By Neal Eggeson

Mitigation of damages – rewritten into irrelevance

Editor's Note: The views expressed in this article are not necessarily those of the Indiana State Bar Association. The Editor will consider publication of opposing viewpoints under proper submission to Res Gestae.

Fresh on the heels of last month's article ("What Went Wrong with 'Mitigation of Damages'?: A Proposal for Two-Tiered Fault Allocation," *Res Gestae*, April 2005, at p. 26), the Indiana Supreme Court handed down its long-awaited decision in *Kocher v. Getz*. The Court's decision will make life easier for plaintiffs across the state, but defense attorneys will be left with a sour taste in their mouths.

Kocher v. Getz was to resolve whether the defense of "mitigation of damages" qualifies as "fault" under the Comparative Fault Act. Though the Act explicitly includes "mitigation of damages" in its definition of "fault,"[1] many attorneys and judges have found it difficult to reconcile that language with common sense. After all, how can a plaintiff's actions *after* a collision, slip-and-fall or similar personal injury have any bearing whatsoever on a defendant's liability for the original accident?

Because of this apparent disconnect between the language of the Act and our own intuition, the Supreme Court had three options in *Kocher v. Getz*: 1) continue to apply the Comparative Fault Act as written and ignore our intuition; 2) reexamine the Act in an effort to reconcile its definition of "fault" with our intuition; or 3) ignore the language of the Act and rewrite the statute to comport with our intuition. In last month's article, this author proposed that the Supreme Court adopt the second approach. Unfortunately, the Court chose the third option.

Kocher v. Getz: the background

As is often the case in lawsuits involving "mitigation of damages," *Kocher v. Getz* arises from a motor vehicle collision. In March 1996, the respective vehicles of Kocher and Getz collided at an intersection in Huntington County. The day after the collision, Getz went to her general practitioner with complaints of neck pain. Over the next several months, Getz received treatment from an orthopedic surgeon, a neurosurgeon and a chiropractor, incurring approximately $10,000 in medical expenses. Additionally, Getz testified that she lost approximately $25,000 in wages – over half of which came from a part-time job that she started after the accident but quit before trial.

Kocher conceded that he caused the collision; his defense focused on Getz's alleged injuries and damages. As part of his defense, Kocher argued that Getz failed to mitigate her damages because she admitted that she had started her part-time job after the accident and had made no effort to replace the alleged lost income after quitting.

Though the trial court instructed the jury on "mitigation of damages," the court refused to give any comparative fault instructions on fault allocation. With no opportunity for fault apportionment on the verdict form, the jury returned a verdict of $250,000 against Kocher.

On appeal, Judges Najam and Darden concluded that the trial court erred by refusing Kocher's tendered instructions on fault allocation. The majority reasoned that "where a defendant admits liability but raises a mitigation of damages defense, it may be reasonable under certain circumstances for the jury to find that the plaintiff's failure to avoid the consequences was so substantial that the damages could be reduced to nothing."[2] Judge Vaidik dissented, arguing that the General Assembly intended to differentiate between mitigation of damages *before* an accident or initial injury and mitigation of

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