PAVLACK LAW LLC

www.PavlackLawFirm.com

April 17 **2012**

by: Colin E. Flora
Associate Civil Litigation Attorney

Damages Pt. 2 – Duty to Mitigate Damages

In this the second installment in a series of posts discussing damages, the lawyers here at Pavlack Law are covering the concept of the duty/obligation to mitigate damages. This, unlike last week's topic on loss of consortium damages, is not a discussion on what kind of recovery a successful plaintiff might obtain, but rather a potential obstruction to full recovery.

The duty to mitigate damages is a universally accepted concept among the various American jurisdictions and crosses the boundaries of both tort and contract law. The basic concept is that a party who is injured – be it by the tortious acts of the defendant or by the defendant's breach of contract – has a duty to act reasonably to minimize the harm that he or she has received. If a court finds that a plaintiff has failed to mitigate his or her damages then the court may decrease the amount of recovery to reflect the amount incurred by this failure to mitigate damages. Note, however, that this is not a bar to liability. If a defendant commits a wrongful act that injures the plaintiff that defendant is still liable to the plaintiff. The duty to mitigate only impacts the amount for which defendant is liable to plaintiff. Three very common areas in which this arises are in the realm of personal injuries sustained by the defendant's negligence, employment related cases, and breach of contract cases.

The duty to mitigate damages provided the basis for one of my favorite cases from law school. That case was a decision by the Supreme Court of California called *Parker v. Twentieth Century-Fox Film Corporation*. In *Parker*, the plaintiff was actress Shirley MacLaine Parker – an extremely well accomplished actress and the older sister of Norman Beaty. The facts of the case were fairly simple. Mrs. Parker had entered into a contract with defendant to star in a film that was to be known as "Bloomer Girl." However, shortly before the film was set to start production it was cancelled. The defendant studio, on the hook to Parker for $750,000, decided to offer her a part in a different movie for the same amount of money. There were two major differences between the two films. The movie for which Parker had signed on was a musical set to be filmed in the United States. The other roll was a western set to be filmed in Australia. The studio argued that because Parker did not accept the second roll, she had failed to mitigate her damages and was thus not entitled to any payment on the original contract.

The California Supreme Court disagreed with the studio and found that the two roles were so different that they were not comparable. As such, Parker was not required to take the second role. The reason this case stands out to me so well is that in my first year contracts class the professor started a discussion among the students about whether this was the right decision. On a mid March day with tired law students all about, I managed to wake up the entire class by my position in support of the California Supreme Court's decision. I noted that were the court to have held otherwise this would have provided a dangerous loophole. What I argued was that this would provide a means for young beautiful actresses to be baited with an offer for a distinguished and career defining film role then see the studio cancel the film and offer only a part in a hardcore pornographic film so as to compel the popular starlet into a film which would stand to make the studio a considerable amount of money and destroy the actress' career in the process. For some reason the entire room awoke upon the mention of the example of Scarlet Johansson within five words of the phrase "hardcore porn."

Transitioning to the employment context; the 7th Circuit Court of Appeals – the federal circuit covering Indiana – has recognized that a plaintiff in an employment case has a legal duty to mitigate damages by making a diligent effort to find reasonably comparable employment. This duty has been interpreted to mean that an employee must seek comparable work, but if none is available, then the employee must seek reasonable alternative work. The fundamental point here is that a plaintiff cannot just sit at home after he or she is fired and accrue damages. The plaintiff must make a reasonable effort to procure new employment. However, the concept that the work must be comparable is a useful concept in determining whether a plaintiff has mitigated his or her damages.

The Honorable Judge Allen Sharp of the United States District Court for the Northern District of Indiana in *Moore v. University of Notre Dame* handed down a decision which probed the concept of comparable employment and a former employee's duty to mitigate damages. Judge Sharp wrote:

> a plaintiff's duty to mitigate his damages is not met by using reasonable diligence to obtain any employment, rather the employment must be comparable employment. . . . The Seventh Circuit has defined "comparable work" as a position that affords "virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status" as the previous position. . . . The goal of mitigation is to prevent the plaintiff from remaining idle and doing nothing. Furthermore, an employee is not required to go to heroic lengths in attempting to mitigate his damages, but only to take reasonable steps to do so. . . . Furthermore, a claimant has no obligation to accept lesser employment . . . or relocate to a new community.

I think that among the many things which Judge Sharp discusses in this short excerpt the fact that the plaintiff is not required "to go to heroic lengths" to mitigate his or her damages is crucial. The purpose of mitigation of damages is to not place the defendant in an unfair position of having to pay a former employee for what amounts to a vacation while the case is pending. However, the upside of this purpose is that where a person is making reasonable efforts to find employment the law will recognize those efforts and not bar plaintiff recovery.

