The Tyra Law Firm, P.C.

Quarterly Newsletter

Summer 2016

Volume 9, Issue 4

JUSTICE GEOFFREY SLAUGHTER

Geoffrey G. Slaughter was sworn in as an Associate Justice of the Indiana Supreme Court in June, 2016. Before his elevation to the Court, Justice Slaughter litigated complex business disputes with the Indianapolis firm of Taft Stettinius & Hollister.

Justice Slaughter replaces the retired Justice Brent Dickson. While Justice Dickson has many outstanding qualities, he was probably the most liberal justice on the Indiana Supreme Court. Therefore, while it remains to be seen how Justice Slaughter performs on the Court, his appointment will almost certainly shift the Court, which is already fairly conservative, in a somewhat more pro-business direction.

Inside this issue:

Contact Information

The Tyra Law Firm, P.C.
9100 Purdue Road, Suite 119
Indianapolis, Indiana 46268
Phone: 317.636.1304
Fax: 317.636.1343
Website: www.tyralaw.net
E-mail: kevin.tyra@tyralaw.net

VICARIOUS LIABILITY

Sony DADC US Inc. v. Mark Thompson
Indiana Court of Appeals, July 13, 2016

Thompson worked at the Sony plant as a security guard through an independent contractor. While Thompson was walking across the Sony parking lot, Bradley Brown struck and injured him with his vehicle. Brown had clocked out from his shift at Sony, but he was on his way to deposit some personal recycling items in a recycling depository maintained on the premises by Sony for the employees' use. Sony had implemented the employee recycling program as part of its effort to become ISO 14001 certified.

The trial court found as a matter of law that Sony was vicariously liable because Brown was within the scope of his employment at the time of the accident.

The Indiana Court of Appeals reversed. After a detailed discussion about vicarious liability and scope of employment, the Court held that a fact question remained about the inferences to be drawn from the evidence, particularly the facts that Brown had clocked out, but he was on the way to use an on-premises facility which may have been considered to serve a business purpose of his employer. The jury would have to weigh the extent to which Brown was to further his employer's business versus an intention to benefit himself.
owever,

KeyPoint: In many instances, such as this one, the determination of whether the employer is vicariously liable for the employee's actions is very fact-sensitive, and likely will need to be determined by a jury.

Kevin C. Tyra
kevin.tyra@tyralaw.net

SETTLEMENT BY CO-DEFENDANT

David Shelton v. Kroger Ltd. Partnership I
Indiana Court of Appeals, August 4, 2016

Shelton, personal representative of the Estate of Sharon Clearwaters, brought claims against Clearwaters' physician and Kroger, which had filled a prescription the physician wrote for Clearwaters, which allegedly caused a fatal cardiopulmonary arrest. Because the physician was covered by the Indiana Medical Malpractice Act (which is exempt from the Indiana Comparative Fault Act), but Kroger was not, the claim against the physician was governed by contributory negligence principles (including joint and several liability), but the claim against Kroger was governed by comparative fault principles.

The physician settled with Shelton, and the case proceeded against Kroger. Normally, under the Comparative Fault Act, the recourse for any remaining defendant is to identify the settling party as a "non-party" for purposes of comparative fault allocation at trial. However, Kroger claimed a credit or set-off for the amount of the physician's settlement with Shelton, focusing on the joint-and-several principles governing the claim against the physician. The trial court granted partial summary judgment to Kroger on that theory.

The Indiana Court of Appeals reversed. A defendant under the Comparative Fault Act does not get a credit or set-off for the settlement of a co-defendant. Kroger's remedy is to argue to the jury at trial that a percentage of fault should be allocated against the physician, thereby presumably reducing the proportion of the plaintiff's total damages ultimately assessed against Kroger.

