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Indiana Court of Appeals Affirms \$32.5M Verdict For Passenger in Car, Which Slid Into a Jackknifed Semi in Median

Typically our discussions here on the Hoosier Litigation Blog focus on a single case to discuss a broader topic of law. Today is one of our rare discussions that focuses on a single case covering a great many topics. Our discussion looks to yesterday's decision from the Court of Appeals of Indiana in *J.B. Hunt Transport, Inc. v. Zak*, in which the court affirmed a jury verdict of \$32.5 million for a passenger of a car who was left with seriously debilitating brain damage after the car struck a patch of ice and slid into a semi-truck that itself had slid on ice and jackknifed into the median an hour before.

As we've discussed before, there are two types of appeals in Indiana: appeals of final judgments and interlocutory appeals. Interlocutory appeals are those that occur before the case is at its end. Appeals from final judgments, typically come at the end of the case, although there is a mechanism under Trial Rule 54(B) to convert certain interlocutory decisions into final judgments. There are issues that must be appealed prior to reaching a final judgment, but, for the most part, a final judgment allows appeal of everything that happened throughout the case, so long as the appeal was preserved by a timely objection or similar mechanism. (If it sounds complicated, it is because it is basically impossible to give a short synopsis of every conceivable way this can play out). Because this is an appeal from a final judgment, which went to jury trial, the appeal covers a great many issues worth discussing.

Although each merits discussion, and will receive some mention here, the most important conclusion was that the semi-truck driver both owned a duty to the passenger of the car and that the injuries suffered by the passenger were reasonably foreseeable to the truck driver who had slid off the road an hour before. It's a remarkable case, so let us dive in.

On a snowy evening in January 2006, Terry Brown operated his truck on I-65 in northwest Indiana. Brown was driving for his employer, J.B. Hunt Transport, Inc. While a few miles from marker 205, Brown felt his truck slip a bit on the ice, but did not think it necessary to pull over. He continued on until he later lost control at marker 205, resulting in his truck and trailer jackknifing where it came to rest fully in the median of the highway. Brown suffered a blow to the head in the process and temporarily blacked out. He called his employer and the police. An ambulance and police officer arrived. Brown was taken to the hospital. At no point before or after leaving the scene did Brown turn on his flashers or place warning triangles. The police officer left the scene believing the vehicle did not pose a safety threat to northbound traffic. The area where the truck was located was dark and another officer later testified northbound traffic likely would not see the truck due to a barrier blocking headlights from shining onto the reflective tape of the disabled truck.

Approximately an hour later, a car driven by Matthew Robinson approached marker 205 with his fiancée, Kristen Zak, riding as a passenger. Robinson lost control of his vehicle and slid into Brown's abandoned semi in the median. The impact resulted in Zak sustaining "serious brain damage, leaving her unable to walk, care for herself, or care for her six-year-old daughter."

Zak's guardians brought claims against Robinson, Indiana State Police, the Indiana Department of Transportation, Brown, and Brown's employer, J.B. Hunt. The claims against each party except for Brown and J.B. Hunt were resolved before trial. For those wondering what J.B. Hunt's role in this is, as we've discussed before, an employee acting within the scope of his employment who negligently injures another exposes his employer to liability under the doctrine of *respondeat superior*. The case made its way to trial and the jury awarded a \$32.5M verdict in favor of Zak with liability apportioned at 30% fault to Brown, 30% fault to J.B. Hunt, and 40% fault to Robinson.

We've discussed before how apportionment of fault works under the Indiana Comparative Fault Act, so we will refrain from going into great detail here. Put simply, in most negligence cases the jury is asked to figure out a percentage for which each person is responsible in causing the harm. The total verdict, here \$32.5M, is then apportioned by percentage to each responsible party. Here,

Robinson already settled his case, so he will not have to pay the \$13M allocated to him. That does not shift it back on Brown and J.B. Hunt. Basically, the \$32.5M verdict is really just \$19.5M to begin with.

As you might have noticed, there was no apportionment of fault to Zak. In a previous post, we discussed an attempt to apportion fault to a passenger in a motor vehicle accident based on the passenger's failure to wear a seatbelt. There, we said:

Mind you, apportioning fault to a passenger of a vehicle is an extremely difficult proposition on its own. A passenger has no operative control over the vehicle, and, barring highly unusual circumstances, should not be deemed responsible in any way for the accident. Thus, [Defendant] found itself in an uphill battle.

