The Tyra Law Firm, P.C.

Quarterly Newsletter

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WELCOME, BAILEY!

We are very pleased to welcome Bailey C. Coultrap to the firm as our new associate.

Bailey graduated from the Villanova University Charles Widger School of Law in Philadelphia in May, 2017, and passed the Indiana Bar this July.

Bailey lives in Indianapolis with her boyfriend, Heath and their dog, Hoosier. In her free time, Bailey enjoys hiking, taking Hoosier to dog parks, and trying Indianapolis's restaurants.

JUDICIAL ESTOPPEL

Jason Ellis v. Keystone Const. Corp.
Indiana Court of Appeals, September 5, 2017

A business dispute developed over some ten years between Ersal Ozdemir and Jason Ellis regarding ownership of Keystone Construction Company. Ellis claimed that Ozdemir made him a "partner" in Keystone with a 20% ownership interest. Eventually, Ellis asserted rights as a Keystone shareholder, Ozdemir disagreed he was a shareholder or partner, and litigation ensued.

During this time, Ellis' wife filed for divorce. The Ellises filed with the divorce court a settlement agreement resolving all issues in the dissolution, which the divorce court accepted and incorporated into the dissolution decree. The settlement agreement purported to disclose "all the property and interest, both real and personal, now held by [the Ellises]." The agreement made no mention of any ownership interest in Keystone.

Keystone filed a motion for summary judgment on the ground of judicial estoppel, noting that Ellis' settlement agreement with his ex-wife contained no mention of any stock or ownership interest in Keystone. The trial court granted Keystone's motion for summary judgment. Ellis appealed.

The Court of Appeals noted that judicial estoppel seeks to prevent a litigant from asserting a position that is inconsistent with one asserted in the same or a previous proceeding. For example, judicial estoppel is applicable when a bankrupt debtor fails to disclose a cause of action as an asset in a bankruptcy proceeding and then pursues the omitted cause of action in a subsequent proceeding. The dispositive question is whether the party was playing "fast and loose" with the courts, not whether the party merely omitted property on their settlement agreement, for example.

Here, Ellis and his ex-wife presented affidavits stating that they left out Ellis' ownership interest in Keystone so they could expedite the dissolution proceeding and that they agreed to an equitable split of Ellis' ownership in Keystone after Ellis and Ozdemir sorted out their dispute. Therefore, the omission of Ellis' claimed ownership in Keystone was intentional, and not merely a good-faith mistake. While this evidence might prevent a claim of fraud between Ellis and his ex-wife, it was an intentional act to keep from the divorce court a potentially large marital asset. The court, therefore, held that Ellis was judicially estopped from claiming an ownership interest in Keystone.

KeyPoint: Information a party intentionally concealed or denied in a previous judicial proceeding may bar the party in a later proceeding unless the nondisclosure was done in good faith. Also, always disclose all of your marital assets when entering into a dissolution settlement agreement.

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LANDOWNER DUTY TO INVITEES

Daviess-Martin County Joint Parks and Recreation Dept., et al. v. The Estate of Waylon W. Abel

After swimming in the lake at West Boggs Park, Abel died from primary amoebic meningoencephalitis (PAM), an infection caused by exposure to *Naegleria fowleri*. *Naegleria fowleri* is an amoeba that is common in warm bodies of freshwater, but it is extremely rare for someone to contract PAM from it.

Abel's Estate argued that the Parks & Recreation Department and the County Health Department were negligent for failing to test for, protect the public from, and warn of *Naeglreia fowleri*. The defendants filed motions for judgments on the pleadings, arguing the CDC does not recommend testing for *Naegleria fowleri* and there is no way to measure or control the amount of *Naegleria fowleri* in a body of water. The Estate responded that the CDC recommends warning of amoebas in warm bodies of freshwater, and that the defendants owed a duty to Abel as an invitee. The trial court denied the motions for summary judgment and certified the order for interlocutory appeal.

