

Affidavit of Deceased Witness Found to Be Admissible

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Today, the Indiana Court of Appeals addressed an interesting evidentiary question in *Cotton v. Auto-Owners Ins. Co.*, Case No. 49A02-1005-CT-575. At issue was whether an affidavit of a deceased person was admissible evidence in support of a motion for summary judgment. The Court held that it was, because the party seeking to strike that affidavit did not prove that the same evidence would not be admissible at trial from another source.

In this case, a passenger in a single car accident sued the driver. The car had been recently purchased and not yet registered in the driver's name. The driver's grandfather owned and operated an automotive sales business, which was insured by a "garage policy" that covered damages "caused by an occurrence and arising out of garage operations." The grandfather had supplied a temporary license plate to the driver, but the driver was not an employee or otherwise affiliated with the garage. The injured passenger sued the driver, his grandfather, the garage, and the insurer.

In the course of discovery, the passenger sought to take the grandfather's deposition but was informed the grandfather was in failing health. Shortly thereafter, the passenger was informed that the grandfather had died. The passenger and insurer then filed cross-motions for summary judgment. In addition, the passenger sought to strike the grandfather's affidavit. The trial court denied the motion to strike and granted the insurer's motion for partial summary judgment. The passenger appealed.

On appeal, the Court first decided that the trial court properly concluded that the garage policy does not cover the vehicle in question or the injuries the passenger sustained in the accident. It then turned to whether the trial court erred in denying the motion to strike.

The Court held that the Indiana Supreme Court's decision in *Reeder v. Harper*, 788 N.E.2d 1236, 1241-42 (Ind. 2003), which held that "an affidavit that would be inadmissible at trial may be considered at the summary judgment stage of the proceedings if the substance of the affidavit would be admissible in another form at trial," applies to all affidavits, not just expert affidavits. Thus, in order to strike the affidavit, the passenger needed to describe what statements in the affidavit are inadmissible under *Reeder* because the same evidence would not be admissible at

trial from another source. The Court demonstrated that *Reeder* provides a generous standard for determining admissibility.

To the extent the statements in the affidavit regard the operations of the Dealer, including its inventory, sales, and employees, the Dealer's business records or the testimony of a Dealer employee would be admissible proof of such matters. Thus, the trial court did not abuse its discretion when it refused to strike those portions of the Bailey Affidavit. Cotton also argues that the Bailey Affidavit was used to establish facts based on Bailey's "personal knowledge which cannot be substantively reproduced because no other witness has the same personal knowledge foundation." To the extent Cotton's argument refers to Bailey's conversation with Sneed about the temporary license plate, Sneed could testify on that matter. Thus, that evidence is also admissible at trial from another source.

The takeaway from this case is that it will be very difficult for a party to strike any affidavit an opposing party presents in support of a motion for summary judgment because it contains evidence that will not be admissible at trial. If you do try to strike an affidavit on these grounds, make sure to find some portions of that affidavit that would only be known by the affiant.

Lessons:

1. An affidavit submitted in support of a motion for summary judgment can only be stricken as containing information that is inadmissible if there is no other form in which that evidence would be admissible at trial.