Along these lines the law recognizes that a claim for failure to mitigate damages is an affirmative defense. What this means is that in order for mitigation of damages to be an issue the defendant must take affirmative steps to assert the defense. Moreover, the burden of proving that defense is upon the defendant. What this means is that plaintiff does not have to prove that he or she took reasonable steps to mitigate his or her damage, but rather defendant must prove that plaintiff did not take those steps. Judge Robert L. Miller – like Judge Sharp of the Northern District of Indiana – in *Clark v. MetroHealth Foundation, Inc.*,stated that in order for a defendant "[t]o establish the affirmative defense of a plaintiff's failure to mitigate damages, the defendants had to show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence."

While the duty to mitigate damages in the employment law context places an easily articulable duty upon the plaintiff – the duty to exert reasonable efforts to

find comparable employment – it is not always quite as clear in other contexts. In the context of personal injury what constitutes a failure to mitigate might be a bit less overt. There are cases out there in which the defendant has argued that plaintiff failed to mitigate his or her damages by failing to undergo a somewhat risky medical procedure.

In addressing this issue, the Indiana Court of Appeals, in *Simmons v. Erie Insurance Exchange*, found that a plaintiff has failed to mitigate his or her damages only where "a reasonable person, under all the circumstances, would submit to surgery[.]" In order to determine the reasonableness of plaintiff's decision to not undergo surgery the court identified four factors: "1) the likelihood that the surgery will correct or improve the condition; 2) the risk involved in the surgery; 3) the pain or inconvenience caused by the surgery; and 4) the ability of the plaintiff to bear the cost of the surgery." The Court of Appeals noted that as set forth by the Indiana Supreme Court in *Willis v. Westerfield*, there is no bright line rule requiring a defendant to use expert testimony to prove that plaintiff should have undergone the surgery. However, the Court of Appeals reiterated the Supreme Court's position in *Willis* by stating that while expert testimony is not absolutely required, "[a] party presenting a failure to mitigate damages defense without expert testimony on causation will do so at his or her own peril."

In the personal injury context where a plaintiff is seeking lost wages resulting from his or her injuries the duty to mitigate is particularly strong. This, like in the employment context, is because it is so relatively easy for a defendant to point to an unemployed person and state that he or she has failed to find a new job. Compared to the medical procedure context, in which defendant typically needs an expert to testify, the lost wages context is fairly straight forward and often a strong weapon in defendant's arsenal. For this reason an injured plaintiff who can work ought to do so. Now that does not mean that if a doctor has given the plaintiff specific instructions to refrain from working that plaintiff must go against explicit medical advice as it is always important to follow the advice of a treating physician as a person's health and wellbeing is of the utmost importance. However, it does require plaintiff to make reasonable efforts in procuring gainful employment.

Due to the complexity in this area of law – and while it may seem simple here, I assure you that it can be fairly complex – it is highly advised that if you are injured by someone's breach of contract or tortious actions, you should find a lawyer who understands the complexities of Indiana law, is experienced, and will zealously advocate to protect your rights.

Join us again for our next post in the series on damages.

- Pt. 1 – Introduction to Damages and Loss of Consortium
- Pt. 3 – Diminished Value of Vehicle Due to Traffic Accident
- Pt. 4 – Damages for Negligently Inflicted Emotional Distress
- Pt. 5 – Assessing Damages When Injured Person is Partially at Fault
- Pt. 6 – Availability of Prejudgment Interest
- Pt. 7 – Indiana Crime Victim's Relief Act
- Pt. 8 – Ability to Recover by Piercing the Corporate Veil
- Pt. 9 – Damages for the Loss of Chance of Survival from Medical Malpractice
- Pt. 10 – Punitive Damages Under Indiana Law
- Pt. 11 – Wrongful Death
- Pt. 12 – Contract Damages

Sources

- *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (Cal. 1970).
- *Moore v. University of Notre Dame*, 22 F. Supp. 2d 896, 906-07 (N.D. Ind. 1998).
- *Clark v. MetroHealth Found., Inc.*, 90 F. Supp. 2d 976, 980 (N.D. Ind. 2000).
- *Simmons v. Erie Ins. Exch.*, 891 N.E.2d 1059, 1067 (Ind. Ct. App. 2008).
- *Willis v. Westerfield*, 839 N.E.2d 1179, 1187 (Ind. 2006).