The Court reversed. It began by analyzing whether the defendants owed a duty to Abel, which in turn is a question of foreseeability, depending on the broad type of plaintiff and the broad type of harm. In *Rogers v. Martin*, the Court noted that "some harms are so unforeseeable that a landowner has no duty to protect an invitee against them."

Here, the broad type of plaintiff was a swimmer, and the broad type of harm was a PAM infection. The Court noted that millions of people swim in lakes each year, and only 132 people in the United States contracted PAM between 1962 and 2013, and that there had never been a PAM infection in Indiana. Accordingly, the Court found that the defendants did not owe a duty to Abel because his injury was not reasonably foreseeable.

The Court also applied the "standard analysis" of the Restatement (Second) of Torts, which imposes liability when the possessor of land "knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and fails to exercise reasonable care to protect them against the danger." The Court found that under this analysis, the defendants were not liable to Abel. The defendants did not know, and by the exercise of reasonable care would not have discovered, the *Naegleria fowleri* because of the lack of testing methods. The defendants should not have realized that it involved an unreasonable risk of harm because PAM infections are extremely rare.

KeyPoint: The owner of a public body of water does not owe a duty to swimmers to protect them from or warn them of the possible presence of rare but fatal amoeba. And generally, a premises owner may argue that the harm suffered by the claimant is so extremely unlikely as to bar the liability claim.

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PROMOTER'S DUTY TO INVITEES

Crystal Jones v. Jerry Wilson
Indiana Court of Appeals, August 15, 2017

Jones attended a Hoosier Pro Wrestling event at the Bartholomew County Fairgrounds, promoted and presented by Wilson. Around 11 p.m., Jones left to go to her car, and was assaulted by an unknown person in the parking lot. The parking lot was secluded and unlit, and there was no security in the parking lot or outside of the event building.

Wilson moved for summary judgment on the basis that the attack was unforeseeable. Jones argued that the attack was reasonably foreseeable because the parking lot was unlit and secluded. The trial court granted summary judgment for Wilson.

The Court of Appeals affirmed. The Court first inquired whether Wilson owed a duty to Jones at all, because the attack occurred in the parking lot and Wilson had rented only the building from the Fairgrounds. The Court did not decide whether Wilson owed a duty to Jones when she was in the parking lot, but assumed that the answer was "yes" and decided the case on the issue of whether "Wilson had a duty in this case to protect Jones against the criminal attack."

The Court analyzed that question under the two Indiana Supreme Court decisions, *Rogers v. Martin* and *Goodwin v. Yeakle's Sports Bar & Grill, Inc*. Generally, landowners "must exercise reasonable care for the invitee's protection while the invitee is on the premises." However, where the invitee's injury occurs because of some third-party act, the landowner owes a duty only where the act was foreseeable. In determining whether a criminal act is foreseeable, the court should ask "whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it."

Applying that standard to the facts here, the Court determined that the likelihood of harm was not serious enough that a reasonable person would take precautions to avoid it. Here, the general plaintiff was a "paying spectator at a wrestling match", and

the general harm was a "random criminal attack." The Court found that there was not a serious likelihood of a random criminal attack on a paying spectator at a wrestling match, because there was no known history of criminal attacks.

KeyPoint: The Court concluded that it is not foreseeable that a person may be assaulted walking through a dark parking lot outside a pro wrestling match. This decision continues the remarkable proposition by the Court in *Goodwin* that it is not foreseeable that someone might be shot in a bar. Presumably the appellate judges only attend really nice pro wrestling matches and hang out in really nice bars.

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MEDICAL MALPRACTICE EXPERT: PERSONAL PRACTICES

David Oaks v. Timothy R. Chamberlain, M.D.
Indiana Court of Appeals, May 11, 2017

Dr. Chamberlain performed laparoscopic surgery to remove Oaks' gallbladder. In the days following the surgery, Dr. Chamberlain determined based on several positive factors that Oaks' medical issues were improving. Dr. Chamberlain did not obtain x-ray images of Oaks' abdomen.

Four days after surgery, Oaks' colon perforated subsequent to an enlargement of the colon, which presumably could have been detected and prevented had Dr. Chamberlain ordered an x-ray of Oaks' abdomen.

