The Tyra Law Firm, P.C.

Quarterly Newsletter

Volume 9, Issue 2

Winter 2016

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Super Lawyers

Congratulations to Kevin on SuperLawyers Selection

The recently-published list of 2016 SuperLawyers for Indiana includes Kevin Tyra, in the category of Civil Litigation Defense.
SuperLawyers is limited to the top 5% of Indiana lawyers.

CONTRACT INTERPRETATION: E-MAILS

Sara Ellison v. Town of Yorktown, Indiana

Indiana Court of Appeals, December 4, 2015

The Town of Yorktown sought to appropriate some easements on Ellison's property that would allow it to build a storm sewer and a recreational trail. In settlement negotiations arising from condemnation proceedings, Ellison requested that the storm sewer be moved to a different part of her property, but said nothing about the recreation trail. Counsel exchanged a series of e-mails regarding the specifics of where and how the storm sewer would be located, as well as the price the Town would pay Ellison. Nothing was discussed regarding the easement for the trail. Over the course of several e-mails, counsel were able to come to an agreement on the storm sewer and trail easements. Ellison executed the easements for the storm sewer, but not the trail easement. A few weeks later, counsel spoke on the phone, and a letter was sent to memorialize the conversation. In this letter, Ellison's counsel asked for the release of the payment from the Town, and stated Ellison was still waiting to discuss the trail easement with her accountant. The Town subsequently sent the check to be held in trust until Ellison executed the trail easement. A week later, though, Ellison's counsel wrote another letter describing several additional changes she wanted to make to the trail easement. As a result, the Town proceeded with the condemnation proceedings, and filed an amended complaint arguing that Ellison breached her agreement with regard to the trail easement.

The Town moved for summary judgment, and sought damages for various costs the Town was forced to incur due to the inability to construct the trail at the same time they completed the storm sewer drain. The trial court granted the motion, and the Court of Appeals affirmed.

The Court noted there was an offer and an acceptance of that offer to support a contract between Ellison and the Town. While some of the multiple e-mails between counsel constituted counteroffers to the storm sewer drain, none of them addressed the trail easement. There was valid consideration to support a contract, as there was a promise to pay Ellison the agreed-upon amount, an agreement to relocate the storm sewer at Ellison's request, and certain assurances were provided by the Town with regard to the construction of the storm sewer.

In addition, the Court found there was mutual assent to the terms of the contract. Ellison's counsel proposed certain terms and stated Ellison would execute all of the easements if the Town agreed, which it did. Ellison had not originally executed the trail easement due to a disagreement on its terms, but only because she was waiting to discuss it with her accountant, which was a manifestation of an agreement to the terms. Ellison, therefore, breached the settlement agreement by failing to execute the trail easement.

Finally, as for Ellison's argument that the agreement did not satisfy the Statute of Frauds, the Court noted that terms of a contract do not need to be specified within the writing itself. Instead, the terms can be extracted from written communications between the parties. The Court found the exchange of letters between counsel for the parties satisfied the writing requirement under the Statute of Frauds.

KeyPoint: A contract can be enforced even though the terms of the contract may be spelled out over the course of several e-mails or letters.

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CONTRACTUAL INDEMNIFICATION OF KNOWN LOSSES

In re: Indiana State Fair Litigation

Indiana Supreme Court, January 28, 2016

The Indiana State Fair Commission manages the yearly Indiana State Fair. This includes other

events that occur at the Fair, including concerts. The Commission has used Mid-America Sound ("MAS") to provide equipment and services for these events, which typically consists of a temporary roof for the grandstand stage, speakers, and lights. During the previous 10 years of their relationship, the Commission and MAS had a standard routine where they would agree on the equipment to be delivered and the corresponding prices. After the Fair was over, MAS collected the equipment and submitted a blank claim voucher form with invoices for the rented equipment. After the Commission verified the invoiced items had been provided, it signed the claim voucher to authorize payment. This was the course of dealing over 100 times over this 10 year period.

