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Indiana Court of Appeals Reminds Us that Admission of Liability Establishes 100% Fault

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In a concise but informative decision the Indiana Court of Appeals ordered a new trial where the trial court erroneously instructed the jury on comparative fault despite the defendant having admitted liability in the matter.

The case, *Banter v. Sheets*, arose from an automobile accident in Kokomo, Indiana. At trial, the defendant conceded liability for the collision with his only defense being the claim that the plaintiff had failed to mitigate his damages. We have previously discussed the concept of failure to mitigate damages in great depth. To rehash it a bit here, in many circumstance the law imparts a duty upon a person who has been wronged to take efforts to minimize the harm that he or she has suffered. An example of this duty is found when a tenant vacates a rental property early. In such a case, the landlord has a duty to try to find a new tenant. Failure to make such attempts may impact the landlord's ability to recover the full value of the lost rent on the property.

Despite the defendant admitting to liability and thereby establishing that he

was 100% at fault for the accident, the jury returned a verdict for the defendant finding that the plaintiff was 70% at fault for the crash. The plaintiff filed a motion for a new trial due to the jury's clearly erroneous decision. The trial court granted a new trial and yet again, the jury found that the plaintiff was 70% at fault for the crash. The plaintiff once more filed a motion for a new trial that was denied. The case then went up on appeal.

The argument on appeal was that the jury was confused and misapplied Indiana's Comparative Fault Act. Like mitigation of damages, we have discussed the Comparative Fault Act at great length before. To summarize; the Comparative Fault Act took the place of the old common law rule of contributory negligence. Under the contributory negligence standard, a plaintiff who was even the tiniest iota negligent in causing the harm is barred from any recovery. This extremely harsh concept has been largely replaced under Indiana law – though not completely removed, as it still exists in suits against governmental entities – by the comparative fault standard. Under Indiana's comparative fault standard, a person may recover for his or her injuries caused by the negligent acts of another so long as the injured person is no more than 50% responsible for his or her own harm. The effect of the allocation of fault is that whatever the total damages suffered is determined to be, that amount is reduced in accordance with the percentage assignable to the plaintiff. For example, if John is injured by another driver and suffers \$10,000 in damages, but is found to be 30% at fault, then he will only recover \$7,000 because \$3,000 (30% of the total) is counted against him.

In the *Banter v. Sheets* case, two different juries determined that the plaintiff was 70% at fault and, consequently, could not recover anything for his injuries. The problem is, however, that by not contesting liability the defendant had already conceded that he was 100% responsible for the accident. The source of the juries' confusion stems from an erroneous jury instruction. The instruction stated:

The plaintiff must use reasonable care to minimize his damages. This is called mitigation of damages. If you find a plaintiff failed to use reasonable care to minimize any of the damages he alleges he has sustained and that failure was a proximate cause of any of the damages he claims, then such conduct would constitute fault to be assessed against the plaintiff. The defendant has the burden of proving by a preponderance of the evidence that the plaintiff failed to use reasonable care to minimize his damages.

The instruction conflated damages and liability, thus creating the confusion. The issue in the case was how much the plaintiff was entitled to recover in damages. The defendant tried to argue, for various reasons, that the defendant was entitled to

recover less money. Likely, what the jury had intended to find was that the damages should be reduced by 70% for failure to mitigate. However, because the instruction conflated fault with mitigation, the jury came back with a verdict attributing more than 50% of **fault** to the plaintiff and barred any recovery for him. With the instruction issue sorted out, the court remanded the case for a third shot at a trial with a less confusing instruction.

One interesting dynamic that was handled in a very matter-of-fact manner by the court was the contention of the defendant that the plaintiff had waived the argument over the instruction. The court tossed in a footnote that rejected the waiver argument and cited to a prior decision – *Burton v. Bridwell* – which found that a plaintiff had “properly preserved [the] issue that allocation of fault was not supported by the evidence when she raised it for the first time in a motion to correct error[.]”

Traditionally, an issue must be objected to in a timely manner to preserve a later contest on appeal. Usually, this objection must be done at the earliest possible time to ward off the error. In a trial there are several phases in which the parties have direct input on jury instruction issues. It would not have surprised me if the law had required objection prior to giving the instruction. Fortunately, for Mr. Banter, the law in Indiana did not require an earlier objection to the instruction. Thus, he was able to earn his third day in court and, hopefully, finally receive an award for his injuries that were 100% due to the fault of the defendant.

Join us again next time for further discussion of developments in the law.

Sources

- *Banter v. Sheets*, --- N.E.2d ---, No. 34A05-1212-CT-629 (Ind. Ct. App. Jul. 16, 2013).
- *Burton v. Bridwell*, 938 N.E.2d 1, 5-6 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1203 (Ind. 2011).
- Indiana Comparative Fault Act – codified at Ind. Code chapter 34-51-2.
- Colin E. Flora, *Damages Pt. 2: Duty to Mitigate Damages*, Hoosier Litigation Blog (Apr. 17, 2012), available at <http://www.pavlacklawfirm.com/blog/2012/04/17/damages-pt-2-duty-to-79535>.

- Colin E. Flora, *Damages Pt. 5: Assessing Damages When Injured Person is Partially at Fault*, Hoosier Litigation Blog (May 11, 2012), available at <http://www.pavlacklawfirm.com/blog/2012/05/11/damages-pt-5-assessing-damages-83000>.
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