This is why there is no fault allocated to Zak; she had no control over causing or avoiding the accident. The more interesting point, as we'll discuss later, is how J.B. Hunt had a portion of fault allocated directly to it. *Respondeat superior* is a doctrine of vicarious liability, wherein the employer stands in the exact same shoes as the employee. Nevertheless, there was an independent theory of liability for J.B. Hunt, so, in the end, J.B. Hunt was left on the hook for both its share and Brown's share for a total of \$19.5M.

On appeal, J.B. Hunt and Brown raised six arguments for reversing what happened at the trial court:

- The trial court improperly denied the appellants' motion to bifurcate the trial on the issues of liability and damages.
- The trial court improperly admitted certain evidence and excluded certain other evidence.
- The trial court erroneously gave certain jury instructions and refused to give certain other jury instructions.
- The trial court should have granted the appellants' motion for summary judgment and/or their motion for directed verdict on the issues of duty and proximate cause.
- There is insufficient evidence supporting the jury's verdict.
- The jury erroneously apportioned fault.

Issue 1: Bifurcation of Liability and Damages

Trial Rule 42 allows a court to first present the issue of liability to a jury to determine whether the defendant is answerable for the plaintiff's injuries before turning to phase two and asking how much should be awarded for the injuries.

Movie fans might remember this being Robert Duvall's ace in the hole in *A Civil Action*. It is generally believed by defense lawyers that juries are more apt to find against their clients if juries are allowed to see how badly injured the plaintiffs are. Of course, just because a court *can* bifurcate, does not mean that it should as a matter of course.

Here, Brown and J.B. Hunt filed a motion to bifurcate the liability and damages portions of the trial. The trial court denied the motion. As the court of appeals said:

To prevail on a bifurcation motion, the defendant must first convince the court that it has a persuasive argument on the issue of liability, and then prove that it will suffer actual prejudice if the trial is not bifurcated. The *Cristiani* Court emphasized “the reluctance with which we reverse based on the failure to bifurcate, even if a high level of prejudice were shown, and implicitly even greater reluctance if prejudice is not as high.”

Here, the trial court concluded that the appellants “have not shown that they have a persuasive argument on the question of liability or that they will suffer substantial prejudice in this case.” The trial court pointedly observed that, “[h]aving conducted numerous jury trials involving substantial injuries to plaintiff, this court has confidence in the ability of a jury to ably decide the separate question of liability in accordance with the court's instructions, even when presented with a sympathetic plaintiff.” We see no error in the trial court's analysis, and given our extreme reluctance to reverse on the basis of a ruling on a motion to bifurcate, we decline to reverse for this reason.

Issue 2: Evidentiary Issues

The first evidentiary issue stemmed from Robinson's testimony “that, based on his training as an emergency medical technician, if he had seen flashers and triangles on or near the median, he would have moved away from the danger and proceeded with caution.” Brown and J.B. Hunt argued that the testimony violated Indiana Rule of Evidence 404, which prohibits evidence in accordance with a character trait. This is a very common basis for excluding evidence in criminal trials—i.e., just because Johnny is a convicted felon does not mean he committed this specific crime. The court concluded that the testimony was not character testimony prohibited by Rule 404. The trial court had found it admissible as evidence of habit, admissible under Rule 406. The appellate court also agreed with application of Rule 406. Instead, the court found it admissible under the most basic Rule 401/Rule 402.

Rule 402 allows all evidence that is relevant to be admissible unless there is a specific reason to exclude it. Rule 401 defines relevant evidence as evidence that “has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.” Here, a crucial question was whether the accident might have been avoided if Brown had turned on his flashers or placed reflective warning triangles on the road. Consequently, the testimony was certainly relevant.

Brown and J.B. Hunt further argued that even if not barred by Rule 404, Rule 403 should have prevented admission of the testimony. Rule 403 allows evidence to be excluded if its risk of prejudicing the jury far out weights its usefulness to the case. A basis for prejudice is if it is confusing. Brown and J.B. Hunt argued that Robinson’s response to a hypothetical question necessitating a great many assumptions caused the testimony to fall into Rule 403 territory. The court pointed out that Brown’s and J.B. Hunt’s attorneys could have cross-examined Robinson on the assumptions or argued the point to the jury. Failure to do so does not render the testimony inadmissible under Rule 403.

