The Tyra Law Firm, P.C.

Quarterly Newsletter

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Congratulations to Amy and Adam!

Amy and Adam Tyra are the proud parents of baby boy Daniel Douglas Tyra, born on October 11, 2017. Daniel weighed 9 pounds, 1 ounce and joins delighted big sister Charlotte, 4. Daniel is Kevin and Jan's first grandson.

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FACILITATED COMMUNICATION

The Hope Source, et al. v. B.T., By His Mother and Next Friend
Indiana Court of Appeals, September 20, 2017

B.T., a twelve-year-old with autism, was only able to communicate by typing on a keyboard by means of facilitated communication, "a method of helping an individual produce typewritten material on a keyboard or communication device with the intention of compensating for difficulties in motor control." The facilitator supports the communicator's wrists, arms, or shoulders while the communicator types.

Through facilitated communication, B.T. typed to his mother that his guide at Hope Source, where he received therapy for his autism, had sexually abused him. After an investigation by the Indiana Department of Child Services determined that the allegations were unsubstantiated, B.T., by his mother, filed a lawsuit against his guide, Hope Source, and other individuals connected to Hope Source. The defendants filed motions to bar the use of facilitated communication at B.T.'s deposition or in any proceeding in the case. B.T.'s mother filed an objection. The trial court denied the defendants' motion as to B.T.'s deposition. Because this was an issue of first impression in Indiana, the Court of Appeals directed the trial court to hold a hearing, under Indiana Rule of Evidence 702, to create a record on the science and admissibility of facilitated communication.

The trial court found that the use of facilitated communication should be determined on a case-by-case basis, and that the party requesting the use of facilitated communication has the burden of proving that the communication is not being influenced by the facilitator. The court determined that this could be proven by asking the communicator fact-specific questions that would show whether there was any influence by the facilitator.

Some courts in other jurisdictions have held that the *Frye* test should be applied to facilitated communication. These courts determined that facilitated communication did not meet the *Frye* standard, because it is not generally accepted as reliable within the scientific community. However, other courts have held that the *Frye* test should not be applied to facilitated communication. One court compared facilitators to interpreters for non-English speaking witnesses. Another court determined that the *Frye* test need not be applied because the issue was whether the communicator was the one communicating, and not the facilitator.

After reviewing the case law from other states, the trial court determined that the initial inquiry is whether the statements made through facilitator communication are those of the communicator, or the facilitator. The court of appeals defined this as a determination of competency, and noted that it is within the trial court's discretion to determine whether a witness is competent to testify. The Court of Appeals therefore affirmed the trial court.

Keypoint: Facilitated communication is admissible on a case-by-case basis, with the burden of proof on the party requesting the use of facilitated communication. Unfortunately, this decision finessed the real issue, which is whether facilitated communication is in fact reliable, and provides no real guidance on how to validate and ensure its reliability.

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FAILURE TO PROSECUTE

Tony Petrovski v. Robert Neiswinger
Indiana Court of Appeals, October 27, 2017

Petrovski retained attorney Vazanellis to pursue his auto-accident claim against Neiswinger. Vazanellis filed suit one day before the statute of limitations ran, but did not serve Neiswinger or otherwise do anything with the case after filing suit.

Sixteen months later, the Indiana Supreme Court suspended Vazanellis from the practice of law. Petrovski learned of the suspension four months later and hired new counsel, who then served Neiswinger. Neiswinger filed a motion to dismiss under Trial Rule 41(E) for failure to prosecute, which the trial court granted.

The Court of Appeals reversed, "under the unique facts of this case." The issue was whether Petrovski should be denied his day in court because of his attorney's utter failure to represent his interests. The Court considered that Petrovski had checked in with Vazanellis once a month during the pendency of the litigation; he retained new counsel as soon as he learned of Vazanellis' suspension; there was no evidence Neiswinger was prejudiced by the delay in prosecution; and Petrovski moved forward with new counsel before Neiswinger filed the motion to dismiss.

Therefore, even though generally a client is bound by his attorney's actions and inactions, in this case a balancing of factors led the Court to conclude dismissal of Petrovski's suit was unreasonable.

KeyPoint: Usually when a plaintiff has failed to prosecute his case for one or two years, including failing to serve the defendant to get the litigation started, the court will likely grant a motion to dismiss. Now and then in a case like this one, however, the court may take pity on the plaintiff, especially if the plaintiff himself was not responsible for the delay, and acted responsibly under the circumstances.

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NEGLIGENT HIRING ,TRAINING, AND SUPERVISION

Dale Sedam, et al. v. 2JR Pizza Enterprises, LLC d/b/a Pizza Hut, et al.
Indiana Supreme Court, October 31, 2017

Amanda Parker was delivering pizzas as a driver for 2JR Pizza Enterprises, LLC ("Pizza Hut"), when she collided with the back of a scooter operated by David Hamblin. As a result, Hamblin was tossed onto the road and was run over and killed by another motorist, Ralph Bliton. Hamblin's Estate filed a wrongful death suit against Parker, Bliton, and Pizza Hut. The Estate blamed Pizza Hut's negligent hiring, training, and/or supervision of Parker; Parker's negligent operation of her car; and that Pizza Hut was liable for Parker's negligence under the doctrine of respondeat superior.

Pizza Hut moved for partial summary judgment, claiming that since it admitted Parker was acting within the course and scope of her employment, it could only be held liable under the doctrine of respondeat superior. The trial court agreed and granted partial summary judgment on the Estate's negligent hiring, training, and/or supervision claim. The Court of Appeals reversed.

The Indiana Supreme Court took this case on transfer and affirmed the trial court's grant of partial summary judgment for Pizza Hut.

