The Tyra Law Firm, P.C.

Quarterly Newsletter

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Inside this issue:

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Welcome to Christie King!

The Tyra Law Firm is very pleased to announce that starting May 23, Christie A. King has joined us in an "Of Counsel" position. Christie and Kevin Tyra have known each other for some seventeen years.

Christie received her Bachelor of Arts in Criminal Justice from Indiana University in 1990 before obtaining her law degree from The John Marshall School of Law in Chicago in 1998.

Christie has been practicing general civil litigation in Indianapolis since 1998 and is a seasoned insurance defense trial attorney with over 30 jury trials to her credit, and numerous bench trials. Christie practices in the areas of general liability insurance defense, medical malpractice defense, insurance coverage, insurance fraud investigation, and appellate law.

Christie is admitted to practice before the Indiana Supreme Court and the United States District Courts for the Southern and Northern Districts of Indiana. She is a member of the Indianapolis Bar Association, the Indiana State Bar Association, the Defense Trial Counsel of Indiana, and the Defense Research Institute.

Christie and her husband, Steven, reside in Indianapolis. In her free time, Christie enjoys golfing, cheering on the Colts, traveling to see family and friends, and gardening.

ADMISSIBILITY OF HOSPITAL DISCOUNT

Parkview Hospital, Inc. v. Thomas E. Frost
Indiana Court of Appeals, March 14, 2016

Frost was injured in a collision and was treated at Parkview Hospital. He did not have health insurance at the time he sustained his injuries. Frost's mother, and guardian of his estate, signed an admission agreement that contained an "Agreement to Pay" provision. Parkview filed its hospital lien.

Frost argued under the Indiana Hospital Lien Act that Parkview's charges were unreasonable because the amounts were greater than amounts Parkview accepted as payment from other patients. Parkview filed and received a stay of discovery and then filed a motion for partial summary judgment seeking an order that its charges were reasonable. The trial court denied Parkview's motion, ruling that evidence of discounts provided to patients who either have private health insurance or are covered by government healthcare reimbursement programs is relevant to the determination of reasonable charges under the Act and are admissible.

On appeal, Parkview argued that Frost could not challenge the reasonableness of the charges because he had agreed to pay the amount charged. Frost argued that under the Act he could challenge those charges and was entitled to discovery from Parkview in relation to discounts. Frost relied on *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009), which determined that the defendant should have been allowed to introduce evidence of the discounted amount that was paid on behalf of the plaintiff in satisfaction of his account, an issue relevant to the determination of damages, to contradict the plaintiff's prima facie evidence.

In affirming the trial court's ruling, the Indiana Court of Appeals found that Parkview, in frustrating Frost's discovery efforts to challenge the lien amount, prevented him from meeting its prima facie evidence of reasonableness and introducing contradictory evidence. Further, the Court held that Frost should be allowed to discover that evidence and that such evidence was admissible under the Act.

KeyPoint: This case lends additional support to the holding in *Stanley v. Walker* in that, when there is no meeting of the minds as to healthcare charges, a defendant can introduce evidence of discounted amounts paid on behalf of a plaintiff, for the purpose of challenging plaintiff's claimed damages.

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ADMISSIBILITY OF IMMIGRATION STATUS

Noe Escamilla v. Shiel Sexton Co., Inc.
Indiana Court of Appeals, March 31, 2016

Noe Escamilla, an undocumented immigrant, was an employee of Masonry by Mohler working at a construction site where Shiel Sexton Company, Inc. was the general contractor. Escamilla was injured on the construction site and sued Shiel Sexton for medical expenses, lost wages, and future lost income.

Prior to trial, Escamilla filed a motion in limine to keep out evidence of his immigration status, and Shiel Sexton filed a motion to exclude Escamilla's expert witnesses that he proffered to support his claim for future lost wages. Shiel Sexton argued that that those experts would testify only about the income Escamilla could have made in the United States, and that said testimony should be limited to income he could earn in Mexico, his country of origin, as he had no legal right to reside or work in the United States. The trial court denied Escamilla's motion in limine and granted Shiel Sexton's motion to exclude Escamilla's expert witnesses. Escamilla filed this interlocutory appeal as to the trial court's order in limine that: 1) evidence of his immigration status would be admissible, and 2) expert testimony about future lost wages based on what he could have made working in the United States would not be admissible.

