaurant in Indianapolis. The Indianapolis Fire Department arrived soon after the fire started, but was delayed in fighting the fire due to several frozen fire hydrants. As a result of the delay, the restaurant was destroyed. National Trust and FCCI Insurance Company both had insured the restaurant, and became subrogees after paying the restaurant pursuant to those insurance policies.

Veolia was responsible for operating the city's water pursuant to an agreement with the City of Indianapolis, which included maintenance of the city's fire hydrants and licensing access to the hydrants' water supply to private companies for commercial use. The insurance companies filed a lawsuit against the City and Veolia, and alleged the fire hydrants had frozen because the companies to whom Veolia had licensed access had failed to properly close the hydrants. The City moved to dismiss, claiming it was entitled to sovereign immunity both under common law and the Indiana Tort Claims Act ("ITCA"). Veolia filed a motion for judgment on the pleadings, arguing it was entitled to common law sovereign immunity. After the trial court denied both motions, the City and Veolia brought interlocutory appeals. The Indiana Court of Appeals reversed, and the insurance companies' petition for transfer.

The Supreme Court held the trial court was correct that Veolia cannot claim common law sovereign immunity and that the City cannot claim sovereign immunity under the ITCA. However, the Indiana Supreme Court found the City was entitled to common law sovereign immunity.

As to the City's claim of sovereign immunity under the ITCA, the Supreme Court said there was no immunity for a discretionary function because there had been no policy decisions made with regard to its water supply, and the City instead had simply failed to require Veolia to follow the terms of the agreement. However, as to the City's claim of common law sovereign immunity, the Supreme Court agreed that a governmental unit's failure to provide adequate fire protection is an exception to governmental tort liability.

In finding Veolia was not entitled common law sovereign immunity, the Indiana Supreme Court somewhat shifted course from prior case law that generally provided immunity to private companies who had contracted with governmental entities to perform typical governmental services. The Court agreed that providing immunity to a private, for-profit company essentially invites negligence because it creates a disincentive to, in this instance, maintain the fire hydrants. Additionally, the Court noted the distinction between a truly private company such as Veolia from companies that appear to be private but are actually operated by a governmental authority, which is in line with the current federal trend.

KeyPoint: A company that contracts with a governmental entity likely will not be subject to common law sovereign immunity if it is a private, for-profit company.

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WHO'S RESPONSIBLE FOR ANIMAL HOUSE?

Brian Yost v. Wabash College, Phi Kappa Psi Fraternity at Wabash College, Phi Kappa Psi Fraternity, Inc., and Nathan Cravens

Indiana Supreme Court, February 13, 2014

Brian Yost was a freshman at Wabash College and a pledge at Phi Kappa Psi fraternity who suffered injuries at the fraternity house during an incident that he alleged was hazing. Yost brought suit against the college, the local chapter of the fraternity, the national fraternity, and one of the fraternity members. The college and the two fraternity defendants moved for summary judgment, which was granted by the trial court. Yost appealed, and the Court of Appeals affirmed. The Supreme Court granted transfer.

In regard to the college, Yost argued that as the lessor, Wabash had a duty to control the conduct of Phi Psi and its members and to protect Yost from reasonably foreseeable tortious conduct. Yost also argued that Wabash had assumed a duty to protect Yost when it prohibited hazing on its campus. Finally, Yost claimed that Wabash was vicariously liable for the actions of Phi Psi. The Supreme Court, however, held that Phi Psi was in exclusive possession of the premises, so Wabash owed Yost no duty as the lessor. It also held that Wabash engaged in general educational outreach programs to discourage hazing, but that did not amount to assuming a duty to protect Yost from hazing. Finally, the Court found that there was no assent to an agency relationship between Wabash and the local fraternity that would give rise to vicarious liability. As a result, the Supreme Court upheld summary judgment in favor of Wabash.

As to the national fraternity, Yost argued that there was liability due to the breach of a general duty of care, a breach of an assumed duty arising from the national fraternity's affirmative steps to prevent hazing, and vicarious liability for the local fraternity's actions.

The Supreme Court upheld summary judgment for the national fraternity, as well. The Court held that under a *Webb v. Jarvis* analysis, there was no general duty owed to Yost from the national fraternity. The relationship between the national fraternity and an individual student was remote, and public policy does not favor recognition of a duty, undermining Yost's argument. The Supreme Court also found that, like with Wabash, the national fraternity engaged in general educational outreach programs to discourage hazing, but that did not amount to assuming a duty to protect Yost from hazing. Finally, the Court found that there was no breach of an assumed duty, as there was no agency relationship between the national and local fraternity; the everyday management of the local fraternity was not undertaken by the national fraternity.

However, the Court reversed summary judgment for the local fraternity chapter. Yost argued that the local fraternity assumed a duty to act with reasonable care. The Supreme Court held that under Restatement (Third) of Torts: Physical and Emotional Harm § 42, Yost could show at trial that the local fraternity failed to exercise reasonable care and thereby increased the risk of harm to Yost.

KeyPoint: When an act of hazing occurs in a fraternity house and during the course of traditions maintained at the local fraternity, the local chapter may be held liable for failing to exercise reasonable care if a member gets hurt.

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