The Tyra Law Firm, P.C.

Quarterly Newsletter

Winter 2017

Volume 10, Issue 2

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

Super Lawyers

Congratulations to Kevin on Repeat Super Lawyers Selection

The recently-published list of 2017 Super Lawyers for Indiana includes Kevin Tyra, in the category of Civil Litigation Defense. Kevin was also selected for the 2016 list.

SuperLawyers is limited to the top 5% of Indiana lawyers.

DEFAULT JUDGMENT

Dalton Corp. v. Larry Myers, et ux.
Indiana Court of Appeals, December 30, 2016

In April 2014, Larry and Loa Myers filed suit against several defendants including Dalton Corporation. Neenah Enterprises, Inc. (NEI) is Dalton's parent company. NEI's general counsel monitors and manages legal matters for NEI's subsidiaries, including Dalton. In 2012, Robert Gitter was the employee designated as NEI's contact for receipt of service with Dalton's registered agent in Indiana, Corporation Service Company (CSC). Beginning in 2013, CSC began providing service to NEI and its subsidiaries via email, and Gitter did not inform NEI's general counsel of this change in procedure. In late 2013, John Laskey became NEI's new contact for receipt of service. Gitter notified CSC of the change, but did not inform Laskey that CSC sent notice only by email and that Laskey would be the only individual receiving those emails.

The Myerses served CSC, which forwarded the notice on to Laskey via email. Laskey did not forward the notice onto NEI's general counsel, and as a result, Dalton did not file an appearance or any responsive pleadings. In September 2014, the Myers filed a Motion for Default Judgment, again serving Dalton with the motion via CSC. On October 3, 2014, the trial court granted the motion and entered default judgment against Dalton. Counsel for the Myerses sent a letter and a copy of the order to CSC.

Over fourteen months later, NEI received a paper copy of the service list from another defendant's pleading and realized that Dalton had been named as a defendant. Dalton then filed an appearance and a Motion for Relief from Default Judgment on December 23, 2015. After a hearing, the trial court denied Dalton's motion. It determined that the motion was time barred, but that even if it were not time barred, the circumstances of the default and the equitable considerations of both parties did not justify granting relief.

On appeal, the Court upheld the trial court's decision. In order to prevail on such a motion, the movant must: 1) allege sufficient grounds showing exceptional circumstances justifying relief from the operation of the judgment other than those set forth in Rule 60(B)(1)-(4); 2) allege a meritorious defense; and 3) file the motion within a reasonable time. The Court held that it only need address whether the trial court erred in concluding Dalton did not present exceptional circumstances justifying relief. The Court noted that the circumstances leading to the default were due entirely to a breakdown of communication between only those who work for Dalton and NEI. CSC had properly forwarded the notice, and no other party was responsible for Dalton's failure to appear or respond. As a result, the Court held that these circumstances were not exceptional.

KeyPoint: Indiana, unlike a number of other jurisdictions, is quite strict about setting aside default judgments. Relief from a default judgment under Rule 60(B)(8) requires the showing of exceptional circumstances, which do not include a breakdown of communications exclusively between individuals in the party being defaulted.

Elizabeth S. Schmitt
elizabeth.schmitt@tyralaw.net

EMPLOYEE vs. INDEPENDENT CONTRACTOR

Mark Vinup v. Joe's Const., LLC
Indiana Court of Appeals, November 30, 2016

Vinup was injured on the job while working for Joe's Construction ("Joe's"). He filed a lawsuit against Joe's seeking damages for his personal injuries. The issue in the consolidated cases for the injury and the declaratory-judgment action brought by Joe's liability insurance carrier was whether the trial court erred when it determined, as a matter of law, that Vinup was an employee of Joe's, rather than an independent contractor, at the time he was injured, and therefore entered summary judgment for Joe's and its liability carrier.

Our Supreme Court has set forth a non-exhaustive list of ten factors to be used in determining whether one is an independent contractor or an employee: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating the relation of master and servant; and (10) whether the principal is or is not in business. *Moberly v. Day*, 757 N.E.2d 1007, 1010 (Ind. 2001).