In August 2011, a thunderstorm quickly approached the Fairgrounds just prior to the start of a concert. While MAS' on-site technicians worked to remove equipment hanging from their temporary roof, strong winds caused the roof to collapse, which killed seven people and injured many more. The victims filed multiple lawsuits against, among others, the Commission and MAS. While the lawsuits were pending, MAS sent a two-sided invoice for the lease of the collapsed roof, along with the one-sided claim voucher form, to the Commission. Above the Commission's signature on the voucher was a certification that "the attached invoice is true and correct" and "in accordance with contract."

In March 2012, MAS filed a third-party lawsuit against the Commission on the grounds that language on the back of the December 2011 invoice entitled MAS to indemnification from the Commission for MAS' own negligence with regard to the roof collapse. Both MAS and the Commission filed cross-motions for summary judgment. The trial court granted summary judgment for the Commission, but the Court of Appeals reversed and remanded on the grounds that a genuine issue of fact existed as to whether the Commission knowingly and willingly agreed to indemnify MAS for the roof collapse (*see our Spring 2015 Newsletter for the discussion of the Court of Appeals decision*). The Indiana Supreme Court accepted transfer, and affirmed the trial court's entry of summary judgement for the Commission.

While the Supreme Court noted that it is generally taken for granted that parties may bargain for indemnification of future acts of negligence, Indiana law had not yet addressed retroactive indemnification language. However, the Court noted several other states had addressed the issue, and found that the language must expressly, plainly, clearly, and unequivocally state that the indemnification is for a known loss.

Because it must be expressly written, the Supreme Court found that retroactive indemnification may not be inferred through the course of dealing between parties. It also rejected MAS' argument that the invoices from the previous year provided a recognition that the following year's rental would be subject to the same indemnification language.

KeyPoint: Retroactive indemnification is disfavored, and cannot be implied through the course of dealing between parties. Instead, it must be explicitly clear and unequivocal in the contract language that the indemnification is for a known and existing loss.

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CONTRACTUAL PROVISION FOR ATTORNEY FEES

Carole Storch as Pers. Rep. for the Estate of Charles Sindledecker v. Provision Living, LLC, et al.

Indiana Court of Appeals, December 23, 2015

Charles Sindledecker, who suffered from Alzheimer's disease, moved into Greentree at Fort Harrison when he could no longer take care of himself.

Sindledecker entered into a residence agreement that contained a clause concerning attorney fees. The clause stated, "In the event of any controversy, claim, or dispute between the parties hereto, arising out of or relating to this Agreement or the breach thereof, the prevailing party shall be entitled to recover from the other party reasonable expenses, costs, and attorney's fees."

During his time at Greentree, Sindledecker enjoyed spending time sitting in a chair by the fireplace in the common room. As his condition worsened, he became angry whenever he found other residents sitting in that chair, so Greentree removed the chair altogether. Sindledecker began standing or sitting on his walker by the fireplace, and Greentree staff would move him when they found him like this, realizing the danger this presented. One day, Sindledecker was found unresponsive on the floor by the fireplace with burns on his right arm. Greentree called 911. The paramedics took Sindledecker to the hospital, where he had his vitals checked and was discharged.

Two days later, Sindledecker was taken back to the hospital because his burn condition had worsened. He spent ten days in the hospital, required a skin graft, and his wounds did not heal for four months. As a result of this incident, Sindledecker lost mobility, became unable to walk, and required both a feeding tube and a catheter.

Sindledecker's daughter, Carole Storch, filed a complaint against Greentree on her father's behalf in January 2012. The complaint included claims for breach of contract and negligence for the fireplace incident. Less than two weeks before trial was to begin, Storch voluntarily dismissed the breach of contract claim. A jury found Greentree to be primarily at fault for $1,000,020 in damages. Storch petitioned for attorney fees. The trial court denied the petition, finding that the residence agreement was not at issue because the breach of contract claim had been dismissed.