The Indiana Court of Appeals affirmed the trial court's rulings. In doing so, the Court declined the parties' requests that it make "sweeping pro-

nouncements" regarding the rights of immigrants; rather, it ruled narrowly on the evidentiary issues raised. As to Escamilla's motion in limine, the Court held that his immigration status was admissible because it was relevant to his claim for future lost income in that 1) his claim was for wages earned in the U.S., and 2) his immigration status left him at risk of deportation; moreover, the Court found that the prejudicial effect of evidence of his immigration status did not outweigh its probative value. As to Shiel Sexton's motion to exclude Escamilla's expert witnesses, the Court found that the experts, in reaching their opinion as to his future lost wages, had not given any consideration to his status as an undocumented immigrant or the impact that fact might have on his claim, and ultimately held that, because the proffered testimony was not adequately tied to the facts of the case, it was irrelevant and, therefore, not admissible.

KeyPoint: Generally, the undocumented status of a plaintiff would be inadmissible, except if the plaintiff is claiming loss of potential income, in which case any analysis of potential future income must consider the possibility of deportation.

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CRIMINAL RESTITUTION AND CIVIL COLLECTION

Freddie L. Webb v. Thomas A. Yeager
Indiana Court of Appeals, March 9, 2016

Yeager provided Webb with a check for the payoff balance of Yeager's vehicle and with the vehicle for Webb to sell. Webb executed the check but did not use it to pay off the balance, and Webb did not return the vehicle.

In the ensuing criminal action against Webb, Yeager submitted a restitution claim for $21,700. Webb pled guilty and was convicted of theft. He was sentenced to probation and to pay restitution to Yeager of $21,700.

A subsequent probation report incorrectly stated that restitution was only $1,107, and that the balance due was zero. The court therefore discharged the probation. In fact, Webb had made payments on the restitution totaling only $2,214.

A few days after the ten-year anniversary of the restitution order, Yeager filed a civil suit against Webb for enforcement of the $19,486 balance.

Thereafter, the prosecutor moved to correct the figures in the probation report that had been accepted by the criminal court, Webb's criminal attorney did not object, and the criminal court corrected the restitution figure to $21,700.

Eventually, the trial court in Yeager's civil suit entered summary judgment for Yeager based on the corrected restitution figure in Webb's criminal case.

The Indiana Court of Appeals affirmed. It observed that a restitution order is a judgment lien that may be enforced to satisfy any payment that is delinquent under the restitution order. Generally, judgment liens in Indiana expire after ten years, but judgments do not expire until twenty years. Therefore, even though Yeager filed suit just after the lien expired, he could still enforce the judgment. And Yeager was entitled to summary judgment because the restitution order, as corrected, was res judicata in Yeager's favor and against Webb.

KeyPoint: For subrogation purposes, make whatever efforts you can to include your subrogation as part of the sentence and restitution order in the liable party's criminal case. On the other hand, keep in mind that relatively few Indiana prosecutors are as likely to enthusiastically protect your claim in restitution as the prosecutor in this case. You may need to pursue a timely civil suit (usually no more than two years from date of loss) against the other party to protect your subrogation interest.

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HEALTH RECORDS STATUTE

HealthPort Technologies, LLC v. Garrison Law Firm, LLC

Indiana Court of Appeals, March 15, 2016

Garrison Law Firm, a personal injury firm in Indianapolis, requested healthcare information about six potential clients from their healthcare providers. This request was outsourced from the providers to HealthPort Technologies, a company that locates and copies medical records.

In the cases of these six patients, HealthPort was unable to locate any information. However, HealthPort still charged Garrison a $20 labor fee for each client. Garrison initially refused to pay, but later did pay under protest. Garrison then filed a "Class Action Complaint," alleging that HealthPort had violated Indiana Code § 16-39-9-4 when it charged a labor fee for searches that produced no documents. Indiana Code § 16-39-9-4 allows the Department of Insurance to set rates for copying records, and lists factors that should be considered in coming up with those rates, including labor costs, software costs for logging requests, and expense costs for copying requests. HealthPort filed for a judgment on the pleadings, arguing that there was no private right of action under that statute, and the trial court denied the motion. HealthPort then appealed.

The Court of Appeals reversed. Looking to the plain language of the statute, the Court found that the statute was designed to protect the general public rather than a private individual. The Court then looked to legislative intent of the statute. The Court found that the statute was located in Title 16 of the Indiana Code, entitled "Health." The enforcement mechanism of that section is located in § 16-19-3-18, and says that "such an action *shall* be brought in the name of the State." Based on this language, the Court held that both the plain language and the legislative intent behind the statute were clear, and that no private right of action was authorized.

Because there was no private right of action, the Court found that the trial court erred in denying HealthPort's motion for judgment on the pleadings.