The analysis requires consideration of all of the ten circumstances and, although no single factor is dispositive, "the 'extent of control' factor is the single most important factor in determining the relationship." Vinup argued that six of the ten *Moberly* factors weigh in favor of independent contractor status and thus, genuine issues of material fact exist and make summary judgment in favor of Joe's and its insurer inappropriate.

After addressing each of Vinup's six challenges, the Court of Appeals determined that Vinup failed to establish that a genuine issue of material fact existed on the issue of whether he was an independent contractor at the time he was injured. The court then addressed Vinup's alternative argument in which he asserted that if Joe's insurer was not obligated to provide coverage because he did not fit within the Policy's definition of employee, he was, instead, a "temporary employee," for which the Policy provided coverage. The insurer argued that Vinup also did not fall within the Policy's definition of "temporary employee." The court agreed finding that under the plain language of the Policy, Vinup was not a "temporary employee."

KeyPoint: Generally, whether a person acts as an employee or independent contractor is a question for the jury; however, when the significant underlying facts are not in dispute, a worker's classification can properly be determined by the court as a matter of law.

Christie A. King
christie.king@tyralaw.net

FORESEEABILITY AND DUTY

Jill Polet, et al. v. ESG Security, Inc.
Indiana Court of Appeals, December 27, 2016

This appeal arose out of the stage collapse at the Indiana State Fair during high wind conditions in August of 2011, just prior to the performance of the band Sugarland. Defendant ESG Security, Inc. ("ESG") filed a motion for summary judgment arguing that it owed no duty to the plaintiffs. Although the State Fair had hired ESG for the Fair's security obligations, there was no written contract between ESG and the State Fair or ESG and Sugarland. ESG argued that if the court ruled in favor of the plaintiffs, that it would, effectively, be holding that a security company has a duty to protect against every possible hazard, including those outside of its contractually assumed obligations. The trial court agreed that ESG owed no duty under plaintiffs' theory of negligence and granted ESG's motion.

In *Goodwin v. Yeakle's Sports Bar & Grill*, 62 N.E.3d 384 (Ind. 2016), the Supreme Court had determined that "[T]he foreseeability component of the duty analysis must be something different than the foreseeability component of proximate cause. . . . As a result, the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence."

With *Goodwin* in mind, the Court of Appeals held that the broad type of plaintiff in the

instant case was a patron of an outdoor concert, and the type of harm was the probability of the weather causing a stage collapse. The court did not believe that a stage collapse was a type of harm routinely contemplated by a security company, thus ultimately finding that "a stage collapse due to high wind is not foreseeable as a matter of law" and, accordingly, affirming the trial court's grant of ESG's motion for summary judgment by holding that ESG did not have a duty relating to the stage collapse.

KeyPoint: When a case is ripe for summary judgment on the issue of duty because the plaintiff and/or the harm were not foreseeable, the court should conduct a general analysis of the broad type of plaintiff and harm involved without analyzing the facts of the actual occurrence in determining whether a duty existed.

Christie A. King
christie.king@tyralaw.net

RESPONSIBILITY FOR DRUNK DRIVERS

Rachel Neal v. IAB Financial Bank
Indiana Court of Appeals, February 2, 2017

Gabriel Biddle got a flat tire and drove into the parking lot of IAB Bank. Bank employees suggested Biddle pull into the furthest teller lane in order to most easily change his tire, and Biddle did so without difficulty. The bank employees then helped Biddle change his tire. The employees who spoke with Biddle noted that he seemed "somewhat unaware and unsettled," but assumed that was due to the flat tire; they did not see or smell alcohol, notice that Biddle's eyes were bloodshot, or suspect that Biddle was intoxicated. After helping Biddle change the tire, the employees noticed that Biddle "kind of staggered." Biddle left the bank, and afterward, the employees questioned whether there had been something wrong with Biddle and started to think he might have been drinking. The bank's assistant manager called 911 to report the suspicion that Biddle might be driving drunk. Biddle was later involved in an accident that injured Rachel Neal.