The Supreme Court noted a line of Indiana precedent spanning nearly five decades holding that an employer's admission that an employee was acting within the course and scope of his employment precludes negligent hiring claims.

Also, the Indiana Comparative Fault Act provides that a jury must apportion fault to those who caused or contributed to cause the alleged injury. This rule is consistent with precluding both negligent hiring and respondeat superior claims in the same action because both claims are derived from the same negligent act of the employee. Thus, at the point an employer stipulates to course and scope it assumes indirect liability for the person who caused or contributed to cause the alleged injury.

Finally, the Indiana Supreme Court recognized that the Restatement (Second) of Torts section 317 provides that "a master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment." However, this rule is applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment,

the master may be vicariously liable under the principles of the law of Agency, which could produce a different result in some circumstances.

KeyPoint: When a defendant employer admits an employee was acting within their scope of employment, a claim for both respondeat superior and negligent hiring, training, and/or supervision is precluded, in most circumstances.

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NON-COOPERATION AND UNINSURED MOTORIST COVERAGE

Indiana Ins. Guaranty Assn. v. Carlos A. Smith
Indiana Court of Appeals, September 25, 2017

Carlos Smith and Martin Torres were involved in a car accident. At the time of the accident, Smith was insured by Affirmative Casualty Insurance Company ("Affirmative") and Torres was insured by ACCC Insurance Company ("ACCC"). A few months after the accident, ACCC denied coverage to Torres based on his lack of cooperation with the accident investigation.

Smith filed a complaint against Torres and Affirmative, after ACCC denied coverage, alleging that Torres negligently caused Smith's injuries and that Torres was uninsured at the time of the accident based on ACCC's denial of coverage.

The Affirmative policy defined "uninsured automobile" as: "1. an automobile or trailer with respect to the ownership, maintenance or use of which there is, in at least the amount specified by the financial responsibility law of the state in which the insured automobile is principally garaged, no bodily injury liability bond or insurance policy ***applicable at the time of the accident*** with respect to any person or organization legally responsible for the use of such automobile." (emphasis added).

Five days before Smith filed his complaint, an order of liquidation was entered against Affirmative and Indiana Insurance Guaranty Association ("IIGA") intervened in the case as the real party in interest.

IIGA filed a motion to dismiss, arguing that Torres was not an uninsured motorist as he had insurance "at the time of the accident." The trial court denied IIGA's motion and IIGA appealed.

The Court of Appeals reviewed Indiana Code section 27-7-5-4(a), which defines "uninsured motorist vehicle" as follows: "a motor vehicle without liability insurance or a motor vehicle not otherwise in compliance with the financial responsibility requirements of IC 9-25 [governing minimum amounts of financial responsibility] or any similar requirements applicable under the law of another state." The Court recognized that the Indiana General Assembly enacted the statute governing uninsured motorist vehicle coverage because it wanted to ensure that motorists have insurance coverage in case of accidents and collisions.

The Court reasoned that "a tortfeasor vehicle that had its coverage denied falls within the category of 'motor vehicle[s] not otherwise in compliance with the financial responsibility requirements,' I.C. § 27-7-5-4(a), because a denial of coverage necessarily means that, although the tortfeasor vehicle technically has insurance, the tortfeasor is without insurance that can actually cover the damages." Therefore, the Court concluded the statute's definition of "uninsured motor vehicle" to include motor vehicles that had liability insurance at the time of an accident but that were later denied coverage.

KeyPoint: If a tortfeasor's insurance company denies coverage because of non-cooperation, the injured party should still have uninsured motorist coverage.

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PREMISES LIABILITY

Marvin Podemski v. Praxair, Inc., et al.
Indiana Court of Appeals, November 17, 2017

Podemski parked his tractor-trailer on a scale at a Praxair facility about 9:00 p.m. The closest light was about 45 or 50 feet away. As he was walking toward the back of the truck, his foot got caught on a black hose that ran from the post into a grate, and he fell.

Podemski had been a truck driver over twenty years at the time of his fall, and testified that he was at the Praxair facility almost every day, because ninety-five percent of his loads came from that facility. He testified that he had never seen a black supply line running from a post into a grate. He also testified that he had a flashlight in his truck, but that he had never before felt that he needed to use it at that facility.

Podemski filed suit against Praxair and Antibus, the company that serviced Praxair's scales. Both defendants filed motions for summary judgment. Antibus designated evidence that it had not serviced Praxair's scales in the four months prior to Podemski's fall. The trial court granted Praxair and Antibus's motions, finding that the hose was not an unreasonable danger and the hose was an open and obvious condition. The court noted that Podemski failed to designate evidence that he did not see the hose, and that even if the lighting was insufficient, Podemski failed to use his flashlight and failed to see the hose.

The Court of Appeals affirmed, holding that Praxair and Antibus were not negligent. While a property owner does not have a duty to provide a safe workplace for an independent contractor, a property owner does have a duty to "maintain its property in a reasonably safe condition for business invitees . . ."

The Court cited the Restatement (Second) of Torts § 343 which states that "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he: (a) 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 (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger."

The Court also cited the Restatement (Second) of Torts § 343A(1), which states that a property owner is not liable to invitees for an open and obvious danger that causes physical harm, unless the property owner should anticipate the harm.

The court found that the danger of the hose and lack of lighting at the Praxair facility was open and obvious. The court noted that Podemski was very familiar with the facility, that he could have used his flashlight if he was unable to see his surroundings, and that Praxair and Antibus could have expected that Podemski would discover the danger and protect himself against it.

Keypoint: A property owner is not liable to business invitees when the property owner could expect the invitees to discover and protect themselves against an open and obvious danger on the property.

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HAPPY HOLIDAYS!

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