The Indiana Court of Appeals reversed the trial court's decision. The trial court had found that the phrase "arising out of or relating to this Agreement or the breach thereof," only referred to claims for breach of contract. The Court of Appeals found this to be an incorrect interpretation based on the addition of the phrase "or the breach thereof"; the Court found that the contract was intended to cover more than just breach of contract actions.

The Court also examined the meaning of the word "relate." The dictionary definition indicates that things relate if they "have relationship or connection." While this is a broad definition, the Court explained that parties have the right to contract broadly.

Because the negligence claim occurred due to Sidledecker's residence at Greentree, and there would have been no residence absent the residence agreement, the Court found that the attorney fees clause was triggered and Storch was entitled to recover reasonable attorney fees. The Court also held that the issue of attorney fees did not need to be presented to the jury, because the issue did not become ripe for consideration until after the trial.

KeyPoint: "Relating to" is a broad term, and will be construed as such in the interpretation of a contract. Be aware of any contractual relationship between the parties that might trigger an attorney-fee award to the prevailing party.

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DRAM SHOP: SOCIAL HOSTS

F. John Rogers, as Pers. Rep. of Paul Michalik, et al. v. Angela Martin, et al.

Indiana Court of Appeals, December 14, 2015

Angela Martin and Brian Brothers lived together in a house owned by Martin. Brothers' co-worker Jerry Chambers attended a birthday party for Brothers at the house with Chambers' significant other Paul Michalik. Brothers bought a keg of beer with Martin's money, and set it up in the garage. Most guests served themselves from the keg, but at one point a pitcher was used to take beer from the keg to the basement. Martin also used the pitcher to take beer to the basement. Around 2:00 a.m., about 10 guests were left at the house, where they were playing cards in the basement. Martin went to bed, but was awoken around 3:30 a.m. by Brothers. Brothers stated that a fist fight started when he asked Chambers and Michalik to leave. He asked Martin for help in getting them to leave, but when they went down to the basement they found Michalik lying unconscious (although breathing) on the floor. Brothers and Chambers carried Michalik upstairs to leave, and Martin returned to bed. When Brothers came to bed, he said Chambers and Michalik still had not left. Martin told him to make sure they got into their car and left. A little while later, Michalik was found dead in Martin's yard.

The Estate contended Martin violated the dram shop statute by furnishing alcohol to Brothers, and that she failed to render aid to Michalik. Martin moved for summary judgment, which the trial court granted. The Court of Appeals reversed and remanded the case for further litigation.

Martin argued that she did not furnish alcohol to Brothers. The Estate argued that Martin's debit card was used to purchase the beer, and Martin had delivered a pitcher of beer to the basement, which it claimed created an issue of fact. The Court concluded the possibility that Martin served beer to Brothers was sufficient to raise a question of fact.

In addition, Martin argued she did not owe a duty to render aid to Michalik because the Restatement (Second) of Torts, which specifies circumstances in which a party has a duty to render aid, does not apply to a social host. The Court found, though, that an imposition of a duty on a social host is not excluded even though a social host is not specifically referenced in the Restatement. Because Martin saw Michalik when he was unconscious on the floor and had to be carried upstairs, the possibility of harm to Michalik was reasonably foreseeable. The Court further found that Martin's actions in leaving Michalik in the care of Chambers is also a question of fact to determine whether Martin breached any duty she owed to Michalik.

KeyPoint: Summary judgment is not appropriate in a dram shop liability claim where an individual furnishes an alcoholic beverage that an intoxicated person may have consumed. At a minimum, the possibility that the tortfeasor consumed the alcoholic beverage(s) provided by someone else is sufficient to defeat summary judgment. Also, simply being a social host does not automatically preclude the imposition of a duty to render aid.