KeyPoint: There is no private right of action under the Health Records Statute.

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RELIANCE ON ATTORNEY STATEMENTS

Edward P. Kramer v. Focus Realty Group, LLC

Indiana Court of Appeals, March 16, 2016

Focus Realty Group negotiated the purchase of real estate from Kramer under an option agreement that provided that the purchase price would be based in part on the rent then due under a lease on the real estate. Focus' attorney asked Kramer's attorney for the amount of the current monthly rent, as a basis for calculating the purchase price. Kramer's attorney provided a figure $400 higher than the actual rent. This resulted in an additional $40,000 to the price on the purchase agreement the parties signed.

Between the signing of the agreement and the closing date, Focus' attorney discovered the $400/month discrepancy. Focus was at a disadvantage because its financing depended on closing on the agreed-upon date, and Kramer insisted on closing on the agreed-upon date pursuant to the previously-agreed terms.

Under protest, Focus closed on schedule, pursuant to the previously-agreed terms. Focus then sued Kramer for breach of contract and fraud, seeking recovery of the $40,000 discrepancy. The trial court granted summary judgment for Focus on the breach of contract claim and awarded $40,000 plus prejudgment interest to Focus.

The Indiana Court of Appeals affirmed. It found that the option agreement was unambiguous about the basis for calculating the purchase price of the real estate, and that Focus' attorney was entitled to rely on representations by Kramer's attorney to calculate the purchase price. "A lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness." The Court rejected Kramer's argument that Focus' attorney was obligated to demand a copy of the current lease at the outset of their negotiations.

The Court further agreed with the trial court that when it realized the misrepresentation just before closing, Focus had two options: stop the deal and sue for specific performance on the option agreement; or mitigate its damages, close on schedule, and sue to recoup the overage, as it did.

KeyPoint: This case reminds us that we will likely be held to our representations in negotiations. Although this is especially so regarding attorney's representations, much of the same reasoning could be applied to the binding effect of representations by claim professionals. And on the other side, we are all entitled to hold claimant's counsel to the representations they make on behalf of their claimants.

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WHO IS A "RESIDENT" OF A "HOUSEHOLD"

Secura Supreme Ins. Co., et al. v. Diana Johnson

Indiana Court of Appeals, February 16, 2016

Tim and Sandra O'Brien lived in a house in Hobart, Indiana, but also purchased a home in Valparaiso, Indiana, with the intention to move there. After purchasing the Valparaiso house, they added it to their homeowner's insurance policy as a secondary residence. While they lived in Hobart, they used the Valparaiso address to send their children to schools. They rented the Valparaiso home to Sandra's sister, who had two dogs.

One day, one of the two dogs crawled under the fence and attacked Diana Johnson as she was walking by with her dogs. Both Johnson and her dogs were injured. She filed a complaint against Sandra's sister and the O'Briens. Johnson also filed a separate dec action, claiming that Sandra's sister was an "insured" under the O'Briens' homeowners policy with Secura.

Secura filed a motion for summary judgment, arguing that Sandra's sister was not an "insured" under the policy. Secura argued that because she rented the home and was not a member of the household, she did not qualify under the policy's definition. Johnson argued that because the policy did not define "household," the policy should be strictly construed against the O'Briens, making Sandra's sister an insured. The trial court granted summary judgment for Johnson. Secura appealed.

The Court of Appeals, however, determined that summary judgment was inappropriate in this situation and reversed summary judgment for Johnson. In coming to this decision, the Court observed that neither "household" nor "resident" were defined in the contract, so it applied Indiana common law to determine their meanings.

Secura urged the Court to adopt a requirement that members of a "household" have a dependent relationship of some sort, which would exclude Sandra's sister. The Court refused to do so, noting that under Indiana law, there is no "single, exclusive definition of the word 'household.'" Because of this lack of a clear definition, and Secura's failure to define the term in the policy itself, the Court found that Secura had not shown that Sandra's sister was not a member of the O'Brien household as a matter of law.

The Court similarly did not fully buy into Johnson's argument that ambiguous terms should always be strictly construed against the insurer. While this is the case when the language of the policy causes the ambiguity, it is not the case when extrinsic facts cause that ambiguity, as the Court found was the case here. The Valparaiso house was a "secondary residence premises" under the policy, and the O'Briens used their Valparaiso address to enroll their children in school. These facts allow for the interpretation that the O'Briens' household included the Valparaiso home. However, the O'Briens also rented the Valparaiso home to Sandra's sister, so it would be equally possible to find that the landlord-tenant relationship is incompatible with being a member of the insured household. The Court therefore found that there was a fact question as to whether Sandra's sister was a member of the O'Brien household.