At trial, Dr. Chamberlain also offered the expert testimony of general surgeon Dr. Moore, who testified that Dr. Chamberlain did not violate the standard of care in deciding not to obtain x-rays of Oaks' abdomen post-surgery.

Dr. Moore would have testified that he would have obtained an x-ray in a post-operative situation like Oaks'. The trial court excluded the testimony relating to Dr. Moore's personal medical practices.

The Court of Appeals reversed the trial court and remanded the decision back to allow the impeachment testimony of Dr. Moore on the applicable standard of care. The Court of Appeals noted that the main issue was whether personal practices testimony can be used to impeach the expert's credibility regarding his or her opinion on the standard of care. The court recognized that the record contained no evidence or explanation as to why Dr. Moore would have ordered an x-ray simply to go "above" the standard of care. Thus Dr. Moore's testimony about his personal practices was in conflict with his testimony on the standard of care. Therefore, his personal practices testimony was relevant and admissible.

KeyPoint: Cross-examination may explore information from the expert about his personal professional practices, which contradict his testimony about standard of care (and can extend to non-medical witnesses and their testimony about industry standards, etc.).

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NON-PHYSICIAN EXPERT WITNESSES ON CAUSATION

Chiropractors Are Not Qualified To Render Opinions On Complex Medical Causation Issues

Craig Totton v. Daniel P. Bukofchan, D.C., et al.
Indiana Court of Appeals, June 14, 2017

In the course of Dr. Bukofchan providing chiropractic treatment to Totton, Totton experienced a sharp pain and tingling down Totton's arm. Thereafter, Totton's arm became progressively worse and an MRI revealed a herniated disc, which Totton underwent anterior cervical discectomy and fusion surgery to treat.

In the course of his malpractice claim, Totton designated an affidavit from chiropractor Dr. DiMartino, stating that Dr. Bukofchan failed to

meet the applicable standard of care ***and*** caused or substantially contributed to Totton's injuries. The trial court disregarded Dr. DiMartino's causation opinion. Totton appealed the trial court's entry of summary judgment for Dr. Bukofchan.

On appeal, Dr. Bukofchan argued that Dr. DiMartino was not qualified under Evidence Rule 702 to render an opinion as to the medical causation of Totton's injuries because he is not a physician. The issue is whether the non-physician health care provider has sufficient expertise, as provided in Rule 702(a), with the factual circumstances giving rise to the claim and the patient's injuries. Thus, a non-physician health care provider may render an opinion under Evidence Rule 702, as to medical causation issues if they are not complex.

The Court of Appeals determined that the medical causation issue in this case was complex, and thus, the chiropractor was not qualified to render an opinion as to medical causation.

KeyPoint: In order to provide an expert opinion on complex causation issues, a witness must be qualified as an expert by knowledge, skill, experience, training, or education and as a general rule, there is a significant difference in the education, training, and authority to diagnose and treat diseases between physicians and non-physician health care providers.

A Nurse Practitioner Can, Under The Proper Circumstances, Offer An Expert Opinion

Charles Aillones v. Glen D. Minton
Indiana Court of Appeals, May 30, 2017

Aillones was injured when his vehicle was struck from behind by Minton. Aillones received treatment from Alan Swartz, a licensed nurse practitioner, for a cervical sprain and pain in his lower back.

In Aillones' negligence claim against Minton, Swartz testified in a deposition that Aillones' injuries were consistent with a motor vehicle accident. Minton's counsel objected to this question based on a lack of foundation for Swartz's opinion. The trial court held that a nurse practitioner, in this case, would not qualify as an expert witness. The Court of Appeals heard this case on an interlocutory appeal.

For a witness to qualify as an expert, the subject matter of the witness's testimony must be distinctly related to some scientific field, business, or profession beyond the knowledge of the average person, and the witness must have sufficient skill, knowledge, or experience in that area so that the opinion will aid the trier of fact.