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FRAUD INVESTIGATION AND BANKRUPTCY

Steven E. Dotlich v. Tucker Hester, LLC

Indiana Court of Appeals, December 31, 2015

Tucker Hester filed for bankruptcy on behalf of Dotlich. Eventually, Tucker Hester withdrew its Appearance on behalf of Dotlich in the bankruptcy case.

Dotlich filed suit against Tucker Hester, alleging malpractice throughout the bankruptcy case, starting with the filing of the petition. Tucker Hester argued, among other things, that Dotlich was judicially estopped from pursuing the claim because he did not list the claim as an asset in his bankruptcy case. The trial court granted summary judgment to Tucker Hester on this issue.

The Indiana Court of Appeals affirmed, holding that "a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends."

KeyPoint: It is notable that the Court stated this judicial estoppel rule in absolute terms, not qualified (as sometimes seen in other cases) by a question of whether the debtor had a furtive intent on the one hand, or the omission was just a misunderstanding on the other. It is common that a claimant will contend he low-balled or omitted assets based on advice of counsel.

Checking a property-loss claimant's past bankruptcy petitions frequently shows that a claimant who is now claiming the theft of, for example, $10,000 in jewelry she has owned for many years, had filed a bankruptcy petition two years ago attesting she owned no jewelry at all, or only $500 in jewelry. The *Dotlich* opinion gives SIU a strong legal basis for denying the claim on grounds of judicial estoppel.

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INDIANA TORT CLAIM ACT: VOLUNTEER AMBULANCE

Sharpsville Community Ambulance, Inc., v.

Cynthia Gilbert, et ux.

Indiana Court of Appeals, December 23, 2015

Sharpsville Community Ambulance, Inc. ("Sharpsville") is an incorporated, not-for-profit entity that operates an emergency ambulance service in Tipton County. It is run entirely by volunteers and performs only emergency services that originate from the county's emergency dispatch or 911 center. Sharpsville has only one ambulance. The County pays Sharpsville for serving as the community's primary emergency ambulance provider. Sharpsville charges for its ambulance runs to discourage unnecessary calls, but does not pursue collections if community members are unable to pay for the services provided.

In August 2011, Sharpsville responded to a call and started to take the patient to Howard Community Hospital. However, on the way there, the ambulance collided with a vehicle driven by Cynthia Gilbert in an intersection. The Gilberts filed a tort claim notice in January 2012, and filed their complaint in June 2013. The Gilberts filed a motion for partial summary judgment, arguing that Sharpsville was not entitled to ITCA protection. Sharpsville responded and filed a cross-motion for partial summary judgment, arguing that it did have protection of the ITCA. The trial court ruled in favor of the Gilberts.

On appeal, the Court upheld the trial court's decision that Sharpsville was not entitled to ITCA protection. The Court turned to the Indiana Supreme Court decision of *Ayres v. Indian Heights Volunteer Fire Department* from 1986. In that case, the Supreme Court held that the volunteer fire department was a governmental entity under the ITCA because "firefighting is a service that is uniquely governmental." Additionally, the Supreme Court found that the language used in the Indiana Code section dealing with volunteer fire departments made it clear that fire departments are instrumentalities of the local government.

In drawing a distinction between *Ayres* and the current case, the Court noted that there are many private companies in Indiana that provide emergency ambulance service, and if the provision of emergency medical services brought an entity under ITCA protection, "virtually every hospital, physician, and paramedic in Indiana would be covered by the ITCA." As a result, the Court decided that Sharpsville was more like an independent contractor who provided services to the community than a volunteer fire department.

However, the Supreme Court decided another case, *Greater Hammond Community Services v. Mutka* after deciding *Ayres* and the subsequent legislative changes to the ITCA. In *Mutka*, the Supreme Court stated that "[a]n entity does not become a 'public agency,' thus coming within the purview of the statutes in question, by contractually *agreeing* to submit to [control by another

governmental entity]. Rather, an entity is 'subject to' those procedures only if *compelled* to submit by statute, rule, or regulation." Since Sharpsville voluntarily entered into the contract with Tipton County, and was not compelled to provide the emergency ambulance services, it was not a governmental entity and therefore not subject to ITCA protection.