KeyPoint: Whether a person is considered a resident of a household may be a question of fact for the fact finder to determine when the terms are not defined in the policy.

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WORKER'S COMPENSATION RETALIATION

Best Formed Plastics, LLC, et al. v. George Shoun

Indiana Court of Appeals, February 16, 2016

Best Formed Plastics (BFP) is a family-owned plastic fabricating company. Jimmy Stewart has a 50% ownership stake, his wife Jane has a 48% stake, and his son, Jeb, has a 2% stake. George Shoun was an employee of BFP since 2007. Prior to starting work, he received specific training on the operation of a CNC machine. Shoun had operated a double-table CNC machine, drove a truck for deliveries, repaired and maintained equipment, and designed programs for the machines. During the last few years of his employment, however, his primary job was operating an automatic thermoforming machine, in which he would lift 2- to 10-pound pieces of raw plastic material and place them into molds. He would also use a forklift to set 800-pound molds and remove them from the thermoforming machine.

In March 2012, Shoun fell and dislocated his shoulder while attempting to repair the thermoforming machine. After one week, he returned to work with restrictions. He performed light-duty work until May, when he was scheduled to take medical leave for shoulder surgery. Jane asked BFP's insurance agent for the best way to pay Shoun after his surgery to save BFP the most money. A few days before his surgery, Jeb accused Shoun of fooling the doctors and the insurance company, alleging that he was not as badly hurt as he claimed.

Shoun had the shoulder surgery and received payments through worker's comp. While he was off work, his worker's comp caseworker informed him that there was a CNC position available at BFP, and the work could be done within Shoun's medical restrictions. Shoun reported back to work in August.

A few days later, however, Jeb told Shoun that he had "cost the company a lot more than just production," and began to treat him poorly. Shoun reported this intentional harassment to one of the worker's comp adjusters who said she was going to make a call. The next day, Jimmy and Jeb confronted Shoun with two disciplinary incident reports written about him. Shoun disputed the reports but was told by Jeb that he had no choice but to sign them.

Shoun continued to work as a CNC operator until September, when Jeb told him that BFP would have no more work for Shoun the rest of the week. Jane spoke to the worker's comp adjuster the next day and told her that due to lack of work, BFP would not have Shoun come in the rest of the week, but if sales began to rise, they would bring him back. Shoun was the only one who was laid off, and BFP's tax returns actually showed a steady increase in sales. Jane also spoke to BFP's insurance agent and told him to cancel all of Shoun's insurance. Shoun was told the next week that there was no work for him. Jane told Shoun's girlfriend that Shoun's insurance had been cancelled because his employment had been terminated and he would never work there again.

Shoun filed a complaint against BFP, alleging that they had wrongfully terminated him in retaliation for making a worker's compensation claim. Jane posted to her Facebook page about it, prompting Shoun to file an amended complaint against BFP and Jane, adding claims for invasion of privacy by false light and defamation. BFP moved for summary judgment on the retaliatory discharge claim. The motion was denied. At trial, the jury found for Shoun on the retaliatory discharge claim, awarding him $337,680 in compensatory damages and $50,000 in punitive damages; found for BFP and Jane on the defamation claim; and found for Shoun on the invasion of privacy by false light claim, awarding him no compensatory damages, but $25,000 in punitive damages. BFP and Jane appealed.

The Court referred to the three-step approach to a retaliatory discharge claim: 1) the employee must prove by a preponderance of the evidence a prima facie case of discrimination; 2) the burden shifts to the employer to articulate a nondiscriminatory reason for the discharge; and 3) if the employer does so, the employee has the opportunity to show that the reason cited is a pretext. BFP argued that the analysis should stop at Step 2. The Court disagreed and held that it would be contrary to public policy to hold that an employer could not fire an employee for filing a worker's compensation claim, but an employer could fire an employee for the inability to return to his job due to the injuries that are a basis for his worker's compensation claim. The trial court did not err in entering judgment in favor if Shoun on the retaliatory discharge claim.

KeyPoint: Firing an employee because he cannot return to his pre-injury job, or who is costing the company money, because of ongoing injuries from a worker's compensation claim may be considered retaliatory discharge.

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Best Wishes to Jerry Padgett

In April, Jerry Padgett informed the firm that he would be leaving to take a position with The Taylor Law Firm, just down the street from us on the northwest side of Indianapolis.

We wish Jerry all the best in this next step in his legal career.

Christie King (see the front page) will be taking over Jerry's caseload.

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