Neal sued the bank, arguing that she would not have been injured but for the bank employees' negligent act of helping Biddle change his tire so that he could continue driving. She also argued that IAB Bank had assumed a duty of care toward Neal and other motorists when they helped Biddle change his tire. The bank moved for summary judgment, and the trial court granted their motion.

The Court of Appeals affirmed the trial court's decision. The Court used the three-part balancing test set forth in *Webb v. Jarvis*, which considers: (1) the relationship between the parties, (2) the reasonable foreseeability of harm, and (3) public policy concerns.

A duty to control the conduct of a third person as to prevent him from causing physical harm to another arises only when a special relationship exists between the actor and the third person, a special relationship exists between the actor and the other, or if the duty is assumed, either gratuitously or voluntarily. The Court held that there was no special relationship between the bank and Biddle or the bank and Neal. It is possible that the law may impose a duty, however, if three factors are demonstrated: (1) where a person is in need of supervision or protection; (2) from someone who is in a superior position to provide it; and (3) the person has a right to intervene or control the actions of the other person. In this case, those three factors were not met. The Court also distinguished between "preventing" an intoxicated person from driving and "assisting" an intoxicated person in driving; liability will only attach when a third person has "assisted" an intoxicated person in driving.

Regarding assumption of a duty, the Court held that it is necessary to identify the specific services undertaken. While Neal argued that the bank "assist[ed] a visibly intoxicated driver in changing a flat tire," the Court disagreed and held that the specific services undertaken were to change a flat tire. Since Neal did not allege that in changing the tire the bank failed to use reasonable care, the Court

held it could not be said that the bank specifically and deliberately undertook to protect the public roadways from an intoxicated driver.

As to the foreseeability of the harm, the Court analyzed the broad type of plaintiff and the broad type of harm. Using this framework, the Court determined that its inquiry was "whether a duty should be imposed on the bank, a financial institution, to take precautions to protect motorists on the roadways from the potential of a stranded motorist being intoxicated, before it gratuitously attempts to render aid to that stranded motorist." The Court held that it was not reasonably foreseeable to a third person that a stranded motorist that they render aid to will harm another motorist on the public roadway.

Finally, the Court held that public policy considerations weighed heavily against finding a duty owed to Neal. Public policy should encourage rendering aid or assisting stranded motorists on the roadways. If a duty were imposed on all individuals to consider the potential harm to third parties before helping a stranded motorist, it would dis-incentivize rendering aid. While there are some situations where a duty can be imposed, such as when the third party has knowledge of the motorist's intoxication, none of those situations exist in this case.

KeyPoint: While there are exceptions, aiding a motorist in need generally does not imply a duty to protect third parties from that motorist's subsequent actions on the roadway.

Elizabeth S. Schmitt
elizabeth.schmitt@tyralaw.net

SPORTS PARTICIPATION INJURIES

Tresa Megenity v. David Dunn
Indiana Supreme Court, February 16, 2017

Megenity attended karate classes at a studio for two years, earning her black belt. During a class, a drill called "kicking-the-bag" involved the students taking turns sprinting to each bag and practicing a certain kick. The first two bags were for side kicks, and the last bag was for flying kicks. Megenity volunteered to hold the flying-kick bag, as she had done "countless" times before.

A flying kick consists of kicking the bag with one foot while keeping the other foot grounded. David Dunn, a green belt, did proper side kicks against the first two bags, but when he sprinted to Megenity's bag, he allowed both feet to leave the ground, executing a "jump kick" instead. The kick hit the padded bag, but the impact was enough to send Megenity "flying and crashing to the floor," hurting her knee.

