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## WHAT'S IN A RELEASE?

*by Tony Patterson*

### Tony Patterson

Most litigating attorneys will agree that obtaining fair settlements in injury cases can be challenging. For this reason, once settlement is reached, the temptation exists to simply execute the release the defendant's attorney encloses with the check. Unfortunately, many releases contain un-negotiated terms or language which leads to unintended results; therefore they must be carefully scrutinized prior to signing.

The first fundamental issue is to be sure the release only discharges intended defendants. Indiana law historically held that a release of one tortfeasor released all tortfeasors. However, in *Huffman v. Monroe County Community Sch. Corp.*, 588 N.E.2d 1264 (Ind.1992), the Supreme Court abrogated the common law release rule and held that the release of one wrongdoer does not release all, as in any contract for the release of joint tortfeasors.

In *Pelo v. Franklin College of Indiana*, 715 N.E. 2d 365 (1999), the Supreme Court extended this holding to derivative actions, reversing the prior Court of Appeals opinion in *United Farm Bureau Mut. Ins. Co. v. Blossom Chevrolet*, 668 N.E.2d 1289 (Ind.Ct.App.1996). The Supreme Court held that a settlement agreement only released those specifically identified and not other defendants, including those whose liability is derivative. *Pelo*.

In a case in which several individuals have been named as parties to the case, there is little difficulty in identifying the

individuals who are not released. However, in a case in which there is an early settlement and there is time to file subsequent claims, it is not always known who the later defendants will be. *Pelo* was significant in allowing plaintiffs to release one defendant while continuing on with investigation to determine if there were other tortfeasors.

While *Pelo* provides some protection to plaintiffs, it is still important to review the release document to ensure that it does not release other individuals the plaintiff may wish to remain as defendants in the case. In the case of *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269 (Ind. Ct.App. 2001), the deceased's estate filed a claim against a drunk driver who negligently caused the deceased's death. The estate reached a settlement with the drunk driver and executed a release discharging the drunk driver "and any other party who is or may be liable" for the death.

Thereafter, the estate filed a dram shop claim against the bar that served the drunk driver. Upon reviewing the release document,

*(Continued on page 2)*

## MEET OUR LAWYERS



Paul Kruse

**Paul S. Kruse** joined Parr Richey Obrebsky & Morton after graduation from law school in 1981 and has been a partner since 1984. Limiting his practice to personal injury litigation, he has extensive experience in handling catastrophic damage and wrongful death claims involving all types of personal injury liability cases. He has tried over 125 jury trials in state courts throughout Indiana. Mr. Kruse presently serves on the Board of Directors of the Indiana Trial Lawyers Association and is a member of the American Association for Justice.

A lifetime Hoosier, Mr. Kruse has been very active in a wide range of community service activities. Most recently, Mr. Kruse, founding director and President of the Boone County YMCA, has been pivotal in partnering with Witham Hospital and undertaking a multi-million dollar fundraising campaign to construct a new YMCA facility. He has also been active in supporting youth sports, having served as assistant varsity coach for the Lebanon High School women's basketball team for several years.

## ITLA SUPPORTS LIMITS ON DIRECT SOLICITATION

The Indiana Trial Lawyers Association overwhelmingly supported a recent proposed addition to the Indiana Rules of Professional Conduct which would prevent lawyers from contacting potential injury victims

through direct solicitation for at least thirty days following an accident. ITLA Board Members, Peter Obrebsky, Paul Kruse and Tony Patterson of Parr Richey all voted in favor of the proposed rule. ■

## WHAT'S IN A RELEASE? (Continued from cover)

the Court of Appeals held that the bar was released by the language discharging "any other party who is or may be liable." This case highlights the importance of reviewing the release language to ensure that only intended parties are released.

The concern for dismissing unintended parties also exists in the context of underinsured motorists claims. Ind. Code § 27-7-5-6 provides that an insured settling with an uninsured tortfeasor must provide his underinsured motorist (UIM) carrier thirty days to advance the settlement and subrogate to the interests of their insured. If the UIM carrier fails to do so, the claimant is authorized to release the tortfeasor and begin prosecution of the UIM claim. While Plaintiffs may release tortfeasors under these circumstances, the release document should be specific, as the potential exists for unintentionally releasing the UIM carrier.

In *American Family Insurance v. Houin*, 777 N.E. 2d 757 (Ind. Ct. App. 2002), the UIM carrier contended it was released when the insured executed a release



with the underinsured tortfeasor which contained language similar to that in *Estate of Spry*. The court held that the UIM carrier was not released by the original document signed between the plaintiff and the tortfeasor. While *Houin* does provide some comfort to plaintiffs' counsel, the factual circumstances in the case suggest that the insurance company was aware of the release language and lay in wait for the plaintiff to execute the document. In the absence of similar conduct by a defendant, the Court may find the UIM carrier released by such broad language.