KeyPoint: We are sometimes asked about our client/insured getting a credit or set-off when a co-defendant settles with the plaintiff. It is settled Indiana law that when both defendants are covered by the Comparative Fault Act, the only remedy for the remaining defendant is to amend its affirmative defenses to identify the settling defendant as a "non-party" for allocation of fault. As this case illustrates,

things get more complicated in hybrid cases in which one defendant is covered by comparative fault principles, but another, such as a physician or a governmental entity, is governed by contributory negligence principles. Generally, the comparative-fault defendant is still governed by comparative fault principles even in a hybrid case.

Kevin C. Tyra
kevin.tyra@tyralaw.net

CONFLICTING POLICY PROVISIONS

State Farm v. Carol Jakubowicz, et al.
Indiana Supreme Court, July 26, 2016

On August 2, 2007, Carol Jakubowicz, along with her two sons, Jacob and Joseph, were seriously injured in a car accident with Ronald Williams. The Jakubowiczes were insured by State Farm. Both the Jakubowiczs and State Farm filed suit against Williams for injuries and property damage from the accident.

In December 2009, Carol put State Farm's counsel on notice that she wanted to pursue an underinsured motorist (UIM) claim. She did not file a motion for leave to amend her complaint until March 2011, which was more than three years after the accident. However, the trial court granted her motion for leave on July 27, 2011.

State Farm filed for summary judgment, arguing that the UIM claim was barred by the three-year statute of limitations period set out in the policy. The trial court denied State Farm's motion. The Court of Appeals accepted State Farm's interlocutory appeal. The Court of Appeals reversed the trial court, concluding that the policy language was unambiguous and that Carol failed to comply with the three year limitation period. The Indiana Supreme Court affirmed the trial court's denial of State Farm's motion for summary judgment.

In reaching its decision, the Court noted two conflicting provisions within Carol's policy – one stated that she had to bring a UIM claim within three years; the other said that she was required to wait to bring legal action until there was full compliance with all provisions of the policy, and one such provision was that the policyholder must fully exhaust the underinsured motorist's coverage before State Farm will pay. Since there was an exhaustion provision as well as a three year limitations provision, the Court found that the provisions were in direct conflict with each other and therefore ambiguous and construed in favor of the insured.

The Court reasoned that the two provisions essentially required Carol to file suit and prohibited her from filing suit at the same time. State Farm argued that "full compliance" did not include exhaustion, and that the exhaustion provision only affected when it would pay its insured, not when suit could be filed. The Court did not buy into either of those arguments, noting that prior case law had spoken on the issue of full compliance and exhaustion, and that payment and filing suit are not as separate as State Farm argued. The Court also reiterated what the trial court noted: "[Y]ou could have easily just written the policy to say if there's an uninsured or [UIM] claim arising out of any incident, you must bring a cause of action against us in three years, period. End of story. Doesn't have to say anything else but that. But, you chose to add all these other conditions and limiting factors."

Because of the additional conditions and limiting factors, the Court found that State Farm's motion for summary judgment was properly denied.

KeyPoint: Exhaustion provisions and limitation periods for UIM claims in insurance policies are often found to be in conflict with each other, and therefore ambiguous and unenforceable.

Elizabeth H. Steele
elizabeth.steele@tyralaw.net

INDEMNIFICATION CLAUSES

BC Osaka, Inc., et al. v.
Kainan Investment Groups, Inc.
Indiana Court of Appeals, June 27, 2016

BC Osaka, Inc. and City Inn, Inc. were tenants ("Tenant") of Kainan Investment Groups, Inc. ("Landlord"). The parties entered into a lease that gave the tenants a single-story building that was surrounded by parking spaces.

On July 1, 2012, Angelica Magallanes met her family at BC Osaka. As Magallanes was walking into the restaurant, she tripped on a rod sticking out of a cement bumper in the parking lot. She filed a complaint for her personal injuries against both the Landlord and Tenant within the statute of limitations. The complaint alleged that the Defendants owed a duty of care to the customers and were responsible for maintaining and inspecting the parking lot.