The Court recognized what appears to be a bright-line rule that nurses cannot testify as expert witnesses with regard to causation. However, the present case was a simple tort action, and not a medical malpractice case, where a nurse would be testifying regarding a medical provider's causation towards a patient's injuries.

The Court, after reviewing the extensive training that a nurse practitioner goes through before become licensed, determined that a nurse practitioner is a highly trained and educated medical professional in a highly regulated field. Although a nurse practitioner obviously does not possess the same level of training and education as a medical doctor, the Court did not believe that it was a bar to the admissibility of a nurse practitioner's expert testimony. Instead, issues regarding the comparative level of training and education of a nurse practitioner would go only toward the weight to be given such evidence.

The Court concluded that Swartz had sufficient knowledge, skill, experience, training, or education to testify as an expert witness. However, Swartz could not testify that Aillones' injuries were caused by the accident because Swartz was not a witness to the accident.

KeyPoint: Although as a general rule, a nurse cannot provide expert testimony on causation issues, under Indiana Evidence Rule 702 if it is apparent that a nurse is an expert based on knowledge, skill, experience, training, or education, which is beyond the knowledge of the average person, there are limited circumstances, where a nurse could qualify as an expert on causation.

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OPEN AND OBVIOUS; CONSTRUCTION MANAGER'S DUTY

Mark Gleaves v. Messer Const. Co. and PERI Formwork Systems, Inc.,
Indiana Court of Appeals, June 13, 2017

While working on a building at Indiana University, Gleaves was hit in the head with a sixteen-foot-long, 2x4 lumber infill. Messer was the construction manager for the project. Gleaves was employed by Whittenberg Construction, the project's concrete contractor. Whittenberg used formwork manufactured by PERI Formwork Systems, Inc. to pour the concrete walls for the building. The lumber infills were used to bridge gaps in the formwork during construction. Gleaves was injured by an infill that fell onto him after a crane removed the formwork.

Gleaves filed a motion for partial summary judgment against Messer. PERI and Messer each filed motions for summary judgment. PERI argued that it did not owe a duty to warn, and that the lumber infills were not its product. Messer argued that it did not owe a duty to Gleaves. The trial court granted both defendants' motions for summary judgment, and denied Gleaves's motion for partial summary judgment. Gleaves appealed.

The Court of Appeals affirmed the trial court's grant of summary judgment for both Messer and PERI. The Court held that PERI did not owe a duty to Gleaves to warn of any danger because the danger was open and obvious. Gleaves testified in his deposition that he knew that the forms were dangerous, that he knew that he should be out of the way when the infills were being pushed, and that he knew that he should have been at least twenty to twenty-five feet away when the forms were being wrecked. Therefore, the danger was open and obvious to Gleaves.

As to Messer, Gleaves argued that summary judgment was improper because Messer assumed a duty to Gleaves by performing safety actions beyond those required by its contract with IU. Messer's contract with IU required that Messer provide and maintain an effective safety program and that each contractor follow Messer's program, that Messer hold a safety orientation for each worker, and allowed Messer to remove a contractor's employees from the work site if the contractor did not remedy a safety issue. At the worksite, Messer required Whittenberg to warn workers when loads were lifted over them, allowed Whittenberg to work without a full-time safety representative at the site, and sent Whittenberg employees home when they were working in unsafe conditions. Gleaves argued that these actions extended beyond the scope of Messer's contract with IU and, therefore, Messer had assumed a duty to Gleaves.

The Court held that "for a construction manager not otherwise obligated by contract to provide jobsite safety to assume a legal duty of care for jobsite-employee safety, the construction manager must undertake specific supervisory responsibilities beyond those set forth in the original construction documents." The Court found that Messer's actions were merely within the scope of Messer's contract with IU and did not constitute an assumption of duty to Gleaves.

KeyPoint: A construction manager does not assume a duty to other contractors' employees by overseeing safety conditions on the construction site when the construction manager's actions within the terms of its contract with the customer.

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STAIRS AND STEPS

Carol Walters v. JS Aviation, Inc.
Indiana Court of Appeals, September 7, 2017

JS Aviation hosted an airport open house. As Walters followed her grandson from the pilot's lounge into the hangar, she fell. There was a five-and-one-quarter inch step down from the lounge into the hangar immediately after the threshold.

