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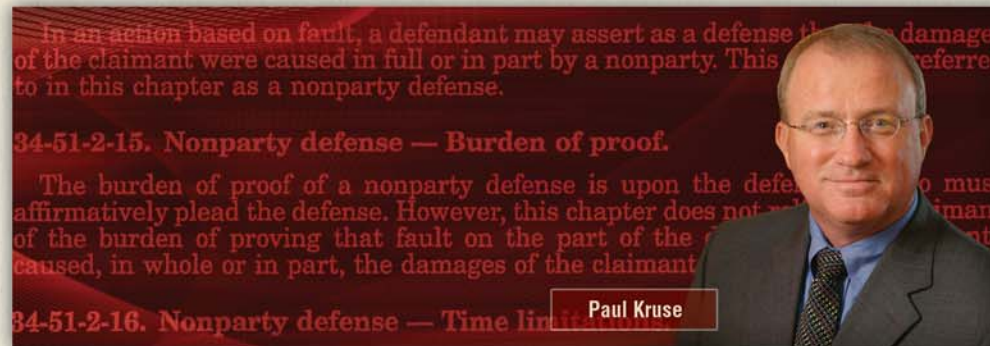
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## CHALLENGING NON-PARTY DEFENSES by Paul Kruse



When handling claims for negligence in Indiana, plaintiffs' lawyers often are faced with non-party defenses, some of which are meritorious and others which appear to be tenuous at best. Because a non-party's presence on a verdict form can have significant consequences for our clients and the verdicts they receive, it is important to aggressively deal with non-party defenses prior to trial and during the pleadings and discovery phases of the case.

For many years, Indiana plaintiffs were faced with the harsh contributory fault rule. Under that contributory fault rule, a plaintiff's claims would fail if the plaintiff was to any extent at fault for the incident. *Huey v. Milligan*, 175 N.E.2d 698, 700 (Ind. 1961). To mitigate the effects of the

contributory negligence common law, the Comparative Fault Act was adopted in 1983. However, under comparative fault, a defendant is allowed to plead that the fault of a person who was not named as a party to the case contributed in whole or in part to the plaintiff's injuries. IND. CODE § 34-51-2-14.

When faced with a non-party defense, it is important to determine if the defendant timely named the non-party. The act provides two deadlines for a defendant to name a non-party. The first deadline is absolute under some circumstances, and the second is based upon reasonable promptness of discovery.

Under IND. CODE § 34-51-2-16, if a defendant is served with a summons and

complaint more than 150 days before the statute of limitations runs against a potential non-party, the defendant must assert its non-party defense no later than 45 days before the statute of limitations against that non-party expires. If the defendant fails to do so, the defendant is prohibited from naming that individual as a non-party, even if the defendant is unaware of the non-party's identity or fault in the case. *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096, 1105-1106 (Ind. Ct. App. 2001). By having this absolute time prohibition in place, the plaintiff can head off potential non-party defenses by filing the claim more than 150 days before the statute of limitations expires.

Many times it is not possible to file the lawsuit 150 days before the statute of limitations expires and this portion of the statute is not applicable. However, if the claim is filed less than 150 days before the applicable statute of limitations expires, the defendant still must plead their non-party defenses in a timely fashion. In this situation, if a non-party is not known at the time of filing the answer, the court may allow the defendant to file additional non-parties later if they plead the non-party defense with reasonable promptness after

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## MEET OUR LAWYERS



Tony Patterson

You may have noticed that we have changed the name of our firm to PARR RICHEY OBREMSKEY FRANSEN & PATTERSON LLP. The name may have changed but our clients and co-counsel can expect the same level of commitment and service from our personal injury attorneys.

Tony Patterson is a current member of the Board of Directors for the Indiana Trial Lawyers Association and was recognized as the ITLA Trial Lawyer of the Year for 2007. Tony is listed in The Best Lawyers in America and as an Indiana Super Lawyer. He represents accident victims with serious personal injuries and handles medical malpractice claims.

Paul Kruse is a Board Member for ITLA and has handled personal injury litigation in more than 40 counties across Indiana. Paul recently served on the faculty for the National Institute for Trial Advocacy. He handles injury claims arising from motor vehicle and semi-truck accidents and premises liability incidents.