The next evidentiary issue was whether admission of an accident review conducted by J.B. Hunt constituted inadmissible evidence of “subsequent remedial measures, which is barred by” Rule 407. The argument was well taken as the authority on the question is split. After analyzing cases from other jurisdictions—with no prior Indiana case on point—the court found guidance in a decision from the Tenth Circuit and the Alaska Supreme Court. Based upon the reasoning of those cases, the court concluded “that evidence of post-accident investigations are not automatically excluded as subsequent remedial measures.” In this case, the investigation was admissible.

The third and final evidentiary issue was that Brown and J.B. Hunt were prevented from admitting evidence that the Indiana State Police did not direct Brown to turn on his flashers or set out the warning triangles. The reason the trial court excluded this evidence was because the State Police had been a defendant in the case, but had been subsequently removed. Brown and J.B. Hunt had not, likely relying on the fact that the State Police was a defendant, identified them as a non-party upon whom fault could be apportioned. The proper move would have been to seek leave to amend their answer to do so once the State Police ceased to be a party. Brown and J.B. Hunt did not. The trial court excluded the evidence because, it believed, Brown and J.B. Hunt sought to do so to imply fault on the part of the State Police. Consequently, the trial court ruled it inadmissible under Rule 403’s ability to confuse the jury. On appeal, trial court evidentiary rulings, especially under Rule 403 are highly deferential, and the court of appeals saw no basis to overrule the trial court.

Issue 3: Amendment to Conform to the Evidence

Brown and J.B. Hunt challenged two jury instructions, but, as the Court of Appeals recognized, the real challenge was to a change of legal theory on plaintiff's part to "assert an independent claim against Hunt for its alleged failures to monitor the weather before 6:00 p.m., direct Brown to shut down his semi before it reached the overpass, and communicate with Brown after the accident, instructing him to activate his flashers and set out reflective triangles." (As I said above, there was an independent claim against J.B. Hunt).

The court concluded that although the case had not been pleaded in that posture, evidence adduced at trial from J.B. Hunt's own expert set the groundwork for the claim. Consequently, because the evidence at trial supported the claim and the accompanying instructions, Trial Rule 15(B) kicked in. Rule 15(B) allows "issues not raised by the pleadings [that] are tried by express or implied consent of the parties, [to] be treated in all respects as if they had been raised in the pleadings."

Issue 4: The Trial Court Should Have Granted Summary Judgment

This issue brings us to the real meat of the case, whether Zak had a legally cognizable claim. A claim for negligence has four requirements: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the breach was the cause of the injury; and (4) that the plaintiff was damaged. Here, there was no question that there were damages. The real question is whether there was a duty in the first place and whether Brown's and J.B. Hunt's negligence was a cause (there can be multiple causes) of Zak's injuries.

The alleged duty was "the general duty to use ordinary care to avoid injuries to other motorists." This duty is well established in Indiana law. The argument here was that that Robinson and Zak were not "other motorists" at the time Brown breached that duty. At that point, Robinson and Zak were still an hour away. The court rejected that argument:

We disagree that so clear a line can be drawn as a matter of law. *See, e.g., Ind. Limestone Co. v. Staggs*, 672 N.E.2d 1377, 1380–84 (Ind. Ct. App. 1996) (finding a question of fact regarding duty of landowner to driver where driver lost control of vehicle, left roadway, and drove into a decades-old quarry located twenty-five feet from the highway); *Smith v. Armor Plus Co.*, 617 N.E.2d 1346, 1352 (Ill. App. Ct. 1993) (finding a question of fact regarding duty where truck had been abandoned on shoulder of highway for hours when another vehicle collided with it). The appellants would have us draw a line, but we question, where

should it be drawn? What proximity is “close enough” or “simultaneous enough” for a duty to be imposed as a matter of law—within visible sight of the driver? Five minutes away? Ten? Thirty? We believe that this issue is heavily laden with factual questions that must be answered by a jury. Therefore, we believe that the trial court did not err by denying summary judgment and directed verdict on this issue.

The more difficult issue was that of causation. Here is where I think people disagreeing with the decision will find the focus of their critiques. In Indiana, “the question of proximate cause is generally left to the factfinder. This tends to be the case because the question of causation often requires a weighing of disputed facts.” The proximate cause analysis requires consideration of “whether the injury was a natural and probable consequence of the negligent act, which, in light of attending circumstances, could have been reasonably foreseen. In other words, whether or not proximate cause exists is primarily a question of foreseeability.”