The Landlord filed a cross-claim against the Tenant, alleging that the Tenant had a contractual obligation to defend, indemnify, and hold harmless the Landlord. The Tenant denied these obligations. The Landlord then filed a motion for summary judgment, which the court granted, requiring the Tenant to defend, indemnify, and hold harmless the Landlord under the lease. The Tenant appealed.

The Court of Appeals reversed. In determining whether the hold harmless provision was valid, the Court engaged in a two-step analysis. The first step looks at the language of the indemnification clause, which must "expressly state in clear and unequivocal terms that negligence is an area of application where the indemnitor has agreed to indemnify the indemnitee." Looking to the language of this particular lease, the Court found that the language was sufficiently clear that the indemnification clause applied to negligent acts.

The second step determines to whom the indemnification clause applies. In this lease, the Court found that the language requires the Tenant to indemnify the Landlord for the Tenant's negligence, but it was not clear as to whether indemnity also applied for the Landlord's own negligence. As a result of this lack of clarity in the language, the Court held that the indemnification clause was inapplicable in this case.

The Court went on to say that even if the indemnity clause were applicable, the Landlord had expressly reserved the right to control and maintain the parking areas. The lease explicitly allowed the Landlord to determine how to maintain the parking area, establish rules for the parking area, change the designated parking areas, withdraw parking areas from the Tenant, and remove Tenant's automobiles from any area not designated for parking. With these provisions in the lease, the Court found that this would at the very least create a material issue of fact as to whether the Tenant had full control and possession of the leased premises, so summary judgment was inappropriate.

KeyPoint: In order for an indemnity clause to be enforceable in negligence actions the language must: 1) clearly state that the clause applies to negligent acts; and 2) clearly state whose negligent acts it will apply to.

Elizabeth H. Steele
elizabeth.steele@tyralaw.net

CONTRIBUTORY NEGLIGENCE AND SAFETY VIOLATIONS

Barbara Hill, et al. v. Erich E. Gephart, et al.
Indiana Court of Appeals, May 6, 2016

Deputy Gephart, driving a Marion County Sheriff's Department vehicle, struck and injured Charles Hill as he was walking with his daughter on the side of the road with his back to traffic. Immediately prior to being struck, Mr. Hill's daughter was walking in front of him as he talked on his cell

phone. The police department investigated the collision and determined that Mr. Hill was "walking westbound at the edge of the westbound lane at the time of the crash," however, "could not determine the exact location of [] Mr. Hill at the time of impact."

The Hill family (the "Hills") filed a Tort Claim, as well as a Complaint in Marion Superior Court, against the defendants alleging that they were negligent when the deputy struck Mr. Hill. Defendants moved for summary judgment arguing that the deputy was not negligent and that Mr. Hill was contributorily negligent, which was the proximate cause of his own injuries. The trial court granted defendants' motion for summary judgment and the Hills appealed.

On appeal, the Hills argued that the trial court erred in granting defendants' motion for summary judgment because defendants' affirmative defense that Mr. Hill was contributorily negligent was an issue to be decided by a trier of fact, not as a matter of law. The Hills conceded that Mr. Hill violated Indiana Code section 9-21-17-14 when he walked on the right hand side of the road. That statute reads, in pertinent part, as follows: "If the roadway is two-way, the pedestrian shall walk only on the left side of the roadway."

The Indiana Court of Appeals defined contributory negligence as "the failure of a person to exercise for his own safety that degree of care and caution which an ordinary, reasonable, and prudent person in the similar situation would exercise." The Court stated that "generally, contributory negligence is a question of fact for the jury, and will only be a question of law appropriate for summary judgment if the facts are undisputed . . . ." The trial court, in granting defendants' motion for summary judgment, had found that it was not impossible for Mr. Hill to comply with the statute by instead walking along the left side of the road. The Indiana Supreme Court, however, established that proof of the violation of a safety regulation creates a rebuttable presumption of negligence, with the test being as follows:

> Where a person has disobeyed a statute he may excuse or justify the violation in a civil action for negligence by sustaining the burden of showing that he did what might be reasonably expected by a person of ordinary prudence, acting under similar circumstances, who desire to comply with the law.