These are just a few examples of the issues the plaintiff's attorney may encounter when

wrapping up a settlement. The plaintiff's attorney must carefully review release documents drafted by the defense and cannot assume that the documents will, as proposed, properly protect the client. If the language is not suitable, counsel should demand that revisions be made. In taking just a little additional time reviewing the release, counsel can avoid potential issues in the future. ■



*Tony Patterson is a partner and trial attorney at Parr Richey with a primary focus in personal injury and wrongful death litigation. Mr. Patterson has been named SuperLawyer in personal injury for three consecutive years. For more information log onto [www.parrinjury.com](http://www.parrinjury.com).*

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

### ATTORNEY FEES

#### Sliding Scale Fee Arrangement in Medical Malpractice Cases



Despite argument to the contrary from the Disciplinary Commission, the Supreme Court held that a structured or sliding scale contingency fee agreement in a medical malpractice case does not violate the Rules of Professional Conduct, so long as the total fee is reasonable. In this disciplinary action, the attorney fee contract provided for a fee of 15% of any recovery from the Patient Compensation Fund plus up to 100% from the first \$100,000 received from the physician's insurance carrier, to equal a fee of one-third of the

total recovery. The attorney later renegotiated the contract and required a \$10,000 non-refundable retainer. After the Supreme Court sanctioned the attorney, the Indiana Trial Lawyers Association (ITLA) intervened and requested clarification on the Indiana Supreme Court's position upon the "sliding scale" fee in Medical Malpractice cases. *In re Stephens*, 867 N.E.2d 148 (Ind. 2007).

#### MEDICAL MALPRACTICE Sponge Count a Non-delegable Duty of Surgeon



A surgeon had an absolute duty to remove all sponges used during surgery and cannot delegate

his duty to nurses or other surgical staff. The Court of Appeals found that the surgeon breached the standard of care in performing abdominal surgery when he left a sponge in the abdominal cavity, despite the fact that the assisting nurses reported a sponge count indicating that all sponges had been removed. He could not absolve himself of liability for his own failure to account for the sponges by claiming he had relied upon the nurses' count. The doctrine of *res ipsa loquitur* applies in such a case, and the plaintiff was entitled to partial summary judgment on the issue of negligence. *Chi Yun Ho v. Frye*, 865 N.E.2d 632 (Ind.App. 2007).

#### NEGLIGENCE Duty of Restaurant to use Reasonable Care to Protect its Patrons

A restaurant patron suffered injuries when a man driving on a nearby highway had a heart attack, crossed over two lanes of oncoming traffic and several parking lots and crashed into a restaurant. Plaintiffs argued that the defendant's failure to erect

barriers in front of the building was a breach of its duty to the plaintiffs to exercise reasonable care. The Court of Appeals disagreed and found that the incident was not foreseeable and therefore held there was no



breach of duty on the restaurant's part and granted summary judgment in its favor. *Schoop's Restaurant v. Hardy*, 863 N.E.2d 451 (Ind.App.2007). ■

### DID YOU KNOW?

**In civil cases, evidence that a party expressed a communication of sympathy (a statement, gesture, act, conduct or writing that expresses sympathy, an apology, or a general sense of benevolence) is not admissible into evidence if the statement relates to causing or contributing to an injury, loss, pain, suffering, death or damage to property, unless it relates to fault.**

—Ind. Code § 34-43.5-1, et seq.

## FEE SHARING IS PERMISSIBLE IN INDIANA

Under many circumstances, lawyers have cases which may need to be referred to other counsel for a variety of reasons. While the case may require referral, many lawyers are hesitant to do so due to fear of losing a fee. This fear arises from Professional Conduct Rule 7.3(f) which prohibits one being paid purely for a referral.

Notwithstanding the ban on pure referral fees, Rule 1.5(e) provides that lawyers in different firms can divide fees from cases provided that:

1. The division is in proportion to the services performed by each lawyer or the attorneys assume joint responsibility for the representation;
2. The client agrees in writing to the division; and
3. The total fee is reasonable.

Under this Rule, referring lawyers are still entitled to collect a fee so long as these requirements are satisfied.

This rule was noted by the Indiana Supreme Court in *In re Hailey*, 792 N.E.2d 851 (Ind. 2003). The Court stated that in all circumstances the total fee must be reasonable and the division must be accepted by the client in writing. Further, absent proportionality in services rendered by the referring attorney, all attorneys receiving a portion of the fee must accept, in writing, joint responsibility for the representation. This ruling resulted in the revision of Rule 1.5 in 2005. ■



## PERSONAL INJURY CLIENT INTAKE

In your first appointment, anticipate the first set of discovery and obtain:

- Thorough biographical information
- Description of incident and investigating agency
- Date of incident—**NOTE** the statute of limitations
- Injuries and consequences of injuries
- Healthcare providers
- Prior healthcare, insurance claims and injuries
- Present and past employment/income
- Defendant's name, address and liability insurance company
- Client's insurance for medical payment and uninsured/underinsured claims

PARR RICHEY  
& OBREMSKEY  
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