Megenity sued Dunn. Dunn moved for summary judgment under the holding in *Pfenning v. Lineman*, arguing that he breached no duty because jump kicks are "ordinary behavior" within the sport of karate. Megenity argued that there was a fact question since a jump kick is "never done" within the specific drill being performed. Summary judgment was granted for Dunn and Megenity appealed. A divided Court of Appeals panel reversed, focusing on the reasonable and appropriate conduct in the karate practice drill.

The Supreme Court revisited its decision in *Pfenning*, in which they held, as a matter of law, "a sports participant commits no breach by engaging in conduct 'within the range of ordinary behavior of participants *in the sport*.'" In *Pfenning*, however what constitutes "in the sport" was not defined. In clarifying this ambiguity, the Court held that what is ordinary behavior in the sport turns on the sport generally and not the specific activity.

The Court went on to say that determining what is reasonable in a specific activity would require courts to parse the nuances of things such as "the exact angle of entry of a soccer player's slide tackle, the exact timing of a football player's late hit." Holding that this is not the type of analysis courts should engage in, the Court held that a broad, sport-centric focus was appropriate, so the correct analysis was whether the jump kick performed by Dunn was ordinary behavior in the sport of karate. The Court determined it was.

In *Pfenning*, however, there is recourse for an injury caused by intentional or reckless infliction of injury, but "intentional and reckless

infliction of injury" was not defined. So the Court went on to define those terms, too. Intentional infliction of sports injury has two elements: (1) "the defendant sports participant must either desire to cause the consequences of his act or believe those consequences are substantially certain to result;" and (2) "the intent to injure must fall 'totally outside the range of ordinary activity involved in the sport.'" Megenity conceded that Dunn did not injure her intentionally, so this does not apply.

Turning to sports recklessness, the Court laid out three elements: (1) "the defendant sports participant must intentionally act or intentionally fail to act;" (2) "in doing so, the defendant must be consciously indifferent to the plaintiff's safety;" and (3) "the defendant's particular conduct – including state of mind – must fall 'totally outside the range of ordinary activity involved in the sport.'" In this case, the Court held that even if Dunn jump kicked intentionally, he did not consciously disregard Megenity's safety, and was not doing something totally outside the ordinary behavior in karate.

Finding that Megenity did not make a case for negligence, reckless, or unreasonable behavior, the Court found no breach as a matter of law on Dunn's part.

KeyPoint: In determining whether a sports-related behavior is within the range of ordinary behavior of participants in the sport, the sport as a whole is examined, not the specific activity within the sport.

Elizabeth S. Schmitt
elizabeth.schmitt@tyralaw.net

VALUATION OF LEASED VEHICLE

Jason Bokori v. Jasmina Martinoski
Indiana Court of Appeals, February 15, 2017

Bokori was at fault in an accident with Martinoski's leased 2013 Toyota Corolla. Bokori's liability carrier paid the agreed fair market value of the Corolla, $17,530.44. However, the balance on Martinoski's lease was a total of $22,676.52, leaving her indebted to Toyota Financial Services for the difference of $5,146.08. Martinoski sued Bokori and his auto carrier for that difference in small claims court.

Bokori tendered the market report on the Corolla which Martinoski's carrier had provided to Bokori's carrier, and which was the basis for the agreed fair market value for the Corolla. The small claims court admitted the report into evidence although no one present at the hearing could authenticate it. However, the court commented that "with no proponent for it, I'm not satisfied that it's sufficient to [establish fair market value.]" The court then entered judgment for Martinoski.

The Court of Appeals affirmed. The Court acknowledged that "the general rule is that a plaintiff's compensatory damages for property destroyed by a tortfeasor shall be the fair market value of the property at the time of loss," defined as "the value a willing seller will accept from a willing buyer for a good," and that the plaintiff has the burden of proving the fair market value of the property. Nevertheless, the Court concluded that the small claims court was within its discretion to conclude that Martinoski's testimony about the balance of her lease was more credible than the unauthenticated market report tendered by Bokori. The Court refused to reweigh the small claims court's assessment of that evidence.