Pete Obremskey is a past president and Board Member for ITLA. He received the ITLA Lifetime Achievement Award in 2002, and has handled more than 250 jury trials during his career.

Give us a call or send us an e-mail if you have any questions or would like to discuss any issues relating to your personal injury practice. ■

## SETTLEMENTS AND VERDICTS

A Downs Syndrome adult was struck while attempting to cross a busy street, causing closed head injuries and \$250,000 in medical expenses. The police expert attributed fault solely to our client, but our expert found the defendant's speed contributed. By using a structured settlement designating his family as secondary beneficiaries and a special needs trust for the plaintiff, we were able to maximize his recovery and maintain his significant government benefits. Call us if you want more information about the procedure. ■

## CHALLENGING NON-PARTY DEFENSES (Continued from cover)

discovery. IND. CODE § 34-51-2-16; *Kelly v. Bennett*, 792 N.E.2d 584, 587 (Ind. Ct. App. 2003). Although this rule does allow defendants to plead non-party defenses after the statute of limitations has run against a particular non-party, the rule does not provide them with an unlimited period of time for filing non-party defenses. As noted in *Kelly*, the requirement that the defendant use reasonable promptness in naming non-party defendants means "some degree of diligence in investigating any possible nonparty defense is warranted." *Id.* (defense not allowed where seven months passed between the defendant's answer and motion to amend to add a non-party).

If a defendant has timely filed the non-party defense, make sure that they plead it appropriately. Under the Comparative Fault Act, the defendant is required to specifically name the non-party. *Cornell Harbison Excavating, Inc. v. May*, 546 N.E.2d 1186, 1187-1188 (Ind. 1989). If the defendant simply names an anonymous or unknown person, such as "the driver of a red car," as a non-party, the defense can be challenged. In *Cornell*, the plaintiff was injured while swerving to miss a dog in the road. The defendant named the "unknown owner of the dog" as a non-party. *Id.* at 1186. The court stated that comparative fault law requires that the defendant name the non-party

rather than making "merely a generic identification." *Id.* at 1186.

If the non-party defense has been filed, the plaintiff's challenge does not stop there. The fact that a non-party is timely identified by the defendant does not mean that the non-party defense will be available at trial. The burden of proving the non-party defense is on the defendant. Throughout discovery and trial preparation you must investigate and discredit the non-party defense. This includes serving discovery, asking for defendant's experts, and obtaining any other information about the defense. When appropriate, you should file a motion to strike or motion for summary judgment to avoid non-party arguments at trial. And at the close of evidence, be sure to ask the court to take away the non-party defense pursuant to Trial Rule 50.

There are many grounds to challenge non-party defenses, and the plaintiff should always be on guard to challenge them when justified. Unfortunately, too many plaintiffs have suffered the effects of improper non-party defenses on their verdicts. You must aggressively respond to these defenses. ■



## RECENT COURT DECISIONS – HOW IT IMPACTS YOUR PRACTICE, YOUR CLIENT



### NON-DELEGABLE DUTY NOT IMPOSED

In *Beatty v. LaFountaine*, a logging company hired a truck driver who ran a red light and killed Beatty. Beatty's estate contended the company was liable for the driver's actions. The driver had the company's logo on his truck. However, he owned the truck, determined the details of the work, did not drive exclusively for the company and was paid by the mile or load. The court found that the driver was an independent contractor but declined to find that the company had a duty to Beatty. The court acknowledged that their contract required the driver to be "subject to [the company's] sole exclusive control," however it did not establish a "specific duty of care

with respect to the plaintiff." Therefore, the company did not contractually assume a non-delegable duty of care to Beatty. *Beatty v. LaFountaine*, 896 N.E.2d 16 (Ind. Ct. App. 2008). ■

### REAR-END COLLISION CAN GIVE RISE TO INFERENCE OF NEGLIGENCE

*Foddrill v. Crane* involved a rear-end accident in which the plaintiff suffered back and neck injuries. The jury found the defendant 100 percent at fault and awarded \$194,100 in damages. The defendant contended that, although he did rear end the plaintiff, there was no direct evidence that he did not exercise reasonable care. The court noted that although a rear-end collision does not give rise to a presumption of negligence, the jury could infer



negligence based upon the facts of the case. *Foddrill v. Crane*, 894 N.E.2d 1070, 1080 (Ind. Ct. App. 2008). ■