Walters alleged that JS Aviation was negligent. The trial court granted JS Aviation's motion for summary judgment. Walters appealed.

The Court of Appeals reversed. It noted that "although a landowner must exercise

reasonable care for the safety of invitees, the landowner is not an insurer of the invitee's safety." The Court acknowledged that "steps and stairs are an everyday occurrence, and invitees are generally expected to see them and know how to use them," but concluded that the steps could create an unreasonable risk of harm to an invitee. Specifically, the Court stated that "a step's character, location, or surrounding conditions" could create an unreasonable risk of harm. In this case, the step's character, location, and surrounding condition were sufficient to preclude summary judgment for JS Aviation.

JS Aviation had warnings about the step on the ground in the hangar and on the doors to the hangar, which were open during the event. The step was in "an unlikely spot," the lighting in the lounge was dim while the hangar was bright, and the non-slip mats in the lounge and the hangar "led Walters to perceive the floor as 'one flat level.'" Taken together, a triable question of fact existed regarding whether these circumstances created an unreasonable risk of harm to JS Aviation's invitees.

The Court also found that JS Aviation's warnings were a triable question of fact because the warning signs on the doors were not as visible to invitees as they would have been if the doors had been closed.

KeyPoint: Although steps are generally not an unreasonable risk to invitees, certain facts can create exposure for the landowner where a step causes an invitee to fall.

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UNJUST ENRICHMENT

RQAW Corp. v. Dearborn County, Indiana
Indiana Court of Appeals, September 6, 2017

Dearborn County contracted for RQAW to pay $90,000 for a Pre-Design Study for Dearborn's plan for the county jail. The contract referenced the future phases of the jail project, without any details regarding price or obligations, and contained details regarding RQAW's obligations during all phases of the jail project. Neither part of the contract contained a detailed scope of work or specific cost for the phases of the Project that would come after the Pre-Design Study. The contract provided for compensation for termination by Dearborn, and for termination expenses, including RQAW's anticipated profit.

After RQAW completed the Pre-Design Study, Dearborn paid RQAW. Dearborn chose a different firm for the remainder of the project. RQAW alleged that the contract covered Dearborn's entire jail project. RQAW also argued that, under the theory of unjust enrichment, it was "unjust to allow [Dearborn] to retain the benefit of [RQAW]'s architectural and engineering services without paying [RQAW] for the value of its services." Dearborn countered that the contract covered only the Pre-Design Study. The trial court granted Dearborn's motion for summary judgment.

The Court of Appeals affirmed. Regarding breach of contract, the Court found that RQAW and Dearborn clearly intended to be bound by the terms of the contract that related to the Pre-Design study, but that their intent as to the remainder of the jail project was not clear. The lack of essential terms, including scope of work and cost of work, regarding the remainder of the jail project rendered it unenforceable as to all phases of the jail project except the Pre-Design Study. "Without these terms, it would be impossible to determine whether a future breach occurred and, if so, what damages would be appropriate."

As to RQAW's equitable claim of unjust enrichment, the Court found that Dearborn was not unjustly enriched because RQAW did not provide any services beyond the Pre-Design study, and RQAW was compensated for the Pre-Design study.

KeyPoint: Where essential terms are missing for some phases, there is no enforceable contract and, thus, no unjust enrichment if the hiring party decides to use a different contractor for the phases of the project for which there is no enforceable contract.

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VISITING THE HOMELAND

Kevin and Adam Tyra vacationed in early September in Munich, Germany and Krakow, Poland. As part of the visit to Poland, a personal tour guide took Kevin and Adam to Goraj, the village in southeastern Poland from which Kevin's grandparents emigrated to the United States in 1913, where Kevin and Adam met a second cousin still living in the village. On the excursion to Goraj, they also visited the district archives in the city of Zamosc, where they located and copied the grandparents' birth records (*pictured:* Adam and Kevin outside Wawel Castle in Krakow).

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