The Indiana Court of Appeals reversed and remanded, finding that, because the purpose of I.C. 9-21-17-14 is to promote safety, it was counter-intuitive to bar the Hills' claim without allowing Mr. Hill to explain why he was walking on the right side of the road instead of the left side. It was up to a jury to determine whether Mr. Hill's actions were reasonable or if he contributed to his injuries.

KeyPoint: Proof of a safety violation (to include motor vehicle statutes) by a plaintiff only creates a rebuttable presumption of contributory negligence and does not make a case ripe for summary judgment. This issue generally is to be determined by a jury.

Christie A. King
christie.king@tyralaw.net

ATTORNEY'S FEES FOR FRIVOLOUS DEFENSES

South Indiana Propane Gas, Inc. v. John Caffrey, et ux.
Indiana Court of Appeals, July 15, 2016

In July 2013, John and Leola Caffrey entered into a propane gas agreement with South Indiana Propane Gas, Inc. ("SIPG") for the Caffreys' propane gas requirements between October 1, 2013, and March 31, 2014, including 300 gallons of propane gas during that time period at a fixed price of $1.289/gallon. There was no provision that allowed the Caffreys to recover attorney fees should they have to enforce the Agreement. The Caffreys prepaid the 300 gallons they were allowed to purchase at a fixed rate, totaling $414.09. In January 2014, John Caffrey called SIPG and requested a delivery of the gas for which they had prepaid. The agent at SIPG said that the price had reached $3.12, the company did not know what it was "going to do" with its prepaid contracts, and that the agent would call John back.

The Caffreys never received a response back, nor any written notification that SIPG was suspending its propane deliveries. The Caffreys pursued a complaint about SIPG to the Indiana Attorney General's Office without resolution.

The Caffreys then hired an attorney to help recover their pre-paid money. On February 4, 2015, the Caffrey's attorney sent SIPG a letter saying that it appeared that SIPG had breached the agreement, and that the Caffreys were seeking their prepaid amount of $414.09, as well as $270 in attorney's fees. The Caffreys then filed a complaint in small claims court. SIPG denied that it breached the agreement, but it delivered propane to the Caffreys in April 2015, without advance notice and without request by the Caffreys.

In May 2015, the small claims court held a trial on the complaint. Because SIPG had performed under the contract, the Caffreys only sought attorney fees. The small claims court issued an order awarding the Caffreys attorney fees that they had accrued until the time that SIPG "settled," which amounted to $756.00. The award was given because the court found that SIPG's defense to its liability was unreasonable, groundless, or in bad faith. SIPG appealed.

SIPG argued that its defense was reasonable and that it did not act with "obdurate, vindictive, or untruthful behavior" because it delivered the propane within 30 days of learning of the problem. The Court of Appeals disagreed and affirmed the trial court's decision.

Indiana follows the "American Rule" in which parties pay their own attorney fees absent an agreement, statutory authority, or other rule to the contrary. In this case, attorney fees were awarded under Indiana Code § 34-52-1-1, which allows for attorney fees for litigating in bad faith or for pursuing frivolous, unreasonable, or groundless claims. The Court found that since SIPG did not perform under the agreement for 14 months – not 30 days – and failed to notify the Caffreys both of the propane shortage and when it was again able to perform after the propane shortage, that it was not convinced that SIPG's defense was not unreasonable, groundless, or in bad faith.

Further, the excusal of performance paragraph in the agreement allowed for suspended performance "while such conditions exist," which was a propane shortage for only 2 weeks, not for the full 14 months during which SIPG failed to provide propane to the Caffreys. Since the attorney fees were awarded only for the time up until SIPG agreed to perform under the contract, so the Court found that the award was reasonable and not unjustified.