### DEFENDANT'S FINANCIAL CONDITION A FACTOR IN PUNITIVE DAMAGES

In *Clark v. Simbeck*, two defendants physically attacked a husband and wife. The trial court awarded significant damages and also ordered each defendant to pay \$60,000 in punitive damages. The court held that the amount of punitive damages was excessive because the court failed to consider the "defendant's financial condition and ability," since neither defendant had significant assets. *Clark v. Simbeck*, 895 N.E.2d 315 (Ind. Ct. App. 2008). ■

### NEW TRIAL ORDERED FOR NEWLY DISCOVERED EVIDENCE

A truck driver slipped and fell at a gas station, injuring himself. At trial, for the first time, the driver produced the jeans he wore at the time of his fall and submitted them into evidence. The jury returned a verdict for the plaintiff, assigning 50 percent of the fault to the gas station. After trial, the gas station chemically tested the jeans and revealed that the jeans did not contain diesel fuel; a fact which supported the gas station's position that the driver simply slipped and fell

off of his truck. The gas station requested a new trial based upon the newly discovered evidence.

The Indiana Supreme Court found that even though the gas station failed to specifically request production of the jeans in discovery or test the jeans before trial, the gas station's "less than perfect pretrial discovery was sufficiently diligent" given the plaintiff's failure to produce the jeans until the day of trial. The defendant was therefore granted a new trial. *Speedway Super America v. Holmes*, 885 N.E.2d 1265 (Ind. 2008). ■

## DID YOU KNOW?

**A minor's claim that is settled for less than \$10,000 does not require the appointment of a guardian. IND. CODE § 29-3-3-1. However, a court of competent jurisdiction still must approve the settlement. IND. CODE § 29-3-9-7. A settlement that is not court approved is not void *ab initio*, however the settlement is not enforceable until it is approved.**

— *Danes v. Auto Underwriters*, 307 N.E.2d 902 (1974).

## MED-PAY CARRIERS CAN'T BYPASS THE PLAINTIFF

When injury victims receive medical payments coverage from their own auto policy to pay their medical bills, the insurance carrier is usually entitled to assert a contractual lien against the insured's third party recovery. Under Indiana lien reductions statutes, plaintiffs can reduce med-pay liens by a pro-rata share of expenses and attorney fees. IND. CODE § 34-53-1-2. Under the Comparative Fault Act, Plaintiffs also are able to reduce med-pay liens by the same proportion that the plaintiff's recovery was reduced by comparative fault or limited liability insurance. IND. CODE § 34-51-2-19. These statutory reductions can result in considerable reductions to med-pay liens and can help maximize the plaintiff's net settlement by reducing his or her reimbursement obligations.

In an effort to circumvent their insured's statutory lien reduction rights, some aggressive med-pay lien holders attempt to collect reimbursement of 100 percent of their liens directly from the negligent third party's insurance carrier. These overt attempts to bypass the lien holder's insured are not permissible. As recognized by the Indiana Supreme Court in *Erie v. George*, 681 N.E.2d 183 (Ind. 1997), a med-pay carrier's contractual claim for reimbursement does not allow it to assert a direct claim against the third party in the absence of permission from the plaintiff. For this reason, plaintiff's counsel should challenge any attempts by med-pay lien holders for reimbursement directly from third party carriers. Failure to do so can lead to a smaller net settlement for the plaintiff. ■

*Indiana Accident Law: A Reference for Accident Victims* was co-authored by Parr Richey partners Tony Patterson and Paul Kruse.



## BOOK AUTHORED FOR INJURED HOOSIERS

In an effort to help educate Hoosiers on Indiana laws and accident victims' rights, partners Paul Kruse and Tony Patterson have written a guide for accident victims. The book was authored in collaboration with personal injury attorneys from 10 other states. However, the book addresses issues specific to Indiana.

*Indiana Accident Law: A Reference for Accident Victims* is an educational tutorial and introduction to personal injury law. It is not intended to serve as legal advice, but provides a broad overview of many legal terms and procedures that confront people who are suddenly thrown into the role of a plaintiff in a personal injury case.

The book is scheduled for publication in March and will be available from Amazon.com. Free print copies can be obtained by contacting Tony or Paul or by downloading a free copy from our website: [www.parrinjury.com](http://www.parrinjury.com). ■

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