KeyPoints: (1) The flaw in the appellate court's analysis is that it conflates Martinoski's evidence of the balance of the lease with evidence of the fair market value of the Corolla, which is clearly incorrect. One interpretation of this decision is that it merely upheld the trial court's discretion to weigh the evidence. However, we may expect that future plaintiffs will use this precedent to argue they are also entitled to amounts beyond the fair market value of the property, whether it is the balance on the lease, or an unusually high balance on an auto loan that resulted, for example, from the plaintiff having purchased the vehicle on an upside-down trade-in. (2) This decision also points out the unpredictability of small claims court; although it is commonplace to offer an unauthenticated document in small claims court, in this case it was the defendant's undoing.

Kevin C. Tyra
kevin.tyra@tyralaw.net

WORKER'S COMPENSATION FOR VOLUNTEER ACTIVITIES

John C. Morris v. Custom Kitchen & Baths
Indiana Court of Appeals, December 7, 2016

Morris owned a construction contracting business, CKB. He often performed volunteer community service, particularly with the Boy Scouts, for which he was not compensated. As a result of that volunteer work, he received a substantial amount of business and goodwill. While working on one of those projects, Morris fell off a roof and fractured his leg. Morris filed a claim with CKB's worker's compensation insurance carrier. Morris argued that his practice of participating in voluntary community projects "fostered the growth of good will, his business reputation, and additional business" for CKB. Ultimately, the full Board found that Morris did not meet his burden to show his injuries arose out of and occurred in the course of his employment.

The Court of Appeals found that the Worker's Compensation Act should be "liberally construed in order to effectuate its humane purpose." It ruled in line with the Supreme Court's holding in *Knoy v. Cary*, 813 N.E.2d 1170 (Ind. 2004), finding that there was a connection between CKB's business interests in participating in the project and Morris' employment and, therefore, Morris' injuries "arose out of and in the course of his employment."

KeyPoint: If at least one purpose of the volunteer activity is to improve the employer's business, any injuries sustained by employees may be found compensable.

Christie A. King
christie.king@tyralaw.net

VICARIOUS LIABILITY: COMPANY VEHICLE

Thomas Hudgins, et ux. v. Brian Bemish, et al.
Indiana Court of Appeals, December 9, 2016

While driving an Ideal Heating company vehicle, employee Brian Bemish collided with a vehicle driven by Thomas Hudgins. At the time, Bemish was driving home from work after dropping his supervisor off at the supervisor's home. Bemish admitted he had smoked the synthetic drug "spice" before the accident. Hudgins and his wife sued Bemish for negligence and Ideal Heating for vicarious liability and negligent hiring and retention of Bemish.

Ideal Heating moved for summary judgment on the grounds that Bemish was not performing any activities for Ideal Heating at the time of the accident, and that Ideal Heating has no actual or constructive knowledge that would show a propensity of Bemish to commit the acts which led to the accident. The trial court granted summary judgment to Ideal Heating.

The Court of Appeals reversed. Bemish had testified in his deposition that he thought he was acting within the scope of his employment at the time of the accident, and his use of the vehicle was for business use only, which created a fact question. The Court also found that it was insufficient for Ideal Heating to simply deny it was negligent in hiring and retaining Bemish, and that Hudgins failed to designate evidence of any such negligence. Ideal Heating was obligated to affirmatively negate the allegation of negligent hiring and retention.

KeyPoints: The employer may in some cases be liable for its employee's negligence while driving a company vehicle home from work. And on summary judgment, the movant is obligated to present some evidence affirmatively negating the allegations, rather than simply asserting the plaintiff has no evidence to support the allegations.

Kevin C. Tyra
kevin.tyra@tyralaw.net

Lawyer Joke

A mother and her young son walking through a cemetery passed by a headstone inscribed: "Here lies a lawyer and an honest man." The little boy read the headstone, looked up at his mother, and asked: "Mommy, why did they bury two men there?"

- Courtesy of lectlaw.com

The Tyra Law Firm, P.C.
9100 Purdue Road, Suite 119
Indianapolis, Indiana 46268