KeyPoint: A private, volunteer emergency medicine provider is not entitled to ITCA protection, as the service it provides is not "uniquely governmental."

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VICARIOUS LIABILITY

Stacy Knighten v. East Chicago Housing Authority, et al.

Indiana Supreme Court, December 8, 2015

The East Chicago Housing Authority operated the West Calumet Complex, a federal HUD property located in East Chicago. It entered into a contract with Davis Security Services to provide security. One of Davis' employees was Donnell Caldwell, who was assigned to work at the guard shack at the front entrance. Caldwell had been romantically involved with a resident, Stacy Knighten, before he was employed by Davis.

One night while on duty, Caldwell allowed Knighten and her friend to take his car to the liquor store. When Knighten returned, she and Caldwell argued about her having spent all his money and driving drunk. Caldwell told Knighten to get out of his car and walk home. Caldwell then entered the guard shack, got his handgun, set the gate to allow traffic in automatically, and drove Knighten's friend home.

When he returned to the guard shack, Knighten was waiting for him and the two got into an argument. There is a question as to where in relation to the guard shack the confrontation occurred, but Knighten damaged the entrance gate during the argument. Eventually, Knighten turned away to walk home, and Caldwell fired a shot at Knighten, hitting her in the back and paralyzing her from the waist down.

Knighten filed a complaint against the Housing Authority, Davis Security, and Caldwell, alleging that Caldwell negligently discharged his firearm during the course of his employment. Davis and the Housing Authority filed a motion for summary judgment, which was granted and upheld by the Court of Appeals. On transfer, Knighten was only challenging the trial court's entry of judgment in favor of Davis Security.

The Supreme Court reversed the trial court's decision, finding that there was a question of fact as to whether Caldwell was acting within the scope of his employment at the time of the shooting. In order to be "within the scope of employment," the act must be "incidental to the conduct authorized or it must, to an appreciable extent, further the employer's business." Davis argued that Caldwell's duties *included* traffic control, and in an affidavit from Caldwell, he stated that his position "only allowed [him] to monitor traffic." The Court found that these two pieces of information created a conflict between what Caldwell's duties were. If his duties only included traffic control, then he would not have been acting within the scope of his employment when he fired his gun. However, if his duties *included* traffic control, he could have had many other responsibilities. Additionally, in the contract between Davis Security and the Housing Authority, security was to be armed and deter or minimize risk of loss.

This discrepancy between being armed and deterring risk of loss and only monitoring traffic was enough that the Court found there to be question of fact as to whether Caldwell was acting within the scope of his employment when he fired his weapon. Since this issue is one for the fact finder, the Court held that summary judgment was inappropriate and remanded the issue for further proceedings.

KeyPoint: Whether an employee is acting within the scope of his employment during a tortious act may be a question of fact for the fact finder to determine.

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Defense Verdict in Rear-End Collision

Elizabeth Steele and Kevin Tyra obtained a defense verdict for their client after a three-day jury trial on January 25-27 in Hamilton Superior Court (Noblesville, IN, just north of Indianapolis) in *Acker v. Sanders*. Their client acknowledged the low-speed impact occurred when she looked away, and did not stop in time.

However, the defense's biomechanical expert showed that the impact was no more than 4.4 mph, which would not have caused the severe, chronic neck and back pain the husband-and-wife plaintiffs were claiming. The plaintiffs did themselves no favors by claiming on direct examination that their necks and backs were fine before the accident, only to have to admit on cross examination that their chiropractic records showed treatment for chronic pain for years leading up to the date of the accident.

If you would like more information about anything regarding this case, and particularly use of a biomechanical expert, please contact Elizabeth or Kevin.

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