KeyPoint: Defenses that are unreasonable, groundless, or in bad faith can result in the payment of attorney's fees to the other party.

Elizabeth H. Steele
elizabeth.steele@tyralaw.net

ASSUMPTION OF CONTRACTUAL DUTY

Michael Ryan v.
TCI Architects/Engineers/Contractors, Inc., et al.
Indiana Court of Appeals, May 23, 2016

Michael Ryan ("Ryan") was injured while working on a construction project at a Gander Mountain store. Ryan was employed by B.A. Romines Sheet Metal ("Romines"), a subcontractor to Craft Mechanical ("Craft"), who was a subcontractor to the general contractor, TCI. Ryan sued Craft and TCI, claiming they owned him a duty to provide a safe workplace and their breach of that duty caused his injury.

Ryan moved for partial summary judgment arguing that both defendants had a non-delegable contractual duty to him based on provisions in the contract between Gander Mountain and TCI, as well as provisions in the contract between TCI and Craft. TCI filed for summary judgment on the issues of duty, breach, and proximate cause, arguing that it had no duty toward Ryan. The trial denied Ryan's motion and granted TCI's motion.

On appeal, Ryan argued the trial court erred because TCI had assumed a duty by contract. In affirming, the Indiana Court of Appeals found that, as a general rule, an employer does not have a duty to supervise the work of an independent contractor and, therefore, is not liable for the independent contractor's negligence. The exception to that rule, however, is when one party is by law or contract charged with performing the specific duty. In determining whether TCI assumed a duty by the

provision of its contract, the court looked at the parties' intent at the time of the execution of the contract. If a contract "affirmatively evinces intent to assume a duty of care, actionable negligence may be predicated on the contractual duty." Additionally, to impose liability, a contract provision must be specific as to the duty assumed by the general contractor. The TCI contract read, in pertinent part, as follows:

> [TCI] *recognizes the importance* of performing the Work in a safe manner so as to prevent damage, injury or loss to (i) all individuals at the site, whether working or visiting, (ii) the Work including materials and equipment incorporated into the Work or stored on-Site or off-Site, and (iii) all other property on the Site or adjacent thereto. [TCI] assumes "responsibility for implementing and monitoring all safety precautions and programs related to the performance of the Work. [TCI] shall, prior to commencing construction, designate a Safety Representative with the necessary qualifications and experience *to supervise the implementation and monitoring* of all safety precautions and programs related to the Work . . . .

The court looked to its holding in *Stumpf v. Hagerman Const. Corp.*, 863 N.E.2d 871, 876, in which it held that the provisions in the contract created a contractual duty on the part of the general contractor because the contract required the general contractor "to take precautions" for the safety of employees on the work site, stated that the general contractor "shall comply with all applicable provisions of Federal, State, and Municipal safety laws. . . ," and also required Hagerman to designate a member of its organization whose duty would be the prevention of accidents. The court distinguished that language from the language in TCI's contract in the instant case, ultimately affirming, by finding that it did not require TCI to "take precautions," but instead said that TCI "recognizes the importance" of safety. Additionally, TCI's representative was not someone "whose duty shall be the prevention of accident" as was the case in *Stumpf*, but rather someone charged with "supervis[ing] the implementation and monitoring" of safety precautions.

KeyPoint: General contractors can assume a duty of care to their subcontractors if the contract shows intent to assume the duty of care and the language in the contract is specific as to the duty assumed.

Christie A. King
christie.king@tyralaw.net

Laura Fifty

Laura Fifty recently accepted a legal assistant position with another Indianapolis firm. Laura has been a delight as a member of our staff over the last three years, and we will miss her very much. We wish her all the best in the future.

The Tyra Law Firm, P.C.

9100 Purdue Road, Suite 119

Indianapolis, Indiana 46268