Importantly, as I mentioned, there can be multiple causes. Here, the jury found that there were multiple causes by assigning 40% fault to Robinson and 30% to J.B. Hunt. The court determined that to hold that Brown and J.B. Hunt were not the proximate cause is to determine that there is no way even a single percent of fault could be assigned to them. The court found:

[T]o resolve proximate cause as a matter of law, we must find that “only a single conclusion can be drawn from the facts.” In this case, we cannot make such a finding. While it may be true that the presence of the semi in the median did not cause Robinson to lose control of his vehicle, there is certainly a question of fact as to whether the presence of the semi in the median caused Zak’s injuries. Hunt’s own litigation director testified that having a semi disabled “[a]ny place off of the roadway is not a safe place[.]” Zak’s treating neurologist testified that her brain injury was caused by the sudden impact with the 29,000-pound immovable semi; we agree with Guardianship that this testimony creates a question of fact as to whether Brown’s actions caused or contributed to the severity of Zak’s injuries.

Furthermore, if Brown’s negligence caused the first accident, a reasonable factfinder could conclude that it would be foreseeable that another vehicle would slide off the road in the same spot and strike the semi. This Court has addressed a similar issue previously and found that the jury must answer such questions:

Where, as here, the actor’s conduct has created a situation

which without more is not dangerous to anyone but which may become dangerous if subsequently acted upon by a human being or force of nature, the reasonableness of the actor's conduct must be evaluated, ultimately by weighing the likelihood and potential for harm against the utility of the actor's conduct. Whether the risk involved in doing a particular act is apparent to an ordinarily prudent person is most appropriately left for a jury which can bring to bear its varied experience and common knowledge.

Ultimately, while the second accident may seem to be considerably attenuated from the first, we cannot say as a matter of law that the appellants' actions and omissions played no role whatsoever in proximately causing Zak's injuries. These issues needed to be evaluated by a jury. Therefore, we find that the trial court did not err by denying summary judgment and directed verdict.

Issue 5: Was There Sufficient Evidence at Trial?

Two aspects of the claim were challenged as lacking sufficient evidence for the jury to find for Zak. The first was the finding that Brown and J.B. Hunt owed a duty to Zak and Robinson—remember that in summary judgment the court said it was an issue for the jury. The evidence supported that Zak and Robinson were on the same stretch of highway within an hour, which was sufficient for the jury to find a duty.

The second argument was on breach of the duty to use ordinary care to avoid injuring other motorists. The court found sufficient evidence of breach because: (1) brown was driving too quickly for weather conditions; (2) Brown was driving in the left lane in violation of J.B. Hunt's policy and Indiana statute; (3) J.B. Hunt failed to tell its drivers to "shut down their trucks because of the weather;" (4) Brown did not activate his flashers or place warning triangles, nor did J.B. Hunt instruct him to do so; and (5) J.B. "Hunt's own witness testified that Brown was driving too fast and that, by failing to activate flashers and place triangles on the roadway, he failed to comply with Hunt's policies and procedures."

Lastly, there was sufficient evidence for the jury to find proximate cause. "Robinson testified that if he had seen flashers or warning triangles, he would have slowed his speed and moved into the right-hand lane of travel." Further, "Zak's neurologist testified that her severe injuries were caused by her vehicle colliding with a stationary semi." Remember, the question is whether the breach caused the *injuries*. Consequently, the court found no basis to overrule the jury's verdict.

Issue 6: Apportionment of Fault

The final argument was that the jury erred in apportioning fault. This is a very difficult challenge. “The apportionment of fault is uniquely a question of fact to be decided by the factfinder. The only point at which it becomes an issue of law is when there is no dispute in the evidence and there is only one logical conclusion.” In light of the very high standard, the court determined that it could not disturb the jury’s verdict.

Final Thoughts

I have little doubt that this will be a case praised by the plaintiffs’ bar and criticized by the defense bar. I’ve laid out the facts and rationale as best I am able and leave it to you to form an opinion on your own—instead of simply relying on the opinion someone tells you to have. I have no doubt that a petition to transfer to the Indiana Supreme Court will be filed. Whether it is granted is a tough call. The vast majority of transfer petitions are denied. Nevertheless, this is an interesting enough case, I’d give it a higher than usual chance of being taken up. But we shall see.

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

Sources

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